

The Common Commercial Policy Under the Influence of Commission, Council, High Representative and European External Action Service

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Introduction

A little more than a decade ago, the European Council adopted the Laeken Declaration.¹ It raised, rather rhetorically, the question: “Does Europe not, now that it is finally unified, have a leading role to play in a new world order, that of a power able both to play a stabilising role worldwide and to point the way ahead for many countries and peoples?”. “Europe” will be able to live up to this leadership role today and in the future only if its political architecture, i.e. the European Union (EU), features the requisite weight among other global players.

Concerning in particular economic globalization, the Union has by now—after the entry into force of the Treaty of Lisbon—a considerably broad range of competences.² Europe’s strength and standing amongst other global economic powers significantly depend on whether and to what extent the Union manages to act unisonously in the area of trade policy.

¹ Laeken Declaration on the Future of the European Union (Annex I to the Presidency Conclusions, European Council Meeting in Laeken, 14 and 15 December 2001, SN 300/1/01 REV 1; available at: http://ec.europa.eu/governance/impact/background/docs/laeken_concl_en.pdf).

² See especially the extended scope of the Common Commercial Policy according to Art. 207 (1) cl. 1 TFEU. See also: Bungenberg, Außenbeziehungen und Außenhandelspolitik, in: Schwarze/Hatje (eds.), *Der Reformvertrag von Lissabon*, EuR Beiheft 1, 2009, p. 195 (204); Herrmann, in: Streinz/Ohler/Herrmann, *Der Vertrag von Lissabon zur Reform der EU*, 2010, 3rd edition, p. 150; Müller-Graff, The Common Commercial Policy enhanced by the Reform Treaty of Lisbon?, in: Dashwood/Maresceau (eds.), *Law and Practice of EU External Relations: Salient Features of a Changing Landscape*, 2008, p. 188 (189 et seq.); Tietje, Die Außenwirtschaftsverfassung der EU nach dem Vertrag von Lissabon, Beiträge zum Transnationalen Wirtschaftsrecht (2009) 83, p. 9. It is also worth mentioning that the Common Commercial Policy falls within the exclusive competence of the EU (Art. 3 (1)(e) in conjunction with Art. 2 (1) TFEU).

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For, in fact, quite a number of EU institutions appear to be competent as regards the Union's external action: the European Council, its President,³ the Foreign Affairs Council as a distinct configuration of the Council, the High Representative of the Union for Foreign Affairs and Security Policy, who also chairs the Foreign Affairs Council and holds the position of the Commissioner being in charge of external relations, the Commission as such,⁴ as well as the new European External Action Service and, last but not least, the Parliament. Hence, the question arises how competences are distributed among the aforementioned multiplicity of institutions.

Overview of the Allocation of Powers in the Field of the CCP

The Treaty of Lisbon has brought about extensive organisational reforms, in particular with regard to the Common Commercial Policy. In addition to Council and Commission, which one may consider ageing actors in the area of the Common Commercial Policy,⁵ the High Representative and the European External Action Service have come into play.⁶ For the purposes of an overview of the allocation of powers among the different EU institutions in the area of the Common Commercial Policy, we have to draw a distinction between unilateral trade measures on the one hand and international treaties on the other hand.

³ Rivalling the High Representative (cf. Art. 27 (2) cl.1 TEU), the President of the European Council is in charge of the external representation of the Union on issues concerning the Common Foreign and Security Policy (CFSP) (Art. 15 (6)(2) TEU). Contrary to views held by some authors (e.g. Pache, *Organgefüge und Handlungsträger der EU nach Lissabon*, in: Pache/Schorkopf (eds.), *Die Europäische Union nach Lissabon*, 2009, p. 19 (27); Weber, *Vom Verfassungsvertrag zum Vertrag von Lissabon*, *EuZW* 19 (2008) 1, p. 7 (9)) the President does not merely fulfil a ceremonial function (also rightly critical: Ohler, in: Streinz/Ohler/Herrmann, *Der Vertrag von Lissabon zur Reform der EU*, 2010, 3rd edition, p. 68). The external representation of the EU falls solely within the competence of the President ("at his level and in that capacity (*sc.* as President)") insofar as "strategic guidelines" laid down by the European Council in the field of the CFSP are concerned (cf. Art. 15 (6)(2), 16 (6)(3), 26 (1)(1) TEU). By contrast, the High Representative is solely in charge of the external representation of the EU insofar as the CSFP has been spelled out by the Council (cf. Art. 18 (2) cl.2, 26 (2)(1), 26 (3), 27 (1), (2) cl.1 TEU). See Dederer, *Zur Gewaltenteilung in der Union: Checks and Balances, institutionelles Gleichgewicht oder Konfusion?*, in: Hoffmann/Naumann (eds.), *Europäische Demokratie in guter Verfassung?*, 2010, p. 89 (94).

⁴ And within the Commission numerous Commissioners concerned with particular aspects of EU external action (e.g. development; trade; international cooperation; humanitarian aid and crisis response; enlargement and European neighbourhood policy).

⁵ See Streinz, *Europarecht*, 2008, 8th edition, para. 742 et seqq.

⁶ And, of course, the European Parliament as well. See Krajewski, *New functions and new powers for the European Parliament: Assessing the changes of the common commercial policy from the perspective of democratic legitimacy*, in this volume, who elaborates extensively on the European Parliament's role.

Unilateral Trade Measures

The Treaty on the Functioning of the European Union (TFEU) provides that unilateral trade measures shall be adopted in accordance with the ordinary legislative procedure.⁷ Hence, the adoption of unilateral measures falls within the competence of the European Parliament and the Council which act as lawmakers on an equal footing within the framework of the ordinary legislative procedure.⁸ The Commission has primarily the right of legislative initiative.⁹

However, lawmaking in accordance with the ordinary legislative procedure is restricted to the adoption of “regulations” defining the “framework” for the implementation of the Common Commercial Policy only.¹⁰ Therefore, Parliament and Council acting as the Union’s legislature may only pass “basic regulations”, but not regulations providing for detailed commercial policy (safeguard) measures in a particular case.¹¹ “Basic regulations” may, of course, confer implementing powers

⁷ Art. 207 (2) TFEU. For further information see Müller-Ibold, Common Commercial Policy after Lisbon: The European Union’s Dependence on Secondary Legislation, in this volume.

⁸ See Art. 289 (1) cl.1, 294 TFEU; cf. also Art. 14 (1) cl.1, 16 (1) cl.1 TEU.

⁹ Art. 289 (1) cl.1, 294 (2) TFEU; cf. also Art. 17 (2) cl.1 TEU. The Commission is, of course, also involved in some of the subsequent steps of the ordinary legislative procedure: see Art. 294 (6) cl.2, (7)(c), (9), (11), (15) TFEU.

¹⁰ Art. 207 (2) TFEU.

¹¹ Herrmann, in: Streinz/Ohler/Herrmann, *Der Vertrag von Lissabon zur Reform der EU*, 2010, 3rd edition, p. 152; Khan, in: Geiger/Khan/Kotzur, *EUV/AEUV*, 2010, 5th edition, Art. 207 AEUV, para. 88; Krenzler/Pitschas, Die gemeinsame Handelspolitik nach dem Entwurf des Europäischen Verfassungsvertrages – ein Schritt in die richtige Richtung, RIW 51 (2005) 11, p. 801 (819); Tietje, Die Außenwirtschaftsverfassung der EU nach dem Vertrag von Lissabon, Beiträge zum Transnationalen Wirtschaftsrecht (2009) 83, p. 12; Hummer, in: Vedder/Heintschel von Heinegg (eds.), *Europäisches Unionsrecht*, 2012, Artikel 207 AEUV, para. 22; see also Monar, Die gemeinsame Handelspolitik der Europäischen Union im EU-Verfassungsvertrag: Fortschritte mit einigen neuen Fragezeichen, Außenwirtschaft 60 (2005) 1, p. 99 (110). Art. 207 (2) TFEU does not serve as a legal basis for the adoption of individual measures. The clear wording of Art. 207 (2) TFEU (English: “framework”, French: “cadre”, German: “Rahmen”) does not allow for any other interpretation. This approach, which strictly adheres to the limits of interpretation imposed by the clear wording of a legal basis for Union action, is supported by the principle of limited attributed powers (Art. 5 (1) cl.1, (2) TEU). Even the “implied powers”-doctrine cannot lead to any other conclusion because this doctrine is – according to the ECJ (ECJ, Case 8/55 *Fédération Charbonnière de Belgique v. High Authority of the European Community for Coal and Steel* [1956] ECR I, 292 (300 et seq.) – merely a rule of interpretation. Thus, the “implied powers”-doctrine cannot apply where the law leaves no margin of interpretation – as is the case in Art. 207 (2) TFEU.

upon the Commission¹² which would be subject to Member State control within the context of the reformed “comitology” procedure.¹³

International Treaties

Inherently more complex but basically just as clear are the rules governing the competences for the conclusion of international treaties. Generally, in the area of the Common Commercial Policy, the standard procedure for the conclusion of agreements between the Union and third countries¹⁴ applies—with certain rather significant modifications, though. Like in the standard procedure, the Council exhibits the essential powers. It is the Council’s competence to authorize the opening of negotiations,¹⁵ to adopt negotiating directives¹⁶ and to conclude the agreements.¹⁷

Departing from the standard treaty negotiating procedure, however, the initiative to open negotiations falls exclusively within the competence of the Commission.¹⁸ The High Representative has—deviating from the standard procedure—no such right.¹⁹ In addition, the Commission is solely responsible for conducting the negotiations.²⁰ In this respect, the Council’s right to nominate the Union negotiator²¹ is vacated. However, the Commission shall conduct the negotiations “in

¹² Art. 291 (2), (3) TFEU. – Alternatively, in accordance with Art. 290 TFEU, the EU legislature could also delegate to the Commission the power to adopt non-legislative acts of general application (see Woolcock, *The potential impact of the Lisbon Treaty on European Union External Trade Policy*, *European Policy Analysis* 8–2008, p. 4, available at: <http://www.sieps.se/sites/default/files/427-20088epa.pdf>).

¹³ See Regulation (EU) No. 182/2011 of the European Parliament and of the Council of 16 February 2011, laying down the rules and general principles concerning mechanisms for control by Member States of the Commission’s exercise of implementing powers (EU L 55/13), based upon Art. 291 (3) TFEU. As long as existing basic acts related to the Common Commercial Policy have not undergone any amendments the specific procedures, which have been laid down in these basic acts without being subject to the former comitology decision (Council Decision of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (EC L 184/23)), still apply and are not affected by the new Comitology Regulation (EU) No. 182/2011 (see KOM/2010/83/FINAL, p. 6; recital 21 and Art. 13 Regulation (EU) No. 182/2011).

¹⁴ Art. 207 (3)(1), 218 TFEU.

¹⁵ Art. 207 (3)(2) cl.1, 218 (2), (3) TFEU.

¹⁶ Art. 207 (3)(3) cl.1, 218 (2), (4) TFEU.

¹⁷ Art. 207 (4), 218 (2), (5), (6) TFEU.

¹⁸ Art. 207 (3)(2) cl.1 TFEU.

¹⁹ Art. 218 (3) TFEU.

²⁰ Art. 207 (3)(2) cl.1 TFEU.

²¹ Art. 218 (3)(2) TFEU. The answer to the question of who will act as Union negotiator depends on the subject matter of the agreement (see Martenczuk, *Außenbeziehungen und Außenvertretung*, in: Hummer/Obwexer (eds.), *Der Vertrag über eine Verfassung für Europa*, 2007, p. 177 (196); also Hummer, in: Vedder/Heintschel von Heinegg (eds.), *Europäisches Unionsrecht*, 2012, Artikel 218 AEUV, para. 13 et seq.). If the agreement focuses on the CFSP the Council will nominate the High Representative as Union negotiator. In all other cases, the Council will nominate the Commission.

consultation” with a special committee appointed by the Council. This so-called “Trade Policy Committee”, which is staffed with senior officials, is merely an advisory body.²² It may control whether the Commission complies with the negotiating directives issued by the Council.²³

Furthermore, the Commission has to report regularly on the status of negotiations to both Parliament and the aforementioned committee.²⁴ This ensures—in accordance with established practice²⁵—that Parliament is involved already in the negotiating phase. In a resolution adopted by the European Parliament²⁶ concerning the revision of the Framework Agreement on the relations between the Parliament and the Commission,²⁷ the Parliament requests that the Commission commits itself to “immediate and full information to Parliament at every state of negotiations”, “in particular on trade matters”. This is not only important for reasons of transparency.²⁸ Rather, it is essential with regard to parliamentary consent to the treaty. For at the closing stage of the treaty negotiation procedure,²⁹ Parliament may only approve or reject the treaty in its entirety (i.e. on a “take it or leave it”-basis³⁰).

²² Note also the French (“en consultation avec”) and the German wording (“im Benehmen mit”).

²³ Krenzler/Pitschas, Die gemeinsame Handelspolitik nach dem Entwurf des Europäischen Verfassungsvertrages – ein Schritt in die richtige Richtung, RIW 51 (2005) 11, p. 801 (810).

²⁴ Art. 207 (3)(3) cl.2 TFEU.

²⁵ Bungenberg, Außenbeziehungen und Außenhandelspolitik, in: Schwarze/Hatje (eds.), *Der Reformvertrag von Lissabon*, EuR Beiheft 1, 2009, p. 195 (212); Krenzler/Pitschas, Die gemeinsame Handelspolitik nach dem Entwurf des Europäischen Verfassungsvertrages – ein Schritt in die richtige Richtung, RIW 51 (2005) 11, p. 801 (810); Krajewski, Das institutionelle Gleichgewicht in den auswärtigen Beziehungen, in: Herrmann/Krenzler/Streinz (eds.), *Die Außenwirtschaftspolitik der Europäischen Union nach dem Verfassungsvertrag*, 2006, p. 63 (70); Monar, Die gemeinsame Handelspolitik der Europäischen Union im EU-Verfassungsvertrag: Fortschritte mit einigen neuen Fragezeichen, *Außenwirtschaft* 60 (2005) 1, p. 99 (111). See also the Framework Agreement on relations between the European Parliament and the European Commission (Annex XIV to the Rules of Procedure of the European Parliament).

²⁶ European Parliament resolution on a revised Framework Agreement between the European Parliament and the Commission for the next parliamentary term, 09 February 2010, Doc.-No. B7-0091/2010.

²⁷ Annex XIV to the Rules of Procedure of the European Parliament as of March 2011.

²⁸ Hummer, in: Vedder/Heintschel von Heinegg (eds.), *Europäisches Unionsrecht*, 2012, Artikel 207 AEUV, para. 23; Krenzler/Pitschas, Die gemeinsame Handelspolitik nach dem Entwurf des Europäischen Verfassungsvertrages – ein Schritt in die richtige Richtung, RIW 51 (2005) 11, p. 801 (810).

²⁹ Art. 218 (6)(2) TFEU.

³⁰ Woolcock, The potential impact of the Lisbon Treaty on European Union External Trade Policy, *European Policy Analysis* 8–2008, p. 1, available at: <http://www.sieps.se/sites/default/files/427-20088epa.pdf>. See also Bungenberg, Going Global? The EU Common Commercial Policy After Lisbon, in Herrmann/Terhechte (eds.), *European Yearbook of International Economic Law*, 2010, p. 123 (129); Herrmann, The Lisbon Treaty Expands the EU’s External Trade and Investment Powers, *ASIL Insight* 14 (2010) 28, IV.

Like in the standard treaty negotiating procedure,³¹ the decision concluding the agreement has to be adopted by the Council.³² However, the Council decision will require prior approval by Parliament³³ if the agreement, depending on its contents, predetermines Parliament as (at least co-deciding) law-making body.³⁴ The scope of Parliament's consent power seems to be still unclear, though.³⁵

³¹ Art. 218 (2), (5), (6) TFEU.

³² Art. 207 (4) TFEU.

³³ Art. 207 (4) TFEU does not supersede Art. 218 (6) TFEU. See also Krajewski, *Das institutionelle Gleichgewicht in den auswärtigen Beziehungen*, in: Herrmann/Krenzler/Streinzi (eds.), *Die Außenwirtschaftspolitik der Europäischen Union nach dem Verfassungsvertrag*, 2006, p. 70 et seq.

³⁴ Reaching the same conclusion: Krenzler/Pitschas, *Die gemeinsame Handelspolitik nach dem Entwurf des Europäischen Verfassungsvertrages – ein Schritt in die richtige Richtung*, RIW 51 (2005) 11, p. 801 (810 et seq.); Martenczuk, *Außenbeziehungen und Außenvertretung*, in: Hummer/Obwexer (eds.), *Der Vertrag über eine Verfassung für Europa*, 2007, p. 177 (197, 199); see also Krajewski, *Das institutionelle Gleichgewicht in den auswärtigen Beziehungen*, in: Herrmann/Krenzler/Streinzi (eds.), *Die Außenwirtschaftspolitik der Europäischen Union nach dem Verfassungsvertrag*, 2006, p. 72 et seq.

³⁵ According to the view presented here, purpose and aim of parliamentary consent to “agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required” (Art. 218 (6)(2)(a)(v) TFEU), is to synchronize “internal” and “external” parliamentary participation: International agreements covering fields, in which internally, i.e. within the Union, consent by Parliament is required in order to pass a legislative act, may only be concluded upon prior approval by Parliament. Therefore, on the one hand, an international treaty in the area of the Common Commercial Policy is not only subject to parliamentary approval in cases in which the treaty affects “the framework for implementing the common commercial policy” within the meaning of Art. 207 (2) TFEU (Krajewski, *Das institutionelle Gleichgewicht in den auswärtigen Beziehungen*, in: Herrmann/Krenzler/Streinzi (eds.), *Die Außenwirtschaftspolitik der Europäischen Union nach dem Verfassungsvertrag*, 2006, p. 71 et seq.), i.e. in cases in which the treaty affects the (potential) amendment or (potential) enactment of “basic regulations”. On the other hand, an international treaty in the field of the Common Commercial Policy is not automatically subject to parliamentary approval simply because the “ordinary legislative procedure” applies in the field of the Common Commercial Policy (Herrmann, *The Lisbon Treaty Expands the EU's External Trade and Investment Powers*, ASIL Insight 14 (2010) 28, IV; Herrmann, *Die gemeinsame Handelspolitik der Europäischen Union im Lissabon-Urteil*, in: Hatje/Terhechte (eds.), *Grundgesetz und europäische Integration*, EuR Beiheft 1, 2010, p. 193 (196); see also Herrmann, in: Streinzi/Ohler/Herrmann, *Der Vertrag von Lissabon zur Reform der EU*, 2010, 3rd edition, p. 154). The decisive question is whether the trade agreement predetermines Parliament in legislating matters to which the ordinary legislative procedure (or a special legislative procedure where consent by Parliament is required, respectively) applies. For example, a trade agreement like the SPS Agreement (Agreement on the Application of Sanitary and Phytosanitary Measures 1994, L 336/40) must be taken into consideration when passing secondary EU legislation in the area of environmental, health and consumer protection. Legislative acts in those fields are often adopted on the basis of Art. 114 (1) cl.2 TFEU (Approximation of Laws) or on the basis of Art. 192 (1) TFEU (Environment). Both legal bases require that secondary legislation is adopted in accordance with the ordinary legislative procedure. Thus, the conclusion of a trade agreement like the SPS Agreement needs parliamentary consent (arguably of the same opinion Krenzler/Pitschas, *Die gemeinsame Handelspolitik nach dem Entwurf des Europäischen Verfassungsvertrages – ein Schritt in die richtige Richtung*, RIW 51 (2005) 11, p. 801 (810)). In practice, however, all trade agreements might be submitted to Parliament for approval anyway (Woolcock, *The potential impact of the Lisbon Treaty on European Union External Trade Policy*, European Policy Analysis 8-2008, p. 4, available at: <http://www.sieps.se/sites/default/files/427-20088epa.pdf>).

Usually, the Council has to adopt the decision concluding the agreement by a qualified majority,³⁶ but in exceptional cases unanimously.³⁷ The requirement of unanimity provides every Member State with a veto right and, therefore, weakens the EU's capability to act in the area of trade policy.³⁸ Nevertheless, the unanimity requirement remains objectively justified in those areas in which the TFEU requires unanimity for the adoption of internal secondary legislation on the same subject matter.³⁹ In this regard, however, the requirement of unanimity will likely be restricted to decisions concluding agreements on direct foreign investments.⁴⁰ In all other cases, the unanimity requirement has the character of a political compromise intended to take into account national sensitivities with regard to certain service sectors.⁴¹ For example, the Council decides unanimously on the conclusion of agreements "in the field of trade in cultural and audiovisual services, where these agreements risk prejudicing the Union's cultural and linguistic diversity" and "in the field of trade in social, education and health services, where these agreements risk seriously disturbing the national organisation of such services and prejudicing the responsibility of Member States to deliver them". These provisions contain

³⁶ Art. 207 (4)(1) TFEU.

³⁷ Art. 207 (4) (1-2), TFEU.

³⁸ Krenzler/Pitschas, Die gemeinsame Handelspolitik nach dem Entwurf des Europäischen Verfassungsvertrages – ein Schritt in die richtige Richtung, RIW 51 (2005) 11, p. 801 (811); more cautious Müller-Graff, The Common Commercial Policy enhanced by the Reform Treaty of Lisbon?, in: Dashwood/Maresceau (eds.), *Law and Practice of EU External Relations: Salient Features of a Changing Landscape*, 2008, p. 188 (201).

³⁹ Art. 207 (4)(2) TFEU. Likewise Tietje, Die Außenwirtschaftsverfassung der EU nach dem Vertrag von Lissabon, Beiträge zum Transnationalen Wirtschaftsrecht (2009) 83, p. 10. This provision also applies to so-called "horizontal agreements", i.e. trade agreements which also contain provisions unrelated to trade in services, commercial aspects of intellectual property or direct foreign investments without, however, marginalizing those provisions which are directly related to trade in services, commercial aspects of intellectual property or direct foreign investments (Hummer, in: Vedder/Heintschel von Heinegg (eds.), *Europäisches Unionsrecht*, 2012, Artikel 207 AEUV, para. 27; Khan, in: Geiger/Khan/Kotzur, *EUV/AEUV*, 2010, 5th edition, Art. 207 TFEU, para. 26; Krajewski, External Trade Law and the Constitutional Treaty: Towards a Federal and More Democratic Common Commercial Policy?, CMLRev. 42 (2005) 1, 91 (122); Krenzler/Pitschas, Die gemeinsame Handelspolitik nach dem Entwurf des Europäischen Verfassungsvertrages – ein Schritt in die richtige Richtung, RIW 51 (2005) 11, p. 801 (806, 811); Tietje, Die Außenwirtschaftsverfassung der EU nach dem Vertrag von Lissabon, Beiträge zum Transnationalen Wirtschaftsrecht (2009) 83, p. 10.

⁴⁰ Krenzler/Pitschas, Die gemeinsame Handelspolitik nach dem Entwurf des Europäischen Verfassungsvertrages – ein Schritt in die richtige Richtung, RIW 51 (2005) 11, p. 801 (806 et seq.); Tietje, Die Außenwirtschaftsverfassung der EU nach dem Vertrag von Lissabon, Beiträge zum Transnationalen Wirtschaftsrecht (2009) 83, p. 10; see also Hummer, in: Vedder/Heintschel von Heinegg (eds.), *Europäisches Unionsrecht*, 2012, Artikel 207 AEUV, para. 28 et seq.; Khan, in: Geiger/Khan/Kotzur, *EUV/AEUV*, 2010, 5th edition, Art. 207 TFEU, para. 26.

⁴¹ Art. 207 (4)(3) TFEU.

numerous rather vague legal terms leaving a wide margin of appreciation to the Member States.⁴²

Influence of the High Representative

In the area of the Common Commercial Policy, the powers of the Council and the Commission have not undergone any revolutionary changes under the Treaty of Lisbon. By contrast, the influence of the Parliament has increased significantly. Its far-ranging involvement in both unilateral trade measures and international trade agreements will minimize the so-called “democratic deficit” considerably.⁴³

Owing to the High Representative’s institutional position combined with his or her specific competences in the area of the Common Foreign and Security Policy

⁴² With regard to “trade in social, education and health services” (Art. 207 (4)(3)(b) TFEU), it is correctly held that unanimity is required if only *one* Member State plausibly asserts to be negatively affected: Hummer, in: Vedder/Heintschel von Heinegg (eds.), *Europäisches Unionsrecht*, 2012, Artikel 207 AEUV, para. 33; Khan, in: Geiger/Khan/Kotzur, *EUV/AEUV*, 2010, 5th edition, Art. 207 TFEU, para. 27; Krenzler/Pitschas, Die gemeinsame Handelspolitik nach dem Entwurf des Europäischen Verfassungsvertrages – ein Schritt in die richtige Richtung, RIW 51 (2005) 11, p. 801 (809); Tietje, Die Außenwirtschaftsverfassung der EU nach dem Vertrag von Lissabon, Beiträge zum Transnationalen Wirtschaftsrecht (2009) 83, p. 11; Müller-Graff, The Common Commercial Policy enhanced by the Reform Treaty of Lisbon?, in: Dashwood/Maresceau (eds.), *Law and Practice of EU External Relations: Salient Features of a Changing Landscape*, 2008, p. 188 (200)). By contrast, some authors argue that the “exception culturelle” laid down in Art. 207 (4)(3) (a) TFEU requires that *all* 27 Member States of the EU share the opinion that the Union’s cultural and linguistic diversity is at risk: Hummer, in: Vedder/Heintschel von Heinegg (eds.), *Europäisches Unionsrecht*, 2012, Artikel 207 AEUV, para. 32; Krenzler/Pitschas, Die gemeinsame Handelspolitik nach dem Entwurf des Europäischen Verfassungsvertrages – ein Schritt in die richtige Richtung, RIW 51 (2005) 11, p. 801 (808); Tietje, Die Außenwirtschaftsverfassung der EU nach dem Vertrag von Lissabon, Beiträge zum Transnationalen Wirtschaftsrecht (2009) 83, p. 11; similarly Khan, in: Geiger/Khan/Kotzur, *EUV/AEUV*, 2010, 5th edition, Art. 207 TFEU, para. 27. However, correctly held, it suffices that a concrete and significant risk with regard to the culture or language of only one Member State is a “risk prejudicing the Union’s cultural and linguistic diversity” within the meaning of Art. 207 (4)(3)(a) TFEU. Therefore, what is decisive is the plausible assertion of only one Member State that its culture and language is concretely and significantly threatened. Purpose and aim of Art. 207 (4)(3) TFEU support the view that this provision ought to be construed uniformly in its entirety. Art. 207 (4)(3) TFEU intends to grant every Member State a veto right. Such a veto right makes sense only for such a Member State which is specifically and negatively affected by service agreements within the meaning of Art. 207 (4)(3) TFEU. In such a case, the Member State will exercise its veto right typically in its own national interest, not in the common interest of the Union. Reaching the same conclusion: Müller-Graff, The Common Commercial Policy enhanced by the Reform Treaty of Lisbon?, in: Dashwood/Maresceau (eds.), *Law and Practice of EU External Relations: Salient Features of a Changing Landscape*, 2008, p. 188 (200).

⁴³ See also Krenzler/Pitschas, Die gemeinsame Handelspolitik nach dem Entwurf des Europäischen Verfassungsvertrages – ein Schritt in die richtige Richtung, RIW 51 (2005) 11, p. 801 (811); Martenczuk, Außenbeziehungen und Außenvertretung, in: Hummer/Obwexer (eds.), *Der Vertrag über eine Verfassung für Europa*, 2007, p. 177 (199) and the article by Krajewski, New functions and new powers for the European Parliament: Assessing the changes of the common commercial policy from the perspective of democratic legitimacy, in this volume.

(CFSP), the High Representative might unfold dynamics which cannot be fully pre-estimated.⁴⁴

For example, with regard to the former Treaty establishing a Constitution for Europe it was argued that the Common Commercial Policy was subordinate to the CFSP. It was further argued that, as a consequence, the Commissioner for Trade was also subordinate to the High Representative (then labelled the “Minister for Foreign Affairs”).⁴⁵ We disagree with this assumption: There is, at least on the basis of the Treaty of Lisbon, no such kind of hierarchy between the Common Commercial Policy or the Commissioner for Trade on the one hand, and the CFSP or the High Representative on the other hand.

Position of the High Representative

The High Representative personifies a “trinity” of functions that were held separately “before Lisbon” by (1) the Secretary-General of the Council as High Representative for Common Foreign and Security Policy, (2) the President of the General Affairs and External Relations Council and (3) the Commissioner for External Relations.⁴⁶ Correspondingly, “after Lisbon”, the High Representative is (1) head of the CFSP (and as such acting as an EU institution of its own)⁴⁷ as well as (2) President of the Foreign Affairs Council⁴⁸ and (3), within the Commission, Commissioner being in charge of foreign relations.⁴⁹ Furthermore, (4) the High Representative participates in the work of the European Council.⁵⁰ The latter function of the High Representative usually remains unmentioned or simply overlooked.

⁴⁴ The same holds true for the European Parliament.

⁴⁵ Monar, *Die gemeinsame Handelspolitik der Europäischen Union im EU-Verfassungsvertrag: Fortschritte mit einigen neuen Fragezeichen*, *Außenwirtschaft* 60 (2005) 1, p. 99 (107 et seq.), who backs his argument that the Commissioner for Trade is subordinate to the High Representative by referring exemplarily to the High Representative’s “koordinierende Weisungsbefugnis” (“coordinating authority to issue directives”). Thym, *Außenverfassungsrecht nach dem Lissaboner Vertrag*, in: Pernice (ed.), *Vertrag von Lissabon: Reform der EU ohne Verfassung?*, 2008, p. 173 (180), seems to follow the same approach. He assumes that the position of the High Representative as Vice President of the Commission implicates “Vorrechte [...] [sic!] bei der Ausarbeitung, Annahme und Durchführung der supranationalen Außenbeziehungen“ (“prerogatives [sic!] regarding the drafting, adoption and execution of supranational foreign affairs”).

⁴⁶ Bungenberg, *Außenbeziehungen und Außenhandelspolitik*, in: Schwarze/Hatje (eds.), *Der Reformvertrag von Lissabon*, *EuR Beiheft* 1, 2009, p. 195 (200); Thym, *Außenverfassungsrecht nach dem Lissaboner Vertrag*, in: Pernice (ed.), *Vertrag von Lissabon: Reform der EU ohne Verfassung?*, 2008, p. 173 (180).

⁴⁷ Art. 18 (2) cl.1 TEU; see also Art. 18 (2) cl.2, 26 (3), 27 (1), (2) TEU.

⁴⁸ Art. 18 (3), 27 (1) TEU.

⁴⁹ Art. 18 (4) cl.1, 3 TEU.

⁵⁰ Art. 15 (2) cl.2 TEU.

Being part of three EU institutions and, in addition, an independent EU institution⁵¹ at the same time seems to militate in favour of abundant competences and, thus, powerfulness of the High Representative. One has to take into consideration, though, that the High Representative, as an independent EU institution, is embedded in a clear hierarchy. He conducts the Union's CFSP,⁵² carries out the CFSP as mandated by the Council⁵³ and represents the Union for matters relating to the CFSP.⁵⁴ It is the Council, however, who frames and defines the CFSP.⁵⁵ The Council, in turn, is bound to the general guidelines and strategic lines as defined by the European Council.⁵⁶ Admittedly, the High Representative also plays a part within these institutions: within the Foreign Affairs Council as its President with the right of initiative⁵⁷ and within the European Council by participating in its work.⁵⁸ Nevertheless, in neither of these institutions, he or she holds a right to vote.⁵⁹ Above all, if the Foreign Affairs Council is convened to discuss Common Commercial Policy issues, the High Representative must be replaced by the Minister in charge of foreign trade⁶⁰ of that Member State which holds the presidency of the Council.^{61,62} Moreover, concerning his or her function as Commissioner being in charge of external relations, the High Representative's powers are significantly restricted by the "principle of

⁵¹ Thus, describing the High Representative as "double-hatted" is highly misleading and should therefore be abandoned. Also rightly critical Sydow, *Der Europäische Auswärtige Dienst*, JZ 66 (2011) 1, p. 6 (9).

⁵² Art. 18 (2) cl.1 TEU.

⁵³ Art. 18 (2) cl.2, 26 (3), 27 (1) TEU.

⁵⁴ Art. 27 (2) TEU.

⁵⁵ Art. 26 (2)(1) TEU.

⁵⁶ Art. 26 (1)(1), (2)(1) TEU.

⁵⁷ Art. 18 (2) cl.2, (3), 27 (1) TEU. One has to note, of course, that also the Member States have a right of initiative (Martenczuk, *Außenbeziehungen und Außenvertretung*, in: Hummer/Obwexer (eds.), *Der Vertrag über eine Verfassung für Europa*, 2007, p. 177 (192)).

⁵⁸ Art. 15 (2) cl.2 TEU.

⁵⁹ Because the High Representative is neither a member of the European Council (see Art. 15 (2) cl.2 TEU: "take part in its work") nor a member of the Foreign Affairs Council (see Art. 18 (3) TEU: "shall preside over the Foreign Affairs Council"). The right to vote is an exclusive right of the Member States or their representatives respectively (see Art. 15 (2) cl.1 TEU, Art. 235 (1)(2) cl.2 TFEU; Art. 16 (2) TEU). Of the same opinion Epping, in: Vedder/Heintschel von Heinegg, *Europäisches Unionsrecht*, 2012, Artikel 15 EUV, para. 5; Artikel 18 EUV, para. 11; Cremer, in: Calliess/Ruffert (eds.), *EUV/AEUV*, 2011, 4th edition, Art. 18 EUV, para. 14.

⁶⁰ In Germany, this would currently be the Federal Minister of Economics and Technology.

⁶¹ Cf. Art. 16 (9) TEU.

⁶² Art. 2 (5)(2) in conjunction with footnote 1 of the Council's Rules of Procedure (Annex to the Council Decision of 1 December 2009 adopting the Council's Rules of Procedure (2009/937/EU) (L325/35)).

collegiality”⁶³ and the “departmental principle”⁶⁴ as well as by the organizational and managerial control exercised by the President of the Commission.^{65, 66} Therefore, e.g., the High Representative’s vote does have no more weight than the other Commissioners’ votes,⁶⁷ and he or she has to respect the other Commissioners’ right to run their departments independently and on their own responsibility as well as the President’s competence to lay down guidelines.

This institutional position of the High Representative makes clear that he or she cannot, *ex officio*, accord the CFSP preponderance over the Common Commercial Policy or any other foreign policy. The High Representative’s omnipresence (participating in three EU institutions) does not lead to his or her omnipotence—neither *de iure* nor *de facto*.

Embedment of the Common Commercial Policy in the Union’s External Action

Of course, the Common Commercial Policy is embedded in the Union’s external action as a whole. But the external action of the Union and the CFSP, headed by the High Representative and carried out under the authority of the Council, are not the same—which would or could mean by implication that the Common Commercial Policy was fully embedded in, and, thus, possibly only subordinate to the CFSP. Rather, the external action of the EU consists of several foreign policies on the same hierarchic level. One of those foreign policies is the CFSP, another one is the Common Commercial Policy.

⁶³ Cf. Art. 17 (6)(1)(b) TEU, Art. 250 (1) TFEU. According to the principle of collegiality, all members of the Commission are coequal, having especially the equal right to vote. It further means that decisions assigned to the Commission as such must be taken by the Commission as a collegiate body, i.e. all members of the Commission shall debate and decide the particular issue and, thus, assume collective responsibility. See Epping, in: Vedder/Heintschel von Heinegg, *Europäisches Unionsrecht*, 2012, Artikel 251 AEUV, para. 1.

⁶⁴ Cf. Art. 17 (6)(1)(b) TEU, Art. 248 cl.1, 2 TFEU. The departmental principle means that every Commissioner runs his or her department assigned to him or her by the President of the Commission independently and on his or her own responsibility. For more information see Epping, in: Vedder/Heintschel von Heinegg, *Europäisches Unionsrecht*, 2012, Artikel 248 AEUV, para. 2.

⁶⁵ “Presidential principle”, meaning the President of the Commission has the power to create and assign portfolios and to lay down guidelines within which the Commission is to work (cf. Art. 17 (6)(1)(a),(b) TEU, Art. 248 cl.1,3 TFEU).

⁶⁶ Of course, those restrictions must keep within the limits which might derive from the High Representative’s position as an independent EU institution (i.e. as head of the CFSP) and his position as President of the Foreign Affairs Council (Art. 18 (4) cl.4 TEU)).

⁶⁷ Apart from that, the High Representative is also bound by the Commission’s majority decisions.

Notwithstanding the assumption put forward here that the various foreign policies of the EU are coequal,⁶⁸ the Common Commercial Policy will presumably become more “politicized” than before, i.e. it will probably be influenced politically by other foreign policies as well as exploited politically for purposes of the other foreign policies.⁶⁹ This would, however, flow from the Common Commercial Policy’s linkage to the value like interests and objectives, which comprehensively capture the Union’s external actions,⁷⁰ but also from the principle of consistency⁷¹ and the far-reaching substantial participation of Parliament.⁷² For

⁶⁸ The following considerations support the idea that the CFSP and the Common Commercial Policy (as well as all other foreign policies) are coequal. The CFSP and the Common Commercial Policy are strictly separated within the EU treaty framework. The CFSP is (almost comprehensively) laid down in the Treaty on European Union (Art. 23 to Art. 46 TEU). Additionally, Art. 218 TFEU provides for the conclusion of international treaties (see Martenczuk, *Außenbeziehungen und Außenvertretung*, in: Hummer/Obwexer (eds.), *Der Vertrag über eine Verfassung für Europa*, 2007, p. 177 (196)). The Common Commercial Policy, by contrast, is fully governed by the Treaty on the Functioning of the European Union (Art. 206 et seq. TFEU). TEU and TFEU are two separate but coequal treaties (Art. 1 (3) cl.2 TEU, Art. 1 (2) cl.2 TFEU). Furthermore, the TEU provides for a clear separation of procedures and powers: The implementation of the CFSP does not affect the procedures and powers for the implementation of all the other foreign policies including the Common Commercial Policy – and vice versa (Art. 40 TEU). The ECJ monitors compliance with these provisions (Art. 24 (1)(2) cl.6 TEU, Art. 275 (2) TFEU). In addition, in view of their position within the context of TEU and TFEU, both CFSP and Common Commercial Policy are subordinate to the general rules governing the external action of the Union (cf. Art. 21 et seq. TEU and Art. 205 TFEU in conjunction with Art. 21 et seq. TEU). This means that the same principles and objectives that guide the Union’s external actions overall are also applicable to both the CFSP and the Common Commercial Policy (Art. 21 (1), (2), (3)(1) TEU; Art. 205 TFEU). Moreover, the objectives obviously concern not only general foreign policy (see especially Art. 21 (2) TEU). To implement those principles and objectives the European Council has been endowed with the duty and power to identify, and to decide on, the strategic interests and objectives of the Union in all fields of its external action, i.e. also in the field of the CFSP and the Common Commercial Policy (Art. 22 (1)(1-2) cl.1 TEU, Art. 205 TFEU). Proposals for such decisions can be made by the High Representative with regard to the CFSP and by the Commission with regard to all other foreign policies. Irrespective of their subject matter (CFSP on the one hand, other external action on the other hand), such proposals have always to be submitted jointly by the Commission and the High Representative (Art. 22 (2) TEU; Art. 205 TFEU; similar provisions in Art. 215 (1) cl.1 TFEU; for a different approach, however, see Art. 218 (3) TFEU). The Common Commercial Policy is therefore, after all, subordinate only to the (legally binding) strategic interests and objectives framed by the European Council, but not to the CFSP.

⁶⁹ Concerning the “politicization” argument see Bungenberg, *Going Global? The EU Common Commercial Policy After Lisbon*, in Herrmann/Terhechte (eds.), *European Yearbook of International Economic Law*, 2010, p. 123 (128 et seq.); Monar, *Die gemeinsame Handelspolitik der Europäischen Union im EU-Verfassungsvertrag: Fortschritte mit einigen neuen Fragezeichen*, *Außenwirtschaft* 60 (2005) 1, p. 99 (108); Tietje, *Die Außenwirtschaftsverfassung der EU nach dem Vertrag von Lissabon*, *Beiträge zum Transnationalen Wirtschaftsrecht* (2009) 83, p. 19 et seq.

⁷⁰ Art. 205 TFEU in conjunction with Art. 21 (1), (2), (3)(1) TEU. For further information see Vedder, *Linkage of the Common Commercial Policy to the General Objectives for the Union’s external Action*, in this volume, p. 121 et seqq.).

⁷¹ Art. 21 (3)(3) cl.1 TEU; see also Art. 7 TFEU.

⁷² Cf. footnotes 24–36.

Parliament is expected to press for “exogenous” objectives and purposes especially in the area of the Common Commercial Policy.⁷³

In addition to the general “politicization” of the Common Commercial Policy, critics also fear its “intergovernmentalization”.⁷⁴ But the Common Commercial Policy’s “intergovernmentalization” would also result from the principle of consistency,⁷⁵ because, according to this principle, the Common Commercial Policy has to be coordinated with the CFSP (as well as with all other foreign policies). On the basis of the current Treaties, consistency between the “intergovernmental” CFSP⁷⁶ and the “supranational” Common Commercial Policy can become practical and effective only by accepting that the Common Commercial Policy comes to a certain extent under Member State influence stemming from the CFSP.⁷⁷

⁷³ Bungenberg, *Going Global? The EU Common Commercial Policy After Lisbon*, in Herrmann/Herhechte (eds.), *European Yearbook of International Economic Law*, 2010, p. 123 (129 et seq.); Herrmann, *The Lisbon Treaty Expands the EU’s External Trade and Investment Powers*, ASIL Insight 14 (2010) 28, IV. See also Bungenberg, *Außenbeziehungen und Außenhandelspolitik*, in: Schwarze/Hatje (eds.), *Der Reformvertrag von Lissabon*, EuR Beiheft 1, 2009, p. 195 (212 et seq.); Monar, *Die gemeinsame Handelspolitik der Europäischen Union im EU-Verfassungsvertrag: Fortschritte mit einigen neuen Fragezeichen*, Außenwirtschaft 60 (2005) 1, p. 99 (111). On occasion, the fact that the Common Commercial Policy might be affected more severely by other foreign policies than in the past is accepted only reluctantly. The general “politicization” of the Common Commercial Policy is simply the compelling consequence of historical developments: The former Economic Community has (already long ago) evolved into a political Union – also in the field of foreign affairs.

⁷⁴ Monar, *Die gemeinsame Handelspolitik der Europäischen Union im EU-Verfassungsvertrag: Fortschritte mit einigen neuen Fragezeichen*, Außenwirtschaft 60 (2005) 1, p. 99 (107 et seq.); see also Krenzler, *Die Außenhandelsbefugnisse der EU*, in: Schwarze (ed.), *Der Verfassungsentwurf des Europäischen Konvents*, 2004, p. 385 (390); Krenzler/Pitschas, *Die gemeinsame Handelspolitik nach dem Entwurf des Europäischen Verfassungsvertrages – ein Schritt in die richtige Richtung*, RIW 51 (2005) 11, p. 801 (803); Müller-Graff, *The Common Commercial Policy enhanced by the Reform Treaty of Lisbon?*, in: Dashwood/Maresceau (eds.), *Law and Practice of EU External Relations: Salient Features of a Changing Landscape*, 2008, p. 188 (194 et seq., 196 et seq).

⁷⁵ Art. 21 (3)(2) cl.1 TEU; cf. Also Art. 7 TFEU.

⁷⁶ On the CFSP’s being intergovernmental in character see Pechstein, *Die Intergovernmentalität der GASP nach Lissabon*, JZ 65 (2010) 9, p. 425.

⁷⁷ The fact that the Common Commercial Policy has to adhere to the principles and objectives that guide all external action of the Union (Art. 205 TFEU in conjunction with Art. 21 (1), (2), (3)(1) TEU) causes a certain “intergovernmentalization” of the Common Commercial Policy as well (on this in detail Monar, *Die gemeinsame Handelspolitik der Europäischen Union im EU-Verfassungsvertrag: Fortschritte mit einigen neuen Fragezeichen*, Außenwirtschaft 60 (2005) 1, p. 99 (107). Because it is these principles and objectives, on the basis of which the European Council has to identify the strategic interests and objectives which are, in turn, also binding on the Common Commercial Policy (Art. 205 TFEU in conjunction with Art. 22 (1)(1), (1) (2) cl.1.2 TEU). The European Council acts on a recommendation from the Council (Art. 22 (1)(3) cl.1 TEU). Within both the Council and the European Council, the Member States are represented on a governmental level.

Albeit, one should view the phenomenon of “intergovernmentalization” in a more stress-free way for two reasons.⁷⁸ First, the TEU provides for, and the ECJ monitors, the allocation of powers with regard to the CFSP on the one hand and the Common Commercial Policy on the other hand.⁷⁹ Second, the European Parliament, which enjoys significantly increased participatory powers⁸⁰ in the area of the Common Commercial Policy, likes to act as “supranational antagonist” defying the Council and the Member States represented therein.⁸¹

Regarding the Union’s capacity to act on the international playing field, it is indispensable that the external action of the Union presents itself as a whole in a coherent way. All foreign policies of the EU, in particular the CFSP and the Common Commercial Policy, must be framed, identified and implemented in a coherent and concerted way according to the principle of consistency.⁸² “Chinese Walls” separating the several foreign policies of the Union would also be entirely unreasonable in terms of global politics. Both TEU and TFEU equally share this deeper rational insight.⁸³ Consistency, of course, also requires institutional as well as procedural linkages between the Union’s foreign policies.

Consequences as Regards the Influence of the High Representative on the Common Commercial Policy

It is the High Representative whom the Member States have enthroned as the institutional crosspoint of such linkages.⁸⁴ The High Representative is integrated

⁷⁸ Likewise Krenzler/Pitschas, Die gemeinsame Handelspolitik nach dem Entwurf des Europäischen Verfassungsvertrages – ein Schritt in die richtige Richtung, RIW 51 (2005) 11, p. 801 (803); Müller-Graff, The Common Commercial Policy enhanced by the Reform Treaty of Lisbon?, in: Dashwood/Maresceau (eds.), *Law and Practice of EU External Relations: Salient Features of a Changing Landscape*, 2008, p. 188 (196 et seq., 199).

⁷⁹ Art. 40 in conjunction with Art. 24 (1)(2) cl.6 TEU. In addition, with regard to the conduct of the Common Commercial Policy, the ECJ may review, via Art. 205, 207 (1)(2) TFEU, compliance with the principle of consistency as laid down in Art. 21 (2)(3) cl.1 TEU as well as adherence to the principles and objectives set out in Art. 21 (1), (2), (3)(1) TEU (cf., Müller-Graff, The Common Commercial Policy enhanced by the Reform Treaty of Lisbon?, in: Dashwood/Maresceau (eds.), *Law and Practice of EU External Relations: Salient Features of a Changing Landscape*, 2008, p. 188 (195)). However, the ECJ will have to leave a certain margin of appreciation to those EU institutions which are competent for ensuring consistency and for identifying the principles and objectives guiding the Union’s external action.

⁸⁰ Cf. footnotes 24–36.

⁸¹ See also Monar, Die gemeinsame Handelspolitik der Europäischen Union im EU-Verfassungsvertrag: Fortschritte mit einigen neuen Fragezeichen, *Außenwirtschaft* 60 (2005) 1, p. 99 (109, 111).

⁸² Art. 21 (3)(2) cl.1 TEU.

⁸³ As has been spelled out before, all external action is subordinate to a common set of objectives and principles (Art. 21 (1), (2), (3)(1) TEU, Art. 205 TFEU) as well as to the principle of consistency (Art. 21 (3)(2) cl.1 TEU; cf. also Art. 7 TFEU).

⁸⁴ See also Thym, Außenverfassungsrecht nach dem Lissaboner Vertrag, in: Pernice (ed.), *Vertrag von Lissabon: Reform der EU ohne Verfassung?*, 2008, p.173 (179, 186).

into the Council and the Commission, i.e. into those two institutions which have, according to the Treaties, the primary responsibility to ensure consistency of the Union's external action and to cooperate to that effect.⁸⁵ To this end, the High Representative has to assist the Council and the Commission⁸⁶ and, in this vein, ensure consistency of the Union's external action.⁸⁷ Hence, it is logically consistent that the High Representative holds a key position, as mentioned above, within the Council and the Commission.

After all, characterizing the High Representative as an institution being "hung up" between Council and Commission and having, thus, "divided loyalties",⁸⁸ seems a little bit too exaggerated and pessimistic. In case of colliding courses of action adopted by the Council in the field of CFSP on the one side and by the Commission in the field of trade policy on the other side, the High Representative is not supposed to side with either the Council or the Commission. Rather, he or she is expected to exert all his or her strength in order to coordinate CFSP and trade policy.⁸⁹ If the High Representative's coordinating efforts within the Commission have failed, Council and Commission must—as provided for in the Treaty⁹⁰—cooperate in order to ensure consistency of the Union's external action. In doing so, the High Representative has—as provided for by the Treaty⁹¹—to support both institutions.⁹² For example, he or she may propose to the Council to redefine the CFSP or some of its aspects. In collaboration with the Commission, the High Representative may submit joint proposals to the Council concerning recommendations to the European Council in order to enable the European Council to define the greater strategic interests and objectives in the areas of the CFSP and the Common Commercial Policy authoritatively in a concerted way.⁹³

⁸⁵ Art. 21 (3)(2) cl.2 TEU.

⁸⁶ Art. 21 (3)(2) cl.2 TEU.

⁸⁷ Cf. Art. 18 (4) cl.1 TEU.

⁸⁸ Cf. Herrmann, in: Streinz/Ohler/Herrmann, *Der Vertrag von Lissabon zur Reform der EU*, 2010, 3rd edition, p. 143. See also Hummer, *Gemeinsame Außen-, Sicherheits- und Verteidigungspolitik sowie Solidaritätsklausel*, in: Hummer/Obwexer, *Der Vertrag über eine Verfassung für Europa*, 2007, p. 307 (314), who points to the "funktionelle Spannungsverhältnis durch die gleichzeitige Zuordnung zur supranationalen Sphäre der Kommission und zur intergouvernementalen Sphäre des Rates" ("functional tension resulting from the simultaneous assignment to the supranational sphere of the Commission and the intergovernmental sphere of the Council").

⁸⁹ Art. 18 (4) cl.3 TEU.

⁹⁰ Art. 21 (3)(2) cl.2 TEU.

⁹¹ Art. 21 (3)(2) cl.2 TEU.

⁹² Martenczuk, *Außenbeziehungen und Außenvertretung*, in: Hummer/Obwexer (eds.), *Der Vertrag über eine Verfassung für Europa*, 2007, p. 177 (193), points out correctly that the High Representative "durch seine Bindung an Kommission und Rat eine wichtige Brückenfunktion einnehmen (kann), die Konflikte schon im Ansatz vermeiden hilft" ("due to his or her liaison with both the Commission and the Council, may take a mediating position which could be instrumental in preventing conflicts right from the start").

⁹³ Art. 22 (2) TEU.

During a particular treaty negotiating procedure in the area of the Common Commercial Policy, the High Representative would not be able to stand up to the Commission pushing a course of action which was, according to his or her viewpoint, in sole conformity with the CFSP. Of course, the Foreign Affairs Council may route the treaty negotiations conducted by the Commission by issuing guidelines.⁹⁴ However, the High Representative does not preside over this distinct Council configuration if the Council addresses questions pertaining to the Common Commercial Policy, e.g. to the conclusion of trade agreements.⁹⁵ Within the Commission, the High Representative has merely the competence to “coordinate” the various foreign policies,⁹⁶ i.e. to harmonize the CFSP and the Common Commercial Policy, but not the competence to assert unilaterally a trade policy option which is from his or her point of view the only CFSP-compliant one.⁹⁷ The High Representative is also unable to do so purely as a matter of fact because the specific expertise required with regard to the often highly technical issues of the Common Commercial Policy continues to lie with the Commission, in particular with the Commissioner for Trade and the Directorate General for Trade.⁹⁸

By contrast, it is of advantage to the High Representative if the subject matter of an international agreement relates essentially to the CFSP, i.e. if, e.g., questions of external trade are not covered or merely constitute an ancillary aspect. In such cases, the initiative to enter into treaty negotiations lies a priori solely with the High Representative whom the Council will also nominate as the Union negotiator.⁹⁹

All these aspects which concern the formal legality of the treaty negotiating procedure are, of course, subject to judicial review by the ECJ to which especially the Commission may submit a case.¹⁰⁰ It is, therefore, quite unlikely that the High

⁹⁴ Art. 207 (3)(3) cl.1 TFEU.

⁹⁵ Art. 2 (5)(2) of the Council’s Rules of Procedure (fn. 62).

⁹⁶ Art. 18 (4) cl.3 TEU.

⁹⁷ See in contrast, e.g., Bungenberg, Außenbeziehungen und Außenhandelspolitik, in: Schwarze/Hatje (eds.), *Der Reformvertrag von Lissabon*, EuR Beiheft 1, 2009, p. 195 (200), according to whom the High Representative has the power “die GHP... gegebenenfalls dem stärker mitgliedstaatlichen Einfluss unterliegenden GASP-Bereich zuzuordnen (*sic!*)” (“to allocate (*sic!*) the Common Commercial Policy, where appropriate, to the CFSP-area on which the Member States exert stronger influence”).

⁹⁸ Cf. Woolcock, The potential impact of the Lisbon Treaty on European Union External Trade Policy, European Policy Analysis 8-2008, p. 3, available at: <http://www.sieps.se/sites/default/files/427-20088epa.pdf>.

⁹⁹ Cf. Art. 218 (3) TFEU. See also in and at fn. 20–21.

¹⁰⁰ See, in particular, the advisory opinion procedure (Art. 218 (11) TFEU), which the Commission may initiate. Cf. on this Müller-Graff, The Common Commercial Policy enhanced by the Reform Treaty of Lisbon?, in: Dashwood/Maresceau (eds.), *Law and Practice of EU External Relations: Salient Features of a Changing Landscape*, 2008, p. 188 (196), who argues that the ECJ may only review whether the procedure was manifestly erroneous; see also on the ECJ’s competence of judicial review with regard to treaties in the area of the CFSP according to Art. 218 (11) TFEU Hummer, in: Vedder/Heintschel von Heinegg (eds.), *Europäisches Unionsrecht*, 2012, Artikel 218 AEUV, para. 34; Khan, in: Geiger/Khan/Kotzur, *EUV/AEUV*, 2010, 5th edition, Art. 218 TFEU, para. 20.

Representative will wantonly ignore the lines of demarcation between CFSP and trade policy.¹⁰¹

Relevance of the European External Action Service

The High Representative cannot be considered to be specifically powerful by pointing to the European External Action Service (EEAS). Of course, the EEAS is the “administrative infrastructure” of the High Representative. In particular, the EEAS has to support the High Representative in his or her function as head and representative of the CFSP.¹⁰² Nonetheless, the EEAS is not solely attached to the High Representative. For example, the EEAS also has to support the Commission in the field of the Common Commercial Policy and to co-operate with the services of the Commission.¹⁰³

In addition, the Commission may instruct the Union delegations to third countries and to international organizations,¹⁰⁴ despite the fact that these delegations form a part of the EEAS¹⁰⁵ which, in turn, is subordinate to the High Representative.¹⁰⁶ The Commission’s competence to issue instructions to delegations is particularly indispensable for purposes of the Common Commercial Policy¹⁰⁷ because it is solely the Commission which has the competence to represent the Union externally with regard to trade policy.¹⁰⁸ Moreover, the staff possessing specific expertise in the field of trade policy has remained with the Commission and has not been transferred to the EEAS.¹⁰⁹ Similarly, the Union

¹⁰¹ See also Krenzler/Pitschas, Die gemeinsame Handelspolitik nach dem Entwurf des Europäischen Verfassungsvertrages – ein Schritt in die richtige Richtung, RIW 51 (2005) 11, p. 801 (803).

¹⁰² Art. 27 (3)(1) TEU.

¹⁰³ Art. 2 (2), 3(1) Decision 2010/427/EU (Council Decision of 26 July 2010 establishing the organisation and functioning of the European External Action Service (2010/427/EU) (OJ EU L 201/30)).

¹⁰⁴ Art. 5 (3)(2) Decision 2010/427/EU.

¹⁰⁵ Art. 1 (4) Decision 2010/427/EU.

¹⁰⁶ Art. 1 (3) Decision 2010/427/EU.

¹⁰⁷ With regard to the necessity of a “enge Einbindung” (“close integration”) of the EEAS into, and a “starke Anbindung” (“strong link”) of the EEAS to, existing structures and the Commission and its services, see Martenczuk, Außenbeziehungen und Außenvertretung, in: Hummer/Obwexer (eds.), *Der Vertrag über eine Verfassung für Europa*, 2007, p. 177 (194 et seq.).

¹⁰⁸ Art. 17 (1)(6) TEU. Subject to the competences of the President of the European Council and the High Representative in the field of the CFSP (see fn. 3), the Commission’s power of external representation is all-embracing (Martenczuk, Außenbeziehungen und Außenvertretung, in: Hummer/Obwexer (eds.), *Der Vertrag über eine Verfassung für Europa*, 2007, p. 177 (191, 193)).

¹⁰⁹ Cf. Annex to the Decision 2010/427/EU. See also Knoop, Der Außenminister der Europäischen Union und der Europäische Auswärtige Dienst, in: *Festschrift für Götz*, 2005, p. 93 (104); Martenczuk, Außenbeziehungen und Außenvertretung, in: Hummer/Obwexer (eds.), *Der Vertrag über eine Verfassung für Europa*, 2007, p. 177 (194).

delegations' personnel occupied with questions relating to foreign trade is not in attendance on the EEAS, but on the Commission.¹¹⁰

At least in theory, conflicting instructions seem to be conceivable,¹¹¹ if, e.g., a delegation receives instructions, which are hardly compatible with each other, from the EEAS on the one hand and the Commission on the other hand.¹¹² This problem has been realized from the beginning. The Council Decision on the EEAS prorogued the issue until the conclusion of an agreement between Commission and EEAS, though.¹¹³

What may be more problematic is that the delegations are also subordinate to the instructions of the High Representative. It is not only the Council Decision on the EEAS¹¹⁴ but also primary law¹¹⁵ which ensures that the delegations are placed directly under the authority of the High Representative. According to its clear wording, the TFEU¹¹⁶ seems to designate the High Representative as the sole institution being empowered to direct the EEAS. In a rather cryptic way, the Council Decision on the EEAS provides that the Commission has to execute its instruction powers, conferred upon it only by secondary law,¹¹⁷ "in accordance with" the power of the High Representative to direct the EEAS, conferred upon him or her by primary law.¹¹⁸ Bringing about such "accord" will, in practice, entail a certain demand for coordination between the Commission and the High Representative.¹¹⁹

Summary

In view of the institutional interweavements presented here, it is not easy to sum up our observations. In the area of the Common Commercial Policy, pivotal powers are vested primarily with the Parliament, the Council and the Commission.

¹¹⁰ EU press release 'EEAS decision – main elements' of 8 July 2010 (MEMO/10/311), at 2.

¹¹¹ Delving into this problem Sydow, *Der Europäische Auswärtige Dienst*, JZ 66 (2011) 1, p. 6 (10).

¹¹² Cf. Art. 5(3) Decision 2010/427/EU.

¹¹³ Recital 13 of the Decision 2010/427/EU. Concerning this problem see Knoop, *Der Außenminister der Europäischen Union und der Europäische Auswärtige Dienst*, in: *Festschrift für Götz*, 2005, p. 93 (105).

¹¹⁴ Art. 5(3)(1) Decision 2010/427/EU.

¹¹⁵ Art. 221(2)(1) TFEU.

¹¹⁶ Art. 221(2)(1) TFEU.

¹¹⁷ Art. 5 (3)(2) Decision 2010/427/EU.

¹¹⁸ Art. 5 (3)(2) Decision 2010/427/EU.

¹¹⁹ Despite the fact that primary law subjects the EEAS to the authority of the High Representative only, his or her instructions will not prevail over instructions issued by the Commission if the Commission and the High Representative are unable to reach an "accord" within the meaning of Art. 5 (3)(2) Decision 2010/427/EU. Such a conclusion would contradict our reasoning in and at fn. 68–101. See, however, Sydow, *Der Europäische Auswärtige Dienst*, JZ 66 (2011) 1, p. 6 (10), according to whom the Commission's exercise of its competence to instruct Union delegations "die grundsätzliche Leitungsverantwortung des Hohen Vertreters nicht in Frage stellen dürfe" ("must not contest the High Representative's primary responsibility to direct [the EEAS]").

Parliament and Council are coequal legislative bodies with regard to unilateral trade measures. Their enactment depends on the Commission's initiative, though. With regard to the conclusion of international treaties, both the initiative to open negotiations and the conduct of negotiations always fall exclusively within the competence of the Commission. Of course, the Commission needs to be authorized by the Council, which may direct the Commission's negotiations by issuing directives and which has to adopt the decision concluding the treaty. The Commission has to inform Parliament during the treaty negotiations on a regular basis. Generally speaking, treaties in the field of the Common Commercial Policy may not be concluded any more without Parliament's consent.

Within the Commission, the High Representative is not superior to the Commissioner for Trade who is still fully responsible for the Common Commercial Policy. The High Representative's task is to ensure consistency of the Union's external actions by coordinating the CFSP and the Common Commercial Policy, i.e. by harmonizing those two foreign policies. Therefore, the relationship between the CFSP and the Common Commercial Policy is not unidirectional squeezing the Common Commercial Policy in a corset plaited by the CFSP. The influence of the High Representative on the doubtlessly increasing "politicization" and "intergovernmentalization" of the Common Commercial Policy should, thus, not be overestimated.

The EEAS will not boost the High Representative's vigour either. Especially in the field of the Common Commercial Policy, the EEAS has to support the Commission and its services as well. What is more, the EEAS has not swallowed up the Commission's staff being in charge of the Common Commercial Policy. As a consequence, the highly technical expertise needed for purposes of the Common Commercial Policy remains with the Commission. In addition, the personnel being responsible for trade issues within the Union delegations to third countries or to international organizations will be deputed by the Commission. Moreover, the Commission has the power to issue instructions to delegations in the area of the Common Commercial Policy.

Of course, the "on-road test" of the allocation of powers in the area of the Common Commercial Policy under the Treaty of Lisbon has just begun. In the end, it will also depend quite naturally on the personalities of the actors how smooth the Common Commercial Policy "after Lisbon" will be driven in light of the quite complex institutional "wheelwork" provided for in the Treaties.