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# Supranational? Federal? Intergovernmental? The Governmental Structure of the European Union After the Treaty of Lisbon

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**SUPRANATIONAL? FEDERAL? INTERGOVERNMENTAL?  
THE GOVERNMENTAL STRUCTURE OF THE EUROPEAN  
UNION AFTER THE TREATY OF LISBON**

*Roger J. Goebel\**

*The goal of this article is to provide an overview of the progressive augmentation of the supranational character of the governmental structure of the initial EEC, gradually evolving into the present European Union, particularly as a consequence of revisions to the constituent Treaties. Part I of this article presents the European Commission, the initial institution whose structure and operations have always been markedly supranational in character and which has always been dedicated to the promotion of supranational goals. Part II examines the Council of Ministers, the political institution that is intrinsically intergovernmental in character, but whose operational role in the adoption of legislation and policies took on significant supranational features in the late 1980s. Part III then describes the European Parliament, which can be properly characterized as a supranational, or indeed federal, institution after it began to be directly elected in 1979, and which strongly promotes a supranational agenda. Part IV presents the intrinsically intergovernmental nature of the European Council, and then examines the impact of the Lisbon Treaty, which marks the start of a shift to a partially supranational operational role for that highest political body.*

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## I. INTRODUCTION

When on January 1, 1958, the European Economic Community (hereinafter EEC) was launched with the goal of achieving “an ever closer union among the peoples of Europe,”<sup>1</sup> its initial six Member States accorded centralized power to permanent institutions in a structure significantly different from loosely-organized bodies employed in traditional intergovernmental cooperation. The EEC’s Commission immediately began to function as the center of central executive and administrative authority, exercising what is commonly viewed as a supranational role. Indeed, already in 1963–64, in two celebrated judgments, *Van Gend en Loos* and *Costa*, the Court of Justice of the European Union (hereinafter simply referred to as Court of Justice) authoritatively depicted the Community as a new “legal system” in which, unlike “ordinary international treaties,” the Member States had permanently ceded significant sovereign powers to the Community’s central

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<sup>1</sup> Treaty establishing the European Economic Community (sometimes called the Treaty of Rome, March 25, 1957), 298 UNTS 11, 4 Eur. Y.B. 412. The famous quoted text appears in the first recital.

institutions and “created a Community of unlimited duration.”<sup>2</sup> Thus, it is possible to characterize the EEC as possessing significant supranational features early in its history. After the EEC’s European Parliament began to be elected by direct popular vote in June 1979, it joined the Commission as a supranational institution, and gradually acquired substantial political and legislative power.

In contrast, the Council of Ministers, the institution that directly represents Member State governments, clearly had an intergovernmental nature in the early history of the EEC. Many EEC Treaty provisions required the Council to take any decisions or adopt any legislation by unanimity. Even when the Treaty authorized the Council to act by a majority vote on some legislation, its customary procedure was to take decisions only if no State dissented.

This Council operational mode was based upon the famous (or infamous) “Luxembourg Compromise,” the name given to an ambiguous policy statement of the initial six Member States’ foreign ministers at an extraordinary meeting held in January 1966. After President Charles De Gaulle had prevented French ministers from attending Council sessions in late 1965, due to his opposition to certain Commission proposals, the foreign ministers drafted the Compromise in order to secure France’s on-going participation in EEC governance. The text of the Compromise suggested that any State could veto proposed Council action whenever it claimed that its “very important interests [were] at stake.”<sup>3</sup> After the Luxembourg Compromise, the Council can be said to have taken decisions on policy and legislation essentially in an intergovernmental mode, because it customarily refrained from acting whenever any Member State was opposed to doing so. The Council’s operational practice only changed after the Single European Act amended the EEC Treaty in 1987 to authorize the Council to act on most legislation to achieve the economically desirable goal of an integrated market by a “Qualified Majority Vote” (QMV) (described in *infra* Part IV.C), which gave greater weight to the States with larger population and economic power.<sup>4</sup> Although the Council remains intrinsically intergovernmental in structure, its ability (and willingness) to act by a type of majority vote on most important legislation has shifted its operational role from purely intergovernmental to one that has both intergovernmental and supranational features.

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<sup>2</sup> Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. I, 19; Case 6/64, *Costa v. ENEL (Ente Nazionale Energia Elettrica)* [National Electricity Board], 1964 E.C.R. 585, 593.

<sup>3</sup> See the invaluable history by an eminent political scientist, Professor Desmond Dinan, DESMOND DINAN, *EUROPE RECAST: A HISTORY OF THE EUROPEAN UNION* 107 (2004) [hereinafter DINAN, *EUROPE RECAST*]. President Charles DeGaulle bitterly opposed several Commission proposals, notably the creation of a system of autonomous financial resources to fund the EEC budget, and blocked action by preventing French ministers from attending Council sessions (the “empty chair” policy). Following the Luxembourg Compromise, the Council resumed its regular meetings and even adopted legislation on occasion by a majority vote, but not on politically sensitive issues when a state voiced opposition. *Id.* at 104–08; see also *infra* note 129 and accompanying text.

<sup>4</sup> The Single European Act, Feb. 28, 1986, 1987 O.J. (L 169) 1 [hereinafter SEA]. For a description of its constitutional impact, see George A. Bermann, *The Single European Act: A New Constitution for the Community*, 27 COLUM. J. TRANSNAT’L L. 529 (1989); Claus D. Ehlermann, *The Internal Market Following the Single European Act*, 24 COMMON MKT. L. REV. 361 (1987); Hans-Joachim Glaesner, *The Single European Act: An Attempt at an Appraisal*, 10 FORDHAM INT’L L.J. 446 (1987); Joseph H. H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403 (1991).

The European Council, composed of the Prime Ministers of the Member States, together with the President of France, is the final governmental structure of the European Union. Since 1969, the European Council has effectively functioned as the most authoritative policy-making body of the European Union (EU).<sup>5</sup> Throughout its history, the European Council has represented preeminently the intergovernmental face of the European Union governmental structure, but, as we shall see in Part VI, the Treaty of Lisbon has begun to shift it towards features of supranationalism.<sup>6</sup>

Successive revisions of the initial EEC Treaty have progressively increased the powers of the governmental institutions and modified their mode of operation in the direction of supranationalism. Two treaty revisions are so far-reaching that they can appropriately be termed revolutionary rather than evolutionary. The first is the Treaty of Maastricht of February 7, 1992, effective November 1, 1993, whose fundamental Treaty on European Union (the "Maastricht TEU") created the European Union. Its accessory treaty, the Treaty establishing the European Community, significantly modified the structure of the EEC's political institutions, especially to grant the Parliament legislative power almost equal to that of the Council, and renamed the EEC as the European Community (EC) in recognition of the major expansion of its scope beyond economic concerns.<sup>7</sup> The Treaty of Amsterdam, effective May 1, 1999, and the Treaty of Nice, effective February 1, 2004, amended both Maastricht Treaties principally to modify provisions concerning the structure of the political institutions and the Court of Justice in order to enable the accession of the Central European and Mediterranean nations in 2004 and 2007.<sup>8</sup>

The second revolutionary treaty is the recent Treaty of Lisbon of December 13, 2007, effective November 1, 2009, composed of a revised Treaty on European Union (the "Lisbon TEU") and an accessory Treaty on the Functioning of the European Union (TFEU). The Treaty of Lisbon merged the European Community into the

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<sup>5</sup> See DINAN, *EUROPE RECAST*, *supra* note 3, at 125–30, for a description of the 1969 Hague summit, which inaugurated the series of meetings of the heads of government that evolved into the regular sessions of the European Council. *See also* *infra* Part VI.A and accompanying text.

<sup>6</sup> Consolidated Version of the Treaty on European Union, Mar. 30, 2010, 2010 O.J. (C 83) 13 [hereinafter Lisbon TEU]. This was accompanied by the Consolidated Version of the Treaty on the Functioning of the European Union, May 9, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU].

<sup>7</sup> Treaty on European Union, together with the Treaty establishing the European Community, July 29, 1992, 1992 O.J.C 191/1 [hereinafter Maastricht TEU and ECT]. The Treaty of Amsterdam, Oct. 2, 1997, 1997 O.J.C 340/1, renumbered all the articles of the initial Maastricht TEU and ECT. The most recent consolidated version was published on Dec. 29, 2006 and is the commonly used reference source. Accordingly, all article references to the Maastricht TEU and ECT hereinafter are made to this Consolidated Version of the Treaty on European Union, 2006 O.J.C 321/ES, and to the Consolidated Version of the Treaty establishing the European Community, 2006 O.J.C 321/E37. As a result, the article references to provisions of the Maastricht TEU and ECT are made using the article numbers as renumbered by the Treaty of Amsterdam. For analytical examinations of provisions of the Maastricht Treaty, see *MAASTRICHT AND BEYOND: BUILDING THE EUROPEAN UNION* (Andrew Duff, John Pinder & Roy Pryce eds., 1994); *see also* *LEGAL ISSUES OF THE MAASTRICHT TREATY* (David O'Keefe & Patrick M. Twomey, eds., 1994). For an overall description of the Maastricht Treaty, see DINAN, *EUROPE RECAST*, *supra* note 3, at 245–64.

<sup>8</sup> The Treaty of Amsterdam, *supra* note 7; The Treaty of Nice Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Feb. 26, 2001, 2001, O.J (C 80) 1. For a description of the difficult discussions among the Member States preceding the Treaties of Amsterdam and Nice, and the key compromises concerning the EU's institutional structure, see DINAN, *EUROPE RECAST*, *supra* note 3, at 285–89.

European Union, further modified its institutional structures, especially the European Council, and expanded its fields of action.<sup>9</sup> As is well known, the Treaty of Lisbon is a reformulation of most of the substantive provisions of the ill-fated draft Treaty establishing a Constitution for Europe, whose ratification process was abandoned after decisively adverse referenda in France and the Netherlands in the spring of 2005.<sup>10</sup> The eminent English authors, Professors Allan Dashwood and Derrick Wyatt, have aptly characterized the Lisbon Treaty as having shed the constitutional “garb” of the draft constitution, but preserving “as many as possible of [its] reforms . . . to improve the Union's effectiveness, efficiency and accountability.”<sup>11</sup> Professors Deirdre Curtin and Ige Dekker further observe accurately that the Lisbon Treaty “improves the systemic visibility and structural clarity of European integration processes [demonstrating] that the EU constitutes an organizational and legal unity.”<sup>12</sup>

## II. SUPRANATIONAL? FEDERAL? INTERGOVERNMENTAL? WHAT DOES THE WORD MATTER?

Initially, it is worth reflecting on why a careful analysis of the fundamental nature of the EU's governmental structures is valuable, and why it matters whether each one is largely supranational or intergovernmental, or a mix of the two, in its role and operations. There are several reasons.

The first obvious reason is the crucial role of the EU governing institutions in acting to achieve the goals of the EU. Article 13(1) of the Lisbon TEU highlights this in declaring that the institutions “shall aim to promote its values, advance its objectives, serve its interests, those of the citizens and those of the Member States, and ensure the consistency, effectiveness and continuity of its policies and actions.”

The second reason is that each European governmental institution has evolved over time, some undergoing radical modification, making it crucial to understand how and why each has changed in order to appraise its current status. Third, each collaborates with the others in promoting EU policies and interest in a highly complicated manner, and this collective responsibility has also markedly evolved overtime. Relevant in this context is the Lisbon TEU Article 13(2)'s admonition that

<sup>9</sup> For a detailed authoritative analysis of the Lisbon TEU, see JEAN-CLAUDE PIRIS, *THE LISBON TREATY: A LEGAL AND POLITICAL ANALYSIS* (2010). Mr. Piris recently retired from the office of Director-General of the Council Legal Service after serving twenty-two years in that post. Professor Paul Craig provides a valuable analytical study in PAUL CRAIG, *THE LISBON TREATY: LAW, POLITICS AND TREATY REFORM* (2011). Also valuable are the essays in *EU LAW AFTER LISBON* (Andrea Biondi, Piet Eeckhout & S. Ripley, eds., 2012).

<sup>10</sup> The draft of The Treaty Establishing a Constitution for Europe, Oct. 29, 2004, 2004 O.J. (C310) 1 (rejected 2005). Its rejection during the ratification process and the incorporation of most of its provisions in the Treaty of Lisbon is described in Paul Berman, *From Laeken to Lisbon: The Origins and Negotiation of the Lisbon Treaty*, in *EU LAW AFTER LISBON*, *supra* note 9, at 3–39, and in CRAIG, *supra* note 9, at 6–21. See also Therese Blanchet, *The Treaty of Lisbon: A Story in History or the Making of a Treaty*, 34 *FORDHAM INT'L L.J.* 1217 (2011).

<sup>11</sup> ALAN DASHWOOD, MICHAEL DOUGAN, BARRY RODGER, ELEANOR SPAVENTA & DERRICK WYATT, *WYATT AND DASHWOOD'S EUROPEAN UNION LAW* 19 (6th ed. 2011) [hereinafter WYATT & DASHWOOD] (The two original authors now joined by three other academic co-authors.).

<sup>12</sup> Deirdre M. Curtin & Ige F. Dekker, *The European Union from Maastricht to Lisbon: Institutional and Legal Unity Out of the Shadows*, in *THE EVOLUTION OF EU LAW*, 155–85, *quoted at* 156 (Paul Craig & Gráinne de Búrca eds., 2d ed. 2011) [hereinafter CRAIG & DE BÚRCA, *THE EVOLUTION OF EU LAW*].

the “institutions shall practice mutual sincere cooperation.” Fourth, when a governmental institution gains or augments supranational characteristics, this heavily influences its operational role in shaping the European Union as a *sui generis* international legal system gradually moving toward supranationalism in an ever-closer Union.

Professors John Peterson and Michael Shackleton provide other reasons for a close analysis of the EU institutions, notably that its “institutions generate a wide array of policies that impact upon EU states and their citizens—as well as many beyond Europe—directly and in ways unmatched by any other international organization,” and “the EU’s institutional structure has uniquely blended continuity and change,” including some radical innovations.<sup>13</sup> Professors Curtin and Dekker concur, contending that examination of the institutions “constitutes in our view the best possible theoretical framework for analyzing [the] complex modern legal system . . . of the European Union.”<sup>14</sup>

With regard to the terminology used in the analysis in this article, “intergovernmental” hardly needs a definition. “Intergovernmental” refers to the retention and exercise by Member States of their autonomous sovereign power in acting upon legislation, setting policies or taking decisions, even though the States may often voluntarily collaborate in promoting the common goals of the EU. When sovereign states voluntarily collaborate to achieve market integration and other common goals, this is often called “liberal intergovernmentalism,” based upon an analysis presented in 1993 by a prominent political scientist, Andre Moravcsik.<sup>15</sup>

In contrast, the term “supranational” is used to describe the centralized and centralizing features of the institutional structure of the Community, now merged into the European Union by virtue of the Treaty of Lisbon. The European Union is certain never to become a nation-state, and its component Member States are bound to retain most of their sovereign characteristics, but it is perfectly plausible to refer to the EU as a *sui generis* supranational legal structure unlike any other in the world. This article follows the lead of Judge Koen Lenaerts of the Court of Justice, who is also an eminent academic scholar, in using the term “supranational,” to describe the European Community. Judge Lenaerts concludes that “supranational” aptly describes the European Community due to several essential characteristics: (a) the possession of institutions that are independent in composition and operation; (b) the use of decision-making procedures by majority votes that nonetheless bind all Member States; (c) the implementation of EC decisions by or under the supervision of EC institutions; and (d) the creation of judicially-enforceable rights and

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<sup>13</sup> JOHN PETERSON & MICHAEL SHACKLETON, *THE INSTITUTIONS OF THE EUROPEAN UNION* 8 (3d ed. 2012) [hereinafter PETERSON & SHACKLETON, *THE INSTITUTIONS*].

<sup>14</sup> See Curtin & Dekker, *supra* note 12, at 156.

<sup>15</sup> Andrew Moravcsik, *Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach*, 31 J. COMMON MKT. STUD. 473 (1993). In Professor Moravcsik’s thoughtful article, his basic claim was that “the EC can be analyzed as a successful intergovernmental regime designed to manage economic interdependence through negotiated, policy coordination.” *Id.* at 474. Obviously, he was examining the EC governmental structure as the Maastricht Treaty entered into effect and not the EU governmental structure after the Treaty of Lisbon. See also Professor Paul Craig’s examination of the impact of “liberal intergovernmentalism” in Paul Craig, *Integration, Democracy, and Legitimacy*, in CRAIG & DE BÚRCA, *THE EVOLUTION OF EU LAW*, *supra* note 12, 17–21.

obligations through the treaties and secondary legislation.<sup>16</sup> This analysis now applies to the European Union, inasmuch as the European Community has merged into the EU.

Many Americans may feel that “federal” represents a preferable descriptive term, instead of “supranational,” and American commentators have frequently used it, especially in articles comparing the EC or EU with the US.<sup>17</sup> However, during the final drafting of the Treaty of Maastricht in 1991, the United Kingdom government of Prime Minister Major vetoed use of the word “federal” as an adjective to describe the European Union, blocking a proposed reference to the “federal goal” or the “federal vocation” of the Union.<sup>18</sup> The UK Foreign Secretary Douglas Hurd rejected “the implications which, in the English language, the phrase “federal goals” carries.”<sup>19</sup> “Federal” is accordingly customarily avoided as a descriptive term by most European commentators in referring to the European Community or Union. Nonetheless, it should be noted that Commission President Jacques Delors declared, in reacting to the UK veto: “[w]hat does the word [federal] matter, as long as we have the actual thing?”<sup>20</sup>

Arguably, “federal” may still be quite appropriate in the analysis of certain features of EU institutional structure. Thus, Judge Lenaerts has observed that “federalism” may be an appropriate term when employed “as a means of structuring the relationship between inter-linked authorities, [and thus] can be used either within or without the framework of a nation-state.”<sup>21</sup> German academic commentators are particularly apt to use “federal” in describing EU institutions or operational structure. Former Court of Justice Judge Ulrich Everling characterizes the institutions as an “imperfect federal structure,” citing many of the features that will be discussed later in this article.<sup>22</sup> Professor Stefan Oeter observes that the initial Commission President, Walter Hallstein, and the other “founding fathers” were practically all “federalists,” and that the UK opposition to the “Dirty F-Word” is

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<sup>16</sup> KOEN LENAERTS & PIET VAN NUFFEL, CONSTITUTIONAL LAW OF THE EUROPEAN UNION 11–18 (Robert Bray ed., 2d ed. 2005). Judge Lenaert’s law clerk, Piet Van Nuffel, was his co-author.

<sup>17</sup> See, e.g., George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331 (1994); Thomas C. Fischer & Stephen C. Neff, *Some American Thoughts about European “Federalism,”* 44 INT’L & COMP. L.Q. 904 (1995); Edward T. Swaine, *Subsidiarity and Self-Interest: Federalism at the European Court of Justice*, 41 HARV. INT’L L.J. 1 (2000).

<sup>18</sup> Former Judge Ulrich Everling of the Court of Justice has observed that Germany wanted to employ the word “federal,” because “in German the word can be employed to a structural principle which may also apply to non-state entities.” Ulrich Everling, *Reflections on the Structure of the European Union*, 29 COMMON MKT. L. REV. 1053, 1069 (1992).

<sup>19</sup> DINAN, EUROPE RECAST, *supra* note 3, at 250 (quoting FIN. TIMES, June 18, 1991, at 1).

<sup>20</sup> *Id.* at 249–50 (quoting AGENCE EUR., Dec. 6, 1991, at 1).

<sup>21</sup> See Koen Lenaerts, *Federalism: Essential Concepts in Evolution—The Case of the European Union*, 21 FORDHAM INT’L L.J. 746, 748 (1998). Political scientist Daniel Elazar expressed earlier the same view: “using the federal principle does not necessarily mean establishing . . . a federal state . . . . [F]ederalism is a phenomenon that provides many options for the organization of political authority and power; . . . a wide variety of political structures can be developed that are consistent with federal principles.” DANIEL J. ELAZAR, EXPLORING FEDERALISM 11–12 (1987).

<sup>22</sup> Ulrich Everling, *The European Union as a Federal Association of States and Citizens*, in PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW, 701–34, quoted in 712 (Armin von Bogdandy & Jürgen Bast eds., 2d ed. 2009).



chiefly due to fear that a federally structured EU would lead to a European state.<sup>23</sup> However, he contends that, nonetheless, “[w]ith elements of supranationality becoming stronger during the evolution of the Community system, the Community is developing increasingly more federal features.”<sup>24</sup> Professor Deirdre Curtin sensibly notes: “[t]he EU may be considered in terms of its nature as a peculiar hybrid: in some respects it . . . resembles . . . rather classical intergovernmentalism of other international organizations; in other respects it displays features of a polity or ‘would be’ (federal) state.”<sup>25</sup>

Not surprisingly, in their valuable book on the European Parliament, Richard Corbett, a Member of the European Parliament, together with senior Parliament officials Francis Jacobs and Michael Shackleton, have no difficulty in concluding that “the EU [is] radically different from a traditional intergovernmental organization,” and is, rather, “federal,” in common “continental usage [where] multi-level governance [is] centralized where necessary [with] limited competences [exercised by] common institutions with their own powers.”<sup>26</sup> They cite the executive role of the independent Commission, the “directly elected supra-national Parliament,” and the operation of the Parliament and the Council as “a federal style bicameral legislative.”<sup>27</sup> Professor Mark Pollack, a prominent political scientist, aptly observes that by the 1980s, the initial EEC had developed federal features, notably a division of authority between state governments and a central government in which each level of government has final authority as to certain decisions, while a “federal high court” adjudicates any differences between the states and the central body concerning the “federal” structure.<sup>28</sup>

Although there is accordingly a strong justification for the use of “federal” as a descriptive adjective, it is still preferable to employ ‘supranational’ as a more neutral one. Supranational will be the term usually employed in this article in contradistinction to “inter-governmental,” but “federal” will be used on occasion when it seems particularly appropriate in analyzing certain aspects of the EU’s division of powers between the central structure and the States.

Finally, before examining the EU’s governmental institutions to assess the degree to which they can be appraised as possessing supranational characteristics, as opposed to intergovernmental features, three brief caveats should be made. The first is that this article examines only the supranational features of the EU institutions, and not those of the EU’s substantive law. The Maastricht Treaty radically expanded the fields of political, economic and legal action of the initial EEC, by inserting new ones specifically in the Treaty (e.g., Monetary Union and economic coordination, environmental protection, advancement of consumer interests, health

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<sup>23</sup> Stefan Oeter, *Federalism and Democracy*, in *PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW* 55–82, at 56 (Armin von Bogdandy & Jürgen Bast eds., 2nd ed. 2009).

<sup>24</sup> *Id.* at 61.

<sup>25</sup> DEIRDRE CURTIN, *EXECUTIVE POWER OF THE EUROPEAN UNION: LAW, PRACTICES, AND THE LIVING CONSTITUTION* 6 (2009).

<sup>26</sup> RICHARD CORBETT, FRANCIS JACOBS & MICHAEL SHACKLETON, *THE EUROPEAN PARLIAMENT* 6–7 (8th ed. 2011).

<sup>27</sup> *Id.* at 7–8.

<sup>28</sup> Mark A. Pollack, *Theorizing EU Policy-Making*, in *POLICY-MAKING IN THE EUROPEAN UNION*, 15–44, (Helen Wallace, Mark A. Pollack & Alasdair R. Young eds., 6th ed. 2010).

protection, research and technological development). The Maastricht Treaty also substantially facilitated the adoption of legislation intended to achieve integration within the Internal Market (the term customarily used to replace the Common Market since the Single European Act in 1987).<sup>29</sup> The Treaty of Amsterdam and now the Treaty of Lisbon have added further fields of action, notably social policy and employment, and policies and legislation concerning civil and criminal justice and police cooperation. Space considerations prevent any discussion of the EU's progressive harmonization of substantive law fields as an aspect of its supranational impact, but it is manifest that the harmonization has contributed enormously to the economic, social and legal integration of the EU.

The second caveat is that this article analyzes only the structure and operational role of the political institutions, and not the judicial ones, notably the Court of Justice. Because the Court of Justice has no political features, and is entirely independent of the other EU institutions and the Member State governments in the execution of its judicial functions, this article will not examine its role. There can be no doubt that the Court's doctrines have greatly contributed to constitutional and legal evolution of the EU.<sup>30</sup> In particular, the Court's doctrine of the primacy (or supremacy) of the Treaty over any laws, or even constitutions of the Member States, has powerfully promoted the supranational character of the European Community, now merged into the European Union.<sup>31</sup> This article will not, however, have occasion to discuss Court doctrines, although some Court judgments which are particularly significant for their impact on EU integration will be noted when relevant.

The third caveat is that the Treaty of Lisbon TEU Article 50 introduces for the first time a procedure for the voluntary withdrawal of a Member State from the Union. Although a withdrawal is only a remote contingency, given the serious adverse economic consequences for a withdrawing State, it is now recognized as a constitutional right. The withdrawal procedure is complex and would require, undoubtedly, sensitive negotiations between the Council and the withdrawing State

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<sup>29</sup> For a current review of the success of the internal market harmonization program, see CATHERINE BARNARD, *THE SUBSTANTIVE LAW OF THE EU* 603–56 (3d ed. 2010).

<sup>30</sup> Professor Anthony Arnall presents an authoritative analysis of the structure, role and procedures of the Court of Justice in ANTHONY ARNULL, *THE EUROPEAN UNION AND ITS COURT OF JUSTICE* (2nd ed. 2006). *THE EUROPEAN COURT OF JUSTICE* (Gráinne de Búrca & Joseph H.H. Weiler eds., 2001) provides valuable commentary. For examinations of the impact of the Treaty of Lisbon upon the Court, see Anthony Arnall, *The European Court of Justice After Lisbon*, in *THE TREATY OF LISBON AND THE FUTURE OF EUROPEAN LAW AND POLICY* 34–54 (Martin Trybus & Luca Rubini eds., 2012); René Barents, *The Court of Justice After the Treaty of Lisbon*, 47 *COMMON MKT. L. REV.* 709 (2010); Francis G. Jacobs, *The Lisbon Treaty and the Court of Justice*, in *EU LAW AFTER LISBON*, *supra* note 9, at 198–212; Alec Stone Sweet, *The European Court of Justice*, in *CRAIG & DE BÚRCA, THE EVOLUTION OF EU LAW*, *supra* note 12, at 121–53.

<sup>31</sup> The Court first enunciated its primacy doctrine in *Costa v. ENEL*, *supra* note 2. In Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr-und Vorratsstelle für Getreide und Futtermittel*, 1970 E.C.R. 1125, the Court specifically held that Treaty provisions and Community rules were superior to national constitutional law. Subsequently in Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A.*, 1978 E.C.R. 629, the Court held that all national courts must immediately enforce Community rules regardless of national legislative, administrative or judicial rules to the contrary. See Arnall, *supra* note 30, at 179–83.

during a significant period of time, but it is conceivable.<sup>32</sup> Accordingly, any Member State government can reclaim all the sovereign power currently relinquished to the EU. Certainly, a right of withdrawal already existed in the application of public international law doctrines, but the new Treaty structural procedures provide valuable clarity.

### III. THE EUROPEAN COMMISSION: INTRINSICALLY SUPRANATIONAL BOTH IN STRUCTURE AND ITS OPERATIONAL ROLE<sup>33</sup>

The Lisbon Treaty's TEU Article 17(1) articulates the Commission's role within the EU more precisely than the rather vague initial EEC Treaty Article 155 did, but does not significantly modify that role. Article 17(1) commences by saying that the Commission "shall promote the general interest of the Union," immediately stressing that the Commission serves the EU as a whole, as opposed to the specific interests of different Member States. Article 17's description of the status, role and powers of the Commission, together with the provisions on the Commission in TFEU Articles 244-50, confirm its character as the preeminent executive and administrative body of the Union. Former Court of Justice Judge Manfred Zuleeg describes the Commission as "a supranational institution, which . . . exercises powers and independently fulfills its tasks throughout the entire Union."<sup>34</sup>

The Commission has always been the political institution most dedicated to taking action to further EEC, EC and now EU policies and goals. Moreover, its operational role has always also been essentially a supranational one: throughout its history, the Commission has vigorously striven to achieve economic integration and all of the other Community or Union goals. Professors Wyatt and Dashwood describe the Commission, together with the Parliament, as the institutions "most clearly [embodying] this supranational idea [striving toward] some form of federal or confederal constitutional system."<sup>35</sup> One of the Commission's favorite nicknames is "the motor of integration." As successive Treaty amendments have authorized social and employment policy, environmental protection, consumer rights and other fields of action, the Commission has promoted each with equal vigor on a Community-wide basis through action programs and initiatives for legislation.<sup>36</sup> In 2000, the

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<sup>32</sup> See Allan F. Tatham, "Don't Mention Divorce at the Wedding, Darling!": *EU Accession and Withdrawal After Lisbon*, in *EU LAW AFTER LISBON*, *supra* note 9, at 128-54 (especially at 147-54). See also Adam Lazowski, *Withdrawal from the European Union and Alternatives to Membership*, 37 *EUR. L.R.* 523 (2012).

<sup>33</sup> For a general description of the nature, role, and powers of the Commission, including the changes made by the Treaty of Lisbon, see DESMOND DINAN, *EVER CLOSER UNION?: AN INTRODUCTION TO EUROPEAN INTEGRATION* 171-203 (4th ed. 2010) [hereinafter *DINAN, EVER CLOSER UNION*]; for a briefer description, see GEORGE A. BERMAN, ROGER J. GOEBEL, WILLIAM J. DAVEY & ELEANOR M. FOX, *EUROPEAN UNION LAW* 44-53 (3d ed. 2011) [hereinafter *BERMAN, GOEBEL, EU LAW*]. More detailed descriptions of the Commission prior to the Treaty of Lisbon are in *THE EUROPEAN COMMISSION* (Geoffrey Edwards & David Spence eds., 2006) [hereinafter *SPENCE, THE EUROPEAN COMMISSION*]; PETERSON & SHACKLETON, *THE INSTITUTIONS*, *supra* note 13. For an analysis of the Commission's executive and administrative role, see CURTIN, *supra* note 25, at 91-100.

<sup>34</sup> Manfred Zuleeg, *The Advantages of the European Constitution*, in *PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW*, *supra* note 22, at 767, 763-86.

<sup>35</sup> WYATT & DASHWOOD, *supra* note 11, at 66.

<sup>36</sup> For the Commission's policy-making role in social policy and employment, see PHILIPPA WATSON, *EU SOCIAL AND EMPLOYMENT LAW: POLICY AND PRACTICE IN ENLARGED EUROPE* 66-68 (2009); see also

Commission's White Paper on Reforming the Commission aptly declared: "the original and essential source of the success of European Integration is that the EU's executive body, the Commission, is supranational and independent from national, sectoral, or other influences. This is at the heart of its ability to advance the interests of the European Union."<sup>37</sup>

*A. The Structure of the Commission—Independence, Collective Responsibilities, Commissioner Portfolios*

The Commission as an institution is composed of one Commissioner chosen by each Member State, making a current total of 28 Commissioners.<sup>38</sup> The Lisbon Treaty's TEU Art. 17(5) prescribes that the Commission's size should be reduced in 2014 to a number corresponding to two-thirds of the Member States, in order to make the Commission more efficient by reducing the total number of Commissioners. Despite this express provision, in order to provide an incentive for Ireland's ratification of the Treaty of Lisbon in October 2009, the European Council decided at its meeting of December 2008 to abandon this reduction and retain one Commissioner for each State.<sup>39</sup>

As each Commissioner has always been designated by his or her Member State, this might have led to an operational structure in which each Commissioner customarily followed the views of his or her government, essentially an intergovernmental approach. However, the ECC Treaty's Article 157(2) declared that the "members of the Commission shall . . . be completely independent in the performance of their duties," and added that "they shall neither seek nor take instructions from any Government or any other body." The Maastricht Treaty's ECT Article 213(2) repeated this, and the Treaty of Lisbon's Treaty on European Union Art. 17(3) reiterates this text.

In view of this strongly-worded grant of independence, the Commission can be described as an institution designed to further the interests of the entire Community or Union, rather than specific State interests. Inasmuch as this Treaty provision was

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Andrea Lenschow, *Environmental Policy*, in POLICY-MAKING IN THE EUROPEAN UNION, *supra* note 28, at 307–30 (emphasizing the Commission role in environmental protection); Stephen Weatherill, *Consumer Policy*, in CRAIG & DE BURCA, THE EVOLUTION OF EU LAW, *supra* note 12, at 845.

<sup>37</sup> Commission White Paper on Reforming the Commission, at 7, COM (2000) 200 final (Mar. 1, 2000).

<sup>38</sup> Curiously, the EEC Treaty did not state the number of Commissioners, while the Maastricht ECT Article 157(1), renumbered as EC Treaty art. 213(1), indicated the total number of Commissioners, and stipulated that each State should have at least one Commissioner, and some could have two, but did not specify which States. At the outset of the EEC, France, Germany and Italy each designated two Commissioners, while the other three States designated one each. When the United Kingdom and Spain acceded, each was allocated two Commissioners. The Treaty of Nice eliminated the five States' second Commissioner, starting in the 2004–09 Commission, the first Commission named after the Central European enlargement. See DINAN, EVER CLOSER UNION, *supra* note 33, at 179.

<sup>39</sup> CRAIG, *supra* note 9, at 96; WYATT & DASHWOOD, *supra* note 11, at 52. Opinion polls indicated that the Irish people were seriously concerned that the elimination of a permanent Commissioner coming from Ireland would harm Irish interests. The European Council reiterated its December 2008 decision at its meeting in June 2009. In a press release on May 22, 2013, the European Council announced that it had taken a decision to keep the number of Commissioners equal to the number of Member States, subject to re-examination when the EU should consist of thirty Member States. EUCO 119/13, Presse 210, available at [http://europa.eu.rapid/press-release/Pres\\_13-210\\_en.htm](http://europa.eu.rapid/press-release/Pres_13-210_en.htm).

drafted by representatives of all the initial Member States and subsequently reiterated without any controversy in all the subsequent Treaties, the text can be seen to represent a definite affirmation of the Commission's status as a supranational body, not an intergovernmental one. The principle of the independence of the Commission and the Commissioners has always been respected in practice.<sup>40</sup> As Professor David Spence notes, "[O]ne of the central objectives of the founding fathers of the Community was to underline and accentuate the freedom of individual Commissioners to take policy positions without influence from their home governments."<sup>41</sup>

In fulfilling its responsibilities stipulated in the Treaties, the Commission must act "collectively," in accordance with the "principle of collective responsibility," the terms used in Article I of its Rules of Procedure.<sup>42</sup> The Court of Justice authoritatively reinforced this principle when it held that the Commission must collectively deliberate and decide before launching an infringement action against a Member State in a Court proceeding.<sup>43</sup>

The emphasis on the Commission's "collegiate nature" and "collective decision-making" obviously reinforces its supranational status. Moreover, as Professor John Peterson has emphasized, the "cardinal principle" of collective responsibility includes an obligation on all Commissioners to "publicly support all decisions and actions of the Commission," although this is sometimes difficult because Commissioners, unlike members of national government cabinets, do not share common political or ideological views.<sup>44</sup>

TFEU Article 250 (formerly EC Treaty Article 219) requires the Commission to take any formal decision or action by a majority vote. Inasmuch as the Commission meetings are confidential and the Commission does not publish its minutes, it is not known to what extent the Commission strives to take decisions by consensus or quasi-consensus, but one may suspect that it prefers to act on the basis of a large majority vote rather than a bare majority. The Commission customarily takes important decisions at a weekly meeting, occasionally at one specially convened to deal with an urgent matter. Because the Commission must take an enormous number of less important decisions, its Rules of Procedure authorize a "written

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<sup>40</sup> In a rare affirmation of the principle of independence, in 1995 Commission President Jacques Santer rebuked Germany for attempting to influence the votes of the two German commissioners on a pending Commission proposal. See Emma Tucker, *German Attempt to Influence Vote Earns Brussels Reprimand*, FIN. TIMES, Aug. 3, 1995, at 10; David Spence, *The President, the College and the Cabinets*, in SPENCE, THE EUROPEAN COMMISSION, *supra* note 33, at 39 (observing that "overt attempts by governments to influence 'their' Commissioner are inevitably greeted with scorn and derision in the European Parliament and the press") (with further discussion at 42-43). See also *id.* at 25-74. Relatively rarely, there is evidence that a State's government will decline to renominate a Commissioner for a second term due to disapproval of his or her policies while in office. Prime Minister Thatcher did not renominate Lord Cockfield, the well-known architect of the Internal Market program, allegedly because he had "gone native." Geoffrey Edwards, *The European Commission in Perspective*, in SPENCE, THE EUROPEAN COMMISSION, *supra* note 33, at 16-17.

<sup>41</sup> Spence, *supra* note 40, at 38.

<sup>42</sup> Rules of Procedure of the Commission, 2000 O.J. (L 308) 26 (EC); slightly revised and re-issued with article titles, Commission Decision 2010/138/EU, Amending its Rules of Procedure, 2010 O.J. (L 55) 60.

<sup>43</sup> Case C-191/95, *Commission v. Germany*, 1998 E.C.R. I-5449, ¶ 48; followed by Joined Cases T-427/04 & T-17/05, *France & France Télécom SA v. Comm'n*, 2009 E.C.R. II-4315.

<sup>44</sup> John Peterson, *The College of Commissioners*, in PETERSON & SHACKLETON, THE INSTITUTIONS, *supra* note 13, at 111. See *id.* at 96-123.

procedure,” in which a draft decision is circulated to all Commissioners. If no Commissioner objects within a reasonable time period, the draft decision is formally adopted at the next meeting without debate and registered in the minutes.<sup>45</sup> If the Commission decision is one that must be made public in order to have binding legal effect, it will be published in all official languages in the Official Journal.

Ever since the initial Commission of President Walter Hallstein, each individual Commissioner has been allocated the administrative responsibility for an important department or service of the Commission, commonly termed a Commissioner’s “portfolio.”<sup>46</sup> Customarily each Commissioner is the head of one of the Commission’s core operational units, the Directorates-General, which correspond to Commission fields of action or administrative responsibility (e.g., agriculture and fisheries, budget and finances, competition, employment and social affairs, internal market, external relations). Able and energetic Commissioners accordingly exercise major administrative power and can become well known. Illustrative examples are Sico Mansholt, responsible for development of the Common Agricultural Policy in the 1960s; Lord Cockfield, the “architect” of the Internal Market program in the 1980s; Padraig Flynn, responsible for the Commission’s energetic employment and social action initiatives in the early 1990s; Sir Leon Brittan and Pascal Lamy, responsible for Commission policy in WTO and trade relations from 1995 to 2009; Mario Monti and Neeli Kroes, who successively supervised the Commission restructuring of its competition policy in 1999–2009; and Gunter Verheugen and Olli Rehn, successively in charge of the Commission role in the accession negotiations with the prospective Central European and Mediterranean nations in 1999–2009.

Member State governments named relatively few women Commissioners in the Commissions headed by Presidents Jacques Delors and Jacques Santer, but five served in President Prodi’s Commission. Aware of this, the current President, José Barroso attempted to persuade more governments to name women Commissioners, with considerable success. Eight women served in his 2004–09 Commission, and nine in the present one. Notably, Catherine Ashton (who simultaneously acts as the Union High Representative for Foreign Affairs), Neelie Kroes, Viviane Redding, and Margot Wallstrom served in the 2004–09 Commission, and are currently in the present Commission.

Although the Commission is composed only of Commissioners, commonly called the College of Commissioners, they are supported by a large body of officials, currently numbering over 18,000. The Commission executes most of its administrative and regulatory tasks through nineteen Directorates-General. The Commission also has several major auxiliary services, such as those responsible for the budget, personnel, press and media information, translation and interpretation. The Commission’s Legal Service plays a crucial role, because it reviews the text of all draft legislation and decisions, and represents the Commission in all proceedings before the Court of Justice, the General Court and the Civil Service Tribunal.

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<sup>45</sup> Rules of Procedure of the Commission, *supra* note 42, art. 5–8, 12. Commission meetings are, of course, confidential, and minutes are not public. *Id.* art. 9.

<sup>46</sup> DINAN, EUROPE RECAST, *supra* note 3, at 84–86.

The Commission Presidents and Commissioners have always been keenly aware of the need for competent and dedicated civil service staff. One of the Prodi Commission's most notable achievements was the modernization of the Commission's civil service. Its White Paper on Reforming the Commission in 2000 revised the Commission's personnel policies to emphasize promotion on merit, to better structure its financial management, and to adopt a code of good behavior.<sup>47</sup> New Staff Regulations in 2004 supplemented this program.<sup>48</sup> Professor Curtin has notably observed that the new personnel policies have considerably reduced "the highly contentious practice of attaching national flags to particular posts."<sup>49</sup> The Commission's civil servants can be said to take a 'European' outlook, in favor of and actively promoting a supranational character for the Commission.<sup>50</sup>

*B. The Commission's Multi-Faceted Roles: The Core Executive and Administrator, the Initiator of Legislation and Policies, the "Guardian of the Treaties"*

In promoting "the general interests of the Union," the Commission has many different roles, and each has continuously increased in scope and importance throughout its history. The Commission's main roles include action in an executive capacity, the adoption of policies and programs, the initiation and facilitation of legislation, responsibility (together with the Court of Justice) for the application and enforcement of EU law, external representation in trade and commercial affairs, and assistance in the process of accession of new Member States and in revision of the Treaties. Each role will be examined in this section.

Whether the Commission should be described as the principal executive body of the EU, or only as its central administrative organ, or as a combination of both, is certainly worthy of reflection. When the EEC was created in 1958, the authors of the EECT presumably intended the EEC Commission to be the same sort of administrative body as that operating under the earlier European Coal and Steel Community Treaty.<sup>51</sup> As Professor Deirdre Curtin has observed in her analytical study, "the Executive Power of the European Union, . . . [t]he Commission was

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<sup>47</sup> *Commission White Paper on Reforming the Commission*, *supra* note 37. For a description of the White Paper program and the general reform efforts of the Prodi Commission, see Handley Stevens & Anne Stevens, *The Internal Reform of the Commission*, in SPENCE, *THE EUROPEAN COMMISSION*, *supra* note 33, at 454–80. See also Liesbet Hooghe and Hussein Kassim, *The Commission's Services*, in PETERSON & SHACKLETON, *THE INSTITUTIONS*, *supra* note 13, at 173–98 (especially at 178–81).

<sup>48</sup> Council Regulation 723/2004, Amending the Staff Regulations of Officials of the European Communities and the Conditions of Employment of Other Servants of the European Communities, 2004 O.J. (L 124) 1 (EC); described in David Spence, *Staff and Personnel Policy in the Commission*, in SPENCE, *THE EUROPEAN COMMISSION*, *supra* note 33, at 173–208 (specifically at 179–91); see also Stevens & Stevens, *supra* note 47, at 472–78.

<sup>49</sup> CURTIN, *supra* note 25, at 113–14.

<sup>50</sup> See Liesbet Hooghe and Hussein Kassim, *supra* note 47, at 192–96 (describing the results of surveys of senior Commission officials conducted in 1996, 2002 and 2008, which clearly indicated their adherence to supranational goals and policies).

<sup>51</sup> The Treaty Establishing the European Steel and Coal Community, Apr. 18, 1951 [hereinafter ECSC Treaty], created the European Coal and Steel Community among the same six Member States who later formed the EEC. Its institutional structure was the model for that of the EEC, and was merged into that of the EEC in 1965. For a brief description, see DINAN, *EUROPE RECAST*, *supra* note 3, at 47–57. The ECSC Treaty expired according to its terms after 50 years.

designed as a technocratic body composed of independent experts to propose solutions to policy problems, to broker deals, to constitute the ‘motor of integration,’ and to be the guardian of the common European interest.”<sup>52</sup> She further declares that in the initial EEC, “the European Commission possessed powers that could only be described as executive in nature, [but] it was the administrative component of executive power that was stressed, not the political component (except perhaps with regard to its exclusive power to initiate legislation in the legislative process) . . . . It has only in recent years been overtly recognized that the European Commission is a very important part of executive power in the EU institutional configuration.”<sup>53</sup>

As we shall see in later parts of this article, executive power within the EU can be properly analyzed as shared among the Commission, the Council of Ministers and the European Council. Nonetheless, as Professor Curtin has well said, the Commission should be deemed the ‘core executive,’ because it constantly carries out the central executive functions. She considers the Commission to be “the main agenda-setter in the EU context; . . . the most important executive actor when it comes to implementation of legislation and delegated rule-making; [as well as exercising] a leading role in external economic relations.”<sup>54</sup>

The Commission’s preeminent ability to achieve economic integration and other EC or EU goals is enhanced by its sole power to initiate draft legislation and monitor the evolution of draft texts during the process of their amendment by the Council and Parliament. This power of legislative initiative, certainly a prime illustration of the Commission’s executive role, was initially stated in EECT Article 149, replicated in ECT Article 250, and now appears in TFEU Article 294(2). Professors Wyatt and Dashwood aptly observe that this Treaty power is accorded to the Commission quite deliberately to ensure that legislative drafts are “formulated by the Union institution [which has] a duty to act independently and without regard to any specific national interests.”<sup>55</sup>

Even though the Maastricht Treaty’s EC Treaty Article 192 (now replicated in TFEU Article 224) granted the Parliament the power to request the Commission to propose a legislative draft, the Commission alone decides when to commence the legislative process, determines the initial draft language, and progressively revises the evolving draft text in the light of amendments inserted by the Council or Parliament.<sup>56</sup> The Commission even has the power to withdraw a pending draft if it seriously disagrees with an amendment, and occasionally exercises this power.<sup>57</sup> The impetus for a Commission legislative proposal may come from the Commission

<sup>52</sup> CURTIN, *supra* note 25, at 63.

<sup>53</sup> *Id.*

<sup>54</sup> CURTIN, *supra* note 25, at 91. See also Philipp Dann, *The Political Institutions*, in PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW, *supra* note 22, at 237–74. He describes the Commission as manifesting “executive federalism” through its roles as the setter of policy and legislative agendas, broker between the Council and Parliament, and the “federal guardian” monitoring the compliance of the Member States and the other institutions with Union Law. *Id.* at 259–60.

<sup>55</sup> WYATT & DASHWOOD, *supra* note 11, at 72.

<sup>56</sup> *Id.* at 91–92; see also John A. Usher, *The Commission and the Law*, in SPENCE, THE EUROPEAN COMMISSION, *supra* note 33, at 102–27 (particularly at 102–05). During the legislative process, the Commission will often revise its proposal in an attempt to obtain its acceptance by the Council and Parliament. See Lenaerts, *supra* note 21, at 759–61.

<sup>57</sup> WYATT & DASHWOOD, *supra* note 11, at 92; Usher, *supra* note 56, at 104.



President, a Commissioner, a senior official expert in a particular field, the Parliament, or a Member State government or interest group. On occasion also, the European Council in its formal meeting will call upon the Commission to make proposals for legislative action, and obviously the Commission will heed the request.<sup>58</sup>

The Commission's articulation of key policies and its development of specific policy programs constitute another of its vital roles. In particular, the Commission has always emphasized the harmonization of national laws in particular sectors in order to achieve an integrated Common Market, or Internal Market, and to establish common, rather than heterogeneous, substantive law rules throughout the Member States.<sup>59</sup> Each Commission sets out its general strategic objectives at the start of its term of office, followed by an Annual Policy Strategy each year. The Commission then periodically issues Action Programs, as well as Green and White Papers setting out its policy views and likely legislative proposals in particular fields.<sup>60</sup> Thus, the Commission has indicated its intent to devote priority attention to legislative drafts to harmonize national rules in various fields, e.g., in banking, consumer rights, environmental protection, intellectual property, public procurement and securities regulation.<sup>61</sup>

Undoubtedly the Commission's most famous program was that laid out in the June 1985 White Paper on Completing the Internal Market, endorsed by the European Council at Milan on June 28–29, 1985.<sup>62</sup> The Single European Act (SEA), effective July 1, 1987, enabled the success of this Internal Market program by amending Article 100 of the EEC Treaty to authorize the Council to adopt harmonization directives by a Qualified Majority Vote (described in *infra* Part II.C), instead of by unanimity. The successful completion of the initial Internal Market Program on December 31, 1992, and on-going legislative action to continue the

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<sup>58</sup> WYATT & DASHWOOD, *supra* note 11, at 72 (characterizing the European Council as "capable of exercising an important steer over the Union's legislative agenda").

<sup>59</sup> See Piet Jan Slot, *Harmonization*, 21 EUR. L. REV. 378 (1996) (Professor Slot's study contains a valuable discussion of harmonization issues). See also Stephen Weatherill, *Maximum versus Minimum Harmonization: Choosing between Unity and Diversity in the Search for the Soul of the Internal Market*, in FROM SINGLE MARKET TO EUROPEAN UNION 174–99 (Niam Nic Shuibhne & Laurence W. Gormley eds., 2012).

<sup>60</sup> See HERWIG C.H. HOFMANN, GERARD C. ROWE & ALEXANDER H. TÜRK, ADMINISTRATIVE LAW AND POLICY OF THE EUROPEAN UNION 512–19 (2011). Action Plans set out overall programs for likely legislative initiatives and administrative action in a particular field. Making use of common British terminology, a Green Paper is an indication of initial Commission policy thinking in a specific policy area, with a request for public comments. A White Paper expresses the Commission's more concrete policy intentions, often including summaries of specific legislative proposals. The Commission sometimes labels a policy program as a Communication, usually directed in particular to the Parliament and Council.

<sup>61</sup> The initial major harmonization program was proposed on May 28, 1969. General Programme of 28 May 1969 for the Elimination of Technical Barriers to Trade which Result from Disparities Between the Provisions Laid Down by Law, Regulation or Administrative Action in Member States, 1969 O.J. (C76) 1. The Commission launched later programs to harmonize essential national rules in company law, banking law, securities regulation, insurance law, intellectual property law, consumer rights protection, etc. For an analysis of the Community's efforts to harmonize national laws and regulations, see BARNARD, *supra* note 29, at 603–36.

<sup>62</sup> *Completing the Internal Market: White Paper from the Commission to the European Council*, COM (1985) 310 final (June 28–29, 1985).

harmonization process, especially through codification, is well known.<sup>63</sup> Although the adoption of the large volume of complex legislation aimed at promoting the Internal Market certainly required the intense collaboration of the Council and the Parliament, the Commission deserves the credit for launching the program, initiating a wide variety of legislative proposals, and continuously pressing for the adoption of specific measures.

The Commission has another vital centralization and integrative role, cited in the Lisbon TEU Article 17(1) as “the application of Union law under the control of the Court of Justice.” The Commission likes to call itself “the guardian of the Treaties,”<sup>64</sup> referring to this role, which is essential to achieve the proper and vigorous enforcement of Community, and now Union, rules. The Commission’s role is crucial, inasmuch as it is the only institution possessing the power to commence a proceeding to sue Member States in the Court of Justice for their alleged failure to fulfill their obligations. This Commission power was stated initially in EECT Article 169, which was later renumbered by the Amsterdam Treaty in 1999 as ECT Article 226, and is now expressed in TFEU Article 258.<sup>65</sup>

The Commission vigorously uses this power to attack alleged State infringements of the Treaty, often to challenge State laws, regulations and administrative practices that hinder the free movement of goods, persons, services and capital (the so-called “Four Freedoms”) within the Common Market. Even more frequently, the Commission sues Member States in order to press their governments to adopt or implement EC (now EU) legislation in a timely and proper fashion. Moreover, the Commission has almost total discretion on when and on what basis to sue a Member State. Obviously, the Commission’s goal is to obtain compliance from a State. The Commission often succeeds in the initial dialogue with the delinquent State’s authorities, thus avoiding actual litigation in the Court of Justice. A reliable estimate is that the Commission is able to obtain its desired compliance in about 85% of all procedures without actual Court litigation.<sup>66</sup> The Commission power to attack the infringements by Member States of their obligations toward the EU is accordingly a crucial aspect of its role in promoting the market integration and other supranational goals of the EU.

The Lisbon TEU Article 17(1) specifies that the Commission “shall exercise coordinating, executive and management functions.” The Commission’s administrative, regulatory and enforcement powers in carrying-out EU legislation, constitute a prime example of its supranational role, notably the promotion of

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<sup>63</sup> For descriptions of the success of the Internal Market program, see THE LAW OF THE SINGLE EUROPEAN MARKET (Catherine Barnard and Joanne Scott eds., 2002); LIESBET HOOGHE, THE EUROPEAN COMMISSION AND THE INTEGRATION OF EUROPE (2002); DINAN, EVER CLOSER UNION, *supra* note 33, at 359–81; ALASDAIR R. YOUNG, *The Single Market*, in POLICY-MAKING IN THE EUROPEAN UNION, *supra* note 28, at 107–31. For a review of the Commission’s more recent efforts to modernize, simplify and codify internal market rules, see BARNARD, *supra* note 29, at 647–51.

<sup>64</sup> David Spence, *The Directorates-General and Their Services*, in SPENCE, THE EUROPEAN COMMISSION, *supra* note 33, at 128–56 (quoted at 145).

<sup>65</sup> For a description of the infringement procedure and the Commission’s effective use of it to promote Community law, see TREVOR HARTLEY, THE FOUNDATIONS OF EUROPEAN UNION LAW 321–330 (2010); John A. Usher, *The Commission and the Law*, in SPENCE, THE EUROPEAN COMMISSION, *supra* note 33, at 102–27; WYATT & DASHWOOD, *supra* note 11, at 135–207.

<sup>66</sup> David Spence, *The Directorates-General and the Services*, *supra* note 64, at 145.

integration within the EU. It is likely that the drafters of the initial EEC Treaty saw this as the Commission's primary task. The three primary fields of Commission regulatory action are agriculture, competition, and customs, but the Commission also has regulatory and enforcement powers in most other spheres of EU action. In particular, the Commission has always used its enforcement of competition policy as a powerful tool in promoting cross-border trade and market integration.<sup>67</sup> Furthermore, either the Council, or the Council acting together with the Parliament, frequently authorizes the Commission to exercise regulatory power in specific fields (currently pursuant to TFEU Article 290).<sup>68</sup>

In the sphere of external relations, the Lisbon TEU Article 17(1) states that the Commission "shall ensure the Union's external representation." The text reinforces the Commission's more specific responsibilities in the negotiation of international agreements in trade, fisheries, development aid, etc., and particularly in trade negotiations within the WTO, delineated in various provisions of the prior Treaties and now in the Lisbon TFEU.<sup>69</sup> As we will observe in discussing the role of the Council in Part VI.B hereinafter, the Council alone has the power to enter into international agreements, and the Council accordingly gives negotiating mandates to the Commission, which is obliged to follow them. Nonetheless, because the Council mandates are customarily rather brief and general in nature, the Commission exercises a major policy-setting role in trade and other negotiations.<sup>70</sup> Obviously, the Commission's power to negotiate on behalf of the Union in its trade and other external relations is an important manifestation of a supranational approach.

Exceptionally, the Commission does not have any representative role in the Common Foreign and Security Policy (the CFSP), the operational sector of purely intergovernmental cooperation in international affairs authorized initially as the so-called "second pillar" of the Maastricht Treaty on European Union, and retained as intergovernmental in the Lisbon TEU. As discussed in Part IV.B and later in Part VI.C, the High Representative for Foreign and Security Affairs acts as the highest EU official in the CFSP. The intergovernmental character of the CFSP is

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<sup>67</sup> See the analytical presentation by Professor Eleanor Fox in BERMANN, GOEBEL, *EU LAW*, *supra* note 33, at 807–1090; see also Stephen Wilks, *Competition Policy*, in *POLICY-MAKING IN THE EUROPEAN UNION*, *supra* note 28, at 133–55; WYATT & DASHWOOD, *supra* note 11, at 705–846. For longer descriptions, see *EUROPEAN COMMUNITY LAW OF COMPETITION* (Peter Roth QC & Vivien Rose eds., 2008) and VALENTINE KORAH, *EC COMPETITION LAW AND PRACTICE* (8th ed. 2004). Professor David Gerber describes the Commission's vigorous role in developing competition policy to achieve market integration in David Gerber, *The Transformation of European Community Competition Law*, 35 *HARV. INT'L L.J.* 97 (1994).

<sup>68</sup> See Robin Pedler & Kieran Bradley, *The Commission, Policy Management and Comitology*, in SPENCE, *THE EUROPEAN COMMISSION*, *supra* note 33, at 235–62; see also HOFMANN, ROWE & TURK, *supra* note 60, at 524–35; WYATT & DASHWOOD, *supra* note 11, at 83–91.

<sup>69</sup> Professor Piet Eeckhout provides an authoritative study of the EU's international relations, with an emphasis on commercial and trade policies. PIET EECKHOUT, *EU EXTERNAL RELATIONS LAW* (2011). For a description of the Commission's role in external relations, especially in commercial and trade negotiations prior to the Lisbon Treaty, see Michael Smith, *The Commission and External Relations*, in SPENCE, *THE EUROPEAN COMMISSION*, *supra* note 33, at 313–40. For a briefer description of EU trade relations with comments on the Lisbon Treaty changes, see DINAN, *EVER CLOSER UNION*, *supra* note 33, at 502–26. Professor Markus Krajewski provides an authoritative review of the rules and procedures governing EU international trade relations post-Lisbon. See Markus Krajewski, *The Reform of the Common Commercial Policy*, in *EU LAW AFTER LISBON*, *supra* note 9, at 292–311.

<sup>70</sup> See Smith, *supra* note 69, at 322–23.

demonstrated by the fact that neither the Commission nor the Parliament has any operational role in it.

The Commission also plays a crucial role in the process of accession of candidate nations to the EU. As we will note later, one of the Council's important prerogatives is to conduct the negotiations with applicant nations. Although the Lisbon TEU Article 49 only refers to the Council's need to consult the Commission during the process, in fact ever since the initial accession of the UK, Denmark and Ireland, the Commission has provided a detailed formal Opinion covering a candidate nation's political, administrative, judicial and economic status, on which the Council relies in deciding whether that nation is suitable for accession.<sup>71</sup> The Opinion also serves as the basis for the Council's subsequent negotiations with suitable candidates. Throughout the lengthy process of Council negotiations with the candidate nations, the Commission reviews the political, economic, legal and administrative status of the candidate, and recommends negotiating positions to the Council, which almost invariably follows them. Moreover the Commission regularly evaluates in annual reports the candidates' progress toward achieving the necessary conditions for accession to the EU.<sup>72</sup> The Commission's role in assisting the Council in careful, detailed negotiations and in preparing progress reports was particularly important during the years of preparation for the accession of the ten Central European and Mediterranean countries in 2004, Bulgaria and Romania in 2007, and Croatia in 2013.<sup>73</sup>

Periodically, Intergovernmental Conferences (IGCs), composed of ministers and other officials representing each Member State, are held to amend the Treaties. Even though the EECT and later Treaty provisions on the procedure for amendments do not mention the Commission, it has a significant advisory role. The Commission customarily proposes draft text for Treaty amendments to the IGC and provides invaluable technical support and a sense of institutional memory.<sup>74</sup> Ever since the IGC that prepared the Single European Act, the President of the Commission and one or two Commissioners have actively participated in the work of each successive IGC. Not surprisingly, the Commission frequently provides reports, studies and proposals in order to influence an IGC's adoption of Treaty amendments that

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<sup>71</sup> See Ulrich Sedelmeier, *Enlargement: From Rules for Accession to a Policy Towards Europe*, in POLICY-MAKING IN THE EUROPEAN UNION, *supra* note 28, at 401–29; see also Tatham, *supra* note 32, at 129–41. Sedelmeier notes at 418–19, and Tatham at 134, that the Council almost always acts in accord with the Commission's Opinion, although it is not binding, e.g., the Council commenced negotiations for Greece's accession despite the Commission's Opinion to the effect that Greece's economic condition did not yet warrant membership in the EC. Sedelmeier provides a list of all the Commission Opinions on accession candidates at 404–05.

<sup>72</sup> For an illustration of this vital Commission role in the 1995 enlargement, see Dierk Booss & John Forman, *Enlargement: Legal and Procedural Aspects*, 32 COMMON MKT. L. REV. 95 (1995) (both authors served in the Commission Legal Service); Roger Goebel, *The European Union Grows: The Constitutional Impact of the Accession of Austria, Finland and Sweden*, 18 FORDHAM INT'L L.J. 1092, 1157–69 (1995).

<sup>73</sup> See DINAN, *EVER CLOSER UNION*, *supra* note 33, at 134–43. For a detailed description of the accession process, including the significant role of the Commission, see THE ENLARGEMENT OF THE EUROPEAN UNION (Marise Cremona, ed. 2003); Roger Goebel, *Joining the European Union: The Accession Procedure for the Central European and Mediterranean States*, 1 LOY. U. CHI. INT'L L. REV. 15 (2003–04).

<sup>74</sup> See Mark Gray & David Spence, *The Commission and Inter-governmental Conferences*, in SPENCE, THE EUROPEAN COMMISSION, *supra* note 33, at 426–30.

strengthen the Parliament and other institutions, and expand the fields for legislative and policy action.<sup>75</sup> Thus, the Commission's assistance to IGCs can certainly be seen as an important aspect of its supranational role.

### C. *The Role and Powers of the President of the Commission*

The status, role, and powers of the President of the Commission provide further convincing evidence of the supranational character of the Commission. Certainly throughout the history of the EEC the President of the Commission has always served as far more than a mere chairman, or a *primus inter pares*. The President has always set the agenda for the Commission, largely determining its principal policies and programs and pressing for their achievement, and served as the spokesman for the Commission to the other institutions and the general public. Since the 1980s, the President has presented the Commission's annual agenda to the Parliament in an important address each January. As Professor David Spence has said, "The President's role is fundamental to the operation of the Commission and the coherence of the EU *per se* . . . . [M]uch depends on the personality and personal clout of the [President]. A strong President can have his own way [within the Commission]."<sup>76</sup>

Indeed, the President's influence has always been so manifest that successive Commissions have been commonly designated by the name of the President during each Commission's term of office. A number of Commission Presidents have greatly enhanced the authority of the Presidency through their political vision, administrative skill, personal influence over Member State leaders, and public charisma. The first President, Walter Hallstein, who served two terms in 1958–67, set the precedent for a vigorous role of the President. During his two Presidencies, the Commission created its first civil service structure, and launched the Custom Union, the Common Agricultural Policy and initial competition policy.<sup>77</sup> Other leaders with unusual vision, energy, and success were pre-eminently Jacques Delors, President for three terms in 1985–95, Roy Jenkins, who served in 1977–80, and Romano Prodi, President in 1999–2004.<sup>78</sup>

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<sup>75</sup> *Id.* at 432–48. The authors observe that the Commission has been especially effective in setting the agendas in the initial preparatory phase of an IGC, notably the IGCs that drafted the Single European Act, the Treaty of Maastricht and the Treaty of Amsterdam. *Id.* at 445–46.

<sup>76</sup> David Spence, *The President, the College and the Cabinets*, in SPENCE, *THE EUROPEAN COMMISSION*, *supra* note 33, at 27.

<sup>77</sup> See DINAN, *EUROPE RECAST*, *supra* note 3, at 85–87, 89–97. Professor John Peterson describes President Hallstein as "a political heavyweight and a forceful leader." John Peterson, *The College of Commissioners*, in PETERSON & SHACKLETON, *THE INSTITUTIONS*, *supra* note 13, at 96–123 (quoted at 98). Regrettably, President Hallstein's proposals for greater financial autonomy for the EEC (its "own resources"), particularly affecting the Common Agricultural Policy, provoked angry resistance from President Charles De Gaulle, who withdrew France's participation in the Council (the "empty chair" crisis), leading ultimately to the well-known Luxembourg Compromise in January 1996. See *supra* note 3. President De Gaulle also blocked a third term for President Hallstein. See DINAN, *EUROPE RECAST*, *supra* note 3, at 104–08. See also PETERSON & SHACKLETON, *THE INSTITUTIONS*, *supra* note 13, at 83–84.

<sup>78</sup> DINAN, *EUROPE RECAST*, *supra* note 3, at 179–80 (Jenkins' injection of new vigor into Commission operations, with somewhat limited success due to structural weaknesses in the Commission), 205–06, 211, 235–36 (influence of Delors in various fields). See also Geoffrey Edwards, *The European Commission in Perspective*, in SPENCE, *THE EUROPEAN COMMISSION*, *supra* note 33, at 19–20 (on Delors' charisma and visionary impact). On the achievements of President Prodi in carrying out a major reform of the Commission's

Although for most of the history of the EEC, the Member States largely determined both the designation and the portfolio for each Commissioner, the Commission Presidents during the 1990s began to try to influence the process, especially after the Treaty of Maastricht's ECT Article 158 provided that the Council should designate proposed Commissioners "in consultation" with the newly chosen President. The Treaty of Amsterdam's ECT Article 214(2) augmented the newly nominated President's role by requiring that the Member State governments should designate proposed Commissioners "in common accord" with the new President. The Lisbon TEU Article 17(7) retains the "in common accord" language.

The Commission President acquired more formal authority when the Treaty of Nice's ECT Article 217(2) granted the President the power to determine each Commissioner's portfolio, enabling the newly-designated President to allocate a Directorate-General or other administrative responsibility to a proposed Commissioner in view of the latter's experience and skills rather than nationality. As Professor Deirdre Curtin has observed, the Nice amendment makes it "difficult for governments to attach particular national flags to particular portfolios."<sup>79</sup> The current Commission President José Barroso exercised this power both in 2004 and 2009, in some instances giving key portfolios to Commissioners from smaller States instead of those from larger States.

The Nice Treaty formally granted the President of the Commission specific authority over the Commission as a whole, stating in a new ECT Article 217(1) that "[t]he Commission shall work under the political guidance of its President." The Lisbon TEU Article 17(6), supplemented by TFEU Article 248, expands this functional authority of the President of the Commission. Not only does the Lisbon TEU Article 17(6)(a) enunciate the President's power to "lay down guidelines within which the Commission shall work," in 17(6)(b) it specifically adds his or her power to "decide on the internal organisation of the Commission, ensuring that it acts consistently, efficiently and as a collegiate body." This is supplemented by TFEU Article 248, which authorizes the President to designate, and reshuffle, each Commissioner's administrative responsibilities, usually as the operational head of a specific Directorate General covering a particular field of Commission operations or in some other administrative post. TEU Article 17(6) even declares that a Commissioner must "resign if the President so requests."<sup>80</sup> The Lisbon Treaty provisions reflect current operational reality. The Commission President largely sets the policy agenda of the Commission, chairs its meetings, strives to achieve consensus among the Commissioners, promotes the adoption of crucial decisions

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operational structure and personnel policies, see DINAN, *EVER CLOSER UNION*, *supra* note 33, at 188–90. See also *supra* notes 45–48 and accompanying text.

<sup>79</sup> CURTIN, *supra* note 25, at 94.

<sup>80</sup> President Jacques Santer undoubtedly wished that he had the power to compel a Commissioner to resign for misconduct, inasmuch as this might have prevented the ignominious resignation of his entire Commission in March 1999 after a high-level experts' report condemned the Commission for failure to discipline two Commissioners for maladministration. See *infra* text accompanying note 184. DINAN, *EVER CLOSER UNION*, *supra* note 33, at 127–29, describes the criticism of the Commission, the experts' report, and the Commission's resignation. See also John Peterson, *The College of Commissioners*, in PETERSON & SHACKLETON, *THE INSTITUTIONS*, *supra* note 13, at 102. The Treaty of Nice amended ECT Article 217(4) to authorize the President to compel a Commissioner's resignation "after obtaining the approval of the College," but this qualification does not appear in the Lisbon Treaty text.

and is the representative of the Commission to the other institutions and the general public.<sup>81</sup>

The Lisbon Treaty's formal description of the personal authority of the Commission President indirectly augments the supranational character of the institution. The Lisbon Treaty has reinforced the Commission President's status and policy-making role, which enables him to speak with greater authority on behalf of the Commission to the other institutions, the political leaders of the Member States and other nations, and to the general public. There is no question but that the Commission President is the best-known EU official by far, and that his views attract constant media attention.

Throughout its history, the Commission has been preeminently supranational in structure and role, acting as the central administration for the EC, and now the EU, and exercising more executive power than any other institution. The Commission has always pursued the goal of political and economic integration in each of its major functional roles, described previously. The President of the Commission has always acted as the principal executive leader of the EC, and even though the President now shares executive authority to some degree with the President of the European Council, as we shall see in Part VI.D *infra*, nonetheless the Commission President is without any doubt the political leader most identified by the citizens of the EU as the foremost architect of the promotion of the "ever closer union among the peoples of Europe."<sup>82</sup>

#### IV. THE COUNCIL:<sup>83</sup> INTRINSICALLY INTERGOVERNMENTAL IN STRUCTURE, A BLEND OF INTERGOVERNMENTAL AND SUPRANATIONAL FEATURES IN OPERATIONS

Although the Council's formal title since the Treaty of Maastricht is the "Council of the European Union," it is more commonly called the Council of Ministers. From the creation of the EEC in 1958 until the entry into force of the Single European Act on July 1, 1987, the Council functioned almost totally in an intergovernmental mode. Indeed, it is still accurate to say, as do Professors Wyatt and Dashwood, that "the European Council and the Council represent [the] persistent intergovernmental instinct within the process of European integration . . . pulling the Union towards looser forms of international co-operation, in contrast to the pursuit of a supranational or 'collective European interest' by the Commission and Parliament."<sup>84</sup> Nonetheless, after the SEA and still more after the Treaties of

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<sup>81</sup> See David Spence, *The President, the College and the Cabinets*, in SPENCE, *THE EUROPEAN COMMISSION*, *supra* note 33, at 27–30. On the Commission President's continued strong influence on EU policy following the Treaty of Lisbon, see CRAIG, *supra* note 9, at 105–08.

<sup>82</sup> Lisbon TEU art. 1 (reiterating the first recital of the initial EECT, which has always appeared in the later Treaties).

<sup>83</sup> For a current overview of the nature, role, and operations of the Council, see DINAN, *EVER CLOSER UNION*, *supra* note 33, at 211–34; Fiona Hayes-Renshaw, *The Council of Ministers*, in PETERSON & SHACKLETON, *THE INSTITUTIONS*, *supra* note 13, at 68–95. For detailed, though earlier, descriptions of the Council, see FIONA HAYES-RENSHAW & HELEN WALLACE, *THE COUNCIL OF MINISTERS* (2d ed. 2006) [hereinafter HAYES-RENSHAW & WALLACE, *THE COUNCIL*]; MARVIN WESTLAKE & DAVID GALLOWAY, *THE COUNCIL OF THE EUROPEAN UNION* (3d ed. 2004).

<sup>84</sup> WYATT & DASHWOOD, *supra* note 11, at 66.

Maastricht, Amsterdam, Nice and Lisbon, the Council's operational rule and mode of decision-taking has shifted in the direction of supranationalism, making a current appraisal a complex one. The appraisal is particularly complicated, because the Council's vital constitutional, legislative and policy-making roles are all shared with the Commission, the Parliament and the European Council in a continuously evolving manner.

*A. The Structure Of The Council: Configurations, Rotating Presidents, Coreper*

Rather curiously, the initial EEC Treaty did not specify the composition of the Council. In its early meetings, the Council was composed of the Ministers of Foreign Affairs, but it soon became customary to have Council meetings of the Ministers of Agriculture, inasmuch as the creation of the Common Agricultural Policy represented one of the most crucial tasks of the initial EEC.<sup>85</sup> Over time the Council has come to resemble a chameleon, with different ministerial compositions depending on the primary agenda topic, e.g., General Affairs Council, Foreign Affairs Council, Economic and Finance Council, Agriculture and Fisheries Council, Social and Employment Council. The use of so many specialized Councils led to a proliferation of Councils, which in turn motivated the European Council meeting at Seville in June 2002 to take the decision to limit the number of Council compositions to nine, instead of 16 in 2000.<sup>86</sup> The Lisbon Treaty effectively increased this to ten, by stipulating in TEU Article 18(3) that the High Representative for Foreign and Security Policy should chair a separate Foreign Affairs Council, which was thus distinguished from the General Affairs Council. Naturally, the frequency of each Council configuration's meetings varies with evolving policy emphasis and priorities.<sup>87</sup> Probably the two most prominent after the General Affairs Council are the Economics & Finance Council (commonly known as Ecofin) and the Agriculture & Fisheries Council, both of which must meet regularly to deal with current issues.

By far the most important composition of the Council is the General Affairs Council, because it is responsible for handling general EC (now EU) affairs, including the review of legislation intended to promote the Internal Market. Although the General Affairs Council is composed of the Foreign Affairs Ministers, or their deputies (often holding the title of European Affairs Ministers), this name is used to distinguish these meetings from the Foreign Affairs Council, which deals with Common Foreign and Security Policy issues. The General Affairs Council meets almost every week. The Lisbon Treaty TEU Article 16(6) stipulates that the General Affairs Council "shall ensure consistency in the work of the different

<sup>85</sup> See DINAN, EUROPE RECAST, *supra* note 3, at 87.

<sup>86</sup> See HAYES-RENSHAW & WALLACE, THE COUNCIL, *supra* note 83, at 34–35, 38–39, 362–66 (setting out Annex II to Presidency Conclusions, Seville European Council, June 21–22, 2002, concerning the Council's operations). The nine Council compositions are: Agriculture and Fisheries; Competitiveness (Internal Market, Industry and Research); Economics and Financial Affairs; Education, Youth and Culture; Employment, Social Policy, Health and Consumer Affairs; Environment; General Affairs and External Relations; Justice and Home Affairs; and Transport, Telecommunications and Energy.

<sup>87</sup> *Id.* at 71 (indicating that the Council currently meets formally between seventy-five and eighty times per year, as supplemented by a number of informal meetings).



Council configurations,” which means that it operates to some degree as the steering committee for the other Councils. TEU Article 16(6) also assigns the General Affairs Council the important role of preparing the meetings of the European Council.

Ever since the launch of the EEC in 1958, an important structural feature of Council operations has been the rotating Presidency. On the basis of a rotation sequence currently set by the European Council, one Member State’s minister acts as the Council President in every Council session during a six-month period, January-June and July-December.<sup>88</sup> This rotation of the Council Presidency was re-affirmed in the Lisbon TEU Article 16(9), supplemented by TFEU Article 236, which authorizes the European Council to set the rotation order by QMV on the “basis of equal rotation.” The European Council’s current rotation schedule runs until 2020, and is divided into blocks of three successive Presidencies, or “trios.”<sup>89</sup> The “trios” are intended to promote continuity through cooperation among successive Presidencies. Manifestly, the equal rotation of Member States in the role of the Presidency, without regard to each one’s population or economic power, underlines the intergovernmental nature of the Council.

The President of the General Affairs Council, and the President of each other Council configuration, largely sets the agenda for Council action during each six-month period. This is obviously a vital operational role. In the early history of the EEC, the rotating Presidency was probably considered to be “a chore to be shared,”<sup>90</sup> but by the 1970s to 1980s, the substantial increase in the Council’s legislative activities made each successive Presidency a source of power and influence as well as a burden.<sup>91</sup> Many commentators have highlighted the increasingly important role of Council Presidencies in setting the agenda for action and trying to ‘broker’ deals to achieve a successful outcome. As Professor Dinan has observed, “a country’s presidential performance [depends upon its] size and resources, diplomatic experience and tradition, familiarity with the EU system, degree of commitment to European integration, and domestic political circumstances.”<sup>92</sup> Even though a Presidency only lasts six months, an able Member State minister aided by a competent staff can promote progress in the review of draft legislation or prospective policies that his government favors. This is particularly the case if the minister is skilled in chairing Council meetings.<sup>93</sup> However, as Professors Wyatt and Dashwood have cautioned, “A Presidency is expected to show objectivity in furthering proposals, without undue regard to its specific national interests.”<sup>94</sup> Professor Hayes-Renshaw concurs, observing that a Presidency must be careful in

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<sup>88</sup> *Id.* at 72–75. Except, as previously noted, Treaty of Lisbon art. 18. created the post of the High Representative of the Union for Foreign and Security Policy, and directs that the High Representative will permanently chair the Foreign Affairs Council.

<sup>89</sup> *Id.* at 74 (setting out a list of trios from 2007 to 2020, set initially in 2004); PIRIS, *supra* note 9, at 210–11 (referring to Council Decision 2009/881/EU, On the Exercise of the Presidency of the Council, 2009 O.J. (L 315) 50. See also HAYES-RENSHAW & WALLACE, THE COUNCIL, *supra* note 83, at 136–40 (describing the prior rotation systems).

<sup>90</sup> HAYES-RENSHAW & WALLACE, THE COUNCIL, *supra* note 83, at 134.

<sup>91</sup> *Id.* at 133–45; see also DINAN, EVER CLOSER UNION, *supra* note 33, at 227–29.

<sup>92</sup> DINAN, EVER CLOSER UNION, *supra* note 33, at 228.

<sup>93</sup> See *id.* at 229.

<sup>94</sup> WYATT & DASHWOOD, *supra* note 11, at 47.

highlighting specific issues, because it does not want to appear “to use (or abuse) the office too flagrantly for its own ends.”<sup>95</sup>

Every Council Presidency, particularly that of the General Affairs Council, must carry out a wide variety of functions during its six month term, e.g., establishing an agenda for all formal and informal meetings, directing the work program for committees, coordinating with the Commission and Parliament on the review and/or negotiation of draft legislation, preparation of minutes and reports, etc.<sup>96</sup> One of the most important Presidential functions is to maintain satisfactory relations with the Parliament, especially because the Parliament now exercises equal power with the Council in the review and adoption of most legislation, as we shall see in Part V.B. An incoming Presidency provides its agenda to the Parliament at the start of its term, and the President or deputies will meet personally with Parliament committees or delegations to discuss the text of draft legislation.<sup>97</sup>

From a constitutional point of view, even more important is the role of the Presidency during an Intergovernmental Conference for the amendment of the Treaties, when the Presidency chairs the negotiation sessions and drafts proposed text. A shift from one Member State’s Presidency to another during the course of an Intergovernmental Conference may lead to a marked revision in the draft Treaty text, and in the negotiating tactics employed by the Presidency as chair of the sessions. Finally the Presidency exercises another important role, one with particular media prominence, in serving as the collective spokesman for the Council in international affairs, both with regard to trade and within the Common Foreign and Security Policy.<sup>98</sup>

The different Council Presidents exercise the great power of the chair at each meeting, determining the order of speakers, and considerably influencing the debate and ultimate outcome. In an empirical study, Professor Jonas Tallberg contends that the “Presidency can play a crucial role in unlocking incompatible negotiating positions and securing agreement,” and “the Presidency possesses a set of informational and procedural resources that can be used to encourage concessions and achieve convergence in EU governments’ negotiating positions.”<sup>99</sup> Professor Tallberg also observes that the President often “does not make use of [his/her] authority to call a vote, but instead proceeds by noting the existence of sufficient support, and if nobody objects the proposal is considered adopted.”<sup>100</sup>

The rotating Council Presidents may well reflect the policy views of their respective governments, which suggests an intergovernmental character. Nonetheless, insofar as particular Council Presidents press for the adoption of legislation or policy decisions that promote market integration among the Member

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<sup>95</sup> HAYES-RENSHAW & WALLACE, *THE COUNCIL*, *supra* note 83, at 81.

<sup>96</sup> For a valuable analysis of the main functions of the Presidency, see HAYES-RENSHAW & WALLACE, *THE COUNCIL*, *supra* note 83, at 140–54, especially the list of Presidency operational functions at 142–43.

<sup>97</sup> *Id.* at 143, 148.

<sup>98</sup> *Id.* at 152–54.

<sup>99</sup> Jonas Tallberg, *The Power of the Presidency: Brokerage, Efficiency and Distribution in EU Negotiations*, 42 J. COMMON MKT. STUD. 999, 999–1000 (2004).

<sup>100</sup> *Id.* at 1005.

States, or the harmonization of national laws in the direction of more uniform rules, the Presidents are promoting supranational goals. Professor Desmond Dinan observes that Presidents “seek both to advance their own positions and to act as impartial arbiters; they are biased and neutral at the same time.”<sup>101</sup>

Not surprisingly in view of the heavy workload of the Council, especially in its configuration of the General Affairs Council, a high-level subordinate body prepares the legislative drafts and debates most of the policy and technical issues concerning them. This is the COREPER, whose name is an acronym based on the French equivalent of the English title, Committee of Permanent Representatives.<sup>102</sup> Each Member State designates two representatives holding the personal rank of an Ambassador to serve on two COREPER bodies, one handling political issues and the other economic ones. Both bodies of COREPER are composed of Member State diplomats customarily assigned to it for long periods, and highly expert in EU law and procedures.<sup>103</sup> The COREPER began to function in the EEC in January 1958 as a preparatory body to assist the Foreign Affairs Council, and has served in that role ever since.<sup>104</sup> EECT Article 151(1) formally recognized its role, stating that COREPER is “responsible for preparing the work of the Council,” language reiterated in the Lisbon TEU Article 16(7).

Both the political and economic bodies of COREPER meet weekly in separate sessions to discuss all proposals for draft legislation or decisions on policy that are close to the stage for Council review. When COREPER has reached agreement on a proposed text, it refers the text to the General Affairs Council, or another appropriate Council, on an agenda of “A” points, and the Council usually approves it with little or no debate, thus facilitating the decision process.<sup>105</sup> Alternatively, COREPER may refer particular unresolved issues concerning a draft text to the appropriate Council on a “B” list agenda, in the hope that the Council may be able to settle the issues and return the text to COREPER for further accelerated review. COREPER itself tends to avoid formal votes, striving instead for a consensus.<sup>106</sup>

Overall, COREPER can be assessed as one of the most powerful players in the process of adopting legislation and policy decisions. Due to the typically long tenure of its members and their accumulated experience and expertise, COREPER is able to

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<sup>101</sup> DINAN, *EVER CLOSER UNION*, *supra* note 33, at 229. Professors Hayes-Renshaw and Wallace observe that at Council sessions, the President sits at the head of the table to chair the meeting, while another representative of his/her government also sits at the table to represent that government. See HAYES-RENSHAW & WALLACE, *THE COUNCIL*, *supra* note 83, at 149.

<sup>102</sup> For a description of the role of COREPER, see Jeffrey Lewis, *National Interests: the Committee of Permanent Representatives*, in PETERSON & SHACKLETON, *THE INSTITUTIONS*, *supra* note 13, at 315–37 [hereinafter Lewis, *COREPER*]. See also HAYES-RENSHAW & WALLACE, *THE COUNCIL*, *supra* note 83, at 72–82.

<sup>103</sup> See Lewis, *COREPER*, *supra* note 102, at 320–23; HAYES-RENSHAW & WALLACE, *THE COUNCIL*, *supra* note 83, at 73–74.

<sup>104</sup> See HAYES-RENSHAW & WALLACE, *THE COUNCIL*, *supra* note 83, at 73. See Lewis, *COREPER*, *supra* note 102, at 317–18 (indicating that COREPER originated in 1952 to assist the Council in the European Coal and Steel Community).

<sup>105</sup> Professors Hayes-Renshaw and Wallace estimate that COREPER decides around 85% of all issues before the Council. See HAYES-RENSHAW & WALLACE, *THE COUNCIL*, *supra* note 82, at 77.

<sup>106</sup> See Lewis, *COREPER*, *supra* note 102, at 325; see also *id.* at 326–33 for a valuable examination of COREPER’s internal negotiation process.

to draft suitable texts and resolve political debates. Professor Dinan observes that COREPER “is extremely powerful and relatively secretive . . . its professionalism ensures generally favorable media coverage.”<sup>107</sup>

It is commonly believed that COREPER is apt to take a “European” view, aiming at compromises to achieve a legislative text or policy decision capable of adoption. Professors Hayes-Renshaw and Wallace observe that COREPER is “conscious of the need to reach agreement at EU level, and predisposed to look for compromise solutions that will take as many interests into account as possible.”<sup>108</sup> Professor Lewis characterizes COREPER as “something of a chimera: to some, it resembles a bastion of intergovernmentalism; to others, it appears less like inter-state bargaining than a haven for Eurocrats to ‘go native.’”<sup>109</sup> He cites a COREPER member who asserts that “there is a high collective interest in getting results and reaching solutions. This is in addition to representing the national interest.”<sup>110</sup> Altogether, COREPER can plausibly be said to exercise an operational role of seeking supranational goals, even though it is clearly intergovernmental in structure.

Quite naturally, like the Commission, the Council is served by a vital civil-service infrastructure, at whose peak is the General Secretariat of the Council,<sup>111</sup> formally recognized as such in the Maastricht Treaty’s ECT Article 151(2), and now in the Lisbon TFEU Article 240(2). The Secretariat is headed by a Secretary General, currently Uwe Corsepius. The Secretariat is divided into eight Directorates-General, the largest for personnel and administration, another for press and media, and six responsible for handling major sectors of EU policies. The highly influential Council Legal Service acts as the counsel for each Council configuration. Subordinate units, often called working groups, review proposed legislative texts, and draft policies and decisions, preparing these for COREPER or senior Secretariat officials. Currently about 3,500 civil servants, recruited by open competition from all the Member States, constitute the Secretariat’s staff—a rather modest number in view of the importance and volume of the Secretariat’s role.

#### *B. The Council in Operation: Executive Policy-Making and Legislative Roles*

From the outset of the EEC until the effective date of the Treaty of Maastricht, November 1, 1993, the Council of Ministers shared with the Commission the crucial role of instituting and elaborating policies, and acted virtually alone as the EEC’s legislature. As we will see in Parts V.C and VI, the European Council has gradually assumed much of the Council’s executive policy-making role, although the Council naturally has retained considerable influence through its expertise in particular sectors. As for the legislative process, we will see in Part III.C how the Council’s autonomous role has been gradually supplanted in most fields by a joint legislative

<sup>107</sup> DINAN, *EVER CLOSER UNION*, *supra* note 33, at 217.

<sup>108</sup> HAYES-RENSHAW & WALLACE, *THE COUNCIL*, *supra* note 83, at 81.

<sup>109</sup> Lewis, *COREPER*, *supra* note 102, at 316.

<sup>110</sup> *Id.*

<sup>111</sup> See Deirdre M. Curtin & Ige F. Dekker, *The European Union from Maastricht to Lisbon: Institutional and Legal Unity Out of the Shadows*, in CRAIG & DE BÜRCA, *EVOLUTION OF EU LAW*, *supra* note 12, at 179–84. For a description of the Secretariat and its operational role, see generally *id.* at 155–85. See also HAYES-RENSHAW & WALLACE, *THE COUNCIL*, *supra* note 83, at 75.

procedure together with the Parliament. In both its executive and legislative roles, the Council has always acted largely in an intergovernmental mode. As Professor Deirdre Curtin has observed, "The Council of Ministers represented institutionalized intergovernmentalism by the Member States acting collectively and was meant to counterbalance the much more innovative and 'supranational' Commission where the general 'Community' interest was to prevail."<sup>112</sup>

Naturally advocates of greater European integration urge increased authority for the executive role of the Commission, and ever-increasing legislative power for the Parliament, and decry the Council's traditional intergovernmental nature as tending to block collective European interests in favor of parochial national concerns. On the other side, supporters of Member State sovereignty and national policy interests applaud the Council's protection against what they consider to be excessively ambitious policies and legislation, unnecessary regulation, and the sacrifice of legitimate local interests. In attempting a more neutral appraisal, it is essential to recall that the Council, regardless of its membership at different times, has steadily promoted market integration and the harmonization of national rules, sector by sector, especially since the Internal Market program in the 1980s. As Professors Hayes-Renshaw and Wallace have well observed, "The Council . . . embodies a sense of collective purpose, collective commitments and collective ideas [and reconciles] the distinctive purposes and powers of the member states with the needs for recurrent and disciplined joint action."<sup>113</sup>

Articles 3 and 8 of the EEC Treaty had initially set guidelines and a twelve-year timetable for initial action to achieve the Common Market. The Council's greatest achievements during the 1960s were the creation of the Customs Union and the agreement on the initial market organizations within the Common Agricultural Policy (CAP). Achieving agreement upon the Common Customs Tariff and common trade policies towards third nations was certainly a laborious process,<sup>114</sup> but far more challenging was the gradual attainment of agreement on CAP policies and programs. Not only was agriculture a far more important economic sector in the 1960s in the initial six Member States than it is today, but each State's protectionist programs were fiercely supported by lobbies on behalf of rural voters. The Council reached critical compromises only with great difficulty.<sup>115</sup> Less controversial, but also of crucial importance to the achievement of a Common Market, were the Council's adoption in 1962 of Regulation 17 to commence the Common Competition Policy,<sup>116</sup> and its initial actions to achieve the "Four Freedoms," notably the Council's 1962 General Programs on the Right to Provide Services and on Freedom of Establishment,<sup>117</sup> the First and Second Council Directives to promote the

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<sup>112</sup> CURTIN, *supra* note 25, at 58.

<sup>113</sup> HAYES-RENSHAW & WALLACE, *THE COUNCIL*, *supra* note 83, at 3.

<sup>114</sup> See DINAN, *EUROPE RECAST*, *supra* note 3, at 89-94.

<sup>115</sup> *Id.* at 94-97.

<sup>116</sup> 1962 O.J. SPEC. ED. 13, 87.

<sup>117</sup> 1962 O.J. SPEC. ED. 9, 3; 1962 O.J. SPEC. ED. 9, 7.

free movement of capital,<sup>118</sup> and Council Directive 68/360/EEC on free movement of workers.<sup>119</sup>

After the end of the EEC's initial twelve year transitional period in 1969, the Council naturally continued to exercise an important executive policy-making role, often in collaboration with the Commission. In 1985, after the European Council endorsed the Internal Market program embodied in the Commission's White Paper on Completing the Internal Market,<sup>120</sup> the Commission and Council implemented this crucial policy program in specific legislation. The Commission proposed the legislative initiatives, such as the harmonization directives in the fields of banking, company and securities law, consumer rights, intellectual property, and television broadcasting, which were then shaped by the Council to take into account the political positions of the various Member States.<sup>121</sup>

As previously observed, after the Treaty of Maastricht, the Council has shared its legislative role with the Parliament in the adoption of almost all legislation to achieve the Internal Market. However, the Treaty of Maastricht amended the TEU to create two new fields of purely intergovernmental action, the Common Foreign and Security Policy (CFSP)<sup>122</sup> and Cooperation in Justice and Home Affairs (CJHA), the so-called "second and third pillars" of the Maastricht Treaty. The Maastricht Treaty authorized the Council to exercise a new autonomous legislative and decision-making role in the CJHA. The Council quickly began to take action in the 1990s through the adoption of policies, regulations and decisions, notably in the creation of common procedures and standard for visas, and the harmonization of asylum and immigration rules.<sup>123</sup> Subsequently, the Treaties of Amsterdam and Nice shifted the civil law side of CJHA to the Community sphere, enabling the Commission and the Parliament to share in the adoption of legislation.<sup>124</sup>

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<sup>118</sup> See Council Directive 92/160/EEC, First Directive for the Implementation of Article 67 of the Treaty, 1959–62 O.J. SPEC. ED. 49; Second Council Directive 63/21/EEC, Adding to and Amending the First Directive for the Implementation of Article 67 of the Treaty, 1963–64 O.J. SPEC. ED. 5.

<sup>119</sup> 1968 O.J. SPEC. ED. L 257, 485.

<sup>120</sup> *Completing the Internal Market: White Paper from the Commission to the European Council*, *supra* note 62.

<sup>121</sup> See generally BARNARD, *supra* note 29, at 603–47. Especially crucial were the Second Council Directive 89/646/EEC, On the Coordination of Laws, Regulations, and Administrative Provisions Relating to the Taking Up and Pursuit of the Business of Credit Institutions, 1989 O.J. (L 386) 1 (also commonly referred to as "Second Banking Directive"); Council Directive 89/592/EEC, On Coordinating Regulations On Insider Dealing, 1989 O.J. (L 334) 30; Council Directive 89/552/EEC, On the Coordination of Certain Provisions Laid Down by Law, Regulation, or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities, 1989 O.J. (L 298) 23; First Council Directive 89/104/EEC, To Approximate the Laws of the Member States Relating to Trade Marks, 1989 O.J. (L 40) 1. All were controversial, hotly debated, and only adopted after compromises.

<sup>122</sup> Previously mentioned in Part III.B and discussed further below in Parts V.B and VI.C.

<sup>123</sup> See Steve Peers, *EU Justice and Home Affairs (Non-Civil)*, in CRAIG & DE BÜRCA, *EVOLUTION OF EU LAW*, *supra* note 12, at 269–72. With regard to visas, see Council Regulation 1683/1995, Laying Down a Uniform Format for Visas, 1995 O.J. (L 164) 1; Council Regulation 574/1999, On the Third Countries Whose Nationals Must Be in Possession of Visas When Crossing the External Borders of the Member States, 1999 O.J. (L 72) 2.

<sup>124</sup> Peers, *supra* note 123, at 272–77, 280–84, 287–90. Notable achievements are Council Regulation 44/2001, On Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 12) 1; Council Directive 2003/109, Concerning the Status of Third-Country Nationals Who Are Long-Term Residents, 2004 O.J. (L 16) 44; and Council Directive 2005/85/EC, On Minimum

After the October 1999 European Council meeting in Tampere, Finland adopted an Action Program in the Area of Freedom, Security and Justice, the Council became extremely active in the field, adopting policies and decisions to promote police and judicial criminal cooperation, standardize asylum and refugee procedures, enact and coordinate anti-terrorist measures, combat illegal migration, etc.<sup>125</sup> Although Title V of the Treaty of Lisbon (TFEU) has integrated legislative action in the field of criminal justice and police cooperation into the ordinary legislative procedure (with some unusual features in TFEU Articles 82, 83 and 86), the Council continues to exercise the principal functional role in this politically sensitive sector.

Finally, the Council exercises a crucial constitutional role with regard to the accession of new Member States. The original EEC Treaty Article 237 on accession stipulated that any candidate nation must apply to the Council, which had to approve the application unanimously. The Treaty of Maastricht shifted the provision to Article 49 of the TEU, which has been largely replicated in Article 49 of the Lisbon TEU. Although both TEU formulations have added as procedural requirements that the Council must consult the Commission and receive the consent—or assent—of the Parliament before approving the accession, the decision still remains one in which the Council must act unanimously. The requirement of unanimity is obviously necessary, because the final step in the accession process is the ratification of an accession treaty by all the Member States. Moreover, by tradition the Council conducts the negotiations with all applicant nations concerning the treaty of accession and any accessory transitional arrangements. In 1970, when Denmark, Ireland, and the United Kingdom applied for accession in the first enlargement of the Community, the Commission requested the Council to authorize it to conduct the negotiations, but the Council rejected this proposal, preferring to conduct the negotiations with the assistance of the Commission.<sup>126</sup> This approach has been followed in all subsequent enlargements.<sup>127</sup>

### C. Council Voting Procedures: the Evolution of Qualified Majority Voting

Throughout the existence of the European Economic Community, the Council customarily acted to take decisions or adopt legislation by unanimity, giving it the

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Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, 2005 O.J. (L 326) 13.

<sup>125</sup> See Steve Peers, *Mission Accomplished? EU Justice and Home Affairs Law After the Treaty of Lisbon*, 48 COMMON MKT. L. REV. 661 (2011); see also Jörg Monar, *The Area of Freedom, Security and Justice*, in PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW, *supra* note 22, at 551–85. Particularly noteworthy are Council Decision 2000/799/JHA, Setting Up a Provisional Judicial Cooperation Unit, 2000 O.J. (L 324) 2 (also referred to as “Eurojust”); Council Decision 2009/371/JHA, Establishing the European Police Office, 2009 O.J. (L 121) 37 (replacing the 1995 Europol Convention, and bringing it within the usual E.U. budgetary and operational structure); Council Framework Decision 2002/475/JHA, On Combating Terrorism, 2002 O.J. (L 164) 3 (adopted in reaction to the terrorist attack on the World Trade Center on Sept. 11, 2001); Council Framework Decision 2002/584/JHA, On the European Arrest Warrant and the Surrender Procedures Between Member States, 2002 O.J. (L 190) 1; Council Framework Decision, On Simplifying the Exchange of Information and Intelligence Between Law Enforcement Authorities of the Member States of the European Union, 2006 O.J. (L 386) 89; Council Decision 2008/615/JHA, On the Stepping Up of Cross-Border Cooperation, Particularly in Combating Terrorism and Cross-Border Crime, 2008 O.J. (L 210) 1.

<sup>126</sup> DINAN, EUROPE RECAST, *supra* note 3, at 135–40. See also Goebel, *supra* note 72, at 1164–65.

<sup>127</sup> See Christophe Hillion, *EU Enlargement*, in CRAIG & DE BÜRCA, *EVOLUTION OF EU LAW*, *supra* note 12, at 187, 199, 201.

appearance of an intergovernmental representative body. Nonetheless, the fact that Member States were always aware of the importance of promoting the market integration goal of the Community had the consequence that even in the initial history of the EEC, a minister did not play a purely representative role—such as that of foreign affairs ministers assembled in a gathering under an ordinary public international treaty—but rather became engaged in a process of deliberation and compromise so that the Council could operate effectively in taking decisions or adopting policies.

The EEC Treaty did authorize the Council to adopt legislation or policy decisions in several fields, notably agriculture (Articles 38(2) and 43 EEC), competition law (Article 87(1) EEC), and external commercial policy (Article 111(3) EEC), by a special type of majority vote, known as the Qualified Majority Vote (QMV). EEC Article 148 specified the initial QMV procedure, the weighted votes for the initial six Member States, and the votes required for action. The essence of QMV voting then, as now, is that each Member State is allotted a stated number of weighted votes set in the Treaty in function of its population and the size of its national economy. In order to be adopted, a proposed decision or legislative measure must receive a stated number of weighted votes. As new nations joined the EEC, and later the EU, the relevant Accession Treaty stipulated each one's weighted vote and increased the total number of weighted votes necessary to adopt a decision or measure. Although successive treaties modified the number of weighted votes, the percentage required for passage has always averaged around 70% of the total.<sup>128</sup>

Unfortunately from 1966 to the mid-1980s the Council frequently did not act by a QMV—even when a Treaty provision authorized the procedure—due to the customary acceptance of the “Luxembourg veto.” As previously noted, the ambiguous formula of the 1965 Luxembourg Compromise had the effect that whenever a State declared that a proposed decision or measure would harm a vital State interest, the other Member States would usually refrain from acting on a proposed measure.<sup>129</sup> As Professor Paul Craig has observed, this “return to intergovernmentalism” not only affected Council decision-making, but also Commission initiatives, “since the threat of the veto shaped the policies put forward by the Commission.”<sup>130</sup>

The Single European Act radically augmented the scope of QMV voting in 1987 when it authorized the Council to act by this vote, instead of by unanimity, in the adoption of legislation intended to harmonize national rules in order to achieve the Internal Market (the new appellation for the Common Market), and the Maastricht Treaty's ECT Article 95(1) replicated this. Fortunately, because of the desire of all the Member State governments to make the Internal Market program a success, the “Luxembourg veto” ceased to be a hindrance to QMV voting on Internal Market

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<sup>128</sup> For a description of qualified majority voting and its evolution in successive Treaties, see DINAN, *EVER CLOSER UNION*, *supra* note 33, at 219–23; HAYES-RENSHAW & WALLACE, *THE COUNCIL*, *supra* note 83, at 54–58, 261–63.

<sup>129</sup> See *supra* text accompanying note 3.

<sup>130</sup> Paul Craig, *Institutions, Power, and Institutional Balance*, in CRAIG & DE BÜRCA, *Evolution of EU Law*, *supra* note 12, at 44–45. See also HAYES-RENSHAW & WALLACE, *THE COUNCIL*, *supra* note 82, at 265–68; Weiler, *supra* note 4, at 2460.



measures.<sup>131</sup> The Treaty of Lisbon's TFEU Article 43 has further shifted the important sector of agriculture and fisheries to QMV voting. Currently, the sensitive fields of competition law, which is covered by TFEU Articles 153(2) and 192(2), the harmonization of direct and indirect taxation, covered by TFEU Articles 110 and 114(2), and certain specified types of action in the fields of employment law and in environmental protection, covered by TFEU Articles 153(2) and 192(2), are the most significant ones in which the Council must act by unanimity<sup>132</sup>—apart from the Common Foreign and Security Policy, in which both the European Council and the Council customarily act only by unanimity. Finally, the Treaty of Lisbon's TEU Article 16(4), supplemented by TFEU Article 238, will modify the system of QMV voting, requiring after November 1, 2014 an affirmative vote of 55% of all ministers, representing States whose aggregate population comprises at least 65% of the total EU population.<sup>133</sup>

It is important immediately to stress that the States whose ministers are outvoted in QMV voting are fully subject to any legislation adopted, or policy decisions—a decidedly supranational, or federal, but not intergovernmental approach. As observed previously, the Commission has the power to sue any State that does not properly implement any legislation before the Court of Justice, whose judgments authoritatively bind any delinquent States.<sup>134</sup> Moreover, even when the Council must act by unanimous vote in a particular sector, on occasion ministers will abstain, rather than submitting a no-vote, and thereby permit the Council to take action. Thus, the Treaty mandate for Council QMV voting in the adoption of legislation and policy decisions in most fields since the Treaty of Maastricht suggests that the Council has shifted from an essentially intergovernmental to a partially supranational operational mode.

Nonetheless, there is some doubt whether the shift to QMV voting represents functional reality on all occasions when the Council acts to adopt a measure, or take a decision, by a QMV vote. There is no clear-cut answer. Political science commentators in their review of actual Council operations indicate that the Council is often reluctant to employ QMV voting in practice. Professor Dinan's view is that "voting is relatively infrequent and . . . consensus remains the preferred path for decision making in the Council. By all accounts, QMV is important in facilitating decision-making because of the so-called shadow of the vote [the Council's legal ability to act by QMV vote] and not necessarily because of actual voting."<sup>135</sup> In a detailed analytic study, Professors Hayes-Renshaw and Wallace conclude that since 1993, the Council continues to prefer to build a consensus when QMV voting is permitted and votes are not usually formally taken; however, no State exercises a

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<sup>131</sup> See DINAN, *EVER CLOSER UNION*, *supra* note 33, at 220. Professors Hayes-Renshaw and Wallace indicate that the Luxembourg veto already had less of an impact in the 1980s and was rarely used in the early 1990s. See HAYES-RENSHAW & WALLACE, *THE COUNCIL*, *supra* note 83, at 269–70.

<sup>132</sup> See PIRIS, *supra* note 9, at 213, for an indication of other fields or specific measures requiring unanimous Council vote.

<sup>133</sup> See *id.* at 212–25 for a detailed account in the evolution of QMV voting in the Council, and the motivation for the new Lisbon Treaty formulation. See also CRAIG, *supra* note 9, at 43–45.

<sup>134</sup> See *supra* text accompanying notes 63–65.

<sup>135</sup> DINAN, *EVER CLOSER UNION*, *supra* note 33, at 223 (citation omitted). Professor Weiler is generally considered to have articulated the concept of "the shadow of the vote." See Weiler, *supra* note 4, at 2461–63.

veto, and States frequently abstain or concur when a clear majority has developed.<sup>136</sup> In Wyatt and Dashwood's view, the Council does strive for "a broad consensus," but if that cannot be attained, "QMV does permit the Council ultimately to override the objections of those Member States unable to muster a blocking minority."<sup>137</sup> Philipp Dann's examination of Council voting since the 2004 enlargement, which greatly increased the number of Member State ministers and the number of weighted votes, indicates that consensus continues to be preferred, even though it is more difficult to achieve. He considers that the Council's consensus approach is fostered by "a certain club spirit . . . that facilitates compromise and consensus."<sup>138</sup>

As for international relations: ever since the Treaty of Maastricht, pursuant to ECT Articles 133 and 300, the Council has had the power to act by a qualified majority vote in providing binding instructions to the Commission when negotiating both proposed commercial and other international agreements, and in ultimately entering into the international agreements on behalf of the EC, or now the EU. Although the Treaty of Lisbon's TFEU Articles 207 and 218 indicate some exceptions when the Council must act unanimously, in general it may act by QMV voting.<sup>139</sup> In any event, once the Community (or now the Union) has entered into an international agreement, it is binding on all Member States—again, a supranational approach first enunciated in EECT Article 228(2), replicated in the Maastricht ECT Article 228(7), and now in TFEU Article 216(2).

The prior examination of the structure and operations of the Council of Ministers indicates that the progressive shift to QMV voting from action only by unanimity, a shift further accentuated by the Treaty of Lisbon, has moved the Council from an essentially inter-governmental institution to one with significant supranational features. However, it remains clear that each Council minister, and notably each President of the Council, necessarily reflects the views of his or her government. Even though the Council record of action on internal market and other legislation since the Treaty of Maastricht demonstrates that the Council has a strong motivation to strive for market integration and common EU rules, in the final analysis the Council may be assessed as being essentially intergovernmental in structure, but one operating to achieve the supranational goals of the EU.

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<sup>136</sup> HAYES-RENSHAW & WALLACE, *THE COUNCIL*, *supra* note 83, at 56.

<sup>137</sup> WYATT & DASHWOOD, *supra* note 11, at 50.

<sup>138</sup> Philipp Dann, *The Political Institutions*, in *PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW*, *supra* note 22, at 249–50.

<sup>139</sup> See EECKHOUT, *supra* note 69, at 201–02.

## V. THE PARLIAMENT<sup>140</sup>—FEDERAL IN NATURE, SUPRANATIONAL IN VISION AND OPERATIONS

Although in the initial European Economic Community, the Commission rapidly demonstrated its nature as a supranational institution dedicated to a deliberate policy of integration and unification of the Community, manifestly the Community lacked a vital democratic component—it had no popularly elected, functional Parliament, only an advisory Assembly. In this section we will review the evolution of the Assembly into the Parliament, its internal structure, and its three most important roles: (1) an equal share with the Council of Ministers in the legislative process for most legislation; (2) a power of veto over the designation of the Commission and its President, together with a strong capacity to supervise the Commission; and (3) a power of consent, or veto, with regard to certain constitutional and quasi-constitutional decisions.

### A. *Structure of the Parliament: Popular Election, Party Groups, President and Committees*

Articles 137–44 of the initial EEC Treaty provided for an Assembly, composed of delegations from Member State parliaments, which was essentially intended to act in a purely advisory capacity. Not only did the Assembly quickly rename itself as the European Parliament, it also vigorously protested this trivial status. Responding to the Parliament's demand that it should receive a popular mandate through elections, the summit of Member State political leaders held in Paris in December 1974 agreed that the Members of Parliament (MEPs) should be elected directly by the voters in each State.<sup>141</sup> In June 1976, after consulting the Parliament, the Council adopted a decision establishing the necessary procedures.<sup>142</sup> The first direct election of the Parliament took place in June 1979 and has since been repeated every five years. The Parliament not only obtained a strong democratic character with direct election, it also acquired a federal character, inasmuch as the MEPs are elected in each Member State as representatives of the people of that State. As MEP Richard Corbett has observed, a directly elected Parliament represents a move toward “a more ‘federal’ system [obtaining] legitimacy directly from citizens instead of via

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<sup>140</sup> For analytical descriptions of the nature, composition, role and operation of the European Parliament, see RICHARD CORBETT, FRANCIS JACOBS & MICHAEL SHACKLETON, *THE EUROPEAN PARLIAMENT* (8th ed. 2011) (Richard Corbett is a UK MEP, and both Francis Jacobs and Michael Shackleton are senior EP staff officials); see also Richard Corbett, *The Evolving Roles of the European Parliament and of National Parliaments*, in *EU LAW AFTER LISBON*, *supra* note 9, at 248–61 [hereinafter Corbett, *Evolving Roles*], for a brief discussion regarding the status of the Parliament after the Lisbon Treaty; DAVID JUDGE & DAVID EARNSHAW, *THE EUROPEAN PARLIAMENT* (2d ed. 2008); Michael Shackleton, *The European Parliament*, in PETERSON & SHACKLETON, *THE INSTITUTIONS*, *supra* note 13, at 95–117; DESMOND DINAN, *EVER CLOSER UNION*, *supra* note 33, at 235–64.

<sup>141</sup> See DINAN, *EVER CLOSER UNION*, *supra* note 33, at 241–52, for the history of Parliament's demand to be elected directly, the reaction of the European Council, the Council's decision on the modalities, and a review of Parliament's elections until 2009.

<sup>142</sup> Council Decision 76/787, 1976 O.J. (L 278) 1. See also EEC Treaty art. 138(3) (foreseeing the creation of direct voting by a Council decision and thus, no need to amend the Treaty to achieve it). See generally CORBETT, JACOBS & SHACKLETON, *supra* note 138, at 12–34 (describing the election procedures set by the Council, the actual systems of voting in the different Member States, and the difficult issues that had to be resolved before creating the direct election system).

national governments,” as well as “a common European level [parliament] complementing, rather than replacing, joint governmental decision-making.”<sup>143</sup>

The Lisbon TEU Article 10 underlines the importance of Parliament’s role as the democratic representative of the people of the EU. Article 10(1) asserts that “[t]he functioning of the Union shall be founded on representative democracy.” Article 10(2) then declares that “[c]itizens are directly represented at Union level in the European Parliament,” while in contrast the European Council and the Council are only indirectly democratic, inasmuch as they represent Member State governments which in turn are “democratically accountable either to their national Parliaments, or to their citizens.”

Although Parliament is now directly elected, its democratic representative credentials are somewhat tarnished by the fact that its MEPs are not allocated among Member States strictly in accordance with population (unlike the United States House of Representatives). The initial 1976 Council decision, and subsequently each successive Treaty provision on the structure of Parliament, has set the size of each State’s delegation of MEPs only partly in consideration of each State’s population. The number of MEPs allocated to each new Member State in its Treaty of Accession is set in negotiations, often with some difficulty, because the figure must be somewhat proportionate to the number of MEPs allocated to earlier States with similar populations. Moreover, after Germany’s reunification in 1990 increased its population by 28 million, its MEP delegation remained the same, in parity with France, Italy and the UK. Thus, successive accessions of new Member States with relatively small populations have increased the discrepancy between the number of MEPs allocated to each State and the number it should have based purely on its population. Currently, Germany should have about 40 more MEPs to be properly represented in proportion to its population, and France, Italy, the UK, Spain and Poland are also significantly under represented by 10–15 MEPs. In contrast, most smaller States have more MEPs than a strict population approach would warrant.<sup>144</sup> The Lisbon Treaty endorses this variance from proportionate democratic representation by setting in TEU Article 14(2) a maximum of 96 MEPs and a minimum of 6 for any State.

Former Court of Justice Judge Manfred Zuleeg justifies the deviation in Member State delegation size from a purely democratic allocation based on population by contending that “[t]he EU is a federative democracy sui generis, one that is not based on a single people, but peoples,” requiring a “derogation from the strict principle of equality to satisfy the need to grant a certain independence and protection to smaller [States].”<sup>145</sup> In any event, TEU Article 14(2) authorizes the European Council, acting unanimously upon a proposal made by the Parliament, to adopt a decision “establishing the composition of the European Parliament,” i.e.,

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<sup>143</sup> Corbett, *Evolving Roles*, *supra* note 140, at 255.

<sup>144</sup> See CORBETT, JACOBS & SHACKLETON, *supra* note 140, at 26–30, for a detailed picture of the discrepancy as of 2009; *see also* DINAN, *EVER CLOSER UNION*, *supra* note 33, at 241 (observing that the substantial under-representation of Germany “undermines the EP’s claim to democratic legitimacy,” citing the German Constitutional Court’s same criticism in its 2009 decision authorizing Germany’s ratification of the Lisbon Treaty).

<sup>145</sup> Manfred Zuleeg, *The Advantages of the European Constitution*, in *PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW*, *supra* note 22, quoted at 773.

determining the number of MEPs allocated to each State. The European Council will have to do this before the next election of Parliament in 2014, because the 2009 Parliament's composition is based on the previous Treaty provisions.<sup>146</sup>

A second blot on Parliament's democratic credentials arises because of the low turnout of voters in successive elections to Parliament, as compared to turnout in national elections, which has fallen from an average 62% in 1979 down to 45% in 2004 and 43% in 2009.<sup>147</sup> Political scientists offer a partial explanation: the election campaigns in each State tend to concentrate on national, not EU-wide issues, and the success of the political parties contesting the MEP elections tend to depend on the popularity, or unpopularity, of the party in control of the national legislature.<sup>148</sup> Obviously, "[f]or those politicians and scholars who believed that direct elections would lead to the creation of a new European identity on the part of the voters, and hence a novel source of supranational legitimation of the EU itself, direct elections have proved to be . . . a practical disappointment."<sup>149</sup> Judge Allan Rosas, currently serving on the Court of Justice, notes the turn-out decline, and ascribes this to "widespread perplexity concerning the real powers of European Parliament" and the "increased feeling of 'remoteness' of ordinary citizens vis-à-vis Union institutions including the Parliament . . ."<sup>150</sup> Michael Shackleton, a senior member of the Parliament's civil service, pertinently observes that national parliaments, not the EU Parliament, decide the political issues that most concern citizens, such as health care, education and taxation. He notes that voters find it difficult "to identify whom to reward or punish for particular policy outcomes when they [vote] in European elections."<sup>151</sup> Despite both of these accurate observations it must still be said that Parliament's democratic credentials suffer because of the low turnout.

However, three aspects of Parliament's internal operating structure do augment its supranational character. The first is that after each direct election, MEPs elected on the basis of their party affiliation in each Member State have customarily formed EU-wide political party groupings.<sup>152</sup> The Socialist party was the largest such party group in the Parliaments elected until 1999, and the European People's Party the largest in 2004 and 2009, although neither has amassed a majority. The Liberals, the Greens and other smaller groups have also developed within the Parliament on an EU-wide basis. These political groups play a major role in selecting the Parliament's President, Vice-Presidents and committee chairs. In addition, they

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<sup>146</sup> See WYATT & DASHWOOD, *supra* note 11, at 57, for a description of the complicated 2009–14 arrangements.

<sup>147</sup> See SHACKLETON, *supra* note 138, at 113, for a chart showing both the overall vote percentage and the percentage in each Member State, from 1979 to 2009. In 2009, Belgium and Luxembourg had by far the highest turnout, each at 90–91%, while Lithuania and Slovakia had the poorest turnouts at 20–21%.

<sup>148</sup> See JUDGE & EARNSHAW, *supra* note 140, at 76–80.

<sup>149</sup> *Id.* at 73.

<sup>150</sup> ALLAN ROSAS & LORNA ARMATI, *EU CONSTITUTIONAL LAW—AN INTRODUCTION* 117 (2010) (Judge Rosas's co-author, Ms. Armati, is a member of the Commission Legal Service).

<sup>151</sup> See PETERSON & SHACKLETON, *THE INSTITUTIONS*, *supra* note 13, at 144.

<sup>152</sup> See CORBETT, JACOBS & SHACKLETON, *supra* note 140, at 78–128, as well as JUDGE & EARNSHAW, *supra* note 140, at 113–46, for detailed descriptions of each political party group, its size after successive elections, and the overall influence of the groups; see also Tapio Raunio, *Political Interests—The European Parliament's Party Groups*, in PETERSON & SHACKLETON, *THE INSTITUTIONS*, *supra* note 13, at 257–76.

influence the basic agenda for the Parliament, as well as any specific vote on draft legislation. In his analysis of how the political groups operate, and their ultimate influence on Parliament's policies and decisions, Professor Desmond Dinan concludes that "MEPs' positions on policy issues depend largely on the positions taken by the political groups, not by the governments in their own member states."<sup>153</sup> MEP Richard Corbett recently observed that the party groups "have become more cohesive over time" and that "the positions taken by the [g]roups—and the negotiations between them—are what counts in determining the parliamentary majorities."<sup>154</sup>

That the MEPs elected in function of their political party affiliation in the diverse Member States are able to form relatively cohesive EU-wide political groups does point to a supranational character for the Parliament's structure. The Maastricht Treaty inserted Article 191 into the ECT Treaty, recognizing that "[p]olitical parties at European level are important as a factor for integration within the Union [and] contribute to forming a European awareness . . . ." Article 10(4) of the Treaty of Lisbon TEU reformulates this as "[p]olitical parties at European level contribute to forming European political awareness and to expressing the will of citizens of the Union."

The second structural feature of the Parliament that augments its supranational character is the status and role of its President. In language that traces back to the EEC Treaty Article 140, the Lisbon TEU Article 14(4) merely states that the Parliament "shall elect its President." Starting in 1979, each successive Parliament has elected two Presidents, each serving two and half years. On several occasions, the two larger parties in Parliament, the European People's Party and the Socialists, have agreed to elect each other's candidate successively in the two terms, but frequently the two larger groups attempt to gain support from smaller ones in a contested election and one prevails.<sup>155</sup> In the 2009–14 Parliament, Jerzy Buzek, the former Prime Minister of Poland and the EPP candidate, was elected for 2009–11, and Martin Schulz, a German Socialist, was chosen for 2012–14.

The Treaties have never expressly stated the status, role and powers of Parliament's President, save for two formal exceptions. TFEU Article 297 states that legislation adopted jointly by the Parliament and Council in the ordinary legislative procedure (described in section B) must be signed both by the President of Parliament and the President of the Council. In addition, TFEU Article 314(9) states that the President of Parliament shall declare that the annual Union budget has been definitely adopted at the end of the complicated budgetary procedure jointly carried out by the Parliament and the Council. The Parliament's internal Rules of Procedure prescribe that the President, *inter alia*, customarily chairs plenary sessions, calling on speakers, deciding when to vote, and formally announcing the

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<sup>153</sup> DINAN, *EVER CLOSER UNION*, *supra* note 33, at 252. See PETERSON & SHACKLETON, *THE INSTITUTIONS*, *supra* note 13, at 133 (observing that "party allegiance is much more important than nationality in determining how members vote").

<sup>154</sup> Corbett, *Evolving Roles*, *supra* note 140, at 255.

<sup>155</sup> See CORBETT, JACOBS & SHACKLETON, *supra* note 140, at 130–31, for a list of the results in all elections since 1979. The Socialist and European People's Party have usually alternated in the Presidency, but in 2002, Patrick Cox, an Irish Liberal, was elected.

results. The President and fourteen Vice-Presidents, who are also elected by Parliament for two-and-a-half year terms, form a steering group, the Bureau, which supervises administrative and organizational matters for the Parliament, decides its agenda, and establishes the size and role of committees.<sup>156</sup> Moreover, the President acts as the customary representative of the Parliament to the other institutions, including the European Council, where the Parliament President addresses the opening session. The President manifestly has the capacity to exert a substantial influence over the operations of Parliament, and exercises a significant role as its formal representative in dealings with other institutions.

The third important structural feature of Parliament is the functional role of its committees.<sup>157</sup> The Parliament has twenty standing committees, each responsible for an important field of EU action (e.g., internal market, agriculture, employment and social affairs, foreign affairs, international trade) or internal operation (e.g., budget, constitutional affairs, legal affairs, regional development), as well as ad hoc committees. Undoubtedly the principal role of committees is to review draft legislation, which they do with great care—plenary sessions of Parliament customarily endorse with little or no change draft proposals approved by the relevant committee.<sup>158</sup> Committees also serve to supervise the operations of the Commission and other EU bodies. Ad hoc Committees of Inquiry, authorized by TFEU Article 226 (ex-ECT Article 193), created whenever one-fourth of the MEPs so request, investigate alleged serious violations of law or maladministration.<sup>159</sup> The most famous Committee of Inquiry was the one that investigated the Commission and Council efforts to halt the spread of “mad-cow disease” from the United Kingdom to other Member States in the late 1990s. That Committee’s critical report spurred an overhaul of EU food safety rules and procedures.<sup>160</sup>

#### *B. Democracy in Action—the Evolution of the Parliament’s Role in the Ordinary Legislative Procedure*

It is not surprising that, upon receiving a popular mandate through direct election, the Parliament contended that it should receive a real share in the legislative and budgetary processes, maintaining that its failure to exercise any significant powers constituted a “democratic deficit.” As Professor Desmond Dinan observes, Parliamentary leaders commenced the use of that term in the 1970s as a “battering ram” to try to gain legislative power.<sup>161</sup> In the 1980s, Parliament first obtained a share with the Council of Ministers in the process of setting the Community’s budget, a share that has steadily been augmented in successive Treaty amendments. After the Lisbon Treaty, Parliament can be said to have attained equal powers with the Council, but because the history of this evolution is complex and the budgetary

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<sup>156</sup> See Shackleton, *supra* note 140, at 101–02.

<sup>157</sup> See CORBETT, JACOBS & SHACKLETON, *supra* note 140, at 144–75, for a valuable review of the history, structure and role of committees.

<sup>158</sup> See Shackleton, *supra* note 140, at 101.

<sup>159</sup> See CORBETT, JACOBS & SHACKLETON, *supra* note 140, at 331–35; see also HOFMANN, ROWE & TÜRK, *supra* note 60, at 771–73.

<sup>160</sup> See CORBETT, JACOBS & SHACKLETON, *supra* note 140, at 334.

<sup>161</sup> DINAN, EUROPE RECAST, *supra* note 3, at 196.

process itself highly complicated, space considerations prevent any discussion of this topic.<sup>162</sup>

Certainly, the most important current operational role of the Parliament is in the legislative process. Initially, under the EEC Treaty, the Council had the exclusive power to adopt all legislation, and the Parliament was merely “consulted” in the Council’s review of draft proposals in some fields.<sup>163</sup> Nonetheless, in the famous *Isoglucose* judgment in 1980,<sup>164</sup> the Court of Justice held that Parliament’s right to be consulted was a necessary procedural requirement. The Court stressed that Parliament’s right to be consulted represented “an essential factor in the institutional balance intended by the Treaty” and reflected the Parliament’s democratic nature as the representative of “the peoples” of the Community.<sup>165</sup> This holding meant that the Council’s failure properly to consult the Parliament when required to do so by a specific Treaty provision invalidated the legislative text concerned. Note however that in 1995, the Court held that Parliament had a duty of “sincere cooperation” to act when the Council expressly indicates that a Parliament opinion is urgently required.”<sup>166</sup> This means that Parliament cannot deliberately refrain from giving its opinion when the Council has clearly indicated that action is urgent.

One of the principal achievements of the Treaty of Maastricht was its grant to the Parliament of a substantial role in the process of adopting most legislation. In the legislative procedure known rather awkwardly as co-decision (although that term was not used in the Treaty), pursuant to ECT Article 251, the Council and Parliament were required to collaborate by either accepting, amending or rejecting amendments which the other institution made to the Commission’s proposed draft. A final text could be adopted only after both the Council and Parliament approved it, resorting if necessary to compromises achieved by a Conciliation Committee representing both institutions. The Maastricht Treaty nearly accorded Parliament a veto in this co-decision procedure, and the Treaty of Amsterdam amended the text in ECT Article 251 to provide the Council and the Parliament completely equal power

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<sup>162</sup> See CORBETT, JACOBS & SHACKLETON, *supra* note 140, at 272–91, as well as DINAN, EVER CLOSER UNION, *supra* note 33, at 315–21, for descriptions of the historical evolution of Parliament’s role in the budgetary process. Parliament initially only participated with the Council in the budgetary determination of funds allocated to the Commission and other administrative bodies, then with regard to the large funds allocated to regional development and infrastructure development, and most recently with regard to the determination of the budget for the Common Agricultural Policy. The current complex budgetary provisions are set out in TFEU art. 313–16; see also Corbett, *Evolving Roles*, *supra* note 140, at 253–54, for a summary of the complicated budgetary procedure.

<sup>163</sup> See CORBETT, JACOBS & SHACKLETON, *supra* note 140, at 258–60, for a description of the early consultative role of the Parliament.

<sup>164</sup> Case 138/79, *Roquette Frères v. Council*, 1980 E.C.R. 3334.

<sup>165</sup> *Id.* ¶ 33. See Case C-388/92, *Parliament v. Council*, 1994 E.C.R. I-2067, ¶ 10 (holding that the Council must re-consult the Parliament if the Council substantially modifies a draft text after Parliament’s initial opinion). See also CORBETT, JACOBS & SHACKLETON, *supra* note 140, at 260–63, and WYATT & DASHWOOD, *supra* note 11, at 79, for a discussion of the judgment’s impact in practice. *But see* Case C-417/93, *Parliament v. Council*, 1995 E.C.R. I-1210, ¶ 16–35 (holding that re-consultation is not required if the Council changes do not materially differ from Parliament’s views in its original opinion).

<sup>166</sup> Case C-65/93, *Parliament v. Council*, 1995 E.C.R. I-643, ¶ 23 (holding that the Parliament had violated its duty to provide its views on a proposed Council measure scheduled to commence January 1, 1993, when the Parliament adjourned on December 18, 1992 despite a Council request made in October).



to approve or veto legislation.<sup>167</sup> Article 294 of the Lisbon TFEU replicates the complicated procedural structure of the co-decision process, but renames it more appropriately as the “ordinary legislative process.”

The Maastricht Treaty’s ECT Article 95(1) authorized the use of the co-decision procedure for almost all legislation intended to affect the Internal Market (the term used in that Treaty instead of the Common Market), and the Treaty of Amsterdam added most legislation in the fields of social policy and employment, environmental protection, consumer rights, health, education and culture. The Treaty of Lisbon’s TFEU has added further fields to the list of those usually subject to the ordinary legislative process, or co-decision, notably agriculture and fisheries, free movement of capital, visas, immigration and cooperation in civil, police and criminal justice.<sup>168</sup> As a consequence, nearly all EU legislation is now to be adopted by means of the ordinary legislative process. Manifestly, the transfer of legislation in these fields to the ordinary legislative process significantly augments their legitimacy and democratic character.

Only a few legislative measures are still solely within the competence of the Council, although some have considerable importance, e.g., action within the fields of harmonization of direct and internal taxation (TFEU Articles 113 and 114(2)), adoption or revision of competition regulations (TFEU Article 103), and certain types of action to achieve economic and monetary coordination (e.g., TFEU Articles 126 and 128).<sup>169</sup>

Although complicated and time-consuming, the codecision or ordinary legislative procedure has proved quite satisfactory in operation.<sup>170</sup> Not only have the Parliament and Council been able to adopt an extraordinarily large volume of legislation, but they have been able to do so in a decidedly harmonious manner, usually without the need to resort to the conciliation phase of the procedure, and able to compromise ultimately in almost all instances when conciliation has become necessary.<sup>171</sup> Professor Desmond Dinan aptly observes that the codecision

<sup>167</sup> See Richard Corbett, *Representing the People, in MAASTRICHT AND BEYOND: BUILDING THE EUROPEAN UNION*, *supra* note 7, at 208–12, for a description of the initial Maastricht formulation of the co-decision procedure; see also WYATT & DASHWOOD, *supra* note 11, at 73–77, for a description of the formulation as amended by the Treaty of Amsterdam, as well as its operation in practice.

<sup>168</sup> See CORBETT, JACOBS & SHACKLETON, *supra* note 140, at 248–50, for a list of the current Lisbon Treaty articles authorizing or extending the ordinary legislative procedure; see also PIRIS, *supra* note 9, at 118–19.

<sup>169</sup> See WYATT & DASHWOOD, *supra* note 11, at 78, for a list of the less important legislative matters still solely within the control of the Council. For example, TFEU art. 64(3) authorized the Council to limit capital movements to and from third countries, and TFEU art. 22 authorized the Council to set standards for citizens of the Union, who are not citizens of the Member states in which they reside, to vote in national municipal elections and in elections of the European Parliament in their States of residence.

<sup>170</sup> Codecision usually requires two or more years. See CORBETT, JACOBS & SHACKLETON, *supra* note 140, at 233–47, for a detailed description of the procedure in operation, and the influence of the Parliament in the amendment process; see also JUDGE & EARNSHAW, *supra* note 140, at 229–37. See SHACKLETON, *supra* note 140, at 137, for a useful chart presenting the reciprocal relationship between the Council and Parliament during the process.

<sup>171</sup> See CORBETT, JACOBS & SHACKLETON, *supra* note 140, at 237–41; see also JUDGE & EARNSHAW, *supra* note 140, at 232–37 (noting that especially after the Treaty of Amsterdam modified the co-decision procedure to give Parliament truly an equal voice with the Council, most legislation has been adopted without resorting to conciliation, and almost all conciliation procedures have produced acceptable compromises).

procedure, although “arcane and difficult to explain,” operates with ease despite its complexity, and he declares that the “secret of success lies in the dedication and expertise of a relatively small number of MEPs” collaborating with Commission and Council officials in “dense professional and personal networks.”<sup>172</sup> Professors Wyatt and Dashwood refer to these cooperative contacts of Commission, Council and Parliament experts as injecting “extra speed and fluidity into the functioning of the ordinary legislative procedure,” although perhaps at the “cost of . . . transparency and accountability.”<sup>173</sup>

That the Parliament, which directly represents the people of the EU, now has an equal share with the Council, which represents the governments, in the adoption of virtually all legislation, not only manifestly reduces the “democratic deficit” in the adoption of legislation, but it also significantly augments the supranational aspect of the EU. As we previously observed, parliamentary committees, composed of MEPs from the different Member States, essentially determine Parliament’s views during the legislative process, and Parliament’s party groups, composed across the national delegations, make the crucial policy decisions. Indeed, in the case of Parliament, the descriptive word “federal” would seem to be appropriate, inasmuch as Parliament directly represents the people of each of the Member States, as opposed to the Council’s representation of the governments. Furthermore, as MEP Richard Corbett has observed, Parliament’s role is not that of a mere “talking shop,” rather, Parliament “exercises its significant legislative powers in a forceful way [in contrast to] most national parliaments [which] rarely amend or reject government proposals.”<sup>174</sup>

However, it is necessary to note that Parliament does have one important handicap in the legislative process. When describing the Commission’s crucial role in shaping legislative drafts, we observed that Parliament lacked any right of legislative initiative. The initial EEC Treaty and all later Treaties give the Commission alone the power to launch the legislative procedure by submitting a proposal. The Lisbon TFEU Article 225, replicating the Maastricht ECT Article 192, authorizes the Parliament to “request the Commission to submit any appropriate proposal,” and then further obligates the Commission to “inform the European Parliament of [its] reasons” if it does not submit the proposal. However, the Parliament has only rarely made use of this provision, because the Commission usually reacts favorably to suggestions made in parliamentary resolutions and debates.<sup>175</sup> Although it is somewhat surprising that the Lisbon Treaty did not accord Parliament the right of legislative initiative, it is true that in most Member States the government introduces almost all important legislative measures.<sup>176</sup>

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<sup>172</sup> DINAN, *EVER CLOSER UNION*, *supra* note 33, at 304, 306.

<sup>173</sup> WYATT & DASHWOOD, *supra* note 11, at 73.

<sup>174</sup> CORBETT, JACOBS & SHACKLETON, *supra* note 140, at 256.

<sup>175</sup> *Id.* at 264–67.

<sup>176</sup> Philipp Dann, *The Political Institutions*, in *PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW*, *supra* note 22, at 256. Professor Dann contends that the Parliament exercises a strong “policy-shaping” legislative role, because it “is better able to rigorously scrutinize and amend bills [than national parliaments] which have to loyally follow their government.”

*C. Parliament as Overseer: Its Role in the Designation and Supervision of the Commission and Its President*

Parliament also exercises a major constitutional role in the process of the designation of the Commission President and the entire Commission. The Maastricht Treaty introduced ECT Article 158(2), which required that the Parliament be consulted in the nomination of the Commission President, and that the entire Commission be approved "as a body" by the Parliament. This important constitutional development was presumably a concession by the Member States that enabled Parliament to have a degree of veto power in the designation process, without acceding to Parliament's desire to both nominate and elect the Commission. In order to correlate to Parliament's direct election every five years, the Maastricht Treaty's ECT Articles 158(1) and (3) prescribed that the Commission's term of office should be five years, commencing in 1995, instead of the initial four-year term set by EECT Article 158.<sup>177</sup>

The Lisbon Treaty, building upon the Maastricht text as later amended by the Treaty of Amsterdam, currently provides in TEU Article 14(1) that the Parliament shall elect the President of the Commission after his or her nomination by the European Council. Furthermore, TEU Article 17(7) makes an important change in the designation of the Commission President: the European Council, which now formally has the power to make the initial nomination, is supposed to take into account the prior "elections to the Parliament." This implicitly means that the President should be acceptable to the largest political party group newly elected to Parliament. As Professor Paul Craig has observed, this new provision is intended to ensure that "the designated President of the Commission will share broadly similar political views on policy to that of the dominant party in the European Parliament."<sup>178</sup> In the event that a European Council nominee for Commission President should be unable to obtain the approval of the Parliament (unlikely but certainly not inconceivable<sup>179</sup>), the Lisbon TEU Article 17(7) prescribes that the European Council must present a new nominee within a month after the initial adverse vote. TEU Article 17(7) further emphasizes Parliament's power to make the final decision on a nominee by stating that it is the Parliament that "elects" the President. The obvious purpose of the new text in TEU Article 17(7) is not only to augment the influence of the Parliament in the European Council's choice of the

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<sup>177</sup> To achieve the synchronization of Parliament's election and the Commission's subsequent designation, ECT Article 158(3) prescribed that the Commission should serve a two-year term in 1993-94, which is why Commission President Jacques Delors served three terms, but for a total of ten years. The initial Maastricht ECT Article 158 was renumbered and amended as ECT Article 214 by the Treaty of Amsterdam.

<sup>178</sup> CRAIG, *supra* note 9, at 72. Professor Craig notes, however, that the Commission's policy agenda will still be primarily influenced by the European Council, rather than the Parliament, and that the other members of the Commission will customarily have "varying political backgrounds." *Id.* at 73.

<sup>179</sup> CORBETT, JACOBS & SHACKLETON, *supra* note 140, at 297. Note that the Parliament's vote in 2009 for the current Commission President José Barroso was only thirteen votes above the absolute majority required. Similarly in 1994, Parliament accorded Jacques Santer, the European Council nominee for President, only a twenty-two vote majority. See Shackleton, *supra* note 140, at 135. In both cases, the Parliament's narrow confirmation vote can be ascribed to the fact that a Member State government had effectively vetoed more prominent political leaders during the European Council's process of selection. See WERTZ, *infra* note 199. The Lisbon TEU Article 17(7) now authorizes the European Council to act by a qualified majority vote in nominating a Commission President.

Commission President, but also to enhance the President's democratic credentials. Professor Craig describes this as the "indirect" election of the President by the Parliament, a compromise devised after the drafters rejected Parliament's desire to alone choose the President.<sup>180</sup>

Following the choice of the Commission President, TEU Article 17(7) provides that the Council, acting "in accord" with the Commission President-elect, shall nominate all of the other Commissioners, who must be approved "as a body" by the Parliament. Although Member State governments still autonomously select their Commissioners, Commission Presidents began in the 1990s to try to influence governments in their choice with a view to obtaining highly qualified individuals. Once the Nice Treaty augmented the President's powers by enabling him to allocate portfolios among prospective Commissioners, then the current Commission President José Barroso could exercise this power to provide portfolios to the most suitable nominees.<sup>181</sup>

Although neither the Maastricht nor the Lisbon Treaties make any reference to the process, since 1995, the Parliament has demanded that the individuals nominated by the Member State governments to serve as Commissioners must appear before parliamentary committees in "confirmation hearings" that review in considerable detail a nominee's qualifications, views and aptitude to serve in a specific Commission portfolio. The nominees in 1995 acquiesced in this customary procedure, as have those ever since. Professor Dinan quotes Klaus Hansch, Parliament's President in 1995, as saying: "What was then a coup has now become established procedure."<sup>182</sup>

In 2004, in a dramatic development, the principal party groups in Parliament threatened to refuse to vote in favor of the entire proposed Commission "as a body" in order to force Commission President José Barroso to obtain the withdrawal of Italy's initial choice for a Commissioner, because the Parliament considered him to be unqualified. Although President Barroso and the Italian Prime Minister Silvio Berlusconi initially rejected Parliament's demand, after several weeks of delay, they felt obliged to yield to Parliament's veto threat.<sup>183</sup> Prime Minister Berlusconi withdrew his initial candidate, and his second nominee, Italy's Foreign Minister Franco Frattini, was easily accepted. This set a vital precedent. In the future, it is

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<sup>180</sup> CRAIG, *supra* note 9, at 89–91. See also WYATT & DASHWOOD, *supra* note 11, at 53 (observing that the new text is intended both to "increase the political influence" of Parliament and to "bolster the Commission's own legitimacy").

<sup>181</sup> See Sedelmeier, *supra* note 71.

<sup>182</sup> DINAN, EVER CLOSER UNION, *supra* note 33, at 322.

<sup>183</sup> For a description of this well-known incident, see CORBETT, JACOBS & SHACKLETON, *supra* note 140, at 295; JUDGE & EARNSHAW, *supra* note 140, at 206–09; Peterson, *supra* note 44, at 108. Prime Minister Berlusconi's initial nominee, Rocco Buttiglioni, a leader in the government coalition, was rejected by a Parliament committee after he expressed views that were deemed hostile to equal treatment of women and homosexuals. A committee of Parliament also threatened to veto Hungary's nominee because he was deemed not qualified for a particular portfolio, but raised no further objection when the candidate was shifted by President Barroso to a different post.

unlikely that a Member State's proposed nominee for Commissioner will be designated if the Parliament indicates its strong opposition to the choice.<sup>184</sup>

The now customary sequence of events is that the newly elected Parliament takes office in July, elects its President and sets its internal operating structures, and immediately acts to approve the European Council's nominee for Commission President. The Council nominates the other Commissioners and the newly-endorsed Commission President nominee allocates each proposed Commissioner a portfolio in August. Parliament committees then hold confirmation hearings on each proposed Commissioner's credentials and suitability in September and October. Parliament votes on the Commission "as a body" at the start of November.

The Parliament's now unchallenged custom of holding confirmation hearings, conceivably exercising a veto over nominees perceived to be unqualified, not only improves the quality of Commissioners, but also enhances the Parliament's supranational character and provides to some degree a check on each government's largely autonomous choice of a Commissioner. MEP Richard Corbett and his co-authors contend that the confirmation procedure enables a beneficial public examination of "the organizational structure and policy priorities" of a new Commission, and the introduction of "pan-European considerations, such as the need for better overall gender balance" in the designation of Commissioners.<sup>185</sup>

Not only does Parliament have a significant role in the selection of the Commission, but it has always possessed the power to censure the entire Commission for misconduct.<sup>186</sup> According to TEU Article 17(8), supplemented by TFEU Article 234, the entire Commission is obliged to resign if the Parliament adopts a censure motion by a two-thirds vote of those cast. On several occasions the Parliament has voted to censure the Commission, but never achieved the requisite majority.<sup>187</sup> However, on March 17, 1999, the Commission headed by President Jacques Santer felt obliged to resign to avoid the certainty of a Parliamentary censure. The Commission had appointed an ad hoc high-level committee of three experts in early February to investigate serious complaints of maladministration and misconduct by several Commissioners. At the end of a detailed report, the experts concluded that the Commission as a whole had failed in its duties by neither preventing nor correcting serious misconduct on the part of the French Commissioner, Edith Cresson, and less serious maladministration by the German Commissioner, Monika Wulf-Mathes. Because the Parliament's Socialist group indicated that it would vote to censure based upon the report, and other groups were certain to agree, the entire Commission immediately resigned.<sup>188</sup> The Commission's

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<sup>184</sup> CORBETT, JACOBS & SHACKLETON, *supra* note 140, at 196 (observing that Parliamentary criticism of another nominee as Commissioner in January 2010 induced the withdrawal of the nomination). Because the Treaty of Lisbon entered into effect on November 1, 2009, the process of designating the Commission was delayed, and Parliament formally approved it in February 2010.

<sup>185</sup> *Id.*

<sup>186</sup> Somewhat surprisingly, the initial EEC Treaty Article 144 gave the Parliament (then called the Assembly) this extraordinary power of censure. The EECT provision was carried over into ECT Article 201, and is presently stated in TEU Article 17(8), supplemented by TFEU Article 234.

<sup>187</sup> *Id.* at 308-11 (describing the nine unsuccessful votes on censure).

<sup>188</sup> Peterson, *supra* note 44, at 102 (describing the criticism of the Commission, the experts' report, and the Santer Commission's decision to resign); *see also* DINAN, EVER CLOSER UNION, *supra* note 33, at 127-

resignation is now seen as an important precedent, warning that there is a genuine risk of a successful censure veto in the future.

An editorial of the *Common Market Law Review* pithily described this “sorry episode” as having a “positive side, namely the coming of age politically of the European Parliament,” so that future threats of censure will be taken seriously by the Commission.<sup>189</sup> As we observed previously when examining the powers of the Commission President, a new Lisbon TEU provision, TEU Article 17(6), authorizes the President to compel a Commissioner to resign. The Lisbon TEU does not give the Parliament any direct capacity to compel the resignation of an individual Commissioner. However, an Inter-institutional Framework Agreement between the Parliament and the Commission of October 2010 stipulates that the Parliament may request the President of the Commission to compel a Commissioner to resign, and the President must either do so or explain his or her refusal to the Parliament.<sup>190</sup>

Thus, although in practice the Commission President is still effectively chosen by the Member State governments acting in the European Council, and each Commissioner largely by his or her Member State government, the power of the Parliament to approve or reject these nominations, coupled with the power to censure the entire Commission, provides a significant supranational element.

#### *D. Parliament as Constitutional Actor—Consent (or Veto) of New Member States and Its Influence on Treaty Revisions*

The European Parliament has a final and highly significant constitutional power: that of consent (or, in the alternative, a veto), set out in a number of Treaty provisions since the Treaty of Maastricht. The Treaty of Lisbon has added provisions stipulating other actions that require Parliament’s “consent.” Undoubtedly the most important is Parliament’s consent, or veto, power over any proposed accession by an applicant nation to the European Union, pursuant to the Lisbon TEU Article 49. Parliament was first accorded this power, then called assent, in the Single European Act, subsequently carried over into Article 49 of the Maastricht TEU. Parliament has accordingly held formal votes in favor of the accession of Austria, Finland and Sweden in 1994,<sup>191</sup> and in favor of the Central European and Mediterranean states before they joined in 2004 and 2007.<sup>192</sup>

Ever since the Treaty of Maastricht added ECT Article 300(3), the Parliament has also had the power to assent to, or veto, certain international agreements, notably association agreements. The Lisbon TFEU Article 218(6) now prescribes Parliament’s power in this regard, but renames it as “consent” rather than “assent.”

29. Note that because Edith Cresson had previously served as Prime Minister of France, it would have been politically difficult for President Santer to press for her resignation.

<sup>189</sup> Editorial, *The Report of the Committee of Independent Experts: An Ill Wind*, 36 *COMMON MKT. L. REV.* 269, 270 (1999).

<sup>190</sup> Framework Agreement on Relations between the European Parliament and the European Commission, 2010 O.J. (L 304) 47, at point 5. WYATT & DASHWOOD, *supra* note 11, at 61 (observing that the Council has indicated its concern that this “informal understanding between the Parliament and the Commission [constitutes] an inappropriate shift in the institutional balance”). Presumably, the Framework Agreement is at most “soft law,” and could not be enforced by the Court of Justice.

<sup>191</sup> See Goebel, *supra* note 72, at 1169–72.

<sup>192</sup> See Goebel, *supra* note 73, at 42.

Parliament has exercised this power on occasion, using veto threats of proposed association agreements to persuade nations seeking them to provide better human rights protection.<sup>193</sup> Parliament also has the power of consent or veto with regard to actions under other Treaty provisions, some of which are rather unlikely to occur, e.g., a European Council decision pursuant to TEU Article 7 that a Member State has made a "serious and persistent breach" of the democratic, human rights and other Union fundamental values set out in TEU Article 2.<sup>194</sup>

Parliament has also exercised a degree of influence upon Intergovernmental Conferences (IGCs) held to draft amendments to the Lisbon Treaty. Both before and during IGCs, Parliament may adopt resolutions endorsing particular proposed amendments, and it also sends representatives to attend negotiating sessions.<sup>195</sup> Indeed, Parliament was significantly involved in the drafting of the provisions of the ill-fated draft Constitutional Treaty,<sup>196</sup> which was essentially prepared by a special 63 member Convention in which Parliament was represented by a large delegation of sixteen MEPs.<sup>197</sup> Inasmuch as most of the draft Constitutional Treaty text has been carried over into the Lisbon Treaty, Parliament can be said to have had considerable influence, although admittedly indirect, upon the current Treaty text.

The Lisbon TEU now expressly grants the Parliament a specific and rather significant role in the process of future Treaty amendments. TEU Article 48(2) authorizes the Parliament (as well as the Commission or any Member State) to "submit to the Council proposals" for amendments, which the Council must refer for ultimate decision to the European Council. TEU Article 48(3) prescribes the use of a Convention as the usual mode of procedure for amendments to the Treaty. Within the stipulated procedure, the European Council must consult the Parliament before it adopts a decision to convene a Convention, which must be composed in part of MEPs. Moreover, the European Council must obtain the consent of Parliament if it considers that a Convention is not necessary. Finally, TEU Article 48(6) authorizes the European Council to amend TFEU provisions on "internal policies and action" by a simplified revision procedure. The Parliament may propose amendments and must be consulted before the European Council acts in this simplified revision procedure.<sup>198</sup>

In conclusion, the Parliament joins the Commission and the Court as a preeminently supranational, or federal institution, in terms of its composition as the

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<sup>193</sup> See CORBETT, JACOBS & SHACKLETON, *supra* note 140, at 253. Note that Parliament has no direct part in the process of negotiating association agreements, nor any power to amend the agreement's text.

<sup>194</sup> See *id.* at 250–51 (indicating a number of other Treaty provisions which require Parliament's consent before action is taken. However, most are either unlikely to occur or have only secondary importance).

<sup>195</sup> See *id.* at 385–92.

<sup>196</sup> See DINAN, EVER CLOSER UNION, *supra* note 33, at 145–50, for a description of the Convention's drafting of the Constitutional Treaty in 2002–03. He pithily characterizes the Lisbon Treaty as "old wine in a new bottle," observing that most of the Constitutional Treaty text was reintroduced in the Lisbon Treaty. *Id.* at 150–57.

<sup>197</sup> See CORBETT, JACOBS & SHACKLETON, *supra* note 140, at 392–93, for a description of Parliament's initial proposal to use a Convention to draft the Constitutional Treaty. The Convention, chaired by former French President Giscard d'Estaing, consisted of 63 delegates, one designated by each Member State government, two by each parliament, sixteen MEPs, and two Commissioners.

<sup>198</sup> See CRAIG, *supra* note 9, at 444–48, for an analytical examination of the amendment procedures.

only democratically-elected body chosen by the people of the EU, and in consequence of its operational roles. The Parliament has also progressively been granted important constitutional powers, notably by the Maastricht and Lisbon Treaties, in the adoption of most legislation jointly with the Council by use of the “ordinary legislative procedure,” in influencing the designation of the Commission President and the other Commissioners, in supervising the Commission, and in exercising a power of consent, or veto, on the accession of new States or amendments to the Treaty. In all of these operational roles, the Parliament represents a powerful supranational force.

#### VI. THE EUROPEAN COUNCIL:<sup>199</sup> INTRINSICALLY INTERGOVERNMENTAL IN STRUCTURE, PARTLY SUPRANATIONAL IN OPERATION

There can be no doubt that the European Council, composed of the highest political leaders of the Member State governments, is the most powerful body in the European Union. Already in 1987, in their book on the European Council, Professors Bulmer and Wessels characterized the body as “the most politically authoritative institution of the EC.”<sup>200</sup> Jean-Claude Piris, the former Director-General of the Council Legal Service, served as chief legal counselor to the European Council for over twenty years, from 1988–2011. In his view, “The increasing powers and influences gained over the years by the European Council were not due to legal provisions of the Treaty, but to political reality.”<sup>201</sup> As a 2009 Common Market Law Review editorial succinctly stated: “Who leads the European Union? Looking at current practice, the answer is simple: the European Council.”<sup>202</sup>

Although the Single European Act and the Treaty of Maastricht both recognized the policy-guidance role of the European Council, it only attained the status of a Treaty institution through provisions in the Treaty of Lisbon. Why the long delay in the articulation of this status? One may reasonably speculate that there was concern that specification of an institutional status for the European Council might undermine the role and authority of the Council, and perhaps even that of the Commission and the Parliament, and might augment intergovernmental policy-making at the expense of the supranational functioning of the existing institutions. In any event, as Professor Desmond Dinan observed, “Only during the constitutional debates in the early 2000s, by which time it was obvious that the European Council had become politically the most important body in the EU and that its prominence

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<sup>199</sup> JAN WERTS, *THE EUROPEAN COUNCIL* (2008), provides the most detailed description of the European Council’s origin, evolution and role prior to the Treaty of Lisbon. Mr. Werts is a journalist, specializing in EU affairs since the 1970s. FREDERIC EGGERMONT, *THE CHANGING ROLE OF THE EUROPEAN COUNCIL IN THE INSTITUTIONAL FRAMEWORK OF THE EUROPEAN UNION* (2012) (essentially a doctoral dissertation), highlights the impact of the Treaty of Lisbon. Other valuable studies are in book chapters: Philippe de Schoutheete, *The European Council*, in PETERSON & SHACKLETON, *supra* note 13; Fiona Hayes-Renshaw & Helen Wallace, *Overlapping Competencies: the Council and the European Council*, in *THE COUNCIL OF MINISTERS*, *supra* note 83; Westlake & Galloway, *The European Council*, in *THE COUNCIL OF THE EUROPEAN UNION*, *supra* note 83. Roger Goebel, *The European Council After the Treaty of Lisbon*, 34 *FORDHAM INT’L L.J.* 1251 (2011), provides a recent overview. See SIMON BULMER & WOLFGANG WESSELS, *THE EUROPEAN COUNCIL* (1987), for a review of the European Council’s early history.

<sup>200</sup> BULMER & WESSELS, *supra* note 199, at 2.

<sup>201</sup> PIRIS, *supra* note 9, at 236.

<sup>202</sup> Editorial, *An Ever Mighty European Council*, 46 *COMMON MKT L. REV.* 1383 (2009).



had not weakened supranationalism, was the European Council given formal status in the Lisbon Treaty."<sup>203</sup>

*A. From Summits to Sessions: the Evolution of the European Council as the Highest Political Authority*

When the political leaders of the initial Member States began to meet in "summits," the European Council commenced as an entirely intergovernmental body. In December 1969, President Georges Pompidou of France invited Chancellor Willy Brandt of Germany and the Prime Ministers of Italy, Belgium, the Netherlands and Luxembourg to a summit meeting at the Hague to discuss several crucial issues confronting the European Economic Community. Their discussions proved to be eminently fruitful.<sup>204</sup> The agreement of the political leaders to invite the United Kingdom, Denmark, Ireland and Norway to commence negotiations to join the EEC proved ultimately to be the summit's most significant contribution.<sup>205</sup> Although the negotiations were not easy, this led to the first enlargement of the EEC when Denmark, Ireland and the United Kingdom acceded on January 1, 1973.

The Hague summit's success prompted the political leaders of the then-Member States to hold occasional similar meetings. The European Council began to have a structural character when at its next prominent summit, that held at Paris in December 1974, the political leaders agreed to hold regular gatherings, customarily two or three each year.<sup>206</sup> At this summit, the first at which the Prime Ministers of Denmark, Ireland and the United Kingdom participated, the principal political leaders were President Valéry Giscard d'Estaing of France and Chancellor Helmut Schmidt of Germany, both dedicated to further efforts toward European integration. Undoubtedly, the summit's most notable achievement was the policy decision to permit the European Parliament to be elected directly by the people.<sup>207</sup> At a press meeting following the Paris summit, President Valéry Giscard d'Estaing declared: "Les sommets sont mort, vive le Conseil Européen,"<sup>208</sup> thus providing the formal name for the European Council.

The European Council's composition has always been denominated as the "Heads of State or Government" in order to enable France to be represented both by

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<sup>203</sup> DINAN, *EVER CLOSER UNION*, *supra* note 33, at 206.

<sup>204</sup> Desmond Dinan provides a valuable description of the Hague summit and its policy decisions in DINAN, *EUROPE RECAST*, *supra* note 3, at 127-30. See also BULMER & WESSELS, *supra* note 199, at 28-29.

<sup>205</sup> In the mid-1960s, President Charles De Gaulle vetoed the request of the United Kingdom government of Prime Minister Harold Wilson to negotiate for accession. When President Georges Pompidou succeeded President De Gaulle in 1968, he immediately became a supporter of the development of the EEC, and was willing to consider the accession of the United Kingdom and other nations. The Hague summit authorized negotiations with the applicant nations on the basis of their acceptance of the existing Community structure and policies, notably the Common Agricultural Policy, an approach commonly referred to as the acceptance of the "acquis communautaire." See DINAN, *EUROPE RECAST*, *supra* note 3, at 135-40. Articles 2-4 of the 1972 Act of Accession demonstrated this in stating that the new States accepted the Treaties, all institutional acts, and all decisions, declarations and resolutions of the Council prior to their admission. 1972 O.J. (L 73) 1, at 14-15.

<sup>206</sup> Bull. EC 12/1974, at 7.

<sup>207</sup> For an overview of the Paris summit, see WERTS, *supra* note 199, at 10-12; see also BULMER & WESSELS, *supra* note 199, at 43-46.

<sup>208</sup> WERTS, *supra* note 199, at 11; DINAN, *EVER CLOSER UNION*, *supra* note 33, at 206. Professor Dinan's translation is: "the European Summit is dead, long live the European Council."

its President, who has responsibility for foreign and defense affairs, as well as its Prime Minister, who is responsible for economic affairs.<sup>209</sup> The other Member States are represented by their Prime Minister (or Chancellor, in the case of Germany and Austria), although on occasion the Presidents of Finland, Poland, Romania, Lithuania and other States attend the meetings along with their Prime Ministers.<sup>210</sup> In March 1975, the political leaders of the Member States invited Commission President Francois Xavier Ortoli to the Dublin European Council meeting, thereby creating a custom in which each Commission President is invited to participate in the sessions. Article 2 of the Single European Act confirms this custom of participation.<sup>211</sup> Although the Commission President is a 'non-voting' member, his proposals for policy initiatives have frequently been extremely influential. The prime example is Commission President Jacques Delors, who served from 1985 to 1995, and has always been recognized as a charismatic leader. President Delors strongly influenced the European Council in its endorsement of the Internal Market program, in its role in authorizing the drafting of the Treaty of Maastricht and the creation of the Economic and Monetary Union (EMU), and in taking other policy decisions. With regard to the extraordinary influence of President Delors, Professor Desmond Dinan describes him as imposing "his stamp on the European Council, putting the Commission presidency at the center of the institution's affairs."<sup>212</sup>

The European Council meeting at London in June 1977 was noteworthy for its creation of a framework for future sessions. The European Council stated that there was "general agreement" that meetings should consist of "(i) informal expressions of view of a wide-ranging nature held in the greatest privacy [not producing] formal decisions or public statements;" and "(ii) discussions . . . designed to produce decisions, settle guidelines for future action or lead to the issue of public statements expressing the agreed view of the European Council."<sup>213</sup> The public statements, often concerning international issues, were to be called "conclusions." The European Council has followed this organizational procedure to the present day.

The European Council first came within the formal framework of the EEC Treaty in Article 2 of the Single European Act, which described its composition as above indicated, and stated that it should meet bi-annually. The Maastricht Treaty's TEU Article 4 replicated this provision, and stated that the European Council's role was to "provide the Union with the necessary impetus for development," and to "define [its] general political guidelines." In the 1990s, the European Council commenced its current practice of holding four regular meetings each year in March, June, October, and November.

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<sup>209</sup> On occasion, when the President of France and its Prime Minister come from opposing parties (commonly called "cohabitation"), they may disagree at a meeting. See EGGERMONT, *supra* note 199, at 36-37.

<sup>210</sup> EGGERMONT, *supra* note 199, at 37-40.

<sup>211</sup> *Id.* at 42-45; BULMER & WESSELS, *supra* note 199, at 50.

<sup>212</sup> DINAN, EVER CLOSER UNION, *supra* note 33, at 207. See also WERTS, *supra* note 199, at 49, who views President Delors as playing a dominating role at successive European Council summits, key to the "10 most successful years of European unification."

<sup>213</sup> Bull. EC 6/1977, at 99-100.

This Treaty enunciation of the European Council's purpose has accurately reflected its actual role ever since the 1970s. Professor Dinan has described this role as providing "strategic direction by considering the EU's and the member states' politics and priorities as an organic whole."<sup>214</sup> Professors Hayes-Renshaw and Wallace concur: "All important new initiatives either originate in the European Council or receive from it its seal of approval,"<sup>215</sup> citing the accession of new Member States, revisions of the Treaty, and significant new policies and programs.

The European Council's most important decisions have been those that may be called "quasi-constitutional:" when and essentially how the constituent treaties should be amended, and when and under what conditions new nations should join the EEC. It is now largely forgotten that when the European Council at Milan, in June 1985, decided to hold an Intergovernmental Conference (IGC) to draft the Single European Act, it did so by a majority vote of seven states against three (Denmark, Greece and the United Kingdom). Despite their initial opposition, the three dissenting States participated in the IGC and ratified the SEA.<sup>216</sup> The European Council meetings at Strassbourg in December 1989, Dublin in April 1990 and Rome in December 1990 agreed in principle upon two Intergovernmental Conferences; one to revise the EEC Treaty and the other to draft the provisions on the Economic and Monetary Union.<sup>217</sup> Subsequently, the European Council at Maastricht in December 1991 agreed upon the compromises essential to enable the final text of the Treaty of Maastricht, which ultimately was ratified (although with considerable difficulty) and became effective on November 1, 1993.<sup>218</sup>

Following the piece-meal amendments introduced by the Treaty of Amsterdam and the Treaty of Nice, the European Council at Laeken in December 2001 called for an extraordinary Convention to draft a more far-reaching recasting of the Treaties.<sup>219</sup> This Convention, composed of representatives of Member State governments, national parliaments, the European Parliament and the Commission, with Valéry Giscard d'Estang as its President, devoted over a year in 2002–03 to drafting the initial text. Most of its draft was adopted in a final version by a subsequent Intergovernmental Conference.<sup>220</sup> However, as previously noted, adverse referenda in 2005 in France and the Netherlands blocked ratification of the ill-fated draft

<sup>214</sup> DINAN, *EVER CLOSER UNION*, *supra* note 33, at 207.

<sup>215</sup> HAYES-RENSHAW & WALLACE, *supra* note 83, at 170. For an impressive list of European Council policy decisions during 1975–85, see BULMER & WESSELS, *supra* note 199, at 67–68.

<sup>216</sup> For a description of the Milan meeting vote and subsequent events, see EGGERMONT, *supra* note 199, at 158–61. See also WERTS, *supra* note 199, at 87–88.

<sup>217</sup> See EGGERMONT, *supra* note 199, at 161–62. The December 1990 Rome European Council provided a detailed list of topics to serve as the agenda for the Intergovernmental Conference; see also E.C. Commission, 24th Report on the Activities of the European Communities, at 35–36 (1991).

<sup>218</sup> DINAN, *EVER CLOSER UNION*, *supra* note 33, at 92–95 (describing the principal issues during the negotiations). A referendum in Denmark initially rejected the Maastricht Treaty by a narrow 50.7% majority, but after the European Council at Edinburgh in December 1992 issued statements intended to reassure the Danish public, a second referendum in May 1993 produced a 56.7% majority in favor of the Treaty. Moreover, the vote in favor in the referendum in France in September 1992 was only 51%, and the UK Parliament's ratification vote was also achieved only by a very narrow majority. *Id.* at 95–100.

<sup>219</sup> See *Laeken European Council*, Bull. EU 12/2001, at 19–23, for the Laeken Declaration on the Future of the European Union.

<sup>220</sup> See Paul Berman, *From Laeken to Lisbon: The Origins and Negotiation of the Lisbon Treaty*, in EU LAW AFTER LISBON, *supra* note 9, at 5–39. See also CRAIG, *supra* note 9, at 6–21.

Constitutional Treaty. Fortunately, the European Council in June 2007, decisively led by Germany's Chancellor Angela Merkel, recast the most important substantive provisions of the draft Constitutional Treaty into the Treaty of Lisbon, enabling a subsequent Intergovernmental Conference to elaborate a final text, which was signed on December 13, 2007, and then ratified in 2008–09.

We noted previously the crucial decision of the 1969 Hague Summit to authorize the negotiations that led to the first enlargement, the 1973 accession of Denmark, Ireland and the United Kingdom. Later European Council meetings authorized the accession of Greece, Spain and Portugal. Thus, the Copenhagen European Council of April 1978 adopted the Declaration on Democracy, which stated that all Member States endorsed "the principles of representative democracy, of the rule of law, of social justice and of respect for human rights," adding that these constituted "essential elements of membership."<sup>221</sup> The intent of the Declaration on Democracy was to warn the newly-democratic governments of Greece, Portugal and Spain that they must remain democratic. Later, after the conclusion of difficult negotiations concerning the transitional periods to phase in the Common Agricultural and Fisheries Policies, the Fountainebleau European Council session in June 1984 set January 1, 1986 as the accession date for Portugal and Spain.<sup>222</sup> Moreover, the European Council initially endorsed the political unification of the German Federal Republic with the former Communist East German state at the December 1989 meeting at Strassbourg and decisively at the April 1990 Dublin meeting.<sup>223</sup> Although this did not constitute an official accession, the Community did have to adopt hundreds of measures and decisions to facilitate the political and legal actions taken by Germany to achieve unification at the end of 1990. Subsequently, the December 1992 Edinburgh European Council authorized the negotiations with Austria, Finland and Sweden which led to their accession on January 1, 1995.<sup>224</sup> Finally, the famous Copenhagen European Council of June 1993 set the "Copenhagen criteria," the crucial political, economic and infrastructure conditions that had to be satisfied by the thirteen Central European and Mediterranean nations in order to join the EU.<sup>225</sup>

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<sup>221</sup> Bull. EC 11/1978, at 5–6. See also EGGERMONT, *supra* note 199, at 176–77.

<sup>222</sup> See DINAN, EUROPE RECAST, *supra* note 3, at 182–92.

<sup>223</sup> See DINAN, EVER CLOSER UNION, *supra* note 33, at 89–90. Commission President Delors and President Mitterand of France pressed for the endorsement of German unification by the European Council. Apparently some Member States would have preferred not to make a formal statement.

<sup>224</sup> Roger Goebel, *The European Union Grows: The Constitutional Impact of the Accession of Austria, Finland and Sweden*, 18 FORDHAM INT'L L.J. 1092 (1995) (describing the relatively easy accession negotiations, due largely to the fact that all three nations were solid democracies with strong functional economies).

<sup>225</sup> For a description of the detailed political, economic and infrastructure conditions set out in the "Copenhagen criteria," and the subsequent period of action by the applicant nations to satisfy them, simultaneously with Commission negotiations with the applicant states and review of their progress, see Roger Goebel, *Joining the European Union: The Accession Procedure for the Central European and Mediterranean States*, 1 LOY. U. CHI. INT'L L. REV. 15, at 24–43 (2004). The political condition essentially restated the 1978 Declaration of Democracy, the economic condition required the applicant nations to have functional market economies, and the infrastructure condition required them to have operational government structures capable of accepting the "acquis communautaire," see *supra* note 205; see also DINAN, EVER CLOSER UNION, *supra* note 33, at 133–43. The December 2002 Copenhagen European Council meeting set

Another illustration of “quasi-constitutional” action by the European Council was its crucial role in the elaboration of the Charter of Fundamental Rights of the European Union. The June 1999 Cologne European Council decided that such a charter should be drafted, and the October 1999 Tampere European Council entrusted the drafting to an extraordinary Convention of 64 Member State government representatives, a Commissioner, Members of the European Parliament, and representatives of national parliaments, chaired by Roman Herzog, the former President of Germany.<sup>226</sup> The text that the Convention proposed was endorsed by the European Council at Biarritz in October 2000 and “proclaimed” by the Presidents of the Parliament, Council and Commission contemporaneously with the Nice European Council in December 2000. After some hesitation, the Court of Justice began to cite the Charter as an inspirational source for its ascertainment of fundamental rights,<sup>227</sup> but at that time the Charter manifestly had no binding authority. When the Lisbon TEU Article 6(1) declared that the Charter should have “the same legal value as the Treaties,” the Charter obtained in effect the status of a Treaty Protocol, with binding legal force.<sup>228</sup> It is worth stressing that, as Professor Paul Craig has well-said, “in substantive terms, the catalyst [for the Charter] was the Heads of State meeting on the European Council,” not, as some erroneous press coverage suggested, some “Machiavellian” impetus coming from the Commission.<sup>229</sup>

The European Council has regularly endorsed key policy programs. Probably the best-known example is the Milan European Council endorsement of the Commission’s White Paper of June 1985 on Completing the Internal Market.<sup>230</sup> Other major European Council policy decisions include the endorsement of the first Commission policy program for environmental protection by the early 1972 Paris summit,<sup>231</sup> the Tampere European Council’s adoption of the Action Program in the Area of Freedom, Security and Justice in October 1999,<sup>232</sup> and the elaboration of the Strategy for Employment, Economic Reform and Social Cohesion by the Lisbon European Council in March 2000.<sup>233</sup> Moreover, although it is certainly true that the

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the May 1, 2004 date for the accession of ten applicant nations. Bulgaria and Romania acceded to the EU on January 1, 2007, and Croatia on July 1, 2013.

<sup>226</sup> See Gráinne de Búrca, *The Drafting of the European Union Charter of Fundamental Rights*, 26 EUR. L. REV. 126 (2001), for a description of the Cologne and Tampere European Council Conclusions, the composition of the Convention, and its deliberative procedures. See also WYATT & DASHWOOD, *supra* note 11, at 359–61, for a briefer account.

<sup>227</sup> See Case C-540/03, *Parliament v. Council*, 2006 E.C.R. I-5769 (Directive 2003/86 on family reunification complies with the respect for family life and protection of the best interests of the child stipulated in the Charter).

<sup>228</sup> For a detailed analysis of the Charter, its provisions and legal impact, see CRAIG, *supra* note 9, at 193–246; WYATT & DASHWOOD, *supra* note 11, at 361–86. See also Gráinne de Búrca, *The Evolution of EU Human Rights Law*, in CRAIG & DE BÚRCA, *EVOLUTION OF EU LAW*, *supra* note 12, at 143–51.

<sup>229</sup> CRAIG, *supra* note 9, at 197.

<sup>230</sup> The European Council meeting in March 1985 requested the Commission to produce the program, and then in June endorsed it. DINAN, *EUROPE RECAST*, *supra* note 3, at 216–17. See *supra* text accompanying notes 61–62.

<sup>231</sup> See EGGERMONT, *supra* note 199, at 215–18.

<sup>232</sup> For a description of the Tampere European Council conclusions and subsequent action on its policy program, see *supra* the legislation accompanying note 124. See also EGGERMONT, *supra* note 199, at 324–32.

<sup>233</sup> See DINAN, *EVER CLOSER UNION*, *supra* note 33, at 416–18; EGGERMONT *supra* note 199, at 275–81.

European Council does not act as a form of appellate body reviewing Council action, on occasion the Council does refer important policy issues or controversies to the European Council, or the Commission may request the European Council to press the Council to take action on stalemated legislative proposals. If the European Council is able to provide authoritative guidance or to resolve key issues, or simply urges action, the Council will usually then move ahead on initiatives in the policy area concerned or in its review of draft legislative text.<sup>234</sup>

Undoubtedly the most famous (and currently controversial) example of the European Council's decisive role in innovative policy-making was its endorsement of the Economic and Monetary Union (EMU) and its determination of crucial aspects of its structure and operations.<sup>235</sup> We previously noted that the initial December 1969 Hague summit specifically examined possible monetary coordination. The topic assumed major importance in the 1970s after the collapse of the Bretton Woods monetary accords and President Nixon's decision on August 15, 1971 to end the gold standard and permit the dollar to float against other currencies, ushering in the international monetary instability of the 1970s. Although the initial Community efforts to achieve monetary coordination and stabilization failed, the joint leadership of Commission President Roy Jenkins, French President Valéry Giscard d'Estaing and German Chancellor Helmut Schmidt, all financial experts, enabled the Brussels European Council in December 1978 to launch the European Monetary System (EMS), creating a structure for stable exchange rates and monetary coordination.<sup>236</sup>

The success of the EMS enabled Commission President Jacques Delors to propose to the European Council the elaboration of a more far-reaching structure. The June 1988 Hanover European Council endorsed the basic concept<sup>237</sup> and authorized President Delors to chair a committee composed of all Member State central bank governors which produced the Delors Report of April 17, 1989 on the goals and structure of EMU.<sup>238</sup> The December 1989 Strasbourg European Council meeting endorsed the report and called for an Intergovernmental Conference to prepare the Treaty revisions required.<sup>239</sup> After the IGC's lengthy debates produced most of the necessary provisions, the December 1991 Maastricht European Council adopted the compromises required to complete the Treaty of Maastricht's complex chapter on EMU, together with complicated technical Protocols.<sup>240</sup> After the

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<sup>234</sup> See EGGERMONT, *supra* note 199, at 124–28. See also HAYES-RENSHAW & WALLACE, THE COUNCIL, *supra* note 83, at 173–74.

<sup>235</sup> For a detailed review of the planning for EMU, its structure, and the role of the European Council in its creation, see Roger Goebel, *European Economic and Monetary Union: Will the EMU Ever Fly?*, 4 COLUM. J. EUR. L. 249 (1998). For an authoritative description of EMU and its early operations, see R. LASTRA, LEGAL FOUNDATIONS OF INTERNATIONAL MONETARY STABILITY (2006). See also DINAN, EVER CLOSER UNION, *supra* note 33, at 395–411.

<sup>236</sup> DINAN, EVER CLOSER UNION, *supra* note 33, at 59–61.

<sup>237</sup> Hanover European Council, Conclusions of the Presidency, E.C. BULL. no. 6, at 165 (1988). See also Goebel, *European Economic and Monetary Union*, *supra* note 235, at 264.

<sup>238</sup> Comm. for the Study of Econ. and Monetary Union, *Report on Economic and Monetary Union in the European Community* (Office of Official Publications 1989) (Apr. 17, 1989).

<sup>239</sup> Strasbourg European Council, Conclusions of the Presidency, E.C. Bull. no. 12, at 11–12 (1989). The European Council took a rare vote, 11–1, with the United Kingdom in opposition. See Goebel, *European Economic and Monetary Union*, *supra* note 235, at 265.

<sup>240</sup> See LASTRA, *supra* note 235, at 188–91; Goebel, *supra* note 235, at 266–67.

Maastricht Treaty was ratified, the Member States that wished to participate in the EMU began to modify their economic and monetary policies in order to satisfy the various criteria set by the Treaty (all except Denmark and the United Kingdom,<sup>241</sup> which had Protocols authorizing them to opt out). On May 2, 1998, the Council, acting in an extraordinary composition of Heads of State and Government (essentially the European Council without the President of the Commission), concluded that eleven Member States qualified to launch the EMU on January 1 1999.<sup>242</sup> These eleven States, together with six others that have subsequently joined in the EMU, have transferred control of their monetary policy to the European Central Bank and have accepted the Euro as their common currency.<sup>243</sup> These Member States are commonly referred to as comprising the Eurozone.

Turning to the sphere of international relations, the intergovernmental character of the European Council has always been particularly manifest in its crucial role within the Common Foreign and Security Policy (CFSP). Ever since the 1970s, in what was initially called European Political Cooperation (EPC), the summit meetings and later the European Council sessions regularly produced Conclusions and Resolutions expressing the common view of the Member State governments concerning contemporaneous international issues.<sup>244</sup> The outbreak of the civil war in Yugoslavia in 1991 both highlighted the need for greater coordination on foreign policy, and the difficulty of trying to achieve this within the Community structure. The Maastricht Treaty accordingly renamed the EPC as the Common Foreign and Security Policy and made it quite distinct from the fields of European Community action. The Treaty left it as a form of purely intergovernmental action in the so-called second pillar of the European Union.<sup>245</sup> When the Maastricht Treaty detailed more formally the nature, goals and operational procedures of the CFSP in the Maastricht TEU, its Article J.8 (later renumbered as Article 12) prescribed that only the European Council could define the principles and general guidelines of the CFSP, and required that the Council act unanimously in any implementation of them. Subsequently, a Treaty of Amsterdam amendment, now reiterated in the Lisbon TEU Article 31(1), specified that the Council is permitted to take implementing actions and decisions only by unanimity. But, to enable action by quasi-consensus, it provided for "constructive abstentions," in which a Member State could abstain from joining the consensus but declare that it would accept that the other States had set a Union policy.

It should be stressed that until the effective date of the Treaty of Lisbon, the European Council can be characterized as a purely intergovernmental body.

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<sup>241</sup> LASTRA, *supra* note 235, at 191.

<sup>242</sup> *Id.* at 194.

<sup>243</sup> Austria, Belgium, Finland, France, Germany, Ireland, Italy, Luxembourg, the Netherlands, Portugal and Spain were the initial eleven. Cyprus, Estonia, Greece, Malta, Slovenia and Slovakia have subsequently joined them. Latvia joined on January 1, 2014.

<sup>244</sup> For a general description of the origin and evolution of the EPC, see DINAN, EUROPE RECAST, *supra* note 3, at 143–44, 158–59, 212–13. See also BULMER & WESSELS, *supra* note 199, at 65–66.

<sup>245</sup> For a description of the Maastricht Treaty provisions on the CFSP, and its initial operation, see Geoffrey Edwards & Simon Nuttall, *Common Foreign and Security Policy*, in MAASTRICHT AND BEYOND: BUILDING THE EUROPEAN UNION, *supra* note 7, at 84–103. See also DINAN, EVER CLOSER UNION, *supra* note 33, at 546–53 (describing the limitations of the CFSP operational system, especially during the civil war in Bosnia). See also EGGERMONT, *supra* note 199, at 307–18.

Although no formal minutes are kept of European Council meetings, it is certain that, prior to the Treaty of Lisbon, its policy decisions were always taken by consensus. Moreover, the Maastricht Treaty's TEU Article 4 specified what had always been the practice, namely that the Presidency of the European Council should rotate bi-annually among the political leaders in the same manner as the Presidency of formations of the Council of Ministers. This is certainly an intergovernmental approach, in principle treating each Member State equally in the rotation of the Presidency.<sup>246</sup> This intergovernmental approach ended with the Lisbon Treaty's creation of the office of President of the European Council.

It is somewhat surprising that despite the strong intergovernmental character of the European Council, it has historically tended to take policy decisions promoting the progress of EU economic integration, as well as endorsing new policy programs in social policy, environmental protection, consumer rights, etc. Professor Philippe de Schoutheete has accurately observed, "The European Council has largely fashioned the Union as we know it today . . . [E]ven if the European Council is basically intergovernmental in character, the system it has so largely contributed to is not mainly intergovernmental."<sup>247</sup> Professor Desmond Dinan concurs, concluding that the European Council has always "contributed to a gradual strengthening, rather than weakening, of supranationalism."<sup>248</sup>

*B. Coming into the Constitutional Structure: the European Council as an Institution after the Lisbon Treaty*

One of the important "quasi-constitutional" changes brought by the Lisbon Treaty is its designation of the European Council as one of the EU's political institutions, along with the Parliament, Council and Commission. Until now, despite the fact that in political power terms, the European Council constituted the source of the authoritative policy guidance recognized by the Maastricht TEU Article 4, its status remained in a sort of penumbra.

The Lisbon Treaty's description of the European Council in its TEU Article 15 sets out in clear, precise language its composition, role and different modes of action. Further provisions of the Lisbon TEU and TFEU set out a variety of important decisions that only the European Council can take. Describing the development, Jean- Claude Piris, the recently retired Director-General of the Council Legal Service, concluded, "The Lisbon Treaty certainly strengthens the European Council by consecrating its role as the only institution which has overall political

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<sup>246</sup> Originally the EEC Treaty Article 146 prescribed that the Presidency should rotate every six months among the Member States in alphabetical order (in accord with each State's name as spelled in its language, for example, Deutschland for Germany). As new States joined, the Council set rotation lists for periods of time. When Austria, Finland, and Sweden joined in 1995, the Council revised the rotation list to ensure that one of the larger States held the Presidency in every third six-month period, but otherwise equally. See Bernhard Schloh, *The Presidency of the Council of the European Union*, 25 SYRACUSE J. INT'L & COM. 93, 100-01 (1998).

<sup>247</sup> De Schoutheete, *supra* note 199, at 65.

<sup>248</sup> DINAN, EVER CLOSER UNION, *supra* note 33, at 205.



leadership on all EU affairs.”<sup>249</sup> He further observes that “the European Council [has now] become an institution alongside or, to put it better, above the Council.”<sup>250</sup>

The Lisbon TEU Article 15(1) slightly modifies the prior Maastricht Treaty text in describing the primary function of the European Council, stating that it “shall define the [EU’s] general political directions and priorities.” It is not clear whether the added word, “priorities,” is intended to augment the European Council’s role. In any event, the Lisbon Treaty now enables the European Council to go beyond the setting of policy, because Article 15 authorizes it to take decisions that have legally binding effect. Prior to the Lisbon Treaty, the European Council had no capacity to take a legally binding decision.<sup>251</sup> Whenever the European Council agreed upon a specific policy or course of action, only the Council or the Commission could carry it out through a legislative proposal or decision. Obviously, because the European Council’s political policy decisions represented a consensus of the views of the highest political leaders of all the States, the Council and the Commission naturally followed them.<sup>252</sup> Now, in a major change, the Lisbon TEU Article 15(1) authorizes the European Council to take legally binding decisions. Article 15(1) does however prudently stipulate that the European Council “shall not exercise legislative functions,” a reservation manifestly intended to preserve the role of the Council in any legislative procedure.

The Lisbon Treaty prescribes that the European Council will take a number of vital operational decisions, often by qualified majority vote. The most significant is the European Council’s nomination of a candidate for President of the Commission pursuant to the Lisbon TEU Article 17(7). Somewhat surprisingly, the EEC Treaty made no reference to the mode of selection of the President of the Commission. The Maastricht Treaty EEC Article 158(2) followed the prior practice in prescribing that the “governments of the Member States shall nominate by common accord” the Commission President, adding that the nominee would be subject to review by the Parliament. The Nice Treaty amended this to provide that the Council, “meeting in the composition of the Heads of State and government and acting by a qualified majority,” should nominate the Commission President, who then had to be actually approved by the Parliament.<sup>253</sup> The Lisbon TEU Article 17(7) reiterates this procedure, adding that the European Council is supposed to take into account the outcome of the prior election to the Parliament in making the nomination (i.e., the European Council ought to select a nominee who generally shares the political views of the largest political party group in the Parliament).<sup>254</sup>

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<sup>249</sup> PIRIS, *supra* note 9, at 208.

<sup>250</sup> *Id.* at 236.

<sup>251</sup> In a rather unusual proceeding, the Court of First Instance held that the European Council had no power to take a legally-binding decision in Case T-584/93, *Roujansky v. Council*, 1994 E.C.R. II 585, a challenge to the European Council’s proclamation that the Maastricht Treaty should enter into force on November 1, 1993.

<sup>252</sup> See WERTS, *supra* note 199, at 46–48 (noting that there is some concern that the Commission’s institutional role has been weakened as the European Council has grown more assertive).

<sup>253</sup> See DINAN, *EVER CLOSER UNION*, *supra* note 33, at 174 (describing the nomination of Commission President Barosso pursuant to the new provision).

<sup>254</sup> *Id.* at 175 (noting that when he was nominated to serve as Commission President, José Barosso, then Prime Minister of Portugal, headed the Portuguese party that joined in the Parliament’s conservative group, the European Peoples Party, the largest after the June 2004 election).

Naturally, the European Council chooses its own President, pursuant to Lisbon TEU Article 15(5), and the High Representative of the Union for Foreign Affairs and Security Policy, pursuant to TEU Article 18(1), in both cases by a qualified majority vote. Finally, the European Council designates by a qualified majority vote the President of the European Central Bank and the other five members of the Bank's Executive Board, pursuant to TFEU Article 283(2).

In terms of constitutional structure, the Lisbon TEU now prescribes that the European Council shall have a crucial role in all the possible procedures for amending the Treaties.<sup>255</sup> The Lisbon TEU Article 48(2) to (5) describes the "ordinary revision procedure," which presumably is to be used for more far-reaching revisions in the Treaties. Although the Commission, the Parliament or any Member State may propose amendments, it is the European Council that has the power, acting by a simple majority, to convene a Convention to draft Treaty amendments.<sup>256</sup> After the Convention has proposed amendments, the European Council may call an Inter-governmental Conference to draft the actual text of any amendments, which then are to be sent to the Member States for ratification. In addition to this elaborate procedure, the Lisbon TEU Article 48(6) and (7) sets out a simplified revision procedure, which authorizes the European Council, acting by unanimity, to amend most of the substantive provisions of the TFEU, subject to ratification by the Member States. Not only can this new procedure be employed to make occasional amendments that are useful but of secondary importance, but it also allows the European Council to act more rapidly on urgent revisions.<sup>257</sup>

It is worth emphasizing that the very fact that the European Council is now recognized as an institution of the EU, with a precise articulation of its role, capacity to make "legally-binding" decisions, and authorization to make certain decisions other than by consensus, points to a shift in its nature from a purely intergovernmental body to one with at least some supranational characteristics.

Inasmuch as the European Council now has the capacity to make legally binding decisions, a respect for the rule of law naturally requires that its decisions become subject to review by the Court of Justice. Pursuant to TFEU Article 263, the Court has jurisdiction to determine whether European Council decisions are compatible with the Treaty when the acts are "intended to produce legal effects vis-à-vis third parties," as well as to review under TFEU Article 265 a complaint that the European Council has failed to act when it had a duty to do so. Although either proceeding is highly unlikely, the Court now has the capacity to ensure optimal procedural regularity in the decisions of the European Council.<sup>258</sup> That the "legally binding"

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<sup>255</sup> See PIRIS, *supra* note 9, at 104–05. See also EGGERMONT, *supra* note 199, at 155–57.

<sup>256</sup> A Convention would be composed of representatives of the Member State governments, each State's parliament, the European Parliament, and the Commission, in a manner analogous to the Conventions that drafted the Charter of Fundamental Rights and the draft constitutional treaty. See *supra* text accompanying notes 220, 226. Professor Bruno De Witte describes the use of the two earlier Conventions and the ordinary revision procedure in *Treaty Revision Procedures after Lisbon*, in *EU LAW AFTER LISBON*, *supra* note 9, at 107–22.

<sup>257</sup> *Id.* at 122–25. See also EGGERMONT, *supra* note 199, at 156–57 (describing the possible use of the simplified revision procedure).

<sup>258</sup> In an important illustration of its judicial review capacity, the Court of Justice examined the extent of discretion of the Council of Ministers in executing its economic sanction duties under Treaty provisions in

decisions of the European Council can now be subject to judicial review is not only desirable in terms of respect for the rule of law, but also clear evidence of a shift toward supranationalism in the nature of the European Council.

*C. European Council Action by Qualified Majority Vote Rather Than Consensus: A Shift to Supranationalism?*

Not surprisingly, the Lisbon Treaty's TEU Article 15(4) continues to prescribe that the European Council usually will take policy decisions or other actions "by consensus." That is certainly plausible when the European Council sets the "political directions and priorities" for the EU, pursuant to TEU Article 15(1). However, TFEU Article 235(1) provides a potentially useful innovation when it states that a European Council member's abstention shall not prevent the European Council from making an act that requires unanimity. This approach parallels that in the Common Foreign and Security Policy, where TEU Article 31(1) authorizes an abstaining State to make a "constructive abstention," which permits the other States to adopt a decision that should be taken by unanimity. On occasion, some States will now be able to abstain when the European Council is reviewing a policy issue, rather than formally dissenting, and permit the European Council to adopt a policy decision. It is worth noting that the Lisbon Treaty occasionally stipulates that the European Council must act unanimously in making a decision, e.g., in determining the composition of the European Parliament pursuant to TEU Article 14(2), and in determination of strategic interests and objectives of the CFSP pursuant to TEU Articles 22 and 26.

A more important innovation of the Lisbon Treaty is its specification of many significant operational decisions that the European Council may now take by a Qualified Majority Vote (QMV), the system of weighted votes customarily employed by the Council in adopting legislation or making decisions, previously described in Part II.C. TFEU Article 238(2) prescribes that the Qualified Majority Vote system for the European Council shall be the same as that used for the Council. This clearly means that when the European Council makes a decision by QMV vote, Germany, France, the UK, Italy and perhaps Spain or Poland are apt to have the decisive voice due to their higher weighted votes based upon their larger population and economic size.

Pursuant to the Lisbon Treaty, the European Council may now act by a QMV in electing its President (TEU Article 15(5)) and the High Representative of the Union for Foreign Affairs and Security Policy (TEU Article 18(1)), in nominating a candidate for President of the Commission (TEU Article 17(7)), in the final appointment of members of the Commission (TEU Article 17(7)), and in designating the President and members of the Executive Board of the European Central Bank (TFEU Article 283(2)). As previously indicated when discussing the Parliament, the European Council's nomination of the Commission President is not final, because the nominee must be approved by the Parliament. Moreover, the European Council's ultimate appointment of the other Commissioners can only occur after the Parliament has approved them "as a body." However, the European Council's

designation of the other officials is definitive (although the European Council must consult the Parliament before its designation of the President and Executive Board of the ECB).<sup>259</sup>

In point of fact, the European Council has been designating the President of the Commission ever since 1976, when the July 1976 Brussels European Council selected the prominent UK Labor Party leader Roy Jenkins for the post.<sup>260</sup> The Lisbon Treaty's provision that the European Council may nominate the President of the Commission by a QMV vote is particularly important, because several qualified Prime Ministers or former Prime Ministers were vetoed as prospective Commission Presidents for terms starting in 1985, 1995 and 1999 by either France, Germany or the UK.<sup>261</sup> Of course, it remains to be seen whether the larger Member States will respect the new Treaty provision and not block a candidate for Commission President.<sup>262</sup>

Moreover, the Lisbon Treaty's TEU Article 49 authorizes the European Council to act by a simple majority vote on one major decision, that of calling an Intergovernmental Conference in order to amend the Treaties. The Maastricht Treaty's TEU Article 49 authorized the Council to call an Intergovernmental Conference to amend the Treaties, but did not specify a voting requirement, which implicitly meant a simple majority vote would suffice. Indeed, as previously noted, the June 1985 Milan European Council meeting took the decision to call the Luxembourg Intergovernmental Conference to amend the Treaties by the Single European Act despite the opposition of the United Kingdom, Denmark and Greece.<sup>263</sup>

The Lisbon Treaty's authorization for the European Council to take so many important and sensitive operational decisions by a QMV vote, and its express

<sup>259</sup> In 1998, when the European Council named Wim Duisenberg as the ECB's first President, and also designated the other members of the Executive Board, the nominees all appeared voluntarily before a committee of Parliament in informal confirmation hearings analogous to those held for nominees for the Commission. The Parliament has, however, no power to block anyone chosen by the European Council. See CORBETT, JACOBS & SHACKLETON, *THE EUROPEAN PARLIAMENT*, *supra* note 140, at 298–99. Recently the European Council persisted in its designation of a male nominee for the Executive Board, despite the Parliament's protest that a woman should be chosen, due to the fact that to date, all Executive Board members have been men.

<sup>260</sup> EGGERMONT, *supra* note 199, at 99.

<sup>261</sup> WERTS, *supra* note 199, at 136–39, citing the UK veto of French Foreign Minister Claude Cheysson in 1984, the UK veto of Belgian Prime Minister Dehaene and Germany's veto of Dutch Prime Minister Lubbers as possible successors in 1995 to President Delors, and the UK veto in 1999 of Belgian Prime Minister Verhofstadt as the successor to President Santer. The current Commission President José Barroso was also essentially a compromise choice in 2004, when Belgian Prime Minister Verhofstadt was again opposed by Italy and the UK. See DINAN, *EVER CLOSER UNION*, *supra* note 33, at 174.

<sup>262</sup> Exercising a sort of "Luxembourg veto" in disregard of the Treaty provisions, analogous to the effective blocking of legislative action by larger Member States based upon the compromise reached in Luxembourg in Jan. 1965 following the "empty chair" crisis created by President De Gaulle's opposition to crucial Commission proposals to advance EEC development. See *supra* text accompanying note 3. See also DINAN, *EVER CLOSER UNION*, *supra* note 33, at 38–39. The Council's use of QMV voting since the Single European Act is generally regarded as ending the "Luxembourg veto." See *supra* text accompanying notes 3, 127.

<sup>263</sup> See WERTS, *supra* note 199, at 87 (observing that in order to call the IGC, a Treaty-based prerogative of the Council under the initial EEC Treaty, the European Council acted as the Council in its composition of Heads of State and Government).

acceptance of a majority European Council vote to commence a formal Treaty amendment process, both manifestly indicate a sharp departure from the traditional intergovernmental nature of the European Council and a shift toward a supranational character. Nonetheless, it remains to be seen whether the Lisbon Treaty provisions are respected, so that the European Council will practically take these decisions by QMV or will rather adhere to its customary preference for a consensus.

Because this article concentrates upon the institutional structure of the EU, there has been only incidental mention of the Common Foreign and Security Policy. It is, however, important to note that even after the Lisbon Treaty, the European Council continues to be the principal actor in formulating any common policies or actions in that field. The Lisbon Treaty's slightly modified provisions on the CFSP were deliberately placed in the TEU, not the TFEU, and continue to accord the European Council the crucial role in determining when common policies are to be adopted, views expressed, or implementing action undertaken.<sup>264</sup> This is always by consensus, although a Treaty of Amsterdam provision, retained in the Lisbon TEU Article 31, permits "constructive abstentions," which occur when a Member State indicates that its abstention should not bar the Council from adopting by unanimity a common policy.

The Lisbon Treaty's TEU Article 18 accords a Treaty-based role to the office of the High Representative of the Union for Foreign and Security Affairs, originally created by a provision of the Treaty of Amsterdam, and held for ten years until 2009 by the distinguished Spanish diplomat, Javier Solano.<sup>265</sup> Pursuant to Article 18 (with some supplementary references in later Articles describing the CFSP), the High Representative's principal role is to provide consistency and continuity in the Union's external relations, contributing proposals and suggestions to the European Council.<sup>266</sup> The High Representative now chairs the Foreign Affairs Council (ending the prior rotation of the chair in accord with the six-month Presidencies), which manifestly improves the coherence and continuity of that Council's policies and actions. Baroness Catherine Ashton of the UK, formerly the Commissioner responsible for external trade, is the first High Representative under the Lisbon Treaty. The creation of this office thus constitutes a slight shift from the otherwise intergovernmental nature of the CFSP. Nonetheless, inasmuch as the High Representative carries out his or her functions as "mandated by the [European] Council" (TEU Article 18(2)), the existence of the office does not significantly alter the essentially intergovernmental character of the CFSP.

Accordingly, even if the Lisbon Treaty has given the European Council some aspects of a supranational character by enabling it to take certain crucial decisions by a

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<sup>264</sup> For an overall current view of the CFSP, see Piet Eeckhout, *The EU's Common Foreign and Security Policy after Lisbon: From Pillar Talk to Constitutionalism*, in *EU LAW AFTER LISBON*, *supra* note 9, at 265–91. See also CRAIG, *supra* note 9, at 408–22.

<sup>265</sup> See DINAN, *EVER CLOSER UNION*, *supra* note 33, at 552, for a description of the initial role of the High Representative and its execution by Javier Solano, the former Secretary-General of NATO, and former Foreign Minister of Spain, who served two successive five-year terms as the High Representative from 1999 to 2009.

<sup>266</sup> Eeckhout, *supra* note 264, at 284–86, provides an analytical review of the High Representation's role and powers.

QMV majority vote, the European Council's status in one of its traditionally important roles, that of acting in the CFSP, remains essentially intergovernmental.

*D. A President for Europe? The Presidency of the European Council*

The creation of the post of President of the European Council is one of the most important institutional innovations of the Lisbon TEU.<sup>267</sup> TEU Article 15(5) stipulates that the European Council shall elect its President for a two and a half year term, renewable once. Pursuant to TEU Article 15(6), the President shall chair European Council meetings and “drive forward its work,” “endeavor to facilitate [its] cohesion and consensus,” and provide continuity between meetings. In all these functions, the President is to cooperate with the President of the Commission and coordinate with the General Affairs Council, which customarily helps prepare the agenda of European Council meetings and the text of its Conclusions or decisions.<sup>268</sup> The President also presents a report to the Parliament after each meeting, in effect representing the European Council to the Parliament.<sup>269</sup>

Further, Article 15(6) provides that the President is to serve as the formal representative of the EU within the context of the CFSP, “without prejudice to the powers of the High Representative of the Union for Foreign Affairs and Security Policy.” The change in the term of the customary spokesperson from a six-month rotation to a longer period will provide greater coherence and continuity in the foreign affairs of the EU.

As previously noted, prior to the Lisbon Treaty, the Prime Minister (or President or Chancellor) of the Member State that occupied the Presidency of the Council of Ministers for the current six-month rotating term chaired each meeting of the European Council. This ability to chair the meetings had much more than ceremonial importance. As chair, the President could largely set the agenda for discussion and possible action, a role of great importance in view of the customary limited time frame of two-day sessions, and could influence the drafting of the European Council's ultimate published Conclusions. The President also largely determined the time allotted to any topic and the order of speakers in any discussion. Political science commentators have emphasized the influence that Presidents of the

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<sup>267</sup> Professors Henri de Waele and Hansko Broeksteeg provide valuable commentary on the new office in their article, Henri de Waele & Hansko Broeksteeg, *The Semi-Permanent European Council Presidency: Some Reflections on the Law and Early Practice*, 49 COMMON MKT. L. REV. 1039 (2012). See also CRAIG, *supra* note 9, at 102–07; DINAN, *EVER CLOSER UNION*, *supra* note 33, at 226–68; PIRIS, *supra* note 9, at 206–09; WYATT & DASHWOOD, *supra* note 11, at 44–45.

<sup>268</sup> Bull. EU 6/2002, at 17. The June 2002 Seville European Council meeting assigned this role to the General Affairs Council. The Seville meeting conclusions also set standards for the conduct of the meetings and prescribed that each Member State should have only “two seats in the meeting room,” i.e., authorizing only one cabinet minister to assist the Head of Government or State at any time during the working sessions. The Rules of Procedure of the European Council, adopted on December 1, 2009, 2009 O.J. (L 315) 51, 52–53 replicate the conclusions of the Seville European Council in Article 3 on the Agenda and Article 4 on the Composition of the European Council, delegations, and the conduct of proceedings.

<sup>269</sup> The Lisbon Treaty on European Union, art. 15(6)(d), requires these reports, codifying a customary practice that dates back to 1987. The Rules of Procedure stipulate in Article 5 that the President represents the European Council to the Parliament. See The Rules of Procedure of the European Council, *supra* note 268, at 53. Professors De Waele and Broeksteeg observe that the President merely provides a report and does not have to discuss “policy lines,” because the Parliament has no Treaty based power to check or sanction the European Council. De Waele & Broeksteeg, *supra* note 267, at 1066–67.

European Council (and of the Council) have been able to exercise through chairmanship and agenda-setting.<sup>270</sup>

An adroit President could augment this influence through visits with other contacts of Member State political leaders during his or her Presidency. In addition, the current President acted as the spokesman of the European Council in any presentation to the media and in making the customary report to the Parliament after each session. Moreover, the then European Council President also acted as the spokesman on CFSP matters.

It is not surprising that many small Member States opposed the creation of the office of President of the European Union during the Constitutional Convention that initially inserted it into the ill-fated draft Constitutional Treaty, prior to its inclusion in the Lisbon Treaty.<sup>271</sup> Presumably the smaller State political leaders were concerned that a longer Presidential term would tend to give greater weight to the views of the larger States. Moreover, even though the cycle of rotation of Presidency of the Council had become a very long one, smaller State leaders relished the opportunity to place their government at the forefront of EU affairs.<sup>272</sup>

Nonetheless, the counter-argument, stressing the importance of enabling the policy continuity provided by a longer-term President, led to the agreement to amend the Treaty to create the office. Manifestly, a President holding the office for a number of years is capable of achieving more coherent and more stable policies and views at the European Council level than can be achieved by a rotating Presidency. As Jean-Claude Piris has authoritatively summarized, "The European Council needed a full-time President. Whatever their abilities, the successive heads of state or government serving for six months on a very part-time basis could not generally offer enough of their time, energy and attention for this job."<sup>273</sup> Professors Henri De Waele and Hansko Broeksteeg similarly conclude that a "stable president [can] draw up common positions with greater efficiency, guarantee accelerated decision-making in cases of urgency, constantly searching for compromises, while remaining receptive to initiatives from the Commission or national delegations."<sup>274</sup>

The insertion of the new post of European Council President into the draft Constitutional Treaty can be traced to an initial proposal in 2002 made by the Spanish Prime Minister Jose Maria Aznar and the UK Prime Minister Tony Blair. Later, it was strongly endorsed by the French Presidents Jacques Chirac and his

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<sup>270</sup> See Jonas Tallberg, *The Agenda-shaping Powers of the EU Council Presidency*, 10 J. EUR. PUB. POLICY 1 (2003); Jonas Tallberg, *Bargaining Power in the European Council*, 46 J. COMMON MKT. STUD. 685 (2008); Jonas Tallberg, *The Power of the Presidency: Brokerage, Efficiency and Distribution in EU Negotiations*, *supra* note 99.

<sup>271</sup> WERTS, *supra* note 199, at 148–53; HAYES-RENSHAW & WALLACE, *supra* note 83, at 185. The smaller States did succeed in blocking the initial proposal that the President should be the permanent chair of the General Affairs Council, which would have given the office a significant additional substantive role. See PIRIS, *supra* note 9, at 206–07.

<sup>272</sup> WERTS, *supra* note 199, at 155–57.

<sup>273</sup> PIRIS, *supra* note 9, at 208–09. Professors Wyatt and Dashwood concur and also observe that an "impartial" President would not have the concern for the protection of the national interests of a particular State which a head of government might feel while serving as the six-month rotating President. WYATT & DASHWOOD, *supra* note 11, at 45.

<sup>274</sup> De Waele & Broeksteeg, *supra* note 267, at 1044.

successor, Nicolas Sarkozy, presumably due to a concern that six-month rotations of the office resulted in instability and inefficiency.<sup>275</sup> An initial issue during the constitutional Convention drafting process was whether to call the new post “President” or “Chair,” the latter being the term used in the first draft text. Ultimately, “President” was selected as the name of the post, quite likely because most Member States favored the title as conveying a “greater gravity,” providing more of an impression that the new official would have a substantial role in the guidance of policy.<sup>276</sup>

The creation of the office has provided a much more pragmatic concern: will the President of the European Council compete with the President of the Commission as a spokesman for the EU, or, worse yet, actually conflict with him on appropriate policy? Professor Paul Craig has suggested that the concern is “based on the simple proposition that two Presidents of the Union is one too many” and observes that the “lack of clarity as to the respective powers of the two Presidents [could] lead to confusion of responsibility.”<sup>277</sup> Nonetheless, the legitimate reasons that motivated the creation of the office of President of the European Council, and the difference in operational functions between that office and that of the President of the Commission, justify the inevitable sharing of the executive role within the EU.<sup>278</sup> Professor Craig further observes that although there will “doubtless be issues on which the two Presidents disagree . . . [t]here are nonetheless incentives for the Presidents to cooperate and develop a coherent agenda,” especially since both Presidents will be well aware that “inter-institutional tension” would be detrimental to the EU.<sup>279</sup> Underlining this view, the European Council’s Rules of Procedure provide that the President shall maintain “close cooperation and coordination” with the President of the Commission, “particularly by means of regular meetings.”<sup>280</sup>

The European Council’s selection of Herman Van Rompuy, at the time the Prime Minister of Belgium, as its first President has alleviated most concerns, especially as he has proved to be politically astute, an impartial chairman, and particularly skilled at mediation and compromise building during the current succession of Euro-crises. In the fall of 2009, not only did the UK urge the choice of its far more prominent former Prime Minister Tony Blair, but other States proposed the names of several other prime ministers or former prime ministers. Although a press release declared that Mr. Van Rompuy’s designation was unanimous, he may

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<sup>275</sup> See DINAN, *EVER CLOSER UNION*, *supra* note 33, at 224–25; see also WERTS, *supra* note 199, at 148.

<sup>276</sup> See De Waele & Broeksteeg, *supra* note 267, at 1046. They observe that the Dutch language version of the TEU gives the title as “voorzitter,” which translates as “chairman” rather than “president,” but that Dutch commentators view the post as exercising a “presidential function.” *Id.* at 1045.

<sup>277</sup> CRAIG, *supra* note 9, at 101.

<sup>278</sup> *Id.* at 101–08.

<sup>279</sup> *Id.* at 105–06.

<sup>280</sup> Article 2(3) of the Rules of Procedure, *supra* note 269. Professors De Waele and Broeksteeg indicate that the two Presidents have weekly breakfast meetings and have developed a “structural pattern” for deciding which one shall speak for the EU at international meetings. De Waele & Broeksteeg, *supra* note 267, at 1064–65.



well have been to some degree a compromise choice.<sup>281</sup> Tony Barber, the well-known Financial Times journalist on EU affairs, aptly concludes that the European Council's choice of Mr. Van Rompuy was probably due to the widely-held assessment that he was a "shrewd, thoughtful politician deeply committed to the ideal of European integration," whose skill in "calming tensions between Belgium's francophone and Flemish-speaking communities" suggested that he could be effective in achieving a consensus on European Council issues.<sup>282</sup> It proved to be a fortuitous coincidence that President Van Rompuy would begin to serve in the new office at the end of 2009, coincidentally with the start of the first stage of the successive Euro-crises, because his stable European Council Presidency could be far more effective than a six-month rotating Presidency. As Professor Thomas Christiansen has observed, President Van Rompuy's leadership during the initial crisis enabled him to "demonstrate both the relevance and the permanence of his post and [expand] its role."<sup>283</sup>

It is obviously beyond the scope of this article to attempt to describe the economic and monetary causes of the successive Euro-crises in 2009–13, occasioned by severe monetary problems in Greece, Ireland, Portugal and Spain, which have jeopardized the monetary stability of the entire seventeen nation Euro-zone. The financial press has exhaustively covered the crisis, and serious academic commentary covers at least the period until late 2012.<sup>284</sup> Many political and monetary leaders have cooperated in seeking immediate and long-term solutions to each crisis, notably the current European Central Bank President Marco Draghi; Commission President José Barroso; Commissioner Olli Rehn, responsible for monetary affairs; Christine Lagarde, Managing Director of the International Monetary Fund; Jean-Claude Juncker, Prime Minister and Finance Minister of Luxembourg and chair of the Euro-group of Finance Ministers; as well as the most prominent national leaders, Chancellor Angela Merkel of Germany, former President Nicolas Sarkozy of France, and current President François Hollande of France.

President Van Rompuy has played a valuable role, both in promoting compromises and consensus within the European Council and in directly helping to develop technical solutions to particular serious issues. Professors De Waele and

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<sup>281</sup> See De Waele & Broeksteeg, *supra* note 267, at 1049–50. Professor Craig observes that the choice of Mr. Van Rompuy was initially criticized as the selection of a "relatively lightweight" candidate, particularly when compared to Tony Blair. CRAIG, *supra* note 9, at 117.

<sup>282</sup> See Tony Barber, *The Appointments of Herman Van Rompuy and Catherine Ashton*, 48 J. COMMON MKT. STUD. 56 (2010). Mr. Barber also observes that many national political leaders were concerned that Tony Blair was not sufficiently committed to "the European project" and might prove to be an "independent-minded 'chief executive' [rather than] a lower-profile consensus-building 'chairman.'" *Id.* at 60–61. Professor Dinan asserts that Chancellor Merkel and President Sarkozy played the principal role in the selection of Van Rompuy instead of Blair, preferring that "the inaugural office holder should be a less forceful and less famous person." See DINAN, *EVER CLOSER UNION*, *supra* note 33, at 224.

<sup>283</sup> See Thomas Christiansen, *The European Union After the Lisbon Treaty: An Elusive 'Institutional Balance'?*, in EU LAW AFTER LISBON, *supra* note 9, at 228–61 (quoted at 242).

<sup>284</sup> See Paul Craig, *The Stability, Coordination, and Governance Treaty: Principle, Politics and Pragmatism*, 37 EUR. L. REV. 231 (2012); Caroline Jensen, *What Doesn't Kill Us Makes Us Stronger: But Can the Same be Said of the Eurozone?*, 46 INT'L LAW 759 (2012); Matthias Ruffert, *The European Debt Crisis and European Union Law*, 48 COMMON MKT. L. REV. 1777 (2011); A. de Gregorio Merino, *Legal Developments in the European Economic and Monetary Union During the Debt Crisis: The Mechanisms of Financial Assistance*, 49 COMMON MKT. L. REV. 1613 (2012).

Broeksteeg point out that President Van Rompuy called no less than fourteen European Council formal and informal sessions in 2010–11 in various efforts to cope with successive Euro-crises.<sup>285</sup> Equally important, President Van Rompuy chaired a special task force of experts in the fall of 2010 on ways to strengthen economic governance and on the drafting of a treaty amendment for a stability mechanism for Member States whose currency is the Euro.<sup>286</sup> The European Council adopted this Treaty amendment by use of the simplified Treaty revision procedure previously described in Section B.<sup>287</sup> In 2011–13, President Van Rompuy continued to devote substantial efforts to urge the European Council and other political and monetary leaders to adopt policies and take specific actions to alleviate further Euro-crises.<sup>288</sup> On March 1, 2012, the European Council redesignated Herman Van Rompuy as its President for a second two-and-a-half year term ending November 2014. The decision came as no surprise and represents a justified tribute to his successful performance.

In conclusion, the creation of the office of President of the European Council, potentially serving for five years, represents a significant shift from intergovernmental leadership to a more supranational approach. This is enhanced by the Lisbon TEU Article 15(5)'s stipulation that the President is to be elected by a Qualified Majority Vote. The President of the European Council is unlikely ever to acquire the authority, prestige, the regard of the media or the general public equal to that of the President of the Commission. Nonetheless, the first European Council President, Herman Van Rompuy, has been notably prominent and effective in chairing the European Council, promoting its development of policies and serving as its spokesman. It is already evident that the Lisbon Treaty's creation of the office of President of the European Council represents a significant illustration of the gradual shift of the European Union to a more supranational operational role.

## VII. CONCLUSION

This article has attempted to provide an overview of the evolution of the institutional structure of the European Economic Community into that of the European Union, initially as established by the Treaty of Maastricht and then as it has evolved into the post-Lisbon European Union. Looking at each institution in turn—the Commission, Council, Parliament, and European Council—the article has analyzed the degree to which each institution, by its nature and through its operations, possesses a largely intergovernmental or a progressively more federal or supranational character. Based on this analysis, the Commission and the Parliament can be assessed as being fundamentally supranational in structure, and decidedly so in operations and vision. Although, in contrast, the Council and the European Council are definitely intergovernmental in structure, both have progressively evolved toward a mix of intergovernmentalism and supranationalism in operations.

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<sup>285</sup> De Waele & Broeksteeg, *supra* note 267, at 1054–56.

<sup>286</sup> *Id.* at 1057. The European Council of Dec. 16–17, 2010 adopted the conclusions endorsing the new policy and prospective amendment. See Ruffert, *supra* note 284, at 1782–85.

<sup>287</sup> European Council Decision 2011/199 of March 25, 2011 to amend TFEU Article 136 to authorize a stability mechanism for Member State whose currency is the Euro, 2011 O.J. (L 91) I. For the simplified Treaty revision procedure, see *supra* text accompanying note 256.

<sup>288</sup> Moreover, since March 2010, President Van Rompuy has chaired the bi-annual meetings of the Heads of Government and State of the Euro-group. De Waele & Broeksteeg, *supra* note 267, at 1058–59.

As said at the outset of this article, the European Union is never destined to become a federal nation-state, but the Treaty of Maastricht and even more the Treaty of Lisbon have created or accentuated the supranational features of each institution. With each successive revision of the basic Treaty provisions, the Member States have yielded a bit more sovereignty to the central institutional structure.

Thus, the overall picture is one in which the EU institutions, including even the European Council, have gradually moved down the road from intergovernmental cooperation to some degree of supranational structure and action. The Treaty of Lisbon marks another significant step down this road, but it is unlikely to be the final one.