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VADMECUM ON THE EXTERNAL ACTION OF THE EUROPEAN UNION

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List of Abbreviations

CFSP	Common Foreign and Security Policy
CSDP	Common Security and Defence Policy
Euratom Treaty	Treaty establishing the European Atomic Energy Community
EEAS	European External Action Service
EEAS Decision	Council Decision 2010/427/EU of 26 July 2010 establishing the organisation and functioning of the European External Action Service (OJ L 201, 3.8. 2010, p. 30)
EUDel	Delegation of the European Union
GICE	Groupe interservices sur les compétences externes
HR/VP	High Representative for Foreign Affairs and Security Policy (HR) and Vice-President of the Commission in charge of the external relations portfolio (VP)
MoU	Memorandum of Understanding
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

INTRODUCTION

The purpose of this *Vademecum* is to explain the legal and institutional framework for EU external action and to give practical guidance. It is complementary to the *Vademecum* on the Relations with the Council¹ and to the Implementing Guidelines for the revised Framework Agreement on relations between the European Parliament and the European Commission². It is also complemented by the *Vademecum* on Working Relations with the European External Action Service (EEAS)³.

This *Vademecum* sets out **general principles**. The basic notions are introduced and explained, in particular with regard to the EU competences and responsible actors ([Chapter 1](#)). It deals with the **external representation** of the Union in bilateral and multilateral contexts, in particular in international organisations ([Chapter 2](#)). It then looks more closely at the **negotiation and conclusion of international agreements**, explaining the applicable rules and procedures ([Chapter 3](#)). **Non-binding instruments**, such as Memoranda of Understanding, are dealt with separately ([Chapter 4](#)).

The Annexes provide practical guidance in the form of frequently asked questions ([Annex I](#)), set out the text of the main **provisions** of the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) applicable to the external action of the EU ([Annex II](#)) as well as **standard templates** ([Annex III](#)).

This *Vademecum* does not specifically deal with the Common Foreign and Security Policy (CFSP) or Common Security and Defence Policy (CSDP). It also does not deal with EU accession negotiations (which are inter-governmental by nature)⁴, or the implementation of the external relations financing instruments (most of which are covered by the "Practical Guide to Contract procedures for EU external actions"⁵).

Should services encounter difficulties in the application of this *Vademecum*, they should seek advice first from the **GICE** ("*Groupe interservices sur les compétences externes*")⁶ **correspondent** within their DGs and, if necessary, from the Secretariat-General (SG F3 - "External institutional relations (including EEAS, G8/G20)") and/or the Legal Service. Furthermore, the GICE meets on a regular basis to discuss external representation issues and to ensure horizontal consistency.

This *Vademecum* will be updated on a regular basis to take into account evolving practices and lessons learned in the external relations field. It is a practical working tool. It is not designed to set out the issues of external action exhaustively nor can it replace legal or political guidance where this is necessary to ensure consistency of the practice of the Commission services. It will be supplemented in due course with elements on Common Foreign and Security Policy (CFSP) and Common Security and Defence Policy (CSDP).

¹ SEC(2011)842.

² Ares(2010)948343.

³ http://myintracomm.ec.europa.eu/sg/en/f/f3/Documents/eeas_vademecum_ares25273.pdf

⁴ With respect to EU enlargement policy in general and relations with candidate countries and potential candidates, the Commission plays a specific role in monitoring and assessing compliance with the Copenhagen criteria.

⁵ http://ec.europa.eu/europeaid/work/procedures/implementation/practical_guide/index_en.htm.

⁶ <http://www.cc.cec/home/dgserv/sg/i/relations/index.cfm?page=gice&lang=en>.

1. GENERAL PRINCIPLES OF THE EXTERNAL ACTION OF THE EUROPEAN UNION

1.1. The international legal personality of the EU and of Euratom

With the Treaty of Lisbon, the previous three pillar structure has been replaced by the EU which has been explicitly granted a **single international legal personality** (Article 47 TEU). On this basis, the EU can, within the ambit of its competences, exercise rights and assume obligations towards other international subjects (States and international organisations).

The EU has taken over all the rights and obligations of the previous European Community (the third paragraph of Article 1 TEU). This **succession** has been notified to third countries and international organisations by way of verbal notes⁷ and does not need to be repeated in further acts or contacts⁸. At the same time, the EU continues to exercise rights and to assume obligations of the European Union stemming from acts preceding the entry into force of the Treaty of Lisbon.

The European Atomic Energy Community (**Euratom**), however, continues to exist with its own legal personality alongside the Union (Article 184 Euratom Treaty) and is vested with the power to conclude international agreements (Articles 101 and 206 Euratom Treaty).

1.2. The principles governing the exercise of the Union's external action

1.2.1. *The principle of sincere cooperation*

Pursuant to the principle of sincere cooperation, provided for in Article 4(3) TEU, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. Both the principle and the duty of cooperation are expressions of Union solidarity, which the Court considers as the basis of the whole Union system⁹. It is important to note that the principle of sincere cooperation is of general application across the entire spectrum of the EU's external action, irrespective of the nature of the EU competences (exclusive, shared or supportive)¹⁰.

In particular, Member States have to take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the *acquis* and facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives. For the external action of the EU, respect of the principle of sincere cooperation is a vital tool to ensure unity of the EU external representation.

⁷ See, in particular, <http://register.consilium.europa.eu/pdf/en/09/st16/st16654-re01.en09.pdf>.

⁸ The replacement of references to the European Community by references to the European Union also applies to the names of bodies set up under existing agreements. However, references to legal instruments adopted before the entry into force of the Treaty of Lisbon should continue to be made to the title of the instrument as it was adopted at the time (thus, e.g.: the *EU-Turkey Association Council*, set up by the *Agreement establishing an Association between the European Economic Community and Turkey*).

⁹ Case 6 & 11/69 *Commission v France* [1969] ECR 523, paragraph 16.

¹⁰ Case C-266/03 *Commission v Luxembourg* [2005] ECR I-4805, paragraph 58, and Case C-433/03 *Commission v Germany* [2005] ECR I-6985, paragraph 64.

The Court has deduced from that principle that Member States are subject to special duties of action and abstention not only where the EU has legislated internally but also in a situation in which the Commission has submitted to the Council proposals or where a Union strategy has already been otherwise established¹¹. The Court has also declared that some clauses of an arrangement agreed by the Commission and the Council to decide who, of the Union or the Member States, should act at FAO meetings represented a fulfilment of the duty of cooperation and constituted a legal instrument involving obligations for the two institutions¹². Finally, the Court has considered that the duty of cooperation entails procedural duties, namely of prior information and consultation of the Commission by the Member States¹³.

It is to be noted that the same principle is the source of the obligation of the EU organs to faithfully cooperate. This obligation applies in particular to the Commission services (or the EEAS) acting as negotiators. Hence, the principle of sincere cooperation is also applicable in the relations between the Union and the Member States as well as in relations between the EU institutions themselves¹⁴.

1.2.2. *The principle of conferral*

Under the **principle of conferral**, the Union can only act within the limits of the competences conferred upon it in the Treaties (EU competences) to attain the objectives set out therein (Article 5(2) TEU).

Competences not conferred upon the Union in the Treaties remain with the Member States ("**sole national competences**"¹⁵). This applies to all types of external action (e.g. political statements, administrative arrangements or international agreements). To decide whether and, if so, how the EU can act externally, it is necessary to assess whether the Treaties have conferred competence upon it for that action (point [1.3.1.](#)) and whether that competence can be exercised externally by the EU acting alone or only with the Member States (point [1.3.2.](#)).

Sole national competences are to be distinguished from areas falling under shared competences where the Union has not yet exercised its competences ("unexercised shared competences"), in particular by adopting legislative acts or by otherwise adoption a Union strategy.

1.3. The rules governing the competences of the EU for external action

The Treaty of Lisbon has codified the rules on competences (including for external action) which, up until this point, had largely been based on case-law. Most of the judgments handed down by the Court before the entry into force of the Treaty of Lisbon are therefore still relevant.

¹¹ Case C-246/07 *Commission v. Sweden* [2010] ECR I-0000, paragraphs 74 to 77.

¹² Case C-25/94 *Commission v Council* [1996] ECR I-1469, paragraph 49.

¹³ Case C-459/03 *Commission v Ireland* [2006] ECR I-4635, paragraph 181.

¹⁴ See Article 13(2) TEU.

¹⁵ Sometimes also referred to as "Member States' sole competences" or "retained competences". The expression "exclusive national competences" is not in line with the principle of conferral and therefore must not be used.

1.3.1. The "existence" of a competence, "explicit" or "implicit"

The Treaties **explicitly** confer certain competences on the EU for its external action in policy areas which are international by nature or for the external aspect of internal policies. For example, the EU is competent to conclude international agreements in the areas of: common commercial policy (Article 207 TFEU), development policy (Article 211 TFEU), cooperation with third countries (Article 212 TFEU) or association agreements (Article 217 TFEU). Article 215 TFEU grants the power to the Council to adopt restrictive measures to interrupt or reduce economic or financial relations with one or more third countries. Article 220 TFEU provides that the EU shall establish relations with third countries and international organisations. In some Treaty chapters on internal policies there is an explicit provision on external action (for example, Article 138(2) TFEU concerning unified representation of the Euro area within the international financial institutions and conferences, Article 186 TFEU in the area of research and technological development and Article 191(4) TFEU concerning cooperation agreements in the area of the environment).

According to well-established case-law, competence can equally flow **implicitly** from provisions of the Treaties or from measures adopted on their basis¹⁶. Furthermore, the Court of Justice has held that the Union has authority to enter into the international commitments necessary for the attainment of a specific objective even in the absence of an express Treaty provision whenever EU law has created powers within the internal EU system for the purpose of attaining that objective¹⁷.

Article 216(1) TFEU reflects both types of competences – explicit and implicit - by providing that the EU may conclude international agreements in the following situations:

- (1) Where the conclusion of an international agreement is **explicitly** provided for in EU primary or secondary law.
- (2) Where the conclusion of an international agreement "**is likely to affect common rules or alter their scope**". In short, the EU is competent externally to the extent that it has adopted legislation internally.
- (3) Where the conclusion of an international agreement "**is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties**". In other words, the EU is competent to conclude an international agreement on subjects on which internal legislation does not yet exist, in so far as the conclusion of this international agreement is necessary to achieve a Treaty objective¹⁸.

¹⁶ Case 22/70 *Commission v Council* [1971] ECR 263, concerning a European Road transport Agreement (ERTA), in French *Accord européen de transport par route* (AETR).

¹⁷ See e.g. the Court's Opinion 1/03 (Lugano Convention) [2006] ECR I-1145, paragraph 114.

¹⁸ The landmark case to illustrate this hypothesis is still Opinion 1/76 (*Rhine Navigation*). Opinion 1/76 [ECR, 741] concerned a draft Agreement establishing a European laying-up fund for inland waterway vessels: in view of the traditional participation of vessels from Switzerland in inland waterway transport, it was not possible to lay down rules to rationalise the economic situation without bringing Switzerland within the scheme. This Opinion was further developed in Opinion 1/94 (*WTO*) and most recently confirmed in Opinion 1/03 (*Lugano*). In order to have a full description of the case-law concerning ERTA/AETR, the services should refer to paragraphs 116-131 in Opinion 1/03 (*Lugano Convention*), where the Court of Justice clearly summarised all its case-law on this matter.

1.3.2. Categories and areas of Union competence

To determine whether the EU can act either alone or together with its Member States in a certain area, services must pay particular attention to the **category** of the competence to which that area belongs. There are several categories of Union competence:

1.3.2.1. Exclusive competence

When EU exclusive competence is at stake, only the EU can legislate and adopt other kinds of legally binding acts, such as the conclusion of international agreements. Member States cannot act, even if the EU has not yet acted or has decided not to do so¹⁹.

The exclusive nature of an EU competence for external action can directly stem from the Treaties (explicit). This applies to the areas listed in **Article 3(1) TFEU**, such as the common commercial policy or the conservation of marine biological resources under the common fisheries policy.

The exclusive nature of an EU external competence can also be established in other ways. In that respect, the Treaty of Lisbon has codified the case-law on the implied exclusive competence and for the conclusion of international agreements.

Article 3(2) TFEU provides that the Union has exclusive competence for the conclusion of an international agreement in the following situations:

- (1) When its conclusion is "provided for in a legislative act of the Union": Under this rule, the Union alone is competent where the conclusion of an agreement is provided for in a basic legislative act²⁰.
- (2) "In so far as its conclusion may affect common rules or alter their scope": This rule is based on the settled case-law of the Court of Justice (called "AETR" or "ERTA" case-law²¹). Under this rule the EU has exclusive competence to conclude an international agreement where internal measures taken as a result of the exercise of the internal competence could be affected or their scope altered by a Member State concluding an agreement with a third party concerning the same subject matter either on its own or together with other Member States. In most cases the following test will be sufficient: an agreement falls within the EU's "AETR" exclusive competence when it can be demonstrated that the subject matter of the agreement falls within the scope of internal common rules, or within an area already largely covered by such rules, or rules have been adopted in areas falling outside common policies and, in particular, in areas where there are harmonising measures, regardless of whether there is or is not a contradiction between those common rules and the agreement.

¹⁹ Except where so specifically empowered by the Union or in order to implement the Union's action (Article 2(1) TFEU).

²⁰ A basic legislative act means an act which is adopted pursuant to the ordinary legislative procedure or a special legislative procedure provided for in Article 289(1) and (2) TFEU.

²¹ The Court for the first time referred to this competence as exclusive in Case 22/70 *Commission v Council* [1971] ECR 263, concerning a European Road Transport Agreement (ERTA), in French *Accord européen de transport par route* (AETR). See recently: Case C-471/98, *Commission v. Belgium ('Open Skies')*; Opinion 1/03 [2006] ECR 1150, on the Lugano Convention, paragraphs 116 and following; Case C-45/07, *Commission v Greece*, Judgment of 12 February 2009, paragraphs 16 and 17.

- (3) When its conclusion is "necessary to enable the Union to exercise its internal competence": The EU is also exclusively competent to conclude an international agreement, **even if it has not yet legislated internally on its subject matter**, when the internal and the external competences may only be effectively exercised at the same time.²²

1.3.2.2. Shared competence

EU competence is 'shared' between the EU and the Member States when the EU has competence to legislate and adopt legally binding acts in specific areas, while each Member State remains competent to act **as long as** the EU has not exercised its competence (Article 2(2) TFEU, which lays down the so-called pre-emption principle). The effects of the **pre-emption principle** are specified by Protocol No 25, which provides that, when the Union has taken action in a certain area of shared competence, the scope of this exercise of competence only covers those elements governed by the Union act in question and therefore does not cover the whole area.

This being said, in the case of international agreements concerning areas listed in Article 4(2) TFEU, only the **Union is entitled to conclude such agreements if the EU has acquired exclusive external competence**, in particular by having adopted common rules internally in the circumstances described in Article 3(2) TFEU. It is indeed important to note that the fact that the subject matter of an agreement falls within an area which, pursuant to Article 4(2) TFEU, is **shared** between the Union and the Member States **does not necessarily mean** that the agreement to be concluded must be a **mixed** agreement.

A **specific type of shared competence** is the so-called "**parallel**" competence, where the exercise by the EU of its competence does not result in Member States being prevented from exercising theirs. It is to be noted, however, that this terminology is not used by the Treaties. This type of competence, where the pre-emption principle does not apply, is related to the areas of research, technological development, space, development cooperation and humanitarian aid (Article 4(3) and (4) TFEU), without prejudice to the obligation of the Union and the Member States to coordinate their activities in those fields (Articles 181, 210 and 214(6) TFEU). In other words, even if the EU has exercised its competence (by legislating or adopting legally binding acts) in these areas of "parallel" competence, Member States remain entitled to legislate or adopt legally binding acts at national level.

In addition, Article 5 TFEU provides for a competence to coordinate economic, employment and social policies.

1.3.2.3. Competence to support, coordinate or supplement the actions of the Member States

Besides the areas of Union competence 'shared' with the Member States, the Union has, in the areas listed in Article 6 TFEU, the competence to carry out actions to support, coordinate or supplement the actions of the Member States. In these areas, action must be

²² The origin of this goes back to Opinion 1/76 [ECR, 741] (Rhine Navigation), which concerned a draft Agreement establishing a European laying-up fund for inland waterway vessels: in view of the traditional participation of vessels from Switzerland in inland waterway transport, it was not possible to lay down rules to rationalise the economic situation without bringing Switzerland within the scheme. Opinion 1/76 has recently been confirmed as a ground of exclusive competence in Opinion 1/03 (*Lugano*).

limited to what the EU is entitled to do under the relevant Treaty provisions (in particular, the EU cannot harmonise national legislation), and EU action in those areas does not supersede the competence of the Member States (Article 2(5) TFEU).

1.4. The legal basis for external action of the EU

The choice of legal basis and the way in which it should be referred to are covered by the following general principles.

1.4.1. *The choice of the legal basis*

In light of the principle of conferral of competences, each legal act of the EU, including that for external action, must have a legal basis. The legal basis (or bases) refers (or refer) to the **Treaty provision(s) - or acts of secondary law** - which empower the Union to act.

When considering the choice of a legal basis, in accordance with the case-law²³, the following elements have to be taken into account:

- the choice must rest on **objective factors** which include the **aim** and **content** of that measure;
- where the Treaty contains a more **specific provision**, the measure must be founded on that provision (*lex specialis*);
- if a measure pursues different aims or has various components and, if one of those aims or components is identifiable as the main one, the measure must be founded on a **single legal basis**, namely that required by the **predominant aim or component**;
- it is only when a measure simultaneously pursues a number of objectives or components which are inseparably linked that such a measure will have to be founded, exceptionally, on the various corresponding legal bases. However, even if this occurs more often for international agreements than for internal measures, **a multiplication of legal bases should be avoided where possible**²⁴.

1.4.2. *Referring to the legal basis*

The obligation to state the reasons on which all legal acts are based (Article 296 TFEU) includes the obligation to indicate the legal basis.

For the various Council decisions related to international agreements, this means that the act must not only refer to the relevant paragraph(s) of Article 218 TFEU or, for trade agreements, to Article 207(3) TFEU, (which lay down the procedures), but also to the **substantive (policy) legal basis** (see the templates in [Annex III](#)).

²³ See Case C-155/07 *EP v Council* [2008] ECR I-08103 and Case C-94/03 *Commission v Council* [2006] ECR I-1.

²⁴ In particular when the agreement is essentially based on a legal basis with a wide material scope, such as Article 211 TFEU (Development Cooperation), Article 212 TFEU (Economic, Financial and Technical Cooperation with third countries) or Article 217 TFEU (Association Agreements), there should be no additional legal bases, referring to one or other sectoral policy, unless this is duly justified in view of the actual aim and content of the agreement. This may be the case when the agreement comprises specific commitments in the area of trade (Article 207 TFEU) and/or of CFSP (Article 37 TEU).

There are **two exceptions** to this principle:

- (1) **Authorisations to open negotiations** should only refer to Article 218(3) and (4) TFEU, and **not** to the substantive legal basis. Indeed, often the outcome of the negotiations cannot be predicted in advance and a reference to a legal basis would be premature. In the explanatory memorandum, the Commission will have to explain what the envisaged content of the agreement could be, and thus make a plausible case that whole or part of the envisaged agreement falls under EU competence. For the same reason, it may be appropriate to leave open, at that stage, the question of whether the agreement will be a mixed agreement.
- (2) **Instruments without any legally binding effects** - which either consist of mere administrative arrangements, or of political commitments (see [Chapter 4](#)).

1.5. Internal decision-making with a view to external action of the Union

1.5.1. *The European Council*

Pursuant to Article 15(1) TEU, the European Council shall provide the Union with the necessary impetus for its development and shall define the **general political directions and priorities** thereof. This also applies to the external action of the Union for which the European Council issues strategic guidelines (Articles 15(1) and 22 TEU).

1.5.2. *The Council*

The **Foreign Affairs Council** (FAC), presided over by the HR, is responsible for elaborating the Union's external action based on the strategic guidelines issued by the European Council and for ensuring consistency of the Union's external action. In addition, other Council configurations establish the common positions on specific policy areas to be taken towards third countries and in international organisations²⁵.

The role of the Council in the conclusion of international agreements is set out in detail in Article 218 TFEU which is discussed in Chapter 3. In this context, the Council generally takes decisions by **qualified majority**. However, it takes decisions by unanimity for agreements covering a field for which unanimity is required, for association agreements, for economic, financial and technical cooperation agreements with candidate countries and for the accession to the European Convention on Human Rights (paragraph 8). Furthermore, unanimity is required for the conclusion of certain trade agreements (see Article 207(4) TFEU).

1.5.3. *The European Parliament*

With regard to the **conclusion of international agreements**, Article 218(10) TFEU provides that the European Parliament is to be immediately and fully **informed** at all stages of the procedure.

²⁵ See Council Decision 2009/908/EU of 1 December 2009 laying down measures for the implementation of the European Council Decision on the exercise of the Presidency of the Council, and on the chairmanship of preparatory bodies of the Council (OJ L 322, 9.12.2009, p. 28).

In addition to that right of information, the European Parliament is to be asked for its consent prior to the **conclusion** of any agreement which does not relate exclusively to the CFSP, except in respect of agreements which do not fall under the cases provided for in Article 218(6)(a) TFEU for which the Parliament is only to be consulted.

Detailed rules for the involvement of the Parliament at the different stages of the negotiation and conclusion of international agreements are set out in the **Framework Agreement** on relations between the European Parliament and the European Commission²⁶ as well as the "Implementing Guidelines for the revised Framework Agreement on relations between the European Parliament and the European Commission"²⁷.

1.5.4. *The European Commission*

The general tasks of the Commission are laid down in Article 17(1) TEU. Pursuant to that provision and with regard to the conclusion of international agreements, under Article 218(3), (5), (6) and (9) TFEU, with the exception of the CFSP, the Commission has the right of initiative. Together with the Council and assisted by the HR/VP, the Commission **ensures consistency** between the different areas of the Union's external action and between these and its other policies (Articles 21(3) and 22 TEU).

1.6. The institutional actors for the external representation of the EU

The distribution of the task of representing the Union can be presented schematically as follows:

	CFSP	Non - CFSP	
		External action (part five TFEU)	External aspects of sectoral policies
Heads of State or Government level	President of the EU Council	President of the European Commission	
Ministerial level	High Representative		

²⁶ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:304:0047:0062:EN:PDF>, in particular points 23 to 29 and Annex 3.

²⁷ Ares(2010)948343.

		Commissioners (including the High Representative acting as Vice President)
Administrative level	European External Action Service (EEAS)	Commission services EEAS HQ services
In third countries / At international organisations	EU Delegations	

According to the Treaties, there is **no longer a role for the Member State holding the Presidency of the Council in external action of the EU.**

The following are the institutional actors for the external representation of the EU.

1.6.1. The President of the European Council

Pursuant to the second subparagraph of Article 15(6) TEU, the **President of the European Council** "shall, at his level and in that capacity ensure the external representation of the Union on issues concerning its common foreign and security policy, without prejudice to the powers of the High Representative of the Union for Foreign Affairs and Security Policy".

It follows that the President of the European Council and the President of the European Commission represent the Union at summits with third countries at the level of Heads of State and Government.

1.6.2. The European Commission

In accordance with Article 17(1) TEU, with the exception of CFSP and other cases provided for in the Treaties (in particular Article 138 TFEU), the Commission **ensures the external representation of the Union.** Therefore, in all non-CFSP policies, the Commission represents the EU externally at all different levels: the President of the Commission (together with the President of the European Council) at the level of Heads of State and Government; at Ministerial level, the Members of the Commission on their specific portfolios (with the HR acting as VP responsible within the Commission for the responsibilities incumbent on it in external relations and for coordinating other aspects of the Union's external action); the Commission services (DGs) at the different expert levels.

Furthermore, in accordance with Article 220(2) TFEU, the Commission shall, outside the context of the CFSP, **implement the cooperation and relations of the EU with international organisations.** The same applies, *mutatis mutandis*, to the cooperation and relations of the EU with third countries (in other words, political dialogue outside CFSP).

With regard to international agreements, in addition to its right of initiative, as a general rule and with the exception of agreements related exclusively or principally to CFSP matters, Article 218 TFEU entrusts the Commission with the role of **negotiator** or head

of the Union's negotiating team (see [Chapter 3](#)). The Commission is also empowered to enter into certain non-binding arrangements (see [Chapter 4](#)).

1.6.3. *The High Representative/Vice President (HR/VP)*

The Treaty of Lisbon has created the double-hatted position of High Representative for Foreign Affairs and Security Policy (HR) being at the same time Vice-President of the Commission (VP) in charge of the external relations portfolio (Article 18(4) TEU).

In accordance with Article 27(2) TEU, the **HR**, in conjunction with the President of the European Council, **represents the Union for matters relating to the CFSP**. In particular, he/she conducts political dialogue with third parties on behalf of the Union and expresses the Union's position in international organisations and at international conferences. The HR also presides over the Foreign Affairs Council (FAC) (Article 18(3) TEU).

In his/her capacity as **VP**, he/she is in charge of the responsibilities incumbent on the **Commission in external relations** and for **coordinating other aspects of the Union's external action**, with a view to ensuring their consistency (Article 18(4) TEU).

For ease of reference, this document uses the denomination 'HR/VP' but recognises that various applicable rules (e.g. on his/her replacement) depend on whether he/she is acting in his/her capacity as HR, as Chairperson of the FAC or as VP.

1.6.4. *The European External Action Service (EEAS)*

In his/her functions, the HR/VP is supported by the European External Action Service (EEAS) (Article 27(3) TEU)²⁸. The EEAS is made up of officials transferred from the Commission and parts of the General Secretariat of the Council, as well as from the diplomatic services of the Member States.²⁹

The EEAS is a *sui generis* body. Administratively, it is neither part of the Commission nor of the Secretariat General of the Council. It is not a separate institution but a "functionally autonomous body" (Article 1(2) EEAS Decision). It has been granted the "legal capacity necessary to perform its tasks and attain its objectives". The EEAS is made up of a **headquarters in Brussels** and the **EU Delegations** (formerly Commission Delegations) to third countries and to international organisations (Article 1(4) EEAS Decision).

The EEAS is placed **under the authority of the HR** (Article 27(3) TEU, Article 1(3) EEAS Decision). The EEAS has as its the task to **support the HR** in conducting the CFSP and in presiding over the Foreign Affairs Council as well in his/her function as **VP** of the Commission insofar as he/she fulfils his/her responsibilities incumbent on the Commission in external relations and in coordinating all aspects of the Union's external action. The EEAS also supports the **President of the European Council** and the **Commission** (Article 2 EEAS Decision).

²⁸ See Council Decision 2010/427/EU of 26 July 2010 establishing the organisation and functioning of the European External Action Service, OJ L 201, 3.8.2010, p. 30 (the "EEAS Decision").

²⁹ The required changes have been made to the Financial Regulation and the Staff Regulations: see Regulations (EU, Euratom) No 1080/2010 and No 1081/2010 of 24 November 2010, OJ L 311, 26.11.2010, p. 1 and p. 9.

1.6.5. The delegations of the European Union (EUDel)

Article 221 TFEU provides that Union Delegations represent the Union in third countries and at international organisations. In other words, Union Delegations take over the representational tasks of the Union **both in CFSP and non-CFSP** matters which include tasks, such as local coordination, which were formerly exercised by the Member State holding the Presidency of the Council.

2. EXTERNAL REPRESENTATION OF THE EUROPEAN UNION

On the basis of the general principles which govern the external representation of the EU (point [2.1](#)), this chapter sets out the modalities of representation both at bilateral (point [2.2](#)) and at multilateral (point [2.3](#)) levels.

2.1. General principles

"Union external representation" is the act of **expressing the position of the Union** on certain issues on the international scene. A very specific form of external representation is the **negotiation** of an international agreement³⁰.

The Union position is established through the EU internal decision making process. It is within that internal process that the rules applicable to the exercise of the competences must be taken into account.

Once a position of the Union has been established, in order to identify who is to represent the Union, the main criteria to be applied will be if the subject matter falls under CFSP or non-CFSP areas and the level of the meeting/fora (see point 1.6. the institutional actors for the Union's external representation).

"External representation" covers all forms of expression of the EU position - be it in public or in closed meetings - in international organisations, at international conferences, at (bilateral or multilateral) meetings with representatives of third countries, or through unilateral statements.

In particular, it covers not only all **oral statements** made in international fora by a representative empowered to speak on behalf of the European Union, but also **written statements**, be they unilateral documents such as declarations or press releases, or documents drafted together with representatives of third states or international organisations such as joint statements, joint declarations, etc³¹. The institution or representative empowered to express an EU position must always ascertain what the **EU position** is and, if it does not exist, take the necessary steps to obtain a decision in that respect.

How, by whom and at what level the EU position is to be decided depends on a number of factors, such as the type of meetings and the nature and level of detail of the proposed intervention (see in particular point [2.2.2](#)).

It should be noted that the **Euratom** Treaty does not contain specific rules for external representation. According to Article 106a(1) Euratom Treaty, the EU institutional framework, including Articles 17 and 18 TEU, is also applicable *mutatis mutandis* in the Euratom context. As a consequence, the European Commission is equally the external representative of Euratom. Similarly, the role of the HR/VP relating to the coordination

³⁰ This is the subject of [Chapter 3](#) of this *Vademecum*. The present part only deals with the external representation of the Union in situations other than the negotiation of international agreements.

³¹ Part 4 of this *Vademecum* deals more in particular with the issues that arise when such documents contain political commitments (such as certain Memoranda of Understanding).

of EU external relations (Article 18(4) TEU) also relates to the external activities of Euratom³².

2.2. Representation in bilateral relations

Meetings with third countries take place primarily in the context of regional or bilateral agreements, mainly **framework agreements** (association or cooperation agreements) which are multi-sectoral in scope. Some **sectoral agreements** also envisage a joint committee, bringing the two parties together, for the follow-up of the implementation of the agreement. Meetings within the framework of such agreements may take place in different bodies at different levels, from Summits to Ministerial level ('Association Council' or 'Cooperation Council') and service level (Joint Committees, sub-committees).

In addition to the bodies formally created by international agreements, meetings with third countries can also be organised on the basis of political arrangements between the EU and the third country concerned (such as the Transatlantic Economic Council with the US or the High Level Economic Dialogue with China).

At service level, memoranda of understanding between relevant services of the Commission and their third country counterparts may also envisage regular meetings.

With a view to representing the EU (point [2.2.2](#)) in such bodies and meetings, services will first have to ascertain what the EU position on the particular issue is and, if it does not already exist, take the necessary steps to obtain a decision (point [2.2.1](#)).

2.2.1. Deciding the EU position

Prior to the external representation, it is necessary to establish a position of the Union through the proper EU internal decision making process. The determination of an EU position, and the modalities which govern its adoption, depend on the purpose of the meeting contemplated and whether it is called to adopt an act having legal effect (point [2.2.1.1](#)) or not (point [2.2.1.2](#)).

2.2.1.1. Adoption of acts having legal effects

When a body set up by an agreement is called upon to adopt an act having legal effect, the EU position must be formally adopted by the Council in advance, on a proposal from the Commission or the High Representative (**Article 218(9) TFEU**)³³. Typically, this concerns decisions to amend or update the technical annexes to the agreements or to adopt implementing measures; more rarely, it involves decisions to amend the agreement itself. In practice, there are mainly **three steps** in the preparation and adoption of an act under Article 218(9) TFEU:

³² Also with respect to the external representation in international financial institutions and conferences of the Union - in its composition of Member States whose currency is the euro - the Treaty only provides for a legal basis for the Council, acting on a proposal of the Commission and after consulting the ECB, to adopt "appropriate measures to ensure unified representation" (Article 138(2) TFEU).

³³ The Council decision on the conclusion of the agreement may lay down more elaborate procedures, as e.g. for the positions to take in the bodies set up by the Energy Community Treaty (Council Decision 2006/500/EC, OJ L 198, 20.7.2006, p. 15).

- (1) First, the Commission services (and/or the EEAS) prepare with the relevant services of the third country a complete draft decision for the body ("the draft act"). Only when there is an agreement at service level on the draft act can the procedure of Article 218(9) TFEU be started; indeed, in cases where the third country requests substantial modifications to the draft act in the relevant body, the procedure of Article 218(9) TFEU must be followed again before the body can adopt the draft act.
- (2) When there is an agreement at service level, the Commission proposes the **draft act to the Council, attached to a proposal for a Council decision** on the EU position to take in the body concerned (see template in [Annex III](#)).³⁴ If, in the course of the discussions in the Council, modifications need to be made to the draft act, the Commission services (or as appropriate the EEAS) should enter into contact with the services of the third country, in order to ensure that the third country will be in a position to agree to the draft act as modified in the Council.
- (3) It is only after the Council has formally adopted the EU position on the draft act, that the EU representatives in the body may express the EU's consent to the draft act and that **the body may adopt it**. Although it has been done in the past, the Council decision on the EU position is not to be published in the Official Journal. On the contrary, it is the 'act' of the body as such which, once adopted, has to be published in the Official Journal in order to have legal effect.

In addition, the Treaties (Article 218(7) TFEU) allow the Council to empower the negotiator to approve modifications to an agreement. Therefore, where the negotiator was the Commission, and where this is specifically provided for in the decision to conclude an agreement, the EU position for the adoption of an act having legal effect is adopted by the Commission (see template in [Annex III](#))³⁵.

2.2.1.2. Decisions on other EU positions

The Treaties do not make any specific provision for the determination of the EU position in cases other than the adoption of acts having legal effect.

Depending on the subject matter concerned, the EU position to be defended in any international forum is the position which flows from EU legislation or policy or from Conclusions (Resolutions) of the European Council or of the Council. Where the EU position is not well-established on the basis of, for example, a standing EU policy on the issue, as it emerges in particular from **EU legislation and/or European Council or Council conclusions**, the competent services will have to prepare specifically for the conference or the meeting concerned (e.g. by a discussion in the relevant Council Working Party of an "annotated agenda", as the case may be, following a Commission decision). For many meetings, the EU position may need to be detailed or adapted to the (expected) positions of the third country. The practice in that respect may vary from sector to sector but the following general principles apply:

³⁴ Unless the draft decision of the body has not yet been agreed with the third country, the EU position is to be treated as an EU-restricted document.

³⁵ See for example the decisions of the EEA Joint Committee simply extending Union acts subject to any technical adjustments. Cf. Council Regulation (EC) No 2894/1994, OJ L 305, 30.11.1994, p. 6.

- (1) If the meeting **is not considered to be politically important**, the competent Commission service (or where appropriate the EEAS) **informs** the relevant Council working party in due time of the venue and the envisaged agenda. An exchange of views on the issues to be discussed may take place. The working party is later informed of the outcome of the meeting.
- (2) When the meeting is considered to be **politically sensitive**³⁶, the responsible service - after having consulted the relevant services, including the EEAS - transmits an "**annotated agenda**" to the relevant working party, in a timely manner to allow for discussion. For each issue on this annotated agenda, the envisaged EU position is concisely indicated. In agreement between the Commission and the Presidency, these annotations on the EU position may be adapted to better reflect the views expressed in the working party. If major differences of view arise, the matter should be referred to COREPER for discussion and decision on the EU position.
- (3) In view of meetings of **substantive political importance**, the Council may wish to adopt **conclusions**. In that case, the Commission should (after due interservice consultation) propose draft conclusions in a Communication to the Council or at least a Commission Staff Working Paper sufficiently in advance of the time at which it is required to present the EU's position.

As the Commission is the institution which is entrusted with the external representation of the Union in non-CFSP areas, it cannot, in international relations, distinguish **between an EU position and a 'Commission position'**³⁷.

2.2.2. *Representing the EU*

The modalities of the EU's representation in and/or (co-)chairing of bilateral bodies are often **set out in the agreement itself or in the Council Decision concluding the agreement** and/or in the rules of procedure for the relevant body - some of which need to be updated to reflect the Treaty of Lisbon³⁸. When a body is set up by a **mixed agreement**, these rules have sometimes provided for the representation or presence of the Member States (or the Member State holding the Presidency of the Council) in such bodies; such rules, however, are without prejudice to the provisions of the Treaties on the

³⁶ By reason of the nature of the issues discussed or of the relations with the third country and/or the detail with which the EU position will be discussed, or simply when it is an established practice in the sector.

³⁷ This is fundamentally different from the action of the Commission within the Union: in the exercise of the tasks entrusted upon the Commission by the Treaties (and notably to take initiatives and to oversee the application the law of the Union), the Commission must, in the general interest of the Union, express its own position towards the other institutions, the Member States and more generally the European public opinion. In international relations, however, it can only express the position of the EU as a whole.

³⁸ It is indeed preferable to facilitate any adaptation that the question of who represents the EU at which level and who can participate/be present in the meetings is covered in the Council Decision on the conclusion of the agreement concerned and not in the agreement itself. However, existing agreements and rules of procedure adopted before 1 December 2009 may differ from the rules set by the Treaties; in such cases, some transitional arrangements are needed to be agreed between all concerned parties. This is true in particular where the agreement or the Council Decision provides for a role for the Member State holding the Presidency of the Council in the representation of the EU.

representation of the EU, as they are applicable since the Treaty of Lisbon and may have to be reviewed.

2.2.2.1. At ministerial level

At ministerial level, the representation of the EU often goes beyond the mere **presentation** of the EU position, and includes the task of **chairing** or co-chairing the meeting.

Whilst **chairing** should normally be ensured by the HR/VP, the **presentation** of EU positions should be attributed **according to the division of competences in the external representation: CFSP or non-CFSP**.

In meetings where both CSFP and non-CSFP issues are addressed, the HR/VP takes the lead on both parts of the agenda³⁹ but will normally ask the relevant Commissioner to take the floor when issues of his/her portfolio responsibilities are at stake (e.g. enlargement, development, trade, neighbourhood).

When the HR/VP is prevented from taking up himself/herself the task of chairing a meeting at ministerial level, he/she can be replaced by a representative of the Member State holding the Presidency of the Council or, where he/she decides so, by a Commissioner (in agreement with the President of the Commission). However, in such a case, the Member State holding the Presidency of the Council should limit itself to the role of presiding over the meeting and (as replacement for the HR) expressing the EU position on CFSP matters (as well as, as the case may be, expressing the views of the Member States on issues within their competence). The presentation of the EU position on all non-CFSP issues should be ensured by another Commissioner(s).

Political dialogue on CFSP matters is under the responsibility of the High Representative (Article 27(2) TEU), who will carry out these dialogues as mandated by the Council (Article 18(2) TEU). The Commission remains responsible for representing the EU position in other political dialogues, whatever their denomination is, relating to other subject matters not pertaining to CFSP. These latter dialogues may be carried out by the HR/VP in his/her capacity as VP or by other Commissioners in line with their respective responsibilities. When acting in this type of dialogues, the HR/VP, in the same way as the Commissioners, is bound by Commission procedures (Article 18(4) TEU).

If a meeting in the framework of a '**mixed agreement**' touches upon issues which fall within sole national competence, it is for the Member States to present their views on these issues. They may request one of the Member States to represent them (usually the Member State holding the Presidency of the Council), but they may also entrust this task to the HR/VP or the Commission.

2.2.2.2. At senior official and official level (e.g. Committees and subcommittees)

As a general rule, EEAS officials **chair** these bodies and **present** the EU position, including in the context of general political dialogue at service level, as representatives of the HR in fulfilling his/her different responsibilities, under Articles 18(4) and 27(2) TEU.

³⁹ A Commissioner may head the EU team where non-CFSP matters are clearly predominant.

In general, the EEAS, in close cooperation with the Commission services, is responsible for organising meetings with partner countries at all levels. This includes setting the agenda, ensuring participation, preparing minutes, etc. The EEAS coordinates these preparations with all relevant Commission services and any other relevant EU bodies (e.g. agencies, other institutions, etc.).

However, for other aspects of the Union's external action relating to **sectoral issues** on meeting agendas such as trade, development, transport, etc., including when this concerns political dialogue on these issues, the **lead Commission services present** the EU position in their respective policy areas.

It may be necessary in certain circumstances for the EEAS to replace Commission services in meetings and events with third countries and vice versa. This should be done in the same spirit of sincere cooperation and respect for respective competences.

Where meetings are **organised by Commission services** (meetings with candidate and potential candidate countries; meetings on purely sectoral issues), it is for the relevant Commission service to **chair** and present the EU position. For example, under agreements with candidate countries and potential candidates, the Commission (DG ELARG) organises and chairs the meetings at committee and subcommittee level. It maintains its overall coordination role for the Stabilisation and Association Agreements. Further, for meetings at senior or working level on purely sectoral issues, such as trade or energy, the Commission services can organise and chair meetings, keeping the EEAS informed.

2.3. Representation in multilateral agreements and international organisations

Article 220 TFEU provides the basis for relations between the EU and the United Nations (UN), its specialised agencies (such as WHO, FAO, etc.) as well as any other international organisation⁴⁰.

It assigns the task of implementing this provision to the HR/VP and the Commission.

At the UN and its specialised agencies, the Council of Europe, the OECD, the OSCE, and the African Union, the Union is represented by EUDels, which operate under the authority of the HR/VP and have been integrated into the EEAS (Article 221 TFEU; Article 5 of the EEAS Decision).

The current situation regarding the status of the EU in these organisations is characterised by a remarkable diversity:

- (1) **Full member** status for the EU should normally be the rule for all organisations dealing with areas in which it enjoys **exclusive competence**, but the reality is often different, since many international organisations only admit States as

⁴⁰ For the representation of the Euro area within the international financial institutions and conferences, this legal basis is provided for in Article 138(2) TFEU.

members. As a result, the EU is currently granted member status only within a few international organisations (such as WTO or FAO)⁴¹.

- (2) Generally, the EU has **observer status**. This status normally enables the EU to take part in the work of these organisations, albeit without voting rights and financial obligations. Observer status often gives the EU the right to speak, while on other occasions this is left to the discretion of the chair of the meeting.
- (3) In some cases, the EU is neither a member of, nor has observer status in, international organisations and this despite the fact that the organisations concerned deal with issues falling under (exclusive) EU competence. In these circumstances, the Member States who are member of these organisations are under the obligation to exercise the EU competence on behalf of the EU⁴².
- (4) Independently of the status of the EU within a given organisation, the EU may become a **contracting party to international agreements or conventions** negotiated within the framework of the organisation in question where the agreements cover issues which fall within EU competence⁴³.
- (5) Finally, the EU is recognised as **full participant** at many international conferences, which is a status similar to that of a member or a contracting party albeit without voting rights.

In sum, the EU participation in each international organisation or multilateral forum has its own specificities; it is governed by the statutes and/or internal rules of that organisation or forum as well as, in some cases, by a specific arrangement with that organisation⁴⁴.

As a consequence, the possibility of the EU presenting its positions in the different bodies of those organisations, conferences or meetings may vary considerably. However, whatever the difficulties the EU may encounter in an international organisation, they should not affect the distribution of competences between the EU and its Member States as they flow from the Treaties, nor the internal decision-making processes on the EU position.

In some international organisations or in multilateral agreements, the participation of the EU has been subject to a "**declaration of competence**" (e.g. in the FAO, and in many conventions in the areas of environment, climate change or transport)⁴⁵. These declarations are decided upon by the Council when it confirms the conclusion of the agreement concerned.

⁴¹ An overview of international organisations of which the EU is a member and its status therein is provided by the database of the Treaties Office. See: <http://ec.europa.eu/world/agreements/Login.do> - Ready inventories.

⁴² This implies that, where necessary, EU positions are to be adopted prior to meetings of bodies of the international organisation concerned, see point 2.3.1.

⁴³ It will thus be vital to obtain, during the negotiations of that agreement, the insertion of a clause which allows specifically the EU or more generally Regional Integration Organisations ("RIOs") to become party to that instrument - see point 3.1.2.

⁴⁴ Such as the EU's status in the Council of Europe, which is governed by an exchange of letters between the Commission and Secretary General of the Council of Europe.

⁴⁵ For an inventory of agreements where a "declaration of competence" has been made by the EU, see Treaties Office database <http://ec.europa.eu/world/agreements/Login.do?> - Ready Inventories.

2.3.1. Deciding the EU position

In the context of a multilateral discussion, the determination of an EU position and the modalities which govern its adoption depend on the purpose of the meeting contemplated, whether or not it is called to adopt an act having legal effect (point [2.3.1.1.](#)) or to touch upon budgetary and nominations issues (point [2.3.1.2.](#)).

2.3.1.1. Acts having legal effect

In most cases, bodies of international organisations or bodies set up by a multilateral agreement have the task of **preparing the text of international agreements**, to be signed and concluded by the contracting parties. In such cases, the EU position is established in accordance with the procedure for negotiation and conclusion of international agreements laid down in Article 218 TFEU (See [Chapter 3](#))⁴⁶.

Sometimes, however, a body of an international organisation or a body set up by a multilateral agreement is given the power, by the basic instrument by which it was created, to adopt acts having legal effect. In such cases, the EU position to take in that body must be decided in accordance with the procedure laid down in **Article 218(9)** TFEU. Hence, the Commission should make a proposal to the Council laying down, in general terms, the EU position to be defended by the Commission, with no draft act attached to the proposal. As the draft act of the international organisation or body is not yet available, the three-step process described in point [2.2.1.1](#) for the preparation and adoption of the act does not apply.

2.3.1.2. Other EU positions

For EU positions other than those which lead to the adoption of acts having legal effect, the observations made in point [2.2.1.1](#) apply *mutatis mutandis*.

In many areas, it is a well established practice that meetings of international organisations or agreements are prepared in specific **Council Working Parties**. Where this is not the case, informal meetings or other contacts with Member States should ensure a minimum level of coordination, or at least prior consultation. In addition to the Council, the lead Commission service should inform and, where necessary, consult the other Commission services as well as the EEAS when preparing regular meetings of international organisations. This requires a high level of advance planning to allow sufficient time for inter-service and Council working party consultation.

In addition to the determination of the EU position in Brussels, the EUDels at international organisations play an important role through local coordination with the representations of the Member States at those organisations. Likewise, at multilateral conferences, the EU position determined in Brussels can be further elaborated in on-the-spot coordination meetings ("*coordination sur place*") between the delegations of the EU and of the Member States⁴⁷.

⁴⁶ Unless the draft decision of the body has not yet been agreed in the international organisation, the EU position is to be treated as an EU-restricted document.

⁴⁷ For the sake of consistency, the term "local coordination" should be used for situations where the Union is represented by a EUDel; the term "on the spot coordination" should be used, on the one hand, for the coordination done by the negotiator of an international agreement (see point 3.4.4)

The **purpose of local coordination and on-the-spot coordination in international conferences** is in the first instance to put in place **practical modalities** as to how the EU position is to be represented most efficiently. This includes tactical issues and the drafting and finalisation of speaking notes. It may also include, in urgent cases, the preparation of reactions to initiatives of other participants. In principle it should not alter the substance of the Union position established by the internal decision making process.

Local coordination meetings for all issues covering EU competences are organised and chaired by the EUDel.

Following the entry into force of the Treaty of Lisbon, **transitional arrangements** for external representation have been agreed for the EUDels to multilateral organisations (transitionally relying on cooperation with and support from the Member State holding the Presidency of the Council, notably in presenting EU statements), which should **gradually be phased out**.

2.3.2. *Intervention at meetings*

The way in which representation of the Union at meetings in international organisations and at international conferences is organised is **an internal issue for the Union**. It should not be discussed in front of international partners.

Representation arrangements must be in line with the Treaty provisions (see point [2.1](#)): on issues other than CFSP, it is for the Commission (represented by the VP responsible for external relations or the relevant Commissioner, or at service level by the relevant Commission service or the EEAS) or the EUDel to speak on behalf of the Union.

In practice, given that the Member States are often members of multilateral organisations, whereas the EU is not, and that conferences are often organised in the framework of a **mixed** international agreement or conventions, Member States often challenge the Commission's (or the EUDel's) role as sole spokesperson for the EU and request the establishment of specific procedures allowing the Commission and a representative of the Member States (be it the Member State holding the Presidency of the Council or another Member State) to speak alternately, depending on the degree of preponderance of Union competence.

In any event, to the outside world, the EU and its Member States should appear united. Therefore, to the extent that is logistically feasible, their representatives (Commission, EUDel and, if appropriate, Member State experts or Member State holding the Presidency of the Council) should sit and speak behind the **EU nameplate**⁴⁸ (this approach may however not be feasible for instance in formal UN meetings or other meetings in UN premises or otherwise under UN rules and seating arrangements). The use of one "EU microphone" could facilitate this approach. Indeed, speaking from behind a single nameplate makes the unity of the EU and its Member States clear at the meeting and reinforces the position of the EU and its Member States.

and, on the other hand, for the coordination done by a delegation of the EU, established *ad hoc*, to represent the EU in international conferences.

⁴⁸ Coreper I endorsed this approach in relation to the negotiations on climate change in Cancun (doc. 16682/10).

In that framework, the Commission usually presents the EU's position on non CFSP issues, the EEAS presents the EU's position on CFSP issues and a representative of the Member States speaks on behalf of "EU Member States" on matters within sole national competence. Member States may also request the Commission (or the EUDel) to represent them on issues of sole national competences.

Ideally, only one person should speak on a single agenda item. In this context, and in order to enhance the effectiveness and unity of the EU's external action, the EU representative and the Member States' representative may enter into **practical arrangements**, whereby both will speak "on behalf of the EU and its Member States" and regardless of whether an item of the agenda falls within the exclusive or shared competence of the EU, or within sole national competence.

2.3.3. *Voting*

As a general rule, voting rights are conferred on full members of an organisation or parties to an agreement, not on observers. Therefore, whether the EU has the right to vote depends on its status within a given organisation/agreement.

When the EU is a member/party without the Member States, some third countries may claim that the EU should only have equivalent rights to those of a State (for example: just one vote instead of the voting rights equivalent to the number of EU Member States). Should the Commission be negotiating an agreement, services should normally oppose this.

In cases where the EU is member/party to the organisation/agreements along with some or all of the Member States, the rules will normally impede the simultaneous vote of the EU and its Member States. The standard "RIO"-clause should be⁴⁹:

"A regional integration organisation, on matters within its competence, shall exercise its right to vote with a number of votes equal to the number of its Member States that are Parties to this Convention [Agreement]. Such an organisation shall not exercise its right to vote if any of its Member States exercises its right to vote, and vice versa".

Deciding when and how the EU should vote must be decided by following the procedures described under points [2.2.1](#) and [2.3.1](#).

2.3.4. *Budgetary issues*

EU financial contributions to the budget of international organisations and to bodies created by multilateral agreements are, generally speaking, related to the nature of the EU competences and its status within a given organisation/agreement.

When the EU competence is exclusive the **EU** should normally be **member or party**, without the Member States, to the organisation or agreement. The fact that the Member States will bear some of the administrative operating expenses of an organisation cannot of itself justify participation of the Member States in the conclusion of the agreement⁵⁰. In such a case, the EU pays a contribution, calculated in accordance with the relevant rules. This is the case, for example, of most of the regional fisheries organisations and

⁴⁹ It should be noted that in the past "REIO" ("*regional economic integration organisation*") clauses were commonly used but that this practice should be adapted where possible.

⁵⁰ Opinions 1/78 and 1/94, *WTO*, paragraph 21.

some commodities organisations, where the agreements do not constitute financial policy instruments in themselves.

The most common situation is, however, that of mixity between the EU and Member States which may arise because the subject matter falls in part within the competence of the EU and in part within that of the Member States, because the agreement does not allow the participation of the EU alone, or because it reinforces the EU's position in the relevant organisation.

The internal rules of the organisations/agreements will normally establish how a regional integration organisation, such as the EU, which is simultaneously a party with its Member States, should contribute to the budget. As a general rule, in those cases where the EU's contribution is required, the Member States' contributions should be consequently brought down. In other cases, the EU pays a fixed amount to meet the supplementary administrative expenses deriving from the EU's member status (e.g. FAO).

Internal rules clarifying certain aspects of the contributions of the EU and of the Member States contributions may be laid down in the Council decision signing or concluding the agreement (as with the case of the 2006 International Tropical Timber Agreement).

Finally, when the EU only has an observer or full participant status, there is normally no obligation to finance the organisation/agreement. However, some international organisations, like the International Whaling Commission, ask observers to make a financial contribution.

2.3.5. *Nominations*

Nominations to posts in international organisations or bodies created by multilateral mixed agreements have usually been considered by Member States as their prerogative. This interpretation is not correct because nominations, like other organisational issues, are an element of the participation in the functioning of the organisation/agreement. Therefore, when the EU is party, with the Member States, to one organisation, it also has the right to propose candidates to fill vacant posts.

Two questions arise here: first, how to ensure coordination between the EU and the Member States, and second, which EU internal procedures must be followed to decide on the EU candidate(s).

Mixed agreements require the EU and the Members States to cooperate closely in the implementation of the agreements to ensure unity in external representation. Nominations form part of such implementation. Therefore, the EU and the Member States should take all necessary measures to ensure that they present one common candidate in those cases when there is only one post. Proliferation of competing European candidates should be avoided. Only when there is more than one post to be filled can an allocation of posts (e.g. one for the EU, the others by agreement among the Member States) be envisaged.

The Treaties do not contain any provision on the procedures to be followed for the nomination of the EU candidate. As a general rule, when the vacancy relates to a high-level political post, the Commission must call for candidates and make a proposal to the Council. However, when the post(s) to be filled is(are) technical, scientific or

administrative, the Commission itself can present a candidate to the organisation, without prejudice to the obligation to inform the Council accordingly.

3. NEGOTIATION AND CONCLUSION OF INTERNATIONAL AGREEMENTS

The European Union⁵¹ has concluded a large number of agreements with third countries (739 bilateral and 231 multilateral agreements)⁵². Some of these agreements, the framework agreements (association or cooperation agreements), cover a wide range of policies (trade, development, economic cooperation, transport, competition, etc.). Other agreements (sector agreements) are limited to a specific policy area, e.g. aviation, environment, fisheries or trade. The EU has also become, by way of conclusion of international agreements, a member of 39 international organisations.

The Treaty of Lisbon empowers the Union to enter into international agreements covering both CFSP issues and all issues of former Community competence: **"Union only" agreements**. The conclusion of "Union only" agreements has a number of advantages: namely, such agreements make it **clear** that all the international obligations concerned are undertaken by the EU and not by its Member States acting together; they ensure optimal **cross-leverages** between the different issues covered, and they can **enter into force more quickly** than mixed agreements as only the consent of the European Parliament is required before the Council decision to conclude – as opposed to the additional ratification procedures in all Member States which are necessary for mixed agreements⁵³. Therefore, **the effectiveness of the EU's external action** is enhanced: it allows the Union to have, within a reasonable timeframe, an adequate and up-to-date legal framework for developing its relations with a given partner country.

It is to be noted that a framework agreement covering CFSP provisions as well as provisions on trade and cooperation on development in areas such as, for example, environment, migration, transport, energy, culture or drug abuse control can be concluded as 'EU only' agreements. The determination of whether an agreement is 'Union only' or 'mixed' requires a case-by-case analysis and can only be definitively fixed at the end of the negotiation process on the basis of the content and purpose of the agreement as a whole and of each specific provision⁵⁴. This issue also applies in particular in relation to the different forms of framework agreements⁵⁵.

⁵¹ Including agreements concluded by the former European Community (see point 1.1.) as well as by the European Atomic Energy Community.

⁵² Listed in Treaties Office database: <http://ec.europa.eu/world/agreements/default.home.do>.

⁵³ The ratification of mixed agreements by national parliaments has sometimes taken several years. For example: four years for the present PCA with Kazakhstan (signature May 1995; entry into force July 1999); more than five years for the present PCA with Tajikistan (signature October 2004; entry into force January 2010).

⁵⁴ This corresponds to case-law before the entry into force of the Treaty of Lisbon; see Case C-268/94 *Portugal v Council* [1996] ECR I-6177, in particular paragraph 39. In its Opinion 1/94 (*WTO*), the Court has held that given that the WTO is an international organisation which will have only an operating budget and not a financial policy instrument, "(...) the fact that the Member States will bear some of its expenses cannot, on any view, of itself justify participation of the Member States in the conclusion of the WTO Agreement" (paragraphs 19-21); see also Case C-25/94 *Commission v Council*, [1996] ECR I-1469, paragraph 47, where the Court held in particular that provisions relating to the possibility for contracting parties to provide assistance to developing countries were not decisive as these provisions did not appear to occupy a prominent position in the draft agreement.

⁵⁵ Framework Agreements are international agreements that the European Union concludes with third countries or group of countries and have a general nature and a broad scope as they regulate relations in a number of sectors. Association Agreements ensure a higher level of commitment by

For multilateral agreements and depending on the context, it is crucial to ensure, from the outset, that "Regional integration organisations" (RIOs) (see point 2.3.3.), such as the EU, can become (full) parties to the agreement and possibly members of the international organisation set up by it.

The procedure to be followed (internally within the EU) for **all** these kinds of international agreements is laid down in **Article 218 TFEU**⁵⁶, except for monetary agreements, governed by Article 219 TFEU, agreements within the scope of the Euratom Treaty and financing agreements concluded by the Commission on the basis of Article 166(1) of the Financial Regulation⁵⁷.

The different stages which govern the negotiation and conclusion of international agreements are: the exploratory talks (point [3.1](#)), the drafting of an authorisation to negotiate (point [3.2](#)), the adoption of this authorisation by the Council (point [3.3](#)), the conduct of the negotiation (point [3.4](#)) and, finally, the signature (point [3.5](#)) and the conclusion of the agreements⁵⁸ (point [3.6](#)). This Chapter further deals with specificities of agreements whose subject matter falls wholly or partially within the area of Freedom, Security and Justice (point [3.7](#)), monetary agreements (point [3.8](#)) and agreements whose subject matter falls wholly or partially within Euratom (point [3.9](#)).

3.1. Exploratory talks

Generally, the negotiation of an international agreement is preceded by exploratory talks with the third country or third countries or the international organisation concerned, during which the purpose and the scope of a future agreement are discussed and the issues for negotiation are identified.

This exploratory work is **carried out informally (Article 218 TFEU does not apply)**. Therefore, no prior agreement of the Council is necessary. However, Member States and possibly also the European Parliament should be kept informed.

At this stage, care should however be taken that the future negotiator (the Commission services or, as the case may be, the EEAS) is already "in the driving seat". This is clearly the case for exploratory talks in areas in which the Union would conclude agreements alone (see point 3.2.2.1.).

both sides and may create stronger and closer ties than Cooperation Agreements. Association Agreements establish an "association" between the EU and the third country, "*involving reciprocal rights and obligations, common action and special procedures*", with the aim of setting up an all-embracing framework to conduct bilateral relations, including political dialogue. They are concluded on the sole basis of Article 217 TFEU (ex Article 310 TEC); Cooperation Agreements typically contain provisions on political dialogue, on trade and other policy areas and create a process of cooperation on diverse economic and social issues. They are concluded on the basis of Article 211 TFEU (development policy) or Article 212 TFEU (cooperation with third countries) and Article 207 TFEU (trade policy). The Council sometimes adds other sectoral legal bases (see point 1.3.1).

⁵⁶ With respect to trade agreements, Article 207 TFEU provides for specific rules which are, however, in substance identical to those of Article 218 TFEU. Nevertheless, reference is made to Article 207(3) TFEU as legal basis for the Council decision to authorise the opening of negotiation of trade agreements (see Annex II).

⁵⁷ Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ L 248, 16.9.2002, p. 1).

⁵⁸ Basic substantial issues with regard to the competences of the Union to negotiate and conclude international agreements and to the actors involved have been dealt with in Chapter 1 to which reference is made.

There is no general rule on **when exploratory talks end and when negotiation starts**. This must be assessed on a case-by-case basis. As a general guideline, negotiation starts when future parties make commitments in the process. In certain cases, negotiations are opened by a decision, adopted more or less solemnly, by the negotiating partners, sometimes referring to a text elaborated either during exploratory talks or by experts. In principle, such a decision should be signed by a representative of the Commission (if it is to be the future negotiator) following the authorisation to negotiate.

In any event, negotiations cannot formally start until the Council has formally adopted the authorisation to negotiate. The European Parliament must be informed of all stages of the procedure, including the Commission's intention to propose the start of negotiations (see in particular point 1 of Annex III to the Framework Agreement).

3.2. Drafting the authorisation to negotiate

Pursuant to Article 218(2) to (4) TFEU, in due time before the opening of the negotiations, the HR must submit to the Council "recommendations" for the future negotiations, with respect to agreements related exclusively or principally to the CFSP. For all other cases of negotiation on Union competences, it is the Commission which must submit such recommendations to the Council.

Without the submission of recommendations, the Council cannot take its decision and, hence, the EU representative cannot negotiate (nor can the Member States do so with regard to EU competences, see point [1.2.1](#)). The same applies where, very exceptionally, the Commission decides to withdraw a recommendation which has already been submitted to the Council.

The following points set out what the standard content of a recommendation should be (point [3.2.1](#)) and give some guidance on how the lead negotiator should be designated (point [3.2.2](#).)

3.2.1. *The content of a Recommendation*

A "Recommendation for a Council Decision authorising the opening of negotiation and negotiating directives" must include:

- An **explanatory memorandum** which may vary in content and level of detail.
- The **Recommendation** for the authorisation to open negotiations and for the appointment of the negotiator with, as an Annex, a **draft Council decision** authorising the opening of negotiations, adopting negotiating directives and appointing the negotiator to which the draft negotiating directives are attached.

Normally, the explanatory memorandum as well as the Recommendation to open negotiations including its annex (in particular the negotiating directives) must be treated as an EU-restricted document.

When drafting a Recommendation, care should be taken to stick firmly to the terms "**negotiating authorisation**" and "**negotiating directives**" for any decision based on Article 218 TFEU. The term "negotiating mandate" should be strictly avoided: this is neither neutral nor legally accurate. The term "mandate" conveys the incorrect impression that the Commission's negotiating role would be strictly limited to following the Council's instructions and that the Commission would act merely on behalf of and in

the name of the Council. However, the negotiating directives envisaged in Article 218 TFEU are not legally binding and leave the negotiator room for initiative and manoeuvre within the scope of the Council's authorisation.

The term "**mandate**" is used exclusively for **intergovernmental acts** (see point [3.2.2.2.](#) for negotiations on subject matters covered by both EU competences and sole national competences).

The content of the negotiating directives necessarily varies from case to case. However, as a general line, the **negotiating directives should be short and general** and should not go into too much detail.

Negotiating directives should not contain a first draft of the agreement or "standard clauses". Indeed, overly detailed negotiating directives could hinder the negotiator's necessary margin of manoeuvre and could potentially force the negotiator to return to the Council for a modification of the authorisation where negotiations follow a different course from that envisaged in the initial authorisation. By way of example, the inclusion of draft provisions in the directives potentially raises the false expectation that all these elements will be the subject of negotiations, something to which the other side may not agree. In the alternative, where the negotiations start with a formal decision to open multilateral negotiations which refers to a text drawn up in the exploratory stage, reference should be made to that text in the negotiating directives.

For negotiations on subject matters covered by both EU competences and sole national competences, it is essential that the negotiating directives (under Article 218 TFEU) and, where it exists, the intergovernmental mandate, are coherent.

3.2.2. *The determination of the negotiator*

The determination of the negotiator depends on whether the subject matter is covered only by EU competences (exclusive or shared with the Member States) or is also covered by sole national competences.

3.2.2.1. Negotiations covered by EU competences only

(1) **Negotiations in areas outside CFSP**

In contrast with ex Article 300(1) EC, Article 218 TFEU does not explicitly provide that the Commission shall conduct the negotiations but states that the Council shall appoint "the Union negotiator or the head of the Union's negotiating team" (except for trade agreements where Article 207(3) TFEU continues to identify the Commission as the negotiator).

Given the general role of the Commission in representing the EU, provided for in Article 17(1) TEU, it is undisputed that, outside CFSP, the **Commission** will be appointed by the Council as the **negotiator for all negotiations of international agreements to which the EU may become a party**.

This applies **irrespective** of whether the subject matter covered by the negotiations falls under **exclusive competences** within the meaning of Article 3(1) TFEU or **shared competences** as provided for in Articles 4 and 5 TFEU.

Where the Commission has been appointed as the negotiator (or where it is leading the negotiating team, see below), the negotiations are effectively run,

depending on the situation, by a Commissioner (who could be the HR acting as Commission VP for external relations) and/or by an official of a Commission service or a staff member of the EEAS to represent it in the negotiations. In any event, the lead service must always ensure close coordination with other services concerned.

(2) **CFSP negotiations**

For agreements "related exclusively or principally" (Article 218(3) TFEU) to the CFSP, the Council must appoint the HR to conduct the negotiations (except where negotiations take place, exceptionally, at the level of heads of State and Government).

The HR will normally appoint a member of the EEAS staff to conduct the negotiations on his/her behalf.

(3) **Negotiations on both CFSP and non-CFSP issues**

Where negotiations cover subject matter falling both under the CFSP and other EU policies and where neither is purely ancillary to the other ("principally"), Article 218(3) TFEU provides for the appointment of "the Union's negotiating team" which is then comprised of both the Commission and the HR.

In this case, the negotiations will normally be conducted by staff members of both the Commission services and the EEAS. The head of the negotiating team will be either the HR (who may be represented by an EEAS staff member) or the Commission (which may be represented by a Commission official, or possibly by an EEAS staff member), depending on the thrust of the matters under negotiation.

3.2.2.2. Negotiations covering both EU competences and sole national competences

Depending on the specific circumstances and in the interest of unified external representation of the Union and its Member States, outside CFSP, the Commission could also conduct negotiations covering both EU competences and subject matter where the Member States have not conferred competences to the Union.

Where the Commission is not the sole negotiator for both EU competences and sole national competences, special attention should be paid to avoid that the Council decision authorising the opening of the negotiations has a hybrid nature (i.e. EU and intergovernmental, at the same time). Furthermore, a separate intergovernmental decision cannot cover fields conferred to the EU by the Treaties. The Commission services following the discussions in the Council must immediately consult the Secretariat-General and the Legal Service when a hybrid decision or a separate intergovernmental decision is prepared.

Where the Commission is not the sole negotiator for both EU competences and sole national competences, special negotiation arrangements should normally be agreed upon between the Commission and the Council. In the absence of such arrangements, the negotiator for the EU and the negotiator(s) for the Member States are nonetheless under the legal obligation to coordinate, in full mutual respect, and assist each other in the spirit of **sincere cooperation**.

A clear delimitation of areas of negotiation should be made wherever possible. Prior coordination of positions to be taken in the negotiations is essential, in particular for

those parts of the negotiations where sole national competences and EU competences are inter-related.

3.3. Adopting the authorisation to negotiate

Following the submission of recommendations by the Commission (or the HR), the Council can:

- authorise the opening of negotiations including the negotiation directives in conformity with the recommendation of the Commission (or the HR); or
- authorise the opening of negotiations including the negotiation directives and, in so doing, modify (in some cases, substantially) either or both of these; or
- refrain from adopting a decision, thereby refusing to authorise any negotiations to take place on behalf of the EU.

In accordance with Article 218(8) TFEU, the Council takes this decision by **qualified majority**, except where, in particular, the negotiations cover a field for which unanimity is required. Qualified majority applies as well for the opening of negotiations which also involve sole national competences (which are not simply ancillary to the EU competences) and for which Member States decide to adopt a separate intergovernmental decision (see point [3.2.2.2.](#)).

Furthermore, given that the decision to authorise negotiations is not taken on the basis of a "proposal" (Article 293(1) TFEU), **unanimity is not required** within the Council for **modifying the recommendation** of the Commission. Moreover, as long as the Council has not taken its decision, the Commission can alter or withdraw its recommendation.

3.4. The conduct of negotiations and initialling

3.4.1. *Legal and political responsibility of the negotiator*

The conduct of negotiations is the **sole responsibility of the negotiator**. While the negotiator is not legally bound by the negotiating directives (point [3.2.1](#)), he/she is responsible for assessing how far he/she can deviate from them and in what circumstances he/she must return, after an Inter-institutional Relations Group (GRI) procedure, to the Council.

Where the Commission is not the sole negotiator, in particular in situations where negotiations cover subject matters of EU competences and of sole national competences, both negotiators must respect the **duty of sincere cooperation** in their dealings with each other.

3.4.2. *Practical modalities*

Unless it is logistically impossible or genuinely prevented by particular rules of an international organisation, the EU negotiator must always speak from behind the EU nameplate. In particular circumstances, a Member State or the Member State holding the Presidency of the Council may need to speak behind the EU nameplate on behalf of the EU and its Member States.

In any event, a Member State (including the Member State holding the Presidency of the Council) should not speak behind its national nameplate on behalf of the EU but only either on sole national competences or to support the EU position presented by the EU negotiator.

The speaker should specify at the beginning of his/her intervention whether he/she speaks on behalf of the "EU" or the "EU and its Member States". No other intervention should be made from behind the EU nameplate.

For practical (and transitional) reasons it may be advisable to arrange with the organisers in advance that the EU nameplate is next to the nameplate/flag of the Member State holding the Presidency of the Council. In addition, it is helpful if only one "EU microphone" is used.

Where documents are tabled during negotiations as EU negotiating positions, they must bear the EU logo or that of the EUDel but not a logo of a Member State (including the Member State holding the Presidency of the Council).

3.4.3. Role of the special committee, cooperation with Member States and the Council

The negotiator may need to conduct negotiations "in consultation" with the **special committee** appointed by the Council under Article 218(4) TFEU or, for trade agreements, under Article 207 TFEU.

The said committees are not mandated to issue instructions to the Commission nor does the Treaty envisage a right of the members of the special committees to be present during the negotiation sessions (for on-the-spot coordination see point [3.4.4.](#)). The Commission is only bound to consult the committee on a regular basis, before or after the negotiating sessions.

Member States have both a role and an interest in being closely involved in negotiations conducted by the Commission and the Commission must approach these issues in a spirit of partnership. The Commission can only represent the Union effectively with the support of the Member States and often needs to draw on their specific expertise. Any successful negotiation therefore relies on a high and continuous level of transparency, consultation from the early stages and involvement of Member States, commensurate with the negotiating responsibilities entrusted to the Commission and the need for specific expertise in the areas concerned.

3.4.4. On-the-spot coordination

In addition to the preparation and follow-up of the negotiations in Brussels within the special committee, coordination with the Member States may take place on the spot, i.e. at the margin of the negotiations. Although these meetings are not expressly provided for in the Treaties, they are long-established in practice. Such coordination meetings are important, as they serve the purpose of addressing unforeseen issues that arise.

However, such meetings should take place in accordance with a number of "rules" bearing in mind the Treaties, in particular:

- These meetings should be **convened and chaired either by the negotiator or the EUDel** (the latter in case negotiations take place at a location where an EUDel exists).
- Under no circumstances can these meetings amend the negotiation directives. This is the prerogative of the Council following a recommendation of the Commission (or HR for CFSP).
- On-the-spot coordination is **not meant for lengthy discussion of institutional and procedural issues**. Fundamental questions of such nature should be referred back to Brussels.

3.4.5. *Information of EEAS/EUDel*

Close cooperation and coordination with the EEAS and the EUDels is essential. Therefore, responsible units in the EEAS or relevant EUDels must be regularly informed and invited to particular inter-service meetings chaired by the lead DG.

More details can be found in the "Vademecum on Working Relations with the European External Action Service (EEAS)"⁵⁹.

3.4.6. *Cooperation with the European Parliament*

The European Parliament is to be informed at all stages of the procedure.

Detailed rules about the inclusion of a delegation of Members of the European Parliament as an observer as well as the procedures for keeping the Parliament informed are set out in points 25 to 27 of the Framework Agreement and points 3 to 5 of its Annex III.

3.4.7. *Inter-service consultation*

Since the inter-service consultation on the proposal for signature of an agreement can only be a formal consultation – but, at that stage, the draft agreement will already have been initialled - it is important that during the negotiations the lead service keeps all other interested services, including the EEAS, fully informed about any developments which may be of interest to them.

In particular, the lead service must ensure coordination of its position with the interested services on any possible contentious issue which may arise during negotiations, which is not clearly covered by the negotiating directives.

3.4.8. *Initialling*

The negotiators of the parties involved in the negotiations usually "initial" the agreed text. Initialling has no legal effect beyond **marking the end of the negotiations**.

It should not be confused with the signature of the agreement.

⁵⁹ http://myintracomm.ec.europa.eu/sg/en/f/f3/Documents/eeas_vademecum_ares25273.pdf

In practice, an agreement negotiated by the Commission may be initialled by the Director-General, the Director, the Head of Unit or even, in exceptional circumstances, another official.

3.5. Signature and provisional application of the agreement

Signature of the agreement subject to ratification does not entail that the Union and its Member States are legally bound at international level⁶⁰. Signature only constitutes a **preliminary endorsement of the agreement**. It demonstrates the signatory's intent to examine the treaty in its domestic system and consider ratifying/concluding it.

However, while signing does not legally commit a party to ratification, it does oblige that party, by virtue of public international law, to **refrain from acts that would defeat or undermine the agreement's object and purpose**⁶¹.

In accordance with Article 218(5) TFEU, it is for the **Council, on a proposal from the negotiator** (see point [3.2](#)), to **authorise the signing** of the agreement. In accordance with Article 218(8) TFEU, the Council takes this decision by qualified majority, except where, in particular, the agreement covers a field for which unanimity is required. The European Parliament is to be informed (Article 218(10) TFEU).

The Council's practice until now was to authorise its President to designate the person(s) empowered to sign the Agreement. In light of the entry into force of the Treaty of Lisbon and in particular of Articles 17(1) and 27(2) TEU, the Commission services must take all measures necessary to ensure that the Presidency empowers a Commission representative to sign (and/or the HR/VP, when he/she was nominated as negotiator, or formed part of the negotiating team). The participation also by a national minister can be considered in exceptional circumstances. See template in [Annex III](#).

Where the proposal for signature and conclusion is submitted at the same time, **two different acts** must be prepared having regard to the different powers of the European Parliament. This does not, however, apply to agreements which can no longer be signed but only acceded to.

In certain cases, it may be appropriate for the proposal to authorise the provisional application of the agreement before its entry into force (Article 218(5) TFEU).

3.6. Conclusion (accession)

Conclusion is the act of ratification of the agreement, meaning that the **agreement becomes binding** upon the Union and on its Member States (Article 216(2) TFEU).

In accordance with Article 218(6) TFEU, it is for the **Council**, on a proposal from the negotiator (see point [3.2](#)), to **conclude** the international agreement. Here again, in accordance with Article 218(8) TFEU, the Council takes this decision by qualified majority, except where, in particular, the agreement covers a field for which unanimity is required.

⁶⁰ Note that, in certain exceptional circumstances, signature can imply conclusion of the agreement. In such a case, the procedure provided for in Article 218(6) TFEU must be respected prior to the signature of the agreement.

⁶¹ Article 18 of the Vienna Convention on the Law of Treaties (1969).

As far as **the European Parliament** is concerned, three situations must be distinguished:

- **Agreements which "relate exclusively" to the CFSP:** the Parliament is only kept informed at all stages of the procedure (Article 218(10) TFEU), but is otherwise **not involved** before the conclusion of such agreements.
- **Agreements listed in point (a) of the second subparagraph of Article 218(6) TFEU** (most agreements, including all agreements covering fields where the ordinary legislative procedure applies): the European Parliament must give its "**consent**" before conclusion; in these cases, in an urgent situation, with the agreement of the Parliament, a time-limit can be set for its consent. In view of the fact that the ordinary legislative procedure applies in most policy areas (now also including trade, and economic cooperation with third countries other than development countries), the consent procedure will apply **in almost all cases**.
- **On all other agreements:** the European Parliament must be **consulted** before conclusion; in these cases, a time-limit may be set for the Parliament's consideration of the agreement, the length of which would depend on the urgency of the matter; in the absence of an opinion within the time-limit, the Council may conclude the agreement (point (b) of the second subparagraph of Article 218(6) TFEU).

Where the Commission is the (co-) negotiator, a formal act to be adopted by the College must be prepared with the negotiated (or already signed) text attached. Where the proposal for signature and conclusion is submitted at the same time, two different acts are to be prepared given the different powers of the European Parliament (see [Annex III](#)).

3.7. Agreements in the Area of Freedom, Security and Justice

In accordance with Protocol No 22, Denmark does not take part in the adoption of Union measures pursuant to Title V of Part Three of the TFEU (Articles 67 to 89 TFEU: "Area of Freedom, Security and Justice"), with the exception of measures determining the third countries whose nationals must be in possession of a visa when crossing the external borders of the Member States, or measures relating to a uniform format for visas⁶². These measures (internal legislation or international agreements) are not binding upon or applicable in Denmark.

Denmark participates in all the measures building upon the Schengen *acquis* under international law. As far as the international agreements related to Schengen are concerned, given that the EU cannot exercise external competences for Denmark, Denmark concludes bilateral agreements with the third country in question. These measures are therefore affected by Article 4 of Protocol No 22.

Furthermore, in accordance with Protocol No 21, the United Kingdom and Ireland do not take part in the adoption of Union measures pursuant to Title V of Part Three of the TFEU, *unless* they notify the wish to take part in the adoption and application of the measure ('opt-in') within three months after the proposal has been tabled or any time after its adoption; measures in the Area of Freedom, Security and Justice are thus only binding upon and applicable in the United Kingdom and/or Ireland in so far as such a notification has been made.

⁶² Article 6 of Protocol No 22.

In addition, while pursuant to Protocol No 19 the Schengen *acquis* does not apply to the United Kingdom and Ireland, either Member State may at any time request to take part in some or all of the provisions of this *acquis*.

3.7.1. Agreements which fall wholly within the scope of Title V

It follows thus from Protocols No 19, No 21 and No 22 that when the EU concludes an international agreement on matters such as migration, readmission, asylum, judicial cooperation in civil or criminal matters, or police cooperation, this agreement is concluded by the Union composed of only 24, or, as the case may be, 25 or 26 Member States.

This circumstance must of course be made clear to the third countries during the negotiations, and will be expressed in appropriate recitals in the agreement and in the Council decisions on the signing and conclusion of the agreement (see [Annex III](#)). As the agreement will not be applicable with respect to Denmark (and, as the case may be, to the United Kingdom and/or Ireland) an appropriate clause on territorial application may also be necessary (see templates in [Annex III](#)).

For the internal decision making procedures, and in particular for the role of the Commission in the negotiations, there are no particular consequences, apart from the fact that Denmark and, as the case may be, the United Kingdom and/or Ireland, will not participate in the decision making process in the Council⁶³.

The United Kingdom and Ireland can proceed to an 'opt-in' notification at the start of the negotiating process, or later. They will only participate in the decision making process on the authorisation to negotiate, on signature and on conclusion from that notification onwards. In case no notification is made before signature, the text of the agreement will have to indicate that the agreement will not apply to the Member State(s) concerned; in that case, the agreement should contain a clause which permits, by notification to the third country, the extension of the territorial application at a later stage to these Member States.

3.7.2. Agreements which fall partially within the scope of Title V

An agreement falls partially within the scope of Title V of Part Three of the TFEU if it is considered that the Council decisions for the signature and conclusion must be based, together with one or several legal bases from other parts of the Treaty, on a provision of that Title (Articles 67 to 89 TFEU). Therefore it should be examined on a case-by-case basis whether such an agreement would not fall within the scope of that Title, in spite of the fact that it contains an aspect which relates to that Title, because that aspect is only ancillary to the object of the agreement.

This poses the problem that for part of the agreement, the Union is to be understood as the Union composed of 27 Member States, whereas for the other part of the agreement, the Union is only composed of 24, 25 or 26 Member States.

In case the agreement concerned is moreover a "mixed agreement" - that is an agreement to be concluded by the Union and its Member States - the practical consequences of

⁶³ In this case, qualified majority will be defined, until 31 October 2014, in accordance with the rules set out in Article 3(4) Protocol No 36, and, from then on, in accordance with the rules set out in Article 238(3) TFEU.

Protocols No 21 and No 22 are rather limited. Indeed, the lack of competence for the Union to agree to the provisions falling within the scope of the Area of Freedom, Security and Justice insofar as Denmark (and possibly the United Kingdom and/or Ireland) is(are) concerned, is offset with regard to the third state by the fact that in any event all Member States are also Party to the agreement, so that the whole agreement will be applicable in all 27 Member States. Appropriate recitals will clarify the legal situation.

However, where the agreement is concluded only by the Union, the application of the provisions of that agreement will be '*à géométrie variable*'. This should be clarified by appropriate recitals and provision on territorial application or, where necessary, in a declaration of competences.

The circumstance that the agreement is based on legal bases whose procedures are incompatible with each other (as qualified majority with 27 Member States is not the same as with a lesser number of Member States) renders the internal decision making process more complex. Indeed, the Commission will have to propose to the Council two decisions for signature or conclusion, one based on the relevant Treaty provision(s) outside Title V, and one based on the relevant provision(s) of Title V (see [Annex III](#)). Whenever this issue arises, the Legal Service needs to be consulted in due time.

3.8. Monetary agreements

The Treaties do not lay down the procedure for the negotiation and conclusion of agreements concerning monetary or foreign exchange regime matters: Article 219(3) TFEU leaves it to the Council to decide, acting on a recommendation of the Commission and after consulting the ECB, on the 'arrangements' to that effect. Thus, in principle, the Treaty leaves the Council free to decide what the procedure for negotiation and conclusion of a given monetary agreement will be - it may, for example, provide for a role in that procedure for the ECB or for a Member State - provided that these arrangements ensure that the Union expresses a single position, and that the Commission is fully associated.

However, the Council should also respect the overall institutional balance. Therefore, contrary to past practice, the Commission should as a general rule recommend to the Council that the 'arrangements' which will govern the negotiation and conclusion of a given monetary agreement (in particular when it concerns the authorisation for a third country to use the euro) remain as close as appropriate to the provisions of Article 218 TFEU; the Commission should conduct the negotiations and the Council should decide upon the signature and conclusion.

3.9. Agreements which fall within the scope of the Euratom Treaty

As already explained in point 1.1., the European Atomic Energy Community (Euratom) continues to exist with its own legal personality alongside the Union (Article 184 Euratom Treaty), vested with the power to conclude international agreements (Articles 101, 102 and 206 Euratom Treaty).

The Euratom Treaty provisions on negotiation and conclusion of international agreements are different from those of Article 218 TFEU; the most striking difference is a more prominent formal role of the Commission in the procedure.

3.9.1. Agreements which fall wholly within the scope of Euratom

International agreements whose subject matter falls wholly within the scope of the Euratom Treaty are negotiated by the Commission in accordance with the directives laid down by the Council (the second subparagraph of Article 101 Euratom Treaty). The Treaty does not envisage the designation by the Council of a special committee, but in practice the negotiations are followed by the relevant Council working party.

The agreement will be concluded by the Commission with the approval of the Council, which acts by a qualified majority (the second subparagraph of Article 101 Euratom Treaty). No intervention of the European Parliament is required, though the Commission's commitments in the Framework Agreement with the Parliament to keep it informed about the negotiations also apply to Euratom.

The procedure has two exceptions:

- firstly, agreements whose implementation does not require action by the Council and can be implemented within the limits of the relevant budget will be concluded solely by the Commission, though the latter must keep the Council informed (the third subparagraph of Article 101 Euratom Treaty), and
- secondly, agreements establishing an association involving reciprocal rights and obligations, common action and special procedures will be concluded by the Council, acting unanimously after consulting the European Parliament (Article 206 Euratom Treaty).

3.9.2. Agreements which fall partially within the scope of Euratom

Many comprehensive agreements with third countries such as association or cooperation agreements also contain a clause on cooperation in the area of nuclear energy. As a consequence, not only the European Union, but also the European Atomic Energy Community will be a Contracting Party.

As a consequence, next to the normal procedures under Article 218 TFEU, the procedure provided in Article 101 Euratom Treaty (or as the case may be in Article 206 Euratom Treaty) will also have to be followed for the decisions on signature and conclusion of this agreement.

4. NON-BINDING INSTRUMENTS

4.1. Types of non-binding instruments

As a general principle, a distinction should be made between the following types of non-binding instruments:

- **Administrative arrangements** that the Commission's services or the EEAS may sign with their counterparts in third countries' administrations and which do not comprise legal or political commitments⁶⁴. These arrangements should preferably be signed by a Commission official and should refer to the relevant Commission service, not the EU, and a department or agency rather than the Government of the third State, as the relevant 'parties'. The arrangement should be limited to technical/administrative matters, should be drafted carefully so as to avoid any international treaty language, and should not be dependent on action to be taken by the other institutions. Signature of such arrangements does not require the involvement of the Council. As a general rule, approval of the College should be sought before signature. In certain cases, however, with the agreement of the Secretariat-General, approval by the College is not necessary where an arrangement is clearly restricted to mere technical/administrative issues (e.g. exchange of information) at working level.
- Instruments which entail **political commitments**. There is a multitude of such instruments where the EU engages into relations with a third country, a third country's administration, an international organisation or other international fora. These instruments are adopted in various forms: Memoranda of understanding ("MoUs"), Declarations, Joint Demarches, Joint Statements, Codes of Conducts, Arrangements, etc. They are often signed or adopted in the framework of international bodies or in the context of international conferences or summits.
- The Legal Service **must always be consulted at an early stage** on all documents so as to verify their very nature, and therefore determine the procedure which should be followed. The Secretariat-General and the EEAS should also be consulted at an early stage to ensure consistency in the Union's action.

The following guidelines deal only with non-binding instruments entailing political commitments.

4.2. Content of the instrument

The intentions of the parties, and thus the content of an instrument, are decisive to determining its legal nature⁶⁵. Accordingly, careful drafting is crucial to ensure that MoUs do not risk being considered as legally binding, in which case Article 218 TFEU would be applicable and the Council would be competent to conclude it.

Careful drafting of non-binding instruments will ensure that they do not contain any formulation which can be interpreted as legally binding.

⁶⁴ Merely practical arrangements on exchanges of information, work programmes, etc.

⁶⁵ Article 2.1.a of the Vienna Convention on the Law of Treaties (1969); see also Case C-327/91 *France v Commission* [1994] ECR I-3641, paragraph 27; and Case C-233/02 *France v Commission* [2004] ECR I-2759, paragraph 42.

In particular, the instrument should be limited to endeavour clauses and **must not contain** any "Treaty-type" language or clauses such as "Party", "shall/will", "entry into force/coming into effect", "Articles", "agree/decide", "obligations/commitments". On the contrary, such instruments should use terms such as "Sides", "envisage/intend", "sections/paragraphs", "accept". In the same vein, as regards the structure of MoUs, it is appropriate to adopt an informal style and to avoid elements which are typical under international agreements such as a preamble, articles and final clauses (dispute settlement, formal clause on the entry into force, amendments or termination of the MoU).

In any event, the intention of the signatories should be clarified by inserting a clause stating, for instance, that "this Declaration does not constitute an agreement binding under international law" or that "this text does not intend to create rights or obligations under international law". It must, however, be noted that such a clause cannot by itself suffice to express the real intentions of the signatories, which result from an analysis of the wording, content and purpose of the MoU.

4.3. Procedure

4.3.1. *Interinstitutional aspects*

As the Treaties do not contain any provision explicitly regulating the adoption of non-binding instruments, the procedure to be applied **depends in practice on the nature and content of the instrument**.

In cases of **non-CFSP**-related instruments/political declarations which do not contain any legally binding commitments for the EU, the Commission should be able to sign/adopt them, since the instrument is only a formal (sometimes solemn) way of expressing that the EU has the same position as one or more third states. It forms part of its task of representing the EU on the international scene in policy areas other than CFSP.

At the same time, while not being legally binding in the strict sense, it is clear that many instruments engage the EU (at least politically) to a certain course of action (for instance, the instrument may set up a certain institutional structure or it may prejudice the objectives and expected results of a legally binding agreement to be negotiated on the basis of the instrument); even where the content as such is standard, the fact that such an instrument is signed with a particular third state may be politically sensitive. Such considerations may justify the involvement of the Council.

Against this background,

- as a minimum, the Commission should **keep the Council bodies fully informed** about the preparation of such instruments, for example through a Commission Communication or Commission services working paper, and available drafts should be considered at Working Party or Coreper level;
- **soft law documents** which contain *new* concrete political commitments or establish important *new* policy orientations should be endorsed, in one form or another, **by the Council**. Documents which merely implement existing political orientations do not need to be approved by the Council.

In the preparation of international conferences where soft law documents are expected to be adopted, **the Commission should take the initiative and should, where possible,**

insist on the approval of an EU position well in advance of the adoption of the soft law instrument, so as not to jeopardise the role of the Commission in the preparatory phases, including negotiations on a draft text, and so as to ensure a coherent Union stance. Often, all or at least some Member States participate in Conferences adopting soft law instruments and there is thus a considerable risk of disparate policies if the Commission does not involve the Council at an early stage in order to secure EU co-ordination towards a common position. The fact that the instrument is not legally binding does not allow Member States to usurp EU competence, and *vice versa*.

4.3.2. *Commission's internal procedures*

Insofar as the internal procedures of the Commission are concerned, and in order to respect the collegiality principle, such instruments should in principle be approved by the College - which will authorise a Commissioner or a senior official to sign or adopt the instrument.

The preparatory phase should start well in advance, so as to ensure that the internal procedures can be completed correctly and in a timely manner. In particular, the Legal Service and the Secretariat-General should be consulted at an early stage in order to assess the very nature of the instrument and the need to go to the College. The EEAS should also be informed in advance, to have the possibility to engage actively in the preparations when relevant, and must be consulted as part of the inter-service consultation (CIS). The same applies to all other interested services.

A **written procedure** must be followed (a communication to the College requesting for approval of the MoU and authorisation to sign it suffices; there is no need for a formal decision or for a reference to the legal basis).

As the adoption of non-binding instruments sometimes takes place within very short timeframes, there may be **flexibility** as regards procedural time-limits and the linguistic regime in accordance with rules 12-4.3 (Expedited written procedure), 12-4.4 (Urgent written procedure) and 12-13.1 (languages) of the rules giving effect to the rules of procedure of the Commission⁶⁶.

Where it appears that the instrument, because of its importance or of its political sensitivity, or because it has been subject to disagreements between services during the CIS, needs to be the subject of discussions at political level in the Commission, it can be submitted to the GRI with a view to an oral procedure.

4.4. **Specific situations**

Two situations deserve a particularly cautious approach.

Firstly, the situation where **a member of the Commission adds his/her signature to a non-binding but politically significant** document which sets forth specific rights and obligations addressed not to the Commission but rather to the other signatory. On the basis of this signature, the Commission might be found responsible for any kind of obligations which could actually be construed as being capable of binding it (e.g. an acknowledgment that the project is ecologically acceptable may have important

⁶⁶ Commission Decision of 15 November 2005 amending its Rules of Procedure (2005/960/EC, Euratom) and rules giving effect to its rules of procedure, C(2005) 4416.

consequences). The Commission could also be seen as potentially committing itself to a certain course of action (even if, again, only politically, because a political commitment naturally can be "enforced" by means of political pressure which can compromise the Commission's course of action in the future).

Secondly, the situation where **a member of the Commission is to sign a MoU in a different capacity to that of the other signatories** (for instance, a MoU could be signed by governmental ministers "in the presence of a Commissioner"). Such a practice is not recommended and the proper course of action would be to restrict such signature only to situations where the presence of the Commission is justified due to its specific role (e.g. as a guarantor of the project discussed in the MoU, etc.) or to an MoU setting out details of a particular project financed out of EU budget. In such instances, the role of the Commissioner (Commission) is clearly special and distinct from that of other participants/signatories, and the distinct treatment justified.

ANNEXES

Annex I: Frequently Asked Questions

The Frequently Asked Questions follow the Chapter headings of the *Vademecum*.

1. GENERAL PRINCIPLES OF THE EXTERNAL ACTION OF THE EUROPEAN UNION

How can I assess if the EU can act externally?

See point [1.3.1](#). You have to assess if EU law (the Treaties or secondary law) provides that the EU can act externally in the policy area concerned. The power to act externally may be explicit. However, in most cases it flows implicitly from the power to act internally ("implied powers").

To establish whether the EU has implied powers to act externally, you should refer, as a starting point, to the internal competences of the EU (resulting either from the Treaties or from secondary law) and to their scope. Please note that certain internal competences could entail possible restrictions on external action: for instance, where harmonisation is excluded internally, the EU has no competence to conclude an international agreement which would have the same effect.

Generally speaking, if legislation has been adopted by the EU within a given area, the EU has the competence to act externally to an extent comparable to the internal policy. If there is no such internal EU legislation, the EU can still act externally within the powers conferred to it. In this case, you must carefully determine whether the conclusion of an international agreement is necessary to achieve a policy objective of the Treaties.

How can I judge if an agreement falls under the exclusive competence of the EU?

See point [1.3.2](#). There are different situations in which only the EU is entitled to act externally, in particular as concerns the negotiation, signature and conclusion of international agreements. Concerning the latter, the most frequent test flows from the principle laid down in the 'AETR' case-law: An agreement falls within the EU's exclusive competence when it can be demonstrated that the provisions of the agreement fall within the scope of internal common rules, or within an area already largely covered by such rules.

Does the existence in an agreement of purely ancillary provisions which would fall within sole national competence mean that this agreement is to be concluded as a mixed agreement?

The reason why certain agreements are concluded as mixed agreements is that the agreement concerned comprises some provisions which fall within EU competence and other provisions which fall within Member State competence.

However, the existence in an agreement of purely ancillary provisions which would fall within sole national competence does not necessarily mean that the agreement is to be concluded as a mixed agreement.

Mixity does not flow from the mere fact that the subject matter of the agreement falls within a shared competence area or from the mere existence of ancillary provisions resorting to Member State competences: it can only be the result of an in depth analysis of the content and purpose of the envisaged agreement.

This analysis should be done by the leading DG in close cooperation with the Legal Service, before launching a Commission initiative, and should be presented in the Explanatory memorandum of the proposal itself.

Should Member States coordinate their actions with the EU in areas of so-called "parallel competences" (in the area of research, for example)?

Member States and the EU are all obliged to respect the principle of sincere cooperation (Article 4(3) TEU) and to ensure that Member States and the Union research policies are mutually consistent (Article 181(1) TFEU).

Should there be negotiations in such areas, the representative of the EU (the so-called EU negotiator) and the Member States must cooperate closely during negotiating process, aiming for unity in the international representation of the Union and its Member States.

Moreover, the EU negotiator and the MS participating (by themselves or represented by whoever they choose) must negotiate in a way that the final agreement respects the respective national and EU competences.

What should I do if Member States in the Council Working Group contest the EU's right to act externally?

Questions of horizontal/institutional nature do not fall within the remit of sectoral Council working groups but must be referred to COREPER.

If you are faced with the refusal of the Council at working group level to recognise Union competence, you should table a Commission's scrutiny reservation and promptly inform the DG's GICE correspondent and, where necessary, the Legal Service and the Secretariat-General.

At international level, discussions – and even more so disputes - with Member States on competences must be kept internal (i.e. they should be discussed, if at all, in internal coordination meetings) and should under no circumstances be exposed externally to third parties.

How do I know what legal basis to use?

See point [1.4](#). The legal basis of an act (e.g. the decision to sign and conclude an international agreement) flows from the content and the aim of the act concerned. While there are situations in which more than one legal basis may be necessary for the signature and conclusion of an international agreement, the multiplication of legal bases should be avoided. Unless the choice of the legal basis is obvious, the Legal Service should be consulted as early as possible.

You say that there is no role for the Member State holding the Presidency of the Council in external activities? But in reality it continues – why?

It is crucial to differentiate between the internal decision making process (see point [1.5](#)) and the external action based thereon (see point [1.6](#)). While the Member State holding the Presidency of the Council has an important task for the internal decision-making as it presides over the different Council formations (except for the FAC), it cannot represent the EU externally.

It may be the case, however, that the HR asks the Member States holding the Presidency of the Council to replace him/her at Ministerial level should CFSP/CSDP matters be discussed.

If sole national competences are included in an agreement or in the related discussions at international level, the Member States may ask a Member State (often the Member State holding the Presidency of the Council) rather than the EEAS or the Commission to represent them on these matters.

There are also specific situations which call for transitional or practical solutions that are not fully aligned with the Treaties. Resort to such solutions should be exceptional and clearly identified as without prejudice to the Treaties.

For example, there may also be practical or logistic obstacles which prevent the Union representatives (EUDel or Commission for non CFSP) from fulfilling its full responsibilities in external representation. The EU may not be a member of an international organisation and have no seat at the meeting table, with the result that the EU position will need to be delivered from behind the nameplate of a Member States (possibly the Member State holding the Presidency of the Council).

In other cases, the EUDel or Commission may not have sufficient personnel to cover all the negotiating and outreach session at large international conferences. One way of dealing with such situations is to agree on practical "burden sharing" arrangements (e.g. with Member States but not necessarily with the Member State holding the Presidency of the Council) which must always make clear that they do not prejudge the division of competences as laid down in the Treaties.

"Practical arrangements" have been mentioned in the Council Working Group: what do they refer to?

In order to facilitate, in a pragmatic way, the implementation of the rules of the Treaties related mostly to external representation of the EU in areas of shared competence, practical arrangements are sometimes agreed upon. These arrangements are legally non binding and must always specify that they do not prejudge the division of competences as laid down in the Treaties.

The term 'practical arrangements' has different meanings in different contexts:

- Practical arrangements have been agreed between EUDels to multilateral organisations and the Member State holding the Presidency of the Council. These arrangements are only transitional and aim to help the EUDel in incrementally assuming its representation and coordination responsibilities. They have to be agreed at local level (between the EUDel and the Member State holding the Presidency of the Council). The Council Working Group and the Commission should be informed of them but do not need to

agree on them.

- Exceptionally, practical arrangements are prepared in view of "mixed negotiations" (i.e. negotiations conducted by the Commission on EU competences and the representative designated by Member States on sole national competences). The purpose of these arrangements, agreed between the negotiators, is to specify who negotiates what on behalf of the EU and its Member States where the content of the negotiations is such that this cannot be set out (or has not been set out) in the decision(s) to open negotiations.

You should not prepare practical arrangements for conferences that do not involve negotiations or decision taking.

The European Parliament is to be immediately and fully informed at all stages of the conclusion of international agreements. What about national Parliaments?

The obligation to inform national Parliaments, as provided for in Protocol No 1 to the Treaties, does not apply to the procedure for the conclusion of international agreements.

2. EXTERNAL REPRESENTATION OF THE EUROPEAN UNION

Do I always need to speak on the basis of an agreed position?

Yes, see point [2.1](#). An EU position normally results from EU law or from European Council or Council conclusions. When, on a specific subject matter, there is no EU position, or where the EU position is insufficiently developed for the circumstances, services must avoid expressing an EU position. In exceptional circumstances and where it is necessary to safeguard the interests of the EU, the EU representative may have to intervene. This should be done in such a way that it does not prejudge a future position of the EU.

Where should the details on who is to represent the Union be spelled out in agreements with third countries?

See points [2.2.2](#) and [2.3.2](#). In the context of agreements with third countries, the details of the representation of the EU should be specified, preferably in the Council Decision on signature/conclusion. They should never be set out in the international agreement itself. Nor should they be part of the discussions with third countries or organisations.

Can discussions on the EU Position take place in local coordination meetings?

Local coordination (depending on the context, also referred to as "on the spot"/"sur place" coordination) can never develop into a policy setting activity. The EU position is, where necessary, to be established in the relevant Council formations (see points [2.2.1](#) and [2.3.1](#)).). Furthermore, EU competence issues, institutional or procedural matters should *not* be discussed locally.

If such discussions arise, they should be referred back to Brussels and to the central services (Secretariat-General, Legal Service and EEAS).

Who chairs local coordination meetings?

Pursuant to the Treaty of Lisbon, EUDels take over the task of representing the Union on CFSP and non-CFSP matters. This includes all tasks formerly exercised by the Member State holding the Presidency of the Council, including the chairing of local coordination meetings. Where there is an EUDel to a multilateral organisation, the EUDel chairs such coordination meetings.

Where there is no EUDel, in the interest of effective external action of the EU, local coordination should normally be ensured by the institution that represents the EU externally (the Commission in non-CFSP matters). Arrangements should be worked out pragmatically.

Have the EUDels taken over the representational role of the Member State holding the Presidency of the Council?

Where the Member State holding the Presidency of the Council was tasked in the past with presenting the agreed EU position on a particular subject matter, the EUDel can do the same.

Can the Member State holding the Presidency of the Council sit behind its nameplate and speak on behalf of the EU? Can I sit behind a Commission nameplate?

The EU can no longer be represented by the Member State holding the Presidency of the Council seated behind the nameplate of its country in international fora. The representative of the EU should sit behind the EU nameplate.

EU positions must be delivered from behind the European Union nameplate.

I am invited to a meeting of a multilateral organisation/conference – whom should I inform 'sur place'?

If you plan to attend meetings of multilateral organisations, you should inform the relevant EUDel which will ensure that they are informed of relevant external representation arrangements.

How is the EUDel accredited to international conferences?

Depending on the circumstances, a letter of credence may have to be sent to the organisation/conference informing it of the composition of the Union delegation. In this context, a difference is to be made between the persons habilitated to represent the Union (Commission or EEAS staff in non-CFSP matters) and other members of the delegation (personnel of the Council, MEPs and their collaborators etc.).

There are two types of letter of credence:

- In one letter the President of the Commission delegates power to a Commissioner to represent the EU (in case of competences exercised by the Commission on behalf of the EU).
- The second type of letter is to inform the international negotiation/Conference organisers about the composition of the delegation when the Commissioner is not part of it (lower level meetings).

For both, the procedure to follow is the same:

- The draft letter is drafted and approved by the hierarchy of the service concerned (see templates in [Annex III](#)).
- The draft letter is sent (by signataire) to the Legal Service for agreement (this agreement could be confirmed by email)
- Once these agreements are confirmed, the Legal Service's agreement together with the relevant documents related to the negotiation/Conference (invitation, etc.) are to be sent by the service concerned to the Protocol service.
- The Protocol will print the letter and prepare the signataire to be presented to the President of the Commission.

What is meant by unity of representation? How do we apply this in practice?

To the outside world, the EU and its Member States should appear united.

To the extent that it is logistically feasible, the EU representatives (Commission, EUDel and, if appropriate, Member State expert or the Member State holding the Presidency) should sit and speak behind the EU nameplate.

The use of one "EU microphone" could facilitate this approach.

Should the Member State holding the Presidency of the Council be empowered by the Member States to speak on their behalf, the multilateral organisation concerned should be asked to seat the EUDel next to the delegation of the Member State holding the Presidency of the Council.

The Member State holding the Presidency of the Council (or any other Member States speaking on behalf of EU Member States) speaks on behalf of the Member States, not on behalf of the EU.

Should the role/competence of the EU representative be contested publicly by a Member State, the EU representatives should refrain from responding publicly. Institutional issues should remain internal and should be referred back to COREPER.

3. NEGOTIATION AND CONCLUSION OF INTERNATIONAL AGREEMENTS

How Should I Plan for International Negotiations?

Services should plan and identify the following well in advance:

- the timetable of international negotiations.
- international meetings which may require either the adoption of a Council decision authorising the negotiation of an international agreement or the establishment of a Union's position for the meeting.

Should it be necessary to establish an EU position, the Commission should take the initiative and make a proposal for a College decision and for onward transmission to the relevant Council Working group.

Similarly, services should pay special attention to conferences which might result in conclusions, action plans or programmes which could impose obligations on the EU. Prior co-ordination in the relevant Council Working group may prove necessary.

This timetable of international events will be dispatched to the **GICE** network and regularly updated on the basis of the latter input.

Where the relevant services are uncertain as to whether an EU position is needed or unsure as to the appropriate course of action, they should consult the Legal Service and the Secretariat-General.

If a Commission decision is needed, services should introduce a work item into Agenda Planning (e.g. under the type of initiative: "Recommendation for Decision authorising the opening of negotiations and negotiating Directives").

The consistency and effectiveness of EU external action requires close coordination between the Commission services and EEAS, especially during the planning, coordination and decision-making stages.

See [Vademecum on Working Relations with the European External Action Service \(EEAS\)](#), part 2 "Planning Coordination and Decision making".

How should I prepare for negotiation of an agreement? What documents need to be prepared?

Once the informal phase of exploratory talks is over (see point [3.1.](#)), you need to prepare the documents on the basis of which the Council will formally decide to authorise the opening of the negotiations. See point [3.2.](#) as well as the templates in [Annex III](#).

While the negotiating directives should be short and concise in order not to excessively bind the negotiator, depending on the circumstances, the explanatory memorandum will need to explain what the envisaged content of the agreement will be, how competences of the EU and Member States are affected by the subject matter of the negotiations and whether the envisaged agreement could be negotiated and concluded as a 'Union only' agreement.

In the negotiating directives, a wording which might weaken the negotiating role conferred on the Commission by the Treaty - such as “in close co-operation with the Member States” or “in conjunction with the Presidency” - should be avoided.

Remember that the European Parliament must be informed at all stages of the procedure (see point [1.5.3](#)), including of the recommendation of the Commission to authorise negotiations (see in particular points 23 and 24 of the Framework Agreement on relations between the European Parliament and the European Commission).

Can DG "X" be mentioned in the recommendation for a negotiation directive?

For all negotiations of international agreements to which the EU may become a party, the Treaties envisage two possible negotiators - the Commission and the HR. No reference should be made to a specific service in this context.

How should negotiations be tackled which affect competences of both the EU and of Member States?

Before the launching the Commission initiative for negotiating directives as well as throughout the negotiation and conclusion procedure, you should examine if it is possible to limit the exercise to matters of Union competence. This way you can avoid that the future agreement needs to be ratified by all 27 Member States before it can enter into force. Should it be necessary to include provisions falling under sole national competence within the scope of the agreements, it is worth examining if they could be separated from the main agreement in a specific Protocol. Remember to thoroughly assess the delimitation of competences and seek the views of the Legal Service in good time.

As already mentioned, even if the agreement contains some provisions which fall under national competence, the agreement does not automatically become mixed. This needs to be assessed in close consultation with the Legal Service. Please note that a cooperation agreement covering CFSP provisions as well as provisions on trade and cooperation in areas such as, for example, environment, migration, transport, energy, culture or drug abuse control can be concluded as 'EU only' agreements..

What changes might the Council introduce in the negotiating recommendation?

If the Council introduces changes to the Commission's Recommendation, it is important to ensure that these changes are in line with the Treaties. You should follow the Council working party discussions closely. Should a special committee be designated in accordance with Article 218(4) TFEU, it must be clear that its role is purely **consultative in nature**.

How are coordination meetings handled in the context of negotiations?

These meetings should be convened and chaired either by the lead negotiator or the EUDel (the latter in case negotiations take place at a location where there is an EUDel).

Under no circumstances can these meetings amend the negotiation directives, nor adopt "common positions". This is the prerogative of the Council following a recommendation of the Commission (or HR for CFSP).

On-the-spot coordination is not meant to be a forum for lengthy discussion of institutional and procedural issues. Fundamental questions of this nature should be referred back to Brussels.

Is the negotiator bound by the negotiating directives annexed to a Council Decision?

See [3.2.1](#) and [3.4.1](#). The conduct of negotiations is the sole responsibility of the negotiator. The negotiator is not "legally" bound by the negotiating directives. Therefore, if required by the evolution of the negotiating process, he/she has the power to deviate from the negotiating directives. He/she is however responsible for assessing in what circumstances he/she must return, possibly after a GRI procedure, to the special committee.

In that respect, he/she may use the coordination on the spot mentioned above to test "politically" how far he/she will be able to adapt positions to the needs of the negotiations, before referring the matter back to the Council.

However, as mentioned above, under no circumstances can the coordination meetings amend the negotiation directives, nor adopt "common positions". This is the reason why no voting is foreseen during such coordination meetings.

How are Member States involved in the negotiation process?

There is an important difference between the formal consultation of the Member States in the special committee and informal local coordination (see points [3.4.3](#). and [3.4.4](#).).

You should coordinate with Member States in the framework of regular EU coordination meetings in third countries/international organisations at the start of and during a negotiating meeting; such coordination meetings are crucial in order to address any new issues arising during negotiations and to inform Member States about the outcome of meetings where not all Member States could participate (e.g. outreach activities, small drafting groups).

You should ensure extensive debriefing of each negotiating session in the special Committee designated by the Council; the results of each negotiating session should be discussed with Member States to take stock of the stage of negotiations, progress in reaching the EU objectives and outline future work (outreach, preparation of new position papers or EU proposals).

You should draw on the expertise of Member States and, whenever necessary, invite Member State experts to informally join the EU negotiator; including by giving the floor to such experts on specific issues of expertise/experience if the Commission considers this to be in the interest of the negotiations.

You should provide an opportunity for Member States to comment on important negotiating texts, including by sharing with Member States papers or proposals, coming from third parties or to be submitted to them; inform Member States of other developments in the negotiations.

As appropriate, you should prepare and discuss lines to take for the Commission and Member States' use in their contacts with relevant third parties; particularly in

multilateral negotiations, it will often be helpful to ask Member State colleagues to engage in informal outreach with other delegations with which they have traditional ties or based on particular language skills as long as it is ensured that the negotiator is fully informed and keeps the full control over the process (see in particular point [3.4.1.](#)).

In cases where Member States, for the sake of coherence and consistency with negotiations on behalf of the EU, also entrust the Commission with the role of negotiator on their behalf, i.e. in areas falling under Member States' sole competence, the Commission will liaise closely on the spot with all Member States present at the negotiations in order to coordinate and take full account of Member States' positions.

Nota bene: the latter has been developed in practice of negotiations under shared competence (e.g. environment type) and in multilateral fora. The advantages of such an inclusive approach, i.e. asking a Member State expert to join the EU team have been the following:

- the use of the best expertise available inside EU 27
- building the trust of Member States and overcoming their resistance towards comprehensive negotiating mandates in the field of shared competences.

I have received a request from the European Parliament to be part of an EUDel: how should I respond?

The Commission made a commitment to facilitate the participation of the European Parliament in the EUDel to multilateral negotiations (see Framework Agreement on relations between the European Parliament and the European Commission, in particular points 25 to 27).

When coming to a decision on participation, the following factors should be taken into account:

- The European Parliament may request for a delegation of Members of the European Parliament (MEPs) to be included in the EUDel. The decision to include a delegation of MEPs in an EUDel is taken on a case by case basis (it is not automatic or a foregone conclusion) and the Commission position (draft reply) on European Parliament's request to be included has to be endorsed by the GRI.
- The European Parliament may also request MEPs to participate as observers in the negotiations themselves. A case-by case assessment (from a legal, technical and diplomatic point of view) should be made in this context for the purpose of the reply. A proposal for the Commission reply needs to be presented to the GRI.
- MEPs included in the EUDel are under the authority of the Head of the EUDel. They must adhere to the general orientations set out in the negotiating directives and by the Head of the EUDel in the negotiations. They should not represent, nor be seen to represent, a 'separate' position of the EU.
- MEPs do not enjoy access to coordination meetings of Council-led working groups or to Special committees established pursuant to Article 218(4) TFEU.

The negotiators initialled the text. What happens next?

Please mind the difference between initialling and signing an agreement (see points [3.4.8.](#) and [3.5.](#)). Where the Commission is the (co)-negotiator, a proposal to the Council for signature must be prepared with the initialled text attached and submitted to formal inter-service consultation before its adoption by the College.

Once the agreement has been signed, the process of conclusion starts (see point [3.6.](#)). Where the agreement has been negotiated by the Commission, it should prepare a decision for the Council to conclude. In the case of "mixed" agreements, which must be concluded by both the EU and the Member States, it is important to initiate co-operation with the Member States early in the process to try to ensure that the agreements are concluded simultaneously. So as to avoid a lengthy ratification process, the Commission could propose setting a deadline for the ratification by Member States of mixed agreements.

When you are informed of the intention of a Member State to conclude a "mixed" agreement unilaterally without awaiting the end of the Union's procedures, you should inform the Legal Service/Secretariat-General, which will then inform the EEAS. It may be necessary to issue a warning to the Member State concerned, reminding it of the duty of co-operation between the Union and the Member States provided for by the Treaty.

When the Council working group modifies the legal basis proposed by the Commission for both the decisions of signing and concluding an agreement, you should notify the Secretariat-General and the Legal Service at the earliest possible opportunity, so that the matter may be referred to COREPER. If the change regarding the legal basis cannot be pre-empted at COREPER level, consideration should be given to adding a statement reserving the rights of the Commission to the Council minutes. This statement should be made both at the time of signature and at the time of conclusion of the agreement.

4. NON-BINDING INSTRUMENTS

Can financial commitments be made in non-binding arrangements?

Financing agreements are not 'non-binding' and are subject to specific rules (see Introduction to [Chapter 3](#)).

Non-binding instruments are strictly limited to either political commitments or administrative arrangements. They cannot entail any financial commitments or have resource implications for the EU. The content and the wording used must reflect this (see points [4.1](#) and [4.2](#).)

What is the procedure for negotiating a non-binding arrangement?

See point [4.3](#). In the absence of specific provisions in the Treaties, the procedure applying to non-binding instruments concluded by the Commission requires case-by-case assessment. The Legal Service and the Secretariat-General should be involved from an early stage and must be consulted in all cases before the signature of such arrangements.

Policy instruments should respect the principle of collegiality and good inter-institutional coordination. In particular, if the non-binding instrument is made on behalf of the EU, the Council must be involved in the process in one way or another.

Planning of internal procedures should begin as early as possible. A CIS, including the EEAS, will be necessary and, in cases where a Commissioner signs the MoU on behalf of the Commission, a written procedure is required.

Check with the Legal Service (RELEX team) and Secretariat-General F.3 well ahead of the CIS, especially if you are unsure about the nature of the instrument or internal but also inter-institutional procedures.

Annex II: Relevant Treaty provisions

Article 207 TFEU – Common commercial policy

1. The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.

2. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt the measures defining the framework for implementing the common commercial policy.

3. Where agreements with one or more third countries or international organisations need to be negotiated and concluded, Article 218 shall apply, subject to the special provisions of this Article.

The Commission shall make recommendations to the Council, which shall authorise it to open the necessary negotiations. The Council and the Commission shall be responsible for ensuring that the agreements negotiated are compatible with internal Union policies and rules.

The Commission shall conduct these negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it. The Commission shall report regularly to the special committee and to the European Parliament on the progress of negotiations.

4. For the negotiation and conclusion of the agreements referred to in paragraph 3, the Council shall act by a qualified majority.

For the negotiation and conclusion of agreements in the fields of trade in services and the commercial aspects of intellectual property, as well as foreign direct investment, the Council shall act unanimously where such agreements include provisions for which unanimity is required for the adoption of internal rules.

The Council shall also act unanimously for the negotiation and conclusion of agreements:

(a) in the field of trade in cultural and audiovisual services, where these agreements risk prejudicing the Union's cultural and linguistic diversity;

(b) in the field of trade in social, education and health services, where these agreements risk seriously disturbing the national organisation of such services and prejudicing the responsibility of Member States to deliver them.

5. The negotiation and conclusion of international agreements in the field of transport shall be subject to Title VI of Part Three and to Article 218.

6. The exercise of the competences conferred by this Article in the field of the common commercial policy shall not affect the delimitation of competences between the Union and the Member States, and shall not lead to harmonisation of legislative or regulatory provisions of the Member States in so far as the Treaties exclude such harmonisation.

Article 216 TFEU – General competence rule for the conclusion of international agreements

1. The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.

2. Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States.

Article 217 TFEU – Association agreements

The Union may conclude with one or more third countries or international organisations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure.

Article 218 TFEU – Procedure for the negotiation, signature and conclusion of international agreements

1. Without prejudice to the specific provisions laid down in Article 207, agreements between the Union and third countries or international organisations shall be negotiated and concluded in accordance with the following procedure.

2. The Council shall authorise the opening of negotiations, adopt negotiating directives, authorise the signing of agreements and conclude them.

3. The Commission, or the High Representative of the Union for Foreign Affairs and Security Policy where the agreement envisaged relates exclusively or principally to the common foreign and security policy, shall submit recommendations to the Council, which shall adopt a decision authorising the opening of negotiations and, depending on the subject of the agreement envisaged, nominating the Union negotiator or the head of the Union's negotiating team.

4. The Council may address directives to the negotiator and designate a special committee in consultation with which the negotiations must be conducted.

5. The Council, on a proposal by the negotiator, shall adopt a decision authorising the signing of the agreement and, if necessary, its provisional application before entry into force.

6. The Council, on a proposal by the negotiator, shall adopt a decision concluding the agreement.

Except where agreements relate exclusively to the common foreign and security policy, the Council shall adopt the decision concluding the agreement:

(a) after obtaining the consent of the European Parliament in the following cases:

- (i) association agreements;
- (ii) agreement on Union accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms;
- (iii) agreements establishing a specific institutional framework by organising cooperation procedures;
- (iv) agreements with important budgetary implications for the Union;
- (v) agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required.

The European Parliament and the Council may, in an urgent situation, agree upon a time-limit for consent.

(b) after consulting the European Parliament in other cases. The European Parliament shall deliver its opinion within a time-limit which the Council may set depending on the urgency of the matter. In the absence of an opinion within that time-limit, the Council may act.

7. When concluding an agreement, the Council may, by way of derogation from paragraphs 5, 6 and 9, authorise the negotiator to approve on the Union's behalf modifications to the agreement where it provides for them to be adopted by a simplified procedure or by a body set up by the agreement. The Council may attach specific conditions to such authorisation.

8. The Council shall act by a qualified majority throughout the procedure.

However, it shall act unanimously when the agreement covers a field for which unanimity is required for the adoption of a Union act as well as for association agreements and the agreements referred to in Article 212 with the States which are candidates for accession. The Council shall also act unanimously for the agreement on accession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms; the decision concluding this agreement shall enter into force after it has been approved by the Member States in accordance with their respective constitutional requirements.

9. The Council, on a proposal from the Commission or the High Representative of the Union for Foreign Affairs and Security Policy, shall adopt a decision suspending application of an agreement and establishing the positions to be adopted on the Union's behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects, with the exception of acts supplementing or amending the institutional framework of the agreement.

10. The European Parliament shall be immediately and fully informed at all stages of the procedure.

11. A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised.

Article 220 TFEU – EU relations with international organisations

1. The Union shall establish all appropriate forms of cooperation with the organs of the United Nations and its specialised agencies, the Council of Europe, the Organisation for Security and Cooperation in Europe and the Organisation for Economic Cooperation and Development.

The Union shall also maintain such relations as are appropriate with other international organisations.

2. The High Representative of the Union for Foreign Affairs and Security Policy and the Commission shall implement this Article.

Article 221 TFEU – EUDel

1. Union delegations in third countries and at international organisations shall represent the Union.

2. Union delegations shall be placed under the authority of the High Representative of the Union for Foreign Affairs and Security Policy. They shall act in close cooperation with Member States' diplomatic and consular missions.

Annex III: Templates

- A1 Recommendation for a Council Decision authorising the opening of negotiations on a bilateral agreement (Article 218(3) and (4) TFEU)
- A2 Recommendation for a Council Decision authorising the opening of negotiations on a multilateral agreement (Article 218(3) and (4) TFEU)
- B1 Proposal for a Council Decision on the signature (Article 218(5) TFEU)
- B2 Proposal for a Council Decision on the signature and provisional application (Article 218(5) TFEU)
- C1 Proposal for a Council Decision on the conclusion - with consent EP (Article 218(6)(a) TFEU)
- C2 Proposal for a Council Decision on the conclusion - after consultation EP (Article 218(6)(b) TFEU)
- C3 Proposal for a Council Decision on the accession to an agreement - with consent EP (Article 218(6)(a) TFEU)
- D1 Commission Decision approving an amendment to an agreement (Article 218(7) TFEU)
- D2 Commission Decision approving an amendment to an agreement adopted by a body (Article 218(7) TFEU)
- E1 Proposal for a Council Decision on the position to be adopted in an international body (Article 218(9) TFEU)

