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WORKING DOCUMENT

on the European External Action Service: Regulation amending the Conditions of Employment of Other Servants of the European Communities

Committee on Legal Affairs

Rapporteur: Bernhard Rapkay

Summary:

The setting up of the European External Action Service (hereinafter “the EEAS”) will require important amendments to the EU's staff rules. Following the entry into force of the Treaty of Lisbon, the staff rules will be amended under the ordinary legislative procedure. More specifically, new rules and a new status (that of a temporary agent) will have to be created for national diplomats working for the EEAS.

This document sets the scene for JURI's work on this matter, which falls under its competence for the staff rules under the Rules of Procedure. In the absence of a formal proposal from the Commission, expected in June at the earliest, your rapporteur, Bernhard Rapkay, highlights some key aspects and general principles which are considered crucial from Parliament's perspective (*Parts II and III*). The document concludes by an examination of the proposal of the High Representative for a Council Decision on the organisation and functioning of the EEAS, which contains some very detailed provisions on staff matters (*Part IV*). Those provisions going beyond the existing staff rules cannot be binding on Parliament and cannot prejudice the latter's pending modification. Apart from this, the fact that the Council tries to set out such extensive provisions on staff matters in its Decision raises legal concerns.

Whereas Parliament is merely consulted on the Council Decision establishing the organisation and functioning of the EEAS, the necessary revision of the staff rules and the Financial Regulation fall under the ordinary legislative procedure. All three proposals will be treated as a single package and will be negotiated jointly by Parliament.

I. Introduction

Given that the European External Action Service is to “*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*”¹, the question arises as to how the appointment and employment of EEAS staff is to be dealt with. Whereas the organisation and functioning of the EEAS is to be established by a decision of the Council, which is to act on a proposal from the High Representative after consulting the European Parliament and after obtaining the consent of the Commission, staff matters will have to be dealt with, as far as national diplomats are concerned, by amending the Conditions of Employment of other servants and, as far as Union officials are concerned, the Staff Regulations of Officials².

According to Article 336 TFEU, those instruments are to be adopted by the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure on a proposal from the Commission and after consulting the other institutions concerned.

¹ Article 27(3) TEU.

² 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 Committee, OJ 45, 14.6.1962, p. 1385, as amended.

Under Annex VII, Section XVI, point 9 of the Rules of Procedure, the Legal Affairs Committee is responsible for the Staff Regulations.

The formal proposal from the Commission is expected at the beginning of June. As committee members will know, the Draft Council decision establishing the organisation and functioning of the European External Action Service of 25 March 2010 (hereinafter, “the Ashton Proposal”) and the Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities, as regards the European external action service¹ have already been presented to Parliament. The reason why the proposal for the amendment of the Staff Regulations and the Conditions of Employment of Other Servants will arrive so much later is because the Commission is bound by the Staff Regulations to consult the Staff Regulations Committee provided for in Article 10 of the Staff Regulations and the trade unions and staff associations. A first draft proposal has been made available informally to the rapporteur, but it cannot be dealt with in committee, since it is only provisional and the legislative proposal cannot start until the formal procedure has been received in all the Union languages.

The rapporteur would note in this connection that he has already had a preliminary meeting with representatives of the trade unions represented in the European Parliament and has arranged a meeting between all the rapporteurs involved in this procedure and the trade unions of the European Parliament, the Council and the Commission.

Pending the submission of the formal proposal and bearing in mind that the other committees have already started work, the rapporteur has drawn up this working document in order to inform members and allow them to consider how the EEAS staffing arrangements ought to be configured having regard in particular to Parliament’s resolution of 22 October 2009². It cannot be stressed too highly that the decision dealing with the organisation and functioning of the EEAS, the budgetary instrument and the staffing arrangements need to be adopted in parallel and as a single package.

As has been seen, the EU Treaty is nearly silent as to the composition and functioning of the EEAS: Article 27(3) TEU merely provides that the EEAS is to 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.

As far as its tasks are concerned, the Treaty simply states that that the EEAS is to assist the High Representative of the Union for Foreign Affairs and Security Policy and “work in cooperation with the diplomatic services of the Member States”. In view of this, it is self-evident that, notwithstanding their different provenance, the staff of the EEAS must form a homogenous body loyal towards the Union.

II. Key aspects

¹ COM(2010) 85 final.

² Resolution of 22 October 2009 on the institutional aspects of setting up the European External Action Service (2009/2133(INI)).

1. New categories of staff

Accordingly, the prime consideration must be that the staff originating from the national diplomatic services must be under a duty of loyalty to the Union. This loyalty may be secured by providing for a new category of **temporary staff** under the Conditions of Employment. This will allow the provisions of the Staff Regulations relating to, *inter alia*, the rights and obligations of officials (Title II) to be applied to them.

However, Article 6 of the Ashton Proposal refers expressly to **seconded national experts** (hereinafter, "SNEs"), which are not mentioned in Article 27(3) TEU. It appears as if they have been introduced as a fourth category of EEAS staff alongside Commission and Council officials and officials originating from national diplomatic services. The question is how loyalty towards the European Union can be secured if SNEs are included in the EEAS as a fourth category of staff. They are entirely financed by the Member State they are seconded from. Furthermore there is no answer how a single selection procedure for all EEAS staff could also apply to this category.

SNEs already work alongside Union officials in the various institutions under specific rules¹. But this is an exception and cannot automatically apply to the EEAS. Your rapporteur sees the need for further clarification of this issue.

2. Ensuring loyalty towards the European Union

A way of ensuring loyalty of all EEAS staff towards the European Union is to guarantee officials originating from national diplomatic services a measure of permanency. A national official who is liable to be recalled at short notice to his civil service is likely to be loyal to that civil service rather than to the EEAS. On the other hand, this might be a sticking point for small Member States. For them, an excessive period of deployment could impose severe financial constraints and deprive them of key diplomatic staff.

This needs further clarification from the rapporteur's point of view. These matters are considered in somewhat greater detail below.

3. Equality of Treatment

The principle must be the equal treatment of all staff components of the EEAS.

a. Appointing authority

The High Representative of the Union for Foreign Affairs and Security Policy should be the appointing authority for all staff, regardless of their provenance.

b. Independence and discretion

¹ The Commission decision is available here: http://ec.europa.eu/civil_service/docs/regime_end_en.pdf. The Council decision is available here: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:327:0010:0020:EN:PDF>.

All EEAS staff, including those originating from national diplomatic services, must be engaged under the Staff Regulations or the Conditions of Employment of Other Servants, including in particular the provisions of Articles 11¹ and 17² of the Staff Regulations.

In addition, the recruitment of staff should take place on the broadest possible geographical basis³ and seek to maintain strict gender balance.

c. Equal rights and equal duties

As far as promotion and end of service is concerned, no distinction should be made on account of their provenance between staff from the Community institutions and staff originating from national diplomatic services.

The emoluments, family allowances, social security scheme and pension arrangements for all staff should be those laid down in the Staff Regulations and CEOS. The education allowance should be such as to enable account to be taken of the need for the children of staff to be educated where necessary elsewhere than in the country of posting. Equal opportunities should apply also when it comes to promotion and opportunities to transfer to another posting within the EEAS.

All staff should benefit from the rights of appeal and be subject to the disciplinary procedures laid down in the Staff Regulations.

d. Selection procedure

All EEAS staff should be subject to the same selection procedure. In particular, the staff originating from diplomatic services of the Member States should be subject to the same selection criteria as the other components of the EEAS, including linguistic knowledge.

Such temporary staff are to be recruited on the basis of the normal recruitment procedure laid down in the Staff Regulations, which is based on clear procedural requirements designed to recruit staff of a high quality. All EEAS staff must be selected on the basis of an objective assessment of merit defined in terms of skills and expertise relevant for tasks of EEAS, and in line with the principle of geographical and gender balance.

¹ “An official shall carry out his duties and conduct himself solely with the interests of the Communities in mind; he shall neither seek nor take instructions from any government, authority, organisation or person outside his institution. He shall carry out the duties assigned to him objectively, impartially and in keeping with his duty of loyalty to the Communities.

An official shall not without the permission of the appointing authority accept from any government or from any other source outside the institution to which he belongs any honour, decoration, favour, gift or payment of any kind whatever, except for services rendered either before his appointment or during special leave for military or other national service and in respect of such service.”

² “1. An official shall refrain from any unauthorised disclosure of information received in the line of duty, unless that information has already been made public or is accessible to the public.

2. An official shall continue to be bound by this obligation after leaving the service.”

³ Article 27 of the Staff Regulations:

“Recruitment shall be directed to securing for the institution the services of officials of the highest standard of ability, efficiency and integrity, recruited on the broadest possible geographical basis from among nationals of Member States of the Communities. No posts shall be reserved for nationals of any specific Member State.”

This assessment should be carried out by selection boards appointed by the appointing authority in accordance with Article 30 of the Staff Regulations. In accordance with the existing practice of EPSO with regard to interinstitutional selection procedures, the members of the selection boards should be drawn from officials of the Parliament, the Council and the Commission.

e. Training

It is essential that all EEAS staff should be able to benefit from training tailored to the specific tasks envisaged. A common training curriculum and an External Action Academy should be established in order to reinforce the coherence, expertise and loyalty of EEAS staff. Your rapporteur considers that the draft Council Decision is unambitious in this respect, referring merely to "building in particular on existing national practices and structures". It should be more a question of building up Union practices and structures in the light of national best practices.

III. Specific aspects

1. Temporary staff

In order to guarantee the independence and promote the loyalty of all staff, a new category of temporary staff has to be created to employ the staff originating from the national diplomatic services of the Member States, bearing in mind that:

- it must be made clear that EEAS temporary staff (hereinafter EEAS-TS) do not have privileged or direct access to posts of officials or other categories of servants of the Union or to internal competitions for such posts. Employment as a temporary staff member in the EEAS excludes any *passerelle* to work in other EU institutions, agencies or bodies.
- the strict wording of Article 27(3) TEU must be respected: only civil servants in active service in the national diplomatic services of the Member States are to be eligible to apply. A clear and uniformly applicable definition of "staff seconded from the national diplomatic services" is needed.

Specific rules must be laid down in the Staff Regulations defining the duration of the engagement and the circumstances under which and by whom the employment of such staff can be brought to an end.

2. Beyond the initial establishment of the EEAS

Vacant posts should be advertised in the Official Journal of the European Union.

Following the initial establishment of the EEAS, officials and qualifying members of the temporary staff of any Union institution or body, including the European Parliament, should be able to apply for vacant permanent posts in the EEAS as a normal consequence of interinstitutional mobility.

Given *inter alia* the fact that temporary posts in the EEAS will not be budget-neutral, a fair

balance should be maintained between Union officials and staff seconded from national diplomatic services.

3. Senior EEAS posts

The most senior posts in the EEAS (the Secretary General and the Deputy Secretaries General) should be subject to a political assessment by Parliament, including the hearing of top EEAS staff by the European Parliament prior to taking up their posts.

4. Specificity of staff serving in a third country

Annex X to the Staff Regulations on Special and exceptional provisions applicable to officials serving in a third country is not appropriate to cater for the situation of Union officials appointed to posts in the EEAS.

5. Transitional arrangements for EEAS-TS

In order to ensure that the EEAS is an attractive option for diplomats from the Member States, Parliament should seek guarantees from the Commission as to whether the current rules of the CEOS would permit a smooth transition from national diplomatic service to EEAS and vice-versa, and should seek to ensure that the instruments setting up the EEAS impose adequate obligations on Member States regarding the reinstatement of diplomats seconded to the EEAS and their career progression.

6. Transitional arrangements for Commission and Council staff moving to EEAS

The legislator will have to specify under which conditions staff currently working in the Commission and the Council will transfer to the EEAS. For example, if the functions fulfilled by an entire organisational unit (unit, directorate, DG etc...) are transferred to the EEAS, to what extent does an official in that unit have a choice as to his or her transfer? If an official is moved to the EEAS without being given a choice, under which conditions could he or she return to the Council and/or Commission? Should this "return ticket" permit treatment as an internal candidate for both Commission and Council vacancies? Should it include an obligation for the official's initial institution to propose a post to reinstate the official?

7. Local staff

Title V of the CEOS should apply to local staff¹. It should be expressly specified, however, that local staff should have the right to belong to a trade union and that EU law on equal treatment and equal opportunities should be fully applicable to them. To what extent should a legal basis be created in Article 121 of the CEOS for the Union provide a complementary social security system for such staff? If such provision is made, should it be possible for the EEAS to discriminate between third countries depending on the sufficiency of the social

¹ Defined in the CEOS as "... staff engaged in places outside the European Union according to local practice for manual or service duties, assigned to a post not included in the list of posts appended to the section of the budget relating to each institution and paid from the total appropriations for the purpose under that section of the budget. Staff engaged in places of employment situated outside the European Union for duties other than those mentioned above which, in the interests of the service, could not be assigned to an official or servant having another capacity within the meaning of Article 1, shall also be regarded as local staff."

security and pension coverage of the local system?

IV. Article 6 of the Ashton Proposal on staff matters

Your rapporteur considers that Article 6 of the Ashton Proposal raises considerable difficulties.

1. Absence of a valid legal basis

The most fundamental observation is related to the legal basis of Article 6. It is recalled that the choice of the appropriate legal basis has "constitutional significance" and must rest on objective factors amenable to judicial review¹. Article 27(3) EU does not appear to be a correct legal basis for such extensive and detailed provisions on staff matters as it refers only to the "organisation and functioning" of the EEAS as an entity. The bulk of the content of Article 6 should therefore be adopted solely under the general legal base for staff matters, Article 336 TFEU, to which the ordinary legislative procedure applies.

In that respect, Article 12(4) of the Ashton Proposal, which seeks to delay the application in time of those parts of the Ashton Proposal which go beyond the current law (until the Staff Regulations / CEOS are amended), does not change anything, and amounts to an implicit recognition that there is no legal basis to decide on staff rules under Article 27(3) EU.

The approach suggested here is consistent with the principles of legal certainty and consistency which dictate that it is preferable to make the principles in the Staff Regulations / CEOS directly applicable to EEAS staff rather than to create parallel criteria outside those rules.

This would not prevent a brief and general reference to the staff rules in the Council Decision, for example a reference to the new title creating a new category of temporary agent.

Neither would it prevent some of the substance of Article 6 from being referred to it in recitals of the Council Decision. Certain general principles could thus be mentioned in recitals, such as the obligation of loyalty of all EEAS staff or the principle of equal rights, duties and opportunities of all EEAS staff.

2. Seconded national experts (SNEs)

As regards specialised seconded national experts (SNEs), which have already been discussed above, it should also be mentioned that it is unclear how, and to what extent, Decision 2007/829/EC should be transposed to the EEAS, as provided for in Article 6(4) of the Ashton Proposal.

3. Transfer of Commission and Council departments

Finally, Article 6(8) and Annex 1 which designate the Commission and Council departments to transfer to the EEAS appear to be of a structural or organisational nature and therefore not

¹ Opinion 1/08 of 30 November 2009, nyr, paragraph 110.

suitable for inclusion in the Staff Regulations / CEOS. By contrast, the consequences for the staff of those departments and their rights during and after their transfer to the EEAS clearly constitute a matter for the Staff Regulations.

4. Duration of engagement of EEAS-TS and reinstatement

As regards the question of duration of engagement and reinstatement, Article 6(12) does not in fact seek to regulate how long the engagement of the temporary agents should last. Instead, it focuses on the duty on Member States to provide for immediate reinstatement into the national diplomatic service after the first and the second (consecutive) periods of secondment, and the option to do so for subsequent secondments

Your rapporteur considers that a secondment is always two-sided. The providing institution (here, the Member States) must have clear rules on what the perspectives are for the seconded diplomat during, and especially after, working for the EEAS as a temporary agent. The "obligation" of reinstatement contained in the Ashton proposal is vague and conditional.