

1. Introduction

With the Treaty of Lisbon a new institutional regime for European foreign policy formulation is being established. Under the responsibility of the High Representative (HR) the European External Action Service (EEAS) shall provide the bedrock for effective policy-formulation and implementation. Within this overall context my paper focuses on the rules governing the Common Foreign and Security Policy (CFSP) and the Common Security and Defence Policy (CSDP). Their analysis is of particular relevance, since the Lisbon Treaty's unitary system does not unmake the specificity of the CFSP and the CSDP which continue to be 'subject to specific rules and procedures' (Art. 24.1(2) TEU). The inspection of the CFSP and CSDP structures helps us to identify their executive character and consider appropriate mechanisms to hold the intergovernmental CFSP executive to account for its activities, thereby closing a potential accountability gap.

Among European lawyers, CFSP and CSDP did not gain much prominence for many years.¹ This limited attention stands in striking contrast to political science, which devotes considerable attention to the Union's activities in the former 'second pillar'.² Certainly, the lack of ECJ jurisdiction explains and justifies a lesser degree of legal scrutiny.³ But this should not leave us with the impression of a legal ghetto. While the rules governing CFSP, which legally includes the CSDP,⁴ are certainly specific, they need to find their place within the wider framework of European constitutional law reflecting the Lisbon Treaty's endeavour to combine the former pillars in a single legal order with one legal personality, an uniform institutional framework and overarching Treaty objectives.⁵

I will present my argument in three steps. First, the inspection of the new Treaty regime governing CFSP and CSDP in the light of the institutional practice helps us to identify their executive character. Foreign, security and defence policies are not about law-making but typified by their political, administrative and operational character (section II). Despite the abolition of the pillar structure the Lisbon Treaty continues legal and institutional intergovernmentalism through specific rules and procedures, whose relationship with the constitutional principles of Europe's supranational legal order requires clarification (section III). Having identified the intergovernmental executive character of the CFSP/CSDP Treaty regime we may conceptually explore the corresponding accountability of the EU's foreign, security and defence executive. In doing so, the article links the analysis of CFSP and CSDP to the on-going debate about the accountability of the EU's executive order (section III).

¹ Even most monographs on EU external relations confined the CFSP/CSDP to one, albeit important, chapter; for an early exception see R. Wessel, *The European Union's Foreign and Security Policy* (1999) and the contributions to M. Trybus/N. White (eds.): *European Security Law* (2007).

² See, recently, the special issue of the *Journal of Common Market Studies* 2011/1.

³ Among legal authors the delicate delimitation between the supranational (first pillar) policies and CFSP/CSDP in the fields of dual use goods, sanctions, development cooperation and armament cooperation gained most attention; cf. the overview by M. Trybus, *European Union Law and Defence Integration* (2005).

⁴ Chapter 2 of the EU Treaty comprises two sections with the 'common provisions' for CFSP and CSDP (Art. 23-41) and specific CSDP rules (Art. 42-46).

⁵ Cf. on legal unity Art. 1(3), 3, 21 and 47 TEU.

2. Expansion of Executive Power in CFSP and CSDP

During the European Convention and the Intergovernmental Conferences drafting the Constitutional Treaty and its offspring, the Lisbon Treaty, both institutional reform and the efficacy of foreign policy decision-making took centre stage.⁶ Most minds were focused on the thorny issue of political leadership and the corresponding prerogatives of the European Council, the Commission and the High Representative (subsection 1). In contrast, the administrative CFSP infrastructure obtained much less attention, although the Lisbon Treaty certainly recognises its existence, thereby reflecting the expansion of executive capacities at Treaty level (subsection 2). But the new rules remain incomplete insofar as they follow the Community blueprint of formalised decision-making procedures. This contrasts with the prevailing informality of political and operational CFSP activities (subsection 3). Such counter-intuitive assessment of the Treaty articles acknowledges the specificity of foreign affairs and lays the basis for the designation of appropriate accountability mechanisms.

2.1. Political Executive Power

For more than a decade, the pursuit of a ‘single voice’ served as a symbol of CFSP reform. Indeed, personification of foreign policy may contribute to its visibility and efficacy, especially if the uniform representation is accompanied by structural changes which facilitate the emergence of collective policy preferences. In this respect, the enhanced status of the High Representative (HR) may facilitate the realisation of a common approach.⁷ With the Lisbon Treaty the second High Representative, Catherine Ashton, formally steps into the limelight by assuming the functions which had hitherto been held by the rotating Council Presidency and the Commissioner with the portfolio for external relations. Whereas the Amsterdam Treaty confined the HR the junior function to ‘assist’ the Council and represent the CFSP ‘at the request’ of the Presidency,⁸ Lisbon entrusts the post with extensive agenda-setting, decision-shaping and implementing powers.⁹ Nonetheless, the HR’s enhanced legal capacities stay short of the political prerogatives of most national foreign ministers.

2.1.1. Spokes –and chairperson– no foreign minister

The High Representative can also in future not autonomously decide the Union’s foreign policy. Without consensus among the Member States there is no policy position which the HR may represent towards the wider public.¹⁰ Catherine Ashton may rely on the EEAS to elaborate proposals and steer the Foreign Affairs Council, which she chairs, towards agreement, but without consensual approval she must, as a matter of legal principle, remain silent.¹¹ The EU’s tardy reaction to the popular uprising in North Africa

⁶ See G. Grevi, *The Common Foreign, Security and Defence Policy*, in: Amato et al. (eds.): *Genèse et destinée de la Constitution européenne* (2007), p. 807 at 811-7.

⁷ Cf. the analysis of media coverage in third countries by M. Rogahn et al., *A Mediator on the World Stage?*, *ELJ* 12 (2006), 680 at 695-6.

⁸ See Art. 18.3, 26 TEU-Amsterdam/Nice; in practice the first HR, Javier Solana, gained considerable influence and was entrusted with important diplomatic missions, such as the arbitration in the constitutional crisis in Serbia and Montenegro or the negotiations about Iran’s nuclear programme; for more details see S. Duke/S. Vanhoonaeker, *Administrative Governance and CFSP*, *EFA Rev.* 11 (2006), 163 at 168.

⁹ For an overview see J.-C. Piris, *The Lisbon Treaty* (2010), pp. 238-49.

¹⁰ On decision-making below section III.1.a.

¹¹ Of course, there is an extensive grey zone between the autonomous conduct of foreign policy and the representation of positions decided elsewhere, especially in the case of political declarations, personal interaction and media interviews; but as a matter of principle the Treaty is clear: the HR chairs, proposes and represents under Art. 27.1+2 TEU, while the Council decides in accordance with Art. 31 TEU.

in early 2011 partly resulted from this need to establish a common line first.¹² Arguably, the appointment of a lesser known figure also signals that the Member States are intent on remaining at the helm.¹³ Article 18(2) TEU adequately grasps the post's underlying tension: the HR 'shall conduct' the CFSP which he/she shall carry out 'as mandated by the Council.'¹⁴ Given these shackles the Lisbon Treaty's modest designation of a 'High Representative' seems more adequate than the Constitutional Treaty's high-flying coronation of a 'Foreign Minister.'¹⁵

One crucial difference between the powers of Javier Solana and his successor, Catherine Ashton, is the extended portfolio. The title 'High Representative of the Union for Foreign Affairs and Security Policy' wrongly suggests that responsibilities are limited to CFSP and CSDP. Rather, the HR shall, as a Vice-President of the Commission, simultaneously preside over the supranational external relations department and '(coordinate) other aspects of the Union's external action.'¹⁶ When acting under her Commission 'hat' the HR must respect supranational decision-making,¹⁷ which the Commission seems eager to protect against intergovernmental contamination (section III.1.b). There is a consensus among most observers that the viability of this construction depends on human chemistry and the wider interinstitutional climate. Ideally, the HR's 'double hat' may result in fruitful complementarity – or leave the HR in a grey zone of overlapping political and institutional loyalties with the Council and the Commission mutually mistrusting a Trojan horse of the other institution.¹⁸

2.1.2. Plurality of external representatives

The institutional picture is complicated by the future President of the European Council which may represent the EU 'at his level and in that capacity'¹⁹ and to which the Commission President will not want to play second fiddle. Thus, a new troika may emerge instead of the original ambition of uniform external representation.²⁰ While relations between both Presidents and the HR raise delicate legal problems,²¹ they arguably reflect the general uncertainty about the allocation of political leadership. With the formal recognition of the European Council as an EU institution the Lisbon Treaty sanctions the latter's authority without however assigning the leadership function to heads of state or government alone. Lisbon rather seeks to advance the established EU practice of joint political leadership by strengthening all institutions involved. Governmental authority will also in future be vested in the (European) Council and the Commission.²² The corresponding potential for overlap and friction is neither new nor amplified by the new set-up and does reflect, arguably, the Union's hybrid character between an international organisation and a federal state.

¹² C.f. the juxtaposition with the quick modification of the US standpoint in the Charlemagne column 'Out of the Limelight', *The Economist* of 3 February 2011, available online at <http://www.economist.com>.

¹³ See T. Barber, *The Appointments of Herman van Rompuy and Catherine Ashton*, *JCMSt.* 48 (2010), Supplement 55 at 61-2.

¹⁴ Legally, this general provision is specified by the detailed rules on the Council chairmanship, the right of initiative, decision-making and representation in Art. 27-32 TEU.

¹⁵ Legally, the powers of the HR under Art. 18 TEU-Lisbon are identical with the functions of the Foreign Minister under Art. I-28 Treaty establishing a Constitution for Europe of 24 October 2004 (OJ 2004 C 310/1), which never entered into force.

¹⁶ Art. 18.4 TEU.

¹⁷ Read the second sentence of Art. 18.4 TEU.

¹⁸ See my earlier argument D. Thym, *Reforming Europe's Common Foreign and Security Policy*, *ELJ* 10 (2004), 5 at 21-2 and, similarly, D. Curtin, *Executive Power of the European Union* (2009), p. 102, Piris (note 9), p. 248 and Grevi (note 6), pp. 788-95.

¹⁹ Art 15.6 TEU.

²⁰ A minor, but telling, example briefly after the establishment of the EEAS: the Joint statement by President Van Rompuy, President Barroso and High Representative Ashton on recent developments in Egypt of 11 February 2011.

²¹ See C. Kaddous, *Role and Position of the High Representative of the Union for Foreign Affairs and Security Policy under the Lisbon Treaty*, in: Griller/Ziller (eds.): *The Lisbon Treaty* (2008), p. 205 at 210-20 and C. Calliess, *Die neue Europäische Union nach dem Vertrag von Lissabon* (2010), pp. 122-4 & 401-2.

²² On joint leadership see P. Craig, *The Lisbon Treaty* (2010), pp. 101-8 and P. Dann, *The Political Institutions*, in: von Bogdandy/Bast (eds.): *Principles of European Constitutional Law* (2nd ed. 2009), p. 233 at 253-62.