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EEAS 2.0

A legal commentary on Council Decision 2010/427/EU
establishing the organisation and functioning of the
European External Action Service

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(editors)

Contributors

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Preface

Pursuant to Article 13(3) of Council Decision 2010/427/EU of 26 July 2010 establishing the organisation and functioning of the European External Action Service, the High Representative is held to provide a review of the organisation and functioning of the EEAS by mid-2013. This review will cover, inter alia, the implementation of Article 6(6), (8) and (11), so as to ensure an adequate geographical and gender balance and a meaningful presence of nationals from all member states in the EEAS. If necessary, the review will be accompanied by appropriate proposals for the revision of the 2010 Council Decision (e.g., suggestions for additional specific measures to correct possible imbalances of staffing). In that case, the Council will, in accordance with Article 27(3) TEU, revise the Decision in light of the review by the beginning of 2014.

This short and user-friendly legal commentary on the 2010 Council Decision is the first of its kind and is intended to inform those involved in the review process and to serve as a reference document for practitioners and analysts dealing with the EEAS. This commentary is not an elaborate doctrinal piece, but rather a textual and contextual analysis of each article, that takes account of i) other relevant legal provisions (primary, secondary, international), ii) the process leading to the adoption of the 2010 Council Decision (i.e. *travaux préparatoires*), iii) the preamble of the Council Decision, and iv) insofar as it is possible at this stage, early implementation. Wherever relevant, cross-references to other provisions of the EEAS Council Decision have been made so as to tie in the different commentaries and ensure overall consistency.

The commentary has been produced by an independent, multinational and multidisciplinary team of scholars brought together by Swedish Institute for European Policy Studies (SIEPS), the European University Institute (EUI) and the Centre of European Policy Studies (CEPS) in the framework of the so-called 'European External Action Service 2.0' project. This research project is carried out in association with the Amsterdam Centre for European Law and Governance (ACELG), the Centre for the Law of EU External Relations (CLEER), the European Institute of Public Administration (EIPA), the Leuven Centre for Global Governance Studies, and the University of Copenhagen.

To serve the ulterior aims of the project, the research team will, in the upcoming months, collect views from different stakeholders about problems faced in the implementation of the EEAS Council Decision and challenges to the organisation and functioning of the EEAS. In particular, the project team will assess whether there is enough interpretative room in the current Council Decision to accommodate changes to the organisation and functioning of the EEAS *à droit constant*. If the margins of appreciation appear too restricted, then the project will offer recommendations as to how to amend the 2010 Council Decision in order to improve the organisation and functioning of the EEAS. The research outputs of this next phase of the project will take the form of a policy briefing with recommendations, to be published at the end of June 2013. A more elaborate academic booklet, compiling all papers produced during the project, will appear this autumn. The products of the EEAS 2.0 project will be published through the regular channels of the research centres involved in this collaborative framework.

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List of terms and abbreviations

AFCO	Constitutional Affairs Committee of the European Parliament
AFET	Foreign Affairs Committee of the European Parliament
CCA	Consultative Committee on Appointments
CEOS	Conditions of Employment of Other Servants
CFSP	Common Foreign and Security Policy
CMPD	Crisis Management and Planning Directorate
COREPER	Committee of Permanent Representatives
CPCC	Civilian Planning and Conduct Capability
DCI	Development Cooperation Instrument
EEAS Decision	Council Decision 2010/427/EU establishing the organisation and functioning of the European External Action Service
EDF	European Development Fund
EIDHR	European Instrument for Democracy and Human Rights
ENPI	European Neighbourhood and Partnership Instrument
EUMS	European Union Member States
FAC	Foreign Affairs Council
FPI	Foreign Policy Instruments Service
ICI	Instrument for Cooperation with Industrialised Countries
NSCI	Instrument for Nuclear Safety Cooperation
nyr	not yet reported
PSC	Political and Security Committee
Quadrilogue	Meeting involving the Council, the High Representative, the European Parliament and the European Commission
SNE	Seconded national expert
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union

ARTICLE 1

Nature and Scope

1. *This Decision establishes the organisation and functioning of the European External Action Service ('EEAS').*
2. *The EEAS, which has its headquarters in Brussels, shall be a functionally autonomous body of the European Union, separate from the General Secretariat of the Council and from the Commission with the legal capacity necessary to perform its tasks and attain its objectives.*
3. *The EEAS shall be placed under the authority of the High Representative of the Union for Foreign Affairs and Security Policy ('High Representative').*
4. *The EEAS shall be made up of a central administration and of the Union Delegations to third countries and to international organisations.*

Article 1 of the Council Decision establishing the organisation and functioning of the European External Action Service (hereinafter the “EEAS Decision”)¹ is entitled “nature and scope”. The provision not only sets out the nature and scope of action *of the Service* (Section 2), it also relates to the nature and scope *of the Decision* itself (Section 1).

1. Nature and scope of the EEAS Decision

- The EEAS Decision was adopted by the Council on the basis of Article 27(3) TEU,² which is the sole provision in the TEU and TFEU that deals with the EEAS.³ Article 27(3) TEU contains three substantive elements on the Service: its *name*, its basic *composition* (“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”) and, albeit in broadly defined terms, its essential *functions*:⁴ namely, to “assist” the High Representative and to “work in cooperation with the diplomatic services of the Member States”. The provision otherwise sets out a specific procedure to establish “[t]he organisation and functioning of the European External Action

¹ Council Decision 2010/42/EU establishing the organisation and functioning of the European External Action Service; OJ 2010 L201/30.

² See Preamble EEAS Decision.

³ The EEAS is also mentioned in Declarations 13 and 14, concerning the common foreign and security policy, and Declaration 15 on Article 27 of the TEU.

⁴ See the discussion on Article 2 EEAS Decision, below.

Service... [whereby the] Council shall act on a proposal from the High Representative after consulting the European Parliament and after obtaining the consent of the Commission”.

- Article 27(3) TEU thus gives a mandate to EU institutions to build upon the Treaty provisions on the EEAS. Yet this mandate appears to be narrowly defined. The Council is empowered to adopt a decision only to establish the “organisation and functioning” of the EEAS,⁵ as indeed recalled in the first paragraph of the EEAS Decision’s preamble, in its Article 1(1), and in its very title. While the notions of “organisation and functioning” could be understood broadly, whether the EEAS Decision, in view of its legal basis, could have included anything more than the general statements on the Service’s mandate that it encloses is subject to question.⁶
- Article 27(3) is located in the CFSP chapter of the TEU (Chapter 2, Title V). Thus, formally, the EEAS Decision is a CFSP act, which in turn would suggest that the EEAS is conceived as a CFSP creature. Yet, the numbering of the Decision in the Official Journal of the EU (“2010/427/EU”) contains an “EU” rather than the “CFSP” reference that CFSP acts usually hold.⁷ The question can thus be raised as to whether the EEAS Decision was conceived as a measure having horizontal nature and scope, rather than of CFSP character only. Such a broad ambit appears to be borne out by the provisions of the Decision itself,⁸ and would incidentally explain the General Court’s uninhibited approach to the Decision that transpires from its Order in case *Elti d.o.o v Delegation of the European Union to Montenegro*.⁹ To be sure, the procedure set out in Article 27(3) TEU does contrast with the archetypal CFSP decision-making procedure evoked in Article 24(1) and 31 TEU, for example, notably in view of the significant roles it

⁵ That the Treaty of Lisbon left it to the EU institutions to elaborate the organisation and functioning of the EEAS is quite remarkable in view of the notable preoccupation with competence that otherwise constrained its drafting. It also indicates that the tangible contribution of the EEAS to furthering coherence essentially depends on the institutions being willing and able to agree.

⁶ See the discussion on Article 2 EEAS Decision, below.

⁷ E.g. Council Decision 2012/392/CFSP of 16 July 2012 on the European Union CSDP mission in Niger (EUCAP Sahel Niger) (OJ L 187, 17.7.2012, p. 48–51); Council Decision 2012/333/CFSP of 25 June 2012 updating the list of persons, groups and entities subject to Articles 2, 3 and 4 of Common Position 2001/931/CFSP on the application of specific measures to combat terrorism and repealing Decision 2011/872/CFSP (OJ L 165, 26.6.2012, pp. 72–74).

⁸ See, for instance, Article 9 of the EEAS Decision, on external action instruments and programming; and discussion of that provision, below.

⁹ The GC appears to consider that it has jurisdiction on the Decision; see Case T-395/11 *Elti d.o.o v Delegation of the European Union to Montenegro*, Judgment of 4 June 2012, nyr, paras. 31ff.

attributes to the supranational political institutions of the Union. In particular, the Commission has to give its *consent* for the decision to be adopted, while the Parliament has the right to be consulted, a right that in practice endowed it with a significant influence over the decision-making process.¹⁰ The rationale for locating the legal basis of the EEAS decision in the CFSP chapter of the TEU can thus be questioned.¹¹

- If the EEAS Decision was indeed conceived as a CFSP act, its scope is in principle circumscribed by the non-contamination principle of Article 40(1) TEU.¹² While the Court of Justice has recalled that the “Union's competence in matters of [the CFSP] shall cover all areas of foreign policy and all questions relating to the Union's security”,¹³ the provisions of the EEAS Decision cannot in principle affect the application of the “procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences referred to in Articles 3 to 6 of the Treaty on the Functioning of the European Union”. That would arguably be the case if the Decision legally affected the powers of the Commission,¹⁴ for example, as established in the TFEU.¹⁵

¹⁰ For more on the process leading to the adoption of the decision, see B. Van Vooren, “A legal-institutional perspective on the European External Action Service”, CLEER Working Paper 2010/7; and L. Erkelens and S. Blockmans, “Setting up the European External Action Service: An institutional act of balance” (2012) 8 *European Constitutional Law Review*, pp. 246-279.

¹¹ The provision on the EEAS in the Treaty establishing the Constitution was also located in the specific CFSP Chapter (Article III-296).

¹² According to Article 40(1) TEU: “The implementation of the common foreign and security policy shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences referred to in Articles 3 to 6 of the Treaty on the Functioning of the European Union”. Article 40 TEU is mentioned specifically in Article 4(3)(a) of the EEAS decision, in the section concerning the role of CSDP bodies included in the EEAS central administration, as if none of the other provisions of the decision were in any way likely to raise issues of compatibility with Article 40 TEU. This would tend to further support the notion that the decision has a horizontal dimension.

¹³ See C-130/10 *European Parliament v Council*, Judgment of 19 July 2012, nyr, at para 62.

¹⁴ In this regard, see the discussion on the ‘normal tasks’ of the Commission evoked in Article 2 EEAS Decision, below.

¹⁵ In view of the case law related to former Article 47 TEU (e.g. Case C-91/05 *Commission v Council* [2008] ECR I-3651), questioning the validity of a CFSP act such as the EEAS decision by reference to the non-contamination principle (now enshrined in Article 40(1) TEU), can arise not only in the context of annulment proceedings (Article 263 TFEU, i.e. within two months following the adoption of the decision), but also through a plea of illegality (Article 277 TFEU), if a decision was adopted on the basis of the 2010 Decision – as there have been in practice (E.g. Joint Decision of the Commission and the HR on Cooperation Mechanisms concerning the Management of Delegations of the European Union, JOIN(2012)8, 28.3.2012) or arguably through a preliminary ruling procedure (Article 267 TFEU).

- Incidentally, the *ECOWAS* case law leaves important interpretative scope for the EEAS in line with the principle of coherence. First, where acts do not resort to “legal effect”,¹⁶ Article 40 TEU is not violated. Hence the Service can play an important role in non CFSP-issues without violating the non-contamination clause. Second, the Court in *ECOWAS* also left room for legal instruments which do not “implement” TEU (CFSP) or TFEU policies, but which function at a level of generality in order to ensure coherent EU external policies, and therefore do not “prejudice questions of competence”.¹⁷ Thus, legally the EEAS has quite a bit of leeway to fully play its role in ensuring coherence across all EU foreign policies, regardless of Article 40 TEU.

- The scope and nature of the EEAS Decision should also be considered in the light of Declaration 14 (annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon) according to which: “the provisions covering the Common Foreign and Security Policy including in relation to the High Representative of the Union for Foreign Affairs and Security Policy and the External Action Service *will not affect the existing legal basis, responsibilities, and powers of each Member State in relation to the formulation and conduct of its foreign policy, its national diplomatic service, relations with third countries and participation in international organisations, including a Member State's membership of the Security Council of the United Nations*” (emphasis added). Thus in principle, the EEAS Decision as CFSP act could not be formulated in such a way as to affect member states’ (diplomatic services) responsibilities and powers in those specific domains.

2. Nature and scope of the Service

- In line with the position defended by the member states,¹⁸ and in contrast to the wishes of the European Parliament (and of the Commission),¹⁹ Article 1 EEAS

¹⁶ See C. Hillion and R.A. Wessel, “Competence Distribution in EU External Relations after *ECOWAS*: Clarification or Continued Fuzziness” (2009) 46 *Common Market Law Review*, pp. 551-586.

¹⁷ See B. Van Vooren, “The Small Arms Judgment in an Age of Constitutional Turmoil” (2009) 14 *European Foreign Affairs Review*, pp. 231-248.

¹⁸ See e.g. Presidency Report to the European Council on the European External Action Service, 14930/09, 23 October 2009.

¹⁹ See e.g. Brok Report to the Committee on constitutional affairs on the institutional aspects of setting up the European External Action Service (2009/2133(INI)) A7-0041/2009.

Decision emphasises the *autonomous character* of the EEAS in several ways. Made up of its own “central administration and of the Union Delegations to third countries and to international organisations”, the Service is conceived as “a functionally autonomous body” of the EU, placed “under the authority of the High Representative”, and “separate from the General Secretariat of the Council and from the Commission”. It is endowed with a “legal capacity necessary to perform its tasks and attain its objectives”.

(i) A “body” of the Union

- As a “body” (translated as “organe” in French), the EEAS is not formally included in the list of EU institutions enshrined in Article 13 TEU, although it is envisaged as such for the purpose of the Staff and Financial regulations,²⁰ respectively.²¹
- The notion of “body” is referred to in and regulated by several provisions of EU primary law.²² Akin to EU institutions, a “body” is bound by e.g. the provisions of the EU Charter of Fundamental rights (see Article 51 EUCFR). Indeed, as a *body*, the EEAS may be brought to Court, e.g. under Articles 263 and 265 TFEU, according to which “acts of bodies intended to have legal effects on third

²⁰ Regulation (EU, Euratom) No 1080/2010 of the European Parliament and of the Council of 24 November 2010 amending the Staff Regulations of Officials of the European Communities and the Conditions of Employment of Other Servants of those Communities, OJ L311, 26.11.2010, p. 1; Regulation (EU, EURATOM) No 1081/2010 of the European Parliament and of the Council of 24 November 2010 amending Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities, as regards the European External Action Service, OJ L 311, 26.11.2010, p. 9

²¹ See pt 8 of Preamble of the EEAS Decision; see also the discussion on Articles 6 and 8 EEAS Decision, below.

²² Here are some Treaty Provisions having legal relevance for EU “bodies”: **TEU**: Article 9 (all bodies respect democratic principles), **TFEU**: Article 15(1) (transparency by all EU bodies); Article 15(3) (access to documents of all bodies); Article 16 (personal data protection by EU bodies); Articles 20 & 24 (citizens may petition “advisory bodies” of the EU); Article 71 (representatives of EU bodies may participate in standing committee on internal security); Article 88 (Europol receiving info from ‘bodies’); Articles 123 & 124 (prohibition of ECB overdraft facilities to EU bodies); Article 226 (EP enquiries into maladministration, without prejudice to competence of other EU bodies or institutions), Article 228 (1)(EU ombudsman may receive complaints on EU bodies’ activities); Article 263 (review of legality of acts of bodies, and acts of those bodies may set up conditions concerning actions against them); Article 265 (failure to act also applicable to EU bodies), 267 (prelim. reference on acts of bodies of the EU), Article 287 1 & 3 (CoA examines accounts of all EU bodies), Article 298 (EU bodies have support of open efficient and independent European administration), Article 325 (combating fraud in all EU bodies).

parties” may be challenged before the European Court of Justice in case of violation of EU law.²³

- More generally, some of the Treaty principles governing the functioning of “institutions” are arguably applicable to bodies such as the EEAS. For instance, while Article 11 TEU on transparency, accessibility, included in the Title on “democratic principles”, only refers to EU “institutions”, the rules it encapsulates may apply *mutatis mutandis* to agencies or bodies given that Article 9 TEU, which operates as *chapeau* of this Title, emphasises that “[i]n all its activities, the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, *bodies*, offices and agencies” (emphasis added). At the very least, provisions applying to institutions in the context of primary law apply to the EEAS when functioning as an “institution”, viz. for the purpose of the Staff and Financial Regulations.²⁴
- While the EEAS, as a body, may be sued, the question may be raised as to whether it may also bring a case before the Courts. Such a standing could be derived from the “legal capacity” with which the EEAS is endowed “to perform its tasks and attain its objectives” (Article 1(2) EEAS).²⁵ Indeed, akin to the European Parliament in 1970-80s,²⁶ the Service ought to be able to defend its prerogatives before the Court of Justice precisely “to perform its tasks and attain its objectives”, however vaguely crafted they may be in the Decision.²⁷ Admittedly, such standing would however be complicated to exercise in practice given that the EEAS falls under the authority of the HR, who in turn is structurally tied both to the Commission (as VP) and to the Council (as HR and President of the FAC). Still, it is not inconceivable that, occasionally, the EEAS and the HR, on the one hand, and the Commission, on the other, might not share the same interest.²⁸

²³ See in this respect Case T-395/11 *Elti d.o.o v Delegation of the European Union to Montenegro*, Judgment of 4 June 2012, nyr, para. 26, and para. 73 *a contrario*.

²⁴ See discussion on Articles 6 and 8 EEAS Decision, below.

²⁵ The EEAS also has its own Legal Affairs Division.

²⁶ See Case 294/83 *Les Verts v Parliament* [1986] ECR 1339; and Case C-70/88 *Parliament v Council* [1990] ECR I-2041.

²⁷ See the discussion under Article 2 EEAS Decision, below.

²⁸ The case C-658/11 *European Parliament v Council of the European Union* on the EU agreement with Mauritius is a case in point: it has been suggested that the HR ought to intervene in support of the Council against the European Parliament, which is supported by the European Commission, which intervenes contrary to the legal advice of the EEAS Legal Affairs Department.

(ii) A “functionally autonomous” body

- Undoubtedly its structural links with the Council and Commission may circumscribe the autonomy of the EEAS. To be sure, in defining the Service as a “*functionally* autonomous body”, the decision appears to qualify the very autonomy that it enjoys.
- This qualified autonomy may indeed be related to the title and scope of the EEAS Decision itself, namely the “organisation and functioning of the EEAS”. In particular, it may be wondered whether the emphasis in Article 1 on the *functional* autonomy of the Service suggests that the latter is, by contrast, not *organisationally* autonomous. If so, then the question arises as to where the dividing line lies between ‘functioning’ and ‘organisation’. Arguably, “functioning” refers to carrying out its tasks of formulating policy proposals, information-gathering, etc., which the EEAS does autonomously from the Commission, whereas organisation refers to elements such as 1) the Staff and Financial Regulations where the EEAS has to respect relevant rules,²⁹ 2) accountability to the European Parliament, and 3) the fact that it is ‘under the authority’ of the HR.
- A reading of different language versions of the Decision confirms that the EEAS is not *organisationally* but only *functionally* autonomous in carrying out its tasks. Hence, the French text of Article 1 envisages the Service as “*un organe de l'Union européenne fonctionnant de manière autonome*”,³⁰ an expression that sounds less conceptual and perhaps more practical than the English phrase.³¹ The notion of functioning autonomously evoked by the French version might suggest that when fulfilling its “tasks” (to use the terminology of Article 2 EEAS) the Service does not need the organisational support of another actor; i.e. that it is organisationally and operationally self-sufficient. Note that many language versions call the EEAS

²⁹ As regards the EU delegation in particular, see Case T-395/11 *Elti d.o.o v Delegation of the European Union to Montenegro*, Judgment of 4 June 2012, nyr.

³⁰ Similarly, the Italian version refers to “un organo dell’Unione europea che opera in autonomia funzionale”, while the Danish version mentions “et funktionelt autonomt EU-organ”. The Dutch text describes the Service as “een functioneel autonoom orgaan van de Europese Unie”.

³¹ Since the Decision was drafted in English, this text arguably best reflects the inter-institutional compromise, yet formally and legally, this does not matter as all language versions have equally authentic value.

an “organ of the EU”, with all that this possibly entails in terms of attribution of acts and ability to bind the legal person of which it is an organ.³²

- In view of the above discussion on organisational v functional autonomy, the question may be raised as to whether the EEAS bringing court cases itself does fall under functioning, or organisation. Via the VP, the EEAS is certainly closely linked to the Commission. However, it stands under the authority of the HR, this means that it is the “office of the High Representative” which, due to organisational dependence, is the one that ought to defend the prerogatives of the EEAS. Does this then mean that such an office is the entity that should be considered the “body” for purposes of Article 267 TFEU?
- However qualified, the autonomy of the EEAS could increase in view of several elements contained in the Decision and as a result of internal practices. Hence, while the Decision foresees that the Service has its own budget and staff,³³ the latter has been organised and labelled to underscore the singular administrative identity of the Service (e.g. “Managing Directorates” rather than the classical Directorates-General, headed by a “Corporate Board”), epitomised by a distinct logo, separate website, and indeed specific email address.
- The autonomy of the EEAS could also be bolstered thanks to the “legal capacity” it is endowed with “to perform its tasks and attain its objectives”. In particular, this capacity may be used for articulating the Service’s mandate by reference to “objectives” which, in contrast to its “tasks” listed in Article 2, are not spelled out anywhere in the Decision – at least not explicitly.

(iii) “separate from the General Secretariat of the Council and from the Commission”

- Unlike the autonomy of the EEAS, the notion that the Service is separate from the General Secretariat of the Council (GSC) and from the Commission is not qualified, either organisationally or functionally.
- Separate from the GSC and from the Commission, the Service *organisationally* falls under the authority of the HR, as stipulated in Articles 1(3) and 2. It is indeed

³² See in this respect, H.G. Schermers and N. M. Blokker, *International Institutional Law* (Leiden: Martinus Nijhoff, 5th Edition, 2011).

³³ See the discussion under Articles 6 and 8 EEAS Decision, below. Indeed, as regards the EEAS personnel, a number of cases already having been decided by or are currently pending before the civil service tribunal: See cases F-15/11 (on EEAS officials having to move out of a hotel in Kabul) and F-64/12 (on refusal of a promotion).

noteworthy that Article 1(3) EEAS Decision only refers to the HR, while it does not contain any reference to the incumbent's function as Vice-President of the European Commission (the same holds true for Article 2(1)).³⁴ This suggests that the EEAS cannot be regarded as a service of the Commission and must therefore be separate from it. This also means that, formally, only the HR/VP can instruct the EEAS.

- However, other provisions ought to be considered. Article 2(2) EEAS Decision establishes the obligation of the Service to assist the presidents of the European Council and of the Commission respectively, as well as the Commission as a whole, "in the exercise of their respective functions in the area of external relations". This obligation could be read as allowing the actors mentioned to instruct the EEAS, albeit arguably in consultation with the HR/VP. Moreover, it should be recalled that the EEAS staff, particularly Heads of Delegations, might sometimes operate qua Commission, for instance when acting with delegated powers of budget implementation.³⁵ The Commission's Rules of Procedure may also apply to the EEAS when it leads the negotiations of framework agreements covering both CFSP and non-CFSP matters – as regards the latter.³⁶
- While relative, the separate character of the EEAS has been consolidated in practice, at least partly. The Service's original umbilical link with the Commission and GSC will at some point be severed. While originally made of transferred staff from the Commission and the Council, the EEAS personnel will be increasingly diversified, notably as the Service will be able to recruit not only from other institutions, but also more broadly on the basis of open competitions.³⁷ Moreover, and perhaps more symbolically, the EEAS has its own separate premises. Instead of being located in a building of the Commission (e.g.:

³⁴ It should be noted that para 1 of the Preamble of the EEAS Decision stipulates that "the reference to the term 'High Representative' will be interpreted in accordance with his/her different functions under Article 18 TEU". Further on this point, see the discussion under Article 2 EEAS Decision, below.

³⁵ See Case T-395/11 *Elti d.o.o v Delegation of the European Union to Montenegro*, Judgment of 4 June 2012, nyr; and commentary of Article 8, below.

³⁶ See the *Vademecum* on the External Action of the European Union (SEC(2011)881); and the "Operational guidelines for the preparation and conduct of negotiations for framework agreements with third countries involving both the European Commission and the High Representative of the Union for Foreign Affairs and Security Policy (HR)".

³⁷ See also discussion on Article 6 EEAS Decision, below.

Charlemagne) or of the Council (e.g. Lex), it is placed in-between the headquarters of these institutions, on the Schuman Roundabout.³⁸

³⁸ Some units of the EEAS nevertheless remain located within the Council or the Commission premises (see the discussion under Article 12 EEAS Decision, below), while the EEAS hosts Commission staff (*viz.* Foreign Policy Instruments Service).

ARTICLE 2

Tasks

1. *The EEAS shall support the High Representative in fulfilling his/her mandates as outlined, notably, in Articles 18 and 27 TEU:*
- *in fulfilling his/her mandate to conduct the Common Foreign and Security Policy ('CFSP') of the European Union, including the Common Security and Defence Policy ('CSDP'), to contribute by his/her proposals to the development of that policy, which he/she shall carry out as mandated by the Council and to ensure the consistency of the Union's external action,*
 - *in his/her capacity as President of the Foreign Affairs Council, without prejudice to the normal tasks of the General Secretariat of the Council,*
 - *in his/her capacity as Vice-President of the Commission for fulfilling within the Commission the responsibilities incumbent on it in external relations, and in coordinating other aspects of the Union's external action, without prejudice to the normal tasks of the services of the Commission.*
2. *The EEAS 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.*

Article 2 defines the tasks of the External Action Service. It does this both in functional (section 1) and policy terms (section 2).

1. The functional tasks of the EEAS

- In describing the mandate of the EEAS, Article 2 of the Council Decision largely reflects the structure of Articles 18 and 27 TEU to which it refers in the *chapeau*. Article 18 is found in Title II "Institutions" of the TEU, and is therefore of general application. By contrast, Article 27 is included in Title V – Chapter 2 of the TEU, and is therefore specific to the Common Foreign and Security Policy. Article 2 of the EEAS Council Decision merges these general and CFSP-specific aspects to attain an integrated support mandate for the office of the HR/VP/FAC Chairperson.
- The aforementioned triple-hatted position is set out in Article 18 TEU. The first paragraph contains the procedure for the appointment of the office holder, and the following paragraphs describe the three hats in the following succession: Article 18 (2) refers to the High Representative conducting the EU's CFSP; Article 18 (3) refers to the High Representative presiding the Foreign Affairs Council; and Article 18 (4) establishes that the High Representative shall be one of the Vice Presidents of the Commission, ensure the consistency of the Union's external action, and be responsible within the Commission for responsibilities incumbent on it in external relations and for coordinating aspects of the Union's external action. Article 2 (1) EEAS Decision exactly follows the sequencing of functions set out in Article 18 TEU;

and merges them, through its first indent, with the CFSP-related tasks as described in Article 27 TEU.

- In other words, Article 2 creates a mandate of support for the EEAS in relation to *all three hats* of the High Representative, and this with *no hierarchy* between them. Arguing to the contrary would imply the re-introduction of the pre-Lisbon pillar approach, which contravenes the spirit of the Treaties. Indeed, the rationale of the triple hats – even since the European Convention in 2002 - is that the person holding this office would integrate all aspects of EU external relations more smoothly to ensure coherence across the multitude of EU actors and instruments.³⁹ It is therefore crucial to point out that the triple-hatted post of High Representative is created by Article 18 in the general institutional Title of the Treaty on European Union, and not the specific Chapter on CFSP in the TEU. Indeed, CFSP as described in Article 27 TEU is but one of the three main tasks of the High Representative named in the more fundamental Article 18 TEU, alongside that of FAC Chairperson and Commission Vice President. The EEAS then works rather like a chameleon: functioning akin to a Commission DG in relation to certain VP-related tasks; functioning akin to the Council General Secretariat in CFSP or FAC related tasks; without one support function taking precedence over the other, but with interlocking and equal importance.
- The EEAS' tasks are largely described by reference to the tasks of other prominent actors⁴⁰ in EU external relations: the HR/VP/FAC Chairperson predominantly, but also the Presidents of the European Council and of the Commission, respectively, the Council General Secretariat and the Commission. The description in relation to them is thus both 'negative' and 'positive': e.g. positive - by stating that its task is one of support/assistance in light of the mandates or functions of these EU actors; negative – by proscribing its function “without prejudice” to the “normal tasks” of the Commission services and the Council General Secretariat. One must thus look at the exact description of the tasks and functions of the EEAS in relation to these actors, and establish what the normal tasks of the respective actors are in order to uncover the EEAS' mandate. The reference to “normal” creates a tension where it assumes there is a common understanding of the respective tasks of the competent EU actors in external policy-making. However, it is axiomatic that the advent of the EEAS would create a “new

³⁹ The European Convention, *Final Report of the Working Group VII on External Action*, CONV 459/02, Brussels, 16 December 2002, 19.

⁴⁰ E.g. not only EU institutions in accordance with Article 13 TEU.

normal”, which this provision does not define. In the context of the ongoing Review, and in view of the possible revision of the EEAS decision, the “normal tasks” of each of the actors/institutions could be clarified, notably in consideration of the way in which they have been fleshed out in the first two years of the EEAS’ work: namely a predominant classical foreign policy (CFSP) focus over an emphasis on the coherence mandate across EU external action as a whole.⁴¹

- In terms of wording, Article 2 meticulously balances the different functional and substantive positions and inter-relationships to ensure the “sui generis” nature of the EEAS in relation to the other actors mentioned in that provision. As previously indicated, it also fleshes out the triple hats of the HR/VP. As regards the subtle differences in wording, we may note the following:
 1. Paragraph 1 speaks of “mandates” (plural) of the HR and paragraph 2 speaks of “function” in relation to the Presidents of the Commission and the European Council.
 2. Within paragraph 1 there is then a differentiation between the first indent, which speaks of the “mandate” to conduct the CFSP, and the second and third indents which speak of her “capacity” as Chair of the FAC and VP of the Commission.
 3. There is also the distinction between the task of “supporting” the High Representative in fulfilling her mandates, and that of “assisting” the President of the European Council, President of the Commission, and the Commission itself.
 4. Finally, the third indent of paragraph 1 then establishes a link between the Commission and the EEAS through the HR *qua* VP. It reads that the EEAS shall support the HR/VP “...in his/her *capacity* as Vice-President of the Commission for fulfilling *within* the Commission the responsibilities incumbent *on it* in external relations” (emphasis added). The word “it” refers to the Commission, and thus the EEAS is to support the VP in carrying out the external relations responsibilities of the Commission.
- In two years of EEAS practice, it can be observed that these differences in formulation have a real-life relevance and policy impact. In relation to

⁴¹ See report prepared for the AFET Committee of the European Parliament, *The Organization and Functioning of the EEAS: Achievements, Challenges and Opportunities*, to be published end February 2013.

assisting the function of the Presidents of the European Commission and the European Council, the task of the EEAS mainly consists of providing preparatory material for summits and visits in the form of briefings. “Assisting” these two Presidents in their “function” is hence more limited than “supporting” the High Representative in her “mandates” and “capacities”. We may thus observe that “mandates” refers to substantive policy tasks being given to the actor holding the mandate; whereas “function” and “capacity” are more informative and managerial in nature. This is underlined by the fact that the kind of support tasks (paragraph 1) or assistance (paragraph 2) to be given by the EEAS are also different.⁴² This has an important consequence for the mandate of the EEAS in relation to the triple hats of the High Representative. Through an *a contrario* reasoning we submit that the EEAS is thereby more than a mere ‘briefing-generating machine’ in all three tasks listed in Article 2 (1) of the EEAS Decision, but an entity that is meant to proactively generate novel policy ideas, notably in line with the coherence mandate which it is expected to support (Art 18 (4) TEU *iuncto* Article 2 EEAS Council Decision). This means that the notion of “normal tasks” of the Council Secretariat and the Commission must duly take account of this. Finally, these findings ought therefore to be connected to different provisions in the Council Decision, notably Article 3 (Duty of Cooperation), Article 5 (Delegations) and Article 9 (Programming).

- The fact that Article 2 (1) and (2) differentiate between support and assistance for the High Representative and the actors named in Article 2 (2) creates a different functional relationship as regards being able to “instruct” the EEAS to carry out certain task for the respective office holder or institution. This can be illustrated by reference to the EEAS’ tasks in relation to the President of the European Council. It has been reported that the work of the EEAS in supporting Mr. Van Rompuy – for example at the G20 – has

⁴² Compare however different language versions of these two paragraphs, which paint a mixed picture. In French, paragraphs 1 and 2 of Article 2 of the Council Decision use the same verb “assister”, but they distinguish between “dans l’exécution de ses mandats” in paragraph 1 and “dans l’exercice de leurs fonctions respectives” in paragraph 2. In the Dutch and Danish versions two different verbs are used: “ondersteunen”/”støtter” (para 1) and “bijstaan”/”bistår” (para 2) “in de uitoefening van zijn mandaat”/”dennes mandater” (para 1) and “hun taken”/”deres funktioner” (para 2). The Dutch and Danish versions thus precisely match the English language version (which was the language in which the document has been negotiated), but this is less true for the French version. Moving to the Italian version, there is yet another reading : here these paragraphs twice use the identical “Il SEAE assiste” and both paragraphs also refer to “funzioni”, thus contradicting the subtle differences of the English language version. Finally the German version speaks twice of “unterstützt”, but distinguishes between “seines Auftrags” and “ihrer Aufgaben”.

been ‘top notch’⁴³, but that the notion of what “assistance” means causes practical difficulties: in the pre-Lisbon era, the rotating presidency had a clear top-to-bottom chain of command in preparing external representation all the way down to expert working group level. However, in the new system the office of the European Council, and that of the EEAS, have been created without truly “embedding them” in a clear structure and hierarchy. Thus, President Van Rompuy only has “chain of command” over his cabinet, and while the EEAS is there to “assist” the office holder. This implies that the President of the European Council holds no hierarchical superiority and has no legal competence to give instructions.⁴⁴ This means that the preparatory process within the Union is more infused with a number of political or institutional interests, is more based on personal relationships and good will, which require more energy to steer EU external relations towards a desirable outcome.

2. The substantive tasks of the EEAS

- Whereas Article 2 EEAS Decision defines the tasks of the EEAS in functional terms, there is very little reference to the substantive policy tasks of the Service. Article 2(1), indent 1, is the only segment of the provision which mentions two explicit substantive policy-related tasks: first, support the High Representative to conduct and formulate policy proposals in the field of CFSP/CSDP; and second to support the High Representative in “ensuring consistency” of EU external relations as a whole.
- In terms of drafting there is an important, yet subtle difference between Article 2 (1) first and third indents; and Article 18 (2) and (4). In the Treaty, Article 18 (2) refers only to policy-making tasks in relation to the CFSP of the High Representative. Article 2 (1) first indent of the EEAS Decision copies the Treaty formulation, but adds the task of ensuring consistency in EU external action. Conversely, in Article 18 (4) TEU we find the Vice-Presidential Commission hat of the High Representative, which explicitly includes tasks in relation to consistency of EU external action, which are faithfully reproduced in Article 2 (1) third indent, EEAS Decision. This implies that the EEAS is given a stronger (compared to the Treaties) coherence-oriented mandate for EU external relations as a whole, and not simply a CFSP-oriented mandate.

⁴³ See the report prepared for the AFET Committee of the European Parliament, *The Organisation and Functioning of the EEAS: Achievements, Challenges and Opportunities*, to be published end February 2013.

⁴⁴ Ibid.

- As regards balancing the CFSP task versus the over-arching coherence mandate of the EEAS, it is being reported that the EEAS has so far focused mainly on its foreign policy tasks, even to the point where the EEAS finds itself in competition with the member states on ‘classical foreign policy’.⁴⁵ This begs the question of whether the coherence mandate of the EEAS ought to be strengthened. A revised EEAS Decision could strengthen the Service’s mandate as regards EU policy coherence by including additional legal bases of a more substantive nature. This would then change the purely “CFSP nature” of the Decision, and therefore support a wider ambit of EEAS tasks, albeit within the current Treaty framework. Notably, a new Decision could have regard to Articles 21 TEU and 205 TFEU. In this sense, such a new legal basis of the EEAS 2.0 Decision on the “(organisation and) *functioning*” of the EEAS would constitutionally embed and substantively widen its function of contributing to the HR’s mandate of ensuring consistency in EU external action (as currently stated in Article 2(1), first indent, of the EEAS Decision; as well as the Decision’s preamble). As previously stated in this commentary, such a dual legal basis is not necessarily incompatible with Article 40 TEU as it can be seen as implementing a duty of coherence and cooperation, “without prejudice” to questions of competence.⁴⁶
- As regards the formulation of the EEAS’ tasks in relation to those of the High Representative, one must also be aware of the fact that Article 2 uses the words “as outlined, notably” in Articles 18 and 27 TEU. Two textual elements are relevant: on the one hand, the word mandates is plural; and second, the words “outlined” and “notably” indicate the open-ended nature of the HR’s mandate, and the fact that alongside Articles 18 and 27 TEU, other provisions may be relevant. One must therefore piece together the whole mandate of the HR from the Treaties, and thereby also substantively broaden the support tasks of the EEAS itself. According to the TEU, the High Representative:

“shall assist the President of the European Council”;⁴⁷ “shall conduct the CFSP”;⁴⁸ “shall be responsible within the Commission for responsibilities incumbent on it in external relations and for coordinating other aspects of the Union’s external action”;⁴⁹ “shall ensure the unity, consistency and

⁴⁵ Interview with a Former Head of Delegation, 24 October 2012.

⁴⁶ Cp. Case C-130/10 *European Parliament v Council*, judgment of 19 July 2012, nyr.

⁴⁷ Article 15(6) penultimate paragraph, TEU.

⁴⁸ Article 18(2) TEU.

⁴⁹ Article 18(3) TEU.

effectiveness of action by the Union in the CFSP”;⁵⁰ shall “put into effect the CFSP”;⁵¹ “shall chair the Foreign Affairs Council”;⁵² “shall contribute through his proposals towards the preparation of the CFSP”;⁵³ “shall ensure implementation of the decisions adopted by the European Council and the Council”;⁵⁴ “shall represent the EU for matters related to the CFSP ... shall conduct political dialogue on the Union’s behalf ... shall express the Union’s position in international organizations”;⁵⁵ and finally, she has an important role in CSDP decision-making.⁵⁶

- Characteristic of the EEAS Decision is that not all information on any given issue is found in one article of the legal instrument. As such, Article 4 (3) on the fashion in which the Central Administration of the EEAS shall be organised is crucial for a good understanding of the Service’s tasks. Indeed, with the limited substantive policy references in the EEAS’ support tasks, it must be acknowledged that much information on the EEAS’ policy work can be inferred from its organogram and the staff it has absorbed from the Council and Commission. Indeed, Article 4 (3) states that the EEAS shall have geographic DG’s covering all areas of the world, as well as thematically focused organisational sub-entities.
- Evidently, having to interpret and define the substantive tasks of an organisation by looking at the fashion in which it is internally structured is putting the cart before the horse: institutional organisation and staffing should be organised in light of projected and clearly defined tasks, rather than the reverse. This problem can be glossed over in relation to the geographic desks of the EEAS. In this case they can be viewed as the logical consequence of the EEAS’ function to aid the HR/VP in ensuring coherence of EU external policy. This is also why, since the European Convention, a consensus emerged that no geographically organised units should exist in the Commission or

⁵⁰ Article 26(2) second indent TEU, together with the Council.

⁵¹ Article 26(3) TEU.

⁵² Articles 18(3) TEU and 27(1) TEU.

⁵³ Articles 18(2) TEU and 27(1) TEU.

⁵⁴ Article 27(1) TEU.

⁵⁵ Article 27(2) TEU.

⁵⁶ Article 42(4) TEU.

Council General Secretariat.⁵⁷ The thematic desks are more problematic, as their substantive policy tasks are the result of the 2009-2010 negotiation process and the tug-of-war over the competences of the EEAS and the Commission. For example, the absence of a thematic desk on energy is the result of Commission efforts to avoid the EEAS siphoning in EU external energy policy, rather than a principled decision on whether or not such a desk would be useful for EU policy.⁵⁸ Another example: the initial proposal for a thematic desk dealing with gender issues was due to the specific interest of the person holding the mandate of the HR/VP in this issue.

- Apart from Article 4 EEAS Decision, certain other provisions in the EEAS legal instrument, such as Article 5(9) and (10), also contain a number of tasks which are not contained in Article 2. They cannot be considered *lex specialis* provisions in relation to Article 2 of the Council Decision, but more additional tasks. This indeed seems to be a recurrent problem with the EEAS decision, namely: despite the fact that provisions are regrouped under ‘tasks’, ‘cooperation’, ‘nature and scope’, etc. one still finds provisions that could fall under either of these categories, in various other articles. More generally, we must also look to other legal/non-legal sources to tease out the tasks of the EEAS:
 - the TEU describing the mandate of the HR/VP;
 - the debate and documents relating to which elements of the Council General Secretariat/Commission the EEAS would/has absorbed;
 - the organogram, in all its different iterations over the last 2 years, provides a source of information on the substantive tasks of the EEAS: the geographic scope of its work, as well as the thematic desks.
 - other documents such as the EEAS-Commission working arrangement of January 2012; and the Joint Decision on managing delegations of March 2012.

⁵⁷ See note 39, above. Although certain Commission DGs have since the advent of the EEAS begun to organise themselves around geographic scope, where this is “deemed necessary”. See report prepared for the AFET Committee of the European Parliament, *The Organisation and Functioning of the EEAS: Achievements, Challenges and Opportunities*, to be published end February 2013.

⁵⁸ J. F. Braun, "EU Energy Policy under the Treaty of Lisbon Rules - Between a new policy and business as usual" (February 2011) *CEPS Working Paper* No 31, 4.

- A final consideration is the extent to which the mandate of the EEAS is circumscribed in an exhaustive fashion. Arguably, Article 2(1) allows it to be entrusted with tasks not explicitly mentioned in the articles it refers to, and that the European Council could entrust the HR and with that the EEAS with other tasks not explicitly provided for in the Treaty, the way the Commission has in the past been endowed with tasks not explicitly foreseen in primary law (e.g. management of the European Development Fund, or the conduct of the EU pre-accession strategy).

In sum, Article 2 did not lay down the tasks of the EEAS in any solid, ascertainable fashion, though that is not necessarily problematic. The question is then, to what extent it is necessary to do so in a potentially revised EEAS decision; and if so, whether this should be done in the Council Decision. The bigger question is then whether the current Treaty rules even allow for any such definition and deepening of the EEAS' mandate.

ARTICLE 3

Cooperation

1. *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.*
2. *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, except on matters covered by the CSDP. The EEAS shall take part in the preparatory work and procedures relating to acts to be prepared by the Commission in this area.*
This paragraph shall be implemented in accordance with Chapter 1 of Title V of the TEU, and with Article 205 TFEU.
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.*
4. *The EEAS shall extend appropriate support and cooperation to the other institutions and bodies of the Union, in particular to the European Parliament. The EEAS may also benefit from the support and cooperation of those institutions and bodies, including agencies, as appropriate. The EEAS internal auditor will cooperate with the internal auditor of the Commission to ensure a consistent audit policy, with particular reference to the Commission's responsibility for operational expenditure. In addition, the EEAS shall cooperate with the European Anti-Fraud Office ("OLAF") in accordance with Regulation (EC) No 1073/1999. It shall, in particular, adopt without delay the decision required by that Regulation on the terms and conditions for internal investigations. As provided in that Regulation, both Member States, in accordance with national provisions, and the institutions shall give the necessary support to enable OLAF's agents to fulfil their tasks.*

While Article 2 of the EEAS Decision predominantly purports to allocate “tasks” to the Service by reference to the functions of other EU external relations actors, Article 3 is entirely devoted to fostering *cooperation* among them (section 1). Generally, Article 3 is formulated in *mandatory* language. It thus establishes an *obligation* of cooperation that recalls the terminology of the TEU (Section 2). It is in turn expressed as various *obligations of conduct* involving procedural duties (Section 3), whose scope of application is broad, particularly in terms of the number of actors to which they are addressed (Section 4).

1. The rationale of cooperation in the EEAS decision

- That an entire article of the EEAS Decision should be dedicated to cooperation is unsurprising for at least three reasons. First, it is essential for the very establishment of the EEAS, which according to Article 27(3) TEU, is based on the absorption and (partial) amalgamation of the relevant services and tasks of the Commission and of the General Secretariat of the Council, and on the

participation of member states' diplomats. Second, cooperation appears all the more necessary since the allocation of "tasks" between the EEAS and others external relations players is vague,⁵⁹ thus making power overlaps and frictions almost inevitable. Third, cooperation is instrumental to the coherence mandate of the HR/VP supported by the EEAS, given the essential function that such cooperation plays in ensuring coherence.⁶⁰ Indeed, as a "Service" rather than a fully-fledged political institution, located between the Commission and the Council, the EEAS is primarily conceived to work for and with other actors, and thus needs the latter's cooperation to effectively fulfil its tasks.

2. A specific expression of the obligation of cooperation enshrined in the TEU

- The cooperation foreseen in Article 3 is crafted as an *obligation*, as testified by the recurring usage of the phrase "shall" throughout the text.
- Paragraph 1, which may be read as a *chapeau* of the whole article, recalls the *function* of cooperation as a means to ensure consistency. Indeed in referring to consistency and in emphasising its multifaceted application (viz. between different areas of the EU external action, and between those areas and other policies), the requirement evoked in Article 3 echoes the comprehensive coherence imperative set out in Article 21(3) TEU, of which it can thus be seen as a specific application. To be sure, the preamble of the EEAS Decision does make an explicit reference to Article 21(3) TEU in its second indent, immediately after the paragraph on the purpose of the measure.
- The role of the EEAS in ascertaining *overall* consistency resonates in paragraph 2 of Article 3 of the EEAS Decision, which underlines the duty of the Commission and the EEAS to consult on "*all matters relating to the external action of the Union* in the exercise of their respective functions" (emphasis added), except CSDP (see further below). The two shall thus consult each other not only on EU policies that are primarily external (e.g. trade, neighbourhood, development) but equally on all EU policies having an external dimension (e.g. environment, transport, climate change, energy).

⁵⁹ See discussion under Article 2 EEAS Decision, above.

⁶⁰ On this connection, see e.g. C. Hillion, "*Tous pour un, Un pour tous!* Coherence in the External relations of the European Union" in M. Cremona (ed.), *Developments in EU External Relations Law*, Collected Courses of the Academy of European Law (Oxford: Oxford University Press, 2008) pp. 10-36. More generally on coherence, see I. Bosse-Platière, *L'article 3 du traité UE : Recherche sur une exigence de cohérence de l'action extérieure de l'Union européenne* (Brussels : Bruylant, 2009).

- The terminology of cooperation used in Article 3 EEAS Decision also recalls the terms of Article 4(3) TEU establishing the principle of sincere cooperation between the member states and the EU, as well as the provisions of Article 13(2) TEU on inter-institutional cooperation. The obligation of cooperation between the EEAS and other actors of the EU external action thus arguably finds its ultimate foundations in the TEU, and could thereby be enforced accordingly.
- In particular, while the EEAS Decision is of a CFSP nature, thereby limiting its enforceability given the circumscribed jurisdiction of the European Court of Justice in this area, the obligations it contains nonetheless ought to be conceived and possibly applied by reference to the constitutional principles and obligations they encapsulate, particularly where those are specifically articulated in subsequent documents, such as the Joint Decision of the Commission and the High Representative on Cooperation Mechanisms concerning the Management of Delegations of the European Union,⁶¹ or the “operational guidelines for the preparation and conduct of negotiations for framework agreements involving both the HR and the Commission”.⁶² According to the latter, the EEAS is expected to work in close cooperation with the services of the Commission when negotiating such comprehensive agreements (i.e. covering CFSP and non-CFSP dimensions) on behalf of the EU. These arrangements arguably “represent the fulfilment of [the] duty of cooperation”⁶³ as expressed in Article 3 EEAS Decision and ultimately founded on Article 4(3) TEU.⁶⁴
- Indeed, akin to the duty of cooperation articulated by the European Court of Justice, Article 3 EEAS Decision points to several obligations of conduct.

2. Cooperation as multiple obligations of conduct

⁶¹ Joint Decision of the Commission and the High Representative of the Union for Foreign Affairs and Security Policy on Cooperation Mechanisms concerning the Management of Delegations of the European Union; JOIN(2012)8, 28.3.2012.

⁶² “Operational guidelines for the preparation and conduct of negotiations for framework agreements with third countries involving both the European Commission and the High Representative of the Union for Foreign Affairs and Security Policy (HR)”, signed by the Secretary-General of the Commission and the Chief Operating Officer of the EEAS.

⁶³ See in this regard, *C-25/94 Commission v Council* [1996] ECR I-1469.

⁶⁴ Paragraph 6 of the preamble of the Joint Decision explicitly refers to Article 3(1) EEAS Decision, while its paragraph 1 evokes the need for the Commission and the EEAS “to collaborate closely” in view of the post-Lisbon EU “institutional set up in the external relations area”. In the same vein, the *Guidelines* mention that “These arrangements... are designed to ensure the full involvement of the Commission services and optimise cooperation with the EEAS”.

- The obligation of cooperation enshrined in Article 3 takes various expressions in the different paragraphs that compose it. It is formulated as duties to “support”, “work in cooperation with” (paragraph 1), “consult”, and “take part in preparatory work” (paragraph 2). Article 3 thus points to several more specific duties that remind of the obligations of conduct which the Court of Justice has derived from the principle of cooperation enshrined in Article 4(3) TEU.⁶⁵
- It should be noted that all the procedural duties are not absolute, as some appear to vary depending on the subject matter and/or the actor concerned. Hence, as suggested above, Article 3(1) should perhaps be read as introducing the obligation of cooperation as a general EEAS duty to “support and work in cooperation with” all actors involved, viz. the services of the Commission, the General Secretariat of the Council, the member states’ diplomatic services, and possibly “other institutions and bodies of the Union, in particular the European Parliament” (Article 3(4)).⁶⁶ Other paragraphs (as well as other provisions in the EEAS Decision) would by contrast establish special duties of consultation, participation and assistance, which would have a more specific and thus differentiated application.

(i) Duty to assist and duty to support

- The obligation of cooperation envisaged by the Decision seemingly makes a distinction between the duty to “support” and the duty to “assist”. For example, while the EEAS “shall *support*” the diplomatic services of the member states, the GSC and the services of the Commission (Article 3(1)), it “shall *assist* the President of the European Council, the President of the European Commission, and the Commission in the exercise of their respective functions” (Article 2(2),

⁶⁵ See in particular: Case C-266/03 *Commission v Luxembourg* [2005] ECR I-4805; Case C-433/03 *Commission v Germany* [2005] ECR I-6985; Case C-459/03 *Commission v Ireland* (*‘MOX plant’*) [2006] ECR I-4635; Case C-246/07 *Commission v Sweden* (*‘PFOS’*), judgment of 20 April 2010, nyr; and more generally: M Cremona, “Defending the Community Interest: the Duties of Cooperation and Compliance” in M Cremona & B De Witte (eds.) *EU Foreign Relations Law: Constitutional fundamentals* (Oxford: Hart Publishing, 2008) 125; E Neframi, “The Duty of Loyalty: Rethinking its Scope through its Application in the Field of EU External Relations” (2010) 47 *Common Market Law Review* 323; C Hillion, “Mixity and coherence in EU external relations: the significance of the duty of cooperation” in C Hillion and P Koutrakos (eds), *Mixed Agreements Revisited – The Union and its Member States in the World* (Oxford: Hart Publishing, 2010); G De Baere, “O, Where is Faith? O, Where is Loyalty? Some Thoughts? On the Duty of Loyal Co-operation and the Union’s External Environmental Competences in the light of the PFOS Case” (2011) 36 *European Law Review* 405.

⁶⁶ Article 3(1) could also be understood as establishing a specific duty of cooperation, involving procedural obligations of particular relevance to relations with the member states and the Council General Secretariat. For the Commission this would then be the *lex generalis*, while being subject to a *lex specialis* in the form of a duty of consultation in paragraph 2, specifically related to Article 21 TEU.

emphasis added), but it “shall *support* the [HR] in fulfilling his/her mandates”.⁶⁷ Other provisions of the Decision that appear to articulate the duty of cooperation also refer to the obligation to “assist” (e.g. Articles 2(2) and 10(3)). The question may thus be raised as to whether the two notions, “support” v “assist”, ought to be understood differently, in the sense of possibly generating distinct obligations of conduct. If so, the obligation of cooperation would take different forms depending on the actor with which the EEAS has to cooperate.

- A look at other linguistic versions of the Decision may nuance the importance of such distinction. For instance, the French text appears to use the word “*assiste*” both where the English refers to either “support” or “assist”.⁶⁸ This would indicate that the notion could be used interchangeably. Indeed, the duty to “assist” is constitutive of the general principle of cooperation enshrined in Article 4(3) TEU. The latter notably foresees that pursuant to such principle, the Union and the member states, shall in full mutual respect, *assist* each other in carrying out tasks which flow from the Treaty. Thus in calling the EEAS generally to work in cooperation with other players, Article 3(1) implicitly encapsulates a duty to assist.

(ii) Duty to consult

- Article 3(2) establishes a specific obligation of consultation between the EEAS and the “services” (plural) of the Commission, on all matters relating to the external action of the Union in the exercise of their respective functions. As briefly evoked above, this entails that the Commission is deemed to consult the EEAS on *all* external aspects of internal policies too. Hence alongside trade, neighbourhood and development policies, for example, the Commission is supposed to consult the EEAS in exercising its own powers in the field of energy policy, environmental protection, justice and home affairs, insofar as these fields touch upon the external action of the Union.
- Similarly, the EEAS has to consult the Commission services when exercising its functions, for instance in the context of international negotiations as referred to above, but also in supporting the HR in e.g. the conduct of political dialogue with third states. As the only express limitation in Article 3(2) to the obligation of

⁶⁷ Emphasis added. The same distinctions can be found in Article 2(2) EEAS Decision, see discussion above.

⁶⁸ For instance, the first paragraph of Article 3 uses the word “*assiste*” in French, where the English version says “support”.

consultation of the Commission concerns the CSDP, it may be assumed that the EEAS shall consult the Commission on the non-CSDP dimension of the CFSP.

- The duty to consult is explicitly addressed to the EEAS and the Commission. Article 3 does not evoke a possible application of such duty between the EEAS and the Council services or members states' diplomatic services. The question may thus be raised as to whether this silence entails that such consultation is neither required, nor even envisaged. Arguably however, one may submit that the latter is implicit, and ultimately results from the duty of sincere cooperation imposed by primary law. Indeed, Article 21(3) TEU foresees that the Commission and the Council cooperate to ensure consistency, assisted by the HR, him/herself assisted by the EEAS. Arguably, the ability of the HR and EEAS to fulfil this coherence-making task primarily depends on the cooperation that both the Commission and Council are able to provide.

(iii) Duty/right to take part

- While the Commission is explicitly compelled to consult with the EEAS, Article 3(2) also obliges it to involve the Service in preparatory work and procedures relating to acts it prepares in the area of EU external action.⁶⁹ Thus, the cooperation obligation of Article 3 goes further than mere consultation as regards the Commission. It also entails participative rights of the EEAS in policy shaping in all areas of EU external action, thus including development, neighbourhood, and trade, but also in forging the external dimension of EU environment, transport, energy policies.⁷⁰ This participation has already materialised in various ways (e.g. "Joint Communications") and is sometimes required by the Treaty provisions (cf. Articles 215 and 222 TFEU).⁷¹

⁶⁹ Indeed, the phrase "this area" at the end of the sentence relates to the "external action of the Union" (cf proposal of Ashton), not the CSDP evoked in the previous sentence as a prima facie reading would suggest. The ambiguity comes from the fact that originally (i.e. in Ashton's proposal of March 2010), the preceding sentence did not contain the expression "except on matters covered by the CSDP".

⁷⁰ The practice is somewhat more nuanced, as regards energy policy for instance, see B Van Vooren, "Europe Unplugged: Progress, potential and limitations of EU external policy three years post-Lisbon" (2012) *SIEPS Report* 2012:5.

⁷¹ See e.g. Joint Communication *Delivering on a New European Neighbourhood Policy*, JOIN(2012) 14 15.5.2012; Joint Communication *Developing a European Union Policy towards the Arctic Region: progress since 2008 and next steps*, JOIN(2012) 19, 26.6.2012; Joint Communication *EU Counter-terrorism Action Plan for the Horn of Africa and Yemen*, JOIN (2012) 24, 31.8.2012; Joint Communication *Human Rights and Democracy at the Heart of EU External Action – Towards a more effective approach*, COM(2011) 886 12.12.2011; Joint Communication *Global Europe : A New Approach to financing EU external action Brussels*, COM(2011) 865, 7.12.2011.

- The cooperation between the EEAS and the Commission, both in the form of consultation and preparatory collaboration is determined by a specific normative framework: Article 3(2) foresees that “*this paragraph* shall be implemented in accordance with Chapter 1 of Title V of the TEU, and with Article 205 TFEU” (emphasis added). Given that this Chapter 1 sets out the “general provisions of the Union’s external action”, it is somewhat surprising that the reference to this normative framework should only be made in the specific context of paragraph 2, as if the objectives and tasks it encapsulates were to be achieved only by the EEAS-Commission cooperation, and not by the member states and the General Secretariat of the Council. It is contended that all the activities of the EEAS and of other institutions too, and all their interactions within the EU system of external relations are legally determined by the “general provisions of the Union’s external action” set out in that Chapter 1.

3. Scope of application of the obligation of cooperation

(i) Cooperation with whom?

- The first paragraph of Article 3 emphasises the duty of the EEAS to cooperate with the member states’ diplomatic services, with those of the Commission and with the General Secretariat of the Council. While the Service was deemed, through its initial composition, to incarnate the requested cooperation between previously competing Commission and Council services,⁷² this provision is an acknowledgement that the GSC and the Commission continue to play a key role in the external action of the Union – as do indeed the member states.
- Indeed, it is noteworthy that the obligation referred to in Article 3(1) concerns in equal terms the member states’ diplomatic services, the General Secretariat of the Council and Commission services. This can be taken as an indication that the EEAS is equidistant from those three actors, at least in terms of obligation to cooperate.
- The EEAS’ duty of cooperation is not limited to those actors mentioned in the first paragraphs. Article 2(2) envisages that the EEAS assists the presidents of the European Council and of the European Commission, respectively. As suggested above, the reference to “assist” rather than “support” ought not to be overrated.

⁷² See Article 27(3) TEU; Article 6 EEAS Decision, as well as the Annex thereto.

- Moreover, Article 3(4) foresees that the EEAS “shall extend appropriate support and cooperation to the other institutions and bodies of the Union, in particular the European Parliament”. Indeed, Article 3(3) envisages possible inter-service arrangements not only with the Commission and the GSC, but also with “other offices or interinstitutional bodies of the Union”. In essence, the duty is of the same kind as the obligation to cooperate with other actors given that the provision refers to *extending* support and cooperation. Equally mandatory (“shall”), it is nonetheless expressed in more nuanced fashion by using the notion “appropriate”. In other words the support might not be as general and automatic as in the case of, e.g., the Commission, Council or member states services. The notion of *appropriateness* suggests that the cooperation might be decided by the EEAS itself, under the authority of the HR, on a case-by-case basis, taking account of the limited role of the EP in EU foreign policy. In practice however, the EP has found means to influence the behaviour of the EEAS and HR, and strengthen its commitment to provide information, to report to, as well as to consult with the EP.⁷³
- Recital 7 of the Preamble provides specific information as to the other bodies which the EEAS might be called to support: e.g. the European Defence Agency, the EU Satellite Centre, the EU Institute for Security Studies and the European Security and Defence College; on the ground that they all involve HR responsibilities. Apart from the European Parliament and these bodies, one may presume that the most obvious candidates for such extended cooperation would be the various EU agencies with an external remit (e.g. Frontex, Europol).
- Cooperation between the EEAS and Commission services is also required at the level of EU Delegations, in view of the inclusion of Commission staff within the Delegations (Article 5 EEAS Decision). As evoked above, a Joint Decision of the Commission and the HR “on Cooperation mechanisms concerning the management of delegations of the European Union” has been adopted in March of 2012, which seemingly fulfils the duty of cooperation of Article 3, to which it explicitly refers.
- Other provisions in the Decision envisage internal cooperation, among the different services of the EEAS. Hence, Article 4(3)(b) EEAS Decision emphasises that full coordination between all the structures of the EEAS “shall be ensured”. This is particularly important in view of the initial composition of the EEAS, but

⁷³ See, e.g., *Declaration by the High Representative on Political Accountability*, OJ 2010 C 210/1, and the *Framework Agreement on Relations between the European Parliament and the European Commission*, OJ 2010 L 304/47).

also considering the level of procedural and organisational differentiation that has been maintained in the creation of the EEAS, as evidenced in the last indent of Article 4(3)(a) EEAS Decision.⁷⁴

- Article 3(4) requires the EEAS to cooperate also with the EU Anti-Fraud Office, OLAF, an office set up by the Commission deemed to help it perform its duty to implement the budget.⁷⁵ The provision includes a reference to Regulation 1073/1999⁷⁶ about OLAF's investigation powers, and the request that the EEAS adopt a decision on the terms and conditions for internal investigations. Cooperation is equally needed between the Commission and the EEAS respective internal auditors, with a view to ensure consistent audit policy.⁷⁷ It should be noticed that this fourth paragraph was much leaner in HR /VP Ashton's proposal of March 2010, which read as follows: "The EEAS shall extend appropriate support and cooperation to the other institutions and bodies of the Union".

(ii) Reciprocal cooperation?

- The obligation of cooperation enshrined in Article 3 appears to operate only one way in the EEAS-member states diplomatic services nexus. Indeed, in contrast to earlier drafts, the Decision is mostly silent on a possible reverse member states' duty of cooperation vis-à-vis the EEAS. Thus Article 5(9) EEAS Decision no longer expressly foresees that the Union delegation diplomatic services of the member states exchange information, *on a reciprocal basis*.⁷⁸ Seemingly, only Article 10(3) EEAS Decision requires assistance from member states, in the specific field of security.⁷⁹ One may thus surmise that member states' diplomatic services are mostly free from any obligation towards the services of the EEAS.

⁷⁴ See discussion on Article 4, below.

⁷⁵ In this respect, see Case C-11/00 *Commission v ECB* [2003] ECR I-7215.

⁷⁶ Regulation (EC) no 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European anti-fraud office (Olaf) [OJ 1999 L 136/1].

⁷⁷ See the discussion under Article 8, below; and Case T-395/11 *Elti d.o.o v Delegation of the European Union to Montenegro*, Judgment of 4 June 2012, nyr.

⁷⁸ Ashton's proposal of March 2010 read as follows: "The Union delegations shall work in close cooperation with the diplomatic services of the Member States. They shall, *on a reciprocal basis*, provide all relevant information" (emphasis added).

⁷⁹ See further discussion under Article 10 EEAS Decision, below.

- It may nevertheless be argued that the duty of cooperation mutually applies to the EEAS and the member states. The provisions of Article 4(3) TEU on sincere cooperation entail that the member states cooperate with the EEAS in fulfilling its tasks, akin to the cooperation member states are expected to show in relation to the Commission in other areas. One could for instance expect national Ministries of Foreign Affairs to consult with the relevant EEAS services before taking initiatives in relation to a third country with which the EU is in the process of forging new ties, especially if the EEAS has been entrusted with the negotiations of a comprehensive agreement with that country.⁸⁰ At the very least, the cooperation of member states is required in organisational terms to ensure the smooth functioning of the EEAS, given the national element of its composition.⁸¹ Incidentally, the EEAS Decision provision on the cooperation between Union delegations and member states' diplomatic services, evoked above, does not seem to exclude reciprocity entirely as regards transmission of information. Article 5(9) foresees that Union delegations "*share* information with the diplomatic services of the Member States" rather than "*share their* information with".⁸²
- The GSC is not explicitly covered by the mutual obligation of cooperation set out in Article 3(2) either. Does this entail that only the Commission is subject to an obligation of consultation with the EEAS? Arguably, such a silence could be explained by the fact that, first, the GSC is not a policy initiator as the Commission is, and second, all relevant services of the GSC that have been involved in external action in the past have in principle been transferred to the EEAS. In practice however, the GSC is not disconnected from policy-making in the external sphere. Indeed, various units in the GSC continue to deal specifically with external relations,⁸³ while several preparatory bodies in the

⁸⁰ As envisaged in the "Guidelines" mentioned above. In this situation, the obligations of conduct, evoked by the Court in cases such as C-266/03 *Commission v Luxembourg* [2005] ECR I-4805; Case C-433/03 *Commission v Germany* [2005] ECR I-6985; Case C-459/03 *Commission v Ireland* ('MOX plant') [2006] ECR I-4635; Case C-246/07 *Commission v Sweden* ('PFOS') (Judgment of 20 April 2010, nyr), could be applicable mutatis mutandis in relation to the EEAS.

⁸¹ In the same vein, Article 13(1) EEAS Decision foresees that both the HR and the Council (as well as the Commission and the member states) are responsible for implementing the decision, it also says that they "shall take all measures necessary in furtherance thereof".

⁸² Similarly, the French version of Article 5(9) says "échangeant des informations avec les services diplomatiques des États membres"; rather than "échangeant *leurs* informations". Indeed, the word "échangeant" suggests a two way process, as could the phrase "share".

⁸³ Directorate General C of the GSC deals with "Foreign Affairs, Enlargement and civil protection" comprising Directorate 1 - Trade, Development, EU-ACP relations; Directorate 2 - Enlargement, Europe (non-EU), Foreign Affairs Council Support and Directorate 3 - Humanitarian Aid and Civil Protection.

Council, working for the FAC, are not chaired by EEAS staff, but by the rotating presidency of the Council thus helped by the GSC.⁸⁴ It is indeed noteworthy that at no point is the Council Presidency mentioned in the EEAS Decision, notably as regards the duty of cooperation, despite the latter's involvement in the external action of the Union post-Lisbon.⁸⁵

- It is thus contended that the obligation of cooperation also operates in relation to the Council services, at least to allow the EEAS to fulfil its key consistency-seeking function. Support for this can be found in Article 3(3) which opens the possibility for the EEAS to conclude inter-services arrangements, to specify the desired cooperation not only with the services of the Commission, but also with those of the Council.⁸⁶ Arguably, this provision would not have much sense if there were no GSC duty to cooperate with the EEAS. Moreover, Article 4(5) EEAS Decision explicitly foresees that the HR and the EEAS shall be assisted where necessary by the General Secretariat of the Council and the relevant departments of the Commission. Here too, the Decision evokes the possibility of inter-services arrangements to specify such assistance. Incidentally, one may wonder why this provision was not included in Article 3.
- More generally, one could invoke the Treaty provisions on sincere cooperation, namely Article 4(3) TEU to fill the gaps of Article 3 EEAS. Hence, despite the silence of Article 3 EEAS, the Council, including all its services, being subject to an obligation of cooperation with other institutions under Article 13(2) TEU, should by extension cooperate with the EEAS, notably when the latter performs functions on behalf of, or which were previously performed by the Commission.

⁸⁴ For instance: the Working Party of Foreign Relations Counsellors (RELEX), the Working Party on Terrorism (International Aspects) (COTER), the Working Party on the application of specific measures to combat terrorism (COCOP), the Working Party on Consular Affairs (COCON), the Working Party on Public International Law (COJUR), and the Working Party on the Law of the Sea (COMAR), the ACP Working Party, the Working Party on Development Cooperation (DEVGEN), the Working Party on EFTA, the Working Party on Dual-Use Goods, the Working Party on Trade Questions, the Working Party on Commodities, the Working Party on the Generalised System of Preferences, the Working Party on Preparation for International Development Conferences/UNCCD Desertification/UNCTAD, the Working Party on Humanitarian Aid and Food Aid ; see Council Decision 2009/908/EU of 1 December 2009 laying down measures for the implementation of the European Council Decision on the exercise of the Presidency of the Council, and on the chairmanship of preparatory bodies of the Council, OJ 2009 L 322/28.

⁸⁵ See Editorial Comments, *"The post-Lisbon institutional package: Do old habits die hard?"* (2010) 47 CMLRev 597.

⁸⁶ Indeed, Article 3(3) mentions the GSC *before* the Commission for possible service-level arrangements, while the Ashton proposal put the Commission first, before the GSC. To our knowledge, no such service arrangement has yet been agreed between the GSC and the EEAS.

It would be surprising that, as a result of the transfer of Commission functions to the EEAS, notably to fulfil the consistency objective of the Treaty makers, the cooperative duties of the Council would diminish.

ARTICLE 4

Central administration of the EEAS

1. *The EEAS shall be managed by an Executive Secretary-General who will operate under the authority of the High Representative. The Executive Secretary-General shall take all measures necessary to ensure the smooth functioning of the EEAS, including its administrative and budgetary management. The Executive Secretary-General shall ensure effective coordination between all departments in the central administration as well as with the Union Delegations.*

2. *The Executive Secretary-General shall be assisted by two Deputy Secretaries-General.*

3. *The central administration of the EEAS shall be organised in directorates-general.*

(a) It shall, in particular, include:

— a number of directorates-general comprising geographic desks covering all countries and regions of the world, as well as multilateral and thematic desks. These departments shall coordinate as necessary with the General Secretariat of the Council and with the relevant services of the Commission,

— a directorate-general for administrative, staffing, budgetary, security and communication and information system matters, working in the EEAS framework managed by the Executive Secretary-General. The High Representative shall appoint, in accordance with the normal rules of recruitment, a Director-General for budget and administration who shall work under the authority of the High Representative. He/she shall be responsible to the High Representative for the administrative and internal budgetary management of the EEAS. He/she shall follow the same budget lines and administrative rules as are applicable in the part of Section III of the Union's budget which falls under Heading 5 of the Multiannual Financial Framework,

— the crisis management and planning directorate, the civilian planning and conduct capability, the European Union Military Staff and the European Union Situation Centre, placed under the direct authority and responsibility of the High Representative, and which shall assist him/her in the task of conducting the Union's CFSP in accordance with the provisions of the Treaty while respecting, in accordance with Article 40 TEU, the other competences of the Union.

The specificities of these structures, as well as the particularities of their functions, recruitment and the status of the staff shall be respected.

Full coordination between all the structures of the EEAS shall be ensured.

(b) The central administration of the EEAS shall also include:

— a strategic policy planning department,

— a legal department under the administrative authority of the Executive Secretary-General which shall work closely with the Legal Services of the Council and of the Commission,

— departments for interinstitutional relations, information and public diplomacy, internal audit and inspections, and personal data protection.

4. *The High Representative shall designate the chairpersons of Council preparatory bodies that are chaired by a representative of the High Representative, including the chair of the Political and Security Committee, in accordance with the detailed arrangements set out in Annex II to Council Decision 2009/908/EU of 1 December 2009 laying down measures for the implementation of the European Council Decision on the exercise of the Presidency of the Council, and on the chairmanship of preparatory bodies of the Council.*

5. *The High Representative and the EEAS shall be assisted where necessary by the General Secretariat of the Council and the relevant departments of the Commission. Service-level arrangements may be drawn up to that effect by the EEAS, the General Secretariat of the Council and the relevant Commission departments.*

The principal aim of Article 4 is to set out the key management and administrative bodies responsible for the everyday running of the Service. In the following, both the basic shape of the EEAS (1) and the specific roles and functions of the Executive Secretary-General and Director-General for budget and administration (2), the geographical, thematic and multilateral desks (3), the crisis management structures (4), the departments (5) and Council working parties (6) are discussed.

1. Basic shape of the Service

- It will be recalled that Article 27(3) TEU sketches out only the basic aspects of the EEAS, including its mandate (to assist the High Representative) and its composition (the relevant departments of the General Secretariat of the Council, the Commission and staff seconded from the national diplomatic services of the Member States).
- Article 1(4) of the Council decision specifies that the EEAS shall be made up of a “central administration” and of “Union delegations to third countries and to international organisations”. It is also worth noting that the terminology used in the EEAS differs from that commonly found in the EU institutions (Managing Directors instead of Director-Generals, Divisions instead of Directorates-General, as well as the presence of a Corporate Board).
- The basic shape of the Service had, however, been outlined in a number of preparatory documents. The Joint Progress Report of Solana and Barroso of 9 June 2005 indicated an expansive Service comprising “geographical desks which cover all countries/regions of the world”. Alongside these there should be a number of “single thematic desks”⁸⁷ focusing on issues such as “human rights, counter-terrorism, non-proliferation and relations with international organisations such as the UN”.⁸⁸
- Even at this early stage, the Joint Progress Report raised prescient questions regarding the central administration of the EEAS. These included how it would be possible to have a single ‘*tableau d’effectifs*’ when drawing staff from three sources; how the High Representative, as the highest appointing authority, can be responsible for recruitment on the basis of merit, while ensuring that “staff are recruited on the broadest possible geographical basis”; how to reflect specific EEAS requirements in the Staff Regulations, and how to meet the administrative costs of the EEAS while retaining a level of autonomy.⁸⁹

⁸⁷ Joint Progress Report by the Secretary-General/High Representative and the Commission on the European External Action Service, 9956/05, Brussels, 9 June 2005, para. 13.

⁸⁸ Joint Progress Report by the Secretary-General/High Representative and the Commission on the European External Action Service, 9956/05, Brussels, 9 June 2005, para. 14.

⁸⁹ Ibid. para. 21.

- The Swedish Presidency Report to the European Council on the EEAS of October 2009 briefly mentioned the need for EEAS to have a limited number of support functions, “in particular, IT, management of human resources. The EEAS will need a small capacity for specific legal advice within its structure”.⁹⁰ For the purpose of cost-efficiency, the report recommended that the High Representative and the EEAS be able to draw on “other services within both the Commission and the General Secretariat of the Council in order to fulfil his/her mandate”.⁹¹
- Due to the multiple roles performed by the HR/VP, as well as the need to personally attend meetings in both Brussels and abroad, the importance of delegation has been widely recognised. The European Parliament advocated the establishment of three deputies in charge of multilateral, bilateral and crisis management.⁹² The EEAS Decision does not contain any provisions for the nomination of Deputies, but it was suggested that Article 33 TEU allowing nomination of special representatives, could provide a legal basis for such nomination. It is still questionable whether the role of the HR/VP could be truly ‘deputised’ in the sense of allowing another individual to fulfil the role of the HR/VP, such as chairing the Foreign Affairs Council without a specific legal basis for such a role.
- The lack of any formal deputisation (the formal delegation of authority) for the High Representative in either the Lisbon Treaty (Article 18 TEU) or the Council decision is surprising given the attention to the issue in the Convention on the Future of Europe and the fact that Article 17.6c TEU and Article 25 of the Commission’s Rules of Procedure clearly envisage deputisation for the President of the Commission. The complexity of deputising for the HR/VP in all of her various roles (Commission, Foreign Affairs Council, European Parliament and external representation) has created slightly different challenges. For the European Parliament, deputisation is carried out in accordance with the Declaration on Political Accountability (8 July 2010), an Inter-Institutional Agreement between the Parliament and Commission and the Rules of Procedure of the Council. Namely, a Commissioner will replace her for issues falling exclusively or primarily under Commission competences or, for those issues falling under CFSP, the rotating Presidency or one of the two relevant ministers of the ‘trio Presidency’. In the case of the Commission the absent member can be represented by the appropriate Chef de Cabinet, but with no voting rights or other rights beyond expressing the absent Commissioner’s position. In the case of the Foreign Affairs Committee, the Minister of the rotating Presidency can be

⁹⁰ Presidency Report to the European Council on the European External Action Service, 14930/09, 23 October 2009, para. 12.

⁹¹ Presidency Report to the European Council on the European External Action Service, 14930/09, 23 October 2009, para. 12.

⁹² *Proposal for the Establishment of the EEAS*, Working Document by Elmar Brok (AFET) and Guy Verhofstadt (AFCO), rapporteurs on EEAS, Updated Version, 20 April 2010, pp.4-5.

invited to chair in the absence of the High Representative.. For external representation and dialogues the HR/VP is, when necessary, represented by the rotating Presidency with a Commissioner (normally Stabilisation and Association and Cooperation Council meetings). In those cases where the rotating Presidency is unable to replace the HR/VP, an appropriate ministerial representative from another member state may be invited.

- The article also makes provision for two Deputy Secretaries-General (para. 2). One addresses Political Affairs while the other concentrates on Inter-Institutional affairs. Along with the High Representative and the Executive Secretary-General, the four constitute the Corporate Board of the EEAS. Since the two Deputies are charged with ‘assisting the Executive Secretary-General’ their roles should therefore be understood in terms of ensuring effective coordination between all departments and with the delegations.

2. Executive Secretary-General and Director-General for budget and administration

- The original draft decision of 25 March 2010 (‘the March draft decision’) did not mention the Director-General for budget and administration. These aspects fell under the ‘Secretary-General’. The revised draft decision following the 21 June 2010 Quadriologue (‘the June draft decision’) showed clear concern from the European Parliament’s perspective regarding the budgetary aspects of the Service. This reflected in the post-quadrilogue draft of Article 4, which introduced the post of “Director General for budget and administration who shall work under the authority of the High Representative” and who, in this capacity, is responsible for the administrative and budgetary management of the EEAS. Mention of this post was included in a statement given by the HR, mentioning that the incumbent would be a “senior figure in the EEAS with proven experience of EU budget and administration”.⁹³
- The role of the Secretary-General was also altered to reflect management responsibilities for administrative, staffing, budgetary, security and communication and information systems⁹⁴ – rather than the attribution of ‘direct authority’ in the March draft decision.⁹⁵ Compared to the March draft decision the Secretary-General became an ‘Executive Secretary-General’. In addition to his

⁹³ Elements for a statement to be given by the High Representative in the plenary of the European Parliament on the basic organisation of the EEAS central administration, 21 June 2010.

⁹⁴ Revised draft (21 June 2010), Consolidated Version with Latest Amendments Post-Quadriologue of 21 June 2010, Article 4.

⁹⁵ Article 4(1), second para., *in fine*, proposal for a Council Decision establishing the organisation and functioning of the European External Action Service (25 March 2010).

coordination role, the March draft decision also mentioned that he shall “represent the EEAS”. Under the EEAS Decision the role of the Executive Secretary-General omits this broader representative function, limiting the post-holder to responsibility for the “smooth functioning” of the EEAS. The original intention was therefore to assist in the need to delegate certain representative functions of the HR to the Executive Secretary-General.

- The subsequent drafts of the Council decision clearly illustrate the shifting role of the Executive Secretary-General and the insertion of the Director-General for budget and administration, largely at the behest of the European Parliament. The EEAS Decision reflects both of these changes but, by so doing, it introduces significant elements of ambiguity regarding the role of the Executive Secretary-General and the relationship between this post and that of the Director-General for budget and administration. Since the former is responsible for “all measures” necessary for the smooth functioning of the Service, including the administrative and budgetary measures, it is noteworthy that the latter works “under the authority of the High Representative” and not, as might be anticipated, the Executive Secretary-General. This is most likely because legal responsibility for budgetary and personnel matters resides with the HR and, with this in mind, reporting on these issues goes directly to the HR.

3. Geographical, thematic and multilateral desks

- In paragraph 3, mention is made of both geographical and thematic desks. The former is more obvious, based upon the transferral of the desks from the Commission and the General Secretariat of the Council (these are laid out in the Annex to the EEAS Decision). A limited impression of the latter can be gleaned by reading through the annex. It was evident prior to the creation of the Service that certain areas like climate change (see first organogram of the EEAS accompanying the March draft decision) were contested in terms of competences. The result is that the thematic areas covered apparently exclude some global issues that are important in terms of EU policy, such as climate change or energy security. There is also little guidance in the Decision as to how the thematic and geographic desks should inter-relate. The horizontal thematic desks can offer support to geographic desks on a wide range of issues including human rights and democracy, counter-terrorism and non-proliferation, however this requires co-ordination between the thematic and geographic desks.
- It was agreed that the thematic and geographic desks should not be duplicated within the Commission or Council General Secretariat, taking into account the Commission DGs’ roles in enlargement, humanitarian aid, trade, and development policy.

4. Crisis management structures

- The provisions on the crisis management bodies (CMPD, CPCC, EUMS, EU Situation Centre) make them work under the authority and responsibility of the

HR. The *travaux préparatoires* indicate sensitivity about the role of these bodies, with the Swedish Presidency report noting the need to take “full account of the specificities of these structures and preserving their particular functions, procedures and staffing conditions”.⁹⁶ The ambiguous position of the crisis management bodies was reinforced by some of the member states. For instance, Slovakia recommended that “ESDP and crisis management should stay out of the EEAS (definitely at the beginning)”.⁹⁷ Although this view did not prevail, the sense of separateness and the specific link to the HR was reflected in Ashton’s ‘Step Change’ paper.⁹⁸ Belgium, although in favour of the integration of these structures into the Service, wanted “to preserve their specificity as a single Directorate General, under direct authority of and direct access to the High Representative”.⁹⁹ The Finnish government saw the inclusion of the crisis response and the crisis management tasks within the EEAS as a “major structural improvement”.¹⁰⁰ The formulations of the October 2009 Swedish Presidency report, as well as some positions of member states, were reflected in both the draft decision and the final version. Hence, mention is made of the “specificities” and “particularities” of the crisis management bodies mentioned (all of which were formerly in the General Secretariat of the Council). The challenge is to be found in the following sentence of the EEAS Decision, which states that “[f]ull coordination between all the structures of the EEAS shall be ensured”.

- The stipulations regarding the crisis management bodies are framed in accordance with Article 40 TEU and, by reference, to Articles 3-6 TFEU. The presence of such references serves to remind the reader of the still partially pillarised nature of the Union and, more specifically, that the attainment of any comprehensive security approach should be mindful of the other related areas partially or exclusively falling under the Commission’s competences (crisis prevention; civil protection; post-conflict stabilisation; security sector reform etc). More specifically, the lack of linkage, other than through the HR, between the crisis management bodies mentioned in this paragraph and other parts of the Service having a more general crisis response function implies that there are challenges to ‘coordination’ and potentially to the ‘smooth functioning of the EEAS’ (see above), which raises legitimate questions about the soft nature of these stipulations. It is also worth noting that the reference in the text of the Council decision to the EU Situation Centre is incorrect since it has since been renamed the Intelligence and Analysis Centre (IntCen).

⁹⁶ Presidency Report to the European Council on the European External Action Service, 14930/09, 23 October 2009, para. 7.

⁹⁷ Non-paper of the Slovak Republic on EEAS (Replies to the Presidency questions), undated.

⁹⁸ “A Step Change in external policy for the Union: Delivering on the promise of the Lisbon Treaty”, Annex 1, 3 March 2010.

⁹⁹ Letter of Steven Vanackere, Belgian Deputy Prime Minister and Minister of Foreign Affairs and Institutional Reform, to Ashton, 4 March 2010.

¹⁰⁰ Finnish views on the European External Action Service (undated), p.3.

5. Departments

- Article 4 of the EEAS Decision mentions a number of specific departments to be included in the EEAS central administration. These include a department for strategic policy planning, departments for inter-institutional relations, information and public diplomacy, internal audit and inspections, personal data protection, as well as a legal department. The EEAS legal department remains relatively small, and is to work closely with the Legal Services of the Council and Commission. A policy planning department is responsible for longer term and strategic planning of the EEAS, and should be in constant dialogue with the thematic and geographic desks. The EEAS Decision builds upon Ashton's 'Step Change' document where she stressed that a 21st century external service required a professional communications structure, a substantive media operation to manage dialogues with NGOs, civil society, non-state actors, and other interested parties.¹⁰¹
- Most of the suggested departments subsequently materialised in the EEAS although, surprisingly, public diplomacy was placed in the Foreign Policy Instrument (FPI) (alongside election observation, which also appears under Human Rights and Democracy in the Global and Multilateral Issues division), which has a particular status vis-à-vis the EEAS but which is not touched upon in this article. The clear intent of this paragraph was to place this function within the 'central administration' of the EEAS. It is arguable whether this has been done in practice, especially bearing in mind that public diplomacy goes beyond strategic communication.

6. Council working parties

- The stipulation in paragraph 5 that the High Representative and the EEAS shall be assisted by the General Secretariat of the Council and the relevant departments of the Commission, relates to the Preamble (Para. 3) since any assistance has to be understood in the context of the 'normal tasks' of the Council Secretariat and the Commission. Article 3(2) creates an obligation of mutual assistance in the context of the Commission but not the Council Secretariat.¹⁰²
- The Decision also expressly refers to chairing arrangements of the Council's preparatory bodies. This was necessary due to the changes introduced to the rotating Presidency by the Lisbon Treaty.¹⁰³ Article 4(4) stipulates that the High

¹⁰¹ "A Step Change in external policy for the Union: Delivering on the promise of the Lisbon Treaty", Annex 1, 3 March 2010.

¹⁰² See commentary of Article 3, above.

¹⁰³ For an overview of the chairing arrangements see Annex 1, (Foreign Affairs) List of Council Preparatory Bodies, Council doc. 12223/12, 4 July 2012.

Representative “shall designate the chairpersons of Council preparatory bodies that are chaired by a representative of the High Representative, including the chair of the Political and Security Committee, in accordance with the detailed arrangements set out in Annex II to the Council Decision concerned.”¹⁰⁴

¹⁰⁴ Council Decision 2009/908/EU of 1 December 2009 laying down measures for the implementation of the European Council Decision on the exercise of the Presidency of the Council, and on the chairmanship of preparatory bodies of the Council, OJ L 322, 9.12.2009, p. 28.

ARTICLE 5

Union Delegations

1. The decision to open or close a delegation shall be adopted by the High Representative, in agreement with the Council and the Commission.

2. Each Union Delegation shall be placed under the authority of a Head of Delegation.

The Head of Delegation shall have authority over all staff in the delegation, whatever their status, and for all its activities. He/she shall be 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.

Staff in delegations shall comprise EEAS staff and, where appropriate for the implementation of the Union budget and Union policies other than those under the remit of the EEAS, Commission staff.

3. The Head of Delegation shall receive instructions from the High Representative and the EEAS, and shall be responsible for their execution.

In areas where the Commission exercises the powers conferred upon it by the Treaties, the Commission may, in accordance with Article 221(2) TFEU, also issue instructions to delegations, which shall be executed under the overall responsibility of the Head of Delegation.

4. The Head of Delegation shall implement operational credits in relation to the Union's projects in the corresponding third country, where sub-delegated by the Commission, in accordance with the Financial Regulation.

5. The operation of each delegation shall be periodically evaluated by the Executive Secretary-General of the EEAS; evaluation shall include financial and administrative audits. For this purpose, the Executive Secretary-General of the EEAS may request assistance from the relevant Commission departments. In addition to internal measures by the EEAS, OLAF shall exercise its powers, notably by conducting anti-fraud measures, in accordance with Regulation (EC) No 1073/1999.

6. The High Representative shall enter into the necessary arrangements with the host country, the international organisation, or the third country concerned. In particular, the High Representative shall take the necessary measures to ensure that host States grant the Union delegations, their staff and their property, privileges and immunities equivalent to those referred to in the Vienna Convention on Diplomatic Relations of 18 April 1961.

7. Union delegations shall have the capacity to respond to the needs of other institutions of the Union, in particular the European Parliament, in their contacts with the international organisations or third countries to which the delegations are accredited.

8. The Head of Delegation shall have the power to represent the Union in the country where the delegation is accredited, in particular for the conclusion of contracts, and as a party to legal proceedings.

9. The Union delegations shall work in close cooperation and share information with the diplomatic services of the Member States.

10. The Union delegations shall, acting in accordance with the third paragraph of Article 35 TEU, and upon request by Member States, support the Member States in their diplomatic relations and in their role of providing consular protection to citizens of the Union in third countries on a resource-neutral basis.

The establishment of Union delegations is a major innovation of the Lisbon Treaty (1). The purpose of Article 5 of the EEAS Decision is to articulate their operation. In commenting this article, the exchange of information with and between the member states will be discussed (2), the role and functions of the Head of Delegation (3), the status of Delegations in third states and at international organisations (4), and Delegations' (potential) role in diplomatic and consular protection (5).

1. A single diplomatic presence

- The pivotal role in external representation by EU delegations finds its basis in Article 221(1) TFEU, which was newly inserted with the Lisbon Treaty: *“Union delegations in third countries and at international organisations shall represent the Union.”* The ambition flowing from this new provision in the TFEU is quite clear: the Union no longer wishes to have an international presence through delegations of only one of its institutions (e.g. Commission Delegations), or through the diplomats of the member state holding the rotating Presidency.¹⁰⁵ The purpose of this Treaty provision was to have “less Europeans and more EU”¹⁰⁶, a single diplomatic presence for the Union speaking on behalf of a single legal entity active globally. Implementing this ambition has meant that the former ‘Commission Delegations’ have been turned into ‘Union delegations’¹⁰⁷ and that for all practical diplomatic purposes they are seen as EU ‘embassies’.¹⁰⁸
- Given the objective of a single diplomatic presence, it is striking that the Special Representatives are not mentioned in Article 5 of the Decision. Still, the European Union currently has eleven Special Representatives (EUSRs) in different countries and regions of the world. They support the work of the High Representative and form part of the EEAS external machinery.
- In a joint letter of 3 March 2010 from Foreign Ministers Bildt of Sweden and Miliband of the UK to High Representative Ashton, it was nevertheless stressed

¹⁰⁵ But see the EEAS document ‘EU Diplomatic Representation in third countries – First half of 2012’, Council of the European Union, Doc. 18975/1/11, REV 1, 11 January 2012, which reveals that in some countries the EU is still represented by a member state.

¹⁰⁶ A. Missiroli, “The New EU Foreign Policy System after Lisbon: A Work in Progress” 15 (2010) *European Foreign Affairs Review* pp. 427-452.

¹⁰⁷ European External Action Service, *Report by the High Representative to the European Parliament, the Council and the Commission*, 22 December 2011, 16. See also F. Bergmüller, “The EEAS: A Loss for the European Commission’s External Relations Capacities?”, in P. Quinn (ed.), *Making EU Diplomacy work: Can the EEAS deliver?* (2011) EU Diplomacy Papers 8/2011, College of Europe, pp. 14-18.

¹⁰⁸ J. Wouters and S. Duquet, ‘The EU and International Diplomatic Law: New Horizons?’ (2012) 7 *Hague Journal of Diplomacy* pp. 31-49.

that the EEAS will need an “intimate relationship with its principal stakeholders in the rest of the Commission, but it must have the keys to its own house”.¹⁰⁹

- According to Article 5(1), the High Representative is responsible for opening or closing delegations. He/she does so in agreement with the Council and the Commission. Given the fact that the former delegations were part of the Commission, this is a major innovation. Opening a mission in a foreign state and thereby institutionalising diplomatic relations with that state is a fundamental step in international law. It is an important power vested in the High Representative, but the Commission and the Council must concur. This raises the question what possibilities the High Representative has when one of the latter, or both, do not agree. The decision to send an envoy or set up a less prestigious type of presence, such as an ‘office’, is not made dependent on their agreement.
- The facilities offered by the Union Delegations are not just at the service of the EEAS itself and the Commission, but also of other institutions. As Article 5(7) refers to “institutions of the Union”, it is clear that it applies to the formal institutions listed in Article 13(1) TEU (European Parliament, European Council, Council, European Commission, Court of Justice, European Central Bank, Court of Auditors). It could be submitted, though, that other EU bodies may also want to rely on Delegations to ‘respond to their needs’ in their contacts with third states and international organisations. This submission is supported by the provisions of Art 3(4) of the EEAS Decision about the mandatory extension of EEAS’ “appropriate support to the other institutions and bodies of the Union”. The latter’s formulation is general: the EEAS is envisaged as a whole, i.e. including central administration and delegations. The idea is to have Delegations function as a portal for the EU and it makes sense not to limit the quest for consistency on the basis of formal rules. The European Parliament is mentioned explicitly. While this is legally not necessary, the reason may be to ensure specifically that for visits abroad MEPs can also rely on the services of the Delegations.
- In terms of evaluation, the Delegations are covered by the same rules as other EU bodies (Article 5(5)). A similar provision is not included for the EEAS as such, although Article 3(4) does refer to specific inspections by OLAF.

2. Exchange of information between the Union Delegations and Member States

- Article 5(9) of the Council Decision obliges Union Delegations to work in close cooperation and share information with the diplomatic services of the member states. While the March draft decision imposed a *reciprocal* obligation to share information, the EEAS Decision only refers to the Delegations and their obligation

¹⁰⁹ Joint Letter dated 3 March 2010 from Foreign Ministers Carl Bildt and David Miliband to The Right Honourable Baroness Ashton, High Representative of the Union for Foreign Affairs and Security Policy, Vice President of the Commission.

to share information with the diplomatic services of the Member States. The question is whether this would imply that member states are not under any obligation to share information with Union Delegations. Pursuant to the principle of sincere cooperation (Article 4(3) TEU), the loyalty obligation (Article 24(3) TEU) as well as the specific obligation of the diplomatic missions of the member states and the Union delegations to cooperate (Article 32(3) TEU), this cannot, in our view, be the correct interpretation. As to the EEAS-Commission relationship, one must again look at the Working Arrangements of January 2012, which states the following concerning reporting back to headquarters:

*EU Delegations shall provide political reporting to the HR/VP, President Barroso and relevant Commissioner(s), the EEAS and Commission services ...A two way flow of information is essential - from the political and trade/economic sections of EU Delegations to the EEAS and Commission services and in the opposite direction. The geographical desks in the EEAS shall be systematically copied on all reports and information relative to her/his respective country. Delegations shall provide relevant reporting to other Commission services outside the external relations 'family'. The Commission services shall keep EU Delegations informed about relevant developments, providing lines to take etc.*¹¹⁰

However, the challenge of political reporting is less one between the institutions themselves than one between the EU Delegations and the member states. At present the member states are mainly on the receiving end of EU Delegations' reports, but share very little in the other direction. There is the hope and expectation that this will change as member states diplomatic representations come to trust and get used to their EU counterparts.¹¹¹

3. Head of Delegation

- Pursuant to Article 5(2) of the Council Decision, the Head of Delegation shall have authority over all staff in the delegation and is accountable to the High Representative. Heads of Delegations de facto act as 'EU Ambassadors'.¹¹² The EU Heads of Delegations representing the Union in third states and at international organisations are thus conferred the authority to perform functions equivalent to those of national diplomats. It is interesting to note that s/he has authority over all staff, irrespective of their briefs. This implies that the Head of Delegation has overall authority, even on dossiers that were not primarily prepared by the EEAS, but by the Commission. Furthermore, s/he shall be accountable to the High Representative in all cases, and not to any of the Commissioners.

¹¹⁰ Working Arrangements Between Commission Services and the European External Action Service (EEAS) in Relation to External Relations Issues, SEC(2012)48, para. 1.2.

¹¹¹ B. van Vooren and R.A. Wessel, "External Representation and the European External Action Service: Selected Legal Challenges", in S. Blockmans and R.A. Wessel (Eds.), *Principles and Practices of EU External Representation* (2012) The Hague: CLEER Working Paper series, pp. 59-82.

¹¹² J. Wouters and S. Duquet, *o.c.*; the post-Lisbon letters of credence co-signed by the President of the European Council and by the President of the Commission still mention that the head of delegation shall have the "rank and courtesy title of ambassador".

- The Head of Delegation shall receive instructions from the High Representative and the EEAS, and shall be responsible for their execution (Art. 5(3) of the Council Decision).
- During the negotiations on setting up the EEAS questions arose from some of the member states wanting to see ‘appropriate’ involvement of the Commission but with ‘all instructions to the delegations’ flowing through the HR and the EEAS to HoDs.¹¹³ Arguably, the formulation of Article 5(3) of the Council Decision does not prevent the Commission from issuing instructions to delegations in areas belonging to its competences, but these shall also be executed under the overall responsibility of the Head of Delegation. The 2012 Working Arrangements between the Commission and the EEAS refer to the situation where the Commission, through the Head of Delegation, calls on EU Delegations to carry out activities related to policy implementation, demarches and policy advocacy on issues of Commission competences (e.g. trade, humanitarian affairs, etc.).¹¹⁴ The reference in Article 5(3) to Article 221(2) TFEU serves as a reminder that the Treaty itself has placed “Union delegations [...] under the authority of the High Representative”. The general authority of the Head of Delegation, together with the overall responsibility to execute all instructions is meant to strengthen the consistency of the EU’s policies in a particular third state or at an international organisation.
- The authority and responsibility of the Head of Delegation extends to the implementation of the financial dimensions of projects in third countries, as s/he shall implement the operational credits.¹¹⁵ In this context, the Head of Delegation might be acting on behalf of the Commission.¹¹⁶
- The EU enjoys international legal personality, which allows it to enter into legal relations with states and other international organisations.¹¹⁷ Article 5(8) of the Council Decision allows the Union to be legally represented by the Head of Delegation in the country where the Delegation is accredited. The provision explicitly refers to the conclusion of contracts, and the role of the Head of

¹¹³ Letter DE Amb. Perm Rep to ES Amb. Perm Rep, 2 March 2010.

¹¹⁴ Working Arrangements Between Commission Services and the European External Action Service (EEAS) in Relation to External Relations Issues, SEC(2012)48, para. 1.1.

¹¹⁵ See Article 9 of the EEAS Decision.

¹¹⁶ Cf. Case T-395/11 *Elti d.o.o. v Delegation of the European Union to Montenegro*, Order of the General Court (Eighth Chamber), judgment of 4 June 2012, nyr.

¹¹⁷ See more extensively R.A. Wessel, “Revisiting the International Legal Status of the EU”, (2000) 5 *European Foreign Affairs Review* 507-537; R.A. Wessel, ‘The European Union as a Party to International Agreements: Shared Competences, Mixed Responsibilities’, in A. Dashwood and M. Maresceau (eds.), *Law and Practice of EU External Relations – Salient Features of a Changing Landscape* (Cambridge: Cambridge University Press, 2008) pp. 145-180.

Delegation as a party to legal proceedings,¹¹⁸ but this is not to be seen as a limitative list. In this context, the question arises whether a Head of Delegation could initial international agreements on behalf of the Union; that would obviously require adherence to the provisions of the treaty-making procedure of Article 218 TFEU.

4. Status of Delegations in third states and at international organisations

- The EU is obviously not a state. Yet, it is an active participant in the diplomatic network of states that is – primarily – regulated by the Vienna Convention on Diplomatic Relations of 1961 ('VCDR'). Not being a party to the VCDR, the Union has developed a steady practice to opt in to its application in a contractual manner, typically through the conclusion of an establishment agreement or headquarters agreement.¹¹⁹ Article 5(6) of the Council Decision foresees "arrangements" to do exactly this. Although the text refers to "arrangements" and "measures", in practice an international agreement will be concluded with the host state or the international organisation concerned, in which diplomatic privileges and immunities are procured.
- The fact that the international rules on diplomatic (and consular) relations were drafted for states makes it difficult for the EU to play along. On an ad hoc basis it needs to come to an agreement with a third state or an international organisation to regulate its status abroad. This is further complicated by the fact that in most cases external competences are divided between the EU and its member states. A practical issue, for instance, concerns the provision of diplomatic passports. Most Member States (CZ, FR, IRL, LUX, LV, NL, PL, SK, SW) offer passports to EEAS officials of their nationality, while others cannot do so without legal changes (DE, EE, GR). Germany is reluctant to grant diplomatic passports because it would feel compelled to provide them to all Commission officials as well. FR, GR, IRL, SW support the idea of a common European travel document (*laissez-passer* discussions were halted in 2009 with the objective of issuing all EEAS officials with a high quality travel document).

5. Diplomatic and consular support

- Another question is to what extent Delegations would also be able to act as legal representatives of EU citizens, for instance when the member state of origin does not have a diplomatic or consular representation in the particular third state. This question is related to the more general question whether and to what extent

¹¹⁸ Ibid. In Case T-395/11 referred to above, the General Court nuances this role by making it dependent on the specific situation.

¹¹⁹ See J. Wouters and S. Duquet, *o.c.*, 38-39.

Delegations would be competent to act on behalf on EU citizens and to protect their interests abroad.

- The March 2010 draft decision mentioned ‘support the Member States in their diplomatic relations and in their role of providing consular protection to Union citizens in third countries’. The EEAS Council Decision refers to the same rights but adds the qualification that this must be “on a resource-neutral basis” (Article 5(10)).
- Articles 3(5) TEU and 23 TFEU provide the basis for diplomatic protection and consular assistance to EU citizens. Article 3(5) TEU obliges the EU to protect the interests of its citizens abroad, and persons holding the nationality of a member state are citizens of the Union (Article 20(1) TFEU). The issue is currently under discussion on the basis of a proposal for a Council Directive on consular protection for citizens of the Union abroad. In relation to a number of issues, the EP’s Committee on Civil Liberties, Justice and Home Affairs (LIBE) proposed the inclusion of an additional role of the Union delegations in consular protection as well as a clear coordinating role of the EEAS.¹²⁰ However, member states are divided on how far the implementation of these provisions should go. Some support a greater role for the EU Delegations in consular affairs. There seems room for discussion on a specification of a civil protection or evacuation role of Delegations for facilitating, pooling and disseminating information drawing on the experiences of Japan and Syria. In the long term, if the Union were to achieve full diplomatic maturity, the most far-reaching implication *might* be that the EU provide such protection as if the persons concerned were ‘nationals of the EU’ for the purposes of international law. While Article 3(5) TEU could accommodate that interpretation, the role explicitly foreseen in the EEAS Decision for diplomatic protection and consular assistance by the EU currently does not, and is merely supplementary. What is certain from the perspective of the EEAS, is that if the Union wishes to pursue such a role for EU Delegations abroad, significantly more financial and human resources will need to be allocated to the EU diplomatic service. The December 2011 EEAS evaluation report stated that “it is difficult to see how this objective could reasonably be achieved “on a resource- neutral basis” as required by the EEAS Decision. It would certainly not be responsible for raising citizens’ expectations about the services to be provided by EU Delegations, beyond their capacity to deliver in such a sensitive area. And the existing expertise within the EEAS in this area is extremely limited. However, over the past year we have also seen that EU Delegations can play an important role in the coordination of evacuations of citizens and that pragmatic solutions can be found on the ground.

¹²⁰ Report of 10 October 2012, PE 492.575v03-00, A7-0288/2012 on the proposal for a Council directive on consular protection for citizens of the Union abroad, (COM(2011)0881 – C7-0017/2012 – 2011/0432(CNS)), available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2012-0288+0+DOC+XML+V0//EN> (last visited on 31 January).

- Article 5(8) of the Council Decision refers to third states and not to international organisations. Yet, the legal representation of the Union may also become relevant there.

ARTICLE 6

Staff

1. This Article, except paragraph 3, shall apply without prejudice to the Staff Regulations of Officials of the European Communities ('Staff Regulations') and the Conditions of Employment of Other Servants of those Communities ('CEOS'), including the amendments made to those rules, in accordance with Article 336 TFEU, in order to adapt them to the needs of the EEAS.

2. 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.

The Staff Regulations and the CEOS shall apply to this staff.

3. If necessary, the EEAS may, in specific cases, have recourse to a limited number of specialised seconded national experts (SNEs).

The High Representative shall adopt rules, equivalent to those laid down in Council Decision 2003/479/EC of 16 June 2003 concerning the rules applicable to national experts and military staff on secondment to the General Secretariat of the Council (1), under which SNEs are put at the disposal of the EEAS in order to provide specialised expertise.

4. 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. In accordance with the second paragraph of Article 11 of the Staff Regulations, EEAS staff shall not accept any payments of any kind whatever from any other source outside the EEAS.

5. The powers conferred on the appointing authority by the Staff Regulations and on the authority authorised to conclude contracts by the CEOS shall be vested in the High Representative, who may delegate those powers inside the EEAS.

6. Recruitment to the EEAS shall be based on merit whilst ensuring adequate geographical and gender balance. The staff of the EEAS shall comprise a meaningful presence of nationals from all the Member States. The review provided for in Article 13(3) shall also cover this issue, including, as appropriate, suggestions for additional specific measures to correct possible imbalances.

7. Officials of the Union and temporary agents coming from the diplomatic services of the Member States shall have the same rights and obligations and be treated equally, in particular as concerns their eligibility to assume all positions under equivalent conditions. No distinction shall be made between temporary agents coming from national diplomatic services and officials of the Union as regards the assignment of duties to perform in all areas of activities and policies implemented by the EEAS. In accordance with the provisions of the Financial Regulation, the Member States shall support the Union in the enforcement of financial liabilities of EEAS temporary agents coming from the Member States' diplomatic services which result from a liability under Article 66 of the Financial Regulation.

8. The High Representative shall establish the selection procedures for EEAS staff, which shall be undertaken through a transparent procedure based on merit with the objective of securing the services of staff of the highest standard of ability, efficiency and integrity, while ensuring adequate geographical and gender balance, and a meaningful presence of nationals from all Member States in the EEAS. Representatives of the Member States, the General Secretariat of the Council and of the Commission shall be involved in the recruitment procedure for vacant posts in the EEAS.

9. When the EEAS has reached its full capacity, staff from Member States, as referred to in the first subparagraph of paragraph 2, should represent at least one third of all EEAS staff at AD level. Likewise, permanent officials of the Union should represent at least 60 % of all EEAS staff at AD level, including staff coming from the diplomatic services of the Member States who have become permanent officials of the Union in accordance with the provisions of the Staff Regulations. Each year, the High Representative shall present a report to the European Parliament and the Council on the

occupation of posts in the EEAS.

10. The High Representative shall lay down the rules on mobility so as to ensure that the members of the staff of the EEAS are subject to a high degree of mobility. Specific and detailed arrangements shall apply to the personnel referred to in the third indent of Article 4(3)(a). In principle, all EEAS staff shall periodically serve in Union delegations. The High Representative shall establish rules to that effect.

11. In accordance with the applicable provisions of its national law, each Member State shall 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. This period of service, in accordance with the provisions of Article 50b of the CEOS, shall not exceed eight years, unless, it is extended for a maximum period of two years in exceptional circumstances and in the interest of the service.

Officials of the Union serving in the EEAS shall have the right to apply for posts in their institution of origin on the same terms as internal applicants.

12. Steps shall be taken in order to provide EEAS staff with adequate common training, building in particular on existing practices and structures at national and Union level. The High Representative shall take appropriate measures to that effect within the year following the entry into force of this Decision.

This long article addresses staffing issues at the EEAS. As Article 27(3) TEU envisaged the composition of the Service only in general terms (“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”), the EEAS Decision had to include a fair degree of detail, –on what are primarily internal matters. Frequent reference is made in this article to the (amended) Staff Regulations and to the Conditions of Employment of Other Servants (CEOS).¹²¹ The amended Staff Regulations note that, “in view of [the Service’s] specific tasks, the EEAS should be granted autonomy within the framework of the Staff Regulations”. For the purposes of the Staff Regulations and the CEOS, the EEAS should be treated as an institution of the Union.

1. Composition

- The basic (initial) composition of the staff had already been determined in the final report of the Convention’s Working Group VII on External Action of 16 December 2002, which touched upon staffing for the projected EEAS *en passant*, mentioning that it would be composed of staff from DG Relex, Council Secretariat officials and staff seconded from the national diplomatic services.¹²² The 2005 Barroso and Solana Joint Progress Report stressed the importance of having a “sufficient number” of national diplomats in the EEAS and argued that they should be temporarily assigned, rather than seconded, so that all staff should

¹²¹ *Regulation of the European Parliament and the Council amending the Staff Regulations of Officials of the European Communities and the Conditions of Employment of Other Servants of those Communities*, PE-CONS 52/10, Strasbourg, 9 November 2010.

¹²² Final Report of Working Group VII on External Action, Brussels, CONV 459/02, 16 December 2002, p. 6.

have the “same status and conditions of employment”. It was also agreed that the nomination of staff to the EEAS should be “based on merit with appropriate selection procedures”.¹²³ A fiche on “Specific arrangements concerning EEAS staff” of 12 October 2009 helpfully distinguished between the staffing demands of the initial set-up of the Service and the following period and noted the need for a policy of mobility in order to avoid the creation of “flagged posts”.¹²⁴

- The High Representative’s “Step Change” document, which was in effect a preview of the March 2010 draft decision, gave an overview of both the architecture of the Service as well as reaffirming many of the previously discussed staffing aspects, including transitional arrangements for the start-up of the Service and a pledge that the EEAS Decision would establish the principle of rotation within the EEAS.¹²⁵ The actual explanatory memorandum of the March draft decision reiterates many of the above points but, somewhat curiously, introduces the Consultative Committee on Appointments (CCA), which is a selection panel for senior appointments (director and above) as well as having a more general mandate to monitor gender and geographical balance, although this is not mentioned in the EEAS Decision itself.¹²⁶ The list of staff due to be transferred to the EEAS (was) transmitted in an annex to this document communicated almost a month **later**.¹²⁷
- The specifics of how to ensure the desired one-third contribution from the member states (at AD level) received further thought and attention in a report by the High Representative on the contribution from the member states in June 2010.¹²⁸
- Amendments to the Staff Regulations and CEOS were necessary to incorporate the EEAS. The revised Regulations reflect many of the issues discussed in the *travaux préparatoires*, such as the balance between AD officials coming from member states’ diplomatic services and permanent EU officials. The issue of geographical and gender balance was discussed intensively during the co-decision

¹²³ Joint Progress Report by the Secretary-General/High Representative and the Commission on the European External Action Service, 9956/05, Brussels, 9 June 2005, Paras. 13-14.

¹²⁴ *Fiche on Specific Arrangements concerning EEAS staff*, 12 October 2009, p. 5.

¹²⁵ “A Step Change in external policy for the Union: Delivering on the promise of the Lisbon Treaty”, Annex 1, 3 March 2010, Section 5.

¹²⁶ *Draft decision establishing the organisation and functioning of the European External Action Service*, from the High Representative to the Council, Explanatory Memorandum, 8029/10, Brussels, 25 March 2010, p. 3.

¹²⁷ *Annex to the proposal for a Council decision establishing the organisation and functioning of the European External Action Service*, from the High Representative to COREPER, 8870/10, 22 April 2010.

¹²⁸ Report from the High Representative, *EEAS Staffing – the contribution from the Member States*, 4 June 2010.

procedure, resulting in the legal text being supplemented by statements by the High Representative pledging appropriate action to promote geographical and gender balance.¹²⁹ Reference in Article 6(1) of the Council Decision to Article 336 TFEU serves as a reminder of the procedures for the amendment of the Staff Regulations (“in accordance with the ordinary legislative procedure and after consulting other institutions concerned...”).

- Article 6(2) of the Council Decision reaffirms the composition of the EEAS. It should be noted that the general wording of the paragraph serves both the current (transition) composition of the EEAS until 30 June 2013 (in line with Article 98(1) of the Staff Regulations) and the situation thereafter whereby the Service shall consider applications of officials from other EU institutions.
- The importance of the quota of permanent officials to temporarily assigned diplomats reflects concerns stemming from a number of the *travaux préparatoires*. Article 6(9) does not specify when the EEAS should ‘reach full capacity’ but the amended Staff Regulations make it clear that this should be by 1 July 2013 (at which time derogations from Article 98(1) of the Staff Regulations should desist). The latest EEAS report on staffing, reflecting the situation as of 1 June 2012, demonstrates good progress on attaining the desired one-third level for staff from the member states at AD level. The paragraph refers only to a general balance and does not specify how any such balance should be attained between the headquarters and Delegations. The indication of the desirable ‘balance’ between temporarily assigned national diplomats and EU officials gives rise to the question, with regard to paragraphs 6 and 8, of whether other forms of balance should not be expressed in general terms.
- The situation following expiry of the derogations noted above (which will coincide with the review of the EEAS) implies that direct recruitment to the Service will be possible on the basis of open competition, beyond the pool of primarily transferred staff (see Article 7 of the Council decision) who comprised much of the initial Service. The likely implications of this for any necessary rebalancing in line with Article 6(6 and 8) should be carefully considered.
- The Rules regarding Seconded National Experts referred to in Article 6(3) of the Council Decision have since been adopted.¹³⁰ Paragraph 3 states that rules shall be adopted equivalent to those laid down in Council Decision 2003/479/EC of 16 June 2003, but these have since been repealed and replaced by Council Decision 2007/829/EC of 5 December 2007.

¹²⁹ See *European External Action Service – adoption of final legal acts*, MEMO/10.521, Brussels, 25 October 2010.

¹³⁰ See Decision of the High Representative of 23 March 2011 establishing the rules applicable to National Experts Seconded to the EEAS.

- Article 6(7) reflects concerns voiced in the *travaux préparatoires* regarding equal treatment of national diplomats and officials of the Union, according them the same rights and obligations. This is confirmed in the amended Staff Regulations (Preamble, fourth recital).

2. Appointing authority

- A report from the European Parliament’s Committee on Constitutional Affairs stressed that “all staff of the EEAS should have the same permanent or temporary status and the same rights and obligations irrespective of origin”, that the powers of appointing authority within the EEAS should reside with the High Representative/Vice-President, and that EEAS staff should “possess a certain objective independence”.¹³¹ The Swedish Presidency Report to the European Council of 23 October 2009 also assigned the High Representative as the appointing authority.¹³² In this context, Article 6(5) of the Council Decision is rather straightforward.
- In practice those appointments at director level and above require a decision by the High Representative/Vice-President while those below are delegated. This is confirmed in the Staff Regulations (third recital of the preamble and Article 95(1)).

3. Meaning of merit and relationship with geographical/gender balance

- Notions such as “merit” and “adequate geographical and gender balance” (see paragraphs 6 and 8 of Article 6) are subjective terms and are open to interpretation. The former, however, could be understood in terms of whether a candidate for a position within the Service meets the job requirements expressed in the job announcement. The EP amendments to the March draft decision suggested that equivalent measures should be undertaken akin to Council Regulation 401/2004/EC, which advocated that special temporary measures should be undertaken departing from the Staff Regulations due to the “exceptional nature” of the “forthcoming enlargement”—i.e. some form of special recruitment should be envisaged (but this only deals with geographical balance and does not address adequacy or meaningful presence). The word ‘ensuring’ was introduced by MEP Franziska Brantner et al. to ensure “stronger and more appropriate phrasing”.

¹³¹ “Report on the Interinstitutional aspects of setting up the European External Action Service”, Committee on Constitutional Affairs, Elmar Brock, rapporteur, A7-0041/2009, 20 October 2009, para. 7.

¹³² Presidency Report to the European Council on the European External Action Service, 14930/09, 23 October 2009, para. 21.

- The wording of paragraph 8 of the same article confuses the situation further by referring to “adequate geographical and gender balance, and a *meaningful* presence of nationals from all Member States”; thus introducing a further layer of subjectivity without reference to the Staff Regulations or other internal documents that might add meaning to these terms. The High Representative is authorised to “promote equal opportunities for the under-represented gender in certain function groups, more particularly in the AD function group” in Articles 1d(2-3) of the amended Staff Regulations. Given that specific mention of the balance issue is made in relation to the forthcoming review (Article 13(3)), the lack of any precision regarding the nature of any inadequacy and its possible consequences may pose problems.

4. Selection procedures

- As has been suggested above, paragraphs 6 and 8 are somewhat duplicative and could be merged and, if not, the confusing reference to gender and geographical balance in this paragraph could be omitted since it appears in paragraph 6. The absence of any mention of the Consultative Committee on Appointments (CCA) is understandable since it was not formally created until March 2011. Its establishment, however, was clearly envisaged in the High Representative’s explanatory memorandum accompanying the March draft decision.¹³³ The explanatory memorandum notes that in addition to their duties regarding senior appointments, the CCA “shall also monitor selection procedures at other levels in the EEAS and the development of EEAS staffing, including with regard to gender and geographical balance”.¹³⁴ Since the issue of geographical and gender balance is mentioned twice in this article, the role of the CCA could now be usefully mentioned in terms of its general mandate as well as its specific duties regarding the monitoring of geographical and gender balance, especially in the absence of any other objective measurement of balance. Mention of the CCA would also permit the High Representative to ask them for further guidance on the development of this facet. With regard to this paragraph and paragraph 3, neither makes it clear that seconded national experts shall not be counted in the one-third of all EEAS staff at AD level, although this is mentioned in the amended Staff Regulations (eighteenth recital of the preamble).

5. Mobility, reinstatement and training

- The CCA met on 14 June 2012 to discuss the evolution of EEAS mobility policy being developed on the basis of Article 6(10) of the Council Decision. The Service is at an early stage of the development of such a policy. The principal challenge

¹³³ Explanatory Memorandum from the High Representative for Foreign Affairs and Security Policy attached to Draft Council decision establishing the organisation and functioning of the European External Action Service, 8029/10, Brussels, 25 March 2010, p. 3.

¹³⁴ Ibid.

facing the EEAS is its absorption capacity to make room for those rotating back to headquarters from the Delegations. A further challenge is the diversity of national systems of mobility.

- Article 6(11) also addresses concerns raised in the *travaux préparatoires*, this time regarding the rights of temporary agents serving in the EEAS from the Member States to ensure immediate reinstatement. The paragraph mentions Article 50(b) of the CEOS, which specifies that staff from national diplomatic services may be engaged “for a maximum period of four years” and that “contracts may be renewed for a maximum period of four years”, with the engagement not exceeding eight years in total (with exceptional provision for an extension of a further two years). It should, however, be noted that the principle of mobility (see paragraph 10) implies that member state diplomats who have served four years and who wish to remain for a further four years, would *not* be guaranteed automatic renewal and would have to apply for a new job; whereas the possibility of continuing service at the end of the eighth year is an extension of an existing contract.
- The provisions on “adequate common training, building in particular on existing practices and structures at national and Union level” (Article 6(12) of the Council Decision) were predicated upon the assumption that the EEAS would have some budgetary independence in this regard. The inclusion of EEAS-related training under the Commission’s budget (DG HR) and the existence of pre-existing framework contracts mean that the EEAS has been unable to fully develop “adequate common training” and has not systematically involved “practices and structures at national and Union level”. It is debatable whether the steps taken are adequate, and there is relatively little national involvement. This aside, the expression of a timescale that has now passed is inappropriate and serves as a specific example of the overall emphasis of the EEAS Decision upon the establishment of the Service in its transitory phase – not as a document that looks much beyond the immediate period until the first major review in mid-2013. Hence, the choice is to amend the paragraph with more specific directions and an amended timescale or to delete it.

6. Conduct

- Finally, Article 6(4) of the Council Decision reminds EEAS staff that they shall carry out their duties “solely with the interests of the Union in mind”. Reference is made to several other parts of the EEAS Decision (Articles 2(1) third indent, 2(2) and 5(3)). The main implication of these references is to ensure that such conduct is reflected as broadly as possible, which includes the support role played by the Service with regard to the High Representative/Vice-President, as well as the President of the European Council, the President of the Commission, and the Commission (as stipulated by Arts 2(2) and 3 of the EEAS Decision), which significantly broadens the envisaged function of the Service as laid out in Article

27(3) TEU. It also applies to Heads of Delegation.¹³⁵ Complications may arise with temporarily assigned diplomats who may have taken similar oaths of allegiance in the national context. In practical terms, it may be difficult to determine whether national diplomats always conduct themselves “solely with the interests of the Union in mind”. It is worth noting that “an EEAS official who has to carry out tasks for the Commission as part of his duties” is expected to follow instructions given by the Commission in accordance with Article 221(2) TFEU (Staff Regulations, fifth recital of the preamble and Article 96).

- A comparison of the provision with the June draft decision demonstrates that the only substantive concern with Article 6 was the insertion of a stipulation that EEAS staff may not accept any payments of any kind from any source outside the Service.

¹³⁵ See Article 5 of the Council Decision.

ARTICLE 7

Transitional provisions regarding staff

1. The relevant departments and functions in the General Secretariat of the Council and in the Commission listed in the Annex shall be transferred to the EEAS. Officials and temporary agents occupying a post in departments or functions listed in the Annex shall be transferred to the EEAS. This shall apply mutatis mutandis to contract and local staff assigned to such departments and functions. SNEs working in those departments or functions shall also be transferred to the EEAS with the consent of the authorities of the originating Member State.

These transfers shall take effect on 1 January 2011.

In accordance with the Staff Regulations, upon their transfer to the EEAS, the High Representative shall assign each official to a post in his/her function group which corresponds to that official's grade.

2. The procedures for recruiting staff for posts transferred to the EEAS which are ongoing at the date of entry into force of this Decision shall remain valid: they shall be carried on and completed under the authority of the High Representative in accordance with the relevant vacancy notices and the applicable rules of the Staff Regulations and the CEOS.

One of the initial challenges of the EEAS was integrating staff from EU institutions and member states. Paras. 1-2 of this Article deal with the transitional arrangements for staff of the Council General Secretariat and the Commission who were transferred to the EEAS and seek to maintain the privileges, status, and mobility of Council and Commission staff. This article was required when around 1,500 staff were transferred to the EEAS on 1 January 2011.

- The “relevant departments”, as envisaged by Article 27(3) TEU are laid out in the annex attached to the Council Decision. The annex refers to “administrative entities” but the list provided is not intended to prejudge “the additional needs and the allocation of resources to be determined in the overall budget negotiations establishing the EEAS, nor decisions on the provision of adequate staff responsible for support functions, nor the linked need for service-level arrangements.” The Council decision does, however, effectively prejudge these issues by stipulating in Article 1(15) that the EEAS should be guided “by the principle of cost-efficiency aiming toward budget neutrality.” This raises the interesting issue of what might happen if there were found to be inadequate staff for support functions, which might imply budgetary adjustments beyond ‘neutrality’.
- The Swedish Presidency report emphasised that there should be no distinction made between the sources of staff in terms of conditions and

tasks.¹³⁶ The transitional period meant that the human resources department initially faced a number of questions, complaints and administrative issues relating to the transitional provisions touching upon issues such as functions, responsibilities, promotion, pay, leave and social benefits. These administrative issues have largely been dealt with. Importantly, the equal treatment of staff from different backgrounds is vital to establishing a strong *esprit de corps* within the new Service.

¹³⁶ Presidency Report to the European Council on the European External Action Service, 14930/09, 23 October 2009, para. 19.

ARTICLE 8

Budget

1. *The duties of authorising officer for the EEAS section of the general budget of the European Union shall be delegated in accordance with Article 59 of the Financial Regulation. The High Representative shall adopt the internal rules for the management of the administrative budget lines. Operational expenditure shall remain within the Commission section of the budget.*
2. *The EEAS shall exercise its powers in accordance with the Financial Regulation applicable to the general budget of the European Union within the limits of the appropriations allocated to it.*
3. *When drawing up estimates of administrative expenditure for the EEAS, the High Representative will hold consultations with, respectively, the Commissioner responsible for Development Policy and the Commissioner responsible for Neighbourhood Policy regarding their respective responsibilities.*
4. *In accordance with Article 314(1) TFEU, the EEAS shall draw up estimates of its expenditure for the following financial year. The Commission shall consolidate those estimates in a draft budget, which may contain different estimates. The Commission may amend the draft budget as provided for in Article 314(2) TFEU.*
5. *In order to ensure budgetary transparency in the area of external action of the Union, the Commission will transmit to the budgetary authority, together with the draft general budget of the European Union, a working document presenting, in a comprehensive way, all expenditure related to the external action of the Union.*
6. *The EEAS shall be subject to the procedures regarding the discharge provided for in Article 319 TFEU and in Articles 145 to 147 of the Financial Regulation. The EEAS will, in this context, fully cooperate with the institutions involved in the discharge procedure and provide, as appropriate, the additional necessary information, including through attendance at meetings of the relevant bodies.*

At first sight Article 8 is an oddly structured provision, which contains cryptic formulations and ample cross-references to treaty articles and secondary legislation. Yet, it is an important article, as it determines the scope of budgetary control the EEAS has over its organisation and functioning. Article 8 is a provision which bears the marks of the inter-institutional strife in the *travaux préparatoires*, and one that packs a few surprises, such as the qualification of the EEAS as an institution – albeit for budgetary matters only (Section 1), a reference to the ‘powers’ of the Service and other peculiarities (Section 2).

1. The EEAS, an institution for budgetary purposes¹³⁷

- In its October 2009 ‘guidelines’ to the future HR/VP, the European Council stated that “The EEAS should be a service of a *sui generis* nature separate from the Commission and the General Secretariat of the Council. It should have autonomy in terms of administrative budget and management of staff”.¹³⁸

¹³⁷ See the discussion under Article 1 EEAS Decision, above.

¹³⁸ Presidency Conclusions of the European Council of 29/30 October 2009, doc. 15265/1/09, Brussels, 1 December 2009, item 16.

- Although on the basis of Article 27(3) TEU the European Parliament only needed to be consulted on the draft EEAS Decision, the EP enjoys the right of co-decision with regard to both the staff and budgetary regulations which needed to be amended to operationalise the EEAS. The EP maximised its negotiating position on the former by coupling the two issues and wielding its veto power over the latter.
- The EP undertook to promote the ‘Community’ method, for instance by proposing to increase the influence of the Commission on the administrative, in particular the budgetary structures of the new Service. The EP stated its belief that: “(...) as a service that is *sui generis* from an organisational and budgetary point of view, the EEAS must be incorporated into the Commission’s administrative structure, as this would ensure full transparency”.¹³⁹ In their Non-paper on the EEAS, MEPs Brok and Verhofstadt insisted that the EEAS should be an autonomous service assisting the HR/VP and accountable to the European Parliament, both in political *and* budgetary terms.¹⁴⁰
- In the quadrilogue, the EP negotiated rather successfully to enhance the influence of the Commission on the administrative structure of the EEAS, in particular with regard to budgetary procedures. In the talks it became clear that the EEAS would have to follow the same budget lines and administrative rules as applicable to the EU budget falling under Heading V of the Multiannual Financial Framework.¹⁴¹ Article 8(1) EEAS Decision reinforces this by prescribing that – *all* – “operational expenditure shall remain within the Commission section of the budget”, and not just the operational expenditure arising from the implementation of the CFSP budget and a number of programmes,¹⁴² as proposed by the HR/VP in Article 7(3) of her draft EEAS Decision of March 2010.

¹³⁹ European Parliament resolution of 22 October 2009 on the institutional aspects of setting up the European External Action Service (2009/2133(INI), operative paragraph 7.

¹⁴⁰ Non-paper EEAS of 18 March 2010 (plus attached to it an organisational chart of the EEAS) by Elmar Brok and Guy Verhofstadt, available at the website of Euractiv <<http://www.euractiv.com/en/future-eu/parliament-pulls-its-weight-eeas-negotiations-news-375926>> (last accessed 31 January 2013).

¹⁴¹ Cf. Article 4(3)(a), last sentence of the second indent of the EEAS Council Decision. The HR/VP’s proposal of 25 March 2010 did not contain such a provision.

¹⁴² The Instrument for Stability, the Instrument for Cooperation with Industrialised Countries, the Communication and Public Diplomacy, as well as Election Observation Missions.

- The EU operational expenditure is the total EU programme budget less the administrative expenditure administrative costs of the European Commission.¹⁴³ The administrative cost calculation is both financial and in kind. The financial cost calculation is towards the fixed overhead costs, such as rental of offices, expenses of meetings and publications. The in-kind expenditure refers to the supply of human resources to the EEAS through the secondment of national experts. These experts are cost-free for the EU as their salary and benefits are covered by their employers in their home countries.
- The Commission also obtained the discretionary power to consolidate budget estimates and to amend the budget (Article 8(4)).¹⁴⁴ Such a budgetary procedure is fully in keeping with the general rules of the TFEU, which prescribe that, with a view to helping to prepare the establishment of the EU's annual budget, the institutions of the Union have to draw up budget estimates, and that it is the competence of the Commission to consolidate and (wherever necessary or considered appropriate) to amend these budget estimates.¹⁴⁵ The EEAS emerges here – by implication – as an institution of the Union with respect to budgetary matters.
- The EP hammered the importance of the institutional status of the EEAS home (i.e. to the Council and the HR/VP) during the negotiations on the collateral Financial Regulation. Regulation No 1081/2010 amended the existing Financial Regulation applicable to the general budget so as to include the European External Action Service as an “institution” with a specific section in the Union budget.¹⁴⁶
- Thus, also for the discharge procedure the EEAS should be seen as an institution and therefore “fully subject to the procedures provided for in Article

¹⁴³ See, generally, <http://ec.europa.eu/budget/explained/budg_system/structure/struct_en.cfm> (last accessed 31 January 2013). Note that Article 41 TEU speaks of “operating” budget.

¹⁴⁴ This provision (and the Commission competence included in it) did not feature in the HR/VP's proposal of 25 March 2010.

¹⁴⁵ Article 314(1) TFEU (first two sentences): “With the exception of the European Central Bank, each institution shall, before 1 July, draw up estimates of its expenditure for the following financial year. The Commission shall consolidate these estimates in a draft budget which may contain different estimates.”

¹⁴⁶ Article 1(2) of Regulation (EU, Euratom) No 1081/2010 of the European Parliament and of the Council of 24 November 2010 amending Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities, as regards the European External Action Service, OJ 2010 L 311/ 9.”

319 of the Treaty on the Functioning of the European Union and in Articles 145 to 147 of the Financial Regulation”.¹⁴⁷

- The budgetary lines between the EEAS and the Commission were further tightened in the area of development cooperation and the European Neighbourhood Policy (ENP). According to Article 8(3) EEAS Decision, the estimates of administrative expenditure in these areas have to be drawn up by the HR “in consultation with the Commissioners for Development Policy and for European Neighbourhood Policy regarding their respective responsibilities”.¹⁴⁸ The Financial Regulation extended this obligation of budgetary cooperation to international cooperation, humanitarian aid and crisis response.¹⁴⁹ Such a provision of close cooperation did not feature in the original HR/VP proposal at all.
- Further, the internal auditors of the EEAS and the Commission would have to cooperate to ensure the audit policy. In accordance with the applicable rules, and as is the case for other institutions, a part of the annual report of the Court of Auditors is dedicated to the EEAS,¹⁵⁰ and the EEAS is expected to respond to such reports.¹⁵¹
- Finally, the European Office Against Fraud (OLAF) has been granted investigative powers with regard to the EEAS.¹⁵²
- From the foregoing, one can draw a few conclusions. Firstly, operational expenditure (i.e. excluding costs for administration) remains within the Commission section of the budget. This gives the Commission control over what the EEAS can do in the operational sphere. Secondly, with regard to administrative expenditures in three shared competence areas (development,

¹⁴⁷ See third preambular paragraph of the EEAS Decision.

¹⁴⁸ Again, this provision did not feature in the HR/VP’s proposal of 25 March 2010.

¹⁴⁹ Article 1(6) of the 2010 Financial Regulation: “The High Representative will hold consultations with the Members of the Commission responsible for development policy, neighbourhood policy and international cooperation, humanitarian aid and crisis response, regarding their respective responsibilities.”

¹⁵⁰ See, e.g., Court of Auditors, Annual Report Concerning the Financial Year 2011, OJ 2012 C 344, Chapter 9, paragraphs 9.25-9.28: EUR 682 Mio made in payments, amounting to 0,5% of the EU total.

¹⁵¹ See the discussion under Article 3(4) EEAS Decision, above.

¹⁵² Ibid. See Regulation (EC) No 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European anti-fraud office (Olaf), OJ 1999 L 136/1.

ENP, and international cooperation, humanitarian aid and crisis response) the EEAS and the Commission have to consult each other. Thirdly, the budgetary procedures of the EEAS have been aligned with those of the Commission. This should facilitate cooperation. Fourthly, the standard procedures for drawing up budget estimates and for the discharge of the budget apply to the EEAS as well. As such, the EEAS has emerged as an institution with regard to budgetary matters, with its own section in the EU budget. But, fifthly, the assumption of these specific responsibilities does not by itself enhance the status of the EEAS as an institution in the sense of Article 13 TEU. Rather, these responsibilities enhanced the position of the European Parliament as a budgetary authority over the EEAS. From a political and institutional perspective, the outcome of the negotiations on the 2010 Council Decision and the collateral Financial Regulation has enhanced the position of the EP as a budgetary authority and strengthened its supervisory powers over the EEAS. The EP's Foreign Affairs Committee (AFET) got it right when it said that the operational part (in particular the management of the external action programmes) of the EEAS budget would be part of that of the Commission, whereas the administrative part would remain separate from the EU budget but still fall under the control of the EP.¹⁵³

2. Institutional and procedural peculiarities

(i) *Split budget lines: representation and delegation*

- Article 8 opens with a rather cryptic paragraph which, when deciphered, exposes a multi-layered regulatory framework. In its first sentence it states that "The duties of authorising officer for the EEAS section of the general budget of the European Union shall be delegated in accordance with Article 59 of the Financial Regulation." According to Article 59(1) of Council Regulation No 1605/2002, the "institution shall perform the duties of authorising officer". Article 8(1) thus implicitly qualifies the EEAS as an "institution" for the budgetary matters contained in the provision.
- According to Article 59(2) of the Financial Regulation, "[e]ach institution shall lay down in its internal administrative rules the staff of an appropriate level to whom it delegates in compliance with the conditions in its rules of procedure the duties of authorising officer, the scope of the powers delegated and the possibility for the persons to whom these powers are delegated to sub-delegate them". Resonating the language of the Financial Regulation, the second sentence of Article 8(1) states that "The High Representative shall adopt the

¹⁵³ See EP press release of 30 June 2010, "External Action Service: EP's budgetary powers guarantee parliamentary oversight".

internal rules for the management of the administrative budget lines". To that end, the HR adopted Decision PROC HR(2011) 001 of 31 January 2011 "On the Internal Rules on the implementation of budget of the European External Action Service (Section X)".¹⁵⁴ As such, the HR "represents" the EEAS in performing the duties of authorising officer pursuant to Article 59(1) of the Financial Regulation.

- In accordance with Article 59(3)¹⁵⁵ and (4)¹⁵⁶ of the Financial Regulation, the High Representative decided to delegate the Service's "powers of budget implementation to the Chief Operating Officer (Director General for Budget and Administration), who carries out the duties of delegated authorising officer of the EEAS" and who exercises those delegated powers "in accordance with the provisions of the 'Charter of tasks and responsibilities of authorising officers by delegation', which the authorising officer by delegation shall sign upon taking up duty and whenever any changes are made to the Charter".¹⁵⁷ The powers delegated to the Chief Operating Officer under these internal rules allow him to implement the budget by making budgetary and legal commitments, validating and authorising payments, establishing entitlements and issuing recovery orders, taking individual decisions on the award of grants or public contracts and proposing transfers of appropriations in accordance with the Internal Rules.¹⁵⁸ As delegated authorising officer, the Chief Operating Officer may in turn delegate his powers to sub-delegated authorising officers,¹⁵⁹ in keeping with the principles, rules and limits fixed in Articles 7-11 of the Internal Rules.
- In order to ensure the "continuity of the functioning of Union Delegations and, in particular, continuity and efficiency in the management of external aid by the Delegations",¹⁶⁰ the 2010 revision of the Financial Regulation added a fifth paragraph to Article 59: "Where Heads of Union Delegations act as authorising

¹⁵⁴ Ref. Ares(2011)109103 - 01/02/2011.

¹⁵⁵ "The powers of authorising officer shall be delegated or sub-delegated only to persons covered by the [Staff Regulations]".

¹⁵⁶ "Authorising officers by delegation or sub-delegation may act only within the limits set by the instrument of delegation or sub-delegation. The responsible authorising officer by delegation or sub-delegation may be assisted in his/her task by one or more members of staff entrusted, under his/her responsibility, to carry out certain operations necessary for implementation of the budget and presentation of the accounts".

¹⁵⁷ Article 4(1) and (2) of HR PROC(2011) 001.

¹⁵⁸ Article 4(3) of HR PROC(2011) 001.

¹⁵⁹ Articles 6 resp. 5 of HR PROC(2011) 001.

¹⁶⁰ Recital 7 in the preamble to Regulation (EU, Euratom) No 1081/2010.

officers by sub-delegation in accordance with the second paragraph of Article 51, they shall be subject to the Commission as the institution responsible for the definition, exercise, control and appraisal of their duties and responsibilities as authorising officers by sub-delegation. The Commission shall, at the same time, inform the High Representative thereof”.¹⁶¹

- In line with Article 317 TFEU, which attributes responsibility to the European Commission for the implementation of the operational budget, Article 59(5) of the Financial Regulation entrenches the rift between the EEAS and the Commission in matters of budgetary control, established by Article 8(1) EEAS Decision. The latter’s second sentence imposes an obligation on the HR to adopt internal rules for the management of “administrative budget lines”, whereas the third sentence prescribes that “[o]perational expenditure shall remain within the Commission section of the budget.” Thus, leaving aside the question of blurred boundaries between “administrative budget lines” and “operational expenditure”, the combination of Article 8(1) EEAS Decision and Article 59(5) of the 2010 Financial Regulation effectively creates split financial circuits at the level of EU Delegations.
- In order to overcome potential difficulties arising from the split of circuits, procedures and accountability,¹⁶² Article 15 of the Internal Rules decided upon by the High Representative provides that “[o]n an exceptional basis, and for reasons of good budgetary execution, in the European Union’s Delegations, specific administrative arrangements may be agreed between the EEAS and the European Commission, in accordance with Article 50 of the Financial Regulation”.
- The “Working arrangements between Commission services and the European External Action Service (EEAS) in relation to external relations issues” agreed to in January 2012 lay down in considerable detail how the financial circuits between the EEAS and the Commission pan out. It states, inter alia, that, the

¹⁶¹ Article 51(2) of the Financial Regulation provides that “the Commission may delegate its powers of budget implementation concerning the operational appropriations of its own section to the Heads of Union Delegations” and that, “[w]hen Heads of Union Delegations act as sub-delegated authorising officers of the Commission, they shall apply the Commission rules for the implementation of the budget and shall be submitted to the same duties, obligations and accountability as any other sub-delegated authorising officer of the Commission”. See, in this respect, Order of the General Court of 4 July 2012 in Case T 395/11, *Elti d.o.o. v. Delegation of the European Union to Montenegro*, nyr.

¹⁶² Recital 14 in the preamble to the EEAS Decision: “Decisions having a financial impact will, in particular, comply with the responsibilities laid down in Title IV of the Financial Regulation, especially Articles 64 to 68 thereof regarding liability of financial actors, and Article 75 thereof regarding expenditure operations”.

Heads of Delegation “can receive sub-delegation of power of authorising officer for budget implementation tasks belonging to the Commission's competence and responsibility, for operational appropriations only”. As such, the Heads of Delegation apply the Commission rules and are subject to the same duties, obligations and accountability as any other sub-delegated authorising officer of the Commission.¹⁶³ They can sub-delegate these powers only to Commission staff in the Delegation, not to EEAS staff. Conversely, the Heads of Delegation can receive sub-delegation of power of authorising officer for budget implementation tasks belonging to the EEAS' competence and responsibility; powers which they can sub-delegate only to EEAS staff in the delegation, not to Commission staff.¹⁶⁴ In the financial circuits in EU Delegations the roles of verification and authorisation are restricted to the staff belonging to each “institution”,¹⁶⁵ with the exception of the double-hatted role of the Head of Delegation, in accordance with Article 51 of the Financial Regulation.

- This split financial regime has been confirmed by order of the General Court, which observed that the EU Delegations may have a role of assisting the Commission in the implementation of the EU budget at local level, more specifically in the event of implementation of projects financed under EU external aid programmes. That assistance, the General Court ruled, “which is part of a sub-delegation to the Head of Delegation, is done under the strict control of the Commission, which is, pursuant to Articles 317 TFEU and 319 TFEU, charged with the implementation of the budget and holds, under Article 51 of the Financial Regulation, the power to withdraw the delegation granted.” In a rather liberal interpretation of its own jurisdiction,¹⁶⁶ the General Court

¹⁶³ Article 60a of the Financial Regulation states that Heads of Union Delegations acting as authorising officers by sub-delegation must, first, report to their authorising officer by delegation concerning, inter alia, the management of operations sub-delegated to them and, second, reply to any request by the authorising officer by delegation of the Commission. According to Article 85 of the Financial Regulation, the Heads of Union Delegations acting as authorising officers by sub-delegation “shall be subject to the verifying powers of the internal auditor of the Commission for the financial management sub-delegated to them”. Furthermore, the 2010 Financial Regulation and the 2010 amendment to the Staff Regulations of Officials of the European Communities and the Conditions of Employment of Other Servants of those Communities (OJ 2010 L 311/ 1) added a new Article 96 to those regulations, the second paragraph of which provides that an “EEAS official who has to carry out tasks for the Commission as part of his duties shall take instructions from the Commission with regard to those tasks, in accordance with Article 221(2) [TFEU]”.

¹⁶⁴ Ref. Ares(2012)41133 - 13/01/2012, p. 5. See also responsibility for staff in EU Delegations in Article 5 EEAS Council Decision.

¹⁶⁵ Nevertheless initiation tasks for the EEAS budget can be entrusted to Commission staff, in exceptional cases and on a transitional basis, as foreseen in the Internal Rules decision of both institutions. For more details on inter-service arrangements on financial issues, *ibid.*, pp. 6-9.

¹⁶⁶ See the discussion under Article 1 EEAS Decision, above.

then concluded that it “follows from Article 221 TFEU, from the decision of 26 July 2010 and from the relevant provisions of the Financial Regulation referred to above that 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, which precludes their being considered a body for the purposes of Article 263 TFEU”.¹⁶⁷

(ii) *Powers of the EEAS*

- Two observations can be made with respect to Article 8(2). The first concerns the one and only direct reference in the Council Decision to the “powers” vested in the EEAS itself. The second observation concerns the scope of those powers.
- The use of terminology is striking if one considers that the EEAS Decision otherwise only speaks of the Service’s “tasks” (Articles 1(2) and 2). Whereas the latter are derivative from the powers vested in the High Representative (as outlined, notably, in Articles 18 and 27 TEU), 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), the reference to the EEAS’ own powers has to be understood in the sense that these are powers which have been bestowed upon the Service by virtue of Articles 8(1) EEAS Decision and 1(2) of the 2010 Financial Regulation, which – for budgetary matters – elevated the status of the European External Action Service to that of an “institution”.
- As has been noted in the commentary on Article 8(1), the scope of the EEAS’ budgetary powers is limited to administrative expenditures. Paragraph 2 makes it clear that these powers will be exercised in accordance with the Financial Regulation applicable to the general budget of the EU, “within the limits of the appropriations allocated to [the Service]”.

(iii) *Duty of cooperation*

- Article 8(3) provides that, “[w]hen drawing up estimates of administrative expenditure for the EEAS, the High Representative will hold consultations with, respectively, the Commissioner responsible for Development Policy and the

¹⁶⁷ Order of the General Court of 4 July 2012 in Case T 395/11, *Elti d.o.o. v. Delegation of the European Union to Montenegro*, nyr, paragraphs 44-46.

Commissioner responsible for Neighbourhood Policy regarding their respective responsibilities”.

- The rationale for the inclusion of this paragraph lies within the agreement between member states that the establishment of the EEAS should be guided by the principle of cost-efficiency and the avoidance of unnecessary duplication of tasks, functions and resources with, e.g., the Commission.¹⁶⁸ As such, the duty to consult enshrined in Article 8(3) is an elaboration of Article 3(2) and of the High Representative’s duty to ensure consistency in the Union’s external action pursuant to Articles 18(4), 21(3) and 26(2) TEU.
- Apparent in paragraph 3 of Article 8 is the limitation of the scope of the HR’s duty to consult: it does not seem to concern such shared external competences areas as enlargement, humanitarian aid and crisis response. With respect to the shared competence areas of international cooperation, humanitarian aid and crisis response, the gap has been plugged by the 2010 revision of the Financial Regulation, which extends the obligation of budgetary consultation to these areas.¹⁶⁹ Drawing up estimates of administrative expenditures in the field of EU enlargement, however, remains outside the scope of this obligation. This apparent limit to the obligation to consult is without prejudice to the general obligation of consultation enshrined in Article 3(2) EEAS Decision. Given that the EEAS is conceived as an “institution” for the purpose of Article 8, one may indeed consider that the obligation of Article 13(2) TEU could apply *mutatis mutandis*.
- In the same vein, paragraph 3 puts a circumscribed obligation of initiative on the shoulders of the High Representative: it is s/he who shall consult the designated Commissioners; not the other way around.
- The final word on drawing up the estimates, however, is with the European Commission. After all, Article 8(4) EEAS Decision prescribes that the Commission consolidates those estimates in a draft budget, “which may contain different estimates”; and that the Commission “may amend the draft budget as provided for in Article 314(2) TFEU”. As such, paragraph 4 echoes the procedure of Article 314(1) TFEU: “(...) each institution shall, before 1 July, draw up estimates of its expenditure for the following financial year. The Commission shall consolidate these estimates in a draft budget, which may contain different estimates”.

¹⁶⁸ See recital 15 in the preamble to the EEAS Decision.

¹⁶⁹ Article 1(6) of the 2010 Financial Regulation.

- In order to ensure budgetary transparency in the area of external action of the Union, Article 8(5) tasks the Commission to transmit to the “budgetary authority”, i.e. the European Parliament, together with the draft general budget of the EU, a working document presenting, in a comprehensive way, all expenditure related to the external action of the Union. Arguably, this task is best executed if the Commission engages with the High Representative in the consultation called for in Article 8(3).

(iv) Discharge

- Finally, regarded as an institution for budgetary purposes, the EEAS is subject to the procedures regarding the discharge, as provided for in Article 319 TFEU and in Articles 145 to 147 of the Financial Regulation. In this context, the High Representative (or delegated officers within the EEAS) will provide the European Parliament with all necessary support for the exercise of the latter’s right as discharge authority.¹⁷⁰ The EEAS is thus required to provide, as appropriate, the additional necessary information, including through attendance at meetings of the relevant bodies. As noted above, the EP has thus some sway over the administrative budget implementation by the Service.

¹⁷⁰ Article 8(6) states that “(...) the EEAS is obliged to fully cooperate with the institutions involved in the discharge procedure (...)”.

ARTICLE 9

External action instruments and programming*

1. *The management of the Union's external cooperation programmes is under the responsibility of the Commission without prejudice to the respective roles of the Commission and of the EEAS in programming as set out in the following paragraphs.*
2. *The High Representative shall ensure overall political coordination of the Union's external action, ensuring the unity, consistency and effectiveness of the Union's external action, in particular through the following external assistance instruments:*
 - *the Development Cooperation Instrument ,*
 - *the European Development Fund ,*
 - *the European Instrument for Democracy and Human Rights ,*
 - *the European Neighbourhood and Partnership Instrument ,*
 - *the Instrument for Cooperation with Industrialised Countries ,*
 - *the Instrument for Nuclear Safety Cooperation ,*
 - *the Instrument for Stability, regarding the assistance provided for in Article 4 of Regulation (EC) No 1717/2006.*
3. *In particular, the EEAS shall contribute to the programming and management cycle for the instruments referred to in paragraph 2, on the basis of the policy objectives set out in those instruments. It shall have responsibility for preparing the following decisions of the Commission regarding the strategic, multiannual steps within the programming cycle:*
 - (i) *country allocations to determine the global financial envelope for each region, subject to the indicative breakdown of the multiannual financial framework. Within each region, a proportion of funding will be reserved for regional programmes;*
 - (ii) *country and regional strategic papers;*
 - (iii) *national and regional indicative programmes.**In accordance with Article 3, 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 without prejudice to Article 1(3). All proposals for decisions will be prepared by following the Commission's procedures and will be submitted to the Commission for adoption.*
4. *With regard to the European Development Fund and the Development Cooperation Instrument, any proposals, including those for changes in the basic regulations and the programming documents referred to in paragraph 3, shall be prepared jointly by the relevant services in the EEAS and in the Commission under the responsibility of the Commissioner responsible for Development Policy and shall be submitted jointly with the High Representative for adoption by the Commission. Thematic programmes, other than the European Instrument for Democracy and Human Rights, the Instrument for Nuclear Safety Cooperation and that part of the Instrument for Stability referred to in the seventh indent of paragraph 2, shall be prepared by the appropriate Commission service under the guidance of the Commissioner responsible for Development Policy and presented to the College of Commissioners in agreement with the High Representative and the other relevant Commissioners.*
5. *With regard to the European Neighbourhood and Partnership Instrument, any proposals, including those for changes in the basic regulations and the programming documents referred to in paragraph 3, shall be prepared jointly by the relevant services in the EEAS and in the Commission under the responsibility of the Commissioner responsible for Neighbourhood Policy and shall be submitted jointly with the High Representative for adoption by the Commission.*
6. *Actions undertaken under: the CFSP budget; the Instrument for Stability other than the part referred to in the seventh indent of paragraph 2; the Instrument for Cooperation with Industrialised Countries; communication and public Diplomacy actions, and election observation missions, shall be under the responsibility of the High Representative/the EEAS. The Commission shall be responsible for their financial implementation under the authority of the High Representative in his/her capacity as Vice-President of the Commission. The Commission department responsible for this implementation shall be co-located with the EEAS.*

* Footnote references have been suppressed here but are included in the discussion below.

Article 9 regulates the programming of external action instruments. It concerns only procedural issues, not policy issues. Whereas the management of the EU's external cooperation programmes remains under the responsibility of the Commission, the HR is under a particular obligation to avail himself of these instruments so as to ensure the overall political coordination, the unity, consistency and effectiveness of the Union's external action (Section 1). In the adoption of the external action instruments (Section 2), inter-service cooperation is crucial in the programming cycle in order to achieve policy coherence (Section 3). Unlike Articles 3 and 5 EEAS Decision, Article 9 does not extend to the evaluation of external assistance and financial responsibility, but these issues have been foreseen in the subsequently adopted inter-service "Working Arrangements" between the Commission and the EEAS (Section 4).

1. Shared responsibilities and objectives

- The reference in Article 27(3) TEU that the EEAS should comprise officials from "relevant departments" of the Commission and the General Secretariat of the Council, as well as diplomats from the member states, carried the obvious implication that the organisation and structures for development cooperation would be influenced by the emergence of the EEAS. In particular, the potential disappearance of most of the Commission's DG Relex and DG Dev¹⁷¹ meant that many questions pertaining to the management, programming and implementation of external action instruments would be on the table.¹⁷²
- Yet, the negotiations leading up to the adoption of 2010 Council Decision did not have as great an effect on the division of external competences as proposed by some of the parties to the discussion. This applies to both the "Tasks" of the

¹⁷¹ See Council Decision 2010/427/EU of 26 July 2010 establishing the organisation and functioning of the European External Action Service, OJ 2010 L 201/30, ANNEX, Departments and functions to be transferred to the EEAS, 2. Commission (including Delegations): "All staff in the departments and functions listed below shall be transferred en bloc to the EEAS, except for a limited number of staff mentioned below as exceptions: (...) DG RELEX. Exceptions: Staff responsible for the management of financial instruments. (...) External Service. Exceptions: Staff responsible for the implementation of financial instruments. (...) DG DEV. Unit CI (ACP I: Aid programming and management): Staff responsible for programming."

¹⁷² See D. Duke and S. 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", *EIPA Working Paper* 2010/1.

EEAS (Article 2), in general, and to the specific provisions on “External action instruments and programming” (Article 9).¹⁷³ These provisions changed only slightly, in the sense that the respective roles of the Commission and the HR/VP were articulated more clearly than in the HR/VP’s proposal of March 2010.¹⁷⁴

- In the context of (business) administration, “management” is the process of dealing with or controlling things or people; the responsibility for and control of a company or organisation. Management in all business and organisational activities is the act of getting people together to accomplish desired goals and objectives using available resources efficiently and effectively. Management comprises designing, planning, organising, staffing, leading or directing, and controlling an organisation (a group of one or more people or entities) or effort for the purpose of accomplishing a goal.
- According to Article 9(1), the management of the EU’s external cooperation programmes is “under” the responsibility of the Commission “without prejudice to the respective roles of the Commission and of the EEAS in programming”. Thus, the Commission retains overall responsibility for dealing with and controlling the Union’s external cooperation programmes, whereas it shares the role of “programming”, i.e. designing, scheduling, or planning the EU’s external cooperation programmes (only an element of the wider concept of “management”), with the EEAS. In short, the basic prescript, namely that during the whole process of planning and implementation both parts of the organisation should work together and that all proposals for decision have to be prepared through the Commission procedures and submitted to the Commission (Article 9(3)), has remained unchanged.
- In comparison with the HR/VP’s proposal of March 2010, Council Decision 2010/427/EU lays down more clearly the obligation (“shall”) of the HR to ensure the overall political coordination, the unity, consistency and effectiveness of the Union’s external action. As such, Article 9 EEAS Decision offers an elaboration of the obligation contained in Article 21(3) TEU: in the implementation of this obligation, the HR shall avail himself “in particular” of the external assistance instruments listed in paragraph 2. Arguably, the obligation of ensuring “overall political coordination” by the HR – not the VP – is superimposed on the

¹⁷³ Compare Article 9 EEAS Decision to Article 8 of the HR/VP’s proposal of 25 March 2010.

¹⁷⁴ See the EP’s Amendments 131 (on the role of the Commission) and 132 (on the role of the HR/VP), in Amendments 76 – 143 of the Committee on Foreign Affairs of 1 July 2010 (document 2010/0816(NLE)).

Commission's responsibility for the management of the EU's external assistance programmes.¹⁷⁵

- The first phrase of Article 9(2) is almost identical to the formulation of the second sentence of Article 26(2) TEU¹⁷⁶ but should not be seen as a *lex specialis* thereof. After all, the primary object of Article 26(2) TEU is how the CFSP is to be put into effect. The scope of Article 9(2) EEAS Decision is broader as it refers to the Union's external action writ large. Neither is there a link with Article 26(3) TEU, which deals with Union resources, as EU external assistance instruments pertaining to the CFSP are dealt with Article 9(6) EEAS Decision.
- In its contribution to the Union's external cooperation programmes, the EEAS is expected to work towards ensuring that the programmes fulfil the objectives for external action as set out in Article 21 TEU, in particular in paragraph (2)(d) thereof,¹⁷⁷ and that they respect the objectives of the Union's development policy in line with Article 208 TFEU.¹⁷⁸ In this context, the EEAS should also promote the fulfilment of the objectives of the "European Consensus on Development"¹⁷⁹ and the "European Consensus on Humanitarian Aid".¹⁸⁰

2. Instrumentarium

- The HR is under a legal obligation to ensure overall political coordination of the Union's external action so as to meet his Treaty obligation to ensure the unity, consistency and effectiveness of the Union's external action, in particular by coordinating the following external assistance instruments listed in Article 9(2):
 - the Development Cooperation Instrument (DCI)¹⁸¹,

¹⁷⁵ See the discussion under Article 2(1) EEAS Decision, above.

¹⁷⁶ "The Council and the High Representative of the Union for Foreign Affairs and Security Policy shall ensure the unity, consistency and effectiveness of action by the Union".

¹⁷⁷ "[F]oster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty".

¹⁷⁸ See Recital 4 of the Preamble to the EEAS Decision.

¹⁷⁹ OJ 2006 C 46/1.

¹⁸⁰ Communication from the Commission to the European Parliament and the Council — Towards a European Consensus on Humanitarian Aid (COM(2007) 317 final, not published in the Official Journal).

¹⁸¹ Regulation (EC) No 1905/2006 of the European Parliament and of the Council of 18 December 2006 establishing a financing instrument for development cooperation, OJ 2006 L 378/41.

- the European Development Fund (EDF)¹⁸²,
 - the European Instrument for Democracy and Human Rights (EIDHR)¹⁸³,
 - the European Neighbourhood and Partnership Instrument (ENPI)¹⁸⁴,
 - the Instrument for Cooperation with Industrialised Countries (ICI)¹⁸⁵,
 - the Instrument for Nuclear Safety Cooperation (NSCI)¹⁸⁶,
 - the Instrument for Stability, regarding the assistance provided for in Article 4 of Regulation (EC) No 1717/2006 (IFS).¹⁸⁷
- Humanitarian assistance, the Instrument for Pre-accession Assistance (IPA)¹⁸⁸ and financial assistance to non-European Overseas Countries and Territories (OCTs) are not covered by Article 9 of the EEAS Decision. The programming and management of these instruments are unified and will continue to be managed by the Commission, under the responsibility of DG ECHO, DG ELARG, and DG DEVCO respectively. Nevertheless, DG ECHO and DG ELARG will consult the EEAS on strategic priorities when preparing the Multiannual Financial Framework for

¹⁸² Council Regulation No 5 laying down rules relating to calls for and transfers of financial contributions, budgetary arrangements and administration of the resources of the Development Fund for the Overseas Countries and Territories, OJ 1958 L 681/58.

¹⁸³ Regulation (EC) No 1889/2006 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, OJ 2006 L 386/1.

¹⁸⁴ Regulation (EC) No 1638/2006 of the European Parliament and of the Council of 24 October 2006 laying down general provisions establishing a European Neighbourhood and Partnership Instrument, OJ 2006 L 310/1.

¹⁸⁵ Council Regulation (EC) No 382/2001 of 26 February 2001 concerning the implementation of projects promoting cooperation and commercial relations between the European Union and the industrialised countries of North America, the Far East and Australasia, OJ 2001 L 57/10.

¹⁸⁶ Council Regulation (Euratom) No 300/2007 of 19 February 2007 establishing an Instrument for Nuclear Safety Cooperation, OJ 2007 L 81/1.

¹⁸⁷ Regulation (EC) No 1717/2006 of the European Parliament and of the Council of 15 November 2006 establishing an Instrument for Stability, OJ 2006 L 327/1. Article 9(2) EEAS Decision does not pertain to the political coordination by the HR when it concerns assistance in response to situations of crisis or emerging crisis. The provision only relates to the HR's political coordination of assistance in the context of "stable conditions" for cooperation, i.e. assistance in the pursuit of strengthening the capacity of law enforcement and judicial and civil authorities involved in the fight against terrorism and organised crime, including illicit trafficking of people, drugs, firearms and explosive materials and in the effective control of illegal trade and transit; support for measures to address threats to international transport, energy operations and critical infrastructure, including passenger and freight traffic and energy distribution; contributing to ensuring an adequate response to sudden major threats to public health, such as epidemics with a potential transnational impact; support for risk mitigation and preparedness relating to chemical, biological, radiological and nuclear materials or agents; support for pre- and post-crisis capacity building.

¹⁸⁸ Council Regulation (EC) No 1085/2006 of 17 July 2006 establishing an Instrument for Pre-Accession Assistance (IPA), OJ 2006 L 210/82.

the IPA and on IPA programming, through the inter-service consultation process.¹⁸⁹

- The Commission Secretariat General and DG BUDG are responsible for the preparation of the Multiannual Financial Framework post-2013, in close cooperation with relevant services of the Commission and the EEAS. In this context, the EEAS and the relevant Commission services have to ensure a coordinated position in relation to any external relations instruments. This also relates to changes in the basic regulations and the programming documents referred to in Article 9(3) EEAS Decision, which will have to be prepared jointly by the relevant services in the EEAS and in the Commission: under the responsibility of the Commissioner for European Neighbourhood Policy insofar as the ENPI is concerned (Article 9(5), and the Commissioner responsible for Development Policy for the EDF and DCI (Article 9(4)). According to the last paragraph of Article 9(3) the decisions shall be submitted jointly, with the HR/VP, for adoption by the Commission.
- In view of the next Multi-annual Financial Framework (2014-2020), Article 9(2) will need to be amended to take account of the new generation of instruments, including the renamed “European Neighbourhood Instrument” and the “Partnership Instrument for cooperation with third countries”.¹⁹⁰

3. Inter-service cooperation in the programming cycle

- According to Article 9(3), the EEAS is under a legal obligation (“shall”) to contribute to the programming and management cycle for the instruments

¹⁸⁹ SEC(2012)48, Ref. Ares(2012)41133 - 13/01/2012, para. 3.13 (ECHO). For IPA, see para. 3.12: “Planning and programming of pre-accession assistance is under the responsibility of DG ELARG/REGIO/EMPL/AGRI as the case may be. Strategic and multi-annual planning documents will be prepared by the lead service of DG ELARG, or DG REGIO/EMPL/AGRI as the case may be. The Commission staff in Delegations will be closely associated to the preparation of programmes and projects including: needs assessments, project identification, consultation with local stakeholders, donors and EU Member States. (...) As regards decentralised management, the responsibility for conferral of management powers rests with DG ELARG/EMPL/REGIO/AGRI. The EU Delegations will be responsible for monitoring the implementation of decentralised management in their country of responsibility. DG ELARG will coordinate with DG REGIO, EMPL and AGRI as regards the components of pre-accession assistance of their responsibility, with a view to ensure harmonised and consistent approaches and instructions issued to Delegations.”

¹⁹⁰ See Joint Communication “Global Europe: a new approach to financing EU external action”, COM(2011) 865 final, Brussels, 7.12.2011; and Foreign Affairs Council, Press Release 11688/12, PRESSE 282, 25 June 2012.

referred to in paragraph 2. In doing so, the Service shall use the policy objectives set out in those instruments as a basis for its contribution.

- In particular, the responsibility has been bestowed upon the EEAS to prepare Commission decisions concerning strategic, multiannual steps within the programming cycle, on three particular counts: “(i) country allocations to determine the global financial envelope for each region, subject to the indicative breakdown of the multiannual financial framework. Within each region, a proportion of funding will be reserved for regional programmes; (ii) country and regional strategic papers; (iii) national and regional indicative programmes”.
- Throughout the entire cycle of programming, planning and implementation of the instruments referred to in Article 9(2), the High Representative and the EEAS are under a legally binding obligation (“shall”) to work with the relevant members and services of the Commission,¹⁹¹ without prejudice to the fact that the EEAS is placed under the authority of the High Representative.¹⁹² As such, Article 9(3) provides a *lex specialis* to the duty of sincere cooperation between the EU institutions.
- The implementation of this particular strand of the obligation has been spelled out in the “Working Arrangements between Commission services and the European External Action Service (EEAS) in relation to external relations issues” of 13 January 2012.¹⁹³ That document provides, inter alia, that the Commission services and the EEAS “will perform their respective tasks throughout the programming and implementation cycle in full transparency, informing and consulting each other, sufficiently in advance, on initiatives or announcements that could have an impact on each other’s areas of responsibility. This includes an exchange of information on preparation of policy and programme documents of both a formal and informal nature. It relates to the representation of EU positions vis-à-vis recipient countries or other donors and related reporting and feedback.”¹⁹⁴

¹⁹¹ See the discussion under Article 3 EEAS Decision, above.

¹⁹² See the discussion under Article 1(3) EEAS Decision, above.

¹⁹³ SEC(2012)48, Ref. Ares(2012)41133 - 13/01/2012. As in the context of the discussion of Article 3 EEAS Decision, above, one may again wonder about the legal nature and justiciability of these “Working arrangements”. See, in this respect, the Court’s judgment in case C-25/94, *Commission v. Council (FAO)*, [1996] ECR I-1469, paragraph 49: “[T]he Arrangement between the Council and the Commission represents fulfilment of that duty of cooperation between the Community and its Member States within the FAO. It is clear, moreover, from the terms of the Arrangement, that the two institutions intended to enter into a binding commitment towards each other.”

- As noted above, all proposals for decisions concerning strategic, multiannual steps within the programming cycle have to (“shall”) be prepared jointly by the relevant services in the EEAS and in the Commission, by following the Commission’s procedures, and will be submitted to the Commission for adoption: under the authority of the Commissioner responsible for Neighbourhood Policy for the ENPI (Article 9(5)), and the Commissioner responsible for Development Policy for EDF and DCI (Article 9(4), first sentence). Specifics on the inter-service cooperation are to be found in the “Working Arrangements”.¹⁹⁵
- Thematic programmes “shall be prepared by the appropriate Commission service under the guidance of the Commissioner responsible for Development Policy and presented to the College of Commissioners in agreement with the High Representative and the other relevant Commissioners” (Article 9(4), second sentence). In this respect, two observations can be made. First, the Commissioner for Development has been given an elevated status when it comes to preparing thematic programmes.¹⁹⁶ Second, the obligation does not apply to the preparation of thematic programmes under the EIDHR and the NSCI,¹⁹⁷ and that part of the IfS referred to in Article 9(2).¹⁹⁸ Because the ENPI is covered by Article 9(5), and because Article 9(6) covers actions undertaken under the CFSP budget, the part of the IfS other than that referred to in paragraph 2,¹⁹⁹ the ICI,²⁰⁰ press, communication and public diplomacy actions,²⁰¹ and EIDHR election observation missions (EOM),²⁰² one can reason *a contrario*

¹⁹⁴ Ibid., p. 15.

¹⁹⁵ SEC(2012)48, Ref. Ares(2012)41133 - 13/01/2012, para. 3.4.

¹⁹⁶ See Explanatory Memorandum, Council Decision Establishing the organisation and functioning of the European External Action Service, 25 March 2010: “horizontal Communications on Development Policy will be prepared by the relevant Commission services under the guidance of the Commissioner for Development, and presented to the Commission in association with the relevant Vice-Presidents and Commissioners.”

¹⁹⁷ For specifics on the inter-service cooperation, see the “Working Arrangements”, SEC(2012)48, Ref. Ares(2012)41133 - 13/01/2012, para. 3.5.

¹⁹⁸ Ibid., para. 3.6

¹⁹⁹ SEC(2012)48, Ref. Ares(2012)41133 - 13/01/2012, para. 3.7.

²⁰⁰ Ibid., para. 3.9.

²⁰¹ Ibid., para. 3.11.

²⁰² Ibid., para. 3.10.

that the provision in the second sentence of Article 9(4) only applies to the preparation of thematic programmes under the EDF and DCI. Arguably, this is a rather cumbersome way of legal drafting.

- The High Representative, and the EEAS which acts in support of the HR, are endowed with the responsibility for actions undertaken under the above-mentioned headings in Article 9(6). Arguably, the phrase “actions undertaken” goes beyond the scope of preparatory actions referred to in the preceding three paragraphs, i.e. actions of a strategic nature, pertaining to multiannual steps within the programming cycle. Yet, the responsibility for actions referred to in paragraph 6 does not encompass the financial implementation of the CFSP budget, the IfS (other than the part referred to in paragraph 2), the ICI, communication and public diplomacy actions, and election observation missions. It is the Commission which is responsible for this aspect, albeit – usefully – under the authority of the first Vice-President of the Commission. The Commission department responsible for this implementation, i.e. the Foreign Policy Instruments Service (FPI), is co-located with the EEAS.
- According to the “Working Arrangements” on inter-service cooperation between the Commission services and the EEAS, “[p]roposals for CFSP actions are discussed in relevant Council working parties (thematic or geographic working groups or, in the case of civilian CSDP missions, the Committee for the Civilian aspects of crisis management CIVCOM). As the Commission representative in the relevant Council Working Parties (Relex Counsellors or, in the case of CSDP missions, the Committee for civilian aspects of crisis management), the Foreign Policy Instrument Service is consulted by the EEAS from an early stage and fully involved in discussions on possible CFSP actions. After political agreement by the Political and Security Committee to launch a CFSP action, the FPI prepares the necessary budgetary impact statement for each CFSP action (containing an estimate of its costs), in consultation with relevant Commission services and the EEAS. The Relex Counsellors’ working party endorses the budget of the action. Once the Council adopts a CFSP action under Article 28 TEU, this serves as the basic act on the basis of which the FPI prepares a Financing Decision on which it consults relevant Commission services through accelerated and restricted inter-service consultation. Given the nature of these proposals, the HR/VP has an empowerment from the Commission, as a Vice-President, to adopt these Commission Financing Decisions. This may be delegated to the Director of the FPI. FPI implements these Financing Decisions. Civilian CSDP missions deployed on the ground as well as their Civilian Planning and Conduct Capability (CPCC) may be requested to provide technical advice,

throughout the programming cycle, and on topics that fall within their mandate and realm of expertise”.²⁰³

4. Evaluation of external assistance and financial responsibility

- The evaluation of external assistance and financial responsibility are topics which are not covered by Article 9 EEAS Decision but which get special attention in the inter-service “Working Arrangements”.²⁰⁴ These arrangements prescribe that DGs DEVCO, ELARG, ECHO and the FPI are responsible for the evaluation of external assistance under the EU instruments in their areas of responsibility,²⁰⁵ and that implementation of operational expenditure can only be performed by the Commission.²⁰⁶
- The evaluation of the results of country, regional and sectoral policies, programmes and programming performance is conducted by the evaluation unit of DG DEVCO or DG ELARG. The Commission and the EEAS have agreed that it is up to the so-called “Group of External Relations Commissioners” to monitor its work through regular reports by the relevant Commissioner. Arguably, this Group’s mandate, covering the chain from programming to implementation, allows a comprehensive view of EU cooperation in a sector or with a country. To ensure coherence on all levels, the “Working Arrangements” foresee that the evaluation unit is also the service responsible for evaluation methodology. The reports from evaluations of country, regional and sectoral policies, programmes and programming performance will be shared with the EEAS and other Commission services.

²⁰³ Ibid., para. 3.8.

²⁰⁴ SEC(2012)48, Ref. Ares(2012)41133 - 13/01/2012.

²⁰⁵ Ibid., para. 3.15.

²⁰⁶ Ibid., para. 3.16. See also the discussion under Article 8 EEAS Decision. In the former, it is provided that the “EEAS shall support Commission efforts to exercise its responsibility for ensuring the legality and correctness of its operations and sound financial management. In particular, the EEAS shall refrain from taking any measure, such as giving instructions to contractors or implementing bodies, on issues which fall under Commission competence, in particular those which could have financial implications for the EU budget or for the Commission's responsibilities in relation to the EU budget.”

ARTICLE 10

Security*

1. The High Representative shall, after consulting the Committee referred to in point 3 of Section I of Part II of the Annex to Council Decision 2001/264/EC of 19 March 2001 adopting the Council's security regulations, decide on the security rules for the EEAS and take all appropriate measures in order to ensure that the EEAS manages effectively the risks to its staff, physical assets and information, and that it fulfils its duty of care and responsibilities in this regard. Such rules shall apply to all EEAS staff, and all staff in Union Delegations, regardless of their administrative status or origin.

2. Pending the Decision referred to in paragraph 1:

— with regard to the protection of classified information, the EEAS shall apply the security measures set out in the Annex to Decision 2001/264/EC,

— with regard to other aspects of security, the EEAS shall apply the Commission's Provisions on Security, as set out in the relevant Annex to the Rules of Procedure of the Commission.

3. The EEAS shall have a department responsible for security matters, which shall be assisted by the relevant services of the Member States.

4. The High Representative shall take any measure necessary in order to implement security rules in the EEAS, in particular as regards the protection of classified information and the measures to be taken in the event of a failure by EEAS staff to comply with the security rules. For that purpose, the EEAS shall seek advice from the Security Office of the General Secretariat of the Council, from the relevant services of the Commission and from the relevant services of the Member States.

Article 10 of the EEAS Decision is simply entitled “security”, that is, security rules as they relates to both the protection of classified information and (all) other aspects of security within the EEAS, applied to all EEAS staff as well as all staff in Union Delegations. The EEAS security rules raise at least three important questions: first, whether these rules constitute a specific part of an EU-wide security framework (Section 1); second, whether they amount to the best standards in diplomatic security (Section 2) and third, how they relate to the new Council rules on classified information (Section 3).

1. EEAS security rules: a specific part of an EU-wide security framework?

- When the EEAS started operating on 1 January 2011 provision was made for the fact that it would not by then have adopted its own security rules and that their full adoption by this ‘functionally autonomous’ body might take some time. In the meantime, Article 10(2) explicitly provided that the existing Council rules (at that time, from 2001)²⁰⁷ would apply with regard to the

* Footnote references have been suppressed here but are included in the discussion below.

²⁰⁷ Annex to Council Decision 2001/264/EC of 19 March 2001 adopting the Council's security regulations, OJ 2001 L 101/ 1.

protection of classified information and the existing Commission rules (also from 2001)²⁰⁸ would apply with regard to “other aspects of security”. From the way it is presented in the EEAS Decision this seems like a neat division; in fact it is not. Both measures contain the general security rules of the two respective institutions, the Council and the Commission, and overlap to a considerable extent. From the manner in which Article 10(2) is phrased it seems that only the Council rules apply to the protection of classified information as such and only the Commission rules to (all) “other aspects of security”.

- This potentially unclear situation did not last for long because on 15 June 2011 the EEAS formally adopted its own security rules as explicitly envisaged in Article 10(1).²⁰⁹ The decision lays down the rules for the safety and security of the EEAS and establishes the general regulatory framework for managing effectively the risks to staff, physical assets and information, and for fulfilling its duty of care. The EEAS security rules are considered equivalent to the security rules of the Commission and the 2011 security regulations of the Council.²¹⁰ They replace the application of the *Commission rules* with regard to the organisation of security in the EEAS and the allocation of security tasks within EEAS structures.²¹¹ They do not, however, cover “the protection of classified information” as such. Since the High Representative has not yet adopted specific rules in this regard within the EEAS, the *Council rules* on the classification of documents in the Council security regulation are still applicable.
- By the time the EEAS adopted its own security rules, the Council had adopted general *new* security rules (in March 2011) and provision could be made for these rules to apply to the protection of classified information within the EEAS, until the moment that the High Representative adopts specific EEAS rules in this regard. Those rules must in any event be *equivalent* to those set out in the Council rules.²¹² The 2011 Council security rules themselves provide for a wide-

²⁰⁸ Annex to Rules of Procedure of the Commission [C(2000) 3614], OJ 2000 L 308/26. See also Commission Decision 2001/844/EC, ECSC, Euratom of 29 November 2001 amending its internal Rules of Procedure, OJ 2001 L 317/1.

²⁰⁹ Decision 2011/C 304/05 of the High Representative of the Union for Foreign Affairs and Security Policy of 15 June 2011 on the security rules for the European External Action Service, OJ 2011 C 304/7 (hereinafter: EEAS security rules).

²¹⁰ Annex to Council Decision 2011/292/EU of 31 March 2011 on the security rules for protecting EU classified information, OJ 2011 L 141/17.

²¹¹ Recital 6 of the EEAS security rules.

reaching system of equivalence of the Council rules among a wide variety of institutions (the Commission and the European Parliament) as well as agencies and bodies or offices (in any event these include the EEAS, Europol, Eurojust and others) as well as the member states. The EEAS security rules explicitly aim to “achieve a more coherent, comprehensive general framework within the European Union for protecting classified information, building on the Council security rules and the Commission security provisions”.²¹³ The EEAS security rules exemplify the nature of the EEAS as a central policy hub that offers a point of contact and channel of coordination and cooperation between national and EU actors, rather than as a purely autonomous EU agency or body.²¹⁴ It comprises Commission and Council officials as well as a meaningful presence of nationals from all member states and aims to offer an environment in which national diplomatic and intelligence services are willing to share and exchange valuable and sensitive information.

- The Council’s explicit strategy, reflected in its decision, is to obtain the necessary commitment from the Commission, the member states, the other EU institutions, agencies, bodies and offices, to comply with its rules and standards in order to protect the interests of the Union and its member states. Several declarations appended to the Council Decision make this perfectly clear. In particular, “the Council and the Commission consider that their respective security rules, and the Agreement between the Member States, meeting within the Council, regarding the protection of classified information exchanged in the interests of the European Union, together constitute a more comprehensive and coherent general framework within the European Union for the protection of classified information originating in the Member States, in institutions of the European Union or in EU agencies, bodies or offices, or received from third States or international organisations.”²¹⁵ Article 3(1) of the EEAS security rules specifically requires the High Representative to adopt rules for protecting classified information that are “equivalent” to those set out in

²¹² Article 3(1) of the EEAS security rules.

²¹³ Recital 3 of the EEAS security rules.

²¹⁴ See discussion under Article 3 EEAS Decision, above.

²¹⁵ Declaration by the Council and the Commission on the protection and handling of classified information, Council of the European Union, Addendum to Note from the Antici Group to COREPER / Council on Council Decision on the security rules for protecting EU classified information - Draft declarations for the Council minutes, 8054/11 ADD 1, Brussels, 23 March 2011, available at <http://www.statewatch.org/news/2011/mar/eu-council-classified-information-8054-add1-11.pdf> > (last visited 31 January 2013) (hereinafter: Declaration by the Council and the Commission on the protection and handling of classified information).

Council Decision 2011/292/EU. Yet the High Representative has not (yet) done so and at the time of writing (early 2013) it is understood that it is still being worked on and may have some supplementary elements (in particular emphasis on support by the services of the member states).²¹⁶ The EEAS is not alone in not (yet) having adopted specific rules on classified information equivalent to the new rules of the Council; it seems that the Commission has not yet done so either despite being “committed” to applying equivalent security standards for protecting European Union Classified Information (hereinafter: EUCI). Subsequent to the adoption of the Council security rules at the end of March 2011, the intention was that the Commission would adopt new security rules too, explicitly modelled on those of the Council, which would then be included as a new annex to its rules of procedure. This is in line with its earlier practice since 2001 when it systematically modified its own rules in parallel with those of the Council. It is not clear why the Commission has not now formally done so. Explicit provision was made for the two institutions to consult one another in advance of any further modification of their respective security rules.²¹⁷ Several agencies had in fact already made their own provision for rules of confidentiality in advance of the new Council security rules.²¹⁸ The EEAS came along afterwards.

- EU agencies generally have well-established bilateral information-sharing relationships with *each other*. Information-sharing more generally serves not only for the purposes of priority-setting and policy-making, albeit in an unstructured manner, but also for the purposes of practical operational implementation. The EEAS is embedded in a much broader vision and practice of institutional unity. It also supports those satellite bodies that now fall under the authority of the High Representative (viz. the European Defence Agency, the European Union Satellite Centre, the European Union Institute for Security Studies and the European Security and Defence College).

²¹⁶ The only public information is in paragraph 36 of European External Action Service, Report by the High Representative to the European Parliament, the Council and the Commission, 22 December 2011, available at: http://www.eeas.europa.eu/images/top_stories/2011_eeas_report_cor + formatting.pdf (last visited 31 January 2013).

²¹⁷ Declaration by the Council and the Commission on the protection and handling of classified information, cited above.

²¹⁸ See, e.g., Rules of Procedure on the Processing and Protection of Personal Data at Eurojust (Text adopted unanimously by the college of Eurojust during the meeting of 21 October 2004 and approved by the Council on 24 February 2005) OJ 2005 C 68/1.

- EU INTCEN, the acronym for the European Union Intelligence Analysis Centre, acts as the intelligence hub of the EEAS.²¹⁹ In 2011, the Situation Centre (SitCen), which was located within the Council of Ministers, was renamed as EU INTCEN and structurally integrated within the EEAS. EU INTCEN produces all source intelligence assessments aimed to provide the Council with high quality information on public security. Traditionally, SitCen covered both external and internal security and the fact that EU INTCEN is now part of the EEAS means that the latter is gradually becoming a more robust and central element in the EU's internal-external security nexus. The EU INTCEN is further part of the Single Intelligence Analysis Capacity (SIAC), which combines civilian intelligence (EU INTCEN) and military intelligence (EUMS INT DIR). The EEAS, like certain other EU agencies (Europol, Frontex), must be distinguished from intelligence agencies at the level of the member states themselves since none of the EU actors have "special powers" to collect information, such as the powers to intercept communications, conduct covert surveillance, use secret informants, etc. Nonetheless, a very important similarity between national intelligence agencies and the EU actors, including the EEAS, is that they receive, produce and disseminate information, including personal data and classified information. They analyse and disseminate information – on threats to internal security or other interests – to a broad variety of actors, including policy-makers and other executive bodies. They perform these functions both within the territory of the EU and in its relations with third countries and international organisations.²²⁰ International agreements concerning the protection of classified information, concluded between the Union and third parties, are applicable to the EEAS. The EEAS is in fact listed as one of the entities that form "the EU".²²¹ It can be expected that in future agreements between the Union and third countries on the security of classified information, which are negotiated under the authority of the High Representative, the EEAS will be by default included as one of the EU entities to which the agreement applies.²²²

²¹⁹ It produces around 200 strategic situation assessment and around 50 special reports and briefings [Joint answer given by High Representative/Vice-President Ashton on behalf of the Commission on 16 August 2012 in reply to written parliamentary questions : E-006018/12 , E-006020/12].

²²⁰ Wils and Vermeulen, "Parliamentary Oversight of Security and Intelligence Agencies in the European Union," Study for the European Parliament, Directorate General for Internal Policies (2011).

²²¹ See Article 3 of the Agreement between the Organisation for Joint Armament Cooperation and the European Union on the protection of classified information, OJ 2012, L 229/2.

²²² Up to now, there are 12 EU "Security of Information Agreements" in place, the first was signed in 2003. Others are being negotiated. The two most recent ones were concluded with Australia (13 January 2010) and Russia (1 June 2010) before the EEAS was created. As shown in the previous footnote, there are permanent security agreements with other international organisations (3 and 1 under negotiation) as well as a permanent administrative arrangement with the UN, allowing the exchange of EUCI classified at the 'restricted' level only. See, Council of the European Union, Note

2. EEAS security rules: best standards in diplomatic security?

- Article 1 of the EEAS security rules provides that they apply to all EEAS staff, including officials and other servants, seconded national experts and local agents, and to all staff in EU Delegations. The High Representative ensures consistency and the application of the security rules, including security inspections (Article 11). S/he adopts more detailed measures for implementation on recommendation by a Security Committee (Article 9(6)) composed of national experts and representatives of the General Secretariat of the Council and the Commission. Article 2 envisages that security risks shall be managed as a process and “in line with the concept of defence in depth”. This approach to security risk management adopts classic “best practices’ strategies common in highly networked and technologically driven environments. For classified information security management as a process means that it shall be protected ‘throughout its life cycle”. As we have seen the EEAS has not yet adopted its own rules for protecting classified information equivalent to those of the Council. The Council’s 2011 security rules apply beyond CFSP to all information classified “in the interests of the Union”. This now seems to apply also to the EEAS, whose work is not limited to foreign and security policy but covers the “overall political coordination of the Union’s external action” including, for instance, development cooperation, neighbourhood and partnership policy, cooperation with industrialised countries, and nuclear safety cooperation.²²³
- Article 4 of the EEAS security rules addresses physical security for the protection of classified information, as well as staff and visitors. Article 5 deals with personnel security clearance, which is the common term for eligibility for access to classified information. Security clearance is required for access to “TRÈS SECRET/TOP SECRET”, “SECRET” or “CONFIDENTIEL” texts, in accordance with the general EU rules.²²⁴ It is granted only to those for whom an appropriate personnel security background investigation has been completed by their home country’s intelligence service. Article 6 specifically addresses security of communication and information systems and sets out requirements that the rules on the protection of classified information²²⁵ will

from General Secretariat of the Council to Delegations, Exchange of EUCI with third states and international organisations, 12619/11, Brussels, 7 July 2011.

²²³ See Article 9(2) EEAS Decision and Article 3(1) of the EEAS security rules.

²²⁴ See also the discussion under Article 11 EEAS Decision, below.

²²⁵ Article 3(1) of the EEAS security rules.

have to meet. These rules will further have to provide for security awareness and training²²⁶ and for consequences of security breaches.²²⁷

- A Managing Directorate for the issues of administration, personnel, budget, security and information systems and communications operating within the EEAS is managed by Patrick Child under the supervision of the Chief Operating Officer, which shall ensure that appropriate physical and organisational measures are in place for the security and safety of staff and visitors, physical assets and information in all EEAS premises.²²⁸
- Article 9 sets out the organisation of security in the EEAS, which is the responsibility of the Security Directorate (Article 9(4)). In addition to the internal Security Directorate (MDR B – Security – Director: Frans Potuyt), which consists of EEAS officials and is at the disposal of the High Representative, Article 9(6) establishes a Security Committee, which is composed of national experts and representatives of the General Secretariat of the Council and the Commission. The Security Committee is not formally part of the bureaucracy of the EEAS, but again exemplifies EEAS' intention to institutionalise close cooperation between member states, the Council and the Commission. It makes recommendations to the High Representative on the implementation of the security rules (Article 1(6)) and the High Representative "shall seek its advice" on any security matter (Article 9(6)). A first meeting of the EEAS Security Committee was held on 21 September 2011.²²⁹
- Article 10 deals with the security of CSDP missions and EU Special Representatives. The responsibility lies with the head of mission or special representative pursuant to the rules in the decision establishing the mission.
- Article 10(3) of the EEAS Decision stipulates that the competent services of the member states shall assist the EEAS Security Directorate. In contrast to some types of cooperation set out in the EEAS Decision, this assistance is not

²²⁶ Article 7 of the EEAS security rules.

²²⁷ Article 8 of the EEAS security rules.

²²⁸ Article 9(3) of the EEAS security rules.

²²⁹ Paragraph 36 of European External Action Service, Report by the High Representative to the European Parliament, the Council and the Commission, 22 December 2011, available at: <http://www.eeas.europa.eu/images/top_stories/2011_eeas_report_cor + formatting.pdf> (last visited 31 January 2013).

reciprocal.²³⁰ The EEAS Security Directorate cooperates very closely with the relevant services in the Council Secretariat and the Commission.

- Article 10(4) of the EEAS Decision mandates the High Representative to take the necessary measures to protect classified information. It should be read in combination with Article 3(1) of the EEAS security rules (see above). The continuing absence of specific EEAS rules on the protection of EUCI should not distract from the high relevance of the information created and shared by the EEAS to the Union's overall use and protection of EUCI. Most classified documents relate to the Common Foreign and Security Policy²³¹ and a significant number are received by the Council from the Commission and the EEAS. Furthermore, Council documents are in principle distributed to all members of the Council, the Commission and the EEAS and their relevant administrative services, which have to ensure that access is granted only to individuals with a need to know and security clearance if appropriate. Article 10(4) of the EEAS Decision is another example of how much the EEAS is located equidistant between the Commission, the Council and the member states: "the EEAS shall seek advice from the Security Office of the General Secretariat of the Council, from the relevant services of the Commission and from the relevant services of the Member States." Moreover, the future EEAS rules on the protection of EUCI can be expected to apply to Union delegations and missions.

3. EEAS application of the Council's rules on EUCI: equivalence with pitfalls?

- The EEAS Decision still refers to the 2001 security rules of the Council. However, as we have already seen above, after the EEAS was established and operational, in March 2011 the Council adopted the next generation of security rules and formally introduced EUCI. These new security rules are much more far reaching in terms of scope and breadth of application than their 2001 counterpart. From 2011 the justifications for classifying documents include in general terms "the interests of the European Union" as well as those of "one or more of the Member States". The EU now has marked out a classification system that applies across the broad spectrum of all its activities with no special mention or position given to the CFSP anymore. The adoption of EEAS specific rules on the protection of classified

²³⁰ See discussion under Article 3 EEAS Decision, above.

²³¹ General Secretariat of the Council, Reply to Written Question E-004374/2012 put by Martin Ehrenhauser (NI), Doc. 10684/12 PE-QE 226, 4 June 2012.

information²³² are required under the principle of equivalence to reflect the new Council security rules from 2011. In any event, they now apply fully in the EEAS context.

- A balancing exercise needs to be performed between the interests of the EU or of the policy area in secrecy and the need for classification and the interests of the public in transparency. But no provision is made for this balancing exercise to be carried out by the person deciding on the classification status of a particular document. Because of the way the classification system works, this person will not only be an EU official but can also be an official of a member state or of a third state or of another international organisation. This is due to the principle of originator control. This principle, abbreviated as ORCON, is deeply interwoven in the EU classification rules and means that the originator of a document, even if circulated in the EU context, retains control over what happens to its classification status. The principle of originator control allows originating governments or agencies/institutions to retain control over the declassification of information (if it is classified) or its release to non-governmental parties (if it is not). The ORCON rule thus eliminates the ability of states/agencies/international organisations to make their own judgments about the wisdom of releasing shared information. The requirement to consult the author (the originator) before granting public access or declassifying is deeply embedded within the Council's rules but also features in several places in the access to documents legislation from 2001.²³³
- Moreover, the principle of derivative classification means that the person classifying a new document who extracts parts of an old classified document (from whatever source) for use in a new document will generally classify the new document at the highest level of classification of the old document, irrespective of whether the particular piece of information re-used actually justifies that. Both these practices can lead to over-classification, which means essentially unnecessary classification or unnecessarily high classification, to an accumulated culture of secrecy within a bureaucracy. As of yet, there is no information available in the public domain as to the numbers of classified documents created by the EEAS nor received by it from

²³² See Article 3(1) of the EEAS security rules.

²³³ See, Article 4(4) and Article 9(3) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001 L 145/43.

other (internal and external) sources, nor the degree of its classified information sharing.

- The main pitfalls of the system of information sharing of classified information in the EU context can be summarised as follows. First of all, information sharing and exchange can only go as far as member states allow it to go. Agencies, including the EEAS, have limited powers to make *member states*, as well as other actors, share information and experience difficulties in obtaining sufficient information.²³⁴ The EEAS may be comparatively advantaged by the fact that “at least one-third” of the EEAS staff directly comes from the member states.²³⁵ A pilot project for local exchange of classified information is being developed in cooperation with member states. For the new system to become operational security approvals at national level will have to be put in place.²³⁶
- Secondly, in many cases sensitive information cannot be shared among agencies. Member states or other (international) actors remain “owners” of the information and it is only with the permission of the originator that this information can be shared. Classification and declassification are the monopoly of the respective institutions and bodies. Until very recently there was no procedure – or practice – of “declassification”. Now the Council has issued guidelines in this regard and the first “declassification” decisions are emerging.²³⁷ The guidelines apply *mutatis mutandis* to the EEAS.

²³⁴ See also, House of Lords, European Union Committee, “Europol: coordinating the fight against serious and organised crime”, *29th Report of Session 2007-08*, Report with Evidence, published 12 November 2008; M. Busuioc, D. Curtin and M. Groenleer, “Agency growth between autonomy and accountability: the European Police Office as a ‘living institution’” (2011) 18 *Journal of European Public Policy*, 848-867 and M. Busuioc, M. Groenleer and J. Trondal (eds.), *The agency phenomenon in the European Union: Emergence, institutionalisation and everyday decision-making* (Manchester: Manchester University Press, 2012).

²³⁵ Article 6(9) of the EEAS Decision.

²³⁶ Paragraph 19 of European External Action Service, Report by the High Representative to the European Parliament, the Council and the Commission, 22 December 2011, available at: <http://www.eeas.europa.eu/images/top_stories/2011_eeas_report_cor_plus_formatting.pdf> (last visited 31 January 2013).

²³⁷ Council Note for the Security Committee, Guidelines on downgrading and declassifying Council documents, Brussels, 2 September 2011, available at <<http://www.statewatch.org/news/2011/nov/eu-council-sec-cttee-declassifying-docs-md-36-11.pdf>> (last visited 31 January 2013).

- Information is shared among many sources (national and supranational; internal and external; private and public) and the information thus shared tends to be a commingling of both internal and external security aspects. What is more, how exactly and what information is being utilised and in what manner is not at all straightforward and serves a variety of different purposes, ranging from priority-setting and policy-making to actual operational implementation. There is a certain level of dislocation in the operational function of information, affected by the overall fragmentation characteristic of this area, more broadly. Ultimately, it makes it impossible to independently verify/check the reliability of such information. The problem is compounded at the EU level because the issue of security and classification rules is regulated purely at the level of the internal organisation rules of individual institutions.

- The absence of overall *external mechanisms* acting as a check over a growing body of “secret” information is highly problematic at EU level, given the growing scope for secrecy and the likelihood of over-classification that flow from the benefits that can be derived from the use of secrecy and the principles of originator control and derivative classification.²³⁸ A new external mechanism that is under development in this regard is the ongoing negotiation by the EEAS with the European Parliament of a specific inter-institutional agreement to enable the EEAS to give the EP access to classified information. In effect, this is part of a wider strategy to engage the EP as a security actor alongside the other EU security actors, and may reduce the ability of the EP to perform its public accountability function fully and with publicity.

²³⁸ See also D. Curtin, “Top Secret Europe,” inaugural lecture, University of Amsterdam, 2011, that attempts to launch a broader debate. Available at <http://oratiereeks.nl/upload/pdf/PDF-5066weboratie_Curtin.pdf> (last visited 31 January 2013).

ARTICLE 11

Access to documents, archives and protection*

- 1. The EEAS shall apply the rules laid down in Regulation (EC) 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents. The High Representative shall decide on the implementing rules for the EEAS.*
- 2. The Executive Secretary-General of the EEAS shall organise the archives of the service. The relevant archives of the departments transferred from the General Secretariat of the Council and the Commission shall be transferred to the EEAS.*
- 3. The EEAS shall protect individuals with regard to the processing of their personal data in accordance with the rules laid down in Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data. The High Representative shall decide on the implementing rules for the EEAS.*

Article 11 relates to access to documents, archives and data protection. As Article 11(2) regarding the EEAS archives appears to be rather self-explanatory, the following focuses on access to documents and data protection only. First, the application of the principle of transparency to the EEAS will be analysed on the basis of the applicable decision of the High Representative and of existing practice and case-law on access to documents containing information regarding foreign policy matters, mainly with respect to the application of Regulation 1049/2001 (section 1). Second, the application of the principle of the protection of personal data to the EEAS will be analysed on the basis of the applicable decision of the High Representative and existing case law and practice on personal data protection, mainly regarding Regulation 45/2001, and some reflections will be offered on the difficult balancing act between those two principles in the light of the European Court of Justice's judgment in *Bavarian Lager* (section 2).

1. The EEAS and the principle of transparency

- Article 11(1) of the EEAS Decision provides for Regulation (EC) 1049/2001 of the European Parliament and the Council regarding public access to European Parliament, Council and Commission documents²³⁹ to apply to the

* Footnote references have been suppressed here but are included in the discussion below.

²³⁹ OJ 2001 L145/43.

EEAS.²⁴⁰ Recital 7 in the preamble to that Regulation further notes that it applies to the CFSP.

- Article 4(1)(a) of the Regulation determines that institutions are to refuse access to a document where disclosure would undermine the protection of the public interest as regards public security, defence and military matters, and international relations, as well as the financial, monetary or economic policy of the Union or a member state.
- Documents affecting public security, defence and military matters also constitute the category of “sensitive documents”. These originate from the institutions or the agencies established by them, from member states, third countries or international organisations, and are classified as “TRÈS SECRET/TOP SECRET”, “SECRET” or “CONFIDENTIEL” in accordance with the rules of the institution concerned.²⁴¹
- The Regulation does not contain any specific conditions or limitations applicable to the public access to documents in the sphere of the CFSP, which can be found in other documents, notably in Council Decision 2011/292/EU of 31 March 2011 on the security rules for protecting EU classified information.²⁴² It was noted earlier that pending the adoption by the High Representative of equivalent rules for protecting classified information, the EEAS is to apply *mutatis mutandis* those security rules of the Council, and the High Representative is to take all necessary measures to implement those rules in the EEAS.²⁴³

²⁴⁰ Nevertheless, the Commission has suggested that Article 3 of the Regulation should be amended to include a point 3, defining ‘institutions’ as “institutions, bodies, offices and agencies of the European Union, including the European External Action Service”: Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents, COM(2011) 137 final, 5.

²⁴¹ Article 9(1) of Regulation (EC) 1049/2001. See also the discussion under Article 10 EEAS Decision, above.

²⁴² OJ 2011 L141/17. That decision repealed and replaced Council Decision 2001/264/EC of 19 March 2001 adopting the Council's security regulations, OJ 2001 L101/1, as last amended by Council Decision 2007/438/EC of 18 June 2007 amending Decision 2001/264/EC adopting the Council's security regulations, OJ 2007 L164/24.

²⁴³ Article 3(1) of Decision 2011/C 304/05 of the High Representative of the Union for Foreign Affairs and Security Policy of 15 June 2011 on the security rules for the European External Action Service, OJ 2011 C 304/7. See the discussion under Article 10 EEAS Decision, above.

- On 19 July 2011, the High Representative adopted Decision 2011/C 243/08 on the rules regarding access to documents.²⁴⁴ In accordance with that Decision, any citizen of the Union or any natural or legal person residing or having its registered office in a member state, is to have a right of access to EEAS documents according to the principles, conditions and limits laid down in Regulation (EC) 1049/2001 and the specific provisions laid down in the Decision. This right of access concerns documents held by the EEAS, namely, documents drawn up or received by it and in its possession.²⁴⁵
- The European Court of Justice appears to be restrained in its review of decisions of institutions refusing access to documents on the basis of public interest. See, for example, *Sison*:
 - the Council must be recognised as “enjoying a wide discretion for the purpose of determining whether the disclosure of documents relating to the fields covered by those exceptions could undermine the public interest”; and
 - “the Community Court’s review of the legality of such a decision must therefore be limited to verifying whether the procedural rules and the duty to state reasons have been complied with, whether the facts have been accurately stated, and whether there has been a manifest error of assessment or a misuse of powers”.²⁴⁶
- The General Court too has by and large been deferential and restrained in its review of the reliance on Article 4(1)(a) by other institutions.²⁴⁷ More recently, however, the General Court has appeared to be willing to conduct a very thorough review.²⁴⁸ A notable example in that regard is the *In ‘t Veld* case, which concerned an opinion of the Council’s Legal Service, issued in the context of the adoption of the Council decision authorising the opening of negotiations, on behalf of the EU, for an international agreement between

²⁴⁴ Decision 2011/C 243/08 of the High Representative of the Union for Foreign Affairs and Security Policy of 19 July 2011 on the rules regarding access to documents, OJ 2011 C 243/16.

²⁴⁵ Article 1(1) of Decision 2011/C 243/08. Any natural or legal person not residing, or not having their registered office, in one of the member states is to enjoy the same right of access to EEAS documents, subject to the same principles, conditions and limits, and on the same terms, with the exception of the right to make a complaint to the European Ombudsman (Article 1(2)).

²⁴⁶ Case C-266/05 P *Sison v Council* [2007] ECR I-1233, paragraphs 33–34.

²⁴⁷ See, for example, Case T-264/04 *WWF European Policy Programme v Council* [2007] ECR II-911.

²⁴⁸ See, for example, Case T-59/09 *Germany v Commission* [2012] ECR II-0000; Case T-465/09 *Ivan Jurašinović v Council*, judgment of 14 February 2012, nyr; and Case T-63/10 *Ivan Jurašinović v Council* judgment of 3 October 2012, nyr.

the EU and the USA in order to make available to the US Treasury Department financial messaging data to prevent and combat terrorism and terrorist financing. That opinion was, in essence, concerned with the legal basis of that decision and with the respective competences of the EU and the then EC:²⁴⁹

- since the choice of the legal basis rests on objective factors and does not fall within the discretion of the institution, any divergence of opinions on that subject could not be equated with a difference of opinion between the institutions as to matters which relate to the substance of the agreement.
- the mere fear of disclosing a disagreement within the institutions regarding the legal basis of a decision authorising the opening of negotiations on behalf of the EU was not a sufficient basis for concluding that the protected public interest in the field of international relations may be undermined.²⁵⁰
- with the exception of those elements of the requested document that concern the specific content of the envisaged agreement or the negotiating directives, the Council had not shown how, specifically and actually, wider access to that document would have undermined the public interest in the field of international relations, and partially annulled the contested decision of refusal of access.²⁵¹
- the Council could therefore not reasonably rely on the general consideration that a threat to a protected public interest may be presumed in a sensitive area, in particular concerning legal advice given during the negotiation process for an international agreement.²⁵²
- “the public interest in the transparency of the decision-making process would become meaningless if, as the Commission proposes, it

²⁴⁹ Case T-529/09 *In 't Veld v Council*, judgment of 4 May 2012, nyr, para 26. The Council's appeal to the judgment is currently pending before the ECJ: Case C-350/12 P *Council v In 't Veld*.

²⁵⁰ *In 't Veld*, paragraphs 47-50.

²⁵¹ *In 't Veld*, paragraphs 57-60.

²⁵² *In 't Veld*, paragraphs 71-74.

were to be taken into account only in those cases where the decision-making process has come to an end”.²⁵³

2. The EEAS and data protection

- Regulation (EC) 45/2001²⁵⁴ does not cover activities that *wholly* fall within the scope of the CFSP. Nevertheless, Article 3(1), which provides that the Regulation is to apply “to the processing of personal data by all Community institutions and bodies insofar as such processing is carried out in the exercise of activities all *or part of which* fall within the scope of Community law”,²⁵⁵ does seem to imply that activities that are only partly within the CFSP are covered by the Regulation. At any rate, the status of the right to data protection as a fundamental right enshrined in Article 8 of the Charter of Fundamental Rights of the EU implies that it applies throughout the Union legal order, including in the CFSP.
- On 8 December 2011, the High Representative adopted a decision on the rules regarding data protection,²⁵⁶ which lays down the implementing rules concerning Regulation (EC) 45/2001 as regards the EEAS.²⁵⁷
- Regulation (EC) 45/2001 contains no reference to the possibility of disclosure of personal data for reasons of transparency. Conversely, Article 4(1)(b) of Regulation (EC) 1049/2001 provides that the institutions are to refuse access to a document where disclosure would undermine the protection of “privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data”.
- The European Court of Justice had the chance to clarify the relationship between Regulation (EC) 45/2001 and Regulation (EC) 1049/2001 in *Bavarian Lager*. That case concerned the Commission’s decision to reject, on the basis

²⁵³ *In 't Veld*, paragraphs 100-101.

²⁵⁴ Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, OJ 2001 L 8/1.

²⁵⁵ Emphasis added.

²⁵⁶ Decision 2012/C 308/07 of the High Representative of the Union for Foreign Affairs and Security Policy of 8 December 2011 on the rules regarding data protection, OJ 2012 C 308/8.

²⁵⁷ Pursuant to Article 24(8) of Regulation (EC) 45/2001, which provides for further implementing rules concerning the Data Protection Officer to be adopted by each Community institution or body.

of Article 4(1)(b) of Regulation (EC) 1049/2001, the request by Bavarian Lager for access to the full minutes of a meeting of 11 October 1996, after which the Commission withdrew a procedure for failure to fulfill obligations brought against the United Kingdom regarding a measure having equivalent effect to a quantitative restriction on imports of beer contrary to what is now Article 34 TFEU:

- by limiting the application of the exception under Article 4(1)(b) to situations in which the privacy or integrity of the individual would be infringed for the purposes of Article 8 of the ECHR and the case law of the European Court of Human Rights, without taking into account the legislation of the Union concerning the protection of personal data, particularly Regulation (EC) 45/2001, the General Court had disregarded the wording of Article 4(1)(b), which is “an indivisible provision and requires that any undermining of privacy and the integrity of the individual must always be examined and assessed in conformity with the legislation of the Union concerning the protection of personal data, and in particular with Regulation No 45/2001”.²⁵⁸
- where a request based on Regulation (EC) 1049/2001 seeks to obtain access to documents including personal data, the provisions of Regulation (EC) 45/2001 become applicable in their entirety.
- By requiring that, in respect of the five persons present at the meeting who had not given their express consent to disclosure, *Bavarian Lager* establish the necessity for those personal data to be transferred, the Commission complied with the provisions of Article 8(b) of Regulation (EC).

²⁵⁸ Case C-28/08 P *Commission v Bavarian Lager* [2010] ECR I-6055, paragraphs 57-59.

ARTICLE 12

Immovable property

- 1. The General Secretariat of the Council and the relevant Commission services shall take all necessary measures so that the transfers referred to in Article 7 can be accompanied by the transfers of the Council and Commission buildings necessary for the functioning of the EEAS.*
- 2. The terms on which immovable property is made available to the EEAS central administration and to the Union Delegations shall be decided on jointly by the High Representative and the General Secretariat of the Council and the Commission, as appropriate.*

It was not only the personnel of the relevant Council and Commission departments that were transferred²⁵⁹ but also the buildings required for the functioning of the EEAS. As with Article 7, to which it refers, Article 12 deals with the transitional arrangements that were needed for this transfer of immovable property. Bringing together staff from eight different buildings in Brussels was one of the first priorities of the HR/VP.²⁶⁰

Article 12(2) refers to the terms on which immovable property was to be made available to the EEAS central administration and to the Union Delegations: these had to be decided on jointly by the HR/VP and the General Secretariat of the Council and the Commission, as appropriate. Indeed, at the time the Decision was adopted, a final arrangement had not been made. Originally, the expectation was that the EEAS would be based in the Commission's Charlemagne building but the building was thought to be too small and would take too long to renovate. The HR/VP preferred to rent the Council's Lex building but was rebuffed. In October 2010 she chose the Axa/triangle building.²⁶¹

Is it worth mentioning, in passing, that the "functioning of the EEAS" included those specific tasks falling to the crisis management bodies²⁶² which, due to the nature of their tasks, require a specific security environment. As a consequence, they were not transferred to the new premises referred to above.

²⁵⁹ See commentary of Article 7, above.

²⁶⁰ House of Lords Select Committee on The European Union, Evidence Session with Baroness Ashton of Upholland, High Representative for Foreign Affairs and Security Policy, Vice President of the European Commission, United Kingdom, 14 June 2011, p. 8.

²⁶¹ A. Rettman, Ashton chooses €12-million-a-year EU headquarters, *Euobserver*, 27 October 2010, <http://euobserver.com/institutional/31140>

²⁶² See Article 4(3) EEAS Decision.

ARTICLE 13

Final and general provisions

- 1. The High Representative, the Council, the Commission and the Member States shall be responsible for implementing this Decision and shall take all measures necessary in furtherance thereof.*
- 2. The High Representative shall submit a report to the European Parliament, the Council and the Commission on the functioning of the EEAS by the end of 2011. That report shall, in particular, cover the implementation of Article 5(3) and (10) and Article 9.*
- 3. By mid-2013, the High Representative shall provide a review of the organisation and functioning of the EEAS, which will cover inter alia the implementation of Article 6(6), (8) and (11). The review shall, if necessary, be accompanied by appropriate proposals for the revision of this Decision. In that case, the Council shall, in accordance with Article 27(3) TEU, revise this Decision in the light of the review by the beginning of 2014.*
- 4. This Decision shall enter into force on the date of its adoption. The provisions on financial management and recruitment shall take effect once the necessary amendments to the Staff Regulations, the CEOS and the Financial Regulation, as well as the amending budget, have been adopted. To ensure a smooth transition, the High Representative, the General Secretariat of the Council and the Commission shall enter into the necessary arrangements, and they shall undertake consultations with the Member States.*
- 5. Within one month after the entry into force of this Decision, the High Representative shall submit to the Commission an estimate of the revenue and expenditure of the EEAS, including an establishment plan, in order for the Commission to present a draft amending budget.*
- 6. This Decision shall be published in the Official Journal of the European Union.*

The last article of the EEAS Decision has a twofold function: first, it identifies the steps needed, and the actors responsible for implementing the Decision (Section 1) and second, it calls for the latter's review and opens the way for its adaptation, "if necessary" (Section 2).

1. Implementing the EEAS Decision

- Paragraph 4 of Article 13 foresees that the EEAS Decision enters into force on the day of its adoption. Full implementation nevertheless required several preliminary steps, most notably the revision of the Staff and Financial Regulations.²⁶³ Moreover, in line with paragraph 5 (and Article 8(4)), the HR submitted an estimate of the revenue and expenditure of the Service to the

²⁶³ Regulation (EU, EURATOM) No 1080/2010 of the European Parliament and of the Council of 24 November 2010 amending the Staff Regulations of Officials of the European Communities and the Conditions of Employment of Other Servants of those Communities, *OJ* 2010 L 311/1 Regulations (EU, EURATOM) No 1081/2010 of the European Parliament and of the Council of 24 November 2010 amending Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities, as regards the European External Action Service, *OJ* 2010 L 311/9. See the discussions under Articles 6 and 8 EEAS Decision, above.

Commission, so as to modify the EU budget and to provide the EEAS with a start-up budget (paragraph 5).²⁶⁴ The required transitional arrangements were thus entered into, while the above-mentioned Regulations were duly amended, all with the approval of the European Parliament. The completion of final negotiations on the EEAS Decision and the adoption of the three flanking measures in barely six months' time triggered one insider to call it a "Guinness record for speed".²⁶⁵ But, as noted above, the speedy compromise has come at a price: EU institutions and member states made sure to keep their influence over the new Service.²⁶⁶

- Paragraph 1 of Article 13 stipulates that the implementation of the EEAS Decision is the responsibility not only of the High Representative, but also of the Commission, the Council and the member states; each of them being bound to take all necessary measures to that effect. That the Commission, the Council and the member states should be mentioned in this list is unsurprising. The organisation and the functioning of the EEAS were from the outset conditional upon each of these actors taking a whole series of practical steps, e.g. for the transfer of staff (Article 7) and buildings (Article 12), as well as the additional measures evoked in the previous paragraph.
- What is remarkable, however, is that the European Parliament is not explicitly included in the list of Article 13(1). Not so much because the Parliament had the right to be consulted in the process of adoption of the Council Decision (as per Article 27(3) TEU), but more in view of its essential role in allowing for the full implementation thereof. It is recalled that neither the staff provisions, nor the budget-related articles of the EEAS Decision could enter into force without the preliminary consent of the Parliament. Moreover, the Parliament's budgetary powers entail a significant influence on the financial assets and thus operational capability of the Service.²⁶⁷ Including the Parliament in the list of actors responsible for implementing the EEAS Decision would not only have reflected the reality, it could also have

²⁶⁴ European Parliament resolution of 20 October 2010 on Council's position on Draft amending budget No 6/2010 of the European Union for the financial year 2010, Section II - European Council and Council; Section III - Commission; Section X - European External Action Service (13475/2010 – C7-0262/2010 – 2010/2094(BUD)).

²⁶⁵ P. Skytte Christoffersen, "A Guinness Record for Speed", in E. Drieskens and L. Van Schaik (eds.), "The European External Action Service: Preparing for Success", 1 Clingendael Paper (2010).

²⁶⁶ See the discussion under Articles 2, 7, 8 and 12 EEAS Decision, above.

²⁶⁷ See the discussion under Article 8 EEAS Decision, above.

increased the sense of ownership and thus of commitment by the Parliament towards the smooth functioning of the Service.

- Indeed, in emphasising that the actors responsible for the EEAS Decision's implementation "shall take all measures necessary in furtherance thereof", Article 13(1) establishes an obligation of good faith, which echoes the provisions of Article 3 EEAS Decision on cooperation. Included in a CFSP act, such an obligation is admittedly limited in its normative effects, in view of the non-contamination principle of Article 40(1) TEU, the declarations to the Lisbon Treaty and the limited jurisdiction of the European Court of Justice in this area, as evoked earlier.²⁶⁸ However, as it arguably encapsulates the principle of sincere cooperation enshrined in Article 4(3) TEU and Article 13(2) TEU, the obligation referred to in Article 13(1) is not as toothless as it might initially look.

2. Reviewing the implementation of the Decision

- Given the originality of the EEAS in the EU institutional landscape, and the ambiguity of the provisions governing its organisation and functioning, it is unsurprising that the monitoring of the Decision's implementation, and its possible revision, were deemed necessary.
- Thus, paragraph 2 envisages that by the end of 2011, just a year after the EEAS actually began operating (see Article 7(1) EEAS Decision), the HR had to submit a report on its functioning, with a particular focus on the sensitive provisions on HR and Commission' instructions to Heads of Delegations, the role of EU delegations in consular protection of Union's citizens, and external action instruments programming. This report was submitted to the European Parliament, the Council and the Commission on 22 December 2011.²⁶⁹
- More generally, Article 13(3) foresees that the organisation and functioning of the Service should be reviewed by mid-2013. Such a *Review*, which is the

²⁶⁸ See discussion under Article 3 EEAS Decision, above.

²⁶⁹ EEAS, *Report by the High Representative to the European Parliament, the Council and the Commission*, 22 December 2011, made available to the public on 5 January 2012. See also "Remarks by High Representative Catherine Ashton at the AFET Committee in European Parliament in Strasbourg, 12 December 2011", Press release A 511/11, Brussels, 13 December 2011; and "Speech by High Representative Catherine Ashton on the Common Security and Defence Policy in the European Parliament in Strasbourg", Press release A 512/11, Brussels, 13 December 2011. For analysis and recommendations, see S. Blockmans, "Fit for Purpose? The European External Action Service One Year On", *OXFAM Briefing Paper* 159, 23 January 2012; and S. Blockmans, "The EEAS one year on: first signs of strengths and weaknesses", *CLEER Working Paper* 2012/2.

basis of the current exercise, is to cover, notably, the EEAS' composition and recruitment, in particular the geographical and gender balance of its staff, as well as member states' representation therein, and formulate proposals for correcting possible imbalances (Article 6(6)).²⁷⁰ The same paragraph adds that the Review shall include, "if necessary", appropriate proposals for the revision of the Decision. Such revision would then take place "by the beginning of 2014", through the procedure used for its adoption, namely Article 27(3) TEU.

- While the review process is underway, it is unclear whether a fully-fledged revision will be proposed. The protracted negotiations resulting from the demanding procedural requirements for the adoption of the EEAS Decision, and the significant role played therein by the European Parliament, may well dissuade certain member states from such a revision. The temptation might be to limit the review process to the formulation of recommendations which might become effective "à droit constant", i.e. by using the interpretative room in the existing provisions without amending Council Decision 2010/427/EU.
- In light of this commentary, and considering implementation to date, the second *EEAS 2.0* publication intends to assess whether such interpretative room exists to accommodate changes to the organisation and functioning of the EEAS, to formulate recommendations accordingly and/or to make proposals for revisions, if deemed necessary.

²⁷⁰ See S. Duke and S. Lange, "Achieving Geographical and Gender Balance in the European External Action Service", Study for Directorate-General for External relations of the Union, Directorate B, Policy Department, EP/EXPO/B/AET/2012/02, Brussels, 2013.