

The Constitutional Debacle and External Relations



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"The Constitutional Debacle and External Relations" argues that even with a ratified Constitutional Treaty, many of the innovations in the external relations area would have been difficult to introduce. In the absence of a Constitutional Treaty for the foreseeable future the author sees limited scope for major overhaul of EU external relations within the scope of the existing treaties and cautions against any temptation to cherry-pick the Constitutional Treaty. The current period of uncertainty calls for open, but structured, debate. In light of this the author argues strongly for the continuation of the deliberations of the working group on the European External Action Service, albeit in a slightly broader format, since their discussions could serve as a valuable platform for an open debate about the role of the EU on the world stage.

The Convention on the Future of Europe shared a common desire to make the external relations of the EU more effective and visible. It was thus unsurprising when attention focused at an early stage on the need for a European External Representative, combining the High Representative's functions with that of the Commissioner for External Relations, in what was to become known as the Union Minister for Foreign Affairs (UMFA).¹ Logically, the presence of a Foreign "Minister" called for some form of supporting ministry which became the European External Action Service (EEAS). Other modifications introduced into the Constitutional Treaty with potentially wide-ranging ramifications for the external relations field included the assumption by the Union of legal personality and the change of Commission delegations into EU delegations under the Union Minister.

The creation of the Minister's position was arguably the most significant innovation of the Constitutional Treaty and thus one of the main casualties of the French and Dutch referenda. Nostalgia for the constitution that might have been

and hand-wringing over the results of the referenda should not preclude a much-needed debate about the future of EU external relations.

The European Council called on 16-17 June 2005 for a "period of reflection" which "will be used to enable a broad

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debate to take place in each of our countries, involving citizens, civil society, social partners, national parliaments and political parties". The "special role" of the Commission in contributing to this debate was noted.² The Luxembourg Presidency also called for "Plan D" or, in other words, a period of dialogue and debate. Jean-Claude Juncker was insistent that any "Plan D" shall not involve a renegotiation of the Constitutional Treaty.³ This brief essay will consider a possible avenue ahead for the period of reflection and for Plan D.

The invitation for dialogue and debate begs many questions, amongst them being: Who is to conduct this dialogue and debate? What if some of those involved insist on renegotiating aspects of the Constitutional Treaty? Presumably, since it is difficult to move ahead with the

constitution *in toto*, the dialogue might also include specific proposals pertaining to parts of the document? If, however, there is to be no renegotiation, what adaptations might sensibly be made to the existing treaties as modified at Nice? All of these

are issues that the European Council has promised to elaborate upon at the beginning of 2006.

On the first issue, it is apparent that the dialogue and debate must be as broad as possible, especially bearing in mind the public criticism and even hostility towards what is



Javier Solana, Secretary-General of the Council of the European Union, High Representative for Common Foreign and Security Policy. Minister-in-waiting?

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seen as an aloof bureaucracy in Brussels. Although there is a certain irony, given that the Convention was designed to be open and to consult with as many interested parties as possible, any attempt to fix the Constitutional Treaty behind closed doors would exacerbate existing public concerns regarding not only the constitution itself but the process by which it was drawn up.

The argument that the Constitutional Treaty needs "renegotiation" depends of course on what exactly is understood by that term. If renegotiation means scrapping the existing Constitutional Treaty and a new Convention in the next few years, the risk is apparent – it would lead to renewed and divisive debates amongst the Member States and any resultant document may well fail to reach EU-wide consensus. So, what options are there?

The Polish-backed idea of a "constitution lite", whereby Part I of the Constitutional Treaty should be extricated and co-exist alongside the existing treaties has some attraction. However, the concept of co-existence would still imply substantial adaptation and amendment, including solving awkward contradictions between the respective documents (on, for example, the pillar structures). Presumably such an exercise would also cause a few conniptions in the European Courts.

The next option is to adapt the existing treaties, not by merging as was suggested above, but by incorporating choice morsels from the Constitutional Treaty into the treaties. This approach is not without its risks since there are already warnings about the "secret cherry-pickers" and efforts to introduce the constitution, or at least parts of it, via the back door.⁴ The prospective UMFA and the EEAS are

often mentioned as parts of the Constitutional Treaty that are ripe for picking. But, aside from the concerns about the political astuteness of going down this road, how feasible is it?

"Cherry-picking" the Union Minister and the European External Action Service

In the first place the UMFA is linked to a whole series of reforms in the external relations area – where he is not only "double-hatted", as is commonly observed, but triple-hatted. In the first place the Minister's role is shaped by his relations with the President of the European Council who "in his or her level and in that capacity" ensure the external representation of the Union in matters concerning CFSP, "without prejudice to the powers of the Union Minister for Foreign Affairs" (Art.1-22 (2)).⁵

His role is also shaped by the Foreign Affairs Council, which he "presides over" (Art. 1-28 (3)). Even a seemingly innocent phrase like this immediately raises questions concerning the capacity (or hat) in which the Minister chairs the Foreign Affairs Council and who then represents the Commission's interests? The Foreign Affairs Council also implies major changes for the Presidency since the Presidency of Council configurations, "other than that of Foreign Affairs" shall be held by the Member States representative in the Council (Art. 1-24 (7)). The arrangements for the chairing of the Foreign Affairs Council and his ability to make proposals are perhaps the most revolutionary in the sense that they imply a complete reversal of the current arrangements, under which the High Representative merely

assists the Presidency (see below). Not only would this significantly undermine the role of national Foreign Ministers regarding CFSP, it would also require enormous skill (and nerve) to ensure that this role is consistent with his Commission roles and procedures.

It is also unclear how smoothly the Political and Security Committee, addressing CFSP issues and chaired by the Minister's deputy, would have worked with Coreper, chaired by the rotating Presidency and responsible for other external relations issues, who refer matters to the Foreign Affairs Council, chaired by the Minister, for decision. Complex issues might also have emerged when it comes to the chairing and organisation of working groups.

However, in his third role, the language of the Constitutional Treaty is a good deal vaguer. The Minister shall also be a Vice-President of the Commission where, somewhat ineloquently, he "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" (Art. I-28 (4)). In exercising these respon-

sibilities within the Commission, the Minister shall be bound by Commission responsibilities "to the extent that they are consistent" with his duties and mandate *vis-à-vis* the Council – thus potentially setting the scene for numerous turf battles. This raises two immediate problems: first, the UMFA is appointed by the European Council and answers to the Foreign Affairs Council, which raises issues regarding his accountability towards the President of the Commission and; second, the question of consistency between the Commission and Council roles is bound to set up institutional friction and will thus require enormous, if not superhuman, tact and diplomacy from the Minister.

It would be difficult to appoint a nominally triple-hatted Solana as the Union's UMFA on an *ad hoc* basis without raising considerable difficulties for the existing treaties which state, quite clearly, that it is "the Presidency who shall represent the Union in matters coming within the common foreign and security policy" and that it is the Presidency who "shall be responsible for the implementation of decisions taken under this capacity and it shall in principle express the position of the Union in international organisations and international conferences". Furthermore, the Presidency "shall be assisted by the Secretary-General of the Council [Solana]" (Art. 18 TEU). Thus, if the UMFA were to have any teeth at all, it would entail amending the existing institutional roles of the European Council, the Council, the Council General Secretariat, the Presidency and the European Commission.

The fate of the EEAS is intimately linked to that of the UMFA since, according to the Constitutional Treaty, "the Union Minister for Foreign Affairs shall be assisted by a European External Action Service" (Art. III-296 (3)). The absence of the UMFA would immediately call into question the logic of having an EEAS and, if it were instituted on an *ad hoc* basis, the same contentious issues encountered by the Council-Commission working group on the EEAS during

the last year of their discussions, would remain. On the Commission side it remains unclear what such a Service might incorporate beyond the current DG RELEX (what desks in DG Enlargement or DG Development might be incorporated?). On the Council side the Service would presumably incorporate DG-E and the Policy Unit, but the picture becomes more murky with the Military Staff or the Joint Situation Centre.⁶ Even a minimalist Service, built around DG RELEX and the Council Secretariat's DG-E would cause considerable upheaval, especially since it would also imply the restructuring of the Commission's External Service.

Given these tensions, there may even be some interest in letting the EEAS quietly slip away – notably from the Commission side. This would be a pity though since the wider discussions provoked by the notion of the EEAS (such as the nature of European-level diplomacy, the problems encountered by the increasingly artificial division of responsibilities in external relations between the *communautaire* aspects and the CFSP ones, the role of diplomatic

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services of the Member States, the role of the delegations and so forth) are of immense value and should therefore continue. At a minimum, they may help to identify ways of working together more efficiently and to carry out structural improvements that do not necessitate changes to any legal texts. For instance, enhancing coherence between the Commission and the Council does not necessarily require treaty amendment, nor does the assumption by the Member States of an enhanced role in the external relations of the Union; nor, finally, does some adjustment of the delegations to include more national or even Council Secretariat officials.

There are, however, limits to how far adjustments can go without necessitating treaty adjustment. For instance, as was mentioned, it is quite possible to review seconding arrangements to and within the existing Commission delegations without treaty change but this would leave important issues, such as accountability and reporting, ambiguous in the absence of a central external relations coordinator such as the UMFA. The non treaty-based adjustments mentioned above are certainly worth exploring but all will eventually run into the lack of a central coordinating figure (and Service) to hold it together.

The Constitutional Treaty also continued the theme of flexibility, introduced in the Amsterdam Treaty and continued in the Nice version, by introducing a number of new types of flexibility – those permitting groups of Member States to be entrusted with a task to "protect the Union's values and serve its interests", enhanced cooperation and permanent structured cooperation. There is little to stop the Member States moving towards more flexible arrangements of cooperation, especially in the security and defence areas where it could be argued that they already exist, albeit in rather *ad hoc* forms. Arguably this has happened in the case of the role of the EU3 (France, Germany and the United Kingdom) in Iran but at the cost of sidelining the

High Representative. This raises the underlying concern of the extent to which the EU Member States, notably the three just mentioned, really wish for a strong Minister and how their own Foreign Ministers would relate to him. If history is any guide, there may be instances where delegation is preferred (such as the Western Balkans) but others where a group of Member States may prefer to take the initiative (Iran). This again suggests that any Minister would not only have to exercise enormous skill in manoeuvring within the EU institutions, but also with the Member States.

Between the devil and the deep blue sea ...

To conclude, the problem with "cherry-picking", quite aside from potential political objections, is that while it may be possible to have a UMFA with some sort of EEAS, it is not possible to have *the* UMFA and EEAS envisaged in the Constitutional Treaty. This does not get us around the awkward problem that many of the concerns about the current system of EU external relations – ineffectiveness, the lack of coherence in EU external relations, the growing artificiality of the divide between the *communautaire* and intergovernmental aspects of external relations, the cacophony in external representation of the Union and the growing importance of European-level diplomacy – still apply. The Constitutional Treaty should not be thought of as a panacea since it is far from clear that, had the Constitutional Treaty been ratified by all Member States, either the Minister or the EEAS would have proven workable in practice.

In spite of the negative referendum results in France and The Netherlands, any ensuing "broad debate" should build upon strong public support for a greater EU role in the foreign and security policy areas, as expressed in successive editions of the *Eurobarometer*, in a clear and transparent manner.⁷ Traditionally these are the areas of that are the most opaque in the Member States, but the EU should not forsake the chance to lead a public discussion on the role that the Union should play on the international scene.

Dialogue and debate should build upon the current discussions taking place between the Council, the Commission and the Member States over the EEAS. Although it has been argued that the EEAS makes little sense without a Minister, the discussions have broader resonance and significance for EU external relations. Many of the themes discussed above – issues of coherence, inter-pillar tensions, the role of the delegations, the future of the Presidency and CFSP, relations and responsibilities of the external relations directorate-generals in the Commission and the Council and issues of legal identity – will need to be touched upon in this group. The work of the group is therefore far from irrelevant and could prove to be of central importance in outlining a way ahead for EU external relations.

Assuming the need for change is acknowledged, an expanded working group, building upon the original EEAS working group composed of a small number of senior

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Commission and Council Secretariat officials, should be constituted to include senior national representatives as well as senior MEPs. The discussions, which will be difficult and may well entail painful reform, should then form the basis for an open public debate since, as successive opinion polls and the referenda themselves show, sizeable majorities in the EU desire a more coherent

and effective European voice on the international stage. The outcome of this debate (as well as appropriate ones in other areas of EU activity) will then suggest whether the Union can live within the parameters of the existing treaties, the extent to which they can be amended, or whether completely new arrangements are called for. Only when the EU that is desirable emerges will the question of whether the Constitutional Treaty has any future be answerable but, for the time being, this should not be the main focus of dialogue and debate. ::

NOTES

- * The author would like to thank the editors of *Eipascope* for their helpful suggestions.
- ¹ The position was originally referred to by the politically less jarring term European External Representative, but it lacked the weight and cachet of the "Union Minister" title.
- ² Declaration of the Heads of State or Government of the Member States of the European Union on the Ratification of the Treaty Establishing a Constitution for Europe, D/05/3, Brussels, 18 June 2005.
- ³ See comments by Jean-Claude Juncker at the Luxembourg Presidency official website, <http://www.eu2005.lu/fr/actualites/communiqués/2005/06/16jclj-ratif/index.html>
- ⁴ Liam Fox, 'Beware the secret cherry-pickers', *The Times*, 10 June 2005.
- ⁵ It was agreed by a Council decision that Javier Solana, the current CFSP High Representative, should become the Union's first Union Minister for Foreign Affairs 'on the day of entry into force of the constitution', see, 2595th Meeting of the Council of the European Union, *Press Release*, 29 June 2004, 10995/04 (Presse 214).
- ⁶ DG-E is responsible for many of the external relations aspects of the Council Secretariat's work, including defence and civilian crisis management aspects. Approximately 200 officials, some seconded, work in DG-E. The Policy Unit, or Policy Planning and Early Warning Unit, was established under the Amsterdam revisions to the treaties. It includes approximately 25 seconded diplomats, divided into Task Forces along geographical or thematic lines, who will monitor, give policy advice and recommendations to the CFSP High Representative.
- ⁷ There is strong support for a common defence and security policy amongst 77% of the recipients (the strongest support coming from the ten new Member States who average 85%), for details see *Standard Eurobarometer 63*, July 2005 (Brussels: European Commission), pp.30-35.