

A European diplomatic service?

One of the most innovative aspects of the now deadlocked European Constitutional Treaty was the creation of a European diplomatic service, known as the European External Service. Bringing together officials from EU institutions and staff seconded from the diplomatic services of the member states the task of the External Service is, according to the Constitutional Treaty, to assist and support the holder of the new post of European Foreign Minister. In the often confused discussion following on the rejection of the Constitutional Treaty by the French and Dutch electors, some commentators and politicians have expressed the hope that it might be possible to introduce the European External Service without waiting for the perhaps impossible final ratification of the Treaty. This Brief considers the legal, institutional and political questions now surrounding the setting up of a European External Service. Our conclusion is that no substantial legal or administrative obstacles remain in the way of an early move towards setting up such an External Service. The current impasse over the ratification of the Constitutional Treaty, however, acts as a considerable barrier to the mobilisation of political will necessary to create the External Service outside the Treaty.

Historical Background

The Treaty on European Union (TEU) signed at Maastricht in 1991 set as a goal for the European Union a Common Foreign and Security Policy (CFSP), with the objectives, inter alia, of safeguarding 'the common values, fundamental interests and independence of the Union', of promoting 'international co-operation' and of developing and consolidating 'democracy and the rule of law, and respect of human rights and fundamental freedom.' With the Amsterdam Treaty of 1997, a number of amendments to the CFSP provisions of the Maastricht Treaty were agreed. The most important was the creation of a High Representative for CFSP, a role held since the Amsterdam Treaty by Javier Solana, who is widely regarded as having given what was originally seen as an administrative post a significant measure of political authority. The High Representative's position has been further reinforced over the past decade by the creation of a number of other new institutions in the CFSP field, notably the Policy Planning and Early Warning Unit, the Political and Security Committee, the European Military Committee and the European Military Staff.

Despite what most member states of the EU see as positive developments in recent years, few observers would deny that the European Union's Common Foreign and Security Policy suffers considerable institutional fragmentation, both internally and externally. There is poor co-ordination between the central institutions of the European Union, and equally uncertain collaboration between national policy-makers and their colleagues in Brussels. It was in the light of such concerns that the European Council of Laeken in 2001 asked the Convention on the future of Europe to consider how to improve the instruments of EU foreign policies so that the EU can become 'a power [...] to change the course of the world'. The two major proposals of the Convention in response to this challenge (both later taken up by the Constitutional Treaty) were for the creation of a European Union Foreign Minister, combining the current responsibilities of the High Representative and the European Commissioner for External Relations; and for the setting up of an integrated European External Service to support this Foreign Minister. There is little doubt that the members of the Convention saw these two proposals as inextricably linked. The failure of the Constitutional Treaty to be ratified in the French and Dutch referendums has led some commentators, however, to wonder whether it might not be possible anyway to set up an External Service. The task of this Service would be to support and improve the Union's already functioning attempts to evolve a coherent Common Foreign and Security Policy under the Maastricht and Amsterdam Treaties.

The Debate on the External Service at the Convention and IGC

The first proposers of a European External Service during the Convention were the former Italian Prime Minister Giuliano Amato and two MEPs, Elmar Brok (Germany) and Andrew Duff (UK). The precise text of their proposal stipulated that 'to strengthen the coherence and

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efficiency of the Union's action in the world, the Convention agrees on the need to establish as an integral part of the Commission administration, one joint service (European External Action Service)'. The concept of a 'European External Service' rapidly gained ground within the Convention and was enshrined in the draft Constitutional Treaty finally proposed by the Convention to the Intergovernmental Conference. But the Convention's agreement on the general principle of an External Service was despite important differences within its ranks on the nature and working of the Service.

In their original initiative, Amato, Brok and Duff had proposed that the External Service form part of the European Commission's bureaucratic structure. This was acceptable, indeed attractive to the current of opinion within the Convention which saw the European Commission as the appropriate eventual executant of the European Common Foreign and Security Policy. It was less attractive to those who see CFSP as being, in the medium or even the long term, as being primarily an intergovernmental arrangement. This disparity of views within the Convention was left unresolved in the final draft Constitutional Treaty, which said that 'the organisation and functioning of the European External Service shall be established by a European decision of the Council' and that the Council will 'act on a proposal from the Union Minister for Foreign Affairs after consulting the European Parliament and after obtaining the consent of the Commission'. In the same way as the Convention eventually compromised on the institutional affiliation of the Minister for Foreign Affairs (although a member of the Commission, he or she would take instructions from the Council of Ministers) so the institutional status of the External Service and the precise scope of its activities were left open by the draft Constitutional Treaty.²

When the EU member states finally adopted the Constitutional Treaty at their Intergovernmental Conference held in June 2004 in Brussels, they did not change the content of the Conventions' proposals on the External Service. Significantly, however, the relevant article was placed in the CFSP Chapter in Part III of the Treaty (Art.III-296 para.3). Arguably, this positioning limits the External Service simply to CFSP matters, a limitation which contradicts a central objective of the External Service, namely to integrate and consolidate the EU's whole range of foreign policy instruments. (Trade, aid, environment and energy questions are all long-standing areas of EU competence, which have substantial foreign policy implications, but remain outside the

narrowly defined intergovernmental CFSP.) It should be observed, however, that the article in question states that the External Service will 'assist' the Foreign Minister. The Service's scope of action should therefore logically reproduce that of the Foreign Minister.

After the signing of the Constitutional Treaty, the member states decided that preparations should begin immediately for the setting up of the External Service. This instruction was followed by the European Commission, working together with Javier Solana, who had been designated as the first European Union 'Foreign Minister'. At the Brussels European Council in December 2004, the EU member states urged the Commission and Mr. Solana 'to continue this preparatory work, in particular by identifying key issues, including the scope and structure of the future service'. While doing so, however, Mr. Barroso and Mr. Solana needed 'to ensure the full involvement of Member States in this process'. They were further instructed to 'prepare a joint progress report' for the June 2005 European Council.³

The Discussion about the External Service

During the first half of 2005, the EU's member states and institutions refined their ideas on the European External Service. The debate took as its starting-point the text of the Constitutional Treaty. Controversy centred on two main questions, the institutional 'location' of the Service and its organisation. As so often in such debates, underlying differences of view about the appropriate nature of the CFSP found their predictable expression in the positions adopted by the participants.

The European Parliament, for instance, demanded in its report of May 2005, that the Service should be 'incorporated, in organisational and budgetary terms, in the Commission's staff structure.' This was consistent with the original proposals put forward in the Convention by the MEPs Duff, Brok and Dini. During the debates leading up to the report of May 2005, however, it had become clear that differing opinions existed within the Parliament on this issue. Mr. Dini himself, for instance, argued that the most natural interpretation of the Constitutional Treaty adopted by the Intergovernmental Conference was that the Service should be a 'sui generis' entity, based on none of the existing European institutional models. Mr. Dini was supported by the former President of the European Parliament, Klaus Haensch, who suggested that if the Service had been envisaged by the signatories of the Treaty as falling into

any existing European institutional category, then they would have said so in the Treaty.

Among the EU member states, there is indeed something very like a consensus that the Service should represent a new institutional departure within the Union. There is emphatically no enthusiasm for it to become part of the Commission, and no obvious support among the member states for locating the Service in the Secretariat General of the Council, a proposal which has been put by some high officials of the Secretariat. Particularly on the part of the bigger member states such as the United Kingdom, there is a clear desire to restrict the autonomy of the new Service. But the oft-repeated call for a 'sui generis' entity seems to mask (albeit imperfectly) uncertainty and disagreement as to how this restriction can best be brought about. The role of the European Commission in this confused situation is an interesting one. It seems to recognise that its preferred solution, the incorporation of the External Service into the Commission itself, is unattainable at present. It seems reluctant, however, to endorse or advocate any other model.

Intertwined with the controversy about the institutional affiliation of the Service are the questions of its composition and organisation. If the Service were to be incorporated into the Commission or the Secretariat of the Council, significant re-organisation of these two latter bodies would need to take place. On the other hand, if the External Service were to be established autonomously of the Commission or the Council, some duplication of staff already engaged in the Commission and Council would be the inevitable consequence. The background is further complicated by the disparity in present staffing levels between the institutions. The Commission has over 3000 staff members working in the three Directorates General most directly engaged in foreign affairs, while the Council has only 225 equivalent staff, admittedly supplemented by a further 140 working on the Military Staff.

This disparity is naturally reflected in all the three main approaches canvassed for the internal structure of the External Service. The organisationally least ambitious approach would incorporate only the foreign affairs Directorate from the Council Secretariat and the Directorate General dealing with external relations from the Commission. With such limited personnel, the Service would probably be too weak to ensure consistency and coherence in EU foreign policies. At the other end of the spectrum, proposals have been discussed for

bringing together in the External Service all officials dealing with the external relations of the Union (broadly defined) from the Council and the Commission, and adding to their number the officials who represent the Union in third countries. This body would certainly not lack for resources, but it might be wondered whether even the European Union's envisaged Foreign Minister would be able adequately to supervise all its activities.

A further complication arises from the stipulation of the Constitutional Treaty that the External Service shall not only comprise 'officials from the relevant departments of the General Secretariat of the Council and of the Commission' but also 'staff seconded from national diplomatic service of the member states'. How many such staff should be detached to the Service, how long they should work for the Service, whether their terms of employment should be the same as those for Council and Commission officials are obviously crucial and controversial questions, with obvious implications for the identity and political culture of the Service.

The Constitutional Treaty explicitly says that 'the service shall work in co-operation with the diplomatic services of the Member States'. Certain member states, indeed, hope that in the medium term it may be possible for the External Service to take over some at least of the representative and analytical functions currently fulfilled by their own expensive and over-stretched diplomatic services. Larger member states such as the United Kingdom and France are less sanguine. They view the External Service on the contrary as a potential rival to their national diplomacies. Ironically, this suspicion co-exists, at least in the United Kingdom, with a more positive view of the External Service, as a possible counter-balance to the increasing external profile of the European Commission. The British Foreign Secretary recently remarked that 'you find all sorts of odd bods from the European Union running all sorts of odd offices around the world and that it would be a good thing if arrangements for the European External Service gave us more control than we have at the moment'.⁴ The contrast between Mr. Straw's long-term aspirations for the workings of the External Service and that of, say, Mr. Brok, could not be more stark. The 'odd bods' running 'odd offices around the world' are a major element of the general debate concerning the future work of the External Service.

The Constitutional Treaty clearly placed the external delegations of the European Union under the authority of the Union Foreign Minister without making clear whether their staff should be drawn from the External Service. There are today 123 such

delegations, not only monitoring EU development aid and agreements with third countries, but also reporting directly to the Commission and the Council and providing local support to the EU's many special representatives. If, as is intended by the Constitutional Treaty, the Union Foreign Minister eventually takes over the permanent chairmanship of the Foreign Affairs Council, it would seem most logical that the external delegations controlled by the Foreign Minister should take on the work relating to CFSP in third countries. Until now, much of this work has been carried out by the national delegations of the country holding the rotating Presidency of the Union. Small countries have found this an unwelcome burden, which they will be happy to lose. This unsentimental view is not entirely reflected among the larger member states, who remain at least hesitant before the prospect of reinforcing the autonomous role of the European external delegations.

Joint Progress Report

The first draft of the joint progress report to be written by Solana and Barroso was presented in March 2005 as a basis for discussions with EU member states. This draft acknowledged that the authors of the Constitutional Treaty may have foreseen a sui generis status for the External Service, and asked the EU member states to make proposals as to what this status should be. In the view of Solana and Barroso, the External Service should incorporate those services presently working in CFSP areas within the Council and the Commission as well as the military staff (with the possible exception of SITCEN) from the Council. The Service needed to comprise 'geographical desks which cover all the countries/regions of the world' and 'single thematic desks [...]', on issues such as human rights, counter-terrorism, non-proliferation and relations with international organisations such as the UN' in order to support not only the Foreign Minister, but also the other Commissioners and the President of the European Council. Areas such as trade, development policy and humanitarian assistance and enlargement negotiations would, however, be excluded from the External Service's remit, a substantial pruning back of the most ambitious aspirations for the Service. The draft paper made no recommendations on the external representations of the EU, or on the budget to fund the External Service.

Between March and June 2005, Solana and Barroso made some progress on finding consensual solutions among the member states on outstanding issues. The great majority of member states envisaged a sui generis status for the Service, 'under the

authority of the Foreign Minister, with close links to both the Council and the Commission'. Most of the member states agreed with the organisation of the Service proposed by Solana and Barroso, namely to include in it the services dealing with CFSP in the Commission (DG RELEX) and in the Council (Policy Unit, DG-E and Military Staff), and to set up within its internal structure both geographical and thematic desks. Differences, however, persisted as to whether the service should incorporate the military staff from the Council or SITCEN. The member states agreed that Union Delegations should be an integral part of the External Service, although most member states thought this did not imply that 'all staff working in the Delegations would need to be members of the (External Service)'. A majority (but not all) of the member states also supported the idea that at some time in the future the Union Delegations might perform additional tasks such as consular protection and visas. Concerning the staff of the External Service, most EU member states argued that their national diplomats should become 'temporary agents' of the Service in order to guarantee that 'all staff in the External Service had the same status and conditions of employment'.

Two important issues, however, remained unresolved. For the European Union, the financing of the Common Foreign and Security Policy has always been a controversial matter, particularly as to whether it should be financed from the general budget of the European Union or as a result of a separate intergovernmental agreement. Solana and Barroso were unable to resolve this matter in regard to the External Service. Their report laconically concludes that 'budgetary issues required further examination'. Another controversial issue for the Solana-Barroso report was that of the chairmanship of the Council working groups dealing with issues affecting the external relations of the Union. Where these matters squarely concerned the Common Foreign and Security Policy of the Union, the chair should be taken by a member of the External Service. Where the subject for discussion was a topic such as development, the environment or agriculture, the chairmanship should be taken by a representative of the country holding the presidency of the relevant specialist council, even though the particular developmental, environmental or agricultural matter under discussion had implications for the general external relations of the European Union. It remains to be seen whether this theoretically acceptable division of labour would be workable in practice.

The future of the External Service after the referendums

After the rejection of the Constitutional Treaty by the French and Dutch voters, the European Council of June 2005 decided to consider the Solana/Barroso report on the External Service. A number of member states had expressed the fear that the continuation of work to set up the Service might be interpreted by voters as a rejection of the negative outcome of the consultations in France and the Netherlands. In the six months since the French and Dutch referendums, the British Presidency of the Union studiously avoided any discussion of the Constitutional Treaty's future, and discussion of the External Service languished correspondingly. The new Austrian Presidency, however, has said that it wishes to promote discussion of the Treaty's future. It is entirely possible that the question of the External Service will once again figure on the political agenda. Two obvious questions present themselves in this context, whether the problems which the External Service was intended to address can only be solved by setting up such an External Service; and whether, if it is thought desirable or necessary, the External Service can be set up before the now doubtful final ratification of the Constitutional Treaty.

It has been obvious from the preceding discussion that the EU's member states have differing expectations among themselves as to the likely advantages of the European External Service. Some see it as an essentially co-ordinating body between other powerful actors on the European stage, others see it as an embryonic European Foreign Ministry and others see it as a potential way of saving money and other resources for specific tasks traditionally carried out in third countries by national diplomatic missions. Although some progress was made by Solana and Barroso in bringing these differing views together before the European Council of June 2005, it is difficult to believe that, starting afresh, the member states could be brought to a new common analysis of where the underlying administrative problems in formulating a European foreign policy lie. The need to come to at least some agreement regarding the setting up of the European diplomatic service envisaged in the Constitutional Treaty concentrated remarkably the minds of national governments in the first half of 2005. It is doubtful whether any such degree of consensus could have been achieved other than under the spur of the supposedly nascent External Service.

Theoretically and intellectually the argument can certainly be made that better co-

ordination between existing institutions (the desirability of which seems common ground between all participants in the debate) could be managed simply between those institutions, without the compelling need for a new organisation such as the External Service. But the question remains why such co-ordination has demonstrably not occurred before now. Whatever else it may have been in the mind of some, the External Service was a serious attempt to improve this co-ordination, the equivalent at the official and administrative level of the European Foreign Minister to whom it was seen as subordinated. If a coherent European foreign policy demands a single figure to articulate it, then that single figure must logically need for the formulation and refinement of European foreign policy a single organisation primarily responsible to him or her. The political case for a European External Service is as powerful as it was at the time of the signing of the European Constitutional Treaty.

Regarding legal requirements, it has been argued that it would be illegal to set up the External Service before the Constitutional Treaty has been ratified. This argument seems, however, juridically highly doubtful. Nobody disputes that if they wish to do so the European institutions can conclude among themselves interinstitutional agreements to facilitate, as the Nice Treaty puts it, 'the application of the provisions of the Treaty establishing the European Community'. Such agreements may not amend or supplement the provisions of the Treaty and may be concluded only with the agreement of the Council, the Commission and the European Parliament. The considerable measure of agreement reached by the member state governments before the European Council in the middle of last year suggests that, if the political will exists now to set up a European External Service, then it should be possible to conclude an interinstitutional arrangement on the subject. It seems highly unlikely that such an agreement would run the risk of legal challenge by 'amending or supplementing' the existing Treaty.

Conclusion

Replying to a question from the British Member of the European Parliament, Charles Tannock, the British Presidency of the Union said in September 2005 that the establishment of the European External Service 'is one of the provisions of the Constitutional Treaty; as such, it shall take effect only when the Treaty itself comes into force'. This negative reaction certainly reflected the desire of the British government to talk and think as little as possible about

the Constitutional Treaty after being saved from a difficult referendum on the Treaty in Britain by the French and Dutch votes. But it must be said that until now little political momentum has been visible behind the oft-voiced view of academic and other commentators that the creation of a European External Service is an attractive and relatively easily achieved element of the Constitutional Treaty for 'cherry-picking'.

It is certainly true that surprising progress was made by Solana and Barroso in their attempts to flesh out the organisational infrastructure of the Service in 2005. But it is probably too early to say whether their relative success in this area will eventually bear fruit. It may be that in due course the member states of the Union, perhaps with different political leadership in a number of countries, will wish to make a concerted effort to rescue what can be rescued from the wreckage of the Constitutional Treaty. At that stage, the European External Service would be an attractive candidate. In the year 2000 Javier Solana drew an interesting comparison between the 14123 American diplomats scattered throughout the world in 300 missions the 39000 European diplomats in 1500 missions, and ironically wondered whether Europe was a more powerful diplomatic force than the USA in consequence. When all the EU's member states have drawn from those statistics the conclusion Javier Solana wished them to draw, the future of the European External Service will be much easier to predict than it is now, within or without the European Constitutional Treaty.

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Notes

¹ Treaty on the European Union, Title V, Art.J.1 para 2, Maastricht 07.02.1992, <http://www.eurotreaties.com/maastrichteu.pdf> [17.11.2005].

² Constitutional Treaty, Part III Art.III-296 para 3, http://europa.eu.int/constitution/en/ptoc66_en.htm [01.11.2005].

³ Brussels European Council - Presidency Conclusion, 16/17.12 2004, p.23, http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/83201.pdf [01.11.2005].

⁴ Allen, David (2004), 'So who will speak for Europe? The Constitutional Treaty and coherence in EU external relations', CFSP Forum, vol.2, issue 5, p.3, www.fornet.info [01.11.2005].