

**Research Report**

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**The European Union, A Healthy Negotiator?  
A study on its unity in external representation and performance  
in the World Health Organization**

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## **Abstract**

In this article the effectiveness of the member states of the European Union (EU) and the European Commission in negotiations taking place in the World Health Organisation (WHO) is analysed and related to its ability to act as a united bloc. EU unity in external representation is taken to result from European Community (EC) competence, preference homogeneity and processes of socialisation among EU member states' representatives. A comparison is made between the negotiations on global strategies on diet, physical activity and health (DPAS, 2004) and on public health, innovation and intellectual property (PHI, 2008). In the DPAS, member states operated primarily on the basis of national positions, whereas in the PHI they operated on the basis of a coordinated position brought forward by the EU presidency and European Commission. In both cases the EU (or a majority of EU member states) was moderately successful in obtaining its objectives in the negotiations. More unity in external representation originated from the Commission claiming EC competence, a pro-active EU presidency and a process of intensive EU coordination becoming gradually institutionalised. Member states' representatives identified economies of scale in conducting a unified external representation, although their initial preferences were rather different. Identified drawbacks included the extensive time spent in EU coordination, the dependency on the intention and qualities of the lead negotiator, and the EU's difficulties with reacting swiftly to new issues coming up in the negotiations.

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# **The European Union, A Healthy Negotiator?**

## **A study on its unity in external representation and performance in the World Health Organization**

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### **1. Introduction**

Politicians concerned with institutional developments of the European Union (EU) regularly emphasize the importance of a unified external representation by the EU in international affairs. It would strengthen the EU's effectiveness in international negotiations. Indeed, in the area of trade, where EU action is very much coordinated, the EU does seem to act as a genuine global actor, but in other areas it does not. Apparent cases have been the EU division on the Iraq war in 2003, and the recognition of an independent Kosovo in 2008. In general, European integration and its foreign policy dimension seem much more coordinated and successful when it comes to economic issues than with regard to the sacrosanct security issues.

An interesting question is how the EU deals with international policy issues that are not purely about economic or security interests, such as environment, labour standards, and health issues. In these areas both national and European policies exist, making it less obvious whether the EU member states or a single EU representative should be in charge over external representation. At the same time, the range and activities of international organisations and platforms covering these issues has expanded rapidly. Within them, EU member states are usually among the key players.

As a rule of thumb, EU member states have to cooperate with a common position in international affairs when the subject being discussed falls within the legislative competence range of the European Community (EC), the 'legal entity' of the European Union (cf. Hoffmeister 2007; Eeckhout, 2004). For some issues, such as specific health, education or cultural policy issues, there is however only a thin layer of

EC competence, making EU coordination over a common international position not obligatory in legal terms. Despite the absence of a legal obligation to coordinate, member states may still find it relevant to operate with a common position represented through a single voice, for instance because they have similar preferences or consider it adds to their strengths when the European Union acts united in all international matters. Not surprisingly, this point is usually also underlined by the European Commission, the supranational representative of the European Community.

This paper will analyse how EU member states operated in the negotiations on two strategies that were adopted by the World Health Organisation (WHO): the global strategy on diet, physical activity and nutrition (DPAS; 2004) and the strategy on public health, innovation and intellectual property (PHI; 2008). EU member states operated primarily on the basis of national positions in the DPAS and with a common EU position in the PHI negotiations.

This paper proceeds as follows. First of all, a theoretical framework will be developed for analysing the degree of unity the EU displays in international affairs and how it may relate to the EU's effectiveness in international negotiations. It addresses the theoretical question whether the "sum truly is more than its parts", i.e. whether more unity in international negotiations leads to more effectiveness for the EU member states. It moreover considers from a theoretical perspective under which conditions EU member states bundle their positions in international affairs.

The paper will subsequently continue with analysing three contextual factors of relevance for the relationship between the EU and the WHO: the foreign policy dimension of health policy, increased attention for EU coordination in international organisations, and the expansion of the EU's health policy agenda and accompanying external competence on (international) health questions. On the basis of a document study and interviews with diplomats and experts involved in the negotiations, the paper will then go on to analyse the cooperation between the EU member states with regard to the two WHO strategies. It will assess why they consider it advantageous or disadvantageous to operate with a common EU position. In particular the contribution of preference homogeneity and processes of EU socialisation will be analysed.

With regard to the EU's negotiating performance, or effectiveness, the extent to which the EU, or a majority of its member states, managed to reach its objectives in the negotiations will be analysed. Findings in the two cases will be compared. The concluding section will focus on under which conditions more EU unity in external representation strengthens the effectiveness of the EU member states in international negotiations.

## **2. EU unity in external representation and effectiveness in international negotiations**

Most researchers studying EU foreign policy assert that the way the EU decides upon its international positions and organises its external representation influences its effectiveness in international negotiations (Keukeleire & MacNaughton, 2008; Cameron, 2007; Sapir, 2008; Bretherton and Vogler, 2006; Vanhoonaeker, 2005). It would influence its capacity to negotiate and thereby its bargaining power (Meunier, 2000; Frieden, 2004; Gstöhl, 2008). The argument that EU foreign policy-making needs to be reformed to make the EU a more effective actor in world affairs has also been a prevailing rationale in the discussions on EU institutional reform leading eventually to the Lisbon Treaty (e.g. Convention, 2002; Lamy, 2004). Reform proposals agreed upon, such as the establishment of an EU foreign policy coordinator, or High Representative, focus on a more uniform external representation (Avery et al., 2007; Aggestam et al., 2007; Duke, 2008).

Although it seems reasonable to assume a more unified EU stance in international affairs increases its influence, only a small number of case studies (e.g. Smith, 2006) have systematically analysed the EU's effectiveness or performance in international negotiations and have related it back to its institutional set-up. This is not surprising since it is rather complicated to measure the EU's effectiveness in international negotiations. Whether the EU is effective is very much influenced by its negotiating partners and subject to perceptions of those who were involved in the negotiations or observed them (e.g. media). Nevertheless, one could still analyse the extent the EU reached its own stated objectives in the negotiations by analysing its

position(s) and perceptions of both EU actors and non-EU actors on how effective the EU negotiated with regard to these objectives. One can also make general statements on what those involved consider the advantages and disadvantages of EU coordination. Here, this will be done for two sets of negotiations that took place within the World Health Organisation. The positions of the EU will be analysed to see to what extent EU objectives were obtained in the final version of the negotiated agreements. In case no common EU statements were made, the positions of the individual member states are analysed. Information is obtained through a detailed study of documents and experts analysis, and 20 semi-structured (telephone) interviews<sup>1</sup> with observers of the negotiations; more specifically with representatives of EU member states, the European Commission, non-EU states, international organisations, and interest groups. To the interviewees it was asked what the three most important objectives of the EU were in the negotiations and to what extent they were achieved, in addition to more general questions regarding their views on the advantages and disadvantages of EU coordination. Their answers were compared with positions outlined in the written contributions of the EU and of EU member states.

To deepen understanding on the relationship between effectiveness and the institutional set-up of the EU, the degree of unity in external representation displayed in the negotiations will be analysed. To identify and understand the degree of unity in external representation three issues will be looked at: the degree of EC competence, the degree of preference congruency, and the degree of EU socialisation that emerged among representatives of the EU member states. With regard to these three issues an interesting question is to what extent EU member states consider it a deliberate choice to unite their external representation. Under which conditions do they consider it advantageous and is it really beneficial in terms of improving their effectiveness in international negotiations?

According to a realist or intergovernmentalist view, EU member states would only agree to bundle their positions to the extent it is in their interest to do so (Smith, 2006; Frieden, 2004). They would consider operating jointly strengthens their

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<sup>1</sup> About half of the interviews were conducted by telephone. The others in face-to-face meetings.

bargaining power in the negotiations and consider other benefits of scale such as a bundling of expertise and resources accruing from operating through a single voice.

However, scholars looking at the influence of institutions argue that member states' options and preferences are influenced by legal rules and procedures and by informal institutional features (Vanhoonacker, 2005). EC competence is such an institutional feature. Transferring legislative competence to the EC, when amending the EC treaty or adopting EC legislation, could be considered a deliberate choice of EU member states. It is unlikely though to expect they were fully aware of possible future implications for international health negotiations when they transferred these competences. The influence of informal norms becomes clear when looking at processes of EU socialisation emerging from institutionalised coordination practices between the EU member states. Diplomats may just consider it "appropriate" to work with their European partners in international negotiations (cf. March and Olson, 1998; Smith, 2006).

EC competence, preference homogeneity and EU socialisation are hence expected to substantially affect the EU's unity in external representation and therefore to influence the EU's effectiveness in the negotiations. They are factors always present when considering the issue of EU coordination and external representation in international organisations. In this paper somewhat less attention is devoted to other, more contextual or incidental factors that may influence the EU's effectiveness, such as the acceptance/ recognition of a unified external representation by non-EU actors (cf. Groenleer & Van Schaik, 2007, Jupille and Caporaso, 1998), issue-specific power such as commercial interests (Coeuré and Pisany-Ferry, 2007; Gstöhl, 2008), the negotiating environment (Meunier, 2000, Rhinard and Kaeding, 2006), and influence of key persons involved in the negotiations. Where relevant, these factors are still elaborated upon in the case description or in the section on the general characteristics of the relationship between the EU and the WHO, but they are not the main focus of this research. Because process tracing is used as a research method, a rather in-depth reconstruction of the negotiations is made. This enhances the likelihood for factors influencing effectiveness, not explicitly taken into account in the research design, still to become apparent during the research.

## **EC competence**

A key question in the field of EU external relations is how competences are divided between the EC and member state level. It influences whether operating with a common or coordinated position is obligatory in legal terms and who will be the key actors involved in the external representation of the EU. The principle of implied powers, that was established by the European Court of Justice, prescribes that in areas where the European Community (EC) has the authority to legislate, the European Commission has authority to represent the EC externally (Eeckhout, 2004; Ott and Wessel, 2006; Hoffmeister, 2007). This is understandable when one considers that international agreements often contain policy obligations affecting EC policies. When the Commission would not be involved in negotiations on such issues, this could undermine the Community system and could dilute the right of initiative for new EU legislation by the Commission. It could offer EU member states an opportunity to bypass the Commission by shifting issues from the European to the international arena.

For areas of exclusive competence, such as trade, it is clear that EU member states are no longer in the position to conduct an independent policy. Since the establishment of a common external border tariff in the 1960s, the Commission is in charge to represent the EC externally on trade matters. It also develops and proposes the EC position in the negotiations. Its autonomy is curtailed by a negotiating mandate decided upon by the member states in the Council. Further supervision is exercised by a committee with member states' representatives, the so-called article 133 committee, called after the EC Treaty article in which it is established (cf. Kerremans, 2004, Niemann, 2006).

For many other EC policies, legislative authority is shared. Either there are both EC policies and national policies, which is the case with regard to for instance environment, transport and development cooperation policies, or EC powers are complementary, implying only few explicitly allowed EC policies exist, which is the case with regard to for instance health, education and culture. This means that in these areas the EU member states also have authority to act on their own behalf in international affairs. In such cases they are usually represented by the member state holding the presidency of the Council. This resembles a practice established in the EU's

Common Foreign and Security Policy (CFSP), which calls for EU member states to be coherent in their foreign policies (Hoffmeister, 2007). This obligation of solidarity can however not be enforced by the European Court of Justice, neither does agreement exist among legal experts on whether CFSP provisions only apply to security-related foreign policy questions, or also to those external policies where a relationship with the European Community exists, but which fall primarily within member states' competence<sup>2</sup>.

When EC competence exists, even if its shared or complementary, operating with a joint position is obligatory in legal terms, but member states often argue no such competence exists or that the thrust of the matter falls within the member states' competence. In a large number of court cases the Commission has contested a decision by the member states to deny competence on an issue, sometimes with success. The European Court of Justice has ruled that EC competence exists the moment the EC would have the power to legislate, but it has also recognised the independent powers of the member states in cases where no clear competence exists (cf. Eeckhout, 2004). Thus, EC competence implies that EU member states have to bundle their position. But, what happens when they cannot or can only partly agree upon a common position? In that case the EU can be expected to be weak, since it will not have a position for the international negotiations. Therefore it can be expected that the member states may start to question provisions on EC competence when they fear it will be difficult to agree upon a common position, and may at such instances consider EC competence a legal straightjacket that decreases effective external representation.

For the EU member states, the competence question is moreover sensitive since the authority over external representation clearly illustrates that sovereignty has been transferred to the EC level and touches upon the fundamental characteristics of statehood (Laatikainen and Smith, 2007). The calling into question of EC competence can also illustrate other concerns EU member states have with regard to a more unified

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<sup>2</sup> Wessel (2004) notes in this respect that the inclusion of an increased number of foreign policy issues in the general external relations of the EU has given the CFSP a 'residual character' with only a clear remit regarding the most sensitive issues that purely security and defence related.

external representation, such as insufficient trust in the Commission as negotiator or in the efficiency of established practices of EU coordination.

Another factor is that the exercise of EC competence can at times be constrained because international structures are traditionally very much geared towards states being the prime actors. States control decision-making in international organisations, and membership is a reflection of the sovereign equality of member states (Laatikainen & Smith, 2007; Govaere et al., 2004). As a result, even in cases where EC competence exists, negotiating partners may not accept the Commission to participate in the negotiations or to act on behalf of the EU member states, for instance because statutes stipulate the EC is not, or cannot become, a member of the international organisation. In other cases some EU member states may lose a prominent position in case external representation is taken over by a joint EU representation (e.g. in IMF and Worldbank, cf. Bini-Smaghi, 2004; Coeuré & Pisany-Ferry, 2007). In the International Maritime Organisation negotiating partners have opposed a uniform EU representation, since they fear the EU would become too dominant. Demanding reform with a view to establish a joint EU representation can in such circumstances come at a political cost or loss of influence for individual EU member states. When the position of the Commission is questioned, because the EC is no member or party of an international agreement or organisation, EU member states may fear supporting EC membership may weaken their position in the negotiations.

Even in cases where exclusive EC competence is exercised, unity in external representation can at times be undermined. An illustration are the tensions between the Commission and the EU member states in the WTO negotiations (Young, 2003; Kerremans, 2004). Consider for instance an open letter from French President Sarkozy to Commission President Barroso in which he asks the Commission to take a cautious stance in the WTO negotiations.<sup>3</sup> For sure it is not a demonstration of EU unity towards the outside world.

In conclusion it can be said that it is clear that EC competence is likely to influence the extent EU unity in external representation is displayed, but is not the only factor influencing it (Gstöhl, 2008). Member states may consider it a legal straightjacket

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<sup>3</sup> Letter from President Sarkozy to President Barroso published on 2 April 2008.

constraining their options, may feel unhappy with the EU operating as a state in the international system, and may fear demanding EC membership and external representation by the Commission becomes part of the negotiations. Hence, the emergence of actual unity in external representation, and it positively influencing effectiveness is also likely to be depend upon other factors. Most important appears to be whether EU member states are able to agree on a common position, a process which is likely to be facilitated by their preferences being in line and a process of EU socialisation to emerge.

### **Preference congruency**

It is usually perceived that operating with a joint position and a single voice adds to the powers of the individual EU member states, also the bigger ones, which at global scale in fact are only middle-range powers (Sapir, 2008). It would prevent third states, such as Russia and the United States, from exploiting their negotiating power vis-à-vis individual member states. Operating as a 'European bloc' could prevent deals that may incur benefits for an individual member state, but not for the EU as such. Particularly for small EU member states operating through the EU is therefore usually considered not only a legal obligation, but also of vital importance to maximize influence in world affairs.

However, on specific issues EU member states may have different interests and view points. This may make it more difficult to bring their preferences in line. Frieden (2004), on the basis of a theoretical model, points to the costs of forcing heterogeneous actors to adopt a common policy position. The pooling of international representation would require member states to weigh the potential benefit of a common policy against the potential cost of a policy not to their liking. A trade-off may occur between the advantages of scale and the disadvantages of overriding heterogeneous preferences. Other scholars working on the basis of principal-agent models point to transaction costs accruing from controlling the representative that negotiates on behalf of the EU member states (Kerremans, 2004; Young, 2003; Meunier, 2000). Indeed, a common critic on the EU's performance in international organisations is that it spends most of its time in EU

coordination meetings, wasting time that otherwise could be used to negotiate with the real negotiating partners (e.g. Smith, 2006; Oberthür & Roche Kelly, 2008).

Studies indicate that a higher voting consensus among EU member states in UN bodies has emerged in recent years (Laatikainen & Smith, 2007; Adriaenssens, 2008). However, it is not clear whether this indicates issue-specific preferences (and underlying interests) have become more similar, or whether a general preference to operate as a European bloc has become more important to EU member states. In the latter case it would not be clear whether member states deliberately choose to bundle their position in international affairs, since they consider this adds to their strengths, or whether they merely consider it appropriate, for instance because the presidency calls for meetings or because outsiders approach the EU as a unified entity. Nevertheless, as Young (2003:57) points out, it can be expected that the interdependence among the EU member states due to the process of European integration, a shared normative and cultural orientation, and geographical interests, shapes their preferences regarding international negotiations and makes them more homogeneous. Still, it often does not appear easy to arrive at a common position. EU member states representatives have nationally defined instructions and can spend hours in coordination to agree upon a common EU stance. Preference heterogeneity, even in cases where EU states may be closer to each other than to third states, may still prevent EU unity to emerge, thereby jeopardising the EU's effectiveness in the negotiations.

### **EU socialisation**

EU unity in external representation may not be the result of EU actors being aware of the existence of EC competence, or of explicit deliberations to closely coordinate with the European partners, because of expected scale benefits. It may just be the result of those being involved accepting an invitation to attend an EU coordination meeting like their predecessors did before them. It may be the result of others approaching them as EU actors. Or, their government may have indicated a preference to operate jointly with the European partners. On the other hand, representatives of EU member states may be jealous over being national representatives, may not trust the EC/EU representative to defend their interests well, or their government may be cautious about EC competence

expansion in external relations. In short, informal norms are also likely to influence whether EU coordination takes place or not.

Research indicates that in general EU member states' representatives can be expected to become socialised in EU practices when they are established (Checkel, 2003; Beyers and Trondal, 2004). The reason for going to EU coordination meetings may just be to find out what the negotiations will be about and which positions other EU member states take (Smith, 2006), but over time increased exposure to EU coordination is likely to stimulate a sense of 'we-ness' among representatives of EU member states leading them to identify with the common European position. When non-EU states and interest groups clearly refer to the EU and not to the national affiliation when approaching the EU member states' representatives, this could strengthen their identification with being a European actor. They are clearly "Europeanised" when they consider explaining and defending the EU position in their capitals among their main tasks. A number of studies indicate that EU socialisation has occurred during the process of EU coordination in international organisations, particularly when it concerns the level of diplomats (Smith, 2006; Niemann, 2006; Laatikainen & Smith, 2007; Adriaenssens, 2008; Groenleer & Van Schaik, 2007).

Here it is relevant to underline the role of the European Commission and the half-yearly rotating presidency of the EU Council. Taylor (2007) argues that the Commission, as supranational EC representative, uses a 'logic of synthesis' among the member states by reiterating commonly adhered to EU objectives and statements. EU presidencies can be expected to simulate unity in external representation as well. Once in the 'driving seat', they have a clear preference for representing a united EU (Schout & Van Schaik, 2008). In fact, in many international negotiations the EU's performance becomes closely intertwined with the presidency conducting the negotiations on behalf of the EU member states (e.g. Smith, 2006).

In the cases it will be analysed whether EC competence existed, whether EU preferences could be brought in line, and whether EU socialisation processes emerged. The degree of unity in external representation as displayed in the formal negotiations, and in the corridors and informal negotiation groups, will be analysed in more depth and

considered in relationship to the EU's effectiveness in the negotiations. Before doing this, the general context of EU participation in the World Health Organisation is briefly elaborated upon.

### **3. The European Union and the World Health Organisation**

With regard to the EU's activities within the WHO three trends appear at stake: i) increased attention for the foreign policy aspects of health questions; ii) increased attention for EU coordination in international affairs; and iii) an expanded range of issues being discussed in WHO where EC competence exists (e.g. tobacco agreement, international health regulations to combat communicable diseases).

The first trend is an increased attention for the interface between foreign policy and health issues (Chan et. al., 2008; Kickbusch et al., 2007). The World Health Organisation was established in 1948 in order to foster the attainment by all peoples of the highest possible level of health around the globe. Its tasks include fighting diseases, shaping the health research agenda, setting norms and standards, articulating evidence-based policy options, providing technical support to countries and monitoring and assessing health trends. It has 193 Member states, including all EU member states. In recent years a number of issues in which the WHO is involved, has received increased political attention. The destabilising effects of AIDS in certain regions of the world, notably Sub-Saharan Africa, and the spread of dangerous infectious diseases such as SARS and swine flue, together with an increased fear for bio-terror have highlighted health-related security threats (McInnes and Lee, 2006; Keukeleire and MacNaughtan, 2008: 249-252). Discussions on a number of other issues, such as obesity and access to affordable medicines, have moreover highlighted international trade rules as key impediments to health-promoting policies in these areas (Kickbusch and Lister, 2006). In reaction, foreign ministries have become more involved. An illustration is the launch of the foreign policy and global health (FPGH) initiative by the foreign ministries of Brazil, France, Indonesia, Norway, Senegal, South Africa, and Thailand. Another illustration is the establishment of a European Council of Global Health in 2006, which is a group of organisations committed to a more systematic European approach to global health. Yet another feature is that the WHO has moved more into treaty-making practices (e.g. on tobacco), whereas before its role was primarily to provide expertise

and assistance to its member states, while sometimes discussing and adopting non-legally binding resolutions.

The second trend has been catalysed by the discussion on the future of the EU and its institutional reform. In these discussions the role of Europe in the world has been a key issue (Avery et al., 2007; Aggestam et al., 2007; Duke, 2008). Due to the process of globalisation, a changing world order with rapidly growing economies, and the enlargement of the EU with mainly small states, it was perceived more important to strengthen the EU's position in international politics. It would also be needed to match the EU's status as an economic superpower. With almost 500 million inhabitants, which is more than the population of the US and Russia combined, the EU is the largest international trade bloc and generates about one fourth of global wealth. The euro is the world's second currency and jointly the European Community and EU member states are responsible for around 55 per cent of total aid, making the EU the biggest development donor in the world. Several observers claim the EU has yet to exploit this powerful position (Cameron, 2007; Sapir, 2007). Understandably, this is also the position the European Commission takes being the EU's supranational representative. It increasingly is active in upgrading its status in a wide range of international organisations (Hoffmeister, 2007; Taylor; 2007). In a recent White Paper on health policy it argues that strengthened coordination on health issues within international organisations, such as WHO, will enhance the EU's voice in global health and increase its influence and visibility to match its economic and political weight (Commission, 2007).

The third trend is linked to a general competence expansion at EC level and an expansion of issues discussed in the WHO where EC competence exists. In the field of health policy the EC formally only has a complementary competence<sup>4</sup>, but this has not prevented the EU from agreeing upon some health-related policies, although these were

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<sup>4</sup> This means that in accordance with the principle of subsidiarity the EC can only act in areas where its involvement amounts to a clearly identifiable added value. In legal terms, the external dimension of EU health policy is governed by article 152:3 of the EC Treaty, which states that "The Community and the member states shall foster cooperation with third countries and the competent international organisations in the sphere of public health".

initially foremost related to the internal market<sup>5</sup> and are still limited in comparison to other policy fields (Mossialos and Permanand, 2000, Guigner, 2006). Neither did it prevent the initiation of co-operation between the EC and the WHO, which started in the beginning of the 1980s with an exchange of letters between the European Commission and the Director-General of the WHO<sup>6</sup>. EC health policy, as guided by Public Health Programmes and Strategies<sup>7</sup>, and EC-WHO cooperation developed gradually and now covers many cross-border health issues. Priority areas for EC-WHO cooperation identified in 2000 included health information, communicable diseases, tobacco control, environment and health, sustainable health development and health research<sup>8</sup>.

The three trends described above have clearly influenced the role of the EC and the EU member states within the WHO. According to Eggers and Hoffmeister (2006: 160-161) a general rethinking by the Commission and EU member states regarding the Community status in the WHO has recently taken place. It was triggered because the US questioned the role of the European Commission in a meeting of the WHO Executive Boards' drafting committee in 2005. Before 2005 the Commission would not have played a very visible role in the WHO. The EC's representative, the European Commission, only had observer status in the World Health Assembly (WHA). It participates within the category of "representatives of other intergovernmental negotiations" and in WHA meetings its desk is situated between the Holy See and the Palestinian Authority. EU member states would not quite often not coordinate their position. Geneva-based health attachés of the EU member states would not have been well connected with Brussels, resulting in them failing to act with a single voice in the

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<sup>5</sup> The EC has been involved foremost in the field of health and safety in the workplace, pharmaceuticals and in the area health professions.

<sup>6</sup> On 28/10/1982 the Official Journal L 300 published an "exchange of letters between the European Communities and the World Health Organization (WHO) laying down the procedure for cooperation between the two organizations – Memorandum defining the arrangements for cooperation between the World Health Organization and the European Communities."

<sup>7</sup> The most important policy documents are the first health programme covering 2003-08 (adopted in 2002) and the second health programme covering 2008-13 (adopted in 2007).

<sup>8</sup> Exchange of letters between the WHO and the Commission concerning the consolidation and intensification of cooperation, published on 4 January 2001 in the Official Journal C1/7.

WHO on Community matters (Eggert and Hoffmeister, 2006). Nor did they put considerable effort in establishing and operating on the basis of common EU positions. If the Commission spoke, it did so as observer after several EU member states already had delivered their statement, sometimes with a comparable content, but not always. Only few issues on the agenda of the WHA would be discussed in the EU Council working party on public health, and only when agreement by consensus could be reached, Council conclusions were adopted.

After the US had questioned the status of the Commission, the EU presidency and Health Commissioner wrote a joint letter to the Chair of Executive Board in which they indicated the Community's intention to participate fully in the deliberations of the Board's 117<sup>th</sup> session in January 2006. According to Eggert and Hoffmeister (2006) the request was formally presented by 4 EU member states sitting in the Executive Board (in total it is composed of 32 elected members reflecting an equitable geographical distribution). As a result, the Commission could from that time onwards participate in relevant meetings, i.e. those where issues falling within the remit of the Community competence were discussed. Another result of the discussions would be an intention to strengthen EU coordination also on issues falling within the remit of the member states competence.

In two recent WHO negotiations, the European Commission on behalf of the European Community has been more involved. It were the Framework Convention on Tobacco Control (1999-2003) and the International Health Regulations (2003-2005). The EC even became a member to the Convention and the Health Regulations agreed upon became binding for the Community (Eggers and Hoffmeister, 2006). The reason the European Commission would be involved in these topics is because internally they are covered by EC legislation.

Notwithstanding the importance of the two issues, on most other issues discussed in the WHO, the EU member states are still the dominant actors and EU coordination on sensitive issues, such as reproductive rights<sup>9</sup>, is not automatic. The

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<sup>9</sup> With regard to the issue of reproductive rights, some EU member states, based on their close ties to Catholic faith, take a very different position than other member states, who consider reproductive rights a key health objective.

intensity of EU coordination is very much dependent on the half-yearly rotating presidency, who calls and facilitates the meetings, and in case of a common position represents the EU member states externally. Still, it can be expected that with regard to the two cases studied in this paper EU member states would have a larger intention to coordinate their positions in the 2008 (PHI) case, than they would have in the 2004 (DPAS) case, given the 2005 event and ensuing discussions on EU representation in the WHO, and the more general trends regarding the foreign policy aspects of health policy and the EU's position in the world. This also corresponds with the initial observation that in the DPAS they operated primarily on the basis of national positions, whereas in the PHI they operated on the basis of a common EU position.

#### **4. International negotiations on the global strategy on diet, physical activity and health**

One of the health problems in the EU that recently has gained in importance is obesity. European levels are approaching those of the US, where one third of the people is estimated to be obese and one third to be overweight. Among children the estimated prevalence of overweight was 30% in 2006 (European Commission, 2007). Obesity is also on the rise in developing countries, particularly in the emerging economies. From a health perspective obesity results in higher risk factors for diabetes, heart diseases, hypertension and some types of cancer.

To combat the rise of obesity there are policies both at EC level and at national level. At the EC level the focus is mostly on nutrition policy (labelling of food, advertising requirements, etc). At the national level issues such as awareness raising for obesity are conducted. At the global level the WHO developed the global strategy on diet, physical activity and health (DPAS, 2004)<sup>10</sup>. The 20-page document has no direct legal consequences, but still is an important symbolic piece of how the “international community” views the issues discussed. It moreover stimulated work on obesity-related food labelling in the Codex Alimentarius and catalysed policy activities at regional and

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<sup>10</sup> 22 May 2004, WHA 57.17, see: [http://www.who.int/gb/ebwha/pdf\\_files/WHA57/A57\\_R17-en.pdf](http://www.who.int/gb/ebwha/pdf_files/WHA57/A57_R17-en.pdf)

national level to combat obesity (Tukuitonga & Keller, 2005). The European Community, for instance, adopted an obesity strategy in 2007<sup>11</sup>.

Intense negotiations taking place in the WHO preceding the adoption of the DPAS also illustrate its significance. During the negotiations earlier versions of the strategy were allegedly softened by extensive pressure from the US protecting the interests of its food industry, supported by sugar-producing developing countries. Particularly the sugar and salt industries would have played a strong lobby to prevent the usage of their products to be endangered by the strategy (Tukuitonga & Keller, 2005). At least two last-minute amendments would have been included in the text to appease industry concerns, one which notes that the strategy should not give justification for the mounting of trade barriers and another which highlights the WHO's strong commitment to addressing malnutrition in order to emphasise it does not only focus on obesity. By and large, the EU and other countries would have supported the original more stringent proposal of the WHO, but positions of EU member states were not fully in line.

### **EU unity and effectiveness in the negotiations**

Most of the EU member states handed in national “comments” on a draft version of the DPAS<sup>12</sup>. In two, the ones by the Netherlands and the UK, a reference is made to a statement made by Ireland on behalf of the EU. Unlike the national comments, this statement has not been published on the WHO website, and was in any case rather short and general. Another expression of a common representation is the inclusion of the issue in a general EU statement in the 2004 WHA by the EU presidency, Ireland<sup>13</sup>. It

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<sup>11</sup> Council Conclusions on Putting an EU strategy on Nutrition, Overweight and Obesity related Health Issues into operation, Council 16139/07, 5-6 December 2007.

<sup>12</sup> The comments made by WHO Member states can be found on: <http://www.who.int/hpr/gs.strategy.country.shtml>

<sup>13</sup> Micheál Martin, Statement by the Irish Presidency of the European Union in response to agenda item 3, Address by Dr. Lee Jong wook, Director General, 57th World Health Assembly Geneva, 17/22 May, 2004.

merely states that the European Union recognises fully the need for endorsing the strategy and enables member states to develop action plans appropriate to national circumstances.

Inspection of the comments made by the EU member states reveals that they address different issues and are sometimes even contradictory. Only the comments by Belgium, Finland and Spain show a certain degree of similarity, whereas the comments by Germany and Italy can be considered outliers in that they take different positions on various issues. Interviews confirm these two countries were most critical of the draft version of the strategy, in comparison to the other EU member states. Their positions were said to reflect the interests of domestic industries, notably the food processing industry. Austria, Luxembourg and Portugal did not hand in any submission, whereas the majority of the states that acceded the EU in May 2004 and January 2007 did. In general, the comments made by EU member states were rather limited in comparison to those made by the US.

A key issue on which difference in opinion existed was the acceptance of the *scientific evidence* as presented by the WHO. Whereas Belgium, Bulgaria, Denmark, Sweden, the Netherlands, the UK, Romania and Finland commended the scientific evidence underpinning the draft strategy, Germany stated that “the exclusive reference to the scientifically controversial report of the Joint WHO/FAO expert consultation on diet, nutrition and the prevention of chronic diseases [...] is not sufficient”. Italy advocated a similar position. This appears strange when considering that the EU in a common position in the FAO had allegedly supported the adoption of the report. With regard to a recommendation on food *advertising* Germany moreover stated that “as it has not been definitively proved from a scientific point of view that advertising inevitably influences dietary habits” it would be recommended to change the word “influences” to “may influence”. The final version of the DPAS does not refer to the 2003 WHO/FAO report. Interviewees indicated that this was mainly due to the US being opposed to referring to it exclusively, but the German opposition helped as well. Regulating marketing activities with a view to promote healthier nutrition remained included, but just as one of the possible policy options for combating obesity (art. 40, DPAS, 2004).

Another contested issue was whether the strategy should make reference to *taxation, pricing and subsidies as possible instruments to promote healthy diets*. Belgium, Ireland, Spain, Sweden and Finland supported the mentioning of this possible policy instruments. Italy, on the contrary, suggested to delete the paragraph on fiscal options, since it argued increasing food prices could have possible impact and consequences on lower income people and especially the poor. Belgium argued on the other hand that it is well known that people in low income groups are at the highest risk for obesity-related diseases. Unhealthy food items would often be cheaper than healthy foods and therefore the option of pricing might be relevant to some countries and situations. Bulgaria considered it still early to include fiscal measures in the Global Strategy as an official recommendation. The Czech Republic and Poland also expressed a negative view with regard to the food pricing recommendation. Romania on the other hand suggested supports for agricultural policy, including subsidies, to be linked to the health of the population. In the final version of the DPAS the fiscal policies are still mentioned (art 40:2, DPAS). It is also mentioned that national food and agricultural policies should be consistent with the protection and promotion of public health (art. 41, DPAS), a recommendation with clear implications for the EC's Common Agricultural Policy (CAP) that subsidizes sugar and other nutrient food ingredients.

The tasks and remit of the *WHO in relationship to the FAO and the Codex Alimentarius Commission* proved a sensitive issue as well. Whereas resolutions of the WHO provide soft law recommendations, food standards agreed upon in the Codex Alimentarius are the central reference point for WTO dispute settlement and thereby determine the extent food regulations are considered prohibited trade barriers (Poli, 2004, Veggeland and Borgen, 2005). The trade relationship proved a difficult issue in the DPAS negotiations. Germany opposed any extension of the mandate of the Codex Alimentarius towards issues such as advertising and marketing. Bulgaria supported backing up the DPAS by the use of the international regulations and standards as agreed upon in the Codex, but argues it should be in accordance with its existing remit concerning safety of foods, labelling and presentation and advertising of foods. The final version of the DPAS requests the Codex Alimentarius Commission "to give full consideration, within the framework of its operational mandate, to evidence-based action it might take to improve the health standards of foods". It refers to areas where

the Codex Alimentarius *could* provide further development. They include food labelling, measures to minimize the impact of marketing on unhealthy dietary *patterns* (note that it does not refer to unhealthy food *products*), and production and processing standards regarding the nutritional quality and safety of products.

Hence, in the final version of the DPAS references to the WHO/FAO report, previously seen as a primary source of reference of the science, were removed and greater emphasis was placed on physical activity and balancing calories consumed with energy expended. By some this has been considered as a victory of the food industry over the scientists that wrote the study and whose findings had been discredited. But, key policy recommendations remained in place – such as using taxes to discourage consumption of sugar, salt and saturated fats and stricter monitoring of food advertising to children.<sup>14</sup> Germany and Italy were thus only partially successful in opposing the initial draft version of the DPAS, and where they were, this was said to be due to strong US opposition.

The EU was not united during the negotiations. DPAS has been discussed in general EU coordination meetings that took place during the WHA meetings, and allegedly an EU expert meeting has been held on the DPAS organised by the presidency. Relevant presidencies (notably Italy second half of 2003 and Ireland in the first half of 2004) only marginally succeed in bringing EU positions together. Perhaps they considered EU positions were too far apart to bridge them. Apparently, EU member states did not care too much about a joint EU representation either. It does not become clear whether they were not convinced that operating as a European bloc would add to their effectiveness in the negotiations, or whether the DPAS negotiations were just politically considered not important enough to devote extensive time and energy to EU coordination. For sure, at that time, it was also not “automatic” for EU member states to strive for a joint representation.

The European Commission showed also remarkably little interest in the negotiations, which is particularly astonishing when considering it could be argued that a number of issues discussed in the DPAS negotiations would fall within exclusive or at least shared EC competence. For instance the relationship with the Codex Alimentarius,

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<sup>14</sup> Buckley, N. and J. Mason, A fix for fatness proves illusive, Financial Times, 21 May 2004.

where clear trade interests are at stake, would seem related to the “EC’s sphere of influence”, as well as provisions with potential consequences for the EC’s Common Agricultural Policy (CAP). Interviewees indicated that among member states there was a general fear for the European Commission to become involved. They perceived this would strengthen the economic interest over the health interest of the citizens. Involvement of the Commission could trigger food lobbyists to underline economic interests for which the Commission would be more receptive. It did not become clear whether the Commission stayed on the side because it considered the DPAS politically not important enough or whether it realised a conflict with the member states could easily emerge when claiming EC competence, something politically not desirable.

Because there was no common position and no extensive EU coordination process on the DPAS, EU socialisation of officials involved did not occur. Those involved considered themselves primarily national representatives. Their national instruction was the most important point of reference.

Another result of not having a common position was that the EU was almost not visible during the DPAS negotiations. Newspaper articles discuss almost only the position of the US. In terms of results, a majority of member states got what it wanted in terms of recommended policy actions and further work being done in the Codex Alimentarius Committee. The removal of the joint FAO/WHO report as scientific reference point, makes it however more difficult to agree on nutrition and diet related food standards, since these need to be underpinned by scientific evidence. On that issue, the US, supported by Germany and Italy, clearly got its way.

## **5. WHO strategy on Public Health, Innovation and Intellectual Property**

In May 2008 the WHA agreed upon a new WHO strategy on public health, innovation and intellectual property (PHI). It was the result of intensive negotiations that took place in an Intergovernmental Working Group (IGWG), which convened for 3 weeks during the course of 2006, 2007 and 2008. It built on recommendations from a 2006 WHO report containing about 60 recommendations related to the discovery, development, and delivery of medicines, as well as innovation for health research in developing countries

(WHO, 2006). The objective of the PHI is to promote research on diseases that disproportionately affect people in poor countries. It is accompanied by a Plan of Action (PoA).<sup>15</sup>

Before the WHA commenced the IGWG had made considerable progress by reducing the number of unresolved paragraphs in the global strategy document from 200 to 18. An open-ended working group on the remaining paragraphs, most of them related to intellectual property issues, was established and started to work early in the week ending late Friday night. According to a WHO official, this has been the longest working group in the WHO negotiating history. In an editorial in the Bulletin of the WHO, Director-General Margaret Chan (2008), together with senior officials from Norway and France, calls the adoption of the PHI strategy a key event in a new era of global health diplomacy (Chan et al., 2008).

Although not all parts of the PoA could be agreed upon, ultimately consensus was reached on a number of topics that were still considered highly controversial during the preceding IGWG sessions<sup>16</sup>. These related to the extent to which strong patent protection should be protected or loosened in relationship to innovation and access to healthcare in developing countries. The final version of the global strategy stipulates that “research and development of developed countries should better reflect the health needs of developing countries” (art. 23, PHI). While it recognises that intellectual property rights (IPRs) are an important incentive for the development of new products, it also states that “this incentive alone does not meet the need for development of new products to fight diseases where the potential paying market is small or uncertain” (art. 7, PHI). The strategy encourages governments to consider ways to stimulate research and development into health treatment for diseases that disproportionately affect developing countries, including the so-called neglected diseases, for which pharmaceutical companies are less likely to develop new medicines, since they exist primarily in developing countries. Examples of potential tools include prizes to reward

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<sup>15</sup> Both documents as well as other IGWG related information can be found on the following website: <http://www.who.int/phi/en/>. Background information and articles on the course of the negotiations can be found on: [http://www.keionline.org/index.php?option=com\\_content&task=view&id=3&Itemid=1](http://www.keionline.org/index.php?option=com_content&task=view&id=3&Itemid=1).

<sup>16</sup> Bridges weekly, International Centre for Trade and Sustainable Development, News and Analysis, volume 12, number 19, 28th May 2008.

drug development, a health and biomedical research and development (R&D) treaty, and patent pools, in which patent holders share technology to provide a common platform for further innovation.

One of the most contentious issues in the negotiations on the global strategy has been the principle that the right to health should take precedence over commercial interests. This principle was advanced by a number of developing countries, but industrialised countries refused to include it in the final document. They reiterated that innovations in the health sector were dependent on a good investment climate for the pharmaceutical industry, and hence upon a strong IPR regime. On certain issues of the PoA, concerning timeframes, progress indicators and estimated funding needs, no agreement could be reached. It was decided to finalise them before the 2009 WHA. In this meeting the overall budget of the WHO will be on the agenda, which allows for linking PHI-related finance issues to general budget discussions.

### **EU unity and effectiveness in the negotiations**

The EU operated on the basis of a common position in the negotiations. Statements were made by the German, Portuguese and Slovenian presidencies, although the latter ones were not made publicly available. Some EU member states also handed in national submissions. The UK published a lengthy response to the 2006 report, and other submissions were received in 2007 by Portugal, Spain and Romania<sup>17</sup>. These were rather short and did not seem to contradict the EU position. Overall the EU took a median, to defensive position, somewhere in between the US, who fiercely defended strong intellectual property protection and Brazil, supported by other developing countries, who questioned the relationship between patent protection and innovation into new medicine, particularly for diseases disproportionately affecting developing countries.

Interviewees referred to various different key priority issues of the EU in the negotiations, which can also be found back in the presidency submissions. The extent to which the WHO would be mandated to deal with IPR issues in relationship to other

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<sup>17</sup> Positions could be found on the following website: <http://www.who.int/phi/en/>

competent international organisations (WTO and WIPO) was clearly one of the most important issues of concern to the EU (EU presidency Germany, 2007). The EU recognised the WHO's role in monitoring the impact of IPR on access to healthcare, but considered IPR protection important to stimulate innovation into new medicines, and to be best safeguarded by the WTO/TRIPS agreement and WIPO arrangements (EU presidency Germany, 2007; EU presidency Portugal, 2007). It wanted to avoid the WHO to become able to take decisions which would allow also the emerging economies, or middle incoming developing countries to produce newly developed medicines at low cost for all patients, rich and poor. This would dilute incentives for costly R&D efforts into new medicines. Relaxing IPR provisions could also incur a risk of 'parallel imports'; exports of low-priced medicines to countries where they are still more expensive, decreasing prices of medicines not only in poor, but also in richer countries, thereby threatening the economic well-being of the commercial pharmaceutical industry and incentives for innovation into new medicines (cf. UK response, 2007:23). Some interviewees indicated the EU considered the WHO not to be the right forum to discuss highly political issues such as the interpretation of the WTO/TRIPS agreement. A decision to set aside patent laws for specific diseases would require strong political backing, whereas the WHO is still very much a technical UN organisation. At the same time, the EU did acknowledge a monitoring role for the WHO and its potential contribution to stimulate access to medicine and research into diseases disproportionately affecting developing countries. It acknowledged that for certain diseases the market does not work. In the final version of the PHI, paragraphs defining how the WTO/TRIPS agreement would need to be interpreted with regard to health issues, and provisions on preventing bilateral trade agreements to restrict governments from using TRIPS flexibilities, were deleted (art 5.3: b-e). The application of the strategy was also contained to medical devices and not strategies. Interviewees indicated this was mainly the result of US opposition to them, but with support by the EU.

Another important issue to the EU was to have an insight and overview of already existing R&D activities and funds, including activities of private-public partnerships, devoted to neglected diseases (EU presidency Portugal, 2007). It wanted existing arrangements and funds to be better coordinated and used before considering new financial instruments. It moreover indicated a better understanding would be

required on the feasibility and impact of suggested actions, such as technology transfer and patent pools (EU presidency Germany, 2007). It asked also for more clarity on definitions, assignments of tasks to actors and a reduction of number of actions and the measurement of related indicators (EU presidency Portugal, 2007). A representative of an EU Member state characterised the EU's contribution as "bringing a sense of realism into the process".

An issue on which it was generally perceived the EU did not succeed in doing so is the reference to a health and biomedical *R&D treaty* in the final version of the strategy (art 2.3c, PHI). Although it is only mentioned as a possible instrument, the symbolic value of having the word *treaty* in the final version of the PHI is considerable. A *treaty* implies hard law with clear commitments, and an acknowledgement of global responsibility. This goes far beyond the charity character of current development assistance allocated to health R&D. Allegedly, it was a "red line" for the EU to not have the word "treaty" in the final version of the PHI strategy and PoA<sup>18</sup>, but the Portuguese presidency wrongly assessed the US would ensure it not to enter the document. When the US, unexpectedly gave in to the demands of Brazil and other developing countries, the EU was unprepared and did not succeed in communicating why it was opposing an R&D *treaty*, thereby allowing it to emerge and remain in the agreed parts of the document from 2007 onwards.

On the issue of financing the EU regretted not being able to reach agreement. It managed to negotiate a package deal with the African group of the WHO, which also included agreement on a division of responsibilities in the PoA, and which was partly accepted by the others in the final stages of the negotiations. For the EU it was important to bring the IGWG negotiations to a conclusion. It was felt further compromise was not in reach and to organise another IGWG session would have been a waste of resources.

The role of the European Commission in the IGWG was brought to discussion by other states participating in the IGWG. They questioned the role of the Commission referring to the discussions in the WHO Executive Board meeting of January 2006. In this meeting incoming EU presidency Portugal, supported by other EU member states

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<sup>18</sup> Love, J. (2007), blog on the IGWG process, 7 November.

being part of the board, proposed to invite the Commission to participate without vote in the deliberations of amongst others the IGWG. Australia, supported by the US, stated it was “prepared to consider the request on the following conditions: provision of a clear statement of competencies by the presidency of the European Union with the support of all its member states; agreement that the European Commission and the European Union member states (including the presidency) would not seek to intervene in discussions of the same subject matter; and the expectation that the status of the European Commission at meetings should not subsequently be relied upon in any way to strengthen the Commission’s claims for additional participation rights in other international forums.<sup>19</sup> This illustrates clearly that a more unified EU representation, and particularly its external representation being taken care of by the European Commission is not taken for granted by third states. They attach clear conditions before allowing the EU to operate according to its own rules. In the final version of the PHI strategy, at several instance footnotes are included mentioning specific tasks to member states, where applicable, also apply to “regional economic integration organizations”, a category de facto only applicable to the EC.

Among the EU actors there were also questions with regard to the division of labour. The Commission claimed IPR falls within the EC’s exclusive trade competence, but member states were keen to emphasize that patent law still is a national competence. On many issues it was difficult to specify exactly the extent of EC competence. Neither were all member states’ representatives always aware of what EC competence implies in terms of procedures. For instance, some considered or feared that the Commission would be in a position to decide single-handedly upon EU statements in areas of exclusive competence. This is not surprising given that with regard to international health questions EC competence is usually non-existent or shared. To a certain extent it also reflect tensions in trade negotiations where member states regularly complain about the European Commission acting too independently. The Commission in turn, sometimes felt it had to remind EU member states of the existence of EC competence and of positions the EC and EU member states had previously taken in WTO and WIPO

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<sup>19</sup> World Health Organization Summary Record of the Executive Board 117th Session, Geneva, 23-27 January 2006, EB117/2006/REC/2.

negotiations on IPR issues. In the initial phases there were considerable tensions between some of the member states' representatives who considered the Commission was too keen on defending commercial interests, whereas they considered the IGWG was about promoting health in developing countries. This also negatively affected the relationship between the Commission and the presidency, for whom it was important to maintain a good relationship and to ensure tensions among EU actors would not become visible to negotiating partners. In the final stages of the negotiations, relations improved with the Slovenian presidency having charged a senior IPR expert to manage EU coordination and external representation. The Commission recognised his expertise and even allowed him to take care of the external representation on issues it considered to fall within EC competence. In return, sometimes the Commission was allowed to speak on behalf of the presidency. Allegedly, in the final hours of the negotiations the presidency was the dominant speaker on behalf of the EU.

EU meetings to discuss and align the positions of the EU member states and the European Commission took place in advance and in daily coordination meetings, but also on the spot during the IGWG sessions. This was facilitated by a decision to organise the room in such a way that regional groups could sit together, which meant EU states could sit together, since they are all part of the Eurogroup. It smoothly settled initial concerns from the US and Australia about the Commission's role when sitting behind the name plate of the EU presidency and speaking on behalf of the EC. In addition to the EU coordination among Geneva-based EU diplomats and health attachés, IGWG issues falling within the remit of EC competence have also been discussed for about 3 times in the Geneva-based article 133 committee (on trade policy), according to an interviewee. It was considered advantageous that the EU's mandate was not discussed in the Council working parties in Brussels, since it would most likely be disputed whether the health, intellectual property or industry working party would be in lead and participants of these working parties would have insufficient knowledge to deal with the cross-cutting policy issues.

In general some EU member states were more active in the IGWG than others. Not all member states had a national position and were said to attend EU coordination meetings. Within member states it proved a challenge to coordinate and decide upon national instructions among various government departments. Officials working on

trade, health or development cooperation policy looked at the IGWG from different perspectives. Officials working in the field of public health were generally less familiar with processes of EU coordination and the role of the European Commission on issues where EC competence exists. The German presidency organised a 1-day workshop in Brussels to bring together various interests and to consult them with regard to the EU position<sup>20</sup>.

With regard to national positions, Finland and the Netherlands appeared more keen on promoting the health interests, particularly viewed from a developing cooperation perspective, whereas Belgium, France, Sweden, Italy and to a lesser extent the UK and Germany were more keen on guarding IPR. The UK appeared most supportive of addressing the relationship between innovation, IPR, and access to health in developing countries in the WHO and seemed most willing to make financial assistance available for R&D instruments in developing countries (cf. UK response to IGWG, 2007). The EU member states that joined in 2004 and 2007 were said to be somewhat less visible and vocal, but when they intervened during EU coordination meetings their concerns were not overruled. The instructions of EU member states were said to reflect quite well their economic interest with regard to having a research-based pharmaceutical industry or generic drugs producers<sup>21</sup>, as well as the importance attached to improving public health objectives, both with regard to safeguarding incentives for innovation and low price levels in the domestic market, as with regard to strengthening health objectives in developing countries. The position of Sweden, and to a lesser extent Denmark, caused some confusion and even annoyance with other EU member states, since they were clearly defending commercial interests, whereas usually they are considered supportive of development interests. Perhaps as a result, cooperation among the Nordic countries was not as intensive as it tends to be with regard to other WHO agenda items, such as reproductive rights.

EU coordination started somewhat unstructured. When the Finnish presidency called for a meeting about one month preceding the first session of the IGWG in 2006,

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<sup>20</sup> Cf. [http://ec.europa.eu/health/ph\\_international/int\\_organisations/who\\_en.htm](http://ec.europa.eu/health/ph_international/int_organisations/who_en.htm)

<sup>21</sup> Pharmaceutical industry in the EU was said to be mainly based in Sweden, Denmark, France, Germany, the Netherlands (biotechnology) and Belgium (vaccines).

member states were very much confused with regard to what the IGWG would be about, did not have their national instructions ready, and were cautious with regard to the issues on which the Commission claimed a right over external representation. Over time, the EU became better organised, although there was some criticism with regard to the Portuguese handling of the IGWG session in 2007. Coordination meetings on average took about 3 hours a day and concentrated more and more on negotiations on specific text proposals. They did forge a spirit of compromise and general willingness to support the presidency and promote the EU position. A synopsis of EU positions and who brought them in, EU fallback positions, and “red lines” was written down in a so-called matrix document. The EU was said to be much better prepared during the final stages of the negotiations and insiders claimed this contributed to it being able to mediate between the US and Brazil, and to come up with compromise proposals.

By and large EU unity was kept, particularly during the formal negotiation sessions. None of the EU member states made interventions on its own behalf, although delegates indicated it was mentioned in EU coordination that EU member states were free to do so as long as others would be informed and it would not contradict or undermine the EU’s position. Some even argued that it may have strengthened the EU’s powers when not one, but several states would have brought forward issues the EU was keen to promote. This strategy allegedly would be used in other international organisations, such as the IMO and UN human rights bodies. In a way it would be unfortunate to have the 27 seats represented by only one single voice, although it could speak for 7 minutes in the official sessions, whereas interventions of individual states, including the US, are limited to 3 minutes. In informal meetings and the corridors the EU was also said to be rather coherent. Complaints persisted about Sweden being particularly unwilling to compromise during EU coordination meetings. Some EU member states’ representatives would moreover have leaked documents to non-governmental organisations (NGOs). Allegedly it has also occurred that EU member states approached the Swiss and Norwegian delegations, and even NGOs, to include issues in their statement or lobby strategies on which no agreement could be reached within EU coordination, or on which it was not certain whether the EU presidency would use the right language or put sufficient efforts in to convincing other states.

Some representatives of EU member states clearly considered themselves European actors, whereas for others the national affiliation remained the most important, indicating the importance of national reporting lines as one of the reasons. Clearly, the instructions from the capital remained an important reference point for diplomats on the ground. On the other hand, supporting the EU presidency by providing information and (text) suggestions was often mentioned as an important task during the negotiation sessions. EU member states also agreed on a division of labour with regard to lobbying third states to join EU statements and positions. For instance, one member state asked its embassy in Brazil to find out to what extent its position was supported domestically and what position Brazil had taken in other IPR-related discussions. In informal negotiations, that took place ahead of the WHA '08, the EU was represented by the Slovenian presidency, the European Commission and the incoming French presidency. In some other informal negotiations also other EU member states, with a specific concern or interest, joined. In the IGWG friends of the presidency group, EU chair Slovenia and the European Commission would participate. One person recalled “they would always sit together”.

Third states and interest groups generally considered the EU as a close coalition, although it is not always clear to them how the Commission and presidency share their work. Frequently the abbreviation EC is misunderstood to stand for European Commission, the European Communities' representative, but not its main decision-maker. Member states generally considered it beneficial to operate with a joint position. It would maximize influence, for instance because the EU is always offered a seat in informal negotiations between the key players in the negotiations. A clear drawback would be the amount of time spend in EU coordination. On one occasion during the Portuguese presidency, the EU had to miss an opportunity to join an informal meeting, because it did not manage to reach agreement in its EU coordination meeting. It reflects a general view on the Portuguese presidency being less well organised, late with actions and interventions, and not having sufficient English language skills to draft statements and bring them forward in the negotiations. Another drawback would be that EU coordination generally leads to a position that is too rigid. In IGWG the EU was very much occupied with negotiations on wordings, and some interviewees indicated that as

a result the EU in the final stage of the negotiations could do little more than accept a deal negotiated by others.

Sometimes a comparison with Norway and Switzerland was made. Both countries were said to “punch above their weight” in the negotiations. This would be due to specific industrial interests in the issue being negotiated, but as well due to having good delegates involved. They would moreover be perceived as neutral and thereby be able to play a bridging function, particularly since the rest of the negotiating spectre was divided in negotiating blocs: the US, the EU, the emerging economies and the least developed countries. But, it was also mentioned that they were more flexible in adjusting their position, since they did not have to coordinate among 27 member states and the European Commission.

In summary it can be said that the IGWG was characterised by an extensive process of EU coordination. EU unity in external representation emerged due to the Commission claiming competence, EU member states being able to arrive at a common position and (most of) their representatives considering supporting the EU position of highly important. EU coordination did contribute to the EU’s visibility and effectiveness in the negotiations, although there were also considerable drawbacks for the EU’s negotiating performance. In the next section a more systematic comparison will be made with the DPAS case study and other research on the EU in the WHO, alongside more general statements made by interviewees on EU coordination in WHO (e.g. on other negotiations).

## **6. Comparing the EU’s performance in two sets of WHO negotiations**

In terms of effectiveness a tentative conclusion is that the EU (PHI), or a majority of the EU member states (DPAS), was moderately successful in obtaining its objectives in the final versions of the strategies. However in both cases its position appeared overshadowed by the US that took a more outspoken position. In the PHI case it was interesting to find the example of the R&D treaty, which the EU did not manage to exclude from the final text, because it wrongfully assessed it could shield behind the

US. Interviewees considered the EU relatively successful in the PHI negotiations, and referred often to how unified they came across, but this may be due to the questions asked to them regarding EU coordination and external representation. Although it is not too clear that the non-coordinated approach that occurred in the DPAS negotiations led to the EU being less effective, it did not help individual member states in playing a larger role. Even a relatively large EU member state, Germany, played only a modest role in the negotiations. In table 1 below some of the key findings are summarised.

Table 1

EU (member states and European Community)	DPAS	PHI
Effectiveness (member states reach their objectives)	Moderate: majority EU member states succeeded in reaching its objectives, but not all of it	Moderate: EU managed to succeed with regard to most objectives, but not with all (e.g. R&D treaty, complete agreement PoA)
Unity in external representation: <ul style="list-style-type: none"> <li>• EC competence</li> <li>• Preferences</li> <li>• EU socialisation</li> </ul>	No; only a few common statements <ul style="list-style-type: none"> <li>• EC competence not claimed by European Commission</li> <li>• Heterogeneous</li> <li>• No</li> </ul>	Yes, but sometimes not kept in informal encounters <ul style="list-style-type: none"> <li>• Exclusive and shared EC competence (disputed on specific issues)</li> <li>• Heterogeneous</li> <li>• Some</li> </ul>

A reason why health experts from the EU member states are concerned about the Commission becoming involved in both cases is that they suspect the Commission to be first of all concerned with its economic agenda and not with “what is healthy for the citizens of Europe and other countries”. The difficulties between aligning economic and health interests is a recurring theme in the cases. In both the DPAS and the IGWG

process leading to the PHI strategy it was clear that trade-oriented representatives were most critical with regard to the WHO's role, particularly with regard to what they considered trade issues. This is in line with findings of Princen (2007), who with regard to case studies on tobacco and alcohol policies, found that EU health officials would feel most comfortable with the WHO, whereas actors representing trade interests favoured the WTO as the relevant platform for negotiations.

The Commission was moreover suspected of competence expansion. These findings confirm other research. Guigner (2006) argues that since the Commission only became active on health issues recently, it faces challenges to establish its position. It would compete with other entities such as the OECD and the Council of Europe, not have sufficient expertise on health issues and would privilege economic interests. Within the Commission, DG Trade would be more powerful than DG Sanco, although the latter has recently been expanded.

Something which became clear from the PHI case study is that because the attribution of EC competence was complicated, and rules for EC participation in the WHO were in flux, these issues could constantly be contested. This sometimes distracted attention from the negotiations and could even be used for tactical reasons by negotiating partners to put pressure on the EU in the negotiations. It also demanded a considerable amount of time and energy from the EU actors. On the other hand, it seemed difficult for the European Commission and the member states to decide upon a more permanent arrangement and it was favoured to keep some flexibility. With regard to the system of EU coordination it was clear that during the IGWG (2008) it was much more institutionalised than with regard to DPAS (2004). According to a diplomat "it would now seem strange to question it".

Despite drawbacks in terms of time spend, a need to reach compromise, and a perceived inflexibility of the resulting EU statement, diplomats and officials still clearly considered EU coordination in the WHO advantageous. The EU would be a "good pool for combining competencies, experiences and information". Deliberations among EU actors would result in "new and smart ideas". Sometimes issues and cases where EU coordination would not be of added value were mentioned. For instance, on the issues of reproductive rights it would be impossible to align positions since some "catholic

countries”, such as Ireland, Poland and Malta, take a more principled position opposing birth control restrictions. When a new Director-General had to be elected, EU member states came up with 5 different candidates without having consulted each other. On other issues it was considered of utmost importance to have a common EU position. The issue of support for public health in the Palestine areas was considered politically so sensitive that having a clear EU position would be essential. Yet others referred to the trade negotiations as example where EU coordination would be too much of a “straight jacket”. It would be too difficult to control the Commission in these negotiations. It was also mentioned that accession of the EC as Member to the WHO could incur a risk of other similar entities being able to claim this right as well.

Most of the people interviewed for this research referred to a structural risk incurred by the considerable role given to the EU presidency in representing the EU externally. It’s rotating character would distort continuity and the EU’s influence would be too much dependent on the ability and capacities of the government and the person in charge. One person mentioned: “it is almost unbelievable that the EU allows its commercial interests to be defended by someone, who is just in this position since he is coming from a government holding the EU presidency”. Another person referred to problems arising from the presidency’s essential role in setting the political agenda and taking care of the most politically sensitive negotiations. These points of criticism are often heard in general discussions on the system of the rotating presidency, and were included among the reasons why the Lisbon Treaty proposes some reforms. With regard to issues being subject to shared or complementary competence, it is however far from clear whether the role of the rotating presidency in representing the EU externally would change, since the sectoral Council configurations, including the “Health Council”, would still be chaired by the presidency (Schout and Van Schaik, 2008). Only when EU representation in (certain) International Organisations would be labelled as “foreign policy”, it would be clear that authority over external representation would be transferred to the Foreign Affairs Council chaired by the newly created position of High Representative of the Union for Foreign Affairs and Security Policy. In such scenario it would also be likely for the newly to be established European External Action Service to become involved. However, for the moment the Lisbon Treaty’s future is uncertain, due to a no-vote in a referendum on its ratification in Ireland. This makes discussions on

a continuation of the rotating presidency representing the EU in the WHO politically incorrect and to a certain extent theoretical.

## **7. Conclusions**

This paper analysed the performance of the EU with regard to the adoption of two WHO strategies. The extent the EU coordinated its position and the way it organised its external representation differed to a large extent with one case being subject primarily to national representation (DPAS, 2004) and one to an extensive process of EU coordination and a joint representation (PHI, 2008). By focusing on the degree of perceived EC competence, preference homogeneity and processes of EU socialisation, advantages and disadvantage of EU coordination for its performance as a negotiator become apparent. More unity in external representation in general is considered to be advantageous for the EU's bargaining power, but ensuring a unified stance and representation consumes a lot of time and energy from the member states and the European Commission. Perhaps, this is why the effectiveness of the EU, or a majority of its member states, appears to be rather similar in the two cases studied.

EC competence clearly contributes to unity in external representation, since it imposes a legal obligation to coordinate towards a common EU position. Politically however it proves sensitive for the Commission to claim EC competence. It can backlash on the willingness of member states to cooperate among each other and with the European Commission. In the field of health it is clear that member states do not thrust the Commission to negotiate in line with their preferences when taking over the negotiations. They fear the EU, would not become a "healthier" negotiator, but merely an economic interest defender. Whereas the Commission, as supranational EU institution, is most keen on a common European representation in international organisations, it does not succeed in winning the "hearts and minds" of the member states needed to become the uncontested EU negotiator within the WHO.

Nonetheless, the Commission claiming competence, and in general seeking ways to enhance EC participation in the WHO, seems to have been the reason for why in 2008 the heterogeneous preferences of the member states were forged into a common

EU position, something hardly attempted in 2004. Although the Finish presidency in 2006 was rather suspicious about the Commission's intentions with regard to IGWG, it did not question the need for EU coordination and a joint EU representation. Even the Portuguese presidency, which appeared not very enthusiastic and interested in the IGWG process, organised daily EU coordination meetings. Criticism on their handling of the IGWG process lead the Slovenes to decide on hiring a professional negotiator with expert knowledge on the subject being discussed. At that time, positions of EU member states and negotiating opponents were much more clearly defined. It had become clear that the EU member states, although their positions varied considerably, were still within a median range in comparison to the US and Brazil.

Representatives of EU member states involved in the IGWG negotiations considered supporting the presidency a key task, but also attached much importance to their national instructions. It is therefore difficult to say if they were completely "Europeanised", but when considering that most of the health experts involved previously had worked foremost in a national or purely intergovernmental context, one could say some EU socialisation occurred during the IGWG process.

By contrast, in 2004, EC competence was not claimed and a process of extensive EU coordination did not emerge. At that time, there was no clear guidance for EU coordination on international health affairs. Therefore it perhaps is not surprising that neither the Commission, nor the presidency was willing to risk a failure of bringing in line the heterogeneous preferences of the EU member states. Relevant policy-makers were insufficiently aware of the existing rules regarding a common EU representation and therefore considered it "normal" to operate on the basis of national positions. This has now become unthinkable. For representatives of EU member states operating as a bloc has become the normal procedure with the exception of some specific agenda items, such as reproductive rights. The value of EU coordination would stretch beyond aligning positions. It would help the EU to arrive well-prepared in the WHO meetings; to master the issues and understand in full its own position. It would allow for information sharing and a division of labour among the EU actors.

Drawbacks of EU coordination have also become more apparent. The objective of ensuring a proper EU external representation seems to somewhat distort attention

from exerting influence in the negotiations. Particularly for presidencies it seemed of vital importance to “keep the EU united before the eyes of the world”, but also for several of the member states and for the Commission this appeared an overriding objective. An interesting finding is that presidencies appear to be judged primarily for their ability to manage the EU and less so for achieving EU objectives in the negotiations. Also for non-EU actors the extent to which they consider the EU to operate effectively seems very much related to the degree of unity it displayed in the negotiations. Other drawbacks include the time spent in coordination, the risk of having to accept a lowest common denominator position, inflexibility regarding the specifics of the EU position and dependency upon the negotiating capacities of the presidency. Forging EU unity can be cumbersome, thereby negatively affecting its performance in the negotiations.

This is most likely the main reason for why in terms of effectiveness it is not obvious that the EU did a better job in the IGWG negotiations than in the DPAS, although we do not know what would have happened when an extensive process of EU coordination would have occurred in DPAS. Neither do we know what would have happened when EU member states would have operated on the basis of national positions in the IGWG process. This makes it difficult to generalise the research findings. It illustrates also why it would be interesting to extend this research to other case studies.

A brief review of such case studies in other policy areas indicates that the tensions between the Commission and the EU member states, the criticism regarding the rotating presidency and time-consuming EU coordination in the EU’s external representation practices are recurring themes (e.g. Bretherton and Vogler, 2006; Smith, 2006; Woll, 2006; Meunier and Nicolaïdis, 2006; Coeuré and Pisany-Ferry, 2007, Groenleer and Van Schaik, 2007; Taylor, 2007; Gstöhl, 2008; Gowan and Brantner, 2008). Findings are inconclusive, but some relationship between performance and the degree of EC competence, the willingness of negotiating partners to accept a unified EU representation and the willingness of EU member states to do so, seems to exist. A striking feature is the variety of external representation arrangements. In some negotiations the Commission is allowed to speak also with regard to issues where officially no exclusive EC competence exists (e.g. WTO with regard to some services issues, cf. Eeckhout, 2004). In other negotiations lead-negotiators are appointed at the

level of senior civil servants to take care of the external representation for a longer time period under the formal responsibility of the presidency (e.g. in the international climate negotiations, cf. Oberthür and Roche Kelly, 2008). This would to ensure continuity without compromising the formal role of the rotating presidency. In yet other negotiations, the EU submits per agenda item who will speak, vote and how its position will be decided upon in advance of each international meeting (e.g. in the FAO). In the international whaling committee the EU even appears to have decided it works better when EU member states take care of their own external representation. It is unclear whether these different arrangements really make the EU a more effective negotiator. It may therefore be interesting to conduct more comparative and in-depth research on EU coordination and external representation in international organisations. In practice a trend towards a more unified external representation of the EU is likely to continue (Hoffmeister, 2007).

Within the context of WHO negotiations more structural efforts into EU coordination and external representation in that respect seem a precondition for making the EU a more “healthy negotiator”. Strategic issues, such as accession of the EC to the WHO, could be considered more openly, even when in the short run, it may require political sacrifices in specific negotiations. For those cases where EC competence is shared or complementary, a more explicit choice between a preference for the Commission or the presidency as the EU’s spokesperson could be made. When deciding a preference is to be given to external representation by the presidency, efforts could be considered to strengthen the support for the presidency or to decide on a system in which a lead negotiator is chosen from among the member states’ representatives. The EU could furthermore consider to develop a foreign policy strategy on health issues to give political guidance to its activities in WHO negotiations. This could deal with issues such as the relationship between free trade objectives and health objectives, international cooperation on health, security threats, and health-related aspects of EU development cooperation. An increased effort in health diplomacy would not seem a luxury when considering more people in this world die at young age from diseases than from wars, hunger or natural disasters.

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