

SWIMMING IN MURKY WATERS

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EU'S EXTERNAL REPRESENTATION

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IIA BRIEFING PAPER 88 • September 2011



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FIIA Briefing Paper 88
September 2011

- Only daydreamers could have imagined that constructing a foreign ministry for a supranational entity with unified external representation would be easy. The European Union has once again entered uncharted waters.
- The EU external representation is complex due to two overlapping developments. First is the confusion over who to represent: the Union or the Union and the member states. The second bone of contention relates to the question of when the EU is supposed to be in charge, since the competences of the EU and the member states are scattered across the board and international negotiations almost always touch upon various types of competences.
- The early compromises on external representation remain fragile and certain issues are still pending and waiting to be addressed. This process is compounded in a time of economic crisis and political instabilities in the member states.
- The strongest motivating factor in favour of the EU's more unified external representation is the fear of external insignificance. The latest examples showing that such concerns are well-founded include the Copenhagen 2009 climate negotiations and the IMF reform, where EU member states had to yield to the coalition of the US and China.

The European Union research programme
The Finnish Institute of International Affairs



The two Presidents: Herman Van Rompuy and José Manuel Barroso. Photo: European Commission Audiovisual Services.

In the area of external affairs, the Treaty of Lisbon has introduced a number of innovations into the functioning of the European Union. The initial phase of these innovations was in 2010 when two parallel processes took place. First, the set-up of the European External Action Service (EEAS) was negotiated and subsequently implemented. Second, a number of developments have taken place in the sphere of the EU's external representation. Soon after December 2009, when the new treaty entered into force, it became clear that it was wide open to interpretation. Since most actors continued to interpret the treaty provisions in their favour, the EU had to engage in difficult negotiations on several occasions. In fact, the new treaty impacts not only EU relations with third states and within international organizations, it also has a significant impact on the *member states'* relations with third states as well as on their representation within international organizations.

The experience of the UN climate negotiations in Copenhagen in December 2009 (coinciding with the new treaty's entry into force) provided fresh impetus for greater cooperation and harmonization among Europeans in dealing with global issues. The issue that pushes Europeans closer together is the fear of global marginalization. As President of the European Council Herman Van Rompuy said about Copenhagen '09: "[It was] a disaster in which Europe was excluded and mistreated."¹

The problem, however, is rather complex, as this paper will attempt to illustrate. There are also no definitive answers at this stage as to *how* the system will ultimately be organized at all levels, and *if* the new system is going to enhance the effectiveness of EU diplomacy. The principal source of this complexity could be narrowed down to two questions: representing *whom* and *when*? There is a degree of ambiguity between the representation of (1) the EU, (2) the EU *and* the EU member states, and (3) the member states collectively. The second question of when and how the representation is provided depends on the nature of competences. While the EU representation in the area of exclusive competences is relatively clearly determined, at the same time there is an additional need to represent the member states collectively in the areas of *shared* competences between the EU and member states.

The issue of competences calls for some clarification. There are three main blocks of Union competences: exclusive, shared, and supportive. The Lisbon Treaty has created a catalogue of these.² When the Union exercises its exclusive competences on trade, for example, the issue of representation is clear-cut, as will be argued in the second part of this paper. However, the Lisbon rules apply only to external representation on issues the Union has competences in. The EU does not have competences in all issues,

¹ *The Guardian*, quoting a Wikileaks source, 3 December 2010.

² Articles 2–6 of the Treaty on the Functioning of the European Union.

and whenever a given competence is shared between the EU and its member states, the external representation is decided on a case by case basis.

The reform of the EU external representation includes a wide range of challenges from third countries recognizing the new actor's prerogatives to internal EU actors' engagement in and contribution to discovering the new uncharted, often murky waters of EU foreign policy. This paper focuses mainly on the internal dynamics in the European Union and its main stakeholders. First, the actors in the EU external representation are examined. Then the point of departure for the EU and its member states is presented in relation to establishing their presence in international organizations. After that, the focus will switch to the issue of how the situation has been developing during the first eighteen months since the Lisbon Treaty came into force. Lastly, the issues that are still pending at this stage will be enumerated.

Actors in the EU external representation

On paper at least, the Treaty of Lisbon is rather clear on who provides the external representation of the Union in different contexts. Those actors are: the European Commission, the High Representative of the Union for Foreign Affairs and Security Policy (and, under her leadership, the European External Action Service), and the President of the European Council. As a general rule, the rotating presidency of the Council of Ministers no longer represents the Union. However, there have been numerous exceptions, especially when it comes to providing external representation on issues falling into the shared competences category. This debate is briefly outlined below.

Article 17 of the Treaty of the European Union bluntly states that “[w]ith the exception of the common foreign and security policy, and other cases provided for in the Treaties, it [the Commission] shall ensure the Union's external representation”. In principle, therefore, it is the *Commission* services' responsibility to provide external representation on all external issues related to the Union policies: trade, development, environment, climate, energy, transport, immigration, financial cooperation, and so forth. At the political level, the corresponding Commissioner provides the EU's external representation. By the

same token, the President of the European Commission provides the external representation of the Union at the level of heads of state and government.

The only limitation to the Commission prerogatives on representation is the Common Foreign and Security Policy (CFSP). On all matters related to “foreign” and “security” issues the representation is provided by the *High Representative* and, under her leadership, the *European External Action Service* (EEAS). Article 27 (2) TEU reads: “The High Representative shall represent the Union for matters relating to the common foreign and security policy...” Since the new treaty has significantly strengthened the High Representative's position (who is simultaneously High Representative, the Foreign Affairs Council Chair and the Vice President of the European Commission³), a new issue came up of possibly delegating some of the work of the High Representative to other actors. There are, in principle, four “Ashton deputies”. The three Commissioners in the European Commission, who were elected to the College in February 2010, are supposed to work “in close cooperation with the High Representative/Vice-President in accordance with the treaties” as President Barroso has indicated.⁴ The fourth “deputy” is the national foreign minister of the member state holding the rotating Council presidency.⁵

Should the problem fall within both the CFSP and other Union policies (namely climate issues within the UN Conference on Climate Change, or global cooperation within the G20 on financial markets supervision, or in the area of development), the representation of the Union is provided jointly by the High Representative and the respective policy Commissioner. The fact that Mrs Ashton is at the same time a member of the College of Commissioners should, in theory, significantly ease this cooperation. In fact, this is one of the most important indicators for the increased effectiveness of the merged positions of the former Commissioner for External Relations and the former High Representative. However, the situation becomes blurred below the College of

3 See e.g. Piotr Maciej Kaczyński, Peadar ó Broin, Two new leaders in search of a job description, CEPS Policy Brief No. 200, 25 November 2009.

4 <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1837>.

5 Art. 2 (5) of the Council's Rules of Procedure, 30 Nov 2009.

Level / Issue	CFSP Issues	Non-CFSP Issues
Level of Head of States or Government	President of the European Council	President of the European Commission
Ministerial Level	High Representative	Any Commissioner responsible for a given dossier

Table 1. Actors in the External Representation of the EU (within the EU competences).

Commissioners, as the EEAS does not form part of the Commission and is largely perceived as an entity external to the Commission services.

However, the High Representative has the new EEAS at her disposal. This service is a *sui generis* body that should cooperate simultaneously with the European Commission, the Council General Secretariat and the member states' diplomacies. It is also composed of staff originating from the above-mentioned bodies. There are already over 4,000 diplomats working in the EEAS, a large majority of whom work in the 136 EU Delegations. The Union delegations represent the EU *vis-à-vis* third countries and international organizations. Previously, the EU representation was provided by the rotating Council presidency.

The permanent *President of the European Council* also provides representation of the EU. As Article 15 (6) stipulates, the President "shall, at his level and in that capacity, ensure the external representation of the Union on issues concerning its common foreign and security policy, without prejudice to the powers of the High Representative". Therefore Mr Van Rompuy does not enjoy any exclusive representational powers, but shares them vertically with the High Representative on CFSP issues and horizontally with the President of the European Commission on all non-CFSP issues.

The external representation of the Union is provided individually or collectively by numerous actors. It could be presented as shown in Table 1.

In situations where the competences for external representation go beyond the given actor (namely when the topic of an international meeting, or policy area of a particular international organization where the EU is active, concerns both a CFSP issue and a Union policy), the external representation should be provided jointly. Hence, both Presidents Barroso and Van Rompuy attend the G20 summits on behalf of the EU, and both are present at summits with African, Asian or Latin American leaders. By the same token,

both the EEAS and the Commission staffers are present in the Union Delegations in order to jointly address the cross-sectoral issues.

In the pre-Lisbon system there was yet another actor providing the external representation of the European Union: *the rotating Council presidency*. The presidencies, as they came and went every six months, represented the EU and its member states on numerous occasions, including within the UN system as well as in bilateral relations between the Union and a third state. The Lisbon Treaty in principle eradicates the rotating presidency powers in external relations; they no longer coordinate the works of the Foreign Affairs Council (this is now performed by the High Representative) and most of its working parties (these services are now provided by the EEAS). What is more, they no longer coordinate member states' action in third countries nor in the international organizations (the Union Delegations now provide this coordination function).

In short, the role of the rotating presidency in providing external representation has been eradicated, except for specific numerous situations. This is sometimes due to the simple fact that Union delegations are not in every corner of the world (for example, the Hungarian presidency represented the EU in Tripoli in spring 2011; and the EU does not have delegations in places like Tehran or Pyongyang). More importantly, and more frequently, in areas of shared competences the corresponding EU institution and the Council presidency (as a representative of the member states) together provide representation of the EU and its member states. On top of that, there are situations where, in order to be successful, the EU and its member states have to engage in coordinated action⁶ at all levels with a unified form of representation, including the EU's competences

6 On the need for coordinated action at all levels, see Angela Merkel's speech at the College of Europe in Bruges on 2 November 2010, <http://www.coleurope.eu/news/2186>.

(exclusive or shared) and the member states' exclusive competences (see Diagram 1). The UN climate talks are an obvious example of such a situation.

Reforming the EU external representation in international organizations

The EU and its member states' presence in various international organizations is organized according to five different models:⁷

- All member states as full members, the EU as observer. This is the most common model in global multilateral organizations. However, the observer status does not stop the EU institutions from being actively engaged with their counterparts from international organisations (for example in the cases of the Council of Europe and international financial institutions).
- All member states and the EU as full members. Where EU competences are particularly important, such as for trade (WTO) and agriculture (FAO), the Union enjoys full status alongside member states.
- Some member states and the EU as full participants. This is most common in less formalized processes, such as the G8/G20 where the larger EU member states are present together with the EU. At G8 and G20 meetings the two Presidents of the European Council and of the European Commission take part in the meetings representing the EU horizontally.
- The EU as a full member/contracting party, with no member states. This is mostly seen in the case of highly specialized international agreements, such as those for individual agricultural commodities or metals.
- Some member states as full members, the EU with no status. The UN Security Council is a special case with two member states (France and the UK) as permanent members, others taking only occasional places in rotation, and the

EU not even present as an observer. However, the Lisbon Treaty provides an arrangement allowing the EU to be invited to express common positions.

The first eighteen months

The most salient difficulty with the establishment of the institutional foreign policy set-up and the (re-)defining of the new actors' powers is probably related to the interplay between three factors:

- The blurred delimitation of EU and national competences in the areas of shared competences.
- On many occasions a strong need for the representation to be provided by the EU and the EU member states *together* as various elements of the issue at hand are an EU and a non-EU competence (see Diagram 1 above).
- Limited trust among EU actors, especially between many EU governments and the European Commission; the situation deepened when the financial crisis coincided with the Lisbon Treaty implementation.

Amid the atmosphere of uncertainty caused by the economic crisis, the practice of the European Union external representation under the Lisbon rules has brought about some interesting developments during the past 18 months. Member states, the Council's Legal Service and the European Commission struggled for months over the definitions of shared competences, the precise delimitation of competences and their application to real-life issues, while searching for practical arrangements that would have saved the EU's face (or European faces) *vis-à-vis* multiplied third counterparts.

Institutionally, there have also been numerous power struggles, especially when the decisions on the establishment of the EEAS were under negotiation. Also, the new powers of the High Representatives proved to be more difficult in practice than previously anticipated. For example, Mrs Ashton chairs the Foreign Affairs Council, but at times her leadership has been publicly challenged. The timing of her proposals and the quality of the discussion papers have also been criticized. All in all, the first months were not the easiest for the High Representative, not

7 For more on this, see Michael Emerson et al, *Upgrading the EU's Role as Global Actor: Institutions, Law and the Restructuring of European Diplomacy*, Brussels 2011.

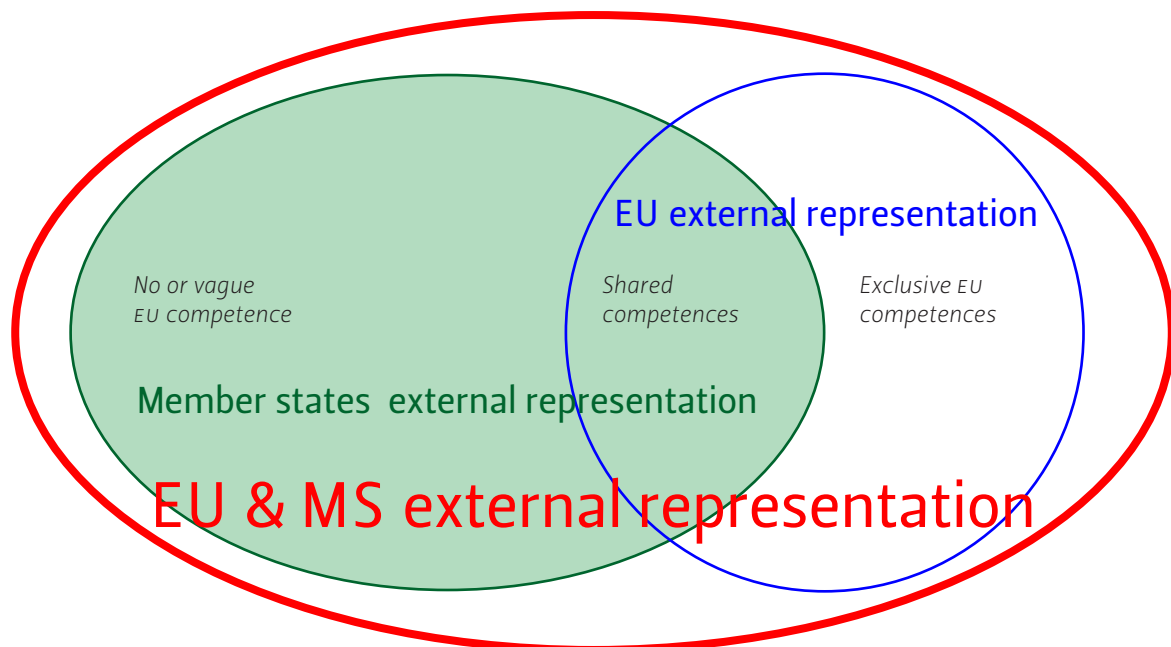


Diagram 1: Areas in EU and member states external representation.

least because for twelve months there was no EEAS, and the first months of 2011 saw the new Service in the early stages of being set up. It will still take some time before the EU's diplomatic corps is fully operational.

There have been relevant developments related to the external representation in four main types of activities. First, there was the representation in the (global) processes leading up to *internationally binding agreements*. These negotiations often touch upon various types of EU competences. The “mercury case” came to symbolize all the related problems. By June 2010, the EU was facing an inter-institutional deadlock (between the member states and the Commission) and risked a diplomatic loss of face during the UNEP-led international negotiations leading up to a legally binding global agreement on mercury.⁸ The first meeting of the global conference was scheduled for June 2010 in Stockholm. For some six months prior to that, various EU actors could not agree on the form that the EU negotiating team should take. On the day, the EU was without any mandate to negotiate and all the EU stakeholders were strongly limiting each other's actions. The Commission argued that vast elements of the mercury negotiations fell under the exclusive competences of the Union, while the Council Legal Service

and many member states thought differently. At one point prior to the Stockholm meeting, one of the Council Legal Service opinions recommended that the Council should take the Commission to court when the Commission withdrew its draft mandate recommendation after the Council had previously approved it at the COREPER⁹ level.

The mercury case and the Stockholm meeting have proved how difficult it can be to work out any arrangement among the EU institutions. At the same time, Stockholm was a stark reminder that arguably the most important motivator for any EU agreement on *how* to organize itself was the fear of losing face in the eyes of counterpartners. Following Stockholm's “cold shower for the Europeans”, as one participant put it, the EU leaders worked out the practical arrangements – in a similar fashion to the large UN climate negotiations in which the EU representation follows a particular pattern. Subject to further changes, the process allowing for moving forward consists of a broad negotiating mandate and the so-called negotiating directives laid down in a

8 For more information, see the United Nations Environmental Programme (UNEP) website <http://www.unep.org/hazardous-substances/Mercury/tabid/434/language/en-US/Default.aspx>.

9 The process of adopting a mandate is as follows: the Commission issues a draft recommendation, which is then processed bottom-up in the Council, in the Working Party, the Committee of Permanent Representatives (COREPER) and, finally, the Council of Ministers. It is unclear, however, whether the Commission can withdraw its draft recommendation.

Council directive,¹⁰ as well as the adoption of practical arrangements, whereby the roles for the Commission, the rotating presidency and other member states were defined. The limitation of these arrangements was their ad hoc nature. Even though both the Belgian and the Hungarian rotating presidencies have tried to use the practical “mercury compromise” as a model for arranging other negotiation practices, they have constantly met with opposition from the European Commission as well as from some member states.¹¹

The second type of problem was related to representation in political activities not leading up to any legally binding document. The EU representation at *international events and conferences* refers here mainly to a wide range of events from major UN conferences to other gatherings such as the G8/G20 or the Union for the Mediterranean. In the case of such events and conferences, practical arrangements are not included in the Council decision, but in the Council conclusions, since there is no law-making involved. The various speaking roles of the Commission and the presidency, the order of internal coordination, and so on, are still being enumerated, while burden-sharing with fellow member states (other than the presidency) by delegating certain topics/interventions during more complex negotiations has become a common practice.

The Council Legal Service has addressed the issue of external representation in this context on several occasions. In these opinions, once again the principle has been confirmed that the member states dispose of wide autonomy in deciding who their representative should be. In principle, the Commission shares this view. However, as already discussed above, this division of labour between the Commission and the Council in all international activities is still being questioned.

The third issue concerning external representation relates to presence in *international organizations*. The establishment of the European External Action Service (EEAS), which also controls the EU Delegations, including delegations to international

organizations, means that it is up to the EEAS and the EU Delegations to provide the EU’s full external presence. However, in issues of shared competences this can become more complex. Furthermore, the transition of EU representation has taken place in 2010 and 2011, during which time the EEAS has still been in the process of becoming operational.

This transformation included, among other things, the need to change the EU’s position in the UN General Assembly. Until 2009, the EU was represented by a rotating presidency. Now it is represented by the Union’s common actors: the EU Delegation in New York, the High Representative and the European Council President. After the initial blow to Union diplomacy (the issue was delayed from autumn 2010 and finally adopted in May 2011), the EU finally managed to convince third states to recognize these actors as legitimate representatives of the Union.¹² Notwithstanding the external approval, the Union is still internally inclined to decide on the representation in line with the so-called transitional arrangements, which include a role not only for the EU Delegations, but usually for the rotating Council presidency as well. An important element of the new system is that the Heads of Missions (HoMs) coordinated by the EU Delegation take the most important decisions. However, the relations between HoMs and the corresponding Council working parties have not yet been fully defined.

There are many other international organizations or bodies where the EU position has changed following the Lisbon Treaty’s entry into force. In the UN Security Council, the High Representative can now be invited to speak for the EU if the EU member states have a common position. However, the High Representative cannot, of course, speak on behalf of permanent or elected member states that sit in the Council. Moreover, the Lisbon Treaty provides a theoretical possibility for the Eurozone states to have unified representation in international financial institutions, most importantly in the International Monetary Fund and the World Bank.

It is also worth mentioning that the Lisbon Treaty provides for the EU to accede to the European Convention on Human Rights. The accession has not yet

10 Implementation of the Lisbon Treaty with regard to the External Representation of the EU in matters of Shared Competences during the Hungarian presidency. State of Play, 30 June 2011.

11 Ibid.

12 United Nations General Assembly (UNGA) Resolution A/res/65/276.

taken place, although the process is moving forward. The Council of Europe has already amended the document allowing the EU to become legally bound by the Convention (previously only states could be parties to the Convention). Once this happens, the EU presence in the Council of Europe system will mean, for example, that there will be EU delegations to the Council of Europe's Council of Ministers (most likely a Commissioner responsible for fundamental rights), and its Parliamentary Assembly (most likely a European Parliament delegation), as well as a judge in the European Court of Human Rights nominated by the EU.

Fourthly, the *bilateral representation* of the EU with third states had to be completely re-organized. During the weekend following the new Treaty's entry into force, the Commission Delegations were turned into EU Delegations. Apart from the name change, they were given a coordination function: the EU Delegations have now taken over the coordination of EU member state embassies. Yet there were significant transitory provisions, and it was not until the end of 2010 that all EU Delegations coordinated the work of national diplomats present on the ground. Moreover, the delegations were still not fully equipped to play the new role, as their objectives had changed overnight on 1 December 2009. There had been hardly any political reporting previously, but it duly became an important activity of all the delegations and a crucial element in the construction of the EEAS and the EEAS input into the activities of the High Representative.

What made the transition even more difficult was that the EU delegations' coordination function was not welcomed everywhere; a new incentive for coordinating national diplomats had to be developed. There are over 3,000 EU member state embassies around the world and tens of thousands of people involved. As each of the transition-in-coordination battles had to be won separately, there were (and in some cases still are) some 136 micro-wars on the ground.¹³ In some cases the transfer of the coordination function was not easy. For example, in Washington some national ambassadors did not show up for local coordination meetings for months.

Another challenge in the delegations came with the arrival of EEAS diplomats. Previously, the entire

Commission Delegations personnel belonged to the Commission and were subject to the same staff regulations. In the new regime, there are two types of staff in the EU Delegations: the Commission staffers subject to one regulation and the EEAS diplomats, who are subject to different rules. This created additional tension in many places, not least because many of the incoming EEAS diplomats were previous national diplomats. All such problems are symbolic of a greater and urgent need to develop a European diplomatic and administrative culture. This, however, will only be possible over the longer term.

The representation during bilateral summits between the EU and a third state was much easier to organize. The new rule is that whenever bilateral summits take place in the EU, they should be held in Brussels. A clear exception to the rule was the EU-US summit in Lisbon in 2010, but all other meetings respected the new rule (the exception was granted at the request of the partners to coincide with the NATO summit). The EU is represented at these summits by the President of the European Council, Van Rompuy, and the President of the European Commission, Barroso.

At the multilateral summits (namely Asia-Europe meetings, Eastern Partnership summits or meetings with the ACP states or the Latin American states), representation is still provided by the same EU leaders (Van Rompuy and Barroso), but national EU leaders are also often present (or at least some of them are). Moreover, whenever these summits take place in the EU, they can either be organized in Brussels or in the country holding the rotating Council Presidency. The EU-LAC (Latin America and Caribbean) summit took place in Madrid in May 2010; the ASEM summit took place in Brussels in October 2010 during the Belgian Council presidency; and the Eastern Partnership summit is scheduled to take place in Warsaw in September 2011.

In lieu of a conclusion: Problems at hand

Only daydreamers could have imagined that constructing a foreign ministry (EEAS) for the European Union with its own network of embassies, its own agenda and its own competences would be easy. The questions on the success or effectiveness of this new system are still impossible to answer conclusively. The EU has once again entered uncharted waters. Foreign policy is the central feature of a state, and

¹³ There are 136 EU Delegations in the world (bilateral and to international organizations).

for the first time in contemporary history a supranational entity (which is not a state!) is set to conduct a foreign policy with unified external representation as one of its features.

Furthermore, the process of reforming the Union representation is still far from completion. That is why formulating major conclusions at this stage would be premature. A recent paper published by the Hungarian Council presidency has outlined ongoing contentious issues when it comes to the EU external representation in the context of shared competences.¹⁴ These issues include the definition of representation, the relationship between the Council and the EU Delegations, and the local coordination.

The term “representation of the Union” has not been defined in the Treaties and there are various definitions in other documents. The following practical issues are the result of this lack of a definition:

- Unity of representation: EU Delegations and the Commission appear to argue that at any particular event or within international organizations it is only the Delegation or the Commission that should assume the widest possible representational roles. This includes all manner of activities, formal and informal, at a given event or in an international organization. The majority of member states are of the opinion that representation must be divided on an ad hoc and individual basis in accordance with the division of competences between the EU and its member states. As a general rule, it is the Council presidency who should act as the joint representative of member states when it comes to member states’ (non-EU) competences.
- The extent of representation: a major point of disagreement is whether the representation of the EU also covers its member states. This issue is particularly pertinent in the context of shared competences where some member states do not want the Commission or the EU Delegations to start their statements with “on behalf of the EU and its member states”.

Secondly, a practical interpretation seems to be emerging that the universal representative role of the Delegations implies that they can negotiate and express positions without the involvement and, in particular, the prior authorization of Council bodies. Even if to some extent this may be justified by political necessity, such steps would not be welcomed among the member states.

Third is the issue of local coordination. At the headquarters of international organizations (especially in the UN context) the EU Delegations have taken over the role of the Council presidency. In practice, however, the internal EU coordination is governed by transitional arrangements using the format of “EU Teams”, which usually consist of the Council presidency team and the local EU Delegation personnel. The unclear division of labour as well as the fluctuating level of expertise at the EU Delegations explain why the system’s internal coordination has remained volatile. There are cases where the system is almost completely dominated by the EU Delegation, leaving hardly any space for the presidency. Indeed, the delegations will be privileged in the longer-term, as their composition does not rotate every six months like that of the presidency.

The impact of the Lisbon Treaty on the local coordination is strongly marked by the regular meetings of the Heads of member state Missions and the EU Delegation (HoMs). HoMs meetings are gaining in importance when it comes to defining EU policy positions. There is a risk that in some cases the HoMs decisions would, in fact, substantially amend the COREPER positions.

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ISBN 978-951-769-319-6

ISSN 1795-8059

Cover photo: Benny Lin / Flickr.com

Layout: Juha Mäkinen

Language editing: Lynn Nikkanen

14 Implementation of the Lisbon Treaty with regard to the External Representation, *ibid.*