



## **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**

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### ***Background and context***

The purpose of this brief is to examine whether HR/VP Ashton's *Proposal for a Council decision establishing the organisation and functioning of the European External Action Service* (EEAS) of 25 March 2010 is in legal accordance with the stipulations of the Lisbon Treaty on development cooperation.

The focus of the development issues around the EEAS is unsurprising. The inclusion of the EEAS in Article 27(3) of the Treaty on European Union (TEU) and mention that it 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 Directorate-General External Relations (DG Relex) meant that many questions pertaining to the management, programming and implementation of development cooperation would be on the table.

The fact that the EEAS would inevitably be a major change in the external relations of the Union by, in effect, introducing a major new institution (although officially *sui generis*) led to often polarised debates about the need to protect the Community model or to promote the Service as the core of a new coherent and comprehensive approach to the challenges of the twenty-first century in external action.

One clear opinion contends that 'The [Lisbon] Treaty extends no powers to the EEAS or the High Representative to implement stages of Development Cooperation'.<sup>1</sup> This line of reasoning is supported by a legal analysis prepared by UK law-firm White & Case for a coalition of almost the entire community of development NGOs, led by Concord (the umbrella group of all European development groups), CIDSE (the

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<sup>1</sup> Mirjam van Reisen, *Note on the legality of inclusion of aspects of EU Development Cooperation and Humanitarian Assistance in the European External Action Service* (EEAS), Brussels, Europe External Policy Advisors, 5 March 2010.

alliance of European Catholic development charities), Aprovev (its Protestant counterpart) and Eurostep (the secular aid coalition):

‘The EAS may be in breach of objectives and competencies laid down in the Lisbon Treaty. The role of the EAS under the EU treaties is restricted to the EU’s Common Foreign and Security Policy (CFSP), which represents only part of the EU’s external action. Development co-operation is outside the scope of the CFSP and therefore the EAS has no capacity in respect of it. The Ashton proposal, which is intended as an instrument setting out the organisation and functioning of the EAS, cannot alter areas of competence as defined under the treaties, such as the ‘exclusive competence’ of the commission in development co-operation activities. Detracting from the exclusive competence of the commission would require a formal treaty amendment.’<sup>2</sup>

The question is whether, in light of certain provisions of the Lisbon Treaty, the standing case-law of the European Court of Justice, and the ‘political orientation’ on Ashton’s proposal reached by Member States in the Council on 26 April, there is any reason to amend this conclusion. In order to address this issue it is necessary to first understand both the spirit as well as the letter of the Lisbon Treaty.

### ***Shared competence and duty of loyal cooperation***

Under the Lisbon Treaty, the EU’s powers on development cooperation are treated as shared competences and not – as claimed above – as one of the areas of exclusive competences listed in Article 3 of the Treaty on the Functioning of the European Union (TFEU). Article 4 TFEU (on shared competences) notes in paragraph 4 that, ‘In the areas of development cooperation and humanitarian aid, the Union shall have competence to carry out activities and conduct a common policy’. Within the limits of pre-emption set by Article 2(2) TFEU and Protocol No. 25, the Member States are bound to exercise their competence to the extent that the Union has not exercised its competence. Conversely, when the Union has taken action in a certain area, the scope of this exercise of competence *only* covers those elements governed by the Union act in question and therefore does not cover the whole area. In practical terms this means that the EU may conduct an autonomous policy in these areas, which does not prevent the Member States from exercising theirs in areas not yet regulated by the EU, but nor does it reduce the Union’s policies in these areas to mere complementary policies.

The shared and co-existent nature of the competences in the field of development cooperation was perhaps more clearly visible at the time of Article 181 of the Treaty establishing the European Community (TEC): ‘*Within their respective spheres of*

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<sup>2</sup> As quoted in Leigh Phillips, ‘Development NGOs issue legal warning over new EU foreign service’, *EU Observer*, 27 April 2010.

*competence*, the Community and the Member States shall cooperate (...)’ (emphasis added).<sup>3</sup>

This reference highlights another crucial element: the autonomy of the EU’s development cooperation policy is therefore restricted by the duty of loyal cooperation between the Union and its Member States, which has been elaborated in this specific domain in Article 210(1) TFEU: ‘In order to promote the complementarity and efficiency of their action, the Union and the Member States shall coordinate their policies on development cooperation and shall consult each other on their aid programmes (...). Member States shall contribute if necessary to the implementation of Union aid programmes.’ Article 210(1) TFEU can be considered a *lex specialis* of Article 4(3) TEU: ‘Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. (...)’. In the field of external relations (incl. CFSP ex Art. 24(3) TEU), this duty has been further developed by the ECJ in its jurisprudence.<sup>4</sup> We will come back to this point later on.

### ***Mainstreaming the eradication of poverty in EU external action***

The main provisions addressing EU development cooperation appear in Title III of Part V of the TFEU. Several features are worth noting. First, the binding nature of Article 205 TFEU, the opening provision of Part V:

‘The Union’s action on the international scene, pursuant to this Part *shall be guided* by the principles, pursue the objectives and be conducted in accordance with the general provisions laid down in Chapter 1 of Title V of the Treaty on European Union’ (emphasis added).

In Article 208(1) TFEU, the main stipulation on EU development cooperation, this reference to the binding general principles of EU external action reappears:

‘Union policy in the field of development cooperation shall be conducted within the framework of the principles and objectives of the Union’s external action. The Union’s development cooperation policy and that of the Member States complement and reinforce each other.

Union development cooperation policy shall have as its primary objective the reduction and, in the long term, the eradication of poverty. The Union shall

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<sup>3</sup> This has been acknowledged by the European Court of Justice (ECJ) in a series of landmark judgments. See, e.g., joined cases C-181 & 248/91 *EP v Council (Bangladesh)* [1993] ECR I-3685; Case 316/91 *EP v Council (EDF)* [1994] ECR I-625: ‘The Community’s competence in that field is not exclusive. The Member States are accordingly entitled to enter into commitments themselves vis-à-vis non-member States, either collectively or individually, or even jointly with the Community.’

<sup>4</sup> See, e.g., Case C-124/95 *Centro-Com* [1997] ECR I-81; C-266/03 *Commission v Luxembourg* [2005] ECR I-4805; Case C-459/03 *Commission v Ireland (‘MOX plant’)* [2006] ECR I-4635; and C-45/07 *Commission v Greece (IMO)* [2009] nyr; and C-246/07 *Commission v Sweden (PFOS)*, judgment of 20 April 2010.

take account of the objectives of development cooperation in the policies that it implements which are likely to affect developing countries.’

Development cooperation is thus set in the context of the principles and objectives of EU external action, which includes fostering ‘the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty’ (Art. 21(2d) TEU). Since the eradication of poverty is accorded the status of a primary objective of the Union, rather than one of the three objectives mentioned previously in Article 177 TEC, it applies to all areas of EU external action, including the Common Foreign and Security Policy (CFSP). In each of these areas account shall have to be taken of development cooperation which greatly strengthens these provisions over the former treaty. The need to mainstream the principles and objectives underpinning development cooperation also implies that stress has to be put on policy coherence, not only in development but in EU external actions more generally.<sup>5</sup> This raises the questions of who should be responsible for any such coherence, what is understood by this and how it will be conducted.

### ***Policy coherence***

The proposal of 25 March 2010 notes that the legal basis for the EEAS stems from Articles 27(3) and 21(3) of the TEU. The former tasks the EEAS with assisting the High Representative in fulfilling her mandate and invites the Council to ‘act on a proposal from the High Representative after consulting the European Parliament and after obtaining the consent of the Commission’.<sup>6</sup> The latter creates a legally binding obligation (‘shall’) for the Union to ‘ensure consistency between the different areas of

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<sup>5</sup> See in this respect already the *Final Report of Working Group VII on External Action*, CONV 459/02, Brussels, 16 December 2002, p. 8: ‘The Working Group, while recognising that development policy has its specific purposes, which are reflected among the principles and objectives of EU external action, underlines the need for ensuring coherence between development cooperation and other aspects of EU external action as well as external aspects of internal policies, since development assistance should be considered as an element of the global strategy of the Union vis-à-vis third countries.’ It was noted that EC/EU funds constitute around 10 per cent of global overseas development assistance (ODA), but the contributions of the Member States (45 per cent) mean that the overall figure amounts to 55 per cent of global ODA. There was therefore perceived to be the need to reinforce ‘close collaboration and complementary activities in order to improve the efficiency of overall EU aid’. *Ibid.*, p. 27, para. 54. In one of the more extensive analyses, the need for synergy between the long-term approach of development cooperation, geared towards addressing the structural root causes of poverty, and the short-term crisis management aspects shaping crisis prevention and political dialogue, was noted. Interestingly, the legal aspects were not raised as a significant barrier to any of the options discussed. See M. Gavas and E. Koeb, *Setting up the European External Action Service: Building a Comprehensive Approach to EU External Action*, European Centre for Development Policy Management and the Overseas Development Institute, 16 March 2010, p. 11; see also *Fiche on Specific Arrangements Concerning the EEAS staff*, 12 October 2009, p. 6. (no other author information given).

<sup>6</sup> Although the Treaty only mentions consultation with the European Parliament, it is clear that the accompanying and necessary changes to the Staff and Financial Regulations, which will be required before the EEAS can operate, will require Parliamentary assent. This will give the European Parliament potential influence when in the ongoing discussions surrounding the structure of the Service. Aside from the context of the regulations, the EEAS is otherwise a ‘functionally autonomous body of the European Union’ (Art. 1 of the *Proposal for a Council decision establishing the organisation and functioning of the European External Action Service*).

external action and between these and its other policies. The Council and the Commission, assisted by the High Representative of the Union for Foreign Affairs and Security Policy, shall ensure that consistency and shall cooperate to that effect’.

An annex to the European Parliament’s ‘non-paper’ of 18 March 2010 (the so-called ‘Brok/Verhofstadt’ paper on the putative EEAS, which, from the Parliament’s perspective, was largely ignored in the proposal for a Council decision tabled the following week)<sup>7</sup>, the EP reproduced Article 21 TEU, highlighting paragraphs (2d) and (2f).<sup>8</sup> With regard to the former, it was argued above that the inclusion of goals such as the elimination of poverty as *objectives* of the Union, instead of general aims as under the previous treaties, strengthened the focus on development cooperation. The latter clearly signified that the focus should be on longer-term perspectives, designed to promote sustainable development, rather than on shorter-term aims. An opinion of a cross-party group of five prominent MEPs built on this last argument by stating that ‘The EAS must be ambitious and include all aspects of external policy – including development. It is only through creating greater coherence that the EU will be able to have a voice and a role in the world. The proposed artificial separation of part of the development competences between EAS services and Commission services is a recipe for incoherence.’<sup>9</sup>

It is obviously too soon to tell whether the Council’s draft proposal, if adopted, will make foreign and development policy more effective, but we should remind ourselves of the entire logic of the Lisbon Treaty exercise, which is the creation of a more coherent, effective and visible EU on the international scene. The EEAS remains key to this aim.

### ***Policy autonomy?***

The idea, advanced in various quarters, that development cooperation should retain its autonomy and ought not to be contaminated by the CFSP is, quite frankly, puzzling.<sup>10</sup>

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<sup>7</sup> Non-Paper, European Parliament, 18 March 2010 available at <[http://bruxelles.blogs.liberation.fr/Note\\_on\\_EAS\\_Outline%20FINAL%201803.doc](http://bruxelles.blogs.liberation.fr/Note_on_EAS_Outline%20FINAL%201803.doc)>.

<sup>8</sup> Which state, respectively, that the Union ‘shall foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty’ and that the Union shall ‘help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development.’

<sup>9</sup> See <[http://www.alde.eu/index.php?id=42&no\\_cache=1&tx\\_ttnews%5Btt\\_news%5D=22793](http://www.alde.eu/index.php?id=42&no_cache=1&tx_ttnews%5Btt_news%5D=22793)>. The members of the cross-part group were Elmar Brok (EPP rapporteur), Guy Verhofstadt (ALDE rapporteur), Hannes Swoboda (S&D) and Rebecca Harms and Daniel Cohn-Bendit (Greens/EFA).

<sup>10</sup> See, e.g., *Report on the institutional aspects of setting up the European External Action Service, Committee on Constitutional Affairs*, European Parliament, A7-0041/2009, 20 October 2009, p. 4, para. H, where rapporteur Elmar Brok notes that ‘the Lisbon Treaty singles out development cooperation as an autonomous policy area with specific objectives and on an equal footing with other external policies.’ The report called on the Commission, in its preparatory work on the EEAS, ‘to put its full weight as an institution behind the objective of preserving and further developing the Community model in the Union’s external relations’. *Ibid.*, p. 5, para. N.2. However, the report included two opinions, from the Committee on Foreign Affairs and Development respectively. The former recommended to the Committee on Constitutional Affairs that ‘there are compelling reasons to include

Prior to the entry into force of the Lisbon Treaty, consistency problems were the obvious consequence of the pillar structure of the Union. The division between political (CFSP) and other/economic (EC) external relations was never easy to make, but at the same time the Union and the Community were forced to use different instruments and decision-making procedures, thereby challenging the EU's potential as a cohesive force in international relations.<sup>11</sup> The *ECOWAS* judgment revealed the difficulties in separating foreign and security policy from other external policies and provided the opportunity for the ECJ to shed some light on the distribution of competences between the EC and the EU *qua* CFSP.<sup>12</sup> In the event, the Court found that by using a CFSP decision on the EU support to ECOWAS (Economic Community of West African States) in the fight against the proliferation of small arms and light weapons, the Council had encroached upon the Community's competence in the field of development cooperation, thus violating the provisions of Article 47 TEU. The Court preserved the *acquis communautaire* in the classic manner and argued that once foreign and security policy elements can be based on the EC Treaty, they should not be based on CFSP.

However, with the entry into force of the Lisbon Treaty, the European Community has disappeared together with the pillar structure of the EU. In terms of legal hierarchy, the TEU and the TFEU are on a par. Moreover, the Lisbon Treaty has introduced a new delimitation provision in Article 40 TEU, which not only underlines the need for a preservation of the *acquis* emanating from the TFEU (cfr. the old Art. 47 TEU), but adds that the Union's competences in CFSP should also be respected:

‘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.

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development policy in the new service’. *Ibid.*, Opinion of the Committee on Foreign Affairs, Rapporteur Anemie-Neyts-Uyttebroeck, 19 October 2009, p. 12, para. 6(b). The Opinion of the Committee on Development did not contradict that of the Committee on Foreign Affairs, but noted that it cannot be taken for granted that ‘the new service will attach equal importance to attaining the EU's development policy objectives and the Millennium Development Goals’. *Ibid.*, p. 14. The Committee considered it important that explicit reference should be made in the Parliament's report to development, to the obligations to work towards poverty reduction in the Lisbon Treaty, and to ‘upholding development cooperation as an autonomous policy area, on an equal footing with other policies in the field of international relations’. *Ibid.*

<sup>11</sup> There are numerous examples in which the institutional separation between CFSP and EC led to problematic decision-making and unclear situations for third parties. See, e.g., Cases T-306/01, *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council and Commission* [2005] ECR II-3533; T-315/01, *Yassin Abdullah Kadi v. Council and Commission*, [2005] ECR II-3649; T-47/03 *Sison* and T-327-03 *Al-Aqsa*, [2007] ECR II-73; T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council*, [2006] ECR II-4665.

<sup>12</sup> Case C-91/05, *Commission v. Council* [2008] ECR I-3651. For a thorough discussion of the legal implications of the case see C. Hillion and R.A. Wessel, ‘Competence Distribution in EU External Relations after ECOWAS: Clarification or Continued Fuzziness?’, 46 *Common Market Law Review* (2009), pp. 551-586.

Similarly, the implementation of the policies listed in those Articles 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 under this Chapter.’

This provision thus no longer subjects CFSP to any competence previously held by the Community. Article 40 TEU places CFSP on an equal footing with other EU external relations policies and brings an end to the default setting of, for instance, EU policy in development cooperation. The legally binding obligation for the Union to ensure consistency between the different areas of external action and between these and its other policies again provides the overarching rationale.

In practice, the need for autonomy when it comes to development cooperation is also contestable given the growing emphasis within the Commission, and elsewhere, to look at issues from a thematic or horizontal perspective. The emphasis on human security within the Commission serves as an example.

Finally, consideration of development cooperation as an autonomous field of interest in EU external relations may well be counterproductive since it would ignore critical trade aspects, those pertaining to climate change or the environment and security, all of which have profound bearings upon not only the EU’s development policies but for sustainable development as well. This point appears to be substantiated by Article 208(1) TFEU, cited above.

Based on the Lisbon Treaty, and in counter-distinction to the autonomy position, it could be argued that the Treaty points in precisely the opposite direction by mainstreaming development-related perspectives into foreign policy considerations.

### ***Representation, strategic programming and management of external policies***

The substance of the legal objection, referred to at the beginning, dwells upon the Commission’s competence, laid down in Article 17(1, 6<sup>th</sup> sentence) TEU, to ‘ensure the Union’s external representation’, with the exception of the common foreign and security policy, which falls to the High Representative (Art. 27(2) TEU), assisted by the EEAS (Art. 27(3) TEU), and the President of the European Council (Art. 15(6) TEU).

It is difficult to conceive of the European Parliament endorsing the wholesale transfer of former Community competences to intergovernmental decision-making. Conversely, it is equally far-fetched to imagine the Member States standing idly by while the shared parallel competences on development cooperation disappeared totally into the clutches of the Commission and the European Parliament. The more interesting debate thus pertains to the *partial* management by the EEAS of

development policy programmes and whether this constitutes a violation of the Lisbon Treaty.<sup>13</sup> In this case it is argued here that the Commission's duty to manage programmes has to be balanced against the more general duties befalling the HR/VP, as well as the Council and the Commission, to ensure consistency in the external actions of the Union.

The issue of whether there are any definitive grounds to assess the proposal as illegal, due to the division of responsibilities between the Commission and the EEAS, has to be approached with caution since there is a lack of clarity about many structural, organisational and procedural aspects of the *sui generis* Service and its relations with other EU institutions. Based, however, upon the proposal of 25 March and the background positions of the institutions and a number of the Member States<sup>14</sup> and outside institutions and academics, as well as the Lisbon Treaty itself, there are reasons to doubt the illegality of the proposal as it stands.

The issue is whether or not the proposed Council decision violates the letter of the Lisbon Treaty by transgressing, in particular, Article 17(1) TEU, which bestows upon the Commission, *inter alia*, the duty to execute the budget and manage programmes, to exercise coordinating, executive and management functions, and to initiate the Union's annual and multiannual programming with a view to achieving interinstitutional agreements. The external representation of the Union, with the exception of the CFSP and other cases provided for in the treaties, falls within this long list of executive tasks. One could therefore be forgiven for believing that the Member States, when negotiating the Lisbon Treaty, had intended to endow the Commission only with the competence to represent the Union when implementing its external policies.<sup>15</sup>

The proposal of 25 March 2010 states in Article 8(1) that, 'In the framework of the management of EU external cooperation programmes, *which remain under the responsibility of the Commission*, the High Representative and the EEAS shall contribute to the programming and management cycle' for a number of thematic and geographical instruments.<sup>16</sup> The instruments include the DCI, EDF, ENPI, the European Instrument for Democracy and Human Rights (EIDHR), the Instrument for

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<sup>13</sup> Part of van Reisen's position is that the Treaty makes no legal differentiation between implementation and management and that any division of responsibilities between the EEAS and the Commission is *ipso facto* illegal. Bearing in mind that her opinion pre-dates the proposal for a Council decision by some three weeks, the legality, or otherwise, of this passage depends upon the interpretation of key words such as execution of the budget and management of programmes, as well as 'coordinating, executive and management functions'.

<sup>14</sup> A number of other formative documents, such as the Swedish Presidency report to the European Council on the EEAS discussed financial and programming issues but, while noting the need to take 'account of the nature of the instruments concerned', did not raise any looming legal concerns. See Council of the European Union, *Presidency Report to the European Council on the European External Action Service*, 14930/09, 23 October 2009, p. 4.

<sup>15</sup> Ultimately, it is up to the ECJ to decide on the width of interpretation of the sixth sentence of Art. 17(1) TEU.

<sup>16</sup> Emphasis added.



Cooperation with Industrialised Countries and the Instrument for Nuclear Safety Cooperation. The relevant article then states:

‘... throughout the whole cycle of programming, planning and implementation of these instruments, the High Representative and the EEAS shall work with the relevant members and services of the Commission. *All proposals for decision will be prepared through Commission procedures and submitted to the Commission for decision*’.<sup>17</sup>

Thus, the proposal allocates to the EEAS particular (not exclusive) responsibility for preparing the Commission decisions on the strategic, multi-annual steps within the programming cycle. More specifically, this covers the first three of the multi-annual steps within the programming cycle (country and regional allocations; country and regional strategy papers; and national and regional indicative programmes). The agreement upon the ‘political orientation’ in the Council on the EEAS of 26 April 2010 marks a general consensus upon the role of the EEAS amongst the Member States.<sup>18</sup>

The objection that the EDF and DCI, which in budget terms represent the largest portion of the overall external action budget, imply a different and essentially long-term approach to programming, whereas much of the programming in other aspects of EU external action is annual or shorter-term, also appears to be accommodated by the proposal for a Council decision. In both cases any proposals ‘shall be prepared by the relevant services in the EEAS and in the Commission *under the direct supervision and guidance of the Commissioner responsible for Development Policy* and then jointly submitted with the High Representative for decision by the Commission’.<sup>19</sup> Similar stipulations apply in the ENPI context with reference to the Commissioner for Enlargement and Neighbourhood Policy.

The Commissioner for Development is given an elevated status when it comes to preparing thematic programmes, which shall be under the guidance of the Commissioner for Development in agreement with the High Representative and other relevant Commissioners. An attached Explanatory Memorandum to the proposed Council decision notes that ‘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’.<sup>20</sup>

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<sup>17</sup> Ibid., Article 8(2) (emphasis added).

<sup>18</sup> Council of the European Union, 3010th Council meeting, General Affairs, 8967/10 (Presse 89 Provisional), Luxembourg, 26 April 2010.

<sup>19</sup> Ibid., Article 8(4) (emphasis added).

<sup>20</sup> *Explanatory Memorandum*, Council Decision Establishing the organisation and functioning of the European External Action Service, 25 March 2010.

Thus, the proposal for a Council decision does not *prima facie* remove either the ‘management functions’, the Commission’s initiatory rights or those of implementation. Article 210(2) of the TFEU, which permits the Commission ‘to take any useful initiative’ to promote coordination between the Union and the Member States on development cooperation, is seen as further proof that the Commission should be the implementer of development policy. However, there is nothing to suggest in either the proposal for a Council decision or the explanatory memorandum, that any such transferral of implementation of development cooperation instruments to the EEAS has been seriously entertained.

Based upon the proposal, substantial management and implementation tasks are retained by the Commission, with the EEAS playing a role in the programming aspects. Programming can be conceived of at the political level, where strategic goals are connected with more specific policy towards a country or region (cfr. the competence of the European Council ex Art. 22 TEU), while the actual management of projects (especially the financial aspects) and execution will be retained by the Commission. The withdrawal of the controversial organigram of the prospective EEAS means that structural issues are left to be discussed. It would seem reasonable to anticipate, based on the proposal and the explanatory memorandum, that Directorates D-E of the Directorate-General for Development will be transferred,<sup>21</sup> as will the relevant units responsible for aid programming and management and pan-African issues (this would include institutional, migration and governance issues).

Until further precise details emerge, it is thus difficult to contest that the proposed arrangement is in contravention to either the spirit or the letter of the Lisbon Treaty. The Commission’s powers in this regard pertain to the initiation of such programming, but not to the entire programming cycle.

If, for the sake of argument, the proposal were deemed illegal, a number of objections could surface. Under Article 18(4) TEU, the High Representative has the obligation to ensure the ‘consistency of the Union’s external action’. Article 21(3) TEU extends this duty to the Council and the Commission who, ‘assisted by the High Representative of the Union for Foreign Affairs and Security Policy, shall ensure that consistency and shall cooperate to that effect’. It could reasonably be claimed that this would not be possible if, in the case of development cooperation, all of the programming were conducted by the Commission, unlike many other areas of EU external action. If the HR/VP were not able to propose changes in country allocations or high-level programming priorities, she could legitimately claim that this would complicate her ability to execute these obligations under the Treaty.

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<sup>21</sup> Directorate D (ACP II – West and Central Africa, Caribbean and Overseas Countries and Territories) and Directorate E (Horn of Africa, East and Southern Africa, Indian Ocean and Pacific).

The High Representative, who is also a Vice-President of the Commission, is 'responsible within the Commission for responsibilities incumbent on it in external relations and for coordinating other aspects of the Union's external action' (Art. 18(4) TEU). It could be argued that the Commission *and* the EEAS are essential for the execution of her mandate as well for her coordination tasks. In unveiling his new Commission in November 2009, it was clear to President Barroso that three Commissioners in particular (for Enlargement and European Neighbourhood Policy; for International Cooperation, Humanitarian Aid and Crisis Response; and for Development) should execute their mandates in close cooperation with the HR/VP 'in accordance with the treaties'.<sup>22</sup>

The HR/VP also has an additional role in relation to the Foreign Affairs Council (FAC) which will deal with development-related issues. In her capacity as chair of the FAC she represents the overall interests of the EU in its external actions and she is assisted by a Commissioner from the external relations group. Her role and that of the FAC is a further way of promoting the role of development in the overall external actions of the EU. The absence of any substantive EEAS (programming) role in development would complicate the tasks of coordination between policy areas enormously and, with the Member State presence in mind, would also weaken the essential connection between the development policies of the Member States and those of the Union.

The argument that the Treaty, with the exception for CFSP, 'does not provide for a split of responsibilities between the EEAS and the Commission', and thus no arrangements to allow a sharing of policy implementation under the Treaty, could also be challenged on the grounds that Article 27(3) TEU is short and in many ways incomplete. This is why it provides for the rather cumbersome but comprehensive consultation and consent procedures with the European Parliament and the Commission respectively, prior to any Council decision. The Treaty does not prejudice what that proposal or subsequent consultations shall include although it had already been agreed, in principle, that the EEAS should have unified desks covering all countries and regions of the world in the joint Barroso/Solana Joint Progress Report in June 2005.<sup>23</sup> In the event that all of the programming and implementation of instruments in the development cooperation area were to be done through the Commission, that would imply substantial duplication of desks – with desks in DG Development addressing development-related aspects, while desks in the EEAS would support the non-development related aspects. This, at the very least, seems to violate the spirit of the Lisbon Treaty and the underpinning logic of the EEAS as a means to enhance the coherence of EU external action. It should also be borne in

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<sup>22</sup> See 'President Barroso unveils his new team', Press Release, IP/09/1837, Brussels, 27 November 2009.

<sup>23</sup> Joint Progress Report by the High Representative and the Commission to the European Council on the European External Action Service, 9956/05, 9 June 2005.

mind that the primary purpose of the desks is to assist the HR/VP, but they shall also support the President of the European Council and the President of the Commission.

Finally, the attribution of all programming aspects of development cooperation to the Commission could have potentially negative connotations for the Member States. Since the EU's total overseas development and assistance (ODA) is around 55 per cent of global ODA, the Union can legitimately claim to be a major player. But, of this figure 45 per cent comes from the Member States and the remaining 10 per cent from the EU. From a consistency point of view it would therefore make most sense to attribute a substantial programming role to the EEAS in which the Member States will be involved in the form of temporarily assigned national diplomats. This would have the double benefit of not only enhancing consistency between EU external action policies but also development cooperation related ones between the Member States and the EU institutions.

### ***Conclusions***

The above overview of arguments surrounding development cooperation in the context of the Lisbon Treaty suggests that it is an unfinished story. For this reason it is difficult to reach any hard and fast conclusions but, thus far, it is reasonable to suggest that the proposal for a Council decision of 25 March 2010 does not constitute a violation of the spirit or letter of the Lisbon Treaty.

The fundamental debate appears to be of a more political nature, concerning the extent to which development cooperation should be autonomous or more closely integrated into the EU's overall external actions. Such arguments tend to be polarising, with some seeing advantages to closer integration of development goals into the wider objectives of EU external actions, while others (notably NGOs in the development area) see the emergence of the EEAS as holding the potential to sideline and contaminate development-related concerns.

This brief has argued a position closer to the former by arguing that the Lisbon Treaty holds the potential to 'developmentalise' EU external relations and that, on balance, the Treaty represents an opportunity rather than a threat. These positions are broadly in line with the conclusions reached by ECDPM at their September 2009 meeting with senior development officials when it was observed that, 'One tendency was to suggest that a strong autonomous development Commissioner with the tools to promote development effectiveness was the prime need. Others emphasised that the key issue should be [policy coherence for development] and the secret was to maximise the development sector's leverage on other policy sectors within the EU'.<sup>24</sup>

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<sup>24</sup> Informal Senior Officials Meeting, *The implications of the ratification of the Lisbon Treaty for EU development cooperation*, Report Château de Neercanne, Maastricht, The Netherlands, 16 September 2009, Executive summary.

It has also become difficult, if not artificial, to insist upon autonomy for development cooperation, a policy which for some considerable time now has raised cross-cutting political and legal issues (just think of Somalia and Sudan as examples). Attempts to hermetically seal development cooperation under a Commission blanket would fly in the face of the spirit of the Lisbon Treaty which remains the creation of a more coherent, effective and visible Union on the international scene.

The proposals, thus far, appear compliant with the Lisbon Treaty. Although many of the precise details regarding the EEAS have yet to be worked out, there is no evidence thus far that there is any intention to fundamentally alter the Commission's implementation role when it comes to development cooperation, nor to rewrite any of the rules for the management of EDF funds. It is reasonable to anticipate that the geographic, aid programming and management aspects of the Directorate-General for Development *will* constitute part of the EEAS. This is entirely consistent with not only text of the Lisbon Treaty but its spirit as well.

The debate, therefore, should centre less on issues of legality and more on how development-related interests can be upheld in the EEAS and, more generally, EU external actions. There is also plainly a need for more discussion about how development and cooperation issues will be handled within the EU delegations.