

*Record of the Balance of Competence Academic Workshop on Foreign Relations  
Lancaster House  
Thursday, 14<sup>th</sup> February 2013*

**Introduction**

The FCO hosted an Academic Workshop on Foreign Relations on Thursday 14<sup>th</sup> February for the purposes of gathering evidence for the Balance of Competences Foreign Policy Report. It was attended by academics specialising in the field of EU law, and particularly external competence, as well as lawyers from across Government. This record, in agreement with participants, is under the Chatham House Rule, i.e. remarks are not attributed by name to those present. It is not an exhaustive record but draws out the key points made. The points below all reflect comments from the floor but do not necessarily appear in the order in which they were made. Rather they have been grouped under a number of sub-headings.

After a brief introduction and presentation of the context of the policy review reports, the programme and aims of the workshop were presented. The workshop was organised into four sessions (EU External Relations Competences; The new Institutional Framework of EU External Action; International Agreements and International Representation; and Key Issues for the Future). A discussion paper with indicative questions was produced in order to stimulate debate and provide a rough structure for the discussion. It was noted that contributions made at the meeting will form a part of one of 34 Departmental reports, and that the Foreign Policy report will provide the overall parameters of the external relations of the European Union with a focus on more traditional aspects of external relations, i.e. Common Foreign and Security Policy (CFSP). However, other areas of external relations will also be flagged up and dealt with in more detail in other Departmental reports. Submission of further written evidence from participants was encouraged.

**Session 1 – EU External Relations Competences**

*Treaty of Lisbon and the respective scope of the Union's CFSP and TFEU competences*

- By way of a general comment one participant voiced the view that limiting mixity would assist negotiations and eliminate confusion regarding international responsibilities.
- It was also suggested by one participant that fewer opt-outs would contribute to clarity since, next to mixity, this is also a very difficult thing to explain to negotiating partners.
- It was noted by one participant that the Treaty uses the language of integration<sup>1</sup> but that there is still clear separation between the competences of the EU under the CFSP and TFEU external competences. It was recognised that it is not always easy for the Court to decide which objectives the action serves. But a number of participants took the view that the Treaty of Lisbon

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<sup>1</sup> See TEU Article 21(3), second paragraph

did not necessarily make the exercise of delineating more difficult. There was no other way but to approach it pragmatically.

- Others found it more difficult to clearly distinguish between different objectives<sup>2</sup> as clearly belonging to one or another type of competence.
- The need not to change the current Treaty provisions was stressed by one participant as addressees are getting used to the Lisbon arrangements and we should live with it for a while.
- Some participants considered that the Treaty confirms the residual character of the CFSP when compared to other external policies since the TFEU competences are more identifiable and therefore potentially easier to use.
- It was suggested by one participant that it would be interesting to draw up a list of areas where the UK retains unaffected external competence and that one might do this by surveying the agreements that the UK is a party to and looking at how many involve the EU and how many have been entered into by the UK only, free and unconstrained. This sort of approach would help determine the actual power that still rests with the UK.
- The problem of consistency was raised. It was argued that it did not only apply to Treaty provisions but stood as a more general policy imperative. It was also stressed that the principle falls within the scope of the CJEU's jurisdiction, although some participants objected to the assertion that this is a fully justiciable principle, describing it instead as 'an act of constitutional desperation'. In light of this debate, there was a discussion on the Court's case law in 2005 where the argument of consistency had arguably been used.
- Some participants considered that the role of the European Council and/or the Council in clearly defining objectives of a particular action was important – if Council clearly specified that a measure was pursuing a foreign policy objective that would be determinative. Lack of such clarity caused problems in the ECOWAS case<sup>3</sup>.
- At first sight, the delimitation of objectives of CFSP and TFEU in Article 21 TEU may seem clear, however it is difficult to achieve consistency in the overall EU external relations.
- At the constitutional level there is a split between two types of competences, and procedural differences make it difficult to bridge them.
- In practice, defining what is meant by the "CFSP" is one of the most challenging tasks. Differences among Member States are clearly visible.

#### *Overlap*

- One participant commented that the overlap between CFSP competences and TFEU external competences is inevitable.
- It was noted that although the Treaty of Lisbon is driven by inspiration for coherence and consistency, the rules of demarcation are now much less workable than they used to be

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<sup>2</sup> in Article 21 TEU

<sup>3</sup> Case C-91/05, *Commission of the European Communities v Council of the European Union* [2008] ECR I-03651

- But the overlap can still be managed even within new art. 40 TEU. Article 40 TEU just requires willingness on the part of EU institutions to work in a less confrontational manner.
- It was suggested that the CFSP as a residual competence could allow primacy to be granted to the TFEU, along the lines of the primacy previously granted to the exercise of a Community competence by art. 47 TEU. Others however thought this was not a good way forward.
- It was also observed that the old art. 47 TEU did not prevent factual overlap either and that it is often natural/right in practice for a policy to pursue two (or several) objectives. It was argued that a revision of the wording of the Treaty provision would not change that.
- Other speakers by comparing the two provisions (the then art. 47 TEU and art. 40 TEU) identified only a minor shift as far as demarcation lines are concerned.
- Institutional dimension was raised in the context of EEAS and its contribution to making the demarcation line (between CFSP/TFUE) even more difficult to draw (i.e. there was a fusion of the two in practice).

*Exclusive competence/art. 3(2) TFEU – has art 3(2) changed the test for supervening exclusivity?*

- Overall, the wording of art. 3(2) TFEU was considered unsatisfactory (although some pointed out that this is inevitable since it attempts to codify in a single provision a complex line of case law) especially when read together with art. 216 TFEU. The latter provision means that it is difficult to identify areas where the EU would not have international competence. Read together with Article 3(2) this could potentially grant the EU a very extensive exclusive external competence and some participants took the view that the Court may well use it as an opportunity to expand its case law/jurisdiction.
- However others noted that unlikely to have such effects in practice and that the intention of the legislator was to codify rather than change. One participant commented that once the Court is asked to interpret art. 3(2) TFEU, it will probably do so in the light of its previous case law. It was suggested that it was a shame that the negotiating conference had not made a declaration at the time that the Court would do so.
- One participant thought that Art 3(2) should be treated more like a sign post to exclusive competence, in the same way articles 2-6 TFEU are.
- One participant thought that the reason there are becoming more areas where the AETR principle applies is simply because of the expanding policies/rules of the EU and less to do with expansionist tendencies of the Court.
- In a similar vein it was noted that the Court had ruled only once in favour of exclusivity since Opinion 1/91. Opinion 1/03 was concluded after a thorough analysis of case law, including *Open Skies*<sup>4</sup>.

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<sup>4</sup> Case C-467/98 *Commission v Denmark (Open Skies)* [2002] ECR I-9519, paragraphs 54-64; Case C-468/98 *Commission v Sweden (Open Skies)* [2002] ECR I-9575, paragraphs 51-61; Case C-469/98 *Commission v Finland (Open Skies)* [2002] ECR I-9627, paragraphs 55-65; Case C-471/98 *Commission v Belgium (Open Skies)* [2002] ECR I-9681, paragraphs 65-75; Case C-472/98

- One participant suggested that perhaps the existence of art 3(2) TFEU will prevent the Court from inventing another form of exclusivity.
- Mixed agreements may continue to be a practical solution, however with the more pugnacious position of the European Commission the situation may become more complex.
- It was noted that article 3(2) does not exist in isolation but rather that it exists against the architecture of the different kinds of competences now set out in the Treaty – this will have implications for the part of 3(2) which talks about enabling the EU to exercise its internal competences.

#### *Duty of loyal cooperation*

- It was noted that the duty of loyal cooperation applies irrespective of the nature of EU competence and that the nature of the competence was irrelevant. Art 4(3) is among the common provisions in the Treaty and confirms that it applies across the board including in relation to CFSP.
- It was questioned by one participant whether this meant that MS competences in parallel areas were rendered illusory. One view was no, it was simply asking MS to show minimum concern and that they can still exercise their competence but within e.g. CFSP objectives. It was also noted that the loyalty required may have different intensities. The idea of parallel powers going in the same direction was raised.
- A link between this duty and the principle of good faith in international law was noted.
- One participant expressed the view that the duty of loyal cooperation had become more than a duty of best endeavours and has been interpreted by the Court as a duty of abstention. MS were entitled to feel genuine concern.
- One participant commented that the duty of loyal cooperation had been there from the beginning that there was a tendency to blame the Court and over dramatise its role.

#### *Cooperation among Member States and EU institutions and bodies*

- It was suggested by some that all Member States and the EU institutions should rise to the challenge and engage to improve the effectiveness of the EU foreign policy.
- Origins of the CSFP treaty provisions were discussed. It was noted that it was the Member States that wanted a forum/framework that would empower them and would enable them to act collectively aiming at coherent actions.
- It was stressed by some that all actors need to work together instead of fighting over competence.

#### *Role of the CJEU – general comments*

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*Commission v Luxembourg (Open Skies)* [2002] ECR I-9741, paragraphs 59-69; Case C-475/98  
*Commission v Austria (Open Skies)* [2002] ECR I-9797, paragraphs 65-75; Case C-476/98  
*Commission v Germany (Open Skies)* [2002] ECR I-9855, paragraphs 80-90.

- Recent judgments relating to EU external relations prove that the Court has been by far more dogmatic than pragmatic.
- It was noted that the Court substantially relies on policy documents and imperatives and that its reasoning may therefore be problematic. The role of the CJEU might get even more political in an area that is already highly politicised.
- It was noted that the Treaty of Lisbon strengthens the role of the Court with regards to the CFSP (implications of new wording of art. 275 TEU). Judgment C-130/10<sup>5</sup> confirms this;
- For the first time the Court underlined that the CFSP covers all aspects of foreign policy<sup>6</sup>.
- Reference was made to art. 42 TEU to establish the EU's competence in this area and to give substance to the CFSP.

## Session 2 – The new Institutional Framework of EU External Action

### *General remarks*

- It was noted that it is difficult to make the institutions and bodies work together (an imbalance between institutions; inter institutional warfare). Whilst positive examples were also noted (e.g. the Polish Presidency was keen to cooperate with the High Representative) a general theme in the discussion was the obvious tension between the role of the EEAS and the role of the Commission in external EU action.
- One participant commented that inter-institutional tensions were inevitable given one institution i.e. Commission was going to lose some of its powers to a new one but questioned whether this necessarily lead to an undermining of foreign policy. Others considered that the inter-institutional tensions was serious, could only damage their ability to act effectively and therefore needed to be addressed.
- Flow of information, communication channels need improvement to move away from the one-way street model i.e. from delegations to Member States.
- The important role of personalities of those involved and their potential influence was stressed. Even if e.g. the High Representative was given more authority a lot would depend on particular personalities.
- One participant commented that the idea that all foreign policy is consistent within the Member States themselves requires substantiation. We needed a dose of realism. That is not to say we shouldn't argue for consistency at EU level but we need to be realistic about the extent to which it is truly obtainable either at EU or national level.

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<sup>5</sup> Case C-130/10, *European Parliament v Council of the European Union* [2012] ECR 00000, paragraph 62

<sup>6</sup> see paragraph 62 of the judgment

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- Another participant commented that at national level MS have the cabinet to presiding over the process which can draw issues together and posed a question as to the extent to which the European Council could perhaps fill this role.
- Reporting problems were identified. It was noted that the reporting systems are complex and can be confusing.
- Tensions among institutions/bodies were illustrated by a pending CJEU case ('Mauritius' [C-658/11]) and the difficult conditions in which the heads of delegations must operate (operational schizophrenia).
- A vast range of strategies exists without a clear link between them and therefore do not contribute to building a clear picture of the external relations of the EU. Problems with concluding a coherent view supported by all 27 Member States in Council were noted.
- One participant commented that the balance of representation between institutions and Member States is a problem for some policy makers and leads to a lack of trust and unnecessary tensions during international negotiations.
- One participant commented on the different roles of the President of the European Council the rotating Presidency and the High Representative – and that this was bound to have an impact on coherence. In law all avenues are still open for all players including the Rotating Presidency to play a role in shaping foreign policy, but it would depend on the particular MS holding the Presidency.

### *Council of the European Union*

- When negotiations were run by the Presidency, some of the Member States felt that their interests were represented better.
- It was noted however that Council Services seem to have become closer to institutions and more “communautaire” in their attitude.
- The struggle between the General Affairs Council and the Foreign Affairs Council was discussed. It was noted that some Member States would like the Foreign Affairs Council to specialize in CFSP matters only. In practice, often the same representatives attend meetings of both compositions of the Council of the European Union, and only agendas of meetings indicate delineation.
- Problems with chairmanship were voiced i.e. four different Chairs of the Foreign Affairs Council. Having different chairs causes confusion and leads to the lack of coherence. One participant commented that this enabled expertise to be utilised. Another participant thought that having the Rotating Presidency as Chair didn't necessarily achieve this as it would be whoever the Presidency chose for the job.

### *European Commission*

- It was suggested that the role of the High Representative in relation to the internal organisation of the Commission could be much greater. The High Representative should be given an authority to summon the Relx Commissioners in order to improve coherence.

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- A number of participants commented on the clearly apparent divisions between the Commission and the EEAS, especially due to the proactive role taken by the Commission with regards to international agreements based on Treaty provisions i.e. art. 218 (3) TFEU.
- Misunderstandings between the Commission and the Member States were discussed and examples of negotiations with third countries that caused tensions were provided. It was considered that these misunderstandings/tensions weakened the negotiating position of the EU as a whole.
- Since Lisbon the tendency of the Commission to rely on Member States has somewhat fallen away. The transferral of the representational role to institutions means there is a risk that MS concerns are lost. EU actors have taken it upon themselves to negotiate without consultation.
- The way the institutions work in relation to development instruments was identified as cumbersome and complex, and therefore it was recommended that the programming cycle should be reviewed.

### *European External Action Service (EEAS)*

- It was noted that the EEAS is under review and FCO report would not duplicate that process. The EEAS review has a broad character and will address a number of issues, including the gender imbalance.
- It was noted that it is sometimes treated as second rate by institutions and bodies due to its status.
- It was added that the creation of the EEAS was badly managed.
- Problems with chairmanship of some of Council's working groups were discussed. In some cases the EEAS does it and one participant took the view that this meant that its ability to maintain neutrality might therefore be compromised.
- The challenge of divided loyalties was raised and discussed. Different groups of people came together into the EEAS, some from the Commission which is a hierarchical structure, some from the Council Secretariat, who were used to working closely with MS and some temporarily assigned national diplomats. There has been very little done so far however to foster cooperation between these groups. Solutions to change mindsets were identified (training, culture change).
- The schizophrenic role which Heads of Delegation have to fulfil was identified as problematic.

### *European Parliament*

- There are new areas where the European Parliament has become a co-legislator and therefore its influence has increased.
- Role of the European Parliament as per art. 218 TFEU was discussed and potential difficulties were identified.

### Session 3 – International Agreements and International Representation

#### *General remarks*

- Criticism of poorly worded art. 216 TFEU was voiced. It was suggested by a number of speakers that it would be useful to obtain the CJEU's interpretation. Litigation was suggested as a possible scenario.
- Discussion on limits to treaty making powers took place. Questions on the limitations potentially imposed by art. 216 TFEU were raised.
- Some participants argued that EU treaty making powers should be recognized in all areas where a substantive legal base exists. Another added that art. 216 TFEU is simply an expression of the EU's flexibility in the field of CFSP.
- A few participants noted that the second situation "where the agreement is necessary to achieve one of the objectives of the Treaties" seemed particularly broad and had the potential to be read as a (residual) power-conferring provision (along the lines of Article 352 TFEU). It seemed inconceivable that you would never have implied external competence as a result of this.
- But most participants agreed that the provision cannot be treated as a substantive legal basis and that the principle of conferral applies to art. 216 TFEU i.e. the provision is not intended to extend external competence but only to serve as a treaty making power. One participant commented that none of the case law on implied external competence can be used to extend the substance of the Union's competence so the same must surely apply to art 216.
- Power struggle between the Commission and the Council in the negotiations of international agreements weakens the EU's negotiating position.
- Tensions between the Commission and the Member States were noted by some as real a cause for concern.
- Cases of Memoranda of Understanding where the Council had not been consulted were raised. These instances can be used as examples of institutional ignorance of the duty of loyal cooperation. Transparency has a direct link to trust. Unfortunately there is a lot of mistrust among Member States.

#### *Mixed Agreements*

- It was proposed that the institutions should use the knowledge and experience that the Member States can bring to the negotiation process.
- Importance of mixity in the area of trade and other areas was raised. It was noted that the Member States see it as a means to maintain control since Union negotiators are not adhering properly to negotiating directives or consulting adequately with the special committee of Member States
- Use of mixity was also presented in the context of a case where the EU institutions were unable to move negotiations forward, and therefore Member States were able to influence.



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- It was noted by one participant that mixity didn't just exist where TFEU legal bases were involved, for example, in the context of the Arms Trade Treaty negotiations, there were some areas which would fall under CFSP - in relation to which the MS can choose to exercise their sovereign powers.
- One participant wondered whether there was potential for a high level compromise i.e. the MS could agree to go along with EU only agreements but the EU Actors really must stick to the mandate which Council has provided and talk to the special committee before making any compromises. Another participant observed that whilst this might have been the intention originally, given the attitudes of the institutions MS have had to resort to whatever means necessary in order to ensure proper MS involvement, including mixity.

### *Competence clauses*

- Declarations of competence were identified by some participants as being unhelpful and confusing particularly for third countries. Another acknowledged that they were difficult to negotiate but there was a tendency to forget that we do need to eventually work out which obligation has been assumed by who since this will be crucial at the state of implementation.
- One participant noted that since the competences of the EU are dynamic it is difficult to see how declarations of competence can provide any clarity on who has assumed which obligation.
- Another observed that confusion on the part of third countries didn't so much arise from this but from the fact that they are drafted with reference to indicative lists of legislation and extracts from case law. Another commented that one would need to know a lot about EU law to understand them.
- It was noted that some competence clauses require the EU to notify any changes in the competence picture but others were not aware of any examples of revised declarations being submitted on this basis. One participant commented that it was therefore better to address the question of international liability when the issue arises since it is not possible to continually update declarations of competence.
- EU accession to ECHR and confusion associated with the process was noted.

### *External/international representation of the EU*

- The EU is often not a member of international organisations and therefore there is no basis to apply the Treaty provisions on representation in such circumstances e.g. art. 27 (2) TEU.
- One participant stated that agreement to the General Arrangements has helped on the ground given they confirm that representation does not have a bearing on competence – however one should still aim for an appropriate division of responsibilities since if total representation goes to EU Actors then the practical implication of that is that competence has (or might as well have) passed.
- Another participant suggested that provided EU Actors are complying with instructions it should matter less whether it is the EU Del or the Pres expressing the position.

- It was noted that the Commission was relying on art 17 to give it the right to represent the views of the EU on a number of issues without resort to the Council and the Council is arguing that art 16 gives it the right to make the policy. This is what gives rise to the lack of trust and is therefore a cause for genuine concern.

#### **Session 4 - Key issues for the future and closing remarks**

The final session of the workshop focussed on whether the European Union is currently (i.e. since the entry into force of the Lisbon Treaty) better equipped to respond to challenges, and more particularly to changes in the geopolitical situation and whether we could find the means of responding within the tools already available.

##### *Existing legal framework /existing tools*

- A number of participants expressed the view that changes to existing treaties or introduction of a new treaty should be avoided. All existing tools should be used and tested instead. Also it was noted that there were limits on how far legal tools can improve effectiveness, and further proceduralisation of the external relations sphere is not necessarily the best way forward. The need to focus on what *can* be achieved within given legal framework was stressed.
- Usefulness of Protocol 25 was noted, and there was a suggestion by one participant that more statements like this might be the way to go.
- Despite criticism of the wording of the Lisbon Treaty, and it was suggested by one participant that the EU has complex machinery at its disposal which is well designed for the sort of entity the EU is. It is now a matter of making the machinery work.
- An assumption that increased centralization is a good thing was voiced, rather than mini negotiations among 27 Member States prior to international negotiations. However, the EU does not seem to be pursuing this route productively. It was noted that pressure for further centralization of the external policy came from the CJEU. Socialisation and integration of EEAS staff were presented by one participant as alternatives to centralization.

##### *Member States*

- It was noted that the categorization of CFSP competences as residual, coupled with a perception of the Member States' autonomous competences in areas of foreign policies as subordinated/secondary to the CFSP, risks leading to the Member States' activities in this sphere being seen as residue of a residue.
- One participant suggested that it was difficult to see how the system could be streamlined and made more efficient except at the expense of Member States – the trend is towards the marginalisation of Member States and a reduction in the number of mixed agreements, so we should instead look to how the EU exercises its competences on behalf of us as a nation.

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- Other participants did not wish to concede that the role of the Member States in external action needs to diminish in future in order to improve effectiveness/streamlining, and that this was by no means inevitable.
- Another participant pointed out that when you take a step back and look at major international crises it was simply not true to say that the EU had taken over completely from the Member States. Clearly in some sectoral areas there was a difficult dynamic but generally in the foreign policy field it is the MS who act and the EU attempts to catch up e.g. in relation to the crisis in Mali it was the French President who acted. Also EU has only managed to join a limited number of International Organisations and in many it is still struggling to find a voice.
- One participant commented that we risk creating divisions between the European Union and the Member States without giving sufficient thought to the fact that it is the high level of the Members States' contributions, involvement and investment in the EU, including the EEAS, that influences its development.
- Phenomenon of socialisation was referred to as a potentially beneficial development in the future i.e. a situation where Member States would not consider their own interests but the common interests instead.
- One participant commented that any counterfactual assumption that powers of the European Union not exercised in the external sphere would be returned the Member States was just wrong, given the fact that national executives would then enter into bi- and trilateral agreements that would create even less transparency. The incremental growth of such international agreements would be likely to restrain freedom of action in the same way or to an even greater degree.

### *European Council – European Commission*

- The role of the European Council in drafting priorities for external relations was discussed. It was advocated by one participant that having the European Council provide a clearer sense of direction would be beneficial. One participant commented that this was difficult given it was made up of 27 heads of state, but another commented that this meant that it needed a strong leader.
- The role of the current President of the Council was appraised positively with credit given for conclusions of the European Council comprising a majority of matters pertaining to external relations.

### *Role of the European Parliament/Democratisation*

- One participant said that with Lisbon greater powers had been given to the EP and that it was therefore not fair to say that given the problems in relation to representation that the EU was not a proper democratic entity.
- Another participant was more sceptical about the role that the European Parliament could play in democratisation of foreign policy and put forward the view that whilst there might be a constitutional arrangements in place that would enable the EP to legitimise decision making, what in their view

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was lacking was proper accountability of MEPs to the electorate. Until that changed the EP could not provide democratic accountability.

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