



# The external representation of the EU: A simple matter of protocol?

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*“Sofagate” has brutally disclosed the internal divergences within the EU in the field of its external relations.*

*Some tried to minimize this unfortunate incident as a mere breach of diplomatic protocol. However, several elements lead us to think that the issue at stake is a very political matter: the division of power between the President of the EU Commission and the President of the European Council concerning the external representation of the EU.*

*Tensions between both presidents were predictable and identified as soon as the Lisbon Treaty came into force (see premonitory analysis written by Professor Niki Aloupi in 2010)<sup>1</sup>. The ambivalent language of the Lisbon treaty seems to be the main source of these tensions which had, until now, been contained. On 6 of April 2021, these misgivings became public as pictures of the Ankara meeting, amplified by social media, went viral.*

*Considering the complex relationship between institutions and Member states as well as the harsh criticism from Eurosceptical populists, an institutional quarrel is the last thing the EU needs in these COVID-19 times. This awkward dispute undermines the ambitions for an efficient and coherent European foreign policy.*

*This article focuses solely on the impact of the incident on the internal structure of the EU’s external representation.*

*It provides an analysis of the dysfunction, why it happened, and how it could be fixed.*

*This paper does not comment on the role of Turkish authorities or any other aspect of the “sofagate”.*

## I. WHAT THE LISBON TREATY SAYS

In the Lisbon treaty (TEU) three main actors have been designated to represent the European Union on the international scene: The President of the European Council, the President of the European Commission, and the High Representative for the Common Foreign and Security Policy.

From 1974 until November 2009, when the Lisbon treaty entered into force, the European Council was presided by the head of state or government of the rotating presidency, clearly designated as head of delegation for all bilateral summits between the EU and third countries. The big innovation introduced by the TEU was the institution of a stable presidency of the European Council elected for a two and a half year term, renewable once (article 15, para.5 TEU). The purpose of this innovation was to reinforce the visibility and continuity of the European Council’s presidency, which became an

official institution of the Union (article 13 TEU). According to article 15, para. 6 “The President of the European Council shall, at his level and in that capacity, ensure the external representation of the Union on issues concerning its common foreign and security policy, without prejudice to the powers of the High Representative of the Union for Foreign Affairs and Security Policy.”

For matters other than foreign affairs and security policy (CFSP), the Commission ensures (as an institution, not as a person) the external representation of the Union (Article 17 TEU). The suppression of the so-called pillars and the attribution of a legal personality to the Union have reinforced the Commission’s role in the external representation of the EU in community matters. Besides the CFSP exception, there is the particular case of the external representation of the eurozone, which is ensured by the president of the Eurogroup (an informal body). Just as the President of the European Council, the President of the European Commission is a full member of the European Council and the counterpart of Heads of State and government in matters relating to the competences of the Commission.

The High Representative (HR) conducts the Union’s common foreign policy, represents the EU in political dialogues with third countries and within international organizations and conferences and in all matters related to the European Security and Defence Policy (CSDP). He presides over the Foreign Affairs Council (Articles 18 and 27 of the TEU) and, as one of the Vice-Presidents of the Commission, ensures the consistency of the EU’s external action.

### **Unsound competition**

As anyone can see, the tasks of the designated actors in charge of the EU’s foreign policy were not clearly defined. The possibility of competition between these actors could not be excluded since the definition of shared competences between the EU and its Member

States was not unambiguous. In fact, the reason why the external representation of the EU remains difficult to grasp, is the reluctance of Member States to transfer the exercise of their national foreign policy to the Union.

The Presidency of the European Council was modelled on the role of a head of state in a classic parliamentary regime, not as politically exposed as a head of government. However, nothing in the TEU prevents an assertive personality of fulfilling his/her tasks with dynamism and taking the necessary initiatives to make the role look more presidential. The lack of precision in the manner in which the job description is drafted allows the President of the European Council to take advantage of any opportunity to compete with the President of the Commission. This loophole was detected and criticized by the representatives of smaller Member States – including Belgium- that considered it a way of weakening the Commission.

When dealing with the external competences of the Union, the EU treaties have always made a clear distinction between those of an intergovernmental nature (which require unanimity as is the case with CFSP/CSDP) and those of an exclusively community nature (such as trade policy, cooperation and development, and humanitarian assistance). In practice, this distinction is not as obvious as it seems. In most cases, when dealing with foreign policy, the Commission and the Council will inevitably depend on one another. Ultimately, the efficiency of the EU’s foreign policy is determined by the personal relationship and compatibility of the respective ambitions of the President of the Commission and the President of the European Council.

## II. POLITICS NOT PROTOCOL.

Calling upon protocol rules to justify primacy in the external representation of the Union is not a convincing argument.

Article 13, para.1 TEU enumerates the institutions of the Union without explicitly indicating any order of precedence. Besides the ambiguity of the treaty, protocol arrangements in the EU are based on customary practices, not on legally binding texts. The practical arrangements referred to as “protocol rules” are, in fact, guidelines with no political meaning provided by the protocol services of either institution<sup>2</sup>. The informal document entitled “Practical Arrangements between President Van Rompuy and President Barroso regarding External Representation of the European Union at Presidential Level”, signed on 16 March 2010, proves this point. This written gentlemen’s agreement had to be negotiated because of the absence of a formal EU protocol book.

Furthermore, the role of the European Council and of the European Commission concerning the management of the financial, migration, BREXIT and COVID-19 crises was not defined by protocol considerations. The way the eurozone crisis or the compromise with Turkey on migration were managed are particularly telling in this regard. These challenges generated a lot of expectations towards the decision-making capacity of European leaders and European institutions. On many occasions both had to “improvise” to use the expression of Luuk Van Middelaar<sup>3</sup>.

Whereas the Lisbon Treaty is relatively silent and ambiguous on precedence arrangements, it is very clear on how institutions should work together. The purpose of the TEU’s innovations was precisely to reinforce the external representation of the European Union in terms of visibility and efficiency. Coherence and unity in representation are the main tools Member States and the EU institutions should use to increase the relevance of EU foreign policy.

The coherence principle is repeatedly mentioned in the TEU (Role of the General Affairs Council article 16, para.6; Role of the High Representative in article 18, para.4; Coherence/cooperation in article 21, para.3 and Common Foreign and Security Policy in article 26, para.2). The loyal cooperation between institutions is specifically mentioned in article 13, para.2 of the treaty. This principle does not only apply for EU institutions, but also for EU Member States (Article 4, para.3).

This cooperation principle, which can be interpreted as a code of conduct or as an obligation to reach a particular result was designed to ensure a strong representation of the EU on the international scene. This is the principle which was violated during the diplomatic incident in Ankara.

### Individuals profiles

Since the TEU entered into force, Member States have been careful not to select personalities who would have boosted the autonomy of the Commission or the European Council. Their reluctance towards a supranational approach of the external representation of the Union confirms the traditional will of European heads of state and government to keep control over the EU’s foreign policy.

One of the ironies in the implementation of the Lisbon treaty is that the same Member States that pleaded for the upgrading of the EU’s role in the world were also the ones that made sure that the selected personalities would not be able to challenge them. This was the result of a compromise between large and smaller Member States – yet another example of the ambivalent identity of the EU in which the community and intergovernmental methods coexist, sometimes in a complementary and sometimes in a competing manner.

The same ambivalence is visible in the EU’s governance, especially in times of crisis. While the Commission represents the supranational aspect of the “EU government”, the European Council

reflects the intergovernmental aspect of European governance and remains as such the supreme decision-making body of the Union.

The internal structure of the EU's external representation has more in common with the way a state is organized than with an intergovernmental organization. But, even if their powers are larger than those of leaders of international organisations, the President of the European Council and the President of the European Commission remain high-ranking civil servants. None of them is the embodiment of the external expression of a (non-existing) European Sovereignty. The "geopolitical Commission" is an abstract notion and the President of the European Council remains the chairman of the European Council, not the President of Europe. Donald Tusk used to refer to himself as "the European Bureaucrat-in-Chief."<sup>4</sup>

### **The foreseeable future**

In a rational world one would have thought that the three designated actors in charge of the external representation of the Union would work together using the flexibilities of the Lisbon treaty, sharing between them in the most efficient way the heavy workload of the EU's foreign policy.

Given the sensitivity of Member States on this matter one would have expected more discretion from the representatives of European institutions when dealing with their internal disagreements. Previous presidential teams (Van Rompuy/Barroso and Tusk/Juncker) managed to do so even in times of crisis.

The diplomatic incident that occurred in Ankara has hurt the credibility of both presidents as well as the credibility of the European Union. Concepts such as "European Sovereignty", "Strategic autonomy" and "team Europe", on which the EU's strategy for the fight against the COVID-19 pandemic is based, could also suffer collateral damage.

Witnessing the EU's foreign policy taken hostage by a quarrel between the persons tasked to represent the Union and its Member States is rather odd.

Merging the Presidency of the European Council with the Presidency of the Commission could be a radical solution to deal with this awkward situation. The idea is not new. It came up during the Convention more than 20 years ago. Jean-Claude Juncker mentioned it during his last state of the Union. From a legal perspective, some experts argue that this could be done without a treaty change. However, from a political perspective the "single presidency" of the European Union is far too risky. It could either lead to a Federal Union governed by the European Commission or risk downgrading the EU, which would become an intergovernmental organization with the Commission as its secretariat. EU Member States are not ready for either option.

The poor performance of the EU's external policy requires rapid reaction, to be pushed by the heads of state and government. Time is of the essence and the EU cannot wait for the negotiation of yet another inter-institutional agreement, let alone for the results of the Conference on the Future of Europe.

The adoption by the European Council of a decision based on a common understanding between the President of the European Council and the President of the European Commission, which would streamline the external action of the European Union on a case-by-case basis, seems feasible. What the external representation of the Union would lose in terms of fluidity and reactivity, would be compensated by gains in terms of coherence and credibility.

Unfortunately, this does not seem the most likely scenario.

With Heads of State and government fully focused on the COVID-19 pandemic, the implementation of the Recovery and Resilience Plans, the twin green/digital transitions and - in the case of Germany and France - important general elections,

it is hard to imagine the next VIDEOEUCO starting with some form of admonishment followed by the smooth adoption of the decision mentioned above.

More likely the member states will let the presidents of both institutions deal with this “protocol problem”. Left to themselves no one knows how long it will take to agree on a common understanding for practical arrangements. The first audition by the EP political groups was not very promising.

The intervention of the European Parliament and the hearing, organized behind closed doors, by the Conference of the Presidents is another anomaly in the follow-up of the now infamous “sofagate”. In principle, the President of the European Council is not accountable to the European Parliament and certainly not on CFSP matters. The President of the European Council is only accountable to the European Council, which can end the President’s term by qualified majority in case of serious misconduct (article 15, para.2), whereas the Commission as a body is accountable to the European Parliament, which may vote on a motion of censure against it. Some Member States will probably react to the implicit mediation role the Parliament wishes to endorse in this dispute.

## CONCLUSION

The turmoil caused by the diplomatic incident that occurred in Turkey will be remembered for a long time by the protocol services.

From an institutional perspective, this incident has damaged the external representation of the Union as it was conceived in the Lisbon Treaty. The possibilities offered by the TUE were wasted because of the personal rivalry between the President of the European Commission and the President of the European Council.

The only way out of this unsound competition seems to be the conclusion of a common understanding, which should be quickly drafted by the cabinets of both presidents in order to restore the credibility of the Union on the international scene.

However, unlike the discreet arrangements concluded in 2010 between presidents Van Rompuy and Barroso, this common understanding will be scrutinized by the legal services of the EU institutions, as well as by Member States. This will inevitably formalize and complicate the negotiation.

Member States - and in particular, the bigger ones – will never accept any modification of the rules concerning the external representation of the Union that would enter into force without their explicit consent and possibly to the detriment of the European Council – speeches on “European sovereignty” notwithstanding.

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## Endnotes

<sup>1</sup> Aloupi Niki. La représentation extérieure de l'Union européenne. In: Annuaire français de droit international, volume 56, 2010. pp. 737-766 which has extensively inspired this analysis.

<sup>2</sup> François Foret. Le protocole de l'Union européenne ou la mise en forme d'un ordre politique inachevé. Site [https://www.diplomatie.gouv.fr/IMG/pdf/FD\\_pp\\_410\\_-\\_425](https://www.diplomatie.gouv.fr/IMG/pdf/FD_pp_410_-_425)

<sup>3</sup> Luuk van Middelaar. De nieuwe Politiek van Europa. Hoofdstuk 1 “improviseren de eurocrisis” pp. 33; Historische Uitgeverij 2017.

<sup>4</sup> Donald Tusk. “After five years I am fed up with being the European Bureaucrat in chief” in Speech by President Donald Tusk at the EPP congress in Zagreb on 20 November 2019. Site du Conseil de l'Union européenne.



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