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**THE EUROPEAN EXTERNAL ACTION SERVICE AND  
THE IMPLEMENTATION OF THE 'UNION METHOD'  
IN EUROPEAN FOREIGN POLICY**

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# INTRODUCTION

*Often the choice is not between the Community method and the intergovernmental method, but between a coordinated European position and nothing at all.*<sup>1</sup>

[H. Van Rompuy]

*I believe we must put old rivalries behind us, we must set common goals and adopt common strategies. Perhaps we can agree on the following description of this approach: coordinated action in a spirit of solidarity – each of us in the area for which we are responsible but all working towards the same goal. That for me is the new “Union method”.*<sup>2</sup>

[A. Merkel]

The European External Action Service (EEAS or Service) is one of the most significant innovations introduced by the Lisbon Treaty. It is also one of the most debated, given the symbolic importance attached to this unprecedented non-national diplomatic service. The EEAS may not seem the most obvious subject for a legal inquiry. Given the administrative nature of this entity, an investigation of its organisation and functions might appear less useful than an analysis of the practical activities of its officers.<sup>3</sup> However, it is apparent that the novel structure of the EEAS may have lasting consequences for the EU, not least because it alters the distribution of power in the Union. The Service is expected to increase the effectiveness of European foreign policy;<sup>4</sup> the very European Parliament found the EEAS' form to be "extremely important if the Union's external relations are to be rendered more coherent and efficient".<sup>5</sup> At the same time, the Service has been accused of denaturing the international identity of the Union, transforming a 'soft' or 'normative' power<sup>6</sup> into a practitioner of the *raison d'état*.<sup>7</sup>

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<sup>1</sup> Van Rompuy, *Not Renationalisation of European Politics, but Europeanisation Of National Politics*, Address given at the invitation of "Notre Europe", Paris, 20 September 2010, PCE 191/10.

<sup>2</sup> Merkel, Speech at the opening ceremony of the 61st academic year of the College of Europe in Bruges, 2 November 2010.

<sup>3</sup> It is indeed commonplace to affirm that "les fonctionnaires diplomatiques valent plutôt par leurs capacités que par la manière dont ils sont groupés", as noted by G. Tornielli, Italian ambassador to France (1895-1908); quoted in Piccioni, *Les Premiers Commis des Affaires Etrangères aux XVII<sup>e</sup> et XVIII<sup>e</sup> Siècles* (De Boccard, 1928), p. 23.

<sup>4</sup> Less than three years after its establishment, several studies have already attempted to ascertain the Service's efficacy, see *inter alia* Vaïsse et al., *European Foreign Policy Scorecard 2013* (European Council on Foreign Relations, 2013), pp. 21-22; Blockmans, *The European External Action Service One Year On: First Signs of Strengths and Weaknesses* (CLEER, 2012); De Jong and Schuntz, "Coherence in European Union External Policy Before and After the Lisbon Treaty: the Cases of Energy Security and Climate Change", 17 *European Foreign Affairs Review* (2012): 165-187.

<sup>5</sup> European Parliament legislative resolution of 8 July 2010 on the proposal for a Council decision establishing the organisation and functioning of the European External Action Service, O.J. 2011 C 351.

<sup>6</sup> See Nye, "Soft Power", 80 *Foreign Policy* (1990): 153-171; Manners, "Normative power Europe: a contradiction in terms?", 40 *Journal of Common Market Studies* (2002): 235-258.

It may be tempting to address these issues through the traditional schemes of European integration. It is well known that the EU is based on the tension between two different visions, one of which is favourable to an "ever closer Union" and the other seeks to maintain the 'Europe of States'. Union bodies are generally understood in light of this dialectic. While the European Parliament and, above all, the Commission stand for further integration, or 'communitarisation', the institutions where the Member States are represented are often depicted as the bastions of intergovernmentalism.

If the EEAS were an instance of 'communitarisation' in foreign policy, it should be expected to increase effectiveness and maintain the exceptional nature of the EU on the international scene. The Service may thus behave as a sort of 'new Commission', providing impetus for the harmonisation of the Member States' foreign policies into a single EU external action. However, it is patent that this sort of Service may exist only to implement a single European foreign policy, which does not exist at present.<sup>8</sup> Such an understanding of the EEAS would thus justify the view of a Euro-sceptic Member of the European Parliament: "the whole EEAS is based on a gigantic myth [since] there is no common European foreign policy."<sup>9</sup>

If, on the contrary, the EEAS were an instance of 're-nationalisation' of the external action, it should be expected to reduce the EU's capabilities and radically alter the international identity of the Union. Also this characterisation of the Service is misleading, simply because EU Members can hardly be expected to be as short-sighted as to ignore that, as the J. Solana recently affirmed, "today, three European countries are among the world's seven largest economies. Ten years from now, only two will remain. By 2030, only Germany will still be on the list, and by 2050, none will remain. [...] What this means is that the European states are too small to compete separately in the world of the twenty-first century. It's as simple as that."<sup>10</sup> As noted by Kissinger, it is transparent that EU Members "are attempting to compensate for this relative weakness by creating a unified Europe, an effort which absorbs much of their energies."<sup>11</sup> Is it logical to argue that the Masters of the Treaties purposefully sought to invert this process via the EEAS?

This analysis intends to demonstrate that the EEAS is not a champion of the traditional approaches to European integration. The Service is functional neither to set up, nor to dismantle, a monolithic foreign policy of the Union, but it should rather seek to promote harmony between the different external actions that already exist. Moreover, the EEAS should not redefine the identity of the Union as an international actor, but it should rather respect the different identities of the Union and its Members, and strive to pragmatically square their different views. In other

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<sup>7</sup> These concerns seem to be at the basis of the scepticism of part of the civil society for the EEAS' role, namely in the field of development cooperation, see Van Reisen, *Note on the Legality of Inclusion of Aspects of EU Development Cooperation and Humanitarian Assistance in the European External Action Service (EEAS)* (Europe External Policy Advisors, 2010); Mekonnen, *The Draft Council Decision on the Establishment of the European External Action Service and its Compliance with the Lisbon Treaty*, Legal Opinion Drafted for European Solidarity Towards Equal Participation of People (Eurostep), 2010.

<sup>8</sup> Bale, "Field-level CFSP: EU Diplomatic Cooperation in Third Countries", 10 *Current Politics and Economics of Europe* (2000): 187 - 212. It is worth specifying that, for the purpose of this work, 'foreign policy' is intended as the sum of official external relations conducted by an independent actor (the EU or its Members) in international relations.<sup>8</sup> EU Foreign policy is consequently used as a synonym for 'EU external action' and 'EU external relations'.

<sup>9</sup> William Dartmouth MEP, meeting of the EP Foreign Affairs Committee, 21 March 2012.

<sup>10</sup> Solana, "The European-American dream", [www.project-syndicate.org](http://www.project-syndicate.org), 26 February 2013.

<sup>11</sup> Kissinger, *Diplomacy* (Simon & Schuster, 1994), p. 24.

words, the Service is the expression of a novel approach to European integration, which does not postulate the renounce to the Member States' sovereignty, but rather seeks the coordination of the different European external actions.

The delimitation of the object of this analysis is simple. We intend to investigate the status, structure, organization and functions of the EEAS. Consequently, we will not deal directly with EU policies, or entities such as agencies or EU Special Representatives.<sup>12</sup> Given the close relationship between the Service and the High Representative of the Union for Foreign Affairs and Security Policy (High Representative or HR), several references are made to the latter, but only when this is necessary for the purpose of our research on the EEAS.

Since the objective is to analyse the nature and functions of the EEAS, and these are mainly determined by the *lex lata*, it is necessary to determine the content of the law, by taking into account its sources and its application in practice.<sup>13</sup> This work consequently adopts a classical 'legal dogmatics' approach (also known as 'legal doctrine' or *technique juridique*).<sup>14</sup> We do not seek to conduct an inquiry in the fields of sociology, philosophy, or political science.

A legal analysis of the EEAS encounters several obstacles, especially when the analysis seeks to reconstruct the law in action: the practice related to the EEAS is limited, difficult to identify and often contradictory. Nonetheless, a legal analysis of the Service does not appear to be premature. It is possible to reconstruct a large part of the law concerning the EEAS, as it is currently applied, by taking into consideration, beside primary and secondary law, subsidiary sources. These include firstly the unpublished documents of EU bodies, which may not have legal content, but influence the way EU law is applied. The documents that are not published in open sources were delivered to the author by the 'access to documents' services of EU bodies. The opinions of EU officers provide for another source.<sup>15</sup> Such opinions were ascertained through 28 'in-depth' interviews conducted by the author between July 2010 and September 2012.<sup>16</sup> These interviews are not relied on in a systematic

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<sup>12</sup> Although the Special Representatives assist the HR, like the EEAS, they are not part of the Service. This is rendered evident by the difference in these organs' legal bases (see Articles 28, 31(2) and 33 TEU), but also by the fact that the EUSRs' mandate is limited to the CSFP. Such conclusion is further confirmed by the practice: if the EUSRs were part of the EEAS, it would be illogical for the Council to require them to "work in close coordination with the European External Action Service (EEAS) and its relevant departments", see e.g. Council Decision 2012/390/CFSP, O.J. 2012 L 187/44, Article 4(3).

<sup>13</sup> In other words, we tend to adopt a 'realist' or 'pragmatic' approach to the legal inquiry, which, as noticed by Summers, "Pragmatic Instrumentalism in Twentieth Century American Legal Thought – a Synthesis and Critique of Our Dominant General theory About Law and Its Use", 66 *Cornell Law Review* (1980): 861, is more a body of general directions of thought than a fully developed set of views completely worked out in all major respects. There is no need, therefore, to discuss the theoretical implications of our approach at this stage: the consequences of our 'pragmatic' viewpoint will become clear in the course of the analysis.

<sup>14</sup> Cf. Corten, *Méthodologie du droit international public* (Editions de l'Université de Bruxelles, 2009), p. 105. See also Peczenik, *Scientia Juris - Legal Doctrine as Knowledge and a Source of Law* (Springer, 2005), pp. 1-2.

<sup>15</sup> For the sake of protecting the anonymity of the interviewees, they will be referred to as officers belong to a certain body, without any further specification as to their identity.

<sup>16</sup> In-depth interviewing is a qualitative research technique that involves conducting intensive individual interviews with a small number of respondents to explore their perspectives on a particular idea, program, or situation. See Boyce and Neale, *Conducting in-depth interviews: a guide for designing and conducting in-depth interviews for evaluation input* (Pathfinder international, 2006); see also Legal, Keegan and Ward, "In-depth Interviews", in Ritchie and Lewis, *Qualitative Research Practice: a Guide for Social Science Students and Researchers*, pp. 138-169.



manner, but only for the purpose of clarifying the content of the law or its application in practice.<sup>17</sup>

Another reason why a legal analysis of the EEAS appears to be feasible today is that the Service is not an idiosyncratic evolution of EU law, but is rather a development grounded on previous experiments. In other words, the EEAS is not entirely 'new'. This work seeks to demonstrate that it is possible to explain the features of the Service by analysing them in light of the evolution of external action law. Our hypothesis is based on a commonplace and an assumption. The commonplace is that the EEAS should provide the "coordination necessary to ensure the coherence of the European Union's external action as a whole", as the European Council, among many others, held when the EEAS was about to be set up.<sup>18</sup> The assumption is that 'form follows function' and that the *function* of the EEAS should consequently determine its *form*.<sup>19</sup> We hypothesise, in other words, that the Service should be structured in a manner that is conducive to coherence in EU and Member States' foreign policy.

An analysis of the EEAS in the perspective of external action coherence is complicated by the uncertainties related to the definition of coherence. The first chapter seeks therefore to demonstrate that coherence is a legal principle that requests EU bodies and Members to promote synergy in the implementation of European external actions and unity in international representation. It is submitted that this principle can be enforced only via the coordination of European decision-makers, through the 'Union method' put forward by Chancellor A. Merkel in 2010. The Masters of the Treaties foresaw an organ tasked with bringing about coordination and coherence, i.e. the High Representative. The HR's tasks are performed in practice by his/her administration, the EEAS, which should consequently implement the 'Union method'. The second chapter seeks to verify whether the EEAS is an expression of the Union method, or is rather a traditional 'Communitarian' or 'intergovernmental' body. It is argued that the EEAS truly embodies the Union method, since it has multiple links to European policy makers, but is entirely accountable only to the HR. Nonetheless, the proteiform and sometimes contradictory inter-institutional relations of the Service render its coordinating capabilities difficult to ascertain *a priori*. Therefore, chapters 3 and 4 focus on the Service's ability to promote coherence in practice. Chapter 3 intends to clarify the EEAS' potential to foster synergy in EU policy management. The Service generally performs this function mainly by *promoting* coordination between European policy makers. In some cases, the EEAS can also *enforce* coordination via specific powers explicitly entrusted by the legislator on the basis of an extensive reading of the principle of external action coherence. The fourth, and last, chapter investigates the EEAS' capability to enhance unity in EU external representation. In

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<sup>17</sup> In fact, the primary task of this work is not to reconstruct the EU officers' view of the EEAS. For a study of the self-perception of EU 'diplomats' (before the Lisbon reform), see Carta, *The European Union Diplomatic Service* (Routledge, 2011).

<sup>18</sup> EUCO 21/1/10 REV 1, Annex I para f, (emphasis added).

<sup>19</sup> Possibly this principle was expressed in this form for the first time by an architect, see Sullivan, "The Tall Office Building Artistically Considered", 57 *Lippincott's Magazine* (1896): 403-409: "it is the pervading law of all things organic and inorganic, of all things physical and metaphysical, of all things human and all things super-human, of all true manifestations of the head, of the heart, of the soul, that the life is recognizable in its expression, that form ever follows function. This is the law." Given the propensity of EU lawyers to favour architectural metaphors (such as the 'Greek temple' structure of the pre-Lisbon EU), it does not seem inappropriate to derive our working hypothesis from an established, albeit contested, architectural doctrine.

most cases, the EEAS facilitates such unity, but does not ensure it. In the field of diplomacy, however, the Service makes sure that the Union 'speaks with one voice' and reinforces unity between EU and Member States' ambassadors.

# CHAPTER 1

## THE 'UNION METHOD': ENFORCING THE PRINCIPLE OF EXTERNAL ACTION COHERENCE

The process of European integration has led to the creation of numerous external initiatives at EU level, which coexist with the policies of the Member States. The challenge is now to bring together these different instruments and capabilities, in order to reinforce the European identity and its independence in order to promote peace, security and progress in Europe and in the world.<sup>20</sup>

EU law soon acknowledged the importance of this issue, which was firstly addressed in primary law by the Single European Act, whose preamble stressed Europe's responsibility "to aim at speaking ever increasingly with one voice and to act with consistency and solidarity in order more effectively to protect its common interests and independence."<sup>21</sup> The Maastricht reform, at Article C TEU (then Article 3 TEU) reinforced this requirement of consistency, by asserting that "the Union shall [...] ensure the consistency of its external activities as a whole in the context of its external relations, security, economic and development policies." The Constitutional Treaty and, later, the Lisbon reform multiplied the references to "consistency". Article 21(3) TEU partially echoes previous Article 3 TEU, by affirming that "the Union shall ensure consistency between the different areas of its external action", but also "between these and its other policies." Other primary law provisions call for "consistency" in specific external action areas or within the EU institutions that manage them.<sup>22</sup> The concept of "consistency" between EU policies also spilled over to other areas, and is now listed among the "provisions having general applications" of the TFEU, whose Article 7 reads "the Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers." There is little doubt, therefore, that external action "consistency" should be considered as a general principle of EU law.

Despite the significant attention practitioners and academics devoted to external action consistency,<sup>23</sup> the content of this principle and its consequence for external

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<sup>20</sup> See European Council, A Secure Europe in a Better world: European Security Strategy, 12 December 2003, not published in the OJ, pp. 3-4, p. 13 and the preamble to the TEU.

<sup>21</sup> Single European Act, preamble: see also Article 30(5).

<sup>22</sup> Articles 18(4), 26(2) TEU and 196(1)(c), 212(1), 214(7), 329(2) TFEU

<sup>23</sup> On external action coherence, see *inter alia*, Mignolli, *L'Azione Esterna dell'UE e Il Principio della Coerenza* (Jovene, 2009); Bosse-Platière, *L'article 3 du Traité UE: Recherche sur une Exigence de Cohérence de l'Action Extérieure de l'Union Européenne* (Bruylant, 2009); Michel (ed.), *Le Droit, les Institutions et les Politiques de l'Union Européenne Face à l'Imperatif de la Cohérence* (Presses Universitaires de Strasbourg, 2009); Dony and Rossi (eds), *Démocratie, Cohérence et Transparence: Vers une Constitutionnalisation de l'Union Européenne* (Editions de l'Université de Bruxelles, 2008); Gauttier, "Horizontal Coherence and the External Competences of the European Union", 10

relations law remain unclear. This chapter seeks to demonstrate that the principle the Treaties refer to as external action "consistency" cannot be construed as to require the mere prevention of legal contradictions in EU external relations, through the delimitation of EU competences. It should rather be interpreted as a duty for both EU bodies and Member States to ensure the political synergy of their external actions.

The first section shows that a restrictive interpretation of external action "consistency" is not to be accepted, since it is theoretically flawed and practically inefficient. The second section intends to demonstrate that EU institutions and Member States tend to overcome some of the issues raised by the delimitation of Union competences through pragmatic solutions, since they consider themselves under a political requirement to foster coherence in European foreign policies. The third section shows that such requirement of coherence has often been interpreted as a legal principle, since it generates legal outcomes and it underlies the architecture of the external action set by the Lisbon Treaty. The fourth, and last, section seeks to demonstrate that external action coherence can be enforced mainly at political level, by bridging the gap between the Community and the intergovernmental methods through the so-called 'Union method', whose implementation is ensured mainly by the European External Action Service (EEAS).

## SECTION 1. EXTERNAL ACTION "CONSISTENCY": INSUFFICIENCY OF A LEGAL REQUIREMENT OF NON-CONTRADICTION BETWEEN EUROPEAN FOREIGN POLICIES

A literal interpretation of external action "consistency" may seem to suggest that this principle merely calls for the prevention of antinomies between European foreign policies. In the common speech, "consistency" is defined as the "ability to be asserted together without contradiction".<sup>24</sup> Such reference to non-contradiction seems to be supported by the most widely accepted legal definition of "consistency", that is to say the absence of logical contradiction between two statements of law.<sup>25</sup> In this sense, consistency is a property of legal systems, which allows for their

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*European Law Journal* (2004): 23-41; Wessel, "The Inside Looking Out: Consistency and Delimitation in EU External Relations", 37 *Common Market Law Review* (2000): 1135-1171; Hillion, *Cohérence et Action Extérieure de l'Union Européenne* (EUI Working Paper, 2012).

<sup>24</sup> For instance, see "Consistency" in the *Merriam-Webster dictionary* (Merriam Webster Mass Market, 2004).

<sup>25</sup> In this understanding, "consistency" would thus amount to what Dworkin refers to as "bare consistency", see Guest, *Ronald Dworkin*, (Stanford University Press, 2013), p. 80. As noted by Maulin, "Cohérence et Ordre Juridique", in Michel (ed.), *Le Droit, Les Institutions et Les Politiques de l'Union Européenne Face à l'Imperatif de La Cohérence* (Presses Universitaires de Strasbourg, 2009), pp. 9-24, at p. 11, the reason for this requirement of consistency descends from the fact that "la valeur de l'ordre juridique ne procède pas seulement de l'autorité qui le crée [...] mais [...] elle procède encore de la raison". This characterisation of consistency can be found in the Treaties, outside the field of external relations, in Article 256(3) TFEU, dealing with the jurisdiction of the General Court. This provision reads "where the General Court considers that the case requires a decision of principle likely to affect the unity or consistency of Union law, it may refer the case to the Court of Justice for a ruling." It is evident that the use of consistency in this case clearly refers to the non-contradiction we referred to above.

existence, and which is protected by preventing the emergence of antinomies.<sup>26</sup> Such prevention can be performed through the interpretation of legal acts, in order to construe norms that are not mutually contradictory. If this proves impossible, antinomies should be prevented through interpretation and, if necessary, solved by relying on the chronological, hierarchical, specialty and competence criteria.<sup>27</sup> It may therefore be hypothesised that 'external action consistency' should be seen as a specification of the general principle, or meta-principle, of consistency typical of the EU legal system. In this perspective, external action consistency may amount to the absence of antinomies between acts that relate to EU external relations. This section seeks to demonstrate that such interpretation cannot be accepted. Paragraph 1 shows that the contradictions in the external action are caused mainly by the delimitation of EU competences, determined by the attribution of limited to the Union. The rest of the section demonstrates that the principle of conferral actually serves to prevent the antinomies between EU and Member States foreign policies (paragraph 2) and between EU external actions (paragraphs 3 and 4).

### *1. The Principle of Conferral and its use as the (Alleged) Main Causes of Legal Contradictions between European External Actions*

As in the other sectors of the EU legal system, the antinomies of the external action can be generated by a number of factors. For instance, a shift in the EU's political priorities may generate intertemporal inconsistencies; moreover, an erroneous interpretation of a Treaty provision may lead to an inconsistency with primary law. An accurate reading of the Treaties clarifies that external action inconsistencies are expected to be caused mainly by the overlapping of different EU policies. Article 21(3) TEU indeed asserts that the Union shall ensure consistency between the different "areas of its external action" and between these and its other "policies". This is further confirmed by Article 7 TFEU, according to which the Union shall ensure consistency between its "policies and activities". An even closer inspection reveals that external action consistency is an issue affecting also the relation between EU and Member States' policies.<sup>28</sup> In one case, Article 196(1)(c) TFEU (civil protection), primary law explicitly call for "consistency" between a policy of the Union and the one of its Members. In other instances, the Treaties require the EU's and Member States' action to promote "complementarity" among their

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<sup>26</sup> It is not necessary to investigate into the detail the philosophical implications of the 'consistency' of legal systems, since there seems to be no unanimity in the doctrine in this respect, and an analysis of this issue would depart from the subject of our studies. In particular, we do not intend to discuss the 'coherence' of legal systems as such, which may be defined as the ability to express a single and comprehensive vision of justice, see Guest, *op. cit.*, p. 80 and Schiavello, "on Coherence and Law: An Analysis of Different Models", 14 *Ratio Juris* (2001), 233-243, pp. 236 ff. As discussed later, we will content with a differentiation between the consistency of the external action, as an expression of the consistency of legal systems, and its coherence. The latter cannot be seen as an expression of a vision of justice, but it is rather an aspect typical of policy management, and particularly of foreign policy.

<sup>27</sup> See Falcón y Tella, *Equity and Law* (Martinus Nijhoff, 2008), p. 106.

<sup>28</sup> This form of 'consistency' is often referred to as 'vertical consistency', in opposition to the 'consistency' of EU external action, which is termed 'horizontal'. This terminology implies a characterisation of the EU system as hierarchically organised, with the EU at the top and the Member States at the bottom of the legal order. Such 'federal' understanding of EU law does not seem to be appropriate for the EU legal order, therefore we will not use the adjectives 'vertical' and 'horizontal'.

policies,<sup>29</sup> and request EU countries to “refrain from any action which is contrary to the interests of the Union”.<sup>30</sup> Provided that the Treaties clearly refer to “consistency” as a requirement relating to the conduct of European foreign *policies*, we do not seek to investigate other possible dimensions of “consistency”, such as the consistency between EU actions and values, or ‘institutional’ consistency.<sup>31</sup>

What does generate this multiplicity of European external policies? The coexistence of EU and Member States’ external action is determined by the principle of conferral. As it is known, the EU does not have general competences, but acts only “within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein” (Article 5 TEU). Since the “competences not conferred upon the Union in the Treaties remain with the Member States”, the actions of the Union coexist with those of its Members. In theory, conferral may not entail external action fragmentation, as long as the competences relating to foreign policy may be concentrated at one level or another. This may suggest that it is actually the *use* of conferral, rather than this principle *per se*, that generates fragmentation. In practice, however, even ‘internal’ policies often have ‘external’ dimensions, and may consequently become part of a subject’s foreign policy, extensively intended.<sup>32</sup>

Conferral allows also for the fragmentation of the external actions at EU level. An international organisation may theoretically be attributed *one* single competence. The masters of the Treaties, on the contrary, decided to confer on the Union numerous competences, which are consequently delimited both *ratione materiae* and teleologically, as testified by the Treaty provisions upon which each policy is grounded, that is to say the ‘legal bases’. Therefore, conferral sets the basic architecture of the external action and determines the “institutional balance” of the Union, that is to say the division of powers between EU bodies established by

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<sup>29</sup> See Article 210 TFEU: “in order to promote the complementarity and efficiency of their action, the Union and the Member States shall coordinate their policies on development cooperation and shall consult each other on their aid programmes”.

<sup>30</sup> Article 24(3) TEU.

<sup>31</sup> For an analysis of the coherence between values and practices, see Bosse-Platière, *op. cit.*, pp. 425 ff; on institutional coherence, see Cremona, “Coherence Through Law: What Difference Will the Treaty of Lisbon Make?”, 3 *Hamburg Review of Social Sciences* (2008): 11-36, p. 25. It seems that the different dimensions of consistency/coherence identified in the literature, for the most part, are just different facets of the consistency/coherence of foreign policies. In any case, considering that the Treaties are rather straightforward in respect of the requirement of consistency/coherence between EU *policies*, there is no need, for the purpose of our analysis, to further break down this principle in different dimensions the Treaty never refers to.

<sup>32</sup> This may be demonstrated through an analogy, *mutatis mutandis*, with the experience of the United States. In this country, foreign affairs questions are generally considered to fall within the exclusive orbit of the federal government (see, e.g. *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 423-24 (2003)), to the extent that the federates states do not ‘exist’ at international level, see *United States v. Belmont*, 301 U.S. 324, 331 (1937). The latter nonetheless act at international level, for instance by entering into nonbinding instruments or by determining, through their conduct, the violation of international law on the part of the U.S. as an international subject. See *inter alia* Bilder, “The Role of States and Cities in Foreign Affairs”, 83 *American Journal of International Law* (1989): 821; Resnick, “Foreign as Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light of Translocal Internationalism”, 57 *Emory Law Journal* (2007): 31-92; Ahdieh, “Foreign Affairs, International Law and the New Federalism: Lessons from Coordination”, 73 *Missouri Law Review* (2008): 1129-1245, p. 1185; Schaefer, “Constraints on State-Level Foreign Policy: (Re) Justifying, Refining and Distinguishing the Dormant Foreign Affairs Doctrine”, 41 *Seton Hall Law Review* (2011): 201; Vogel and Swinnen (eds), *Transatlantic Regulatory Cooperation: the Shifting Roles of the EU, The US and California*, Cheltenham (Edward Elgar, 2011).

primary law.<sup>33</sup> The limits of the powers of EU bodies, indeed, are not to be inferred from a general principle, but rather from an interpretation of the legal bases,<sup>34</sup> as testified by the letter of Article 13(2), which asserts that "each institution shall act within the limits of the powers conferred on it in the Treaties".

The centrality of conferral to the division of European foreign policies is likely to generate inconsistencies in practice. The attribution of competences is dependent on a legal fiction, that is to say the distinction between different policy areas, which is increasingly at odds with reality.<sup>35</sup> In contemporary international relations, the boundaries between different foreign policies are blurred: it is probable that actions sharing a single functional purpose may be pursued by policies with different legal bases. Thus initiatives based on different material competences and having different objectives may coexist in the same area. This may well lead to the proliferation of legal contradictions in the external action of the Union. For instance, international agreements with developing countries may be based on different Treaty provisions, such as development cooperation and trade, and still have similar functions. If a development cooperation and a trade agreement coexisted in the same field, there would be a high risk of inconsistency among the two acts, not least because development cooperation pursues the reduction of poverty" (Article 208 TEU), whereas trade fosters a partially different objective, that is to say the progressive abolition of restrictions on international trade (Article 206 TFEU).

The contradictions determined by the overlapping of different policies may theoretically be solved on the basis of the usual hierarchical, chronological, specialty and competence criteria. The hierarchical and specialty criteria, however, are of scarce usefulness in this context, since EU policies are not in a hierarchical or general-special relationship with each other. The chronological criterion may be of some use in certain circumstances, but not always: for instance, if the EU entered into two international undertakings with partially different groups of States, it would not be obliged to disregard the former, but it may select which commitment it should violate. More generally, the use of the chronological criterion in the case of overlapping policies may lead to a paradoxical result, that is to say the continuous redefinition of the EU position, *via* the use of different legal bases. Provided that the speciality, hierarchical and chronological criteria are not effective for our purpose, it remains to be seen whether the antinomies generated by the multiplicity

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<sup>33</sup> For the first application of the doctrine of 'institutional balance' see Case 9/56, *Meroni*, [1958] ECR 11. See Constantinesco, "L'équilibre Institutionnel dans La Constitution de l'Union Européenne", Raux (*Liber Amicorum*), *Le Droit de l'Union Européenne en Principes* (Apogée, 2006), pp. 481-491, at p. 485: "issu du principe d'attribution des compétences (à la Communauté) et des pouvoirs (aux institutions), [l'équilibre institutionnel] s'analyse d'abord comme conduisant au respect, par toutes les institutions, des prérogatives de chacune". See also Jacqué, "The Principle of Institutional Balance", 41 *Common Market Law Review* (2004): 383-391. For the impact of the Lisbon Treaty on institutional balance, see Daniele, "Le Istituzioni Politiche Dell'unione Europea dopo Il Trattato Di Lisbona: Verso Un Nuovo Equilibrio?", *Studi Sulla Integrazione Europea*(2009): 43-54, and Christiansen, "The European Union After the Lisbon Treaty: An Elusive 'Institutional Balance'?", in Biondi, Eeckhout and Ripley (eds.), *EU Law After Lisbon* (Oxford University Press, 2012), pp. 228-247.

<sup>34</sup> Joined cases 188-190/80, [1982] ECR 2545, para 6.

<sup>35</sup> See, for instance, the Report by Mr. Leo Tindemans, Prime Minister of Belgium, to the European Council, Bulletin of the European Communities, Supplement 1/76, according to which: "the traditional distinctions maintained by diplomatic chancelleries in this field make increasingly less sense in the modern world. Recent developments of international life show that economic, industrial, financial and commercial questions will all in the future be the subject of negotiations, the significance of which will be highly political".

of European foreign policies may be solved on the basis of the competence criterion, that is to say by relying on conferral.

## *2. Conferral as a Solution to the Antinomies between EU and Member States' Policies*

In principle, conferral delimits the action of the Union, thus ensuring the non-overlapping of its policies with those of the Member States. The absence of overlapping, in turn, makes sure that different policies do not have similar scope, and consequently prevents their contradiction. Thus conferral sets the basis for the solution of inconsistencies between the acts of the EU and its Members in the field of foreign policy.

On the one hand, Union acts cannot impinge on the Member States' competences. If a EU measure were not based on a conferred competence, it should be declared invalid, or even non-existent, because of the incompetence of the Union. On the other hand, and as a corollary of conferral, the Member States' cannot hinder the exercise of the competences they conferred on the Union. This principle is generally referred to as 'loyalty' and it has been described as a akin to the *bona fide* typical of international law and the principle of 'federal loyalty' that characterises certain internal legal systems.<sup>36</sup> At EU level, it is rendered explicit by Article 4(3) TEU, which affirms *inter alia* that the Member States "shall refrain from any measure which could jeopardise the attainment of the Union's objectives" and should "facilitate the achievement of the Union's tasks".

Article 4(3) TEU and its predecessors have been fundamental for preservation of the consistency of EU law, also in the field of external relations. This is clarified, in the first place, by the ECJ jurisprudence on primacy. As it is known, the Member States must grant primacy to EU law because, as the ECJ held in *Costa v. Enel* "the executive force of community law cannot vary from one state to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the treaty set out in article 5(2) [now article 4(3) TEU]".<sup>37</sup> The Court clarified also that the duty loyalty descends from conferral, since the Member States "have limited their sovereign rights and have thus created a body of law which binds both their nationals and themselves".<sup>38</sup> Thus by enforcing a corollary of conferral, that is to say loyalty, the Court can prevent contradictions between EU and Member States' acts on the basis of the criterion of competence. Such prevention concerns all the sectors of activity of the Union, therefore including also the external action.

The ECJ has identified at least one expression of the Member States' loyalty which is specific to the external action. In the *ERTA* case, the Court found that the duty of

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<sup>36</sup> Constantinesco, "L'article 5 CEE, de La Bonne Foi A La Loyauté Communautaire", in Pescatore (Liber Amicorum), *du Droit International Au Droit de L'intégration* (Nomos Verlagsgesellschaft, 1987). See also Neframi, "The Duty of Loyalty: Rethinking Its Scope through Its Application in the Field of EU External Relations", 47 *Common Market Law Review*, 2010: 323-359.

<sup>37</sup> Case 6-64, *Costa v. Enel*, [1964] ECR 1129.

<sup>38</sup> *Id.*: "by creating a community of unlimited duration, having [...] real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the community, the Member States have limited their sovereign rights and have thus created a body of law which binds both their nationals and themselves. The integration into the laws of each member state of provisions which derive from the community and more generally the terms and the spirit of the treaty, make it impossible for the states, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity."



loyalty of the Member States also implies the ‘parallelism’ of internal and external competences. If the EU has exercised its internal competences in order to pursue the objectives conferred by the Treaties, the Member States no longer have the right "to undertake obligations with third countries which affect those rules",<sup>39</sup> since this would question their loyalty. Therefore, not only does loyalty, and thus conferral, ensure the consistency of EU and Member States’ acts through the principle of primacy, but it contributes to their non-overlapping also *in abstracto*, by excluding the Member States’ ability to enter into international legal commitments in areas already covered by EU internal measures.

The delimitation of EU competences, and thus the enforcement of conferral, may encounter some difficulties in practice. A classic example in this sense is provided for by Opinion 1/78, where the Court was requested to determine whether an international agreement relating to trade, but having repercussions on the economic policy competence of the Member States, fell within the competence of the EEC.<sup>40</sup> The ECJ started from the assumption that the concept of trade policy has to be interpreted extensively, in order not to "risk causing disturbances in intra-Community trade".<sup>41</sup> On the basis of this finding, it concluded that the existence of repercussions on the Member States economic policy did not exclude the agreement from the scope of EU competences. This example demonstrates that the existence of links between EU and Member States’ competences does not prevent the delimitation of the European and Member States’ area of action. It also suggests, however, that a policy of the Union may lawfully have "repercussions" on, and thus interfere with, the policies of the Member States.

It is clear, therefore, that the principle conferral is apt at delimiting EU and Member States’ competences, thus preventing the existence of inconsistencies between the two, both in theory and in practice. However, conferral is not always easy to enforce and it does not completely exclude the existence of interferences between the policies adopted at one level and the actions conducted at another.

### *3. Conferral as a Solution to the Antinomies between EU External Actions...*

Not only does conferral ensure the non-contradiction of EU and Member States’ foreign policies, but it prevents contradictions also between the different external actions of the Union. Each of the EU competences, and the policies which are founded upon them, has a specific material and teleological delimitation. In order to enforce the non-contradiction of EU policies it is sufficient to make sure that the material and teleological scope of each EU act is referred only to the legal basis it is founded upon. This is precisely the function of the ‘centre of gravity’ doctrine elaborated by the EC, according to which the choice of the legal basis for a measure must be based on objective factors, which include in particular the aim and the content of the measure.<sup>42</sup> On the basis of such objective factors, the interpreter can always reconstruct the content and purpose of an act and, thus, its legal basis.

The centre of gravity doctrine allows for the identification of the correct legal basis even in the case of acts having a twofold purpose or component. According to an

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<sup>39</sup> Case 22-70, *Commission v Council*, [1971] ECR 263, para 17.

<sup>40</sup> Opinion 1/78, *International Agreement on Natural Rubber*, [1979] ECR 2871.

<sup>41</sup> *Id.*, para 45.

<sup>42</sup> See *inter alia* Case 45/86, *Commission v Council*, [1987] ECR 1493, para 11, Case C-300/89, *Commission v Council*, [1991] ECR I-2867, para 10, and Case C-269/97, *Commission v Council* [2000], ECR I-2257, para 43.

established jurisprudence of the Court, if one such purpose or component is incidental, the measure must be founded on the legal basis required by the predominant purpose or component.<sup>43</sup> This signals that two policies may be separated, but they can nonetheless influence each other, as in the case of EU-Member States relations.<sup>44</sup> These influences may be prevented, in a formal perspective, simply by allowing for the cumulation of legal bases. In such a case, an act would be part of two policies at once, and would thus 'ontologically' embody their non-contradiction.

The cumulation of legal bases is exceptionally admitted by the Court, but only if an act pursues a twofold purpose, or has a twofold component, none of which is incidental.<sup>45</sup> The rationale for this restrictive approach is transparently linked to the protection of the institutional balance. Each legal basis may determine its decision-making procedure. The cumulation of legal bases would thus question the link between legal bases and procedures that was foreseen by the Treaties.<sup>46</sup> The Court's intention to maintain institutional balance *via* the centre of gravity jurisprudence is also confirmed by the *Titanium dioxide* jurisprudence, according to which two legal bases foreseeing incompatible procedures can never be cumulated.<sup>47</sup>

It is clear, therefore, that conferral creates a multiplicity of EU external policies, but it also contributes to their consistency, by allowing for their legal separation, according to the 'centre of gravity' doctrine. The enforcement of such separation may be troublesome, and it does not always prevent the influence of one policy on the others,<sup>48</sup> especially because of the need to preserve the institutional balance set in the Treaties.

#### 4. ...Including the Common Foreign and Security Policy

Before the entry into force of the Lisbon Treaty the EU and its external action were divided in three 'pillars', i.e. the EC, the Common Foreign and Security Policy (CFSP) and Police and Justice Cooperation in Criminal Matters (PJCCM). The pillars were different in a 'formal' perspective, since the first was provided for in the TEC, while the others were contained in the TEU. Even more importantly, the pillars were different in a substantive viewpoint. The EC pillar was managed

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<sup>43</sup> C-42/97 *Parliament v Council* [1999] ECR I-869, para 39 and 40.

<sup>44</sup> This issue is particularly thorny in the case of acts having a component related to one competence and pursuing the objective of another competence. Such difficulties are elucidated by a comparison between the *Energy Star* case and Opinion 2/00 on the Cartagena Protocol. In both circumstances, the controversial measures had prevalently commercial content and environmental objectives. In the former case, the Court seems to have favoured the material perspective, concluding that the controversial agreement had to be founded on the trade legal basis. In the latter, the ECJ gave more importance to the teleological dimension of the agreement, concluding in favour of the environment legal basis. See Opinion 2/00, *Cartagena Protocol*, [2001] ECR I-9713, and Case C-281/01, *Commission v Council*, [2001] ECR I-12049.

<sup>45</sup> See *inter alia*, Case C-42/97, *Parliament v Council* [1999], ECR I-869, para 39 and 40, Case C-336/00, *Huber* [2002], ECR I-7699, para 31, and Opinion 2/00, cited above, para 23.

<sup>46</sup> The legal basis is indeed "one of the manifestations of the institutional balance", according to Jacqu e, *op. cit.*, p. 386.

<sup>47</sup> Case C-300/89, *Commission v Council*, [1991] ECR I-2867, paras 18-21.

<sup>48</sup> The development cooperation and agriculture policy of the Union, for instance, are well known to be at odds, even when they do not unwarrantedly overlap, since the protectionism that underlies the Common Agricultural Policy hinders the exports of developing countries and, thus, their economic progress. See, *inter alia*, Koula mah-Gabriel and Oomen, *Improving Coherence: Challenges For European Development Cooperation* (ECDPM Policy Management Brief No. 9, 1997).

through procedures that generally reflected the archetypal 'Community method', which may be defined as the exercise of legislative power by the EC following the Commission's exclusive right of initiative, leading to the adoption of legislation by the Council (by qualified majority) and Parliament, resulting in a binding uniform rule which is subject to the jurisdiction of the Court of Justice.<sup>49</sup> The EU pillars, on the contrary, were seen as 'intergovernmental', since their decision-making was performed almost exclusively by the Council, which decided mostly by unanimity, and the other EU institutions played an ancillary role.<sup>50</sup>

The relation between the pillars was regulated not only by the centre of gravity doctrine, but also by primary law. Article 47 TEU asserted that "nothing in this Treaty shall affect the Treaties establishing the European Communities or the subsequent Treaties and Acts modifying or supplementing them." When the Court was called to judge upon inter-pillar conflicts determined by acts with a clear purpose or content, it applied the doctrine of the centre of gravity. Thus acts pursuing mainly EC aims, or having a primarily Communitarian content, and having mere repercussions on EU issues, could be validly based on the TEC. Thus in the *Dual Use* case<sup>51</sup>, the Court relied on the findings of Opinion 1/78 to conclude that a measure whose effect is to prevent or restrict the export of certain products "cannot be treated as falling outside the scope of the common commercial policy on the ground that it has foreign policy and security objectives."<sup>52</sup> Similarly, acts pursuing mainly EU aims, and with ancillary EC components, had to be founded on the TEU. In the *PNR* case, indeed, the Court asserted that, even if the controversial EC act incidentally affected an "activity which falls within the scope of Community law" it could not be based on the TEC, since it was mainly related to "operations concerning public security and the activities of the State in areas of criminal law".<sup>53</sup> Article 47 TEU was not however without effect with respect to the delimitation of EC and EU competences. The Court held in *Ecovas* that acts having non-ancillary EC and EU purposes and components could not be based on both TEC and TEU basis, as the centre of gravity doctrine would have (extraordinarily) been allowed. In order to justify this finding, the Court argued that since "Article 47 EU precludes the Union from adopting, on the basis of the EU Treaty, a measure which could properly be adopted on the basis of the EC Treaty, the Union cannot have recourse to a legal basis falling within the CFSP in order to adopt provisions which also fall within a competence conferred by the EC Treaty on the Community."<sup>54</sup> Such interpretation of Article 47 TEU is not entirely convincing, since it appears to be based on a circular line of reasoning: in order to determine whether an act could be adopted on a EC or EU legal basis, the Court started from the assumption that...“a

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<sup>49</sup> Craig, "Institutions, Power and Institutional Balance", in Craig and de Burca (eds), *The Evolution of EU Law* (Oxford University Press, 2011), pp. 41-84.

<sup>50</sup> As noted by Missiroli, *A little discourse on method(s)* (Egmont, 2011), p. 2.: "the so-called 'communitarian' and the 'intergovernmental' approaches often constituted rather "ideal-types" à la Max Weber than concrete methods or models - and they rarely operated in a 'pure', unadulterated form". Nonetheless, this dichotomy effectively expresses the different decision-making patterns in the EC and EU frameworks (and now in the non-CFSP and CFSP areas). Therefore the traditional definitions "Community method" and "intergovernmental method" are retained for our purposes.

<sup>51</sup> Case C-70/94, *Fritz Werner Industrie-Ausrüstungen v Germany* [1995] ECR I-3189.

<sup>52</sup> *Id.*, para 10.

<sup>53</sup> Joined cases C-317/04, *Parliament v Council*, [2006] ECR I-4721, paras 55-57. See also Papakonstantinou and de Hert, "The PNR Agreement and Transatlantic Anti-Terrorism Cooperation: No Firm Human Rights Framework on Either Side of the Atlantic", 46 *Common Market Law Review* (2009): 883-919, p. 891

<sup>54</sup> Case C-91/05, *Commission v Council*, [2008] ECR I-3651, para 77.

measure [...] could properly be adopted on the basis of the EC Treaty"! The *Ecovas* judgement is important, however, because it confirms the Court's concern for institutional balance. Presumably, the ECJ excluded the accumulation of EC and EU legal bases because this would have led to the 'contamination' of Communitarian procedures, typical of the TEC, with intergovernmental elements, characteristic of the TEU. In other words, the Court considered that the protection of the Community method justified a significant interference of EC policies on EU activities.

This problem may have been solved by the Lisbon Treaty. Not only did the recent reform abolish the 'pillars', but it substituted the subordination clause contained in Article 47 TEU with a 'symmetric' non-affected provision for CFSP and non-CFSP sectors, now contained in Article 40 TEU. The latter still affirms that the implementation of the CFSP shall not affect the application of non-CFSP policies, but it adds that the implementation of non-CFSP actions shall not affect the CFSP. This innovation can hardly modify the *Dual Use* and *PNR* jurisprudence, but it may theoretically have effects as far as the acts having non-ancillary CFSP and non-CFSP components and purposes are concerned. An exact interpretation of this provision, however, requires an assessment of the structure of the Lisbon Treaty, therefore it will be provided in section 4.

It may be concluded that the principle of conferral, *via* the centre of gravity doctrine, ensures the consistency between the CFSP and the rest of the external action. As demonstrated in Paragraphs 2 and 3, such application of conferral is problematic, and it does not exclude the existence of interferences between one sector of the external action and the others.

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This section sought to demonstrate that, although the delimitation brought by conferral generates some concerns about the consistency of European foreign policies, the same principle of conferral is actually instrumental in solving them. In this perspective, external action "consistency" seems not to be problematic. The numerous references to external action "consistency" contained in the Treaties consequently appear redundant, and even superfluous. Why should have the drafters of the Treaties called for the non-contradiction of European foreign policies when the principle the Union is founded upon already ensures it?

At the same time, conferral is not a *panacea*, since paragraphs 2, 3 and 4 suggest that this principle is not easy to apply in practice and it cannot prevent the existence of influences between the different European foreign policies, even when they are correctly separated. Such influences do not amount to interferences susceptible of questioning the delimitation of EU and Member States policies in theory, but they raise practical problems, since they may question the European cohesiveness on the international scene. They have consequently been tackled by political institutions and Member States through pragmatic means, as demonstrated in the next section.

## SECTION 2. EXTERNAL ACTION COHERENCE AS A POLITICAL REQUIREMENT: EVIDENCES FROM THE PRACTICE

According to the preamble of the TEU, the Union should seek to reinforce "the European identity and its independence in order to promote peace, security and progress in Europe and in the world". Although this statement is referred to the CFSP, it may be understood as a general requirement of effectiveness for the EU as a whole. For this purpose, the mere consistency of the EU legal order is not sufficient, since the different European foreign policies influence each other.<sup>55</sup> Union Institutions and Member States are cognizant of this issue, and have been tackling it through pragmatic solutions that seek to 'bridge' the different policies, in order to regulate their mutual influences and foster *coherence* in foreign policy. The first paragraph of section conceptualises the concept of "coherence" between European foreign policies. The remainder of the section analyses situations where EU institutions and Member States have been seeking coherence in their external relations, to the detriment of delimitation. It is submitted that European policy makers sought to coordinate their actions in order to increase coordination in their external actions (paragraphs 2 and 3) and to enhance unity in international representation (paragraph 4).

### 1. Conceptualising the Requirement of Coherence in European Foreign Policy

If the mere legal non-contradiction of foreign policies is insufficient, which objective should Union institutions and Member States seek? It is generally acknowledged by academics and the civil society that European foreign policies should not only be "consistent", that is to say delimited, but they should be also "coherent". The latter is a protean concept, whose meaning is usually accepted to refer to the existence of synergy between norms, actors and instruments in EU external relations.<sup>56</sup>

Coherence differs from consistency, in our understanding, for three reasons. In the first place, the idea of coherence postulates that EU institutions and Member States should not only seek to eliminate contradictions by delimiting EU policies, but they should rather try to bring EU and Member States' instruments together in order to reinforce the European identity at international level.<sup>57</sup> In other words, they should coordinate their policies so as to give rise to a coherent EU foreign policy.<sup>58</sup> Secondly, coherence cannot be defined with precision *in abstracto*, differently from the non-contradiction of legal norms. A system can, or cannot, be "consistent",

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<sup>55</sup> Cf. Neframi, "Exigence de Cohérence et Action Extérieure de l'Union Européenne", in Michel (ed.), *Le Droit, Les Institutions et Les Politiques de l'Union Européenne Face à l'Imperatif de La Cohérence* (Presses Universitaires de Strasbourg, 2009), pp. 49-80, p. 49, according to whom "pour avoir du poids politique il faut que l'Union soit un acteur global et cohérent".

<sup>56</sup> Cremona, "Coherence through law", cit. *supra*, at p. 16.

<sup>57</sup> Cf. Bosse-Platière, op. cit., p. 524, according to whom: "la recherche de la cohérence ne signifie pas seulement l'élimination des contradictions entre les politiques, afin de les rendre compatibles. Elle requiert également la capacité pour l'Union d'utiliser les potentialités offertes par l'ensemble de ses instruments dans le cadre de toutes ses politiques, à fin de dégager une stratégie d'ensemble permettant la satisfaction de l'objectif d'affirmation de son identité sur la scène internationale."

<sup>58</sup> Portela, "(In-)Coherence in EU Foreign Policy: Exploring Sources and Remedies", Paper Presented At the European Studies Association Bi-Annual Convention, Los Angeles, 2009, p. 4.

while it can be more or less "coherent".<sup>59</sup> Thirdly, and as a consequence of the first two differences, the degree of coherence of a system can difficultly be appraised solely through the legal methodology, whereas consistency can be ascertained, and ensured, through the interpretation of legal acts. The identification of the legal content of coherence is necessary, however, since EU institutions and Member States routinely bypass, or defy, conferral and delimitation precisely for the purpose of promoting coherence, by bridging the gap between EU and Member States' competences, as well as between the different competences of the Union.

## *2. Coherence as Synergy in Policy Management: Bringing Together Communitarian Initiatives and Member States' Foreign Policies via the CFSP...*

The first, and possibly most significant, manifestation of coherence in European foreign policies is provided for by the arrangements set up in the last decades in order to foster coordination in policy management across the delimitations set by conferral.

The first example in this sense is the very Common Foreign and Security Policy. Shortly after the creation of the EEC, the Member States realised that the entirety of their foreign policies could be affected by the activity of the Communities. Therefore, in 1970 the Foreign Ministers of the Six adopted the Davignon Report, a document that sought to foster progress "in the area of political unification through cooperation in foreign policy matters".<sup>60</sup> This report indicated that the Member States should have stepped up their political cooperation and provided themselves "with ways and means of harmonizing their views in the field of international politics." Such endeavour was motivated by the fact that the "implementation of the common policies being introduced or already in force require[d] corresponding developments in the specifically political sphere". These "corresponding developments" were not necessary to foster non-contradiction in European foreign policies: as long as the EEC had no "political" competence in external relations inconsistencies were inconceivable. The new *impetus* for foreign policy coordination, on the contrary, was functional to enable Europe "to discharge the imperative world duties entailed by its greater cohesion and increasing role" and "to bring nearer the day when Europe can speak with one voice".<sup>61</sup> This renders apparent that the Davignon Report called for increased *coherence*, functionally to ensure the synergy of European foreign policies and lead to the affirmation of the European identity on the global scene.

In order to foster such objective, the Report envisaged the creation of the "European Political Cooperation" (EPC), a loosely institutionalised form of cooperation among EEC Members in the field of foreign policy.<sup>62</sup> It is not necessary, for our purposes, to describe the EPC in detail. It suffices to highlight two of its crucial aspects. First, the EPC was a truly intergovernmental forum, since it consisted of a framework for consultations among governments. Consequently, Community institutions played only a minor role. The Commission, in particular,

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<sup>59</sup> Tietje, "The Concept of Coherence in the Treaty on European Union and the Common Foreign and Security Policy", 2 *European Foreign Affairs Review* (1997): 211-233, at p. 212.

<sup>60</sup> Davignon Report (Luxembourg, 27 October 1970), Bulletin of the European Communities, November 1970, n° 11.

<sup>61</sup> *Id.*, Part One, Para. 8-10.

<sup>62</sup> For a more detailed account of the creation of the EPC and its relation with external action coherence, see Mignolli, *op.cit.*, pp. 229-239.

was only consulted when the activities of the Communities were affected by the political cooperation. Second, the EPC did not form the object of a conferral of competences. This had a relevant corollary: whereas the EEC could act only within the limits of the competences conferred upon it by the Member States in the Treaty to attain the objectives set out therein, the EPC had neither material nor teleological limits.<sup>63</sup> The lack of limits and the intergovernmental character of the EPC were complementary: provided that each Member State was in control of the developments occurring under the EPC there was no need to delimit its field of application.

The Maastricht Treaty institutionalised the EPC in the Common Foreign and Security Policy, which formed the second pillar of the European Union. Subsequently, the Lisbon Treaty abolished the pillars, thus inserting the CFSP in the general institutional framework of the EU. A formal appraisal may thus suggest that the CFSP should be treated as one among other policies. For the sake of simplicity, also the present analysis adopted this formalistic viewpoint so far. Such approach, however, may not enable an accurate comprehension of the substantive reality of the CFSP. The law and practice of the CFSP suggest the existence of remarkable analogies between this policy and the EPC. Like the latter, the former is a prevalently intergovernmental forum, which consists of a framework where the Member States act in common for the purpose of achieving the objectives laid down in the TEU.<sup>64</sup> On the one hand, the CFSP is an *embryonic* policy, whose function remains primarily one of “cooperation” among the Member States, and whose development is precariously tied to the European balance of power. Indeed, CFSP decisions are normally adopted by unanimity in the Council, without any intervention of either the Parliament or the Commission. On the other hand, the CFSP is a *sui generis* EU competence, which lacks a material field of application and objectives of its own.<sup>65</sup> Like pre-Lisbon Article 11 TEU, and in assonance with the Davignon report, current Article 24 TEU asserts that “the Union’s competence in matters of common foreign and security policy shall cover *all areas of foreign policy*”;<sup>66</sup> the CFSP therefore lacks any material limit.<sup>67</sup> The CFSP is not given any specific aim either, but it must pursue the list of external action objectives set by Article 21(2) TEU,<sup>68</sup> which is very generic. Such objectives encompass, for instance, the safeguarding of EU “values, fundamental interests, security, independence and integrity”, the preservation of peace, the prevention of conflicts and the strengthening of international security, thus probably serving as a basis for any possible CFSP initiative.

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<sup>63</sup> Indeed, European governments committed themselves to “consult each other on all major questions of foreign policy”, with the broadest possible objectives: “to ensure greater mutual understanding” and “to increase their solidarity”, *id.* Part Two, points I and IV.

<sup>64</sup> Gosalbo Bono, “Some Reflections on the CFSP Legal Order”, 43 *Common Market Law Review* (2006): 337-394, at p. 347. Notice however that this consideration *de facto* does not question, in our opinion, the formal characterisation of the CFSP as a policy of the Union (even before the Lisbon Treaty), for the simple reason that the Masters of the Treaties explicitly construed it as such in primary law, see Case C-91/05, *Commission v Council*, [2008] ECR I-03651, para. 60-61.

<sup>65</sup> *Reactor*, the CFSP is a “competence” in formal terms, as asserted by Article 24(1) TEU, and a framework for coordination.

<sup>66</sup> Emphasis added.

<sup>67</sup> In this sense, see Brkan, “Exploring EU Competence in CFSP: Logic Or Contradiction?”, *Croatian Yearbook of European Law and Policy* (2006): 173-207, at p. 180.

<sup>68</sup> Article 23 TEU.

The dual characterisation of the CFSP as a competence of the Union and as a framework for intergovernmental cooperation<sup>69</sup> explains the concern for the consistency/coherence of this sector with other non-CFSP policies, also in a political perspective. If the consistency of the CFSP with the rest of the external action can be ensured by relying on conferral, as seen above, its *coherence* is more evanescent. The next paragraph intends to demonstrate that EU institutions are well aware of the necessity of coherence between CFSP and non-CFSP actions and created innovative solutions to tackle it.

### 3. ...and Coordinating CFSP and non-CFSP Implementation

As seen in the previous section, CFSP and non-CFSP actions should be kept distinct, in order not to jeopardise the institutional balance of the Union. The existence of mutual influences between these areas, however, suggests that some form of CFSP/non-CFSP coordination should be identified in practice.

The need to coordinate the different strands of the external action has been taken into consideration by Union institutions, which have tried to 'mainstream' external action coherence in their law-making activity. In the first place, the Council used certain CFSP acts to influence non-CFSP activities. Such influence, in some occasions, has taken the form of a Council invitation to the Commission to orient its action towards the realisation of CFSP objectives through economic actions in the ambit of the implementation of Communitarian programmes.<sup>70</sup> In other cases, the Council adopted CFSP acts that directly regulated issues that were probably related to the non-CFSP area. For instance, Joint Action 96/195/CFSP, concerning the participation of the European Union in the Korean Peninsula Energy Development Organization, arguably encroached upon the exercise of Euratom competences: although this Joint Action was meant to address also a typical CFSP objective ("contribute to an overall solution to the issue of nuclear proliferation in the Korean peninsula") it nonetheless had a primary Euratom finality (cooperation with third countries in the field of civil nuclear energy).<sup>71</sup> Similarly, other CFSP acts probably encroached upon the exercise of EC competences, in fields such as nuclear safety, humanitarian aid, development cooperation, economic cooperation and

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<sup>69</sup> Cf. Constantinesco and Petculescu, "La Personnalité de l'Union", in Constantinesco, Gauttier and Michel (eds.), *Le Traité Etablissant une Constitution Pour l'Europe* (Presses Universitaires de Strasbourg, 2005), pp. 65-78, at p. 69: "la PESC s'analyse d'avantage comme une série de mécanismes destinés à favoriser la recherche d'une certaine unité des positions et des actions des diplomates nationales au sein de l'Union, que comme l'attribution à celle-ci d'une véritable compétence propre et autonome en matière de politique étrangère". Similarly, the CFSP has been defined as a "policy process" by Edwards, "Common Foreign and Security Policy: Incrementalism in Action?", in Koskenniemi (ed.), *International Law Aspects of the European Union* (Martinus Nijhoff, 1998), pp. 3-18, at p. 3.

<sup>70</sup> See, e.g., Council Decision 94/367/CFSP, O.J. 1994 L 165/2, Article 3.

<sup>71</sup> Cf. case C-91/05, cit. *supra*. See Agreement on the establishment of the Korean peninsula energy development organization", 9 March 1995, Article II(a): "The purposes of the Organization shall be to: [...] provide for the financing and supply of a light-water reactor [...] project in North Korea"; see also the Article 2 Euratom: "In order to perform its task, the Community shall, as provided in this Treaty: [...] (h) establish with other countries and international organisations such relations as will foster progress in the peaceful uses of nuclear energy." In this sense, see Gauttier, op. cit., 23-41, at p. 28, and Wessel, op. cit., at p. 1154.



international trade.<sup>72</sup> This extensive understanding of the scope of application of the CFSP raised some concerns. In order to ease the tension, the Council and the Commission adopted a soft law instrument, called *mode d'emploi*, regulating the superposition of Community and intergovernmental policies in external relations, according to which “[CFSP] Common positions [...] shall preserve at all stages each institution’s competences, the procedures through which such competences are exercised, and the rules established for adopting decisions under different Treaty provisions.”<sup>73</sup> The *mode d'emploi* had only partial effect, since some CFSP acts adopted at a latter stage seemed not to have been entirely respectful of EC competences.<sup>74</sup>

While numerous CFSP acts probably interfered with Communitarian actions, some EC acts possibly encroached upon the CFSP field. This was the case of acts in the field of trade, such as Regulation 2036/2005/EC<sup>75</sup>, which was ultimately meant to restrict the commerce of tools which could be used to give the death penalty. Similarly, Regulation 2368/2002/EC,<sup>76</sup> relating to the Kimberley process, was concerned with the import of goods (diamonds), but it was ultimately meant to improve security in Sierra Leone. In light of Opinion 1/78 and its extensive definition of the Community’s trade policy, it may be argued that these acts were probably rightly founded on the TEC, but they nonetheless interfered with the CFSP.

Other Community actions had a stronger link to the CFSP. This is the case of the Rapid Reaction Mechanism (RRM),<sup>77</sup> and its successor, the Instrument for Stability (IfS).<sup>78</sup> These instruments are intended to underpin existing Community policies and programmes and enable the Community to take urgent action to help re-establish or safeguard normal conditions for the execution of the policies undertaken, especially in the field of development cooperation, in order to preserve their effectiveness. Both instruments serve EC purposes, since they are functional *inter alia* to re-establish the conditions essential to the proper implementation of other EC/EU policies, but they have also a close link to the CFSP, since they foresaw (and foresee) the financing of operations not entirely referred to the framework of the EC and FEU Treaties, such as the support for international criminal tribunals and the destruction of landmines.<sup>79</sup> It is not surprising, therefore, that the RRM sought to contribute to “the coherence of the external activities conducted by the European Union in the context of its external relations”<sup>80</sup> and the IfS Regulation

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<sup>72</sup> See *inter alia* Common Position 94/779/CFSP, O.J. 1994 L 313/1; Decision 94/697/CFSP, O.J. 1994 L 283/1; Decision 94/276/CFSP; Decision 94/942/CFSP. For a fuller critical appraisal of these acts, see Wessel, *op. cit.*, pp. 1154 ss.; Mignolli *op. cit.*, pp. 391 ss.; Gauttier, *op. cit.*, pp. 28 ss.

<sup>73</sup> Council doc. 5194/95, not published in the O.J.

<sup>74</sup> See *inter alia* Common Position 95/413/CFSP, point C; Common Action 2001/759, Article 2(2). Nonetheless, the *mode d'emploi* may have favoured the transition towards a ‘softer’ CFSP influence on the rest of the external action. If in the early nineties CFSP acts sometimes contained a rather peremptory language, after the adoption of the *mode d'emploi* CFSP instruments tended to take note of Community actions and to make generic references to the requirement of external action consistency/coherence, also in the Communitarian area; see, e.g., Common Action 2000/298/CFSP, Article 2(2). See also Gauttier, *op. cit.*, p. 29 and Wessel, *op. cit.*, p. 1155 and .g., Common Action 98/301/CFSP, preamble; Common Action 2008/112/CFSP, O.J. 2008 L 40/11, Article 11(1).

<sup>75</sup> O.J. 2005 L 200/1.

<sup>76</sup> O.J. 2002 L 358/28.

<sup>77</sup> Council Regulation 381/2001/EC, O.J. 2001 L 57/5.

<sup>78</sup> Regulation of the Parliament and the Council 1717/2006/EC, O.J. 2006 L 327/1.

<sup>79</sup> *Id.*, Article 3(2).

<sup>80</sup> Regulation 381/2001/EC, *cit. supra*, preamble.

explicitly requires the instrument to be “consistent” with the CFSP.<sup>81</sup> After the *Ecowas* judgement (2008), it would be difficult to argue that the RRM and IfS are incompatible with the centre of gravity doctrine. It is significant, however, that, at the time of their adoption (2001 and 2006), EC institutions already understood the scope of Communitarian competences in a broad manner, as partially covering also security-related fields close to the CFSP.

Given the legal issues relating to the coordination of CFSP and non-CFSP through hard law, EU institutions have also used soft law instruments to foster coherence.<sup>82</sup> Thus EU institutions were able to adopt the European Security Strategy and the Internal Security Strategy<sup>83</sup>, but also other CFSP/non-CFSP instruments, such as the strategies for the external Dimension of Justice and Home Affairs (JHA) and the Area of Freedom Security and Justice (AFSJ)<sup>84</sup> or the European Consensus on Development.<sup>85</sup> Although these documents were adopted by different institutions,<sup>86</sup> they respond to the same necessities and present a view that is widely shared by Union institutions and Member States. These soft law instruments do not seek to create new competences or to substitute the hard law acts already in place. On the contrary, they are functional to “integrating existing strategies and conceptual approaches”<sup>87</sup> and “organising [existing instruments] around defined principles and guidelines”.<sup>88</sup> This should lead to the coordination of the “broad range of instruments at the EU’s disposal”, also across the CFSP/non-CFSP divide, and to increase external action coherence.<sup>89</sup> Notwithstanding their ‘soft’ character, these instruments can have some legal effect, since they may serve as an aid to interpretation. In the *Ecowas* case, in particular, the Court used the Consensus on Development in order to ascertain the relation between the Communitarian (development cooperation) and the intergovernmental (CFSP) strands of the external action. The Court noted that, according to the Consensus “without peace and security development and poverty eradication are not possible, and without

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<sup>81</sup> Regulation 1717/2006/EC, cit. *supra*, Article 1(3).

<sup>82</sup> If it seems that soft law is subject to the principle of attribution as hard law, the delimitation of the competence to adopt soft law acts is obviously quite ‘flexible’. See Senden, *Soft Law in European Community Law* (Hart, 2004), pp. 291 ff. In addition, it would appear from the *Ecowas* judgement that soft law CFSP acts cannot impinge on non-CFSP competences. See Case C-91/05, cit. *supra*, para 33: “It is therefore the task of the Court to ensure that acts which, according to the Council, fall within the scope of Title V of the Treaty on European Union and which, by their nature, *are capable of having legal effects*, do not encroach upon the powers conferred by the EC Treaty on the Community” (emphasis added). For a comment of this issue, see Hillion and Wessel, “Competence Distribution in EU External Relations After *Ecowas*: Clarification Or Continued Fuzziness?”, 46 *Common Market Law Review* (2009): 551-586.

<sup>83</sup> European Council, A secure Europe in a better world: European Security Strategy, 12 December 2003, not published in the O.J., pp. 3-4. Council of the European Union, Internal Security Strategy for the European Union: « Towards a European Security Model », doc. 5842/2/10 REV 2, p. 2.

<sup>84</sup> Council of the European Union, A strategy for the external dimension of JHA, doc. 14366/3/05, 30 November 2005; Communication from the Commission - A strategy on the external dimension of the area of freedom, security and justice, COM(2005) 491 final, 12 October 2005.

<sup>85</sup> European consensus on Development, Joint statement by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission on European Union Development Policy, O.J. 2006 C 46/1.

<sup>86</sup> The security strategies were approved by the European Council, the strategies on JHA and the AFSJ were adopted by the Commission, while the Consensus was contained in a joint statement of European institutions and Member States

<sup>87</sup> Internal Security Strategy, cit. *supra*, Introduction.

<sup>88</sup> A strategy on the external dimension of the area of freedom, security and justice, cit. *supra*, point III.

<sup>89</sup> A Strategy for the External Dimension of JHA, cit. *supra*, para. 9.

development and poverty eradication no sustainable peace will occur.”<sup>90</sup> This allowed the Court to conclude that the objectives of “development cooperation policy should [...] not be limited to measures directly related to the campaign against poverty”,<sup>91</sup> but should encompass also issues such as the fight against arms proliferation.

#### 4. Coherence as Unity in the International Representation of the Union and its Members: the Case of Mixed Agreements

The cohesiveness of the foreign policies of the EU and its Members is not fostered only by their capability to conduct coordinated policies, but also by their ability to “speak with one voice”.<sup>92</sup> The multitude of European voices at international level is known to puzzle EU's interlocutors, as testified by the famous question “who do I call if I want to call Europe?”, attributed to H. Kissinger.<sup>93</sup> This issue is generally referred to as the ‘external representation’ of the European Union.

There is some terminological confusion about this issue in the literature and the practice. External representation *stricto sensu* refers to the competence of an entity to speak on behalf of its organisation, and as such it is referred to in the EU Treaties. More generally, the concept of external representation’ is used to indicate the process through which the Union and its Members express their position externally, thereby including the identification of the speaker, but also the formulation of the message it delivers and the legal-political framework in which the message is expressed. This paragraph refers to ‘external representation’ in its wider sense, as it is most commonly used in practice.

Conferral fragments the external representation of the EU and its Members, since the former is able to adopt and express internationally a position only within the ambit of its competences and the latter are prevented from doing so in the same area. This problem was partially solved through the introduction of the so-called ‘mixed agreements’, which may be defined as agreements that are signed and concluded by the EU and (some of) its Member States, on the one hand, and by one or more third parties, on the other hand.<sup>94</sup>

This sort of agreement is very frequent in EU external relations, for legal and political reasons. When an agreement contains matters falling within EU's exclusive competences, or already exercised shared competences, and aspects falling within Member States’ sole competences, it can neither be concluded by the Union, nor by the Member States acting alone. In order to solve this problem, the Member States and the Union can conclude the agreement as a single party, through the recourse to the ‘mixed form’.<sup>95</sup> In these circumstances, the mixed form limits some of the

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<sup>90</sup> European Consensus on Development, cit. *supra*, para. 40.

<sup>91</sup> Case C-91/05, cit. *supra*, para. 66-67.

<sup>92</sup> See the Davignon report, cit. *supra*.

<sup>93</sup> Notice that H. Kissinger affirmed that “I am not sure I actually said it [...] But it's a good statement so why not take credit for it?”, according to Gera, “Kissinger says calling Europe quote not likely his”, *Bloomberg Businessweek News*, 27 June 2012.

<sup>94</sup> Cf. Maresceau, “A Typology of Mixed Bilateral Agreements”, in Hillion and Koutrakos (eds.), *Mixed Agreements Revisited: the EU and Its Member States in the World* (Hart, 2010), pp. 11-29, p. 12. Notice that, according to some authors, the expression “mixed agreement” should describe, in principle, agreements where the European Union and the Member States share competences; in this sense, McGoldrick, *International Relations Law of the European Union* (Longman, 1997), p. 78

<sup>95</sup> Daniele, “Il Diritto Internazionale Generale e Gli Accordi Internazionali Nel Sistema Delle Fonti Dell'unione Europea”, in Pace (ed.), *Nuove Tendenze del Diritto Dell'unione Europea Dopo Il*

shortcomings entailed by conferral: in the absence of mixity, the EU and its Members would not be able to conclude certain agreements, because of their relative lack of competence, or may do so only separately. Thus mixity appears as an instrument for the promotion of unity in international representation.<sup>96</sup>

The interest of EU institutions and Member States for unity in international representation may seem to be questioned by the fact that in many, and perhaps most, circumstances mixed agreements are used for political, rather than legal, reasons.<sup>97</sup> This is the case of the agreements containing matters falling within EU's exclusive competences and aspects falling within shared competences not yet exercised. In this situation the Council may decide to exercise the shared competence and conclude the instrument in the EU-only form, that is to say without the participation of the Member States. The Member States, however, are often unwilling to authorize the Union alone to conclude agreements containing concurrent competences.<sup>98</sup> Even in such context, mixity may contribute to the unity of European external representation, at least in the perspective of the Member States. According to Article 5 TEU, the Member States can exercise shared competences as long as the EU has not done so; several authors, and certainly also the Council, consider that this principle applies also to the conclusion of mixed agreements.<sup>99</sup> Therefore, by concluding an agreement containing non-exercised

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*Trattato Di Lisbona* (Giuffrè, 2012), pp. 207-221, at p. 214, notes also that "lo strumento dell'accordo misto si è rivelato utile di fronte all'ipotesi di accordi riguardanti anche materie che non rientravano affatto nella competenza dell'Unione".

<sup>96</sup> As noted by De Baere, *Constitutional Principles of EU External Relations* (Oxford, 2008), p. 265, mixity "also has the advantage of combining the knowledge and expertise, as well as the diplomatic and intelligence resources, of all the member states with those of the Community".

<sup>97</sup> Among these political reasons, it is possible to mention also the uncertainty of the distribution of competences, especially in the eyes of third states. Cf. Roucouas, *Engagements Parallèles et Contradictaires* (Hague Academy of International Law, 1987), p. 269: "il n'est donc pas surprenant que l'échelle mobile des compétences communautaires crée des incertitudes pour les Etats tiers quant à la bonne partie avec laquelle il faut contracter pour éviter les contestations subséquentes. Dans ce contexte, on peut comprendre l'épanouissement des accords dits mixtes, accords dans lesquels la Communauté participe conjointement avec ses Etats membres intéressés."

<sup>98</sup> Rosas, "Mixed Union – Mixed Agreements", in Koskeniemi (Ed.), *International Law Aspects of the European Union* (Nijhoff, 1998) 125-148, at p. 144. This is testified by the recent practice, cf. the decisions authorising the negotiation of new framework agreements, e.g., Council decision authorising the negotiation of a Cooperation agreement with Afghanistan, Council, of 10 November 2010, Council doc. 16146/11, Article 1(1): "the Commission shall negotiate the provisions of the Agreement [...] which, in accordance with the Treaties, fall within the competences of the Union, either as matters falling within the Union's exclusive competence or as matters *in respect of areas of supporting or shared competence to the extent that the Union has exercised its competence*" (emphasis added).

<sup>99</sup> This appears to be a rather settled view. Cf. Heliskoski, *Mixed Agreements As A Technique For Organising the International Relations of the European Community and Its Member States* (Kluwer Law International, 2001), pp. 42-43; Leal Arcas, "The European Community and Mixed Agreements", 6 *European Foreign Affairs Review* (2001): 483-513, at p. 494; Rosas, "Mixed Union – Mixed Agreements", in Koskeniemi (ed.), *International Law Aspects of the European Union* (Nijhoff, 1998), pp. 125-148, at p. 132. Nonetheless, two different solutions may be available. On the one hand, Advocate General La Pergola, in *Portugal v. Council*, Case C-268/94, [1996] ECR I-06177, par. 4, held that "the provisions laid down by the Agreement [...] affect sectors that are within the purview of the Member States and therefore *required* the adoption of a mixed agreement" (emphasis added). On the other hand, it may be argued that mixity is not possible when an agreement contains elements falling within exclusive competences and matters falling within non-exercised shared competences, since the latter have been conferred on the Union, and its Members should allow it to exercise them, consistently with their duty of loyalty (ex Article 4(3) TEU). This second reading probably should be preferred in case the choice of the mixed form were detrimental to the effectiveness of the EU's participation in the agreement (see *infra*), at least in so far as coherence is

shared competences in the mixed form, the Member States may actually increase, rather than decrease, European unity (at least in their view), since they do *not* enter into the agreement separately from the Union. This consideration seems to be confirmed by the fact that even the Commission, as 'guardian of the Treaties', often does not oppose this form of mixity, and even proposes it.<sup>100</sup>

The 'political' character of mixity may be more problematic in a second situation, relating to agreements whose content is entirely covered by Union exclusive competences (either originally exclusive or exercised shared competences), which are concluded in the mixed form solely for reasons of political expediency.<sup>101</sup> The rationale for this choice is transparent: the Member States desire to participate in the negotiation of the agreement, or, more frequently, simply intend to maintain and reinforce their international status. Such mixity is problematic, since it evidently decreases, rather than increasing, the external unity of the EU. The perils of this form of mixity, however, should not be overemphasised. Since the Member States are not competent to conclude the agreement, they lack the capability to determine the negotiating line and give implementation to the agreement. In other words, this sort of 'political' mixity does not seem to be exceedingly problematic for the EU's external unity, even if it is in violation of EU Treaties (and it should consequently be abandoned).

The element of mixed agreements that clarifies their objective of 'unity' in international representation is perhaps contained in the negotiation phase. Independently from the distribution of competences, the 'mixed' negotiation often functions as a *de facto* 'EU-only' negotiation, since the Member States normally entrust their representation on the EU negotiator (generally, the Commission). This may not prevent the Member States from interfering with the negotiation, namely by issuing instructions to the EU representative for the negotiation of elements falling within their area of competence. Nonetheless, it would seem that the Member States leave ample margin of manoeuvre to the Commission, in order to

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interpreted as a legal principle in light of which Treaty provisions (like Article 4(3) TEU) must be interpreted, as we seek to demonstrate below.

<sup>100</sup> See, e.g. Commission proposal for a Council Decision on the conclusion of the Anti-Counterfeiting Trade Agreement, COM(2011)380, 24 June 2011, exploratory memorandum, par. 6: "where a matter falls under shared competence, either the European Union or Member States may legislate and adopt legally binding acts. Regarding the signature and conclusion of ACTA, the Commission has opted not to propose that the European Union exercise its potential competence in the area of criminal enforcement pursuant to Article 83(2) TFEU. [...] For this reason, the Commission proposes that ACTA be signed and concluded both by the EU and by all the Member States."

<sup>101</sup> According to Schermers, "a Typology of Mixed Agreements", in O'Keeffe and Schermers (eds.), *Mixed Agreements* (Kluwer, 1983), pp. 23-33, at p. 27, such agreements are *formally* mixed, but substantively "they are agreements made by the Community alone". On political mixity see also Maresceau, *op. cit.*, p. 16 and Rosas, *op. cit.*, note 27, p. 130. To be precise, the ultimate exam of the legal basis of the agreement can be performed only when the negotiation is terminated and the final text is ready, that is to say with respect to the authorisation to sign the agreement. Indeed, it is the *conclusion*, and not the authorisation to negotiate an agreement, that engenders the pre-emption effect. In this sense, see ECJ Opinion 1/76, [1977] ECR 741, par. 4. Cf. also Smyth, "Mixity in Practice: a Member State's Practitioner Perspective", in Hillion and Koutrakos (eds.), *Mixed Agreements Revisited: the EU and Its Member States in the World* (Hart, 2010), pp. 304-319, at p. 313. Nonetheless, the mixed or Union-only character of an agreement is generally determined before the beginning of the negotiation, although it remains potentially subject to change. Cf. also Groux, "Mixed Negotiations", in O'Keeffe and Schermers (eds.), *Mixed Agreements* (Kluwer, 1983), pp. 87-96, at p. 87, and Macloed et al., *op. cit. supra* note 23, p. 152.

increase the efficiency of the process, thus demonstrating their commitment for the external unity of the EU.<sup>102</sup>

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This section sought to demonstrate that Union institutions and Member States strive to ensure coordination among European foreign policies and unity in their external representation, by developing pragmatic solutions that bypass the obstacles posed by conferral. This suggests that European policy makers consider coherence as a political requirement guiding their foreign policies. Such requirement seems so crucial that it may be wondered whether it may have also some legal content.

### SECTION 3. EXTERNAL ACTION COHERENCE AS A LEGAL PRINCIPLE: FROM SEVERAL 'FOREIGN POLICIES' TO A EUROPEAN 'FOREIGN POLICY'?

The political relevance of coherence as a requirement guiding the external action is certainly important, but it is perhaps of limited relevance for a legal analysis. This section therefore investigates the capability of coherence to function also as a legal principle, that is to say as a fundamental proposition of law which underlies the EU legal system and from which concrete rules or outcomes derive.<sup>103</sup> This section seeks to demonstrate that the concern for external action coherence has led to concrete legal outcomes in the practice, namely as far as the interpretation of primary law was concerned.<sup>104</sup>

Such analysis may seem futile, since the English version of the Treaties refers to "consistency" and not to "coherence". However, consistency and coherence are closely interrelated concepts, and they are sometimes considered as synonymous in the English language.<sup>105</sup> What is more, the linguistic distinction between consistency and coherence does not exist in several European languages and, consequently, it is not reflected in other versions of EU Treaties.<sup>106</sup> The distinction between consistency and coherence that is presented here, therefore, should be understood as purely analytical in nature, and it should not prevent from

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<sup>102</sup> See Gatti and Manzini, "External Representation of the European Union in the Conclusion of International Agreements", 49 *Common Market Law Review* (2012), 1703-1733, pp. 1719-1720.

<sup>103</sup> Tridimas, *General Principles of EU Law* (Oxford University Press, 2006), p. 1. In this sense, see also Blumann, "Objectifs et Principes en Droit Communautaire", in Raux (Liber Amicorum), *Le Droit de l'Union Européenne en Principes* (Apogée, 2006), p. 39-67.

<sup>104</sup> General principles do not necessarily take priority over (other) Treaty provisions, but they may decisively the latter's interpretation, as noted by Tridimas, op. cit., p. 53.

<sup>105</sup> See Franklin, "The Burgeoning Principle of Consistency in EU Law", 30 *Yearbook of European Law* (2011): 42-85, at p. 47, according to whom "consistency may also be understood in a broad sense as meaning that something is organized so that each part of it agrees with all other parts—a condition in which a given subject-matter coheres so as to stand together. Taken in this sense, consistency would appear somewhat synonymous with a broader notion of coherence as this term is usually understood in the English language."

<sup>106</sup> For instance, "consistency" is referred to as coherence (French), coerenza (Italian) coerenza (Spanish) and coerência (Portuguese).

interpreting the references the Treaties make to "consistency" as calls for "coherence".

The first and second paragraphs of this section seek to demonstrate that coherence has had legal effects in the recent practice, since political institutions and the very Court of justice relied on it in order to interpret the Treaties, thus fostering synergy in the implementation of European foreign policies (paragraph 1) and unity in international representation (paragraph 2). The third and fourth paragraphs show that coherence is a fundamental proposition of law underlying the post-Lisbon EU legal system, as demonstrated by the creation of a single framework for EU external relations (paragraph 3) and the general overlapping of EU and Member States' foreign policies (paragraph 4).

### *1. Coherence as a Legal Principle Allowing for Synergy in Policy Management*

The previous section demonstrates that Union institutions have adopted a number of acts that bypass, or even challenge, the delimitation of EU policies, for the purpose of increasing coordination in the implementation of European foreign policies. This paragraph seeks to demonstrate that, in at least two instances, innovative solutions have been adopted for the same purpose, on the basis of a coherence-oriented interpretation of conferral.

The first example that serves the purpose of our analysis is provided for by the external action 'strategies' adopted by the European Council. Before the Lisbon reform, according to Article 13(2) TEU, this body was responsible for the adoption of "common strategies to be implemented by the Union in areas where the Member States have important interests in common". Importantly, Article 13(2) TEU was part of the CFSP Title of the TEU, and "common strategies" consequently were CFSP acts. Even a cursory reading of the common strategies adopted in practice, however, suggests that these acts were used as a tool to orient the entire external action. Common strategies, in particular, explicitly set cross-pillar finalities and objectives, and foresaw the use of both EC and EU instruments.<sup>107</sup>

Thus common strategies generated a problem: as acts adopted upon a CFSP legal basis, found in the TEU, they affected also Community areas, even if the already mentioned Article 47 TEU explicitly affirmed that "nothing in this Treaty shall affect the Treaties establishing the European Communities". The use of Common Strategies thus suggests that Union institutions and Member States (which participate in the European Council) interpreted Article 47 TEU in a 'flexible' manner. A literal interpretation of this provision, indeed, would have led to the adoption of strategies concerning only the CFSP, which would have added little to the effectiveness of the external action. The European Council probably preferred a systemic appraisal of the Treaties. Articles 13(2) and 47 TEU could be read along with Article 4 TEU, whereby the European Council was responsible for the identification of the "general political guidelines" of the Union. The "common strategies" foreseen in Article 13(2) TEU could therefore appear as a specific form of

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<sup>107</sup> As noted by Hillion, "Common Strategies and the Interface Between EC External Relations and CFSP", in A. Dashwood and C. Hillion (eds.), *The General Law of EC External Relations* (London, Sweet & Maxwell, 2000), pp. 287-301, at p. 29: "by adopting a [Common Strategy (CS)], the European Council mobilises all existing and future EU instruments – in a very wide sense – and institutions to achieve the objectives set out in the strategy. The CS becomes a vehicle for consistency of the E.U.'s external policy [...] by being established as hierarchically superior to any other instruments adopted in the framework of the E.U., EC external relations included".

“guideline” for the external action, which could only be “general” if it concerned also EC areas. Why was this approach preferred to the literal interpretation of Article 47 TEU? Arguably, this choice was performed in light of external action coherence: the acceptance of a restrictive interpretation of Article 47 TEU would have led to fragmentation in the strategic governance of EU external relations. The solution that was retained in practice, on the contrary, enabled for the coordination of EU activities “as a whole”, as required by then Article 3 TEU.

This approach was so convincing that the Constitutional Convention characterised common strategies as instruments “aimed at covering Community policy, JHA and CFSP”, functionally to “ensure an integrated approach in the external action of the EU”.<sup>108</sup> As a result, the Constitutional Treaty and, later, the Lisbon Treaty, codified the pre-Lisbon practice in what is now Article 22 TEU, whereby “decisions of the European Council on the strategic interests and objectives of the Union shall relate to the common foreign and security policy and to other areas of the external action of the Union.”

The adoption of common strategies thus shows that institutions and Member States read primary law in light of external action coherence. Such reading of the Treaties appears so cogent that it is capable of leading to the modification of provisions whose letter was previously not entirely compatible with the pursuit of a synergetic external action. In this sense, external action coherence seems to have legal outcomes, and thus function as a legal principle of the EU legal order, allowing for a ‘flexible’ interpretation of conferral and the non-affectation clause contained in Article 47 TEU. Such conclusion, however, may be overly optimistic, since the practice relating to common strategies is quite scarce: only three such acts were adopted in practice, probably because of the lengthy internal negotiations linked to their adoption.

Economic sanctions, or, as they are referred to in the Treaties, “restrictive measures”, provide for a perhaps more significant example for our purposes. On the one hand, they are politically important, since they are very numerous and represent one of the most developed parts of the EU external action. On the other hand, they are theoretically relevant, since they embody the clearest interaction between the different strands of the EU’s external relations.

In the sixties, Community institutions and Member States were faced with a conundrum: could Member States adopt economic sanctions against third countries individually, or should they do so in the EEC framework? In a teleological perspective, economic sanctions could be characterised as part of the Member States’ foreign policies, since they pursued a political objective, that is to say changing the behaviour of a third country. In an instrumental viewpoint, however, sanctions could be seen as commercial measures (falling within EEC competences), since they were economic in nature.<sup>109</sup> Sanctions therefore embodied a very clear link between politics and economics in European external relations.

This conundrum was solved through a compromise: the decision to adopt sanctions was adopted by the Member States, in the EPC framework, and it was implemented by the EEC. Such compromise is relevant for our analysis, since it shows that EU institutions and Member States did not delimit EEC (and Member States’) competences in order to ensure the non-overlapping of external policies, for the sake of external action consistency. They rather gave a ‘flexible’ interpretation of

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<sup>108</sup> The European Convention, Working Group VII - "External Action", CONV 459/02, p. 25.

<sup>109</sup> See De Wilde d'Estmael, "L'Elaboration du Droit Des Sanctions Economiques Communautaires: Enjeux et Normativité Politiques du Processus", 49 *Droit et Société* (2001): 729-769, at pp. 731-732.



EEC and Member States' competences in order to promote the coordination of European foreign policies, thus allowing for their coexistence in the same field. Such reading of the Treaty was so accepted that it led to the modification of primary law. The Maastricht reform codified this practice in Article 228A TEC, lately Article 301 TEC. According to this provision, when a Union (CFSP) act provided "for an action by the Community to interrupt or to reduce, in part or completely, economic relations with one or more third countries", the Council was required to take the necessary "restrictive measures" by qualified majority. This procedure was substantially maintained also by the Lisbon Treaty, in Article 215 TFEU.<sup>110</sup> The integration of CFSP and non-CFSP measures in the adoption of economic sanctions is all the more important since it was upheld by EU Courts in several occasions. In the *Kadi* case, both the Court of First Instance (CFI) and the ECJ termed such integration "a bridge [...] between the actions of the Community involving economic measures [...] and the objectives of the EU Treaty in the sphere of external relations, including the CFSP".<sup>111</sup> In its judgement, the CFI went a step further, by explicitly linking the procedure leading to the adoption of economic sanctions to external action coherence. The CFI considered, in particular, that the use of the 'flexibility clause', then Article 308 TEC, to pursue CFSP objectives should have been allowed "for the sake of the requirement of consistency laid down in Article 3 of the Treaty on European Union".<sup>112</sup> This reference was particularly relevant, since the Court did not have jurisdiction to enforce Article 3 TEU directly, provided that it was part of the common provisions of the TEU and, as such, it was excluded from the Court's jurisdiction by Article 46 TEU. The ECJ apparently did not share the view of the CFI. Although it did not question the existence of a 'bridge' between Article 301 TEC and the CFSP, the ECJ considered that "neither the

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<sup>110</sup> It is understood that, given the elimination of the pillar structure, restrictive measures are no longer adopted through a EU/EC procedure, but through a CFSP/non-CFSP one. There are however four main differences between Article 215 TFEU and previous Article 301 TEC. First, restrictive measures in the non-CFSP area are no longer proposed by the Commission individually, but are put forward by the Commission and the High Representative. Second, the EP must now be informed about the adoption of these measures. Third, Article 215 TFEU explicitly allows for the adoption of restrictive measures against natural or legal persons (other than States), which was only implicitly allowed for by the TEC (see *infra*). Fourth, restrictive measures are now required to "include necessary provisions on legal safeguards".

<sup>111</sup> Joined cases C-402/05 P and C-415/05 P Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission, [2008] ECR I-6351, para. 197. See also case T-306/01, Ahmed Ali Yusuf and Al Barakaat International Foundation v Council and Commission, [2005] ECR II-3533, paras. 159-160. In this sense, see also Case C-130/10, *Parliament v Council*, cit. *supra*.

<sup>112</sup> The Court was *inter alia* requested to determine whether a sanction against a person other than a State could be adopted on the basis of Article 301 TEC, which only referred to "third countries", complemented by the 'flexibility clause', then Article 308 TEC. The latter allowed for the adoption of measures, which the EC was not otherwise competent to adopt, if action by the Community proved "necessary to attain, in the course of the operation of the common market, one of the objectives of the Community". The CFI considered that economic sanctions did not pursue Community objectives, but they rather sought EU (CSFP) ones. This, however, did not prevent Article 308 TEC from functioning as a legal basis for economic sanctions. In order to demonstrate this, the Court preliminary noted that an action adopted on the basis of Article 301 TEC was an "action by the Union", since it pursued a EU (CFSP) objective, as discussed above. The Court also noted that, according to Article 3 TEU, the Union was "to ensure the consistency of its external activities as a whole in the context of its external relations, security, economic and development policies". Therefore, considering that the powers to impose economic sanctions provided for by Articles 301 TEC could be "proved insufficient to allow the institutions to attain the objective of the CFSP", recourse to the additional legal basis of Article 308 EC was justified "for the sake of the requirement of consistency laid down in Article 3 of the Treaty on European Union". See case T-306/01, cit. *supra*, para 161-164.

wording of the provisions of the EC Treaty nor the structure of the latter provides any foundation for the view that that bridge extends to other provisions of the EC Treaty, in particular to Article 308 EC". In other words, the ECJ found that the Treaties enabled Article 301 TEC to pursue CFSP objectives, but they did not allow Article 308 TEC to do so, as the CFI had affirmed. Nonetheless, the ECJ accepted that Article 308 TEC could function as a legal basis for economic sanctions, since Article 301 TEC was "the expression of an implicit underlying objective, namely, that of making it possible to adopt [restrictive] measures through the efficient use of a Community instrument"<sup>113</sup> and such objective could consequently "be regarded as constituting an objective of the Community for the purpose of Article 308 EC."<sup>114</sup> A cursory reading of these judgements may suggest that they provide for incompatible readings of coherence and delimitation in European foreign policies. Whereas the CFI argued that Article 301 TEC could be used "to attain the objective of the CFSP [...] in view of which [it] was specifically introduced", the ECJ held that Article 301 TEC was meant "to implement actions decided on under the CFSP [...] through the efficient use of a Community instrument". A closer look, however, reveals that the approaches of the CFI and the ECJ are not entirely incompatible. Not only did both judgements lead to the same result, that is to say allowing for the adoption of restrictive measures on the basis of Article 308 TEC, but they were also characterised by a similar construction of the linkage between external action pillars. Neither Court considered the 'bridge' provided for in Article 301 TEC as an exception, to be interpreted restrictively.<sup>115</sup> On the contrary, both Courts acknowledged that this provision served to foster coherence, transversally to the external action. If the CFI explicitly affirmed that Article 301 TEC served this purpose, the ECJ did so in an implicit manner by arguing that the adoption of restrictive (CFSP) measures through the efficient use of a Community instrument was itself an objective of the Community (and not of Article 301 TEC in particular), which could thus be pursued also through Article 308 TEC.<sup>116</sup> The example of restrictive measures confirms that EU institutions and Member States challenge the delimitation entailed by conferral, not only occasionally, as seen in the previous paragraphs, but on a constant basis. As a result, the very Treaties have been reformulated, in order to codify the solutions previously suggested only by the concern for external action coherence. Even the Court of Justice has acknowledged the crucial role of coherence in the interpretation of

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<sup>113</sup> *Id.*, para 226.

<sup>114</sup> *Id.*, para 227.

<sup>115</sup> Cf. Ecke, "Judicial Review of European Anti-Terrorism Measures—the *Yusuf* and *Kadi* Judgments of the Court of First Instance", 14 *European Law Journal* (2008): 74-92, p. 79, who asserted that "it is true that Article 301 EC has the specific purpose to enable the Community to adopt sanctions following a CFSP decision and that this direct linkage between the first and second pillar is of an exceptional character. However, particularly because this linkage is an exception to the general division of the EU into three separate and autonomous pillars, it must be construed narrowly".

<sup>116</sup> In fact, both Courts acknowledged that the controversial EC acts could find its footing on the Community pillar, i.e. Article 301 TEC only after the Council had adopted a common position or a joint action under the CFSP. In such circumstance, was it really different to allow for the use of Article 308 TEC for the pursuit of CFSP objectives, as the CFI did, rather than for making it possible to implement CFSP actions in the EC framework, as done by the ECJ?. In this respect, we partially disagree with Hillion, *Cohérence et action extérieure*, op. cit., according to whom "la Cour étayait ainsi la thèse selon laquelle les compétences communautaires ne sauraient être exercées dans le but de réaliser des objectifs PESC qui relevaient alors des compétences de l'Union, quand bien même cette opération inter-pilier eût pu se justifier par des considérations de cohérence. La Cour fait ainsi prévaloir les règles relatives à l'ordonnement des compétences, sur l'exigence de cohérence" (p. 4).

primary law, albeit implicitly. Therefore, the evidence presented in this paragraph supports the argument whereby coherence has some legal content in so far as it entails legal outcomes.

## *2. Coherence as a Legal Principle Requesting Unity in International Representation*

As noticed in the previous section, the fragmentation of international representation threatens the coherence of European foreign policies. EU institutions and Member States tackle this issue also by entering into mixed agreement and nominating a single negotiator for both the EU and its Members. In some circumstances, however, the identification of a single negotiator may not be possible or desirable for the Member States.<sup>117</sup> The problems for unity of international representation that the fragmentation in the negotiation entails have been addressed by the ECJ through the use of coherence as an interpretative tool, in order to infer obligations for the Member States.

As the Court affirmed in Ruling 1/78 (*International Atomic Energy Agency*), when mixed agreements are negotiated by both EU and Member States' representatives, there should be "a close association between the institutions of the community and the member states."<sup>118</sup> The ECJ later specified, in Opinion 1/94, that the duty of "close cooperation" between the negotiators of mixed agreements descends from "the requirement of unity in the international representation of the Community."<sup>119</sup> At that time, however, the "unity in the international representation" remained a rather broad formula, whose implementation did not find any specific guideline in the jurisprudence of the Court, and was consequently difficult, or even impossible, to implement.<sup>120</sup>

Three relatively recent cases clarify which conduct is required from the Member States in order to foster unity in international representation, and what is the source of such requirement. In the two *Inland Waterways* cases, the Court found that the Member States are under a *procedural* obligation to promote unity, since they must 'consult' the European representative (i.e. the Commission) before entering, in their own capacity, into international agreements whose conclusion may negatively affect "a concerted Community action at international level".<sup>121</sup> In the subsequent *PFOS* judgement the ECJ went a step further, by arguing that the requirement of unity in international representation entails also a *substantive*

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<sup>117</sup> The potential coexistence of two or more representatives is an unavoidable consequence of the simultaneous participation of the Union and Member States in an international agreement. In this sense, see Opinion 1/94, [1994] ECR I-5267, paras. 106–107.

<sup>118</sup> Ruling 1/78 [1978] ECR 2151, paras. 34 to 36.

<sup>119</sup> Opinion 1/94, cit. *supra*, para 108; see also Opinion 2/91, [1993] ECR I-1061, para 36, and Case C-25/94 *Commission v Council* [1996] ECR I-1469, para 48.

<sup>120</sup> Heliskoski, "Should there Be A New Article on External Relations? Opinion 1/94 'Duty of Cooperation' in the Light of the Constitutive Treaties", in Koskeniemi (ed.), *International Law Aspects of the European Union* (Nijhoff, 1998), p. 274. See also Cremona, "Defending the Community Interest: the Duties of Cooperation and Compliance", in Cremona and de Witte (eds.), *EU Foreign Relations Law – Constitutional Fundamentals* (Hart, 2008), p. 127, p. 168.

<sup>121</sup> Case C-266/03, *Commission v. Luxembourg*, [2005] ECR I-4805, para 60. See also Case C-433/03, *Commission v. Germany*, [2005] ECR I-6985, para 66. By analogy, see Case C-459/03, *MOX plant*, [2006] ECR I-04635, para 176, where the Court held that, during the implementation of mixed agreements, the Member States must "inform and consult" the competent EU institutions prior to undertaking initiatives that may lead "a judicial forum other than the Court will rule on the scope of obligations imposed on the Member States pursuant to Community law."

obligation, that is to say not to make use of a State competence in order to dissociate oneself “from a concerted common strategy within the Council”, especially when such dissociation has negative consequences for the Union.<sup>122</sup>

It is evident that in neither case the obligation of cooperation of the Member States was derived directly from conferral or was interpreted in its light,<sup>123</sup> since the Member States were acting in the ambit of non-exercised shared competences and there could consequently be no interference with EU competences *in abstracto*. In *Inland Waterways*, the EU had not exercised its competences since the Council had merely authorised the Commission to negotiate an international agreement. In *PFOS* the exercise of EU competences was even more remote, in so far as the Council had not adopted any legal act explicitly embodying a Union position. According to the Court, however, the existence of obligations for the Member States does not stop at the limits of EU competences, but it extends beyond them, thus protecting the *coherence* of European foreign policies. In the *Inland Waterways* cases, the Court expressed this idea by affirming that the adoption of a decision authorising the Commission to negotiate a multilateral agreement “marks the start of a concerted Community action at international level” and requires a duty of close cooperation between the Member States and the Community institutions,<sup>124</sup> in order to ensure “the coherence and consistency of the action and its international representation.” This same interpretation of the duty of cooperation was maintained in *PFOS*, and it was even expanded, since the Court held that such “concerted Community action at international level” could also be embodied in a “common strategy” that is not explicitly contained in a typical act, but that may be identified by interpreting Council conclusions in light of the works of its preparatory bodies.<sup>125</sup>

These cases signal that the Court did not intend to protect EU *competences*, but it rather sought to preserve the Union *political position*, which may be disrupted even when conferral is formally respected, because of the ‘repercussions’ of the Member

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<sup>122</sup> Case C-246/07, *Commission v. Sweden*, [2010] ECR I-3317, paras. 87–102. Although this case did not concern the negotiation of an international agreement, but the adoption of a position the Union should have taken within a body established through an international agreement, it would seem logical to apply this jurisprudence by analogy.

<sup>123</sup> It may be recalled that the obligation of cooperation is of general application (and it embodied “in particular”) in Article 4(3) TEU, as the Court noted in case 230/81, *Luxembourg v Parliament*, [1983] ECR 255, par. 37. Therefore, it is not necessary for our purposes to determine whether the duty of cooperation Member States were under in the aforementioned cases stemmed directly from an alleged principle of unity in international representation, or from then Article 10 TEC (now Article 4(3) TEU). On the issue, see Casolari, “The Principle of Loyal Cooperation: A ‘Master Key’ For EU External Representation?”, in Blockmans and Wessel, *Principles and Practices of EU External Representation*, (CLEER, 2012), pp. 11-36, at p. 13. See also Hillion, *Mixity and Coherence in EU External Relations: the Significance of the ‘Duty of Cooperation’* (CLEER, 2009).

<sup>124</sup> Case C-266/03, *cit. supra*, para 60. Notice that the Court makes an analogy with its earlier jurisprudence (Case 804/79 *Commission v United Kingdom* [1981] ECR I-1045, paragraph 28), where it held that the then Article 5 TEC, now Article 4(3) TEU, “imposes on member states special duties of action and abstention in a situation in which the commission, *in order to meet urgent needs of conservation*, has submitted to the council proposals which , although they have not been adopted by the council , represent the point of departure for concerted community action” (emphasis added). Although the Court does not mention this ‘detail’, the analogy is incomplete, because in the *Inland Waterways* case there was no ‘urgent need of conservation’.

<sup>125</sup> Case C-246/07, *cit. supra*, para 89. The Court may have been influenced in this sense by a consideration rendered explicit by it Advocate General, according to whom the absence of a decision was in fact determined by the defendant Member State, which “did not let [the] decision-making process take its natural course”, see Opinion of Advocate General Poiares Maduro, Case C-246/07, *cit. supra*, para 58.

States' actions. What is more, the Court interpreted the duty of cooperation of the Member States in an extensive manner, which is explicitly motivated by the concern for coherence.<sup>126</sup> The latter, therefore, indubitably has legal outcomes, in so far as it affects the interpretation of a core EU principle and, in particular, it enables the sidelining of conferral.<sup>127</sup>

### *3. Coherence as the Principle Underlying the 'Softening' of Delimitation in the Lisbon Reform: the Creation of a Single External Action Framework...*

Our necessarily brief presentation of the EU's practice relating to coherence, as a political requirement and a legal principle, is not meant to deny the existence of an equally significant practice supporting the opposite conclusion, that is to say the denial of coherence for the sake of delimitation.<sup>128</sup> The pre-Lisbon practice, therefore, suggests that coherence may have legal effects, but it does not necessarily demonstrate that it underlies the EU legal system. In our perspective, however, the practice relating to coherence is particularly important because it expresses the line of tendency that inspires the entire architecture of the external action set by the Lisbon Treaty. The remainder of this section seeks to demonstrate that the recent reform renders coherence one of the central regulatory standards of the EU external action, to the detriment of the delimitation of competences. This paragraph shows that the Lisbon Treaty 'bridged' the different policies of the Union, by creating a single framework for the external action. The next paragraph completes the picture, by clarifying that several, apparently unrelated, novelties entailed by the Lisbon reform allow for an ample overlapping of EU and Member States' competences.

The drafters of the Lisbon Treaty clearly sought to enhance coherence in the external action of the Union. This is testified by the mandate for the 2007 Intergovernmental Conference, which was asked to draw up a reform "with a view to enhancing the efficiency and democratic legitimacy of the enlarged Union, as well as the *coherence* of its external action."<sup>129</sup> As a consequence, the Lisbon Treaty reinforced the principle of coherence by making numerous references to it, as noted above, and by structuring the architecture of the external action in order to augment the unity of EU representation and the coordination in the conduct of its actions.

Unity in international representation is reinforced primarily by the merging of the EC and the EU into one single legal person (Article 47 TEU), thus entailing the abolition of the three 'pillars'. Such reform promotes coherence in external representation *lato sensu*, since the Union now presents itself to third parties as a single entity, and not as a scarcely intelligible triadic structure. In practice, this means that the Union can now indubitably enter into international agreements in

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<sup>126</sup> Cf. Bosse-Platière, *op. cit.*, p. 692, according to whom "l'obligation de coopération étroite découlant de l'exigence d'unité de la représentation internationale de la Communauté peut trouver dans les disposition combinées des articles 10 CE et 3 UE un fondement juridique approprié".

<sup>127</sup> This would explain why "the legal picture emerging from the case-law does not consider the possible interplay between the loyalty principle and other EU principles – namely the principle of conferred competences and the principle of proportionality – which could lead to a more cautious affirmation of 'fidelity duties' binding Member States", as affirmed by Casolari, *op. cit.*, 20.

<sup>128</sup> As a matter of fact, examples in this sense are not absent from our analysis either: for instance, in the *Ecovas* case the Court did not hesitate to re-affirm the delimitation of Union pillars, to the detriment of coherence

<sup>129</sup> IGC 2007 Mandate, Council doc. 11218/07, 26 June 2007, p. 2.

its own name, something that was contested before the entering into force of the Lisbon Treaty. The EU can also adopt legal acts concerning its entire external action and, possibly, all its sectors at once. In particular, it may be argued that the EU could theoretically enter into international commitments covering both CFSP and non-CFSP issues, something Union institutions had considered before the reform but never put into practice because of the legal difficulties entailed by Article 47 TEU. Finally, the new architecture of the external action enhances the unity of external representation *stricto sensu*, since it simplifies the rules governing the identification of the Union speaker. Before the reform, as a general rule, the Rotating Presidency spoke on behalf of the EU, whereas the Commission represented the EC. The Lisbon Treaty eliminated the representation power of the Rotating Presidency, and provided for a general rule on EU representation, contained in Article 17(1), whereby, with the exception of the cases provided for in the Treaties, the Commission ensures the Union's external representation.

Coordination in policy management is promoted through more elaborate structural arrangements. The Lisbon Treaty created a single framework for the external action, which provides for principles and objectives common to all strands of European external relations, including the CFSP (Articles 21 and 22 TEU). At the same time, the reform preserved the peculiarities of the single external action policies. Non-CFSP actions still pursue specific objectives, contained in their legal bases, but must foster them within the framework of the principles and objectives of the Union's external action. CFSP actions pursue only the generic objectives of the external action, but remain procedurally 'anomalous'. This policy is indeed the only one that finds its legal bases in the TEU, whereas the others are contained in the TFEU. In addition, and most importantly, the CFSP remains largely intergovernmental in nature, whereas the other policies are generally managed through the Community method, or similar decision-making procedures. This motivates the persistence of a clause separating the CFSP and the rest of Union policies, contained in Article 40 TEU (previously Article 47 TEU). As noted above, however, this provision no longer foresees a straightforward subordination of the CFSP to non-CFSP initiatives, but it is 'symmetric' in nature.

Therefore, the new architecture of the external action transparently suggests that the drafters of the Treaties sought to 'soften' the boundaries between Union policies, in order to increase unity in EU international representation and coordination in the implementation of its actions.

#### *4. ...and the Overlapping of EU and Member States' Foreign Policies*

The recent reform did not abolish the separation between EU and Member States' foreign policies. The drafters of the Lisbon Treaty, however, set a legal architecture that allows the Union and its Members to identify the level of action in a pragmatic manner, as to foster unity in international representation and coordination in the implementation of external policies. This can be demonstrated through a systemic reading of the Treaties, which shows that the external competences of the Union and its Members overlap in most instances, rather than excluding each other.

Such argument may seem to be contradicted by the existence of EU exclusive competences, in fields such as trade and monetary policy. Even in these fields, however, an intervention of the Member States is possible, since they the EU may authorise them to act. Similar considerations may be extended to the areas falling within the shared competences of the Union which the latter has already exercised.

The contemporary action of the EU and its Members is, by definition, always possible in the ambit of EU shared competences not yet exercised by the Union and in the fields covered by EU shared competences whose exercise does not result in Member States being prevented from exercising theirs (sometimes labelled as 'parallel competences').<sup>130</sup> This last category of shared competences includes *de facto*, if not *de jure*, also the CFSP: the Union is capable of adopting acts relating to "all areas of foreign policy and all questions relating to the Union's security" and the Member States are bound by its decisions. In respect of issues not covered by CFSP actions, however, the Member States maintain their competence intact.

Both the EU and its Members can act also in the areas where the Union has competence to carry out actions to support, coordinate or supplement the actions of the Member States. The freedom of the Union is restrained, since Article 2(5) TFEU asserts that the use of "support" competences cannot lead to the harmonisation of Member States' laws. This restriction to the EU's power should not be overemphasised, since the Treaties do not exclude the possibility to adopt harmonising measures having an impact on the areas covered by "support" competences on the basis of other (shared or exclusive) competences.<sup>131</sup>

What of the areas not covered by Union competences? In principle, the competences not conferred upon the Union in the Treaties remain with the Member States. In the areas where the Union intervention is not explicitly excluded by the Treaties, however, the Union can rely on its implied powers to conduct international actions.<sup>132</sup> The implied powers of the Union relate, firstly, to the conclusion of international instruments. As the Court held in Opinion 2/91, the EU is empowered to enter into the international commitments necessary for attainment of its objectives even in the absence of express provisions to that effect.<sup>133</sup> More generally, the Union can adopt unilateral and international acts for which the Treaties have not provided the necessary powers, on the basis of the so-called 'flexibility clause', i.e. former Article 308 TEC and current Article 352 TFEU.<sup>134</sup> The scope of this provision is debated. The ECJ held in Opinion 2/94, that this provision "is designed to fill the gap where no specific provisions of the Treaty confer on the Community institutions express or implied powers to act",<sup>135</sup> but it cannot serve as a basis for widening the scope of Community powers beyond the "general framework" created by the provisions of the Treaty.<sup>136</sup> This apparent contradiction may be explained by the fact that the 'flexibility clause' could be relied on only "in the course of the operation of the common market", which could be

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<sup>130</sup> i.e. research, technological development, and, above all, development cooperation and humanitarian aid (Article 2(2) TFEU).

<sup>131</sup> Case C-376/98, *Germany v Parliament and Council*, [2000] ECR I-8419, p. 77-78.

<sup>132</sup> As noted by the International Court of Justice in *Reparation for Injuries*, "the necessities of international life may point to the need for [international] organizations, in order to achieve their objectives, to possess subsidiary powers [...] known as 'implied' powers", ICJ, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, 8 July 1996, International Court of Justice, Advisory Opinion, ICJ Reports 1996, p. 25. Cf. also Engstrom, "How to Tame the Elusive: Lessons from the Revision of the EU Flexibility Clause", *International Organizations Law Review* 7 (2010); 343-373.

<sup>133</sup> Opinion 2/91, [1993] ECR I-1061, para 7.

<sup>134</sup> Article 352(1) TFEU reads "if action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures."

<sup>135</sup> Opinion 2/94, [1996] ECR I-1759, para 29.

<sup>136</sup> Opinion 2/94, cit. *supra*, para 30.

roughly be considered as the "general framework" of the EC Treaty. However, the common market clause, was interpreted very broadly in the practice, to the extent that some commentators argued that it did not serve any practical purpose.<sup>137</sup> The Lisbon reform acknowledged this extensive reading of the 'flexibility clause', by modifying the wording of the 'common market clause' into "within the framework of the policies defined in the Treaties". This suggests that the use of Article 352 TFEU is likely to be excluded only in most exceptional cases.<sup>138</sup>

Therefore, it would seem that the EU is capable of intervening in any CFSP and non-CFSP sector. The EU's action may however encounter three obstacles. The first obstacle to the exercise of (non-exclusive) EU competences is provided for by the principle of subsidiarity, enshrined in Article 5(3) TEU, according to which "the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States", but can rather be better achieved at Union level. It is easy to note that this principle hardly hinders the EU's external action. Despite the indubitably legal nature of this principle,<sup>139</sup> its enforcement depends mainly on a political evaluation, since the interpreter must determine whether the objectives of the proposed action can be "sufficiently" achieved by the Member States or can be "better" achieved at Union level.<sup>140</sup> The observance of subsidiarity, therefore, is more formal than substantial.<sup>141</sup> This is all the more true for the external relations, where EU institutions may easily demonstrate that any external action is best performed at EU level, simply by arguing that "we are stronger when we act together".<sup>142</sup> In other words, the concern for *coherence* may justify the conduct of an action at EU level.

A second obstacle may be found in the objectives of the EU's external action: if Union competences can be used only to attain the objectives set in the Treaties, the

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<sup>137</sup> The very Court of Justice implicitly acknowledge this: even in its Opinion 2/94, where it sought to limit the breadth of the flexibility clause, it never mentioned "the common market" requirement; see Dashwood, "the Limits of European Community Powers", 21 *European Law Review* (1996): 113-128.

<sup>138</sup> Even in Opinion 2/94, the Court seems to have provided a narrow interpretation on the scope of former Article 308 EC, not because of the need to protect conferral as such, but rather in order to avoid the undesired effect of submitting itself to the scrutiny of a distinct organization with its own legal principles, judicial structure, and case-law, see Konstantinides, "Drawing the Line Between Circumvention and Gap-Filling: An Exploration of the Conceptual Limits of the Treaty's Flexibility Clause", *Yearbook of European Law* (2012): 1-36, p. 10. Notice however that the use of the flexibility clause seems to be declining, also because of the *Lissabon Urteil* judgement of the German Constitutional Court, see Konstantinides, op. cit., and Rossi, "Does the Lisbon Treaty Provide a Clearer Separation of Competences Between EU and Member States?", in Biondi, Eeckhout and Ripley, *EU Law After Lisbon* (Oxford University Press, 2012), pp. 85-106, at p. 105.

<sup>139</sup> On the political, rather than legal characterisation of subsidiarity, see *inter alia* Kapteyn, "Community Law and the Principle of Subsidiarity", 35 *Revue Des Affaires Européennes* (1991): 35-43; Lenaerts and Ypersele, "Le Principe de Subsidiarité et Son Contexte : Etude de L'article 3 B du Traité C.e.", 13 *Cahiers de Droit Européen* (1994): 13-33; Estella, *The EU Principle of Proportionality* (Oxford University Press, 2002).

<sup>140</sup> This is not to say that subsidiarity can never be enforced by the ECJ. Cf. cases C-233/94, *Germany v Parliament and Council*, [1997] ECR I-2405 and C 491/01, *British American Tobacco and Imperial Tobacco*, [2002] ECR I-11453. See also C-58/08, *Vodafone et. al.*, not published yet in the ECR. See also Biondi, "Subsidiarity in the Courtroom", in Biondi, Eeckhout and Ripley (eds.), *EU Law After Lisbon* (Oxford University Press, 2012), p. 213-227. The Lisbon reform also introduced a specific procedure, involving national parliaments, to enforce subsidiarity, which may however lead only to a 'review' of the proposed EU acts, and consequently does not restrain the EU's capability to act at international level, See Protocol 2 to the Lisbon Treaty, on the application of the principles of subsidiarity and proportionality, O.J. 2010 C 83/206.

<sup>141</sup> Rossi, *Does the Lisbon Treaty Provide a Clearer Separation of Competences Between EU and Member States?*, cit. *supra*, p. 95

<sup>142</sup> European Security Strategy, cit. *supra*, p. 13.



international actions that do not pursue such objectives (and do not fall within the EU's exclusive competences), in principle, should be performed at State level. Such consideration is accurate in a formal perspective, since external action objectives are binding and may even be enforced jurisdictionally, at least in theory.<sup>143</sup> The practice, however, is likely to go in the opposite direction. In the first place, the common objectives of the external action are numerous, partially contradictory<sup>144</sup> and extremely generic: the very first objective mentioned by Article 21 TEU may be used to justify almost every action on the international level, since it asserts that the EU should “safeguard its values, fundamental interests, security, independence and integrity.”<sup>145</sup> Since the flexibility clause and the CFSP can be used to pursue any of these objectives,<sup>146</sup> it may be argued that they are scarcely limited in a teleological perspective. Secondly, even the objectives of sector (non-CFSP) policies provide for scarce restraints to the EU's action. The objective of the Common Commercial Policy, for instance, seems rather straightforward: contributing to the harmonious development of world trade, the progressive abolition of restrictions on international trade and on foreign direct investment, and the lowering of customs and other barriers. It can hardly be denied that this provision is binding upon Union institutions, given its peremptory wording.<sup>147</sup> Nonetheless, such objective seems hardly capable of restraining the margin of manoeuvre of EU institutions. It cannot be ignored that an international actor needs to play according to the rules of its own legal order, as well as of those of international relations. These include the legal requirements of the international system, the rules and political willingness of

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<sup>143</sup> Case C-268/96 *Portugal v. Council* [1996] ECR I-6177, para. 23. See also Larik, *Shaping the International Order as a Union Objective and the Dynamic Internationalisation of Constitutional Law* (CLEER, 2011).

<sup>144</sup> For instance, the eradication of poverty (Article 21(2)(d) TEU) might not be compatible with the progressive abolition of restrictions on international trade (Article 21(2)(e) TEU).

<sup>145</sup> In order to affirm that this objective is of any interest in our perspective, one should assume that the EU may actually intend *not* to pursue its interests, security and independence in the future, which is obviously illogical. In this respect, see Parliament resolution of 8 June 2011 on Regulation (EC) 1905/2006 establishing a financing instrument for development cooperation: lessons learned and perspectives for the future (2009/2149(INI), par. 16, according to which “development cooperation is the *only* external action policy (besides humanitarian aid) which has not been designed to serve *EU interests* but rather to defend the interests of the most marginalised and vulnerable populations on this planet” (emphases added).

<sup>146</sup> According to Article 23 TEU, “The Union’s action on the international scene, pursuant to [the CFSP] Chapter, [...] shall pursue the objectives of, and be conducted in accordance with, the general provisions laid down in Chapter 1”, i.e. Article 21 TEU. More generally, Article 352 TFEU can be used when the action by the Union proves necessary “to attain one of the objectives set out in the Treaties”.

<sup>147</sup> Before the Lisbon reform, the TEC affirmed, differently from current Article 206 TFEU, that “By establishing a customs union between themselves Member States aim to contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and the lowering of customs barriers” (Article 131). The ECJ stated the non-binding character of the liberalization objective in Case C-150/94 *United Kingdom v. Council (Chinese Toys)* [1998] ECR I-7235, para. 67; Case C-112/80 *Dürbeck v. Hauptzollamt Frankfurt* [1982] ECR 1251, para. 10 ff.; see also Case C-51/75 *EMI v. CBS United Kingdom Ltd* [1976] ECR-811. It may be argued, however, that the re-formulation of this provision in the Lisbon Treaty suggests that it has now acquired binding character, also in light of the ECJ jurisprudence on the objectives of other EU policies (see *infra*). For a fuller discussion of the issue, see Bonavita, “The EU Strategy Towards WTO Commercial Disputes After the Lisbon Reform”, in Larik and Moraru (eds.), *Ever-Closer in Brussels – Ever-Closer in the World? EU External Action After the Lisbon Treaty* (European University Institute, 2011), pp. 41-60, at pp. 44-46. See also Dimopoulos, “The Effects of the Lisbon Treaty On the Principles and Objectives of the Common Commercial Policy”, 15 *European Foreign Affairs Review* (2010): 153.

other states, as well as the allocation of resources outside one's own borders.<sup>148</sup> Thus there is a need to preserve an ample degree of discretion for political institutions. The ECJ jurisprudence on the application of WTO law in the EU legal order confirms that primary law should be interpreted as to maintain the scope for manoeuvre enjoyed by Union institutions, especially in the context of relations based on reciprocity. In *Portugal v. Council* (1999), for instance, the Court held that "to accept that the role of ensuring that Community law complies with [international] rules devolves directly on the Community judicature would deprive the legislative or executive organs of the Community of the scope for manoeuvre enjoyed by their counterparts in the Community's trading partners".<sup>149</sup> The Court probably takes into consideration the effectiveness of the EU's external action also when it does not explicitly mention it. For instance, it has recently been asserted that, by holding that the application of the EU Emissions Trading Scheme to the aviation sector is compatible with EU and international law, the ECJ actually sought to foster the "environmental leadership" of the Union at multilateral level.<sup>150</sup> The third limit to the EU's capability to act on the international scene may be provided for by the explicit exclusion of certain areas from its competences. Primary law asserts that the exercise of certain EU competences "shall not affect" the competences of Member States in specific areas. For instance, the Union competence on border checks, asylum and immigration "shall not affect the competence of the Member States concerning the geographical demarcation of their borders" (Article 77(4) TFEU).<sup>151</sup> These limitations of EU competences, however, do not seem able to exclude *any* EU intervention, but only those based on specific legal bases (in our examples: border checks). The 'flexibility clause' may therefore be used in this ambit to fill the gap in the EU powers. In a few circumstances, however, this course of action seems to be precluded, in so far as certain provisions do not only exclude the use of *certain* competences, but they rather forbid the EU's interference with Member States' activities. Thus, for instance, Article 17(1) TFEU asserts that "the Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States".<sup>152</sup> For the purpose of the external action, this means that the Union cannot enter into international agreements with the Holy See, as several EU Members did, for the purpose of regulating the status of the Roman Church throughout the EU.<sup>153</sup>

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<sup>148</sup> Larik, op. cit., p. 20.

<sup>149</sup> Case C-149/96 *Portugal v Council* [1999] ECR I-8395, par. 46, (emphasis added).

<sup>150</sup> Bogojevic, "Legalising Environmental Leadership: A Comment On the CJEU'S Ruling in C-366/10 On the Inclusion of Aviation in the EU Emissions Trading Scheme", 24 *Journal of Environmental Law* (2012): 345-356.

<sup>151</sup> Similarly, the EU's competence on energy "shall not affect a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply" (Article 194(2) TFEU). In this sense, see also Articles 72, 79(5), 154(4), 168(7) TFEU.

<sup>152</sup> Similarly, Article 165(1) TFEU affirms that the Union should fully respect "the responsibility of the Member States for the content of teaching and the organisation of education systems." This implies that, in particular, the Union can never enter into international instruments containing commitments relating to the content of school programmes, independently from the legal basis that is chosen for this purpose.

<sup>153</sup> This is not to say to say the EU should have no relation with religious organisations or that the EU should have no stance whatsoever towards religious groups. Article 17(3) TFEU, in fact, affirms that the Union must maintain an "open, transparent and regular dialogue" with religious organisations, and Union institutions have actually a certain leeway in the conduct of this dialogue. See Rynkowski, "Remarks on Article I-52 of the Constitutional Treaty: New Aspects of the European Ecclesiastical Law?", 6 *German Law Journal* (2005): 1719-1730, at p. 1726. See also Gatti, "Autonomy of Religious

In summary, the Lisbon reform enables both the EU and its Members to contemporarily intervene in almost every circumstance, thanks to the EU's cumulation of CFSP and non-CFSP competences in the Union framework, the reformulation of the 'flexibility clause' and the identification of wide objectives for the external action. This suggests that the drafters of the Lisbon Treaty did not intend to delimit EU and Member States' area of intervention with precision. They rather sought to allow for an allocation of the level of intervention on the basis of pragmatic considerations. Consequently, Union institutions and Members can conduct contemporary and synergetic actions. In other words, the reform appears to be inspired by the concern for external action coherence, rather than by a formalistic approach to conferral.

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This section sought to demonstrate that coherence is not only a political requirement perceived by EU institutions and Member States, but also a legal principle. Before the Lisbon reform, EU institutions used this principle in order to 'soften' the delimitation of EU competences, in order to foster unity in international representation and synergy in the implementation of Union competences. Coherence, therefore, seems to have had legal effects insofar as it *allowed* for a 'flexible' interpretation of conferral and it was even considered to *request* international unity. The pre-Lisbon practice favourable to external action coherence was confirmed by the Lisbon Treaty, which unified the architecture of the external action in order to allow for the overlapping of EU's external actions and Member States' foreign policies, transversally to the division of competences determined by conferral.

This means that the spirit of the Lisbon reform does not reflect the traditional project of law – to draw lines between different areas of action – but is actually functional to sustain the interdependence of European foreign policies, in order to promote their coherence.<sup>154</sup> The very idea of a plurality of European foreign policies may be reconsidered: if it is true that the EU and its Members conduct different external actions, it is also evident that they are closely integrated, to the extent that they largely overlap. Given the blurred distinction between the competences of the EU and those of its Members, it is possible to describe their external actions as a multiform European foreign policy.

Since coherence has legal effects and it underlies the entire architecture of the entire external action, it should be considered as a legal principle, in light of which EU law *should* be interpreted. It may be wondered, however, how such interpretation may be enforced in practice.

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Organizations in the European Convention on Human Rights and in European Union Law, in Rossi (Ed.), *Fundamental Rights in Europe and China: Between Identities and Universalism*, in course of publication.

<sup>154</sup> Similar considerations have been expressed, with respect to the US legal order, by Ahdieh, op. cit.

## SECTION 4. THE 'UNION METHOD': POLITICAL COORDINATION AS A MEANS TO ENFORCE EXTERNAL ACTION COHERENCE

If coherence is the legal principle that underlies the recent reform, its practical implementation may be complicated. This section intends to demonstrate that the most significant contribution to external action coherence is likely to be provided for by the High Representative and his/her Service. Paragraph 1 shows that, even after the Lisbon reform, external action coherence is still hindered by procedural issues, and its promotion can take place only by bridging the Community and intergovernmental approaches, through the so-called 'Union method'. Paragraph 2 shows that the Union method can be implemented through the legal instruments foreseen in the Treaties, but only to a certain extent. Paragraph 3 clarifies that the Union method can be applied in practice mainly through the activity of the High Representative, who is tasked by the Lisbon Treaty with the coordination of European foreign policies; it is also argued, however, that the effective performance of the HR's tasks is dependent on the administration that supports him/her, that is to say the European External Action Service. Paragraph 4 concludes the analysis by presenting the main challenges for the effectiveness of the EEAS, as they appeared during the process that led to its establishment.

### *1. Political Coordination as a Response to Policy Incoherence: Introducing the 'Union Method'*

Although the architecture of the external action is inspired by the principle of external action coherence, it is apparent that synergy is far from being achieved in practice. This persisting incoherence may be explained mainly in a procedural perspective. To be sure, the EU *may* intervene in almost all external relations fields, by mobilising coherently all its tools. Such outcome, however, is primarily dependent on the priorities of the Member States. In the absence of unanimity in the Council, neither the CFSP nor the flexibility clause can be activated. Reaching unanimity is obviously challenging, since by using these frameworks the Member States substantially restrain their scope for manoeuvre in respect of sensitive issues, such as security policy. Even reaching the qualified majority that is generally requested for non-CFSP decision-making sometimes proves quite difficult.<sup>155</sup>

Even when the Member States agree upon a EU policy the obstacles to coherence are not eliminated. Since every policy has specific legal bases, and may be conducted according to autonomous procedures, the outcome of the different decision-making processes may not support each other. This is especially true in respect of the CFSP, since the different decision-making procedures of this sector might lead to the formulation of priorities incompatible with those of the non-CFSP areas. This may prevent, at political level, the linking of the former external action pillars.

Despite these procedural obstacles, coherence is not unattainable. It is well known that coordination in the management of policies can be reached also in polycentric frameworks. Abundant evidence suggests that repeated negotiation among actors

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<sup>155</sup> This is especially true in the case of non-exercised shared competences, whose use entails also the pre-emption effect (and, thus, a restriction of the Member States' discretion in the future).

often leads to cooperation and some form of mutually supportive actions.<sup>156</sup> Coherence may therefore be the product of cooperation between decision-makers, transversally to the traditional approaches to European integration. This idea finds ample support in European circles. For instance, in its Communication on external action coherence of 2006, the Commission held that the Community and intergovernmental methods need to be combined on the basis of what best achieves the desired outcome, rather than institutional theory or dogma.<sup>157</sup> Indeed, according to H. Van Rompuy, "often the choice is not between the Community method and the intergovernmental method, but between a coordinated European position and nothing at all".<sup>158</sup> The objective of the Union, therefore, should not be about giving up the Member States' role, "it is about leveraging our strength by aligning our positions, pooling resources, acting in the world as a club – and increasingly as a team",<sup>159</sup> or, to put it more vividly, as "a convoy of 27 ships, negotiating the waves of the geopolitical ocean".<sup>160</sup>

The most known definition of this approach was provided for by A. Merkel in a speech in 2010: "I believe we must put old rivalries behind us, we must set common goals and adopt common strategies. Perhaps we can agree on the following description of this approach: coordinated action in a spirit of solidarity - each of us in the area for which we are responsible but all working towards the same goal. That for me is the new Union method".<sup>161</sup> To be sure, A. Merkel did not refer to the external action in particular, but to EU law-making as a whole. We retain however this definition since it effectively depicts the need to bridge Community and intergovernmental approaches to European foreign policy.

The Union method has been debated, since it has been characterised as an attempt at hindering the activity of EU institutions and even the integration process. However, it is not a new idea: a close analysis of the functioning of the EU shows that the Community and the intergovernmental principles have always coexisted and have actually been merged in several instances.<sup>162</sup> In the internal fields, the EU has sometimes managed policies in "partnership" with the Member States, by relying on its coordination competences.<sup>163</sup> In external relations, the clearest

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<sup>156</sup> For evidence in the international relations literature, see Axelrod, *The Evolution of Cooperation* (Basic Books, 1985); comparable conclusions have been reached also in other sectors, such as organisational behaviour, see *inter alia* Powell, "Neither Market Nor Hierarchy: Network Forms of Organization", 12 *Research in Organisational Behaviour* (1990): 303. For a discussion of the implications of these findings for legal systems, see Ahdieh, *op. cit.*, p. 1216.

<sup>157</sup> Communication from the Commission to the European Council of June 2006, *Europe in the World – Some Practical Proposals for Greater Coherence, Effectiveness and Visibility*, 8 June 2006, COM(2006) 278 final, para. 4. See also COM(2002) 247, *A project for the European Union*, p. 12..

<sup>158</sup> Van Rompuy, *Not Renationalisation of European Politics*, *cit. supra*.

<sup>159</sup> "Europe on the World Stage", speech by President of the European Council Herman Van Rompuy, at Chatham House 31 May 2012.

<sup>160</sup> Van Rompuy, *Not Renationalisation of European Politics*, *cit. supra*.

<sup>161</sup> Speech by Federal Chancellor Angela Merkel at the opening ceremony of the 61st academic year of the College of Europe in Bruges on 2 November 2010.

<sup>162</sup> See Missiroli, *a Little Discourse on Method(s)* (Egmont, 2011), p. 8, according to whom "this is why the current European public "discourse on methods" and the resulting polarisation between [Community method] and [Intergovernmental method] - with Merkel's [Union method] as a dark horse - appear superficial and, above all, not to the point".

<sup>163</sup> See the description of the "dual partnership coordination" in Smismans, "from Harmonization to Coordination? EU Law in the Lisbon Governance Architecture", 18 *European Journal of Public Policy* (2011): 504-524, at p. 508. See also Commission Communication, 'Common action for growth and employment: the Community Lisbon Programme', COM(2005) 330 final. See also Council Presidency, Conclusions, 14 March 2008, para 14 and 18. Cf. also Quermonne, *La Question du Gouvernement Européen* (Notre Europe, 2002), p. 2: "l'institution des "piliers" a généré un

example of an *ante litteram* application of the Union Method probably is provided for by the Common Foreign and Security Policy. As seen above, the EPC and, later, the CFSP were originally conceived as instruments to coordinate the Member States' foreign policies with the activities of EEC institutions, through negotiation and dialogue. The pre-Lisbon attempts at fostering coherence through coordination, however, proved insufficient in practice. Does the recent reform bring added value in this respect?

## 2. On the Insufficiency of Secondary Law for the Attainment of Coordination

The pre-Lisbon practice suggests that EU institutions and Member States have often sought to bridge the gap between the Community and intergovernmental methods through secondary law. Does the Lisbon reform render this approach more effective?

The Treaties directly foresee an act that should orient the entire external action, that is to say the 'strategic' decisions of the European Council. Article 22 TEU, significantly located among the common provisions of the external actions, codifies the pre-Lisbon practice on Common Strategies. This provision affirms that the European Council may identify the strategic interests and objectives of the Union through its decisions. These acts may play a crucial role in the implementation of the Union method, since they relate to the entire EU external action, and define the means to be made available by both the Union and the Member States. The practical significance of Article 22 TEU, however, may be scarce, since the European Council adopts 'strategic decisions' by unanimity and the pre-Lisbon practice suggests that the reaching of unanimity within the Institution entails lengthy negotiations, which are rarely conducive to the adoption of decisions. This is confirmed by the fact that no such decision has been adopted after the entry into force of the Lisbon Treaty.

The bridging of the Community and intergovernmental methods may be ensured also through the acts of other institutions. The creation of a single framework for the external action, characterised by common principles and objectives, may lead to a 'relaxation' of the centre of gravity doctrine. The vagueness and multiplicity of external action objectives makes sure that the EU external actions share some objectives with internal and external policies. This was demonstrated in the recent *Parliament v Council* case, where the ECJ held that although "the combating of terrorism and its financing may well be among the objectives of the area of freedom, security and justice [...] the objective of combating international terrorism and its financing in order to preserve international peace and security corresponds, nevertheless, to the objectives of the Treaty provisions on external action by the Union" and, in particular, of the CFSP.<sup>164</sup> The identity of objectives of EU policies implies that the Union can pursue its external aims by selecting the instruments that are most appropriate in each specific circumstance, according to the *content* of the action to be undertaken. In other words, the legislator is no longer obliged to

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cloisonnement, voire des doubles emplois entre les organes de l'Union, comme en témoigne la coexistence d'un Haut Représentant pour la PESC et d'un Commissaire aux relations extérieures. [...] Dans d'autres domaines, d'ordre économique et social, l'intelligente invention de la "méthode ouverte de coordination", par le Conseil européen de Lisbonne, a tenté de remédier à cette entrave, mais sans que ses résultats soient, jusqu'à présent, tout à fait convaincants".

<sup>164</sup> Para. 61.

use the legal basis that is linked to the pursuit of a specific objective. This renders the EU strategy more flexible and potentially more coherent.

This line of reasoning may seem to be partially contradicted by the fact that most external action objectives listed in Article 21 TEU are *also* objectives of specific internal or external action policies set in the TFEU. It may be hypothesised that this should lead to the prevalence of TFEU objectives over common external action aims by way of *lex specialis*. For instance, it may be argued that, since fostering the sustainable development of developing countries is a 'special' objective of development cooperation (Article 208 TFEU), the CFSP should not be allowed to contribute to it. Such reading of the Treaties, however, takes into consideration neither the principle of external action coherence nor the explicit request for coordination between non-CFSP actions and external relations as a whole contained in TFEU legal bases. It is more logical to argue that, although 'sector-specific' objectives should be *primarily* promoted through sector-specific legal bases, they may be pursued *also* through other bases. This is not to say that the centre of gravity doctrine should cease to have any function: an act that seeks *only* to foster sustainable development should certainly be based on the development cooperation basis. The Court may however apply its doctrine with a certain flexibility, by accepting that the connection between an act and external action objectives different from those of its legal basis, or even typical of other legal bases, might be more than 'incidental'. For instance, the connection between CFSP actions and development cooperation objectives may be stronger than the link the Court habitually accepts between the means and objectives of internal policies. The acceptable degree of such connection will evidently have to be determined through the jurisdictional practice.

What of the actions whose contents and objectives are so closely tied to two (or more) policies that it is impossible to ascertain which one should prevail? Before the Lisbon reform, this issue was particularly contentious in the case of cross-pillar issues, since the *Ecovas* jurisprudence excluded the cumulation of EU and EC legal bases, and initiatives relating to both pillars had to be adopted on Communitarian bases only. The situation may be different today, since the subordination clause of Article 47 TEU was substituted by a 'symmetric' non-interference clause for CFSP and non-CFSP actions. Since Article 40 TEU no longer expresses any *favor communitatis*, it may be argued that the accumulation of CFSP and non-CFSP legal bases should be possible. Acts having CFSP and non-CFSP legal bases may be labelled 'cross-Treaty', since the CFSP provisions are located within the TEU, while non-CFSP legal bases are to be found in the TFEU.<sup>165</sup>

The letter of the Lisbon Treaty is clearly in favour of at least one category of cross-Treaty acts, i.e. international agreements. Before the Lisbon reform, this kind of act was considered impossible because of the separation of EC and EU legal personalities, the restrictive interpretation of Article 47 TEU seen above, and the discrepancy between Community and CFSP procedures (i.e. the *Titanium Dioxide* jurisprudence).<sup>166</sup> The first problem was solved by the Lisbon reform, through the

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<sup>165</sup> See, in this sense, Gatti and Manzini, "External representation of the European Union in the conclusion of international agreements", 49 *Common Market Law Review* (2012), 1703-1733, p. 1707.

<sup>166</sup> For the sake of precision, it must be stressed that the EU actually concluded similar agreements before the Lisbon reform, but only in an 'indirect' manner (i.e. by relying on an extensive interpretation of EC competences), or, in a few cases, by using two internal (EU and EC) acts for the conclusion of one single EU/EC agreement. See Wessel, "Cross-Pillar Mixity: Combining Competences in the Conclusion of EU International Agreements", in Koutrakos and Hillion (eds.),

introduction of the new legal personality of the EU, which encompasses both CFSP and non-CFSP policies. The second is probably solved by new Article 40 TEU. The third, that is to say the discrepancy of treaty-making procedures, was addressed by the merging of treaty-making procedures: the pre-Lisbon provisions regulating the conclusion of international agreements of the EU (Article 24 TEU) and the EC (Article 300 TEC) were substituted by a single provision, that is to say Article 218 TFEU.<sup>167</sup> The existence of a single legal basis for all international agreements (to the partial exception of trade and monetary agreements) suggests that the drafters of the Treaties did not intend to exclude cross-Treaty agreements *a priori*. Against this finding it cannot be held that Article 218 TFEU foresees *de facto* two different procedures for CFSP and non-CFSP agreements, roughly corresponding to the Community and the intergovernmental methods.<sup>168</sup> An accurate reading of this provision suggests indeed that 'mixed' Community/intergovernmental procedures for the conclusion of international agreements are explicitly allowed by primary law. Whereas, according to paragraph 8, the Council shall act unanimously in respect of agreements relating primarily or exclusively to the CFSP,<sup>169</sup> paragraph 6 stipulates that the Parliament shall not approve only the agreements that relate "exclusively" to the CFSP. This implies that agreements relating also, but not exclusively, to the CFSP may be adopted by unanimity in the Council and after approval of the EP,<sup>170</sup> that is to say through a *de facto* CFSP/non-CFSP procedure. The practice confirms this reading of the Treaties, since the Council has already adopted seven decisions authorising the negotiation of cross-Treaty agreements.<sup>171</sup>

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*Mixed Agreements Revisited* (Hart Publishing, 2010), pp. 30-54; see also De Baere, *op. cit.*, pp. 294 ff.

<sup>167</sup> With the partial exception of trade (Article 207 TFEU) and monetary policy (Article 219 TFEU).

<sup>168</sup> First, while the opening of negotiations, the signing and the conclusion of non-CFSP agreements is approved by the Council by qualified majority, CFSP agreements are authorized, adopted and concluded by unanimity. Second, the conclusion of non-CFSP agreements is subject to the previous consultation of the European Parliament, whose opinion is often binding. In the case of CFSP agreements, the Parliament is not even consulted. Third, the opening of negotiations for non-CFSP agreements is recommended by the Commission, while CFSP agreements are proposed by the High Representative (HR). Fourth, the ECJ maintains its jurisdiction in respect of the compatibility of non-CFSP agreements with the Treaties, but it can control CFSP agreements only with respect to their influence on non-CFSP provisions.

<sup>169</sup> Article 218(8) TFEU asserts that the Council "shall act unanimously when the agreement covers a field for which unanimity is required for the adoption of a Union". In light of centre of gravity doctrine, this can but mean that the Council shall act unanimously in respect of acts having preponderant CFSP content and/or objectives.

<sup>170</sup> In these cases, the intervention of the Parliament would however be limited to association agreements, agreements establishing a specific institutional framework by organising cooperation procedures and agreements with important budgetary implications for the Union, see Article 218 TFEU.

<sup>171</sup> An example of the decisions authorizing the opening of negotiations with Georgia, adopted on 10 May 2010, can be found in the letter to the European Parliament attached to Council doc. 7462/2010, 27 May 2010 (annex II); for the framework agreements with Azerbaijan and Armenia, whose negotiations were authorized on the same date, see Council doc. 7461/10 annex II and doc. 7460/10 annex II, respectively. Note that the authorizations to negotiate these agreements were proposed by the Commission before the entry into force of the Lisbon Treaty, and that they were not published, unlike similar decisions adopted afterwards. Nonetheless, it may be assumed that their content is similar, if not identical, to the decisions authorizing the negotiation of the following framework agreements: the Cooperation Agreement with Afghanistan, whose negotiation was authorized through a Council decision (doc. 16146/11) and a Member States' representatives decision (doc. 16147/11), both adopted on 10 Nov. 2010; the Partnership and Cooperation agreement with Kazakhstan (Council doc. 8282/11 and 8283/11, 13 Apr. 2011); the framework agreement with Australia (doc. 14657/11 and 14658/11, 4 Oct. 2011); the framework agreement with Canada (Council



Such agreements are being negotiated in the ‘mixed’ form, that is to say with the participation of the Member States; consequently, the Member States have unanimously approved the opening of the negotiations. It is true that, theoretically, a mere practice cannot derogate from the rules laid down in the Treaties,<sup>172</sup> but, given the plausibility of the legal basis chosen for these agreements, and the general approval they meet with in the institutions and the Member States, this practice is likely not to remain isolated.

The adoption of cross-Treaty *unilateral* acts may seem to be more troublesome because of the *Titanium Dioxide* jurisprudence. CFSP and non-CFSP unilateral acts maintain separate legal bases, which foresee different and potentially incompatible procedures. Whereas the adoption of CFSP acts calls for unanimous voting in the Council acting alone, most TFEU legal bases provide for application of the ordinary legislative procedure, which entails qualified majority voting in the Council and the Parliament’s full participation in the procedure. The ECJ recently affirmed, in a rather succinct way, that “differences of that kind are such as to render those procedures incompatible”.<sup>173</sup> This jurisprudence may seem to suggest that unilateral cross-Treaty acts should be impossible. Such conclusion, however, should be nuanced in light of a broader assessment of the Court’s jurisprudence. Two aspects of the CFSP and non-CFSP procedures seem to be problematic for the Court: the voting method in the Council and the role of the EP. The first issue was found to be unproblematic in the *International Fund for Ireland* case,<sup>174</sup> dealing with the accumulation of two non-CFSP procedures entailing qualified majority voting, on the one hand, and unanimity, on the other. In this judgement, the Court affirmed that “the ‘co-decision’ procedure referred to in Article 251 EC and the requirement that the Council should act unanimously” are compatible.<sup>175</sup> Because of this judgement, the Parliament and the Council subsequently adopted Regulation 1232/2010 “acting in accordance with the ordinary legislative procedure and the requirement for unanimity in the Council provided for in the first sentence of Article 352(1) [TFEU]”.<sup>176</sup> *Mutatis mutandis*, the EP and Council may therefore seem able to adopt a cross-Treaty act in accordance with the ordinary legislative procedure and the requirement for unanimity in the Council provided for in the CFSP Chapter of the TEU (Article 24). The second obstacle to the adoption of a cross-Treaty, i.e. the role of the Parliament, is not more problematic. Such an act may theoretically be adopted by the Council acting alone, but this would nullify the

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doc. 16964/11 and 17037/11, not published, 30 Nov. 2011). Note that the wording of the decisions authorizing the negotiation of these agreements is almost identical. Remarkably, the negotiation of these agreements was authorized through two separate Decisions, adopted by the Council, on behalf of the Union, and by the representatives of Member States, meeting within the Council, on the States’ behalf.

<sup>172</sup> Case 68/86, *United Kingdom v Council*, [1988] ECR 855, para. 24.

<sup>173</sup> Cf. Case C-130/10, *Parliament v Council*, [2012] not published in the ECR yet, par. 47.

<sup>174</sup> Case C-166/07, *Parliament v Council*, [2009] ECR I-7135.

<sup>175</sup> Theoretically, it may be argued that this jurisprudence became obsolete with the entry into force of the Lisbon Treaty, since nowhere in this Treaty is the co-decision procedure with unanimity retained. However, this does not seem to be the case, since when the Court laid down its *International Fund for Ireland* judgement it could not ignore that it would have led to the adoption of an act (Regulation 1232/2010, see *infra*) under the accumulation of Lisbon procedures. For a wider discussion of this issue and its implications, see Corthaut, *Case C-166/07, European Parliament V Council of the European Union, Judgement of the Court of Justice (Grand Chamber) of 3 September 2009* [2009] ECR I-7135, 48 *Common Market Law Review* (2011): 1271-1296.

<sup>176</sup> Regulation of the Parliament and the Council (EU) No 1232/2010 of 15 December 2010, O.J. 2010 L 346/1, preamble.

effect of the non-CFSP legal basis, thus jeopardising the democratic principle the European Union is founded upon.<sup>177</sup> Alternatively, the EP may be fully involved in the procedure, as prescribed by the TFEU legal basis, but this would seem to question the “choice made by the framers of the Treaty of Lisbon conferring a more limited role on the Parliament with regard to the Union’s action under the CFSP.”<sup>178</sup> This second solution should nonetheless be preferred, since an involvement of the EP in the adoption of a CSFP/non-CFSP act does not run counter to the spirit of the Lisbon Treaty, which allows for the intervention of the Parliament in at least one CFSP procedure, that is to say the conclusion of international agreements that relate “principally”, but not “exclusively” to the CFSP. Even more convincingly, the previous jurisprudence of the Court suggests that the use of different legal bases, foreseeing a variable degree of involvement of the EP, should simply lead to the integration of the Parliament in the decision-making process, as required by the most ‘democratic’ procedure. Thus in *Commission v Parliament and Council* (2006) the Court affirmed that Articles 133 and 175(1) TEC could be combined “although the first-mentioned article does not formally provide for the participation of [the Parliament] in the adoption of a measure of the kind at issue in this case, [whereas] the second article, on the other hand, expressly refers to the procedure provided for in Article 251 EC.”<sup>179</sup>

Therefore, it would seem possible for institutions to adopt cross-Treaty acts in the future, by relying on *ad hoc* procedures, generally involving the use of unanimity in the Council and the full intervention of the EP. The shortcoming of this solution is that it may question the institutional balance set in the Treaties, and which the Court sought to defend through its centre of gravity doctrine. Not only would the EP obtain a certain influence on CFSP decision-making but unanimity in the Council would be applied also to sectors covered by the ordinary legislative procedure. The latter issue may render the adoption of external action acts exceedingly difficult, ultimately reducing, rather than improving, the effectiveness and coherence of the external action. Such problem, however, should not be overestimated, since the CFSP/non-CFSP international agreements presently being negotiated actually demonstrate that the mixing of ‘methods’ is not necessarily unworkable in practice. In addition, it cannot be ignored that the Member States may be less than willing to adopt non-CFSP acts having non-secondary CFSP components, as an inflexible protection for institutional balance (and the *Ecovas* jurisprudence) would require. Therefore, the choice may not be between the Community method and the intergovernmental method, but between a ‘sub-optimal’ CFSP/non-CFSP procedure and nothing at all. If political institutions seek cross-Treaty acts because they consider them to be effective, the Court may grant them this opportunity, by interpreting primary law in light of external action coherence, even at the cost of partially sacrificing institutional balance.

The adoption of cross-Treaty instruments, however, may not be entirely effective. On the one hand, institutions may not be comfortable with the ‘reshuffling’ of institutional balance that would be determined by the cumulation of legal bases, as

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<sup>177</sup> Indeed, “participation by the Parliament in the legislative process is the reflection, at Union level, of the fundamental democratic principle that the people should participate in the exercise of power through the intermediary of a representative assembly”, Case C-130/10, cit. *supra*, para. 81. See also the *Titanium dioxide* judgement, Case C-300/89 *Commission v Council* [1991] ECR I-2867, para. 20; see also Case 138/79 *Roquette Frères v Council* [1980] ECR 3333, para. 33.

<sup>178</sup> Case C-130/10, cit. *supra*, para. 82.

<sup>179</sup> Case C-178/03 *Commission v Parliament and Council* [2006] ECR I-107, para. 59. In this sense, see also Case C-155/07 *Parliament v Council* [2008] ECR I-8103, para. 79.

testified by the absence of cross-Treaty unilateral acts at present. On the other hand, and this is the most important issue, the absence of unanimity between the Member States prevents any coordination with, and within, the CFSP framework. It is necessary to assuage the concerns of EU institutions and promote the consensus among the Member States. These functions are performed by the new 'coordinators' of EU external relations.

### 3. *The High Representative as an External Action Coordinator: the "Impossible Job"*

The drafters of the Treaties did not ignore the concerns created by the fragmentation of European foreign policies, but responded to them through institutional engineering, by creating an organ that should organise the activities of other bodies in order to foster coherence,<sup>180</sup> that is to say a 'coordinator' of the external action.

The idea of coordinating decision-makers at political level is not unknown to the EU. Intergovernmental coordination, in particular, has been fostered by several entities since the inception of integration process. This is the function of the Presidencies of intergovernmental bodies, which facilitate cohesion and *consensus* among the representatives of the Member States.<sup>181</sup> Similarly, the COREPER contributes to the efficiency of the Council's decision-making by preparing its works.<sup>182</sup> Even the Commission contributes to *consensus* building, since it mediates between the Member States by proposing measures on which their views may converge.<sup>183</sup> What the EU lacked, before the Lisbon reform, was an entity performing a coordinating role across the intergovernmental and Communitarian frameworks. The Lisbon Treaty sought to fill this gap by providing for the creation of the High Representative of the Union for Foreign Affairs and Security Policy.<sup>184</sup> The High Representative is a Union office, whose creation and main powers are provided for in Article 18 TEU, and who is appointed by the European Council by qualified majority with the agreement of the President of the European

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<sup>180</sup> On the activity of coordination see *inter alia* Mazzaroli et al., *Diritto Amministrativo* (Monduzzi, 2005), p. 397 and Giannini, *Diritto Amministrativo* (Giuffrè, 1993), p. 314.

<sup>181</sup> Article 15(6)(c) TEU explicitly refers to this function with respect to the President of the European Council.

<sup>182</sup> Article 16(7) TEU. See also Article 19(2) of the Rules of procedure of the Council, 2009/937/EU, O.J. 2009 L/35, which asserts that "Coreper shall endeavour to reach agreement at its level to be submitted to the Council for adoption." On the coordinating role of COREPER, see Sauron, "Rapport Introductif", in Constantinesco and Simon (eds.), *Le COREPER dans Tous Ses Etat* (Presses Universitaires de Strasbourg, 2000), pp. 15-21, at pp. 18-19. See also Constantinesco, *Compétences et Pouvoirs Dans Les Communautés Européennes: Contribution A l'Etude de La Nature Juridique Des Communautés* (Librairie Générale de Droit et de Jurisprudence, 1974), pp. 341-347.

<sup>183</sup> Constantinesco, *Compétences et Pouvoirs*, cit. *supra*, pp. 405-407.

<sup>184</sup> The coordinating role of the HR, as a corollary of the abolition of EU pillars, was originally supported by the Rapport du groupe présidé par Jean-Louis Quermonne, Commissariat Général du Plan, see Quermonne, *L'Union Européenne en Quête D'institutions Légitimes et Efficaces* (La Documentation Française, 1999), pp. 99-110. Cf. also Mestre, "La Commission Européenne", in Constantinesco, Gauttier and Michel (eds.), *Le Traité Etablissant une Constitution Pour l'Europe* (Presses Universitaires de Strasbourg, 2005), pp. 161-178, at pp. 168-169: "les constitutionnels ont décidé de fondre les deux fonctions [de Commissaire pour les affaires étrangères et de Haut Représentant] entre les mains d'un seul responsable [...] l'objectif d'une telle fusion réside dans la volonté de rapprocher les positions des Etats membres et de permettre enfin l'émergence d'une politique extérieure européenne propre à l'Union".

Commission. The coordinating function of the HR is testified, firstly, by his/her multiple responsibilities. It is in fact commonly affirmed that the HR has three 'hats'. He/she has two intergovernmental roles: he/she presides over the Foreign Affairs Council and he/she "conducts" the CFSP, since he/she has been conferred initiative, implementation and external representation competences in this field.<sup>185</sup> The HR has also responsibilities in the formerly Communitarian area, since he/she is one of the Vice-Presidents (VP) of the Commission. For the sake of a good understanding of the analysis, it is worth specifying that we refer to the HR as "HR/VP" only when discussing his/her activities in his/her capacity as a Vice-President of the Commission.

The coordinating function of the HR is demonstrated also by the letter of the Treaties, and more precisely by Article 21(3) TEU, according to which "the Council and the Commission, "assisted by the High Representative" shall ensure external action "consistency". A cursory reading of this provision may suggest that the Council and the Commission share the same responsibility to maintain coherence as the HR. A more accurate reading of Article 21(3) TEU, however, clarifies that the roles of these entities are necessarily different. Whereas the Council embodies the intergovernmental approach, and the Commission is closely associated with the Community method, the HR is located somewhere 'in between' the two institutions, as testified by his/her multiple 'hats' and the procedure for his/her appointment. This implies that his/her cooperation with the Council and the Commission is necessarily meant to bridge the gap between the activities of the Institutions.<sup>186</sup>

Such reading is further supported by Article 18(4) TEU, which asserts that the HR is "responsible within the Commission for responsibilities incumbent on it in external relations and for coordinating other aspects of the Union's external action". In other terms, the HR, in his/her capacity as a Commission VP, should also *coordinate* the activities of the Commission with the aspects of external relations that are not "incumbent" on the latter (including the CFSP). The coordinating function of the HR is further confirmed by his/her role in intergovernmental frameworks. The coordinating duties of the HR are implicit in the role of President of a Council formation, who must facilitate cohesion and consensus among the representatives of the Member States, as noted above. Explicit references to the HR's coordinating function in the intergovernmental field are also found in provisions dealing with specific issues. According to Article 32 TEU, the HR and the Ministers for Foreign Affairs of the Member States should coordinate their activities in the CFSP. Article 34 TEU, furthermore, asserts that the HR must "organise th[e] coordination" of the Member States in international organisations. Article 43(2), finally, affirms that the HR ensures "coordination" of the civilian and military aspects of crisis management.

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<sup>185</sup> As it is well known, the Council has a double nature, since "c'est d'une part le lieu de rencontre des intérêts étatiques et, d'autre part, un organe intégré dans le système institutionnel des Communautés", Constantinesco, *Compétences et Pouvoirs*, cit. *supra*, p. 308.

<sup>186</sup> The Commission supported this view as early as in 2003, when it affirmed that the HR/VP's functions is to improve "the consistency of the Union's external action in all fields, regardless of the decision-making procedure provided for in the Constitution", COM(2003) 548 final, *A constitution for the Union*, para. 18. A similar opinion was expressed by Barnier and Vitorino in their contribution to the European Convention on the "Joint External Action Service", p. 3: "the point of abandoning the pillared structure of the existing Treaties, and creating a post of Foreign Minister, is to allow the European Union to pursue a genuinely coherent foreign policy". In this sense, see also Franklin, op. cit., p. 76.

The protean role of the HR may seem an absolute innovation of the recent reform, especially in light of the HR's office as it previously existed. Before the entry into force of the Lisbon Treaty, the HR merely assisted the Council in the CFSP area, and acted externally only on its behalf and at the request of the Rotating Presidency.<sup>187</sup> A closer investigation of the new HR's duties, however, reveals that this office is not entirely new, in so far as it constitutes an attempt at 'importing' the figure of the Minister for Foreign Affairs in the Union framework. It is well known that the Ministers for Foreign Affairs of sovereign States are primarily tasked with the coordination of the external activities of their Countries.<sup>188</sup> They perform this function through their responsibilities in foreign affairs *stricto sensu*, as well as through the oversight of the external activities of the government as a whole. The Constitutional Treaty sought to insert this figure in EU law by introducing, in Article I-28, the Union Minister for Foreign Affairs. The Lisbon Treaty modified the *nomen* of the Minister, for reasons of political opportunity, but maintained its powers intact.

The figure of the High Representative, therefore, is not innovative *per se*, but rather because of the legal constraints it is subject to. Since external action competences are divided among the Member States and the Union, and between CFSP and non-CFSP sectors, there is no 'government' in which the HR may coordinate the entirety of European foreign policies. The activity of the HR must therefore span across the activities of the Member States and those of the Union, in both CFSP and non-CFSP areas.

The peculiarities of the EU render the activity of the HR, as a *sui generis* Minister for Foreign Affairs, difficult to perform in practice. In the first place, the HR may be contemporarily subject to political pressures in opposing directions. The Ministers for Foreign Affairs of States are part of a government, where priorities can be set in a centralised manner, ultimately by the Head of Government or Head of State. The HR is in a more delicate position: whenever the interests of the Member States collide with those of European integration, the HR must strike a balance between the 'Communitarian' approach that predominates in the Commission and the intergovernmental priorities he/she is sensitive to because of his/her intergovernmental 'hats' (in the CFSP area and within the FAC). To make matters worse, the recent creation of the post of High Representative renders the boundaries of his/her attributions blurred, thus potentially engendering numerous controversies with both the Member States and Union institutions (and namely the Commission), especially because of the unstable HR's balance across the intergovernmental and 'Communitarian' fields.

Secondly, the HR does not have the resources to perform all his/her tasks at once. The Ministers for Foreign Affairs of sovereign States operate within legal and political frameworks that have been evolving and adjusting for centuries, thus ensuring the feasibility of the Ministers' tasks. The HR's role, on the contrary, has not been tested yet, and the multitude of his/her functions does not militate in favour of its sustainability. Not only does the HR have to coordinate the activities of its own organisation (the Union), but he/she must promote synergy at another level (between the Member States). The multitude of the HR's activities is rendered more

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<sup>187</sup> See Article 18, 26, 27d,

<sup>188</sup> On the role of the Minister for Foreign Affairs and its ministry, see Decaux, "La Réforme du Ministère Français Des Affaires Etrangères", 25 *Annuaire Français du Droit International* (1979): 792-805 and Outrey, "Histoire et principes de l'administration française des Affaires Etrangères, 2 *Revue française de science politique* (1953): 298-318.

problematic by the difficulty the HR encounters in delegating his/her powers. While the Treaties do not explicitly provide for any such delegation, an established jurisprudence of the Court explicitly excludes the possibility for Union bodies to delegate the exercise of discretionary powers.<sup>189</sup>

It is no wonder, therefore, that the HR's job has been termed "impossible".<sup>190</sup> Like national Ministers for Foreign Affairs, however, the HR is assisted by a bureaucracy, the European External Action Service, which may render his/her coordination objective more attainable in practice.

#### 4. *The Setting up of the European External Action Service: Implementing the 'Union Method'?*

The creation of a 'Ministry of Foreign Affairs', or 'diplomatic service', of the European Union was one of the major novelties discussed in the European Convention. If the general purpose of the European External Action Service (EEAS) was rather clear, i.e. assisting the triple-hatted HR/VP, its nature was subject to debate. Some participants argued in favour of its integration within the structure of the Commission,<sup>191</sup> but this view did not prevail. The Constitution provided for the creation of the Service in Article III-197(3), which belonged to the CFSP Chapter, thus suggesting a close link between the Service and this policy. This provision was quite obscure, since it merely stated that "in fulfilling his or her mandate, the Union Minister for Foreign Affairs shall be assisted by a European External Action Service." (Article III-197(3)).<sup>192</sup> Such vagueness was probably intended, since, as the Commission later affirmed, the way the Service would have been set up was "essentially of an administrative nature and should therefore not be regulated in the Constitution."<sup>193</sup> The Joint Paper presented by the Commission and the High Representative/Secretary of the Council General Secretariat in 2005 did not enter into the details of the issue either.<sup>194</sup> The Member States, at the time, were only able

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<sup>189</sup> Case 9-56, *Meroni v High Authority*, [1958] ECR English special edition 133.

<sup>190</sup> See Schmid, *The Deputisation of the High Representative/Vice-President of the Commission: Making the Impossible Job Work* (College of Europe, 2012); Avery, "Europe's Future Foreign Service", 43 *The International Spectator* (2008): 29-41., at p. 32; Wouters, Coppens and Meester, "The European Union's External Relations After the Lisbon Treaty", in Griller and Ziller (eds.), *The Lisbon Treaty: EU Constitutionalism Without a Constitutional Treaty?* (Springer, 2008), pp. 144-198, p. 155; Missiroli, "Solana Leaves Ashton Impossible Job Description", Euractiv, 10 December 2009, retrieved 18 January 2013, <http://www.euractiv.com/future-eu/solana-leaves-ashton-impossible-news-223243>.

<sup>191</sup> See, e.g., the suggestion for Amendment of Article I-19, by Brok et al., according to which the Foreign Minister should have been "supported by a single administration within the Commission including officials from the relevant units from the General Secretariat of the Council and foreign ministries of the Member States". See also the suggestion for Amendment of Article I-19 by Barnier, Vitorino, O'Sullivan and Ponzano, who held that the Foreign Minister should have been "supported by an administration, which comprises the delegations of the Union in third countries and to international organisations and which forms part of the services of the Commission."

<sup>192</sup> Even the Declaration on the creation of a European External Action Service did not clarify the Service's position, although it suggested its 'inter-institutional' characterisation, since it affirmed that the Service should have been "composed of officials from relevant departments of the General Secretariat of the Council of Ministers and of the Commission and staff seconded from national diplomatic services."

<sup>193</sup> COM(2003) 548 final, cit. *supra*, para 19.

<sup>194</sup> Commission and High Representative, Issue paper on the European External Action Service, Annex II to Council doc. 9956/05, para 10: "the question arises as to whether this should be an

to agree on the fact that the EEAS would have had a "*sui generis*" nature: it would not have been a new "institution", but a service under the authority of the Foreign Minister, "with close links to both the Council and the Commission". The nature of those links was left unaddressed.<sup>195</sup>

The Lisbon Treaty did not innovate significantly with respect to the Constitution. Article 27(3) TEU, which substitutes Article III-197(3), is similarly worded and located in the CFSP Chapter of the TEU. Article 27(3) differs from its predecessor only in two respects. Firstly, it affirms that the Service "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." This provision, which is modelled on a declaration annexed to the Constitution, vaguely suggests that the EEAS should have inter-institutional nature and should be tied, to a certain extent, to the Member States, but it does not provide for any decisive evidence in respect of the EEAS' nature. Secondly, and most importantly, Article 27(3) TEU provides for the procedure for setting up the Service: "the organisation and functioning of the European External Action Service shall be established by a decision of the Council. The Council shall act on a proposal from the High Representative after consulting the European Parliament and after obtaining the consent of the Commission."

It is on the basis of this provision that the High Representative presented the Council with a proposal on the establishment of the EEAS in March 2010.<sup>196</sup> This proposal partially clarified the position of the EEAS, as "a functionally autonomous body of the European Union, separate from the Commission and the General Secretariat of the Council".<sup>197</sup> The Parliament did not agree with this aspect of the Proposal, since it considered that the EEAS should have been incorporated into the Commission's administrative structure,<sup>198</sup> but it did not try to obtain its modification.<sup>199</sup> The Commission and the Council eventually endorsed the proposal of the HR, which was finally inserted in Article 1(2) of Decision 2010/427/EU establishing the organisation and functioning of the European External Action Service (EEAS Decision).<sup>200</sup> As a consequence, at the beginning of 2011 numerous departments of the Council (DG E, crisis management, policy unit, staff in secondment to Special Representatives) and the Commission (DG RELEX, external service and part of DG DEV) were merged into the new EEAS,<sup>201</sup> together with a number of national diplomats seconded to the Service.

The relation between the EEAS and the other entities that manage European foreign policies, however, remains far from clear. Is the EEAS a mere service of the HR? How does it relate to Union institutions, and particularly to the Commission and the Council, and their services? And how does it interact with the Member

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autonomous service, neither in the Commission nor in the CGS, or whether it should be partly attached to either or both."

<sup>195</sup> Council doc. 9956/05, para 6.

<sup>196</sup> High Representative, Draft Council decision establishing the organisation and functioning of the European External Action Service, Council doc. 8029/10, 25 March 2010.

<sup>197</sup> *Id.*, Article 1(2).

<sup>198</sup> For the position of the Parliament, see the EP Resolution on the institutional aspects of setting up the European External Action Service, 2009/2133(INI), 22 October 2009, para 7.

<sup>199</sup> See European Parliament legislative resolution of 8 July 2010 on the proposal for a Council decision establishing the organisation and functioning of the European External Action Service, O.J. 2011 C 351.

<sup>200</sup> O.J. 2010 L 201/30.

<sup>201</sup> *Id.*, Annex.

States? In other words, does the EEAS represent "a logical extension of the *acquis communautaire* in the sphere of the Union's external relations"<sup>202</sup>, is it the *longa manus* of the intergovernmental method in the external action, or does it truly embody the 'Union method' in foreign affairs? The next Chapter explores these questions, and it hopefully identifies the EEAS' position *vis à vis* EU Institutions and Member States. It may be anticipated, however, that the analysis will not be sufficient to determine the nature of the Service. Indeed, the relation between the EEAS and other European actors is primarily functional, in so far as, being a *service*, the EEAS performs *services* for them. The nature of the EEAS cannot therefore be satisfactorily understood without investigating its tasks in detail.

The functions of the European External Action Service have never been entirely clear. To be sure, its role as an assistant to the High Representative was never questioned. It was generally believed, moreover, that the EEAS should coordinate the external action, in order to enhance its coherence.<sup>203</sup> The most authoritative assertion in this sense probably emanated from the European Council, which affirmed that "the European External Action Service will be a crucial tool in support of the efforts towards enhancing the European Union's external policy. At service level, it will, under the authority of the High Representative, provide support to the European Council, the Council and the Commission concerning the strategic overview and coordination necessary to ensure the *coherence* of the European Union's external action as a whole."<sup>204</sup> Apart from these generic considerations, however, there was little consensus on the EEAS' role in policy management. At one extreme, some Member States considered that the EEAS' activities should have encompassed also some non-CFSP policies, like enlargement, neighbourhood and development (but not trade).<sup>205</sup> At the other extreme, the EP argued that the integrity of Community policies with an external dimension should have been preserved,<sup>206</sup> and the Commission should have been responsible for their initiative and implementation, in accordance with Article 17 TEU. Also the issue of external representation raised some doubts. In particular, it was soon clear that Union Delegations should have been placed under the authority of the High Representative<sup>207</sup>, and would have consequently become part of the EEAS.<sup>208</sup>

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<sup>202</sup> European Parliament legislative resolution of 8 July 2010 on the proposal for a Council decision establishing the organisation and functioning of the European External Action Service, cit. *supra*, preamble.

<sup>203</sup> See Commission and High Representative, Issue paper on the European External Action Service, cit. *supra*, para 7. See also the EP Resolution on the institutional aspects of setting up the European External Action Service, cit. *supra*, preamble, letter J, according to which: "whereas after the entry into force of the Treaty of Lisbon the VP/HR will be responsible for the coherence of the Union's external action; whereas, in keeping with that task, the VP/HR will, in his or her capacity as the Commission's Vice-President, exercise the Commission's external relations responsibilities and, at the same time, implement the CFSP as instructed by the Council ('double hatting'); whereas the VP/HR will make use of the EEAS [...]"

<sup>204</sup> European Council conclusions, 16 September 2010, EUCO 21/1/10 REV 1, Annex I para f, (emphasis added).

<sup>205</sup> Commission and High Representative, Issue paper on the European External Action Service, cit. *supra*, para 8.

<sup>206</sup> EP Resolution on the institutional aspects of setting up the European External Action Service, cit. *supra*, Article 6(c).

<sup>207</sup> Cf. Article III-230(2) of the Constitutional Treaty, according to which "Union delegations shall *operate* under the authority of the Union Minister for Foreign Affairs" and Article 221(2) TFEU, which affirms that "Union delegations shall be *placed* under the authority of the High Representative" (emphases added).



Nonetheless, it was not clear whether this implied that all staff working in the Delegations would have needed to be members of the EEAS,<sup>209</sup> or they could also be "specialist advisers from Commission Directorates-General".<sup>210</sup>

Both these issues were addressed in the HR's proposal for a EEAS Decision. According to this document, the EEAS should have had the function of supporting the HR in all his/her functions, that is to say as CFSP office, president of the FAC and Commission VP. In addition, the Service would have led and partially staffed Union Delegations, which would have however maintained also Commission staff. Finally, the Service was granted a primary role in the management of certain development cooperation and neighbourhood programmes. This was probably the most important cause of disagreement between the Parliament and the other political institutions. Although the procedure set in Article 27(3) TEU did not require the Parliament's assent, the EP sought to obtain this power *de facto*, by threatening to withdraw its approval of the amendments to the staff and budget implementation regulations that would have been necessary for the EEAS to initiate its operations. After a 'quadrilogue' between the HR, the Council, the Commission and the EP, a final compromise on the EEAS Decision was reached in June 2010, which led to the adoption of the Decision on the following month. The reach of the EEAS' policy management powers, however, remained largely untouched, and the Service maintains a primary role in the management of development and neighbourhood programmes, as well as authority on EU Delegations.<sup>211</sup>

The precise division of labour between the EEAS and other bodies in the implementation of EU policies and the external representation of the Union remains fuzzy. To what extent does the EEAS interfere with the Commission's prerogatives in the field of policy implementation? Does the EEAS play a major role in the decision-making within the Council? Which rationale lies behind the division of labour between the EEAS and the services of other institutions? Which powers does the EEAS' authority on Union Delegations entail? In other words, does the EEAS have the capability to ensure synergy between European external actions and unity in international representation? These issues are investigated in Chapters 3 and 4, in order to verify whether the Service can truly enforce the Union method and promote coherence in European foreign policy.

## CONCLUSION OF CHAPTER 1

The purpose of this chapter was to determine the legal content of the principle of external action consistency/coherence, and the instruments available to implement it. A survey of the pre-Lisbon practice, as well as of the structure of the Lisbon Treaty, demonstrated that this principle should be interpreted extensively, as a legal requirement of coordination in the implementation of European foreign

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<sup>208</sup> See Commission and High Representative, Issue paper on the European External Action Service, cit. *supra*, para 11, according to which "there is broad consensus that the existing network of Commission delegations should become the future Union Delegations, and that as a consequence of the provision of the Constitutional treaty which places them under the authority of the Foreign Minister, they should be an integral part of the EEAS".

<sup>209</sup> *Id.*

<sup>210</sup> EP Resolution on the institutional aspects of setting up the European External Action Service, cit. *supra*, Article 6(e).

<sup>211</sup> See Article 5 and 9 of the EEAS Decision.

policies and unity in the EU's international representation. The implementation of this principle can be performed only through the so-called 'Union method', that is to say political coordination between European decision-makers, a task which the Treaties entrust upon the High Representative. Given the limits of the HR's office, however, his/her coordinating tasks are performed in practice mainly by the European External Action Service. The remainder of this work seeks to shed light on the peculiar aspects of the EEAS by relying on the findings of this chapter. In an analytical perspective, it is hypothesised that the 'anomalous' features of the EEAS can be explained by considering that the legislator interpreted the Treaties in light of external action coherence. In a normative viewpoint, it is anticipated that the provisions concerning the EEAS *should* be interpreted by bearing this principle in mind, also when the legislator failed to do so.

## CHAPTER 2

### EMBODYING THE UNION

#### METHOD: RELATIONS BETWEEN

#### THE EEAS AND OTHER

#### POLICY-MAKERS

The first chapter suggested that the EEAS is functional to implement the Union method for the purpose of enforcing external action coherence. It may be hypothesised, therefore, that the legal nature of the EEAS should be functional to bridge the Community and intergovernmental approaches to European foreign policy. This chapter seeks to demonstrate that the EEAS embodies the 'Union method', since it serves the coordinator of the external action (i.e. the HR), but it is partially accountable also to the entities that express the intergovernmental and Communitarian approaches. Section 1 elucidates the relation between the EEAS and the HR, by defining the former as a service capable of acting autonomously in 'administrative' fields, but dependent on the HR for operative purposes. Section 2 seeks to demonstrate that such apparently bizarre characterisation of the Service is functional to promote the development of close ties between the EEAS and the exponents of both the Community and intergovernmental methods.

#### SECTION 1 – THE EEAS AS AN ADMINISTRATIVELY AUTONOMOUS SERVICE OF THE HIGH REPRESENTATIVE

The Treaties only mention the European External Action Service in Article 27(3) TEU, which affirms that in fulfilling his mandate, the High Representative “is assisted by a European External Action Service”. The content of this provision is reflected in Article 2 of the EEAS Decision, which asserts that the EEAS supports the High Representative in fulfilling his/her mandates and is placed under the latter’s authority.<sup>212</sup> These provisions cannot be interpreted easily, since the traditional categories of national or EU administrative law are transparently inadequate to grasp the novelties of the EEAS. The Service is indeed a one-of-a-kind entity, which has a 'dual' identity, since it is autonomous from the HR in administrative matters, but depends on him/her for operative purposes. This section is divided into ten paragraphs. Paragraph 1 shows that that the EEAS is an entity administratively autonomous from the HR. The second paragraph intends to demonstrate that the EEAS, given its administrative autonomy, functions as an institution and a service at once. We subsequently turn, in the third paragraph, to

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<sup>212</sup> Article 1(3) and 2(1).

define the formal manifestations of the EEAS' autonomy, that is to say legal personality and legal capacity. The remainder of the section delimits the boundaries of the EEAS' legal capacity. In the fourth paragraph we turn to the EEAS' capacity to adopt legal acts. In the fifth one we address the EEAS' capacity to cooperate with other EU bodies and in the sixth paragraph we investigate the implementation of cooperation, through an analysis of the EEAS' capacity to enter into legally binding instruments with other EU bodies. The last paragraphs address the EEAS standing before the ECJ, both as a defendant and as a plaintiff

### *1. The EEAS as an Entity Administratively Autonomous from the High Representative*

This paragraph intends to show that the EEAS is a service of the HR. Consequently, it is not completely independent and it does not participate in its name and on its own behalf in the political life of the Union. The EEAS nonetheless enjoys autonomy from its master with respect to its internal management, and is consequently conceivable as a separate body, albeit exclusively in relation to administrative issues. This can be demonstrated by comparing the autonomy of the EEAS to the autonomy of other Union offices and bodies.

Union offices and bodies generally enjoy ample autonomy, in six perspectives. In the first place, they are endowed with autonomous competences; therefore, they participate in the division of powers set by the Treaties. Secondly, and as a corollary of their competences, most Union offices and bodies autonomously determine their political line. To be sure, some offices and bodies are accountable to others and all bodies follow the general political directions set by the European Council.<sup>213</sup> However, Union offices and bodies usually have margin of manoeuvre in the performance of their tasks. Thirdly, most Union bodies can autonomously adopt the rules that govern their functioning.<sup>214</sup> Such form of autonomy is most evident in the case of the Council, since Article 240(2) TFEU explicitly affirms that the Council decides on the organisation of its General Secretariat. The Treaties also protect the autonomy of the Commission, since Article 249(1) TFEU states that the Commission adopts its Rules of Procedure so as to ensure that its departments operate. Similarly, the other EU institutions, as well as the European Economic and Social Committee (EESC) and the Committee of the Regions (CoR), adopt their rules of procedure.<sup>215</sup> Fourthly, Union bodies, and, in particular institutions, determine the provisions that govern access to the documents they possess, consistently with Article 15 TFEU and secondary law; they also decide whether to grant access to specific documents. Fifthly, most EU bodies and offices autonomously manage their internal budget. Although the Commission generally implements the EU budget ex Article 317 TFEU, Regulation 1605/2002 (Financial Regulation) affirms that the Commission confers on other bodies (including institutions, the EESC, the CoR, the European Ombudsman and the European Data Protection Supervisor) the requisite powers for the implementation of the sections

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<sup>213</sup> Article 15(1) TEU.

<sup>214</sup> For a discussion of organisational autonomy, see Roland, *Le Triangle Décisionnel Communautaire à L'aune de La Théorie de La Séparation Des Pouvoirs: Recherches sur La Distribution Des Pouvoirs Législatif et Exécutif dans La Communauté* (Bruylant, 2008), pp. 160 ff.

<sup>215</sup> Article 232, 235(3), 253, 287 TFEU and Article 12(3) of the ECB Statute, respectively. Also agencies adopt their rules of procedure, as suggested by Article 15(3) TFEU.

of the budget relating to them.<sup>216</sup> In practice, these offices and bodies authorise, through agents called “authorising officers by delegation”,<sup>217</sup> the disbursement of the funds related to their internal functioning. Sixthly, according to the Staff Regulations<sup>218</sup> most Union bodies, including institutions, the EESC, the CoR, the European Ombudsman, and the European Data Protection Supervisor, are capable of entrusting an agent of theirs (the “appointing authority”) with the power to appoint, promote or transfer officials within the ranks of their respective administrations.<sup>219</sup> In addition, these bodies hold the exclusive power to issue instructions for their agents.<sup>220</sup>

The EEAS may appear not to have any autonomy from the HR. Provided that the Service's mandate consists of assisting the HR, the EEAS does not have competences of its own, but it exercises those of its master. This implies that the HR has authority on the Service and can consequently exercise the powers typical of entities heading public administrations. The authority of the HR extends firstly to 'operative' issues, since he/she can set the political line the Service must follow and, for this purpose, issue instructions to the EEAS staff. The HR has also powers relating to administrative issues: he/she can determine the structure of the EEAS<sup>221</sup> as well as the rules that concern its administrative budget and staff;<sup>222</sup> moreover, he/she authorises the expenses of the Service, as its ‘authorising officer’, and she manages its staff, in his/her capacity as ‘appointing authority’ of the Service.<sup>223</sup>

A more careful analysis of the EEAS’ prerogatives, nonetheless, shows that the Service has some autonomy from its master in respect of 'administrative' issues, that is to say access to documents, staff management and budget implementation. The EEAS enjoys relevant autonomy with respect to access to its documents, since the EEAS Decision enabled the Service to grant, or refuse, access to its own documents.<sup>224</sup> More interestingly, the EEAS is autonomous also with respect to administrative budget implementation and staff management. This is demonstrated by the fact that, in a substantive perspective, budget implementation and staff management decisions are often taken by EEAS, and not by the HR: provided that the latter can hardly find the time and resources to perform political tasks, he/she is most unlikely to interfere with ‘bureaucratic’ issues.<sup>225</sup> The EEAS' autonomy in

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<sup>216</sup> Council Regulation 1605/2002/EC/Euratom, of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities, O.J. 2002 L 248/1–48.

<sup>217</sup> *Id.*, Article 59.

<sup>218</sup> Regulation 259/68/Euratom/ECSC/EEC of the Council of 29 February 1968 laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Communities and instituting special measures temporarily applicable to officials of the Commission, O.J. 1968 L 56/1–7, ECR English special edition: Series I Chapter 1968(II) p. 30 as lastly amended by Regulation 1080/2010 of the European Parliament and of the Council of 24 November 2010, O.J. L 311/1–8.

<sup>219</sup> *Id.*, Article 2.

<sup>220</sup> *Id.*, Article 11.

<sup>221</sup> Notice however that the overarching structure of the EEAS is contained in the EEAS Decision, according to which the Service is managed by an executive secretary-general and it is divided in Union Delegations and a central administration. The latter is further divided in directorates-general and administrative departments, see Articles 1 and 4.

<sup>222</sup> EEAS Decision, Article 8(1) and 6(5).

<sup>223</sup> Decision of the High Representative on the internal rules on the implementation of the budget of the European External Action Service, PROC HR(2011) 001, 31 January 2011, not published in the O.J., Article 3; EEAS Decision Article 6(5), Staff regulations Article 7.

<sup>224</sup> See Article 11.

<sup>225</sup> Admittedly, in a relatively few cases this consideration may not apply, since it is presumable that the HR directly oversees the appointment of the EEAS' top management. According to Blockmans

respect of staff management and budget implementation becomes more evident in a formal perspective, since, for the purpose of the financial regulation and staff regulations, the EEAS is considered as an institution. Therefore it has its own budget and it entertains direct relations with its officers. The HR simply acts as the authorising officer and appointing authority *of the EEAS*: he/she does not operate in his/her capacity as High Representative, but rather in his/her capacity as *EEAS* top officer (i.e. as an organ of the EEAS).

Therefore, the EEAS has decisional autonomy with respect to access to documents, administrative budget and staff management. This form of autonomy may be labelled as 'administrative'.<sup>226</sup> Consequently, we provisionally term the EEAS as an 'administratively autonomous entity'. The next paragraph clarifies the EEAS' status, and its consequences, by comparing it to other EU bodies.

## 2. A truly Sui Generis Service?

The administrative autonomy of the EEAS suggests that the Service is a *sui generis* entity, as several practitioners and commentators have held in the last years. Such labelling, however, is of scarce usefulness for the legal analysis, since it does not clarify the role the EEAS plays in the architecture of the external action. A closer inspection of the analogies and differences between the EEAS and other EU bodies may clarify the status and purpose of the Service. Since the EEAS is neither a legislative nor a jurisdictional body, such comparison should concern entities performing executive tasks.<sup>227</sup>

It may be excluded that the EEAS should be characterised as an institution. In a formal perspective, it is easy to notice that institutions are set up by the Treaties and they are enumerated by Article 13(1) TEU; since this provision does not mention the EEAS, the Service cannot be an institution. The EEAS is not similar to institutions in a substantive viewpoint either, since it does not have competences of its own. This implies that the EEAS is also different from those EU offices and bodies that are not referred to as "institutions" in the Treaties, but which are conferred competences similar to those of institutions, such as the High Representative.

Moreover, and for partially similar reasons, the EEAS cannot be considered as a body acting upon delegated powers, such as the executive agencies of the Commission.<sup>228</sup> On the one hand, according to the *Meroni* doctrine, such bodies

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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-CEPS-EUI, 2013), p. 41, "those appointments at director level and above require a decision by the High Representative/Vice-President, while those below are delegated".

<sup>226</sup> We intend this adjective to refer to 'administration' *lato sensu*, that is to say the activities of a body established by public law which do not concern operative tasks. The TFEU seems to refer to this notion of 'administration' at least once, in Article 15(3), where it affirms that EU bodies are "subject to this paragraph only when exercising their administrative tasks".

<sup>227</sup> This 'residual approach' to the definition of the EEAS is motivated by that fact that it is easier to delimit the 'judicial power' and the 'legislative power' than the executive power as such, especially in the case of the EU, see Curtin, *Executive Power of the European Union: Law, Practice and Constitutionalism* (Oxford University Press, 2009), and particularly p. 153.

<sup>228</sup> Cf. Council Regulation 58/2003/EC of 16 January 2003, O.J. 2003 L 11/1-8, Article 2(1): "The Commission may decide, after a prior cost-benefit analysis, to set up an executive agency with a view to entrusting it with certain tasks relating to the management of one or more Community programmes. It shall determine the lifetime of the executive agency."

cannot be entrusted with discretionary powers in translating political choices into action; consequently, executive agencies generally manage ‘technical’ aspects, such as the implementation of projects.<sup>229</sup> Differently, the Service may, and indeed should, support the HR also in the exertion of the powers that involve the discretionary determination of a political line.<sup>230</sup> On the other hand, the bodies that exert delegated powers enjoy autonomy in their specific field of intervention: in certain circumstances the Commission may not participate in the adoption of decisions by agencies.<sup>231</sup> Although the EEAS enjoys administrative autonomy, it is not autonomous in ‘operative’ areas, unlike executive agencies.

Finally, the EEAS may be compared to an entity that is functionally attached to an institution, agency, office or body and which is dependent on it, that is to say a “service”. The creation of EU services is explicitly foreseen by the Treaties, according to which in carrying out their missions, the institutions, bodies, offices and agencies of the Union shall have the support of an open, efficient and independent European administration (Article 298(1) TFEU). Given its lack of operational autonomy, and its dependence on the HR, EEAS may be seen as the administration, or service, that supports the HR.<sup>232</sup> The analogy between the EEAS and other services, however, is incomplete, in so far as the former has administrative autonomy, while the latter do not.

Hence, we may characterise the EEAS in two different ways. For operative purposes, it functions as a *service*. In an administrative viewpoint, it works as an institution. The next paragraphs formalise such duality by investigating the existence, and limits, of the legal personality and capacity of the Service.

### *3. A formal Appraisal of the EEAS’ Autonomy: Legal Personality and Capacity*

In a formal perspective, the autonomy of an organ is expressed by its legal personality and capacity.<sup>233</sup> Legal personality is commonly defined as the quality through which an entity can be subject to rights and obligations. Legal capacity then denotes the scope of its power to be subject to rights and obligations.<sup>234</sup>

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<sup>229</sup> Cf. *Id.*, Article 6.

<sup>230</sup> Cf. Joint Progress Report to the European Council by the Secretary-General/High Representative and the Commission, 9 June 2005, doc. 9956/05, par. 7: “All Member States underlined that the purpose of the service was to assist the Minister in his various functions, including that of Vice-President of the Commission. He *must have the means to shape the agenda, to make proposals, and to ensure overall coherence and consistency*, subject to the relevant treaty provisions” (emphasis added).

<sup>231</sup> Cf. case T-411/06, *Sogelma Srl v European Agency for Reconstruction*, [2008] ECR II-2771, par. 50-51: “it must be pointed out that the EAR is a Community body endowed with legal personality and established by a regulation [...] In the present case, it is the EAR which took the decision to cancel the tender procedure, by virtue of the powers delegated by the Commission in accordance with Regulation No 2667/2000. The Commission played no part in the decision-making process. Accordingly, it is clear that the EAR is the body which enacted the contested measure.”

<sup>232</sup> Such interpretation of the EEAS’ nature appears to be confirmed by a systemic reading of Article 27(3) TEU and 240(2) TFEU: these provisions are formulated in a similar manner, since the former affirms that the HR is assisted by the EEAS, while the latter states that the Council is “assisted by a General Secretariat”, that is to say the service of the Council.

<sup>233</sup> In this sense, see Gautier, “The Reparation For Injuries Case Revisited: the Personality of the European Union”, in *Max Planck Yearbook of United Nations Law* (2000), pp. 331-361, p. 333.

<sup>234</sup> The definitions are taken from Van Vooren, “a Legal-Institutional Perspective on the European External Action Service”, 48 *Common Market Law Review* (2011): 475-502, p. 485; see also, *inter alia*, Smith, “Legal Personality”, 37 *Yale Law Journal* (1928): 283-299; Yasseen, “Création et

It may be excluded that the EEAS should be able to act on the international level in its own capacity, insofar as it is merely an organ of the Union; hence, the EEAS can have neither international legal personality nor international legal capacity. For similar reasons, it may be excluded that the EEAS should have legal personality and capacity in the legal order of the Member States.<sup>235</sup> It may be wondered, however, whether the Service has been granted internal legal personality and capacity by the EU legislator and it consequently exercises it in the legal order of the EU.<sup>236</sup>

The existence of the EEAS' legal personality is demonstrated by its autonomy: being separate from the HR in administrative areas, the Service must be subject of rights and obligations in its own name.<sup>237</sup> The EEAS, for instance, is the entity with which the Service's officers have a contractual relation for the purpose of their professional activity. Similarly, it is the EEAS that is under an obligation to disclose its documents to European citizens and that enters into financial commitments for the purpose of implementing its budget.

The existence of the EEAS' legal personality can be demonstrated also through a parallelism with the international legal personality of international organisations. As affirmed by the International organisation Court Justice (ICJ), in the *Reparation for Injuries* case, the legal personality of an international organisation is demonstrated by the fact that it occupies "a position in certain respects in detachment from its Members."<sup>238</sup> By analogy, the legal personality of a body of an international organisation may be demonstrated by its position in detachment from other organs of that organisation. Since the EEAS is autonomous from the HR, at least for administrative purposes, it should have legal personality. The fact that the EEAS is not *entirely* autonomous, on the other hand, is not significant. International organisations are not completely autonomous either, since, as the ICJ held in 1996, they "are governed by the "principle of speciality", that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them".<sup>239</sup> Since the speciality of international organisations does not question their international personality, the speciality of their organs should not lead to the exclusion of the latter's legal personality either.

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Personnalité Juridique Des Organisations Internationales", in Dupuy (ed.), *Manuel sur Les Organisations Internationales* (Hague Academy of International Law, 1988), pp. 33-56, at p. 43.

<sup>235</sup> According to Article 335 TFEU "In each of the Member States, the *Union* shall enjoy the most extensive legal capacity accorded to legal persons under their laws [...] To this end, the Union shall be *represented* by the Commission. However, the Union shall be *represented* by each of the institutions, by virtue of their administrative autonomy, in matters relating to their respective operation" (emphases added); in other words, the Union has personality in the legal order of Member States, and its bodies function as its organic representative in Member States' legal orders.

<sup>236</sup> Indeed, "la creation des personnes de droit public n'est jamais le résultat de l'initiative privée; c'est l'autorité publique seule qui y procède, Waline, *Droit administratif* (Dalloz, 2010), p. 50.

<sup>237</sup> In this sense, *mutatis mutandis*, see Mazzaroli et al, *op. cit.*, p. 151-152.

<sup>238</sup> *Reparation for injuries suffered in the service of the United Nations*, Advisory Opinion: I.C.J. Reports, 1949, p. 174, at p. 179. Cf. also Yasseen, *op. cit.*, p. 43: "Ce qui caractérise une organisation internationale c'est qu'elle est une association d'Etats qui fait naître une entité distincte, indépendante des Etats qui la composent." On the autonomy and legal personality of the EU (before the Lisbon reform), see also Dehousse and Andoura, "La Personnalité Juridique de l'Union Européenne: Le Débat Qui N'existe Pas", in Franck and Duchenne (eds.), *L'action Extérieure de l'Union Européenne : Role Global, Dimensions Matérielles, Aspects Juridiques, Valeurs*, pp. 229-254, and especially pp. 239-241.

<sup>239</sup> *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion: I.C.J. Reports, 1966, p. 66, at para 25.



The characterisation of the EEAS as a body endowed with legal personality encounters a main logical difficulty. Is it possible to conceive an entity having a 'large' legal personality (the EU) that contains other entities having a 'small' legal personality (the EEAS)? The earlier case law of the ECJ clearly excludes this, since “only the Community has legal personality, and its institutions do not”.<sup>240</sup> This assertion, however, should not be interpreted literally. If legal personality is the quality through which an entity can be subject to rights and obligations, then each and any entity capable of being subject to rights and obligations should be a legal person. There is little doubt that EU institutions fall in this category and this is rendered most evident by the case of sincere cooperation: as the Court held in several instances, Union institutions are “subject to the same mutual duties of sincere cooperation which [...] govern relations between the Member States and the Community institutions.”<sup>241</sup> How could institutions be subject to duties, if they lacked legal personality? And even more convincingly, towards whom these duties should be directed? Denying the legal personality of EU institutions would be tantamount to affirming that an entity representing the Union has a mutual duty of cooperation with another entity representing the Union...thus the Union should be under a duty to cooperate with itself! Provided that the EU's legal order foresees rights and obligations for Union institutions, it must be concluded that the 'large' personality of the EU contains the 'small' personalities of its bodies.

A closer investigation of the ECJ case law shows, in fact, that EU judicial bodies often implied the legal personality of Union institutions. The General Court, for instance, argued that a service cannot be sued because it is attached to an institutions and “it is without legal personality”.<sup>242</sup> More generally, the ECJ and the General Court repeatedly held that provisions that do not concern individuals directly and individually may not be challenged in a direct action “by natural or legal persons other than *Community institutions* and Member States”.<sup>243</sup> Strikingly, the Court held this very opinion in one of the judgements where it allegedly denied the existence of the personality of EU institutions.<sup>244</sup>

If the above considerations suggest that EU institutions should have legal personality, they are not sufficient to demonstrate that a service, such as the EEAS, should be in the same position. As a matter of fact, the services of EU institutions do not have legal personality.<sup>245</sup> A cursory reading of Article 1(2) of the EEAS Decision appears to confirm this, since it asserts that the EEAS is only endowed

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<sup>240</sup> Case 7/56, 3 to 7/57, *Algera and others v Common Assembly of the ECSC*, [1957] ECR English special edition p. 39, at p. 57; see also Joined cases T-177/94 and T-377/94, *Henk Altmann and Margaret Casson v Commission*, [1996] ECR II-2041, par. 150.

<sup>241</sup> Case 230/81, *Luxembourg v European Parliament*, [1983] ECR 255, par. 37; Case 204/86 *Greece v Council* [1988] ECR 5323, par. 16; Case C-65/93 *Parliament v Council* [1995] ECR I-643, par.23.

<sup>242</sup> Case T-309/03 *Camós Grau v Commission* [2006] ECR II-1173, par. 66; in this sense, see also T-264/09 *Technoprocess v Commission and Delegation of the European Union to Morocco*, not published in the ECR, par. 70; case T-395/11, *Elti d.o.o v Commission*, not published in the ECR, par. 36.

<sup>243</sup> Case 92/78, *SpA Simmenthal v Commission*, [1979] ECR 777, par. 40 (emphases added); *Altmann*, cit. *supra*, par. 127; case C-171/00, *Alain Libéros v Commission*, [2002] ECR I-451, par. 32.

<sup>244</sup> *Altmann*, cit. *supra*, par. 127. This apparent inconsistency may be explained by arguing that, rather than excluding the legal *personality* of Union institutions, the ECJ excluded their *capacity* to enter into obligations towards thirds in their own name; this is logical, considering that the Treaties clearly affirm that only the Union is contractually and non-contractually liable towards third subjects.

<sup>245</sup> The situation is not entirely different in the law of the Member States. In France, the ministries lack personality, whereas in Italy their personality is debated, see *inter alia* Mazzaroli et al., op. cit., p. 408.

“with the legal capacity necessary to perform its tasks and attain its objectives”. Legal personality, on the contrary, is never mentioned by the Decision establishing the Service.<sup>246</sup> In theory, such literal interpretation of Article 1(2) may only be accepted under two alternative conditions. In the first place, the EEAS should be able to act in its own name on the legal level, in the areas where it is autonomous, without being able to be subject to rights and obligations. However, this is obviously impossible: once a person’s capacity to enter into legal relations is established, such capacity presupposes the ability of that person of being subject to rights and obligations.<sup>247</sup> Alternatively, the EEAS’ should be able to participate in legal relations without yet having become a party to them,<sup>248</sup> but only as a representative of the HR. This argument cannot be accepted, either, given the EEAS’ administrative autonomy and its consequent capacity to act on its own. It must be concluded, therefore, that the EEAS, like EU institutions, has legal personality because it enjoys a certain autonomy from the HR.

Our view, which derives the legal personality of the EEAS from its autonomy, is reinforced by the recent case law of the General Court. In the *Elti* case (2012), a company governed by Slovenian law tried to challenge an act allegedly adopted by the Delegation of the EU to Montenegro. Union Delegations, after the creation of the EEAS, have an apparently double nature: on the one hand, they represent the EU abroad (Article 221(2) TFEU), while, on the other hand, they are departments of the EEAS.<sup>249</sup> This twofold nature of Delegations was found to be problematic in the *Elti* case. Both the applicant and the defendant accepted that EU’s bodies *locus standi* derives from their legal personality and that the latter is a consequence of their ‘autonomy’ or ‘independence’. While the applicant asserted that Delegations are “independent players having legal personality”<sup>250</sup>, the Delegation held that it did not enjoy “the status of independent body” and did not act as such in the circumstances of the case. Although the EEAS formally did not participate in the proceedings, it inevitably shared the Delegation’s view, for the simple reason that the latter is part of the former. The Court supported the view of the Delegation, by holding that it “is merely a division of [the EEAS], whereas the latter is clearly designated as an *independent* body of the European Union”.<sup>251</sup> This led the Court to conclude that Delegations are attached to the EEAS and are dependent on it, and therefore they have no legal personality (and no *locus standi*). It is only logical to suppose, *a contrario*, that since the EEAS is “independent” it should have legal personality.

Why, then, did the EEAS Decision fail to mention the EEAS’ personality? Arguably, the Council formulated Article 1(2) of the EEAS Decision in a manner that was politically acceptable for the Parliament and the Commission. The former was

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<sup>246</sup> Such reading of Article 1(2) of the EEAS Decision may appear to be further reinforced by the fact that, when the legislator establishes a body endowed with legal personality it generally confers this quality in an explicit manner. On the legal personality of the typical entities set up through secondary legislation, that is to say EU agencies, see Chiti, “An Important Part of the EU’s Institutional Machinery: Features, Problems and Perspectives of European Agencies”, 46 *Common Market Law Review* (2009): 1395-1442.

<sup>247</sup> De Quadros, *Droit de l’Union Européenne: droit constitutionnel et administratif de l’Union Européenne* (Bruylant, 2008), p. 51.

<sup>248</sup> Cf., *mutatis mutandis*, Smith, *op. cit.*, p. 283.

<sup>249</sup> EEAS Decision, Article 1(4): “The EEAS shall be made up of a central administration and of the Union Delegations”. The implications of this duality in respect of institutional balance are investigated in chapter 4.

<sup>250</sup> *Elti*, *cit. supra*, para 33.

<sup>251</sup> *Id.*, para 35 (emphasis added).

particularly vocal in calling for the EEAS to be “incorporated, in organisational and budgetary terms, in the Commission's staff structure”.<sup>252</sup> The lack of an explicit recognition of the EEAS’ legal personality may have been functional to reduce the apparent ‘distinctiveness’ of the EEAS, in order to appease the Parliament.<sup>253</sup>

The acknowledgement of the legal personality of the EEAS has symbolic importance, but it ultimately holds scarce relevance for the determination of the Service's position in the architecture of the external action. Legal personality, indeed, does not imply full legal capacity. All legal persons, including Union bodies, have limited legal capacity, instrumentally to the performance of their functions, according to the already cited principle of specialty.<sup>254</sup> The EEAS makes no exception to the rule, as testified by the latter of Article 1(2) of the EEAS Decision, which, somewhat tautologically, states that the Service has the legal capacity necessary to perform its tasks. Therefore, the remainder of this chapter seeks to elucidate the limits of the legal capacity of the EEAS.

#### 4. EEAS' Capacity to Adopt Unilateral Acts

The partial autonomy of the EEAS and its legal personality are first reflected in its capacity to adopt legal acts. To be sure, the Service cannot adopt acts with respect to the operative areas. Although the Service participates in the preparation of legal acts, under the authority of the High Representative (and other entities) and it influences the content of such acts, the final decision as to their adoption remains with the HR (or any other institution, body or office that is conferred the relevant power by the Treaties). The recent practice supports this conclusion: acts having their bases in the HR or Commission’s powers are constantly adopted by the HR and the Commission, respectively, even if they are prepared by the EEAS, or by the latter and other services. By way of analogy with COREPER, therefore, the EEAS may be considered as an auxiliary body of the HR, for whom it carries out preparation and implementation work.<sup>255</sup>

Nonetheless, the EEAS’ administrative autonomy suggests that the Service may adopt at least a few acts. In order to evaluate EEAS’ capacity to adopt legal acts it is not sufficient to consider whether the Service actually adopts acts in its own name: in light of the ECJ jurisprudence, an act can only be attributed to a EU body if, having regard to its content and all the circumstances in which it was adopted, the act in question is not in reality a decision of another office or body.<sup>256</sup> Therefore, we address both the formal and substantive authorship of the acts the Service may adopt.

In the first place, the EEAS adopts acts whereby it grants, or denies, access to documents in its possession. As noticed above, Article 11(1) of the EEAS Decision asserts that the EEAS shall apply the rules laid down in Regulation 1049/2001/EC

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<sup>252</sup> European Parliament resolution on the institutional aspects of the European External Action Service, of 26 May 2005, O.J. 2006 C 117 E/232-233, par. 1. Notice that the ‘non-paper’ by MEPs Brok and Elmar on the EEAS, of 18 March 2010, held that “the EEAS should be an autonomous service that: is in administrative, organisational and budgetary terms linked to the Commission”.

<sup>253</sup> Cf. Van Vooren, *op. cit.*, p. 485.

<sup>254</sup> Cf. Douence, “La Spécialité Des Personnes Publiques”, *Revue de Droit Publique* (1972): 762; De Quadros, *op. cit.*, p. 160.

<sup>255</sup> See C-25/94, *Commission v. Council*, [1996] ECR I-1469, par. 26.

<sup>256</sup> Cf., *mutatis mutandis*, joined cases C-181/91 and C-248/91, *Parliament v Council*, [1993] ECR I-3685, par. 14.

regarding public access to documents.<sup>257</sup> Article 11(1) of the EEAS Decision was implemented through the HR Decision governing access to documents in possession of the EEAS.<sup>258</sup> This act demonstrates the EEAS' capacity to adopt acts relating to access to documents: according to its Article 3(1) "the EEAS shall answer initial and confirmatory applications"; in addition, Article 4(2) specifies that even 'difficult' cases are ultimately decided upon by EEAS Officers. The HR, on the contrary, appears not to play any role in the procedure.<sup>259</sup>

The recent practice confirms this interpretation. The EEAS generally grants or denies access to documents through a communication of its own department responsible for this activity, in the form of an email or letter. A practical example vividly elucidates such practice: the EEAS recently denied access to two internal documents through an e-mail signed by the Head of a EEAS department, under the heading "European External Action Service".<sup>260</sup> The letter specifies that the adoption of the decision not to grant access to the documents was preceded by "in-depth consultations concerning the releasability of such documents"; nothing in the letter suggests that those consultations involved entities other than EEAS departments. Hence, this act was both formally and substantively adopted by the EEAS.

Secondly, the EEAS adopts acts concerning the implementation of its administrative budget. As demonstrated above, the EEAS is treated as an institution with respect to this issue. Even if the High Representative holds ultimate authority in respect of the implementation of the EEAS' budget, he/she should exercise this authority *qua* EEAS organ. This is testified by an analogy with the authorising officers of other Union bodies: the latter do not adopt act in their own capacity, but in the name of their body; similarly, the acts that concern the implementation of the EEAS' budget should be adopted by the EEAS, under the (political) authority of the HR. These acts are likely to be EEAS acts also in substantive terms, in so far as the High Representative can hardly screen the disbursement of all EEAS funds.<sup>261</sup>

Thirdly, the EEAS adopts acts linked to the management of its staff. As demonstrated above, the HR acts as the appointing authority of the EEAS and he/she delegates this power to EEAS officers. However, as in the case of financial

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<sup>257</sup> Regulation 1049/2001/EC of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, O.J. 2001 L 145/43-48.

<sup>258</sup> Decision of the High Representative of the Union for Foreign Affairs and Security Policy of 19 July 2011 on the rules regarding access to documents, O.J. 2011 C 243/16-18.

<sup>259</sup> Indeed, even the "answers to confirmatory applications shall be decided upon by the Chief Operating Officer, on the advice of the Access to Documents Coordinator", see Decision of the High Representative of the Union for Foreign Affairs and Security Policy of 19 July 2011 on the rules regarding access to documents, *cit. supra*, Article 4(2).

<sup>260</sup> Letter by Cesare Onestini, EEAS Corporate Board Secretariat, to the author, of 13 August 2012, EEAS CBS D(2012), Ares document 1139689.

<sup>261</sup> The relevance of this aspect is currently limited to the *cuisine interne* of the EEAS, since its administrative budget truly concerns internal issues. However, the recent history shows that the administrative budget of Union institutions and bodies can be used as a means to finance operative initiatives: during the nineties, the Council used its own administrative budget to finance CFSP operations, in order to bypass the control of the Commission on the operative lines of the EU budget and fully preserve the intergovernmental character of CFSP. It cannot be excluded that the EEAS may try to use its administrative budget in a similar manner: the use of the EEAS' funds for the financing of certain operations, such as public diplomacy, would streamline the implementation of EU funds relating to activities already managed by the Service. This would render the autonomy of the EEAS in this area particularly significant also in a political perspective.

implementation, the HR performs this role as a representative of the EEAS, and not in his/her own capacity. Thus, it is the EEAS, and not the HR, that should adopt decisions concerning the appointment or the transferral of EEAS officers.

At first sight, the practice may seem not to be consistent with the above line of reasoning, since the HR adopts, in his/her capacity as HR, acts relating to the administrative governance of the EEAS.<sup>262</sup> This apparent anomaly can be explained in two complementary perspectives. On the one hand, the direct intervention of the HR may be advisable for merely political reasons, since it stresses the salience of the act to be adopted. On the other hand, the adoption by the HR in his/her capacity, rather than by the HR *qua* EEAS appointing authority has limited practical consequences: any act concerning the administration of the EEAS, independently from its form, is likely to be prepared and implemented by EEAS officer, under the authority of the HR; in addition, staff management acts are to be implemented by EEAS officers delegated by the HR. It may be concluded that the HR's acts on EEAS staff management and budget implementation are acts of the *Service*, which take the form of instruments of the High Representative for merely political reasons.

##### *5. EEAS' Capacity to Cooperate with other Union Bodies*

The second corollary of the EEAS' legal capacity consists of its ability to cooperate with other Union bodies. As it is known, the close relation between the EU external actions and Member States' foreign policies implies that the entities that manage the different strands of European external relations should closely cooperate. It may be wondered whether the EEAS should be directly addressed by an obligation of cooperation, which source this obligation stems from, and which instruments are used to implement it in practice. This paragraph addresses the first and second issues, whereas the third is investigated in the next paragraph.

The very legal basis of the EEAS Decision, Article 27(3) TEU, affirms that the EEAS "shall work in cooperation with the diplomatic services of the Member States"; the cooperation between the EEAS and other Union bodies is not explicitly mentioned in the Treaties. The entire Article 3 of the EEAS Decision is devoted to cooperation between the Service and other entities. The first paragraph of this provision provides for a general obligation of cooperation, and it reads: "the EEAS shall 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, in order to ensure consistency between the different areas of the Union's external action and between those areas and its other policies." The fourth

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<sup>262</sup> The adoption of some of these acts by the HR is explicitly provided for in the EEAS Decision, therefore they are rather unproblematic. See Article 6(3), (8), (10) and 8(1). Other acts, however, have been adopted by the HR, relying on his/her powers as EEAS appointing authority. This contradiction is elucidated by the HR's Decision on the delegation of the powers of authorising officer. In a formal perspective, this Decision was adopted by the HR, on the basis of its powers as authorising officer, and it formally characterised as a HR Decision. However, it bears the heading 'European External Action Service', which clearly marks the real origin of the document, cf. Decision of the High Representative HR(2010) 002 on the exercise, delegation and sub-delegation of powers conferred by the Staff Regulations on the appointing authority and by conditions of employment of other servants on the authority empowered to conclude contracts of employment, 17 December 2010, not published in the O.J.

paragraph extends the duty of cooperation to “the other institutions and bodies of the Union, in particular to the European Parliament.”

In light of the above, it is evident that the EEAS must work with the other bodies that manage European foreign policies. Is it the addressee of the duty of cooperation? Arguably, the answer to this question depends on the EEAS’ capacity to be subject to legal obligations. As demonstrated above, the EEAS has legal personality, because it has autonomous responsibilities concerning its own administration. This leads us to believe that the EEAS is directly addressed by an obligation of sincere cooperation in areas concerning access to documents, the implementation of its budget and the management of its staff. For instance, the EEAS is responsible for the conduct of cooperation with the Commission in financial areas, as to ensure the regular disbursement of the funds relating to the EEAS administrative budget.<sup>263</sup>

If the EEAS is addressed by an obligation of sincere cooperation in administrative areas, this obligation does not extend to the operative field. As demonstrated above, the Service does not hold autonomous powers related to policy management and external representation, since it is attached to, and depends on, the High Representative for the performance of its activities.<sup>264</sup> Therefore, in operative areas the EEAS should cooperate with other bodies because of an obligation binding its master, i.e. the HR.

It remains to be seen where this duty of cooperation comes from. Arguably, the obligation of sincere cooperation that binds the High Representative and the EEAS does not originate in the EEAS Decision, but it is rooted in the Treaties. As it is known, Article 13(2) TEU affirms that Union institutions “shall practice mutual sincere cooperation.” Although the Treaties do not explicitly affirm that other Union organs, including the HR and the EEAS, are bound by this obligation, such conclusion appears to be necessary. This is testified by the fact that, according to the ECJ, this obligation “is of general application”<sup>265</sup> and, even more convincingly, by its rationale, that is to say ensuring the effective performance of the tasks entrusted upon Union institutions.<sup>266</sup> Considering that the HR is entrusted with specific competences by the Treaties, and that the EEAS should assist him/her in the performance of his/her tasks, we are inclined to think that these entities should cooperate with other Union institutions, bodies and offices, as well as with Member States, in force of an obligation enshrined in the Treaties. This means that the provisions of the EEAS Decision implementing the duty of cooperation must be interpreted consistently with the duty itself.

A literal interpretation of Article 13(2) TEU suggests that the EEAS shall practice mutual sincere cooperation with all other Union offices and bodies, *in all areas related to its activity*. A teleological interpretation of this provision points in the same direction, since the effective discharging of EU bodies’ duties would be

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<sup>263</sup> Notice, however, that, since the HR acts as the authorising officer of the EEAS, he/she must oversee the cooperation between the EEAS in this aspect, but always as a representative of the EEAS.

<sup>264</sup> In these respects, the obligation of sincere cooperation must be addressed to the High Representative, who shall consequently work with other Union institutions, bodies and offices in order to ensure the effectiveness and coherence of the EU’s external action. In this case, the EEAS is indirectly concerned by the obligation of sincere cooperation: the HR’s authority on the EEAS implies her responsibility for the cooperation between his/her Service and the services of other Union institutions, bodies and offices.

<sup>265</sup> Case C-266/03, *Commission v Luxembourg*, [2005] ECR I-4805, par. 58.

<sup>266</sup> Such is indeed the rationale of institutional balance according part of the doctrine, see Curtin, *Executive power of the European Union*, cit. *supra*, p. 153.

hindered by a ‘segmented’ form of cooperation. This argument is further reinforced by the aforementioned jurisprudence of the ECJ, according to which the duty of cooperation is of general application. A cursory reading of the EEAS Decision may seem at odds with this argument, since its Article 3(2) explicitly affirms that, although the EEAS and the services of the Commission “shall consult each other on all matters relating to the external action”, such duty of consultation does not extend to “matters covered by the [Common Security and Defence Policy (CSDP)].” Hence, the EEAS may seem not to be bound to cooperate with the Commission with respect to administrative issues related to CSDP, such as, for instance, access to CSDP documents or instructions for staff employed in crisis management missions. The contradiction between the letter of the EEAS Decision and our interpretation of sincere cooperation appears to be more apparent than real: Article 3(2) of the EEAS Decision explicitly affirms that “this paragraph shall be implemented in accordance with Chapter 1 of Title V of the TEU, and with Article 205 TFEU”, that is to say in accordance with the provisions that govern the entire external action, transversally to the divide between CFSP and the other policies. The teleological interpretation of this provision suggests that cooperation between the EEAS and other Union bodies (and their services) should promote the coordination of European foreign policies and, thus, it should concern the entire external action. In other words, the EEAS should *always* cooperate with Commission services, including CFSP and CSDP areas. This is not to say that this cooperation should always take identical forms. Article 3(2) of the EEAS Decision regulates this aspect, by asserting that cooperation between the EEAS and Commission services should generally take the form of a consultation on all matters relating to the external action. In areas related to CSDP, such cooperation may take other forms, but it should not cease to exist.

#### *6. EEAS' Capacity to Enter into Binding Arrangements with other Union Bodies*

The EEAS Decision directly provides for instruments implementing the duty of sincere cooperation: the arrangements with the services of other Union offices and bodies. According to Article 3(3), the EEAS “may enter into service-level arrangements with relevant services of the General Secretariat of the Council, the Commission, or other offices or interinstitutional bodies of the Union.” The rationale of this provision is clear: fostering and supporting cooperation between the EEAS, on one side, and the services of other Union institutions and bodies, on the other. This is hardly surprising, considering that Article 3 of the EEAS Decision is devoted to the “cooperation” between the EEAS, Union bodies and Member States.

Some doubts, however, concern the real content of this provision and, consequently, the nature of the instruments entered into by the EEAS with other entities. At first sight, the arrangements entered into by the EEAS may seem to lack legal nature, because of three factors: the limited legal personality of the EEAS, the lack of legal personality of its counterparts and the intrinsic features of the arrangements themselves. This argument may seem to be supported by a superficial analysis of the principal category of arrangements entered into by the EEAS, that is to say the ‘service-level arrangements’ (SLA) between the EEAS and Commission services.<sup>267</sup> Most SLAs are entered into by the EEAS and a Commission service.

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<sup>267</sup> SLAs are not published. The author is aware of the existence of the following:

Their characterisation as legal acts may seem to be impossible, for a simple reason: the EEAS enters into arrangements with a *service*, that is to say an administrative entity that is attached to the Commission and is dependent on it, and which consequently lacks legal personality and cannot be subject to rights and obligations. Similar considerations may seem to extend to a particular arrangement the EEAS entered into with Commission services in December 2010, that is to say the Framework Administrative Arrangement (FAA), which provides for the procedural and administrative framework that disciplines subsequent SLAs.<sup>268</sup> According to its preamble, this arrangement was concluded by the EEAS, on the one side, and the “services et offices de la Commission européenne [...] représentés par le Secrétariat Général de la Commission européenne [...]”, on the other side. At first sight, the FAA may consequently be qualified as a multilateral SLA, which, like bilateral SLAs, should lack binding force. Such reading of the arrangements entered into by the EEAS may seem to be logical also in light of the HR's role as a Commission Vice-President: since the EEAS assists the HR in the exercise of his/her Commission functions, the EEAS may reasonably be characterised as a Commission service. Thus, the arrangements entered into by the EEAS and Commission services might be considered as internal documents of the Institution.

This conclusion is not entirely convincing, because it appears to be at odds with the role of the EEAS as an administratively autonomous entity. The remainder of this paragraph demonstrates that the interservice arrangements the EEAS enters into may be binding upon the Service and its counterparts.

It is submitted that the FAA and SLAs may be qualified as legal acts, since they are capable of altering the legal position of Union bodies and offices.<sup>269</sup> In order to demonstrate this, it is opportune to make an analogy between these instruments and interinstitutional agreements, as they existed before the Lisbon reform. As it is known, Union bodies have been entering into interinstitutional instruments for decades. Even before the Lisbon reform rendered (some) interinstitutional agreements binding (Article 295 TFEU), the doctrine and the jurisprudence recognised their legal nature, at least when they were prescribed, or authorised, by the Treaties, or they represented a fulfilment of the duty of sincere cooperation or

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- Service Level Agreement between Commission services with staff in EU Delegations and the European External Action Service, 20 December 2010.
  - Service Level Agreement between the Directorate General For Interpretation (DG Interpretation) of the European Commission and The European External Action Service (EEAS), 21 December 2010.
  - Arrangement Administratif Spécifique portant sur la fourniture de services ICT entre le Service Européen pour l'Action Extérieure et la Direction Générale pour l'informatique de la Commission Européenne (DG DIGIT), 21 December 2010.
  - Accord de service entre la Direction Générale de la Traduction de la Commission Européenne et le Service Européen pour l'Action Extérieure, 22 December 2010.
  - Service Level Agreement concerning the collaboration between the European External Action Service and the Directorate-General for Human Resources and Security of the European Commission (DG HR), 22 December 2010.
  - Service Level Agreement (SLA) spécifique entre l'Office pour les infrastructures et la logistique et le Service Européen pour l'Action Extérieure, 22-23 December 2010.
  - Service Level Agreement between the European Commission's Traineeship Office and the European External Action Service, 28 January 2011.

<sup>268</sup> Arrangement administratif entre les services de la Commission Européenne et le Service Européen pour l'Action Extérieure, 13 December 2010, not published in the O.J.

<sup>269</sup> Cf. case C-151/88, *Italy v Commission*, [1989] ECR 1255 and Hartley, *The Foundations of European Union Law* (Oxford University Press, 2010), p. 354.



unity of international representation.<sup>270</sup> The arrangements entered into by the EEAS are similar to the second category of interinstitutional agreements, since they represent a fulfilment of the duty of sincere cooperation. As demonstrated in the previous paragraph, the EEAS has the legal capacity to enter into legal relationships, and it is bound by the duty of sincere cooperation, in the areas relating to administrative issues. The Framework Arrangement and the SLAs serve the purpose of facilitating cooperation between the Service and the Commission (or its services) precisely in respect of administrative issues. Hence, these instruments can be seen as a fulfilment of the duty of sincere cooperation that is requested by the Treaties, and they should consequently have legal character, if the parties so intended.

In this last respect, it may be noted that, although both the Commission and the EEAS were reluctant to acknowledge the legal nature of the arrangements, the latter are formulated in rather unequivocal terms. Their form, with the exception of the title, is similar to the one of legal acts, and includes a preamble, articles and a signature. Moreover, the engagements undertaken by the parties are precise and unconditional and they are consequently likely to create expectations of conduct.<sup>271</sup> Finally, the FAA foresees a dispute settlement mechanism,<sup>272</sup> also applicable to SLAs, whereby the parties may nominate a mediator or designate an arbiter “dont la décision s'imposera aux parties”. It would indeed be difficult to imagine how the interpretation of a non-binding instrument may be binding upon the parties! Hence, we tend to consider the FAA, and consequently SLAs, as binding instruments, embodying the duty of sincere cooperation.

The fact that the SLAs are formally characterised as inter-*service* arrangements does not seem to question this finding. On the one hand, it would seem that the EEAS entered into SLAs with the Commission in its own capacity, which is reminiscent of that of Union bodies, at least as far as administrative issues are concerned. The aforementioned Framework Arrangement and SLAs concern precisely administrative areas. The very first Article of the Framework Arrangement asserts that “le présent arrangement vise à faciliter l'établissement et le fonctionnement du SEAE, en sa qualité d'institution au sens de l'article 1er du règlement financier et de l'article 1er ter du statut.” On the other hand, we are inclined to believe that the FAA and SLAs were entered into by the EEAS and the *Commission*, rather than by its services. This can be demonstrated by stressing that the FAA is an anomalous interservice arrangement, since it concerns all Commission services and, thus, the entire Commission structure. In substantive terms, this means that the FAA is not different from an interinstitutional agreement. In procedural terms, it implies that the College of the Commissioners probably approved the FAA, albeit implicitly: a document of such relevance for the

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<sup>270</sup> Case C-25/94, *Commission v Council*, [1996] ECR I-1469, par. 49. See also the opinion of the advocate general in case 204/86, *Greece v Council*, [1988] ECR 5323 at 5349. Notice also that in case 34/86, *Council v Parliament*, [1986] ECR 2155, para 50, the Court implicitly acknowledged that interinstitutional agreements can establish rules for the settlement of interinstitutional conflicts. Cf. Monar, “Interinstitutional Agreements: the Phenomenon and Its New Dynamics After Maastricht”, 31 *Common Market Law Review* (1994): 693-719, at 703 and Snyder, “Interinstitutional Agreements: Forms and Constitutional Limitations”, in Winter (ed.), *Sources and Categories of European Union Law: a Comparative and Reform Perspective* (Nomos Verlagsgesellschaft, 1996), pp. 453-466, at 462. On the potentially binding nature of interinstitutional agreements, see also Tournepiche, *Les Accords Interinstitutionnels dans l'Union Européenne* (Bruylant, 2011), pp. 443 ff.

<sup>271</sup> Cf. Wellens and Borchardt, “Soft Law in European Community Law”, 14 *European Law Review* (1989): 267, at 312.

<sup>272</sup> Article 6.

activity of the Commission could hardly be entered into without at least an informal approval of the Institution. The letter of the FAA confirms the fact that the instrument was entered into by the Commission. Although its title mentions the EEAS and Commission *services*, the instrument was signed “pour la Commission européenne”.

The status of the FAA is probably shared by most SLAs. The first Article of the FAA affirms that: “le présent arrangement comprend [...] en annexe les conditions particulières relatives aux services à rendre, sous la forme d’arrangements administratifs spécifiques. Celles-ci sont conclues entre le service de la Commission ou l’office intéressé et le SEAE. Une fois conclues et signées par les parties, ces annexes font partie intégrante du présent arrangement.” This paragraph implies that, although SLAs are approved by Commission services, they have the same legal status of the FAA they are annexed to. Therefore, Commission services may enter into binding SLAs on behalf of the Institution. This argument in favour of the legal nature of SLAs may meet a further obstacle, since it may seem to contradict the ECJ jurisprudence. At the onset of the integration process, the Court held that Commission acts should always be approved by the College of the Commissioners. It is clear that the FAA and the SLAs have been signed by Commission departments.<sup>273</sup> This obstacle, however, does not appear to be insurmountable: more recently, the ECJ accepted that acts adopted by the Union officers may be binding for their institutions if they are taken on the basis of a delegation of power and they concern less important decisions, having mainly bureaucratic nature.<sup>274</sup> SLAs belong to this category of acts, since they are entered into on the basis of an explicit delegation (contained in the FAA) and they are related to administrative issues. This suggests that the FAA and SLAs were entered into by Commission services on behalf of the Institution.

The above conclusions may raise a question: if the EEAS and the Commission intended to conclude binding inter-*institutional* instruments, why did they choose to draft these documents as apparently non-binding inter-*service* arrangements? This may be due to an exceedingly restrictive interpretation of the EEAS Decision, whose letter only authorises the EEAS to enter into “service-level arrangements”. There is also another, political, reason that may explain the form of the FAA and SLAs: as recalled above, Union bodies are reticent to explicitly recognise the EEAS as an “independent kingdom” in EU external relations.<sup>275</sup> Hence, the Commission refrained from treating the EEAS as a peer, but it formally interacted with it as if it were a ‘normal’ service, even when it *de facto* recognised its semi-institutional character through the conclusion of binding arrangements.

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<sup>273</sup> See joined cases 53-54/63, *Lemmerz-Werke GmbH and others v High Authority*, [1963] ECR English special edition p. 239: “a decision must appear as a measure taken by the high authority, acting as a body, intended to produce legal effects and constituting the culmination of procedure within the high authority, whereby the high authority gives its final ruling in a form from which its nature can be identified.”

<sup>274</sup> The ECJ accepted that letters signed by Commission officials can be considered Commission acts, cf. Joined cases 8 to 11/66, *Société anonyme Cimenteries C.B.R. Cementsbedrijven N.V. and others v Commission*, [1967] ECR English special edition p. 75. Even oral statements may be legal acts, as the ECJ affirmed in case Joined cases 316/82 and 40/83, *Nelly Kohler v Court of Auditors of the European Communities*, [1984] ECR 641. Hartley, op. cit., p. 366, note 61, convincingly asserts that in *Lemmerz-Werke*, cit. *supra*, the Court may have intended the principle whereby Collegiate bodies should adopt legal acts as a College only with respect to acts “having serious legal consequences”, as it was the case in *Lemmerz-Werke*.

<sup>275</sup> Elmar Brok (MEP), quoted in Euractiv, “The EU’s new diplomatic service”, 9 March 2010, [www.euractiv.com](http://www.euractiv.com).

Evidently, these arguments cannot apply to the arrangements concluded outside the framework of the FAA. Such arrangements must be understood as mere expressions of purely voluntary coordination and are therefore not intended in themselves to have legal effects, unless such entities act as representatives of Union bodies. In addition, arrangements relating to political issues cannot be binding upon the EEAS, since the Service does not have any autonomy in this respect.<sup>276</sup>

### 7. EEAS' Capacity to be Sued in Annulment Proceedings

The last corollary of the EEAS' autonomy and personality consists of its capacity to stand before the Court of Justice. This and the next two paragraphs concern the EEAS' capacity to be sued. The last paragraph addresses the EEAS' capacity to sue other bodies.<sup>277</sup>

The position of the EEAS as a defendant may relate, in the first place, to the annulment of its acts. It is worth clarifying the rationale for this analysis. A superficial reading of the Treaties may suggest that an inquiry into the EEAS' position before the ECJ is totally unnecessary, because of the combination of Article 275 TFEU and Article 27(3) TEU. Article 275 TFEU affirms that "the Court of Justice of the European Union shall not have jurisdiction with respect to the provisions relating to the common foreign and security policy nor with respect to acts adopted on the basis of those provisions." Article 27(3) TEU, that is to say the legal basis of the EEAS Decision, is part of the CFSP chapter of the TEU. Hence, the ECJ may seem not to have jurisdiction with respect to any act adopted by the EEAS. This interpretation could only be accepted if the EEAS were solely concerned with CFSP, which is not the case. As demonstrated above, the Service only acts in its own capacity in areas related to its own administration. Such activity is not solely CFSP-related, since the EEAS performs tasks in non-CFSP areas, under the responsibility of the High Representative in his/her capacity as president of the Foreign Affairs Council and Vice-President of the Commission. The administration of the EEAS, therefore, is not a purely CFSP affair, and is not covered by Article 275 TFEU. Therefore, it cannot be asserted *a priori* that the EEAS cannot stand before the ECJ as a defendant.

In order to analyse the EEAS' capacity to be sued in annulment proceedings, we have to consider, in particular, the first paragraph of Article 263 TFEU:<sup>278</sup> "the Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects *vis-à-vis* third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects *vis-à-vis* third parties."

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<sup>276</sup> Such instruments, if entered into by the HR, may however be binding upon him/her.

<sup>277</sup> It is worth stressing that we only intend to elucidate the peculiarities of the EEAS' position, and we consequently do not provide for a comprehensive account of jurisdictional procedures involving the Service.

<sup>278</sup> Notice that According to the last paragraph of this provision "acts setting up bodies, offices and agencies of the Union may lay down specific conditions and arrangements concerning actions brought by natural or legal persons against acts of these bodies, offices or agencies intended to produce legal effects in relation to them." This provision, however, is of scarce interest at present, since the EEAS Decision never mentions such specific conditions and arrangements.

This provision, as interpreted by the ECJ, implies that the EEAS should pass a four stages test in order to be capable of being sued in annulment proceedings. In the first place, the Service should be characterised as an institution, agency, office or body of the Union, consistently with the last sentence of the first paragraph of Article 263 TFEU. This does not prove exceedingly challenging, since we have already demonstrated that the EEAS is an administratively autonomous entity, which possesses legal personality. Consequently, it is a ‘body’ within the meaning of Article 263 TFEU.

Secondly, the EEAS must be able to adopt reviewable “acts”, within the meaning of Article 263 TFEU. This aspect proves rather unproblematic too, especially because the Court specified that reviewable acts are not identified on the basis of formal criteria, such as their *nomen juris*, but only with regard to their capability to have legal effects.<sup>279</sup> The ECJ also specified that reviewable acts do not necessarily need to be adopted pursuant to a Treaty provision. Hence, even *sui generis* acts may be reviewed by the Court. This makes sure that EEAS acts, however defined, may be reviewed, provided they meet the substantive requirements that form the object of the two last stages of our test.

Thirdly, the EEAS should be capable of adopting acts “intended to produce legal effects”. To be sure, the EEAS cannot adopt legal acts concerning operative areas, but it merely prepares the acts to be adopted by the HR, in his/her own capacity. This implies that it should be the HR, and not the EEAS, to defend acts relating to operative areas. If an EEAS act ever concerned an operative issue, it should be declared non-existent, given the manifest lack of competence of the Service.<sup>280</sup> As demonstrated in the preceding paragraphs, the EEAS can however adopt legal acts and enter into legally binding arrangements with other Union bodies in the areas concerning its own administration, that is to say staff management, administrative budget implementation and access to documents. Such legal acts should consequently be subject to review.<sup>281</sup>

Fourthly, the EEAS should be capable of adopting acts producing legal effects “*vis-à-vis* third parties”.<sup>282</sup> The Court originally elaborated this concept in cases concerning the European Parliament, by affirming that it is not possible to challenge acts of this Institution which only relate to the internal organisation of its work.<sup>283</sup> The Court further developed this concept in the case *France v.*

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<sup>279</sup> See case C-22/70, *Commission v Council (Agreement on Road Transport)*, [1971] ECR 263, and case C-151/88, *Italy v Commission*, [1989] ECR 1255.

<sup>280</sup> On the non-existence of EU acts, see joined cases T-79, 84, 85, 86, 89, 91, 92, 94, 96, 98, 102 and 104/89, *BASF AG and others v Commission*, [1992] ECR II-315; joined Cases 1 and 14/57 *Société des Usines à Tubes de la Sarre v High Authority* [1957] ECR 105; joined Cases 15 to 33, 52, 53, 57 to 109, 116, 117, 123, 132 and 135 to 137/73 *Kortner and Others v Council, Commission and Parliament*, [1974] ECR 177; case 15/85, *Consorzio Cooperativo d' Abruzzo v Commission*, [1987] ECR 1005; case 226/87, *Commission v Hellenic Republic*, [1988] ECR 3611; case 156/89 *Valverde Mordt v Court of Justice* [1991] ECR II-412.

<sup>281</sup> This should apply also to statements concerning the action that the EEAS may take in the future, provided that they are definite and unequivocal. See case C-15/63, *Lassalle v Parliament*, [1964] ECR English special edition p. 31; case C-79/74, *Kuster v Parliament*, [1975] ECR 725; case C-25/77, *De Roubaix v Commission*, [1978] ECR 1081, par. 6-9.

<sup>282</sup> See case C-294/83, *Parti Ecologiste 'Les Verts' v European Parliament*, [1986] ECR 1339.

<sup>283</sup> See case T-345/05, *Ashley Neil Mote v Parliament*, [2008] ECR II-2849, par. 22-24; see also order in case 78/85, *Group of the European Right v Parliament*, [1986] ECR 1753, par. 11; order in case C-68/90, *Blot and Front national v Parliament*, [1990] ECR I-2101, case C-314/91, *Weber v Parliament*, [1993] ECR I-1093; joined Cases T-222/99, T-327/99 and T-329/99, *Martinez and Others v Parliament*, [2001] ECR II-2823.

*Commission* (1990),<sup>284</sup> where it asserted that the capability of an act to affect the legal position of thirds is not simply determined by its form, but it must be verified on the basis of its content:<sup>285</sup> a binding act, disguised as an internal document, is subject to review.<sup>286</sup> At first sight, it may seem that all EEAS acts should be 'internal' since they relate to administrative issues. However, 'administrative' does not equal "internal".<sup>287</sup> For instance, the decisions whereby EEAS officers authorise the disbursement of Union funds necessarily affect the legal position of thirds; similarly, the EEAS acts that concern the management of its staff affect the position of physical persons (i.e. EEAS officers).

In sum, since some EEAS acts may meet this quadruple test, they may be challenged before the ECJ.

### 8. Standing to Challenge EEAS Acts

After having demonstrated that the EEAS can theoretically defend its acts before the ECJ, it is necessary to verify the likelihood of such defence by investigating the standing to challenge EEAS acts of privileged applicants, semi-privileged applicants and non-privileged applicants.

In the first place, EEAS acts may be sued by privileged applicants, that is to say Council, Commission, EP and Member States: since these entities can always institute proceedings against other offices and bodies' acts they should be able to sue the EEAS. In practice, privileged applicants may use their standing to sue the EEAS mainly for two reasons. On the one hand, in order to make sure EEAS acts do not 'spill-over' to non-administrative areas; for instance, they may initiate proceedings against any act whereby the EEAS authorises the disbursement of its administrative funds for operative purposes. On the other hand, privileged applicants may challenge EEAS acts to ensure the respect for the distribution of power provided for in the Treaties and the EEAS Decision;<sup>288</sup> for example, Member States, the Council or the Parliament might institute proceedings against binding arrangements entered into by the EEAS and the Commission, in order to challenge their potential inconsistency with primary and secondary law.

Secondly, EEAS acts may be challenged by 'semi-privileged applicants', that is to say the Court of Auditors, the European Central Bank and the Committee of the

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<sup>284</sup> Case C-366/88, *French Republic v Commission*, [1990] ECR I-3571.

<sup>285</sup> Cf. Della Cananea, "L'impugnabilità degli Atti "Interni" dell'amministrazione nel Diritto Comunitario: un Nuovo Orientamento della Corte di Giustizia. (Osservazioni in Margine a Corte di Giustizia delle Comunità Europee, Sentenza 9 Ottobre 1990, in Causa 366/88)", *Rivista Italiana di Diritto Pubblico Comunitario* (1992): 891-900, at p. 896.

<sup>286</sup> Cf. Della Cananea, op. cit., p. 899. See case C-366/88 *France v Commission*, cit. *supra*, par. 11; see also case T-258/06, *Germany v Commission*, [2010] ECR II-2027, par. 28; case C-303/90, *France v Commission*, [1991] ECR I-5315, par. 10; and case C-57/95, *France v Commission*, [1997] ECR I-1627, par. 9.

<sup>287</sup> The EEAS certainly adopts also internal acts, but they are subject to the regime applicable to other Union bodies, therefore this aspect is not further addressed here. It may be anticipated that *Commission* internal acts that concern the EEAS may concern the position of thirds (and namely the very EEAS); this aspect will be addressed in the next chapter.

<sup>288</sup> As a matter of fact, the violation of the acts establishing the EEAS amounts to an infringement of the Treaties and an infringement of procedural requirements, in so far as the acts establishing the Service are founded upon the legal bases contained in the Treaties, and such legal bases provide for specific procedures to be followed for their adoption. As it is evident, the EEAS cannot circumvent these procedures, neither by adopting unilateral acts, nor by entering into arrangements with other bodies.

Regions. Since Article 263 TFEU enables them to have standing for the purpose of protecting their prerogatives, and these bodies are functionally different from the EEAS, they are unlikely to have direct relations with the Service and, thus, to challenge its acts in practice. The practical consequences of the semi-privileged status of these applicants consequently does not require particular attention.

Thirdly, the EEAS may be sued by natural and legal persons other than privileged and semi-privileged applicants. Natural and legal persons have access to the Court through under two different sets of conditions, concerning the impugnation of regulatory and non-regulatory acts, respectively. This distinction was introduced by the Lisbon reform, in order to simplify access to Court in relation to 'regulatory acts'. These acts consist of acts of 'general application', that is to say acts which are applicable not to a limited number of persons, defined or identifiable, but to categories of persons viewed abstractly and in their entirety.<sup>289</sup>

The EEAS can adopt regulatory acts; in practice, it would seem to do so especially in order to organise its internal functioning. An example is provided for by the recent Decision on the "Junior Professionals in Delegation" programme,<sup>290</sup> which provides for detailed rules governing a staffing programme and is not addressed to any person in particular. According to Article 263 TFEU, as interpreted by the ECJ, regulatory acts may only be challenged by natural and legal persons under two cumulative conditions. On the one hand, they must not imply the necessity for implementing measures, that is to say measures to put the original acts into operation, which the applicant may challenge before the ECJ or national courts.<sup>291</sup> On the other hand, a regulatory act should concern directly the applicant; in other words, there should be a causal link between the controversial act and the affectation of the applicant's legal sphere and the effects of that act must not depend on the discretion of another entity.<sup>292</sup> Therefore, the access to Court of natural and legal persons is not exceedingly problematic in the case of regulatory acts of the EEAS, since the Service only adopts acts related to its own administration and it is unlikely to enable other bodies to exert discretion in its internal matters. As a matter of fact, the reverse situation is more probable: the

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<sup>289</sup> Order of the General Court in case T-381/11, *Europäischer Wirtschaftsverband der Eisen- und Stahlindustrie (Eurofer) ASBL v Commission*, [2012] not published yet, par. 42. See also joined cases 16/62 and 17/62, *Confédération nationale des producteurs de fruits et légumes and others v Council*, [1962] ECR English special edition p. 471, par. 2. It may be noted that legislative acts of general application are subject to the same rules as non-regulatory acts, but this aspect can be ignored in the present inquiry, since the EEAS does not adopt legislative acts.

<sup>290</sup> Decision of the Chief Operating Officer of the EEAS, in agreement with the directors-general of DG DEVCO and DG HR of the European Commission, of 6 July 2012, on the implementing rules of the high level traineeship programme in the Delegations of the European Union in partnership with the Member States of the European Union, EEAS DEC(2012) 009/2, not published in the OJ; available at <http://eeas.europa.eu>, last visited on 5 September 2012. Notice that this decision has two peculiar aspects. In the first place, it was adopted on delegation from the HR and the Commission, cf. Joint Decision of the Commission and the High Representative of the European Union for Foreign Affairs and Security Policy, of 12 June 2012, establishing a High Level Traineeship Programme in the Delegations of the European Union and the Rules Governing this Programme in Partnership with the Member States of the European Union, JOIN(2012) 17 final, not published in the OJ; available at <http://eeas.europa.eu>. Secondly, it is a joint programme of the EEAS and the Commission, therefore it was launched by both the HR and the Commission and it is implemented by the EEAS officer that was delegated appointing authority powers from the HR, that is to say the Chief Operating Officer, in consultation with appointing authority delegated by the Commission, that is to say directors-general of Commission services.

<sup>291</sup> Hartley, *op. cit.*, p. 388.

<sup>292</sup> See case 69-69, *SA Alcan Aluminium Raeren and others v Commission*, [1970] ECR 385, par. 8.

EEAS may be *delegated* the adoption of measures implementing framework decisions of other bodies, such as the HR and the Commission.<sup>293</sup> In such circumstances, natural and legal persons should challenge the implementing decisions of the EEAS.

The EEAS can also adopt non-regulatory acts, since the Service needs to take measures addressed to defined or identifiable persons in order to perform its administrative tasks, such as authorising the disbursement of funds or appointing its own officers.<sup>294</sup> Non-regulatory acts can obviously be challenged by their addressees; they may also be challenged by natural and legal persons not formally addressed, but only under severe conditions: direct concern (as in the case of regulatory measures) and *individual* concern. The latter requirement implies that natural and legal persons can only institute proceedings against an act that affects them “by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons,” and if by virtue of these factors the act distinguishes them individually just as in the case of the person addressed.<sup>295</sup> In the case of unilateral EEAS acts these requirements are not necessarily problematic, since such measures probably affect only their addressees or a ‘closed group’ of persons, which have automatic standing.<sup>296</sup> For instance, EEAS decisions appointing or promoting officers can be challenged by their addressees and unsuccessful applicants; similarly, EEAS decisions awarding a contract to a person may be challenged by other persons that sought the same contract. The impugnation of instruments entered into by the EEAS and other bodies, however, may raise some concerns. Although these instruments might contain provisions indirectly affecting the position of natural and legal persons, they are unlikely to distinguish such persons individually.

#### 9. EEAS’ Capacity to be Sued in Proceedings other than Annulment

After having considered the EEAS’ capacity to be sued in annulment proceedings it is necessary to verify its standing in other circumstances. We turn firstly to failure to act and subsequently address reparation for damages.

The EEAS’ capacity to be sued for failure to act appears to be unquestionable, albeit limited *ratione materiae*. Article 265 TFEU explicitly affirms that whenever EU bodies, in infringement of the Treaties, fail to act, they may be sued by privileged and non-privileged applicants, under different conditions. In order to test the EEAS’ capacity to be sued for failure to act, we need to conduct a three stages test.

In the first place, the EEAS would be capable of being sued under Article 265 TFEU only if EU law required the *Service*, and not other Union offices or bodies, to act. In other words, the EEAS cannot be sued because of the omissions of *other* Union

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<sup>293</sup> If one embraced the view that the HR’s acts as EEAS appointing authority are truly HR acts (a vision we do not share), this would be the case of the JPD programme decision referred to above, that implements a joint decision of the HR and the Commission.

<sup>294</sup> For instance, decisions relating to access to documents grant, or deny, access to document to the person that requested it. Similarly, budgetary decisions identify the entity that receives the payment and staff management decisions refer to specific officers to be hired, promoted, demoted or transferred.

<sup>295</sup> Case C-25/62, *Plaumann and Co. v Commission*, [1963] ECR English special edition p. 95.

<sup>296</sup> In this sense, joined cases 106 and 107/63 *Alfred Toepfer and Getreide-Import Gesellschaft v Commission*, [1965] ECR English special edition p. 405; and case 62/70, *Werner A. Bock v Commission*, [1971] ECR 897.

entities, including the HR. Considering that the EEAS has legal capacity in administrative areas, it cannot be sued for operative omissions, but it can be sued for its failure to adopt administrative acts.

Secondly, the EEAS should be *required* to act by primary or secondary law.<sup>297</sup> In other words, the EEAS, like other Union bodies, cannot be sued for its failure to adopt discretionary acts.<sup>298</sup> In some cases, the EEAS does enjoy discretion; this is particularly evident with respect to the conclusion of binding instruments with other bodies: although, according to Article 3 of the EEAS Decision, the Service shall cooperate with other entities, the same provision specifies that it *may* enter into arrangements with them. However, the EEAS is also *required* to adopt certain legal acts. For instance, according to Article 7(1) of Regulation 1049/2001, read in combination with Article 11 of the EEAS Decision, the EEAS “shall within 15 working days from registration of the application [...] either grant access to the document requested and provide access [...] within that period or, in a written reply, state the reasons for the total or partial refusal.”

Thirdly, the EEAS should be able to “act” (and, thus, “fail to act”) within the meaning of Article 265 TFEU. This can be verified by answering a question: which ‘actions’ does Article 265 TFEU refer to? A literal interpretation of this provision suggests that it concerns omissions to take *any* action, including the adoption of nonbinding acts.<sup>299</sup> In light of this interpretation, acts that are not reviewable under Article 263 TFEU may form the subject of omissions for the purpose of Article 265 TFEU. This may seem to be at odds with the ECJ jurisprudence whereby annulment and failure to act are two aspects of the same legal remedy.<sup>300</sup> However, this apparent contradiction is not problematic, since the very ECJ affirmed that the conditions and limitations applicable to the procedures for annulment and failure to act should not necessarily be the same.<sup>301</sup> Therefore, the EEAS may be sued for

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<sup>297</sup> Although Article 265 TFEU does not explicitly mention secondary law; however, failure to act in infringement of secondary law constitutes an infringement of the Treaties in itself, since, when primary law empowers Union bodies to enact binding legislation, the Treaties require other Union bodies to comply with it. According to this line of reasoning, legally binding instruments entered into by Union bodies, being part of the law based upon the Treaties, may give rise to obligations to act for the parties. Hence, the EEAS may be sued for its failure to act, in infringement of the instruments it enters into with other Union bodies.

<sup>298</sup> Cf. case C-247/87, *Star Fruit co. v Commission*, [1989] ECR 291. Notice that in a case relating to the application of Article 86 TEC (now Article 106 TFEU) the ECJ held that “the possibility cannot be ruled out that exceptional situations might exist where an individual or, possibly, an association constituted for the defence of the collective interests of a class of individuals has standing to bring proceedings against a refusal by the Commission to adopt a decision pursuant to its supervisory functions under Article 90(1) and (3),” case C-107/95 P, *Bundesverband der Bilanzbuchhalter v Commission*, [1997] ECR I-2181, par. 25. This meaning of ‘exceptional circumstances’ was partially clarified in case T-17/96, *Télévision Française 1 SA (TF1) v Commission*, [1999] ECR II-1757, par. 52-57. However, this jurisprudence probably should not be applied analogically to failure to act proceedings, because these jurisdictional procedures have different objectives and they are addressed to different persons. See Manzini, “La Proposizione di un Ricorso in Carezza in Assenza di un Obbligo di Agire dell’istituzione: Riflessioni sul Caso TF1”, *Rivista Italiana di Diritto Pubblico Comunitario* (1999): 381-414, p. 408.

<sup>299</sup> As a matter of fact, an exegetic interpretation points in the same direction: if the legislator had intended to exclude nonbinding acts from the scope of Article 265 TFEU, it would have done so explicitly, as it did in the case of Article 263 TFEU

<sup>300</sup> Case C-15/70, *Amedeo Chevalley v Commission*, [1970] ECR 975.

<sup>301</sup> Indeed, “there is no necessary link between the action for annulment and the action for failure to act; this follows from the fact that the action for failure to act enables [the applicant] to induce the adoption of measures which cannot in all cases be the subject of an action for annulment”, case C-302/87, *Parliament v Council*, [1988] ECR 5615, par. 16.



its failure to adopt both binding and nonbinding acts. This is not to say, however, that any applicant may impugn any EEAS omission, since the second paragraph of Article 265 TFEU explicitly affirms that non-privileged applicants can only sue Union bodies for failure to adopt any act “other than a recommendation or an opinion”. In other words, only privileged applicants can sue the EEAS for its failure to adopt nonbinding acts.<sup>302</sup>

The literal interpretation of Article 265 TFEU may have significant consequences for the EEAS, namely in respect of its relations with other EU bodies. Article 3(4) of the EEAS Decision affirms that “the EEAS shall extend appropriate support and cooperation to the other institutions and bodies of the Union, in particular to the European Parliament.” If we accept that any conduct mandated by law may form the object of an omission reviewable on the basis of Article 265 TFEU, we should conclude that the EEAS may be sued for not extending “appropriate support” to other Union bodies, whatever content this support may be required to take.

After having discussed the EEAS’ standing to be sued in case of failure to act we turn now to reparation for damages. It is worth specifying that these proceedings concern the Union as a whole, rather than the EEAS: like all Union bodies, the Service has no capacity to be sued in this context. However, it may have capacity to represent the Union before the Court. Therefore, we address this issue alongside situations where the EEAS is a defendant.

In cases concerning contractual liability (Article 340 TFEU, first paragraph) the Union representative is easily identifiable. If the contract contains an arbitration clause in favour of the ECJ, as foreseen by Article 272 TFEU, the EU representation probably should be ensured by the body or office that entered into contract on behalf of the Union.<sup>303</sup> If the contract provides for the jurisdiction of the tribunal of a Member State,<sup>304</sup> the EU is represented in judgement according to Article 335 TFEU, which affirms that the Union shall be represented by the Commission or by other EU bodies “by virtue of their administrative autonomy, in matters relating to their respective operation.” Since the EEAS’ legal capacity is limited to the administrative area, the Service may only enter into contracts relating to administrative issues (that is to say by virtue of its administrative autonomy); consequently, whenever the EU’s contractual responsibility is raised by a contract concluded the EEAS, the representation before the ECJ is likely to be ensured by the Service.

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<sup>302</sup> Our conclusion is not shared by part of the doctrine, according to which only binding acts should normally be subject to proceedings for failure to act, because of the analogy between this proceeding and annulment; partially differently, Hartley, (op. cit., pp. 399-400) accepts that preliminary acts, that is to say non-binding acts that constitute the first step in the adoption of other acts, should also form the subject of proceedings for failure to act. Even the acceptance of these restrictive interpretations of Article 265 TFEU would not imply that the EEAS may not be sued for failure to act, since it is actually required to adopt preliminary acts and, as demonstrated above, binding acts. An instance of preliminary act is provided for by the preparation of the draft budget: without EEAS’ preliminary acts, the budget cannot be proposed and, *a fortiori*, adopted. According to Article 31 of the Financial Regulation the EEAS shall send to the Commission an estimate of its revenue and expenditure before 1 July each year. Such estimate is an intermediate step in the adoption of the budget, which enables the Commission to prepare a draft budget and a comprehensive working document on the external action, as required by Article 32 and 33 of the Financial Regulation and Article 8(5) of the EEAS Decision. Hence, if the EEAS did not provide the Commission with its estimates, the Institution may sue the Service for failure to act.

<sup>303</sup> This appears to be logical and consistent with the ECJ jurisprudence on non-contractual liability, whereby the representation of the Union is ensured by the body whose conduct gave rise to the controversy (see *infra*).

<sup>304</sup> Cf. Article 272 TFEU.

In cases concerning non-contractual liability, representation arrangements are slightly more complicated. According to the Court, in proceedings for non-contractual liability, the representation of the Union is not determined through an analogical application of Article 335 TFEU, but it is ensured by the body whose conduct gave rise to the controversy.<sup>305</sup> Therefore, we have to assess the EEAS' capacity to give rise to a controversy. This issue can be investigated by considering separately the non-contractual liability raised by the conduct of the EEAS staff and the one raised by the conduct of the EEAS as such.

There is little doubt the conduct of EEAS staff may give rise to the non-contractual liability of the Union. Article 340 asserts that the EU shall make good any damage caused by "by its servants in the performance of their duties." Since the EEAS is a Union body, its staff obviously belongs to the category of EU "servants"; this consideration extends also to the temporary officers of the EEAS, including the officials and diplomats seconded from the Member States.<sup>306</sup> In light of the above, the EEAS should represent the Union in non-contractual liability proceedings raised by the conduct of its officers.

A cursory reading of Article 340 TFEU may suggest that the EEAS' conduct cannot give rise to controversies and, thus, that the Service cannot represent the Union in proceedings determined by its conduct. Indeed, this provision affirms that the Union shall make good any damage caused by its "institutions". A restrictive interpretation would evidently exclude the EEAS from scope of this Article. The ECJ jurisprudence, however, clarified that this reference to "institutions" should be interpreted extensively, as to encompass any EU body,<sup>307</sup> presumably including the EEAS. Hence, the Service should represent the Union in proceedings for non-contractual liability raised by its own conduct. It must be stressed, however, that, due to its limited legal capacity, the Service may only raise the Union's non-contractual liability in respect of administrative issues. The non-contractual liability of the Union in operative areas is only entailed by the actions of other offices and bodies, such as the HR, even when the EEAS takes part in the preparation of those actions.

#### *10. EEAS' Capacity to sue Other Bodies*

The last corollary of the EEAS' legal capacity consists of its capacity to sue other Union bodies for their actions and omissions. This paragraph addresses this issue by focussing on the EEAS' standing in annulment proceedings and, subsequently, in proceedings for failure to act.

It may be recalled that Article 263 TFEU provides for different conditions of access to Court for privileged, semi-privileged and non-privileged applicants. To be sure,

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<sup>305</sup> Joined cases C-63-9/72, *Wilhelm Werhahn Hansamühle and others v Council*, [1973] ECR 1229, par. 7.

<sup>306</sup> See EEAS Decision, Article 6(2), according to which "the EEAS shall comprise officials and other servants of the European Union, including personnel from the diplomatic services of the Member States appointed as temporary agents", and Article 6(4), whereby "the staff of the EEAS shall carry out their duties and conduct themselves solely with the interests of the Union in mind. Without prejudice to the third indent of Article 2(1) and Articles 2(2) and 5(3), they shall neither seek nor take instructions from any government, authority, organisation or person outside the EEAS or from any body or person other than the High Representative."

<sup>307</sup> Case C-370/89, *Société Générale d'Entreprises Electro-Mécaniques and Roland Etroy v European Investment Bank*, [1993] ECR 2583, par. 15-16.

the Service is not listed as a privileged or a semi-privileged applicant. This does not prevent the Service from initiating proceedings in its capacity as a “legal person”, within the meaning of the fourth paragraph of Article 263 TFEU. It may be recalled, however, that the EEAS’ capacity is limited to the administrative area. Hence, the Service may sue other bodies with respect to administrative issues, but it is barred from suing other bodies’ acts that concern operative matters.<sup>308</sup>

Being a “legal person” for the purpose of Article 263 TFEU, the EEAS can only challenge other bodies’ acts subordinately to two conditions: direct concern and lack of implementing measures, for regulatory acts, or direct and individual concern, for non-regulatory acts. In principle, this should not prevent the Service from being able to challenge most acts affecting its activities. However, the criteria set by Article 263 TFEU may prove problematic in the case of some non-regulatory acts, which are not addressed to the EEAS but impinge on its prerogatives. For instance, a Commission decision whereby the Institution grants access to a EEAS document in its possession may be characterised as a non-regulatory act, since it has a specific addressee, that is to say the person who requested access to the document. According to Regulation 1049/2001 the Commission may only grant access to such document after having consulted the EEAS.<sup>309</sup> If it did not do so, however, the EEAS may hardly challenge the Commission’s decision, which is neither formally nor substantively addressed to the Service.

This problem may appear to be solvable through an analogical application of the ECJ jurisprudence. The Court affirmed in *Chernobyl* that “observance of the institutional balance means that each of the institutions must exercise its powers with due regard for the powers of the other institutions. It also requires that it should be possible to penalize any breach of that rule which may occur.”<sup>310</sup> This line of reasoning famously led the ECJ to conclude that, although at the time of the facts the Treaty did not enable the Parliament to bring action for annulment, such an action was admissible provided that it sought only to safeguard the EP’s prerogatives.<sup>311</sup> This might lead to think that the EEAS should be enabled to bring action for annulment in order to safeguard its prerogatives. This jurisprudence, however, does not appear to be applicable to the EEAS: in *Chernobyl*, the Court started from the assumption that “the Treaties set up a system for distributing powers among the different Community institutions, assigning to each institution its own role in the institutional structure of the Community and the accomplishment of the tasks entrusted to the Community.”<sup>312</sup> The EP’s access to Court was thus functional to preserve the distribution of power set in the Treaties. Institutional balance cannot be violated in a case concerning the EEAS, since this entity has legal capacity only in respect of administrative matters, and it does not directly participate in its own capacity in the political life of the Union. Consequently, the EEAS’ access to Court is not implied by the distribution of power

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<sup>308</sup> The Service may use two non-judicial ways to ensure the compatibility of such acts with the Treaties. *Ex ante*, it may influence the content of those acts through its responsibilities as a service working for the Commission and the Council. *Ex post*, the EEAS may suggest the HR to impugn other bodies’ acts before the Court. However, Article 263 TFEU does not list the HR among privileged applicants, therefore this second way may not be exceedingly easy to follow.

<sup>309</sup> Cf. *Id.*, Article 4(4): “as regards third-party documents, the institution shall consult the third party with a view to assessing whether an exception in paragraph 1 or 2 is applicable, unless it is clear that the document shall or shall not be disclosed.”

<sup>310</sup> Case C-70/88, *Parliament v Council*, [1990] ECR I-2041, par. 22.

<sup>311</sup> *Id.*, par. 27.

<sup>312</sup> *Id.*, par. 21.

set in the Treaties and the Service may be incapable of bringing action against certain acts of other Union bodies.

After having analysed the *locus standi* of the EEAS in respect of annulment, it is necessary to briefly evaluate the EEAS' capacity to initiate proceedings for failure to act. As in the case of annulment, the EEAS is a non-privileged applicant for the purpose of Article 265 TFEU. This implies that the Service cannot challenge omissions of other bodies that are not concerned with the Service's activities, namely the failure to adopt decisions relating to operative issues.

In addition, the non-privileged status of the EEAS implies that the Service cannot challenge omissions to adopt non-binding acts. As a consequence, the EEAS is not able to sue other Union bodies for failure to cooperate, as required by Article 3 of the EEAS Decision, unless the Service demonstrates that this cooperation should be implemented through binding acts directed at the Service; on the contrary, as we demonstrated above, Union institutions may sue the EEAS because of its lack of support, independently from the instrument through which this support should be implemented.

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This section sought to demonstrate that the EEAS is new kind of body of the European Union, since it has a 'dual' identity. It lacks competences of its own and autonomy of political direction and it consequently functions as a service of High Representative. At the same time, it has the legal capacity that is necessary to oversee its internal administration, in all its aspects, ranging from the adoption of acts, to cooperation with other entities and capacity to stand before the Court of Justice. The EEAS, therefore, seems to closely 'mimic' the functioning of a Union institution.

It is apparent, therefore, that the legislator intended the couple HR/EEAS to function as a single *quasi*-institution, where the HR performs the 'operative' functions, dealing with the exertion of Treaty-based powers, while the EEAS manages the administrative governance. The original design of the EEAS has a clear rationale: enabling the setting up of an administration capable of assisting the HR in the performance of his/her duties without encumbering him/her with the performance of administrative tasks. Such choice is manifestly in line with the purpose of the EEAS that was outlined in chapter 1, that is to say contributing to the feasibility of the HR's "impossible job".

This conclusion raises a further question: why did the legislator avoid creating a simple new institution made up of both the HR and the EEAS? The reason appears to be simple: by establishing the EEAS as a *service*, the legislator enabled it to participate in the activities of other entities. This allows the Service to work with (and within) the entities that spearhead the intergovernmental and Community method, that is to say the Councils and the Commission, as demonstrated in the next section.

## SECTION 2 – 'SERVANT OF TWO MASTERS': EEAS' POLITICAL ACCOUNTABILITY TO OTHER POLICY-MAKERS

The characterisation of the EEAS as the administration that supports the High Representative has important consequences for its relation with the other entities that manage European foreign policies, and for its position in the division of power of the external action. Given the HR's responsibilities in the Commission and intergovernmental frameworks, it may be expected that his/her administration should, as noted by Catherine Ashton, "serve the President and Members of the Commission, especially the RELEX family, and the President of the European Council, and of course the Member-States and European Parliament."<sup>313</sup> This issue is of great relevance. If the EEAS served the Member States, the latter may use it to 'intergovernmentalise' the entire external action. If the EEAS served the bodies that promote EU interests, i.e. the Commission and the European Parliament (EP), it may entail an unwarranted 'communitarisation' of national foreign policies. Finally, if the EEAS served both the Member States and EU bodies, it may encounter insurmountable obstacles. It is indeed common knowledge that "no man can serve two masters: for either he will hate the one, and love the other; or else he will hold to the one, and despise the other."<sup>314</sup>

This section intends to verify whether the EEAS *serves* entities other than the HR, and is divided into 7 paragraphs. The first one investigates the EEAS' capability to assist the HR in the performance of all his/her functions, and consequently excludes that the EEAS' assistance to the HR may entail its hierarchical subordination to other entities. The second one hypothesises a 'softer' form of subordination, and argues that the EEAS may be 'accountable' to the entities that have legitimacy in the EU. The third paragraph assesses the 'democratic' accountability of the Service. In paragraphs 4-6 the analysis turns to the 'international' accountability of the EEAS, by focusing on the relation with the Member States (paragraphs 4-5) and intergovernmental organs (paragraph 6). The section is concluded, in paragraph 7, through an analysis of the EEAS' accountability to the institution embodying the legitimacy brought by the process of European integration, that is to say the Commission.

### *1. Assisting the HR in his/her Capacity as an Organ of other Institutions*

If the EEAS were a 'normal' service of the HR, it may be expected to assist him/her in the performance of all his/her functions, including those in the Commission and the Council. A literal interpretation of the Treaties seems to exclude such possibility, since the EEAS is only mentioned in the CFSP chapter of the TEU (Article 27(3)). Had the drafters of the Treaties intended to give the EEAS a role 'transversal' to the external action, they would have provided for its legal basis in the common provisions on the external action (Articles 21-22 TEU) or directly in Article 18 TEU, which introduces the three 'hats' of the HR.<sup>315</sup> The opposite

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<sup>313</sup> Speech to the European Parliament's foreign affairs committee, 23 March 2010, Brussels.

<sup>314</sup> King James Bible, Matthew 6:24. See also Pinsky and Laranjeira, "No one can serve two masters", *Addiction* (2008): 855, according to whom "because of its universality, it is possible to find versions of these wise words in many cultures".

<sup>315</sup> Blockmans and Hillion (Eds.), *op. cit.*, p. 2, notice that "the rationale for locating the legal basis of the EEAS decision in the CFSP chapter of the TEU can thus be questioned".

conclusion can be reached through a teleological and systemic interpretation of Article 27(3) TEU. The EEAS' function is to weave together the Community and intergovernmental approaches through the Union method. Moreover, the principle of coherence requires an interpretation of the Treaties favourable to the conduct of a synergetic external action. Hence, Article 27(3) TEU should receive an extensive interpretation.<sup>316</sup>

The legislator retained this approach. The numbering of the EEAS Decision (2010/427/EU) suggests that it is not a merely CFSP act (since, in the latter case, it would appear as 2010/427/CFSP). Moreover, Article 2(1) of the EEAS Decision explicitly states that "the EEAS shall support the High Representative in fulfilling his/her mandates as outlined, notably, in Articles 18 and 27 TEU". This provision further clarifies that the EEAS supports the HR in the performance of all his/her tasks, including the conduct of the CFSP, the presidency of the Foreign Affairs Council and the promotion of external action coherence.<sup>317</sup>

The concern for coherence of the legislator was such that it actually introduced *new* tasks of assistance for the EEAS. Whereas, according to Article 27(3) TEU, the EEAS assists the HR, Article 2(2) of the EEAS Decision asserts that it "shall assist the President of the European Council, the President of the Commission, and the Commission in the exercise of their respective functions in the area of external relations." This provision is not entirely surprising, since the EEAS is linked to both the European Council and the Commission *via* its duty of assisting the HR, who takes part in the work of the former and is a Vice-President of the latter. It cannot be denied, however, that Article 2(2) suggests the existence of a *new* direct link between the Service and the two aforementioned institutions. Does this imply that the EEAS is hierarchically integrated in the administration of other institutions?<sup>318</sup>

This is not the case, since primary law clearly hints at the fact that the EEAS functions as the administration that serves the HR. A systemic reading of the Treaties confirms that the EEAS is not one of the departments of the Commission, since the organisation of the latter is regulated according to Article 249(1) TFEU, whereas the EEAS has its legal basis in Article 27(3) TEU. The EEAS is not an administration of intergovernmental institutions either, since their services find their mandate in Articles 235(4) and 240(2) TFEU. The practice confirms this reading of the Treaties. Although the EEAS' bureaucratic structure resembles that of the Commission (and of most national administrations), the Service has peculiarities of its own. This is rendered evident by the EEAS nomenclature: instead of having units, heads of unit, directorates and directors, like the Commission, the Service has "divisions", "heads of division", "managing-directorates" and "managing-directors". The EEAS' structure is anomalous also in substantive terms. For instance, the Service has two heads: a Chief operating

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<sup>316</sup> A similar conclusion is reached when Article 27(3) TEU is interpreted in light of preparatory documents: as noted in chapter 1, the drafters of the Treaties transparently intended to enable the EEAS to support the HR in the performance of all his/her tasks.

<sup>317</sup> Perhaps incongruously, this reference to consistency is performed in the same paragraph that provides for the EEAS role in the CFSP, whereas, as shown in chapter 1, this issue is transversal to the different areas of the EU's external action.

<sup>318</sup> On the hierarchical relations between the organs of the public administration see, e.g., Garofoli and Ferrari, *Manuale di Diritto Amministrativo* (Nel Diritto, 2009), p. 101, Mazzaroli et al., *op. cit.*, pp. 390 ff., and Waline, *Droit Administratif* (Dalloz, 2010), p. 67. It must be stressed, however, that the peculiarities of the EEAS render the traditional characterisation of hierarchy scarcely useful in our perspective, since the Service may receive input from different sources, which may be hierarchically superior (HR) but also linked in a non-hierarchical manner (Commission, Council), as this paragraph intends to clarify.

officer, dealing with administrative issues, and an Executive Secretary General, overseeing operative aspects (under the HR guidance). Together with their deputies and other high-ranking officers, these subjects compose the “corporate board”, that is to say the internal coordination management unit that steers the EEAS’ activities. The peculiar nomenclature of the EEAS is not found in any other EU institution, but it seems to have been borrowed (for reasons that remain obscure) from the terminology used in business management.

It is clear, therefore, that the EEAS’ support to the HR does not imply the hierarchical subordination of the former to other Union institutions. The EEAS’ duty to assist the Commission and the European Council must consequently be construed as a generic political duty to ‘serve’ these institutions. How can such duty be enforced?

## 2. Introducing the EEAS’ Political Accountability

Although the EEAS is part neither of EU institutions nor of Member States’ administrations, it may theoretically serve European and national actors because it is *accountable* to them. In political terms, it seems quite established that accountability is one of several methods of constraining power<sup>319</sup>, and it characterises relationships in which a person is held to answer for performance that involves some entrustment of power from another entity.<sup>320</sup> Thus the ‘accountable’ entity is under at least two political duties: providing information as to its actions and suffering punishment in the case of eventual misconduct.<sup>321</sup> The reliance on a political concept such as ‘accountability’ admittedly raises methodological issues for the legal research. It is nonetheless opportune, since it enables us to position the EEAS in the institutional and constitutional framework of European foreign policies. Such analysis is also feasible in a legal perspective, since accountability is enforced mainly through legal instruments.

Accountability descends from legitimacy. In democratic States, the exercise of power is believed to be delegated by the people to elected organs, which are consequently accountable to the *demos*.<sup>322</sup> Non-elected organs may be directly accountable to people’s representatives, and indirectly accountable to the people themselves, such as in the case of governments in parliamentary democracies. Legal investigations of accountability, consequently, are usually related to ‘democratic’ accountability.<sup>323</sup> The EU system is characterised also by other two elements of legitimacy. On the one hand, there is the ‘international’ legitimacy of the Union, which stems from the conferral of competences by the Member States, and which is

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<sup>319</sup> Lindberg, *Accountability: the Core Concept and Its Subtypes* (Overseas Development Institute Working Paper, 2009), p. 2.

<sup>320</sup> Romzek and Dubnick, “Accountability”, in Shafritz (ed.), *International Encyclopedia of Public Policy and Administration* (Westview, 1998), p. 6.

<sup>321</sup> Schedler, “Conceptualizing Accountability”, in Schedler, Diamond and Plattner, *The Self-Restraining State: Power and Accountability in New Democracies* (Lynne Rienner Publishers, 1999), pp. 14–28.

<sup>322</sup> For instance, see Philip, “Delimiting Democratic Accountability”, 57 *Political Studies*: 28-53.

<sup>323</sup> Cf. Verhey, Kiiver and Loeffen (ed.), *Political Accountability and European Integration* (Europa Law Publishing, 2009); see also, e.g., Bidégaray, *La Responsabilité Politique* (Daloz, 1998); Rescigno, *La Responsabilità Politica* (Giuffrè, 1968); Azzariti (ed.), *La Responsabilità Politica nell’era del Maggioritario e nella Crisi della Statualità* (Giappichelli, 2005), Bressman, “Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State”, 78 *New York University Law Review* (2003): 461-557.

expressed through intergovernmental organs.<sup>324</sup> On the other hand, there is the legitimacy that is inherent to the integration process, and which is manifested by the subject acting in the "general interest of the Union", i.e. the Commission.<sup>325</sup> Given the democratic principle the EU is founded upon, it may be hypothesised that the EEAS should be accountable to the European Parliament, as investigated in next paragraph. The remainder of this section will evaluate the 'international' and 'Communitarian' strands of the EEAS' accountability.

### 3. *The Scarce Democratic Accountability of the EEAS*

The EEAS Decision mentions the Service's support to, and cooperation with, the EP,<sup>326</sup> and it specifies that the HR should submit a few reports on the EEAS to the Parliament. Neither this Decision nor the Treaties, however, clarify the democratic accountability regime applicable to the EEAS.

The Service's relation with the EP may be determined on the basis of the HR's position. In this perspective, the democratic accountability of the EEAS seems rather limited. Whereas Article 230 TFEU affirms that the Commission must reply to questions put to it by the Parliament, no Treaty provision specifies that the HR should respond to the representatives of European citizens. In addition, whereas the Commission may be censured by the EP and the HR may be obliged to resign from duties that he or she carries out in the Commission, he/she cannot be compelled to renounce its prerogatives in the CFSP area and within the Council.

Nonetheless, the HR is indirectly accountable to the EP through other means. He/she is subject to a vote of consent by the EP when the latter approves the Commission *en bloc*.<sup>327</sup> Thus a very strong opposition to the HR on the part of the European Parliament may render impossible the appointment of the Commission. Such form of 'indirect' accountability is reinforced by the fact that the HR "shall resign, in accordance with the procedure set out in Article 18(1) [TEU], if the [Commission] President so requests." Thus if the Commission President (who is accountable to the EP) comes to oppose the HR, he may ask for the latter's demotion.

The EEAS' democratic accountability is partially strengthened by its direct relation with the Parliament. The EEAS must take into consideration the Parliament's views, since the latter co-decides the adoption of the budget. The EP is unlikely to reduce the Service's administrative budget, but it may well choose not to grant the

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<sup>324</sup> On the democratic and international form of legitimacy of the EU, see Constantinesco, *Compétences et pouvoirs*, cit. *supra*, particularly at p. 418. The coexistence of democratic and international accountability in the EU explains why the Commission entertains an original relation with the EU legislator, which oscillates between a State-like government-parliament model and the typical formula of an international organisation's administration; see also Constantinesco, "La Responsabilité de La Commission Européenne : La Crise de 1999", 92 *Pouvoirs* (2000): 117-131, at p. 130.

<sup>325</sup> De Quadros, *Droit de l'Union Européenne: Droit Constitutionnel et Administratif de l'Union Européenne* (Bruylant, 2008), pp. 190-191. The inherent legitimacy of the Commission is testified by the letter of Article 17 TEU, according to which "In carrying out its responsibilities, the Commission shall be completely independent. Without prejudice to Article 18(2), the members of the Commission shall neither seek nor take instructions from any Government or other institution, body, office or entity. They shall refrain from any action incompatible with their duties or the performance of their tasks."

<sup>326</sup> Article 3(4).

<sup>327</sup> Article 17(7) TEU.



discharge of the EU's budget.<sup>328</sup> Since the EU budget is entirely implemented by the Commission, ex Article 317 TFEU, it is the latter institution that is directly accountable to the EP. However, considering that the EEAS cooperates with the Commission in the implementation of several policies, and it must interact with it for the purpose of financing CFSP endeavours (which are implemented by the HR/EEAS), it is evident that the Commission's accountability partially extends to the EEAS *de facto* if not *de jure*.

In addition, the EP may oversee some of the EEAS' implementation activities in the context of Comitology procedures. As it is known, Comitology relates to the procedures through which the Member States control the implementation of Union acts,<sup>329</sup> before their adoption by the Commission.<sup>330</sup> The EP has a "right of scrutiny" in Comitology procedures,<sup>331</sup> whereby "it can indicate to the Commission that, in its view, a draft implementing act exceeds the implementing powers provided for in the basic act. In such a case, the Commission shall review the draft implementing act."<sup>332</sup> Since the Service assists a Vice-President of the Commission, it may be administratively responsible for the implementation of certain policies; therefore, it may represent the Institution in some Committees. In this perspective, the EEAS is partially accountable to the EP as far as the implementation of Union policies is concerned. The EEAS' democratic accountability in the implementation of Union policies, however, has relevant limits. The EP's "right of scrutiny" does not concern the merit of a decision, but only its respect for institutional balance. Moreover, the exercise of this right obliges the Commission and thus the EEAS to revise, but not to modify, the proposed implementing decision. Finally, and most importantly, the right of scrutiny of the EP does not extend to the implementation of the CFSP, which is performed directly by the EEAS, under the authority of the HR, outside the Commission framework.

In order to reinforce these weak forms of accountability, the EP requested the HR to adopt a Declaration on political accountability,<sup>333</sup> as part of the negotiation for the approval of the EEAS Decision. Most provisions contained in this document probably are non-binding. The wording of the Declaration might seem to indicate that the HR intended to give the European Parliament a supervisory role in the field of CFSP decision-making<sup>334</sup> and implementation,<sup>335</sup> beyond the letter of the Treaties. Considering that primary law does not provide for such powers for the EP, and provided that EU offices and bodies cannot modify the distribution of competences set in the Treaties, it is evident that the HR could not intend to confer competences on the EP, but she simply wanted to undertake political

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<sup>328</sup> On the discharge procedure, see Petit, "Les Finances de l'Union Européenne dans Le Projet de Traité Etablissant une Constitution Pour l'Europe", in Constantinesco, Gauttier and Michel (eds.), *Le Traité Etablissant une Constitution Pour l'Europe* (Presses Universitaires de Strasbourg, 2005), pp. 191-202.

<sup>329</sup> See Article 291(3) TFEU and Regulation 182/2011/EU of the European Parliament and of the Council of 16 February 2011 OJ 2011 L 55/13 –18.

<sup>330</sup> The existence of a function of 'control' does not exclude the possibility that Committees perform other functions too, including "technical assistance" to the Commission, see Baratta, "Introduzione Alle Nuove Regole Per L'adozione Degli Atti Esecutivi Dell'unione", *Diritto Dell'unione Europea* (2011): 565-583, p. 568.

<sup>331</sup> Regulation 182/2011/EU, Article 11.

<sup>332</sup> The Commission may modify and integrate the non-essential elements of the base act, Case 23/75, *Rey Soda*, [1975] ECR 1301 and C-403/05, *Parliament v. Commission*, [2007] ECR I-9045.

<sup>333</sup> Declaration by the High Representative on political accountability, O.J. 2010 C 210/01.

<sup>334</sup> E.g. *id.*, par. 1.

<sup>335</sup> E.g. *id.*, par. 3.

commitments.<sup>336</sup> Notwithstanding its ‘soft law’ character, the Declaration requires attention, since it may shape the expectations of both the EEAS and the EP, thus entailing the accountability of the former to the latter.

The Declaration may be analytically divided in three parts. The first contains political commitments that the HR entered into in order to enhance the transparency of the EEAS *vis à vis* the EP and European citizens. These commitments concern mainly the ‘interviews’ of high ranking EEAS officer. According to the Declaration, Heads of Delegation are required to participate in “exchanges of views” with the EP, before taking service, if the latter so desires.<sup>337</sup> Similarly, Heads of Delegations, Heads of CSDP missions and senior EEAS officials may be required to participate “in relevant parliamentary committees and subcommittees in order to provide regular briefings”.<sup>338</sup> It is not clear to what extent this first category of political commitments is enforceable. The EP is unlikely to transform such commitments into ‘hard powers’, as it did in the case of the appointment of prospective Commissioners. The views of the Parliament on single Commissioners cannot be disregarded, lest the EP does not approve the Commission.<sup>339</sup> On the contrary, the EP has little means to sanction the non-cooperative behaviour of the EEAS senior staff or their perceived inadequacy.

The HR/EEAS’ accountability to the EP seems to be stronger in a second area, relating to mutually beneficial arrangements. In her Declaration, the HR affirmed that the EP will be consulted on the identification and planning of Election Observation Missions and their follow-up”.<sup>340</sup> Given the obvious expertise of the European Parliament in respect of elections, it may be expected that the EEAS will live up to this commitment, at least because of its own interest in the matter. In this case, however, the relation between the EP and the EEAS resembles a dialogue between two functionally similar bodies, rather than the relation of a body accountable to another.

The EEAS’ accountability is most evident in the fields where cooperation is fostered by the EP’s ability to sanction the Service. This is transparently the case of the Declaration’s provision whereby the EEAS shall provide briefings relating to CFSP missions “financed out of the EU budget”.<sup>341</sup> Since the funding of these missions is dependent also on the will of the EP, in its capacity as budget authority, it is evident that the Service needs to take the latter’s view into consideration. A similar example consists of the requirement to provide information as to the negotiation of international agreements for the conclusion of which the consent of the Parliament is required,<sup>342</sup> since any serious lack of cooperation on the part of the EEAS may lead to the non-approval of the agreement that is being negotiated.

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<sup>336</sup> Some provisions contained in the declaration *might* nonetheless be binding, insofar as they concern the internal governance of the EEAS or the deputising of the HR’s functions. Since these provisions merely echo the Treaties, or have an extremely vague content it is not necessary to investigate their legal character.

<sup>337</sup> *Id.*, par. 5.

<sup>338</sup> *Id.*, par. 7.

<sup>339</sup> As it is known, the EP obtained a *de facto* veto power on the nomination of new Commissioners, as testified by the case of the prospective Commissioner Buttiglione, see Zucca, “The Barroso Drama: All Roads Lead to Rome”, 1 *European Constitutional Law Review* (2005): 175-181.

<sup>340</sup> Par. 9.

<sup>341</sup> *Id.* par. 1.

<sup>342</sup> *Id.* par. 2. The provision is rather puzzling, in so far it relates to the agreements falling under the HR’s area of responsibility, “where the consent of the Parliament is required.” Since the HR only negotiates CFSP agreements, which are generally not subject to the approval of the EP, this provision is likely to be redundant.

In summary, the EEAS, unlike the European Commission, is scarcely accountable to the European Parliament. The elements of accountability binding the Service are mainly related to non-CFSP policy implementation, financial implementation and the negotiation of international agreements.

#### 4. 'International' Accountability: EEAS' Strong Links to the Member States

After having considered the 'democratic' side of the EEAS' accountability, we now turn to the 'international' one. The accountability of the EEAS to the Member States may be ensured in three manners: *via* a direct relation between the Service and the States, through the EEAS' officers and through the relation between the EEAS and intergovernmental organs. This paragraph addresses the first issue, paragraph 5 concerns the second one, and paragraph 6 approaches the third.

The EEAS is most closely associated with the Member States when it acts as their organ. There is no international or EU rule that prevents States from entrusting the exercise of their competences to Union bodies, outside the field of Union competences. They have done so, in practice, in numerous occasions. This is typically the case of the European Development Fund (EDF), which was created through an 'internal agreement' of the Member States, entrusting EDF implementation on the Commission.<sup>343</sup> A similar solution is often adopted in the negotiation of the so-called 'mixed agreements', where the Commission represents the Member States in their area of competence.<sup>344</sup> In these situations, the Member States do not confer competences on the Union; the Commission, therefore, does not act in its capacity as a Union body. They do not attribute competence on the Commission either, since the latter is not an international subject and it cannot have competences of its own under international law. It may consequently be argued that the Member States adopt the Commission as their common organ;<sup>345</sup> in other words, the Commission functions as a part of Member States' executives, and is consequently accountable to them.

The Member States may adopt also the EEAS as their common organ.<sup>346</sup> They seem to do it in practice in the case of the "EU local statements",<sup>347</sup> which are issued by the Union Delegations accredited to third countries "in agreement with the EU Heads of Mission", that is to say Member States' embassies.<sup>348</sup> Provided that the

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<sup>343</sup> The very ECJ accepted the legality of these arrangements, by holding that "no provision of the Treaty prevents Member States from using, outside its framework, procedural steps drawing on the rules applicable to Community expenditure and from associating the Community institutions with the procedure thus set up". C-316/91 [1994] ECR I-625, par. 41.

<sup>344</sup> The legality of these arrangements was supported by Advocate General Jacobs in his opinion in Case C-316/91, *Parliament v. Council*, [1994] ECR I-625.

<sup>345</sup> On the notion of 'common organ' in international law, see Sereni, *La Représentation en Droit International* (Hague Academy of International Law, 1948), p. 86.

<sup>346</sup> The direct adoption of the EEAS is improbable, since the Service does not have operational autonomy from the HR. It is more probable the Member States adopt the High Representative as their organ; since the EEAS is a Service of the HR, the Member States would implicitly adopt the EEAS too.

<sup>347</sup> Cf. [http://eeas.europa.eu/statements/local/index\\_en.htm](http://eeas.europa.eu/statements/local/index_en.htm)

<sup>348</sup> Since the latter do not necessarily issue the statements autonomously, it may be assumed that their "agreement" functions as an *ad hoc* entrustment of competence to deliver a message. The picture may be complicated through a consideration of the distribution of competences. If the statement concerns both EU and Member States' competences, the Delegation represents also the Member States. If the statement concerns only EU competences, the agreement expressed by Member States' missions should be seen in analogy to the voting within the Council: the EU mission

Delegation is not autonomous from the EEAS, it would seem that the Member States adopt the EEAS as their organ for the issuing of “local statements”. Another interesting case concerns the negotiation of mixed agreements on behalf of the Member States: although the latter traditionally entrust their representation on the Commission, it may not be excluded that they will choose the HR and the EEAS as their representatives for future agreements containing ‘political’ elements, given their expertise in CFSP issues.

The adoption of the EEAS as a common organ of the Member States appears to imply the complete accountability of the former to the latter: the power of the EEAS should be strongly constrained, since the Member States may issue detailed instructions, request information and sanction the EEAS’ incompliance through the withdrawal of its powers. Would the accountability of the EEAS be different in the case it acted in its capacity as a Union body?

There is no Treaty provision that suggests a general accountability of the EEAS to the Member States. As it is known, the Union is conferred competences by the Member States and it exercises them through its organs, including the EEAS. Consequently, there should be no direct relation between the Member States and Union organs,<sup>349</sup> unless the Treaties affirm otherwise. Since the Treaties do not foresee any direct relation between the Member States and the HR/EEAS, a formalistic approach would lead to exclude any accountability of the latter to former. However, such reading probably is neither realistic nor useful. Since the Member States are the Masters of the Treaties, their views can hardly be disregarded by Union bodies. The mechanisms enforcing their accountability are not only found in the Treaties, but are identified also in the practice. Informal mechanisms for the enforcement of accountability may be provided for by critical notes or reports. Such was the case of the non-paper on the EEAS prepared by several EU Member States in 2011.<sup>350</sup> Although this document obviously had no binding character, it had at least the effect of placing some issues in the HR’s agenda.

The Member States can use another mechanism to enforce the EEAS’ accountability: comitology. As recalled above, comitology consists of a mechanism for control by Member States of the Commission’s exercise of implementing powers.<sup>351</sup> Comitology concerns the EEAS in so far as the latter participates in the

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would therefore act representing the EU position, decided upon by the Member States’ representatives. Independently from the distribution of competences, however, the decision-making method is always intergovernmental, since it is based on consensus. Therefore, the distinction between these two situations is theoretically relevant, but probably has no practical implication.

<sup>349</sup> The only exception to this principle is provided for by intergovernmental organs, which are formed by the States’ representatives: since the EEAS is not composed by such representatives, this issue can be ignored.

<sup>350</sup> Non-paper on the European External Action Service from the Foreign Ministers of Belgium, Estonia, Finland, France, Germany, Italy, Latvia, Lithuania, Luxembourg, the Netherlands, Poland and Sweden, 8 December 2011, available at <http://www.europarl.europa.eu/>, last visited 15 December 2012.

<sup>351</sup> Regulation 182/2011/EU of the European Parliament and of the Council of 16 February 2011 OJ 2011 L 55/13 –18. Although Comitology is now codified, it was created in the practice: the Member States subjected Commission implementing decisions to the scrutiny of a *committee* composed by their representatives, on the basis of the delegation of implementing powers by the Council to the Commission. The Court famously held that comitology did not run counter the EU institutional balance, because “without distorting the community structure and the institutional balance, the management committee machinery enables the council to delegate to the commission an implementing power of appreciable scope, subject to its power to take the decision itself if necessary”,

implementation of policies falling within the competence of the Commission, that is to say non-CFSP actions. The Service is invited by the Commission to participate in the Committees dealing with actions prepared also by the EEAS, such as in the field of development cooperation. Comitology is not directly applicable to the CFSP, whose implementation is regulated by Article 24 and 26 TEU, rather than Article 291 TFEU. However, since the HR and the EEAS put into effect this policy under the scrutiny of the Council, it is evident and logical that the Member States should exert a strong control in this area too.<sup>352</sup> The interaction between the Member States and the EEAS in the implementation of CFSP is particularly evident with respect to the CSDP. The Service indeed contains the organs that are responsible for the support to military operations (EU Military Staff), the conduct of civilian CSDP missions (Civilian Planning and Conduct Capability), and the civilian-military strategic planning structure for CSDP operations and missions (Crisis Management and Planning Directorate). These organs are accountable to Council bodies, namely the Political and Security Committee (PSC), which *inter alia* exercises the political control and strategic direction of the crisis management operations (Article 38 TEU). Since the PSC is composed of representatives of the Member States, the EEAS is particularly accountable to the Member States in this ambit.

##### 5. EEAS Officers as a Source of Accountability to the Member States?

At first sight, the EEAS' accountability to the Member States may seem to be reinforced by the relation between its officers and European countries. Such relation may be problematic, in the first place, with respect to the EEAS' top management. In March 2011, the HR Decision (2011) 005 established the 'Consultative Committee on Appointments' to the EEAS.<sup>353</sup> This Committee has, among its functions, those of acting as interview panel for senior appointments and monitoring EEAS selection procedures, in particular in relation to geographical balance issues.<sup>354</sup> Two representatives of the Member States, on a rotational basis, sit in the Committee. This implies that European countries have a say in the management of the EEAS' staff policy, in particular for apical positions. The relevance of the Member States influence, however, should not be overemphasised, since the Committee encompasses also a Commission member, who may counterbalance Member States' representatives. Even if the Committee's positions were biased in favour of the Member States' positions, they remain *nonbinding* on the appointing authority (the HR), as provided for by Article 5 of the Decision. Finally, it cannot be ignored that the Member States are hardly alien from interferences with top level nominations in other EU bodies, and namely within the Commission, even if no hard or soft law document explicitly recognises this.<sup>355</sup> The above considerations suggest that the EEAS should not be seen as particularly

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Case 25-70, *Einfuhr- und Vorratsstelle für Getreide und Futtermittel v Köster and Berodt & Co.*, [1970] ECR 1161, par. 9.

<sup>352</sup> Although the Member States formally exert this form of control via Council preparatory bodies, and not purely intergovernmental organs, such as in the case of Comitology, it is appropriate to mention this issue in the present paragraph, rather than in Paragraph 7, because of its analogy with Comitology.

<sup>353</sup> PROC HR(2011) 005, 9 March 2011, not published in the OJ.

<sup>354</sup> *Id.*, Article 2(c).

<sup>355</sup> Interviews with Commission officers, March-June 2011.

accountable to the Member States simply because of their intervention in the Service's Consultative Committee on Appointments.

The EEAS' accountability to European countries seems to be suggested in a more credible way by the fact that the Service is staffed also by Member States' officers. Like other Union bodies, the EEAS is partially composed of seconded national experts (SNE), that is to say officers from the administrations of the Member States, who work for the Union on a temporary basis. In practice, the SNEs staffing the EEAS are primarily those working in the field of crisis management, and they are militaries, policemen and judges. As it is evident, these officers are necessarily seconded by the Member States, since the EU cannot hire them on a permanent basis. The EP, however, insisted that only a "limited" presence of SNEs in the Service should be permitted, and only when "necessary" and "in specific cases" (Article 6(3) EEAS Decision). The Parliament's concern for the presence of SNEs in the EEAS is explained by the Member States' choice to flood the Service with a new sort of seconded officers: national diplomats.

According to Article 27(3) TEU, the EEAS comprises officials from the General Secretariat of the Council and of the Commission "as well as staff seconded from national diplomatic services of the Member States", who, according to Article 6(2) of the EEAS Decision, are "appointed as temporary agents." Member States' diplomats have significant weight within the Service, since they "should represent at least one third of all EEAS staff at AD level" (Article 6(9) EEAS Decision). What is more, national diplomats have meaningful responsibilities within the Service, since their presence is particularly evident at the management level.<sup>356</sup> The relevance of the role entrusted upon national officers within the Service naturally raises an issue of accountability: do Member States use their *fonctionnaires* to constrain the EEAS' power? In other words, are SNEs and national diplomats the 'Trojan horse' of the Member States in the EU external action?

The relevance of 'geographical balance' in the staffing of the EEAS seems to suggest that these questions should be answered affirmatively. The staff policy of the EEAS should be determined by three requirements contained in Article 6(8) of the EEAS Decision: gender balance, geographical balance and merit. The coexistence of meritocracy and geographical balance raises two theoretical problems. On the one hand, meritocracy and geographical balance may well counter each other, since the *personal* merit of an officer may require an appointment to a post different from the one his/her State have a 'right' to.<sup>357</sup> On the other hand, if the content of meritocracy can be easily guessed, the one of geographical balance is less straightforward. These problems were solved in practice by systematically favouring geographical balance over meritocracy and by equating the former with balance of power. Thus the biggest Member States are well represented by the HR (UK), the EEAS Secretary General (France) and deputy secretary-general (Germany). Smaller Member States have been given (less) relevant positions, that is to say Chief Operating Officer (Ireland), another deputy secretary-general (Poland), and the

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<sup>356</sup> "In the second year of recruitment from the three Treaty sources, 30% of management posts will be occupied by national diplomats", European Commission press release, 3 August 2011, IP/11/944, europa.eu, last visited on 23 August 2012.

<sup>357</sup> As it is evident, there may be a contradiction between geographical balance and meritocracy, as plastically rendered by an interview of the Commissioner for institutional relations in 2010, according to whom the Service should have had "no national quota", but, at the same time, "the landscape of the European Union must be reflected in the External Action Service". Euractiv interview with Commissioner Sefcovic, <http://www.euractiv.com/en/future-eu/eeas-reach-balanced-representation-2013-interview-493904>.

officer responsible for crisis coordination (Italy). Since the top management of the EEAS was nominated in light of the preferences of the (biggest) Member States, and not necessarily in light only of meritocracy, it would seem that the former should be accountable to the latter.

The above conclusion seems to be further reinforced by the fact that the Member States have foreseen the means necessary to enforce the accountability of EEAS officers. National officers seconded to the EEAS spend only part of their career in the Service; national diplomats, in particular, are supposed to spend between four and ten years in Brussels. In principle, each Member State should provide its officials who have become temporary agents in the EEAS “with a guarantee of immediate reinstatement at the end of their period of service to the EEAS” (Article 6(11) EEAS Decision). In practice, however, EU institutions do not seem to have any realistic instrument to ensure the compliance of Member States in this respect. Therefore, it is evident that any national officer displaying an ‘unfriendly’ behaviour towards the administration he/she belongs to may be sanctioned, for instance, through the withdrawal of promotions or the transfer to an undesired location.

The above reading of national officers’ role is not entirely misleading, but it appears exceedingly pessimistic. The assumption whereby the Member States second their officers to the Service solely in order to promote national interests seems unrealistic. In some cases, the Member States may simply want to foster coordination between national and European administrations, by providing the Union with the expertise that is solely found at national level.<sup>358</sup> Such desire of the Member States is legitimate and conducive to external action coherence and effectiveness: there certainly are many aspects of foreign policy the EU is not well equipped to deal with, and the secondment of national officers appears as a cost-effective means to solve this problem. The secondment of national diplomats may also benefit national services, by granting them insight into EU procedures and *modus operandi*, thus promoting mutual understanding and supporting the effectiveness of both national and EU services in Europe and in third countries. For instance, it was reported that the lack of experience within European institutions renders national diplomats unaware of the potentialities of European diplomatic cooperation. At the same time, officials having European experience tend to instinctively search for EU-wide collaboration (the so-called “Community reflex”).<sup>359</sup> The Member States’ interest for European coordination, however, does not explain their competition for the positioning of national officers in the Service, which may be better understood in light of the quest for visibility and presence. The placing of a national officer to an apical position of the Service may be presented as a success by a national government, whereas the lack of visible representation may be perceived as a political failure. The press and academic coverage of the EEAS

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<sup>358</sup> Such intention on the part of the Member States was confirmed by three permanent Commission officers and four SNEs interviewed by the author (March 2011-September 2012), and it is supported by the findings of Suvarierol and Van Den Berg, “Bridge Builder Or Bridgeheads in Brussels? the World of Seconded National Experts”, in Geuijen et al. (eds.), *The New Eurocrats: National Civil Servants in EU Policy-Making* (Amsterdam University Press, 2009). In this sense, see also Trondal, “Governing At the Frontier of the European Commission: the Case of Seconded National officials”, 29(1) *West European Politics* (2006): 147-160.

<sup>359</sup> Interview with an EEAS officer, September 2012. Notice however that previous research on SNEs working in the Commission suggests that there are limited long-lasting effect of socialization within European Union's executive machinery of government, Trondal, Van Den Berg and Suvarierol, “The Compound Machinery of Government: the Case of Seconded officials in the European Commission”, 21 *Governance* (2008): 253-274.

staff reinforces this perception, since it often equates geographical balance with balance of power.<sup>360</sup> In this light, the struggle for EEAS apical posts does not appear as an instrument for the promotion of national interests, but rather as end in itself. Therefore, even if it cannot be excluded that some national officers seconded to the EEAS may actually be accountable to their own countries, it cannot be assumed *a priori* that national diplomats are always likely to foster national interests. It is consequently necessary to take a closer look at the way national officers behave. In a formal perspective, national officers should be treated, and should behave like their colleagues, since they must “carry out their duties and conduct themselves solely with the interests of the Union in mind” and they should “neither seek nor take instructions from any government, authority, organisation or person outside the EEAS or from any body or person other than the High Representative” (Article 6(4) EEAS Decision). The practice seems to confirm the respect for this provision. The literature on SNEs suggests that national officers seconded to the EU generally behave with the interests of the Union in mind. As effectively summarised by a Commission SNE quoted by Suvarieriol and Van der Berg: “expertise is the most important. We are not the Member States representatives here. They are in the Council”.<sup>361</sup> What is more, it would seem that even national diplomats operating in Council structures develop a certain sensitivity to EU priorities.<sup>362</sup> The interviews conducted by the author signal that national diplomats seconded to the EEAS do not behave very differently from permanent officers, either.<sup>363</sup> All in all, it seems inappropriate to characterise EEAS officers as a source of accountability to the Member States.

## 6. ‘International Accountability’: the Relatively Weak Ties between the EEAS and the European Council

The ‘international legitimacy’ that characterises the Member States pertains also to the intergovernmental organs, because of their composition.<sup>364</sup> The letter of the Treaties seems to suggest that the EEAS is strongly accountable to the European Council, because the HR is closely linked to this institution. The HR is appointed by the European Council acting by qualified majority; the Institution can also end his/her term of office through the same procedure.<sup>365</sup> This implies that the HR’s office is unlikely to be entrusted on a person disliked by a majority of Member States; in addition, the HR probably seeks not to displease his own appointers, or a

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<sup>360</sup> Cf. Ivan, *A European External Action Service of the Whole Union? Geographical and Gender Balance Among the Heads of EU Delegations* (EPIN, 2011).

<sup>361</sup> Suvarieriol and van der Berg, *op. cit.*, p. 118. In this sense, see also Trondal, *op. cit.*

<sup>362</sup> According to Juncos and Pomorska, national diplomats who participate in the CFSP bargaining in Brussels enter into a mutually influencing relationship with their sending institution, to the extent that “those that left the capitals and started working in Brussels felt the growing gap between themselves and their colleagues from the ministry. One of them observed that in Brussels ‘everything changes faster, when it comes to the mentality of the diplomats’ and that the people in the capital ‘become frustrated, as they feel that we are getting further away and then the lack of understanding appears’, see Juncos and Pomorska, *Playing the Brussels Game: Strategic Socialisation in the CFSP Council Working Groups* (European Integration Online Papers, 2006).

<sup>363</sup> Some cases of direct national influence on EEAS decision-making via seconded national diplomats have been reported, but they only relate to a few high-ranking officers (managing director and above), and appear to be primarily linked to the personalities involved and the attitude of a few national governments. This confirms the finding by Suvarieriol et al and van der Berg, *op. cit.*, p. 118.

<sup>364</sup> Constantinesco, *Compétences et pouvoirs*, *cit. supra*, p. 418.

<sup>365</sup> Article 18(1) TEU.



majority thereof. Since the EEAS is, by definition, bound to promote the political line of the HR, it would seem that the Service should be accountable to the European Council.

This formalistic reading of the Treaties, however, is not completely satisfactory. The High Representative is not likely to be appointed solely because of his/her political proximity to a majority of Member States. His/her nomination is not performed in the void, but in the context of repeated interactions among decision-makers. In addition, the HR's nomination is influenced also by the preference of bodies other than the Member States: since the HR is also Vice-President of the Commission, and the latter is approved by the European Parliament, the preferences of this Institution must be taken into consideration. The process of nomination of the incumbent HR clarifies this issue: Catherine Ashton possibly was not the most likely candidate for this post, but she possessed a number of features that made her a suitable HR in light of the other appointments made at that time. Since the European Popular Party and the Member States had agreed to nominate a conservative man from a medium-sized Member State as the President of the Commission, and a conservative man from a small country as the President of the European Council, it seemed fit to nominate a woman issued from a left-wing party and coming from a big Member State to the post of HR. Provided that France and Germany were granted other posts, the choice of a British woman from the Labour Party seemed inevitable.<sup>366</sup> This shows that C. Ashton was not chosen only because of her trustworthiness in the eyes of the Member States, but because of other factors, including her nationality, her political affiliation and even her gender.

Not only do these factors influence the HR's nomination, but they affect also his/her confirmation in the office, and the possibility that the European Council asks the HR to resign. These threats certainly constrains the power of the HR, but only if they are credible.<sup>367</sup> Since the choice to nominate the High Representative depends on delicate political balances, it would seem that the European Council can difficultly ask him/her to resign, and it may re-nominate him/her even if it is not entirely pleased with his/her performance.

Given the limited HR's accountability to the European Council, it may be argued that the EEAS is unlikely to be held accountable to the Member States via this Institution.

### 7. 'International Accountability': the EEAS as a 'Servant' of the Council

As we demonstrated in Chapter 1, the EEAS should serve the HR in the performance of all the functions the Treaties allocate upon the latter's office, including the tasks related to the presidency of the Foreign Affairs formation of the Council (FAC).<sup>368</sup> This function is particularly relevant, since the FAC is the sole

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<sup>366</sup> Barber, "The Appointments of Herman Van Rompuy and Catherine Ashton", 48 *Journal of Common Market Studies* (2010): 55-67.

<sup>367</sup> By way of analogy, see Constantinesco, *La responsabilité de la Commission européenne*, cit. *supra*, p. 120: "certes, l'on sait que, dans les régimes parlementaires, la menace de la motion de censure est un moyen pour la majorité de l'Assemblée de contraindre le gouvernement à l'entendre sinon à l'écouter : encore faut-il, pour que la menace soit efficace, que l'emploi de la motion de censure soit crédible..."

<sup>368</sup> Article 18(3) TEU.

decision-making body that is responsible for the whole of the European Union's external action.<sup>369</sup>

The EEAS primarily contributes to the work of the FAC by drafting its agenda and by intervening in the bodies that prepare the work of the Council. As it is known, the preparatory bodies of the Council include the Committee of Permanent Representatives (COREPER), which is composed of the diplomatic representatives of the Member States and prepares the work of the Council,<sup>370</sup> and other Committees and Working parties, composed of delegates of the Member States,<sup>371</sup> which prepare the work of COREPER. Preparatory bodies do not adopt legal acts,<sup>372</sup> but they nonetheless play a crucial role, in so far as political compromises are often reached within them.<sup>373</sup> Such compromises are fostered by the chairperson, who determines in what sequence agenda items are addressed, ensures the smooth conduct of discussions,<sup>374</sup> and draws conclusions on the bodies' sessions.<sup>375</sup> Before the Lisbon reform, COREPER, Committees and Working Parties were chaired by representatives of the Rotating Presidency. The creation of the EEAS has modified these arrangements. According to the rules of procedure of the Council, while COREPER remains chaired by the Rotating Presidency,<sup>376</sup> about a half of external relations Committees and Working Parties are chaired by the EEAS.<sup>377</sup>

It may be argued that the EEAS plays an important role in the Council, which is evidently functional to foster consensus-reaching among the Member States. The EEAS, however, is not unrestrained in the performance of its functions within the FAC. The Service must be very attentive not to displease Council Members, since this may lead them to react *via* the instruments mentioned in the previous paragraphs; for instance, in 2011 some Member States subtly, but publicly, criticised the EEAS for not circulating FAC preparatory decision-making papers sufficiently in advance.<sup>378</sup> What is more, if the Service failed to bring about consensus in preparatory bodies, the Council may even re-instate the Rotating Presidency in its former chairmanship position, since the EEAS' role is foreseen only in the rules of procedure of the Council. Hence, the EEAS performs a crucial

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<sup>369</sup> Decision 2009/937/EU of the Council, 1 December 2009 adopting the Council's Rules of Procedure, OJ 2009 L 325, Annex "Rules of Procedure of the Council", Article 2(5). Other entities have responsibilities encompassing the entire external action, namely the COREPER; the latter, however, does not have decision-making powers, in so far as it merely prepares the decisions of the Council.

<sup>370</sup> Article 16(7) TEU and Article 240 TFEU.

<sup>371</sup> Currently, there are about 140 such Committees and Working Groups, see Council doc. 12223/12, 4 July 2012, available at [www.consilium.europa.eu](http://www.consilium.europa.eu). Certain Committees and Working Parties have a specific role of providing expertise in a given area, such as the Political and Security Committee (PSC), as seen in Paragraph 4, cf. Council Decision of 22 January 2001 setting up the Political and Security Committee, OJ 2011 L 27/1-3.

<sup>372</sup> C-25/94, *Commission v. Council*, [1996] ECR I-1469, par. 26.

<sup>373</sup> On the central role of COREPER in practice see Lewis, "National Interests: Coreper", in Peterson and Shackleton (eds.), *The Institutions of the European Union* (Oxford University Press, 2006), pp. 315-337; see also Constantinesco, *Compétences et pouvoirs*, cit. *supra*, p. 343-345.

<sup>374</sup> Handbook of the Presidency of the Council of the European Union, Council doc. 3835/2/11 REV 2, 16 November 2011, p. 43.

<sup>375</sup> *Id.*, p. 32.

<sup>376</sup> *Id.*, p. 40.

<sup>377</sup> Cf. *id.* "The High Representative shall ensure that the person he or she intends to appoint as chairperson will enjoy the confidence of Member States. If that person is not yet a member of the EEAS, he or she shall become one in accordance with the EEAS recruitment procedures, at least for the time of the appointment."

<sup>378</sup> Non-paper on the European External Action Service, cit. *supra*, para 1.

role of consensus-building in the Council, and is strongly accountable to the Institution.

#### 8. 'Communitarian' Accountability: the EEAS as a de Facto Commission Service

The relation between the EEAS and the Commission seems to be exhaustively foreseen in primary law, since the Treaties indirectly provide for the integration of the EEAS in the Commission. Article 18(4) TEU affirms that the HR is “one of the Vice-Presidents of the Commission”. Since the EEAS is a service of the HR, it may be hypothesised that the EEAS should be accountable to the Commission itself.

It may seem that the EEAS functions roughly as a Commission department and is almost completely accountable to the College of the Commissioners. This can be appreciated by noticing, firstly, that the EEAS acts upon the instructions of the Commission (when it operates in the area of Commission responsibility).<sup>379</sup> Not only can the College of the Commissioner discretionally decide how Commission competences are to be implemented, but it is responsible for the adoption of all Commission acts.<sup>380</sup> Secondly, the Commission may demand information to the EEAS. This serves to enable the Commission to perform its decision-making functions and to express its opinion externally. To this end, the Commission may request the EEAS to brief its members before meeting with the Parliament, representatives from the Member States or third States. Thirdly, the Commission sets the procedures the EEAS must respect. The relevance of this aspect should not be underestimated, since the application of internal procedures has substantive consequences, namely with respect to the requirement to cooperate with other Commission services. This issue is of such importance that it was provided for in primary law: Article 18(4) TEU explicitly affirms that in exercising his/her responsibilities within the Commission the High Representative is bound by Commission procedures. Commission procedures, however, are to be respected by the EEAS only insofar as they relate to issues falling within Commission responsibilities. Thus, internal documents such as the Commission Vademecum on working relations with the European External Action Service,<sup>381</sup> are only binding on the Service when it acts in the area of responsibility of the Commission. Fourthly, the Commission can request the EEAS to respect its commitments towards other bodies. Therefore, the EEAS may be requested to defend Commission acts before the Member States during Comitology procedures. Similarly, the EEAS may be required to respond to the inquiries of the European Parliament, national parliaments and other bodies.

What if the EEAS failed to live up to the requests of the Commission? In other words, can the Institution enforce the EEAS' accountability? In principle, the Commission may rely on the most radical threat, that is to say the demotion of the

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<sup>379</sup> On the power of instruction, see *Id.*

<sup>380</sup> Notice, however, that in 'normal' circumstances, the internal delegation of powers to Commission services may enable their officers to adopt certain administrative acts *on behalf of their Institution*, as we have seen in Chapter 2. Such possibility is precluded to EEAS officers: not being part of the Commission *de jure*, they cannot represent it in the adoption of legal acts. Cf. European Commission, Vademecum on working relations with the European External Action Service, SEC (2011)1636, not published in the OJ, p. 13: “As a Vice-President of the Commission, the HR/VP may also adopt decisions on behalf of the College by empowerment procedure. These cannot be sub-delegated to the Executive Secretary General of the EEAS (as it is not a Commission service)”.

<sup>381</sup> Cit. *supra*.

HR/VP. Being a Commissioner, the HR/VP should carry out the duties devolved upon him/her by the President of the Commission under his/her authority; the latter should consequently be able also to request the HR to resign. As seen above, however, the HR is nominated by the European Council, which, according to Article 18(1) TEU, has also the power to demote him/her by qualified majority. How can these two competing allegiances be squared? Article 17(6) TEU provides for an apparently contradictory solution: "the High Representative of the Union for Foreign Affairs and Security Policy shall resign, in accordance with the procedure set out in Article 18(1), if the President so requests." This may seem to imply that the European Council retains the ultimate decision-making power relating to the HR's demotion. A systemic interpretation of Articles 17(6) and 21(3) TEU, however, leads to the opposite conclusion: if the HR is to promote coordination in European foreign policy, functionally to its coherence, he/she must cooperate with all the most important decision-makers, including Member States' governments, represented in the European Council, and the Commission. To this end, the HR must enjoy the trust of both institutions. The dissatisfaction of one of the two is sufficient to render the HR's job 'impossible', and consequently justifies his/her demotion. Hence, the choice of the European Council to demote the HR must be sufficient to override the intention of the Commission to maintain him/her in her position, and vice-versa. It is obvious that, in the case of inter-institutional conflicts, it would be prudent for the HR/EEAS not to take sides, for the sake of not compromising the HR's position. In particular, and differently from what a superficial reading of Article 17(6) TEU may seem to suggest, the EEAS should be wary about displeasing the Commission, in so far as the latter may demote the HR, as much as the European Council could. As noted above, however, the demotion of the HR is an unlikely event, due to the delicate balances of power that affects the choice of the High Representative, and all the more so in a context where the HR must earn the trust of both the Member States' governments and the Commission. There is another, and more direct, reason why the EEAS should be mindful of the Commission's views: the Institution may directly restrain the field of action of the Service. A cursory reading of the Treaties may suggest that the activities of the HR/EEAS in the Commission are determined directly by primarily law, since Article 18(4) asserts that the HR/VP is responsible for managing external relations and coordinating "other aspects of the Union's external action". This may suggest that the HR/VP should be responsible for the management of *all* the external relations policies falling within the competence of the Commission. Such interpretation would render the HR/VP responsible for trade, development cooperation, humanitarian aid and possibly the external aspects of EU internal policies. This view cannot be accepted, since the content of 'external relations' policies in the Commission framework has constantly been interpreted in a narrower manner. The pre-Lisbon practice shows that the Commissioners responsible for "external relations" did not manage all external relations policies, but they shared the burden with other Commissioners, and namely those managing trade and development cooperation. The interpretation of Article 18(4) TEU given by European institutions confirms this finding. The HR/VP was not entrusted with the management of trade, humanitarian aid and the external aspects of internal policies. This aspect is of the uttermost importance, in so far as the Commission's actions relating to 'external relations' are, as it is known, primarily concerned with these issues. In other words, it cannot be assumed *a priori* that the HR/VP should have a pivotal role in the Commission; what is more, the precise boundaries of his/her role may not be easy to identify. This means that the tasks of the HR/VP,

and thus those of the EEAS, are largely determined pursuant to a discretionary choice of the Commission. In other words, the EEAS may be delegated the exercise of a Commission power on the basis of the Institution's prerogatives relating to the organisation of its services.<sup>382</sup> Such delegation power is 'internal' to the Institution, in so far as it enables an administration of the Commission to work on its behalf.<sup>383</sup> This implies that the may modify or withdraw its delegation of power at will, thus restraining the EEAS' discretion.

The EEAS' accountability to the Commission may thus appear to be absolute. In this sense, the relation between the Commission and the EEAS seems to emulate the hierarchical relation existing between the Commission and its services. This analogy, however, should not be overstretched. All bureaucracies, including the services assisting the Commission, must be granted a certain margin of manoeuvre in order to perform their tasks.<sup>384</sup> The discretion of most EEAS officers *vis à vis* the Commission is even wider, considering that their career is not decided upon by the Institution.<sup>385</sup> The EEAS is likely to make full use of the leeway it is granted, since the Service and its master have political agendas of their own. The coupling of 'administrative' discretion and autonomous 'political' priorities renders the EEAS less accountable than a 'normal' Commission service.

The Commission probably is well aware of the potential discrepancy between its own views and those of the HR/EEAS. This may explain why the College of the Commissioners was not particularly prone to delegate tasks to the EEAS so far. The external relations policies that do not fall under the responsibility of the HR, i.e. trade, humanitarian aid and the external aspects of internal policies, are entirely managed by Commission services. What is more, the Service was not entrusted with several responsibilities previously falling on DG RELEX, such as representing the Commission before other bodies managing external relations.<sup>386</sup> Circumstantial evidence, however, suggests that the good working relations put into place in the last two years are leading the Commission to delegate some tasks to the Service, namely in scarcely visible areas, such as the negotiation of international agreements.<sup>387</sup>

This lack of enthusiasm on the part of the Commission was hardly unexpected. This may explain why the legislator saw it fit to entrust some of the Commission's

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<sup>382</sup> Article 248 TFEU. On the prerogatives of self organisation of public administrations, see, e.g., Waline, *op. cit.*, p. 67.

<sup>383</sup> This delegation of power should not be confused with the 'external' delegation that formed the object of the *Meroni* judgement, since, in the present case the EEAS does not operate as an entity separate from the Commission. Therefore, the Commission can theoretically delegate any task on the Service, including those involving broad political discretion, but the EEAS cannot formally substitute the Commission in the performance of its functions.

<sup>384</sup> According to some authors, such margin of manoeuvre legitimises the definition of the civil service as "the fourth branch of government", see Smith and Licari, *Public Administration: Power and Politics in the Fourth Branch of Government* (Oxford University Press, 2006). For a general appraisal of the different "fourth branches of government", see Curtin, *Accumulated Executive Power in Europe: the Most Dangerous Branch of Government in the European Union* (Klaw Press, 2009).

<sup>385</sup> On the power of public administrations in the field of career management, see Waline, *op. cit.*, p. 67. The career of the top management of the EEAS, however, is partially controlled by the Commission, whose representative sits in the EEAS 'Consultative Committee on Appointments', *cit. supra*.

<sup>386</sup> This task is now performed by the biggest external relations DG, i.e. DEVCO.

<sup>387</sup> Interview with a Commission officer, September 2012. The agreement concerned was the framework agreement with Canada, that is to say an instrument falling within CFSP/non-CFSP and Member States' competences. For an appraisal of the negotiation arrangements in this area, see Gatti and Manzini, *op. cit.*

powers on the Service through the EEAS Decision. This instrument provides for the allocation on the EEAS of certain Commission's prerogatives relating to diplomacy and development cooperation. According to Article 5 of the Decision, a EEAS officer has authority on Commission *fonctionnaires* in Union Delegations. Article 9, moreover, rendered the EEAS responsible for the programming of certain external action instruments, previously managed by Commission services. Articles 5 and 9 of the EEAS Decision raise several legal issues, including one relating to accountability: if the Commission does not delegate its power to the EEAS, how can it influence the conduct of the Service?<sup>388</sup> The answer to this question is provided for in Article 5 and 9 themselves. These provisions explicitly affirm that the EEAS must act upon the instructions of the Commission, it must provide it with information and it must respect Commission procedures. Therefore, even if the Commission loses an important tool for the enforcement of the EEAS' accountability, that is to say the allocation of responsibilities among its departments, it maintains the instruments that are necessary to oversee the EEAS' activities. In other words, the EEAS remains accountable to the Commission, but more feebly than in the cases when the Service is delegating powers by the Commission itself.

In summary, the EEAS manages Commission external relations by relying on an internal delegation of competence or an entrustment of power performed by the EEAS Decision. In both cases the Service is accountable to the Commission, but the former maintains political priorities separate from those of the latter. Moreover, when the Service acts upon a power based on the EEAS Decision, its accountability is difficult to enforce. Therefore, the EEAS' functional accountability to the Commission in the management of its external relations should be seen as relevant, but incomplete.

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This section addressed the crucial relations between the EEAS and the other entities that manage European foreign policies. It demonstrates that the EEAS is not hierarchically dependent on any other entity, but it is accountable to several 'masters'. The Service has limited democratic accountability; the European Parliament may restrain the EEAS' power, namely by relying on its budgetary and decision-making powers, but it can scarcely influence its work. The EEAS is more closely accountable to the entities that represent the 'international' and 'integration' legitimacy of the Union. The Service is 'internationally' accountable, more because European countries oversee the implementation of EU policies and the EEAS participates in the work of the Council, than because of the authority of the European Council on the Service or the activity of national diplomats in the EEAS. The Service is accountable also to the main institution acting in the interest of European integration, i.e. the Commission, in which the EEAS performs the role of a 'normal' service, albeit with an unusually ample leeway. It may be hypothesised that when the European Parliament maintains an approach favourable to European integration, as it often does, the 'democratic' accountability of the EEAS may strengthen the effects of the 'integration' accountability.

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<sup>388</sup> The other issues raised by these provisions will be analysed in detail when discussing the EEAS' role in international cooperation and diplomacy (chapters 3 and 4).

The EEAS may thus be seen as having two ‘clusters’ of principals, typified by the intergovernmental and Community methods. The obvious shortcoming of this situation is that the functioning of the service is dependent on the precarious balance of these visions, and of the entities that support them. If the EEAS held to the one, to the detriment of the other, it would honour its duties towards the first, but fail the ones towards the second, and vice-versa. Nonetheless, the Service is neither meant to foster national interests, like national organs, nor to translate the existence of a Union interest, like the Commission.<sup>389</sup> Therefore, it is not entirely accountable to either EU institutions or Member States, and it consequently must not choose one master over the other, but it must mediate between different, and potentially opposing, views.

If the Service succeeded in this task, being a 'servant of two masters' would become an advantage. Thanks to its close ties to different entities, the Service may truly weave together the intergovernmental and integration-oriented aspects of the EU decision-making process,<sup>390</sup> thus allowing for the implementation of the 'Union method'.

## CONCLUSION OF CHAPTER 2

This chapter sought to demonstrate that the design of the EEAS reflects its function, that is to say implementing the Union method. It is apparent that the EEAS was carefully designed to perform its function of coordination. The proximity to the HR grants the EEAS the capability to support him/her in the performance of his/her 'impossible job'. The existence of a weaker link to other Union bodies and the Member States provides the Service with a possibility to mediate between intergovernmental and integration-oriented approaches. Finally, the characterisation as a 'service' facilitates the performance of the EEAS' tasks, since it allows it to integrate *de facto* in the hierarchy of other bodies. The latter are consequently more likely to entrust the Service with the exertion of their powers, under their own rules, than they would be if the EEAS were another operatively autonomous Union body or office.

The fundamental characteristics of the EEAS, therefore, suggest that it was designed for the purpose of coordinating the external action, transversally to the limits set by conferral. In other words, the EEAS truly embodies the 'Union method'. This finding, however, is insufficient to affirm that the EEAS can enhance external coordination in practice. It is therefore necessary to investigate the *activities* of the Service, which are addressed in the next two chapters.

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<sup>389</sup> On this characterisation of the Commission, see Constantinesco, *Compétences et pouvoirs*, cit. *supra*, p. 313.

<sup>390</sup> J. M. Barroso, “European governance and the Community method”, speech delivered in Brussels on 28 February 2012, pp. 15-16.

# CHAPTER 3

## THE EEAS AND POLICY MANAGEMENT: FOSTERING SYNERGY

The creation of an entity tasked with the maintenance of external action coherence *in theory* may be of little relevance, even if its design is functional to the enforcement of the Union method. What is required of the EEAS, in fact, is to enforce coherence *in practice*. The deliberate choice of the legislator to position the Service 'across' the different areas of the external action complicates the identification of its activities, and the rationale for the choice thereof. This chapter seeks to verify whether the EEAS can enhance coordination in the conduct of European foreign policies, and thus foster external action coherence, and it is divided in two sections. The first maps the role of the EEAS in the exertion of the constitutional powers relating to the EU's external action. The second focuses on its capabilities relating to the management of cooperation with third countries, which is subject to a special regime.

### SECTION 1 – 'SOFT' COORDINATION: EEAS' PARTICIPATION IN THE EXERTION OF POLICY MANAGEMENT POWERS

As recalled in chapter 1, Union bodies do not infer their powers from an abstract division contained in a general principle, such as the 'separation of powers', but they have only the competences that are attributed to them by the Treaties. It is in this sense that the ECJ speaks of an "institutional balance",<sup>391</sup> whose protection is now provided for also by Article 13(2) TEU, according to which each "institution shall act within the limits of the powers conferred on it in the Treaties". The powers of the EEAS in the management of EU policies must therefore derive from an attribution of competences contained in the Treaties. Considering that the Service has no competences of its own, as discussed in chapter 2, its tasks are likely to be identified on the basis of the attributions of the HR and the other entities the EEAS 'serves'.

This section seeks to demonstrate that the policy management powers of the EEAS are potentially conducive to increased coordination in practice, since they derive from competences spanning across the spectrum of the external action, and throughout the policy-making process. Paragraph 1 discusses the participation of the Service in the legislative function, paragraph 2 investigates its involvement in

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<sup>391</sup> Joined cases 188-190/80, [1982] ECR 2545, para 6.



the performance of executive tasks. Paragraph 3 focuses on a case study, i.e. security management, in order to verify the coordination capabilities of the Service.

### *1. The Pragmatic Rationale for Coordination in the Legislative Phase*

In the EU, the legislative power *lato sensu* is shared by numerous bodies, since the Treaties confer on several entities the capacity to produce secondary law. In general terms, however, the legislative power is considered to be concentrated mostly in the Parliament and in the Council. In the non-CFSP areas, where the ordinary legislative procedure prevails, the two Institutions often act as 'co-legislators', and the Council votes by qualified majority. In the CFSP field, the legislative power is exerted only by the Council, by unanimity. The Council, and particularly its Foreign Affairs formation (FAC), which is responsible for both non-CFSP and CFSP external policies, is therefore the crucial legislator in the field of external relations.

If the EEAS has a relatively weak link to the EP, it is strongly involved in the activities of the Council, since the HR is the President of the FAC. According to the Council Rules of Procedure, the High Representative is required to identify FAC priorities before each presidency period<sup>392</sup>, and before each meeting.<sup>393</sup> In practice, it is the EEAS that prepares the agenda, through an extensive work of coordination. Such coordination is, above all, internal: the EEAS must collect the views of its departments and insert them in the political framework set by its political leadership. The coordination has also an external dimension, since the agenda must contain the items in respect of which a request for inclusion has been received from a Member State or the Commission.<sup>394</sup> The Service needs to obtain the opinions of the Member States, in particular, in order to ensure the ownership of the process by the latter, which remain the only-decision makers in the Council. Since the HR holds the right of initiative in the CFSP area, whereas the Commission has a similar power in the rest of the EU's external action, the EEAS should formulate the FAC agenda by taking into consideration also the views of the Commission and make sure that CFSP proposals are compatible with non-CFSP ones. It is apparent, therefore, that by supporting the HR in his/her capacity as President of the FAC, the EEAS may contribute to the coherence of policy-making process, since it can promote consensus between the Member States and it can foster dialogue with the Commission.

The EEAS' function of coordination is magnified by the power it is conferred directly by the Council to preside over preparatory bodies. The preparatory bodies of the Council include, first and foremost, the Committee of Permanent Representatives (COREPER), which is composed of the diplomatic representatives of the Member States and prepares the work of the Council (Article 16(7) TEU and Article 240 TFEU). COREPER does not adopt legal acts, since it is "an auxiliary body of the Council, for which it carries out preparation and implementation work."<sup>395</sup> Nonetheless, it plays a crucial role, in so far as political compromises are often reached within this body. Such compromises are fostered by the chairperson, who determines in what sequence agenda items are addressed and ensures the

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<sup>392</sup> The agenda is required to show "the legislative work and operational decisions envisaged", Rules of procedure of the Council, cit. *supra*, Article 2(7).

<sup>393</sup> *Id.*, Article 3-1.

<sup>394</sup> Rules of procedure of the Council, Article 3(2)

<sup>395</sup> C-25/94, *Commission v. Council*, [1996] ECR I-1469, par. 26.

smooth conduct of discussions.<sup>396</sup> The work of COREPER is further prepared by other Committees and Working parties, composed of delegates of the Member States. The views of Committees and Working Parties are not binding upon COREPER and, *a fortiori*, third subjects, but their role is important, since 'technical' issues are generally decided at this level. As in the case of COREPER, the chairmen of these bodies have a crucial role in fostering the adoption of common positions: they can hold an informal poll of Member States' positions, draw conclusions on the bodies' sessions and either refer matters to COREPER, or else decide to hold further meetings of the preparatory bodies.<sup>397</sup>

Before the Lisbon reform, COREPER, Committees and Working Parties were chaired by representatives of the Rotating Presidency, on the basis of the Council Rules of Procedure. The Lisbon Treaty did not explicitly introduce any change in this respect. The identification of the entity chairing preparatory bodies, therefore, must be performed through a systemic appraisal of primary law, which may seem to lead in two alternative directions. On the one hand, it may be argued that the determination of the chairpersons of Council preparatory bodies is an internal affair of the Institution.<sup>398</sup> Therefore, the Institution should be able to freely determine the chairing arrangements and maintain the role of the Rotating Presidency. On the other, it may be submitted that institutional balance suggests that the EEAS should chair all preparatory bodies in the field of external relations. Considering that the HR presides over the foreign affairs Council, it would seem logical for the service that *assists* him/her to chair the bodies that *assist* the FAC. This interpretation may appear to be reinforced by a teleological appraisal of the HR's role in the FAC. It is apparent that the HR chairs this formation because of its coordinating potential; such objective would be difficult to attain if the preparation of the FAC were not conducted under the indirect guidance of the HR, since most decisions are taken *de facto* at COREPER or Committee/Working Party level.

Significantly, neither solution was retained in practice, since the Rules of Procedure of the Council provide for a third, intermediate, solution. The COREPER is still chaired by a diplomat of the rotating presidency,<sup>399</sup> while the EEAS only participates in the works of the COREPER by briefing the Rotating Presidency.<sup>400</sup> In the case of the bodies that prepare the work of the COREPER the situation is fuzzier. A "representative of the High Representative", that is to say a EEAS officer, chairs "Geographic preparatory bodies", CSDP Working Parties, the PSC and most "horizontal preparatory bodies" (dealing mainly with the CFSP). On the contrary, "preparatory bodies in the area of trade and development" and some horizontal preparatory bodies are chaired by delegates of the rotating presidency.<sup>401</sup> All in all, EEAS officers chair about a half of external relations Committees and Working Parties.

This original solution may be understood in light of the principle of coherence. The most limited role performed by the EEAS within the COREPER can be explained by

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<sup>396</sup> Handbook of the Presidency of the Council of the European Union, cit. *supra*, p. 43.

<sup>397</sup> *Id.*, p. 32.

<sup>398</sup> On the legal effects of and possibility to impugn such acts, see case T-345/05, *Ashley Neil Mote v Parliament*, [2008] ECR II-2849, par. 22-24 and others analysed in Chapter 2 par. 7.

<sup>399</sup> Article 2 of the European Council Decision on the exercise of the Presidency of the Council, and Article 19(4) of the rules of procedure of the Council, cit. *supra*.

<sup>400</sup> Handbook of the Presidency of the Council of the European Union, cit. *supra*, p. 40.

<sup>401</sup> Decision 2009/908/EU of the Council, 1 December 2009 and on the chairmanship of preparatory bodies of the Council, OJ 2009 L 322, p. 28, Annex II, Chairmanship of the preparatory bodies of the Foreign Affairs Council.

the mismatch of their mandates: whereas the EEAS coordinates EU *external relations*, the COREPER must ensure the coherence of *all Union policies*, including internal ones.<sup>402</sup> The EEAS could only chair this Committee if the latter addressed external relations issues separately from other EU policies. Since this would be contrary to the very logic that led to the creation of COREPER, it is evident that such solution cannot be adopted in practice.<sup>403</sup>

A similar line of reasoning may be applied to the other Committees and Working Parties. The Service's intervention in preparatory bodies dealing with the CFSP and the relations with international organisations seems logical, in light of its primary role relating to the initiative and implementation of CFSP and the maintenance of multilateral relations. By cumulating the powers of initiative and implementation with the prerogatives of the chairperson of Council preparatory bodies, the EEAS may truly reinforce coordination, and thus coherence, in the legislative phase. The choice not to entrust the Service with the chairmanship of the bodies relating to trade, development and consular affairs seems to follow the same logic, since these policies are primarily managed by the Commission and the Member States, respectively, rather than by the EEAS.<sup>404</sup>

Thus it may be argued that the EEAS' chairmanship of Council preparatory bodies was not performed on the basis of abstract considerations relating to the Institution's autonomy or the HR's competences, but rather in light of the EEAS' coordination capabilities in each specific circumstance. This signals the fact that the division of labour is not performed in light of a dogmatic institutional balance carved out in the Treaties, but is fashioned in a pragmatic way, dependently on the added value brought by the Service. Such interpretation is problematic, since it blurs the distinction between the distribution of competences among Union bodies, which is a legal concept, and the effectiveness of decision-making procedures, which is a political one. It nonetheless appears acceptable once the Treaties are interpreted in light of the principle of external action coherence. The maintenance of a coherent external action does not require the EEAS to chair all Council preparatory bodies, but only those where the Service can bring added value in terms of coordination, that is to say those dealing with issues it is most closely associated with.

## *2. EEAS' Support to Coordination in the Exertion of Executive Powers*

In the traditional separation of powers, the executive one is the least well defined. Its precise boundaries, in fact, vary from one State to another. The Union is even more complex in this respect. The Treaties do not define executive powers, and entrust the functions typically performed by executive bodies on a number of organs. Although executive functions are multiple and ill-defined, for our purposes

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<sup>402</sup> Article 19(2) of the rules of Procedure of the Council, *cit. supra*.

<sup>403</sup> It is true that 'technical' issues are addressed by COREPER I, whereas 'political' ones, including external relations, are managed by COREPER II. Nonetheless, the activities of the latter encompass, but are not limited to, external relations.

<sup>404</sup> It is perhaps less clear, however, why the Service was not granted the chairmanship of the bodies relating to international sanctions and the fight against terrorism, given the relevant role of CFSP in this area.

we may accept that they relate primarily to three competences regulated by EU Treaties: policy implementation, budget implementation<sup>405</sup> and initiative.<sup>406</sup>

In the formerly Communitarian (non-CFSP) area, the executive function is concentrated mostly in the Commission. This Institution generally has competence to propose the adoption of secondary law, according to Article 17 TEU. Moreover, the Commission is competent to implement the budget of the Union (Article 317 TFEU) and it gives implementation to non-CFSP acts (Article 291(2) TFEU). None of these powers is exclusive. In rather rare cases, the Treaties allow also other entities to propose the adoption of non-CFSP acts. The very Article 317 TFEU enables other Union bodies to give implementation to the EU budget, but only for the parts relating to their own administrative expenditure. Finally, and most importantly, the implementation of EU acts can also be performed by the Member States, if uniform conditions for implementing Union acts are not needed, or by the Council "in duly justified specific cases";<sup>407</sup> in addition, the Member States oversee the implementation of Union acts by the Commission, as discussed in chapter 2, via comitology procedures.

In the CFSP field, the executive function is regulated in slightly more complicated manner. The role the Commission has in formerly Communitarian areas is largely devolved to the High Representative, who is competent to propose the adoption of legal acts and give them implementation (Article 18(2) and 26(3) and 24(1) TEU). The Commission is not entirely excluded from the CFSP, since it gives implementation to the EU budget also in this area, to the exclusion of CFSP operating expenditures "having military or defence implications", which cannot be charged to the Union budget. The role of the Member States in the CFSP is greater than it is in the non-CFSP fields: not only they can implement the CFSP, but they normally share the initiative competence with the HR,<sup>408</sup> and they implement the expenses having military or defence implications (which are not charged to the EU budget). The following table summarises the distribution of the executive powers:

	<b>CFSP</b>	<b>non-CFSP</b>
<b>Initiative</b>	HR or Member States	Commission
<b>Policy implementation</b>	HR or Member States	Commission or Member States
<b>Budget implementation</b>	Commission*	

\* Excluding the CFSP expenses having military implication, which are implemented by the Member States.

<sup>405</sup> It worth specifying that this paragraph deals only with budget implementation, and not the decision-making process on the budget. On the latter aspect, see Rossi, "La Dinamica Interistituzionale nella Definizione del Bilancio Comunitario", *Diritto dell'unione Europea* (2006): 179 – 200.

<sup>406</sup> Admittedly, initiative may be categorised also as part of the legislative function, of which it constitutes the beginning. Considering that the power of initiative is often exerted by executive bodies, at least in Europe, and especially in the EU, it is opportune to address initiative and implementation at once.

<sup>407</sup> See Article 291, paragraphs 1 and 2.

<sup>408</sup> An exception being Article 218 TFEU: only the High Representative can propose the conclusion of an international agreement in the CFSP domain.

It is apparent that an effective coordination of executive functions at EU level requires an intervention in the area falling within the remit of both the HR and the Commission. Since there is no doubt that the EEAS can exert the powers of the HR, it can be assumed that the Service participates in the initiative and implementation of the CFSP.

The EEAS' role in the Commission is less straightforward. As recalled above, the Service assists the HR, and the latter is "responsible within the Commission for responsibilities incumbent on it in external relations and for coordinating other aspects of the Union's external action". Therefore, it may be hypothesised that the EEAS contributes to Commission activities, in order to promote external action coherence; for this purpose, it also manages certain policies falling within the remit of the Institution.

As seen above, the Service may, or may not, be given responsibilities in the Commission, depending on the requirements of secondary law and the will of the Institution. At the moment, it would seem that the Commission is reluctant to delegate the exertion of its powers to the Service. To the best knowledge of the author, the Commission did not give the EEAS the lead in any policy area where it was not compelled to do so by secondary law. In other words, whereas the Council was eager to sacrifice its organisational autonomy for the sake of coherence, the Commission prefers to maintain its area of influence. The Commission's concern for delimitation of competences is understandable: unlike the chairpersons of Council working groups, Commission services are *de facto* entrusted with decision-making powers, since the Institution can hardly oversee all their operations. This implies that by allowing the EEAS to substitute its own departments the Commission would actually renounce part of its discretion, something it is evidently not enthusiastic about.

In this context, it is necessary, firstly, to investigate the EEAS' coordinating capabilities in cases where the Commission does not entrust the EEAS with the management of any specific policy, a topic that forms the subject of the remainder of this paragraph, and that is further analysed in the next one. The investigation is concluded in the next section, which presents the effects of the entrustment of executive responsibilities on the EEAS via secondary law.

Even when the Service is not given any specific responsibility in the Commission, it may contribute to external action coherence by 'coordinating' the activities of Commission departments and cooperating with them. Article 3 of the EEAS Decision generally calls for cooperation between the EEAS and Commission services, and it specifies that "the EEAS shall support, and work in cooperation with [...] the services of the Commission, in order to ensure consistency between the different areas of the Union's external action and between those areas and its other policies." The cooperation between the EEAS and Commission services normally is performed in an informal manner, through exchanges of views among EEAS and Commission officers. In certain cases, however, such cooperation is institutionalised. The legal instruments fostering the EEAS' cooperation with Commission services in administrative matters, that is to say "inter-service arrangements", have been addressed in chapter 2. Beside these instruments, soft law frameworks serve to foster cooperation between the EEAS and Commission services in operative areas.<sup>409</sup>

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<sup>409</sup> As seen in Chapter 2, in operative areas the duty of cooperation may be seen as binding on the HR; even in this case, however, cooperation must be implemented by the EEAS. Therefore, there is

The most evident form of institutionalised cooperation in Commission's external relations is perhaps provided for by the 'External Relations Group of Commissioners.' This entity, which is set up by the President of the Commission, is composed by the President himself, the HR and the Commissioners from the 'RELEX family', and it should serve as a forum to coordinate positions and prepare College debates on strategic aspects of external relations.<sup>410</sup> The EEAS contributes to the work of this Group, by briefing the HR and preparing the agenda of the Group when the HR chairs it. The EEAS may use these functions to promote coordination, through dialogue, since its tasks obviously entail relevant interaction with the other services managing external relations. Such result is partially hindered by the fact that, during this legislature, the Group is only chaired by the HR when the President of the Commission does not participate in it. This solution is transparently motivated by the intention to preserve the prerogatives of the Commission in the field of external relations, which may appear a legitimate concern, at first sight. Since the Commission did not entrust the HR with the chairing of the Group, however, it restrained his/her coordinating potential, precisely because it did not enable him/her to intervene, as a 'coordinator', in areas falling within the responsibilities of other Commissioners. It would seem, therefore, that the Commission adopted an approach favourable to 'delimitation' rather than seeking 'coherence' in its external relations

The EEAS' coordinating potential is clearer in the case of administrative-level coordination frameworks. This issue is specifically regulated in Article 3(2) of the EEAS Decision, which asserts that "the EEAS and the services of the Commission shall consult each other on all matters relating to the external action of the Union in the exercise of their respective functions." This provision is implemented mainly through two institutionalised forms of service-level cooperation. In the first place, the EEAS participates in the so-called Inter-Service Groups (ISG). The ISGs are formed by representative of Commission services and chaired by the service having the lead in a specific policy area, and they are tasked with service-level coordination.<sup>411</sup> It is standard procedure for Commission services chairing ISGs with an external dimension to invite the EEAS to participate in such groups.<sup>412</sup> This grants the Service a chance to enter into multilateral dialogue with all the services concerned by the implementation of Commission's external policies managed by other departments. Secondly, the Service participates in Inter-Service Consultations (ISC). The ISC is a dialogue conducted via the Commission intranet on the documents and proposals prepared by Commission services. Through this procedure the lead Commission department seeks the formal opinion of all other Directorates-General and services with a legitimate specific interest in the substance of the proposal. This procedure has a twofold rationale. On the one hand, it makes sure that the College of the Commissioners does not waste time discussing petty details on which the services do not agree. On the other hand, it streamlines the decision-making procedure, by enabling the College of the Commissioners to adopt the acts that obtain the consensus of their services through a rapid silent

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little need to distinguish this situation from the case of cooperation in administrative matters, where the EEAS is directly bound by the duty of sincere cooperation.

<sup>410</sup> Vademecum on working relations with the European External Action Service, cit. *supra*, p. 12.

<sup>411</sup> An example in this sense is the Relex information committee, which coordinates communication strategies at services level, and is chaired by the EEAS, see Working Arrangements, p. 34.

<sup>412</sup> Vademecum on working relations with the European External Action Service, cit. *supra*, p. 13. See also EEAS Decision, Article 3(2).

assent procedure.<sup>413</sup> Since the EEAS is responsible for external relations, it should be consulted through an ISC whenever an issue has external implications; this gives the Service a possibility to know what other departments are doing as well as a chance to express its views from the onset of the decision-making process.

Through these responsibilities the EEAS may 'softly' contribute to coordination, through dialogue and the building of mutual trust with Commission departments. Nonetheless, it may reasonably be doubted whether the EEAS' coordination capabilities might be effective in practice, and especially whether the EEAS may foster coherence in the implementation of EU policies, transversally to the legislative and executive phase. The latter issue is investigated in the next paragraph, by focussing on security management.

### *3. The EEAS and Security Management: Potential and Limits of External Action Coordination*

The management of security at EU level is notoriously fragmented. Security is at the heart of, at least, two policy frameworks, which are interdependent but procedurally separate: Common Foreign and *Security* Policy and the Area of Freedom *Security* and Justice. This fragmentation is known to lead to a "procedural chaos" that engenders tensions between EU institutions.<sup>414</sup> At the same time, EU security strategies directly or indirectly recommend a 'global approach' to security, since the threats facing EU security are multifaceted and they must be addressed through a coherent mix of policies<sup>415</sup>. This paragraph intends to demonstrate that the EEAS, through its leading role in the CFSP, its activities in the Council and its coordinating duties in the Commission, may weave together the intergovernmental and 'Community' strands of security management, thus fostering external action coherence. Nonetheless, its action may be hampered in practice by the defensive stance, and the scarce concern for coherence, of other bodies.<sup>416</sup>

For the sake of a good understanding of the analysis, it is worthwhile identifying the Union's activities that have a 'security' dimension. The activities taken into consideration are explicitly meant to foster security (*e.g.* Common *Security* and Defence Policy) or may affect 'security' as defined by EU security strategies.<sup>417</sup> Such

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<sup>413</sup> In the absence of consensus on proposal, the Commission would indeed be able to adopt a Decision only through a lengthy oral procedure, whereas the agreement of all departments enables the use of a rapid written procedure in the College, cf. Commission rules of procedure, Articles 8, 12 and 23(3).

<sup>414</sup> Flaesch-Mougin and Rapoport, "Les Instruments de Gestion Des Crises de l'Union Européenne", in Blumann and Picod, *L'Union Européenne et Les Crises* (Bruylant, 2010), p. 191, p. 191, at p. 198.

<sup>415</sup> The most explicit definition of the "global approach" can be found in the Internal Security Strategy, at p. 16: "the EU must not restrict itself just to cooperation between the law-enforcement agencies of Member States and other countries [...] It is necessary to build relationships with other countries through a *global approach to security*, working closely with them and, when necessary, supporting their institutional, economic and social development" (emphasis added); see also the European Security Strategy, *cit. supra*, notably at pp. 7 and 13.

<sup>416</sup> A more detailed analysis of the EEAS' contribution to security management can be found in Gatti, "The Role of the European External Action Service in the External Dimension of the Area of Freedom Security and Justice", in Flaesch Mougin and Rossi (eds.), *La Dimension Extérieure de L'espace de Liberté, de Sécurité et de Justice Après Le Traité de Lisbonne*, pp. 171-193.

<sup>417</sup> The scope of this work does not allow for a comprehensive investigation of all the possible facets of EU security. We will not directly address, for instance, the specificities of food crises; in this respect, see Petit, "Les Crises Alimentaires et Sanitaires", in Blumann and Picod, *L'Union Européenne et les Crises* (Bruylant, 2010), p. 56, p. 56. It is understood, however, that, unless otherwise specified, all

activities tackle, *inter alia*, terrorism, organised crime, disasters, proliferation of weapons of mass destruction, regional conflicts and state failure.<sup>418</sup>

The EEAS contributes primarily to the CFSP strand of EU security, namely through its implementation responsibilities in the CSDP area. If military CSDP missions are managed almost entirely by the Member States, the Service has a more crucial role in Civilian Crisis Management (CCM),<sup>419</sup> since it ensures their operational command through one of its departments, the Civilian Planning Conduct Capability. Thus, the EEAS may also foster cooperation between CSDP missions and other actors in the field, especially when other bodies' officers are seconded to EU delegations<sup>420</sup>. Despite its extensive responsibilities in the CSDP area, however, the Service cannot give financial implementation to the EU budget. Consequently, the effective management of CSDP missions requires close cooperation between the EEAS and the Commission.

The EEAS participates also in the management of the non-CFSP aspects of EU security. The EEAS' direct contribution to this field, in principle, should be limited to its activities in the Council, since the exertion of executive powers in the non-CFSP sector of security management is reserved to the Commission. The multiple responsibilities of the EEAS, however, sustain each other and give it a significant capability to coordinate the entire EU's response. The role of the EEAS in the non-CFSP may obviously depend on the existence of procedural links between the CFSP and the rest of the external action. This is the case of the two-steps process that leads to the adoption of 'restrictive measures'. During the first (CFSP) stage, the EEAS assists the High Representative, who proposes the adoption of restrictive measures in the CFSP framework<sup>421</sup>. During the second stage, the High Representative and the Commission jointly propose the implementation of such measures in the non-CFSP area<sup>422</sup>. The Service may thus coordinate its activities with those of Commission departments, through the instruments addressed in paragraph 2.

The EEAS' intervention in the non-CFSP fields of security management may also be justified by practical factors, such as its control of crucial assets. On the one hand, the EEAS provides intelligence to EU agencies such as Europol<sup>423</sup> and Eurojust.<sup>424</sup> On the other hand, it can use its CFSP assets to influence humanitarian aid and civil

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the non-CFSP security-related policies are managed in a roughly similar manner, and are consequently (not) coordinated by the EEAS, as described below.

<sup>418</sup> Cf. the European Security Strategy, *cit. supra*, and Internal Security Strategy, *cit. supra*.

<sup>419</sup> Hoffmeister, "Inter-Pillar Coherence in the European Union's Civilian Crisis Management", in Blockmans (ed.), *The European Union and Crisis Management* (TMC Asser Press, 2008), pp. 157-180.

<sup>420</sup> Cf. Internal Security Strategy, *supra* note 3, p. 17. CSDP missions and Europol regularly cooperate, as confirmed in an e-mail communication from Europol to the author, June 2011; the exchange of information between Europol and CSDP missions is regulated through doc. 13311/08 of the Council, 22 September 2008.

<sup>421</sup> Articles 18 and 27 TEU; EEAS decision, *supra* note 11, Article 2-1.

<sup>422</sup> Article 215 TFEU.

<sup>423</sup> Cf. doc. 14050/05 of the Council, 7 November 2005, which contains the framework for exchanging classified information between Europol and the Council (Sitcen); according to a Europol e-mail communication to the author this framework was still applicable as of June 2011.

<sup>424</sup> Cf. Decision 2002/187/JHA of the Council, Article 26-1, as amended by Decision 2009/426/JHA of the Council of 16 December 2008, OJ n° L 138 , 4 June 2009, p. 14: "Eurojust shall establish and maintain cooperative relations with at least: [...] d) the Council, in particular its Joint Situation Centre".



protection.<sup>425</sup> Civil protection and humanitarian aid may also be supported by CSDP missions, which may provide military assets to facilitate civilian-led operations<sup>426</sup>.

The EEAS' pivotal role in the management of security naturally provides it with potential for coordination. The HR recently tried to put that potential into practice, by setting up two new structures, linked to the EEAS. In the first place, the new Crisis Management Board, which is a permanent body composed mainly of high-ranking EEAS officers, including those responsible for CSDP and intelligence, and which should coordinate the activities of the different EEAS departments in cases of crisis. Secondly, and most importantly, the 'Crisis Platform', a non-permanent entity composed of relevant services belonging to the EEAS, the Commission and the General Secretariat of the Council, which provide for political guidance with respect to specific crises. The Crisis Platform may be extremely successful in promoting coordination, since it brings together the different visions about crisis response existing in the different organs of the Union. In addition, the Platform does not challenge institutional balance, since it is based on a 'soft law' mandate, and it is not aimed at adopting legal acts. Therefore, it appears as a creative means to bridge the intergovernmental and Community approaches to crisis response, and it seems to be conducive to increased coherence, despite the delimitation of CFSP and non-CFSP areas.

The effects of such delimitation, however, cannot be eliminated. Notwithstanding its 'inter-institutional' character, the Platform is closely tied to the EEAS, since it is activated by the High Representative or his/her assistants and its conclusions are endorsed by the High Representative, thus becoming instructions for his/her Service.<sup>427</sup> This may raise the distrust of other actors, and namely of the Commission, which may feel that the activity of 'coordination' that is typical of the Platform may in fact lead to the EEAS' interference in the conduct of their activity.

Therefore, if the EEAS' powers and assets render it a suitable coordinator of EU security management, coordination cannot be *enforced* by the EEAS, but it must always be *promoted* by entering into a dialogue with other Union bodies.<sup>428</sup>

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<sup>425</sup> These strands of the EU's external action are relevant in the perspective of security since they are instrumental to disaster response, which is interpreted by EU institutions as an integral part of European security. On the relevance of civil protection for EU security, cf. the Internal Security Strategy, *supra* note 19, pp. 6-14; on the relevance of humanitarian aid cf. European Security Strategy, *supra* note 18, pp. 7-11; the security dimension of consular protection during crises is quite evident, also due to its conceptual overlapping with civil protection, cf. also Lindstrom, "EU Consular Cooperation in Crisis Situation", in Olsson, *Crisis Management in the European Union* (Springer, 2009), pp. 109-126, pp. 109-126.

<sup>426</sup> General Secretariat of the Council, doc. 9462/3/06 REV 3, Military support to EU disaster response: Identification and coordination of available assets and capabilities, 25 October 2006 and doc. 8976/06, General Framework for the use of Member States military or military chartered Transportation Assets and ESDP Coordination tools in Support of EU Disaster Response, 4 May 2006. See also Working Arrangements, *supra* note 55, p. 10-14.

<sup>427</sup> The managing director for Crisis Response and Operational Coordination, A. Miozzo, was nominated on 2 December 2010, see EU High Representative Catherine Ashton appoints EEAS Managing Director for Crisis Response, [www.consilium.europa.eu](http://www.consilium.europa.eu).

<sup>428</sup> The relation between the EEAS and DG ECHO is regulated, *inter alia*, by the Working Arrangements, cit. *supra*, pp. 10-14; see also European Commission, Towards a stronger European disaster response: the role of civil protection and humanitarian assistance, cit. *supra*, pp. 8-12.

The analysis showed that the EEAS has the potential to coordinate policy management, since it exercises the CFSP powers of the HR and it participates in the activities of the Council and of the Commission. The status of *service* provides the EEAS with an advantage in this respect, since its role within other bodies is not necessarily determined by abstract evaluations relating to the institutional balance, but it may be motivated by the added value it brings about in practice. It would seem that the Council privileged external action coherence over delimitation for the purpose of identifying the EEAS' tasks in the Institution. On the contrary, the Commission generally preferred to protect its prerogatives. This does not prevent the EEAS from promoting coordination in policy management, but certainly hampers its capability to *enforce* it, as confirmed by the example of security management. Probably the legislator was aware of this issue, and consequently provided the EEAS with the capacity to substitute Commission services, in the management of international cooperation, as demonstrated in the next section.

## SECTION 2 – 'HARD' COORDINATION: THE EEAS AND COOPERATION WITH THIRD COUNTRIES

Of all the external policies that are implemented by the Commission, cooperation is probably the one most in need of coordination. In a legal perspective, this policy may be defined as the set of practices and acts of EU bodies that are directly or indirectly founded on the chapters 'development cooperation' and 'economic, financial and technical cooperation with third countries' (Articles 208-213 TFEU), located within the third title of the fifth part of the TFEU ('the Union's external action'). Cooperation with third countries encompasses also the management of the European Development Fund, which is not provided for in the EU Treaties, but which logically, institutionally and administratively belongs to the framework of international cooperation.

The above definition implies that cooperation with third countries is composed of two policies, that is to say development cooperation and economic, financial and technical cooperation with third countries. Notwithstanding their similarities, these policies are characterised by certain differences. In the first place, they are based upon partially different competences. Both policies are shared in nature, but, while economic, financial and technical cooperation is a 'standard' shared competence, development cooperation is a *sui generis* shared competence,<sup>429</sup> whose exercise does not result in Member States being prevented from exercising their competence in this field, *ex* Article 4(4) TFEU. The rationale for this difference is clear. The Member States have little interest in conducting economic, financial and technical cooperation with non-developing countries, an issue that attracts relatively little amounts of money. On the contrary, they intend to protect of their capacity to conduct development cooperation, that is to say a highly visible policy characterised by the allocation of large sums of financial resources. Secondly, these policies refer to the relation with different subjects: development cooperation relates to the

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<sup>429</sup> Indeed, according to 4(1) TFEU "the Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6.", and 'economic, financial and technical cooperation' is mentioned neither in Article 3 nor in Article 6 TFEU.

cooperation with ‘developing countries’, whereas the ‘economic, financial and technical cooperation’ is referred to the relation with “third countries other than developing countries”.<sup>430</sup> The EU generally identifies developing countries as low and middle income countries based on gross national income (GNI) per capita, with the exception of G8 members, EU members, and countries with a firm date for entry into the EU.<sup>431</sup> Thirdly, these policies have different objectives: development cooperation has “as its primary objective the reduction and, in the long term, the eradication of poverty”.<sup>432</sup> This implies that the measures directly or indirectly based on Article 209 TFEU must have the economic development and welfare of developing countries as their main objective.<sup>433</sup> ‘Economic, financial and technical cooperation’, on the contrary, does not have autonomous objectives, and it fosters only the objectives of the EU’s external action.<sup>434</sup> Finally, these policies have a different scope: ‘economic, financial and technical cooperation’ is, by definition, limited to these three sectors, whereas development cooperation relates to all measures which contribute to the eradication of poverty.<sup>435</sup>

It is widely believed that the management of cooperation with third countries requires extensive coordination, for two main reasons. First, the EU’s development cooperation may conflict with the development policies of Member States, since the latter can conduct autonomous development policies. Hence, Article 210 TFEU affirms that the Union and the Member States must coordinate their policies on development cooperation, and that the Commission may take any useful initiative to promote such coordination.<sup>436</sup> Second, development priorities may conflict with other policies of the Union, including the cooperation with non-developing countries. Since ‘cooperation with third countries’ is an integral part of the external action, it must be conducted within the framework of the principles and objectives of the Union’s external action,<sup>437</sup> provided for in Article 21 TEU. However, a measure adopted on the basis of Article 209 TFEU (development cooperation) may

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<sup>430</sup> For the partners envisaged by the ‘economic, financial and technical cooperation’, see Article 212(1) TFEU. As for the partners of development cooperation, see Article 209(1) TFEU.

<sup>431</sup> Indeed, the Union conducts the cooperation based on Article 209 TFEU (that is to say the development cooperation legal basis) with the countries identified as recipients of ‘official development assistance’ (ODA) by the Development Co-operation Directorate (DAC) of the OECD (or a subset thereof), cf. Article 1 of the Regulation 1905/2006 of the European Parliament and of the Council of 18 December 2006 establishing a financing instrument for development cooperation, O.J. L 2006 378/41–71. For the OECD DAC list, see <http://www.oecd.org/dac/stats/daclist>.

<sup>432</sup> Article 208(1) TFEU.

<sup>433</sup> EU instruments usually make reference to the definition of ‘Official Development Assistance’ (ODA) provided by the OECD/DAC, that is to say “flows of official financing administered with the promotion of the economic development and welfare of developing countries as the main objective, and which are concessional in character with a grant element of at least 25 percent (using a fixed 10 percent rate of discount). By convention, ODA flows comprise contributions of donor government agencies, at all levels, to developing countries (“bilateral ODA”) and to multilateral institutions. ODA receipts comprise disbursements by bilateral donors and multilateral institutions. Lending by export credit agencies—with the pure purpose of export promotion—is excluded”, see the OECD glossary of statistical terms, <http://stats.oecd.org>.

<sup>434</sup> Article 212(1) TFEU.

<sup>435</sup> Cf. *mutatis mutandis* Case C-268/94 *Portugal v. Council*, [1996] ECR I-6177, par. 73-76. See also See the ECOWAS: Case C-91/05, *Commission v Council*, [2008] ECR I-03651; for a comment, see *inter alia*, Hillion and Wessel, “Competence distribution in EU external relations after *Ecowas*: clarification or continued fuzziness?”, 46 *Common Market Law Review* (2009) 551-586.

<sup>436</sup> Notice that in the Joint Communication *Global Europe : A New Approach to financing EU external action*, COM(2011) 865 final, 7 December 2011, the Commission and the HR affirmed that “joint programming with Member States [...] should become the norm for the EU”, par. 5.2.

<sup>437</sup> Article 208(1) TFEU and Article 212(1) TFEU.

offset other objectives of the Union, thus compromising the ‘coherence’ of the EU’s external action. Similarly, a measure based upon another basis may jeopardise development objectives, thus questioning the EU’s ‘policy coherence for development’, that is required by Article 208(1) TFEU, which states that “the Union shall take account of the objectives of development cooperation in the policies that it implements which are likely to affect developing countries”.<sup>438</sup>

The European External Action Service (EEAS) appears to be well placed to coordinate cooperation with third countries, since it has privileged relations with Member States and it oversees several external policies, including CFSP. However, the involvement of the EEAS in the management of cooperation with third countries raises some political and legal issues. Can the Commission be forced to delegate its powers to the EEAS? Would this lead to increased coherence, or would it simply reinforce intergovernmentalism in EU external relations? In order to answer these questions, this section describes, in paragraph 1, the main EU’s instruments in this area and it subsequently addresses the role of the EEAS in the coordination of cooperation with third countries. Paragraph 2 introduces the programming of external action instruments, paragraph 3 presents the EEAS’ role in this area and paragraph 4 discusses the legality of the EEAS’ involvement in this phase. Paragraphs 5 and 6 conclude the analysis by presenting the phase known as ‘implementation’ of external action instruments, and discussing the EEAS’ role in it.

### *1. Introducing External Action Instruments*

The EU’s cooperation with third countries is implemented mainly through the so-called ‘external action instruments’. An external action instrument may be defined as a framework composed by a financial facility, which may have its source either in the EU budget or elsewhere, and the procedures that regulate its allocation and disbursement. ‘External action instruments’ are provided for in regulations, which are implemented by the Commission, through the exertion of its powers of policy implementation and budget implementation (Article 291(2) and 317 TFEU).

The external action instruments devoted to the cooperation with third countries constitute one of the main tools of EU’s external relations, and they absorb the largest share of external action resources. They are presently being amended. Since their structure is unlikely to change,<sup>439</sup> however, the following analysis concerns the existing instruments, and it makes punctual references to the pending proposals, whenever they introduce substantial innovations.<sup>440</sup>

The ‘Development Cooperation Instrument’ (DCI) is the only instrument that is provided for in a regulation founded exclusively on a development cooperation legal basis (Article 179 TEC, now Article 209 TFEU). Indeed, the primary and overarching objective of this instrument is “the eradication of poverty in partner

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<sup>438</sup> Cf. Joint statement by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission on European Union Development Policy: ‘The European Consensus’, OJ 2006 C 46/1, par. 36 and 37.

<sup>439</sup> Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions A Budget For Europe 2020, COM(2011)500 final, par. 5.7.

<sup>440</sup> On the current structure of external action instruments, see Bartelt, “The Institutional Interplay Regarding the New Architecture For the EC’s External Assistance”, 14 *European Law Journal* (2008): 655–679.

countries and regions”.<sup>441</sup> This is testified by the fact that the can be used to finance cooperation almost only through measures that foster the economic development and welfare of developing countries.<sup>442</sup> The EU’s assistance under the DCI is implemented through ‘geographic’ and ‘thematic’ programmes. ‘Geographic’ programmes, which absorb two thirds of the DCI’s funds, are meant to foster cooperation with partner countries and regions determined on a geographical basis.<sup>443</sup> Developing countries in sub-Saharan African and in the EU’s neighbourhood are not eligible for ‘geographic cooperation’ under this instrument, since they are targeted by other instruments. ‘Thematic’ programmes, which are subsidiary to ‘geographic’ programmes, “encompass a specific area of activity of interest to a group of partner countries not determined by geography, or cooperation activities addressed to various regions or groups of partner countries, or an international operation that is not geographically specific.”<sup>444</sup> Such programmes may concern aspects as diverse as education, gender equality, environment protection and food security.<sup>445</sup> DCI thematic programmes may finance activities in sub-Saharan Africa, but they cannot address EU’s neighbours. Although the DCI is the only instrument founded exclusively on a development cooperation legal basis, it is not the only EU’s instrument meant to foster only development cooperation. At the beginning of the European integration process, Member States set up a European Development Fund (EDF), meant to finance projects in countries located in sub-Saharan Africa, the Caribbean and the Pacific ocean, the ‘ACP’ countries. Unlike other external action instruments, the EDF is foreseen by a multilateral framework agreement stipulated by the Union and its Members with the ACP countries, the ‘Cotonou Agreement’, that is renovated every five years.<sup>446</sup> The Fund is set up through an ‘internal agreement’ of Member States, whereby they accept to give a voluntary contribution to the Fund.<sup>447</sup> Hence, this Fund exists outside the framework of the Treaties and of the EU budget. The implementation of the Fund is regulated by EU law and it is modelled after the procedures for the implementation of other instruments; in particular, the Commission gives implementation to this instrument, under the supervision of a Committee composed of Member States’ representatives. According to the ECJ, these peculiar arrangements do not pose any legal problem, since “no provision of the Treaty prevents Member States from using, outside its framework, procedural steps drawing on the rules applicable to Community expenditure and from

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<sup>441</sup> DCI regulation, Article 2(1).

<sup>442</sup> DCI regulation, Article 1 and 2(4). However, notice that, while DCI thematic programmes should primarily support developing countries, two beneficiary countries as well as the overseas countries and territories, whose characteristics do not meet the requirements to be defined as ODA recipients by the DAC are also eligible for thematic programmes under the conditions set out in the DCI Regulation

<sup>443</sup> On ‘geographic’ programmes, see DCI regulation, Article 5. On the distribution of DCI funding, see Annex IV to the DCI regulation.

<sup>444</sup> DCI regulation, Article 11(1).

<sup>445</sup> DCI regulation, Article 12(2)(b) and (c), Article 13 and Article 15.

<sup>446</sup> ACP-EC partnership agreement, Signed in Cotonou on 23 June 2000, revised in Luxembourg on 25 June 2005 and revised in Ouagadougou on 22 June 2010, see O.J. 2000 L 317, O.J. 2004 L 297, O.J. 2005 L 209, O.J. 2005 L 287, O.J. 2006 L 247, O.J. 2010 L 287.

<sup>447</sup> Cf. the 10th EDF internal agreement, O.J. 2006 L 247/32. Apparently, the EDF contribution key is being brought closer to the key used for the EU budget, see Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions A Budget For Europe 2020, COM(2011)500 final, par. 5.8.1.

associating the Community institutions with the procedure thus set up.”<sup>448</sup> Although the Commission and the European Parliament periodically call for its insertion in the EU budget (the so-called ‘*budgetisation*’ of the EDF), the EDF is constantly renovated every five years, and it is now about to enter its 11<sup>th</sup> cycle. Even if the Fund does not only finance development assistance *stricto sensu*, its development dimension is pre-eminent.<sup>449</sup> Therefore, it may be considered as a development cooperation instrument, similarly to the DCI.

While the DCI and the EDF foster development cooperation, other instruments promote the economic, financial and technical cooperation with non-developing countries, and are consequently founded on Article 212 TFEU (previously Article 181a TEC). Such is the case of the Instrument for Pre-Accession Assistance (IPA), which supports cooperation with candidate, or potential candidates, to EU membership, in order to foster their progressive alignment with the standards and policies of the European Union.<sup>450</sup> Similarly, the Instrument for Cooperation with Industrialised Countries (ICI) is based on Article 181a TEC (now Article 212 TFEU) because it fosters economic, financial and technical cooperation and other forms of cooperation falling within its spheres of competence, with industrialised and other high-income countries and territories.<sup>451</sup>

While the above instruments pursue either development cooperation or economic, financial and technical cooperation, most external action instruments pursue both objectives, and consequently have both development and non-development legal bases (former Article 179 and 181a TEC, current Article 209 and 212 TFEU). Some of these instruments have a geographic focus. This is the case of the European Neighbourhood Partnership Instrument (ENPI),<sup>452</sup> which is meant to provide EU assistance for the development of an area of prosperity involving the European Union and its Neighbours, mainly in the interests of the EU’s partners but also for the mutual interest of partner countries and Member States.<sup>453</sup> A second ‘geographic’ instrument having both a ‘development’ and ‘non-development’ connotation is the Partnership Instrument (PI), recently proposed by the European Commission as a successor to the ICI.<sup>454</sup> The ‘double’ nature of the PI enables the EU to co-operate with new emerging economies on issues related to advancing core EU interests and on common challenges of global concern.<sup>455</sup>

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<sup>448</sup> Case C-316/91, *Parliament v. Council*, [1994] ECR I-625, par. 41.

<sup>449</sup> See the Regulation of the Council 617/2007/EC of 14 May 2007 on the implementation of the 10th European Development Fund under the ACP-EC Partnership Agreement, O.J. 2007 L 152/1-13, and in particular Article 2(6).

<sup>450</sup> Regulation 1085/2006/EC of the Council of 17 July 2006 establishing an Instrument for Pre-Accession Assistance (IPA), O.J. L 2006 210/82–93, Article 1.

<sup>451</sup> Regulation 1934/2006/EC of the Council, establishing a financing instrument for cooperation with industrialised and other high-income countries and territories, O.J. 2006 L 405/41-59, Article 1.

<sup>452</sup> Regulation 1638/2006 of the European Parliament and of the Council laying down general provisions establishing a European Neighbourhood and Partnership Instrument O.J. 2006 L 310/1/14.

<sup>453</sup> *Id.*, Article 1.

<sup>454</sup> Notice that the Commission recently proposed to enlarge the scope of the ICI’s to encompass developing countries, see proposal for a Regulation of the European Parliament and of the Council establishing a Partnership Instrument for cooperation with third countries, COM(2011) 843 final, explanatory memorandum, par. 1. Notice also that the new Partnership Instrument proposed by the Commission has *three* legal bases, including Article 209 and 212 TFEU, but also Article 207 TFEU (trade).

<sup>455</sup> In particular, it serves to finance the cooperation with emerging countries, that are not covered by the geographic programmes of the new DCI, recently proposed by the Commission. See Proposal for a

Most external action instruments having both development and non-development components are ‘thematic’ in nature. Hence, ‘thematic’ instruments foster specific objectives worldwide (but normally not in industrialised countries), and they may, or may not, pursue development priorities. The clearest example in this sense is provided for by the European Instrument for Democracy and Human Rights (EIDHR).<sup>456</sup> This instrument is explicitly meant to provide assistance contributing to the development and consolidation of democracy and the rule of law, and of respect for all human rights and fundamental freedoms “within the framework of the [EU’s] policy on development cooperation, and economic, financial and technical cooperation with third countries”.<sup>457</sup>

Another instrument that fosters both development and non-development goals is the Instrument for Stability (IfS).<sup>458</sup> This instrument has two components (both of which may, or may not, be related to development cooperation). On the one hand, the ‘short-term’ component of the IfS finances assistance in response to situations of crisis or emerging crisis, and it is meant to “contribute to stability by providing an effective response to help preserve, establish or re-establish the conditions essential to the proper implementation of the [EU’s] development and cooperation policies.” On the other hand, the ‘long-term’ component of the IfS finances assistance in the context of stable conditions for cooperation, to help build capacity both to address specific global and transregional threats having a destabilising effect and to ensure preparedness to address pre- and post-crisis situations.<sup>459</sup> Given the peculiar nature of the IfS, the measures taken in its framework should be consistent with Common Foreign and Security Policy.

A third instance of development/non-development cooperation is provided for by the Instrument for Nuclear Safety Cooperation (INSC).<sup>460</sup> This instrument is meant to support the promotion of a high level of nuclear safety, radiation protection and the application of efficient and effective safeguards of nuclear material in third countries. Since the EU’s competence in this area is foreseen in the Euratom Treaty, the INSC is based neither on Article 209, nor on Article 212 TFEU, but it is founded upon Article 203 Euratom, that is to say the ‘flexibility clause’ of this Treaty.<sup>461</sup> Nonetheless, the INSC appears to be related to both development and non-development cooperation, since it is likely to foster both the interests of the EU and the development and welfare of developing countries, similarly to other thematic instruments.

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Regulation of the European Parliament and of the Council establishing a Partnership Instrument for cooperation with third countries, COM(2011) 843 final, explanatory memorandum, par. 1.

<sup>456</sup> Regulation 1889/2006/EC of the European Parliament and of the Council of 20 December 2006 on establishing a financing instrument for the promotion of democracy and human rights worldwide, O.J. 2006 L 386-11.

<sup>457</sup> *Id.*, Article 1(1).

<sup>458</sup> Regulation 1717/2006/EC of the European Parliament and of the Council of 15 November 2006 establishing an Instrument for Stability, O.J. 2006 L 327/1-11.

<sup>459</sup> *Id.*, Article 1. For the ‘short-term’ component see Article 3, for the ‘long-term’ component, see Article 4.

<sup>460</sup> Council Regulation 300/2007/Euratom of 19 February 2007 establishing an Instrument for Nuclear Safety Cooperation, O.J. 2007 L 081/ 1-10.

<sup>461</sup> Consistently with the TFEU flexibility clause (Article 352), Article 203 Euratom reads: “if action by the Community should prove necessary to attain one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.”

## *2. The Programming of External Action Instruments*

The funds contained in external action instruments are normally allocated during the phase known as 'programming'. Programming is the first phase in the cycle of operation. During this phase, the situation at national and sector level is analysed to identify problems and opportunities to be addressed through cooperation. Based on the country diagnosis, lessons learnt from past and present cooperation and the comparative advantage of donors, the EU defines the strategy whereby it supports the partner country's efforts to achieve its development objectives.<sup>462</sup> Programming is therefore a multiannual and indicative process, which results into the allocation of financial resources and in the drafting of a 'strategy paper' and of an 'indicative programme'. The strategy paper consists of a single, logical and coherent document comprising a series of key elements, and it identifies the main objectives and sector priorities for cooperation with third countries. The defined strategy is converted into an indicative programme, which specifies the overall objectives and lays down the strategic choices for EU cooperation as well as the indicative financial allocation, both overall and per priority area.<sup>463</sup>

The control over the programming process evidently entails a relevant degree of control on the priorities of EU external action funding, as well as on the EU's resources. Therefore, the identification of the entities responsible for the programming of external action holds a crucial value. The programming of external action instruments should be a Commission responsibility, since it is part of the 'implementation' of the EU acts, within the meaning of Article 291(2) TFEU. Indeed, the instruments' regulations, as well as the Cotonou Agreement, enable the Commission to allocate resources and to adopt and modify strategy papers and indicative programmes, subject to comitology procedures.<sup>464</sup>

However, the creation of the EEAS may complicate this framework. In order to appreciate this, it is necessary to take a closer look at the administrative structure of the instruments' programming. The remainder of this paragraph provides for a description of the instruments' programming before the creation of the EEAS, while

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<sup>462</sup> See PCM p. 25 and GBS p. 39

<sup>463</sup> Partial exceptions to this rule are provided by the cases where the Union committed legally or politically at the international level to reach a certain financial allocation, or where the EU is required to allocate its resources according to a standard and rigid scheme. However, it must be stressed that, even in the cases when the allocation criteria are 'standard, objective and transparent', as required by the European Consensus on development, the EU maintains certain discretion as to the precise definition of each partner's share of funds.

<sup>464</sup> After the entry into force of the Lisbon Treaty, and namely during the revision of external action instruments, the legislator may decide to regulate some programming aspects directly in the instruments' base acts; subsequently, the legislator may delegate to the Commission the power to adopt non-legislative acts to supplement or amend certain such elements, ex Article 290(1) TFEU. This solution would enable the Council and the Parliament to determine the objectives, content, scope and duration of the delegation, and it would enable any of these institutions to revoke the delegation or to prevent any delegated act from entering into force. The European Parliament seems to prefer an ample reliance on Article 290 TFEU in this context. In particular, the EP intends to make the adoption of strategy papers, indicative programmes and financial allocations subject to a delegation of power, within the meaning of Article 290 TFEU. This would evidently increase the grasp of the EP on the management of external action instruments. The Commission does not share the Parliament's view, since it considers the aforesaid documents not to fall within the ambit of Article 290 TFEU. Nonetheless, its recent proposals accommodate some of the Parliaments' requests, since they foresee a delegation of power to the Commission in respect of three issues: the list of the EU's partner countries, the areas of cooperation and the distribution of relative allocations among different sectors.



the next two paragraphs analyse the changes brought by the creation of the Service, and the political/legal consequences thereof. Even before the creation of the EEAS, the programming of external action instruments was a complex procedure, whose nature varied considerably depending on the instruments' scope (geographic or thematic) and purpose (development cooperation or cooperation with industrialised countries). The most structured form of programming was provided for by the main geographic instruments, that is to say the ENPI and the DCI, which were programmed by DG RELEX, and the EDF, which was programmed by DG DEV. The programming of these instruments was divided in three phases: the drafting of the strategic paper and of the indicative programme, the quality control and the formal approval.

The drafting of strategic papers and indicative programmes began with an analysis of the policy agenda of partner countries, as well as their political, economic and social situation. Such analysis was normally conducted by DG RELEX or DG DEV and Delegations,<sup>465</sup> in coordination with partner countries, in order to enhance their ownership of the cooperation, as well as with civil society, Member States and third subjects. In light of the analysis of the situation in the partner country, the EU's cooperation objectives and the lessons learnt from past experience, the Commission elaborated an 'indicative programme', which identified the priorities across sectors, the financial 'envelopes' for each sector, the objectives of the cooperation, its expected results and the type of assistance to be provided. Once the first draft of the strategy paper/indicative programme was prepared, it was submitted by Delegations to Headquarters, and it was discussed by several Commission services in the so-called 'Country-Team meeting' (CTM). The membership of the CTM was variable, and it could encompass both DG DEV and DG RELEX departments, but also other services, such as trade or aid implementation (DG AIDCO).

After the Country Team meeting reached a working version of the draft strategy paper, the latter was subject to a three-stages 'quality control', which constituted the second phase of the instruments' programming. The first stage of 'quality control' was performed by the Interservice Quality Support Group (iQSG), a body composed by a small number of Commission officers coming from different external relations services,<sup>466</sup> selected for their skills and experience by the Group of external relations Commissioners. The iQSG screened programming documents against a common framework and ensured high quality standard of programming documents. The conclusions it adopted were sent back to the DG RELEX or DG DEV desk officer and the Delegation, which could discuss them further with the

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<sup>465</sup> Communication from the Commission to the Council and the European Parliament concerning the Development of the External Service 2000, par. 3.2: "The deconcentration of responsibility for development aid from Headquarters to Delegations [...] will mean that many Delegations will continue to have co-operation as one of their major tasks. [...] Delegations will be called upon to lead the policy dialogue with beneficiary countries as well as operational co-ordination with the Member States' representatives on the spot within the framework of reinforced multi-annual programming".

<sup>466</sup> The members of the group are senior representatives of all Directorates General involved in the management of the Community's relations with developing countries: DGs Development, External Relations, Trade, Economic and Financial Affairs, Enlargement, ECHO, EuropeAid Cooperation Office and the Joint Evaluation Unit. Both the chairman and the members are selected ad personam by their respective Directors General for their skills and experience. Their views as expressed in the iQSG do not commit the Directorates-General from which they come from", Commission Staff Working Document - iQSG Progress Report on second-generation Country Strategy Papers 2007/8-2013, SEC(2009) 431, p. 16 note 29, not published; document available at <http://www.uni-mannheim.de/edz/pdf/sek/2009/sek-2009-0431-en.pdf>, last visited on 21 May 2012.

partner State and the other entities concerned. The second stage of ‘quality control’ was constituted by the inter-service consultation (ISC): like most proposals for the adoption by the Commission, programming documents (including the conclusions of the iQSG) were sent by the lead department (DG RELEX or DG DEV) to all other Directorates-General and services with a legitimate specific interest in the substance of the proposal. The programming documents were subsequently submitted for the third stage of ‘quality control’, which was performed by the Member States’ committee responsible for the instrument, under ‘comitology’ procedures. In some instances, a negative opinion of the Committee could oblige the lead department to reformulate the strategy paper.

After the quality screening, the strategy paper and the indicative programme were submitted to the College of the Commissioners, or to the group of external action Commissioners, for approval, which constituted the third and last phase of programming. If all Commission services having an interest in the programming documents had approved the proposal in inter-service consultation, the College could adopt them through the rapid ‘written procedure’; in the absence of unanimity among Commission services,<sup>467</sup> the programming documents generally had to be adopted by the College through the lengthier oral procedure. After approval by the Commission, the strategy paper and the indicative programme became binding, thus constituting the formal ‘Order for Service’ covering the entire programming period. The strategy paper and the indicative programme could however be revised during the multi-annual financial framework, and particularly at mid-term. In principle, the revision of these documents, including the financial allocations, followed procedures similar to those described above.

The programming of thematic instruments and programmes was similar to the programming of the main geographic instruments. The process began with the drafting of a strategy paper by the competent unit; thematic programmes under the DCI were managed by DG DEV, while thematic instruments (EIDHR, IfS, INSC) were programmed by DG RELEX. The thematic strategy papers were subsequently commented upon by other Commission departments, in the context of a ‘Thematic Team Meeting’. The draft programming document was subsequently evaluated by the iQSG, submitted for consultation among other Commission service and screened by the Member States’ Committee. Finally, the strategy paper was adopted by the Commission.<sup>468</sup>

The programming of two geographic instruments, ICI and IPA, was organised in a different way. The programming of the Instrument for Cooperation with Industrialised Countries (ICI) was less structured than the programming of other instruments, and it foresaw the adoption of a single Multi-annual programme of cooperation encompassing all partner countries. Like other strategic documents, this programme was subject to interservice consultation, comitology and, finally, adoption by the Commission. DG RELEX was responsible for the entire programming cycle of the ICI.

The programming of the IPA was centred on three-years strategic planning documents - the Multi-Annual Indicative Planning Documents (MIPD) – which set

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<sup>467</sup> Note, however, that in the event of a dispute between the lead department and a department consulted, the

Secretariat-General could be asked to mediate, see the Commission’ Guide to Interservice Consultation (2010), par. 2.4., not published in the O.J.

<sup>468</sup> On the programming of thematic instruments and programmes before the Lisbon reform, see the Common Framework And Procedure For Strategy Papers For The Thematic Programmes 2007 – 2013, 30 May 2006, available on [www.europa.eu](http://www.europa.eu).

out the EU's priorities for assistance to candidate and eligible candidate countries. Such planning documents were prepared by DG Enlargement (ELARG) units, in cooperation with DGs Regional Affairs, Employment and Agriculture. Subsequently, DG ELARG consulted the partner countries' administration on the draft MIPD, and it sought the opinion of Member States' authorities in partner countries, civil society and other Commission DGs. Subsequently, DG ELARG submitted the draft document for inter-service consultation, and for the quality-check by the ELARG Quality Support Group. Finally, the MIPD was submitted to the IPA management Committee and eventually approved by the Commission. It may be noted that the IPA was the only instrument to be programmed neither by DG RELEX nor DG DEV; in fact, line DGs were involved in the programming of this instrument more closely than other RELEX family DGs. Moreover, the role of Delegations in the programming of the IPA was less evident than in the case of development cooperation geographic instruments, since DG ELARG was in direct contact with the partner country's administration. Arguably, these peculiarities were due to the peculiar relation between the EC/EU and candidate countries, which is 'external' in nature, but has 'internal' characters, since candidate countries are required to 'internalise' the *aquis communautaire*.<sup>469</sup>

### 3. Involvement of the EEAS in the Programming of External Action Instruments

In principle, the programming procedures described in the previous paragraph are still valid, with some modifications, mainly due to the creation of the EEAS. This paragraph shows that the EEAS can affect the programming of external action instruments, through its function as a *de facto* Commission service and its control on Delegations, but also through the management responsibilities it was recently attributed.

In the first place, the EEAS participates in the programming of *all external action instruments* since it is consulted during their preparation. Although the EEAS is not a Commission Service, it is consulted before the submission of proposals to the Commission, since the Service assists a Vice-president of the Commission, i.e. the High Representative, in his/her capacity as Commission Vice-President. Thus, the EEAS may comment upon other services' initiatives; if the EEAS' comments are not accepted, the Service may theoretically render the adoption of other services' initiatives more difficult, by withdrawing its approval of the envisaged actions.<sup>470</sup> In all circumstances, the EEAS may also advise the HR/VP to vote against a proposal within the College of the Commissioners. However, the EEAS cannot make extensive use of these tools, which ultimately risk undermining its working relations with Commission services.

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<sup>469</sup> European Commission - DG Enlargement, 'IPA Programming Guide, Volume 1, for Component I (TA-IB) and Component II (CBC), Annex 4, IPA Planning guidelines, 2008, pp. 91-93, not published in OJ; the document is available on the website of the government of the Former Yugoslav Republic of Macedonia, [http://www.sep.gov.mk/content/Dokumenti/MK/IPAprogrammingguide-rev%2031\\_03\\_08%20-%20Volume%201\\_GB.pdf](http://www.sep.gov.mk/content/Dokumenti/MK/IPAprogrammingguide-rev%2031_03_08%20-%20Volume%201_GB.pdf), last visited on 21 May 2012. planning guidelines on MIPD (31/03/2008)

<sup>470</sup> The combination of Article 12 and Article 23 of the Commission's rules of procedure make the adoption of an act through a 'written procedure' subject to the approval of all the services with a legitimate interest in the proposal. If such approval were denied, the Commission would have to approve the proposal in a formal meeting; see Commission Decision 2010/138/EU, Euratom, of 24 February 2010, amending its Rules of Procedure, O.J. 2010 L 55/60-67.

In the second place, the EEAS participates in the programming of the *main geographic instruments* through its partial control on EU Delegations. As noted above, Delegations play a decisive role in the drafting of strategy papers for the main external action instruments, that is to say the EDF, DCI, ENPI. Delegations may influence also the programming of the Instrument for pre-Accession, since they assist DG ELARG in the performance of certain task on the spot, and notably for the consultation with local stakeholders, donors and EU Member states. However, the potential influence of Delegations, and, thus, of the EEAS, in respect of the IPA programming appears to be less evident than it is in the case of the EDF, DCI and ENPI, for the reasons mentioned above. A cursory reading of the EEAS Decision may suggest that the creation of the Service did not affect the Delegations' role in the programming of these instruments, since cooperation with third countries is a non-CFSP policy, which should be executed by the Commission, and by its officers in Delegations, under the Commission's instructions.<sup>471</sup> However, the relation between the EEAS and Delegations necessarily affects the programming of the main geographical instruments. On the one hand, EEAS officers in Delegations may directly contribute to the programming of external action instruments: a joint Commission-EEAS note sent to EU Heads of Delegation in December 2011 stipulates that the HoD can require EEAS staff to work on tasks falling within the remit of the Commission,<sup>472</sup> thereby presumably including the cooperation with third countries. The involvement of EEAS officers in this activity may be quite effective, since they are likely to hold specific expertise related to the analysis of the partner country's political situation, which may be useful in the drafting of strategy papers. On the other hand, the Head of Delegation (HoD), who is a EEAS officer, contributes to the programming of external action instruments by coordinating this activity with the rest of the EU's action in the country of accreditation. Thus, the HoD, under instructions from the HR and the EEAS, can make sure that the strategy papers are drafted consistently with the EU's strategy in the partner country.

In the third place, the EEAS participates in the programming of *certain instruments* in a more direct way, that is to say through its officers in Brussels. The direct involvement of the EEAS in this area may seem to be logical, since the EEAS is composed also by officers formerly responsible for these duties. Before the creation of the Service, DG RELEX was responsible for the programming of certain instruments and programmes, i.e. DCI (geographic), ENPI, EIDHR, IfS, INSC.<sup>473</sup> As it is known, since January 2011 DG RELEX and a small part of DG DEV were merged into the EEAS, while the rest of DG DEV was merged with DG AIDCO, to form DG DEVCO. Had programming responsibilities followed the transfer of their respective departments, the EEAS would have been made responsible for the programming of all the instruments that previously fell within the remit of DG RELEX. This would have weakened the position of the Commission. In this perspective, and considering that Article 27(3) TEU enables the Commission to veto the adoption of the Decision establishing the EEAS, it is perhaps not surprising that the final EEAS Decision considerably reshuffled programming responsibilities.

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<sup>471</sup> EEAS Decision Article 5.

<sup>472</sup> European Commission-European External Action Service, note to Heads of Delegation, 'Management of Staff in Delegations', 20 December 2011, not published in the OJ.

<sup>473</sup> The remaining instruments were programmed by DG DEV (EDF, DCI-thematic) and DG ELARG (IPA).

Article 9(3) EEAS Decision affirms that the EEAS contributes to the programming and management cycle for several instruments (DCI, ENPI, EDF, ICI, EIDHR, INSC and IfS). The same paragraph affirms that the EEAS has responsibility for preparing country allocations, country and national strategic papers and national and regional indicative programmes, in relation to the aforesaid programmes. Article 9(3) further specifies that “throughout the whole cycle of programming, planning and implementation of the instruments referred to in paragraph 2, the High Representative and the EEAS shall work with the relevant members and services of the Commission”. Since these provisions are not completely univocal, the precise allocation of responsibilities in this area was subsequently determined through negotiations between the Commission and the EEAS. These negotiations led to the adoption of the ‘Working Arrangements between Commission Services and the EEAS in relation to external relations issues’ (Working Arrangements).<sup>474</sup> In a formal perspective, these arrangements are a Commission internal document, which is not legally binding. In practice, since they are the result of a negotiation between Commission services and the EEAS, they are likely to provide for a rather accurate description of the current distribution of tasks in this area.

In an analytical perspective, the degree of intervention of the EEAS in the programming of external action instruments may be divided in five categories. First, the EEAS may not directly intervene in the programming of external action instruments. This is the case of the Instrument for Pre-Accession, which is not mentioned in Article 9(3) EEAS Decision. This instrument is still programmed by DG ELARG, under the responsibility of the Enlargement Commissioner, consistently with pre-Lisbon practice; the lack of innovation in this area may be justified by the peculiar nature of this instrument, as described above.<sup>475</sup>

Secondly, the EEAS may be ‘consulted’ by Commission services. This is the case of the thematic programmes contained in the Development Cooperation Instrument, which, according to Article 9(4) EEAS Decision, are prepared “by the appropriate Commission service”, under the guidance of the Commissioner responsible for Development Policy. The Working Arrangements confirmed this provision, by affirming that the thematic programmes of the DCI are programmed by DG DEVCO, “in consultation with the EEAS and relevant Commission services”.<sup>476</sup> Also this provision is partially consistent with previous practice, since thematic programmes were previously programmed by DG DEV.

Thirdly, the EEAS and Commission services may ‘co-decide’ the programming of external action instruments. This is the case of the main geographical instruments, that is to say EDF, DCI and ENPI. The EEAS Decision provides limited guidance in this respect, since Article 9(4) and (5) EEAS Decision only specify that the proposals related to the programming of these instruments are prepared jointly by the relevant services in the EEAS and in the Commission under the responsibility of the Commissioner responsible for development (EDF, DCI) or neighbourhood policy (ENPI). *In abstracto*, it may be argued that the combination of Article 9(4) and (5), on the one hand, and of Article 9(3), on the other hand, implies that the EEAS should take the lead in the programming of these instruments. Indeed, Article 9(3) EEAS Decision, as noted above, explicitly affirms that the EEAS is

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<sup>474</sup> SEC(2012) 48, 10 January 2012, not published in the O.J.

<sup>475</sup> Of course, the EEAS is not completely excluded from the programming of IPA, insofar as it participates in the interservice consultation that precedes the adoption of programming documents by the Commission.

<sup>476</sup> See Working Arrangements, p. 20.

‘responsible’ for the programming of these instruments. Such interpretation is confirmed by the Working Arrangements, according to which it is the EEAS that prepares “in agreement with DEVCO” financial allocations, programming guidelines and draft strategy papers. Subsequently, the EEAS organises Country Team Meeting “meeting jointly with DEVCO”, and it invites other services, in order to assess the analysis and the programming proposals from Delegations. Moreover, the EEAS launches the inter-service consultation on the proposed documents as well as the Commission procedure for adoption, always “in agreement with DEVCO”.<sup>477</sup> Nonetheless, interviews with EEAS and Commission officers suggest that DG DEVCO does not have a subordinate role in the programming of the main geographical instruments.<sup>478</sup> On the contrary, it appears to lead the programming of development cooperation in practice: development cooperation is not the ‘core business’ of the EEAS, while it is the very *raison d’être* of DEVCO; therefore, the latter is more likely to take initiative in this ambit. Moreover, the EEAS may lack sufficient human and ‘institutional memory’ resources, because most DG DEVCO officers were transferred to DEVCO. This may prevent the EEAS from taking the lead in certain areas, and namely in the programming of the EDF (which was previously managed by officers now working mainly for DG DEVCO). It may be argued that, in principle, the main geographic instruments should be the responsibility of the EEAS “in agreement with DEVCO”, but, in practice, the contrary appears to be true. This seems to contradict the argument put forward by some NGOs whereby the involvement of the EEAS in the management of development cooperation instruments may be likely to subordinate development cooperation to foreign policy priorities.<sup>479</sup>

Fourthly, the EEAS may be responsible for the programming of external action instruments, in ‘consultation’ with Commission services. The EEAS Decision does not explicitly foresee any such instance. Nonetheless, the Working Arrangements specify that thematic instruments, i.e. the INSC, the EIDHR (with the exception of electoral observation), and the long-term part of the IfS, are entirely prepared by the EEAS in consultation with DG DEVCO and other relevant Commission services, under the responsibility of the HR/VP.<sup>480</sup> Again, this confirms a partial consistency with previous arrangements, since these instruments were previously programmed by DG RELEX; this solution confirms also the coordinating role of the EEAS in respect of thematic programmes.

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<sup>477</sup> However, both the EEAS and DEVCO respond to the requests of Member States’ committees and to the requests of the Parliament, in the newly established procedure for democratic scrutiny; moreover, the EEAS does not chair Member States’ committees, which are presided by DG DEVCO. see Article 10, new Comitology Regulation 182/2011;

<sup>478</sup> Interviews with DEVCO officers March-July 2011, June 2012; interviews with EEAS officers April 2012-June 2012.

<sup>479</sup> Cf. Phillips, "Development NGOs issue legal warning over new EU foreign service", *EU Observer*, 25 April 2010: “Stripping away the jargon, essentially the development groups believe that the European Commission is less ‘political’ than the member states. It has been the sole agent responsible for development policy and implementation until now, and they fear that the commission is having its powers in this area diluted or even stripped away. They view the EU executive as an organisation that in principle is supposed to stand above national interests and represent the interest of Europe as a whole and so is a better manager of development policy. They worry in particular that with the development area being placed in the hands of the EAS, the member states will now have their fingers in the pie and will subordinate poverty reduction in the third world to less altruistic foreign policy imperatives.”

<sup>480</sup> It is worthwhile noticing that, although the EEAS has primary programming responsibilities, it does not chair the competent Member States’ committee; the chairmanship is provided for by DG DEVCO, although the programming documents are defended by the EEAS.

Fifthly, the EEAS may be responsible for the instruments' programming in relative autonomy. In this sense, Article 9(6) EEAS affirms that the Instrument for Cooperation with Industrialised Countries, the short-term part of the Instrument for Stability and election observation missions (provided for in the EIDHR) are under the responsibility of the High Representative/the EEAS.<sup>481</sup> The Working Arrangements confirm that the programming of these instruments is performed by the EEAS. The only Commission department consulted throughout the programming cycle is the new Foreign Policy Instrument Service (FPI), whose nature and role are better understood in the perspective of the instruments' implementation (see *infra*). All other Commission services are consulted only through 'inter-service consultations'.<sup>482</sup>

The table below summarises the role of the EEAS in the programming process and the potential for its influence in this phase.

Instrument/ programme	Commissioner responsible	EEAS' role in programming
ICI, IfS (short-term), EIDHR (election monitoring)	HR/VP	EEAS' autonomous programming
EIDHR, IfS (long-term), INSC	HR/VP	EEAS' programming, with consultation of DG DEVCO
DCI (geographical), ENPI, EDF	Development/Enlarge ment	EEAS co-decision with DG DEVCO
DCI (thematic)	Development	Responsibility of DG DEVCO - EEAS consulted
IPA	Enlargement	EEAS not consulted

The division of labour between the EEAS and other Commission services leads to three conclusions. In the first place, the Service does function as a Commission service, mainly by substituting the DGs that preceded it (RELEX and DEV) but also by acquiring different responsibilities. This means that, although Article 2(1) of the EEAS Decision affirms that the tasks of the Service in the Institutions shall be performed "without prejudice to the normal tasks of the services of the Commission", the EEAS can be truly integrated in the structure of the Commission. This finding is reinforced by a second conclusion: the EEAS supports the HR/VP in the performance of his/her tasks in the Commission, but it supports also other Commissioners (Enlargement and Development). This testifies the EEAS' capacity to serve entities other than the HR, as suggested by the already cited Article 2(2) of

<sup>481</sup> Notice that, in principle, the short-term part of the IfS is not subject to 'programming', since it is meant to tackle crises, which, by definition, cannot be 'programmed'. Because of this reason, it is not referred to in Article 9(2) EEAS Decision, which deals only with the programming of external action instruments. However, it is for the EEAS to manage the 'indicative pipeline of IfS interventions', that embodies the political orientation of the instruments; hence, the short-term part of the IfS is treated here alongside the strategic dimension of other instruments, as embodied in the programming phase.

<sup>482</sup> Evidently, since the short-term part is not programmed, no inter-service consultation takes place in this context.

the EEAS Decision, which calls the Service to assist the President of the Commission, and the Commission as a whole.

Thirdly, and most importantly, the division of labour between the EEAS and Commission services does not follow the alleged rift between ‘development’ and ‘politics’, since there is no clear correlation between the instruments’ legal bases and the degree of the EEAS’ involvement in their programming, as clarified by the table below. For instance, the EEAS is excluded from the management of a ‘political’ instrument such as the IPA, which does not have a development cooperation legal basis, but the same Service leads the programming of thematic instruments, which have a strong development component.

Instrument/programme	Leading service	Consultation	Legal basis (TFEU)
IPA	ELARG		212
DCI - thematic	DEVCO		209
EDF	EEAS - DEVCO		Sui generis <sup>483</sup>
DCI	EEAS - DEVCO		209
ENPI	EEAS - DEVCO		209- 212
INSC	EEAS	DEVCO	Sui generis <sup>484</sup>
EIDHR	EEAS	DEVCO	209-212
IfS (long-term)	EEAS	DEVCO	209-212
ICI/PI	EEAS		212
IfS – short-term	EEAS		209-212

To be sure, this case-by-case approach to division of labour entails some shortcomings, such as lengthy negotiations between the EEAS and Commission services concerning the precise delimitation of the respective duties, and the rather fuzzy distribution of responsibilities across EU services. However, it enables the EEAS to intervene in the areas where it can bring added value in practice, through modalities that are sensitive to the peculiarities of each specific sector. This means that the influence of the EEAS is strongest in the sectors that are closest to ‘high politics’, and, thus, to CFSP, which is managed by the HR and the EEAS. Thus the Service manages autonomously the short term part of the IfS, which is strictly linked to CSDP, and electoral observation, which is closely related to a typical CFSP activity such as the recognition of the democratic nature of an electoral process. In other words, the EEAS is closely involved in the programming of most external action instruments, not because of its position in the institutional balance of the

<sup>483</sup> For a discussion of the legal basis of the EDF, see above.

<sup>484</sup> For a discussion of the legal basis of the INSC, see above.



Union, but rather because of its added value in specific areas. The allocation of programming responsibilities on the EEAS is meant to enhance the synergy between the different components of the EU's external action, irrespective of the boundaries that separate them, and in harmony with the attention paid by the Lisbon reform to external action coherence.

#### *4. External Action Coherence as the Legal Rationale for the EEAS' Programming Responsibilities*

Irrespectively of the effects entailed by the entrustment of programming responsibilities on the EEAS, its intervention in this area may engender legal contradictions. In the first place, the EEAS' intervention in the programming of external action instruments may violate the institutional balance set by the Treaties. In 2010, some NGOs argued that the HR's proposal for a Decision establishing the EEAS was illegal, because "the Treaty does not provide for a split of responsibilities between the EEAS and the Commission, and there are no arrangements to allow a sharing of policy implementation under the Treaty."<sup>485</sup> In other words, since the programming of external instruments is part of the execution of the base regulations, and the Treaties entrust the implementation of non-CFSP policies on the Commission, it is for the Commission, and not for the EEAS, to program external action instruments.<sup>486</sup> Hence, the EEAS Decision may be seen as impinging on the competences of the Commission, thereby violating Article 13(2) TEU, which embodies the principle of institutional balance by affirming that "each institution shall act within the limits of the powers conferred on it in the Treaties". This argument has its merits, since the programming of external action instruments should undoubtedly be performed by the Commission, through the exercise of its competence of policy implementation (Article 17 TEU and Article 291(2) TFEU).<sup>487</sup> These concerns are partially assuaged by the fact that the EEAS Decision never intended to entrust the EEAS with any such competence, simply because the EEAS remains a *service*, which assists a Union organ, that is to say the High Representative.<sup>488</sup> The EEAS was merely entrusted with the task of assisting the HR/VP and the Commission as a whole, and it was treated as a *de facto* Commission service, to the extent that, during its activities in this area, the Service must follow the Commission's procedures.<sup>489</sup> It may be excluded, therefore, that the entrustment of programming responsibilities on the EEAS embodies a transfer of competence.

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<sup>485</sup> Van Reisen, *Note on the legality of inclusion of aspects of EU Development Cooperation and Humanitarian Assistance in the European External Action Service (EEAS)* (Europe External Policy Advisors, 2010); in this sense, see also Legal Advice Prepared by White & Case LLP to CAFOD (Catholic Agency For Overseas Development and CIDSE (an international alliance of Catholic development agencies), 16 April 2010, available at [http://www.eepa.be/wcm/dmdocuments/CAFOD\\_CIDSE\\_memo\\_EEAS.pdf](http://www.eepa.be/wcm/dmdocuments/CAFOD_CIDSE_memo_EEAS.pdf).

<sup>486</sup> Indeed, "By way of analogy with the EU's common commercial policy, responsibility for development cooperation activities falls solely within the competence of the Commission", Legal Advice Prepared by White & Case LLP to CAFOD, par. 3.9.

<sup>487</sup> The Commission may also exercise its power to adopt delegated acts, under Article 290 TFEU; however, the nature of the final act does not affect the allocation of responsibilities on the Commission.

<sup>488</sup> In this sense, see Van Vooren, *op. cit.*

<sup>489</sup> Art 9(3) EEAS Decision.

It is still possible, nevertheless, that the EEAS' activity in the Commission impinges on the exercise of the latter's powers, in violation of the institutional balance set by the Treaties. Even if the EEAS is not formally entrusted with any competence, it is true that its intervention in the programming of external action instruments may influence the priorities of the EU's cooperation with third countries. Programming documents are elaborated by relying on the expertise of numerous trained officers, and their counterparts in other states and organisations. Therefore, it would be impossible for the College of the Commissioners to enter into the details of the instruments' programming in order to question the judgement of the services that prepared them. Since the Commission should be the only entity setting the priorities of international cooperation during the implementation phase, it may be argued that the EEAS' intervention in this area questions institutional balance in practice, even if the Commission's competences remain formally intact. Even this argument, however, does not appear to be completely convincing, in so far as it does not take into consideration one of the main responsibilities of the High Representative: coordinating the EU's external relations (Articles 18(4) and 21(3) TEU). In this sense, Duke and Blockmans argued that, if the HR could not participate in the setting of the priorities for international cooperation, (s)he would hardly be able to ensure the coherence of international cooperation with other policies, and namely the CFSP.<sup>490</sup> Therefore, a systemic interpretation of Articles 18(4), 21 and 13(2) TEU, informed by the principle of external action coherence, is sufficient to exclude a violation of institutional balance by the EEAS Decision.

Secondly, the EEAS' intervention in the management of the instruments' programming may be considered as a violation of the organisational autonomy of the European Commission. This autonomy is embodied in Article 248 TFEU, according to which the responsibilities incumbent upon the Commission are structured and allocated among its members by its President. Since the EEAS Decision, which was adopted by the Council, clearly allocates Commission responsibilities on the HR and his/her Service, it may theoretically be seen as violating Article 248 TFEU. Such interference with the Commission's organisational autonomy may however be justified by the fact that the Treaties already allocate certain responsibilities on the EEAS, albeit implicitly. The EEAS' responsibilities in the Commission may be partially justified on the basis of Article 18(4) TEU, which sets the HR/VP's functions in the Commission, since the Service *assists* the High Representative/Vice-President in the programming of instruments such as the IfS, the EIDHR and the INSC.

Article 18(4) TEU, however, does not explain why the Council may, through the Decision establishing the EEAS, determine the Service's capacity to assist also the Commissioners for Development and Enlargement, in respect of instruments such as the EDF, the DCI and the ENPI. It may be hypothesised that the entrustment of such programming responsibilities on the EEAS depends on a systemic reading of Article 248 TFEU with Articles 21(3) TEU and 7 TFEU, which provide for the principle of coherence, since, if Article 248 TFEU were interpreted literally, as to exclude the capability for the Council to mandate the EEAS to assist the Commission at large, the latter may exclude the Service from its activities, thus jeopardising coordination and, ultimately, coherence. Such reading of the Treaties

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<sup>490</sup> Cf. Duke and Blockmans, *The Lisbon Treaty Stipulations on Development Cooperation and the Council Decision of 25 March 2010 (Draft) Establishing the Organisation and Functioning of the European External Action Service* (European Institute of Public Administration, 2010), p. 10.

appears to be in line with the spirit of the Lisbon reform, which calls for coordination transversally to the different policies of the Union.

### *5. The 'Implementation' of External Action Instruments*

In the phase commonly referred to as 'implementation' EU bodies put the principles contained in strategic instruments into practice. It must be stressed that the 'implementation' of external action instruments, as defined above, is comprised within the 'implementation' of Union policies, ex Article 291 TFEU. This lexical contradiction is unavoidable, given the widespread usage of these formulas; the context will however clarify the meaning of the term.

The implementation of external action instruments is performed by the Commission, by exercising the power of execution (Article 291(2) TFEU) and budget implementation (Article 317 TFEU), and it is commonly divided in five stages. In the first and second stages, known as 'identification' and 'formulation', Commission services identify the projects to be financed, by consulting the intended beneficiaries of each action. The proposed interventions are normally screened, through the usual 'quality control', performed through the interservice Quality Support Group, interservice consultation and comitology.<sup>491</sup> In the third phase, generally referred to as 'financing', Commission services request the College of the Commissioners to adopt such proposals.<sup>492</sup> In the fourth phase, 'financial implementation', the Commission decision indicates the way the project is given financial implementation.<sup>493</sup> The Commission may entrust financial implementation tasks directly on its officers, either in Headquarters or in Delegations. In this case, an officer authorised by the Commission, the so-called 'authorising officer by delegation' is in charge of procedures and of signing contracts/agreements with third parties, such as grants or procurement contracts, and (s)he authorises the disbursement of EU funds.<sup>494</sup> When performing these functions, the authorising officer by delegation must ensure that the budgetary principles of the EU are complied with, namely in respect of sound financial management. The Commission may also decide to entrust the financial implementation of an action to entities such as beneficiary countries, international organisations or national bodies from donor countries.<sup>495</sup> In the fifth stage,

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<sup>491</sup> The present description refers to the implementation of cooperation through 'projects', and not through budget support, which functions through different modalities. This choice is motivated by the fact that the largest part of EU cooperation is still implemented through projects and the EEAS/Foreign Policy Instrument Service (FPI) are scarcely involved in budget support activities: among the instruments implemented by the FPI, only the IfS allows for budget support. On the FPI, see below.

<sup>492</sup> The proposed project are normally adopted through an Annual Action Programme (AAP), that is to say a single decision for all projects financed under a country, regional or thematic programme during the same year.

<sup>493</sup> Commission documents generally refer to this phase as 'implementation'; we prefer the use of the 'financial implementation' formula since it is more univocal and it reflects the nature of the activity and the Commission's power concerned, cf. Article 317 TFEU.

<sup>494</sup> More precisely, the Authorising Officer by delegation is generally the Director-General of a Commission service, who may also subdelegate his/her powers to directors, who in turn may subdelegate certain implementation tasks.

<sup>495</sup> According to the spirit of the reform of the management of external assistance of 2000, such 'decentralisation' is a desirable objective, though it is not appropriate in every partner country. The delegation of budget-implementation tasks to third entities has an impact on the nature of work carried out by the services of the European Commission. The focus of the assessments of the country

'evaluation', Commission services evaluate the cooperation with third countries, thereby making an assessment of projects, programmes or policies, their design and results. In principle, the results of this evaluation should be incorporated into the subsequent decision-making.

Between 2000 and 2009, the implementation of external action instruments was entrusted on Commission DG AIDO, which was placed under the responsibility of the Commissioner for external relations.<sup>496</sup> Hence, the programming and implementation of development cooperation were allocated on DG RELEX/DEV and DG AIDCO, respectively. In order to coordinate their activities, the services responsible for programming and implementation consulted each other at all stages. At the same time, DG ELARG gave implementation to the Instrument for pre-Accession, and DG RELEX implemented a few programmes, including the short-term part of the Instrument for Stability. Therefore, these instruments and programmes were programmed and implemented by the same service.

Also Commission Delegations played a pivotal role in the implementation of external action instruments: whereas the responsibility for programming was considered to be more effectively allocated upon Commission headquarters, implementation tasks were often entrusted on Delegations. According to the so-called 'devolution' (or '*deconcentration*') process "anything that can be better managed and decided on the spot, close to what is happening on the ground, should not be managed or decided in Brussels".<sup>497</sup> DG AIDCO was consequently extensively represented in Delegations by its officers, who worked under the authority of the Head of Delegation (who, in turn, belonged to DG RELEX). In most cases, the Head of Delegation was also responsible for financial implementation; to this end, (s)he was delegated budget implementation powers by the Commission. In other words, the Head of Delegation was also authorising officer by delegation.

## 6. EEAS' Indirect Involvement in the Implementation phase

A cursory reading of the EEAS Decision may suggest that the Service is only indirectly involved in the implementation of external action instruments, since the Decision does not entrust the Service with any responsibility in this area. As in the case of programming, the EEAS can use two channels to indirectly influence the implementation of external cooperation. First, the Service is consulted by the Commission services responsible for implementation, in order to ensure the coordination between programming and implementation. In particular, the EEAS is consulted through inter-service consultation before the financing phase of 'implementation'. The Service may also instruct the High Representative to support, or oppose, certain implementing measures in the College of the Commissioners. Second, the Service can influence implementation through the activity of its officers in Delegations, and namely through the Head of Delegation. In the 'identification' phase, Delegations provide the substantial input for the draft

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systems is consequently more narrowly focused on the procedures and entities that are involved in the management of the specific project or programme.

<sup>496</sup> Before the reform of the management of external assistance performed in 2000, the services responsible for programming (DG RELEX and DG DEV) managed also the identification, formulation and financing phases, whereas the Common Service for External Relations, created in 1998, was responsible for financial implementation and evaluation.

<sup>497</sup> Communication from the Commission to the Council and the European Parliament concerning the Development of the External Service 2000.

project proposals; this activity falls under the responsibility of Commission services, but EEAS officers may support it through their expertise. The Head of Delegation, in particular, oversees this part of implementation, since he/she has authority over all Delegation officers and he/she is responsible for the dialogue with third subjects, which is preliminary to the 'identification' phase. Moreover, Heads of Delegation give financial implementation to EU assistance, since, like the HoD of Commission Delegations, new Heads of Delegation are entrusted with budget implementation powers by the Commission.<sup>498</sup> Hence, they are responsible for the decisions involving expenditure to be charged to the EU's budget (as well as to the EDF), they must comply with Commission rules and procedures and they must report to Commission services. This implies that the HoD may also be held responsible for the violation of Commission rules and procedures, and (s)he may be subject to disciplinary measures.

It may be hypothesised that, in parallel with the process of programming, there should be also a 'direct' involvement of the EEAS in the implementation of external action instruments. Such parallelism, however, is not confirmed in practice. After the Lisbon reform, implementation tasks have consistently been entrusted on the bodies that manage the instruments' programming, in order to foster coherence throughout the policy cycle and discourage internal conflicts. Thus, the new DG DEVCO, which programmes (either autonomously or with the EEAS) most external action instruments, was tasked with their implementation and DG ELARG maintained its implementation responsibilities in respect of the IPA. The EEAS, however, was not entrusted with any implementation responsibility, not in even in the areas where it enjoys autonomous programming responsibilities (IfS, ICI).

The choice not to entrust the EEAS with implementation does not appear to be motivated by legal motives. If it is accepted that the treaties allow the EEAS to participate in the programming of external action instruments, it must be concluded that they do not hinder its exercise of implementation tasks, at least as long as the ensuing decisions are formally adopted by the College of the Commissioners. As demonstrated by the case of Heads of Delegation, *certain* EEAS officers actually give implementation to the operative lines of the EU's budget: it would be sufficient to adopt an amendment to the financial regulation in order to enable the Commission to delegate this task to *any* EEAS officer.<sup>499</sup> It is presumable, therefore, that the legislator did not grant any implementation responsibility to the EEAS for political reasons, and more precisely because of the opposition of the Commission.

The entrustment of implementation duties on a department completely separate from the EEAS, however, would have risked jeopardising coherence in the management of certain external instruments, namely those entirely programmed by the Service. In order to balance the Commission's priorities against the need for coherence in the management of external action instruments, the legislator elaborated a compromise: the creation of a 'hybrid' service. Article 9(6) EEAS Decision foresees the creation of a *Commission* department responsible for the

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<sup>498</sup> Council regulation 1605/2002/EU/Euratom of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities, following its amendment by the Regulation (EU, Euratom) No 1081/2010 of the European Parliament and of the Council of 24 November 2010, as regards the European External Action Service, Article 51: "the Commission may delegate its powers of budget implementation concerning the operational appropriations of its own section to the Heads of Union Delegations".

<sup>499</sup> Indeed, such an amendment already allows for the delegation of budget implementation powers to a specific EEAS officer, that is to say the Head of Delegation, see above.

“financial implementation” of instruments programmed by the EEAS, i.e. the ICI, election observation (under the EIDHR), and the short-term part of the IfS. At the same time, this new Commission department is under the authority of the *High Representative*, in his/her capacity as Vice-President of the Commission, and should be “co-located with the EEAS”. The Commission established such department in October 2010, by creating the service for Foreign Policy Instruments (FPI),<sup>500</sup> through the transfer of some units, or parts thereof, formerly belonging to DG RELEX and DG AIDCO.<sup>501</sup> Although the EEAS Decision affirms that this Commission department should have been entrusted with the ‘financial implementation’ of external action instruments and programmes, the FPI conducts all the implementation phases. This means that the FPI is to the EEAS what AIDCO used to be to DG DEV/RELEX. This is testified by the fact the FPI is the only Commission department that is consulted by the EEAS in the programming of the ICI, election monitoring and the short-term part of the IfS.

The creation of the FPI raises political and legal issues. In a political perspective, it may be wondered whether the FPI can bring more coordination, or is rather likely to generate conflicts. Since both the EEAS and the FPI are under the authority of the HR/VP, and they are located in the same premises, it may be argued that their cooperation may be more effective than the cooperation between DG DEV/RELEX and DG AIDCO in the past. The ‘hybrid’ nature of the FPI, however, may be problematic. The FPI is a small service whose activities are functional to the performance of the task of the EEAS. The EEAS may thus tend to see the FPI as a mere ‘service provider’, while the FPI may desire to maintain a certain political autonomy. This contradiction may complicate the relation between the two services; in this respect, anecdotic evidence is still mixed.<sup>502</sup> The creation of the FPI may also create conflicts with DG DEVCO, since the two services perform similar functions. The smaller FPI may be perceived as a competitor by the bigger DEVCO, especially because of the ‘special relation’ that exists between the FPI and the EEAS. It would seem that DG DEVCO was not very collaborative towards the FPI at first, since it instructed its officers in Delegations not to perform the tasks entrusted upon the FPI. Such instruction was perceived as hostile by the FPI, since the latter has relatively few officers in delegations, and it can hardly perform the functions it has been entrusted with in all third countries.<sup>503</sup>

In a legal perspective, the creation of the FPI raises three sources of concern, relating to institutional balance, the Commission's organisational autonomy and the delimitation of the EEAS' duties. Being part of the Commission, the FPI evidently does not challenge the institutional balance. It may however question the organisational autonomy of the Commission, which did not freely decide upon its creation and responsibilities. As in the case of the EEAS' programming

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<sup>500</sup> The FPI was originally known as FPIS.

<sup>501</sup> See *Décision de la Commission - Organigramme pour le nouveau FPIS (Foreign Policy Instrument Service)*, SEC(2010)1307/3, 29 October 2010, not published in the O.J.

<sup>502</sup> While a FPI officer affirmed that the FPI tends to conflict with the EEAS “over how money should be managed”, a two EEAS officers denied the existence of any problem in this respect. Interviews conducted in March-June 2012.

<sup>503</sup> Case-by-case solutions are presently being found on the spot, but, even if other Commission services gave implementation to the instruments under the responsibility of the FPI, the situation would not be unproblematic: as shown above, such instruments are ‘political’ in nature, and they should consequently be managed by officers dealing with ‘political’ aspects within Delegations. The only efficient solution, therefore, would be either to increase the FPI staff in Delegations or entrust implementing responsibilities on the EEAS, *via* an amendment of the financial regulation.

responsibilities, however, it may be argued that the principle of coherence justifies a partial compression of the Commission's autonomy also in this case. Finally, it may be wondered whether the creation of the FPI contradicts Article 27(3) TEU, whereby "in fulfilling his mandate, the High Representative shall be assisted by a European External Action Service". Since neither Article 27(3) TEU, nor any other Treaty provision, ever refers to the possibility of setting up another service of the HR/VP, it may be argued that the creation of the FPI does run counter the letter of the Treaties. An appraisal of Article 27(3) TEU in light of the principle of coherence further reinforces this finding: the existence of a Commission service closely tied, but separate, from the EEAS is an expression of the desire to delimit, rather than coordinate, European foreign policies. Since no legal obstacle prevents the merging of the FPI and the EEAS in the future, but the principle of coherence actually requests it, it may be argued that such course of action should be pursued in the near future.

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The EEAS plays a pivotal role in the management of cooperation with third countries, even if the Service is not part of the institution that is responsible for the execution of this policy, that is to say the Commission. The EEAS can indirectly influence the programming and implementation of external action instruments through the exercise of its responsibilities as a *de facto* Commission service, and by sending instructions to Heads of Delegation, who play a significant role in the programming and implementation of the most relevant instruments. The EEAS has also direct means of influence on the programming of external action instruments and programmes. Similarly, the EEAS can exert significant influence on the implementation of external action instruments through the Service Foreign Policy Instruments, a 'hybrid' Commission service closely linked to the EEAS.

The principle of external action coherence seems to be capable of justifying the EEAS' involvement in the management of the cooperation with third countries. The drafters of the EEAS Decision appear to have interpreted the Commission's organisational autonomy and the principle of institutional balance in light of the principle of coherence, in order to enable the Service to bring about coordination in its activities in the Institution, where its contribution is most likely to be effective. By doing so, the legislator demonstrated its intention to weave together the intergovernmental and Community approaches in a pragmatic manner, and not according to institutional dogma, as required by the Union method.

### CONCLUSION OF CHAPTER 3

This chapter sought to demonstrate that the EEAS can enhance coordination in policy management, and thus contribute to external action coherence. The Service participates in the exertion of the legislative and executive power in a significant manner, by fostering consensus in the Council and promoting dialogue within the ranks of the Commission. The effectiveness of its action is further reinforced by the fact that its duties often are not delimited by relying on institutional dogma, but they are actually determined on the basis of pragmatic considerations. Thus the

Service was given a particularly strong influence on the activities of the Council that are closest to the 'core business' of the EEAS, that is to say diplomacy and the conduct of the CFSP. The Service has also particularly strong responsibilities in the Commission with respect to non-CFSP issues that are functionally close to the CFSP itself. It is apparent that such pragmatic approach is rendered possible by the interpretation of primary law in light of external action coherence, as well as by the characterisation of the EEAS as a 'service', that is not part to the EU's institutional balance, and which can be integrated in the structure of other bodies.

It is also apparent that, when EU institutions rigidly insist on the delimitation of EU's bodies competences, the EEAS' potential may be hampered. This is rendered evident by the case of the Commission, where the EEAS is not given a significant role in the coordination of external relations commissioners and, more generally, is not entrusted with the management of most non-CFSP activities. The Commission's concern for delimitation may be understandable, at present, since the uncertainties surrounding the EEAS' identity may raise some distrust. If the EEAS proves capable of increasing coordination in practice, however, its responsibilities should be augmented. Similarly, if delimitation proves problematic in practice, an increase in the EEAS' role should be granted, for the purpose of fostering coordination. Probably, this should be the case of external action instruments implementation, since the present division between the FPI and the EEAS seems hardly capable of promoting coordination in policy management.

The enlargement of the EEAS' tasks may come through a revision of the EEAS Decision. This course of action would however be problematic, since the Council and the Commission would have to approve it, and they would ultimately undertake a further exercise of delimitation. It would be desirable, on the contrary, that EU institutions accept the EEAS' potential, and voluntarily permit it to expand its role in their own structures. It is for the EEAS, therefore, to demonstrate its added value, in order to obtain the instruments necessary to effectively perform its own duties. To the Service, from which much is required, much *might* be given.



# CHAPTER 4

## THE EEAS AND EXTERNAL REPRESENTATION: PROMOTING UNITY

The first chapter demonstrated that, in the practice, EU policy makers seek to increase coherence in European foreign policies also by enhancing unity in international representation, as to finally address the eternally unanswered question "who do I call if I want to call Europe?". This chapter seeks to show that the EEAS contributes also to this dimension of external action coherence, and is divided in three sections. The first presents the fragmentation of EU external representation and delineates the potential and limits of the EEAS as a coordinator in this field. Section 2 introduces a particular ambit of EU external representation, that is to say diplomacy, and it shows that the EU is showing great potential in this area. These findings are built upon in section 3, where the analysis intends to demonstrate that the peculiarities of diplomacy, as a sector of external representation, motivate the choice of the legislator to entrust the EEAS with a crucial role in this ambit.

### SECTION 1 – PARTIALLY COMPENSATING FOR FRAGMENTATION IN EXTERNAL REPRESENTATION

#### *1. The Persisting Fragmentation of External Representation*

As noted in chapter 1, European external representation suffers from severe fragmentation. The delimitation of competences entailed by the principle of conferral engenders division in representation *lato sensu*, thus meaning the process and framework in which the EU and its Members express their position(s), and *stricto sensu*, that is to say in the deliverance of the EU's message. There is no need to further discuss the persistence of fragmentation in the wide meaning of the concept, since the first chapter already clarified the potential and limits of the Lisbon Treaty in this respect. It is more interesting to note that the arrangements concerning representation *stricto sensu* have been significantly changed by the recent reform, and they may lead to an effective streamlining of representation arrangements.

The Treaties provide for a general rule for EU external representation, contained in Article 17(1) TEU, according to which "with the exception of the common foreign and security policy, and other cases provided for in the Treaties, [the Commission] shall ensure the Union's external representation." The first exception to this rule is

contained in Article 27(2) TEU, whereby "the High Representative shall represent the Union for matters relating to the common foreign and security policy." A second exception, which complements the first, is contained in Article 15(6) TEU, which affirms that the President of the European Council shall, at his level and in that capacity, ensure the external representation of the Union on issues concerning its common foreign and security policy, without prejudice to the powers of the High Representative of the Union for Foreign Affairs and Security Policy.

It is evident, therefore, that the EU's external representation generally follows a 'dualistic' scheme. In the non-CFSP domain, external representation is ensured by the Commission. In the CFSP area, external representation is provided for by the High Representative, at ministerial level, and by the President of the European Council, at head of State level. Needless to say, such division of competences is likely to generate controversies: the President of the Commission and the President of the European Council, for instance, are entitled to participate contemporarily in all the summits that concern both non-CFSP issues (such as economic governance) and CFSP aspects (e.g. peace and war). In practice, M. Barroso and H. Van Rompuy participated at the same time in the last G8 and G20 summits. The same dichotomy may exist also at ministerial level, since the HR represents the EU in the CFSP area, while Commissioners perform the same role in the non-CFSP field. It is true that the HR might *also* represent the EU *qua* Vice-President of the Commission, thus cumulating his/her powers and those of the Commission, but this possibility remains dependent on a choice of the College of the Commissioners.

The fragmentation of EU external representation depends also on the fact that other actors perform representation functions either on the basis of specific Treaty provisions, *praeter legem*, or *contra legem*. Certain primary law provisions provide for specific arrangements concerning external representation. In particular, Article 138(2) TFEU enables the European Central Bank to represent the Union in the conclusion of agreements in the monetary field and Article 221(1) TFEU enables Union Delegations to represent the Union in third countries and at international organisations. Even when specific norms do not enable certain entities to function as representatives, they may exert such power on the basis of other competences. This is mainly the case of the Member States and, in particular, the Rotating Presidency. Before the Lisbon reform, the Rotating Presidency used to represent the Union with respect to the Common Foreign and Security Policy (CFSP) and Police and Judicial Co-operation in Criminal Matters, as well as in the signing of numerous international agreements. In theory, the Treaties no longer contain any provision which allows the Rotating Presidency, or any other Member State, to perform representative functions. In practice, the Member States maintain representative functions in three ambits. They represent the Union in multilateral *fora* open only to States, such as the Security Council. Moreover, the presidency negotiates mixed agreements on behalf of the Member States. Finally, the Council often enables the rotating presidency to sign international agreements on behalf of the EU. This last practice is justified by the Council on the basis of an extensive reading of its competence to authorise the signing of international agreements.<sup>504</sup> It may be argued, however, that it runs counter to Articles 17 and 27 TEU, since it questions the Commission and HR's competence to represent the Union.<sup>505</sup>

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<sup>504</sup> See e.g. Council Decision 2010/615/EU of 17 May 2010, O.J. 2010, L 271/1, Article 1 and Council Decision 2011/189/EU of 24 June 2010, O.J. 2012, L 081/1, Article 2.

<sup>505</sup> Arguably, the systemic interpretation of the Treaties provided for in Article 1(2) TFEU requires Article 218(5) TFEU to be read consistently with Article 17 and 27 TEU. These Articles clearly state

The existence of representation regimes challenging the distribution of representation competences set in the Treaties is not exceptional. This was rendered most evident by the awarding of the Peace Nobel Prize to the EU. As soon as such awarding was rendered public, all major EU political bodies and offices issued a communiqué (which may be seen as a form of external representation). A statement came from the Rotating Presidency, another from the European Parliament, a third from the High Representative, a fourth from the President of the European Council, a fifth from the President of the Commission, and a sixth from...the two Presidents together.<sup>506</sup> The plurality of European representatives extended also the participation in the Nobel Ceremony in Oslo. According to the Treaties, both H. Van Rompuy and M. Barroso should have been present, since the 'presidential couple' ensures the EU representation at the highest level. In practice, however, the Parliament imposed the presence of its President on the Nobel's stage, notwithstanding the absence of competences of representation for this Institution.<sup>507</sup> In order to compensate for such partial disregard for the Treaties, the three Presidents reached a pragmatic solution, whereby only Presidents Van Rompuy and Barroso delivered a speech on behalf of the EU.

## 2. The EEAS as a 'Unifier' in International Representation

Numerous solutions have been identified in the practice to promote unity in international representation. The most important probably is provided for by mixed agreements, analysed in chapter 1, which allow for the simultaneous representation of the EU and its Members in the conclusion of an international instrument. The recent introduction of Cross-Treaty agreements, thanks to the new wording of Article 218 TFEU, allows for further unity, since CFSP and non-CFSP issues can be simultaneously contained in the same international instrument. Such result may be magnified in practice by the simultaneous participation of the Member States and the EU in the conclusion of such agreements, thus engendering the new category of 'cross-Treaty mixed agreements'.

Solutions for the promotion of unity are often fostered also with respect to external representation *stricto sensu*. The EU negotiator (the Commission) normally entrusted with the Member States' representation in the conclusion of mixed agreements. Even in the case of a bicephalous representation (Commission-Rotating Presidency), the conclusion of practical arrangements between the two negotiators allows for increased coordination of their activity,<sup>508</sup> either by

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that the Commission and the High Representative represent the Union. As recalled above, the subject that signs an international agreement is the representative of its sending subject. Therefore, the identification of the EU signer must follow the general rules concerning Union representation, contained in Article 17 and 27 TEU. See Gatti and Manzini, *op. cit.*, p. 1726.

<sup>506</sup> See Gatti, "Who do I call if I want to give Europe a Nobel Prize?", *EJIL Talk!*, 14 October 2012, <http://www.ejiltalk.org>.

<sup>507</sup> Cf. Rossi, "Il valore del Nobel all'UE", *Affari Internazionali*, 22 October 2012, <http://www.affarinternazionali.it>: "La questione è però politica oltre che giuridica e merita soluzioni comprensibili, sia per i cittadini che agli occhi del mondo. Sebbene il Parlamento europeo non abbia alcun potere di rappresentare l'Ue sul piano esterno, una delegazione che comprenda i tre Presidenti (del Consiglio europeo, della Commissione e del Parlamento europeo) potrebbe forse meglio rappresentare l'unità istituzionale dell'Ue."

<sup>508</sup> See the judgement C-25/94, *Commission v. Council*, [1996] ECR I-1469, paras. 48–49

delimiting their sphere of intervention,<sup>509</sup> or by allowing for the identification of a single speaker.<sup>510</sup> The issue of coordination is felt also at EU-only level. For instance, the President of the European Council and the President of the Commission need to reach some kind of compromise as to the EU's representation, namely in the case of international summits, since bicephalous arrangements may not always be acceptable. Thus, in 2010 it was accepted that Barroso's aides (the so-called 'sherpas') would have prepared the work of both presidents in view of the G20, while Van Rompuy's aides would have done the same for the G8. More generally, it has also been reported that the two Presidents decided on a case-by-case basis who was to take the floor on behalf of the Union.<sup>511</sup> It may seem that at ministerial level the potential for unity is more evident, since the HR(VP) may truly embody the unity of EU external representation. In practice, however, the Commission has been less than enthusiast about giving the HR representation responsibilities in the non-CFSP area, presumably because of the Institution's desire to protect its competences. May the EEAS contribute to solve this deadlock, and promote unity at administrative level?

A cursory reading of primary and secondary law may suggest that the EEAS has no particular advantage over the HR. Since the former 'assists' the latter, and has not additional competence of its own, it may be expected not to bring about additional unity. There are, however, at least two benefits the EEAS may bring about. In a political viewpoint, the intervention of the Service is much less evident than that of the High Representative. For instance, the public opinion is well aware of the identity of the signer of international agreements, which is often a ministerial representative,<sup>512</sup> but it can hardly realise which administrative-level officers actually negotiated an agreement.<sup>513</sup> Thus the delegation of representation powers from the Commission to the EEAS may be politically more acceptable than the same delegation to the High Representative. The practice already provides for limited evidence in this sense: while the Commission has not wilfully delegated much of its powers to the HR, it seems to have allowed the EEAS to perform negotiating activities in its own area of competence. In at least one case of Cross-Treaty mixed negotiation, the Commission and the EEAS reached a compromise whereby they distributed the negotiating tasks on the basis of the 'political' salience of each issue: the Commission intervened in 'technical' areas, leaving politically-

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<sup>509</sup> Cf. Code of conduct between the Council, the Member States and the Commission on the UNESCO negotiations on the draft Convention on the protection of the diversity of cultural contents and artistic expressions, Council doc. 5768/05, of 31 Jan. 2005.

<sup>510</sup> For instance, the PROBA 20 arrangement, concluded by the Commission and Member States, provided for the creation of a single delegation representing both the EC and its Members. In other words, the EC and its Members participated in the negotiation through a common organ *ad hoc*. The PROBA 20 arrangement concerns negotiation in a multilateral forum, but it may apply to our subject by analogy. The arrangement is cited in Völker and Steenbergen, *Leading Cases and Materials on the External Relations Law of the e.C., With Emphasis on the Common Commercial Policy* (Kluwer Law and Taxation, 1985), pp. 48–51.

<sup>511</sup> De Baere and Orbic, "The European Union in the Gx System", in Jorgensen and Laatikainen (eds), *Routledge Handbook On the European Union and International Institutions – Performance, Policy, Power* (Routledge, 2012), pp. 311–323, at p. 314.

<sup>512</sup> On the distinction between the representation of international subjects in the negotiation and signature of international agreements, see, *inter alia*, Tanzi, *Introduzione al diritto internazionale contemporaneo* (CEDAM, 2010), pp. 127–128.

<sup>513</sup> The high visibility of the EU's signer may also contribute to explain why the Member States insist on maintaining the Rotating Presidency's role in this area, after the Lisbon reform, once it should probably be abandoned, see Gatti and Manzini, *op. cit.*, p. 1728.

sensitive topics, in CFSP and non-CFSP fields alike, to the EEAS.<sup>514</sup> However, this sort of practice does not appear to be generalised for the time being, presumably because of lack of mutual trust between the Commission and the EEAS. Probably the legislator foresaw this issue, and it enforced unity where it is most necessary, that is to say in diplomatic representation.

## SECTION 2 – A SINGULAR FORM OF EXTERNAL REPRESENTATION: INTRODUCING EU DIPLOMACY

The capacity of the Union to conduct diplomatic relations requires careful qualification. The very term “diplomacy” is not unequivocal. It may generally be defined as the political process whereby political entities establish and maintain official relations with one another, in pursuing their respective objectives in the international environment.<sup>515</sup> In legal terms, it is more precisely conceived as the organs (the diplomatic missions) and the physical persons (the diplomatic agents) which conduct such activities on behalf of States.<sup>516</sup> The use of the word “State” in this context is significant, in so far as diplomacy, as it is usually referred to in international law, is a States’ prerogative. The progressive affirmation of non-State actors on the international scene questioned the States’ monopoly of diplomacy. In particular, the twentieth century saw the progressive establishment of a *sui generis* diplomacy conducted by international organisations. The European Communities have always been at the forefront of this evolution. The post-Lisbon Union “diplomacy” is, many respects, a development of the EC’s advanced para-diplomacy, although it also displays significant differences.

This section investigates the nature of the EU’s diplomatic relations by analysing its capacity to send and receive diplomatic missions. This analysis will begin with a general description of the so-called right of legation of States, while paragraph 2 turns to the right of legation of international organisations and paragraph 3 provides for an analysis of the EU right of legation. Paragraph 4 concludes the investigation, by providing for an account of the practice of EU diplomatic relations.

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<sup>514</sup> This is the case of the framework agreement with Canada, presently being negotiated (see Council doc. 16964/11 and

17037/11, not published, 30 Nov. 2011), as reported by a Commission officer in September 2012.

<sup>515</sup> See Plischke, *Instruction in Diplomacy: the Liberal Arts Approach* (American Academy of Political and Social Science, 1972), p. 20. See, in this sense, also Calvo, *Dictionnaire manuel de diplomatie et de droit international public et privé* (ed. Lawbook Exchange, 2009 – original edition Puttkammer & Mühlbrecht, 1885), p. 137: “la diplomatie est la science des relations qui existent entre les divers Etats, telles qu’elles résultent de leurs intérêts réciproques, des principes du droit international et des stipulations des traits ou des conventions.” See also the generic definition of diplomacy provided for by Nahlik, *Development of Diplomatic Law – Selected Problems* (Hague Academy of International Law, 1990), p. 202: “diplomacy means the activities of States, in some cases also of other subjects of international law, in their mutual official relations. In this meaning, it can be said to constitute the main tool of the foreign policy of a State.” For an historical overview of the development of diplomacy and diplomatic law, see Stuart, *Le Droit et La Pratique Diplomatiques et Consulaires* (Hague Academy of International Law, 1934), pp. 5 ff.

<sup>516</sup> In this sense, see Nahlik, *op. cit.*, p. 202.

## 1. The 'Right of Legation' of States

The ability to exchange representatives is one of the traditional prerogatives of sovereign subjects, which derives from the right of monarchs to exchange representatives.<sup>517</sup> This ability is traditionally referred to as “right of legation” or *ius legationis*.

It is preliminarily necessary to verify whether the 'right of legation' is a right *stricto sensu*. Ancient texts support this view: Vattel, for instance, affirmed that every sovereign State has a *right* to send and to receive public ministers.<sup>518</sup> The *ius legationis* was thus considered as a right *stricto sensu*, which derived from the principle of the *ius gentium* whereby there must be a minimum degree of relations between States (*ius communicandi*).<sup>519</sup> Such interpretation has a merit, in so far as it stresses the objective of the diplomatic intercourse: fostering the communication between States and, ultimately, promoting their peaceful coexistence. Notwithstanding its advantages, such interpretation of the right of legation is rejected by contemporary authors, who argue that legation is not a 'right' *stricto sensu*, since it does not imply any correlative obligation on the part of other States to receive (or send) diplomatic envoys.<sup>520</sup> In fact, the establishment of a diplomatic mission impinges on the sovereignty of the receiving State, which must consequently be able to oppose the establishment of the mission. The discretion in this ambit is testified by the 1961 Vienna Convention, which unequivocally affirms that “the establishment of [...] permanent diplomatic missions takes place by mutual consent”.<sup>521</sup> Therefore, it has been affirmed that it would be more logical to replace the word 'right' by 'faculty'.<sup>522</sup> Since a discussion on the exact limits of the 'right' of legation exceeds the scope of the present analysis, and the traditional formulation 'right of legation' is generally used also today (even by those who reject its literal interpretation), we maintain the traditional definition here.

Who can exercise the right of legation? There is no doubt that States, being the main (and original) international actors, can certainly send and receive permanent diplomatic missions. In fact, the 1961 Vienna Convention on diplomatic relations applies to inter-*State* relations. This implies that the exercise of the right of legation has two prerequisites: statehood, that is to say internal and external sovereignty, and mutual recognition. The exercise of the right of legation in practice, therefore, testifies the mutual recognition of the parties that enter into the diplomatic intercourse,<sup>523</sup> thus potentially contributing to the ultimate success of an entity in

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<sup>517</sup> Dembinski, *Modern Law of Diplomacy: External Missions of States and International Organizations* (Martinus Nijhoff, 1988), p. 29.

<sup>518</sup> Vattel, *Le droit des gens*, (edition Joseph Chitty and Edward D. Ingraham, 1883), Book IV, Chapter 5, §57.

<sup>519</sup> For a discussion of this theory, see Reichling, *Le Droit de Legation Des Communautés Européennes* (UGA, 1964), p. 12.

<sup>520</sup> In this sense, see *inter alia* Reichling, *op. cit.*; Nahlik, *op. cit.*, p. 202, note 5; Salmon, *Manuel de Droit Diplomatique* (Bruylant, 1994), pp. 27-28.

<sup>521</sup> Vienna Convention on Diplomatic Relations, 18 April 1961, UNTS vol. 500, p. 95.

<sup>522</sup> Erice and O'Shea, *Derecho Diplomático* (Instituto de Estudios Políticos, 1954), p. 101.

<sup>523</sup> Denza, *Diplomatic Law: Commentary On the Vienna Convention On Diplomatic Relations* (Oxford University Press, 2008). It is worth specifying that recognition, the establishment of diplomatic relations and the establishment of permanent representations (i.e. the exercise of the *ius legationis*) are different legal phenomena, even if they can be contemporary: States can recognise each other without entering into diplomatic relations, and, if even when they do, they can conduct them through channels different from permanent diplomatic representations.

being accepted as a State by the international community.<sup>524</sup> In other words, the States whose legal status is disputed can exercise the right of legation in so far as other States are willing to recognise them and support their claim for statehood in practice.

It remains to be seen whether the right of legation has a precise content. The notion of 'right of legation' *stricto sensu* does not relate to the sending of *any* representative ('legate') abroad, but it consists of the capacity to establish *permanent diplomatic* missions. The 'permanent' character of diplomatic missions differentiates diplomatic missions from temporary forms of representation, such as *ad hoc* envoys.<sup>525</sup> The requisite of permanence, however, must be understood as relative, because diplomatic missions can cease to function, either because the sending State closes them or because the sending State disappears. The 'diplomatic' character of missions implies that they should contribute to the maintenance of official relations between the sending and the receiving subjects, by performing 'diplomatic' functions. Such functions are manifold. A legal analysis may safely rely on the categorisation made by the 1961 Vienna Convention,<sup>526</sup> which lists five functions: representation, promotion of peaceful relations, protection of the sender's interests, information and negotiation.<sup>527</sup> Notwithstanding its limits<sup>528</sup> this list has the advantage of being sufficiently accurate;<sup>529</sup> consequently, it is relied on for the purpose of the present analysis.

The function of "representing the sending State in the receiving State" is at the core of the very idea of the diplomatic intercourse and it is the primary task of diplomatic missions.<sup>530</sup> Diplomatic representation serves the purpose of providing a

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<sup>524</sup> Cf., *mutatis mutandis*, the judgement of the Supreme Court of Canada in *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217; 1998, para. 155: "although there is no right, under the Constitution or at international law, to unilateral secession, the possibility of an unconstitutional declaration of secession leading to a de facto secession is not ruled out. The ultimate success of such a secession would be dependent on recognition by the international community, which is likely to consider the legality and legitimacy of secession having regard to, amongst other facts, the conduct of Quebec and Canada, in determining whether to grant or withhold recognition."

<sup>525</sup> On the evolution of the permanent character of diplomacy, see Weckmann, "Origen de La Misiones Diplomáticas Permanentes", 1 *Foro Internacional* (1960): 268-298, and Outrey, "Histoire et Principes de L'administration Française Des Affaires Etrangères, 2 *Revue Française de Science Politique* (1953): 298-318, particularly at p. 301: "pour nous l'existence d'une diplomatie au sens propre du terme implique nécessairement celle de missions diplomatiques permanentes".

<sup>526</sup> Vienna Convention on diplomatic relations, 18 April 1961, UNTS vol. 500, p. 95.

<sup>527</sup> Article 3 Vienna Convention 1961.

<sup>528</sup> The list of diplomatic functions contained in Article 3 Vienna Convention 1961 has been criticised by J. Salmon, *op. cit.*, p. 103, because: "Cet article [...] mélange des fins [...] et des moyens [...], tout en négligeant de mentionner certains moyens".

<sup>529</sup> In this sense, see Tanzi, "Relazioni diplomatiche", in *Digesto delle discipline pubblicistiche*, p. 122-147, at p. 130, and bibliography cited therein, note 42.

<sup>530</sup> Maresca, *La Missione Diplomatica* (Giuffrè, 1967), p. 150; Blum, "Diplomatic Agents and Missions", in Bernhardt (ed.), *Encyclopaedia of Public International Law* (North-Holland), pp. 1034-1040, p. 1038; Tanzi, *op. cit.* at p. 130. Of course, the term "representation", in this context, cannot be interpreted as a synonym of "agency": since diplomatic missions do not enjoy international personality, they cannot be agents for their State. Diplomatic missions are simply organs of an international subject that "represent" it before another international subject; in this sense, see Sereni, *La représentation en droit International*, *cit. supra*, p. 85, who affirms that "les organes des sujets de droit international ne sont pas leurs représentants". According to Sereni, in fact, the very use of the term "représentation" in this context is not correct, since the diplomatic "representatives" of international subjects do not exert the function of representation *stricto sensu*. (*Id.*, p. 87); Cf. also Anzilotti, *Corso di diritto internazionale*, I, 1912, p. 126: "We cannot conceive the relationship between state and organ as an agency relationship: agency implies two distinct subjects, one of which declares the intention and acts for the other. But a state without its organs is nothing: it is an abstract

permanent link between the sending and the receiving States, thus ensuring the participation of the former in the internal and international political life of the latter, within the limits imposed by international law.<sup>531</sup> Diplomatic representation is not limited to international relations, but it concerns also the internal legal order: the Head of Mission represents the sending subject in internal proceedings, both as a claimant and as a defendant.<sup>532</sup> The representation performed by Diplomatic missions is *complete* since they have the capacity to represent their entire State in all its functional and geographical dimensions (*ius representationis omnimodo*).<sup>533</sup> The *ius representationis omnimodo* is crucial, since it expresses the need for unity in the conduct of diplomatic relations: diplomatic representations are functional to convey the message of the entire sending state, and not only of a part thereof. The *ius representationis omnimodo* must nonetheless be understood as relative, since diplomatic missions may coexist with *temporary* representatives, ranging from ministers to *ad hoc* envoys.<sup>534</sup>

The protection of interests is framed by the Vienna Convention as the function of “protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law.”<sup>535</sup> As for the content of the interests protected, the wording of the Convention and the nature of international relations militate in favour of a very broad interpretation of the provision.<sup>536</sup> Consequently, diplomatic missions can protect any “interest” which is deemed as such by the sending subject, as long as the protection does not trespass the limits imposed by international law.

The function of information is framed as “ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State.” The mission can collect information through multiple sources, covering “the political, cultural, social and economic activities of the country, and in general all aspects of life which may be of interest to the sending State.”<sup>537</sup> The diplomatic function of information is characterised by its confidential nature: the communications from diplomatic missions to their capitals can be encoded and they must not be intercepted by the State of accreditation.<sup>538</sup> The secrecy of diplomatic communications is not limited to the relations with third countries: generally, they are not disclosed in the home country either.<sup>539</sup>

Finally, the function of negotiation is defined by the 1961 Vienna Convention as “negotiating with the government of the receiving State”. This provision can be

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conception; there cannot be a distinction between the state and its organs”, translation by Sereni, “Agency in International Law”, 34 *American Journal of International Law* (1940): 638-660.

<sup>531</sup> Maresca, *op. cit.*, p. 150.

<sup>532</sup> Salmon, *op. cit.* p. 112-113.

<sup>533</sup> For instance, a commercial mission or a development cooperation agency do not, in principle, represent the State as a whole, but only a ministry, in its field of activity, therefore they are not the product of the exercise of the right of legation and, thus, they are not diplomatic missions *stricto sensu*.

<sup>534</sup> For instance, the sending State might desire to conduct its relations with a third State through a special mission, or summitry, thus “bypassing” its own permanent diplomatic mission; this would not amount, however, to a “downgrading” of the mission itself.

<sup>535</sup> Article 3(b), see *supra* note 1.

<sup>536</sup> Cf. Salmon, *op. cit.*, p. 104.

<sup>537</sup> Commentary to the 1961 Vienna Convention, p. 90. In particular, the information the mission transmits to the sending government can concern bilateral relations, local political, social or cultural events, the relations of the State of accreditation with other States and local repercussions of facts happened in the sending State, see Maresca, *op. cit.*, p. 151.

<sup>538</sup> Vienna Convention 1961, see *supra* note, Article 27(1)

<sup>539</sup> Salmon, *op. cit.*, p. 116



interpreted in two ways. According to a restrictive interpretation, such function may be construed in accordance to Article 7(2)(b) of the Vienna Conventions 1969,<sup>540</sup> which affirms that the Heads of diplomatic missions can represent the sending State “for the purpose of adopting the text of a treaty between the accrediting State and the State to which they are accredited”, even in the absence of full powers. According to an alternative interpretation, the diplomatic function of negotiation should be interpreted more extensively: “il s'agit de concilier, de rechercher des transactions, de préparer des traités, de conclure des engagements politiques.”<sup>541</sup>

## 2. *The Functional Right of Legation of International Organisations*

The development of international organisations<sup>542</sup> during the 20<sup>th</sup> century led to the creation of new forms of international relations, which had to be conducted through innovative instruments. In principle, international organisations may conduct their international relations through Member States diplomatic missions. Such 'triangular' diplomacy may however lead to a conflict of interests for national diplomats, since the priorities of a Member State may differ from the political line of the international organisation.<sup>543</sup> Therefore, international organisations often establish missions of their own, in order to implement their policies and to foster their objectives.<sup>544</sup> This can be appreciated by addressing firstly the right of 'passive' legation, that is to say the ability to receive diplomatic missions, and subsequently turn to the right of 'active' legation, i.e. the capacity to send diplomatic representatives abroad.

International organisations do not have any right of passive legation with respect to their Member States. Although international organisations enjoy separate international personality, their Member States must participate in their life. Such participation may require the establishment of missions to the organisations. Consequently, an international organisation does not have any discretion as to the acceptance of its Members' missions. This is testified by the fact that Member States normally provide for the establishment of their missions to international organisations in the latter's founding instruments. International organisations do have a *functional* right of passive legation with respect to third States. As noted above, the right of legation is traditionally a prerogative of States. However, international organisations share with States a crucial feature: international

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<sup>540</sup> Vienna Convention on the Law of the Treaties, 1969, UNTS vol. 1155, p. 351.

<sup>541</sup> Salmon, op. cit., p. 115.

<sup>542</sup> To be sure, there is no customary definition of international organisation, see, for instance, the 1986 Vienna Convention on the Law of Treaties between States and International Organizations (21 March 1986, not yet in force) elliptically defines international organisations as...“intergovernmental organizations”, Article 2(1)(i). However, for the purposes of this research, an international organisation can be described as an autonomous entity, set up by a constituent instrument, which expresses its independent will through common organs and has a capacity to act on an international plane, see Gautier, op. cit., at p. 33.

<sup>543</sup> Magi, *Le Organizzazioni Internazionali e Il Diritto di Legazione* (Dissertation – University of Siena, 1967), p. 50.

<sup>544</sup> “Compte tenu du fait que les activités exercées par les organisations internationales produisent, quel que soit leur degré de spécialisation, des effets directs ou indirects à l'égard de pays tiers et d'autres organisations internationales, il est inconcevable qu'elles puissent se trouver dans un état d'isolement total [...] la plupart des organisations de date récente ont des objectifs spécifiquement internationaux dont la poursuite rend indispensables les relations avec des pays tiers.”, Reichling p. 26; cf. also Magi, p. 26.

personality, that is to say the capacity to act in the international legal system and to be subject to rights and obligations.<sup>545</sup> Since (certain) international organisations have to act internationally, they must also be endowed with the means to conduct their external action. These means may encompass the acceptance of a third State's mission. For instance, Article 16 of the protocol on the privileges and immunities of the Communities affirmed that "the Member State in whose territory the Communities have their seat shall accord the customary diplomatic immunities and privileges to missions of third countries accredited to the Communities",<sup>546</sup> thus implying that the Communities enjoyed the right of passive legation.

The right of passive legation of international organisations encounters a limit: whereas the right of legation of States is a consequence of their personality, and ultimately of their sovereign character, the right of legation of an international organisation depends on the tasks and competences it is attributed.<sup>547</sup> In other terms, both the international personality and the right of legation of an international organisation are a consequence of the functions the organisation is entrusted with.<sup>548</sup> Thus, an international organisation can receive the representatives of third States only if the right of passive legation is necessary in order to foster the organisation's goals and exercise its competences. In other words, international organisations hold only a *functional* right of passive legation. The functional limit of the right of legation of international organisations affects also the nature of the States' missions that are accredited to international organisations. Although States can certainly establish permanent missions that represent the entirety of their sender, they cannot establish a mission capable of performing all diplomatic functions. For instance, a State's mission accredited to an international organisation is generally not able to protect the interests of the States' citizens, in so far as the organisation can scarcely exert coercive powers.

Like the passive dimension of the right of legation, the right of active legation is not an intrinsic feature of international organisations. Nonetheless, it is submitted that international organisations hold a functional right of active legation, and can set up organs roughly similar to States' diplomatic missions, in order to conduct their 'diplomatic' relations in practice. Of course, international organisations do not hold the right of active legation by default, in force of their international personality or because they exercise the right of passive legation.<sup>549</sup> In their relations with Member and third States alike, international organisations are entitled to send their representatives in so far as this is necessary in order to foster the objectives of the organisation. In other terms, international organisations hold a functionally limited right of active legation, as well as a functionally limited right of passive legation. It

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<sup>545</sup> International organisations enjoy international personality if this is explicitly envisaged in their founding instruments; moreover, they can also enjoy international personality, as an "implied power", if this is necessary in order to accomplish the tasks they are attributed by States, cf. ICJ judgement, *Reparation for injuries suffered in the service of the United Nations*, Advisory Opinion, I.C.J. Reports, 1949, p. 174.

<sup>546</sup> Translation of Protocole sur les privilèges et immunités des Communautés européenne, O.J. 1967 152/13.

<sup>547</sup> Thus Magi supra note 5, p. 17.

<sup>548</sup> "La personalità giuridica delle organizzazioni internazionali è in particolare non il presupposto, ma piuttosto la conseguenza dell'attribuzione di obiettivi e competenze sul piano esterno, fatta esplicitamente o implicitamente dagli Stati fondatori nei Trattati istitutivi", Rucireta, "Aspetti del C.D. 'Diritto di Legazione' Attivo e Passivo Delle Comunità Europee", *Annali Istituto di Studi Europei Alcide de Gasperi* (1987): 117-156, at p. 119.

<sup>549</sup> This contradicts what was affirmed by Van der Goes van Naters, European Parliament, doc. 87/1959, January 1960.

may be wondered whether the right of legation of international organisations meets other limits: can organisations set up missions similar to the diplomatic missions of States, i.e. endowed with the character of permanence and the capacity to perform diplomatic functions?

First, international organisations can create permanent missions, if the exertion of the organisations' powers requires such organs. Such was the case of the European Communities: after having been endowed with relevant external responsibilities, the Communities felt the urge to open delegations in third countries. The ECSC opened a liaison office in the UK in 1954 and the EEC Council evaluated the opening of other EEC delegations in the sixties. For political reasons, the Communities never opened any other delegation.<sup>550</sup> However, the urge for permanent representation in third countries was such that neither the Council nor Member States ever opposed the creation of *Commission Delegations*, which existed until they were substituted by Union Delegations in 2009.<sup>551</sup>

Second, the missions of international organisations normally *cannot* perform all diplomatic functions. As shown above, the establishment of international organisations' missions is functional to the exertion of the powers of the sending subject. Consequently, the functions of the former can be performed only by relying on the limited powers of the latter. Such powers enable the performance of a restricted set of diplomatic functions. The missions of international organisations may well represent their sending subject, in its entirety (*ius representationis omnimodo*)<sup>552</sup> and in the internal and international legal order. For instance, it is widely accepted that the pre-Lisbon delegations of the European Commission represented the entire Community, despite their *nomen juris*.<sup>553</sup> Such missions may also gather information and negotiate on behalf of their organisation.<sup>554</sup> However, the capability to promote peaceful relations and defend the sender's interests, not to mention the protection of its citizens, is beyond the reach of most international organisations.

Our analysis therefore shows that the right of active and passive legation of international organisations differs from the right of legation of States in two main

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<sup>550</sup> It would seem that France opposed the creation of any further mission on the part of the EEC, for reasons related to politics and prestige. Indeed, this period coincided with the "empty chair" crisis. cf. Magi, op. cit.

<sup>551</sup> It is to be noted that, unlike States, international organisations are not intrinsically "permanent", insofar as their dissolution can be determined by a volition of their member States. Nevertheless, this lack of permanence of the sender does not necessarily determine a lack of permanence of its missions. To be sure, a mission endowed with a representative function ceases to exist when its sender disappears. However, even the missions of States cease to function when their senders disappear: this limit does not question the character of permanence of the mission, since, as noted before, when a State ceases to exist, its diplomatic missions normally terminate their functions.

<sup>552</sup> Of course, such representation is functionally limited, in so far as the very personality of the sending subject is not complete. As noted above, however, the requirement of general representation is to be understood as relative: international organisations may well be capable of creating missions that represent the organisations in their entirety.

<sup>553</sup> Such function was however shared, in a few cases, with the representatives of the Council, see Rucireta, op. cit., p. 137.

<sup>554</sup> Another example is provided by the Council of Europe liaison office to European Union, which routinely performs functions such as representation and information, cf. Council of Europe, *Implementation of the Memorandum of Understanding between the Council of Europe and the European Union: Overview of activities*, DPA/Inf (2011) 18, 5 May 2011: "[the liaison office] organised and/or facilitated in 2010 a large number of meetings and contacts between senior officials of both organisations, as well as meetings with media representatives. In addition, through bilateral contacts with senior officials of the European Union, the Brussels Office regularly reported on important developments related to the European Union and advised on initiatives related to these."

aspects. First, the right of legation of international organisations is a consequence of attribution and it is consequently functionally limited, while the right of legation of States derives from their international personality and is not limited. Second, the missions that international organisations send and receive can perform only certain diplomatic functions, because of the functionally limited personality of the sending organisation, while the missions of States can perform any function which is allowed for by international law. This theoretical distinction has a practical consequence: inter-state relations are diplomatic *stricto sensu*, and their status is consequently disciplined also by customary diplomatic law. The relations of international organisations, on the contrary, are not 'diplomatic' *stricto sensu*, therefore they are disciplined only conventionally. In light of this significant difference, it is therefore necessary to wonder whether the EU, being a *sui generis* international organisation, has the same right of legation as other international organisations, or it is more similar to a State in this respect.

### 3. The 'Mixed' Right of Legation of the European Union

Since the EU is an international organisation, founded on the principle of conferral, it may be expected to enjoy a *functional* right of legation, which allows it to establish only *sui generis* diplomatic missions. This paragraph seeks to demonstrate that this is not the case, by testing the EU's capabilities to overcome the two limits characterising the right of legation of international organisations.

The first limit to the right of legation of international organisations consists of the incompleteness of their competences. As noted in chapter 1, the EU can exert its power in the external relations domain almost in any area, on the basis of the competences it has been explicitly attributed, its CFSP 'competence'<sup>555</sup> and through the flexibility clause. Since EU external competences are potentially unrestrained its *functional* right of legation is similar to the full right of legation of a State.<sup>556</sup>

The second limit to the right of legation of international organisations consists of the functional deficiencies of the missions that are accredited to them, and which they send abroad. There is no doubt that the missions of third States accredited to the EU can perform the function of representation, and it is apparent that they also negotiate on behalf of their sending subjects. This is clearly shown by the fact that the international instruments stipulated by the Union are frequently signed by the Heads of Mission of third countries. Third States' missions collect also information, by interacting with Union bodies and with the representatives of the Member States. At the same time, they promote friendly relations with the Union, in

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<sup>555</sup> As noted in the first chapter, although Article 24(1) TEU asserts that the CFSP is a competence of the Union, it appears to be more a framework for coordination than a competence *stricto sensu*.

<sup>556</sup> Cf., *a contrario*, Pescatore, *Les Relations Extérieures Des Communautés Européennes: Contribution à la Doctrine de la Personnalité des Organisations Internationales* (Hague Academy of International Law, 1961), p. 192, according to whom "l'usage du qualificatif diplomatique pour désigner les missions des Communautés dans les pays tiers doit provoquer une équivoque et un conflit avec les Etats membres. Il ne faut pas perdre de vue, en effet, que les Communautés européennes poursuivent des objectifs à caractère économique, que leur compétence externe se situe dans le domaine commercial et dans le domaine de la coopération nucléaire, respectivement; les missions qu'elles peuvent être dans le cas de détacher dans les pays tiers ne sont donc pas représentatives de la communauté européenne tout court, mais il s'agit de missions spécialisées, chargées de sauvegarder les intérêts extérieurs du marché commun ou de l'industrie nucléaire européenne."

particular by promoting cultural, economic and scientific cooperation,<sup>557</sup> given the EU's extensive competences in the field of international cooperation. Finally, the missions of third States accredited to the EU may protect the interests of their sending countries and, to a certain extent, of their citizens, by advocating the adoption of policies favourable to their interests. Third countries' missions, however, cannot completely ensure the protection of their citizens, since some issues, such as the visa policy, are largely administered by Member States, even if they are disciplined also at EU level.

The performance of diplomatic functions by EU Delegations is more controversial. Union Delegations can perform the function of *representation* on the basis of Article 221(1) TFEU, which affirms that "Union delegations in third countries and at international organisations shall represent the Union." This implies that EU Delegations exercise the *ius representationis omnimodo*. Delegations represent the Union within the legal system of the receiving States; in particular, the Heads of Delegation represent the Union "for the conclusion of contracts, and as a party to legal proceedings".<sup>558</sup> Moreover, they represent the Union also in the sphere of international relations, by delivering Union messages to the Ministries for Foreign Affairs of third countries, as well as to entities that are not tasked with the management of foreign policy, such as ministries dealing with internal affairs,<sup>559</sup> local authorities<sup>560</sup> and the local population at large.<sup>561</sup> Delegations represent the Union also at international organisations, by intervening on behalf of the Union in the organs of international organisations.<sup>562</sup> First, the Union may be a Member of

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<sup>557</sup> For instance, the US mission to the EU has even opened a Commercial Service, meant to foster the insertion of American business into the EU market, cf. <http://export.gov/europeanunion>.

<sup>558</sup> EEAS Decision, Article 5(8). On the representation of sending States in the legal system of receiving countries, see Salmon, *op. cit.* p. 112-113; Tanzi, *op. cit.* p. 131.

<sup>559</sup> For instance, constant interaction is required between the EU (formerly "Commission") Delegation and the "National Authorising Officer" (NAO) for the implementation of the European Development Fund, cf. Partnership Agreement between the members of the African, Caribbean and Pacific Group of States, of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000, O.J. L 317, 15 December 2000, Annex IV, and particularly Article 35. Noticeably, the NAO is usually a minister with an economic portfolio. For instance, the NAO of Cameroon currently is the Minister of Economy, Planning and Regional Development (cf. the website of the Cameroon NAO, [www.caonfed.org](http://www.caonfed.org), last visited on 16 August 2011), in the case of Liberia the NAO is the Minister of Planning and Economic Affairs (cf. the website of the corresponding ministry, [www.mopea.gov.lr](http://www.mopea.gov.lr), last visited on 17 August 2011).

<sup>560</sup> Letter from the EU Ambassador to the governor of Texas on the *Mathis* case, 31 May 2011; the Head of delegation to the US sent a letter to the same governor on 13 June 2011, in the *Leal* case; both letters are available on the website of the EU delegation to the US: <http://www.eurunion.org>, last visited on 28 August 2011.

<sup>561</sup> On EU public diplomacy see Rasmussen, "The Messages and Practices of the European Union's Public Diplomacy", *The Hague Journal of Diplomacy* (2010): 263-287, pp. 273-276, and De Gouveia and Plumridge, *European Infopolitik: Developing EU Public Diplomacy Strategy* (the Foreign Policy Centre, 2005), p. 14. Notice that public diplomacy is not necessarily conducted through diplomatic means, since it can be managed by headquarters and governments as well. There is no universally accepted definition of "public diplomacy", but it can be described as "a government's process of communicating with foreign publics in an attempt to bring about understanding for its nation's ideas and ideals, its institutions and culture, as well as its national goals and current policies," definition by Tuch, *Communicating with the world: U.S. public diplomacy overseas*, (Palgrave Macmillan, 1990), p.3.

<sup>562</sup> The EU's representation in multilateral contexts proved contentious in 2011, when the United Kingdom blocked the issuing of statements on behalf of the 'European Union' claiming they actually were adopted on behalf of the 'Union and its Members', see Van Vooren and Wessel, "External representation and the European External Action Service: selected legal challenges", in Blockmans and Wessel (Eds), *Principles and practices of EU external representation* (CLEER, 2012), pp. 59-83,

an international organisation, originally or subsequently to its accession. In this case, Union Delegation officers can participate in the works of the organisation, thus presenting the Union position and, eventually, voting on its behalf. Second, the Union may be an observer to an international organisation. In this case, the Union cannot express any vote and it is for Member States' representatives to cast the votes also with respect to matters falling within Union competences. Nevertheless, Delegation officers represent the Union positions during the discussions. Third, the Union may not be represented within international organisations; consequently, Delegations cannot represent the Union at the organisation.<sup>563</sup> In this case, Member States must also represent the Union position (with respect to matters falling within Union competences). The Union may not be represented at diplomatic level within international organisations for another reason: it may not have accredited a Delegation, even if this were not legally impossible.<sup>564</sup> These last considerations do not run counter the fact that, whenever a Delegation is accredited to an international organisation, it does represent the Union.

It may seem that Union Delegations should neither *negotiate* nor sign any instrument on behalf of the Union. The negotiation of international agreements is disciplined by Article 218(3) TFEU, whereby the Council nominates the Union negotiator depending on the subject of the agreement envisaged. This provision, read in combination with Article 17 and 27 TEU can but signify that international agreements are to be negotiated by the bodies that represent the Union in the non-CFSP area, that is to say the Commission, and in the CFSP area, that is to say the High Representative.<sup>565</sup> This does not prevent Delegations, however, from negotiating agreements with third countries (or international organisations) on behalf of either the Commission or the High Representative.<sup>566</sup> More generally, there is no doubt that Delegations perform a function of negotiation *lato sensu*, by interacting with the authorities of the host subject.

Union Delegations are capable of performing also the diplomatic function of information. One of the original purposes of Commission delegations was precisely

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at p. 66. The problem was partially solved through the subsequent Council of the European Union, 'General Arrangements for EU Statements in Multilateral Organisations', 16901/11, Brussels, 24 October 2011.

<sup>563</sup> See Emerson et al., *Upgrading the EU's Role As Global Actor: Institutions, Law and the Restructuring of European Diplomacy* (CEPS, 2011), p. 8, 9. On the participation of the Union to international organisations, see also, inter alia, Sack, "The European Community's Membership of International Organizations", 32 *Common Market Law Review* (1996): 1227-1256.

<sup>564</sup> As an alternative, the Union may accredit an "office" to an international organisation, being the "office" part of a Delegation accredited to a third Country. Such is the case of the EU office at the International Civil Aviation Organisation, which is administratively part of the EU Delegation to Canada (cf. the website of the EU Delegation to Canada <http://eeas.europa.eu/delegations/canada>). The Commission requested the Council the authorisation to open negotiations with ICAO in order to upgrade the status of the EC/EU within the organisation, which is presently open to States only, see SEC(2002)381 final, 9 April 2002, not published in the OJ. The proposal was never approved by the Council. Notice that the existence of an autonomous Delegation or of an "office" that is part of another Delegation does not question the function of representation performed by the organ, therefore the issue is not addressed more in detail here.

<sup>565</sup> see Gatti and Manzini, *op. cit.*

<sup>566</sup> Such is the case of , the Country Strategy Paper stipulated by the Union in the framework of the implementation of the European Development Fund, and available at the Europeaid website [http://ec.europa.eu/europeaid/where/acp/overview/csp/csp\\_10th\\_edf\\_en.htm](http://ec.europa.eu/europeaid/where/acp/overview/csp/csp_10th_edf_en.htm). Although these documents are generally finalized by Headquarters' officers, they are prepared, in the first stages, by Delegation officers, as noted in chapter 3.

the gathering of information.<sup>567</sup> Nowadays, Delegations collect information related to diverse aspects, related to CFSP and non-CFSP areas alike. For instance, they retrieve information about the protection of fundamental rights in third countries,<sup>568</sup> or their economic and financial situation.<sup>569</sup> The Delegations' ability to retrieve (significant) information is testified also by their capability to transmit it via confidential channels,<sup>570</sup> and by their participation in the “Correspondance Européenne” (COREU). This is a system for the exchange of CFSP-related classified information between authorities within Member States (including diplomatic missions), the Commission and the Council General Secretariat.<sup>571</sup> The confidentiality of COREU messages relates both to international relations and internal politics: by default, the content of these messages is disclosed neither to the governments of third countries nor to other EU bodies or European citizens.<sup>572</sup> The

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<sup>567</sup> “The first delegation in the history of the European communities was opened in 1954 in London by the European Coal and Steel Community (ECSC). It was originally designed to serve merely as an information and communications office”, Bruter, “Diplomacy Without A State: the External Delegations of the European Commission”, 6 *Journal of European Public Policy* (1999): 183-205, at p. 183

<sup>568</sup> Cf., e.g., the Local EU Statement on demolitions and forced evictions, by the EU Delegation to Azerbaijan, 12 August 2011, available on the website of the EU Delegation to Azerbaijan, <http://www.eeas.europa.eu/delegations/azerbaijan>, last visited on 18 August 2011: “The European Union Delegation [...] Will continue to closely monitor and report on domestic developments in Azerbaijan, notably in the domain of evictions, expropriations and general respect for property rights”. See also the *Binayak Sen* case: an observer from the EU delegation to New Delhi monitored the hearing of an alleged member of the Indian Maoist Party in 2010, along with observers from the diplomatic missions of some Member States, see *Court hearing in the case of Dr Binayak Sen*, 21/01/2011, [www.eeas.europa.eu](http://www.eeas.europa.eu) (last visited on 12/04/2011) and “EU observers want to watch Binayak's trial”, *The Times of India*, 23 January 2011. For a critical reception of the episode, see K. Gupta, “Left-lib sheds glycerine tears for Binayak Sen”, *The Pioneer*, New Delhi, 13 February 2011: “the High Court's proceedings were monitored by a group of observers delegated by the European Union which had accused the lower court of conducting an 'unfair trial'. I personally found the presence of the all-White EU delegation in the courtroom offensive, not the least because allowing these observers to monitor the functioning of Indian judiciary is tantamount to accepting that our justice system is neither transparent nor fair.”

<sup>569</sup> Such information is required, *inter alia*, for the preparation of strategy documents in the programming of international cooperation, see *supra*, chapter 3.

<sup>570</sup> In this regard, it may be noted that both the Commission and the Council have put into place security arrangements, which cover also the internal dissemination of information. These arrangements provide for the creation of four security levels for EU documents: RESTREINT UE, CONFIDENTIEL UE, SECRET UE, TRES SECRET UE. This increasing level of confidentiality reflects the degree of harm the dissemination of the document could produce to EU or Member States' interests, ranging from “disadvantageous” to “exceptionally grave”.; see Commission Decision 2001/844/EC, Euratom, of 29 November 2001, OJ L 317, 3.12.2001, p. 1, amended by Commission Decision 2005/94/EC, Euratom, of 3 February 2005 L 31, p. 66, 4 February 2005, Commission Decision 2006/70/EC, Euratom, of 31 January 2006 L 34 p. 32, 7 February 2006, Commission Decision 2006/548/EC, Euratom, 2 August 2006, L 215 p. 38, 5 August 2006; Decision of the Council 2001/264/EC, of 19 March 2001, O.J. L 101, 12 April 2001 p. 1 and Decision of the High Representative for CFSP, 27 July 2000, OJ C 239 23 August 2000. The security arrangements of the Commission, in particular, concern the communication with delegations, cf. Article 2, of the annex to Commission Decision 2001/844.

<sup>571</sup> Notably, the biggest single provider of inputs to the system used to be Council General Secretariat (GSC), therefore it may be inferred that this role will pass on to the EEAS (which absorbed GSC's external relations' DG). Thus, the presence of EEAS officers will further enhance the role of EU delegations in this system. Notice also that EU delegations are inserted also in another information-sharing circuit, CSDP-net, dealing with security information, which is usually highly classified, see Bicchi and Carta, *op. cit.*, particularly at pp. 10-11.

<sup>572</sup> Although COREU documents are classified, their content may be disclosed, whenever such disclosure is not likely to harm the interests of the Union or of its Members. On the access to COREU

participation in the COREU system ultimately certifies the capacity of Delegations to perform the diplomatic function of information: as affirmed by the Council, “COREU messages are the equivalent of diplomatic telegrams.”<sup>573</sup>

The capacity of EU Delegations to promote friendly relations with third Countries is not questionable either. The very agreements between the Union and third countries, which allow for the establishing Union Delegations, explicitly affirm that the parties are desirous of further strengthening and developing friendly relations and cooperation.<sup>574</sup> The Commission created several delegations in the 60’s and in the 70’s<sup>575</sup> precisely to implement development cooperation; this activity remains the main function of Delegations in many developing countries. International cooperation is principally meant to promote economic priorities; development cooperation, in particular, intends to foster the sustainable economic development of developing countries, in order to eradicate poverty.<sup>576</sup> However, international cooperation may foster other forms of cooperation, also in the cultural and scientific domain, with developing<sup>577</sup> and industrialised countries alike.<sup>578</sup>

Finally, Union Delegations can give protection to EU interests. Although some of the objectives of the external action seem functional to the promotion of 'altruistic' interests (such as the eradication of poverty),<sup>579</sup> the very Treaties require the Union

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documents, see *inter alia* Order of the Court, Case C-120/94 *Commission v Greece*, [1994] ECR I-03037 ; Case C-353/99, *Council v Heidi Hautala*, [2001] ECR I-09565; Case C-353/01 P., *Olli Mattila v Council*, [2004] ECR I-01073.

<sup>573</sup> Case T-204/99, *Olli Mattila v Council*, [2001] ECR II-02265, par. 49, emphasis added.

<sup>574</sup> Cf., e.g., second paragraph of the preamble of the establishment agreement with Uzbekistan: “desirous of further strengthening and developing the friendly relations and cooperation between the European Union, the European Atomic Energy Community and the republic of Uzbekistan [...]”, Agreement between the European Union, the European Atomic Energy Community and the government of the Republic of Uzbekistan on establishment and the privileges and immunities of the Delegation of the European Union in the republic of Uzbekistan, signed on 24 January 2011, not published in OJ; in this sense, see also the Agreement between the Government of New Zealand and the Commission of the European Communities on the establishment and the privileges and immunities of the Delegation of the Commission of the European Communities in New Zealand, signed on 10 March 2004, UNTS vol. 2524. A similar wording (in French) is used in the Accord entre le gouvernement du Japon et la Commission des Communautés Européennes sur l'établissement ainsi que les privilèges et immunités de la délégation de la Commission des Communautés Européennes, signed on 11 March 1974, UNTS vol. 1002, p. 220.

<sup>575</sup> See Sobrino Heredia, "La Actividad Diplomática de Las Delegaciones de La Comisión en El Exterior de La Comunidad Europea", 20 *Revista de Instituciones Europeas* (1993): 485-53; see also Dimier and Mcgeever, "Diplomats Without A Flag: the Institutionalization of the Delegations of the Commission in African, Caribbean and Pacific Countries", 44 *Journal of Common Market Studies* (2006): 483-505.

<sup>576</sup> Cf. Article 21(2)(d) TEU and Article 208(1) TFEU.

<sup>577</sup> See, e.g., the Cotonou agreement, *supra* note, Article 23: “Cooperation shall support sustainable policy and institutional reforms and the investments necessary for equitable access to economic activities and productive resources, particularly: [...] i) trade development, including the promotion of fair trade; [...] l) development of scientific, technological and research infrastructure and services; including the enhancement, transfer and absorption of new technologies; [...] n) the promotion of traditional knowledge; see also Article 22(1): “Cooperation shall support ACP efforts to implement: [...] structural policies designed to [...] liberalise trade and foreign exchange regimes and current account convertibility, having regard to the particular circumstances of each country”, and Article 27, titled “culture and development”.

<sup>578</sup> Cf. Article 212(1) TFEU: “the Union shall carry out economic, financial and technical cooperation measures, including assistance, in particular financial assistance, with third countries other than developing countries.”

<sup>579</sup> Cf. Article 208(1) TFEU. Cf. the European Parliament resolution of 8 June 2011 on Regulation (EC) 1905/2006 establishing a financing instrument for development cooperation: lessons learned and perspectives for the future (2009/2149(INI), par. 16: “development cooperation is the only



to safeguard its fundamental interests (Article 21(2)(a) TEU). Thus, at least *some* Union policies must pursue Union interests.<sup>580</sup> Not only do Delegations promote the interests of the Union, but they also defend the interests of European citizens, at least to a certain extent. It is well known that the diplomatic and consular protection of EU citizens abroad is performed by the authorities of their own State of nationality or, in the absence thereof, by the missions of other Member States. However, EU Delegations coordinate the work of the Member States, *ex* Article 35 TEU.<sup>581</sup> What is more, some Member States recently requested to step-up the role of Delegations in this area.<sup>582</sup> Such solution would have the advantage of enlarging the consular network of most Member States.<sup>583</sup>

The right of legation of the EU therefore appears similar to the one of a State, since the EU may theoretically conduct an external action virtually unrestrained by attribution, and because it is equipped with organs capable of performing most of the functions typical of diplomatic missions. Is this similitude with the diplomacy of States reflected in the practice of diplomatic law?

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external action policy (besides humanitarian aid) which has not been designed to serve EU interests but rather to defend the interests of the most marginalised and vulnerable populations on this planet.”

<sup>580</sup> In fact, even development cooperation instruments have a ‘EU interest’ component”. Cf., e.g., the programmes on the fight against illegal immigration, which is evidently not a priority for developing countries: Article 13 (Migration) of the Cotonou Agreement, *supra* note, and DCI regulation, *supra* note, Article 6 (migration and asylum), and in particular par. 2(c) (illegal migration and readmission).

<sup>581</sup> See Articles 20(2)(c), 23 TFEU and Article 46 of the EU Charter of Fundamental Rights.

<sup>582</sup> Jean Asselborn, Speech on the occasion of the diplomatic conference of Latvia, Latvia, 20 December 2011: “alongside its Benelux partners, Luxembourg is convinced that the EEAS should take on consular functions.[...] I am pleased that we have started concrete thinking on this matter. The Benelux have joined forces with the Baltic states, Finland and Sweden to identify specific consular tasks that lend themselves to closer cooperation between member states and could, we believe, be taken on by the EEAS. I intend to push this endeavour with all possible means, because it’s not only good for the smaller countries that are not present everywhere in the world, but because it’s good for the EU and the perception the public have of the EU.” The Speech is available at the website of the government of Luxembourg, <http://www.gouvernement.lu>. It may also be noted that also other, bigger, Member States affirmed that “the role of the EEAS in the area of consular protection should be further explored, in line with the Treaty”, in the Non-paper on the European External Action Service from the Foreign Ministers of Belgium, Estonia, Finland, France, Germany, Italy, Latvia, Lithuania, Luxembourg, the Netherlands, Poland and Sweden, 8 December 2011, par. 4; the non-paper is available at the address [www.bruxelles2.eu](http://www.bruxelles2.eu).

<sup>583</sup> The entrustment of consular functions on Delegations would not be unproblematic in the perspective of international law, since third countries are not obliged to accept the performance of diplomatic or consular protection by entities other than the State of nationality. In this sense, see Salmon, *op. cit.*, p. 106. What is more, third and Member States may not be willing to accept the performance of a typical States’ prerogative by the mission of an international organisation. Be it as it may, the role of Delegations in this area is probably destined not to change in the next future. The Commission recently proposed the adoption of a directive on the protection of European citizens, on the basis of Article 23 TFEU, but this proposal does not foresee any role for Union Delegations, apart from consultation and coordination on the spot. Communication from the Commission to the European Parliament and the Council, Consular protection for EU citizens in third countries: State of play and way forward, COM/2011/0149 final, 14 January 2012; cf., in particular, Article 14.

#### 4. *The Practice of EU Diplomatic Relations: 'Mixed' Evidence*

There are elements of the practice relating to EU diplomatic relations that suggest significant analogies between the Union and sovereign States in this area, as well as a few elements that point in the opposite direction.

The practice relating to the passive side of the EU's right of legation displays significant analogies with the one of States. The first analogy concerns the very core of diplomatic law, that is to say the conferral of immunities and privileges, and is contained directly in primary law, since the Treaties of Rome. Indeed, what is now Protocol (No 7) on the privileges and immunities of the EU holds that "the Member State in whose territory the Union has its seat shall accord the customary diplomatic immunities and privileges to missions of third countries accredited to the Union."<sup>584</sup> In the course of the years, the Commission tended to extend the analogies with States' diplomacy beyond the mere conferral of immunities. In particular, the Commission soon established the practice whereby letters of credence were presented to the President of the Commission, who had instituted for these occasions a ceremony modelled on the one used between States. This practice irritated some Member States, which, through the Luxembourg Compromise, imposed the sharing with the Council of the power to receive the letters of credence.<sup>585</sup>

The Commission complied with the Council's request, but did not renounce its penchant for mimicking States in diplomatic relations. In transparent analogy with States, the Commission still publishes a list of the diplomatic missions accredited to the EU, including the names of the officers thereof and, in particular, those of the heads of missions, who are referred to, not only as "ambassadors" but also as "extraordinary and plenipotentiary". The latter titles do not have any practical consequence in legal terms, but they are important in a symbolic perspective, since they are typical of inter-state diplomacy.<sup>586</sup> Another curious analogy between the EU and States in this ambit is provided for by the figure of the 'doyen' of the diplomatic corps, that is to say the senior diplomatic representative tasked principally with instructing other heads of missions upon their arrival. Not only does the Commission's protocol service contemplate this figure, but it also entrusts its function on the Papal Nuncio,<sup>587</sup> consistently with the long-standing tradition of several Catholic States.

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<sup>584</sup> Protocol (no. 7) on the privileges and immunities of the European Union, O.J. C 2010 83/266, Article 16 (emphasis added).

<sup>585</sup> Extraordinary session of the Council, Luxembourg, 17 to 18 and 28 to 29 January 1966, Final Communiqué of the extraordinary session of the Council, Bulletin of the European Communities, March 1966, 3-66, pp 5 – 11: "5. In 1959 the Council laid down the rules which, provisionally, were to govern the recognition of diplomatic missions accredited to the Community (letter of 25 July 1959 from M. G. Pella, President of the Council, to the President of the Commission). These rules amount to a sharing of prerogatives between the Council and the Commission. In particular, letters of credence are presented to the President of the Commission, who has instituted for these occasions a ceremony modelled on that used between states, whereas the Treaty of Rome lays down that the Council alone may commit the Community vis-à-vis non-member countries. A stop must therefore be put to the present practices and all the prerogatives of the Council restored.

6. Consequently, any approaches by foreign representatives to the Commission must be reported with all despatch to the Council or to the representative of the State in the chair."

<sup>586</sup> The 'Permanent observers' to the Organisation of American States, for instance, are simply referred to as "ambassadors", see [http://www.oas.org/en/ser/dia/perm\\_observers/countries.asp](http://www.oas.org/en/ser/dia/perm_observers/countries.asp).

<sup>587</sup> European Commission, Vade-mecum for the use of the diplomatic corps accredited to the European Union and to the European Atomic Energy Community, para VI.1.

The passive dimension of the EU's right of legation has also two major differences from the similar function of sovereign states. First, the EU interacts with foreign missions via a plurality of bodies. Not only are accreditations approved by both the Commission and the Council, as foreseen in the Luxembourg Compromise, but letters of credence are presented to the President of the Commission and the President of the European Council. At first sight, this practice appears bizarre. A closer investigation, however, reveals its tendential consistency with the States' practice: since the accreditation of foreign representatives is a traditional prerogative of the monarch, this function is currently performed by heads of State. This practice was 'imported' in the EU system by entrusting the accreditation function to the figures that may be most closely assimilated to a head of State, that is to say the two Presidents.

A second difference between the EU and sovereign States is slightly more significant: whereas States can ensure reciprocity in the conduct of diplomatic exchanges, since they can protect foreign missions, the EU may seem to be incapable of doing the same, because it lacks a territory and a police force. Thus the relations between the EU and third States are not truly bilateral, but 'triangular', since the former can only grant privileges and immunities to the missions of the latter by requesting the intervention of Belgian authorities. Despite its merits, such argument does not appear entirely satisfactory: Belgium is required by Protocol 7, and its duty of loyalty, to grant protection to third countries' missions. What is more, the EU legal order contains the instruments that are necessary for the enforcement of such obligations; the Commission may, for instance, initiate an infringement procedure against Belgium. Against this argument, it cannot be held that the EU is unable to force Belgium to comply with its duties through the recourse to force, since even in federal systems the 'central' government may encounter difficulties in promoting compliance with international law, as demonstrated, for instance, by the *Medellin* case in the US.<sup>588</sup>

The active side of the EU's right of legation has also striking similarities with the conduct of diplomacy by States. The first such analogy consists, again, in the status of the missions: EU Delegations, like States' embassies, normally enjoy full diplomatic privileges and immunities, as provided for in the Vienna Convention of 1961.<sup>589</sup> Another analogy between the status of EU Delegation and that of embassies is provided for by the application of the Vienna Convention of 1961 to the diplomatic exchange, also beyond the provisions relating to immunities and privileges; in other words, most States accept that the status of EU Delegations is,

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<sup>588</sup> Supreme Court of the United States, *José Ernesto Medellin v. Texas*, opinion of the Court, 552 U.S. (2008), 25 March 2008: "The United States contends that while the Avena judgment does not of its own force require *domestic courts* to set aside ordinary rules of procedural default, that judgment became the law of the land with precisely that effect pursuant to the President's Memorandum and his power "to establish binding rules of decision that preempt contrary state law." [...] The United States maintains that the President's constitutional role "uniquely qualifies" him to resolve the sensitive foreign policy decisions that bear on compliance with an ICJ decision and "to do so expeditiously." In this case, the President seeks to vindicate United States interests in ensuring the reciprocal observance of the Vienna Convention, protecting relations with foreign governments, and demonstrating commitment to the role of international law. These interests are plainly compelling. Such considerations, however, do not allow us to set aside first principles. The President's authority to act, as with the exercise of any governmental power, "must stem either from an act of Congress or from the Constitution itself" (emphasis added).

<sup>589</sup> As discussed below, there are however (partial) exceptions, see also Baroncini, *Il Treaty Making Power della Commissione Europea* (Editoriale Scientifica, 2008), p. 191.

in a substantive perspective, almost identical to the one of States' embassies.<sup>590</sup> The similarity between EU Delegations and States' missions is further confirmed by its symbolic characterisation. The Head of Delegation, for instance, is generally accredited to the Head of State of the receiving country, whereas the Heads of the missions of international organisations are normally accredited to the Ministries for Foreign Affairs. In addition, the Head of Delegation is universally termed "Ambassador". This usage, which is generally requested by the EU,<sup>591</sup> was widespread also before the Lisbon reform. Nonetheless, EU officers were sometimes reluctant to use it, presumably in order not to irritate the Member States.<sup>592</sup> The creation of the EEAS, and the secondment of national diplomats to the post of Head of Delegation, rendered this practice obsolete, and it is now standard usage to refer to the HoD also as 'ambassador'.

The *quasi* State-like status of the Union is testified also by its position in the list of diplomatic missions accredited to third countries and by the place of its Head in the order of precedence in the diplomatic corps. The Commission has always been keen on preventing the host States from placing the EU's delegation and ambassador among the organs and representatives of other international organisations. Thus it is frequent to find the EU Delegation in the list of the missions of States.<sup>593</sup> The placement of the Head of Delegation is more delicate, since the position of ambassadors is normally determined by the date in which they presented their letters of credence. Considering that the HoD may arrive before the ambassadors of the Member States, the latter may theoretically be preceded by the European representative. Since this result is considered unacceptable by (some?) Member States, the HoD is often placed after the ambassadors of sovereign States, but before the representatives of international organisations. In at least one case, that is to say Canada, the EU ambassador is however listed among the States' representatives; as a result, he comes before the US envoy, and those of several Member States.<sup>594</sup>

Beside the analogies between the EU's diplomacy and that of States, there remains a most significant difference in the source of the Delegations' immunities. Whereas States' missions (and their staff) enjoy privileges and immunities on the basis of customary law, EU representatives obtain immunities on the basis of a specific act.

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<sup>590</sup> In this sense, see *inter alia*, Agreement between the Government of New Zealand and the Commission of the European Communities on the establishment and the privileges and immunities of the Delegation of the Commission of the European Communities in New Zealand, signed on 10 March 2004, UNTS vol. 2524.

<sup>591</sup> Boselli, *Guide diplomatique pratique à l'usage des fonctionnaires en poste dans les délégations de la Commission de la C.E.* (European Commission, External Relations DG, 1992): "A partir de 1983, le rang d'ambassadeur est explicitement mentionné dans les lettres de créances, ce qui implique, dans la plupart des cas, leur présentation au niveau de Chef d'Etat."

<sup>592</sup> Third countries were not always as reluctant as European actors. For instance, Winand, "The US Mission to the EU in Brussels D.C., *The European Commission Delegation in Washington D.C. and the New Transatlantic Agenda*", in Philippart and Winand (eds), *Ever Closer Partnership: Policy Making in US-EU Relations* (Peter Lang, 2004), pp. 107-154, at p. 144, noted that, already at that time, "there [was] a clear tendency on the part of Americans to call the Delegation's ambassador, "EU ambassador", which he [was] not".

<sup>593</sup> Examples in this sense are provided for by the United States (where the EU shares this status with the African Union, see <http://www.state.gov/s/cpr/rls/dpl/2012/182778.htm>), Canada (<http://wo3.international.gc.ca/Protocol-Protocole/Heads-Chefs.aspx?lang=eng>), Australia (<http://www.dfat.gov.au/protocol/diplomaticlist.pdf>) and Japan ([http://www.mofa.go.jp/about/emb\\_cons/protocol/a-h.html#E](http://www.mofa.go.jp/about/emb_cons/protocol/a-h.html#E)); last visited on 4 August 2012.

<sup>594</sup> See the website of the Canadian government, <http://wo3.international.gc.ca/Protocol-Protocole/Ambassador-Ambassadeur.aspx?lang=eng>; last visited on 4 August 2012.

In most circumstances, the Union concludes an agreement with the host country, the so-called 'establishment agreement', whereby the State accepts the establishment of the Delegation and provides for the application *mutatis mutandis* of the Vienna Convention of 1961, including the parts relating to privileges and immunities. In other cases, the host country provides for the privileges and immunities of the EU's mission through a unilateral act.<sup>595</sup> To the best knowledge of the author, there is no EU Delegation whose status is not regulated either through a bilateral or a unilateral act. This implies that it is generally believed that the EU does not conduct a fully fledged diplomacy, and its missions should consequently not benefit from the protection offered by customary law. The non-application of customary law to EU Delegations has a corollary: third States may decide not to grant full diplomatic protection to EU Delegations. Canada, for instance, grants immunities to most EU officers only for acts performed in their official capacity.<sup>596</sup>

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It may be concluded that the diplomatic relations of the Union are different from the relations conducted by international organisations, since the EU's external action is equivalent to a virtually full foreign policy (at least in principle) and the missions of the Union are capable of performing most diplomatic functions. This finding is partially confirmed by the practice, which shows that the diplomatic relations of the EU are very similar to those of States. Given the isomorphism of Union and States' diplomacy in the 'external' perspective, it may be hypothesised that the EU's diplomatic relations should be 'statomorphic' also in an 'internal' viewpoint. In other words, they should be conducted according to the principle of unity in external representation that informs the foreign policy of States.

### SECTION 3 – PROMOTING UNITY IN DIPLOMATIC REPRESENTATION

Although the Union can conduct virtually full diplomatic relations, the fragmentation of its external representation may theoretically hamper the EU's unity in diplomatic representation, as shown in paragraph 1. The remainder of this section seeks to demonstrate that the EEAS can ensure unity in European diplomacy, since its officers have authority on EU Delegations (paragraph 2), substitute Commission officers in the performance of certain diplomatic activities (paragraph 3) and coordinate the missions of the Member States.

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<sup>595</sup> This is the case of Switzerland, US and Canada, see Baroncini, *op. cit.*, pp. 195-200.

<sup>596</sup> See European Communities Privileges and Immunities Order, C.R.C., c. 1308, para 4(b): "officials of the [EU], other than senior officials, shall have in Canada, to such extent as may be necessary for the performance of their functions, the privileges and immunities specified in section 18 of the Convention [on the Privileges and Immunities of the United Nations]". Section 18 of the aforesaid Convention reads: "Officials of the United Nations shall: (a) be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity", see Convention on the Privileges and Immunities of the United Nations, adopted by the Assembly General on 21 February 1946. Notice that the applicability of this law was confirmed by Chantal Schryburt, Office of protocol, Foreign Affairs and International Trade Canada, in an email to the author of 14 October 2011.

## 1. Fragmentation in EU's Diplomatic Relations

The CFSP/non-CFSP duality of the EU's external action affects also the performance of the diplomatic relations of the EU. This can be demonstrated by taking into consideration the relations between the Union and the missions of third subjects and the relations between Union Delegations and the third subjects they are accredited to.

The previous section showed that the third subjects' missions accredited to the EU perform most diplomatic functions. In order to do so, they interact with the Union bodies capable of representing the EU's opinion externally, and namely with the Commission and the High Representative, with respect to non-CFSP and CFSP issues, respectively.<sup>597</sup> Such a duality has a major consequence. Whereas the missions accredited to States mainly address officials responding to the local government's chain of command, third subjects' missions accredited to the EU routinely interact with entities that respond to different chains of command. For instance, if the mission of a third subject wished to discuss an aspect related to agriculture, it would have to address the competent Commissioner, or his/her Service; therefore, the Commission's College would be ultimately responsible for the position expressed by the Union in this area. If the mission of a third subject intended to discuss a purely diplomatic (CFSP) aspect, it would have to address the High Representative, or the EEAS. In principle, the High Representative would be responsible for the opinion (s)he and his/her Service would express.

To be sure, the Union position is decided upon by the Council, and in certain cases by the Council and the Parliament, and not by the EU's representative(s); therefore, it may seem that the presence of two Union speakers does not necessarily entail negative consequences, in so far as the representatives deliver the same message. However, the contrary conclusion appears to be more realistic, for three reasons. First, the presence of two speakers engenders *per se* the image of a non-cohesive Union. Second, the difficult distinction between CFSP and non-CFSP areas may give rise to 'turf battles' between the Union representatives as to the respective capacity to enter into a dialogue with respect to a specific subject, thus further reducing the image of European unity. Third, Union representatives may transmit non-coordinated messages, since they do enjoy some leeway: the power of representation, as referred to in Article 17 and 27 TEU, does not simply imply the capacity to *speak*, but it actually entails some degree of discretion. In particular, the representative is free to choose the timing, the medium and the wording for the communication, as long as the content of the position is respected.

It may seem that the fragmentation of the external action should affect also the active side of the EU's legation. As shown in previous section, Union Delegations represent the Union in third countries and at international organisations, they negotiate on its behalf, contribute to the protection of European interests, foster cooperation with third subjects and collect information for the EU. It is evident that

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<sup>597</sup> As noted above, the Treaties confer the external representation power mainly on four entities, that is to say Union Delegations, the President of the European Council, the Commission and the High Representative. However Union Delegations and the President of the European Council do not interact with third subjects' missions accredited to the EU. On the one hand, EU's Delegations cannot be tasked with maintaining the contacts with third subjects' missions because they are in different places: the former are located in third subjects, while the latter are located in the Union. On the other hand, the President of the European Council represents the Union at his/her own level, that is to say at the level of Head of State, therefore (s)he usually does not interact with third Subjects' missions. It may be argued that.

the performance of these functions requires the exertion of several powers, including policy and budget implementation and, of course, external representation. As noted above, the distribution of these powers is affected by the CFSP/non-CFSP duality of the external action. Delegations should therefore exert powers that descend from the competences of both the HR and the Commission, and may be conceived as organs "characterised by a two-fold organic and functional dependence with respect to the EEAS and the Commission", as noted by the General Court in the *Elti* case.<sup>598</sup> The duality of EU Delegations is expressed graphically in the following table:

	<b>CFSP</b>	<b>non-CFSP</b>
Political level	High Representative	College of the Commissioners
Administration	EEAS	COM Services
Diplomatic mission	<b>Delegation</b>	
Management of the external action at diplomatic level	<b>EEAS</b>	<b>COM Services</b>

The dichotomous structure of Delegations is testified, in the first place, by the double source of their staff. The presence of EEAS officers in Delegations is not surprising, since Delegations are part of the Service itself, whilst the presence of Commission officers requires further attention. Article 5(2) of the EEAS Decision affirms that staff in delegations shall comprise Commission staff "where appropriate for the implementation of the Union budget and Union policies other than those under the remit of the EEAS."<sup>599</sup> This confirms that the reason why Commission officers are present in Delegations is the link between the latter and the Commission's powers.<sup>600</sup> It must be stressed that Commission officers in Delegations are *not* seconded to the EEAS: they retain their status as Commission servants, they remain part of a Commission service, they are subject to Commission rules, and their career progression remains in the hand of the Commission. Moreover, it may be noted that, since the College can autonomously organise its own services (Article 248 and 249 TFEU), the Commission can autonomously

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<sup>598</sup> See case *Elti*, cit. *supra*, para 46: "the legal status of the Union Delegations is characterised by a two-fold organic and functional dependence with respect to the EEAS and the Commission."

<sup>599</sup> Article 5 EEAS Decision, emphasis added. *Ad abundantiam*, it may be noted that the persisting presence of Commission staff in Delegations is testified also by the transitional arrangements concerning the transferral of Commission department to the EEAS in 2010. In fact, former Commission Delegations were transferred to the Service, along with their Heads and their political sections. However, the EEAS Decision did not affirm that *all* Delegation officers would have been transferred to the Service. On the contrary, it explicitly excluded the "staff responsible for the implementation of financial instruments" from the transferral, EEAS Decision, Annex, section 2.

<sup>600</sup> According to the letter of the EEAS Decision, the presence of Commission officers in Delegation is eventual: Commission officers can staff a Delegation only when the latter performs tasks functional to the exertion of powers conferred on the Commission. In practice, all Delegations perform such tasks. In fact, Commission officers are always present in Delegations, and, in some cases, they staff the Delegation almost completely, cf. Report by the High Representative to the European Parliament, the Council and the Commission, 22 December 2011, par. 16.

decide whether to post its officers to Delegations. Therefore, the EEAS Decision does not make the posting of Commission officers to Delegations subject to the approval of the High Representative or of the EEAS.<sup>601</sup> In light of this last consideration, it is evident that there is a stringent need for cooperation between the EEAS and the Commission, since the first must enable the latter to effectively exert its powers through Delegations.

In the second place, the dichotomous identity and structure of Delegations is testified by the fact that they receive input from both the Commission and the HR. According to the first paragraph of Article 5(3) of the EEAS Decisions, Delegations receive instructions from the HR and the EEAS. This is understandable, because Article 221(2) TFEU affirms that Delegations are “placed under the authority of the High Representative” and because Delegations are staffed by EEAS officers, who are meant to assist the HR, in line with Article 27(3) TEU. According to the second paragraph of Article 5(3) of the EEAS Decisions, the Commission may also issue instructions to Delegations, “in areas where the Commission exercises the powers conferred upon it by the Treaties”. This confirms that the link between the Commission and Delegations is determined by the exercise of Commission competences

by Delegations.hnn identity of Union Delegations is testified by the distribution of the budget implementation powers in respect of administrative expenditure. The EEAS is responsible for the implementation of its own administrative budget (Article 8(1) EEAS Decision); consequently, the EEAS part of the Delegations’ administrative budget is implemented by an EEAS officer identified accorded to the rules established by the High Representative. At the same time, the Commission is responsible for the implementation of its own administrative expenditure in Delegations, that is generated by the presence of Commission officers and by the performance of activities falling within the remit of Commission’s powers; consequently, the Commission part of the Delegations’ administrative budget is implemented by a Commission officer, identified by the Commission according to Commission rules.

It is clear, therefore, that the distribution of external action management powers between the Commission and the High Representative affects also the conduct of EU diplomatic relations. The dis-unity that ensues is certainly negative with respect to the passive side of the EU's right of legation, since the missions of third States in Brussels may be disoriented by the complexity of the EU's machinery. All political systems, however, have their peculiarities, and diplomats are well equipped to adjust to them, in the course of time. What is particularly pernicious is the potential division of the *active* side of the EU's legation. The 'projection' of the EU's external action dichotomy may seriously hamper the unity in international representation of the Union, not least because diplomatic missions are tasked precisely with the conveyance of a single position to third countries, and for this purpose they are placed under the authority of a single officer, i.e. the ambassador. Needless to say, third States would be extremely confused if the EU Delegation spoke with two voices, one for the Commission and the other for the HR. If this were the case, Union Delegations probably would be sidelined, and possibly bypassed through a direct dialogue with the EU Head Quarters, or even with the Member States. The dis-unity of EU Delegations, therefore, would not only jeopardise unity in

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<sup>601</sup> It may be noted, however, that the dimension of the Delegation may be subject to restrictions by the accrediting country or international organisation, cf. Article 11 Vienna Convention 1961 and Article 14 of the Vienna Convention 1975; see also Salmon, *op. cit.*, p. 561.



international representation, but it would ultimately disrupt the entire project of a EU diplomacy that was carefully nurtured by the Commission during the last fifty years.

## 2. *Fostering Unity in EU Diplomacy via the 'Authority' of the Head of Delegation...*

A systemic appraisal of Article 221(2) TFEU and Article 27(3) TEU may suggest that Delegations should be placed under the authority of the EEAS. How is this possible in a context where Delegations must exert powers belonging to different EU bodies and offices? The solution put forward by the legislator was to create a novel figure, the Head of Delegation, who, despite his/her status as EEAS officer, should ensure coordination transversally to the CFSP/non-CFSP divide.

The HoD is not entirely new. The very definition 'Head of Delegation' is a legacy of Commission 'diplomacy'. The Heads of Commission's Delegations were tasked, *inter alia*, with the maintenance of the unity of Delegations,<sup>602</sup> since these organs were staffed by officials originally affiliated with different (Commission) services: Heads of Delegation had authority over all staff and activities of the Delegation, and they represented the entire Commission.<sup>603</sup> Nonetheless, the new HoD is an original figure, because he/she is entrusted with the same responsibilities as the HoD of pre-Lisbon Commission Delegations, but he/she has also a more 'political' (CFSP) role. This determines an original interplay between the HoD's affiliation and his/her tasks.

It must be noted that the HoD is an officer of the EEAS. The affiliation of the Head of Delegation is explicitly defined neither by primary nor by secondary law. However, the EEAS Decision implicitly identifies him/her as a EEAS officer, since it affirms that the HoD exerts a powers of the HR: the first paragraph of Article 5(2) of the EEAS Decision asserts that the HoD has authority on the Delegation, in line with Article 221(2) TFEU, which gives the HR authority on the same organ. The direct relationship between the HoD and the HR is further testified by the second paragraph of Article 5(2) of the EEAS Decision, which states that the HoD is "accountable to the High Representative for the overall management of the work of the delegation and for ensuring the coordination of all actions of the Union". This last responsibility of the HoD is particularly significant: the HoD is an officer of the EEAS, but he/she must ensure the coordination of *all* actions of the Union, thereby presumably including CFSP and non-CFSP actions.

The HoD seems able to perform this task, since Article 5(2) of the EEAS Decision confers the HoD authority on the entire Delegation, for all its activities and on all its staff, whatever their status (thereby including also national officers seconded to the EU). This renders the HoD capable of overseeing the implementation of all Union policies,<sup>604</sup> namely by exerting authority on all Delegation officers. Not only does

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<sup>602</sup> Commission Delegations evolved significantly over time; for the purpose of the present analysis it is sufficient to consider the organisation of the last pre-Lisbon structure of Commission's para-diplomacy, as set by Commission decision on the administrative reform of the External Service, December 2002, C(2002)5370, not published in the OJ. For a detailed account of the evolution of the Commission External Service, see Carta, *The European Union Diplomatic Service* (Routledge, 2011).

<sup>603</sup> Commission Decision C(2002)5370, Article 7(1), (3) and (4).

<sup>604</sup> Arguably, the HoD is responsible also for the retrieval of information necessary to the performance of the initiative function; however, it is difficult to distinguish this function from policy implementation in practice, therefore it will be assumed that it is comprised within policy implementation.

the HoD oversee the execution of CFSP initiatives, but he/she also supervises the execution of non-CFSP actions. As recalled above, the latter receive execution by the Commission, ex Article 291(2) TFEU, therefore they are implemented by Commission officers in Delegations. Consequently, through his/her “authority” on Commission officers, the HoD functions as a *de facto* Commission officer.

The 'dual' nature of the HoD has two problematic consequences. First, the HoD must respect both EEAS and Commission rules and procedures. If the HR or the Commission have reason to consider the HoD non-compliant with his/her obligations, they may “initiate administrative inquiries and disciplinary proceedings” against him/her.<sup>605</sup> Subsequently, it is for either the HR or the Commission to decide whether “a failure to comply with obligations” has taken place, and whether to address a warning to the HoD or initiate disciplinary proceedings.<sup>606</sup> If the HR, or the Commission, considers the behaviour of the HoD to constitute a “serious misconduct”, the latter may even be required “to make good, in whole or in part” any damage (s)he may have caused to the Union.<sup>607</sup> Therefore, the Heads of Delegation that are less versed into EU procedures, namely national diplomats, may encounter relevant difficulties in practice, and they may have to devote a significant part of their attention to 'bureaucratic' issues, for the sole purpose of not incurring in administrative sanctions. It may well be that prospective candidates, especially from the Member States, may even be discouraged from applying to posts as HoD.<sup>608</sup> This problem may nonetheless be temporary, since the progressive socialisation of national diplomats to the EU mindset may render them more sensitive to procedural issues.

A second problem is more structural, and difficult to tackle. Delegations, like all diplomatic missions, have 'representative' character, therefore they must act upon instructions.<sup>609</sup> This implies that they do not autonomously decide upon the exertion of policy implementation, budget implementation and external representation powers in an autonomous manner, but they must act upon the instructions of the entities that are attributed competences in these areas, that is to say the HR and the Commission. To this end, both the Commission and the HR need to directly or indirectly issue instructions to Delegations. The HR's instructions can be transmitted and executed by the HoD, or by other officers under his/her authority, in a rather unproblematic manner, since the HoD is part of the chain of command of the EEAS. The execution of Commission's instructions is more complicated, since the HoD should receive instructions from, and transfer them to, the officers belonging to a body different from its own. Such arrangement evidently violates the long standing principle enshrined in the EU's staff regulations whereby officials "shall neither seek nor take instructions from any government, authority, organisation or person outside his institution".<sup>610</sup> Therefore the staff regulation was amended in 2010, also to allow for the insertion of the HoD in the

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<sup>605</sup> Staff regulations, Article 95(3) and 86.

<sup>606</sup> Staff regulations, Annex IX, Article 3.

<sup>607</sup> Staff regulations, Article 22.

<sup>608</sup> A diplomat of a Member State reported these difficulties to the author in January 2013.

<sup>609</sup> “Le corollaire du caractère représentatif du chef de mission est qu'il censé agir sur instructions.” Salmon, *op. cit.*, p. 113.

<sup>610</sup> Regulation 259/68/EEC/Euratom/ECSC of the Council of 29 February 1968 laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Communities and instituting special measures temporarily applicable to officials of the Commission, OJ L 56, 4 March 1968, p. 1 (hereinafter, “Staff Regulation”), Article 11.

chain of command of the Commission.<sup>611</sup> The capacity of the Commission to issue instructions to the HoD had his/her Delegation may theoretically take three alternative forms. First Commission's instructions may have to be routed via the HR or his/her Service. Article 221(2) TFEU, in fact, does not mention the Commission's authority, that is to say hierarchical superordination, over Delegations. This may well imply the HR's *exclusive* ability to interact with and issue instructions to EU missions abroad. Such reading of primary law appears most consistent with the principle of external action coherence, since it makes sure that EU missions abroad receive coherent input. It has the shortcoming, however, of inserting other non-Commission officers in the chain of command of the Institution, an issue that should be addressed via a further amendment to the staff regulations. Second, Commission's instructions may be issued directly to Heads of Delegation. This solution places the HoD in the uncomfortable position of having to arbitrate between the instructions of the HR and those of the Commission, but it may be effective, in so far as Delegation officers would anyway receive one single input. The legislator, however, seems to have preferred a third approach to Article 221(2) TFEU. The preamble of the EEAS Decision affirms that, when the Commission issues instructions to Delegations, the Commission simultaneously "provide a copy thereof to the Head of Delegation and to the EEAS central administration". In other words, the Commission may directly address its own officers in Delegations, thus by-passing the HR, the EEAS and the very HoD, and potentially questioning the unity and effectiveness of EU external representation. The Commissions' instructions may indeed contrast with previous or subsequent instructions of the HoD and, ultimately, of the HR, thus challenging his/her authority under Article 221(2) TFEU.<sup>612</sup>

### 3. ...and the Exercise of Commission Powers

The previous paragraph shows that the HoD, despite being an EEAS officer, fosters unity in EU diplomacy through his/her contextual insertion in the hierarchies of both the EEAS and the Commission, and his/her consequent authority on both EEAS and Commission officers. This paragraph completes the analysis by demonstrating that he/she may also substitute Commission officers in the exertion of two crucial powers, that is to say budget implementation and external representation.

The budget implementation tasks of the HoD are twofold. In the first place, he/she gives implementation to the administrative budget of the EEAS. Article 8 of the EEAS Decision enables the HR to give implementation to the EEAS' administrative budget,<sup>613</sup> and to delegate this power within the EEAS, and presumably to the HoD.

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<sup>611</sup> Regulation 1080/2010/EU of the European Parliament and of the Council of 24 November 2010, OJ L 311, 26 November 2010, p. 1. See, in particular, new Article 96 of the staff regulations.

<sup>612</sup> It is perhaps not surprising that these arrangements have already led to some controversies. For instance, Vogel reports that "the Commission routinely issues direct instructions to Commission staff working in EU delegations instead of routing them through the head of delegation", in "Ashton on defensive on EU's diplomatic service", in *European Voice*, 5 January 2012. Nonetheless, the HR's report on the EEAS of 2011 affirms that "these arrangements have not given rise to any systemic problems".

<sup>613</sup> On the implementation of the administrative budget see Article 1(2) and 50 of the Council Regulation 1605/2002/EC/Euratom of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities OJ L 248, 16 September 2002, p. 1, as amended by Regulation 1081/2010/EU/Euratom of the European Parliament and of the Council of 24 November

This power is mainly ‘technical’ in nature, but its exercise may be time-consuming, since the Delegation may be endowed with a relevant budget, which relates to its buildings, staff and security. This issue is complicated by the fact that the HoD may be prevented from delegating this power. The EEAS Decision enables only EEAS officers to give implementation to the EEAS’ administrative budget. Since several Delegations have few or no EEAS officer apart from the HoD, the latter may be obliged to personally give implementation to the EEAS’ administrative budget.

In the second place, the HoD may implement the operative lines of the EU budget, relating to the policies managed by his/her Delegation. As recalled above, the Treaties entrust the power of financial implementation on the Commission (Article 317 TFEU), with respect to both CFSP and non-CFSP activities. Before the Lisbon reform, the Commission HoD gave implementation to the EU budget in third countries. This arrangement can no longer be applied, since the officers of EU bodies different from the Commission should not be able to exert this power.<sup>614</sup> The legislator introduced a provision meant to maintain the role of Heads of Delegations. Article 5(4) of the EEAS Decision asserts that the Head of Delegation implements operational credits in relation to the Union’s projects in the corresponding third country, where delegated by the Commission.<sup>615</sup> This means that the HoD gives implementation to the operative lines of the EU budget as if he/she were a Commission officer, thus confirming the findings reached above, according to which the HoD has been *de facto* inserted within the chain of command of the Commission. The rationale for the maintenance of the HoD’s role in budget implementation, via a delegation from the Commission, is clear. On the one hand, this solution makes sure that all the expenses of EU Delegations are supervised by a single entity, in accordance with the principle of unity that inspires the Union’s budget. On the other hand, as noted by the Court of Auditors, this solution preserves the authority of the Commission with respect to budget implementation and it may be seen as an attempt to safeguard, as much as possible, the internal Commission procedures for the implementation of the EU’s operative budget.<sup>616</sup>

It may be wondered whether the participation of the HoD in the implementation of operative lines of the Union budget is legal. Since the HoD is not a Commission official, the delegation of budget implementation powers to the HoD is subject to the general conditions applicable to the delegation of powers to third parties:

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2010 on the Financial Regulation applicable to the general budget of the European Communities, as regards the European External Action Service, OJ L 311, 26 November 2010, p. 9 (hereinafter, “Financial Regulation”). Notice that the European Development Fund is subject to different budget implementation rules, since it does not belong to the EU budget; therefore the creation of the EEAS engendered the modification of the EDF financial implementation Regulation too, cf. Council Regulation 370/2011/EU of 11 April 2011 amending Regulation 215/2008/EC on the Financial Regulation applicable to the 10th European Development Fund, as regards the European External Action Service OJ L 102, 16 April 2011, p. 1. Since the provisions of the EDF Financial Regulation, and their recent amendments, are similar to the arrangements of the general Financial Regulation, only the latter will be addressed hereinafter.

<sup>614</sup> Financial Regulation, cit. *supra*, Article 51.

<sup>615</sup> Notice that the EEAS Decision affirms that the budget implementation power is *sub*-delegated by the Commission. The use of the prefix “*sub*” is due to the fact that the College directly delegates budget implementation powers to the directors general of its Services, and these subsequently *sub*-delegate the budget implementation to Commission officers, or to the HoD.

<sup>616</sup> Court of Auditors, Opinion No 4/2010 on a proposal for a regulation of the European Parliament and of the Council amending Council Regulation 1605/2002/EU/Euratom on the Financial Regulation applicable to the general budget of the European Communities, as regards the European External Action Service, OJ C 145, 3 June 2010, p. 4, par. 8.

according to the *Meroni* jurisprudence, EU institutions can delegate their powers to third parties only when this “does not imply any delegation of powers involving a real margin of discretion.”<sup>617</sup> Although the strategic relevance of external actions funds, and the pivotal role of Delegations with respect to their implementation,<sup>618</sup> characterise budget implementation as a highly “political” function, the budget implementation powers delegated to the HoD do not involve a substantial margin of discretion. Indeed, the Financial Regulation stipulates that Heads of Delegation are subject to the Commission “as the institution responsible for the definition, exercise, control and appraisal of their duties and responsibilities.”<sup>619</sup> Moreover, Heads of Delegation “apply the Commission rules for the implementation of the budget” and are submitted to the same duties “as any other sub delegated authorising official of the Commission”.<sup>620</sup> Finally, the HoD may even have his/her delegation or subdelegation withdrawn temporarily or definitively by the Commission.<sup>621</sup>

Despite its advantages and its legality, the technique used to vest the HoD with the budget implementation power entails some shortcoming. First, the choice to give only the HoD the capability to implement the operative lines of the budget renders the implementation of operative expenditure more complex and subject to conflict of priorities between the Commission, that holds the budget implementation power ex Article 317 TFEU, and the HR, that has authority on the Delegation and its Head.<sup>622</sup> This reinforces the negative effects of potentially conflicting instructions, as seen above. Secondly, the attribution of an exclusive budget implementation function on the HoD, coupled with his/her other multiform responsibilities and his/her potential personal responsibility for violation of Commission procedures, contributes to complicate the HoD's job in practice. An EU ambassador that is not entirely familiar with EEAS and Commission procedures may in fact be incentivised to spend a significant portion of his/her time dealing with administrative issues, rather than conducting EU diplomacy proper.

Beside his/her role in the implementation of the budget, the HoD has a crucial, and exclusive, function in what is probably the most fundamental activity of Union Delegations, that is to say external representation *stricto sensu*. Article 5(8) of the EEAS Decision affirms that the HoD represents the Union “in the country where the delegation is accredited, in particular for the conclusion of contracts, and as a party to legal proceedings”. This provision demonstrates that the HoD has the capacity to represent the Union within the legal order of the host State. More generally, it suggests that the HoD's has the ability to speak on behalf of the Union

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<sup>617</sup> Chiti, op. cit., at p. 1421. Cf. Cases C-9/56 and C-10/56 *Meroni v High Authority*, ECR 1958, ECR English special edition, p. 133, par. 10: “to delegate a discretionary power to bodies other than those which the treaty has established to effect and supervise the exercise of such power each within the limits of its own authority, would render less effective the guarantee resulting from the balance of powers established by article 3.” Notice that the *Meroni* judgement referred to Article 3 of the European Coal and Steel Community Treaty, which contained the principle of institutional balance: “Within the framework of their respective powers and responsibilities and in the common interest, the institutions of the Community [...]”; this principle is now enshrined in Article 13(2) TEU, described above.

<sup>618</sup> As for the pivotal role of EU Delegations with respect to budget implementation, see Court of Auditors, Special Report No 10/2004 concerning the devolution of EC external aid management to the Commission Delegations OJ C 72, 22 March 2005, p. 1

<sup>619</sup> Financial Regulation, cit. *supra*, Article 59.

<sup>620</sup> Financial Regulation, cit. *supra*, Article 51.

<sup>621</sup> Financial Regulation, cit. *supra*, Article 64(1).

<sup>622</sup> See the Court of Auditors' Opinion 4/2010, cited above, par. 9 and 14.

*qua* international subject, that is to say by delivering its political messages, including diplomatic *démarches*.<sup>623</sup> This interpretation is supported by the very letter of Article 5(8), which asserts that the HoD represents the Union in the country where the Delegation is accredited "in particular", but not *exclusively*, for the purpose of concluding contracts. Such interpretation is corroborated also by an appraisal of the Treaties in light of the principle of external action coherence: the choice to entrust Delegations with the representation of the entire Union (Article 221(1) TFEU) and to place them under the authority of a single office (Article 221(2) TFEU) is evidently meant to foster unity in international representation, and thus coherence. Such unity can only be expressed in the field by the Head of Delegation, who is the apical officer of the organ.

The representative role of the Head of Delegation is testified by the practice. Heads of Delegation are accredited to third subjects through letters of credence, which certify their representative function.<sup>624</sup> These letters are signed by the president of the European Council and the president of the Commission.<sup>625</sup> This choice is justified by the fact that the President of the European Council represents the Union at Head of State level with respect to CFSP matters, whereas the Commission represents the Union in non-CFSP areas. Since the letter of credence is signed by EU representatives in CFSP and non-CFSP areas, it is evident that the HoD represents the entire Union.<sup>626</sup>

The holistic nature of the representation task of the HoD has two corollaries. On the one hand, the HoD exerts the power of representation of both the HR and the Commission. As demonstrated in the previous paragraph, the HoD must act upon instructions, therefore he/she must *represent* the position(s) he/she receives from Brussels. Although the HoD does not eliminate the fragmentation of EU decision-making, he/she may at least make sure that third subjects receive one single message.<sup>627</sup> On the other hand, the HoD may perform its representative function via both Commission and EEAS officers, if he/she so desires, but they are prevented from issuing messages to third parties without the approval of the HoD.

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<sup>623</sup> On the use of EU's diplomatic *démarches* (before the Lisbon reform), see Khaliq, *Ethical Dimension of the Foreign Policy of the European Union: A Legal Appraisal* (Cambridge University Press, 2008), pp. 89-90.

<sup>624</sup> Indeed, the crucial element of all letters of credence lies in their request "that credit may be given to all that the agent may say in the name of his sovereign or government", Roberts (ed.), *Satow's Diplomatic Practice* (Oxford University Press, 2009), p. 62. Notice that the so-called "accreditation" to international organisations is, in fact, an information that the Union transmits to the organisation concerned, cf. Salmon, *op. cit.*, p. 558-559.

<sup>625</sup> Cf. Wouters and Duquet, *The EU, EEAS and Union Delegations and International Diplomatic Law: New Horizons* (Leuven Centre For Global Governance Studies, 2011), at p. 10-11.

<sup>626</sup> In this sense, see also J. Vantomme (Head of Section 'Protocol and Diplomatic Questions' at the European External Action Service), intervention 'The European Union and the Vienna Convention on Diplomatic Relations: a Practitioner's view' at the conference *The Vienna Convention on Diplomatic Relations at the age of fifty: State of affairs and challenges ahead*, Leuven, 9 May 2011; Vantomme held that this practice is justified precisely because the two presidents represent the entire EU, in the two strands of its external action, and Delegations must represent the entire Union.

<sup>627</sup> It must be stressed, however, that the exclusivity of the representation function entrusted on the HoD relates only to the diplomatic level. The HR, Commissioners, the President of the European Council, and special representatives may perform their functions alongside the Delegation. By definition, however, their role is *temporary*, whereas the Head of Delegation represents the EU in *permanence*. At the same time, the Delegation represents the EU only with respect to the relation with the subject it is accredited to. Thus the Head of Delegation to a country cannot issue *communiqués* relating to the EU's policy towards another country.

Commission officers, in particular, cannot undertake any initiative towards third subjects against the will of the HoD, even if the Commission itself requests it. In such circumstance, it is for the HoD to raise the issue with the EEAS, the HR and Commission management.

The increased 'unifying' capabilities of the HoD are justified by the peculiarities of his/her activities. The EU budget must be implemented by a single officer in order to preserve its unity and avert accounting errors. Most importantly, the EU position must be presented through a single voice, in order not to disorient EU's partners. The cumulation of the authority on the Delegation and the exertion of both EEAS and Commission powers renders the HoD potentially very effective in ensuring the unity of EU diplomacy. As a former UK ambassador recently put it: "I wish, as a British head of mission, I had had the same powers that a European head of delegation does, because it would have enabled me to bring together all the different [assets of the mission]".<sup>628</sup>

#### *4. Coordinating European Diplomatic Missions*

Not only does the EEAS ensure the unity of EU diplomacy, but it also promotes cooperation between EU and Member States' diplomatic representations, thus fostering external action coherence. Cooperation between diplomatic missions is a corollary of cooperation in European foreign policy. The missions of the Member States started to maintain close links early in the integration process, namely through regular meetings chaired by the Rotating Presidency. The London Report of foreign Ministers of EEC Members on the EPC<sup>629</sup> (1981) acknowledged the relevance of this practice, asserting that it was "important that the Heads of Mission of the Ten maintain the practice of meeting regularly in order to exchange information and co-ordinate views." EEC foreign ministers went as far as to affirm that the first instinct of European diplomats should have been "to co-ordinate with their colleagues of the Ten".

The Commission was originally excluded from these meetings, which were part of the intergovernmental EPC framework. Since the Institution was to be "fully associated with the proceedings of Political Co-operation"<sup>630</sup> among the EEC Members, it gradually managed to introduce its representatives in almost all the meetings of Member States' diplomats.<sup>631</sup> As a matter of fact, cooperation meetings went far beyond the policy boundaries of the EPC, and soon included also issues falling within EEC competences. In certain occasions, therefore, the presence of Commission representatives was not only tolerated, but appreciated because of their expertise.<sup>632</sup>

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<sup>628</sup> N. Westcott, Managing Director for Africa, EEAS, in UK House of Lords, The Select Committee on the European Union, Inquiry on European External Action Service, 22 January 2013, p. 4, available at <http://www.parliament.uk>.

<sup>629</sup> Report on European Political Cooperation issued by the Foreign Ministers of the Ten on 13 October 1981.

<sup>630</sup> Article 30(3)(b) of the Single European Act.

<sup>631</sup> Bot, "Cooperation Between the Diplomatic Missions of the Ten in Third Countries and International Organisations", 10 *Legal Issues in European Integration* (1994): 149-169.

<sup>632</sup> On the activities of Commission Delegations see *inter alia* Bruter, "Diplomacy without a state: the external delegations of the European Commission", 6 *Journal of European Public Policy* (1999): 183-205, at p. 193.

The Single European Act codified the practice of diplomatic cooperation in Article 30(9), by requesting the Member States and the Commission to "intensify co-operation between their representations accredited to third countries and to international organizations". The Maastricht reform further specified that the diplomatic and consular missions of the Member States and Commission Delegations were to cooperate in ensuring that the common positions and joint actions adopted by the Council were complied with and implemented. It also affirmed that they should have exchanged information, carried out joint assessments and contributed to the implementation of the right to diplomatic and consular protection of European citizens.<sup>633</sup>

In the daily activity of European diplomatic missions, cooperation was organised in a pragmatic manner. The frequency of the meetings varied according to the requirements of each specific situation, and on the strategies of EEC Members. Generally, European diplomats met at least once a month, but they could gather more frequently. The level of representation varied too, depending on the circumstances: beside the meetings of the ambassadors, there could be meetings of deputy heads of mission as well as heads of sections. Finally, the flexibility of this form of cooperation was testified by their outcome. Cooperation could have two main purposes. On the one hand, it could be used to foster cooperation on 'practical' issues, such as the compliance with the administrative requirements of the host State or the management of communication devices (e.g. the 'diplomatic bag'). On the other hand, it could be functional to 'political' purposes, namely the exchange of information, the preparation of joint reports for the Council and its preparatory bodies, the adoption of joint positions within international organisations,<sup>634</sup> the introduction of joint demarches towards the host States or the issuing of common statements for the general public (the so-called 'local statements'). It is worth stressing that, being diplomatic cooperation part of the intergovernmental EPC, the adoption of joint positions could only be taken by consensus of the Member States' representatives, and without the association of the Commission representatives. The external representation in the deliverance of such joint positions and demarches was generally performed by the representative of the Rotating Presidency.<sup>635</sup>

The advantages of diplomatic cooperation were manifold. Cooperation in practical areas enabled the Member States to allocate their administrative resources more effectively, and possibly reinforced their sense of solidarity. Political cooperation, on the other hand, granted even more significant benefits. The exchange of information allowed the Members, and especially the smallest ones, to keep abreast of recent developments. The drafting of joint reports could prevent the duplication of the reporting tasks of European missions. What is more, the formulation of joint positions enabled the EC/EU to truly speak with one voice in multilateral *fora* and *vis à vis* third countries. The unity of international representation also granted the Member States increased scope for manoeuvre, since positions that could have been difficult to uphold by single countries became easier to adopt as a European group:

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<sup>633</sup> Article 20 TEU, in the last pre-Lisbon consolidated version.

<sup>634</sup> On the cooperation of the missions accredited to international organisations see in particular Carotenuto, *La Participation de La Communauté Européenne et de Ses Etats Membres Aux Organisations Internationales* (PhD Dissertation, University of Strasbourg, 1999), pp. 353 ff. and Rasch, *The European Union At the United Nations: the Functioning and Coherence of EU External Representation in a State-Centric Environment* (Martinus Nijhoff, 2008), pp. 59 ff.

<sup>635</sup> Bot, *op. cit.*, pp. 154-158.



the EPC thus served as a 'shield' behind which the Member States could voice their opinions.

Diplomatic cooperation, however, had also evident limits. It is obvious that it could not be used as an alternative to genuine cooperation at political level. Diplomatic missions could coordinate their activities in the implementation of each States' policy, but they could not modify the policies as such. To be sure, this limit is inevitable: by definition, diplomatic missions act upon the instructions they receive from their capitals, and are not independent decision-making bodies. Diplomatic cooperation had also other, less inevitable, limits. To begin with, the involvement of the Commission was rather troublesome, in so far as the Member States' sometimes distrusted the scarce secrecy of the Institution and the lack of diplomatic background of its officers.<sup>636</sup> Especially at the earliest stages, this rendered more difficult the circulation of information among European representatives. Moreover, the Member States were not always eager to cooperate with each other, especially when their core interests relating, in particular, to trade and defence, came into play. It has also been reported that some Member States routinely withheld information in order to promote their own positions.<sup>637</sup> Finally, if it is generally accepted that the mission of the Rotating Presidency played a pivotal role in the promotion of cohesion between its peers, both in respect of agenda-setting and in the promotion of consensus, it is also widely believed that the Rotating Presidency possibly did not ensure an optimal coordination of European missions. Since the Presidency had political *priorities* of its own, its diplomats were sometimes perceived as non-neutral in the performance of their coordinating activities, and they could consequently be distrusted by their colleagues. Even more problematically, the Presidency often lacked the *capacity* to perform the coordination, in so far as most Member States have few diplomatic missions. In several third countries the coordination had to be performed by other Member States, thus jeopardising the coherence of the coordination process throughout the world. Finally, the Presidency did not ensure *continuity*, since the Rotating Presidency, by definition, varies every six months. This issue was internally problematic, since the missions of the Member States did not have a permanent point of reference. As it is obvious, the shortcomings entailed by the lack of continuity were particularly severe in an external perspective, since the 'phone number' of the EU changed every six months.<sup>638</sup>

The Lisbon reform, and the creation of the EEAS, may have solved some of these problems. The Treaties make numerous direct and indirect references to the cooperation between European diplomatic missions. Articles 32 and 35 TEU, as well as Article 221(2) TFEU explicitly call for cooperation between EU Delegations and Member States' diplomatic missions.<sup>639</sup> It is worth stressing that this cooperation should cover CFSP as well as non-CFSP areas. Additionally, such cooperation should be reciprocal: although Article 221(2) TFEU only refers to the *Delegations'* duty to "act in close cooperation with Member States' diplomatic and consular missions" it cannot be argued that such cooperation should be unilateral,

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<sup>636</sup> *Id.*, p. 154.

<sup>637</sup> Tomkys, "European Political Cooperation and the Middle East: a Personal Perspective", 63 *International Affairs* (1987): 425-437, at p. 435.

<sup>638</sup> On the shortcomings entailed by the Rotating Presidency's role in diplomatic coordination see Rijk, *EU Diplomatic Representation in Third Countries*, Paper Prepared For the GARNET Conference 'the EU in International Affairs' (2008).

<sup>639</sup> Notice that the very Article 27(3) TEU asserts that the EEAS must cooperate with the diplomatic services of the Member States, including therefore their diplomatic missions.

since it would be logically difficult for a Delegation to 'work with' (co-operate) with embassies that do not reciprocally 'work with' the Delegation.<sup>640</sup> The need for diplomatic cooperation is implied also by other provisions. Article 20 and 23 TFEU, which foresee the diplomatic and consular protection of European citizens, implicitly request the Member States to cooperate in order to ensure the effectiveness of such protection. Even more significantly, Article 34 TEU, concerning the EU representation in multilateral *fora*, requests the Member States to coordinate their actions, and it demands the High Representative to organise such coordination; consequently, the EU Delegations to international organisations should coordinate the activities of national representations in those frameworks.

The modalities of diplomatic cooperation in practice do not seem to have significantly changed since the entry into force of the Lisbon Treaty: the frequency and outcome of the meetings are still determined by the needs that prevail in the field.<sup>641</sup> This is not particularly surprising, considering that the modalities of European diplomatic cooperation have always been determined in a pragmatic manner. What the Lisbon reform changed was the identity of the actor that is pivotal to the process of coordination, that is to say the chair of the diplomats' meetings. Since the Rotating Presidency no longer has any competence in the field of external representation, it is for a Union office to ensure the chairing of European missions abroad. This office is the EU Delegation, which, according to Article 221(1) TFEU, represents the Union in respect of both CFSP and non-CFSP issues. This last aspect is of particular importance, since it is the *ius representationis omnimodo* that grants the Delegation the ability to chair these meetings, which concern 'political' as well as 'technical' issues. In practice, the meetings at ambassadorial level are chaired by the Head of Delegation (at the level of ambassadors), his/her deputy, or the heads of the Delegations' sections.

The presence of the Delegation solves most of the problems generated by the role of the Commission. Unlike its predecessor, the new EU Delegation headed by the EEAS can easily be characterised as 'diplomatic' in nature, also in the eyes of other European diplomats. This is due not only to the fact that diplomats from the Member States are seconded to the EEAS, but also to the Delegation's capability to manage 'high politics'. The characterisation of the Delegation as a 'diplomatic' mission is likely to have at least one beneficial effect: national diplomats may accept to provide it with access to restricted information on a regular basis, something they were not always willing to do with Commission Delegations because of their perceived lack of secrecy.

What is more, the Delegation has relevant advantages over the Rotating Presidency, as a chair of European meetings. As it is evident, the Delegation should not suffer from a conflict of *priorities*. Since the work of the Delegation is directed by the EEAS, it is presumable that the coordination should be oriented to the pursuit of the Service's overarching priority, that is to say coherence. This should motivate the Member States to rely on the coordination provided by the Delegation in the field, and accept its function as an 'honest broker'. The possible presence of Commission officers *qua* Delegation representatives in meetings at head of section level does not

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<sup>640</sup> Similarly, Article 5(9) of the EEAS Decision affirms that "the Union delegations shall work in close cooperation and share information with the diplomatic services of the Member States". This provision cannot be intended as a unilateral obligation of cooperation for the Delegation, since such reading would imply that a EU organ 'works together' with Member States' bodies...that do not work with the EU organ itself. In this sense, see Blockmans and Hillion, *op. cit.*, pp. 21-22.

<sup>641</sup> Wouters et al., *The Organisation and Functioning of the European External Action Service: Achievements, Challenges and Opportunities* (European Parliament, 2013), p. 70.

challenge this finding, since they must respond to the Head of Delegation. The fact that national diplomats may often chair coordination meetings, *qua* temporary EEAS officers, may raise some conflicts of allegiance, but, as seen in chapter 2, such problems are not likely to be frequent.

EU Delegations have also an advantage in terms of *capacity*: unlike the embassies of most EU Members, they can chair the meetings in almost all third countries. The Delegations may ensure coordination also within the international organisations to which they are accredited, even when the EU is not a Member of the organisation; this is the case, for instance, of the United Nations. Thus the EEAS may make sure that the arrangements concerning diplomatic cooperation respond to similar standards; it may also be expected that the Service will be able to easily promote the transfer of the 'best practices' from one context to the other.

Finally, and most evidently, the Delegations ensure the *continuity* of the coordination. This is important in an internal perspective, because the representatives of the Member States have a permanent interlocutor, with which they can develop a relationship of mutual trust. The permanence of the Delegation has also a most important external consequence: the host State, or the other Members of international organisations, have a single interlocutor. Thus the unity of Europe may become complete: not only does the Union speak with a single representative (i.e. the Head of Delegation), but its Members may identify with the 'one voice' of the EU. It is already possible to notice that EU Heads of Delegation routinely deliver messages on behalf of the Union and its Members, thus reinforcing the Union identity (and visibility) on the international scene. For instance, EU representatives have been delivering 'local statements' on behalf of the Union and its Members concerning issues like peace-building in Ivory Coast,<sup>642</sup> freedom of expression in Mali<sup>643</sup> and the use of force on the part of Israel.<sup>644</sup>

The diplomatic unity brought by the EEAS may, in the long term, lead to the prevalence of a diplomatic 'norm' of consultation among European

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<sup>642</sup> EU Delegation to Ivory Coast, La Délégation de l'Union européenne émet la déclaration locale suivante en accord avec les Chefs de Mission des Etats membres en République de Côte d'Ivoire, 25 June 2012: "La Délégation de l'Union européenne s'inquiète de la montée en puissance d'un discours virulent parmi la classe politique et les médias ivoiriens. Ce genre de propos a par le passé attisé la haine et les conflits. Ils nuisent aujourd'hui au processus de dialogue et de réconciliation nationale souhaité par le Président de la République et les citoyens, qui aspirent à vivre en paix", see [www.eeas.europa.eu](http://www.eeas.europa.eu).

<sup>643</sup> EU Delegation to Mali, Communiqué de l'Union européenne sur les atteintes contre la liberté de la presse au Mali, 19 July 2012: "La Délégation de l'Union européenne en accord avec les Chefs de Mission des Etats Membres de l'Union Européenne accrédités au Mali a publié le communiqué suivant: La Délégation de l'Union européenne à Bamako dénonce avec force les agressions dont sont victimes des journalistes au Mali. Elle condamne ces tentatives d'intimidation et se prononce en faveur d'une presse libre, pluraliste et responsable, qu'elle soit écrite ou audiovisuelle, publique ou privée", see [www.eeas.europa.eu](http://www.eeas.europa.eu).

<sup>644</sup> EU Delegation to Israel and EU Technical Assistance Office (West Bank), Local EU statement on NGO offices raided by Israeli security forces: "The EU missions in Jerusalem and Ramallah are deeply concerned by the incursion by Israeli

Security Forces into Ramallah on 11 December, to raid the offices of 3 NGO's with which the EU and some of its Member States have implemented cooperation projects: [...] The EU missions in Jerusalem and Ramallah see Palestinian civil society as an essential partner in the shared project of democratic state building." See also the Local EU statement on recent arrests of Palestinian lawmakers, 28 January 2012: "The EU Missions in Jerusalem and Ramallah are concerned about the arrest at the ICRC office in East-Jerusalem of Palestinian Legislative Council member Mohammed Totah and former Minister for Jerusalem Affairs Khaled Abu Arafah. The EU missions in Jerusalem and Ramallah are also concerned about the recent arrests of PLC Speaker Aziz Dweik and PLC members Khaled Tafesh and Abduljabbar Fqaha", see [www.eeas.europa.eu](http://www.eeas.europa.eu).

representatives,<sup>645</sup> which has aptly been described as 'Community reflex' or 'coordination reflex'.<sup>646</sup>

If the cooperation proves to be particularly effective, the Member States may decide to pragmatically renounce the exercise of (part of) their right of legation, in favour of the EU Delegation. The Member States may do so by adopting the Delegation as their organ, in particular when diplomatic relations are broken off between a EU Member State and the State hosting the Delegation, or if the mission of the EU Member is recalled. The EU Member State may entrust the protection of its interests to the EU,<sup>647</sup> which may perform this function via the Delegation. Such solution might be useful in case the EU Member wanted to express its dissatisfaction with the behaviour of the host State, but intended to maintain the diplomatic 'channel' open. The choice of the Union, rather than another State, as the 'protecting power' for these purposes may be logical, in so far as the latter is more likely to have a political agenda differing from that of the EU Member breaking diplomatic relations. The entrustment of diplomatic functions on the EU Delegation may also become permanent, at least in respect of bilateral diplomacy, for instance because a Member State seeks to be 'present' in a third country, but it does not intend (or cannot) establish a mission of its own, also because of financial reasons.<sup>648</sup> The temporary and permanent entrustments of functions to the Delegation may be accompanied by the secondment of national officers to the Delegation. In this case, the EU and its Member(s) may be able to ensure external unity and internal division of labour, through the creation of a national section within the Delegation. In a formal perspective, national diplomats may be presented to the receiving State as officers of the Union. In a substantive viewpoint, they would maintain a certain margin of manoeuvre in the conduct of national policies within the Delegation. Although some (small) Member States expressed interest for some form of adoption of the Delegation as a national organ, this solution seems not to be exceedingly realistic at present, since renouncing the control on embassies would dramatically decrease the visibility of a EU Member abroad. In order to decrease costs and maintain the visibility of national diplomacy at once, the Member States may simply seek to co-locate their missions with the EU Delegation, as some of them have done in Ethiopia, Yemen,<sup>649</sup> South Sudan, Nigeria

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<sup>645</sup> For a discussion of the diplomatic 'norm' of consultation see Holland, "European Political Cooperation and Member State Diplomatic Missions in Third Countries - Findings from A Case Study of South Africa", 2 *Diplomacy and Statecraft* (1991): 236-253. Notice that the interviews recently conducted by Wouters et al., op. cit., p. 70, suggest that the novel arrangements have generally improved coherence.

<sup>646</sup> According to Bale, "Field-Level CFSP: EU Diplomatic Cooperation in Third Countries", 10 *Current Politics and Economics of Europe* (2000): 187 – 212, p. 38, there was not, at the time, anything that "could accurately be described as a coordination reflex. The automaticity implied by such a term is impossible when those who might demonstrate - the diplomats themselves - rely in important matters on instructions from home first before acting in concert".

<sup>647</sup> See Article 45 of the 1961 Vienna Convention, cit. *supra*.

<sup>648</sup> The figures presented by Emerson et al., *Upgrading the EU's role as global actor: institutions, law and the restructuring of European diplomacy* (CEPS, 2011), p. 10, in fact, "suggest huge scope for economies of scale if the EEAS is able to take on functions that in some cases are currently duplicated 27 times. There are possibilities for this in arranging common political and economic reporting, in establishing common consular services for issuing at least short-term Schengen visas, and in arranging for mini-diplomatic missions to be co-located with the EU Delegations to save in infrastructural costs. In addition there are many international meetings where the EU does not have to be represented by 27+1 delegations"; see also *Id.*, p. 63.

<sup>649</sup> Wouters et al., op. cit., p. 71.

and Tanzania.<sup>650</sup> Even this solution, however, is far from being sought by all the Member States.

Not only are EU States unwilling to renounce the control on their embassies, but they sometimes challenge the very foundations of EU diplomatic cooperation, by contravening their duty of loyalty. Recently, some EU countries intermittently questioned the representative capacity of the EU Delegations, for political rather than legal reasons.<sup>651</sup> Even when the Member States accepted the role of the Delegation, the effectiveness of the latter's action was sometimes impaired by the maintenance of national positions conflicting with the single stance adopted at EU level.<sup>652</sup>

What is more, the Members' loyalty to the Union is not sufficient to ensure unity in practice, since the absence of unanimity renders coherence impossible. For the time being, the Member States remain less than eager to cooperate in areas affecting their core interests and visibility in specific third countries.<sup>653</sup> This is, in fact, a limit of European diplomatic coordination that cannot be addressed by the EEAS. As in other fields, the Service may foster unity, but it cannot *enforce* it.

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This section sought to investigate the peculiarities of the EU's representation at diplomatic level. It demonstrated that the EU's diplomatic representation is not unaffected by fragmentation, but that the creation of the new post of Head of Delegation, who is an EEAS officer, has the potential to limit the shortcomings entailed by such fragmentation. It is manifest that the legislator sought to promote unity, and thus coherence in this area, since the Head of Delegation is meant to facilitate coordination between the activities of the EEAS and those of the Commission, through his/her insertion in the hierarchy of both entities. Importantly, the coordinating functions of the HoD are not inspired by a 'static'

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<sup>650</sup> N. Westcott, Managing Director for Africa, EEAS, in UK House of Lords, The Select Committee on the European Union, Inquiry on European External Action Service, 22 January 2013, p. 4, available at <http://www.parliament.uk>.

<sup>651</sup> *Id.* See also Van Vooren and Wessel, "External Representation and the European External Action Service: Selected Legal Challenges", in Blockmans and Wessel (eds), *Principles and Practices of EU External Representation* (CLEER, 2012), pp. 59-83, p. 66, who notice that "the fact that now Article 47 TEU explicitly gives legal personality to the EU, has prompted the UK to deploy the rather legal-formalistic argument that the terminology 'EU' can no longer be utilized to designate 'EC and its Member States' when delivering statements on behalf of the EU in multilateral fora. [...] The Commission and several Member States strongly opposed this reasoning, which led to 'EU' representation in multilateral fora such as at the OSCE and UN to ground to a halt during the second half of 2011." The issue was partially solved with the "General Arrangements for EU Statements in Multilateral Organisations", Council doc. 16901/11, 24 October 2011, which regulates how messages are to be delivered 'on behalf of the EU' or on behalf of "the EU and its members".

<sup>652</sup> According to a diplomat from a non-EU State, interviewed by the author in April 2012, it is well known that the positions upheld by EU and Member States' diplomatic missions, especially in the fields of human rights, are often contradicted by the behaviour of national embassies in the context of bilateral relations. Several EEAS officers interviewed at a latter stage denied the existence of such a widespread practice. Anyway, also Wouters et al., *op. cit.*, p. 71, notice that "in case of delicate issues, such as human rights, the Member States prefer an EU demarche. While this may impair the Union's relationship with the third country in question, it allows Member States to continue to maintain good relations with it."

<sup>653</sup> Wouters et al., *op. cit.*, p. 70.

understanding of division of labour, but they are modelled to increase coherence where unity is most necessary,

#### CONCLUSION OF CHAPTER 4

This chapter intended to demonstrate that the EEAS can enhance unity in EU external representation, and thus lead to increased coherence in the conduct of European foreign policies. It is submitted that, although the external representation of the Union is fragmented because of conferral, the EEAS may contribute to increase the EU's unity on the international scene. In general, the EEAS renders such unity more feasible, since the Commission may be relatively more trustful of the Service than it is of other entities, including the HR. It is in the field of diplomacy, however, that the Service brings about the most evident added value.

The EU has the potential to conduct an almost full (and state-like) diplomacy, and this potential is largely confirmed by the practice. Such potential would however be nullified by the fragmentation of competences in the field of external representation, by projecting the divisions between EU actors in third countries and at international organisations. Given the need to foster unity in this area, the legislator directly provided an EEAS officer, the Head of Delegation, with the capability to oversee the entire work of EU delegations, also in the areas falling within the competences of the Commission, thus privileging unity in international representation over delimitation. The HoD was also allowed to substitute Commission officers in areas where unity is essential, that is to say budget implementation and, above all, external representation *stricto sensu*.

The EEAS' contribution to diplomatic unity is not limited to the EU level. In fact, unity can be promoted also transversally to the divide between EU and Member States' competences, since the new EU Delegations are likely to render diplomatic coordination more effective. In sum, third States may have finally found, in their own territory, the telephone number they need to talk to Europe.

## CONCLUSION

The analysis sought to demonstrate that the European External Action Service is a new sort of Union body, which is meant to reconcile the two Europes that interact with the world – the 'technocratic Europe', dealing with 'Communitarian' issues such as trade and aid, and the 'power Europe', dealing with 'high politics'.<sup>654</sup>

The motivation for this 'mixed' identity is found in the contradiction that affects current European foreign policy. Monnet's prophecy on Europe's role in international relations has become commonplace: "nos pays sont devenus trop petits pour le monde actuel à l'échelle des moyens techniques modernes, à la mesure de l'Amérique et de la Russie d'aujourd'hui, de la Chine et de l'Inde de demain".<sup>655</sup> Therefore, the pure 'intergovernmental' vision can no longer be accepted. The Member States do not ignore this fact, but they are not willing to preside over the dismemberment of their foreign policies, because of ideology, the lack of mutual trust or the existence of diverging interests. In this context, an inflexible support for the Community method throughout European foreign policies probably would be counterproductive, since the Member States may prefer not to cooperate rather than accepting the EU's 'competence creep'. This conundrum is solved by accepting plurality in European foreign policy, while requesting the Union and its Members to ensure the *coherence* of their external actions.

Coherence can be implemented only through the coordination of the different, and separate, initiatives of European policy-makers, that is to say by bridging the gap between the 'Community' and intergovernmental approaches. This is the 'Union method' envisaged by A. Merkel: "coordinated action in a spirit of solidarity - each of us in the area for which we are responsible but all working towards the same goal".<sup>656</sup> The EEAS embodies the 'Union method', since it is clearly meant to coordinate the different strands of European foreign policy. In fact, the Service is not a simple extension of the *acquis communautaire* in the sphere of the Union's external relations<sup>657</sup>, because it is tasked with promoting consensus among the Member States, and it must consequently consider their interests and priorities. The EEAS is not a proxy of the Member States either, since it operates under the control of a EU organ (the High Representative) in close cooperation with the Commission; moreover, its officers are likely to work with the interests of the Union in mind.

The characterisation of the EEAS as a 'coordinator' explains its apparently anomalous features. Some aspects of the Service overtly defy conferral and its corollaries precisely because the EEAS was designed from the onset to pragmatically combine the Community and intergovernmental methods. The

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<sup>654</sup> Vaisse et al., op. cit., p. 20.

<sup>655</sup> Jean Monnet (1954), quoted in Barroso, *Europe: quel héritage? Quelles responsabilités? – Etats généraux de l'Europe*, Strasbourg, 17 April 2010, SPEECH/10/166.

<sup>656</sup> Speech by Federal Chancellor Angela Merkel at the opening ceremony of the 61st academic year of the College of Europe in Bruges on 2 November 2010.

<sup>657</sup> See European Parliament legislative resolution of 8 July 2010 on the proposal for a Council decision establishing the organisation and functioning of the European External Action Service, O.J. 2011 C 351, preamble.

challenge is now to make sure that this pragmatic approach is applied in respect of all the activities of the Service, thereby including also the areas where the concern for delimitation constantly hinders an effective coordination. For instance, EEAS officers may be enabled to give financial implementation to the operative lines of the EU budget; additionally, the EEAS should be allowed to verify all the instructions sent to EU officers in Delegations, possibly via the Heads of Delegation.<sup>658</sup> More generally, it is necessary to redefine the EEAS' tasks on the basis of what best achieves the desired outcome, rather than institutional theory or dogma. It would thus seem logical to give the Service responsibilities in the most politically sensitive areas, even when they pertain to fields other than the CFSP, such as in the case of security management<sup>659</sup> or climate change.<sup>660</sup> This can be done through the revision of the EEAS Decision due to take place in 2013/2014. In principle, it would seem logical to 'de-regulate' the division of labour between the Service and other bodies, since the recent practice suggests that EU services require ample scope for manoeuvre in the determination of their respective roles. However, such course of action is possible only if Union institutions, and namely the Commission, voluntarily accept the 'interference' of the EEAS with their activities. Further research may indicate which 'hard' or 'soft' legal instruments are most apt at ensuring increased coherence in practice.

The nature of the EEAS as a coordinator provides indications also as to its probable influence on European foreign policy. The Service is bound neither to reinforce the 'exceptionalism' of the Union as an international player, nor to transform the EU's external action into a state's realist foreign policy. The EEAS is more likely to mediate between the positions of European foreign policy actors, in order to foster its overarching objective, that is to say *coherence*. In other words, the EEAS is more concerned with the *existence* of a European foreign policy than with its *content*. Future researches may shed light on the exact consequences of the EEAS' creation. For instance, it would be useful to understand to what extent the allocation of the EU's development cooperation funds will be re-routed to non-development purposes in the next few years. Given the findings of chapter 3, it may be hypothesised that there may be shifts in certain marginal areas, and namely those closely linked to the CFSP, but that the bulk of EU aid will remain as development-oriented as it was in the recent past.

The EEAS' concern for effectiveness does not automatically imply its capability to ensure increased coherence in practice. It is possible that even a successful activity of coordination fails to increase coherence because of the opposition of some policy-makers. This apparent paradox can be elucidated through the example of the EU's stance towards Israel-Palestine relations. As it is known, the Union has a well-established position in this area, whereby it seeks to foster a comprehensive negotiated peace on the basis of a two-state solution.<sup>661</sup> This position is supported, at least in principle, via CFSP and non-CFSP initiatives alike.<sup>662</sup> However, it is easy

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<sup>658</sup> See *supra*, chapters 3 and 4.

<sup>659</sup> See *supra*, chapter 3.

<sup>660</sup> Cf. De Jong and Schuntz, *op. cit.*

<sup>661</sup> See Declaration by the High Representative on behalf of the European Union on the Middle East Peace Process, Brussels, 29 November 2012

<sup>662</sup> In the context of its trade policy, the Union does not extend the preferential treatment accorded to Israeli products to the goods originating from occupied territories. Indeed, whereas the EC-Israel Association Agreement provides for preferential treatment for Israeli products imported in the EU, "the European Union takes the view that products obtained in locations which have been placed under Israeli administration since 1967 do not qualify for the preferential treatment provided for



to note that EU diplomatic missions never publicly condemned the building of new Israeli settlements via a 'local statement'. This absence of unity may well depend on a weak coordination on the part of the EU Delegation (and thus of the EEAS) but it may also be caused by the rigidity of some Member States: as noted in chapter 4, the Service can promote, but not enforce, unity in external representation.<sup>663</sup>

The example of Israel-Palestine relations shows also that coherence may be ensured even in the absence of a successful coordination. In 2011, some EU Members voted in favour of Palestine accession to UNESCO, whereas others opposed it, and a third group abstained. The following year, when the UN General Assembly granted observer status to Palestine, cohesion was greater, and only one Member opposed the demand of Palestine.<sup>664</sup> Evidently, it is not possible to assert *a priori* whether this improvement is a consequence of the EEAS' coordination or depends on exogenous factors, such as the international outrage for the boosting of the Israeli colonisation policy.<sup>665</sup>

Thus assessing the added value of the Service is a complex task. A balanced evaluation of the EEAS' contribution to European foreign policy can only be performed through an accurate analysis of the specific circumstances of each case and the mobilisation of new theoretical tools, capable of distinguishing the outcome of the coordination process from that of the EU action as a whole. Future research may consequently demonstrate empirically whether the Service is a mere instrument for the projection of national interests or it has the capability to create a coherent foreign policy where incompatible views previously existed.<sup>666</sup> This kind of research would not serve only academic purposes, but it would also help parliamentary bodies and European citizens to identify the subjects responsible for the creation, or the absence, of EU-wide policies.

These conclusions, as well as the additional researches they suggest, are particularly significant, since the 'Union method' is likely to be the sole means through which a European foreign policy can come into being during the next years. The creation of a monolithic, 'Community-like', foreign policy would need the relativisation of national interests, which, in turn, necessitates the weakening of national identities. Since this outcome is far from being achieved, the sustainability of a European foreign policy can only be ensured via the affirmation of a new approach to external

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under that agreement, Case C-386/08, *Firma Brita GmbH v Hauptzollamt Hamburg-Hafen*, [2010] ECR I-1289, para 64

<sup>663</sup> A third explanation may be that the HR issued such condemnation herself in numerous occasions. It is worth noticing, however, that in this case it is the *Union* and not its Members that condemns Israeli actions. If the settlement policy were condemned via a joint statement of EU missions, the participation of all Union members would be more evident. The European countries that are closest to Israel may therefore prefer the former solution, which is less problematic for their bilateral relations.

<sup>664</sup> From the 2011 to the 2012, three Member States switched from abstention to approval (Italy, Denmark, Portugal), three countries switched from "no" to abstention (Germany, Netherlands, Lithuania), one country switched from "no" to approval (Sweden), see Fisher, "Map: How Europe voted on Palestine at the U.N., in 2011 and now", *Worldviews-Washington Post*, <http://www.washingtonpost.com/blogs/worldviews>, 29 November 2012.

<sup>665</sup> Cf. McGreal, "Israel to build new Jewish settlement homes after UN Palestine vote", *The Guardian*, 30 November 2012, according to whom "the Israelis were particularly stung by the German decision to shift from opposition to abstention. Haaretz reported that Germany moved because of Israeli intransigence on Jewish settlement construction and because Israel had not met previous commitments to the German government."

<sup>666</sup> A theoretical framework to address at least part of this issue is provided for in Furness, "Who Controls the European External Action Service? Agent Autonomy in EU External Policy", 18 *European Foreign Affairs Review* (2013): 103-122.

relations, which acknowledges that "often the choice is not between the Community method and the intergovernmental method, but between a coordinated position and nothing at all".<sup>667</sup> The development of this coordination is the main contribution of the EEAS to European integration and the principal challenge it has to face. Besides, "coordination is often a first stage which leads on to more integrated measures."<sup>668</sup>

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<sup>667</sup> Van Rompuy, *Not Renationalisation of European Politics*, cit. *supra*.

<sup>668</sup> *Id.*

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