



Who is in charge? The external representation of the EU on dialogues on immigration and asylum with third countries

13 Wednesday JAN 2016

IN ASYLUM CRISIS, EU INSTITUTIONS, THIRD COUNTRIES



Print this article



by [Paula García Andrade](#), *Universidad Pontificia Comillas*

The current refugee crisis the EU is experiencing has created quite a few divisions and disagreements among EU Member States and also among EU institutions. Discord does not however seem to focus only on the substance, but it has also reached the form. In recent months, a certain confusion has arisen with regard to the responsibility to convene and lead talks with third countries aimed at finding effective responses to the challenges posed to the EU by the constant arrival of people seeking international protection.

Last October, President Juncker organized a [mini-summit with Western Balkan countries](#) in order to agree “on common operational conclusions which could be immediately implemented in order to tackle the refugee crisis along the Western Balkans route”. The summit, held on the 25th October at the level of Heads of State and Government, was attended by Albania, Serbia and the FYROM, as well as by some EU Member States (Austria, Bulgaria, Croatia, Germany, Greece, Hungary, Romania, and Slovenia). The President of the European Council, the President of the European Parliament, the current and incoming Presidencies of the Council of the EU and the UNHCR

also attended the meeting, along with representatives of the European Asylum Support Office (EASO) and FRONTEX.

The Presidency of the Commission has also taken the lead on strengthening EU-Turkey cooperation to address the refugee crisis, reflected in the Action Plan primarily aimed at supporting Syrians under temporary protection in Turkey and strengthening the latter's cooperation to prevent migration flows into the EU ([see Jean-Baptiste Farcy's comments on this blog](#)). After the call for a reinforced dialogue following a EU-Turkey working dinner on 17th May and the informal meeting of EU Heads of State or Government on 23rd September, the [draft version of the Action Plan](#) was presented by President Juncker to President Erdoğan during a meeting they both held in Brussels, on 5th October. [A visit to Turkey](#) by First Vice-President Timmermans and the ENP & Enlargement Negotiations Commissioner Hahn was foreseen for 11th October in order to continue negotiations over the Action Plan proposed by Juncker. The final [EU-Turkey Action Plan](#) was agreed *ad referendum* on 15th October and activated at the meeting of 29th November between the Heads of State or Government of EU Member States and Turkey.

On 17th December, [another mini-summit](#) took place between the Turkish Prime Minister, the President of the European Commission, the President of the European Parliament and leaders of some EU Member States inclined to follow the Commission's recommendation to resettle Syrian refugees from Turkey. [The EU and Turkey will meet again in February 2016](#), just before the European Council of that month, in order to evaluate the implementation of the EU-Turkey Action Plan. On this occasion, the invitation to the summit will most probably come from the EU rotating presidency of the Council held by the Netherlands in the first semester of 2016.

Clarifying the scope of the external representation of the EU

The prominent role that especially President Juncker has adopted in the organisation of these forms of political dialogue on migration cooperation has led some voices to argue that the call for high-level summits is a prerogative of the President of the European Council and not of the President of the Commission. This argument on a possible encroachment of functions seems to be based on the level of representatives involved. However, the attribution of the external representation of the EU does not necessarily depend on the category of authorities invited to the gatherings, but rather on the matter to be discussed.

According to the Treaties, the responsibility for the external representation of the Union follows the traditional division between the Common Foreign and Security Policy (CFSP) and the rest of the external action of the EU. Article 17(1) of the [Treaty on European Union](#) (TEU) vests in the Commission the duty to "ensure the Union's external representation", with the exception of the CFSP, field which corresponds to the responsibility of the President of the European Council according to Article 15 TEU. The same provision empowers the High Representative-Vice President (HR-VP) of the Commission to conduct the external representation of the Union as far as the CFSP is

concerned. The distinction between the responsibilities of the President of the European Council and the HR-VP lies, in this case, on the level of representation, as the former corresponds to the level of Heads of State and Government, while the latter would refer to a ministerial level.

Consequently, the external representation is clearly different from the internal tasks of the Presidency of the European Council, who is responsible for convening regular summits of EU Member States at the level of Heads of State or Government, as well as special meetings when the situation so requires. As already stated, the issue addressed here, however, concerns the responsibilities of convening summits on dialogue and cooperation between the EU and its Member States with third countries. The question therefore primarily lies on the subject to be addressed in the corresponding meeting with third countries. As the above-mentioned summits with Turkey and the Western Balkan countries deal with the external dimension of migration and also with development cooperation and financial assistance – policies covered by the [Treaty on the Functioning of the European Union](#) (TFEU) -, they were rightly convened by President Juncker without infringing the mandates accorded in EU primary law. Nonetheless, one cannot overlook that the Commission's power to convene and lead gatherings with third countries' authorities is different from the power to determine the content of the Union's position to be defended therein. Union policies and positions are formulated at the level of the Council, with the Foreign Affairs Council entrusted to elaborate the Union's external action on the basis of the strategic guidelines and priorities laid down by the European Council, according to Article 16(6) [TEU](#). Consequently, external representation does not amount to policy-making.

These apparent disagreements on the delimitation of responsibilities between the Presidency of the Commission and the Presidency of the European Council might conceal rather substantive discord among their different perspectives on how to deal with the refugee crisis. While President Juncker is pushing for the EU to assume responsibility for the reception of refugees and distribute it among Member States, President Tusk emphasises the need to strengthen border protection and fight against irregular immigration more in line with Eastern Member States' positions.

Although the external representation of the Union in the field of migration corresponds to the Commission, [the Valletta Summit of 11-12 November 2015](#), hosted by the Maltese Prime Minister, was chaired by the President of the European Council. This summit between the EU, its Member States and African states dealt with the external dimension of migration, development and economic assistance. Even though to a certain extent issues related to the CFSP, such as the need to act towards the prevention of the political conflicts creating migratory flows, were also at stake, the reason President Tusk took the lead in Valletta might be connected to the political importance given by the EU to this meeting, in which the President of the Commission, the HR-VP and the Luxembourg rotating Presidency of the Council also represented the EU. While most of the migration

dialogues in which the EU takes part have originated at ministerial conferences in which the Commission usually acts as sole representative of the Union – e.g. the [Rabat](#) or the [Khartoum](#) process –, other dialogues share with the Valletta Summit a similar institutional presence of the EU at their launching meetings, such as the EU-Africa Summit of 2014 leading to the adoption of the [EU-Africa Declaration on Migration and Mobility](#) or the [Eastern Partnership Summits](#) leading to the launch of the Eastern Partnership Panel on Migration and Asylum. When this kind of meetings are held at the level of Heads of State and Government, the presence of the President of the European Council is justified and apposite, but he should be accompanied – as it is always the case – by the President of the Commission, in which the external representation of the EU is vested regarding non-CFSP related issues.

Past controversies on launching and managing migration dialogues with third countries

It is not the first time disagreement arises with regard to the external representation of the EU in matters concerning the external dimension of migration. Similar controversies were triggered in 2010, at the [set-up of a migration dialogue between the EU and Russia](#). After the proposal made by the Russian authorities to launch a high level dialogue on all the aspects of migration, the Commission suggested to send a migration mission to Russia in January 2010 to exchange ideas on the substantive elements to include in the terms of reference of the new dialogue. The proposal to be submitted to the Russian authorities to this effect, presented at the Council by the Commission, was received with disapproval by Member States, both by reason of the fact that the Commission intended to sign the terms of reference of the dialogue with the Russian representatives, and the predominant role the institution was determined to play in the development of the dialogue.

The first issue regards the power to agree and sign the terms of reference or bases of a migration dialogue with the authorities of a given third country and thus the division of responsibilities among EU institutions for the assumption of international commitments. Even though a migration dialogue does not entail the adoption of legally binding commitments, excluding thus the application of Article 218 [TFEU](#), the Commission is not entitled to agree with a third country the fields and issues in which the Union is ready to cooperate, without the previous approval of the Council, the institution which holds the power of political decision both on the internal and external plane, according to Article 16 TEU. Acting otherwise would constitute an infringement of the principle of distribution of powers among EU institutions and consequently of the principle of institutional balance, as enshrined in Article 13(2) TEU (for a recent analysis to this effect, see the [Opinion of AG Sharpston in Case C-660/13, Council v. Commission](#)), since the Commission should only represent, on the basis of Article 17 TEU, the Union's position when its content has previously been determined by the Council as can be deduced from Article 16 TEU (see also [Council document no. 12498/13](#) of 18 July 2012, on the "Council position on the arrangements to be followed for the conclusion by the EU of Memoranda of Understanding,

Joint Statements and other texts containing policy commitments, with third countries and international organisations”).

The second question raised in the EU-Russia controversy reverts to the strict issue of the external representation of the EU in the development of a migration dialogue. As stated before, in the non-CFSP related external action, the Commission is entrusted with the external representation of the Union, allowing this institution to become a valid interlocutor with a third country’s authorities. However, Article 17 [TEU](#) confers on the Commission the external representation of *the Union*, not the representation of *the Union and its Member States*. The Treaties do not regulate the international representation of the Member States in fields in which they retain powers, either exclusive competences or concurrent competences still not exercised by the Union. For this reason, Member States have to decide the manner in which they wish to be represented as far as issues under their remit are concerned, such as, for instance, certain aspects of legal migration and integration that were to be covered in the EU-Russia dialogue.

In addition to their individual standing, an option for the external representation of Member States could be to confer their international representation to the rotating Presidency of the Council, as this is not forbidden by the Treaties. Indeed, the Presidency of the Council has historically had certain powers regarding EU external relations, as it had assumed, until the Lisbon Treaty, the external representation of the EU in the CFSP, with the assistance of the former High Representative for CFSP (Article 18(1) and (3) of [former TEU](#)), as well as a central role also in the external dimension of the field of police and judicial cooperation on criminal matters (Article 37, second paragraph of [former TEU](#)). The Lisbon reform has formally eliminated the external representation powers of the rotating Presidency of the Council with regard to fields of action regulated in the Treaties. However, nothing seems to prevent the Council Presidency from continuing to hold the international representation of Member States on issues still in their hands. In any case, whether the summit with the Turkish authorities foreseen for next February would be correctly convened by the rotating Presidency of the Council seems questionable. If the meeting gathers all EU Member States with Turkey with the aim of evaluating the implementation of the EU-Turkey Action Plan, it would rather be for the Commission to convene and organise the summit in order to present the Union’s stance on the matter, without prejudice to the involvement of the rotating Presidency of the Council as far as issues under Member States’ responsibility are concerned.

Another alternative for the external representation of Member States’ positions could be to assign it to the Commission. This option could be the most adequate in order to comply with the requirement of unity in the international representation of the EU (e.g. [Case 246/07, Commission v. Sweden, para. 73](#)). The most significant requirement would be nonetheless to secure coherence and internal coordination of the positions to be defended before the third country in question, as demanded by the principle of sincere cooperation. This internal coordination is to be ensured by the [High Level Working Group on Asylum](#)

and Migration, the Council working structure in which both Member States and the European Commission participate with the aim of facilitating the exchange of information and even ensure the presence, whenever necessary, of Member States in EU migration dialogues with third countries.

In the end, two years after the Russian proposal, the EU-Russia dialogue on migration was finally launched in May 2011, following negotiations held by the Commission and a formal decision adopted by the EU-Russia PCA Council, ensuring thus the participation of Member States. Later on, subsequent migration dialogues with Southern Mediterranean countries have been developed by the EU with previous and clear indications from EU institutions aimed at securing both EU and Member States' participation (JHA Conclusions 11-12 April 2011, point 10). Although, at present, disagreements on external representation have not reached such degree of discord, it is of paramount importance to have certainty about who is in charge of doing what in order to guarantee unity in the international representation of the EU. Substantive divisions on the European responsibility to search for responses to the global refugee crisis seem amply sufficient to damage the image of the EU without necessarily adding institutional clashes to this already regrettable picture.

<http://eumigrationlawblog.eu/who-is-in-charge-the-external-representation-of-the-eu-on-dialogues-on-immigration-and-asylum-with-third-countries/>