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High Representative of the Union for Foreign Affairs and Security Policy – Analysis of the Lisbon Treaty Provisions

Abstract: *The introduction of the Treaty of Lisbon has brought important changes to the architecture of the European Union and its institutions. The institutional balance of the new structure, which abolished the pillars of the EU, and the external representation of the Union have undergone especially deep changes, focused mainly on the High Representative of the Union for Foreign Affairs and Security Policy. Through literal, systemic and functional interpretation this article provides an analysis of the evolution and content of the provisions concerning the High Representative in order to ascertain the value and effect of the changes introduced. The research indicates that the new legal solutions encompassed by the function of the High Representative, although incomplete, offer many interesting possibilities for consolidating the Union's institutional structure. Regrettably however, they leave too much to negotiations and political manoeuvring and too little to concrete legal solutions, leaving the Union with an incomplete and unclear external relations institutional structure.*

Introduction

On 13 December 2007 the leaders of the European Union signed the final version of the new European Treaty, which was designated, after the place of its signing, as the Treaty of Lisbon (hereinafter also 'TL'). Immediately, many groups of euro enthusiasts began to celebrate the coming of the long awaited institutional reform, which would provide a stable institutional basis for the Union; while many sceptics pointed out that the new Treaty was nothing more

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than a copy of the Constitution for Europe, ingeniously concealed within the much more complicated structure of the Treaty of Lisbon.¹ Although it is not the aim of this paper to give a full analysis of the new Treaties, their contents may well serve as a valid point of departure in the ongoing discussion about them.

The main focus of this paper shall be the analysis of the Lisbon Treaty provisions on the High Representative of the Union for Foreign Affairs and Security Policy (hereinafter also 'HR'). This analysis is conducted in order to highlight those new legal issues of institutional importance which might arise with the introduction of the new framework, i.e. of the function of HR featured in the Treaty of Lisbon. Therefore, the article focuses on a legal analysis of institutionally relevant provisions of the Treaty of Lisbon, but also gives a short summary of the evolution of the powers of the HR from the old Treaties to the TL, as well as a summary of the reasons which instigated this evolution. This is necessary in order to understand the complexity of the changes involved, as well as their direction and effect.

The article consists of three parts. Part One describes, in general terms, the function of the HR within the framework of the old EU Treaty and his position within the Common Foreign and Security Policy (hereinafter also 'CFSP'). This description will include the scope of the powers of the HR as well as some institutional problems that were present under the EU Treaty. It will also highlight the need for changes that drove the Intergovernmental Conference (hereinafter also 'IGC') responsible for drafting the Constitution for Europe to introduce the new systemic solutions to the function of the HR.

In Part Two, the process that led to the drafting of the provisions of the Constitution will be analysed. Due consideration is given to the many conflicting opinions that were present among the Member States when it came to the future of the CFSP, and the reasons that motivated the members of the IGC to introduce new institutional solutions and possibilities into the post of the HR. Owing to the fact that most of the provisions of the Constitution concerning the HR were transferred to the Treaty of Lisbon, the analysis in this part will be focused on the discussions that took place when the provisions were drafted. In addition those changes which were the result of the 2007 IGC are identified, as well as what was taken from the earlier drafted articles.

After considering the evolution of the function of the HR, Part Three takes a closer look at the provisions of the Treaty of Lisbon. Applying a literal, sys-

¹ Which in fact is an amendment to the Treaty on the European Union as well as the Treaty establishing the European Community, which is now called The Treaty on the Functioning of the European Union. Hereinafter the Treaties will be referred to as, respectively, TEU and TFEU. For more information on the Lisbon treaty see also Part Three of this article.

temic and functional approach the contents of the relevant provisions of the Treaty of Lisbon are analysed, with the aim of ascertaining what changes have been implemented compared to the provisions of the old EU Treaty. An attempt is made to ascertain the importance and scope of the powers of the HR under the Treaty of Lisbon, and also identify possible problems that may arise now that the Treaty of Lisbon has entered into force. This part is divided into three subchapters, dealing with the competences of the HR, issues of institutional balance, and finally with matters of external relations.

In the conclusion of this article it will be shown that the changes introduced by the Treaty of Lisbon in relation to the HR are a step in the right direction, albeit an incomplete one. The general structure of the post of the HR which emerges from the analysis undertaken in this article shows that in the process of drafting of the new Treaties too many legal solutions were abandoned in favour of political compromises and manoeuvring, the consequences of which are hard to predict.

1. The High Representative under the old EU Treaty

The European Union is the first ever supranational international organisation. This fact alone hints at the institutional complexity of its workings and decision-making processes.² This complexity was made even more complex by the existence of the pillar structure within the EU/EC. Even though with the introduction of the Treaty of Lisbon this structure has been simplified,³ its earlier existence leaves an imprint and deeply influences all the internal and external workings of the EU/EC institutions. The reason for the introduction of such a complicated pillar structure was the need to include not only economic, but also defence and security aims within the Union's

² See also: D. Gerard, K. Lenaerts, *The Structure of the Union According to the Constitution for Europe: The Emperor is getting dressed*, "European Law Review" Vol. 29/2004, p. 300.

³ In my opinion the Lisbon Treaty does not abolish the pillar divide completely. See: E. Baker, C. Harding, *From past imperfect to future perfect? A longitudinal study of the Third Pillar*, "European Law Review" Vol. 34/2009, p. 43–54; P. Craig, *The Treaty of Lisbon, Process, Architecture and Substance*, "European Law Review" Vol. 33/2008, p. 142, 143; B. Crowe, *Foreign Minister of Europe*, "Foreign Policy Centre Publication" 2005, p. 5, 6; D. Eisenhut, *Delimitation of EU-Competences under the first and second pillar: A view between ECOWAS and the Treaty of Lisbon*, "German Law Journal" Vol. 10/2009, p. 598–603; M. Niedźwiedź, *Stosunki zewnętrzne Unii Europejskiej w świetle projektów Traktatu Konstytucyjnego (External Relations of the European Union in Light of the Projects of the Constitutional Treaty)* in: *Unia Europejska w dobie reform (European Union in the Time of Reforms)*, ed. C. Mik, Toruń 2004, p. 320; B. de Witte, *The Constitutional Law of External Relations* in: *A Constitution for the European Union: First Comments on the 2003 – Draft of the European Convention*, eds. I. Pernice, M.P. Maduro, Baden Baden 2004, p. 97.

scope of interests. This was finally done when the Maastricht Treaty of 1992 was drafted, but then and even now not all European countries were ready to subject their delicate defence and security matters to the rapidly expanding community method.⁴ Thus the CFSP, created by the Maastricht Treaty, was included in a separate pillar (second pillar) of the newly founded EU and was based on the intergovernmental method of co-operation. The Community tasks and powers under the EC Treaty were consolidated into the first pillar, and finally Justice and Home Affairs co-operation was placed in the third pillar of the Maastricht Treaty.⁵ This complicated structure carried the Union into the new millennium, and the next two amending Treaties that followed Maastricht⁶ introduced no revolutionary provisions aimed at closing the divide between the pillars.⁷

The pillar structure of the Union was and still is of great consequence for the position and institutional issues connected with the post of the HR. To fully analyse the standing of the HR within the institutional framework of the Union prior to Lisbon, it is important to first understand the tensions that existed (and still exist) between the pillars. Many authors have posited that the community and intergovernmental methods, while in contradiction to each other, are still a method for working together inside the EU/EC framework.⁸ This means that when one method 'expands its reach', then the area of competence of the other method is usually lessened. We can also identify the institutions that are the heralds of the influence of the two methods, and then name and describe the tensions within the EU/EC institutional framework. The community method of the first pillar is most strongly represented by the Commission, and the intergovernmental method is the specialty of the Council.⁹ This was and still is a direct consequence of the competences assigned

⁴ In particular, France and the UK. See: Y. Devuyst, *The European Union at the Crossroads*, Brussels 2003, p. 133, 134.

⁵ See: K. Lenaerts, P. van Nuffel, *Constitutional Law of the European Union*, London 1999, p. 59–61.

⁶ The Amsterdam Treaty of 1997 and the Nice Treaty of 2001.

⁷ Even with the introduction of the High Representative by the Treaty of Amsterdam. See: K. Miszczak, *Zmiany instytucjonalne, strukturalne i mechanizm decyzyjny w II filarze UE (Institutional, Structural Changes and the Decision Mechanism of the II Pillar of the EU)* in: *Przyszły Traktat Konstytucyjny. Zagadnienia prawno – polityczne, instytucjonalne i proces decyzyjny w UE (The Future Constitutional Treaty. Legal, Political and Institutional Aspects and the Decision – Making Process in the EU)*, ed. J. Barcz, Warszawa 2004, p. 171, 200.

⁸ See: N. Winn, C. Lord, *EU Foreign Policy: Beyond the Nation State*, Palgrave 2001, p. 2; R. Rummel, J. Wiedemann, *Identifying Institutional Paradoxes of CFSP* in: *Paradoxes of European Foreign Policy*, ed. J. Zielonka, Den Haag, London, Boston 1998, p. 53.

⁹ See: J.M. Beneyto, *From Nice to the Constitutional Treaty: Eight theses on the (Future) Constitutionalisation of Europe* in: *The Lisbon Treaty. EU Constitutionalism without a Constitutional Treaty?*, eds. S. Griller, J. Ziller, Wien, New York 2008, p. 6, 7.

to these two institutions, as well as a consequence of their composition.¹⁰ With the above in mind we shall now consider the position of the HR within the old EU Treaty framework.

The EU Treaty itself was not very elaborate on the position of the HR. Article 18 paragraph 3 of the old EU Treaty¹¹ stated, that the Secretary-General of the Council ‘*shall exercise the function of the High Representative for the common foreign and security policy*’. It also stated that the HR shall assist the Presidency in its representation of Union CFSP matters and implementation of the decisions taken under Title V of the old EU Treaty. Therefore, the Treaty hinted that the HR was closely linked to the Council and to the Presidency. He/she was a purely intergovernmental actor concerned only with foreign and defence policies. The other areas of foreign policy that were included in the first pillar were the domain of the Commission.¹² Article 18 also signified the first area of institutional concern connected with the post of the HR. The fourth paragraph of this article stated that ‘*The Commission shall be fully associated with the tasks(...)*’ undertaken under the CFSP.¹³ Even putting the ambiguous language of the Treaty aside,¹⁴ it’s easy to see that Article 18 paragraph 4 formed a point where the two pillars met, and therefore also the different methods used in the pillars, which put the HR in a difficult position. The difficulty was in co-operating closely with the Council, but also being on good terms with the Commission in order to facilitate a consistent EU foreign policy. This was not easy considering the fact that the two institutions often had different views on how EU policies should be conducted.¹⁵

The complexity of this structure in which the HR operated was bound to create institutional issues. Thus problems existed, and it was owing to them that significant institutional changes were introduced in the draft of the Constitution. Just to highlight a few of the issues, we should first point out that in matters of external relations the Union suffered from a competence divide that ran smoothly along the pillar lines. In external trade relations, which belonged in the first pillar, the Commission was the competent authority, along with the Commissioner for External Relations,¹⁶ whereas in matters of CFSP

¹⁰ See: M. Górka, *System instytucjonalny Unii Europejskiej (Institutional System of the European Union)* in: *Prawo Unii Europejskiej. Zagadnienia systemowe (Law of the European Union. Systemic Problems)*, ed. J. Barcz, Warszawa 2006, p. 156–169.

¹¹ *The Consolidated Version of the Treaty on the European Union* in: *Blackstone’s EU Treaties and Legislation 2007 – 2008*, ed. N. Foster, Oxford 2007, p. 86–103.

¹² Especially the Commissioner for External Relations.

¹³ This was also repeated on a more general level in Article 27 of the old EU Treaty.

¹⁴ It is unclear whether the word ‘associated’ means a deep cooperation with the Commission or only a need to keep the Commission informed.

¹⁵ See: C-176/03 *Commission v. Council* [2005] ECR I-07879.

¹⁶ See: Y. Devuyt, *The European Union...*, op.cit., p. 118–132.

it was up to the Council (which meant also the Presidency and the HR) to act and represent the Union. The divide was more complex, because within the first pillar the Commission negotiated agreements under the supervision of the Council, and in CFSP matters the Commission had the right to make initiatives.¹⁷ Thus, maintaining a sound and decisive foreign policy, not to mention a common one,¹⁸ was not simple with so many institutions involved.¹⁹ This was especially so when we take into account the contrasting nature of the pillars, which did not make the co-operation any smoother. For the HR this meant that he had to find his place within a 'Troika', together with the Presidency and the Commissioner for External Affairs.²⁰ In this complex structure co-operation and flexibility was the key, and insofar as external representation was concerned the Union had to react with great flexibility.²¹ Different combinations of officials were chosen from among the relevant external policy actors depending upon which pillar the matter in question was more firmly based,²² the division of competence, internal agreements, and political sensitivity.²³ But still, such a complicated mode of co-operation takes time, and when the placement of competences is not totally clear effort is wasted, the workload is doubled, and inconsistency creeps into the formulation of foreign policy. Therefore, the imbalance inherent in this structure needed correcting in order to provide for a consistent EU external policy.

Further analysis of the other structural links connected with the post of HR, as well as his competences, reveals that the structure was simply too complicated to provide for smooth and efficient results. First of all, the HR was a part of the Council *sensu largo*, because he was responsible for the Council's General Secretariat with the help of the Deputy Secretary-General.²⁴ The HR assisted the Presidency of the Council,²⁵ which represented the Union in CFSP matters, and that meant that the HR also assisted the European Council, as the two Councils shared the same Presidency.²⁶ The HR was also the

¹⁷ See: Articles 300 and 133 paragraph 3 of the EC Treaty and Article 22 paragraph 1 of the old EU Treaty.

¹⁸ Which brings the Member States into the picture and further complicates the process. See: R. Rummel, J. Wiedemann, op.cit., p. 61, 62.

¹⁹ See also: K. Miszczak, op.cit., p. 205–210.

²⁰ See: N. Winn, C. Lord, op.cit., p. 46.

²¹ See: B. Crowe, op.cit., p. 14–18.

²² Determining this alone can be a cause of many arguments.

²³ See: K. Lenaerts, P. van Nuffel, op.cit., p. 617.

²⁴ See: Article 207 paragraph 2 of *The Treaty establishing the European Community (Consolidated Version in accordance with the Treaty of Nice)* in: *Blackstone's EU Treaties and Legislation 2007 – 2008*, op.cit., p. 59.

²⁵ The Presidency was previously held by a Member State of the Union and it changed every 6 months. See: Article 203 of the EC Treaty.

²⁶ See: Article 4 of the old EU Treaty.

head of the European Defence Agency,²⁷ the supervisor of the Policy Unit and of the European Union Military Staff,²⁸ as well as the Secretary-General of the Western European Union (WEU).²⁹ Besides the many responsibilities mentioned above, the HR had to co-operate with the Permanent Representatives Committee (COREPER) and the Political Committee, which play an important role in the Council's foreign decision-making process.³⁰ The old EU Treaty also envisaged, in Article 18 paragraph 5, the possibility of appointing special representatives for certain policy areas. Many such Representatives were indeed appointed.³¹ They supported the work of the HR and operated under his supervision. The institutional position of the HR highlighted above does however not give a full account of the competences linked to the function.³² Articles 26 and 27d of the old EU Treaty provide an additional outlook on the matter, albeit a rather vague one. According to them, the HR contributed to the formulation, preparation and implementation of policy decisions and could also conduct international dialogue with third countries, if the Presidency so requests. What's more the HR was bound to keep the European Parliament and the members of the Council fully informed of all matters concerning enhanced cooperation within the CFSP. A note must be made of the phrase '*in particular*' in Article 26, which signifies that the above competences could even be expanded if necessary.

At first sight this indicates that the HR played a significant role within the CFSP under the old EU Treaty. It should be highlighted however that despite the impressive set of various apparent competences, in truth the HR under the regime of the old EU treaty lacked true authority, with no state backing him up and no vote to exercise.³³ Therefore, his standing was very delicate. The HR had to carefully weigh the many interests present at every stage of the EU's policymaking process, but lacked true authority to force his own ideas in shaping EU policy. In addition the HR was tasked with many

²⁷ See: Article 7 paragraph 1 of Joint Action No 2004/551/CFSP of the Council of 12 July 2004 on the establishment of the European Defence Agency; OJ L 245, 17.07.2004, p. 17–27.

²⁸ *The Common Foreign and Security Policy, Council of the European Union General Secretariat Brochure*, Luxembourg 2002, p. 13, 14.

²⁹ For more information on WEU see: <http://www.weu.int/> (last visited 24.03.10). See also: K. Miszczak, *op.cit.*, p. 194, 195, 197.

³⁰ See: R. Rummel, J. Wiedemann, *op.cit.*, p. 56. For more on the COREPER and the Committee, see: *The Common Foreign...*, *op.cit.*, p. 11.

³¹ There are eleven Representatives at the moment. They are appointed by the Council on the recommendation of the HR. *EU Council Secretariat Fact Sheet*, December 2009 at <http://www.consilium.europa.eu/uedocs/cmsUpload/091203%20EUSR%20FACTSHEET%20December%202009.pdf> (last visited 23.03.10).

³² For a more detailed description of the competences of the High Representative under the old EU Treaty, see: K. Miszczak, *op.cit.*, p. 204.

³³ See also: B. Crowe, *op.cit.*, p. 2, 3.

responsibilities, and completing them in accordance with his own concepts was a nearly impossible task. Certainly the function was not suitably adapted to the day-to-day management for which it had been designed. Thus, over time it became apparent that the system of external representation under the old EU Treaty was not sufficient to shape the Union's foreign policy in an effective manner.³⁴ As the institutional faults of the system were being pointed out by more and more authors and by the EC/EU officials themselves,³⁵ the need for reform became apparent. These changes could be introduced only by way of amending the old Treaties or drafting new ones. The latter method was chosen. The first step was the IGC of 2004 and the drafting of the Constitution for Europe.

2. The new idea for a High Representative in the Constitution for Europe

As the preceding section has made clear, the institutional structure for conducting external affairs in the old Treaties was in significant need of improvement. When the idea of a new treaty began to take form there were many voices insisting on bringing about improvements in the function of the HR. The old system was described as '*inherently unstable*' and in real need of change.³⁶ Therefore, right from the first days of the work of the Constitutional Convention external affairs were given a lot of attention.³⁷ Everybody agreed on the necessity of reforms, but there were many different views on how to achieve the proper functioning of the Union's CFSP without upsetting the already delicate institutional balance.³⁸ As was to be expected, the views of the Member States' Representatives in the Convention were divided along pillar lines. Peter Hain, the British representative, agreed on the need to restructure the external affairs institutions, but was in favour of a more in-

³⁴ See also: M. Niedźwiedź, op.cit., p. 304.

³⁵ K. Lenaerts, P. van Nuffel, op.cit., Chapter 19; D. Gerard, K. Lenaerts, op.cit., p. 300; N. Winn, C. Lord op.cit., p. 167–179; R. Rummel, J. Wiedemann, op.cit., p. 62; Y. Devuyst, *The European Union...*, op.cit., p. 135, 136; Commission of the European Communities, *European Governance – a White Paper*, COM (2001) 428 final, Bruxelles 2001, p. 2, 27.

³⁶ P. Norman, *The Accidental Constitution. The Making of Europe's Constitutional Treaty*, Bruxelles 2005, p. 88–94.

³⁷ See generally: A. Jasińska, *Osobowość międzynarodowoprawna Unii Europejskiej – prace Konwentu a najnowsza praktyka stosowania art. 24 i art. 38 Traktatu o Unii Europejskiej (International Personality of the European Union – the Work of the Convention and the Recent Use of Article 24 and 38 of the Treaty on the European Union)* in: *Unia Europejska w dobie reform (European Union in the Time of Reforms)*, ed. C. Mik, Toruń 2004, p. 90, 91.

³⁸ See: M. Niedźwiedź, op.cit., p. 311, 312.

tergovernmental approach focused on the role of the Council, while Joschka Fischer of Germany proposed a more integrationist approach making use of the first pillar community method.³⁹ Many other representatives were still hesitating, and although the proposition for an EU Foreign Affairs Minister appeared, the idea was labelled as far from perfect and in need of more deliberation.⁴⁰ It should be noted that in January 2003 the French and German governments put together a joint proposal, including many institutional changes, which also featured the introduction of the EU Foreign Affairs Minister (hereinafter also ‘Minister’).⁴¹

The final Treaty text that was adopted in Brussels in 2004 incorporated the Franco-German proposal for a Foreign Affairs Minister to take the place of the HR, but with many changes. First and foremost, the Minister was no longer a one pillar function focused on the CFSP. He was to be a totally new kind of a European official, performing what was coined a ‘double-hatted’ role and was firmly rooted in both the Commission and the Council.⁴² Although at the same time the Constitution brought about a partial dissolution of the troublesome pillar structure, which could suggest that the new specific position was not so unique after all, a deeper reading of its text demonstrates that most of the intergovernmental methods of the CFSP were still present in the Constitution.⁴³ This meant that introducing a new function based on both the community and the intergovernmental methods, so opposed to each other, was indeed a gamble.

Unfortunately, all of the above ideas were put on hold when the Constitutional referendums in France and the Netherlands demonstrated the peoples’ negative reaction to the Constitution and blocked its ratification. This could not, however, entirely stop the reform movement and soon the work on a new treaty began. This treaty – the Treaty of Lisbon – is now a reality and is the governing legal instrument of a Union of over 500 million people. The question remains however, what changes has the new amending Treaty brought in the case of the HR, when compared to the previously proposed Constitution? When we read the provisions of the TL in general and those concerning the HR in particular, a great similarity with the provisions of the

³⁹ P. Norman, *op.cit.*, p. 93.

⁴⁰ *Ibidem*, p. 115.

⁴¹ *Ibidem*, p. 143–145.

⁴² See also: J. Wouters, *The Union Minister for Foreign Affairs: Europe’s Single Voice or Trojan Horse?* in: *The European Union, An ongoing process of integration: Liber Amicorum Alfred E. Kellermann*, eds. S. Blockmans, J. Jans, F.A. Nelissen, and J.W. Zwaan, Den Haag 2004, p. 77–86.

⁴³ This also applies to the Treaty of Lisbon. See: G. de Búrca, *The EU Constitution: in Search of Europe’s International Identity*, Groningen 2003, p. 11, and the other relevant sources cited at 3. For a full text of the Constitution see: OJ C 310, 16.12.2004, p. 1–474.

proposed Constitution is easily noticeable. Therefore, a comparison of the TL with the Constitution is necessary to ascertain what has been added by the IGC of 2007.

What is striking is that the Mandate of the 2007 IGC,⁴⁴ which constituted the basis for the changes made, consists of less than 20 pages. This is very small if we take into account the fact, that the Mandate is very detailed and that the TL itself consists of over 350 pages (with Protocols and Declarations). But, if we look closer at the provisions of the TL the reason for the discrepancy becomes obvious. Many articles of the TL that amended the old Treaties were taken word for word from the Constitution. Still, some minor changes are noticeable, like the change of the name of the function from 'Union Minister for Foreign Affairs' to 'High Representative of the Union for Foreign Affairs and Security Policy'. This change in the nomenclature of the HR post has a political rationale and was introduced mainly because of British opposition to the term 'Minister' and because of the wishes of the Member States to erase all references to state symbols in the amended Treaties.⁴⁵ Another change is the addition of two Declarations (No. 13 and 14) concerning the HR. As C. Kaddous writes, these two Declarations are restrictive. They demonstrate the will of the Member States to keep the inter-governmental nature of EU foreign policy intact,⁴⁶ which should influence the direction in which the policy's institutional co-operation will be shaped.⁴⁷ After considering the above changes let us turn to the provisions of the TL.

Following a close and careful analysis of the provisions concerning the HR of both the TL and the Constitution, one conclusion stands out. The provisions are almost identical. Out of the 41 articles of the TL that mention the HR or are of consequence to her function, as many as 37 are identical word for word with the provisions of the proposed Constitution, if we disregard changes in the names of the institutions and other bodies and necessary grammatical adjustments to the text. The differences between the TL and the proposed Constitution in the other four articles⁴⁸ are a consequence of the systemic changes

⁴⁴ For the text of the IGC Mandate see: <http://register.consilium.europa.eu/pdf/en/07/st11/st11218.en07.pdf> (last visited 23.03.10).

⁴⁵ See also: P. Craig, *The Treaty of Lisbon, Process, Architecture...*, op.cit., p. 156; C. Kaddous, *Role and position of the High Representative of the Union for Foreign Affairs and Security Policy under the Lisbon Treaty*, in: *The Lisbon Treaty. EU Constitutionalism without a Constitutional Treaty?*, eds. S. Griller, J. Ziller, Wien 2008, p. 206; J. Wouters, D. Coppens, B. de Meester, *The European Union's External Relations after the Lisbon Treaty*, in: *The Lisbon Treaty. EU Constitutionalism without a Constitutional Treaty?*, eds. S. Griller, J. Ziller, Wien 2008, p. 150.

⁴⁶ See: C. Kaddous, *Role and position of the High Representative...*, op.cit., p. 206, 207.

⁴⁷ See: J. Wouters, D. Coppens, B. de Meester, op.cit., p. 155. More on the power struggle in post Lisbon Union representation is in part 3.3.

⁴⁸ Article 39 of the TEU, and Articles 205, 238 and 354 of the TFEU.

made in the TL⁴⁹ or of changes included in the Mandate,⁵⁰ but even these articles closely resemble specific provisions of the Constitution.⁵¹ This means that a literal interpretation of the provisions of the TL and the Constitution leads in practice to the same results. What's more, there is only one article on the HR in the Constitution that is not present in the TL – Article IV-439 containing transitional provisions. Therefore, the content and wording of the TL's and Constitution's provisions on the HR is virtually the same. However, we must also consider other methods of interpretation in order to conclude that the meaning of the provisions will indeed be identical. If we consider systemic interpretation, we have to take into account the new placement of the articles on the HR in the structure of the Treaties. That structure is a synergy between the structure of the old Treaties and the structure of the Constitution. For example, nearly all articles on the CFSP are included in the TEU, but other provisions (on the institutions for example) are placed similarly as in the construction adopted in the Constitution.⁵² All in all, even though the structure of the TL resembles a scrambled jigsaw puzzle,⁵³ a truly significant change in the structure of the Treaties is not noticeable as far as the articles on the HR are concerned. The same can be said about the function of those articles. The competences of the institutions, agencies and bodies of the Union are also heavily based on the Constitution, thus a close functional resemblance with the Constitution exists.

All in all, nothing in the wording, placement or function of the articles of the TL on the HR supports a claim that they should be read any differently than their constitutional predecessors. The sources available on the TL point to the same conclusion.⁵⁴ For this reason the analysis provided for in this article

⁴⁹ Meaning its division into two Treaties, instead of one text as in the Constitution.

⁵⁰ See: points 13 and 15 of the Mandate.

⁵¹ Article 39 of the TEU resembles Article I-51 of the Constitution; Article 238 resembles Articles I-25 paragraph 2 and I-44 paragraph 3 of the Constitution; and Article 354 of the TFEU resembles Article I-59 of the Constitution.

⁵² If we consider the order of the Treaties featured in the TL. The TEU would then correspond to the 'beginning' of the Constitution and the TFEU to the 'end'.

⁵³ Some parts of the old Treaty on the EU are fragmented throughout the amended Treaties, like competence provisions.

⁵⁴ See: Robert Schuman Foundation Factsheet at <http://www.robert-schuman.eu/doc/divers/lisbonne/en/fiche10.pdf> (last visited 24.03.10); House of Commons European Scrutiny Committee on the European Union Intergovernmental Conference. Thirty-fifth Report of Session 2006–07, p. 25–46; *The Lisbon Treaty and the European Constitution: a side-by-side comparison*, Open Europe Research Paper available at <http://www.openeurope.org.uk/research/comparative.pdf> (last visited 24.03.10); P. Craig, *The Treaty of Lisbon, Process, Architecture...*, op.cit., p. 139, 142, 143, 156; C. Kaddous, *External Action under the Lisbon Treaty in: Ceci N'est Pas Une Constitution – Constitutionalisation Without a Constitution?*, 7th International ECLN-Colloquium, Sofia 17–19 April 2008, eds. I. Pernice, E. Tanchev, Baden-Baden 2008, p. 179; A. Łabędzka, A. Łazowski, *Wprowadzenie do Traktatu z Lizbony (Introduction to the Lisbon Treaty)*, Warszawa 2010, p. 13, 14; J. Wouters, D. Coppens, B. de Meester, op.cit., p. 150.

of the provisions concerning the HR as set out by the Constitution and the TL is based solely on the amended Treaties to avoid repetition and provide commentary on the most recent legal acts.

3. The interpretation of the provisions of the Treaty of Lisbon on the High Representative of the Union for Foreign Affairs and Security Policy

After describing the position and competences of the HR in the old Treaties as well as the process which led to the introduction of new institutional solutions involving the post, we shall now turn to the provisions of the Treaty of Lisbon itself in order to highlight and discuss the changes and the problems which may accompany them.

The Treaty of Lisbon is a consequence of the failure of the Constitution. The negative referenda in France and the Netherlands demonstrated that the rapid progress of the Union is not always welcome in Europe. After that, a compromise was necessary. The Union needed institutional reform, but one that would calm the fears of those who envisioned the birth of a federation and decline of European national differences in the evolution of the Union. The Treaty of Lisbon achieves just that. It eliminated all the symbolic articles and brought back the usual amendment method. In doing so it has aligned itself with the political will of the European states to keep the Union at its current level of integration. Legally however, the TL implements many of the changes featured in the Constitution. Although the scope, nature and substance of these changes can be criticised from different angles, the fact remains that the much-needed institutional reform of the Union has taken place.

This appears to be the essence of the compromise that is the basis of the TL. From a legal standpoint the Treaty of Lisbon amends the old Treaties and as of 1 December 2009 they are called the Treaty on the European Union ('TEU') and the Treaty on the Functioning of the European Union ('TFEU'). This does not mean that the Treaty of Lisbon is divided into two legal acts. Quite the contrary, just like the other amending Treaties⁵⁵ the Treaty of Lisbon is, from a purely legal point of view, a single legal act. Thus, when it is mentioned that it consists of two Treaties, it only means that its amendments, together with the old texts of the Treaties, form two legal acts. Hence from a practical standpoint the TL consists of two parts: one that amended the old Treaty on the European Union and one that amended the EC Treaty.⁵⁶ As is

⁵⁵ The Treaty of Amsterdam or the Treaty of Nice, for example.

⁵⁶ See: Y.Devuyst, *The European Union's institutional balance after the Treaty of Lisbon: Community method and democratic deficit reassessed*, "Georgetown Journal of International Law" Vol. 39/2008, p. 261, 262.

apparent from the above statements, the construction of the TL differs from that proposed in the Constitution. First, the Treaty of Lisbon must be read in conjunction with the texts of the old Treaties. It is also important to note that the new Treaties, as amended by the TL, will have equal legal status⁵⁷ and therefore must be interpreted together as one legal text imbedded in two legal acts. This makes it difficult to bring out the true meaning of the TL's articles. Even with the consolidated version of the Treaties available, only a handful of lawyers interested in European law will be conscious of its contents and this hardly supports a wide understanding and recognition of the changes.⁵⁸ It may be a good thing politically, but from a social point of view this is clearly a drawback. Second, several important articles that were present in the text of the Constitution were eliminated from the text of the TL. A good example is the article on the primacy of Union law. While its contents only expressed what was obvious in European law for many years, it made the law much less obscure and more citizen friendly. In the TL that article has been transformed into a Declaration,⁵⁹ which is not only hard to notice but also not very informative. In simple terms, the reservations expressed mean that with the TL we have lost the chance to make European law a little more understandable for laymen.⁶⁰

Now let us turn to the position and the competences of the High Representative, as provided for by the provisions of the TL.

3.1. The competences of the High Representative under the Treaty of Lisbon

The new competences of the HR are as manifold as her structural links to different institutions and bodies. The HR is, first and foremost, the most important figure in the implementation and co-ordination of, not only the CFSP, but also all other external policies of the Union. The HR conducts, puts into effect and safeguards the principles of the CFSP, and also contributes to its evolution through her proposals.⁶¹ She co-ordinates the consistency of

⁵⁷ Article 1 paragraph 2 of the TFEU. In the citations I shall refer to the numbers of the articles of the Treaties, as amended by the Treaty of Lisbon. For the text of the TL see: OJ C 115, 09.05.2008, p. 1–388.

⁵⁸ See also: P. Craig, *The Treaty of Lisbon, Process, Architecture...*, op.cit., p. 140, 141.

⁵⁹ Declaration 17 attached to the Treaty of Lisbon.

⁶⁰ The structure of the Constitution has also been criticised. See: J. Barcz, *Wspólna Polityka Zagraniczna i Bezpieczeństwa w obradach Konwentu Unii Europejskiej (Common Foreign and Security Policy in Workings of the Convention of the EU)* in: *Przyszły Traktat Konstytucyjny. Zagadnienia prawno – polityczne, instytucjonalne i proces decyzyjny w UE (The Future Constitutional Treaty. Legal, Political and Institutional Aspects and the Decision – Making Process in the EU)*, ed. J. Barcz, Warszawa 2004, p. 227.

⁶¹ Article 18 paragraph 2, Article 24 paragraphs 1 and 3 of the TEU.

the CFSP with other policies of the Union and the Union's external action in general.⁶² She also co-ordinates the Union's representation in international fora, the implementation of the Union's common positions along with the Ministers for Foreign Affairs of the member states, as well as deals with all matters of crisis management, and the co-ordination of the Common Security and Defence Policy ('CSDP') and its structured co-operation.⁶³

Furthermore, the HR is supposed to be the central figure representing the Union, along with the President of the European Council.⁶⁴ This includes not only general representation in CFSP matters, but also the right to conduct political dialogue with third parties on behalf of the Union, the right to present the Union's position before the United Nations Security Council, and the right to represent the Commission as the Commissioner for External Affairs.⁶⁵ In matters of implementation of external relations policies, the HR is responsible for the implementation of the decisions of the European Council and the Council, the implementation of the Treaty articles on the international relations as well as the solidarity clause.⁶⁶ She also consults and keeps the European Parliament informed of all CFSP and CSDP matters.⁶⁷ Moreover, the HR has many possibilities of making initiatives, giving opinions and consultations. The HR can submit joint proposals, together with the Commission, to the Council⁶⁸ under Article 22 paragraph 2 of the TEU, propose restrictive economic measures under Article 215 paragraph 1 of the TFEU, is able to refer questions concerning the CFSP to the Council under Article 30 paragraph 1 of the TEU, can make proposals connected to urgent financing of the Union's CFSP actions under Article 41 paragraph 3 of the TEU, and

⁶² Article 18 paragraph 4, Article 24 paragraph 3 of the TEU.

⁶³ Article 32 paragraph 2, Article 34 paragraph 1, Article 38 paragraph 2, Article 42 paragraph 4, Article 43 paragraph 2, Article 44 paragraph 1 and Article 46 paragraph 1–3 of the TEU. See also: M. Jeżewski, *Wspólna polityka obronna Unii Europejskiej w pracach Konwentu* (*The Common Defence Policy of the European Union in the Workings of the Convention*) in: *Unia Europejska w dobie reform* (*European Union in the Time of Reforms*), ed. C. Mik, Toruń 2004, p. 344, 345; K. Miszczak, op.cit., p. 157, 158; M.Á. Verdugo, *European Security and Defence Policy within the framework of the European Union's current reform*, "Revista Jurídica de la Universidad de Puerto Rico." Vol. 73/2004, p. 1137–1149.

⁶⁴ For more on this matter, see part 3.3 of this article.

⁶⁵ Article 27 paragraph 2 and Article 19 paragraph 2 of the TEU.

⁶⁶ Article 27 paragraph 1 of the TEU, Article 220 paragraph 2 and Article 222 paragraph 3 of the TFEU.

⁶⁷ Article 36 of the TEU. See also: N. Lalone, *Accountability in the EU's Common Foreign and Security Policy: Lessons from the Common Commercial Policy* in: *The role of Parliaments in European foreign policy*, eds E. Barbé, A. Herranz, Barcelona 2005, p. 13.

⁶⁸ Such practice has already been used. See: The Summary Note on a Joint Report available at [http://www.reliefweb.int/rw/RWFiles2007.nsf/FilesByRWDocUnidFilename/EK0I-6ZS37F-Full_Report.pdf/\\$File/Full_Report.pdf](http://www.reliefweb.int/rw/RWFiles2007.nsf/FilesByRWDocUnidFilename/EK0I-6ZS37F-Full_Report.pdf/$File/Full_Report.pdf) (last visited 24.03.10).

make initiatives under the CSDP in accordance with Article 42 paragraph 4 of the TEU. She should also work in close co-operation with the Political and Security Committee,⁶⁹ which is chaired by one of the her representatives.⁷⁰ The HR is also concerned with making recommendations to the Council connected with negotiation of international agreements on the CFSP, and is able to propose, along with the Commission, their suspension in certain cases. The HR plays a significant role in matters of enhanced cooperation.⁷¹ She gives opinions on the compatibility of enhanced cooperation with the CFSP, must be informed by every Member State wishing to participate in enhanced cooperation, is consulted on the fulfilment of enhanced cooperation criteria, and can propose the adoption of transitional provisions within the framework of enhanced cooperation.⁷² Lastly, the HR is also mentioned in the Protocols and Declarations attached to the TL, but the provisions provided for in them are mostly of a transitional nature.⁷³

The new competences outlined above do suffer from minor inconsistencies, for example in Article 334 of the TFEU. This article belongs in the Chapter on Enhanced Cooperation. As was detailed above, the HR has many competences linked to enhanced cooperation. Still, despite all those competences, the HR is not mentioned in Article 334 of the TFEU, which states that *‘the Council and the Commission shall ensure the consistency of activities undertaken in the context of enhanced cooperation and the consistency of such activities with the policies of the Union, and shall cooperate to that end’*. The failure to mention the HR in this article is surprising if we take into account her other competences, especially those that make her responsible for maintaining the consistency of the Union’s external action and the consistency of the Union’s external action with its other policies.⁷⁴ It is true that in maintaining the consistency of the EU’s external action with its other policies, the HR only assists the Council and the Commission, but considering her competences linked to the matters of enhanced cooperation there was surely a need to include her in Article 334 of the TFEU. Although this should not cause

⁶⁹ In matters of the management of the Common Security and Defence Policy tasks. See Article 43 paragraph 2 of the TEU.

⁷⁰ Article 2 of Declaration No. 9 attached to the Treaty of Lisbon on the Draft decision of the European Council on the exercise of the Presidency of the Council.

⁷¹ Article 218 paragraphs 3 and 9 and Article 328 paragraph 2, Article 329 paragraph. 2, Article 331 paragraph 2 of the TFEU.

⁷² Articles 329 paragraph 2 and 331 paragraph 2 of the TFEU.

⁷³ With the exception of Declarations 13 and 14, which were mentioned above. See also: Article 5 of Protocol 36 on Transitional Provisions and Declarations No. 6, 8 and 12, attached to the TL.

⁷⁴ Article 18 paragraph 4 and Article 21 paragraph 3 of the TEU.

any significant problems in practice, it ought to be corrected for the sake of coherence and clarity.

The above paragraphs cover the most important articles relating to the competences of the High Representative.⁷⁵ These new competences give the HR a stronger standing than the one envisaged by the old Treaty text, especially by making the HR the only person capable of overseeing the integrity of Union external policies. By acting in all dimensions of external policy the HR can now more effectively give it shape, although not without the co-operation of the other institutions and bodies involved. It is not surprising that with so many actors involved the articles mentioned above are sometimes unclear and might pose interpretational and legal problems now that the TL has entered into force.

3.2. Issues of institutional balance

According to Article 18 paragraph 1 of the TEU, the HR is appointed by the European Council via qualified majority vote (QMV), with the consent of the President of the Commission. She presides over the Foreign Affairs Council, which shall discuss the Union's external action on the basis of the guidelines adopted by the European Council,⁷⁶ and is also one of the Vice-Presidents of the Commission, acting as the Commissioner for External Relations.⁷⁷ The position of the HR set out in the above article also provides for two regimes of work for her to perform. On one hand, when acting in her Commission capacity as Commissioner of External Relations, the HR is subject to the internal workings of the Commission and the community method in general, together with all its nuances.⁷⁸ On the other hand, in matters of foreign policy, which are still subject to the intergovernmental method, the HR serves as the co-ordinator of the Council's work,⁷⁹ and that means also that she has to co-operate with the European Council.⁸⁰ It must be noted however, that in reality the HR is much more dependent on the European Council and her work in the Commission is limited by her responsibilities as

⁷⁵ See generally: C. Kaddous, *Role and position of the High Representative...*, op.cit., p. 207–210; M. Niedźwiedź, op.cit., p. 317, 318; S. Rynkiewicz, *Stosunki zewnętrzne Unii Europejskiej w pracach Konwentu Europejskiego – wybrane aspekty* (*External Relations of the European Union in the Workings of the Convention – chosen aspects*) in: *Unia Europejska w dobie reform* (*European Union in the Time of Reforms*), ed. C. Mik, Toruń 2004, p. 326, 327.

⁷⁶ In whose work the HR also takes part. See: Article 15 paragraph 2 and Article 18 paragraph 3 in fine TEU.

⁷⁷ Article 18 paragraph 4 of the TEU.

⁷⁸ Article 18 paragraph 4 of the TEU. This applies also to the collegiality principle that operates in the Commission.

⁷⁹ Article 26 paragraph 3 of the TEU.

⁸⁰ Article 15 paragraph 2 of the TEU.

President of the Foreign Affairs Council.⁸¹ Thus, the new post of HR still carries the dualism of the pillar structure with it. The major difference and novelty here is that, for the first time, this dualism is incorporated into a single function, which means that inter-pillar negotiations may be simplified via the HR, as someone firmly rooted in both pillars. The question remains whether this dualism will inhibit the function itself.

As regards the accountability of the HR, the construction of the Lisbon Articles shows much forethought, although some fear that the ‘double-hatted’ nature of the High Representative’s position might make her superiors unsure of where her loyalties lie.⁸² First, the HR is accountable to the European Council, which both appoints him/her and can end his/her term of office.⁸³ Second, the President of the Commission can force the HR to resign, but the phrase ‘*in accordance with the procedure set out in Article 18(1)*’⁸⁴ suggests that the President would have to secure the support of the European Council first. Third, the HR would be forced to resign, but only from her position as the Vice-President of the Commission, if the European Parliament were to vote on a censure motion on the Commission.⁸⁵ Fourth, the HR can be dismissed by the Court of Justice, but only from the Commission if the Court decides that he/she no longer fulfils the conditions necessary for Commissioner or is guilty of serious misconduct.⁸⁶ Article 246 of the TFEU provides that in case of compulsory retirement or death, the HR will be replaced in accordance with the appointment procedure. From these articles it can be concluded that the High Representative is accountable primarily to the European Council, but the President of the Commission also holds some sway over her position. Such a structure, where both the European Council and the Commission can influence the HR, seems appropriate for this ‘double-hatted’ function. However, a question of a more political nature still remains. What would happen if one of the Union institutions (the

⁸¹ See: Y. Devuyt, *The European Union’s institutional balance...*, op.cit., p. 295.

⁸² See: G. de Búrca, op.cit., p. 12; B. Crowe, op.cit., p. 9; S. Dudzik, *System instytucjonalny Unii Europejskiej w Konstytucji dla Europy. Zarys problematyki (Institutional System of the European Union in the Constitution for Europe. Outline of Issues)* in: *Konstytucja dla Europy. Przyszły fundament Unii Europejskiej (The Constitution for Europe. The Future Basis of the European Union)*, ed. S. Dudzik, Zakamycze 2005, p. 240; M.G. Puder, *Constitutionalising government in the European Union: Europe’s new institutional quartet under the Treaty establishing a Constitution for Europe*, “Columbia Journal of European Law” Vol. 11/2004, p. 109, 110; J. Wouters, op.cit., p. 6, 7; J. Wouters, D. Coppens, B. de Meester, op.cit., p. 155.

⁸³ Article 18 paragraph. 1 of the TEU.

⁸⁴ Article 17 paragraph 6 of the TEU in fine.

⁸⁵ Article 17 paragraph 8 of the TEU.

⁸⁶ Article 247 of the TFEU. See also: J. Wouters, D. Coppens, B. de Meester, op.cit., p. 151, 152.

Commission or the Council) lost confidence in the High Representative? In such a situation, from the purely legal point of view one cannot reach a definite conclusion. The procedure set out in Article 18 paragraph 1 suggests that neither the European Council (which of course would support the Council of Ministers), nor the Commission can dismiss the HR on its own. Only both institutions working together could accomplish this. This is a reasonable solution for the 'double-hatted' HR, but it could lead to a standstill if the Commission and the Council could not reach an agreement. This could be especially troublesome if one of the institutions lost its confidence in the HR. It would seem that the solution to such a standoff would be based on negotiations rather than legal arguments. If both institutions would remain adamant in the above circumstances, it could gravely prejudice the effectiveness of the HR's work in one of the institutions. His/her position requires sound co-operation and full trust in both the Commission and the Council.⁸⁷ This can only be achieved if both institutions agree not only on the right person for the function, but also on the need to dismiss the HR in case the Commission or the Council can no longer accept him/her. Negotiations and friendly dialogue are more suited to help the institutions reach a consensus in such a case.⁸⁸ It is open to debate whether basing legal solutions of institutional balance upon negotiations and friendly dialogue is a reliable way to frame such provisions. Still, the above solutions are a direct consequence of the dual role of the HR. Choosing a different solution would prejudice the trust the HR needs within the institutions to conduct her work. The solution chosen by the drafters is thus largely a necessity and a consequence of the entire concept. Luckily, such a solution is more acceptable in the European Union, which by reason of its structure and divided executive power has always relied on the art of compromise.⁸⁹

Next, the lack of provisions specifying the term of office of the HR⁹⁰ and the impact of the post on the institutional balance of the EU needs to be considered.⁹¹ These two issues are connected, inasmuch as the length of term of office is of paramount importance for establishing a strong institutional standing. The term of office of the HR is not specified in any of the provisions of the TL. In my view this is surely not an omission, but a solution chosen with careful consideration. It enables the European Council to keep the same person as HR for more than one Commission term in order to provide greater

⁸⁷ See: B. Crowe, *op.cit.*, p. 9; J. Wouters, D. Coppens, B. de Meester, *op.cit.*, p. 155.

⁸⁸ It must be noted that Union officials and Council ministers have much experience in handling institutional negotiations, thus such a standstill is, in my opinion, unlikely.

⁸⁹ See: P. Craig, *The Treaty of Lisbon, Process, Architecture...*, *op.cit.*, p. 152, 153.

⁹⁰ See: J. Barcz, *op.cit.*, p. 240.

⁹¹ See generally: B. de Witte, *op.cit.*, p. 103.

consistency and longevity to EU external policies.⁹² Yet, this can only be achieved if each new President of the Commission and the European Parliament consent to it, which creates the proper institutional balance.⁹³ Such a solution in practice also secures the crucial role of External Affairs Commissioner (i.e. HR) for the bigger Member States for many Commission terms, without subjecting her to the appointment procedure featured in Article 17 of the TEU.⁹⁴ For the smaller Member States this is a downside, but for the successful execution of EU foreign policy it is a necessary solution, as it would be impossible to conduct foreign policy without the support of the larger Member States.⁹⁵ As regards the fear that the HR will destabilise the institutional balance, it remains to be seen if the HR will emerge as a powerful enough official to achieve that, especially without the possibility to vote in the European Council or the Council.⁹⁶ In my opinion destabilisation is unlikely in the present circumstances, as the HR is an important, but not the sole, figure conducting external relations. Smooth execution will therefore depend partially on good co-operation and this has been facilitated by introducing a function which is rooted in all endeavours connected with external policies. A lot will depend on the character of Lady Ashton,⁹⁷ her political ability, and the way in which the European External Action Service ('EEAS') will be shaped.

Furthermore, at the stage of drafting the Constitution many concerns were raised about the lack of treaty provisions that would give the HR greater democratic legitimisation and more accountability, especially when she holds so many important competences.⁹⁸ While the general concern about the lack of democratic legitimacy in the European Union certainly remains valid, the introduction of the Treaty of Lisbon has made positive inroads. The Parliament has gained stronger powers with respect to the Union budget and the Common Commercial Policy, and over the HR as far as her Commission role is concerned.⁹⁹ In practice granting the HR a 'double-hatted' position has caused

⁹² Against: C. Kaddous, *Role and position of the High Representative...*, op.cit., p. 208.

⁹³ Article 17 paragraph 7 of the TEU. The consent of the President of the Commission is necessary only politically.

⁹⁴ J. Barcz, op.cit., p. 230.

⁹⁵ B. Crowe, op.cit., p. 14–18.

⁹⁶ See: M. Cremona, *The Draft Constitutional Treaty: External relations and external action*, "Common Market Law Review" Vol. 40/2003, p. 1355; J. Wouters, D. Coppens, B. de Meester, op.cit., p. 152.

⁹⁷ Lady Catherine Ashton is the first High Representative under the Lisbon Treaty. P. Koutrakos, *New links in the Union's institutional chain*, "European Law Review" Vol. 35/2010, p. 1, 2.

⁹⁸ See: A. Arnall, *The Member States of the European Union and Giscard's blueprint for its future*, "Fordham International Law Journal" Vol. 27/2004, p. 525.

⁹⁹ Article 17 paragraph 7 of the TEU. See also: C. Kaddous, *External Action...*, op.cit., p. 185; C. Kaddous, *Role and position of the High Representative...*, op.cit., p. 213, 214.

the European Parliament to be indirectly involved in the process of her nomination. As the HR is a member of the Commission, the institutions that appoint the new HR must always make sure that the person chosen will be able to secure the acceptance of the Parliament. Therefore, while the HR has little direct democratic legitimisation, indirectly through the consent of the Parliament this legitimisation is much stronger. These changes are certainly a step in the right direction and possibly the only step imaginable given the current construction of the Treaties. Any other attempt at giving the HR direct democratic legitimisation would require the drafters to link the procedure of appointment of the HR directly to the European Parliament. Such a solution surely cannot be accepted without introducing general reforms to the institutional system of the EU and the CFSP.¹⁰⁰

Lastly, it should be mentioned that, contrary to the provisions of the old Treaty on the European Union,¹⁰¹ in the amended Treaty the Commission is unable to refer questions or submit proposals concerning the CFSP on its own to the Council. Under the Treaty of Lisbon, the Commission is only able to do so using the office of the HR.¹⁰² On the surface this might seem like a step backwards for the CFSP, because even if the Commission is not the central institution of the CFSP it can still drive the policy forward and provide a counterbalance to the Council's domination in this field. In practical terms however it is hard to imagine a proposal of the Commission that would not be accepted by the HR, who is now one of the Commissioners. The principle of collegiality would preclude any such proposal. Thus the new arrangement is a practical correction and a consequence of the way in which the Commission operates.

The introduction of the 'double-hatted' HR is a novelty in the structure of the EU. Never before has such a function existed within the pillar structure. Putting this novelty to good use will require great effort and skilful manoeuvring on part of the person chosen for the post. A successful HR will need to reconcile the diverging interests of the various institutions and decide how to conduct policies within both her Commission and Council capacities, without allowing the other members of these institutions to push through conflicting ideas. She will be in the middle of the institutional power struggle and one might wonder if the competences given to the HR will be

¹⁰⁰ At the present stage the Parliament is almost entirely excluded from the decision-making process of the CFSP. See also: P. Craig, *The role of the European Parliament under the Lisbon Treaty* in: *The Lisbon Treaty. EU Constitutionalism without a Constitutional Treaty?*, eds. S. Griller, J. Ziller, Wien 2008, p. 109–135; P. Craig, *The Treaty of Lisbon, Process, Architecture...*, op.cit., p. 149.

¹⁰¹ Article 22 paragraph 1 of the old EU Treaty.

¹⁰² Article 30 paragraph 1 of the TEU.

enough to keep her afloat. Marginalisation of the function in these circumstances is a possible scenario. Also, there will be no clear-cut way for the HR to execute her responsibilities. They will require subtle manoeuvring and negotiations. On the other hand, the new HR will have the unique possibility to successfully cross the pillar divide. She will be the best positioned person to negotiate with all the institutional actors as one of their own. The HR will also be the only true co-ordinator of external policies and the sole person able to understand and gather all aspects of these policies together. Through this the HR may be able to shape these policies, although only by subtle political manoeuvring and not through assertions of direct power, for which the function has little competence. Thus, this will probably be the most difficult and delicate function within the institutional structure; capable of achieving either great success or nothing at all. The choice of Lady Ashton probably signifies that the Member States are not yet ready for a strong HR, but the systemic solutions will still be there to be exploited even after she has completed her work.

3.3. The standing of the High Representative in external relations of the EU under the Treaty of Lisbon

From the articles of the TL it becomes clear that the Union High Representative function is aimed at creating a new person in charge of co-ordinating the work of the Commission and the Council – the two major institutions responsible for the Union’s external affairs. The HR is also to serve as the person representing the Union.¹⁰³ To this effect the High Representative fulfils her function with the aid of the European External Action Service,¹⁰⁴ is the head of the Special Representatives of the Union,¹⁰⁵ and the chief of the Union’s delegations in third countries and at international organisations.¹⁰⁶ However, these responsibilities for co-ordination and representation in external relations, together with the Articles establishing them, leave room for doubt as to how the HR will relate to other officials tasked with very similar responsibilities.

¹⁰³ A. Jasińska, *op.cit.*, p. 97; S. Rynkiewicz, *op.cit.*, p. 325.

¹⁰⁴ Article 27 paragraph 3 of the TEU. For more information on the EEAS see also: B. Crowe, *op.cit.*, p. 6–8; J. Wouters, D. Coppens, B. de Meester, *op.cit.*, p. 156–161; T. Vogel, *Ashton presents proposal for EU foreign service*, “European Voice” available at <http://www.european-voice.com/article/2010/03/ashton-presents-proposal-for-eu-foreign-service/67534.aspx> (last visited 28.03.10). See also: Proposal for a decision of the Council of 25th March 2010 establishing the organisation and functioning of the European External Action Service available at http://eeas.europa.eu/docs/eeas_draft_decision_250310_en.pdf (last visited 28.03.10).

¹⁰⁵ Article 33 of the TEU and part 1 of this article.

¹⁰⁶ Article 221 paragraph 2 of the TFEU.

Firstly we'll deal with the problem of representation of the Union. Article 15 paragraph 6 of the TEU contains exactly the same wording as Article I-22 paragraph 1 of the Constitution. This article provides that the President of the European Council is to represent the Union externally '*without prejudice to the powers of the High Representative of the Union for Foreign Affairs and Security Policy*'. This is somewhat of an anomaly, because the aim of the changes introduced by the Constitution and the TL was to eliminate the 'Troika' representation problem¹⁰⁷ through the introduction of the Foreign Affairs Minister (now High Representative). Article 15 paragraph 6 of the TL instead gives birth to a new potential competence conflict, and the remaining provisions of the Treaty give no hint as to its resolution. It still is unclear who in fact is to be the major figure in foreign politics, and the words '*without prejudice*' are of little assistance in trying to interpret the new Treaties.

Since the wording of the article does not provide a solution to the problem, we should look for the solution in other articles concerning the President and the HR. As we have already described above, the HR's powers of representation are not solely linked to the CFSP, but also encompass the HR's role within the Commission. On the other hand, Article 15 paragraph 6 of the TEU clearly signifies that the President's powers of representation are limited to the CFSP. Thus it would appear that the problem of a competence conflict may arise only within the CFSP. Even that conflict seems unlikely however, if we look closer at the articles describing the competences of the President of the European Council. These competences are exclusively concerned with the co-ordination and facilitation of the work of the European Council, with extraordinary international situations, and with the ordinary revision procedure provided for in the Treaty of Lisbon.¹⁰⁸ The President has hardly any external competences.¹⁰⁹ His only external competence, besides Article 18 paragraph 6 of the TEU, is enshrined in Article 26 paragraph 1 of the TEU, which deals with extraordinary international developments.

This does not mean that the President's power of representation in CFSP matters can be ignored. Surely in practice the President will defend and represent the influence and political significance of the European Council.¹¹⁰ Thus a high degree of co-operation between the President and the HR will be necessary,¹¹¹ but in legal terms there is little room for a real competence conflict. A proper way of forming an acceptable consensus in this matter would be to let the HR and the President of the European Council represent the Union at

¹⁰⁷ See: part 1 of this article.

¹⁰⁸ Article 16 paragraph 6, Article 26 paragraph 1 and Article 48 paragraph 3 of the TEU.

¹⁰⁹ See: P. Craig, *The Treaty of Lisbon, Process, Architecture...*, op.cit., p. 152.

¹¹⁰ See: B. Crowe, op.cit., p. 5.

¹¹¹ See: C. Kaddous, *External Action...*, op.cit., p. 180; M.A. Verdugo, op.cit., p. 1139.

different levels, as the Treaty suggests. It seems that the President would be the perfect representative in meetings of heads of state, but only after discussing the Union's external action with the HR.¹¹² Any lower level policy meetings should be conducted by the HR, who is the only one capable of reconciling and executing the various EU external policies.

Secondly, some commentators posit that the Treaty of Lisbon provisions will lead to the formation of a new 'Troika' in external relations: the HR, the President of the European Council and the President of the Commission.¹¹³ This might bring about two institutional problems: a conflict of the HR with the Commission President, and a shift of power in the institutional balance of EU external relations. The conflict with the Commission President is in purely legal terms unlikely. Formally the President remains the superior of the HR as far as the inner workings of the College of Commissioners are concerned,¹¹⁴ and thus retains the prerogative to dismiss the HR from the Commission, although not without the consent of the European Council.¹¹⁵ In day-to-day Union politics however the possibility of conflict is greater, especially with a HR that will try to advocate Council politics in external relations. A power struggle between the Council and the Commission in external relations is in fact the main factor in trying to project possible institutional frictions that may occur under the TL, while at the same time constituting the main opportunity for a clever HR. The divide in external relations between these two institutions is not remedied by the new Treaty,¹¹⁶ but it is a divide that is well known in European politics. It is based on a fundamental question of authority: who will rule – the Member States or the supranational Commission? In terms of external affairs, the answer to this question lies mostly in the hands of the HR. With her unique position and manifold competences she will be able to shape Union external policies in favour of the Council or the Commission. Thus, in external relations the power, after Lisbon, can shift either way,¹¹⁷ although a shift towards the strengthening of the Council seems more probable. It is up to the HR to meander this difficult power struggle

¹¹² See also: C. Kaddous, *Role and position of the High Representative...*, op.cit., p. 211; J. Wouters, D. Coppens, B. de Meester, op.cit., p. 153.

¹¹³ See: M.G. Puder, op.cit., p. 107, 108; J. Wouters, D. Coppens, B. de Meester, op.cit., p. 154.

¹¹⁴ The HR is the Vice-President of the Commission. See: part 3.2 of this article.

¹¹⁵ Article 17 paragraph 6 of the TEU and part 3.2 of this article.

¹¹⁶ See: J. Wouters, D. Coppens, B. de Meester, op.cit., p. 155.

¹¹⁷ See also: P. Craig, *European governance: Executive and administrative powers under the new constitutional settlement*, "International Journal of Constitutional Law" Vol. 3/2005, p. 432; A. Dashwood, A. Johnston, *The institutions of the enlarged EU under the regime of the Constitutional Treaty*, "Common Market Law Review" Vol. 41/2004, p. 1503, 1504; Y. Devuyt, *The European Union's institutional balance...*, op.cit., p. 295; J. Wouters, D. Coppens, B. de Meester, op.cit., p. 155, 156.

minefield. This could either prove to be too much for the person exercising the function, or it might provide the necessary leverage that the HR will need in order to become a significant player in the Union's external policies.

Next, let us turn our attention to Article 218 paragraph 3 of the TFEU,¹¹⁸ which reads as follows: *'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'*.

The provisions of this Article are central to the issue of negotiations of any of the Union's international agreements, and also very important for the institutions involved in the Union's external policies. The wording of the article is very obscure and quite unfortunate. Especially the words *'exclusively or principally'* make it very hard to clearly define the division of competences envisaged by the Article. Quite possibly, a recourse to the other articles of the Treaties and to the systemic method of interpretation will be necessary, but a definitive answer to this problem will probably need to be made by the Court of Justice. I believe that in order to classify an agreement *'principally'* to one of the policy fields of the Union, its function and aim must be considered as the determining factors. This method does not alleviate all the doubts that may appear in practice, but in instances such as Article 218 paragraph 3 it would seem that only a case by case interpretation can yield satisfactory results.

From the above we can infer that the High Representative might become one of the central figures in external relations in the years to come, and she has the possibility to strengthen the representation of the Union vis-à-vis third countries. Past quarrels between the Member States on matters of international security have exposed the Union's weakness in foreign policy, and the primary players on the international political scene were more than happy to exploit this weakness.¹¹⁹ In the future this process will surely repeat itself unless the new HR is able to reconcile the positions of the Member States. Her role as negotiator and constant counsellor should form the basis for achieving compromises by the Member States on matters of international security. She should be at the forefront of every action of the EU towards third countries, with as many Member States as possible publicly backing her. This is especially true

¹¹⁸ See: M. Niedźwiedz, op.cit., p. 318, 319; J. Wouters, D. Coppens, B. de Meester, op.cit., p. 181.

¹¹⁹ As was done during the Iraq war by the US.

with regard to the United States, which continues to dominate international politics and has on more than one occasion dictated the Union's foreign policy.¹²⁰ In addition it would be desirable if the HR could also drive the external policies of the Union forward and contribute to their constant evolution.

The main problem is that the structure of external representation of the Union will make it very hard to achieve these results. Unfortunately, the Treaty of Lisbon has bolstered not only the HR, but also other actors involved in external representation. The role of the President of the European Council is the most confusing in this respect. Once again there will be no external unity and no '*phone number*' to Europe. Consistency will require a lot of negotiating and synchronising, especially since the importance of the actors is not laid down according to competences, but rather according to the importance of the institutions they represent. Surely this is a very confusing situation for anyone not well-versed in European politics. The new solutions will probably also lead to strengthening of the role of both the Council and the European Council in external relations. This is not necessarily a good thing, taking into account that the Member States often have divergent opinions and interests in matters of foreign policy. Surely the Commission is better suited to provide unity in this matter. The HR might be able to even out this power shift, but she could also make it worse.

Conclusions

The main thrust of the novelties and changes introduced in 2009, when the TL entered into force, are now clear. But the question remains: how to evaluate the changes? Is the TL a much-needed step forward? Many of these questions can't be answered at this moment. Until we see how the TL operates in practice, it is difficult to make an assessment of its true value. Nonetheless, a few conclusions can be drawn concerning the function of the HR.

The changes made to the function of the HR must be viewed as a step in the right direction. The new structure introduced in the Constitution and reintroduced in the Treaty of Lisbon carries with it many possibilities for positive changes and developments. The HR has the possibility to act as a bridge between the pillars. This is the first such opportunity since the EU was created, and that alone gives it a lot of meaning and a hope that the Union will henceforth strive to bridge the pillar gap¹²¹ and create a more integrated institutional framework. The High Representative also has the possibility to

¹²⁰ B.Crowe, *op.cit.*, p. 18–20.

¹²¹ Although it will probably never disappear completely.

become the single, dominant voice of the Union's external policies. Now that the dualism of pillars has been partially eliminated from this sphere, the HR can make the best of the opportunity and begin the formation of a more common external action, representation and policy.

The only real concern about the new HR is that all of the opportunities are merely possibilities at this point in time. The new legal framework of the function of the HR creates these important options, but does not guarantee that they will be used or will work. A step in the right direction has therefore been taken, but it is only a step, hampered by political compromise that casts doubt on the good will of the Member States in terms of their conviction and commitment to proper solutions. The solutions that were proposed and accepted are legally sound, but they can be subverted in day-to-day practice.

The new HR puts some of the old institutional conflicts to rest (or at least lessens them), but at the same time creates new ones. The HR will have to manage these conflicts on constant basis, not only in cross-pillar relations, but also while conducting her duties in the Council or the Commission. The competences of the HR give a clear view of what she is supposed to accomplish: consistent policy actions and unified representation. But the competences are limited and the HR will be hard pressed to accomplish these aims. Consistent policy action will have to be negotiated with the Member States in the Council, and these negotiations are aligned with the actions undertaken by the President of the European Council while he secures the approval of the heads of states. During these negotiations the interests of the Commission must also be taken into account, and finally in some cases CFSP policies must be consolidated with other ones that previously belonged in the first pillar (like the Common Commercial Policy). The HR has the tools to accomplish all this, but it will not be easy.

In matters of external representation the situation is similar. The HR is supposed to bring unity and has been equipped with competences to that end, but at the same time new posts like the President of the European Council have been introduced. Also, placing the HR in the Commission has strengthened the role of the Commission President in relation to the HR. Therefore, in practice shaping a common representation in this setting will be largely dependent on the people involved. This fault is a common feature in the analysed provisions. The future success of the HR depends too much on delicate negotiations, power struggles and personal choices, and too little on clear and precise legal structures. This provides more flexibility, but less certainty. In these circumstances the ability, willpower and perseverance of the HR will be vital in order for her to establish a proper role within the new framework of the Union. The position of the HR will possibly be the most demanding of all, and considering the enormous workload it might prove too much to handle.