

# **The EEAS' Diplomatic Dreams and the Reality of European and International Law**

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## **Abstract**

The aim of this paper is to confront the diplomatic ambitions of the European External Action Service (EEAS) with the reality of EU and international law. Treaty provisions as well as policy documents and statements of EU officials reveal a development in the direction of a strengthened role for the EU itself as a diplomatic actor. The findings underline a continued tension between the EU's diplomatic ambitions and EU and international law as it stands. In relation to the EU's internal structures, there is no doubt that in the new EU institutional landscape dividing lines remain firmly in place. Yet, the working arrangements do point to 'holistic' thinking implying cooperation and reciprocity. In addition the paper argues that the EU's ambitions sit uncomfortably with traditional state-centred international diplomatic law. Extensive diplomatic activity of the EU depends on the acceptance by the willingness of third states to accept the EU as a diplomatic actor.

*Keywords:* European External Action Service; European Law; International Law; Diplomacy; Diplomatic Law

## **1. Introduction**

The European Union (EU) is not a state. Yet, it is an active participant in the diplomatic network of states that is – primarily – regulated by international diplomatic and consular law. In the report of December 2011 evaluating the first year of the new Diplomatic Service, its foundation is viewed as an historic opportunity to rise above 'internal debates pertaining to institutional and constitutional reform', and instead to focus on 'delivering new substance to the EU's external action' (European External Action Service 2011a) There is certainly no lack of ambition in post-Lisbon EU external relations, prompting one commentator to observe that "if there was an international award for 'enthusiasm', the EU would stand good chances for winning it." (Larik 2011).

These intensified global diplomatic actions of the EU trigger the question to which extent the EU's external ambitions are compatible with their European and international legal framework. Traditionally, diplomatic relations are established between states and the legal framework is strongly state-oriented. The EU is not a state but an international organization,

albeit a very special one. It enjoys international legal personality, which allows it to enter into legal relations with states and other international organizations (Wessel 2000; 2008). At the same time, its external competences are limited by the principle of conferral (Art. 5 TEU), and in many cases the EU is far from exclusively competent and shares its powers with the Member States.

As our starting definition of diplomacy we utilize the Vienna Convention on Diplomatic Relations (VCDR). The Convention does not exhaustively define diplomacy, but it does list in Article 3 that the functions to be carried out by a diplomatic mission are, “*inter alia*” to engage in the following five activities: (a) Representing the sending State in the receiving State; (b) Protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law; (c) Negotiating with the Government of the receiving State; (d) Ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State; and (e) Promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations. Amongst these rather fluid and overlapping activities of diplomacy, we focus on the following issue areas, and investigate any European or international legal obstacles which may impede EU diplomatic ambitions in these areas:

- (a) the legal existence of the EU as a single entity post-Lisbon, and its representation through demarches at multilateral fora where Member States are equally present;
- (b) the conduct of diplomatic relations through visits and missions to third countries and international organizations by the EU’s highest political representatives such as the European Council or Commission Presidents, as well as Commissioners and the HR/VP;
- (c) the task of political reporting by EU delegations, in the complex inter-institutional and Member State landscape that characterizes the EU;
- (d) and finally, the protection of ‘European Union’ citizens not merely as derived from Member State nationality but as an independent legal reality.

Evidently, the realisation of the EU’s ambitions in diplomatic representation also depend on the extent of the recognition by the host countries (Wouters and Duquet 2012). However, in this contribution our main focus is on the EU’s internal hurdles rather than on the third country perspective. Similarly, the scope of this article does not allow for an in-depth analysis of the roles of the different EU institutions/actors. Rather, we emphasize (new) legal provisions, policy statements and other formal and informal documents to indicate the EU’s ambitions, and legal hurdles to achieve them.

## **2. Delivery of EU Demarches on behalf of the EU and/or its Member States**

### ***2.1 From Commission Delegations to ‘Embassies’***

Article 221 (1) TFEU was newly inserted with the Lisbon Treaty and reads: “*Union delegations in third countries and at international organisations shall represent the Union.*” The ambition flowing from this new provision in the TFEU is clear: The Union no longer wishes to have an international presence through delegations of only one of its institutions (e.g. Commission delegations), or through the diplomats of the Member State holding the

rotating Presidency.<sup>1</sup> Rather, the purpose of this new treaty provision was to have “less Europeans and more EU” (Missiroli 2010), e.g. a single diplomatic presence for the Union speaking on behalf of a single legal entity active globally. When Mrs Ashton took up her post in December 2009, she said that the EU delegations “should be a network that is the pride of Europe and the envy of the rest of the world” and “a trusted and reliable ally on European issues” (Ashton 2009). Speaking on Europe Day 2011 she underlined this continued ambition, that the EEAS should be a “single platform to protect European values and interests around the world”, and “a one stop shop for our partners.” (Ashton 2011).

The transformation from Commission delegations into Embassies proper was not purely formal, but was in some cases accompanied by added powers to at least some of those representations abroad. While all 138 Commission delegations<sup>2</sup> were transformed into EU Delegations mere weeks after the entry into force of the Lisbon Treaty, 54 were immediately transformed into ‘EU embassies’ in all but name (Rettman 2010a). This meant that these ‘super-missions’ were not merely given the new name, but also new powers in the form of an authorization to speak for the entire Union (subject to approval from Brussels); as well as the role to co-ordinate the work of the member states’ bilateral missions. Prominent exclusions among those 54 delegations were those to international bodies such as the UN in New York or the OSCE in Vienna, since the Union still had to work out how to handle EU representation in multilateral forums under Lisbon (Rettman 2010b).

In the recent EEAS evaluation report of December 2011, it has been expressly stated that it is the ambition to “progressively” expand these powers to other EU delegations as well (European External Action Service 2011b). This report further states that EU delegations “have progressively taken over the responsibilities held by the rotating presidency for the co-ordination of EU positions and demarches” (European External Action Service 2011a). In evaluating that process, the report adds that this evolution has been a ‘mixed success’. It argues that the transition “has gone remarkably smoothly in bilateral delegations and has been welcomed by third countries”, although commentators are more cautious (Kaczynski 2011). As regards EU representation at international organizations, the EEAS evaluation report states that “the situation has in general been more challenging in multilateral delegations ... given the greater complexity of legal and competence issues.” (European External Action Service 2011a).

Indeed, the unified diplomatic presence for the EU in multilateral fora post-Lisbon has so far proven highly problematic, in spite of the TFEU’s specific legal obligation in its Article 220 (1) TFEU. This provision requires that the EU “shall establish all appropriate forms of cooperation” with various international organisations including, but not limited to (Article 220 (2) TFEU), the UN, the Council of Europe, the OSCE and the OECD. The saga of speaking rights at the UN General Assembly and EU participation in the UN concluded in May 2011 is

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<sup>1</sup> But see the EEAS document ‘EU Diplomatic Representation in third countries – First half of 2012’, Council of the European Union, Doc. 18975/1/11, REV 1, 11 January 2012, which reveals that in some countries the EU is still represented by a Member State.

<sup>2</sup> This is the latest number including the two newly opened delegations in Libya and the South Sudan.

well known (Ashton 2010; 2011a). There is thus no need to dwell further on this example, and in this contribution we look at evolutions from the second half of 2011. In the following paragraphs we shall look at the dispute concerning EU legal personality and formal presence in multilateral fora on the Member States' presence, with the International Civil Aviation Organization (ICAO) as a specific example.

For the EU wishing to establish its unified substantive diplomatic presence in multilateral fora, for some Member States – the UK notably – it has become problematic that the EU's legal personality is now explicitly recognised by the Treaty (Article 47 TEU). Indeed, with the Lisbon Treaty, the European Community (EC) has ceased to exist (Article 1 TFEU), and is now replaced by the European Union which possesses legal personality. (Article 1 to 47 TEU) While prior to the Lisbon Treaty the EU did already conclude many international agreements and could thus be argued to possess *implicit* legal personality (Wessel 2000; 2008). This what one might term 'politically constructive ambiguity', allowed the label European Union to function as a political umbrella term referring to the EC and its 27 Member States. The fact that now Article 47 TEU explicitly gives legal personality to the EU, has prompted the UK to deploy the rather legal-formalistic argument that the terminology 'EU' can no longer be utilized to designate 'EC and its Member States' when delivering statements on behalf of the EU in multilateral fora.<sup>3</sup> The UK argues that because the Union's legal personality has explicitly been recognized, "EU" has become a purely legal concept, and can no longer serve to represent areas covered both by EU and Member State competences as that might lead to competence creep for the Union.

The Commission and several Member States strongly opposed this reasoning, which led to formal EU representation in multilateral fora such as the OSCE and UN to grind to a halt during the second half of 2011.<sup>4</sup> At that time, several dozen of EU statements and demarches were blocked over deep disagreement as to who delivers the statement: "the European Union" or "the European Union and its Member States". A temporary cease-fire, though not a permanent solution, was agreed on 24 October 2011 in the form of a document entitled "general arrangements for EU statements" (Council of the European Union 2011) Through this document the EU wishes to keep competence battles "internal and consensual" so that the EU achieve "coherent, comprehensive and unified external representation" in multilateral organisations. However, its focus on extreme minutiae at the level of the Council ("*EU representation will be exercised from behind an EU nameplate*") shows how difficult it still is for the EU to reach its ambitions as a diplomatic actor exhibiting these three qualities. Notably, the arrangement implies an extremely rigid interpretation of 'international unity' by requiring that each statement made in a multilateral organisation requires tracing who is competent for which area, and to ensure that the internal division of competences is adequately reflected *externally*, namely on the statement's cover page and in the body of the text.

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<sup>3</sup> Interview with a senior official in the legal service of a Member State foreign ministry, and discussion with senior official from the Commission, November 2011.

<sup>4</sup> *Ibid.*

It is beyond the scope of this paper to discuss the exact arrangements as to when a statement should say “on behalf of EU”, or “on behalf of the EU and its Member States” (Council of the European Union 2011), though it is truistic to state that such is hardly the core-business of multilateral diplomacy – the substance of the single message being of central importance. What is then notable in light of the single message is that even when there is agreement that the EU shall present a statement on its *own behalf*, according to the arrangement, still, “*Member States may complement statements made on behalf of the EU whilst respecting the principle of sincere cooperation.*” (Council of the European Union 2011)

This statement is rather troubling diplomatically and legally: Diplomatically, the utility of a Member State also taking the microphone to repeat what the EU delegate has just said (since the duty of cooperation in Article 4 (3) TEU would not allow that Member State to say anything that contravenes it), seems rather futile. In international diplomacy one may certainly consider it useful that specific Member States with specific skills, knowledge, or historically good diplomatic relations ‘back up’ and strengthen ‘EU’ action, but this is not what is envisaged by this arrangement: it concretely implies that Member States should still be allowed to repeat the same message of the Union, largely for the visibility of their own foreign (etc.) minister. Legally too, the duty of cooperation entails from the Member States that they respect “the EU institutional process” and accept that their interests be defended ‘through the Union’ as a consequence of their EU membership.<sup>5</sup> In fact, when the EU has decided to act internationally, in many cases this will actually entail a “duty to remain silent” on the part of the Member States, even in the area of shared competences (Larik and Casteleiro 2011; Van Vooren 2011b). Thus, the arrangement rather goes against well-established legal interpretations of shared competence and the duty of cooperation, and seems hardly conducive to the unified diplomatic actor the Lisbon Treaty and EEAS sought to create.

## ***2.2 An Implied Expansion of EU Competences?***

One example may further illustrate the concrete impact of this rigid interpretation of Union competence and legal personality from the perspective of unified diplomatic representation. It also shows the apparent willingness of some Member States to back-track what could be gained from the Lisbon Treaty in terms of unified EU diplomatic representation.

On 22 February 2012, the Council adopted a Decision concluding the “Memorandum of Cooperation between the European Union and the International Civil Aviation Organisation providing a framework for enhanced cooperation, and laying down procedural arrangements related thereto.”<sup>6</sup> The Commission had proposed the negotiation of this Memorandum in June 2009, and it was authorized to do so by the Transport Council in

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<sup>5</sup> Opinion of Advocate General Maduro, Case C-246/07 Commission v. Sweden (Stockholm Convention on persistent organic pollutants), 1 October 2009, para 49 & 56.

<sup>6</sup> Council Decision on the conclusion of a memorandum of Cooperation between the European Union and the International Civil Aviation Organisation providing a framework for enhanced cooperation, and laying down procedural arrangements related thereto, DOC 5560/12, Brussels, 22 February 2012

December 2009, with the final document being initialled in September 2010. The purpose of this document is to ensure deep EU involvement in a multilateral organization of which it is not a member, but where it has significant competences.

This is essentially the situation at issue in Opinion 2/91, where due to absence of EU membership in the International Labour Organization, the Court stated that Member States owed a close duty of cooperation to the Union to ensure adequate representation of the common “Union interest” (Opinion 2/91). And the Union certainly has a strong legal and political interest to be represented in a singular fashion before the ICAO. Through the completion of the internal aviation market by the mid-nineties, as confirmed by the Open Skies judgments of 2002 (Holdgaard 2006), many of the aspects on civil aviation covered by the 1944 Chicago Convention (safety, security, environment and air traffic management) fall within the scope of EU competence through the application of the ERTA doctrine (Van Vooren, 2011b). In keeping with this reality, the EU-ICAO memorandum essentially sets out a regime of closer cooperation through the reciprocal participation in EU and ICAO consultative processes, joint mechanisms for regular dialogue, information sharing through databases, and so on. From the perspective of the EU Member States, supporting the EU in achieving its Treaty objectives through such a Memorandum in an organization of which it is not a member, is indubitably an expression of their duty of loyalty towards the Union embedded in Article 4 (3) TEU.<sup>7</sup> The response of the United Kingdom was the following:

*"The UK will be abstaining on the Decision on Conclusion of a Memorandum of Cooperation between the European Union and the International Civil Aviation Organisation. The UK recognises the benefits of the Memorandum of Cooperation, but attaches great importance to the principle of Member State sovereignty in international organisations. The UK is cautious about any measures and processes which could eventually lead to a change of the distribution of competences between the EU and Member States. We would wish to convey these concerns by abstaining on this Decision."*<sup>8</sup>

The source of this abstention is the UK's more general suspicion towards a common EU diplomacy (or the EU as such), as is clear from the House of Commons' EU scrutiny committee *travaux préparatoires* (European Scrutiny Committee 2011). Here we see that the UK government considered that an effect of this agreement could be to “eventually lead to the Commission securing overall competence in ICAO matters through full membership of the organisation”. For that reason the Scrutiny Committee argued that thus an abstention would not suffice, and that the UK ought to vote against in Council because it considered the Commission's guarantees against competence creep insufficient. Namely, that institution had submitted that the proposal was not intended to affect relations between individual Member States and ICAO, nor that it was to affect the arrangements for preparing EU positions for meetings of the ICAO Council. The UK thought that insufficient, and while a negative vote was thought too far-reaching, the Minister of State Department of transport replied that “it is

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<sup>7</sup> Opinion 2/91, 'Convention No 170 ILO on the safety in the use of chemicals at work', [1993] ECR I-1061

<sup>8</sup> Council Decision of 22 February 2012, *o.c.*, at 3.

necessary to put down a marker that the UK is concerned about the principle of Member State sovereignty in international organisations and cautious about any proposals which appear to enhance the role of the EU at the expense of Member States.”

Because the legal basis of this Decision is Articles 100 (2) to 218 (6) TFEU, the Council adopts this decision by qualified majority and the adoption of the ICAO Memorandum is not blocked. However, it points to a road in EU external representation which ought not to be taken. A close look at the substance of the Memorandum of Cooperation shows that it is ‘procedural’ in nature, by establishing forms of closer cooperation between the EU and the ICAO in areas where it already possesses competence. It thus does not ‘expand’ EU competence in scope or substance, and one might query what would be the on-the-ground consequences of this ‘abstention’? In application of QMV it is normal that certain Member States may be outvoted, but the explicit adoption of this statement cannot be permitted to have any further consequences. Indeed, the UK remains bound by the duty of loyalty embedded in Article 4 (3) TEU: “The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.” Thus, in practice the UK must actively support EU activities in Montréal to implement this Memorandum of cooperation, and may not undertake any action that would hamper its implementation. Time must now tell whether that will be the case, but the blockage of EU presence in other multilateral fora in 2011 does not bode well.

### **3. Diplomatic visits by top EU political representatives: separate roles of the EEAS, EU Delegations and the Commission.**

The issue of competence as a challenge to the EU’s diplomatic representation is equally exemplified by the procedures relating to visits, missions and meetings of the Commissioners or the High Representative with third countries and international organisations – part and parcel to international diplomacy. The decision on the need for such visits, their preparation as well as their execution is rather complex within the Union, due to the co-existence of many ‘high level political faces’ of the Union, and notably the co-existence of the Commission and EEAS each with their own international relations responsibilities (Arts 17 and 27 *io.* 18 TEU). In January 2012 the EEAS and Commission agreed a ‘working arrangement’ in implementation of Articles 3 (3) and 4 (5) of the EEAS Council Decision (European Commission 2012), which duly illustrates the coordinative challenges of having two distinct actors with a significant and similar role in the single diplomatic task of external representation at the highest political levels. In legal terms, the procedures agreed in case of such visits is the expression of the duty of cooperation embedded in Articles 4 (3), 13 (2) and 24 TEU, as explicitly reiterated in Article 3 (2) of the EEAS Council Decision (Van Vooren 2011a): “*The EEAS and the services of the Commission shall consult each other on all matters relating to the external action of the Union in the exercise of their respective functions, except on matters covered by the CSDP. The EEAS shall take part in the preparatory work and procedures relating to acts to be prepared by the*

*Commission in this area.*”<sup>9</sup> The Working arrangement’s rules on cooperation in the case of visits and missions are set out in four paragraphs:

- 1) Ensuring that relevant EEAS and Commission services are properly informed about planned visits and missions.
- 2) Establishing the role of EU Delegations in such visits.
- 3) Establishing the role of the EEAS and the Commission in visits of commissioners and the HR/VP’s visits and missions.
- 4) Establishing competence boundaries for the EEAS and Commission officials in multilateral contexts during such visits.

The first point is that of intra-EU information about impending visits. Namely, when a Commissioner will visit a third country or international organization, the relevant Commission services “shall inform” the EU delegation and the EEAS country desk of such a visit for which they are responsible (European Commission 2012). This does not contain reciprocity however, and thus the EEAS must not inform Commission services of visits by the HR/VP. This is no coincidental omission, as that same first paragraph does state that “*information about the HR/VP’s and Commissioners’ missions shall also be communicated to [the Secretariat General, Directorate F3 on relations with the EEAS] which is maintaining a strategic planning calendar of missions and meetings.*” We may of course query whether reciprocity in this regard would even be necessary, given her CFSP focus? However, should for the HR/VP visit the Palestinian Authority for example – as she has regularly done in the past – DG DEVCO would certainly have an interest in direct information about such as visit by the HR/VP.<sup>10</sup> Undoubtedly, in practice, Commission development staff would come to know about such visits through staff at relevant EU delegations, the internal calendar, or other day-to-day contacts, but the formal absence of reciprocity in the Working Arrangement is nevertheless telling of competence sensitivities. The principle in the Arrangement seems to be that the EEAS, a structure set up on a legal basis within the TEU’s articles on CFSP (Art. 27 (3) TEU), ought not inform Commission services of missions conducted by its top officials.

The second paragraph of the Working Arrangement focuses specifically on EU Delegations stating that they “*will provide all necessary support for the organisation of visits or missions to the countries or IO’s for which they are responsible. They should be consulted in advance on the aim, content and timeliness of visits/and or demarches.*” These consultations are indeed crucial, and importantly, the Working Arrangement is silent on whose visits they should be consulted upon – which is positive. On the basis of the EEAS’ tasks as described in Article 2 of the EEAS Decision, we can thus assume that it concerns both Commissioners, the HR/VP, but also the President of the European Council. From the perspective of diplomatic ambitions, the working Arrangement is then laudable as it gives a crucially “embassy”-like role to the EU

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<sup>9</sup> Council Decision 2010/427/EU of 26 July 2010 establishing the organization and functioning of the European External Action Service, O.J. 2010, L 201/30, 3 August 2010

<sup>10</sup> See for example: Statement by High Representative Catherine Ashton following her meeting with the President of the Palestinian Authority, Mahboud Abbas, Brussels, 14 December 2011, A 514/11

delegations. The fact that this second paragraph is formulated ‘in the abstract’ is then arguably significant: there is no reference to specific competence-related limitations, but EU delegations are expected to act as the proverbial one-stop-shop with important influence on visits and missions by EU representatives.

In paragraph 3, the Working Arrangement gets more complex (or at least, meticulous) when it comes to preparing the briefings of the visitor to the third country or IO. Importantly, the notion of reciprocal cooperation of Article 3 (2) EEAS Council Decision imbues this paragraph. Here the Arrangement refers not to “EU delegations” but rather to the more generic EEAS – which implies that this paragraph pertains to staff at headquarters based in Brussels, and here institutional competences and division do matter: The basic principle is that “*the EEAS will contribute to briefings for Commissioners’ visits to third countries*”, and equally that “*Commission services will contribute to briefings for the HR/VP’s visits*” – with specific arrangements for briefings for candidate countries. Thus, the EEAS and Commission should together write the document the visiting official will read on the plane-ride to her or his destination. However, when it comes to meeting with the Commissioner or HR/VP, staff of ‘the other’ institution will not necessarily be present: “*Where appropriate, the relevant Commission service(s) and the EEAS will participate in preparatory meetings with the Commissioner(s). Where appropriate, the relevant Commission service(s) will participate in preparatory meetings with the HR/VP.*” (European Commission 2012). Empirical research would be required what exactly “where appropriate” means in this context, but past experiences in the field of EU external relations one might become suspicious of such wording. On the one hand it may imply room for turf battles over the appropriateness of attending meetings with top politicians of the other institution, though on the other hand it may simply imply that when the EEAS has forwarded some documents to the Commission in preparing a visit by for example the trade commissioner, there is no need to attend the preparation meeting prior to the visit. Indeed, a Working Arrangement at this level must leave room for what EEAS Managing Director Christian Leffler rightly calls “common sense” (Leffler 2012). Only when it is useful should staff be present in the work of the other institution, and the Working Arrangement reflects the same sentiment when it comes to making the journey itself. Where appropriate, “Commission staff may be asked to accompany the HR/VP on visits. Similarly EEAS staff may be asked to accompany Commissioners on visits.” (Leffler 2012).

Finally, the Working Arrangement states that “*In accordance with Article 221 TFEU, EU Delegations in third countries and at international organisations represent the EU. Where the relevant Commissioner participates in meetings, conferences or negotiations related to international organisations, conventions and/or agreements, he/she will represent the EU position in non-CFSP matters. In meetings at official level, the non-CFSP EU position can be presented either by the EU Delegation or by Commission officials.*” (Leffler 2012). That the High Representative speak in CFSP matters and Commissioners in non-CFSP matters comes as no surprise (Art. 40 TEU), but the sentence on meetings at ‘official level’ is perhaps more puzzling. This sentence concerns representation by the *EU institutions* in multilateral contexts such as the United Nations and the OSCE. Let us draw the parallel with national diplomatic activities: It is certainly not exceptional that diplomatic staff of a Member State to the United

Nations would be joined by experts from national ministries (foreign ministry, agriculture, development, etc.) on topical issues such as for example ECOSOC meetings. However, the working arrangement does not speak of EEAS officials from Brussels (EU equivalent of a national foreign ministry) and Commission officials (the ‘other’ ministries) presenting the non-CFSP EU position aside from the EU delegation, but only of the latter category. Here too, we can have two interpretations: the ‘common sense’-interpretation implies that this simply replicates the situation of national experts joining their diplomats at the permanent representation in New York. However, the more ‘suspicious’ interpretation would be that this sentence is an extension of Article 17 (1) TEU, which is an article on which the Commission has been placing much emphasis in the post-Lisbon era. It reads: “With the exception of the common foreign and security policy, and other cases provided for in the Treaties, [the Commission] shall ensure the Union's external representation.” Thus, if this sentence in the Working Arrangement indeed means that the Commission shall ensure external representation alongside with, or instead of the EU delegations, this certainly detracts from the EU’s ambition for them to be the “one stop shop” for EU diplomacy and external representation. This is especially so if it means that EU delegations are thus still associated with the task of representing the EU only on “CFSP issues”, something which Article 221 TFEU expressly seeks to avoid.

#### **4. Diplomatic Protection and Consular Assistance for ‘EU Nationals’ and the Reality of International Law**

An important role for diplomatic missions abroad as described in Article 3 (1) VCDR is to “Protect the interests of the sending state and its nationals in the receiving state – within the limits permitted by international law” (Article 3, (b) VCDR). There is a strong basis in the Treaties for EU ambitions on this front. Articles 3 (5) TEU and 23 TFEU together provide the basis for diplomatic protection and consular assistance to EU citizens. Article 3 (5) TEU obliges the EU to protect the interests of its citizens abroad, and persons holding the nationality of a Member State are citizens of the Union. (Article 20 (1) TFEU).\

However, Member States are divided on how far the ambitions implementing these provisions would reach. In its most long-term version, if the Union were to achieve full diplomatic maturity, its most far-reaching implication *might* be that the EU provide such protection as if they were ‘nationals of the EU’ for the purposes of international law. While Article 3 (5) TEU could accommodate that interpretation, the role explicitly foreseen in the EEAS Decision for diplomatic protection and consular assistance by the EU does not, and is merely supplementary: “*The Union delegations shall, acting in accordance with the third paragraph of Article 35 TEU, and upon request by Member States, support the Member States in their diplomatic relations and in their role of providing consular protection to citizens of the Union in third countries on a resource-neutral basis.*” (Art 5(10) of the EEAS Decision).

While one may argue that consular assistance thus is not a competence of the EEAS or the Union delegations per se, a role of the delegations in this area seems obvious and was

already foreseen by the Commission prior to the entry into force of the Lisbon Treaty.<sup>11</sup> At that point in time the Commission has been quite active in working together with the Member States in the protection of their citizens in crisis situations in third countries (European Commission 2011a). In March 2011, the Commission published a state-of-play on this issue, where it argued that “the need of EU citizens for consular protection is expected to increase in the coming years.” (European Commission 2011a). To support that argument the Commission first quoted Eurostat numbers which show a steep upwards trend in EU citizens travelling to third countries: from 80 million trips in 2005 to 90 million trips in 2008. The Commission also referred to major recent crises which affected a considerable number of EU citizens: Libya, Egypt and Bahrain after the democratic uprisings in spring 2011, Japan after the earthquake in March 2011, or Iceland's volcanic ash cloud in spring 2010. In these circumstances, the Commission argued that “it appears particularly relevant to further reinforce the effectiveness of the right of EU citizens to be assisted in third countries for their different needs (e.g. practical support, health or transport).

With public budgets under pressure, the European Union and the Member States need to foster cooperation to optimise the effective use of resources.” (European Commission 2011a). However, the EU Member States are deeply divided on how far EU ambitions reach in this area, and what is the end-point of ‘optimisation of resources’? Some Member States have a strong interest for EU Delegations to develop a capacity for consular support for EU citizens, whereas others are clearly opposed to the EU taking such a role, since they see this as a purely national competence (European External Action Service 2011a). What is certain from the perspective of the EEAS, is that if the Union wishes to pursue such a role for EU delegations abroad, that significantly more financial and human resources will need to be allocated to the EU diplomatic service. The December 2011 EEAS evaluation report stated that “it is difficult to see how this objective could reasonably be achieved “on a resource neutral basis” as required by the EEAS decision. It would certainly not be responsible to raise citizens’ expectations about the services to be provided by EU delegations, beyond their capacity to deliver in such a sensitive area. And the existing expertise within the EEAS in this area is extremely limited. However, over the past year we have also seen that the EU Delegations can play an important role in the coordination of evacuations of citizens and that pragmatic solutions can be found on the ground.”

International law generally makes a distinction between consular assistance and diplomatic protection. Diplomatic protection “consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility.” (Art. 1

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<sup>11</sup> See ‘Effective consular protection in third countries: the contribution of the European Union’, European Commission Action Plan 2007-2009, COM(2007) 767 final, p. 10: “In the longer term, the Commission will also consider the possibility of obtaining the consent of third countries to allow the Union to exercise its protection through the Commission delegations”.

of the 2006 Draft Articles on Diplomatic Protection). It is often considered to involve judicial proceedings, but protection of citizens may take different shapes, including the forceful protection by military missions (Larik 2011). Interventions outside the judicial process on behalf of nationals (issuing passports, assisting in transnational marriages, etc.) are generally not regarded as constituting diplomatic protection but as falling under consular assistance (Künzli 2006). For EU citizens consular assistance is mostly what they seek whenever they are in a third country and in need of some administrative actions, both in peace time and in crisis situations (Lindström 2009). Diplomatic protection may come up when they run into legal troubles and a governmental intervention is requested.

Is it at all possible for the EU to play a state-like role in these matters? With the entry into force of the Maastricht Treaty in 1993, a European Citizenship was created, and the European Court of Justice even hinted at the idea of European citizenship being the primary identity of the nationals of the Member States (Shaw 2007).<sup>12</sup> On the basis of Article 23 TFEU, EU citizens are entitled to protection by the diplomatic and consular authorities of all Member States, when his/her own country has no representation (Art. 23 TFEU; Art. 46 of the EU Charter). Yet, it is clear that ‘EU citizenship’ cannot be said to have created ‘EU nationality’. The experiences since 1993 are somewhat mixed. “[...] some States consider that very little has changed since the adoption of this provision, while others are more enthusiastic about it” (Vermeer-Künzli 2011). The fact is that, partly apart from the treaty provisions, the EU itself seems to be well on its way to further develop its capacities in the area of consular assistance. As an answer to the differences between the 27 national legal frameworks on consular and diplomatic protection, a common EU legal framework may be developed (Moraru 2011).<sup>13</sup> There are good reasons to believe that this development may have consequences for the diplomatic services of the Member States and that traditional international law is being sidestepped (Vermeer-Künzli 2011). In that sense, Article 23 TEU already forms a good example of a deviation from general international law, as it provides for the right of EU citizens to diplomatic and consular protection of Member States other than the State of nationality in the territory of a third country (Vigni 2011).

Indeed, one of the key problems is that the relevant international rules depart from the notion of ‘nationality’, defined as “the status of belonging to a state for certain purposes of international law” (Art. 3 VCDR and Art. 5 VCCR). Indeed, “the criterion of nationality helps to recognise the entity that is both competent and accountable to act in the name of individuals vis-à-vis third countries.”<sup>14</sup> In principle, states can only protect their own nationals.<sup>15</sup> In general, however, it is clear that – irrespective of the invention of a ‘European Citizenship’ – a

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<sup>12</sup> Case 184/99, *Grzelczyk*.

<sup>13</sup> The Commission hinted at new legislative measures in *Consular protection for EU citizens in third countries: State of play and way forward*, Commission Communication, 23.3.2011, COM(2011) 149 final, at 13.

<sup>14</sup> Vigni, *o.c.*

<sup>15</sup> *Panevezys-Saldutiskis Railway Case*, [1937] PCIJ Rep Series A/B No 76, 16. Also in the *Nottebohm Case* (Second Phase) [1955] International Court of Justice Rep 4,22.

‘bond of nationality’ is by definition absent in the relationship between the EU and its citizens. European citizenship is granted to the nationals of the Member States (Article 20 TFEU).

In the academic debates on the scope of Article 23 TFEU the point is often made that this provision not only provides a right to EU citizens to consular protection, but also to diplomatic protection. Public international law academics would argue that it is in particular this dimension that cannot be established by the EU unilaterally, given the non-existence of the concept of ‘European nationality’. In their view the essential ‘solid link’ between the intervening state and the protected citizen is missing. It has, however, been argued that the ILC Draft Articles on Diplomatic Protection establish minimum standards under public international law which permits the States to go beyond these rules as long as they respect the condition of obtaining the express unanimous consent of all the States involved in the new model (both EU Member States and (at least implicitly also by) third states) (Moraru 2011).

It is true that the general international rules apply “in the absence of a special agreement” and obviously states can simply agree to allow for the protection by states of non-nationals. Allowing the *European Union* to protect the nationals of its Member States would, however, be a new step. As third states are not bound by EU law they will have to recognise European citizenship to allow the EU to protect or assist its citizens abroad (Vigni 2011). The EU does not yet have competences in this area, but the Commission has been quite clear on its ambitions: “[i]n the longer term, the Commission will also consider the possibility of obtaining the consent of third countries to allow the Union to exercise its protection through the Commission delegations” (European Commission 2007); Lindström 2009). Article 23 TFEU, which now only allows Member States to protect EU citizens with the nationality of another Member States, would then be a first step in a development towards the recognition of a role of the EU itself (Ianniello Salicetti 2011). The current EEAS legal regime does not yet include this option and, obviously, any transfer of powers will depend on the consent of the Member States as well, as they may have good reasons to continue a bilateral representation. After all, essential elements of a relationship between a Member State and a third state may not be covered by the EU’s competences or a special relationship may exist between an EU state and a third country, either due to historical ties and/or geographic location (Cusens 2011). Nevertheless, one medium-sized Member State already openly discussed the possible benefits of a transfer of certain consular tasks to Union delegations (Wouters and Duquet 2012; Netherlands Ministry for Foreign Affairs 2011).

It is difficult to come up with cases in which the EU itself would have a reason to protect EU citizens abroad. The Commission mentions the case in which EU citizens are not represented and may be in need of a ‘portal’ for further assistance (Netherlands Ministry for Foreign Affairs 2011). Another situation may be when the protection of an EU citizen is required on the basis of an agreement that was concluded between the EU and a third state.<sup>16</sup> One may expect the Union delegations to play a role in these situations in the future, but the extent to which the delegations can actually take up diplomatic and consular tasks ultimately depends on agreements that are to be concluded with the third countries.

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<sup>16</sup> A case in point was Case C-293/95 *Odigitra AAE v Council and Commission* [1996] ECR I-06129.

## **5. Conclusion: Realistic Ambitions or Diplomatic Dreams?**

The main aim of this paper was to confront the diplomatic ambitions of the EEAS with the reality of EU and international law. Treaty provisions as well as policy documents and statements of EU officials reveal a development in the direction of a strengthened role for the EU itself as a diplomatic actor. Our findings underline a continued tension between the EU's diplomatic ambitions and EU and international law as it stands. In relation to the EU's internal structures our conclusions are necessarily mixed. On the one hand, there is no doubt that in the new EU institutional landscape dividing lines remain firmly in place. Divisions within the wider 'RELEX family' in Brussels, as well as divisions between the Member States and the Union itself, are visible in different echelons of EU external diplomacy. The previous picture points that intra-EU structures are certainly not yet final, but that the working arrangements do point to 'holistic' thinking implying cooperation and reciprocity. Turf wars may exist intra-institutionally, but they seem minor in comparison to the deep schism between the EU and its Member States.

In addition we argued that the EU's ambitions sit uncomfortably with traditional state-centred international diplomatic law. Whereas in the area of diplomatic representation we have seen a pragmatic acceptance of a 'contracting in' strategy by the EU (allowing for instance for Heads of Delegations to be accepted alongside states Embassies) (Wouters and Duquet 2012), the diplomatic and consular protection of citizens is too much related to the notion of 'nationality' (Vignu 2011).

The practical implication is that third states will have to accept that the EU acts on behalf of its citizens. At the same time, the EU Member States do not seem to be willing to give up their traditional competences in this area: "consular protection is an area of Member State competence and Member State competence solely" (Lindström 2009). As a consequence, "[r]ather than a zero-sum relationship, Member States and the EU as a collective foreign policy actor may operate along-side, across and in tandem with one another" (Bátora and Hocking 2008). While this may form a solution for the short term, the EU's ambitions seem to go beyond a mere coordinating role. International law does not per se block a further development of the EEAS (and its Delegations) in the area of diplomatic and consular protection, but further steps will not only have to be accepted by the EU Member States, but obviously also by third states (on the basis of bilateral agreements). We believe that in the years to come a pragmatic acceptance of a new role of the EU will have an impact on the interpretation and perhaps even on the nature of international diplomatic law as primarily inter-state law.

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