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# **THE DRAFT COUNCIL DECISION ON THE ESTABLISHMENT OF THE EUROPEAN EXTERNAL ACTION SERVICE AND ITS COMPLIANCE WITH THE LISBON TREATY**

*Legal Opinion Drafted for European Solidarity Towards Equal Participation of People  
(Eurostep)*

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## **The Draft Council Decision on the Establishment of the European External Action Service and its Compliance with the Lisbon Treaty\***

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### **1. Introduction**

The European Union (EU) is considerably growing in size and importance via the adoption of new treaties, introduction of new policy areas and reform agendas into its major institutional organs. On 1 December 2009, the Lisbon Treaty entered into force, amending two of the main treaties of the EU, namely: the Treaty on European Union (TEU) and the Treaty establishing the European Community (TEC). The latter has been renamed the Treaty for the Functioning of the European Union (TFEU). The Lisbon Treaty gave effect, among other things, to the creation of a new post of a High Representative for Foreign Affairs and Security Policy (High Representative), currently occupied by Catherine Ashton. The creation of this new post is meant to bring together EU's many levers of influence in a more effective manner so as to pursue a wide range of goals on the international scene, by increasing the EU's political and economic influence in the world.

Article 18 of the TEU (as amended by the Lisbon Treaty), tasks the High Representative to conduct the EU's Common Foreign and Security Policy (CFSP), to chair the Foreign Affairs Council, to fulfil within the European Commission (the Commission) the responsibilities incumbent on the latter in external relations and for coordinating other aspects of EU's external relations, and to support and facilitate the cooperation between the European Council (the Council) and the Commission in order to ensure consistency between the different areas of external action. In accomplishing the strategic objectives set by the Lisbon Treaty, article 27(3) of the TEU stipulates that the High Representative shall be assisted by a European External Action Service (EEAS). The EEAS is envisaged to help strengthen the EU on the global stage, give it more profile, and enable it to steer its interests and values more efficiently. In order to attain these objectives and implement the Lisbon Treaty, on 25 March 2010, the High Representative issued a proposal for a Council

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\* The views expressed in this paper are those of the author. They do not necessarily reflect those of Tilburg University or INTERVICT.

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decision<sup>1</sup> which provides for the establishment of the organisation and functioning of the EEAS. Among other things, the proposal includes EU development cooperation within the purview of the EEAS.

Development-oriented nongovernmental organisations (NGOs) responded by expressing concern on the fact that the Draft Council Decision has serious legal and political implications on the development agenda of the EU, the leading financier of development aid in the world. Having provided around €50 billion in development aid in 2009, Europe is the world's largest donor. Last year's contribution of Europe constituted approximately 60% of total Official Development Assistance globally.<sup>2</sup> Understandably, the Draft Council Decision generates serious concerns on the part of development actors, NGOs and civil society working in the developing world. Concerned stakeholders believe that the Ashton Proposal fails to comply with the provisions of the Lisbon Treaty which stipulate that development cooperation is the mandate of the Commission and not that of the High Representative and the newly envisaged EEAS. From a purely legal point of view, there are two competing theories on this, one favouring the Draft Council Decision and another opposing it. By analysing both arguments, the paper provides additional input into the debate, with the objective of identifying a most workable plan in furtherance of the cause promoted by development NGOs and civil society working in the developing world. The analysis is based on relevant EU treaties, policy and operations documents, as well as propositions made by experts and development actors.

## 2. Controversial Aspects of the Draft Council Decision

Part of the Ashton Proposal which triggered the controversy is detailed in article 8 of the proposal. The first paragraph of article 8 endows the High Representative with the mandate to give *strategic political guidance* in the management of EU's external cooperation programmes, including development cooperation. Similarly, the EEAS is also mandated to contribute to the programming and management cycle of EU's major geographic and thematic instruments such as the Development Cooperation Instrument (DCI) and the European Development Fund (EDF). The

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<sup>1</sup> Proposal for a Council Decision Establishing the Organisation and Functioning of the European External Action Service, 25 March 2010, available at [http://eeas.europa.eu/docs/eeas\\_draft\\_decision\\_250310\\_en.pdf](http://eeas.europa.eu/docs/eeas_draft_decision_250310_en.pdf) (hereinafter "the Ashton Proposal" or "the Draft Council Decision").

<sup>2</sup> Oxfam International "Oxfam Reaction to Ashton's Proposal on the New European External Action Service," 25 March 2010, available at <http://www.devwire.eu/eu-development-policy/126-oxfam-reaction-to-ashtons-proposal-on-the-new-european-external-action-service.html>.

EEAS has in particular been mandated with the responsibility to prepare decisions on the strategic, multi-annual steps within the programming cycle of the Commission, including the power to determine country allocations and global financial envelopes for each region. The EEAS is also mandated with the preparation of country and regional strategic papers (CSPs/RSPs), as well as national and regional indicative programmes (NIPs/RIPs).<sup>3</sup> Other powers granted to the EEAS include the preparation of proposals with regard to the European Development Fund and the Development Cooperation Instrument, a task that shall be fulfilled under the direct supervision and guidance of the Commissioner responsible for Development Policy. Such proposals are to be jointly submitted with the High Representative for decision by the Commission<sup>4</sup>

From the above, it is clear that the ultimate decision-making power lies on the Commission. However, the proposal is replete with ambiguities on the precise balance between the EEAS and the Commission. According to some development NGOs, this will grant the EEAS an influential role within the EU's development cooperation activities, at least in relation to executive initiative. This is deemed precarious, because involvement of the EEAS in decision-making processes related to development cooperation activities may subject such activities to EU foreign policy objectives and not to the imperative of poverty reduction, which is the guiding principle of the EU on development cooperation. The proposed involvement of the EEAS in development cooperation needs to be assessed on the basis of essential EU treaties and founding documents.

### 3. The Issue of Legality

As noted before, the basis for the Ashton Proposal is the Lisbon Treaty, which entered into force on 1 December 2009, amending the two foundational treaties of the EU, namely TEU and TFEU. The formation of the post of the High Representative and the EEAS are some of the major innovations of the Lisbon Treaty. The Ashton Proposal provides the draft framework for the operationalization of the EEAS. There are two competing legal arguments on the issue of legality: one promoted by legal experts from White & Case LLP,<sup>5</sup> and another one developed by Simon Duke and Steven

<sup>3</sup> Ashton Proposal, article 8(3).

<sup>4</sup> Ashton Proposal, article 8(4).

<sup>5</sup> Legal Advice Prepared by White & Case LLP to CAFOD (Catholic Agency For Overseas Development and CIDSE (an international alliance of Catholic development agencies), 16 April 2010, available at [http://www.eepa.be/wcm/dmdocuments/CAFOD\\_CIDSE\\_memo\\_EEAS.pdf](http://www.eepa.be/wcm/dmdocuments/CAFOD_CIDSE_memo_EEAS.pdf).

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Blockmans of the Centre for the Law of EU External Relations (CLEER).<sup>6</sup>

The legal experts at White & Case LLP conclude that the manner in which the Ashton Proposal defines the powers and functions of the EEAS is in breach of the objectives and competencies laid down in the Lisbon Treaty. In reaching this conclusion, the experts start by deconstructing the ‘double-hatted’ character of the High Representative, as envisaged in article 18 of the TEU. Accordingly, in addition to being the High Representative per se, the incumbent is also the Vice-President of the Commission. In her capacity as the High Representative, the incumbent is responsible for EU’s CFSP, while in her capacity as the Vice-President of the Commission, she is responsible for ensuring “the consistency of the Union’s external action.” This includes responsibility of the incumbent with regard to “external relations and for coordinating other aspects of the Union’s external action.”<sup>7</sup>

In a briefing prepared for Europe External Policy Advisors (EEPA), Mirjam van Reisen describes the new position of the High Representative not just as a double-hatted but as a triple-hatted<sup>8</sup> in that the incumbent also assumes another third responsibility, that of chairing the EU Foreign Affairs Council – as provided by article 18(3) of the TEU. There seems to be an overlap between the functions of the High Representative as the Chair of the EU Foreign Affairs Council and as the High Representative for CFSP. It is in fulfilment of these two particular, and seemingly overlapping, tasks that the formation of EEAS becomes more important. Article 27 of the TEU, the only place where the EEAS is mentioned, elaborates this as follows:

1. The High Representative of the Union for Foreign Affairs and Security Policy, who shall chair the Foreign Affairs Council, shall contribute through his proposals towards the preparation of the common foreign and security policy and shall ensure implementation of the decisions adopted by the European Council and the Council.
2. The High Representative shall represent the Union for matters relating to the common foreign and security policy. He shall conduct political dialogue with third parties on the Union’s behalf and shall express the Union’s position in international organisations and at international conferences.

<sup>6</sup> Simon Duke and Steven Blockmans “The Lisbon Treaty Stipulations on Development Cooperation and the Council Decision of 25 March 2010 (Draft) Establishing the Organisation and Functioning of the European External Action Service,” CLEER Legal Brief, 4 May 2010, available at [http://www.asser.nl/upload/documents/542010\\_121127CLEER%20Legal%20Brief%202010-05.pdf](http://www.asser.nl/upload/documents/542010_121127CLEER%20Legal%20Brief%202010-05.pdf).

<sup>7</sup> Article 18(4) of the TEU.

<sup>8</sup> Mirjam van Reisen “Establishing the EU External Action Service (EEAS),” 21 April 2010, available at [http://www.eepa.be/wcm/dmdocuments/20100421\\_Briefing\\_EEAS.pdf](http://www.eepa.be/wcm/dmdocuments/20100421_Briefing_EEAS.pdf).

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3. In fulfilling his mandate, the High Representative shall be assisted by a European External Action Service. This service shall work in cooperation with the diplomatic services of the Member States and shall comprise officials from relevant departments of the General Secretariat of the Council and of the Commission as well as staff seconded from national diplomatic services of the Member States. The organisation and functioning of the European External Action Service shall be established by a decision of the Council. The Council shall act on a proposal from the High Representative after consulting the European Parliament and after obtaining the consent of the Commission.

In spite of the triple-hatted role of the High Representative's position, the two functions relevant for the current debate are the incumbent's responsibilities with regard to CFSP and EU's external action. Article 24(1) of the TEU defines CFSP as "all areas of foreign policy and all questions relating to the Union's security, including the progressive framing of a common defence policy that might lead to a common defence." This is further supported by article 27(1) of the TEU which clarifies the duties of the High Representative on matters related to CFSP. From this, White & Case LLP conclude that CFSP is chiefly about the diplomatic activities of the EU and matters relating to the EU's security.

Another important observation made by White & Case LLP is based on the positioning and language of article 27 of the TEU, the most important provision of the TEU which uses the EEAS terminology. This provision appears in the second Chapter within Title V of the TEU, that part of the treaty which focuses on 'specific provisions on the common foreign and security policy.' This supports the interpretation that EEAS' main function is the promotion of CFSP and its role is strictly limited to this. Following the argument of White & Case LLP, it appears that "development cooperation activities do not substantially relate to the CFSP as defined; rather these activities reside in the realm of 'the rest of the Union's external action' for which the High Representative acts as Commissioner and possesses only a coordination function, and in relation to which the EEAS is to have no role." White & Case LLP also argue that "indeed there are aspects of the EU's external action for which" the competence of the Commission "has already been established, which are clearly not within the CFSP, such as the EU's common commercial policy."<sup>9</sup>

Certainly, development cooperation may not be one of the activities which fall within the remit of EEAS as envisaged by the Draft Council Decision. In contrast, several provisions of the TFEU (those in Part Five, Title III) show that development cooperation is a shared competence of the

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<sup>9</sup> White & Case LLP, para 3.5.

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Commission and the Member States. Article 208 of the TFEU is one of the most important departure points in this regard. The full text reads as follows:

1. Union policy in the field of development cooperation shall be conducted within the framework of the principles and objectives of the Union's external action. The Union's development cooperation policy and that of the Member States complement and reinforce each other.

Union development cooperation policy shall have as its primary objective the reduction and, in the long term, the eradication of poverty. The Union shall take account of the objectives of development cooperation in the policies that it implements which are likely to affect developing countries.

2. The Union and the Member States shall comply with the commitments and take account of the objectives they have approved in the context of the United Nations and other competent international organisations.

However, the argument of White & Case LLP which describes development cooperation as an 'exclusive competence' of the Commission has inherent shortcomings. In contrast, Duke and Blockmans make accurate observation on this point. They elaborate development cooperation as a shared competence between the Commission and the Member States. One of the bases for is article 4(4) of the TFEU which clearly defines development cooperation as a shared competence between the Commission and the Member States. Support to this argument also comes from article 210(1) of the TFEU which requires the EU and the Member States to promote complementarity of their policies on development cooperation by consulting each other on their aid programmes. The authors strengthen their argument by referring to the hitherto practice (*acquis communautaire*) of the EU and some landmark cases of the European Court of Justice<sup>10</sup> on this particular issue. Accordingly, they conclude that development cooperation is subject to the duty of loyal cooperation between the EU and the Member States.<sup>11</sup> However, it is clear that the shared competence of the Member States in this regard does not extend to development issues related to the Commission's main instruments such as the DCI and the EDF. Although the Members States may take initiatives to promote the coordination of these instruments, only the Commission has exclusive competence on these particular instruments.

<sup>10</sup> The authors cite the following cases: C-181 & 248/91 *EP v Council (Bangladesh)* [1993] ECR I-3685; Case 316/91 *EP v Council (EDF)* [1994] ECR I-625; C-124/95 *Centro-Com* [1997] ECR I-81; C-266/03 *Commission v Luxembourg* [2005] ECR I-4805; Case C-459/03 *Commission v Ireland ('MOX plant')* [2006] ECR I-4635; and C-45/07 *Commission v Greece (IMO)* [2009] nyr; and C-246/07 *Commission v Sweden (PFOS)*, judgment of 20 April 2010.

<sup>11</sup> Duke and Blockmans, 3–4.

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Among the number of provisions in the TFEU,<sup>12</sup> which show the role of the Commission in development cooperation, the underlying principle is captured by article 208. What is important to note, as argued by White & Case LLP, is the fact that neither the High Representative nor the EEAS is mentioned in the entire section of the TFEU which deals with development cooperation.<sup>13</sup> Seen against this, the Ashton Proposal may appear to be in contradiction with the relevant provisions of EU treaties, as the proposal seems to alter important areas of competence defined by these provisions. In light of article 13(2) of the TEU which requires each institution of the EU to “act within the limits of the powers conferred on it in the Treaties,” the Draft Council Decision may also appear problematic. As noted by White & Case LLP, the over ambitious EEAS plan recommended by the Ashton Proposal may only be effected by a formal treaty amendment, as it detracts from treaty competences of other EU organs, such as that of the Commission and the Member States, failing which its legality would remain controversial.<sup>14</sup> This calls for a review of the Draft Council Decision, particularly that which proposes the inclusion of development cooperation within the purview of the EEAS.

Contrary to the conclusion of White & Case LLP, Duke and Blockmans argue that the Ashton Proposal is in legal accordance with the stipulations of the Lisbon Treaty on development cooperation. For them, the creation of EEAS by article 27(3) of the TEU, with a broad range of responsibilities, has inevitable implications on the organisation and structures for development cooperation. According to Duke and Blockmans, one of the compelling reasons to include development cooperation in the EEAS is the problem of consistency emanating from the institutional separation between CFSP and the Commission, which in the past has led to problematic decision-making processes. They argue that this was a daunting challenge to EU’s potential as a cohesive force in international relations.<sup>15</sup> Citing article 40 of the TEU, they further contend that CFSP has now been put on equal footing with other EU external relations policies, such as development cooperation. This, according to the authors, ensures consistency and provides the overarching rationale. Mainstreaming development-related perspectives into foreign policy

<sup>12</sup> Such as articles 210(2), 213 and 214(6).

<sup>13</sup> White & Case LLP, para 3.10.

<sup>14</sup> White & Case LLP, para 3.11.

<sup>15</sup> In furtherance of this argument, the authors cite C-91/05, *Commission v. Council* [2008] ECR I-3651.

considerations is therefore precisely in line with the spirit and the word of the Lisbon Treaty, as they conclude.<sup>16</sup>

On the other hand, Duke and Blockmans suggest that due to lack of clarity about many structural, organisational and procedural aspects of the EEAS and its relations with other EU institutions, it may be difficult to reach any hard and fast conclusions on the illegality of the Ashton Proposal. And as such, it is the European Court of Justice which should finally decide on the interpretation of treaty provisions in question.<sup>17</sup> While a number of counter arguments can be conferred in response to the underlying conclusions made by Duke and Blockmans, as will be done in the next section, it is important to note one of the most imperative observations the authors make: “The debate ... should centre less on issues of legality and more on how development-related interests can be upheld in the EEAS and, more generally, EU external actions.”<sup>18</sup> Legality is still a pertinent issue. Nonetheless, the authors’ observation underscores the fact that aside from purely legal arguments, the issue also requires consideration of other imperatives, such as the broader objective of poverty eradication and whether the Ashton Proposal is compatible with such objectives, as will be explored in the following section.

#### **4. Eradication of Poverty as a Guiding Principle**

Undoubtedly, there is a broader consensus on the need to revitalise the EU and reform its institutions, particularly in light of the two waves of enlargement which have taken place since 2004 and which have increased the number of EU Member States from 15 to 27. More than this, central to the EU reform agenda is the need to refine the consistency and coherence of the EU’s external actions. The Lisbon Treaty was meant to achieve this. The Ashton Proposal also purports to advance this same objective. However, the concern is that the part which deals with development cooperation may seriously undermine the broader objectives of poverty eradication for the following reasons.

The proposed scope, structure and financing of the EEAS are indeed problematic. By aligning development cooperation with the EEAS, the Draft Council Decision blurs the distinction between

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<sup>16</sup> Duke and Blockmans, 8.

<sup>17</sup> Duke and Blockmans, 10, 11, 13.

<sup>18</sup> Duke and Blockmans, 11.

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foreign and security policy and development policy. Development NGOs fear that this may facilitate the subordination of poverty reduction to security and foreign policy priorities. This concern is particularly pronounced in the following joint statement of CIDSE and CAFOD:

The HR [High Representative] model for the EEAS would compromise the integrity of EU development aid. It would do so by proposing a ‘horizontal split’ of responsibilities in development programming where the EEAS and the HR would have authority over allocating development funds and setting out country strategies and priority sectors and themes, including multi-year financial envelopes (stages 1 to 3 of EU development programming). The Commissioner for Development (and DG Development) would be responsible for formulating development policy and implementing it based on decisions made by the EEAS (stages 4 and 5).<sup>19</sup>

According to CIDSE and CAFOD, the impact of the above strategy would be stripping the Development Commissioner of control over the EU’s development budget which in actual terms exceeds by far the budget of the EEAS. Since 2000, there has been a steady increase in aid commitments and disbursements by the Commission. Output has increased substantially in terms of volume, which increased from €7.5 billion in 2007 to €12 billion in 2008, and, in 2009, to US\$ 15.4 billion (approximately €12.5 billion).<sup>20</sup> CIDSE Secretary-General Bernd Nilles compares this to the annual budget for CFSP: which is marginal at €300 million. As rightly put by Nilles, combining development cooperation in the remit of the EEAS would inevitably create a situation where common EU development budget might be used to pursue national, economic and security interests, thereby compromising the broader objectives of poverty eradication, the central theme of EU’s development cooperation.<sup>21</sup>

The advancement of development cooperation is gauged in terms of the long standing commitments the EU has made in this regard. The guiding principle is contained in the second paragraph of article 208(1) of the TFEU. Accordingly, the primary objective of EU’s development cooperation is the reduction and, in the long term, the eradication of poverty. In so doing, the EU explicitly binds itself to “take account of the objectives of development cooperation in the policies that it implements which are likely to affect developing countries.” There is no clear example in this regard than the Ashton Proposal which represents a policy that potentially affects developing

<sup>19</sup> CIDSE and CAFOD, Joint Media Briefing, 23 April 2010.

<sup>20</sup> Organisation for Economic Cooperation and Development (OECD) Creditor Reporting System (CRS), Press Release, 14 April 2010, Paris: OECD.

<sup>21</sup> Louise Tait “Ashton’s EEAS Proposals ‘against EU Treaty,” 26 April 2010, available at [http://www.theparliament.com/no\\_cache/latestnews/news-article/newsarticle/ashtons-eas-proposals-against-eu-treaty/](http://www.theparliament.com/no_cache/latestnews/news-article/newsarticle/ashtons-eas-proposals-against-eu-treaty/).

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countries. The concern is more pressing when seen against the fact that the formulation of the Draft Council Decision did not take into account the view of developing countries and their development partners outside the EU structure, particularly international NGOs and civil society working in this same area. Mirjam van Reisen captures the dilemma as follows:

[This] denies the real conflicts of interests that do exist between EU policy areas and interests of developing countries, and therefore, the need to address objectives in such a way that the particular policy aims are promoted and not undermined. Whereas the EU's trade policy legitimately and aggressively defends the interests of the EU economy, the EU's development cooperation provides balance in having eradication of poverty as the central objective. They are different and require different instruments and whether or not policies are effective is measured in a different way.

The EU development policy is based on the concept of a partnership, of promoting ownership of development cooperation by developing countries; this has been a welcome change away from previous approaches that had more (neo-) colonial points of departure. This idea of partnership, in respect of ownership, has to remain the central underpinning of the EU development policy.

The proposal to integrate development cooperation in the EEAS has been defended on the basis of it helping the EU to offer carrots to developing countries (as opposed to brandishing sticks). It is questionable indeed if the developing countries will be interested in replacing ownership with carrots.<sup>22</sup>

According to one of the most comprehensive agreements on development cooperation between the EU and the developing world, the Cotonou Agreement, poverty eradication is a central element of the development cooperation between the EU and the African, Caribbean and Pacific (ACP) Group of States. The second paragraph of article 1 of the Cotonou Agreement reads as follows: "The partnership shall be centred on the objective of reducing and eventually eradicating poverty consistent with the objectives of sustainable development and the gradual integration of the ACP countries into the world economy." In article 2, the Cotonou Agreement puts emphasis on the need for equality of partners and dialogue, accentuating the right of the developing world for participation in decision-making processes that affect their interests. On this particular issue, there is also an insightful recommendation made by a European think tanks' group, which include Overseas Development Institute (ODI), European Centre for Development Policy Management (ECDPM), Fundación para las Relaciones Internacionales y el Diálogo Exterior/ Foundation for International Relations and External Dialogue (FRIDE) and German Development Institute/Deutsches Institut für Entwicklungspolitik (DIE). Noting that programming mandates must not become the exclusive preserve of the EEAS, the group emphasises the need to ensure the participation of developing countries themselves in setting frameworks and programming

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<sup>22</sup> van Reisen.

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development cooperation. The group further recommends that EU institutions should work together to embed policy and programming as close to the field as possible.<sup>23</sup>

Albeit its imperfections, the hitherto practice of the EU with regard to development cooperation depends on Commission responsibility for priority setting and budget allocation, with the ‘primary objective’ of poverty reduction. In what seems a reluctant effort to maintain this approach, the Ashton Proposal envisages an oversight role for the Development Commissioner over development programming. However, CIDSE and CAFOD criticise this as half hazard, because it fails to mention how this would happen in practice. The resultant decision-making processes are not spelled out clearly in the Draft Council Decision, prompting CIDSE and CAFOD to argue that in the likely event of any disagreement, the High Representative’s opinion will override that of her Development Commissioner. If this happens, it “will inevitably favour security and foreign policy priorities over those of development.”<sup>24</sup> The worst form of such a crisis would be diversion of funds<sup>25</sup> from poverty reduction to foreign or security policy. In other words, this also means politicisation of development cooperation.<sup>26</sup> As the largest donor in the world, this would undermine Europe’s role in the achievement of the Millennium Development Goals (MDGs) and other global commitments.<sup>27</sup> These concerns have been expressed by development experts in different phases of the EU’s enlargement and reform of its institutions, again van Reisen being one of the leading commentators on this. She argues that attempts to increase the profile of the CSFP without a clear programme have affected EU development cooperation policy which is often used as a substitute.<sup>28</sup> Putting the challenge in a broader perspective, van Reisen writes:

<sup>23</sup> An Open Letter from ODI, ECDPM, FRIDE and DIE to Barroso, Ashton and Piebalgs on the EEAS, 5 May 2010.

<sup>24</sup> CIDSE and CAFOD, Joint Media Briefing.

<sup>25</sup> Previously, EU institutions have been criticised for covert transfer of funds from development cooperation to external relations. See, for example, Mirjam van Reisen *Window of Opportunity: EU Development Cooperation after the End of the Cold War* (EEPA/Africa World Press, Brussels/Trenton: 2009) 256–257.

<sup>26</sup> There are a number of examples that show the politicisation of EU development cooperation, Eritrea being the classic example in this regard. In December 2009, Eritrea was hit by stringent UN Security Council sanctions in the face of continued and unaccountable flow of development aid from the EU. Mirjam van Reisen describes this as one of the two rude awakenings of the year to EU’s inadequacies as an international player. See Mirjam van Reisen “A New Year, a New Treaty, but the same Old Problems?,” *European Voice*, 14 January 2010, available at <http://www.europeanvoice.com/article/imported/a-new-year,-a-new-treaty,-but-the-same-old-problems-/66859.aspx>.

<sup>27</sup> CIDSE and CAFOD, Joint Media Briefing.

<sup>28</sup> Mirjam van Reisen “The Enlarged European Union and the Developing World: What Future?” in Andrew Mold (ed) *EU Development Policy in a Changing World* (Amsterdam University Press: Amsterdam, 2007). 49.

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Following the introduction of the European Monetary Union and the eastward enlargement, political and public pressure has mounted to demonstrate that the EU is a global player, and can act independently from the United States. However, the incapacity of the EU to translate these aspirations in legal, institutional and financial terms that would allow a stronger CFSDP has created increasing pressure on European development cooperation for resources and institutional capacity to be used in support of common external actions, other than development purposes.<sup>29</sup>

Building on the legal opinion of White & Case LLP, it would be correct to argue that poverty eradication, as the primary objective of EU development cooperation, is binding on all EU institutions, including the EEAS.<sup>30</sup> The Ashton Proposal fails to recognise this imperative by not including safeguards that guarantee the broader development objectives of the EU. Since this goes against the word and the spirit of EU treaties, there is a need to amend this by revising the Draft Council Decision. CIDSE and CAFOD suggest that this can be done by adding a statement or a paragraph in the Ashton Proposal that clearly recognises poverty reduction as the primary objective of development cooperation and operationalization of this in the actual setup of the EEAS.<sup>31</sup> In conclusion, CIDSE and CAFOD note that:

For poverty reduction to be protected as the primary objective of EU development cooperation, and for the respective areas of competencies to be respected, as outlined in the Treaties, the setup of the EEAS must give the Development Commissioner authority to sign off on all decisions involving the use of EU development aid taken by the EEAS. In particular, the Commissioner and the DG Development must retain responsibility for at least stage 3 of the development programming cycle.<sup>32</sup>

The Ashton Proposal has the effect of mixing policies which are clearly defined by treaty as belonging to intergovernmental framework, on the one hand and the remits of the Commission, on the other. This, in addition to weakening the position of the European Parliament, also entrenches the deficiency on the effectiveness of democratic scrutiny on EU programming towards developing countries. This has the danger of centralisation of policy and creating a new institution (EEAS) with a blank cheque that has the power of unrestrained allocation and/or spending of the EU budget,

<sup>29</sup> van Reisen "The Enlarged European Union," 52.

<sup>30</sup> White & Case LLP, para 4.1. Duke and Blockmans (on page 4 to 5) also draw the same conclusion by noting that eradication of poverty is accorded the status of a primary objective of the EU, including in the area of external action such as the CFSP. However, they qualify this by the need to mainstream the principles and objectives underpinning development cooperation, which implies policy coherence. According to the authors, this is the main motivation for the creation of the EEAS and by extension the Ashton Proposal. Nonetheless, the authors fail to note that the need for policy coherence cannot override the guiding principle of poverty eradication by diluting the essence of the latter in processes of policy implementation.

<sup>31</sup> CIDSE and CAFOD, Joint Media Briefing.

<sup>32</sup> CIDSE and CAFOD, Joint Media Briefing.

without democratic control over its activities.<sup>33</sup>

As also noted by van Reisen, the High Representative already has far-fetching powers that combine responsibility of the executive (the European Commission) with the legislative (the EU Council) together with a representative role. This blurs the required level of scrutiny that ensures some division of power, as it denies the European Parliament and the Member States the power to scrutinise policy implementation.<sup>34</sup> This links the debate with the form of governance the EU promotes and exhibits in its development cooperation with the developing world. In this regard, the EU has been criticised for its contradictions in the form of governance it promotes rhetorically and that which is manifested in its relations with the developing world. In their thorough examination of this issue, Slocum-Bradley and Bradley show that “like most other donor agencies, the EU does not clearly articulate the objectives of its governance agenda, and acts in such a way that its processes of governance and their outcomes fail to fulfil the criteria for good governance that it sets for others.”<sup>35</sup> This also resonates with the observation of Eurostep which says that the controversial Ashton Proposal comes “at a time when there is already concern over the effectiveness of the democratic scrutiny on EU programming towards developing countries.”<sup>36</sup> While democratic accountability has been suggested as the most effective remedy to rectify this problem, the Draft Council Decision conversely encourages centralisation of policy in a more stringent fashion than has been the case thus far.

## 5. Conclusion

The concern of development of NGOs on the inclusion of development of cooperation in the remits of the EEAS seems to be well justified. Unsound EU policy on development cooperation will have far fetching ramifications on the developing world, for the simple reason that Europe is the largest donor of development aid globally. Budgetary and policy decisions on EU development money have thus far been made by the Commission. The Ashton Proposal desires to shift this

<sup>33</sup> Eurostep “Defining the EU’s Management and Implementation of its External Actions in Accordance with the Provisions of the Treaty,” Briefing Paper No. 47, 17 March 2010, available at: [http://www.eurostep.org/wcm/dmdocuments/BP\\_48\\_EEAS.pdf](http://www.eurostep.org/wcm/dmdocuments/BP_48_EEAS.pdf).

<sup>34</sup> van Reisen.

<sup>35</sup> Nikki Slocum-Bradley and Andrew Bradley “Is the EU’s Governance ‘Good’? An Assessment of EU Governance in its Relationship with ACP States” *Third World Quarterly* 2010 31(1): 31–32. For further critical reflections on EU’s governance and development cooperation in its relations with the developing world, see the contributions in the entire special issue of the *Third World Quarterly* 2010 31(1) titled “Governance, Development and the South: Contesting EU Policies.”

<sup>36</sup> Eurostep.

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responsibility to the newly formed EEAS where decisions will be made mainly on the basis of political and strategic priorities of the EU, rather than on poverty objectives. As shown above, the Draft Council Decision is not in harmony with the requirements of the Lisbon Treaty.

Apart from the issue of legality, the Ashton Proposal also reflects a misconception on effective development policy which unfortunately makes poverty objectives hostage to foreign policy goals.<sup>37</sup> At the same time, this may also reflect the power differential between the EU, as the donor, and the developing world, as the receiver. As in other policy areas, the role of power asymmetries in this regard is undeniable. Europe as the leading donor, and inherently as the powerful partner, has at its disposal effective wielding mechanisms and instruments. The developing world in contrast, with its limited access to resources, has less influence in the process.<sup>38</sup> The possible primary motive for the Ashton Proposal could therefore be EU's drive to increase its structural power in the global political economy but this may run counter with the interests of the poor majority in the developing world. In development cooperation, the EU has committed itself to give priority to poverty eradication. Adherence to this commitment is the least to be expected from the EU and in order to do this the EU has to resist its temptation of promoting self-interest at the expense of poverty objectives.

For several years, the EU has been criticised for its lack of effective oversight mechanisms in its development cooperation, particularly checks and balances on the part of the European Parliament that allow for effective democratic scrutiny. The EU needs a system of development aid and cooperation that has these checks and balances in place. As a partner that manifests the criteria of good governance in its relationships with others, especially with weaker counterparts, the EU will be better positioned if it can advocate good governance not only in principle but also in practice. This position has been persistently maintained by experts on EU development cooperation even before the advent of the Ashton Proposal.<sup>39</sup> The Draft Council Decision gives all the more reasons to take this issue seriously. Indeed, the Ashton Proposal needs to be aligned with the recommendations discussed above which are all in tandem with the word and the spirit of the Lisbon Treaty.

<sup>37</sup> Oxfam International.

<sup>38</sup> Slocum-Bradley and Bradley, 35. For similar observations on the role of power asymmetry in development cooperation and international relations, see van Reisen *Window of Opportunity*, 15.

<sup>39</sup> Slocum-Bradley and Bradley, 46.