

Institutional Trends in CFSP/ESDP in the Wake of the EU's Constitutional Crisis

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Council-Commission Relations – Ways to Improve Coherence in Absence of the ‘Double-hatted’ Concept

1. Is double-hatting a premise for improving coherence in CFSP?

Are there ways to improve coherence between the Council and the Commission with respect to CFSP and ESDP in absence of the ‘double-hatted’ concept? My answer is yes, both because the provisions of the EU Treaty leave some room to conventional assessments enhancing that coherence, and because double-hatting as such is not a panacea for the intricate institutional problems affecting EU foreign policy.

Let me begin with the second point. As it is well known, double hatting, or, more precisely, the ‘personal union’ solution, combining the present functions of the High Representative and the Commissioner for External Relations (Relex) into the figure of the Union Minister for Foreign Affairs, emerged from the workings of the Brussel Convention, was substantially accepted from the IGC and was finally provided in Articles I-27 and I-28 of the EU's Constitutional Treaty.

According to the Treaty, the Foreign Minister is appointed by the European Council by qualified majority, with the agreement of the President of the Commission. The European Council may end the Minister's tenure by the same procedure as that through which he or she was appointed. The Minister for Foreign Affairs is also one of the Vice-Presidents of the Commission. In this capacity he or she is part of the Commission, which, as a collegiate body, has to be approved by the European Parliament before taking up its duties. In exercising responsibilities within the Commission, and only in exercising those responsibilities, the Minister is bound by Commission procedures. In the event of a motion of censure adopted against the Commission by the European Parliament, the Minister will be treated differently, in that he or she must "resign from duties that he or she carries out in the Commission". This allows the Minister to continue to perform Council duties pending the formation of a new Commission.

The Foreign Affairs Minister will wear two hats, being both the Council's representative for the common foreign and security policy and one of the Commission's Vice-Presidents. As such, the Foreign Affairs Minister will conduct the Union's common foreign and security policy and, for this purpose, will have a right of initiative in foreign policy matters and implement that policy under mandate from the Council of Ministers. The Minister will perform a similar role in the area of common security and defence policy. When acting under this mandate, he or she will be bound by the collegiate principle governing the Commission.

The Constitutional Treaty also provides that, as well as presiding over the formation of the Foreign Affairs Council, the Foreign Affairs Minister will contribute by his or her proposals to the preparation of common foreign and security policy and ensure implementation of European decisions adopted by the European Council and the Council of Ministers. Together with the Council of Ministers, he or she is responsible for seeing that CFSP principles are complied with (Article III-294).

The Foreign Affairs Minister will represent the EU in matters concerning the common foreign and security policy, conduct political dialogue on the Union's behalf and express

the Union's position in international organisations and at international conferences. He or she is also responsible for co-ordinating Member States' action in international forum (Article III-305). In this capacity, he or she may, where the Union has defined a position on a subject which is on the United Nations Security Council agenda, be called upon by the Member States sitting on the Security Council to present the Union's position (Article III-305).

In addition, the Union's special representatives (appointed and mandated by the Council of Ministers to deal with specific policy issues) carry out their mandate under the authority of the Union Minister for Foreign Affairs (Article III-302).

At the same time, the Union Minister for Foreign Affairs is one of the European Commission's Vice-Presidents, responsible within the Commission for external relations and co-ordinating other aspects of the Union's external action. The EU is responsible for maintaining consistency between the different areas of its external action and between these and its other policies, and the Council of Ministers and the Commission, assisted by the Union Minister for Foreign Affairs, must co-operate in ensuring that consistency (Article III-292).

Finally, the Foreign Affairs Minister will be in charge of a diplomatic service with delegations in almost 125 countries. The Constitution provides for a European External Action Service to be set up to assist the Minister in his or her functions (Article III-296).

This service will be established by a decision of the Council of Ministers, after consulting the European Parliament and after obtaining the consent of the Commission, and will be placed under the authority of the Foreign Affairs Minister. It will be composed of officials from relevant departments of the General Secretariat of the Council of Ministers and of the Commission and staff seconded from national diplomatic services. The staff of the Union's delegations operating in third countries and within international organisations will be provided from this joint service.

According to the Declaration annexed to the Final Act of the IGC, the necessary arrangements for establishing the European External Action Service will be made once the Treaty establishing a Constitution for Europe is signed.

The core of the double hatting solution consists, therefore, in the fact that the Minister for Foreign Affairs would work in, and would accordingly be accountable for, different 'modes' depending on whether the policy issue concerned enters the remit of the Commission or the formerly separate CFSP portfolio. Here emerges an issue affecting EU foreign policy management, irrespective of the entering into force of CT provisions concerning the Minister for Foreign Affairs. That issue consists in the division of foreign policy tasks between the Council and the Commission, reflecting the fact that the EU decision-making is characterized both from intergovernmental and from supranational features. But foreign policy needs coherence, even more than other policy issues. What we need here is "quick decision and action, whereas the Community method was essentially devised as a rule making procedure"¹.

In light of these considerations, double hatting is not necessarily a premise for bridging the gap between growing expectations of Union performance in international affairs and inefficient decision-making and insufficient capabilities for action. It might rather be conceived as the final result of institutional devices and assessments imagined within the framework of the EU treaties. But which devices and assessments are feasible at this proposal?

2. The diverse tasks affecting EU foreign policy and the growing influence of the High Representative for CFSP

¹ P.de Schouette-H.Wallace, *The European Council*, 2.7.2002, in paper, at 12.

The EU Treaty (Articles 13, 18, 26 and 27) distributes the tasks concerning CFSP among the following institutions:

- **The European Council** “shall define the principles and general guidelines for CFSP”, including defence, and “shall decide on common strategies to be implemented by the Union in areas where the Member States have important interests in common”;
- **The Council** “shall take the decisions necessary for defining and implementing the common foreign and security policy on the basis of the general guidelines defined by the European Council”, and “shall ensure the unity, consistency and effectiveness of action by the Union”;
- **The Presidency of the Council** “shall represent the Union in matters coming within the common foreign and security policy” and “shall be responsible for the implementation taken under this title; in that capacity it shall in principle express the position of the Union in international organisations and international conferences”;
- **The Secretary General of the Council-High Representative for CFSP** “shall assist the Council in matters coming within the scope of the common foreign and security policy, in particular through contributing to the formulation, preparation and implementation of policy decisions and, when appropriate and acting on behalf of the Council at the request of the Presidency, through conducting political dialogue with third parties”; and shall assist the Presidency of the Council in representing the Union and in implementing the related decisions;
- **The Commission** “shall be fully associated with the work carried out in the common foreign and security policy field”, and in the tasks of representing the Union and of implementing the related decisions.

While giving the HR the task of “contributing to the formulation, preparation and implementation of policy decisions”, the TEU leaves room for depicting this figure as that of a ‘general manager’ of CFSP. On the other hand, the TEU distributes single tasks among diverse institutions, although such distribution is far from being clear in certain fields, particularly for what concerns CFSP’s implementation, where there is a risk of overlapping between the Council and the Commission.

It is worth adding that, on factual grounds, some of the tasks are now accomplished from institutions different from those provided from the EU Treaty. Such shifting has particularly characterized representation of the Union in international organisations and at international conferences, where, rather than merely “assisting” the Presidency of the Council, the High Representative represents directly the Union. This customary practice, established by Javier Solana, reflects the emergence of a new centre of influence and initiative around the High Representative, which, according to some scholar, has also limited the Commission’s margin of manoeuvre in the field of CFSP².

Why did this shifting occur? Mr. Solana’s political skill is certainly one reason, but is unlikely to be the only one. The tenure of the office might also be considered at this respect. While the EC Treaty establishes in six months the Presidency of the Council’s tenure, clearly a very short time for dealing with foreign policy issues, the EU Treaty doesn’t fix the HR’s tenure, depending on the European Council’s will. This is an ‘institutional resource’, giving to the HR a particular authoritativeness in the conduction of foreign relations.

² G.Durand (ed.), *After the annus horribilis: a review of the EU institutions*, European Policy Centre Working Paper No. 22, January 2006, at 18.

However, both the fact that the Treaty gives the opportunity of depicting the HR as the CFSP's 'general manager' and the growing influence already gained by the HR, particularly for what concerns EU's representation, should not be overestimated. After all, the HR has to move himself among three European institutions, that is, the European Council, the Council and the Commission, and twenty-five Member States. A 'general manager' is not an Hercules. It is rather called to ensure co-ordination between those different actors and, more generally, a coherent EU foreign policy.

3. The recent Commission's proposals on co-ordination of CFSP

The Communication "Europe in the World", presented from the Commission to the European Council of 15/16 June 2006, contains proposals for enhancing coherence in the EU foreign policy.

It is worth mentioning those proposals ensuring:

- a) co-ordination of the External Group of Commissioners with the High Representative, by inviting the HR "to be associated with the work of the Relex Group, particularly on strategic planning";
- b) co-ordination of the Relex Group with the European Council and the HR, through informal meetings taken every six months "to undertake an overview of the Union's external action";
- c) extension to other fora of the experience of co-ordination in Council on the EU position between Member States, the Presidency and the Commission, where EU is already member of UN bodies, multilateral and regional organisations;
- d) co-operation between EU institutions and Member States, through various devices such as exchange of personnel with diplomatic services of the Member States and the staff of the Council Secretariat (which the Commission is already preparing), national diplomatic training schemes to staff in EU institutions working on external relations issues, proposals from the Council and the Commission of double-hatting of Heads of Delegations and EU Special Representatives in particular areas such as the Western Balkans.

These proposals deserve appreciation to the extent that they try to enhance co-ordination not only between the high ranks of the Commission and the Council, but also between the related administrations and national diplomacies.

In the end, however, it might not follow a remarkable progress. After all, informal meetings joining together the Relex group and the HR are nothing more than different ways of working. Rather than preparing changings within the formal division of tasks between European institutions as provided from the EU treaties, they presuppose, and might even strengthen, that formal division. On the other hand, the Commission's proposals pose the general question of who co-ordinates who, and for which purposes. Association of the HR to the Relex's workings presupposes that Relex is the decisive CFSP seat even for "strategic planning", contrary to the EU Treaty provisions giving the Commission the chance to be "fully associated" to the workings concerning CFSP.

While respecting the treaty provisions, proposals aimed at 'co-ordinating' European institutions in CFSP could have the ambition of paving the way for major changings.

4. An alternative approach to co-ordination

An alternative and more ambitious approach to co-ordination relies on a gradual strengthening of the powers and tasks of the HR, conceived as the CFSP's 'general manager'.

With a special agreement, as has been already suggested by some authors, Member States could confer upon the High Representative the power of giving voice to any common position the EU works out on issues being discussed in the UN Security Council, as provided by the CT. Also the creation of the European External Action Service envisaged in the declaration annexed to the CT could be realized through an agreement of the Council and the Commission establishing the functional links between the structures required for such Service³. It is worth adding that the responsibility for the European External Action Service could be conferred on the HR.

At any rate, while being fully compatible with the Treaty, these changings need certain political conditions to be met. The chances of co-ordination among European institutions within CFSP are strictly linked to the capability of EU institutions, foremost the HR, in capturing a moment of sufficient political cohesion among Member States for creating consensus around enduring changings within the CFSP institutional framework.

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³ G.L.Tosato and E.Greco, *The EU Constitutional Treaty: How to Deal with the Ratification Bottleneck*, in *The International Spectator*, 4/2004, at 14.