

# eipascope

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# About Eipascope

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Eipascope is the Bulletin of the European Institute of Public Administration and is published biannually. The articles in Eipascope are written by EIPA faculty members and associate members and are directly related to the Institute's fields of work. Through its Bulletin, the Institute aims to increase public awareness of current European issues and to provide information about the work carried out at the Institute. Most of the contributions are of a general character and are intended to make issues of common interest accessible to the general public. Their objective is to present, discuss and analyse policy and institutional developments, legal issues and administrative questions that shape the process of European integration.

In addition to articles, Eipascope keeps its audience informed about the activities EIPA organises and in particular about its open seminars and conferences, for which any interested person can register. Information about EIPA's activities carried out under contract (usually with EU institutions or the public administrations of the Member States) is also provided in order to give an overview of the subject areas in which EIPA is working and indicate the possibilities on offer for tailor-made programmes.

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## Eipascope dans les grandes lignes

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Eipascope est le Bulletin de l'Institut européen d'administration publique et est publié deux fois par an. Les articles publiés dans Eipascope sont rédigés par les membres de la faculté de l'IEAP ou des membres associés et portent directement sur les domaines de travail de l'IEAP. A travers son Bulletin, l'Institut entend sensibiliser le public aux questions européennes d'actualité et lui fournir des informations sur les activités réalisées à l'Institut. La plupart des articles sont de nature générale et visent à rendre des questions d'intérêt commun accessibles pour le grand public. Leur objectif est de présenter, discuter et analyser des développements politiques et institutionnels, ainsi que des questions juridiques et administratives qui façonnent le processus d'intégration européenne.

En dehors des articles, Eipascope contient également des informations sur les activités organisées par l'IEAP et, plus particulièrement, ses séminaires et conférences ouverts qui sont accessibles à toute personne intéressée. Notre bulletin fournit aussi des renseignements sur les activités de l'IEAP qui sont réalisées dans le cadre d'un contrat (généralement avec les institutions de l'UE ou les administrations publiques des Etats membres) afin de donner un aperçu des domaines d'activité de l'IEAP et des possibilités qu'il offre pour la réalisation de programmes sur mesure adaptés aux besoins spécifiques de la partie contractuelle.

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# The Euro Crisis, the Other Crisis and the Need for Global Thinking

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In addition to the euro crisis the EU faces a second, more existential crisis, in the form of an ill-defined notion of the Union's global role. This contribution argues that the euro crisis should not redefine perceptions of the EU on the global stage, which it is in danger of doing. Instead, the EU and its members should embark upon a strategic reassessment in order to define three core interrelated factors. First, the nature of the EU's actorness remains ill-defined and it is therefore necessary to explain, both within and beyond the Union, what its global role is. Second, in order to facilitate the joining up of the myriad of sub-strategies in EU external relations, the notion of 'red lines' should be considered which define specific aspects of behaviour that are mainstreamed throughout the EU's external actions and, more importantly, upheld. Third, in spite of the rapid development of the harder elements of the EU's actorness over the last decade or so, there remains a worrying gap between rhetoric and reality. This aspect is of particular concern for the United States and will affect perceptions of the EU's ability to be a genuine strategic partner at a time of dramatic change in the international system. By engaging in what will inevitably be a difficult debate, the EU and its members will not only help give purpose and strategic direction to the Union's actions on the international scene, it will also speak to the euro crisis since both are fundamentally about the future shape and direction of European integration.

## Introduction

As the EU finance ministers conclude another meeting on the euro crisis, it is remarkable how little thought has been given to the ramifications of this crisis upon the Union's external actions. The focus on the euro crisis has, so far, had two negative effects upon the EU's external actions. First, it has distracted attention from the urgent need for thought and debate about the Union's attempts to build a more coherent, effective and visible role for itself on the international stage in the face of a rapidly changing global order<sup>1</sup>. Second, the euro crisis is in danger of defining the EU's external image in the absence of any concerted efforts to otherwise define the Union's global role. With this in mind, this contribution calls for a parallel and complementary debate on the EU's global role.

The need for this debate has been evident for some time and pre-dates the euro crisis. If we cast our minds back over the last decade (back to the Convention on the Future of Europe) the most pressing issue was the need for the EU to present a more coherent, effective and visible face to the world. What eventually became the Lisbon Treaty was supposed to help address this at a structural and procedural level, leaving the more political debate about defining the EU's place in the changing global constellations to the newly appointed senior posts in the Union and to the heads of state and governments of the members. Events, however, have a way of interfering with the best laid plans<sup>2</sup>.

These events took the form of the global financial crisis and the connected euro crisis. Efforts to grapple with the latter have been characterised by not only their complexity but also fundamental disagreements about the nature of the crisis, or more precisely, crises (since the crisis has fiscal, competitiveness and banking aspects to it). Some have even suggested that it may not even be primarily about economics or finance but is political and 'even largely presentational' in nature<sup>3</sup>. Any resolution to the crises mentioned above will ultimately depend upon the ability to restore economic growth in the near future, notwithstanding any necessary institutional engineering or treaty amendments.

While, for understandable reasons, much of the attention has focused on the euro crisis, a second more existential crisis is looming. This crisis stems from the lack of any real clarity about the EU's global role and how it wishes to engage in and shape the emerging international order. The euro crisis is already shaping third party perception of the EU due to the simple fact that much of the Union's presumed external attractiveness has been based upon the export of its internal values and principles<sup>4</sup>. Hence, if the attractiveness of the EU's model of integration as exemplar is tarnished, the euro crisis risks redefining perceptions of the EU's global role in a negative manner. Indeed, as explained below, there is already some evidence that this is happening. Yet, to equate the euro crisis as the cause for the second, more existential, crisis would be a mistake since, as Björn Fägersten has aptly observed, 'while Europe is in decline in relation to the resources it can devote to

foreign policy and its ability to act as a unified actor, the euro-crisis has not caused, but only exacerbated, ongoing trends<sup>5</sup>.

Any ensuing strategic debates about the EU's global role should therefore actively consider the wider ramifications of the euro crisis but at the same time it should not circumscribe the parameters of these broader exchanges. In so far as there is mention of the EU's global role in the debates surrounding the euro crisis, it is often couched in terms of geo-economics and the EU's role in the G20 as the 'vector for Europe to speak with one voice in the world'<sup>6</sup>. The temptation for the EU to define its external role in geo-economic terms, based upon its traditional strengths in trade and the (still unclear) results of the euro crisis, runs the risk of neglecting the more political and normative underpinnings of the Union's external role. Any such reassessment must therefore be undertaken with one eye on the wider effects of the euro and wider global financial crises, but with an equally firm gaze on longer-term geo-political dimensions.

The arguments below suggest that the developing debates about the EU's global role were truncated by the euro crisis. Notwithstanding the euro crisis, it is argued that there is an urgent need for the Union to adopt a global perspective on its role, complete with a clearer idea of what links its numerous sub-strategies in its external actions. It is suggested that one such linkage might be found in the delineation of specific 'red lines' that would inform all of the sub-strategies. These red lines should then be mainstreamed through the various sub-strategies so that the character of the EU's international role and its actorness become more visible and coherent.

Beyond the delineation of red lines, any strategic perspective should also consider how comprehensive the EU wishes to be as a global, or even regional, actor. This will involve more serious thinking about the Union's 'harder' facets and whether the Member States have the necessary will and resources to underpin the Common Security and Defence Policy (CSDP). The extent to which the EU is persuasive on this point will be of critical importance to the reformulation of the EU's most important external partnership and, arguably, its only real one – the United States. Although dialogue with the EU's nine other strategic partners, and beyond, should be part and parcel of any such strategic reassessment, the United States is unique in its global reach and its comprehensiveness as an actor. Just as the EU needs the United States, the latter requires a strategically-oriented and capable partner.

### A truncated debate

There were attempts to articulate the Union's role on the international stage prior to the Lisbon Treaty, such as those voiced in the European Convention a decade ago. In the interim between the Convention and the adoption of the Lisbon Treaty, a number of official documents, such as Solana's *A Secure Europe in a Better World: The European Security Strategy*<sup>7</sup>, or the Commission's *June 2006 Europe in the World*<sup>8</sup>,





the Report on the Implementation of the European Security Strategy<sup>9</sup> on December 2008, all amplified the need for a more coherent, effective and visible Europe on the world stage. This accounts for the fact that of the 62 amendments made to its predecessors, the Treaties of Rome and Maastricht, no fewer than 25 applied to provisions on foreign and security policy<sup>10</sup>. There were even signs that, post-Lisbon, the newly ensconced President of the European Council, Herman van Rompuy, wished to pursue the dialogue when he observed that the main challenge facing the EU is 'how to deal, as Europe, with the rest of the world'<sup>11</sup>. Whatever momentum was building up in response to this crucial question was soon overshadowed by the global financial crisis and the ensuing euro crisis.

All is not lost though. For example, the last two Gymnich meetings of EU foreign ministers, under the Danish and Cypriot Presidencies respectively, noted the importance of horizontal issues, or 'those issues that are so important for our relationship in the world and on which it is so important that we are engaged'<sup>12</sup>. The Future of Europe Group, which combined 11 foreign ministers meeting in a personal capacity, made a strong plea for 'a comprehensive and integrated approach to all components of the EU's international profile'<sup>13</sup>. In spite of the preoccupation of the European Council of 18-19 October with 're-launching growth, investment and employment', they still found time to note the need to 'improve the EU's external relations'<sup>14</sup>. The European Council made reference to an earlier meeting in September 2010 which noted that the economic and financial crisis 'has dramatically shown the extent to which the well-being, security and quality of life of Europeans depend on external developments' and that 'the emergence of new players with their own world views and interests is also an important new feature of the international environment'<sup>15</sup>. In this spirit subsequent reviews of six key strategic partners (a term that itself lacks any strategic precision) commissioned by this European Council were disappointingly general and inconclusive and did little to elucidate a wider role for the Union on the international scene<sup>16</sup>.

It would therefore be an exaggeration to claim that the understandable concentration on the immediate exigencies of the euro crisis has completely obliterated consciousness of the need for the EU to think and act more strategically in its external actions. For those readers who doubt the wisdom, or even the ability of the EU or its Member States to think and act more strategically, it is worth noting that the EU adopted an internal security strategy in 2010 which involved public debate, consultation with numerous internal stakeholders, the advancement of a security 'model', a clear idea of objectives and the matching of the latter to resources and existing policies<sup>17</sup>. Although a strategy for the EU's external posture will inevitably be a good deal more complicated, the onus of drawing up any such strategy need not be entirely cast upon the EU's institutions or the EEAS, especially when there is mounting external interest and a willingness to contribute to any such process, as shown by the European Global Strategy initiative<sup>18</sup>.

### Thinking globally to solve local problems

It is a truism to observe that the world moves on, but what is significant about the current reconfiguration of the world order is that this is being done with relatively little EU input and, importantly, in the absence of a clear strategic vision of the Union's role in the changing constellations. The first issue therefore is the nature of the EU's role in the emerging international system.

Historically the EU's role in external relations developed around trade and development. This has posed the challenge of fitting the more recent foreign and security dimensions into the relatively well developed and defined (former) *communautaire* aspects. One option, therefore, would be to strengthen the Union's strengths in these realms – a move which might also be suggested by the ramifications of the euro and global financial crises. This option would also play to the real strengths of European-level diplomacy which have historically been in the trade area. If the EU is to become a pragmatic and essentially geo-economic actor, a different set of calculus apply than those suggested for a Union that seeks to promote normative values built around its founding principles<sup>19</sup>. In the case of the former, a *realpolitik* perspective is called for, centred on defending the economic interests of the Union. This would suggest a highly pragmatic foreign policy geared

towards opening and sustaining market access. It would be trade led and based upon material interests, emphasising the negotiation of free trade area agreements. Any wider foreign and security policy considerations would be subservient to this trade-led perspective. As Richard Youngs has suggested, this is exactly the approach adopted towards Asia with 'no strategic perspective in Asia beyond a race for commercial contracts and reversal of its weakening economic presence'<sup>20</sup>.

The development of the foreign and security policy aspects since the 1990s, the end of the Cold War and the attribution of legal personality to the EU under the Lisbon Treaty, has



**The obvious danger posed by the euro crisis is that instead of broad normatively-informed principles and objectives being applied to the EU's external policies, Member States may be driven to prioritise short-term economic gains and interests over longer-term common goods.**

introduced far more concern with the more normative aspects of the Union's global role. However, any credible strategic approach to the EU's global role cannot be based solely on lofty principles, but will also have to include elements of pragmatism. As the EU and its members struggle to balance values and interests, it is important to bear in mind that values should inform interests, whereas interests may distort values.

The obvious danger posed by the euro crisis is that instead of broad normatively-informed principles and objectives being applied to the EU's external policies, Member States may be driven to prioritise short-term economic gains and interests over longer-term common goods. There is already some evidence that 'covert forms of protectionism' are on the rise, reversing the idea of economic openness which has been one of the fundamentals of the EU's common commercial policy<sup>21</sup>. An acceptance of variable-speed integration on fiscal affairs may further undermine the external logic of a united front on foreign policy.

The impression that the EU and its members are acting in more geo-economic and self-interested ways has already prompted some, such as the Association of Southeast Asian Nations (ASEAN), to 'start to question' the much touted European model<sup>22</sup>. The corrosive effects of similar impressions may be quite profound on other areas of the world, such as the southern Mediterranean, where, in light of the Arab spring, the EU promised to not only deliver on the three 'M's' (money, markets and mobility), but to actively promote the concept of 'deep democracy' and the principle of 'more for more'. Any impression that the EU is less than sincere about the more normative elements of its external relations will only erode the sympathies of young Arabs and undermine EU policy in the area. The failure to engage regimes, civil society and even social media in a normatively informed dialogue threatens to condemn the EU and its members to exactly the kind of trade-first relations promoted under the regimes that have just been overthrown. One of the more awkward questions for the EU and its members emanating from the Arab spring is where its much vaunted principles and values were in the EU's relations with the supplanted regimes. Challenges like these demand a strategic response.

Ideally, any strategic reassessment of the EU's global role should take account of both geo-economic and geo-political interests, balanced by the promotion of core values and principles. The EU's ability to export its particular model of regional integration can be historically attributed to this fusing of economic and political liberalism. On paper, the promotion of market economies is the flip side of democratisation and a human rights coin. The obvious danger posed by the euro crisis is that the tie between the two may be weakened, especially if the response involves protectionism, the relaxation of state aid rules, bilateral (and inconsistent) trade agreements and the jealous protection of its advantageous representation in many international organisations. The dangers of a potentially widening gap between the internal realities of European integration and the substance of the EU's external actions are nicely reflected by Justin Vaïsse and Hans Kundnani:



Source: <http://frontpagemag.com>

*As a conflicted and divided Europe drifted towards economic stagnation and political gridlock, so the model for which the EU stands – that of an expanding and ever more effective multilateralism as a solution to the problems of a globalised world – was also discredited in the eyes of others. Emerging powers such as Brazil and China understandably wondered why they should pay to help rescue a continent which is proving unable to get its act together even though it has the resources to do so – let alone why they should listen to its lectures about regionalism and good governance<sup>23</sup>.*

This is the crux of the problem. The credibility of the EU's external policies has always depended upon its ability to export a particular model of integration as exemplar. The construction of the Union internally enables the EU to extol its variant of regional integration elsewhere in the world. Similarly, the promotion of the EU externally as exemplar is part of the reaffirmative process of the continuing construction of the Union and its identity. The danger is that at the core of the EU's advocacy are its much vaunted social

model and the internal market, both of which are under fire not only from the euro crisis but also longer-term economic malaise and shifting demographics. The juxtaposition between a Union that continues to export its model of integration, even if less convincingly, whilst engaging in geo-economically driven trade and energy deals will further erode the EU's overall appeal and ability to shape the emerging world order. Youngs noted the existence of this uncomfortable duality when he observed that, 'It is unsustainable for the EU to think that it can bask in post-modernism within Europe while guarding such a supposedly Kantian paradise through realist bargaining outside its borders'<sup>24</sup>.

Given that European integration is based around a reaffirmative process between internal and external politics, it is logical to suggest that the adoption of a clearer strategic view of the EU's global role, its aims and interests, may shape the internal dialogue. This is all the more necessary if log-jam or paralysis threatens internally. In order to do so, the EU and its members will have to develop a keener sense of the Union's overarching strategic interests and values.

## Paradoxically, the EU is drowning in strategies, but lacks a strategy.

### Red lines?

Paradoxically, the EU is drowning in strategies, but lacks a strategy. In so far as one can talk of strategy in EU external actions, they are contained in no less than '134 individual country strategies ... strategies for most regions (Central Asia, the Andes, etc.), thematic issues (counterterrorism, non-proliferation, etc.), even whole continents (Asia, Africa, and Antarctica)<sup>25</sup>. This approach to countries and regions is typical of the process-driven type of foreign policy practiced by the EU, with broad similarities between the individual country or



region agreements. In a similar vein, the presence of numerous dialogues with the strategic partners is often portrayed as a badge of pride, with less attention paid to what the dialogues actually achieve or a clear strategic conception of what the EU wishes to attain. The situation is somewhat reminiscent of the Dodo's mantra in *Alice in Wonderland* ('Everybody has won, and all must have prizes'). In this context, all shall have summits.

The need for a common strategic linchpin, linking and supporting all of the various sub-strategies, could take the form of 'red lines' that traverse the sub-strategies. These red lines should be normatively informed and relate to precepts of good global governance and, as noted, they should be connected with the internal realities of European integration. It may well be that the rise of Asian and other powers will challenge western notions of good governance and order, as may the equation of western notions of human rights and universal values with a number of Islamic cultures. Rather than avoid such debates, the EU and its members should embrace them since the recent (but still tentative) changes in the southern Mediterranean, Myanmar and even China itself suggest that they are not entirely antithetical to 'western values' or notions of democracy and multilateralism. What is sometimes portrayed as a crisis of liberalism may actually be more about the institutionalisation of a liberal world order at the multilateral level, but is not necessarily a contestation over 'the basic rules and principles of the liberal international order', where the likes of China or Brazil 'wish to gain more authority and leadership *within* it'<sup>26</sup>. What many of the EU's so-called strategic partners are volubly demanding is a greater role in an international order which still largely resembles the post-war *status quo* and not the realities of the 21<sup>st</sup> century.

In broad terms, 'red lines' can be defined as those principles that have inspired the Union's 'creation, development and enlargement'<sup>27</sup>. The treaty gives us many potential 'red lines', but two obvious ones spring to mind: multilateralism and the rule of law. Considerable effort would be required to move them from the realms of mantra to workable strategic elements. Multilateralism, as noted above, would require a greater willingness on the part of the Union and its members to end what is perceived by many to be the latter's over-representation in many international forums. This has already become a litmus test for a number of strategic partners, like Brazil and India, of how sincere the EU and its members are about promoting multilateralism. In addition the EU is under pressure from not only the emerging powers but also the United States to engage in such a reassessment. In spite of the difficulties of any such reformulation of the representation of the EU's members in the key multilateral bodies, it is hard to see how the Union's multilateralism mantra will appear credible if the *status quo* is blindly defended.

The promotion of the rule of law as another potential red line could also play to the EU's inherent strengths. It would, however, require much more thought about how it should be systematically applied across all aspects of the EU's

external action since the Union lacks any 'comprehensive and authoritative framework enabling the EU to take stock and subsequently monitor rule of law compliance in any particular country in any given year'<sup>28</sup>.

Any red lines would then have to be 'mainstreamed' through the geographical desks of the EEAS and other relevant parts of the Commission and supported by the Member States. This is easier than it sounds since the predominance of geographical perspectives is reflected in many parts of the EU including in the funding instruments which tend to reflect the priorities of geographically-oriented regional or even country strategies. Only two of the eight principal funding instruments (Democracy and Human Rights and Nuclear Safety Cooperation) really qualify as thematic<sup>29</sup>. The transition to thematic and 'joined-up' approaches will demand a shift of mindsets. It will also imply wrestling with fundamental questions about the nature of the EU's actorness (What type of actor does the EU wish to be? Does it have aspirations to a global role or should it be primarily a regional actor? How comprehensive should its role be?), and a more critical approach to geographically-oriented 'strategic partnerships'. Above all, it would imply the willingness to think through the consequences for the EU's external actions with those who violate red lines in their relations with the EU and, conversely, the willingness to use positive tools to encourage others towards their adoption and enforcement.

While it could be argued that this is what the EU attempts to do with its current forms of conditionality, it has been done in a way that risks the promotion of double-standards which, in a variant of Gresham's law, threatens to prove that bad practice drives out good. In cases such as Russia or Central Asia, legitimate questions concerning the nature of the regimes, the judicial systems, the treatment of minorities, freedom of the press and human rights, have tended to be muted in light of the need for energy. This has led to a kind of fatalism where well-intentioned normative elements are held hostage to energy security considerations. A strategic reassessment could recast this by suggesting that the relations with these countries are framed by inter-dependence and not dependence (since they need access to a European market willing to pay market prices as much as many of the EU members need their oil and gas). Changes in perception such as this could then introduce a normatively informed strategy, complete with clear red lines that underpin the Union's fundamental aim of supporting a liberal world order to which there are no credible alternatives.



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The delineation of 'red lines' implies the need for both positive as well as coercive tools. The EU has well founded experience in utilising its more positive tools, such as financial aid or assistance and preferential trade agreements. It has the ability to use some punitive tools as well, such as sanctions. If the EU's aspiration is to be a comprehensive actor it should also have the ability to bolster 'red lines' where needed. More often than not, the use of civilian or military crisis management resources will be humanitarian in nature, but they also relate to wider questions of regional or global security and post-conflict stabilisation and reconstruction. The question of whether the

EU can credibly adopt a broad strategic perspective and 'red lines' based predominantly on its substantial reserves of soft power, has been challenged since the end of the Cold War by constant reminders that the EU's post-modern paradise is frequently challenged by the modern world surrounding it.

### No war please, we're European

There is a difference between the decision to utilise soft power and the inability or lack of will to use harder power. The former is essentially a decision about the nature and character of the EU. The latter is a default position which on several occasions, such as in the Western Balkans, has resulted in EU reliance upon the United States to provide the harder power elements. The continuing behind-the-scenes dependence on America is all the more remarkable when the EU members maintain more active military personnel in uniform than the United States, but at the same time having less than 10% deployable. The traumas of the Western Balkans in particular provided a rude reminder about the nature of the modern world on the EU's borders and provided the impetus for what became CSDP.

The euro crisis may well imply that national austerity measures will further squeeze EU defence budgets which, in most cases, have been declining anyway for a decade or more (Denmark, Finland, France, Poland and Sweden are amongst those currently implementing significant cuts). A foreign policy-led perspective should suggest that even if there is any illusion left that its citizens live in a post-modern paradise, the world around us is distinctly modern or even pre-modern. The launch of recent operations in the Sahel (EUCAP Sahel Niger), South Sudan (EUNAVSEC South Sudan) and the Horn of African (EUCAP NESTOR) are indicative of not only the growing awareness of the security challenges from these countries or regions, but also of the contribution that the Common Security and Defence Policy (CSDP) can make in conjunction with longer-term instruments. A geo-economic perspective would suggest that at least the EU should have the ability to contribute, either alone or with like-minded allies, to the protection of vital trade routes. In spite of rhetorical support for CSDP, the ability of the EU to respond to either more demanding or multiple crises is conditioned by the hollowing out of armed forces, not to mention uncoordinated national budget cutting, which risks exposing the EU members to the effects of external instability, illegal migration, militancy and acts of terrorism.

As unpopular as it may be domestically within the EU, the case should be made to reinforce the EU's CSDP capabilities so that the Union is able to credibly embrace its comprehensive approach, first outlined by Javier Solana in 2003. Much can be done, as has been suggested in the past, by sharing and developing joint platforms, or enabling others to assume more responsibility for their own security by means of EU advice and training (the African Union being an obvious example). However, the EU still needs to establish its own credibility in this realm if it is to be respected. The net effect of over twenty missions spread over almost a decade needs

to be more thoroughly assessed. Most of the missions have been civilian in nature, but they have left the EU no nearer to a properly joined up civilian-military response capability. The EEAS remains bifurcated with crisis management still largely separate from civil protection, crisis prevention, mediation, post-conflict stabilisation and sanctions. Bearing in mind the EU's pretensions to be a 'comprehensive' security actor, much more energy needs to be devoted to thinking about linkages and how to do more with the same (and possibly less). The point is not to promote the harder security aspects *per se*, but to equip the EU so that it may cover a spectrum of responses ranging from softer options to harder ones at the other end of the scale.

The difficulties in responding militarily to the uprisings in Libya, which included the withdrawal of an Italian aircraft carrier mid-mission on financial grounds, the near exhaustion of British and French smart munitions, and with substantial behind-the-scenes support from America, provided an example of what has been memorably termed 'following from the front'<sup>30</sup>. The decision by Germany not to support military intervention, siding with the BRICS, meant that the resulting operation could not be a CSDP one. Eleven European countries eventually participated in a NATO led operation. If the Libya operations demonstrated Europe's potential, it also showed its weaknesses. Not the least of which were the divisions within Europe, especially the wider concern of whether German interests in external actions will revolve around economic diplomacy and its own export needs.

Although the Member States continue to pay lip service to pooling and sharing, vainly spurred on by the remonstrations of the recent Polish Presidency, decisions on defence expenditure continue to be made on the basis of national security requirements. The underlying issue is often presented as a capabilities question, but the underpinning lack of political will from the Member States is a more serious issue. Although a strategic review at the EU level would not solve these problems, it may encourage the Member States to think through the consequences of the increasingly obvious gap between rhetoric and sources. The willingness and ability of the EU to become a more credible partner in this particular realm is a key litmus test to the most important of the Union's strategic partners.

### The only real strategic partner

One potent reason to think through the linkage between the EU's dwindling 'soft power' assets and the harder power aspects lies in the relationship with the United States – arguably the Union's only real strategic partner in terms of the depth and breadth of the relationship. Although the relationship is primarily economic in nature, the security aspects should not be ignored. In the absence of a Congressional deal on deficit reduction, the U.S. faces automatic sequestration at the beginning of 2013 as per the Budget Control Act. Of the

A foreign policy-led perspective should suggest that even if there is any illusion left that its citizens live in a post-modern paradise, the world around us is distinctly modern or even pre-modern.

\$1.2 trillion in cuts, a sizeable portion (almost \$500 billion) will fall on the defence budget. Even without this scenario, the costs of assuming global policing roles will soon be beyond the United States. In a refrain that is familiar to Americans from the 1970s, they continue to look for global partners and burden sharing. Libya was an example of just such a scenario where the European allies should have been able to step up to the plate.

The EU is more likely to be a credible strategic partner, in the real sense of the word, if it is able to balance the extraordinary depth of mutual trade and (in particular) foreign direct investment (FDI) across the Atlantic with a more balanced security partnership. The admonishment by Robert Gates, former American Secretary of Defense, from February 2010 bears repeating in this context: 'The demilitarization of Europe – where large swaths of the general public and political class are averse to military force and the risks that go with it – has gone from a blessing in the twentieth century to an impediment to achieving real security and lasting peace in the twenty-first'<sup>31</sup>. Similar remarks have been made by the current Secretary of Defence, Leon Panetta, and they remain a significant impediment in transatlantic relations.

A key part of any strategic assessment should therefore be how to strengthen transatlantic relations, based on a shared view of the need for a liberal world order. The EU is likely to have a far stronger hand in shaping American perceptions and actions as a credible partner rather than as an 'impediment'. This would imply recognition that the transatlantic bargain of the 1950s needs replacing with a more relevant response to the geo-political realities of the 21<sup>st</sup> century. A more principled EU may well be an occasional irritant to the United States, but if it were capable of assuming the burdens incumbent in shaping and defending a liberal world order, it may also be more respected.

The objective of any such strategic realignment would not be to challenge China's role *vis-à-vis* the United States, or that of any other emerging power, but to reinforce the perception that the EU and the United States should jointly promote a common vision for the emerging international system, both through their mutual relations, as well as through those with third parties, and to stand by it. This would involve close and, at times, undoubtedly difficult discussions on defining and shaping common 'red lines' based on a clearer strategic understanding of the EU's standing and that of its members on this issue. Notwithstanding occasional differences, the EU and the United States have far more in common than almost any other strategic partners and could mutually reinforce one another in promoting and defending common standards of global governance and a liberal world

order. Canada and Japan could usefully be added to this list as natural allies of the EU in terms of their ability and willingness to promote shared principles and values.

## Conclusions

The growing pressure to engage in a debate about the global role of the EU, from within and outside the EU, should be embraced. This debate should not be delayed due to the still uncertain outcome of the euro crisis. Rather than viewing the euro crisis and the quest for global strategy as disconnected issues, the linkages between them need to be stressed. The euro crisis has already had an impact upon the EU's global image in a detrimental manner which, if left unchecked, will further damage the Union's soft power and its global credibility.



With this in mind, this contribution argues for a thorough strategic reassessment of the EU's global role as a matter of priority. The question of whether it should build upon the 2003 *European Security Strategy* and its 2008 review, or whether the drafting exercise should start afresh, is in many ways a secondary issue (although the latter may allow for a broader perspective beyond a potentially constraining security orientation)<sup>32</sup>. Any formal or informal strategic review should embrace, wherever possible, thematic or horizontal approaches ('red lines') with the intention of mainstreaming these concerns in an orderly fashion across the EU's areas of geographical interest. Any such strategic review should also be subject to periodic reassessment, ideally to coincide with the early stages of planning for the next financial perspectives (every seven years in other words).

**The EU is more likely to be a credible strategic partner, in the real sense of the word, if it is able to balance the extraordinary depth of mutual trade and (in particular) foreign direct investment (FDI) across the Atlantic with a more balanced security partnership.**

Any worthwhile debate about the EU's global role in the changing world will prompt some fundamental questions: What kind of Union do we wish to be? Do the Member States have the necessary vision, leadership, solidarity and public support to take us towards a common goal? These core questions are of equal salience to the euro crisis as they are to the EU's wider global role. By striving towards a Union that is more coherent, effective

and visible – the fundamental aims of the Lisbon Treaty in its external actions – some of the core questions underpinning the euro crisis will have been answered. The emergence of a more strategic, principled, directed and realistic EU is more likely to appeal to international partners than a Europe divided internally and adrift externally.

## Notes

- <sup>1</sup> In a notable exception, see the letter written by Charles Grant and signed by prominent EU foreign affairs experts, 'EU Foreign Policy must not become a casualty of the euro crisis', at <http://www.cer.org.uk/in-the-press/eu-foreign-policy-must-not-become-casualty-euro-crisis>.
- <sup>2</sup> The original quote, of which this is a paraphrase, is often attributed to Harold Macmillan but its provenance is unproven.
- <sup>3</sup> C. Fred Bergsten, 'The Outlook for the Euro Crisis and Implications for the United States', Testimony presented before the hearing on 'The Outlook for the Eurozone', Senate Budget Committee, United States Senate, 1 February 2012.
- <sup>4</sup> Treaty on European Union, Article 3(5). See also Article 21.
- <sup>5</sup> Fägersten, B., 'European foreign policy and the eurozone crisis: A Swedish perspective', *UI Analysis* (Swedish Institute of International Affairs), p. 6.
- <sup>6</sup> Van Rompuy, H., President of the European Council, 'The Challenges for Europe in a Changing World', address to the Collège d'Europe, Bruges, Concert Hall 't Zand, PCE 34/10, Bruges, 25 February 2010.
- <sup>7</sup> *A Secure Europe in a Better World: The European Security Strategy*, Brussels, 12 December 2003.
- <sup>8</sup> *Europe in the World – Some Practical Proposals for Greater Coherence, Effectiveness and Visibility*, Communication from the Commission to the European Council of June 2006, Brussels, 8 June 2006, p.2.
- <sup>9</sup> *Report on the Implementation of the European Security Strategy: Providing Security in a Changing World*, Brussels, S407/08, 11 December 2008, p.2.
- <sup>10</sup> Menon, A., 'European Defence Policy from Lisbon to Libya', *Survival*, Vol. 53, No 3, June-July 2011, p. 75.
- <sup>11</sup> Van Rompuy, H., *supra*. note 6.
- <sup>12</sup> Remarks by High Representative Catherine Ashton before the informal meeting of EU Foreign Ministers (Gymnich), Cyprus, 7 September 2012.
- <sup>13</sup> *Final Report of the Future of Europe Group* (of the Foreign Ministers of Austria, Belgium, Denmark, France, Italy, Germany, Luxembourg, the Netherlands, Poland, Portugal and Spain), 17 September 2012.
- <sup>14</sup> European Council, Conclusions, 18-19 October, 2012, EUCO 156/12.
- <sup>15</sup> European Council, Conclusions, 16 September 2010, EUCO 21/1/10.
- <sup>16</sup> Reviews were conducted for Brazil, China, India, Russia, South Africa and the United States over the following year.
- <sup>17</sup> *Internal Security Strategy for the European Union: Towards a European Security Model*, March 2010 (Brussels: General Secretariat of the Council).
- <sup>18</sup> The European Global Strategy is an initiative by four think tanks, the Istituto Affari Internazionali, the Polish Institute of International Affairs, the Elcano Royal Institute for International and Strategic Studies and the Swedish Institute of International Affairs. See [www.euglobalstrategy.eu](http://www.euglobalstrategy.eu).
- <sup>19</sup> See Articles 3 and 21 of the Treaty on European Union for an expansion of these fundamental objectives.
- <sup>20</sup> Youngs, p.7.
- <sup>21</sup> Vaïsse, J. and H. Kundnani p. 6.
- <sup>22</sup> Fägersten, B., p. 10.
- <sup>23</sup> Vaïsse, J. and H. Kundnani, *European Foreign Policy Scorecard 2012*, European Council on Foreign Relations, January 2012, p. 11.
- <sup>24</sup> Emerson *et al.* p. 20.
- <sup>25</sup> Hemra, S., T. Raines and R. Whitman, *A Diplomatic Entrepreneur: Making the Most of the European External Action Service*, Chatham House Report (London: Chatham House), p. 9.
- <sup>26</sup> Ikenberry, J., 'The Future of the Liberal World Order', *Foreign Affairs*, Vol. 90(3), May/June 2011, p. 57 (emphasis added).
- <sup>27</sup> Treaty on European Union, Article 21(1), see also Article 3.
- <sup>28</sup> Pech, L., 'Rule of law as a guiding principle of the European Union's external action', *Working Papers*, Centre for the Law of EU External Relations, 2012/3, p. 35.
- <sup>29</sup> Excluding the European Development Fund which falls outside the EU budget.
- <sup>30</sup> *Ibid.* p. 14.
- <sup>31</sup> Remarks delivered by Secretary of Defense, Robert M. Gates, National Defense University, Washington D.C., 23 February 2010, at <http://www.defense.gov/speeches/speech.aspx?speechid=1423>.
- <sup>32</sup> See Lars-Erik Lundin, 'From a European Security Strategy to a European Global Strategy: Ten content-related issues', *UI Occasional Papers*, No 11 2012 (Stockholm: Swedish Institute for International Affairs).



A network diagram with several person icons connected by lines, overlaid on a blue background. Two of the icons are replaced by actual photographs of women.

# What Does the Lisbon Treaty Change Regarding Subsidiarity within the EU Institutional Framework?

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The principle of subsidiarity refers in general to the choice of the most suitable and efficient level for taking policy action. The European Union associates subsidiarity with the way of taking decisions '*as closely as possible to the citizen*', as it is referred to in the EU treaties. Thus, ensuring the respect of subsidiarity within the EU legislative framework ensures that any EU action is justified when proposing draft legislative acts. The Lisbon Treaty establishes new mechanisms reinforcing subsidiarity control, both *ex ante* and *ex post* the EU legislative process, and by doing so, enhances mainly the role of the national parliaments (and to a lesser extent the regional parliaments) and the Committee of the Regions. But in the end, this is a way of ensuring legitimacy of the EU action as it is quite often questioned, especially in times of crisis. Years of practice will tell whether the words will join reality.



**Introduction**

The Lisbon Treaty reinforces provisions with regard to the subsidiarity principle and gives a new, important role to the national parliaments. This is especially highlighted by the new order of the protocols attached to the EU Treaties: Protocol No 1 on the role of national parliaments in the European Union (ex-Protocol No 9) and Protocol No 2 on the application of the principles of subsidiarity and proportionality (ex-Protocol No 30). Through the provisions of these two protocols and of other articles in the body text of the European treaties, a new approach of subsidiarity can be noted as well as a more inclusive definition of the principle since Article 5 TUE now refers explicitly to the regional and local levels. Moreover the Lisbon Treaty clearly establishes new mechanisms to control subsidiarity both *ex ante* and *ex post* the EU legislative process; it raises the profile of some actors in the European institutional arena, such as the national parliaments with the Early Warning System, and the Committee of the Regions with its new right to bring a case before the Court of Justice of the European Union (CJEU). These major novelties regarding subsidiarity, affect both the EU institutional framework and its procedural mechanisms, and may be considered as another step towards a European multilevel and multi-actor governance.

**With the Lisbon Treaty, an explicit reference has been made for the first time to the regional and local levels in the provision concerning the subsidiarity principle, which renders this new approach of subsidiarity more inclusive than it was within the former treaties.**

**A new inclusive approach of the subsidiarity principle for the European Union**

With the Lisbon Treaty, an explicit reference has been made for the first time to the regional and local levels in the provision concerning the subsidiarity principle, which renders this new approach of subsidiarity more inclusive than it was within the former treaties. Indeed, Article 5 TEU states that *‘Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level’*. The recognition of the role of the regional and local authorities in the European integration process through the new definition of the subsidiarity principle could also be examined with regard to the taking into account of the local and regional dimensions in new policy fields, these being climate change (Article 191 and 192 TFEU), energy (Article 194 TFEU) and civil protection (Article 196 TFEU).



This new inclusive approach of the subsidiarity principle is being developed and implemented by the European institutions. The recent EP Resolution<sup>1</sup> deserves special

mention as it emphasizes that *‘it is essential for scrutiny of the principle of subsidiarity to extend to the regional and local levels in the Member States’*. It calls on the national parliaments to consult the regional parliaments with legislative powers, and on the Commission to pay attention to the role of the latter. On the other hand the Subsidiarity Annual Report published by the Committee of the Regions and the REGPEX website<sup>2</sup> set up by the Committee assists the exchange of information and will make further improvements in the regional/local monitoring of subsidiarity.

**Ex ante subsidiarity control: the early warning system**

Under the Lisbon Treaty, the *ex ante* monitoring role of the national parliaments has been strengthened as regards control over the subsidiarity principle (but not the proportionality principle, which monitors that the draft legislative act does not go beyond what is necessary). Article 12 b. TEU states that *‘National parliaments shall contribute actively to the good functioning of the Union [...] by seeing to it that the principle of subsidiarity is respected in accordance with the procedures provided for in the Protocol on the application of the principles of subsidiarity and proportionality’*.

Article 7 of Protocol No 2 on the application of the principles of subsidiarity and proportionality describes the process of the so-called early warning system: *‘The European Parliament, the Council and the Commission, and, where appropriate, the group of Member States, the Court of Justice, the European Central Bank or the European Investment Bank, if the draft legislative act originates from them, shall take account of the reasoned opinions issued by national parliaments or by a Chamber of a national parliament. Each national parliament shall have two votes, shared out on the basis of the national parliamentary system. In the case of a bicameral Parliamentary system, each of the two Chambers shall have one vote’*. This is also underlined in Article 8 of Protocol No 1 on the role of national parliaments in the European Union, *‘Where the national parliamentary system is not unicameral, Articles 1 to 7 shall apply to the component Chambers’*.

Still, according to Article 7 of Protocol No 2 on the application of the principles of subsidiarity and proportionality, a draft European legislative act must be reviewed within the eight-week time limit if one third – or one quarter in the area of freedom, security and justice – of the national parliaments oppose its subsidiarity arguments. The Commission, a group of Member States or the European institution from which the draft originates, may decide to maintain, amend or withdraw the draft and reasons must be given for each decision. This is

the 'yellow card' procedure. In 2010, a total of 211 opinions were received from national parliaments but only a small number of them (34 overall) raised subsidiarity concerns. The first yellow card case came more than three years after the entry into force of the Lisbon Treaty and is related to the EC proposal for a Council regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services (the so-called 'Monti II-regulation') published on 21 March 2012<sup>3</sup>. On 30 May 2012, the College of the Commissioners confirmed that the one-third threshold of national parliaments/chambers from 12 Member States<sup>4</sup> expressing concerns about subsidiarity infringement of the proposal had been reached. Facing the disagreement of national parliaments/chambers, trade unions and some national governments, the European Commission decided to withdraw its proposal on 11 September 2012. Yet, the spokesman of László Andor European Commissioner for Employment, Social Affairs and Inclusion, indicated that this decision was not based on the yellow card, for which it is not justified, but because the Commission knew it did not have enough political support from the European Parliament and the Council of Ministers (requiring unanimity for this EC proposal)<sup>5</sup>. In any case, after some doubt concerning the efficiency of such a 'heavy' mechanism to be set for each national parliament/chamber, this is the proof that the early warning system is raising awareness within national parliaments of the importance of adequate scrutiny of legislative proposals, and is essential for national parliaments to act as a counterbalance in the EU legislative process.

Furthermore, the Lisbon Treaty – contrary to the defunct Treaty establishing a Constitution for Europe (2003) – establishes another procedure called the 'orange card' which applies only to the draft European legislative acts falling under the ordinary legislative procedure (the former co-decision procedure). If more than half of the national parliaments oppose such an act on the grounds of subsidiarity arguments, the latter must be reviewed. The European Commission may then decide to maintain, amend or withdraw the proposal. If the European Commission decides to maintain its proposal, then it has to provide a reasoned opinion justifying why the Commission considers the proposal to be in compliance with the subsidiarity principle. On the basis of this reasoned opinion, and that of the national parliaments, the European legislator, by a majority of 55 per cent of the members of the Council or a majority of the votes cast in the European Parliament, shall decide whether or not to block the EC proposal.

## The provisions related to subsidiarity check brought about by the Lisbon Treaty provide national parliaments with incentives to consider draft European legislative acts at an early stage of the EU law-making process.



The provisions related to subsidiarity check brought about by the Lisbon Treaty provide national parliaments with incentives to consider draft European legislative acts at an early stage of the EU law-making process. The thresholds for the 'yellow and orange cards' have underscored the need for greater inter-parliamentary cooperation, e.g. by exchanging respective parliaments' contributions, in order to establish a common interpretation of subsidiarity in Europe. The IPEX website (Inter parliamentary EU Information Exchange)<sup>6</sup> constitutes the principal source of information on the state of play of the subsidiarity check in other national parliaments. Bilateral contacts and intensive exchange of information through their permanent representatives in Brussels is also a common practice among national parliaments.

According to Article 6 of Protocol No 2 on the application of the principles of subsidiarity and proportionality, *'It will be for each national parliament or each Chamber of a national parliament to consult, where appropriate, regional parliaments with legislative powers.'* Most of the regional parliaments automatically receive all legislative proposals from the central level, thus different filtering systems have been established by some national/regional parliaments. Nevertheless, efficient involvement of the regional parliaments in subsidiarity checks can still be improved, partly due to the ongoing revisions of the existing procedures to do so in most of the countries with regional parliaments<sup>7</sup>. Moreover, it should also be highlighted that the resources and time for conducting subsidiarity checks for some regional parliaments is scarce, thereby expressing the need to better evaluate the importance of the EU draft legislative proposals and be selective before embarking in a detailed subsidiarity scrutiny exercise. The European Parliament has recently called for an analysis of the time scales laid down in the treaties, to determine whether or not they are sufficient.

Due to the former general lack of involvement of regional parliaments in *ex ante* subsidiarity control, Article 6 of Protocol No 2 certainly aims to enhance their role and pushes them to be part of a new process defining the respective roles of the new key actors of the EU legislative process. The Lisbon Treaty creates awareness of the subsidiarity principle within the parliamentary systems of the EU, facilitating the establishment of a culture of European debate, which was rather absent until now in most regional assemblies. The early warning system (EWS) therefore raises awareness about the importance for national and regional parliaments to act as a counterbalance in the EU legislative process. If building upon the lessons learnt, the actors involved will open up a new path towards the efficient use of the opportunities provided by the EWS. Indeed, making use of the possibilities to

establish an early multilevel dialogue to formulate EU policy/legislation with other parliaments (regional and national), as well as with the European Commission, goes beyond the previous existing practice of legislative/executive scrutiny within the internal borders.

### Ex post subsidiarity control: bringing a case to the CJEU for infringement

National parliaments also have the possibility to participate in an *ex post* subsidiarity control, as the Lisbon Treaty provides that an action might be brought to the CJEU by a Member State in the name of its parliament or one of its Chambers if it is a bicameral parliamentary system, and if the latter considers that a legislative act does not respect the subsidiarity principle. Article 8 of Protocol No 2 on the application of the principles of subsidiarity and proportionality states that *'The Court of Justice of the European Union shall have jurisdiction in actions on grounds of infringement of the principle of subsidiarity by a legislative act, brought in accordance with the rules laid down in Article 263 of the Treaty on the Functioning of the European Union by Member States, or notified by them in accordance with their legal order on behalf of their national parliament or a Chamber thereof.'*

Moreover, the Lisbon Treaty brings about one of the biggest novelties concerning the Committee of the Regions since its creation by the Maastricht Treaty: the right to bring a case before the Court of Justice of the European Union for the annulment of an EU legislative act, in two cases: to protect its own prerogatives (Article 263 TFEU) and to ensure respect of the subsidiarity principle regarding legislative acts

for the adoption of which the EU treaties provide its consultation (Article 8 of the Protocol No 2 on the application of the principles of subsidiarity and proportionality). These new provisions are proof that the complaints expressed in 1995 by the CoR about how difficult it is to bring a case before the Court for any infringement of the subsidiarity principle by an EU institution, have finally been partially heard: *'In the case of annulment proceedings, Community procedures confer on the Commission, Council and Member States the general right to bring actions, whereas the Parliament [this is no longer the case] and European Central Bank may only bring actions to protect their prerogatives. Other natural or legal persons [thereby including the CoR at that time] have to demonstrate that a legal act affects them directly and individually [...]. The Committee of the Regions and its constituent members are in an extremely weak position in respect of this system. The nature of the subsidiarity principle coupled with the lack of direct effect make it impossible to appeal against an act or a failure to act of a Union institution in breach of the above principle, insofar as the plaintiff has to provide proof that he has been directly and individually affected. Consequently, the Committee and its constituent members find themselves in practice in a situation where they are unable to defend themselves – something which is contrary to the spirit of Community law'*<sup>8</sup>.

The former CoR President, Luc Van den Brande, declared a few months after the entry into force of the Lisbon Treaty: *'We see this new right to challenge EU laws in court more as a deterrent than an actual threat. We are convinced that this new possibility will deepen our relations with other EU institutions and national parliaments. We will exercise this right with caution, but with great conviction in cases where we feel it is necessary to defend the subsidiarity principle in EU law-making. However, we hope that swift implementation of all Lisbon Treaty provisions, which reinforce subsidiarity already in the pre-legislative stage and during the adoption of new EU laws, will ensure that it never comes to that'*<sup>9</sup>. In May 2012, the Bureau of the CoR revised the CoR strategy about subsidiarity monitoring. It specified that *'the CoR has already adopted rules for taking the appropriate judicial steps. Such actions may be proposed to the Plenary Assembly either by the President or by the competent commission acting in accordance with Rules 53. The Legal Service has prepared a Handbook which describes a 'modus operandi' that should be followed in the event of bringing an action before the Court of Justice on grounds of subsidiarity'*. It also reiterated its position highlighting that *'any potential action before the Court of Justice should be understood only as a last resort and the final step of a process'*<sup>10</sup>.

The Lisbon Treaty's provisions can be considered as an important step for the Committee of the Regions regarding its place in the European institutional arena. Its new, important right to bring a case before the CJEU will reinforce

its role at an early stage of the legislative process, firstly by ensuring that it is consulted by the European institutions when the EU treaties provide it, and secondly, by scrutinising EU legislative proposals and their compliance with the subsidiarity principle.

## The Lisbon Treaty's provisions can be considered as an important step for the Committee of the Regions regarding its place in the European institutional arena.

### Conclusion

The abovementioned Lisbon Treaty provisions strengthen the national parliaments' role and may also constitute a substantial breakthrough for regional parliaments with legislative powers if they become truly conscious of the importance of adequate scrutiny of legislative proposals. These novelties are the result of the political will to stimulate participation of national parliaments in EU matters and to bring Europe closer to its citizens.

Moreover, regional and local authorities across Europe will witness important progress as a result of the Lisbon Treaty, towards the recognition of multi-governance in the European Union. A more inclusive Europe seems to be favoured: better involvement of regional and local expertise in the quest for a more cohesive Europe together with a reinforced principle of subsidiarity and an increasing role granted to the national parliaments. Many concrete novelties ensure that EU governance will evolve into more advanced multi-level forms; the most general ones are of utmost interest to local and regional authorities as they could change the way of working and cooperating with the other levels of government participating in the European decision-making process.

Yet, one should bear in mind that Protocols No 1 on the role of the national parliaments and No 2 on the subsidiarity and proportionality principles apply only to the EU legislative acts, but not to the EU non-legislative acts (i.e. the delegated and implementing acts). Therefore, the determination of an EU legislative act/non-legislative act has an important impact on the right of recourse to the control mechanisms facilitated by the Lisbon Treaty's provisions regarding the national authorities and their regional and local entities.

## Notes

- \* Delphine Bourdin is an expert in EU Law and ex-administrator at the Committee of the Regions, a position held until autumn 2009. She is currently EU Policy Officer at the Greater Dunkirk Council (*Communauté urbaine de Dunkerque*) in France. She has regularly collaborated with EIPA Barcelona since 2005.
- <sup>1</sup> European Parliament Resolution of 13 September 2012 on the 18<sup>th</sup> report on Better legislation – Application of the principles of subsidiarity and proportionality, 2010.
- <sup>2</sup> <http://extranet.cor.europa.eu/subsidiarity/regpex/Pages/default.aspx>. REGPEX is a tool set up by the Committee of the Regions for the exchange of information among regional parliaments within the Early Warning System, mirroring the IPEX website for national parliaments.
- <sup>3</sup> COM (2012)130 final.
- <sup>4</sup> Belgium, Denmark, France, Finland, Latvia, Luxembourg, Malta, Poland, Portugal, Sweden, the United Kingdom and the Netherlands.
- <sup>5</sup> *Bulletin Quotidien Europe* No 10687 of Thursday 13 September 2012, p. 10.
- <sup>6</sup> See [www.ipex.eu](http://www.ipex.eu).
- <sup>7</sup> For further information on the procedures, please consult the Committee of the Regions' study on 'The role of regional Parliaments in the context of subsidiarity analysis within the Early Warning System of the Lisbon Treaty', (2011) published on <http://portal.cor.europa.eu/subsidiarity/news/Pages/StudyonRegionalParliamentsandtheEarlyWarningSystem.aspx> and written by the European Institute of Public Administration (EIPA, Barcelona), (Authors: Vara Arribas, G. and D. Bourdin). It does not represent the official views of the Committee of the Regions.
- <sup>8</sup> CdR 136/95, Opinion of the Committee of the Regions on the 'Revision of the Treaty on European Union and of the Treaty establishing the European Community', Special Commission for Institutional Affairs, 21 April 1995, Rapporteur: Mr Pujol i Soley.
- <sup>9</sup> See Article 'Regions hope to wield new powers with Lisbon Treaty', published on <http://www.euractiv.com/regional-policy/regions-hope-wield-new-powers-li-news-257928>, 10 June 2010.
- <sup>10</sup> R/CdR 606/2012 item 7a) rev. 1 EN/o, see point 2.3.2.



# Calendar of Events

## January - May 2013

28-29 Jan.	Formal Writing in English - Master Class: Produce Better Texts in Less Time !	Maastricht
28-29 Jan.	EU Environmental Law for Non-Lawyers	Luxembourg
30-31 Jan.	State Aid in the European Union: Latest Developments on Policy and Practice	Maastricht
31 Jan. -1 Feb.	Successful Preparation and Implementation of Twinning Projects	Maastricht

20-22 Feb.	Introductory and Practitioners Seminar: European Public Procurement Rules, Policy and Practice	Maastricht
20-22 Feb.	Strategy and Planning in the Context of Total Quality Management	Maastricht
21 Feb.	European e-Justice and Practical Solutions (Beginners level)	Luxembourg
22 Feb.	European e-Justice and Practical Solutions (Advanced level)	Luxembourg
21-22 Feb.	Implementation of Environmental Legislation: How to Avoid Infringements, Court Cases and Financial Penalties	Maastricht
21-22 Feb.	Evaluation of Public Policies: Learning from Comparative Experiences	Barcelona
25-27 Feb.	EU Law for Non-Lawyers	Luxembourg
26-27 Feb.	Public Sector Budget Review and Service Reform in a Cold Economic Climate	Dublin
27 Feb.	Economic Governance	Brussels
28 Feb. - 1 Mar.	Evaluation of EU Structural Funds 2014-2020: <i>Ex Ante</i> Appraisal of Programmes and Projects	Maastricht

7-8 Mar.	Europe on the Internet: Finding your Way through the European Information Jungle	Maastricht
18-19 Mar.	Preparing for new EPSO competitions: The Road to the European Institutions	Luxembourg
21-22 Mar.	Understanding EU Decision-Making: Principles, Procedures, Practice	Maastricht

10-12 Apr.	Project Cycle Management: A Technical Guide	Maastricht
15-16 Apr.	Formal Writing in English: Effective Written Communication for Public Officials	Maastricht
16-19 Apr.	Der Entscheidungs- und Umsetzungsprozess in der Europäischen Union und seine Bedeutung für die deutschen Länder, for German Länder Officials	Maastricht, Brussels
18-19 Apr.	Managing Change in Public Administration	Maastricht
23-24 Apr.	European Public Procurement, Public-Private Partnerships (PPP) and Concessions	Dubrovnik
25-26 Apr.	Implementing the Structural Funds Regulations: Comparing 2014-2020 with 2007-2013	Maastricht
25-26 Apr.	EU Litigation on Regulatory Issues	Luxembourg
25-26 Apr.	Working with Impact Assessment in the European Union	Maastricht

6-7 May	Public Sector HRM in Times of Crisis: What Skills and Competencies are Needed and How to Use Them?	Maastricht
16-17 May	Managing Public Finances	Dublin





# The Revision of the Insurance Mediation Rules at EU Level and its Impact on Consumer Protection

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The European Commission has put forward a new proposal for a directive on insurance mediation which should provide for significant changes in practices of selling insurance products and guarantee enhanced level of consumer protection. This proposal accompanies other regulatory initiatives in the insurance sector, all of them pursuing three main objectives: firstly, a strengthened insurance supervision with convergent supervisory standards at EU level; secondly, a better risk management of insurance companies; and thirdly a greater protection of policyholders. All these initiatives contribute to the EU programme on consumer protection and herald a new approach to EU insurance regulation and supervision. However, while the new supervisory rules are a direct response to the financial crisis and shortcomings of cross-border cooperation between national supervisors, the plans for the revision of insurance mediation rules were conceived much earlier due to scandals with mis-selling of insurance products in the United States and some EU Member States. This article will focus entirely on the Commission's initiative in the consumer mediation area and the aspects of insurance supervision and risk management will be dealt with in separate articles.

## Introduction

At the beginning of July, the European Commission presented its long-anticipated legislative proposal for a Directive on insurance mediation<sup>1</sup>. With the objective of having equal levels of protection for consumers purchasing insurance products across the EU, the Commission is proposing to tighten disclosure and conduct of business requirements for sales of insurance contracts. In addition, by covering direct-selling and certain insurance-related activities (e.g. loss adjustment), the new proposal significantly expands the scope of the current insurance mediation regime, and subsequently also the number of protected policyholders. Finally, the Commission wishes to enhance consumer protection in relation to a distinct category of insurance products called insurance investment products. It hereby draws upon the rules of the Markets in Financial Instruments Directive (MiFID) regarding the identification, prevention and management of conflicts of interest. Consequently, two different insurance regimes will be now clearly delineated at EU level: one for so-called 'classic' insurance products without an investment element, and another one for products entailing investment factor.

In the European Parliament, the Economic and Monetary Affairs Committee is now discussing the Commission's proposal. Werner Langen, from the Christian Democratic Union in Germany, was appointed the rapporteur responsible for tabling amendments and preparing the Committee's report. Once accepted by the Parliament in its first reading scheduled for May 2013, and if jointly adopted with the Council of the EU, the new Directive will come into force by the end of 2013 and repeal the current Insurance Mediation Directive (IMD1) from 2002. The Member States will dispose of a two-year time period to implement it into their national laws. While the legislative adjustments might be minor in some Member States where reviews of insurance mediation rules were undertaken in recent years (e.g. the Retail Distribution Review in the UK), this new EU Directive will bring about significant legislative changes in other Member States where many aspects of insurance mediation are still not regulated.

The objective of this article is to present the new legal set-up for insurance mediation and to analyse its impact on consumers and the insurance industry.

### 10 years of insurance mediation regulations: minimum standards of consumer protection at EU level

During the last decade, insurance intermediaries' activities were regulated by the Directive on Insurance Mediation from 2002 (IMD1)<sup>2</sup>. The objectives of this Directive were two-fold: to establish a single market for insurance mediation and to introduce minimum standards on consumer protection throughout the EU.

#### Professional and information requirements under IMD1

In order to achieve these goals, IMD1 introduced minimum requirements on registration of insurance intermediaries, their professional conduct as well as pre-contractual information

provided for their customers. The fulfilment of professional requirements was indispensable for an intermediary to be registered by a competent authority of his home Member State and it guaranteed a certain level of professionalism *vis-à-vis* his customers. Hence, an insurance purchaser could expect that his intermediary possessed the *appropriate knowledge and ability* to provide intermediation services (Article 4 (1)), was of *good repute*, had a *clean police record* and had not previously been declared *bankrupt* (Article 4 (2)). In addition, intermediaries were required to hold professional indemnity insurance against liability arising from professional negligence (Article 4 (3)).

The requirements for pre-contractual information determined the process of selling insurance products by insurance intermediaries. Prior to the conclusion of any initial insurance contract, an insurance intermediary had to inform about his status, commercial links or contractual obligations towards an insurance undertaking and the nature of advice given (Article 12 (1)). All intermediaries were required to specify customers' demands and needs, and underlying reasons for advice given on a given insurance product before the conclusion of a contract. In addition, independent intermediaries (without commercial links or contractual obligations towards insurance undertakings) were required to give advice on the basis of analysing a sufficiently large number of insurance contracts available on the market (Article 12 (2, 3)).

With merely three articles laying down the above-mentioned professional and pre-contractual information requirements,

**The minimum harmonisation approach was characteristic for the first generation of EU insurance mediation regulation but 'gold-plating' practices used by the Member States has clearly thwarted the EU legislator's attempt to guarantee a similar level of consumer protection within the EU.**

the old Directive required only the minimum obvious for any professional conduct and thus provided a fairly basic level of consumer protection. Moreover, its provisions were written in a very general manner, thus allowing for a wide interpretation by the Member States. Lastly, the Directive was a minimum harmonisation legal act, allowing for reinforcement of its minimum standards by the Member States.

#### Problems with IMD1 implementation

The minimum harmonisation approach was characteristic for the first generation of EU insurance mediation regulation but 'gold-plating' practices used by the Member States has clearly thwarted the EU legislator's attempt to guarantee a similar level of consumer protection within the EU.

In 2008, the Commission carried out an 'implementation check', revealing substantial differences in national approaches to IMD1 implementation, and subsequently a regulatory patchwork of national insurance mediation regulations<sup>3</sup>.

In countries like the UK, France or the Netherlands, the minimum standards were exceeded by additional stricter rules. This 'gold-plating' brought about significant inconsistencies in applying IMD1 across the EU. Consequently, the IMD1 objective – the introduction of a similar level of consumer protection across the EU – was not achieved.



of their customers. Furthermore, MiFID bans commissions paid by third parties to act as independent advisors. As for other advisors, it allows payments only if they are properly disclosed to the customers and enhance the quality of the service provided. Finally, MiFID introduced detailed rules to guarantee fair conduct of business by investment firms, such as

### Conflict of interest and conduct of business rules: IMD1 vs. MiFID

There has been a great deal of negative publicity surrounding insurance industry in the years preceding the financial crisis. In particular, the controversy of brokers' contingent commissions has cast light on intransparent practices of insurance companies and intermediaries which proved to be in conflict of interest with their policyholders<sup>4</sup>. In addition, in some Member States' unfair business practices in the insurance sector were revealed, such as the provision of improper advice on products or insufficient disclosure of information to insurance



purchasers. These selling practices aimed at incentivising purchasers to buy products bringing high returns to insurance intermediaries. As a result, consumers were often sold products unsuitable for them and entailing high investment risk<sup>5</sup>.

These developments urged the Commission to investigate the insurance markets across the EU. In its 2007 report on sectoral inquiry into business insurance, the Commission highlighted proper remuneration disclosure as an effective means to mitigate conflicts of interest between commercial considerations of insurance intermediaries and the objectivity of advice they provide to their clients<sup>6</sup>. Since the publication of this report, the necessity for adequate conflict of interest and conduct of business rules for insurance mediation business came under the spotlight. However, the regime introduced under IMD1 lacked clear and efficient conduct of business and conflict of interest rules, and thus could not ensure transparent selling processes and prevent mis-selling of products. Hence, the Commission had to assess different options to improve the functioning of insurance markets. In 2010, it announced the revision of IMD1 modelled on the conflict of interest and conduct of business rules of MiFID<sup>7</sup>.



When adopted in 2004, MiFID revolutionised the world of financial investment markets by establishing new mechanisms for the prevention and mitigation of conflicts of interest when selling and advising on investment products. Implementing measures detailed in MiFID require investment firms to implement specific processes and controls for the identification, management and disclosure of any risks harming the interests

and appropriateness tests for the assessment of suitability of recommended products for their purchasers. When providing investment advice or portfolio management to customers, investment firms should obtain appropriate information about the customer regarding his knowledge and experience of the specific type of product or service, financial situation and investment objectives. Only after the information provided by a customer has been processed, may the investment firm recommend an investment product that is suitable for the individual customer.

Undoubtedly, detailed MiFID rules provide for a high level of consumer protection and can serve as a good benchmark for the future changes to IMD1. However, these rules were designed for investment products and cannot be copied for the insurance sector without necessary adjustments. The following chapter will explain to what extent the Commission was inspired by MiFID rules.

### IMD2 and new approach to consumer protection standards in the insurance mediation sector

In the explanatory memorandum attached to the proposal for IMD2, the Commission refers to the current financial crisis and the necessity of shifting the focus to strengthening consumer protection and ensuring a level playing field between different insurance distribution channels. The Commission is trying to achieve these objectives by extending the scope of IMD2, tightening provisions on professional requirements and pre-contractual information, and including more stringent rules on conflicts of interest for the investment insurance products.

#### Scope of the IMD2

In the future, consumers buying insurance products directly from insurance companies will benefit from the expanded scope of IMD2, as it will also apply to employees of insurance companies responsible for direct selling (Article 1 (1)). Changes brought about by the IMD2 will be of added value for consumers living in those countries where this channel is often used for purchasing insurance policies<sup>8</sup>. Until now this distribution channel remained unregulated at EU level. Although conflict of interest rules relating to remuneration disclosure might be of low relevance here, consumers will definitely benefit from enhanced professional and information requirements for insurers' employees.

Secondly, IMD2 will cover various groups of professionals either selling insurance on an ancillary basis (e.g. travel agencies or car rental shops) or providing after-sales services (e.g. loss adjusters and experts appraising claims). The information requirements imposed by IMD2 on these distribution channels will help consumers, for example with understanding the coverage of insurance policies offered in addition to certain products or services (e.g. when renting cars or buying holiday packages).



By broadening the scope of the new rules, IMD2 will first of all provide the same level of information given to purchasers of insurance products irrespective of the channel. Additionally, a level playing field between 'traditional' intermediaries and other distribution channels will be guaranteed. Such a modification will also contribute to coherent application of insurance mediation rules in different Member States<sup>9</sup>. However, IMD2 requirements may be adapted according to the complexity of products sold, for example with regard to professional requirements for sellers of ancillary insurance products of low risk (Article 4 and 8 (1)). This will help to avoid disproportionate burdens for businesses.

### Professional requirements

The proposal in its current form does not foresee any significant changes to the professional requirements in comparison to the old directive. All persons involved in insurance distribution shall possess an appropriate level of knowledge and ability, and demonstrate appropriate professional experience to perform their duties adequately (Article 8). However, the Commission has decided to make use of its new competences and empowered itself to supplement IMD2 by delegated acts. These future non-legislative acts will specify the notion of 'adequate knowledge and ability' and the criteria for determining the appropriate level of qualifications, experience and skills of carrying insurance mediation (Article 8 (8)). Hence, the IMD2 will become a framework directive reinforced by Level 2 measures providing for more detailed rules. This will allow for a more coherent interpretation by the Member States of certain notions which were unclear under IMD1, as well as legal certainty for both consumers and distributors.



### Conduct of business rules and remuneration disclosure

The most significant change to be introduced by the IMD2, which will be of high relevance for the future purchasers of insurance products, concerns the disclosure of remuneration received by persons pursuing insurance mediation activities from third parties (Article 17 (1 f)). Modelled on examples from MiFID, the proposal for IMD2 requires all insurance distributors to inform their consumers about the different elements of the total price of insurance policies, including the nature (e.g. commissions or fees), structure and amount of their remuneration. The advantages of this new disclosure regime for consumers are two-fold: firstly, it will contribute to greater transparency when selling insurance products and allow consumers to better assess total costs of these products (e.g. parts of premiums paid to cover intermediaries' fees) and thus make better informed decisions. Secondly, adequate information on all costs and additional charges associated with insurance products will allow consumers to compare different channels and choose the cheapest one.

**The MiFID conduct of business and conflict of interest rules has now become a clear benchmark for insurance selling practices; but it remains to be seen whether these rules will prove applicable for insurance.**

Moreover, the IMD2 will address the problem of contingent commissions paid on the basis of achieving a pre-determined target. It will require intermediaries to tell their customers about such targets and amounts of commission paid upon achievement of such targets (Article 17 (1g)). Although contingent commissions will not be prohibited directly, the obligatory information on their existence will sensitise consumers to the risk of potential conflict of interest.

By requiring intermediaries to act honestly, fairly and professionally in accordance with the best interests of their customers, IMD2 will introduce only high-level rules on conduct of business and will therefore not raise consumer protection standards to the level guaranteed by MiFID (Article 15).

### Strengthened consumer protection requirements for insurance investment products

The Commission decided, in line with its earlier announcements, to propose a set of distinct rules for insurance investment products. These products are sold in many countries as unit-linked life insurance policies or other investments packaged as life insurance policies. In contrast to classic insurance products, investment insurance products entail investment risk for their purchasers and are therefore classified as high-risk products. Nevertheless, in many countries they are either not regulated or fall under general insurance regulations; as a consequence, insurance intermediaries are not being required to disclose to their customers the costs and risk associated with these products. Most mis-selling cases concern this

type of products as consumers are often unaware of any risks involved and potential financial losses they may incur when buying these products. With a separate set of rules included in IMD2, the Commission wants to address this problem and at the same time fit into a broader discussion on the 'Consumer retail Package' and the regulation of so-called packaged retail investment products at EU level<sup>10</sup>.

The MiFID conduct of business and conflict of interest rules has now become a clear benchmark for insurance selling practices; but it remains to be seen whether these rules will prove applicable for insurance.

Insurance investment products will undergo a more stringent and MiFID-inspired regime on the identification, mitigation and disclosure of

conflicts of interest to provide consumers with even greater protection than when selling classic insurance products. Consumers buying insurance investment products will need to obtain information about the product's insurance coverage and all costs and investment risks related to it. Enhanced requirements also concern the provision of appropriate advice to customers with a proper assessment

of suitability and appropriateness of products during the selling process. Finally, IMD2 will introduce a revolutionary change concerning a ban on commissions and fees for independent insurance brokers selling these types of products. All these requirements are a copy-paste of MiFID rules; only their application in practice will help determine whether or not they are workable for the insurance sector.

#### Does IMD2 continue minimum harmonisation approach?

As mentioned before, IMD1 is a minimum harmonisation directive and its implementation resulted in many gaps and inconsistencies. Nonetheless, the Commission decided to maintain the same features for the IMD2. Such a solution might be an attempt by the Commission to accommodate different legislative developments in the Member States in the aftermath of the IMD1. For instance, when transposing IMD1 some countries (e.g. Finland and Denmark) introduced so called net-quoting system, namely that intermediaries were prohibited from receiving commissions from insurance firms. Maintaining a minimum harmonisation approach should allow these Member States to maintain stricter national rules. At the same time, countries where the remuneration has not yet been regulated (e.g. Poland), will be required to lift their regulatory standards to the level of IMD2.

However, parts of IMD2 relating to insurance investment products follow the MiFID approach, with high-level rules supplemented by detailed Level 2 delegated acts. Since MiFID is considered to be a maximum harmonisation Directive, this level of harmonisation might be unavoidable for insurance investment products. For the time being, it is not clear how much flexibility will be left to the Member States in this respect. Since the Commission strives to significantly raise minimum standards, the final outcome might be a high degree of harmonisation with consistent rules and the same consumer protection level across the EU.

#### Conclusions

The flaws in the IMD1 regime can be summarised in four points:

- Regulatory patchwork due to minimum harmonisation character;
- Insufficient information requirements to guarantee transparency for consumers;
- Lack of clear and efficient conduct of business and conflict of interest rules to prevent mis-selling of products;
- No level playing field between intermediaries and other distributors of insurance products.

The new IMD2 will address these issues by firstly expanding the scope of its application and thus creating a level playing field between different distribution channels. Consumers will definitely benefit from the same level of protection irrespective of the distribution channel through which they will buy insurance products.

Secondly, IMD2 will be a starting point for identifying, managing and mitigating conflicts of interest for classic insurance products and it will introduce a more enhanced regime for investment insurance products. The increased transparency on selling practices will help to avoid conflicts of interests and to regain consumer confidence and trust in insurance markets.

Furthermore, by reinforcing advice standards in relation to insurance investment products, IMD2 will introduce more transparency and help consumers to better understand the characteristics of different offers and whether products will be suitable for them.

Three points are worth mentioning when it comes to certain risks associated with the proposal for a new directive. In the financial services world new costs are often passed on to end-users, in our case insurance policyholders. New requirements for insurance business will involve costs which might, at the end, result in higher premiums for policyholders. Secondly, the mandatory disclosure of remuneration is a revolutionary step forward and will be a clear novelty for the insurance industry. However, it may incentivise intermediaries and insurance companies to look into new forms of cooperation and new commercial structures to circumvent this requirement. Finally, the new regime will distinguish between classic and investment insurance products, resulting in insurance distributors following different rules in the future. To provide for more simplification, the Commission might decide to align these rules when taking up a new revision exercise in the future. This might cause certain problems as MiFID rules might not always address the specificity of insurance business.

#### Notes

- <sup>1</sup> COM(2012) 360/2; text of the proposal can be downloaded from [http://ec.europa.eu/internal\\_market/insurance/docs/consumers/mediation/20120703-directive\\_en.pdf](http://ec.europa.eu/internal_market/insurance/docs/consumers/mediation/20120703-directive_en.pdf).
- <sup>2</sup> Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation, OJ L 009, 15 January 2003
- <sup>3</sup> See a study prepared by CRA International: [http://www.cityoflondon.gov.uk/business/economic-research-and-information/research-publications/Documents/2007-2000/Comparative%20Implementation%20of%20EU%20Directives%20III\\_Insurance%20Mediation.pdf](http://www.cityoflondon.gov.uk/business/economic-research-and-information/research-publications/Documents/2007-2000/Comparative%20Implementation%20of%20EU%20Directives%20III_Insurance%20Mediation.pdf).
- <sup>4</sup> Contingent commissions are paid by insurance companies to insurance intermediaries on the basis of the business generated for these insurance companies. While such commissions paid to insurance agents are less controversial due to fiduciary duties of the latter towards insurance companies, they might bias insurance brokers who owe fiduciary duties to their policyholders not to consider the best interest of the latter. The practice of paying contingent commissions to insurance brokers was investigated by the New York Attorney General Elliot Spitzer in 2003-2005. For more information on Spitzer investigations see <http://www.economist.com/node/3308447>.
- <sup>5</sup> Problems with the mis-selling of insurance products were encountered e.g. in the Netherlands, Belgium and in the UK; European Commission's Impact Assessment accompanying the proposal for a Directive on insurance mediation, [http://ec.europa.eu/internal\\_market/insurance/docs/consumers/mediation/20120703-impact-assessment\\_en.pdf](http://ec.europa.eu/internal_market/insurance/docs/consumers/mediation/20120703-impact-assessment_en.pdf), pp. 20-22; van Dijk, M., The price of free advice, *CPB Discussion Paper* No 66, pp. 12-14, July 2006.
- <sup>6</sup> Remuneration disclosure concerns the disclosure to an insurance purchaser of any commissions, fees and other means of remuneration an insurance intermediary may receive from an insurance company when selling this company's product. See the final report of the European Commission at [http://ec.europa.eu/competition/sectors/financial\\_services/inquiries/final\\_report\\_annex.pdf](http://ec.europa.eu/competition/sectors/financial_services/inquiries/final_report_annex.pdf), page 74.



- <sup>7</sup> See Commission's consultation document [http://ec.europa.eu/internal\\_market/consultations/docs/2010/insurance-mediation/consultation-document\\_en.pdf](http://ec.europa.eu/internal_market/consultations/docs/2010/insurance-mediation/consultation-document_en.pdf).
- <sup>8</sup> For statistics, please see the report of the Insurance Europe *Insurance distribution channels in Europe*, March 2008, <http://www.insuranceeurope.eu/uploads/Modules/Publications/cea-statistics-nr-39---distribution.pdf>, pages 17 ff.
- <sup>9</sup> For instance, French and UK legislation transposing IMD1 included car dealers in the scope of the Directive and in other countries this distribution channel remained unregulated.
- <sup>10</sup> Packaged retail investment products are financial products (from banking, securities and insurance sector) offered through different legal structures. They may appear as non-investment products but in reality entail an investment element and risk for the customer through exposure to the performance of assets. They may have different legal structures but the same economic function – return through exposure to assets. An element of packaging and indirect investment risk are key characteristics of these products. The Discussion on regulating these products started in 2007 and a separate proposal was put forward by the Commission in 201



# Programming EU External Action Post-Lisbon: New Opportunities or Business as Usual?

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Over 90% of the external relations budget of the EU is processed through its external financial instruments. With the Lisbon Treaty and the creation of the new European External Action Service (EEAS), the institutional architecture of these instruments was significantly reformed. This contribution analyses strategic programming both pre- and post-Lisbon, identifies 'winners' and 'losers', and examines the potential of the new provisions to increase the coherence of EU external action. The examination shows that the instruments can be categorised into three groupings: 'the big three' comprising the bulk of funding characterised by joint programming and responsibilities; the 'Commission-only' instruments where all powers remain with the Commission; and the 'EEAS-led rest' in which the High Representative and the EEAS play a strong role but only have limited financial resources available. The new system calls for strong coordination of all involved actors in order to make it work. Findings of a case study on the Instrument for Stability reveal, however, that so far the establishment of the EEAS has not made a substantial impact on strategic programming in its first two years.

**Introduction**

One area of external relations in which the EU has traditionally played an important role is that of technical and financial cooperation with third countries through its external programmes. These geographic and thematic financial instruments constitute one of the EU's most important tools for shaping its external environment and wielding its influence on the international stage. The Treaty of Lisbon started a process of institutional restructuring that shifted the competences for programming and implementation of the instruments within the EU machinery. The new High Representative of the Union for Foreign Affairs and Security Policy/Vice President of the European Commission (HR/VP) was tasked to ensure 'the unity, consistency and effectiveness of the Union's external action, in particular through the (...) external assistance instruments'<sup>1</sup>. This has led to a complex new allocation of competences. The new EEAS plays a significant role in the strategic programming of certain instruments; while simultaneously, the Commission maintains the overall authority to manage and implement the instruments. The last two years saw intense turf wars between the EU institutions on the overall division of competences in this matter.

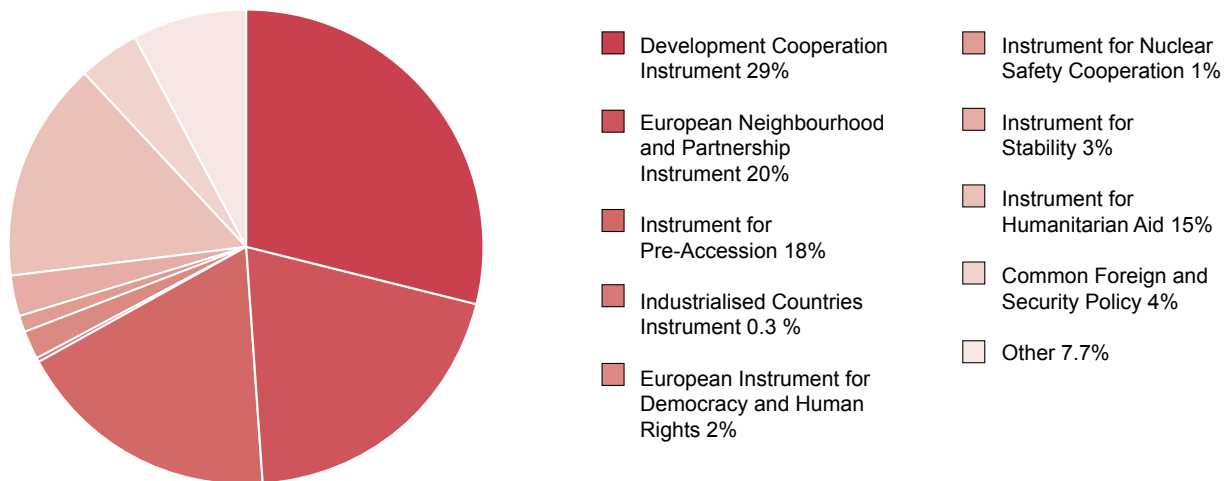
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According to who decides on what in the new system, the nine instruments can be subdivided into three general groupings: the 'big three', the 'Commission-only' instruments, and the 'EEAS-led rest'.

programming setting are the Commission Directorate-General (DG) Development and the newly established EEAS<sup>2</sup>. Programming usually includes the following five steps: fund allocation, strategy paper, multi-annual indicative programme, annual action programme, and implementation.

The new programming provisions were laid down in the Council decision of July 2010 that established the EEAS, although the exact distribution of competences between the EEAS and the Commission remained unclear in the first year of the service. Voices in the Commission acknowledge that the first version of an inter-service agreement meant to settle these issues was not very well drafted. It took the involved actors more than a year after the EEAS was officially declared operational to agree on detailed working arrangements between the Commission and the EEAS. According to who decides on what in the new system, the nine instruments can be subdivided into three general groupings: the 'big three', the 'Commission-only' instruments, and the 'EEAS-led rest'.

Figure 1: EU Budget 2011, Heading 4 'The EU as a global actor'



Source: European Commission (2012) EU budget 2011 - Financial Report.

The financial instruments of EU external action account for more than 90% of its external relations budget expenditure. This amounts to €6.9 billion or 6% of the overall EU budget in 2011. The 10<sup>th</sup> European Development Fund adds another €22.7 billion to EU development cooperation for the years 2008-13, but is so far not part of the EU budget.

As a general rule, it is the Commission as the EU's executive branch, which has the competence to execute the budget and manage programmes. The main actors in the new

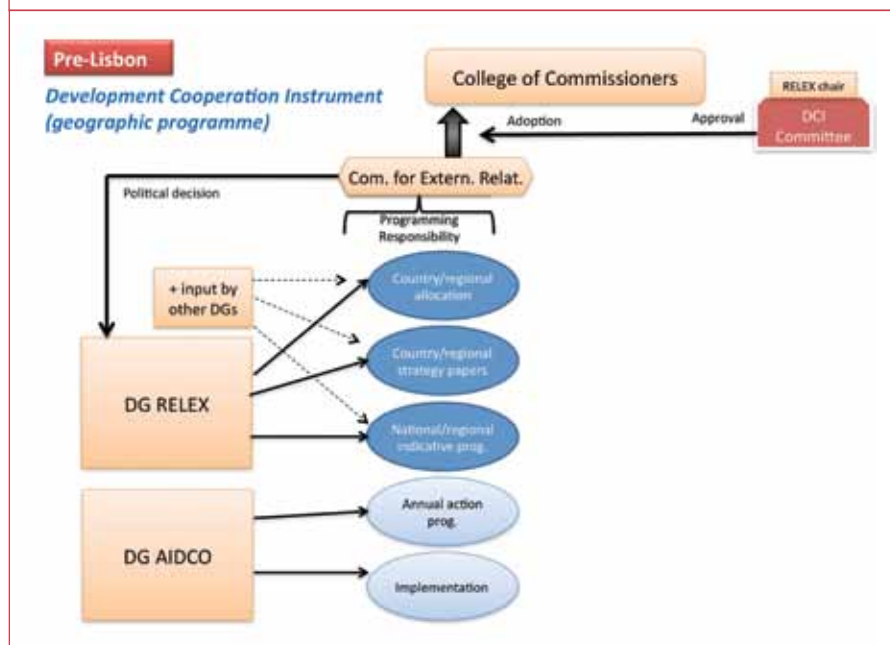
**The 'big three' instruments**

The first group consists of the three financially best equipped geographic instruments: the Development Cooperation Instrument (DCI), the European Development Fund and the European Neighbourhood and Partnership Instrument, which all share a similar strategic programming procedure. Both the Commission and the EEAS share competences like in no other group of instruments and the development of the work relationship between the two actors will have a significant

influence on how EU external action is conducted. Significant changes took place especially in the part of the DCI which finances cooperation with countries in Asia, Latin America, the Middle East and South Africa. While the Commission succeeded in keeping the competence for thematic funds (e.g. for migration, health, environment) under its influence, the geographic programming now involves new actors.

Parliament, tried to keep the political responsibility for the instrument in its sphere of influence. At the end of the process, however, both the Development Commissioner and the HR/VP have to sign the strategic documents and submit them jointly to the College of Commissioners for adoption, although it is expected it will mostly be the cabinet of the Commissioner who is actively involved in the actual programming process, e.g. through the coordination of services and cabinets.

Figure 2: Key actors and procedures in DCI strategic programming pre-Lisbon



In pre-Lisbon times it was solely the Commission's DG External Relations (RELEX) which was in charge of preparing strategic documents, under the responsibility of the former Commissioner for External Relations (see Figure 2).

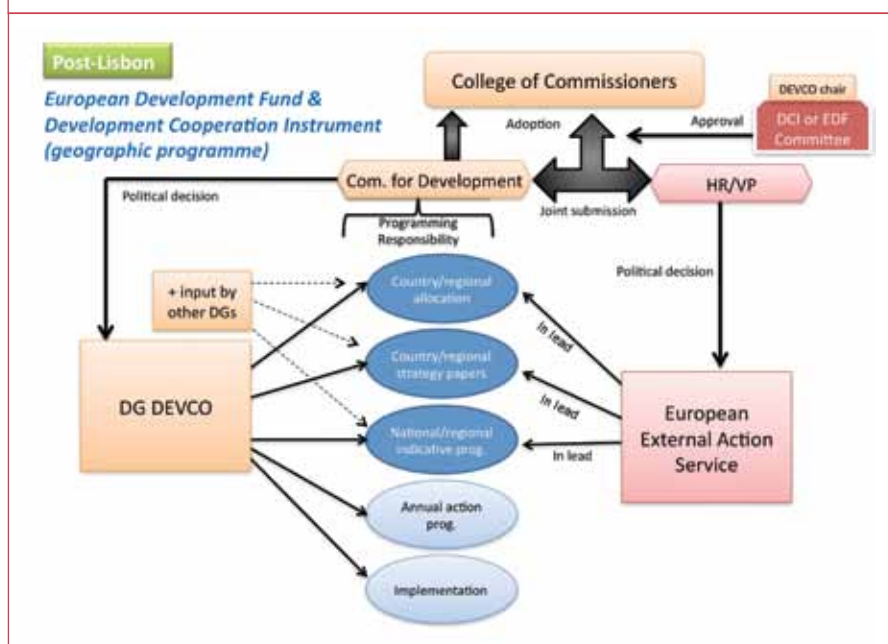
Now the EEAS and DG Development share the competence to jointly undertake the strategic programming under the responsibility of the Commissioner for Development (see figure 3) with the EEAS being the lead service during the whole process. It is apparent that DG Development and the Commissioner for Development received a significant amount of influence over the DCI post-Lisbon which they did not previously possess. Although all geographical desks responsible for programming were transferred to the EEAS during its inception, the merger of the former DG Development with DG EuropeAid has led to the incorporation of the geographical units of the latter into the new DG. This seems like a duplication of programming desks in both EEAS and DG Development, but this is to a certain degree unavoidable given the sole responsibility of DG Development for the geographic implementation of the financial instruments. In addition, the political responsibility for the DCI was not given to the HR/VP, as one could have expected, but instead to the Commissioner for Development. This shows how the Commission, supported by the European

One interesting detail of the new provisions concerns the European Neighbourhood and Partnership Instrument and points to an asymmetric power distribution within the Commission. In pre-Lisbon times, the competence for the instrument was located with the former Commissioner for External Relations. The responsibility for the instrument was then transferred to the portfolio of the Commissioner for Enlargement and European Neighbourhood Policy by a 'pre-emptive strike' of Commission President Barroso to defend Commission competences vis-à-vis the direct influence of EU Member States. It is remarkable that the Commissioner now has the political responsibility for European Neighbourhood Policy, while 'his' DG is only in charge of enlargement countries and has neither the staff nor the competence to programme the neighbourhood instrument. This is instead done by the EEAS and DG Development.

The 'Commission only' instruments

The second group of financial instruments includes instruments that are programmed and managed exclusively by the Commission services under the direct responsibility of a Commissioner other than the HR/VP. After the inception

Figure 3: Key actors and procedures in DCI strategic programming post-Lisbon





of the EEAS, only three instruments remain in the category: Instrument for Pre-Accession, Instrument for Humanitarian Aid, and the thematic programme of the DCI. The programming of, for instance, the Instrument for Pre-Accession is solely in the hands of the Commission, with DG Enlargement in the lead under the direct responsibility of the Commissioner for Enlargement. Not much has changed following the Lisbon Treaty concerning the programming procedure. It should be stressed that the Instrument for Pre-Accession is completely omitted from the influence of the EEAS headquarters. It is surprising that the EEAS now has, in general, the leading role in the planning of geographic cooperation with third countries (e.g. with the Ukraine), with only the exception of enlargement countries (e.g. Serbia). Whether these provisions help to enhance the coherence and efficiency of EU external action on an institutional level is questionable, although at the practical level and from the perspective of the EU delegations that carry out crucial planning and implementation work 'in the field', not much of a difference can probably be observed.



### The 'EEAS-led rest'

The third group consists of four instruments – Industrialised Countries Instrument, European Instrument for Democracy and Human Rights, Instrument for Stability (IfS), and Instrument for Nuclear Safety Cooperation – which are characterised by a strong leading role of the EEAS in terms of strategic programming under the direct responsibility of the HR/VP. Furthermore, these instruments all have a rather limited budget in comparison to the big programmes covering development cooperation, and accounted for only 6.3% of EU external action funds in 2011. Before the entry into force of the Lisbon Treaty and the establishment of the EEAS, it was the competence of the former DG RELEX to draft the strategy of these instruments. Today, the services of the Commission are no longer substantially involved because the competence for strategic programming was transferred to the EEAS. It is apparent that the HR/VP has strong authority over all stages of programming of the instruments, although of course all decisions of the Commission still have to be adopted by the College of Commissioners and approved by the Member States in the respective comitology committees.

### Implications for policy coherence

The establishment of the EEAS and its new role in strategic programming might have a significant influence on the focus and direction of EU external action. It is essential to highlight that the EEAS incorporates several policy fields of EU external action under one roof, but has diverging competences in each of them. Ideally the new structures will allow for several fields to be combined in order to achieve common objectives and thus lead to a more coherent EU external action. This was, after all, the main objective to establish the new service in the first place: fusing the competences for relevant policy fields, strategies and instruments into one service. However, the leverage of the EEAS in the fields of, for instance, development cooperation, security, crisis response and human rights, varies significantly. At the same time, important policy fields such as trade and enlargement remain almost completely in the Commission's sphere of influence. This development

was caused by concerns, especially stemming from the supranational institutions, the Commission and European Parliament, about a loss of political influence in EU external action to the EU Member States.

The new role of the EEAS and the shift of programming competences among the EU institutions could yet also have adverse effects for policy coherence. Observers already fear that the new role of the EEAS might lead to a 'securitisation of aid', meaning that instead of pursuing poverty eradication, development funds might rather be used to address other foreign policy goals. The discussion on the military dimension of the African Peace Facility financed by the EDF is a prominent example of this. Some officials in EU delegations now perceive a slight shift of focus towards more security-related issues with the inception of the EEAS, and name also the Sahel strategy on security and development in this regard. As a consequence of the involvement of the EEAS in strategic programming, the demarcation between community and Council actions might be blurred, which could in turn lead to a more coherent EU external action; but this also carries the risk of encroaching on the competences of the Community institutions in a similar way as in the 'ECOWAS case'<sup>3</sup>.

So far, the HR/VP has not displayed a great interest in pushing development policy objectives and has left the topic primarily to Development Commissioner Piebalgs. Similarly, it seems that for most officials in the EEAS, policy coherence for development ranks rather low on their agenda. The development cooperation coordination division in the EEAS finds it difficult to raise awareness for development policy among their colleagues and only has limited resources at its disposal to push this policy issue. DG Development would have a strong interest in doing that, but because of the significant transfer of staff to the EEAS it has lost programming expertise without gaining much additional human resources. Moreover, on the political level in the Commissioners' cabinets, officials argue that there is no willingness to promote own agendas, e.g. development policy, in the portfolios of other Commissioners.

### New programming structures – business as usual?

When the EEAS became operational the strategy papers of most external instruments were already in place. The only exception was the new strategy paper for the long-term component of the Instrument for Stability<sup>4</sup>, which was drafted mainly in 2011, thus constituting a first test for the strategic programming capacity of the EEAS post-Lisbon. Throughout the whole process however, significant changes to pre-Lisbon times were not observable and working relations between officials in the EEAS and the Commission went largely unaffected by inter-institutional struggles that simultaneously took place at the macro level. One important point to consider is that EEAS staff, which is now responsible for the Instrument for Stability, consists mostly of the same officials that previously had this responsibility in DG RELEX. Interviews with staff from EEAS and the Commission reveal that one of the main reasons why working relations run smoothly is that the officials already know each other, have worked together before and are used to the Community procedures applied in the Commission. Especially the latter point might be

important in the medium term when an increasing number of Member States' diplomats not accustomed to Commission working procedures will join the EEAS.

## Conclusion

Following the cumbersome process of macro-institutional scramble in 2010 and 2011, the true litmus test of the effects of the new provisions on the coherence, effectiveness and efficiency of EU external action will be the upcoming programming cycle for the 'big three' instruments. It does not seem that the inception of the EEAS and the reshuffling of competences have had a significant effect on strategic programming in the first two years of the service, but this is likely to gradually change from now on. The new political allocation of funds to partner countries, led by the EEAS, or the strategic objectives of the new documents will hint towards the further direction of EU external relations.

Due to the complicated net of responsibilities for the external instruments post-Lisbon, strong institutional ties and coordination efforts are needed. Above the everyday working relations of EU officials, whose effect on coherence may diminish with the incorporation of more national officials into the EEAS, guidance of the political level of the Commissioners and especially the HR/VP is required. The upcoming EEAS review by the HR/VP, expected in mid-2013, offers the opportunity to better adjust and fine-tune the new structures and procedures. Until then, more coordination efforts of the Commissioners and their cabinets and more engagement of the HR/VP, also in development policy, would help to improve the programming of the external financial instruments and thus the visibility and effectiveness of EU external action.

## Notes

- \* Research for this article was conducted during a stay at EIPA from November 2011 to February 2012 in the framework of the Marie Curie ITN, 'EXACT' on EU external action.
- <sup>1</sup> Article 9 Council Decision of 26 July 2010.
- <sup>2</sup> Some observers raised doubts about the legality of equipping the EEAS with programming competences regarding development cooperation instruments (cf. Van Reisen 2010), while others state that the competence allocation is in legal accordance with the EU treaties (cf. Duke, S. and S. Blockmans 2010).
- <sup>3</sup> In the ECOWAS case (Case C-91/05, *ECOWAS*) the European Court of Justice found that the Council had encroached upon the development cooperation competence of the European Community when using a CFSP legal base for the support of ECOWAS in the fight against the proliferation of small arms and light weapons (Hillion, C. and R. A. Wessel 2009).
- <sup>4</sup> The IfS is split in a short-term (crisis response and preparedness) and a long-term component (e.g. counteracting global and trans-regional threats) of which only the latter is programmable. Responsibilities for the instrument are distributed between the EEAS, DG Development and the new Foreign Policy Instrument Service which is legally part of the Commission but co-located with the EEAS.

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European public sectors are particularly affected by the demographic challenge and an ageing and shrinking workforce. According to OECD statistics, over 30% of public employees of central government in 13 countries will leave during the next 15 years. Moreover, the public sector has as compared to the private sector to rely on a much older workforce, who will have to work longer in future. Against this background, European governments need to react and re-think major elements of current HR and organisational management in the public sector. Particularly the skills in age management should be improved in order to also maintain in future a highly productive, competent and efficient public sector and to ensure that public employees stay longer 'employable', 'healthy', 'fit for the job' and 'up to the task'. The survey suggests some solutions by investing more in three priority areas in the field of HRM.

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