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External Representation of the European Union and Shared Competences – an Unsolved Puzzle

Abstract: Following the entry into force of the Treaty of Lisbon, the issue of the external representation of the European Union has been high on the agenda of all subsequent EU rotating Presidencies, including the Polish Presidency. The new legal framework created by the TEU and TFEU has an important impact on the practice of external representation, giving rise to continuous interpretative questions as regards the division of powers between the EU and the Member States. These issues may be linked to three main aspects of the EU’s presence in international relations: participation in the negotiations of international agreements; representation of the EU at international organisations; and bilateral relations between the EU and third countries. This paper focuses on the practical aspects and exercise of external representation in matters of shared competences, presenting cases that took place during the second half of the year 2011 (and in the period directly preceding Polish Presidency), in which the discrepancies in the approach of the Member States and the rotating Presidency on the one hand, and the European Commission and High Representative for Foreign Affairs and Security Policy (supported by the European External Action Service) on the other were highly visible. Possible scenarios for future developments in the area of EU external representation are also presented.

Introduction

The aim of this paper is to acquaint readers who have no direct access to the ‘technocratic life’ of EU institutions with selected issues concerning the exercise of external representation of the European Union in matters of shared competences, which were high on the agenda of the Polish Presidency because of their contentious nature. This ‘picture’ of selected aspects and events illustrates a puzzle that is yet to be solved. In this paper we do not

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intend to present any general solution, but rather sketch out some possible scenarios for future developments in this field.

For the sake of this article, EU external representation is regarded quite narrowly, that is ‘operationally’ – as a tool designed for the presentation of the EU’s position in various international fora. All the cases presented in this paper can be perceived as arising from the lack of a precise answer to a simple question that may be posed by the third parties during various international negotiations: ‘With whom do we speak when the “EU” sits at the table?’ While this may seem a mere technical problem, in reality, due to variety of actors involved and legal rules applicable, the answer is not only hard to find within the Union itself, but also not readily acceptable to the outside parties. The majority of contentious issues that have caused difficulties in the exercise of EU external actions relate to the three main aspects of its presence in international relations: participation in international negotiations and the conclusion of international agreements or of other types of documents on behalf of the European Union; representation of the EU in international organisations, and bilateral relations between the EU and third countries.

The first section of this paper briefly describes the most important factors of the legal and institutional framework of the EU with respect to external representation. We also present the key challenges that the Polish Presidency was faced with on ‘day zero’.

The second section, the most crucial one, presents the most significant cases of disputes between the various actors which arose in the second half of 2011 and in the period directly preceding the Polish Presidency, thus having a substantial impact on its activities. This section is predominantly based upon information that is not accessible for a wider audience, and therefore not in every case could a direct reference to sources or documents be made. In the concluding part of this section we present the principles that constituted the foundations of the Polish Government’s position towards the issue of EU external representation and influenced the strategy of the Polish Presidency.

In the final section, based upon the course of events described in the article and the expertise gained – especially in the period of Polish presidency – we make an attempt to draw some scenarios for future development that eventually may lead to a solution of this yet unsolved puzzle.

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1. Legal and institutional framework

Following the entry into force of the Treaty of Lisbon, the issue of the EU’s external representation has been high on the agenda of all subsequent Presidencies of the Council of the European Union. Although one of the principal assumptions of the new treaty was ‘to see Europe more involved in foreign affairs [...], in other words, greater and better coordinated’ insofar as the consistent external visibility of the EU is concerned this aim has not yet been achieved.

In the first instance it is the division of powers between the EU and its Member States itself that makes it difficult to clarify this issue. Both the Treaty on European Union (TEU) and the Treaty on Functioning of the European Union (TFEU) allow to distinguish between the following categories of EU competences:

- exclusive competence (Article 3 TFEU) in the fields of: customs union; common commercial policy; competition rules for the functioning of the internal market; monetary policy for Euro-zone members; conservation of marine biological resources under the common fisheries policy;
- shared competences (Article 4 TFEU) in the fields of: internal market; social policy; economic, social and territorial cohesion; agriculture and fisheries, excluding the conservation of marine biological resources; environment; consumer protection; transport; trans-European networks; energy; the field of freedom, security and justice; common safety concerns in public health matters, and the aspects defined in the Treaty;
- competence to carry out actions to support, coordinate or supplement the actions of the Member States (Article 6 TFEU) in the fields of: protection and improvement of human health; industry; culture; tourism; education, vocational training, youth and sport; civil protection; administrative cooperation;
- competence to coordinate economic and employment policies of the Member States (Article 5 TFEU) in the fields of economic, employment, and social policy;
- competence to exercise actions in parallel with the activities of Member States (Article 4 (3) and (4) TFEU) in research; technological development; space; developmental cooperation; and humanitarian aid;

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4 The Authors make a distinction between the ‘supportive competences’ (Article 6 TFEU) and ‘coordinative competences’ (Article 5 TFEU), mainly due to the recent developments in EU legal instruments in the field of economic policy, falling within the latter category.
competences in matters of the Common Foreign and Security Policy (Article 24 TEU), including common defence issues.

In addition, when describing the above-indicated delimitations of powers in the external representation of the EU, several provisions of the Treaties of a ‘constitutive nature’ have to be taken into consideration:

- Article 4(3) TEU lays out the principle of ‘sincere cooperation’, according to which the Union and the Member States shall, with full mutual respect, assist each other in carrying out tasks which flow from the Treaties. Moreover, the Member States shall both ‘ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union’ and ‘facilitate the achievement of the Union’s tasks and refrain from any measure which could jeopardise the attainment of the Union’s objectives’;

- Article 5 (1) and (2) TEU sets out the principle of conferral, according to which ‘the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein’ and ‘competences not conferred upon the Union in the Treaties remain with the Member States’;

- Article 2 (2) TFEU, supported by the provisions of Protocol No. 25, clarifies the pre-emption principle, according to which, on the one hand ‘the Member States shall exercise their competence to the extent that the Union has not exercised its competence’, but on the other ‘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’.

Last but not least, the constant struggle for the right to represent the EU externally would not take place if the TEU did provide for different ‘EU actors’ involved in formulating and executing the EU external policy. These include:

- the President of the European Council, in accordance with Article 15 (6) TEU;
- the Commission, in accordance with Article 17 (1) TEU;
- the High Representative of the Union for Foreign Affairs and Security Policy, in accordance with Article 18 TEU, supported by the European External Action Service (EEAS) and the Delegations of the European Union;
- diplomatic and consular missions of the Member States in third countries and at international organisations, in accordance with Articles 32 and 35 TEU.

The above-mentioned legal provisions, although quite simple in their direct wording, are the cornerstone of the constant struggle between the actors involved in exercising the duties of external representation. The Hun-
garian Presidency of the Council of the European Union, preceding the Polish one, can be regarded as quite active in this respect. When the Hungarian Government summed up its achievements in the shared competences’ area of EU external relations, it highlighted four issues as ‘contentious’:

- lack of a proper definition of the representation of the European Union at international fora, both in terms of the composition and extent of attributed competences;
- the degree of independence of EU actors acting locally (in third countries and at international organisations) from ‘Brussels’, understood as independence from the Brussels-based EU institutions and from Member States taking part in the decision-making process;
- the role, tasks and chairmanship of local coordination;
- technical issues concerning visibility (the ‘visual identification’) of the EU at international fora.

As is illustrated in the cases described subsequently in this paper, this ‘heritage’, left in part for the Polish Presidency, quite precisely set the scene for the second half of the year 2011.

2. Post-Lisbon representation: theory vs. practice

The entry into force of the Treaty of Lisbon has had an important impact on the practice of external representation of the EU under the shared competences, giving rise to continuous interpretative questions as regards the division of powers between the main actors: EU institutions (European Commission, High Representative of the Union for Foreign Affairs and Security Policy supported by the European External Action Service) on the one hand and Member States and the rotating Presidency on the other. The main area of potential conflicts between the European Commission/EEAS and EU Member States relates to the extent to which the Commission is empowered to conduct negotiations and to formally conclude international agreements on behalf of the European Union. The Commission claims, on the basis of Article 17.1 TEU, that it enjoys the full right to represent the EU externally, except for the Common Foreign and Security Policy. Member States continue to underscore that the relevant Treaty provisions, particularly Article 218 TFEU, guarantee

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5 ‘The Commission, or the High Representative of the Union for Foreign Affairs and Security Policy where the agreement envisaged relates exclusively or principally to the common foreign and security policy, shall submit recommendations to the Council, which shall adopt a decision authorising the opening of negotiations and, depending on the subject of the agreement envisaged, nominating the Union negotiator or the head of the Union’s negotiating team.’
their competence to designate a negotiator or negotiators without prejudice to his/her institutional origin.

Furthermore, there have been on-going discussions over the modalities of the EU relations with international organisations, taking into account the fact that both the EU and its Member States participate simultaneously in a number of organisations, and their formal status and level of involvement may vary significantly. The European External Action Service (EEAS) consistently raises the issue of the scope of Article 221 TFEU, which states that EU delegations in third countries and at international organisations shall represent the Union. The EEAS interprets this provision as a general authorisation to act on behalf of the EU and its Member States and to take over the full representation of the EU in international organisations. The EU delegations and the Commission argue that it is solely the delegations or representatives of the Commission that should assume all representational roles, including chairmanship of local coordination meetings (coordination with the Member States on the spot, outside the ‘official’ negotiations, which allows the EU to address unforeseen issues), serving to adapt negotiating positions adopted by various Council bodies and to divide speaking roles between EU institutions and Member States.

The question of distribution of powers and tasks has been also frequently raised in the context of bilateral relations. The EEAS and the Commission claim that they are responsible for organising meetings with third countries at all levels and that the EU position should be presented either by the EEAS or the Commission, depending on the subject matter. This general competence to represent the EU externally refers also to EU diplomatic correspondence, the most common forms of which are demarches and notes verbales.

However, in relation to all the above-mentioned aspects of external representation, the majority of Member States favour the view that technical arrangements cannot in any way overrule the delineation of competencies provided in the Treaties, and that external representation procedures must be defined on an individual basis in accordance with the division of competences between the EU and its Member States. In practice this means that the rotating Presidency may play the role of a joint representative of the Member States.

In the following sections, the most conspicuous cases of the ‘struggle’ as to which role the rotating Council Presidency and Member States should maintain in the external representation of the EU will be presented and examined more closely. This part of the paper will also demonstrate how Member

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States and rotating Council Presidencies have reacted to the establishment of the High Representative and of the EEAS, which include a variety of different stances, from submissive to assertive.

2.1. Negotiations and the conclusion of international agreements and of other types of documents

2.1.1. EU participation in UNEP negotiations on legally binding global agreement on mercury

One of the examples of this type of contentious struggle concerned the preparation process before the negotiating session on a legally binding global agreement on mercury, which was held in Stockholm in June 2010. In July 2009 the European Commission submitted to the Council a recommendation on EU participation in the United Nations Environment Programme (UNEP) negotiations on this matter. The Commission requested authorisation to conduct negotiations on behalf of the EU as the sole negotiator with respect to all the provisions intended to constitute a part of a future international agreement, according to Decision 25/5 of the UNEP Governing Council.\(^7\) This proposal was strongly opposed by the majority of the Member States, arguing that some elements of the mandate, e.g. financial assistance to developing countries, remain issues of exclusive national competence.

In its opinion of 9 March 2010 regarding the negotiating mandate for the Commission and the possibility to delimit its scope to only some elements to be negotiated, the Council Legal Service stated that where the Council considers it appropriate to participate in negotiations on an international agreement on mercury, the Commission should be given a mandate to participate on behalf of the Union as regards all the elements which should be addressed by these negotiations, since all these elements touch upon the existing competences of the Union. It would not be legally correct, according to the Council Legal Service, to limit the scope of the Commission’s mandate to only some of the issues under discussion, if it is agreed that the participation of the EU in the negotiations is appropriate and that the Union is competent, although not exclusively, to act in the area of the negotiations. It is however possible to adopt a joint decision by the Council and the Representatives of the Governments of the Member States, adopted by common accord, authorising the opening of negotiations on behalf of the EU and its Member States

acting together. Following the issuance of this legal opinion, the Council decided to adopt a joint decision – of the Council and the Representatives of the Governments of the Member States – and the Spanish Presidency prepared a compromise text for a decision aimed at defining the division of tasks between the Commission, representing the European Union, and the rotating Presidency, acting on behalf of the Member States. The draft decision listed on the one hand the provisions of the future instrument on mercury that should be negotiated by the Commission, accompanied by a representative of the Presidency, and on the other the elements falling under the joint responsibility of the Presidency and the Commission that should be obliged to conduct together the negotiations. Furthermore, the draft decision clarified in which thematic areas the negotiating team should be led by the Commission and in which by the rotating Presidency. The document obliged both the Presidency and the Commission to 'act in consultation with a special committee of representatives of Member States and in accordance with the negotiating directives agreed by the Council.'

However, following the adoption on 12 May 2010 of the modified decision by the Committee of Permanent Representatives, the Commission withdrew its recommendation to the Council on participation in negotiations, arguing that the restricted scope of the authorisation granted to the Commission to participate in the negotiations and the enhanced role of the rotating Presidency were in direct contradiction with Treaty provisions.

Although the Council decided finally to adopt conclusions providing general political guidance for the EU and the representatives of the Member States for the first round of the negotiations (Intergovernmental Negotiating Committee – INC 1 meeting), the EU took part in the negotiations in Stockholm without a clear mandate. This contentious issue was solved only just before the second round of the negotiations (INC 2 meeting) in Japan in January 2011, through the clear distribution of speaking roles between the Commission and the Presidency. In December 2010 the Council adopted the decision on the participation of the Union in the negotiations, authorising the Commission to participate on behalf of the EU as regards matters falling within the Union’s exclusive competences and in respect of which the Union

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8 Ibidem, p. 5
10 Addressing global mercury challenges – Adoption of conclusions by the Council and the Representatives of the Governments of the Member States, meeting within the Council, doc. ref. 10564/10, 4.6.2010.
has adopted rules, in consultation with a special committee of representatives of the Member States. This decision also referred to the matters falling within the area of shared competences, and stated that the Commission and the Member States should cooperate closely during the negotiating process.

The general provisions of the Council decision were then developed and clarified in the practical arrangements adopted by the Working Party on International Environment Issues in January 2011. This agreed-upon document listed the elements of the common EU position that should be presented and negotiated either by the Commission or by the rotating Presidency. In the case of joint negotiating prerogatives, the Commission and the Presidency should agree on sharing speaking time. According to the rules established with respect to the practical arrangements, coordination meetings on the spot should be organised and chaired by the Presidency.

2.1.2. Signing of the Memoranda of Understanding on the Conservation of Migratory Sharks and Birds of Prey, agreed upon within the context of the Convention on the Conservation of Migratory Species of Wild Animals

Similar problems arose with respect to the signing, on behalf of the EU, of non-legally binding documents. In January 2011, the Commission presented a Communication to the Council in which it requested the authorisation to sign two Memoranda of Understanding (MoUs) on the Conservation of Migratory Sharks and Birds of Prey, agreed to under the Convention on the Conservation of Migratory Species of Wild Animals (CMS). Both Memoranda were legally non-binding instruments. As a regional economic integration organization, the EU is allowed to be a signatory and to take part at the Meetings of the Signatories, which are the governing bodies of the Memoranda.

The Commission asked for the Council’s authorisation to sign these two MoUs on behalf of the EU. According to the Commission’s Communication, ‘it is proposed that the EU becomes a Signatory of the MoUs and that this will be achieved by the signature by a representative of the European Commission which represents the EU at the Convention on Migratory Species.’ The Commission’s proposal provoked a discussion on the allocation of pow-

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13 Ibidem, p. 4.
ers between the EU institutions with regard to the conclusion of international agreements and on the procedure that should be followed to authorise the signature of an MoU on behalf of the EU. The Commission was of the view that it was entitled to sign both MoUs because of their non-binding character. This argumentation was not shared by Member States, in this instance supported by the Council Legal Service (CLS). The CLS noted in its opinion, issued on the occasion of the meetings of the Working Party on International Environmental Issues, that in light of the Court of Justice’s ruling\textsuperscript{14} the fact that a measure was not legally binding was not in itself sufficient to lead to the conclusion that the Commission had the competence to adopt it. It is always necessary to take into account the division of powers and the institutional balance established by the Treaty in the field in question. In addition, the CLS stated that the proposed MoUs included political commitments going beyond administrative matters, inter alia cooperation with inter-governmental and non-governmental organizations and relevant international conventions, and financing of the implementation measures from national or other sources. As a result of such provisions, the MoUs gave rise to international commitments that might be undertaken only after the Council’s approval, following the voting rules applicable for a legally binding international agreement on the same subject. In such circumstances, the Council is entitled to authorise the negotiations and designate the negotiator and the representative or representatives empowered to sign the MoUs on behalf of the EU.

In June 2011, the Hungarian Presidency prepared and presented a draft of Council conclusions, endorsing the signing of the Memoranda and authorising the rotating Presidency to designate the person(s) empowered to sign these documents.\textsuperscript{15} This proposal was accepted by all Member States, despite the critical opinion of the Commission. In the view of the Commission, the Council did not have the competence to authorise the designation of the person entitled to sign the Memoranda, but could only endorse the signing of the documents. The Commission argued that, following the agreement on the signing of the MoUs in accordance with Article 17 TEU, it fell within the Commission’s competence to sign the Memoranda.

Despite the decision of the Council, the Commission made an attempt to block the signing of the Memoranda by a representative of the Polish Presidency in November 2011 during the Conference of the Parties (COP) meeting in Bergen, Norway. During informal talks between the Commission (DG


ENVI) and the Polish Presidency, the Commission threatened to bring the case before the Court of Justice of the European Union. As a compromise, it was finally agreed that the MoUs would be signed jointly by the representative of the rotating Presidency (in accordance with the Council decision) and by the representative of the European Commission.

2.2. Representation of the European Union at international organisations and other fora

2.2.1. Representation at the United Nations Forum on Forests

One of the first conflicts of interest in this regard emerged over the question of who was entitled to deliver statements on behalf of the EU and to chair coordination meetings on the spot during the New York session of the United Nations Forum on Forests (UNFF-9), which is a subsidiary body of the Economic and Social Council of the United Nations (ECOSOC). The issue was initially discussed by the Working Party on Forestry. The Hungarian Presidency put forward a proposal for a new working formula, the co-called ‘EU Team’, consisting of members of the EU Delegations, the rotating Presidency, and diplomats from other missions. This concept envisaged that coordination meetings would be prepared and chaired by the EU Team, headed by a coordinator designated by the Presidency, and that statements at the formal meetings would be made by the Presidency on behalf of the EU and its Member States, and negotiations at informal meetings would be conducted by the EU Team or the representatives of any Member State agreed upon at the coordination meeting.

The Council Legal Service indicated in its opinion that the agenda of the UNFF-9 meeting covered subjects of national or shared competences. As a result, the Member States had the right to decide how and by whom their external representation would be ensured. It could be done through the Presidency, the EU Delegation, or any other Member State. The Legal Service stated also that given the nature of shared competences, there was no legal obligation for the EU Delegation to ensure EU institutional representation at the UNFF-9 meeting.

The Commission argued for the full participation of the EU Delegation in the UNFF. It insisted on co-chairing the coordination meetings by representatives of both the EU Delegation and the Presidency. The Commission suggested also that EU Delegation experts could carry out negotiations on some points at informal meetings, and that the delivery of statements at formal meetings could be the subject of burden-sharing agreements.

The majority of Member States supported the Presidency’s proposal for practical arrangements during the UNFF-9 meeting, including the leading
role of the Presidency in EU representation, and insisted on the necessity of reaching a final decision in Brussels and having a clear understanding of the roles and tasks before the start of the negotiations. Furthermore, they stressed that they saw no need to change the previous procedures of EU representation, especially in the context of burden-sharing between the Commission, the Presidency, and the Member States.\(^\text{16}\)

The draft practical arrangements were further discussed by COREPER I and served as a basis for the preparation of draft general arrangements for the UNFF-9 meeting. This modified document provided that coordination meetings would be prepared by the ‘EU Team,’ but chaired by the rotating Presidency. Statements and speeches would be delivered on behalf of the EU and its Member States by the relevant ‘EU Team’ member, according to arrangements agreed upon during coordination meetings. In addition, negotiations at informal meetings, including outreach sessions, would be conducted by the ‘EU Team’ or by the burden-sharers, defined as Member States requesting to join the ‘EU Team.’

The adjusted Hungarian proposal was not formally adopted owing to a lack of consensus among the Member States, but in practice this new model was used during the negotiations in New York, with some modifications, including coordination meetings chaired by the Presidency.

### 2.2.2. EU Statements in multilateral organisations

The temporary model elaborated by the Hungarian Presidency did not solve all the problems arising from the divergent understandings of the provisions of the Treaty of Lisbon and, as a consequence, of Members States’ remaining prerogatives with respect to the external dimension of EU policies. In the second half of 2011, during the Polish Presidency of the EU Council, the lack of consensus on who should make statements in multilateral fora in cases of shared competences resulted in a complete deadlock as regards the presentation of the EU’s official positions in Vienna (The Organisation for Security and Cooperation in Europe and the International Atomic Energy Agency), Geneva (The World Health Organisation, United Nations Conference on Trade and Development, and International Organisation for Migration), and in New York (United Nations).

The United Kingdom adopted a rigid position concerning the delivery of statements in the area of shared competences and requested that all EU presentations be prefaced by the phrase ‘on behalf of the EU and its Member States’. This proposal was opposed by a group of Member States, calling for

the separation of the legal question of the division of competences from the practical aspects of the external representation, which would allow for common use of the formulation ‘on behalf of the EU’.

Attempts to solve the problem through bilateral contacts between the EEAS and London were unsuccessful, and the issue was raised by the EEAS at COREPER II meetings in October 2011. Following long discussions, COREPER agreed on a document setting out basic rules on the delivery of EU statements in multilateral organisations. The document, entitled ‘EU Statements in multilateral organisations – General Arrangements’ (hereinafter ‘General Arrangements’) was formally adopted by the General Affairs Council on 22 October 2011.

It refers not only to the question of the delivery of statements, but also to other aspects of the EU’s participation in works of relevant organisations (like coordination meetings), and to the position of the rotating Presidency. It also stresses that external representation and internal coordination does not affect the distribution of competences under the Treaties, and that the EU can only make a statement with respect to the areas where it is competent.

The ‘General Arrangements’ use the term ‘EU actors’ to establish those EU institutions competent to represent the EU externally, i.e. the President of the European Council, the Commission, the High Representative, and EU Delegations. Member States and EU actors are obliged to coordinate their action in international organisations and to conduct adequate prior consultation on statements reflecting EU positions. According to the provisions of the ‘General Arrangements’, EU actors should conduct local coordination and deliver statements on behalf of the EU, unless prevented by the rules of procedure of the forum concerned. However, it is still possible to implement other specific local arrangements with regard to the delivery of statements, coordination, or burden-sharing at organizations such as the World Trade Organisation (WTO) or Food and Agriculture Organisation (FAO).

The statements, referring exclusively to actions undertaken by or being the responsibility of the EU, should be prefaced by ‘on behalf of the European Union’. In the case of presenting a statement expressing a position common to the European Union and its Member States, it should be prefaced by ‘on behalf of the EU and its Member States.’ The Member States may also agree to collective representation by an EU actor in relation to the exercise of their national competences. In such a case, the statement should be prefaced by ‘on behalf of the Member States’. The Member States may also request the rotating Presidency to represent them externally.

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The ‘General Arrangements’ agreement constitutes a set of practical rules and solutions to be implemented by representatives of the EU and its Member States in their work carried out within the framework of various international organisations. It should be clearly noted that the agreed arrangements relate only to the external representation in multilateral organisations, and should not be automatically mirrored in the framework of other types of international negotiations, *inter alia* meetings of Parties to a Convention or conferences, which may require separate provisions due to their complex character.

Furthermore, the ‘General Arrangements’ relate solely to some practical aspects of external representation, and do not prevent any potential disagreements regarding the scope of the EU’s exclusive competences and of the shared competences. The main objective of the agreement is to separate the technical and organisational aspects of external representation from the substantive discussion on negotiation mandates and EU positions.

The ‘General Arrangements’ also declare that any problems arising in the application of the agreement should be solved through local coordination on the spot. If this is not possible due to the divergent positions of the EU delegation and Member States, the Head of the EU delegation should refer the matter to the EEAS, which subsequently submits the issue at stake to COREPER for decision.

2.2.3. The representation of the European Union and its Member States in the General Assembly of the United Nations and its committees and working groups, and in international meetings convened under the auspices of the General Assembly

The entry into force of the Treaty of Lisbon provoked a long discussion on the EU presence in the United Nations, especially in the light of the observer status granted to the European Economic Community in 1974, which allows for its participation at formal meetings and for interventions, but without the right to propose amendments, vote, or chair meetings. This was applicable to the sessions of the General Assembly of the United Nations as well as of its committees.

As a result of the granting of legal personality to the EU, the EU undertook actions to upgrade its status in the UN General Assembly. In May 2011 the General Assembly adopted resolution 65/276 – *Participation of the European Union in the work of the United Nations*. According to the provisions of this document, the representatives of the Union presenting positions of the EU and its Member States are allowed to be inscribed on the list of speakers of representatives of major groups in order to make interventions. They may also participate in the general debate of the General Assembly (GA), in accordance with the order of precedence, and present their own communications.
relating to the sessions and work of the GA and to the sessions of other international meetings convened under the auspices of the Assembly. However, the resolution states that the representatives of the EU do not have the right to vote or to co-sponsor draft resolutions or decisions, and they remain seated among the observers.\textsuperscript{18}

In parallel with the work on a new status for the EU, the EU Delegation at the United Nations started to gradually assume the former responsibilities of the rotating Presidency, in particular internal EU coordination on the spot and chairmanship of some of the UN-related Council Working Groups.

This process, however, was accompanied and shaped by uncertainties concerning EU Treaty provisions on the scope of representative roles. The EU Delegation seems to favour the view that the GA Resolution has increased its horizontal prerogatives to represent the EU, regardless of the nature of issues at stake and of the legal division of powers and competences, while some Member States point out the fact that the Resolution is a technical measure granting limited speaking roles to the EU Delegation, and does not interfere with the exercise of competences conferred upon the EU under the Treaties.

During the Polish Presidency, one of the contentious matters in relation to EU participation in the work of the United Nations concerned the designation of a representative entitled to sign and submit a common position of the EU and its Member States with regard to the so-called regular process under the United Nations framework (regular process for global reporting and assessment of the state of the marine environment, including Socio-Economic aspects), prepared by the COMAR (Working Group on the Law of the Sea), chaired by the rotating Presidency. According to the EU Delegation in New York, in light of UN General Assembly Resolution an official letter submitting the position of the EU should be signed solely by the EU Delegation. The Polish Presidency argued, however, that the resolution had no effect on the EU internal procedures resulting from the division of powers guaranteed by the Treaties. For this reason, and bearing in mind the range of issues included in the EU position on the regular process, the Presidency opted for a joint signing of the document by both the EU Delegation and the rotating Presidency representatives.

The final decision was adopted at a meeting of the Heads of Missions of all Member States in New York. The Member States decided that the letter submitting the EU position would be signed by a representative of the Polish Presidency and by the EU Delegation.

A dispute of a similar nature took place as regards the EU contribution to a compilation document serving as a basis for the preparations to the UN Conference on Sustainable Development (Rio +20), drafted by UN DESA (The United Nations Department of Economic and Social Affairs).

The European Commission argued that the cover letter for the contribution agreed by the EU Member States should be signed only by the Commissioner. The Commission also opposed any references to a joint contribution by the European Commission and the rotating Presidency.

Finally, the contribution of the EU and its Member States for UN DESA was approved at a meeting of COREPER I. The document adopted by COREPER provided that the Commission and the Presidency would jointly submit the EU position to UN DESA through the EU Delegation in New York. The letter was signed by the representatives of the Polish Presidency and of the European Commission.

2.3. Bilateral relations between the European Union and third countries

A demarche/outreach is a specific form of external representation involving a formal approach towards a third country and its representatives in order to gather information on a precise issue and, at the same time, to present an official position. In the EU context, demarches are often used in the preparatory phase before international negotiations, meetings, or conferences. During the Polish Presidency of the EU Council, a competence problem appeared with respect to the appointment of an EU representative entitled to prepare and carry out a demarche in third countries concerning the first session of the plenary meeting of the Intergovernmental Platform on Biodiversity and Ecosystem Services (IPBES) in October 2011 in Nairobi.

In accordance with well-established rules, demarches concerning environmental issues, remaining in the area of shared competences, have been carried out by the rotating Presidency, with the possible participation of the EU Delegation at meetings with representatives of third parties upon the invitation of the Presidency. This practice has been questioned by the European Commission and the EEAS, which requested a leading role in the process. The European Commission and the External Action Service argued that the demarche should be conducted by the relevant EU Delegation, acting under the instructions of the Commission. The Commission may also invite the rotating Presidency or any other Member State(s) to accompany the EU Delegation in conducting the demarche where it deems the same to be in the interest of the EU.

In case of the IPBES session, the Polish Presidency conducted the demarche in accordance with a questionnaire agreed upon by the European
Commission and Member States at the Working Party on International Environmental Issues meeting. The initiative of the Polish Presidency was not opposed by any Member State. However, the European Commission, without any previous consultations with the Presidency or the Council, decided to send out instructions to the EU Delegations in relevant third countries and to request them to carry out a demarche. This lack of agreement as regards the way of conducting the demarche resulted in inconsistent actions being undertaken by different actors. In some cases, thanks to diplomatic efforts, the relevant embassies of the rotating Presidency and the External Service were able to avoid a direct conflict and find a practical solution by inviting the EU Delegation to accompany representatives of the Presidency. But in a few extreme cases the EU Delegation and the Presidency conducted two separate demarches.

2.4. Principles of the Polish Presidency

As the above mentioned examples illustrate, the tasks of the Polish Presidency in matters of external representation, concerning both inherited (notably from the Hungarian Presidency) and new cases, were not of the simplest nature. The Authors do not intend to judge whether the actions of the Polish Presidency can be described as those of ‘a honest broker’, for our approach may not be the most objective, and therefore we kindly leave the assessment for each reader.

However, what may be of help in this judgment is the general position of Poland – as a Member State – towards the EU external representation issue. The official Polish Government’s position in the matters of EU external representation19 is based upon three principles:

— the principle of sincere cooperation (Article 4(3) TEU) is to be regarded as the superior one;
— the unity of the external representation of the EU and its Member States is to be preserved in accordance with the judgments of the Court of Justice;
— the distribution of competences between the Member States and EU is the key factor to be considered when EU representatives are

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19 Stanowisko Polski w sprawie reprezentacji zewnętrznej Unii wobec państw trzecich i organizacji międzynarodowych oraz koordynacji wewnętrznej przy organizacjach międzynarodowych po wejściu w życie Traktatu z Lizbony (Poland’s Position concerning EU external representation towards third countries and international organisations, and internal coordination within the framework of international organisations, following the entry into force of the Treaty of Lisbon), adopted by the Committee for European Affairs on 8.10.2010 and updated on 9.3.2011.
appointed, and therefore in matters of shared competences and in hori-
zontal issues a role for the rotating Presidency has to be foreseen.

These principles have been already elaborated upon (either directly or by
the means of reference) in the first and second sections of this article. How-
ever, their application in the practical exercise of EU external representation
is widely recognised by ‘EU actors’ only insofar as the first two above-cited
principles are concerned.

The third of the aforementioned principles is questioned by the EU insti-
tutions and also by some Member States. Nevertheless, Poland is of the
opinion that the role of Member States in external representation of the EU
cannot be denied, for it is foreseen directly in the Treaties (the previously
mentioned Articles 32 and 35 TEU) and can be derived from its various pro-
visions (e.g. the above-mentioned TFEU Articles on the distribution of com-
petences). Such an opinion has found support in the opinions of the Council
Legal Service.

In lieu of conclusions

The differences in views and opinions among all the parties involved in
the exercise of EU external actions cannot be regarded as a purely legal
problem. They also feature what may be called ‘a human factor,’ or perhaps
‘a matter of ambition.’ On the one hand there are Member States for which
the perception of the tension of the struggle for external representation is
a function of the degree of the Presidency’s involvement and its will to
engage in disputes and discussions with other ‘EU actors.’ The Hungarian
and Polish Presidencies may be regarded as having been willing to play
a more active role, perhaps because of being ‘novices’, while the Danish
Presidency – a ‘mature’ one – acted in a more calm way, not engaging itself
in open quarrels with EU institutions wishing to play a key role in EU exter-
nal representation. On the other hand, there are conflicts within the EU insti-
tutions themselves – e.g. between Commission and High Representative

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21 e.g. the notion to include Member States among EU actors in the document ‘EU Statements
in multilateral organisations – General Arrangements’ (op.cit.) was not accepted during the dis-
cussion at the Committee of Permanent Representatives, and therefore the document refers to
‘Member States and EU actors’.
22 See footnotes to section 2.
23 For the elements of such analysis, see e.g. P.M. Kaczyński, Swimming in murky waters:
Challenges in developing the EU’s external representation, FIIA Briefing Paper, No. 88/2011,
The Finnish Institute of International Affairs, Helsinki.
(EEAS). E.g., as far as environmental issues are concerned (an area of shared competences) not only can the Member States and EC be found denying each other’s competences (as presented in chapter 2), but also the EEAS enters into discussion.24

Bearing in mind that the issues highlighted in previous sections of this paper constitute a source of constant struggle between the ‘EU actors’, a rather obvious question arises: ‘Can any universal and permanent solution be achieved in the near future?’ As has already been underscored, the Authors do not intend to propose such a general solution. However, in an attempt to examine and explore the possible ways forward, the following four scenarios emerge.

‘No change scenario’

When attempting to recap the situation with respect to EU external representation, one may postulate that it is not really an ‘unsolved puzzle,’ but rather a ‘day-to-day business’ issue in the EU institutional framework. But if we examine other areas of a similar nature, where problems have been evoked after the entry into force of the Treaty of Lisbon, we can see that they have either been foreseen while drafting the treaty (e.g. composition of the College of Commission) or brought out by the economic crisis (e.g. the inadequacy of EMU institutional rules). This is why all the solutions reached in the different cases described in section 2 should be considered as only of a temporary nature, based upon in situ agreements between the parties and lacking firm foundations in the provisions of the Treaties. However, such ad hoc solutions may be interesting from the ‘matter of ambition’ point of view. Among the plethora of solutions for the contentious cases, every ‘EU actor’ may have had a number of preferred ones, but each case ended in a satisfactory way (in the opinion of the actor involved), and therefore the system as a whole may be perceived as ‘fair enough’.

‘Weak evolutionary scenario’.

This scenario implies the adoption of some kind of solution (or solutions) having a more universal nature than the series of ad hoc ones which have been taken, but still of a somewhat (legally) limited nature. In the 2013 at least two important documents concerning the role of the EEAS in EU external representation will be published: the review of the functioning of the EEAS25 and the report on the implementation of the ‘General Arrangements’

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24 As could be observed e.g. during discussions that led to the adoption of the conclusions on ‘EU climate change diplomacy’ at the Foreign Affairs Council meeting on 18.07.2011.

25 Article 13(3) of Council Decision 2010/427/EU establishing the organisation and functioning of the European External Action Service, OJ 2010 L 201/30-40) calls upon the High Representative to provide a review of the EEAS by mid-2013.

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concerning EU statements in multilateral organisations. On the one hand, the EEAS is still on the path toward reaching its full-fledged organisational potential. On the other, the more expertise the EEAS gains in various external aspects of EU policies (including the areas of shared competences), the stronger becomes its will to play crucial role in the co-ordination of EU activities towards third parties. Therefore the aforementioned documents will certainly include notions aimed at strengthening the role of the EEAS. The remaining questions are: ‘To what extent?’ and ‘At what cost to the Member States and European Commission?’.

‘Strong evolutionary scenario’.

It has to be underlined that in the field of EU external representation ‘an at least equally important role [as the institutional innovations such as the High Representative for Foreign Affairs and Security Policy and the establishment of a European External Action Service] is to be played by the Court of Justice in applying the principles of loyalty and consistency as instruments to ensure the unity of the EU’s external representation’.

While the rulings of the Court of Justice have not been discussed in detail in this article, the Authors are aware that they have had an obvious impact on the international dimension of the Union’s (or better to say European Communities’) activities in the past, stronger than any ad hoc or ‘general’ arrangements. The rulings of the Court of Justice also have an important feature which strengthens their impact – they are not the result of consensus reached by the parties involved, but constitute an independent command of an external (in relation to the ‘EU actors’) institution. However, since the post-Lisbon rulings of the Court of Justice of the European Union are still to be expected, these can only be the subject of further research when they appear.

‘Revolutionary scenario’

If the words of the Laeken Declaration, cited at the beginning of this article, still hold true, then a substantial revision of the Treaties seems to be the

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26 Point 7 of the document ‘EU Statements in multilateral organisations – General Arrangements’ (op.cit.) foresees that the EEAS and the Commission services will present a report at the latest by the end of 2012, and in light of this report, the document could be reviewed.


28 P. Van Elsuwege, H. Merket, The role of the Court of Justice in ensuring the unity of the EU’s external representation in: Principles and practices of EU external representation, op.cit., p.59.

29 e.g. pending Case C-28/12 Commission v. Council, concerning the annulment of a Decision of the Council and of the Representatives of the Governments of the Member States of the European Union meeting within the Council on the signature and provisional application of the Air Transport Agreement between the United States of America, the EU and its Member States, Iceland and Norway.
only way out that would ensure a permanent solution. As the Ministers of Foreign Affairs of 11 EU Member States admitted in the summer of 2012, less than three years after the Treaty of Lisbon entered into force, ‘the EU must take decisive steps to strengthen its act on the world stage. [...] Some of these measures could be implemented on the basis of the existing treaties – possibly already in the short term – while others could only be addressed in the long term through treaty changes, to be agreed upon on the basis of a Convention. [...] We have to enhance the coherence of the EU’s external action.’.³⁰

These four scenarios shall not be perceived as the only ones. Moreover, they are not mutually exclusive. The first three are complementary, albeit having a different impact for each of the ‘EU actors’ involved, and they may eventually lead to the fourth one – the one that, hopefully, will ‘solve the puzzle’.

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³⁰ Final Report of the Future of Europe Group of the Foreign Ministers of Austria, Belgium, Denmark, France, Italy, Germany, Luxembourg, the Netherlands, Poland, Portugal and Spain. 17.09.2012.