The High Representative for Foreign Affairs and Security Policy before the Court of Justice of the European Union

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Abstract

The article discusses the participation of the High Representative for Foreign Affairs and Security Policy of the European Union (the High Representative) and that of the European External Action Service (EEAS) in proceedings before the Court of Justice of the European Union (CJEU). It recalls that, while the EEAS, in accordance with its prerogatives, has been accepted as a party mainly in staff cases since its creation, the High Representative itself has only recently asked for leave to intervene in order to protect its institutional standing. By order of 3 March 2022, the President of the Court of Justice allowed the intervention of the High Representative in an inter-institutional case (C-551/21), opposing the Commission and the Council on the question of which institution is allowed to decide who signs EU agreements with third countries. Only two months later, the order of the President of the Grand Chamber of the General Court of 11 May 2022 granted the High Representative leave to intervene in support of the Council in case T-125/22 *RT France v Council*. These two orders mark a milestone for the judicial presence of the Union's foreign policy chief. The High Representative can now intervene before the Court in external relations cases which directly affect his institutional prerogatives. The authors submit that the same arguments should also allow the High Representative to bring direct action against other EU institutions or to be challenged in that way in certain constellations.

Keywords: European Union, External Relations, High Representative for Foreign Affairs and Security Policy, Locus Standi before the Court of Justice of the European Union, Interventions and Direct Action

A. Introduction

The office of the High Representative was introduced by the Treaty of Amsterdam (1997). It endowed the Council's Secretary General with the role of the "High Representative for the common foreign and security policy". This role has ever been exercised by one person only: Javier Solana, "Mr CFSP". Being combined with the office of the Council's Secretary General, the High Representative did not have an autonomous institutional role. Indeed, it assisted the Council and its rotating Presidency.[1]

1 Article 1(10) of the Treaty of Amsterdam, amending Title V of the Treaty on European Union (TEU), provided that Article J.8, paragraph (3) TEU was to be amended as follows: "The Presidency shall be assisted by the Secretary-General of the Council who shall exercise the function of High Representative for the common foreign and security policy". Article 2(39) of the Treaty of Amsterdam, amending Article 151 of the Treaty establishing the European Community (TEC), provided that Article 151(2) TEC was to be amended as follows: "The Council shall be assisted by a General Secretariat, under the responsibility of a Secretary-General, High Representative for the common foreign and security policy, who shall be assisted by a Deputy Secretary-General responsible for the running of the General Secretariat".

One of the main innovations of the Treaty of Lisbon was the creation of a new figurehead for Union external action under the already familiar name of the High Representative for Foreign Affairs and Security Policy (the High Representative, the HR). Although he/she could not retain the lofty title of "EU Minister of Foreign Affairs" as envisaged in the Draft Treaty establishing a Constitution for Europe,[2] the Treaty of Lisbon maintained the significant extension of the HR's treaty-based functions. Apart from remaining "Mr(s) CFSP", he/she also became the permanent Chair of the Foreign Affairs Council (FAC) and one of the Vice-Presidents of the Commission. Article 18(2)–(4) and Article 27 TEU refer to these three main functions as follows:

- Conducting the foreign and security policy (CFSP), including defence policy; contributing through proposals to the development of that policy and securing the implementation of decisions by the European Council and Council, ensuring the representation of the EU in the CFSP (Articles 18 (2), 27(1), (2) TEU).[3]
- Presiding over the Foreign Affairs Council (Article 18(3) TEU).
- Performing the function of one of the Vice-Presidents of the Commission ensuring consistency of the Union's external action and exercising the responsibilities incumbent on external relations and external action (Article 18(4) TEU).

The multi-institutional involvement of the HR in conducting the CFSP and acting as Vice-President of the Commission is commonly referred to as a "double" or even a "triple hat" (when the function of the FAC Chair is also taken into account) and represents, *inter alia*, the EU's "quest for horizontal coherence".[4]

The necessity to mould the three roles of the High Representative together made the office institutionally equidistant from both the Council and the Commission,[5] making the High Representative an "autonomous actor in the institutional structure of the EU".[6] However, the precise institutional nature of the office remains debated by scholars and legal experts alike.[7]

The possibility of the High Representative's involvement as intervener or the question of his/her legal standing in cases before the European courts has been analysed internally within the EEAS, without however putting any of those theories to the test until very recently. Why did it take 12 years for the High Representative to ask for intervention in a case before the EU's highest court? Does he/she enjoy legal standing to bring cases or 'only' to intervene in pending cases?

This article will briefly summarise the practice of the first 12 years since the entry into force of the Treaty of Lisbon, where only the EEAS appeared before the Lux-

2 Draft Art. I-27, European Parliament Resolution 2004/2129(INI), p. 5, para. 3 (d).
3 On the practice of EU external representation since Lisbon see *Hoffmeister*, ZEuS 2017/4.
4 See among others *von Arnauld*, in: von Arnauld/Bungenberg (eds.), § 1 para. 62; *Van Vooren*, CMLR 2011/2, p. 496 refers to a "triple hatted position" of the HR.
5 See *Blockmans/Wessel*, EFAR 2021/1, pp. 5–12.
6 *Behrmann/Marquardt*, in: von Arnauld/Bungenberg (eds.), p. 316.
7 See, by way of example *Blockmans/Hillion* (eds.), EUI Working Papers AEL 2013/3, p. 14; *Blanke/Mangiameli*, pp. 739–740; *Piris*, pp. 243–258.

emburg courts (Chapter B). It will then turn to the new developments in 2022, where both the Court of Justice and the General Court accepted interventions of the High Representative in high-profile cases (Chapter C). In that chapter we will tackle open questions relating to direct actions, before concluding in Chapter D.

B. The European External Action Service as litigant before the European Courts

I. The EEAS as a functionally autonomous body

Another innovation of the Treaty of Lisbon was to provide the High Representative with its own support body, the European External Action Service (the EEAS).[8] The EEAS officially started its work on 1 January 2011. Based on Article 1(2) of Council Decision 2010/427[9] (EEAS-Decision), it is a "functionally autonomous" Union body "separate from the General Secretariat of the Council and from the Commission".[10] In the area of EU civil service law and for budgetary matters under the EU Financial Regulation, it is equated to an institution.[11] In that context, the High Representative acts as "appointing authority" (AIPN).[12]

II. EEAS litigation practice for staff cases

Against that background, the question whether EEAS staff (or Commission staff seconded to the EEAS in order to serve in EU delegations in third countries) should bring cases under the Staff Regulation against the High Representative or the EEAS had to be decided. The established rules[13] and administrative, as well as litigation practice, points to the EEAS as being the employer of the staff in question.[14] Accordingly, aggrieved staff members have to bring their cases against the EEAS as de-

8 See Article 27(3) TEU.
9 *Council of the European Union*, Decision 2010/427/EU of 26 July 2010 establishing the organisation and functioning of the European External Action Service, OJ L 201 of 3/8/2010, p. 30.
10 Cf. further *Blockmans/Hillion* (eds.), EUI Working Papers AEL 2013/3, Art. 1, pp. 15–17.
11 See Article 2(67) of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union (EU Financial Regulation), OJ L 193 of 30/7/2018, p. 1, and Article 1b(a) of Regulation No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community (EU Staff Regulation), OJ 45 of 14/6/1962, p. 1385. The institutional prerogatives of the EEAS are also reflected in Recitals (8) and (14) of the EEAS-Decision, respectively.
12 Article 95(1) of the EU Staff Regulations.
13 See note 11 *supra*. The institutional prerogatives of the EEAS are also reflected in Recitals (8) and (14) of the EEAS-Decision.
14 For details see *Gatti*, ELR 2014/5.

fendant before the General Court (GC),[15] following the dissolution of the Civil Service Tribunal.[16]

Thus, the EEAS has the capacity to be party to staff cases. The situation is less evident for interventions. In 2019, the EEAS wished to support the Commission in a dispute brought by six Commission officials serving in different EU delegations around the world. The President of the Court of Justice (ECJ) accepted that the EEAS qualifies as a "body" under Article 40(2) of the Statute of the Court, but denied a direct interest of the EEAS in the outcome of the case as the judgment would not change the legal position of the intervener.[17]

The situation becomes even more complex when staff cases relate to civilian EU crisis management missions on the ground or to EU Special Representatives. These owe their legal existence to Council decisions taken under a CFSP legal basis. However, as the ECJ held in *H v. Council,* that does not remove staff litigation from the jurisdiction of the Court under Article 24(1) TEU, as the Court would be competent on the basis of Articles 263, 268, 340 TFEU in conjunction with Article 19(1) TEU and Article 47 of the EU-Charter on Fundamental Rights.[18]

Once jurisdiction of the EU courts for a particular staff action is affirmed, the next question is to identify the correct defendant. According to the latest case law, the fact whether or not an EU mission may have been granted legal capacity on its own,[19] or whether an EU Special Representative (EUSR) is paid by the European Commission or supported by the European External Action Service may play a role in individual cases,[20] with the consequence that the EEAS may or may not be the proper defendant in such cases concerning staff employed by an EU mission or an EUSR.

III. EEAS litigation practice for other than staff cases

Although the bulk of the cases that involve the EEAS relate to staff complaints, it occasionally happens that plaintiffs decide to introduce claims before national courts also involving the EEAS and those cases may find their way to Luxemburg in

15 From recent practice see, by way of example, GC, case T-681/20, *OC v EEAS*, ECLI:EU:T:2022:422; GC, case T-88/21, *Paesen v EEAS*, ECLI:EU:T:2022:631.

16 See, by way of example, Civil Service Tribunal, case F-94/15, *Wolff v EEAS*, ECLI:EU:F:2016:73; Civil Service Tribunal, Case F-2/16, *Herzig v EEAS*, ECLI:EU:F:2016:148.

17 Order of the President of the ECJ of 29 July 2019 in case C-119/19 P, *Commission v Carreras Sequeros and others*, ECLI:EU:C:2020:676, para. 18.

18 ECJ, case C-455/14 P, *H v Council and others*, EU:C:2016:569, paras 56-58. In that case the ECJ held that even litigation involving staff seconded by the Member States to the Union institutions would fall under its jurisdiction. For a discussion of the scope of the exclusion of the Court's jurisdiction under Article 24(1) TEU see *Hillion/Wessel*, in: Blockmans/Koutrakos (eds.).

19 GC, case T-602/15 RENV, *Jenkinson v Council and others*, EU:T:2021:764, para. 77; under appeal before the ECJ (case C-46/22 P).

20 The question is *sub iudice* before the GC, case T-776/20, *Stockdale v Council and others*. Action brought on 29 December 2020, OJ 2021/C 128/44.

the form of a preliminary ruling request.[21] Similarly, damages claims can also arise against the EEAS as a potential defendant.[22] While these cases are limited in number, they can touch upon questions of important institutional (legal capacity and liability of EU missions set up under the CSDP – in C-283/20) or even constitutional nature (jurisdiction of the Court in the area of the common foreign and security policy – in the pending case C-29/22 P).

C. The High Representative as litigant in external relations cases

Going beyond the particular context of the EEAS and staff cases, an equally important question relates to the legal standing of the High Representative itself in external relations cases.

I. Interventions under Article 40(2) of the Statute of the Court

The institutional desire to establish the High Representative as an actor in the courts of the Union is nothing new. The possibility for the High Representative to intervene in an inter-institutional case first came about in July 2011, when the European Parliament, supported by the Commission, brought an action against the Council (case C-658/11)[23] supported by five Member States, with respect to Council Decision 2011/640/CFSP on the signature and conclusion of the EU pirate transfer agreement with Mauritius.[24]

That agreement regulated the conditions of transfer of suspected pirates and associated seized property from the European Union-led naval force to the Republic of Mauritius and the conditions of detainment of suspected pirates after such transfer. The Parliament contested that the CFSP legal basis for the Council Decision was sufficient, arguing that a justice and home affairs and development cooperation legal bases needed to be added to Article 37 TEU and thus requiring the involvement of the Parliament under Article 218(6).[25] In its judgment of 24 June 2014, the Court did not pay heed to the Parliament's position concerning the need for additional legal bases and accepted the arguments of the Council in this regard.[26]

21 See ECJ, case C-283/20, *CO and Others v MJ and Others*, ECLI:EU:C:2022:126.
22 Order of the General Court of 10 November 2021, case T-771/20, *KS, KD v Council, Commission and EEAS* [not yet published] – under appeal in C-29/22 P.
23 See ECJ, Case C-658/11, *Parliament v Council*, EU:C:2014:2025.
24 *Council of the European Union*, Decision 2011/640/CFSP of 12 July 2011 on the signing and conclusion of the Agreement between the European Union and the Republic of Mauritius on the conditions of transfer of suspected pirates and associated seized property from the European Union-led naval force to the Republic of Mauritius and on the conditions of suspected pirates after transfer, OJ L 254 of 30/9/2011, p. 1.
25 See ECJ, Case C-658/11, *Parliament v Council*, EU:C:2014:2025, para. 25.
26 ECJ, Case C-658/11, *Parliament v Council*, EU:C:2014:2025, paras. 62 and 63. The Court went on and annulled the contested decision based on a different plea. For a discussion of this case see *Wouters/Hoffmeister/De Baere/Ramopoulos*, pp. 72–75 and 368.

In that context, one could have expected that the High Representative would have requested to intervene in support of the Council in the litigation, as it was the HR who had negotiated the agreement in question and proposed the contested act to the Council. However, as the Commission intervened in support of the Parliament, the Cabinet of the HR turned down the recommendation to intervene from the EEAS Legal Affairs Division at the time. Accordingly, it was never tested whether the High Representative would be accepted as litigant in foreign policy cases before the Court. No further attempts to change this situation were even discussed internally in the EEAS.

1. Intervention by the High Representative before the Court of Justice in case C-551/21

The situation changed under the watch of High Representative Borrell. In September 2021, an internal re-organisation had led to the establishment of the Legal Department in the EEAS[27] building on what had been known as the Legal Affairs Division since the establishment of the EEAS. The internal functions and structure of the Legal Department were further clarified in an administrative decision of the Secretary-General in February 2022.[28] At the same time in September 2021, the Commission brought a case against the Council to clarify the appropriate procedure on signing an international agreement concluded by the Union in the area of fisheries (case C-551/21 Commission v Council[29]). The subject matter of the case was highly relevant for the High Representative's institutional prerogatives. Based on a recommendation from the Legal Department to strengthen his role before the Court, the High Representative agreed to file an application to intervene in case C-551/21. The factual background of the case is that Commission had negotiated a new Protocol to the EU-Gabon fisheries agreement according to the negotiation directives issued by the Council under Article 218(3) TFEU.[30] When it came to signature, the Council decided to appoint the Portuguese Ambassador to the EU to sign the agreement on behalf of the EU under Article 218(5) TFEU. The Commission considered that this act violated, *inter alia*, its prerogatives as external representative of the Union under Article 17(1) sixth sentence TEU.

Quite clearly, the outcome of this case would not directly affect the rights of the HR in its role of conducting the CFSP, to represent the Union, as he has no role in signing an agreement on fisheries. However, any interpretation of Article 218(5)

27 To be noted that Article 4(3)(b) second indent of the EEAS-Decision already foresaw the creation of a "legal department under the administrative authority of the Executive Secretary-General which shall work closely with the Legal Services of the Council and of the Commission".

28 *Secretary General of the European External Action Service*, Decision of 25 February 2022 on the Legal Department of the European External Action Service, ADMIN(2022) 18.

29 Application brought on 7 September 2021, case C-551/21, *Commission v Council*, OJ C 462 of 15/11/2021, p. 27.

30 Adopted by the Council on 22 October 2015. See Council document ST 13328/15 at page 13.

TFEU has a direct impact on the prerogatives of the HR in the area of CFSP as well, as the same situation could equally occur for a pure CFSP agreement.[31] It cannot be excluded, analogously to a non-CFSP agreement, that the Council would empower the HR to negotiate a CFSP agreement under Article 218(3) TFEU, but might be tempted to entrust actual signature thereof to another person under a decision pursuant to Article 218(5) TFEU. Against that background, the HR asked for leave to intervene in the case on 6 January 2022. In a landmark order of 3 March 2022, the President of the Court accepted the request.[32] The order makes two important points, which we will now briefly analyse.

a) The HR as a "body, office or agency" for the purpose of Article 40(2) of the Statute of the Court

The President first addressed the HR's plea to either be equated to an institution under Article 40(1) of the Statute of the Court or to be accepted as intervener with a special institutional interest under Article 40(2) of that Statute. The first alternative would have meant privileged access of the HR to the Court like any EU institution, while the second alternative was to consider the HR as a body, office or agency of the Union, having to show an "interest in the result of the case".

The President recalled in paragraphs 9 to 11 of his order that the HR cannot be classified as an institution of the Union within the meaning of Article 40(1) of the Statute, as for that purpose Article 13(1) TEU contains an exhaustive list.[33] However, the HR was admitted to intervene under Article 40(2) of the Statute.[34]

In its analysis relevant to the case at hand, the President first concluded that, unlike "natural or legal persons", the "bodies, offices and agencies of the Union" having an interest in the result of the case can intervene in cases between institutions. It thus followed from the wording and scheme of the second sentence of Article 40(2) of the Statute that the exclusion of natural or legal persons did not apply.[35]

Second, while it is legally straightforward to qualify the EEAS, assisting the High Representative in his/her mandate in accordance with Article 27(3) TEU, as a Union body,[36] such a deduction follows much less naturally for the High Representative itself. The President of the Court, underlining that the mandate of the HR is "in-

31 This is due to another novelty of the Treaty of Lisbon, namely the introduction of Article 218 TFEU, constituting "a single procedure of general application concerning the negotiation and conclusion of international agreements" regardless of whether these have a CFSP or non-CFSP legal basis. See ECJ, Case C-658/11, *Parliament v Council*, EU:C:2014:2025, para 52.

32 Order of the President of the ECJ of 3 March 2022 in case C-551/21, *European Commission v Council of the European Union*, ECLI:EU:C:2022:163.

33 Ibid., para. 10 and the case law cited.

34 Ibid., para. 24.

35 Ibid., para. 13, citing the Order of the President of the ECJ of 17 September 2021 in case C-144/21, *European Parliament v European Commission*, ECLI:EU:C:2021:757, paras. 6–8.

36 Cf. Article 1(2) of the EEAS-Decision.

trinsically linked" to the functioning of the EU, dissipated all remaining doubts in this respect: the High Representative, while being supported by the EEAS, is legally separate from it and must be equated with "the 'bodies, offices or agencies of the Union' for the purpose of applying" Article 40(2) of the Statute.[37]

b) The interest in the result of the case

The second question before the President was if the High Representative had an "interest in the outcome of the case" under Article 40(2) of the Statute. For natural or legal persons, the interpretation of this condition had been rather strict – they have to show a direct and existing interest in the outcome of the case. For bodies, offices and agencies of the Union the "direct and existing" interest "must be applied in a way that reflects the specificity of the mandate which such an applicant is called upon to fulfil pursuant to EU law".[38] Thus, the European Data Protection Supervisor (EDPS) would be admitted to intervene whenever "the application for leave to intervene falls within the framework of the task entrusted to the EDPS".[39] Such reasoning should be applied *a fortiori* to the High Representative, who is equated to "bodies, offices and agencies of the Union" and whose tasks are not defined by secondary law, but are directly flowing from primary law.

The President, in paragraphs 19 to 23 of his order, accepted that the High Representative has a direct and existing interest in the outcome of the case. Going into the heart of the matter, this part of the order is worth quoting in full:

> 19 In the case at hand, the dispute concerns, in particular, the question whether the task of ensuring the external representation of the Union, referred to in the sixth sentence of Article 17(1) TEU, implies that it is for the Commission – and not for the President of the Council – to designate, with a view to the conclusion of an international agreement on behalf of the Union, the person empowered to sign that agreement.
>
> 20 The Court's assessment of this question of institutional law will determine not only the outcome of the dispute in this case, but will also have a decisive influence, mutatis mutandis, on the choice of procedure followed and on the powers exercised by the High Representative when an international agreement must be signed in the field of the CFSP. Like the Commission in matters lying outside the CFSP, the High Representative is vested, in matters falling within the CFSP, with the mandate of ensuring the representation of the Union.
>
> 21 It is true that, in the case at hand, the High Representative bases his interest in the result of the case on the analogous prerogative relating to the representation of the Uni-

37 Order of the President, see note 32 *supra*, para 14.

38 Ibid., para. 16 and the case law cited. See, by contrast, a stricter interpretation vis-à-vis the EEAS, in the order of the President of the ECJ in case C-119/19 P, *Commission v Carreras Sequeros and others*, ECLI:EU:C:2020:676.

39 Orders of the President of the ECJ in the following cases: C-317/04 P, *Parliament v Council*, ECLI:EU:C:2006:346; C-518/07, *Commission v Germany*, ECLI:EU:C:2010:125; C-288/12, *Commission v Hungary*, ECLI:EU:C:2014:237 and C-615/13, *Client Earth and Pan Europe v EFSA*, ECLI:EU:C:2015:489.

> on which he holds under Article 27(2) TEU as compared with the prerogative held by the Commission under Article 17(1) TEU, for the purposes of representing the Union in areas which do not fall within the CFSP, whereas only the latter prerogative is at issue in the present case. However, it should be emphasised that that interest of the High Representative in the result of the case is based not on the fact that he is potentially in the same situation as the Commission in one or more similar cases, but, as has been stated in the preceding paragraph, on the fact that the result of the case in this instance will determine the scope of his role and of the powers which he derives from primary law, as regards the signing of any international agreement concluded by the Union in the field of the CFSP.
>
> 22 In view of that general scope of the interest invoked by the High Representative, as well as the fact that the latter is, in principle, the only person or entity able to invoke it, that interest must be classified as 'direct' and 'existing'.
>
> 23 The direct and existing interest which the result of the case in this instance can thus have for the High Representative is not invalidated by the fact, highlighted by the Council, that the High Representative chairs, pursuant to Article 27(1) TEU, the Foreign Affairs Council. In that regard, it is sufficient to note, first, that, as the Council has pointed out, decisions authorising the signing of an international agreement in the field of the CFSP are not always taken by the Foreign Affairs Council and, second, that, irrespective of the precise role played by the High Representative in the conclusion of such an international agreement, the legal clarification provided by the Court as to the scope of the task of representation under Article 17(1) TEU is liable to define the scope of the representation mandate referred to in Article 27(2) TEU.

The key consideration seems to be that the outcome of the case "determines the scope of [the High Representative's] role and powers derived from primary law"[40] and that such interest is hence "direct and existing".[41] In other words: the HR can intervene in cases before the Court when his/her institutional interests are directly at stake.

2. Interventions by the High Representative before the General Court

The President's well-reasoned order opened the door for the High Representative to become more active before the EU Courts also in other areas of EU external relations, notably in the area of restrictive measures. In particular, when RT France challenged the Council legal acts having imposed a broadcasting ban against it, and only weeks after the order in case C-551/21, the High Representative asked the General Court to be granted leave to intervene in the *RT France v Council* case (T-125/22). The President of the Grand Chamber of General Court, also relying on the order of the President of the Court in case C-551/21, admitted the intervention of the HR on the ground of Article 40(2) of the Statute, applicable to the GC by virtue of Article 53(1) of that Statute. The President of the Grand Chamber held

40 Order of the President of the ECJ of 3 March 2022 in case C-551/21, *European Commission v Council of the European Union*, ECLI:EU:C:2022:163, para 21.

41 Ibid., paras. 22 and 23.

that the High Representative had a direct interest in the outcome of the case since he exercised the power of initiative in the procedure for the adoption of acts under Article 29 TEU and 215 TFEU.[42] Following this positive precedent, the High Representative was also granted leave to intervene in a follow-up case, in which Dutch internet providers challenged the same measures.[43]

3. The value added of the interventions by the High Representative

As asking for an intervention under Article 40(2) of the Court's Statute is discretionary in nature, the final question to address is the value added of the High Representative's action. As to actively participate in any Court proceeding is time and resource intensive, a commitment by the HR to become more involved on the "Luxemburg scene" makes good administrative and policy sense only if it presents a solid added value. Similarly, to justify a request from the perspective of the judges hearing the case, it is important that the intervention(s) of the High Representative add value to the legal debate. In this respect, the below aspects are to be underlined.

First, as witnessed in the "Gabon" case, the High Representative may have an institutional interest to defend his own position vis-à-vis other EU institutions. Just as the Commission, the Council or the European Parliament have fought for their proper place in EU external relations law, the High Representative has a legitimate interest to be recognised as a serious player with his/her own prerogatives. In that way, the value added of an intervention is to contribute to a proper interpretation of the balance of powers between the different institutional actors responsible for conducting the European Union's external action.

Second, as exemplified in the "broadcast ban cases", the High Representative may lend his support to the defence of EU decisions, in the design of which it actively participated. It is helpful for the judges to hear "from the horse's mouth", i.e. directly from the High Representative the arguments relating to the political and legal environment in which a CFSP proposal to the Council was drafted. This dimension seems to have met the appreciation of the General Court as well. Encouragingly, the judgment of the Court of 27 July 2022 mentions the High Representative's position expressed at the hearing several times in an affirmative manner – another novelty in EU external relations law.[44]

Third, the High Representative, assisted by the EEAS, may lend the available expertise on international law to the Court to enlarge the relevant material before it, as

42 Order of the President of the President of the Grand Chamber of the General Court of 11 May 2022 in case T-125/22, *RT France v Council*, ECLI:EU:T:2022:483, para. 2, and the case law cited.

43 Order of the President of the First Chamber of the General Court of 16 November 2022 in case T-307/22, *A2B Connect BV and others v Council* (case in progress), para 4.

44 GC, case T-125/22, *RT France v Council*, ECLI:EU:T:2022:483, paras. 89, 208 (under appeal, case C-620/22 P). By virtue of Article 172 of the ECJ's Rules of Procedure, as any intervener at first instance, the High Representative is also to be considered in the appeal procedure as a "party authorised to lodge a response".

the case may be. Without going into the substance of these pending cases, it could be pointed out nevertheless that the High Representative's intervention in the "Gabon case" brought to the attention of the Court certain elements from international practice on the qualification of signature of an international agreement as an act of external representation, complementing the points made by main litigants, the Commission and the Council. Similarly, in the "broadcast ban cases", the High Representative drew the attention of the General Court and the Court of Justice to the important question how to deal with war propaganda under Article 54 of the EU Charter on Fundamental Rights,[45] Article 17 of the European Convention on Human Rights and Article 20 of the International Covenant on Civil and Political Rights. From the HR's perspective, this point deserved more attention than actually given to it in the proceedings until then.

II. Possibilities for a direct action involving the High Representative

Further to the scenario of an intervention in support of a main party, could the High Representative go one step further and challenge in a direct action any act of the institutions in order to defend his institutional prerogatives? Famously, although not being mentioned in Article 263(1) TFEU as it stood at the time, the Court allowed the European Parliament to bring an action against the Council with the argument that, as an institution under the Treaties, its legislative powers had not been respected by the latter. In *Les Verts*,[46] the ECJ granted *locus standi* to the European Parliament with a constitutional reasoning. Although not an institution, could a similar move be conceived for the High Representative? For that, we will first look at potential constellations before offering some legal thoughts on *locus standi*.

1. Potential constellations for a direct action by the High Representative

The general starting point would be a dispute between the High Representative and another EU institution on the interpretation and application of Article 40(2) TEU, according to which the application of the procedures and the powers of the institutions under the CFSP are protected against affectation by a TFEU based action. Such "border" cases have in the past been fought "the other way around" already.[47]

Famously, under the old 47 TEU (now Article 40(1) TEU) the Commission won a case against the Council for having wrongly adopted on a CFSP legal basis an action on fighting the distribution of small arms and light weapons in Africa, while

45 See also, for an analysis of the judgment mentioning this particular point https://blog.lehofer.at/2022/07/EuG-RT.html (27/1/2023).

46 ECJ, case 294/83, *Parti écologiste 'Les Verts' v European Parliament*, ECLI:EU:C:1986:166.

47 Cf. the judgment of the ECJ, case C-91/05, *Commission v Council (ECOWAS)*, ECLI:EU:C:2008:288.

the action should have been properly based on the development policy legal basis.[48] Since the entry into force of the Treaty of Lisbon, Article 40(2) TEU provides for a similar reasoning: if a measure needs to be adopted on a CFSP legal basis, it cannot be based on a non-CFSP legal basis instead. In the above-mentioned *RT France* case, the General Court underlined this point powerfully, when faced with the argument that the EU should not have adopted a CFSP decision on suspending the broadcast rights of certain media outlets, as this would encroach on the EU's internal market powers to regulate national media regulators:[49]

> 60 In that regard, it is sufficient to recall that, in accordance with the second paragraph of Article 40 TEU, the implementation of the policies listed in Articles 3 to 6 TFEU is not to affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences under the common foreign and security policy.
>
> 61 It follows that the Union's competences under the common foreign and security policy and under other provisions of the FEU Treaty coming within the third part of that Treaty, dealing with the Union's policies and internal actions, are not mutually exclusive, but are complementary, each having its own scope, and aim to achieve different objectives (see, to that effect and by analogy, judgment of 19 July 2012, *Parliament* v *Council*, C-130/10, EU:C:2012:472, paragraph 66).

As the High Representative is mandated to implement the CFSP under Article 18(2) TEU, several scenarios seem to be possible if another institution were to step over the line drawn by Article 40(2) TEU.

a) Action for annulment under Article 263 TFEU

For example, under Article 41(1) 2nd sentence of the Council Decision establishing the European Peace Facility (EPF),[50] it is for the High Representative to appoint an internal auditor for the EPF. Nevertheless, the Commission appointed its own internal Audit Service to perform this task with the argument that the Commission service to administer foreign policy instruments (FPI) is in charge of implementing the EPF.[51] Faced with such *fait accompli* the High Representative chose to "mirror" this

48 For a discussion of Article 40 TEU and ECJ case C-91/05, *Commission v Council (ECOWAS)*, ECLI:EU:C:2008:288 see *Wouters/Hoffmeister/De Baere/Ramopoulos*, pp. 367 and 368.

49 GC, case T-125/22, *RT France v Council*, ECLI:EU:T:2022:483, paras. 60 and 61.

50 *Council of the European Union*, Decision (CFSP) 2021/509, OJ L 102 of 24/3/2021, p. 14.

51 *European Commission*, Decision C(2021)2011 of 24 March 2021 on accepting and implementing the roles of an administrator, accounting officer and internal auditor for assistance measures of the European Peace Facility and granting an empowerment to the High Representative for Foreign Affairs and Security Policy in the capacity of Vice-President of the Commission and a delegation to the Head of Department of the Service for Foreign Policy Instruments for the adoption of measures necessary for such implementation.

decision by adopting a subsequent decision confirming the Commission's move.[52] However, from a strictly legal point of view, the High Representative could have also considered bringing a legal action against the Commission under Article 263 TFEU, testing before the Court whether the latter's reasoning was sufficiently solid to deviate from the clear wording of Article 41(1) 2nd sentence of the EPF Decision.

b) Action for failure to act under Article 265 TFEU

Another possible scenario could arise in the area of diplomatic relations. Whenever the High Representative appoints a new EU Ambassador as new Head of Delegation in a third country, that appointee must be accredited with the third State in question. As the *agrément* is given by the foreign Head of State under Article 14(1) (a) on the Vienna Convention on Diplomatic Relations 1961, it is diplomatic custom that the European Commission President and the President of the European Council are asking for such *agrément* by a joint letter. But what happens if either of them were not signing such letters in good time thereby frustrating a valid appointment decision of the High Representative? In such scenario, it does not seem to be excluded that the High Representative might consider an action for failure to act according to Article 265 TFEU if prior notice to act within two months would not have produced any result in the "Berlaymont" or the "Europa" buildings, respectively.

2. *Locus standi* of the High Representative

In such scenarios under Article 263 or 265 TFEU, the *locus standi* of the High Representative would again have to be examined. Could the High Representative be regarded as a privileged claimant like any other institution, although not being mentioned in the respective lists under Articles 263(1) TFEU and 265(1) TFEU? In that respect, it seems important that the High Representative is not listed in Article 13(1) TEU as an "institution". As argued in the President's order, privileged access has so far been linked to being listed in Article 13(1) TEU. This seems to shut the door for the application of the *Les Verts* jurisprudence to the HR and consequently to a reasoning that the latter would receive an unqualified access to the Court by simply being equated to any other privileged claimant.

However, it would also seem inappropriate to subject the High Representative to the same conditions like natural or legal persons under Article 263(4) TFEU or Article 265(3) TFEU, respectively. His prerogatives in the Union's external action are laid down in primary law, and Article 18 TEU figures in the chapter on "institutional provisions". Hence, building on the reasoning of the President in paragraphs

52 *High Representative*, Decision of 20 December 2022 confirming the designation by the Commission of the administrator, accounting officer and internal auditor for assistance measures of the European Peace Facility, ADMIN(2022)68.

19-23 of the order in case C-551/21,[53] it would be decisive to show that the contested (or omitted) act would directly impinge on an institutional prerogative of the High Representative, conferred either directly by the Treaty or by secondary law. Seen from this perspective, paragraph 23 of the C-551/21 order, referring to the autonomous institutional role of the HR, becomes even more important.

The pending direct case recently brought by the EDPS against the Parliament and the Council[54] is notable in this regard. The EDPS justifies its legal standing under Article 263 TFEU by the need to defend its institutional prerogatives, in particular its independence as a supervisory authority under Article 8(3) of the Charter of Fundamental Rights, and the institutional balance between the role of supervisory authorities and the role of the legislator.

The very fact that the High Representative also chairs the Foreign Affairs Council and is a member of the Commission as Vice-President does not change the fact that a given Council or Commission decision could go against the institutional prerogatives of the HR or could sit uncomfortably between CFSP and non-CFSP within the meaning of Article 40(2) TEU. Accordingly, it is conceivable that the High Representative can bring a direct action against another EU institution with whom it has a "special relationship" as laid down in Article 18 TEU. Certainly, next to the requirement for legal standing, all the other admissibility requirements, such as having a challengeable act and the passive legitimation of the opposed institution would have to be met as well.

3. Possible direct action against the High Representative

The High Representative has not yet been brought to the Court in a direct action as defendant. Although such eventuality is to be considered in any event to remain very exceptional, it is worth toying with the idea under the following imaginary scenario.

The High Representative often issues statements on behalf of the European Union in reaction to international events.[55] Whenever there exists an established EU

53 See paras. 19–23 of the order of the President of the ECJ of 3 March 2022 in case C-551/21, *European Commission v Council of the European Union*, ECLI:EU:C:2022:163, entitled: "The interest in the result of the case".

54 GC, case T-578/22, *EDPS v Parliament and Council* (case in progress), application brought on 16 September 2022, OJ C 424 of 7/11/2022, p. 45.

55 For recent examples see the following HR statements:
On restrictive measures alignment: https://www.consilium.europa.eu/en/press/press-releases/2022/12/30/statement-by-the-high-representative-on-behalf-of-the-eu-on-the-alignment-of-certain-third-countries-concerning-restrictive-measures-directed-against-certain-persons-and-entities-in-view-of-the-situation-in-tunisia/ (27/1/2023); On women's rights: https://www.consilium.europa.eu/en/press/press-releases/2022/12/21/afghanistan-statement-by-the-high-representative-on-behalf-of-the-european-union-on-additional-restrictions-by-the-taliban-to-the-right-of-education-of-girls-and-women/ (27/1/2023); On attack on democratic institutions: https://www.consilium.europa.eu/en/press/press-releases/2023/01/11/brazil-statement-by-the-high-representative-on-behalf-of-the-eu-on-the-attack-on-democratic-institutions/ (27/1/2023).

policy, the High Representative is entitled to make statements in the implementation of those policies. However, in practice, the Council, claiming to defend its policy making prerogative, insists in many situations that such statements can only be delivered once "consensus" among Member States is reached in the relevant Council instances. As the legality of such requirement is questionable, and as there can be instances where the reach of consensus is torpedoed by a single Member State representative, it cannot be excluded that the High Representative would decide to make a statement before such a "consensus" is reached. Provided that the decision to make such a statement, or the statement itself would intend to produce legal effects in respect of third parties and would thus constitute a challengeable act,[56] it would give the possibility to the Council (or to a Member State) to take the High Representative to Court for not respecting the Council's institutional prerogatives under Article 16 TEU or the institutional balance, as per Article 13(2) TEU.

D. Conclusion

The triple-hatted High Representative for the Union's foreign and security policy is a unique phenomenon in the Union's complex institutional structure. While being endowed with its own treaty-based prerogatives under Article 18 TEU, it does not figure as an institution under Article 13 TEU. However, as recently proven, that does not mean that the HR has no access to litigation before the Court of Justice in Luxemburg. By virtue of the order of the President of the Court dated 3 March 2022 in the "Gabon Fisheries Agreement" case, opposing the Commission and the Council, it is by now established that the High Representative can intervene under Article 40(2) of the Statute of the Court in external relations cases when a direct and existing interest in the outcome of a case can be established on account of the High Representative's institutional prerogatives. In our view, the reasoning of that order can also be employed and built on for granting the HR *locus standi* for potential future direct challenges. Further acknowledging the High Representative's constitutional role as an autonomous institutional actor in the EU's external relations, especially in the area of the CFSP, could, on the one hand, help striking the right balance between the different actors involved in those fields and, on the other, add an additional layer of external relations law and international law expertise to litigation before the EU courts in Luxemburg.

56 As recalled by the General Court in para. 42 ("Turkey Statement") of its judgment in case T-192/16, *NF v European Council*, EU:T:2017:128, "the fact that the existence of a measure intended to produce legal effects vis-à-vis third parties was revealed by means of a press release or that it took the form of a statement does not preclude the possibility of finding that such a measure exists or, therefore, the jurisdiction of the European Union Courts to review the legality of such a measure pursuant to Article 263 TFEU, provided that it emanates from an institution, body, office or agency of the European Union".

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