The Treaty of Lisbon:
A Second Look at the Institutional Innovations

September 2010

Joint Study

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EGMONT

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INTRODUCTION

Three years ago, three Brussels based think tanks thought it useful to join efforts in analysing potential implications of the Lisbon Treaty in the field of institutions. At the time that Treaty had not been ratified and the question of whether it would ever come into force was an open one. The result of their efforts was published in November 2007 as a joint study under the title *The Treaty of Lisbon: Implementing the Institutional Innovations*[1]. It attracted the attention of policy makers, national and European administrations and the academic community.

Now that the Treaty has come into force and that the institutional innovations are gradually being implemented, the same three think tanks have thought it useful to revisit and develop their joint analysis. It is obviously too early to pass final judgment on the implications of the Lisbon Treaty on the institutional framework of the Union. Past experience shows that it takes a period of five to ten years to be able to exercise that sort of judgment. But some trends are already apparent.

One aspect common to all European treaties is that, as a general rule, they are not implemented in the exact context, and with the precise objectives, in which they were conceived. This is due in part to the length of the ratification process, particularly significant in the case of the Lisbon Treaty. It is also due to changing circumstances.

Two major challenges, which were not so obvious when the Treaty texts were initially drafted, determine the context in which they are being implemented. Climate and energy is accepted as the major issue of the new century and the European Union strives to influence global solutions, not always successfully as was shown by the Copenhagen conference. The banking and financial crisis, initiated in the United States, has economic and monetary consequences which are gradually unfolding, and they influence the balance of economic power in the world. Both challenges are a source of considerable external pressure as the European Union, like other world actors, tries to adapt to the co-management of globalisation.

It is with those considerations in mind, that ten issues have been identified and are dealt with in the following chapters. As in any collective effort, the three institutions involved share the general conclusions to which they have come, but do not necessarily feel bound by the specific formulations in each chapter.

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[1] Joint Study *The Treaty of Lisbon: Implementing the Institutional Innovations* (Brussels, CEPS, EGMONT and EPC, November 2007), retrievable at: http://www.egmontinstitute.be/SD/Joint_Study_complet.pdf, hereafter referred to as *"First Lisbon Study"*.

THE EUROPEAN COUNCIL

1. BEFORE LISBON

The European Council was created at the Paris summit of 1974 in order to ensure progress and overall consistency in European affairs. A regular but informal "fireside chat" (*kamingespräch,* said Willy Brandt) of Heads of State or Government should give new dynamism and political impulse to European integration. Jean Monnet called it the beginning of a European authority. Tindemans hoped that it would give the continuing political momentum needed for the construction of Europe.

High expectations have certainly been fulfilled. By the end of the century it was being called "*the arbiter of systemic change*", "*the principal agenda setter and the core of the EU's executive*"[1], or "*the primary source of history making decisions*"[2].

The gradually increasing power of the Heads of State or Government can be mapped through the history of treaty changes. They had only marginal influence on the drafting of the Single European Act (1985). They played a more significant role in the Maastricht negotiation (1992), but completing essential work done beforehand by Foreign (CFSP) and Finance Ministers (Monetary Union). They took centre stage in the Amsterdam negotiation (1997) and have never left it since. Both the Nice Treaty and the six-year saga that leads from the end of the Convention to the ratification of the Lisbon Treaty were determined and finally resolved by action at European Council level.

There is no doubt that the European Council has been a positive instrument of change. It has moved the fledgling European Community of the sixties to the larger, more diverse, but certainly more integrated European Union of today. An instrument deliberately created by some (and feared by others) as purely intergovernmental, has led to, or at least condoned, more supranational authority, for instance in Parliament or on the euro.

But it is also clear that the European Council has gained power and political space at the expense of the original Community institutions. Quite obviously the Commission is no longer today the main initiator of the integration process, as it was in the early years of the Community. The Council of Ministers is no longer the ultimate decision taker on most important issues. Those roles have been in practice taken over by the European Council. Gradually over two decades, real power, political guidance and impetus, moved to an entity outside the institutional framework. When that happens the institutional structure is inevitably weakened.

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[1] Ludlow, P., *The Laeken Council (European Council Commentary)* (Brussels, EuroComment, 2002), pp. 5-15.

[2] Peterson, J. and Bomberg, E., *Decision-Making in the European Union* (Basingstoke, Palgrave Macmillan, 1999), p. 33.

Over the years the main achievement of the European Council has been the ability to find solutions where normal Council procedures were failing: on the British budgetary problem in the eighties for instance. It has also usefully operated as a collective head on major policy issues, such as enlargement or the euro. But perceived weaknesses came in parallel with the achievements.

Two weaknesses, that became very obvious in the nineties, were overload and procedural improvisation:

- Too many issues landed on the table of the European Council which should have been settled elsewhere within the institutional system of the Union. Too many problems were postponed for discussion in an indefinite future because of obvious or suspected disagreement. Written conclusions were clogged with irrelevant material. In view of their national obligations, Heads of State or Government simply do not have the time to settle a wide variety of European issues. They operate optimally when dealing with one central issue, but at most meetings they found a dozen on their agenda.

- Because the European Council was not initially conceived as an institution it operated in a world apart. Successive meetings were held in an improbable variety of Renaissance fortresses and palaces, nineteenth century hotels, modern conference buildings and trade centres, housing an ever-increasing number of delegates and journalists. Successive presidencies had their own objectives, their own ways of preparing meetings through personal contacts, a lightning tour of capitals and telephone calls. Conclusions were drafted in the night and distributed at dawn. Responsibility for the implementation of decisions remained diffuse and uncertain.

This combination resulted in chaos. Tony Blair, leaving the Nice European Council in 2000 famously stated: "*We cannot go on working like this*". The Secretary General of the Council, Javier Solana, was tasked with the drafting of a report on the functioning of the European Council. His report was uncompromising: the European Council has been sidetracked from its original purpose, he stated, and presidency is used for furthering national preoccupations and inappropriate exercises in self-congratulation.

This stark analysis resulted in a number of procedural changes adopted at Seville in June 2002. European Council meetings were generally held in Brussels.[1]

[1] This results from Declaration 22 annexed to the Final Act of the Nice Treaty: "*When the Union comprises 18 members, all European Council meetings will be held in Brussels*".

COREPER and the General Affairs Council undertook the preparation of draft conclusions prior to the meeting itself. Some effort was made to limit the size of delegations, the number of points on the agenda and the length of conclusions. It was certainly a change for the better.

2. FROM CONSTITUTIONAL TREATY TO LISBON RATIFICATION

The Convention, which met in 2002 and 2003 to prepare treaty changes, led to an unprecedented exercise in collective reflection on institutional matters. Part of that exercise was devoted to the European Council and, with hindsight, it seems that two structural fault lines, which insiders and outsiders have been underlining for a number of years, were correctly identified.

2.1. The Presidency

Traditionally the President of the European Council played a quasi-exclusive role in preparing, organising and managing the meetings and in presenting the results to internal and external audiences. European Councils, the highlights of successive presidencies, allowed political leaders to bask in the limelight and to show to their national audience that Union membership, and especially its Presidency, were not vacuous concepts. But of course six months is a short time to master the intricate details of Community files. Successive enlargements have made it more difficult to identify and understand the details of partner governments' positions. Adequate preparation of an enlarged European Council has become more time consuming, and, in a busy agenda, the temptation is to pay less attention to the views of smaller partners. A lot depends on personalities and national political proficiency does not necessarily prepare to chair and guide an international body with potentially conflicting interests. It needs a fair sense of balance: inertia is criticized but activism can be resented. Writing about the Sarkozy Presidency in 2008, Peter Ludlow remarks: "*As the weeks have passed, other member state governments have become increasingly concerned by the Presidency's tendency to disregard procedures and to bombard them with paper after paper. There was real crisis of confidence prior to the 7 November meeting*".[1]

[1] Ludlow, P., *The EU and the Financial Crisis: The European Councils of October and November 2008, A View From Brussels*, Briefing Note Vol. 6, No. 4 & 5 (Brussels, Eurocomment, November 2008), p. 6.

2.2. The General Affairs Council

Part of the deficiencies of the European Council had always been attributed to malfunctioning of the Council and singularly the inability of the General Affairs Council, composed of Foreign Ministers, to ensure adequate preparation and follow-up of European Council meetings, which presumes a coordinating role across the different formations of the Council. The problem was not new: it was indeed part of the reason for creating the European Council in the first place. But it had clearly become more intractable over time as the Union grew in size and scope of activity and as a wider range of ministers has been swept up into European affairs. Enlargement magnified existing problems by making coordination more time consuming. More and more problems, some of a very complex nature such as the financial perspectives, were left to the arbitration of Heads of State or Government. The procedural rules adopted at Seville in 2002 went some way towards ensuring better preparation of European Council meetings but they were only partly successful.

Institutional changes concerning the European Council adopted in the Convention were meant to address those concerns, as also to increase the international visibility of the Union. They remained largely unchanged in the lengthy ratification process which came to an end on 1 December 2009.

3. A FORMAL INSTITUTION

In legal terms, the most obvious modification introduced by the Lisbon Treaty is the fact that the European Council now becomes a recognised part of the institutional framework. It is mentioned as an institution, for the first time, in Article 15 of the Treaty on European Union, immediately after the European Parliament. It shall "*provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof*". That formula comes from the Constitutional Treaty and differs only slightly in wording from the text introduced by Article D of the Treaty of Maastricht nearly twenty years ago. But the fact that this task is no longer exercised by an intergovernmental meeting of Heads of State or Government is of course significant, it gives legal basis to current practice.

Over the years the European Council had gradually taken over some real power and impetus initially vested in the institutional framework of the Community. That locus of power, formerly separate, is now integrated, and this can be seen as a consolidation of the institutional framework. It gives a stronger legitimacy to the European Council's guidance. But it also formalizes a transfer of power:

- The Commission keeps the exclusive right of initiative for legislation. But in the field of political initiative, where it once, in practice, also had a monopoly, this right is now, according to the Treaty, shared with the European Council, as also with Parliament, and indeed the citizens through the right of petition.
- The Council was initially the sole decision making institution. For some years it has formally shared that right with Parliament through co-decision, and informally with the European Council who defined general political directions and priorities. The latter is now formalised and the authority of the European Council strengthened by the creation of a semi-permanent President.

The legal nature of the European Council, which had been the subject of some academic debate, is clarified. It is not a superior form of the Council, but a different institution. It is not part of the legislative process (Art. 15 TEU). The quaint formula of the "Council meeting at the level of Heads of State and Government", introduced by the Maastricht Treaty, has now disappeared.

One of the less noticed consequences is that the European Council will have, in some circumstances, the power and the obligation to adopt acts having legal effect, which was not the case before. The Court of Justice will have the power to control the legality of such acts. When taking such decisions, the European Council will therefore need to pay more attention to legal form than has been the case in the past. This explains why its first act, when the Lisbon Treaty entered into force, was formally to adopt its own rules of procedure.

4. COMPOSITION OF THE EUROPEAN COUNCIL

Article 15 TEU para. 2 says: "*The European Council shall consist of the Heads of State or Government of the Member States, together with its President and the President of the Commission. The High Representative of the Union for Foreign Affairs and Security Policy shall take part in its work*". Paragraph 3 of the same article adds: "*When the agenda so requires, the members of the European Council may decide each to be assisted by a minister and, in the case of the President of the Commission, by a member of the Commission*."

This means that Foreign Ministers who had been *de jure* participants in the European Council from the very beginning have lost that capacity. The justification generally given for that decision is that in an enlarged Union the presence of two

members per delegation leads to a meeting of sixty or more people round the table which becomes difficult to manage and loses that intimate character to which participants have always attached great importance.

It should be noted however that Foreign Ministers get a sort of proxy presence in the European Council through the High Representative, who is chairman of the Foreign Affairs Council. Moreover Foreign Ministers, as also Finance Ministers, can be called to take part in the discussion of agenda points relevant to their competence. Experience will tell whether the European Council decides to make a generous or a parsimonious use of this faculty. Pressure from the minister level can be expected, but past experience shows that a significant number of Heads of State or Government are happy to meet with their counterparts in a secluded club.

5. FREQUENCY OF MEETINGS

Article 15 para. 3 TEU and Article 1 of the Rules of Procedure indicate that the European Council shall meet at least four times a year. In fact regular use of informal meetings, and occasional meetings in the margins of summits with third countries, lead to more frequent contacts, particularly in times of crisis. Under the French Presidency in 2008 Heads of State or Government met practically every month. The trend towards more frequent meetings seems likely to continue and is probably inevitable in view of the increased responsibilities of the European Council. Given the size of the Union, and the natural inertia of such a large body, occasional meetings will not, in the words of Article 15 TFEU, "*provide the Union with the necessary impetus*".

More frequent meetings at the highest level have a potential impact on the decision-making machinery in general. On controversial issues, Ministers meeting in Council have frequently been tempted in the past to leave the difficult decisions to Heads of State or Government. The temptation is greater when a European Council meeting is scheduled in the near future. Some restraint will have to be exercised to avoid clogging the agenda at the top level.

6. THE SEMI-PERMANENT PRESIDENCY

Article 15 para. 5 of the TEU which says that the European Council will be chaired by a president elected for a two and a half year period, renewable once, is one of the most spectacular changes in the institutional framework. Hotly debated in the Convention, and initially rejected by the smaller Member States (on the basis

of a Benelux memorandum), it later, and relatively quickly, became part of the "acquis". At a speech in Florence in May 2007, the Belgian Foreign Minister even stated that this innovation could not be abandoned ("*simply not for sale")* in the drafting of a new treaty.[1]

The potential consequences of this change, its merits and weaknesses, are analysed in some detail by the initial Joint Study to which the present publication is a sequel. One of its conclusions was that "*the well-worn conflicting notions of, on the one hand, a President who is simply a chairman, and on the other hand, a President* in the fullest sense of the word*, loses much of its relevance* […] *the Member States sought to rule out both the notion of a single figurehead, in a role limited to giving people the floor and making appropriate declarations, and that of a supreme figure of authority, ultimately responsible for the fate of the Union*".[2]

This point is worth looking at in the light of the debate that preceded the appointment of the first President of the European Council.

It is clear that the hype surrounding the candidacy of Tony Blair was based on the notion that the external dimension of the new job should predominate, and that it should indeed be held by a figure of authority "capable of stopping the traffic in Washington or Beijing".

It is no less clear that the choice made by the Heads of State or Government is based on the opposite notion that, without minimising the external role, it is the internal dimension which should predominate and that it should be held by a figure apt at consensus building and group leadership.

On the basis of our previous analysis that was indeed what the Treaty implied.

The Joint Study identified the four main tasks which, together with external representation at his level, are entrusted by the Treaty to the President of the European Council:

- preparing the meetings,
- conducting the debates,
- drawing conclusions,
- following them up.

They are worth looking at again.

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[1] Speech by Karel De Gucht at the European University Institute in Florence, Italy, 17 May 2007, *Towards a Union that is fit for the global era.*

[2] *First Lisbon Study*, p. 49

7. PREPARING THE EUROPEAN COUNCIL

"*The President of the European Council […] shall ensure the preparation and continuity of the work of the European Council in cooperation with the President of the Commission, and on the basis of the work of the General Affairs Council*" [Art. 15 para.6(b) TEU]. "*The General Affairs Council […] shall prepare and ensure the follow-up to meetings of the European Council, in liaison with the President of the European Council and the Commission*" (Art. 16 para. 6 TEU).

These articles do not imply new procedures. The preparation of a European Council has always been largely in the hands of the Presidency, working with the General Affairs Council and the Commission. Prior to ratification of the Lisbon Treaty, that procedure was seen as not entirely satisfactory in practice. The question is therefore whether changes in the European Council presidency and in the General Affairs Council are likely to give better results.

A successful European Council meeting, like any other meeting, implies that the chair(wo)man starts with a good knowledge of the substantial issues to be debated and a clear understanding of conflicting views and interests round the table. He/She can then manage the discussion in such a way that agreement becomes possible. It is clear that the new President of the European Council has a significant advantage over his predecessors: he has more time to prepare himself and to prepare the meeting. Moreover he can look forward and planify future meetings which he will also be chairing. "*Time*", as President Van Rompuy said, "*is a politicians' prime material*".[1]

Combining the duties and responsibilities of a national Head of State or Government with the duties and responsibilities linked to the preparation and chairmanship of the European Council has always been somewhat problematic, even more so for the bigger Member States than for the smaller ones. The difficulty has been compounded by successive enlargements because views and interests are more varied, and the personal relationship between participants less intimate. Visiting each capital in the last few days before a meeting used to be accepted practice. With 27 capitals it becomes practically impossible, and those omitted in the tour are understandably aggrieved.

[1] Speech by the President of the European Council Herman Van Rompuy at the "Klausurtagung" of the CSU-Landesgruppe Wildbad Kreuth, Germany, 7 January 2010, retrievable at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/112174.pdf.

The single most important advantage of the new system is that the President of the European Council will, in normal circumstances, begin each meeting with a deeper understanding of the issues and a better knowledge of the respective positions of the participants, with whom he will have had personal contact. This advantage, by itself, probably justifies the innovation.

That said, the hybrid nature of the new overall concept, and the overlapping authorities which result from it, remain a source of concern.

If we take the example of the preparation of an important foreign policy statement to be delivered by the European Council, the scenario would be approximately the following:

- An initial draft would be discussed in the Political and Security Committee (COPS) under the chairperson appointed by the High Representative.
- It would then go to COREPER (which insists on vetting all documents before they go to the ministerial level) chaired by the Permanent Representative of the rotating Presidency.
- COREPER would forward it to the External Relations Council, chaired by the High Representative, for ministerial approval.
- It would then move to the General Affairs Council preparing the European Council which is chaired by the rotating Presidency (Art. 3 of the Rules of Procedure of the European Council).
- And then appear on the agenda of the European Council chaired by the President of that institution.

A proposal on development aid introduced by the Commission would follow a similar track: working group, COREPER, External Relations Council, General Affairs Council, European Council.

In both cases the initial draft would be discussed in meetings chaired in succession by three different sources of authority (High Representative, rotating Presidency, president of the European Council) which have no hierarchical link between them. On paper this is a very dysfunctional way of proceeding. Now experience shows (notably in Belgium) that procedures that are clearly dysfunctional in theory, can sometimes work reasonably well in practice. Many observers already considered that the institutional framework resulting from the Maastricht Treaty was quite dysfunctional, yet it cannot be said that decision-making in the Union has broken down. But such procedures do not make life easier for the person who is ultimately responsible for presenting a draft to the European Council, namely its President.

In practice such a system can only work if there are good personal relations, and some similarity in goals, between the President of the European Council, the President of the Commission, the High Representative and leading political figures in the rotating Presidency. There is no reason to believe that this will not happen. But a system which is to a high degree dependent on good personal relations is fragile, conflict prone and time consuming.

8. THE GENERAL AFFAIRS COUNCIL

In this respect, the main innovation introduced by the Treaty of Lisbon is the fact that the General Affairs Council has been split from the External Relations Council and specifically tasked with the preparation of the European Council. This last point is made more specific by Article 3 of the Rules of Procedure of the European Council:

- Contributions by other Council configurations shall be forwarded to the General Affairs Council at the latest two weeks before the meeting of the European Council.
- Draft conclusions and draft decisions of the European Council, shall be discussed in the General Affairs Council.
- A final meeting of the General Affairs Council shall be held within the five days preceding the meeting of the European Council. In the light of that final discussion, the President of the European Council shall draw up the provisional agenda.
- Except for imperative and unforeseeable reasons, no other configuration of the Council or preparatory body may, between the session of the General Affairs Council at the end of which the provisional agenda for the European Council is drawn up and the European Council meeting, discuss any subject submitted to the European Council.

Similar rules, though less clearly formulated, have been in place since 2002 (European Council in Seville). They had a beneficial effect but, as indicated above, were only partly successful. The question arises whether the new structure is likely to be more efficient and the answer is not self-evident.

Doubt is partly justified by the fact that both the main "preparatory body" (namely COREPER) and the President of the European Council sit permanently in Brussels, and will presumably talk to each other and to other significant actors such as the Commission, whereas the General Affairs Council will only occasionally meet there.

Experience shows that, in such circumstances, regular contact has more impact than occasional meetings on the preparation of a debate on complex issues.

Two further points give food for thought:

- In most administrations the chairman of a group that prepares a meeting sits personally in that meeting, to listen, explain and ensure continuity. This will not be the case here. On the basis of Article 15 para. 2 TEU, the President of the General Affairs Council has no seat in the European Council. To ensure efficiency and continuity in the process, it would seem reasonable to examine the legal possibility of ensuring his regular participation.
- Conversely the President of the European Council has no status in the General Affairs Council. In our previous Joint Study, we suggested that, in order to enable him to exercise the role conferred by the Treaty, he should have "*a right to intervene and to make proposals in all areas directly or indirectly related to the preparation and implementation of European Council decisions*" both in specialised Councils and in the General Affairs Council.[1] This is not the practice which is presently evolving. It seems that direct participation in Council meetings is considered inappropriate for the President of the European Council. Instead informal contacts with the General Affairs Council will be organised on a regular basis before each European Council meeting. It remains to be seen if such informal contacts, however useful, enable a coordinated in depth preparation.

As things stand, there seems to be a clear hiatus between the formal preparation of the meeting and the meeting itself. From the point of view of efficiency, this is certainly not the best solution.

One other unknown is the future composition of the General Affairs Council. In the previous combination of General Affairs and External Relations the incumbents were the Ministers for Foreign Affairs. In practice they frequently left their seat, especially when dealing with "General Affairs", to junior ministers. Experience has shown that these were not in fact able to have much impact on the preparation of European Council meetings. Unless there is some quite radical change in the composition of the General Affairs Council that experience is likely to prevail.

Radical change might for instance consist in requesting the Head of State or Government of the rotating Presidency to chair the General Affairs Council. This would presumably upgrade the whole exercise but it seems a very unlikely solution, given

[1] See *First Lisbon Study*, pp. 49-50.

the increased frequency of meetings, and the fact that the President of the European Council is not inclined to sit there himself. The Foreign Minister of the rotating Presidency, who loses the chairmanship of the External Relations Council, is a more likely choice, but there is no reason to believe that he will be able to ensure a higher level of participation than was previously the case. The fact that Foreign Ministers will no longer automatically sit on European Council meetings may well reduce their, already limited, commitment to preparatory work.

On the basis of the treaty texts, the General Affairs Council will clearly be a necessary preparatory step for each European Council meeting. Whether it will exercise major influence on the conclusions of such meetings remains to be seen.

9. CONDUCTING THE DEBATE AND DRAWING CONCLUSIONS

The President of the European Council has never been entirely master of the agenda. There is no way of preventing a Head of State or Government from talking about something he is determined to talk about. But the Rules of Procedure (Art. 3 para. 1) do give the President a powerful influence both on setting the agenda and on drawing the conclusions.

- "*At least four weeks before each ordinary meeting of the European Council […] the President of the European Council, in close cooperation with the member of the European Council representing the Member State holding the six-monthly Presidency of the Council and with the President of the Commission, shall submit an annotated draft agenda to the General Affairs Council*".
- "*The President of the European Council, in close cooperation as referred to in the first subparagraph, shall prepare draft guidelines for the European Council conclusions and, as appropriate, draft conclusions and draft decisions of the European Council, which shall be discussed in the General Affairs Council*".

Even before the entry into force of the Lisbon Treaty, it was already the case that prior debate in COREPER and, up to a point, in the General Affairs Council, enabled the Presidency to have a view on potential conclusions.

This should be reinforced by the fact that, as indicated above, the President will, in most circumstances, have had time to acquire, from the outset, a better knowledge of the issues to be debated, and a better understanding of the respective positions, than any of the other participants. Coupled with a large degree of control on the agenda and on draft conclusions, this should enable him to conduct the debate efficiently and to draw whatever conclusions can be reached in a given situation.

10. FOLLOW UP

Difficulties to be expected in the follow up of European Council decisions are likely to stem from the same source as difficulties in preparing the meeting, namely that the President does not have direct authority on the various Council formations (not to speak about the Commission) which need to take action.

However, compared to the situation prevailing before the entry into force of the Lisbon Treaty, the President has two advantages which are likely to be determinant:

- **Presence.** In cases where Ministers have been known to differ from European Council conclusions they have mostly reacted by stealth. For obvious reasons, Ministers will not openly contradict Heads of State or Government. They have been known, however, in some circumstances, to fail to act, to sidestep or ignore a decision which they judge misguided. This will be less easy with a President of the European Council permanently present in Brussels, able to recall in public statements, in the press or in Parliament, what the conclusions were, what the consequences are, what action needs to be taken.

- **Time.** Because his mandate is not limited to a few months, the President can take time to persuade, to argue, to convince. He can call on support from public opinion, Heads of State or Government or Parliament. In stubborn cases he can wait for a change of the rotating Presidency. Time is on his side. He has continuity, durability and predictability which are important assets in politics.

11. EXTERNAL RELATIONS

Article 15(6) para. 2 TEU says that "*The President of the European Council shall, at his level and in that capacity, ensure the external representation of the Union on issues concerning its common foreign and security policy, without prejudice to the powers of the High Representative of the Union for Foreign Affairs and Security Policy*". This is not the clearest of treaty texts and it is probably the one which has given rise to the most abundant interrogation and comment. For some political observers, and part of public opinion, his external role has been considered as the major task of the new figure. President Van Rompuy has clearly taken a more balanced view, but the implementation of that paragraph will obviously be delicate and important. His role in the functioning of the External Action Service, for instance in the receiving and sending of credentials, will be significant.

For reasons of presentation and coherence, the role of the President of the European Council in common foreign and security policy is dealt with in another section of this study, together with external relations in general. It is however essential to keep in mind that his internal and his external role are closely interconnected. In diplomacy, internal credibility and external credibility interact. If the President is seen to have authority in the working of the European Council, his credit with third parties will increase. If he books a success on the international stage, his authority within the system will be greater.

12. CONCLUSION

The fact that the European Council formally becomes an institution of the Union will not, by itself, bring a major change in the decision-making mechanism. It confirms, and ratifies in legal terms, an evolution which practice had already brought about. The fact is that, well before the entry into force of the Lisbon Treaty, the Commission was no longer the main initiator of the integration process. The Council was no longer the ultimate decision taker on complex and difficult issues. Those tasks had in practice been taken over by the European Council. There is no reason to believe that its role will in future be substantially different from what it was before the Lisbon Treaty.

Similarly the fact that Foreign Ministers are no longer *de jure* members of the European Council confirms existing practice, namely that those ministers have, for some time, been unwilling or unable to ensure effective horizontal coordination of issues dealt with in various formations of the Council. In a way the new composition of the European Council confirms the reality of integration: European policy issues can no longer, as they were in the first years of the Community, be considered to be essentially foreign policy issues. But here again there is no reason to expect a substantial modification of the role and power of the European Council as a result of this innovation. With a reduced membership, meetings may become more easily manageable, slightly more intimate, allowing for participants to get to know each other better. That at least is the intention, as is shown by the fact that President Van Rompuy called the first meeting in Brussels of the European Council under the new Treaty, admittedly an informal one, not in the cavernous halls of the Justus Lipsius building, but in the Art Nouveau setting of the Solvay Library.

The potential role of the new "General Affairs" Council, as a preparatory organ to the European Council, remains unclear.

But the substantial innovation introduced by the Lisbon Treaty is the semi-permanent Presidency. The previous joint study already indicated that the President of the European Council was likely to be neither a simple figurehead, with a role limited to giving the floor and making declarations, nor a supreme figure of authority, along the lines of the President of the French Republic. Subsequent events have confirmed that analysis. In appointing Herman Van Rompuy, the Heads of State or Government chose a political figure coming from a tradition of compromise and consensus, not of presidential supremacy. But they chose a Prime Minister in power, not a figurehead. His first act, as new President, was to call an informal meeting, showing that he had the capacity, and the will, to bring together the members of the European Council whenever he thought that useful.

Chairing a relatively large group of people, each of which is the main source of political power in his, or her, own country, has never been an easy task, as successive presidents have found out. But the semi-permanent president has a natural asset which was denied to the rotating chair, namely time. Time to study the files, time to understand the sources of disagreement, time to look for solutions. Perhaps most importantly, time to establish a personal relationship with all participants. Personal relations of trust and understanding between Heads of State or Government have always played an important role in the decision-making process of the European Council. The most frequently quoted examples concern the Franco-German relationship but there are many others. An increased number of members, the result of successive enlargements, have made that form of relationship more time consuming, and more difficult to establish and maintain. Tensions between big and small Member States, between old and new participants, which, to a certain degree, have always existed, are today more acute. They are frequently an obstacle to mutual trust. A permanent chair can do much to alleviate them.

The new President of the European Council derives significant powers from the Treaty: he proposes the agenda, he prepares the meeting, he chairs it, then presents its conclusions and oversees their execution. Combined with the availability of time, this should enable him to exercise real leadership. And the European Union clearly needs leadership.

However he will not exercise leadership in isolation. Even leaving aside external relations, which are dealt with in another part of this study, potential rivalries are built in the system. Two "semi-permanent" presidents are simultaneously operating in Brussels, respectively at the Head of the Commission and of the European Council. Two forms of presidency coexist in the Council, the rotating one and the semi-permanent. The resulting complexity in the decision-making system is

described in the preceding pages. Treaty texts offer no clear solution. Regular and effective communication, consultation and coordination, is essential if the system is to work.

In fact experience shows that the European Council and the Commission complement each other. Political decisions at the highest level frequently require legislative proposals, which the Commission alone can initiate, or executive measures to be implemented by Commission services. And the most successful Commission Presidents have known how to persuade the European Council to support their views or their proposals.

Similarly the institutional system established by the new Treaty, partly because of its complexity, imposes a high level of coordination between rotating Presidencies and the new President of the European Council. Neither branch can hope to book meaningful successes without close cooperation with the other.

Logic would therefore command that all protagonists concentrate on cooperation rather than rivalry and conflict. Treaty texts can always be interpreted in various ways and some articles of the Lisbon Treaty open wide avenues for contradiction and debate. But however dysfunctional the system may appear on paper, it will be made to work if main actors agree that it must. "*It is my fervent intention to work in partnership and to mobilise all the energies and competencies in the Union. It is the only way to progress*", says Herman Van Rompuy.[1]

One of the classical exercises in the academic analysis of European institutions is to examine with a powerful lens, and weigh with a delicate balance, the intergovernmental versus the supranational character of each new text. On this scale the Treaty of Lisbon is frequently considered to be on the intergovernmental side, because the legal confirmation of the institutional role of the European Council as primary source of initiative weakens the Commission. In fact the Lisbon Treaty, like all its predecessors since the Treaty of Maastricht, is quite ambiguous on this score. It does indeed introduce the European Council in the institutional framework, but it also recognises the international legal personality of the Union, strengthens the powers of the European Parliament and increases the possibilities of majority voting. The fact that the European Council has a President who is no longer a member of a national government should presumably be interpreted, in this narrow analytical debate, as a step away from pure intergovernmentalism.

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[1] Speech by Herman Van Rompuy at the Collège d'Europe, Bruges, 25 February 2010, *The Challenges for Europe in a Changing World,* retrievable at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/113067.pdf.

This debate, which has been going on for half a century, is increasingly irrelevant. The fundamental question for the next few years is whether political forces and public opinion in Member States is sufficiently committed to the European process, irrespective of its institutional character, to move it forward as an instrument of power and influence in a globalised world. Obviously academic analysis cannot, by itself, give an answer to that question.

ANNEX

Rules of Procedures of the European Council (adopted on 1 December 2009)

Article 1: Notice and venue of meetings
The European Council shall meet twice every six months, convened by its President.
At the latest one year before the beginning of a six-month period, in close cooperation with the Member State which will hold the Presidency during that six-month period, the President of the European Council shall make known the dates which he or she envisages for the meetings of the European Council during that six-month period.
When the situation so requires, the President shall convene a special meeting of the European Council.
The European Council shall meet in Brussels.
In exceptional circumstances, the President of the European Council, with the agreement of the General Affairs Council or the Committee of Permanent Representatives, acting unanimously, may decide that a meeting of the European Council will be held elsewhere.

Article 2: Preparation for and follow-up to the proceedings of the European Council
1. The President of the European Council shall ensure the preparation and continuity of the work of the European Council in cooperation with the President of the Commission, and on the basis of the work of the General Affairs Council.
2. The General Affairs Council shall prepare and ensure the follow-up to meetings of the European Council, in liaison with the President of the European Council and the Commission.

3. The President shall establish close cooperation and coordination with the Presidency of the Council and the President of the Commission, particularly by means of regular meetings.
4. In the event of an impediment because of illness, in the event of his or her death or if his or her term of office is ended in accordance with Article 15(5) of the Treaty on European Union, the President of the European Council shall be replaced, where necessary until the election of his or her successor, by the member of the European Council representing the Member State holding the six-monthly Presidency of the Council.

Article 3: Agenda and preparation
1. In order to ensure the preparation provided for in Article 2(2), at least four weeks before each ordinary meeting of the European Council as referred to in Article 1(1), the President of the European Council, in close cooperation with the member of the European Council representing the Member State holding the six-monthly Presidency of the Council and with the President of the Commission, shall submit an annotated draft agenda to the General Affairs Council.
Contributions to the proceedings of the European Council by other Council configurations shall be forwarded to the General Affairs Council at the latest two weeks before the meeting of the European Council.
The President of the European Council, in close cooperation as referred to in the first subparagraph, shall prepare draft guidelines for the European Council conclusions and, as appropriate, draft conclusions and draft decisions of the European Council, which shall be discussed in the General Affairs Council.
A final meeting of the General Affairs Council shall be held within the five days preceding the meeting of the European Council. In the light of that final discussion, the President of the European Council shall draw up the provisional agenda.

2. Except for imperative and unforeseeable reasons linked, for example, to current international events, no other configuration of the Council or preparatory body may, between the session of the General Affairs Council at the end of which the provisional agenda for the European Council is drawn up and the European Council meeting, discuss any subject submitted to the European Council.
The European Council shall adopt its agenda at the beginning of its meeting.
As a rule, issues entered on the agenda should have been examined beforehand, in accordance with the provisions of this Article.

Article 4: Composition of the European Council, delegations and the conduct of proceedings

1. Each ordinary meeting of the European Council shall run for a maximum of two days, unless the European Council or the General Affairs Council, on the initiative of the President of the European Council, decides otherwise.
The member of the European Council representing the Member State holding the Presidency of the Council shall report to the European Council, in consultation with its President, on the work of the Council.

2. The President of the European Parliament may be invited to be heard by the European Council. Such exchange of views shall be held at the start of the meeting of the European Council, unless the European Council unanimously decides otherwise.
Meetings in the margins of the European Council with representatives of third States or international organisations or other personalities may be held in exceptional circumstances only, and with the prior agreement of the European Council, acting unanimously, on the initiative of the President of the European Council.

3. Meetings of the European Council shall not be public.

4. The European Council shall consist of the Heads of State or Government of the Member States, together with its President and the President of the Commission. The High Representative of the Union for Foreign Affairs and Security Policy shall take part in its work.
When the agenda so requires, the members of the European Council may decide each to be assisted by a minister and, in the case of the President of the Commission, by a member of the Commission.
The total size of the delegations authorised to have access to the building where the meeting of the European Council is held shall be limited to 20 persons for each Member State and for the Commission, and to five for the High Representative of the Union for Foreign Affairs and Security Policy. That number shall not include technical personnel assigned to specific security or logistic support tasks. The names and functions of the members of the delegations shall be notified in advance to the General Secretariat of the Council.
The President shall be responsible for the application of these Rules of Procedure and for ensuring that discussions are conducted smoothly.

Article 5: Representation before the European Parliament
The European Council shall be represented before the European Parliament by the President of the European Council.
The President of the European Council shall present a report to the European Parliament after each of the meetings of the European Council.

The member of the European Council representing the Member State holding the Presidency of the Council shall present to the European Parliament the priorities of its Presidency and the results achieved during the six-month period.

Article 6: Adoption of positions, decisions and quorum
1. Except where the Treaties provide otherwise, decisions of the European Council shall be taken by consensus.
2. In those cases where, in accordance with the Treaties, the European Council adopts a decision and holds a vote, that vote shall take place on the initiative of its President.
The President shall, furthermore, be required to open a voting procedure on the initiative of a member of the European Council, provided that a majority of the members of the European Council so decides.
3. The presence of two thirds of the members of the European Council is required to enable the European Council to vote. When the vote is taken, the President shall check that there is a quorum. The President of the European Council and the President of the Commission shall not be included in the calculation of the quorum.
4. Where a vote is taken, any member of the European Council may also act on behalf of not more than one other member.
Where the European Council decides by vote, its President and the President of the Commission shall not take part in the vote.
5. Procedural decisions adopted by the European Council by virtue of these Rules of Procedure shall be adopted by a simple majority.

Article 7: Written procedure
Decisions of the European Council on an urgent matter may be adopted by a written vote where the President of the European Council proposes to use that procedure. Written votes may be used where all members of the European Council having the right to vote agree to that procedure.
A summary of acts adopted by the written procedure shall be drawn up periodically by the General Secretariat of the Council.

Article 8: Minutes
Minutes of each meeting shall be drawn up; a draft of those minutes shall be prepared by the General Secretariat of the Council within 15 days. The draft shall be submitted to the European Council for approval, and then signed by the Secretary-General of the Council.
The minutes shall contain:

- a reference to the documents submitted to the European Council;

- a reference to the conclusions approved;
- the decisions taken;
- the statements made by the European Council and those whose entry has been requested by a member of the European Council.

Article 9: Deliberations and decisions on the basis of documents and draftsdrawn up in the languages provided for by the language rules in force
1. Except as otherwise decided unanimously by the European Council on grounds of urgency, the European Council shall deliberate and take decisions only on the basis of documents and drafts drawn up in the languages specified in the rules in force governing languages.
2. Any member of the European Council may oppose discussion where the texts of any proposed amendments are not drawn up in such of the languages referred to in paragraph 1 as he or she may specify.

Article 10: Making public votes, explanations of votes and minutes and access to documents
1. In cases where, in accordance with the Treaties, the European Council adopts a decision, the European Council may decide, in accordance with the voting arrangement applicable for the adoption of that decision, to make public the results of votes, as well as the statements in its minutes and the items in those minutes relating to the adoption of that decision.
Where the result of a vote is made public, the explanations of the vote provided when the vote was taken shall also be made public at the request of the member of the European Council concerned, with due regard for these Rules of Procedure, legal certainty and the interests of the European Council.

2. The provisions concerning public access to Council documents set out in Annex II to the Rules of Procedure of the Council shall apply mutatis mutandis to European Council documents.

Article 11: Professional secrecy and production of documents in legal proceedings
Without prejudice to the provisions on public access to documents, the deliberations of the European Council shall be covered by the obligation of professional secrecy, except insofar as the European Council decides otherwise.
The European Council may authorise the production for use in legal proceedings of a copy of or an extract from European Council documents which have not already been released to the public in accordance with Article 10.

Article 12: Decisions of the European Council

1. Decisions adopted by the European Council shall be signed by its President and by the Secretary-General of the Council. Where they do not specify to whom they are addressed, they shall be published in the Official Journal of the European Union. Where they specify to whom they are addressed, they shall be notified to those to whom they are addressed by the Secretary-General of the Council.
2. The provisions concerning the form of acts set out in Annex VI to the Rules of Procedure of the Council shall apply mutatis mutandis to decisions of the European Council.

Article 13: Secretariat, budget and security
1. The European Council and its President shall be assisted by the General Secretariat of the Council, under the authority of its Secretary-General.
2. The Secretary-General of the Council shall attend the meetings of the European Council. He or she shall take all the measures necessary for the organisation of proceedings.
3. The Secretary-General of the Council shall have full responsibility for administering the appropriations entered in Section II — European Council and Council — of the budget and shall take all measures necessary to ensure that they are properly managed. He or she shall implement the appropriations in question in accordance with the provisions of the Financial Regulation applicable to the budget of the Union.
4. The Council's security rules shall apply mutatis mutandis to the European Council.

Article 14: Correspondence addressed to the European Council
Correspondence to the European Council shall be sent to its President at the following address:
European Council
rue de la Loi 175
B-1048 Brussels.

THE EUROPEAN PARLIAMENT

1. INTRODUCTION

Ever since the introduction in 1979 of direct EU-wide elections, the European Parliament has steadily gained in power and prestige as successive treaty changes, from the Single Act onwards, have extended its reach, in differing ways, into most policy areas at the European level. These gains have been the consequence of two factors: firstly the readiness of the Member States, when amending the treaties, to agree to extend the Parliament's formal powers as part of the wider process of European integration, and secondly, the ambition and ability of the Parliament to exploit these formal powers to acquire additional influence. In doing so, the European Parliament is following a long tradition of national assemblies which have attributed to themselves the objective of advancing their interests and extending their prerogatives against those of a powerful executive. It seems inherent in the definition of a parliament.

The Lisbon Treaty, like its predecessor the European Constitution, continues the trend of extending the formal powers of the European Parliament. Most significant is the very large extension of policy areas to which the co-decision procedure (renamed as the "ordinary legislative procedure") applies, but the Parliament also gains in its ability to exercise oversight of the executive (particularly the Commission but also, to a lesser extent, the Council — see chapter on comitology). The budgetary procedures have been modified, with a *de facto* shift to co-decision (although the impact of this remains unclear), and the Parliament's role in the area of international relations is enhanced significantly through the requirement for its endorsement of the majority of international agreements. Parliament's new responsibilities will undoubtedly require some structural reorganisation, although the initial low level of legislative activity means that it will probably be some time before it becomes clear what form this will take. In the meantime the Parliament has secured additional financial resources for 2010 to assist it in coping with the impact of the entry into force of the Lisbon Treaty.

Aside from the obvious observation that the extension by the Lisbon Treaty of the Parliament's powers is simply the continuation of a long-standing process, there are a number of explanations for the extent of these changes. Firstly, not only was there a significant level of representation (and an even higher level of influence) of MEPs in the Convention which drew up the Constitution, but the Parliament moreover had to give its formal consent, as with any treaty change, and therefore had to be taken seriously. Secondly, at the time, many Member States' delegations overly focussed on other institutional innovations (in particular vote weighting and the arrangements governing the Presidency), whilst others sought precisely to

ensure that the Parliament's powers were enhanced in order to strengthen democratic accountability.

The result was that there was very little serious assessment of many of the new provisions. Some, such as the extension of co-decision, were based on existing experience — there was little reason or political scope to question them. Others appeared modest in their effect. As a result the Council has been surprised by the extent to which the Lisbon Treaty has, both directly and indirectly, affected the behaviour of the European Parliament. At best it has led to the Council having to adjust the way in which it manages its relations with the Parliament; at worst it has put it on the defensive as it has considered it necessary to take rearguard action to protect its prerogatives.

This chapter looks at a number of key areas in which the Parliament has gained powers under the Lisbon Treaty. They are grouped together under the headings of the Parliament's task of providing political oversight, its function as co-legislator, its budgetary role and its involvement in the Union's external policies.

2. POLITICAL OVERSIGHT

2.1. The Commission

The Lisbon Treaty strengthens the degree to which the Parliament exercises political oversight of the Commission. For the first time this relationship is made explicit by the statement that "*The Commission, as a body, shall be responsible to the European Parliament*" in Article 17(8) of the TEU. This general statement is a logical consequence of the existing provision allowing the Parliament to bring a motion of censure against the Commission, and thereby bring it down, as was so powerfully demonstrated by the downfall of the Santer Commission in 1999.

The procedures for the appointment of the Commission now also give the Parliament a stronger role, even if this change is relatively modest. The new provisions, by requiring the European Council, when it puts forward its candidate for Commission President, to take into account the election to the European Parliament, explicitly politicises the appointment.[1] This, combined with the subsequent "election" of the Commission by the European Parliament, provides the Parliament with an opportunity to bring a more high-profile and party political angle to the selection

[1] See *First Lisbon Study*, pp. 26-27, for a more extensive analysis of this elected Commission President.

procedure [Art. 17 (7) TEU].[1] Interestingly, the process this time round (which began with the European Council putting up the incumbent President Barroso in June 2009 - before the Lisbon Treaty was in force), turned out to be less about party political preferences within the Parliament itself (although these certainly existed) but reflected more the concern of the Parliament as a whole to consolidate its institutional role. This was for two reasons: firstly, the presentation by Barroso as President-designate to the Parliament in September 2009 of his programme containing something for everybody, and therefore in the end very little; there was no real choice of policy on offer for the Parliament; secondly, the Socialists although not officially supporting Barroso, offered no alternative candidate with the result that there was no political choice other than to vote for or against Barroso. He was endorsed with a very respectable majority.

If the early part of the process ended up neutralising a genuinely party political contest, the procedures associated with the appointment of the rest of the Commission served to put the emphasis on the institutional role of the Parliament. The updating of the 2005 Framework Agreement between the Commission and Parliament was, at the latter's insistence, discussed with Barroso as President-elect, and he was forced into a corner to accept in principle a number of new (and in some cases far-reaching) provisions as the price to pay for the Parliament's overall endorsement of his team.[2]

These new provisions, on which formal negotiations began subsequently under the guidance of Commission Vice-President Sefcovic, caused consternation in the Council, which considered that many of them went far too far. For example both the proposal that the President of the Commission involve the Parliament in decisions to reshuffle Commissioners' portfolios, and the suggestion that information on individual infringement proceedings be made available to the Parliament, would confer prerogatives on the Parliament for which the Treaties do not provide.

2.2. The Council

The Parliament has never had much of a hold over the Council. There is no provision in the Treaty which allows the Parliament to censure the Council, and the Council has proved to be stubborn in its refusal to accept greater oversight of its activities. Much of the pressure to do so arises from the late 1990s when the EU

[1] See *First Lisbon Study,* pp. 13-14, 27, for further debate on the possible politicisation of the Commission resulting from the EP's increased oversight powers.

[2] See European Parliament resolution of 9 February 2010 on a revised Framework Agreement between the European Parliament and the Commission for the next legislative term, P7_TA(2010)0009.

began to make serious moves towards developing a common foreign and security policy, for which the Council had primary executive responsibility, and over which the Parliament, to its great frustration, has very little influence.

The entry into force of the Lisbon Treaty has sharpened Parliament's keenness to hold the Council to account. In a discussion on 17 December 2009 on the implementation of the Lisbon Treaty, the Conference of Chairs of Political Groups decided to instruct the Secretary-General to ensure equal treatment and reciprocity with the Council for all administrative arrangements. Reciprocity (covering issues such as sharing of document and access to meetings) is now quoted regularly by the Parliament as a principle which should guide the relationship between the two institutions.

The Framework Agreement between the Parliament and Commission[1], together with Barroso's attempts to create a special relationship between the two by constant references to the "two Community institutions par excellence" has tended to pit both against the Council. Although this is in line with the tendency for the Commission to depend increasingly on the Parliament over the years, the shift in the respective prerogatives of the institutions as a result of the Lisbon Treaty could also draw the Parliament and Council closer together as they realise that they have interests in common, not least as the Council sheds its executive responsibilities to the External Action Service. In many other areas the Council and Parliament now act as co-legislators and share equal and joint responsibility for establishing the whole of the EU budget. Both depend on the Commission for legislative initiatives, and both rely on it for information in most international negotiations.

2.3. The European Council

With the Lisbon Treaty, the European Council becomes for the first time an institution in its own right and is chaired by a stable President appointed for a two and a half year term which is renewable.[2] The Parliament has for many years sought a place for its President at the table of the European Council. This has been resisted by Member States, although the President of the Parliament normally addresses the European Council before the start of its formal meetings, and has on occasions participated in dinner and lunch discussions. The Prime Minister of the rotating Presidency has also traditionally reported to the Parliament's plenary on the outcome of European Council meetings.

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[1] *Ibid.*

[2] Arts 13 & 15 TEU.

For the Parliament, the changes introduced by the Lisbon Treaty presented an opportunity also to change the relationship between the two institutions. It sought a more systematic presence by President Van Rompuy at its plenary sessions, and announced its intention to amend its own internal rules to allow parliamentary questions to be put to the European Council. In both cases the response to these initiatives has been negative. President Van Rompuy made it very clear from the outset that he would fulfil his Treaty obligation to report to the plenary after each European Council, but no more.

The argument for resisting any direct parliamentary oversight of the European Council is that it is not strictly speaking part of the institutional triangle. It cannot exercise any legislative function and its role is largely to give strategic direction to the Union. Parliamentary questions to the European Council could thus pose particular problems both on principle and practical grounds. The views of the European Council are expressed through the conclusions to its meetings. Beyond these, it cannot express any view, nor can the President do so on its behalf. Regular contacts between the presidents of the two institutions are a different matter since each is able to represent the interests of his institution in a less public manner. Hence the initiative to establish regular meetings between President Buzek and President Van Rompuy seems very useful.

2.4. Rotating Presidency

The fragmentation of the Presidency created by the Lisbon Treaty engenders both challenges and opportunities for relations between the Council and the Parliament. The fact that the Parliament has two stable interlocutors in the posts of President of the European Council and High Representative will certainly increase the consistency, and therefore probably the quality, of the dialogue. At the same time, neither of them, even with the best will, is likely to be able to devote as much time to the Parliament as it would wish. President Van Rompuy has also, as mentioned earlier, regarded himself in any case as constrained by the provisions of the Treaties on this point. The rotating Presidency will remain the Parliament's principal interlocutor on legislative issues, but political debates in plenary tend to focus on topical, high-profile and international issues. In the six months following the entry into force of the Lisbon Treaty, the Presidency has found itself by default speaking on behalf of the Council on many issues where the policy lead now lies with either Herman Van Rompuy or Catherine Ashton. Despite its best efforts, the rotating Presidency has not been able completely to hide the fact that it is no longer the Parliament's main interlocutor for many non-legislative issues.

2.5. Conclusion

Whilst the Lisbon Treaty has provided the Parliament with a few additional tools to assist it in overseeing the two other principal institutions, the overall nature of political control within the European Union has not fundamentally changed. Aside from its legislative role, the Council plays an important policy-making (or executive) function, which largely falls outside the scope of oversight by the Parliament, and parliamentary control of the Commission, although more developed than that of the Council, is less formalised than the relevant Treaty provisions would appear to suggest. In short, parliamentary oversight within the Union cannot, at present, be compared to the classical constitutional system which functions at the level of the Nation State.

3. CO-LEGISLATOR

One of the more consistent threads in the process of European integration has been the increasing involvement of the European Parliament in the legislative process. Successive treaty changes have modified the types of legislative procedures, culminating in the introduction in the Treaty on European Union in 1992 of the co-decision procedure, which in effect gave the Council and Parliament equal and joint responsibility for the adoption of legislation. The number of policy areas covered by this procedure was initially limited, but was subsequently extended by the Amsterdam Treaty (1997) and, to a lesser extent, by the Nice Treaty (2001). The Lisbon Treaty took this process much further by providing for about forty new policy areas to be covered by co-decision, now the "ordinary legislative procedure". In so doing, it has established this procedure as the principal method of legislating in the Union.[1]

Some of the policy areas now subject to the ordinary legislative procedure are very significant. They include provisions under Title V of the Treaty on the Functioning of the EU (TFEU): Area of Freedom, Security and Justice: border controls, legal immigration, judicial cooperation in civil matters with cross-border implications, judicial cooperation in criminal matters and police cooperation. Also covered are the market organisations under the Common Agricultural and Fisheries Policies (CAP and CFP), the common commercial policy, intellectual property rights and measures necessary for the use of the euro as the single currency.

[1] For a brief analysis of the type of internal reform that could aid the European Parliament in managing its increased legislative workload, see *First Lisbon Study, p*p. 8-9.

The co-decision procedure has in general been regarded as a success story, which partly explains why Member States were ready to agree to such a significant extension of its scope. It offers an opportunity to bring expertise from both Council and the Parliament jointly to the negotiations, and it is a process which is designed to facilitate negotiation and compromise. Indeed the success of the procedure has meant that a significant number of dossiers are settled at first reading as a result of deals struck between the Council Presidency and the rapporteur, prompting some to suggest that the Parliament should in fact prolong the process in order to try to secure a more favourable outcome at least at second reading.

It is too early to reach a considered view on the changes introduced by the Lisbon Treaty in this area, not least because the delay in appointing the new Commission resulted in a significant drop in legislative activity at the end of 2009 and beginning of 2010. However some preliminary observations can be made.

Firstly, the actual procedure itself remains largely unchanged. The fact that the Treaties contain concise and clear rules on how exactly co-decision functions has tended to limit the possibility for Parliament to seek to interpret or exploit the provisions to its own advantage. However, the possibility of linkage has always existed, and this could increase with the passage to co-decision of several important horizontal instruments, not least the Financial Regulation. Indeed the Parliament has already taken the line that the need to amend both the Financial Regulation and Staff Regulations in order to establish the European External Action Service (EEAS) gives it *de facto* a co-decision role on all aspects of the Service, on which formally it only has the right to be consulted.

Secondly, some of the policy areas which pass to co-decision have traditionally been among the more important for the Union. The application of co-decision to agriculture and fisheries in particular has led to much speculation as to what impact this could have on future CAP reform. The traditionally corporatist attitude towards agriculture across all the institutions could be challenged when Parliament comes to decide on proposals on future market organisation. Given the existing pressure from within the Parliament to rebalance the EU's expenditure towards more "modern" policy areas such as research and development, and with the prospect in any case of a more significant redistribution of CAP money to the Member States which joined in 2004 with effect from the next Multiannual Financial Framework in 2014, the extension of co-decision to the CAP could act as a catalyst in prompting further reform even if it is difficult at this stage to predict what form and direction this might take.

Thirdly, even if the co-decision procedure itself is clearly spelt out in the Treaties, the scope of its application is not always so obvious. In several of the new areas covered by co-decision, the Parliament has already made it clear that it has a much more generous interpretation of the Lisbon Treaty than either the Council or the Commission. The dividing line in Article 43 TFEU between the common organisation of agricultural markets and implementing measures is one example; another is the extent to which the Parliament has a role in the subsequent implementation of the (co-decided) rules which will set out the framework for the common commercial policy. Both these issues are closely related to the wider discussions which will be needed between the institutions on the horizontal rules and principles on implementing acts (Art. 291 TFEU).

Fourthly, the wide generalisation of the co-decision procedure should have the effect of bringing the Council as a whole into a more systematic and consistent relationship with the Parliament. In particular, it involves directly COREPER II meetings of the 27 ambassadors in co-decision dossiers for the first time (until now almost all such dossiers fell within the remit of their deputies in COREPER I). The relationship between the Parliament and Council will increasingly centre on the ordinary legislative procedure. This means that differences of view will largely be contained and resolved within a fixed framework of rules, holding out the hope of more stable and mature relations between the two institutions.

The Lisbon Treaty generalises what has been a largely successful procedure. The ordinary legislative procedure offers legitimacy to a negotiating process which brings together expertise from both the Council and Parliament, and has therefore successfully guaranteed the quality and acceptability of EU legislation. The prospect of these benefits now being extended across a wider range of policy areas is almost certain to be to everyone's advantage.

4. BUDGETARY ROLE

The Parliament's powers in the area of the budget are longstanding, dating back even before the first direct elections in 1979. It has therefore had plenty of experience in using these powers to considerable effect, not least when it rejected the 1980 draft budget, prompting a minor crisis between the institutions as the Council in particular was confronted with the reality of a Parliament with new powers and the willingness to use them.

Prior to the Lisbon Treaty the procedures for establishing the annual budget were based on a distinction between "compulsory" expenditure (i.e., that which flows

directly from existing commitments), and "non-compulsory" or "discretionary" expenditure. The Council had the final word on compulsory expenditure and the Parliament on discretionary expenditure.

The Lisbon Treaty significantly changes these procedures, removing the distinction between the two types of expenditure and introducing a Conciliation Committee which will provide a mechanism for managing negotiations between the two institutions. In practice this means that in the future the annual budget will be co-decided (Art. 314 TFEU). A further significant change is the creation of a new legal basis for the Multiannual Financial Framework (MFF — previously known as the Financial Perspective) which is agreed unanimously by the Council after obtaining the consent of the Parliament (Art. 312 TFEU).

It will only be possible to make an assessment of the new budget procedures once an entirely new budget cycle has been completed. However, some preliminary observations can already be made.

Firstly, the Parliament has consistently stressed that its powers are strengthened under the provisions of the Lisbon Treaty. At first sight, this is not obvious. Under the previous arrangements Parliament had the final word over all non-compulsory expenditure which over the years had grown to about 60% of the total budget. The Lisbon Treaty provides for shared responsibility by the Council and Parliament for the whole of the budget, although the very marginal advantage it gives to the Parliament at the very end of the annual budget process bears witness to Parliament's constant struggle in the treaty negotiations to have the last word (Arts 310 & 314 TFEU).

Secondly, since the late 1980s the annual budget has had to comply with the MFFs. These have traditionally been the subject of particularly difficult negotiations, culminating in a degree of horse-trading at the level of Heads of State or Government. Although prior to the Lisbon Treaty the results of these negotiations had subsequently to be translated into an Inter-Institutional Agreement, the scope for the Parliament to reopen the figures was extremely limited; so far Parliament has not seriously challenged the collective will of the European Council. The creation of a specific legal base for the MFF may well draw the Parliament into the negotiations at an earlier stage, making it more difficult for the Council (or European Council) to strike a prior deal on its own. The fact that the Parliament is suggesting that the current duration of seven years covered by the MFF should be reduced to five (which would be possible under the Treaty) in order to align it with the institutional timetable looks like an attempt to bring wider political pressure to bear on the negotiations.

Thirdly, the new provisions under the Lisbon Treaty will inevitably have an impact on a number of other practices and procedures in the budgetary area, many of which have never been fully codified or formalised. One such administrative arrangement is the so-called "gentlemen's agreement" according to which neither the Council nor the Parliament calls into question the other's administrative budget, thereby ensuring budgetary autonomy. The change in the dynamics of the budget negotiating process as a result of the introduction of a co-decision type procedure means that the "gentlemen's agreement" is likely to be revisited. The main impetus for doing so is coming from the Council, which considers that it has little to lose in allowing further oversight of its own administrative budget, and potentially much to gain by questioning the rationale behind the (much larger) Parliament budget.

It is difficult to see where these developments may end up, but with the possible exception of the Multiannual Financial Framework, the major battles of the past are unlikely to be repeated. Control of the purse gives Parliament strong influence over policy and to some extent a lever over the other institutions. But the budget is one of the first areas where the Parliament gained significant power, and this is now firmly embedded in both law and practice. The Lisbon Treaty, although introducing apparently significant changes to the budget procedure, is likely in the long-term to do little more than consolidate an accepted and well-established process.[1]

5. OVERSIGHT OF EXTERNAL POLICIES

The Parliament has always considered that it lacked an appropriate degree of oversight in the whole area of the Union's external policies, not least in the Common Foreign and Security Policy. The Lisbon Treaty addresses some, but certainly not all, of Parliament's concerns.

For the first time the Parliament is given a significant role in the formulation of the Union's common commercial policy, as the main instruments setting out the framework for implementing the policy pass to co-decision (Art. 207 TFEU). It also gains important new powers in the area of international agreements, of which a very significant number are from now on subject to the consent of the Parliament [Art. 218 (6)(a) TFEU]. This has had some immediate practical consequences. The Parliament has held up ratification of an agreement with South Korea (which was negotiated and initialled before the entry into force of the Lisbon Treaty) primarily because of concerns that the text contained insufficient safeguards to protect Euro-

[1] For a similar conclusion see already *First Lisbon Study, p.* 11.

pean industry. Even more politically sensitive is the proposal to allow the Turkish-occupied part of Cyprus to trade directly with the EU. This has been blocked by Cyprus, but passes to co-decision under the Lisbon Treaty provisions, removing Cyprus' veto and giving the Parliament direct influence over the matter.

In general, in the few months since the entry into force of the Lisbon Treaty, the whole area of international agreements has been the scene of a series of skirmishes between the three institutions which have in some cases had implications which go well beyond the institutions themselves. In February 2010 the Parliament, with a substantial majority, voted down an agreement on the transfer of data to the US for the purposes of the Terrorist Finance Trafficking Program (known as the "SWIFT" agreement), primarily because of concerns about data protection. The impact of the vote was considerable, with the US subsequently acknowledging that in the future they would need to devote more attention and resources to the Parliament.

In this area more than any other, the Parliament regards the Treaty provisions as a starting point rather than the end, and has been active in attempting to exploit its new powers to extend its prerogatives even further. One example is the issue of the authorisation for the opening of negotiations on an international agreement. According to the Treaty, this is the sole prerogative of the Council, upon a recommendation of the Commission or (in the case of exclusively CFSP agreements) the High Representative [Art. 218 (2) & (3) TFEU]. At the same time the Council can (and usually does) adopt negotiating directives to guide the negotiator. The Treaty gives no role to the Parliament at this stage of the process, but the latter has insisted that if it is expected to endorse the outcome of the negotiations, then it needs to have some influence over the content from the outset. The Council's response to this has been simply to recall the provisions of the Treaty. The Commission, which in most cases has the responsibility for drawing up draft negotiating directives, has already demonstrated a much greater degree of openness. For example, when the Commission put forward a draft mandate for a revised SWIFT agreement in April 2010, it ensured that the Parliament not only had sight of it, but also the opportunity to debate it. In practice, the Member States sold the pass on this when they signed the Treaty.

As far as the negotiating process is concerned, the Treaty provides that the Parliament "*shall be immediately and fully informed at all stages of the procedure*" [Art. 218 (10) TFEU]. How exactly this will happen is largely a matter for the Commission, and will be an important part of the new Framework Agreement. But some in the Parliament consider that they have a right to much more than information, and are putting pressure on both the Commission and Council to secure partici-

pation by the Parliament both in the negotiations themselves and in EU internal coordination meetings. In doing so, the Parliament looks to be more inspired by the example of the US Senate than the procedures in most EU Member States. However practice in the US does distinguish between the formal powers of congressional oversight and the practice of regular informal briefings which are provided to targeted congressmen during the course of the negotiations.

The demands of the Parliament in general go further than the practice of national parliaments within Europe. They would, if accepted, also constitute a radical departure from current practice whereby the involvement of MEPs is limited to international conferences, and then only with the agreement of the Council and Commission, and subject to respect for some basic ground-rules. Until now there has been a clear separation of the role of the executive and legislature, and the proposal for a rather different approach raises quite significant issues of principle as to how a Parliament can have a stake in the outcome of international negotiations, and yet also play the role of impartial assessor.

Parliament's role in the SWIFT affair highlighted another aspect which rises in the context of the Lisbon Treaty: that of access to confidential information. The Council has already accepted the need for the Parliament to be given access to all parts of an international agreement — including classified annexes (as was the case with the SWIFT agreement) — in cases where it is being asked to give its consent. But Parliament is also seeking a wider and more systematic access to classified information as part of its role in ensuring parliamentary accountability in its widest sense. Much (although not all) of this information relates to CFSP, which is an area where implementing the provisions of the Lisbon Treaty has so far proved particularly time-consuming.

The Lisbon Treaty provides no new direct powers to the European Parliament in the area of CFSP. If there were any doubt about this from the Treaty provisions themselves, Declaration 14 annexed to the Lisbon Treaty is unambiguous: "*the provisions governing the Common Security and Defence Policy do not give new powers to the Commission to initiate decisions nor do they increase the role of the European Parliament*".

Yet such broad declaratory statements cannot conceal that as a matter of fact the Lisbon Treaty provides considerable scope for the Parliament to extend its reach over CFSP. One of the key levers at its disposal is the decision to establish the European External Action Service (EEAS). Although it is only formally consulted on this decision, in reality it has the power to block (and therefore also to influence considerably) the establishment of the Service. As already mentioned, this stems

primarily from the fact that two important legislative instruments (the Financial Regulation and Staff Regulation) necessarily require amendment in order for the EEAS to function. Both pass to co-decision under the Lisbon Treaty (Arts 322 & 336 TFEU). From the outset, the Parliament, which has traditionally been very persistent in its desire to carve out a role in CFSP, has been clear that the establishment of the EEAS will be a package (i.e. that it will only give a view on the draft decision establishing the EEAS once a satisfactory agreement has been reached on the two legislative instruments).

A significant part of the negotiations on the EEAS (on which the Commission and Council reached agreement relatively quickly, despite some significant initial differences) focused on its position and structure (and in particular the call from the Parliament that the EEAS budget be integrated within that of the Commission, whereas the position of Member States has always been that it is an independent body with a separate budget). This exposed a major difference of principle. However the focus of negotiations subsequently turned to the more general issues of parliamentary accountability, including the provision of information to the Parliament, *ex ante* consultation of the Parliament before the launching of ESDP missions, and oversight by the Parliament of senior appointments.

However, the prospect of the Parliament being seen to hold up one of the most vaunted aspects of the Lisbon Treaty has no doubt assisted some MEPs in putting the issue within a wider perspective, as the final result indicates. Some were already openly backing their own governments' view on the importance of adequate participation by Member State diplomats in the EEAS, and the need for "geographical balance".

It is nevertheless almost certain that the Parliament will gain some new powers of oversight in the area of CFSP. If it chooses to place those powers at the disposal of the Union as a whole, to avoid micromanaging foreign policy, in a genuine desire to achieve a more effective and more accountable CFSP (which entails acknowledging the continuing specific nature of CFSP, and the limits of Parliament's own role set against that of national parliaments), then the provisions of the Lisbon Treaty in this area will fulfil many of the expectations which have been placed in them.

6. CONCLUSION

The three most important innovations in the Lisbon Treaty (and in the Constitution which preceded it), are the strengthening of the European Council, the revision of qualified majority voting, and the raft of new powers which have been given to the

European Parliament. As stated in the introduction, the focus was always much more on the former than the latter. The nature and scope of the Convention's work meant that it was difficult for it to engage at the time in detailed analysis of the implications of the Parliament's new powers, with the result that the Council has given the impression of being repeatedly surprised at the extent of these new powers, and has therefore found itself constantly on the defensive. The reaction of the Commission, by contrast, has been more limited.

If the Parliament is astute, it will use the new provisions of the Lisbon Treaty to carve out a new and significant role for itself. But this will require a solid understanding of its proper role within an institutional structure which was designed with its own checks and balances. It requires the Commission to be more willing to take a stand when its own powers and prerogatives are threatened; if the Commission can no longer play the role of impartial arbiter of the common European good, it runs the risk of losing influence within the overall institutional structure. It also means that the Council will need to embrace more willingly the new powers which the Lisbon Treaty attributes to the Parliament rather than giving the impression constantly of trying to recover what has already been granted. That does not mean complete passivity; like the Commission it must be ready collectively to uphold its prerogatives when challenged, but it needs to choose carefully, and with greater discrimination, where to take a stand, and then to do so with vigour.

If the Parliament pushes too far (its claim to have an active participation in international negotiations is an obvious example), it risks confusing the distinction between the legislative and executive authorities. This could upset the delicate institutional balance, and provoke a backlash from the other institutions (not least from the European Council itself).

THE COMMISSION

1. INTRODUCTION

The Commission is one of the few areas where the Lisbon Treaty introduced a genuine departure from the failed Constitutional Treaty. Following the Irish referendum, the plans for a reduced Commission were abandoned in favor of a Commission composed of one Commissioner per Member State.[1] This alters the terms of the debate triggered by the Treaty's implementation. In addition, several other reforms retained by the Lisbon Treaty are likely to — and can to some extent already be observed to — considerably impact upon the Commission's legitimacy and weight.

First of all, it must be underlined that the abandonment of a smaller College set-up does not amount to a complete overhaul of the situation as it would have been under the Constitutional Treaty. Indeed, while the Constitutional Treaty prescribed a reduced Commission, it did so subject to a system of equal rotation between the Member States. Hence, the difference between the two treaties lies in the number of Commissioners, but not in the equal representation of the Member States. Under the Constitutional Treaty equal representation was guaranteed "in time" through rotation, whereas under the Lisbon Treaty such equality is established on a permanent basis by having one Commissioner per Member State. Clearly, this does have an impact on the format of the Commission, which undoubtedly becomes more difficult to manage.

The Lisbon Treaty has however preserved several other reforms introduced by the Constitutional Treaty which are likely to affect the Commission. Some concern the Commission itself (the new appointment procedure of the President of the Commission[2]). Others relate to the other institutions (the strengthening of the European Parliament's powers, the creation of the President of the European Council) and thus affect the institutional framework within which the Commission operates.

Within this new context, the Commission is essentially confronted with one major challenge. How can it recover its legitimacy which has, according to most observers, diminished during the last 20 years?

Before envisaging some possible recommendations, it is essential to identify the structural causes of this evolution. Neither the equal representation of the

[1] Note however that the Treaty text still prescribes the reduction of the number of Commissioners to 2/3 of the number of Member States by 2014. Art. 17 (5) TEU itself however foresees the possibility to revise this by means of a European Council decision by unanimity. Hence the Member States have committed themselves to adopt this decision to ensure the Irish yes, but this solution has not been unanimously accepted.

[2] See *First Lisbon Study*, pp. 26-27.

Member States within the College, nor the behavior of the successive Commission' presidents, however good or bad, are part of them. Rather, four elements (at least) seem to have played a key role. Firstly, the areas of EU interventions have progressively been extended. They touch now much more upon sensitive topics (for example taxation, social security, internal security). Secondly, the EU itself has been steadily enlarged, and has become much more heterogeneous. In such a context, the definition of the common interest has become considerably harder. Thirdly, the powers of other institutions (especially the European Parliament) have been increased — sometimes directly in their relation with the Commission — by successive Treaty revisions. Fourthly, the increased call for democratization of the European Union in the early 1990's has undermined the Monnet-style output legitimacy traditionally relied upon by the Commission.

The debate concerning the legitimacy of the Commission generally turns on three topics: its political representativeness, its ability to deliver, and its place in a moving institutional square/quadrangle. This can be illustrated by various examples drawn from the Barroso I and early Barroso II Commissions, without however going into detail on this already extensively debated question.

2. POLITICAL REPRESENTATIVENESS

2.1. The Two Faces of a Fundamental Question

In the course of the last decades, EU actions have multiplied, and therefore become more prone to conflict. The EU, which was in its first decades largely (and mistakenly) perceived by the public opinion as a "technical" project, has progressively turned into a "political" one, interfused with increased national and ideological oppositions. In this new context, the Commission was increasingly contested from various often opposite sides as lacking democratic legitimacy. Indeed, in comparison with the elected European Parliament or the Council, composed of elected governments, it resembled more a "technocratic" institution.

During the last Treaty revisions, this has created a tendency to increase the Parliament's role in the nomination of the Commission, finally resulting in the new Lisbon Treaty regime whereby the candidate for President of the Commission is elected by the European Parliament [Art. 17 (7) TEU]. However, this election procedure combined with the Commission's responsibility towards the European

Parliament [Art. 17 (8) TEU] also increases the former's dependency on the Parliament. Clearly, recouping a strong legitimacy is all but an easy task.

Moreover, an additional problem has compounded the first one. Indeed, during the last two decades, two cumulative types of enlargement have transformed the EU, i.e. the increase in its membership and the extension of its areas of competence. As a result, all Member States experienced a loss of influence. Consequently, since the Amsterdam Treaty negotiations, their respective weight in the different institutions became a considerably more sensitive issue.

This eventually resulted in the new Lisbon Treaty regime. At the European Council of 18 and 19 June 2009 it was decided that "*provided the Treaty of Lisbon enters into force, a decision would be taken, in accordance with the necessary legal procedures, to the effect that the Commission shall continue to include one national of each Member State*" (conclusions, point 2). Just as a reduced College would have caused the small Member States to feel that the Commission fails to properly recognize all Member States, the Lisbon solution maintains —and even amplifies — the feeling in the large Member States that the Commission lacks demographic legitimacy. Once again, recovering a strong legitimacy proves a challenging matter. An additional problem caused by the equality of the Member States in the Commission's composition is that it accentuates a tendency to consider the Commissioners as representatives of their Member State.

By comparison, it is useful to recall the early days of the Commission. From the 1950s onwards, the legitimacy of the Commission did not come from the equal representation of the Member States. On the contrary, the large Member States had in fact twice as many Commissioners as the smaller ones.[1] Rather, the Commission derived its legitimacy mainly from its ability to define the common interest of the Member States.

2.2. The Decline of Voting

Anyway, the recurring malaise about the Commission's political representativeness has obviously become a barrier to voting. Despite the perspective held by some that equal representation of the Member States increases the input legitimacy of the

[1] Seen from another angle, the big Member States had two thirds of the commissioners.

Commission[1], the workings of Barroso I and early Barroso II seem to indicate the reverse. Indeed, under Barroso I voting by simple majority no longer took place within the Commission[2] because it was felt that no legitimate vote could be held in a system where a majority of Member States representing only a minority of the population can outvote the rest.

2.3. Increased "Nationalization"

In addition, this legitimacy based on the Member States being represented by "their Commissioner" seems to have backlashed already at the start of Barroso II where the partly incorrect yet necessary myth of a Commission somewhat *independent* from national conflicting interests was brutally shattered by the painful political show surrounding the nomination of the Frenchman Barnier as the Commissioner for Internal Market and services (including financial services). Indeed, the wholly inappropriate triumphant statements by President Sarkozy that the British had lost the competition for economic top jobs and that Barnier would have the mandate to recast the Anglo-Saxon model of capitalism, severely damaged the image of independence of the Commissioners.

Likewise, Barroso's response of appointing a British Director-General Jonathan Faull at the top of DG Internal Market as counterbalance further reinforced the view that Commissioners are mere servants of their national interests. According to some media sources, the UK government had lobbied for a British Director-General, but contested M. David Wright, the original nominee, as being too eurocratic[3]. Even more strikingly, this appointment as a sort of guarantee for the City's interests discredits also the independence of permanent senior Commission officials.

Even if the independence of Commissioners is subject to nuance and in reality amounts to their willingness to seek a compromise between their national and the

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[1] According to this perspective, the presence of a commissioner from *each* Member State increases the "representativeness" of the College and thus indirectly its legitimacy. However, if representativeness of the Commission is judged from the perspective of the numerical weight of the Member States in terms of population, the current constellation (like the equal rotation mechanism) might be thought to fall short and thus lack legitimacy. In the *First Lisbon Study*, it was already suggested that such lack of representation could lead to a lack of national support from the "key" Member States, thereby seriously affecting the clout of the Commission. Obviously, the main loyalty of a Commissioner should lie with the Community's interest, but political reality teaches that such Community interest will be much easier to sell to the Member States and its citizens if they "have a man in".

[2] Art. 250 TFEU (old Art. 219 EC).

[3] http://www.euractiv.com/en/financial-services/brit-quits-commission-after-london-snub-news-493766?utm_source=EurActiv+Newsletter&utm_campaign=4b0387fd76-my_google_analytics_key&utm_medium=email (updated 12 May 2010).

European interest, it remains an important general principle which is crucial for the Commission's legitimacy and authority.

2.4. A Possible Drift Towards Intergovernmentalism in Foreign Relations

This threat of increased "nationalisation" could become greater in the field of external relations. One of the most essential topics in the lengthy debate between the Council and the European Parliament on the creation of the European External Action Service was the control over the external dimension of Community policy areas (for example development, Echoaid, and especially trade) and over the Commission's delegations. The final compromises reached are complex and the jury is still out on this matter[1]. Likewise, the functioning of the High Representative/ Vice President of the Commission awaits further evaluation[2].

3. ABILITY TO DELIVER

Traditionally the Commission's *ability to defend the common interest of the Member States* has provided the main source of its legitimacy. Hence, the impact of the structural changes identified above (enlargement, extension into sensitive policy areas, increased powers of the other institutions and democracy demands) on these "functional" sources of legitimacy needs to be examined. However, given the multifaceted nature of the Commission's assignment, this argument needs to be subdivided in relation to the *diverse* functions exercised by the Commission, paying special attention to the experiences of the last years.

3.1. Policy Maker: Initiator of Policy Development and "Motor of Integration"

Despite fears to the contrary, the Lisbon Treaty has retained and reaffirmed the Commission's quasi-exclusive "*right of initiative*" to propose legislation and thus theoretically places it at the vanguard of policy development.[3] Nonetheless, if the

[1] See chapter on External Action.

[2] Interestingly, it appears that the media failed to notice that Mrs Ashton did not take the oath which in principle all members of the Commission take before the Court of Justice of the European Union, by which they undertake "*to be completely independent in the performance of (their) duties, in the general interest of the Communities; in the performance of these duties, neither to seek nor to take instructions from any government or from any other body*".

[3] Art. 17 (2) TEU.

Commission possesses the quasi-monopoly over the *formal* right of *legislative* initiative, it has to share the right of *political* initiative with the European Council[1], the Council[2], the European Parliament[3], and since the introduction of the Citizens' initiative, the organized civil society[4], who can request it to draft a proposal[5]. These various actors, and in particular the European Council, have increasingly exercised this right of political initiative. Most likely, the installation of a semi-permanent President of the European Council "at the heart of the Brussels' institutional scene" will further reinforce the European Council's position and attempts to take over the political initiative from the Commission[6].

Still, this quasi-monopoly to formally initiate legislation endows the Commission with the power to decide *if* it responds to a request for legislative action from the other institutions, and if so, *how* it will design the particular measure. Hence, when drafting legislative proposals, even if on request, the Commission retains considerable power to *shape* the particular measures and thereby indirectly steer the policies developed.

With regard to its power to influence the "big picture" and engage in strategic policy development, the Commission has several avenues at its disposal to do so. In addition to its right of legislative initiative, the Commission is expected to set the legislative agenda for each coming year (so-called work programme) and has the prerogative to deliver opinions on any EU matter. Well-known examples of such successful general policy strategies launched by the Commission in the past are the Single Market and the EMU, and more recently the climate and energy package.

However, despite these powerful instruments at its disposal, the Commission's influence as a *strategic policy developer* is generally thought to have decreased relative to the other institutions from the 1990's onwards. Indeed, over the last decades the Commission has shown much more reluctance to exercise its right of initiative.[7]

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[1] Art. 15 (1) TEU: "*The European Council shall provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof*".

[2] Hence the Council has increasingly used Art. 241 TFEU (old Art. 208 EC) on the basis of which it "*may request the Commission to undertake any studies the Council considers desirable for the attainment of the common objectives, and to submit to it any appropriate proposals*", as well as the adoption of resolutions and opinions to pressure the Commission into undertaking specific legislative action.

[3] Art. 225 TFEU which allows the EP to request the Commission to submit appropriate proposals on matters where it deems that Union action is required to ensure the implementation of the Treaties.

[4] Art. 11 TEU.

[5] Note that the Commission can refuse but will have to explain why. See chapter on Citizen's Initiative.

[6] See chapter on the Presidencies' triangle.

[7] Both Santer and Barroso occasionally presented the reduction of the Commission's propositions as a positive objective *per definition*.

In addition, during the Barroso I Commission, the wish to forego confrontation in favour of consensus often resulted in comparatively non ambitious legislative proposals which were beforehand stripped from potentially controversial elements.[1] The drafting of the climate and energy package was quite illustrative of this approach.

Admittedly, for the Barroso I Commission, the *context* of lingering uncertainty as to the fate of the "Constitution" after the negative referenda, of learning to swim with an enlarged Union as well as of various global crises (commodity crisis, financial crisis,...) did not always facilitate ambitious projects. Be as that may be, from the perspective of the capitals, the Barroso I Commission further lost credibility precisely by reason of its failure to respond adequately to the financial and economic crisis.[2]

If the Commission's role as strategic policy developer is generally thought to have decreased relative to the other institutions, this evolution could, however, be seen as a logical step in the maturing of the Union's institutional set-up. In Monnet's day, the lack of trust in the political process in a traumatized post-war Europe arguably justified his strong reliance on the technical expertise and performance of the Commission as a basis for the legitimacy of its decisions. However, the already tenuous credibility of the argument that its decisions were mere "technical" translations of the objectives decided upon by the founding fathers and set out in the Treaty became more and more unsustainable as the European actions wandered off into more politically sensitive policy domains. In parallel with this evolution, the Union's overarching "integration"-objective lost some of its unconditional character. Indeed, in the early 1990's the calls to revalue the "diversity" part of the "Unity in diversity" motto became inescapable.

Thus, in today's Europe it might make sense that a non-directly elected body like the Commission should not be entrusted with genuine political powers solely on the basis of its technical expertise. From this perspective, the gradual loss of political initiative to the elected "political" institutions of the EU can be seen as a natural evolution. Similarly, the emancipation of the European Parliament, while limit-

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[1] Thus, rather than leaving the national interest-compromise to the Council and fulfilling its role of guardian of "the general interest of the Union", the Barroso I Commission is sometimes criticised for having curtailed its own initiatives by seeking the lowest common denominator. Arguably this attitude could also partially be explained by the desire of the Commission to avoid being by-passed by a first reading agreement between the Council and the European Parliament which would rob it of any influence on the content of the resulting legislative measure.

[2] See the survey conducted by Piotr Maciej Kaczynski, *The European Commission 2004-09: A Politically Weakened Institution? Views from the National Capitals,* EPIN Working Paper No. 23, May 2009, at http://www.ceps.be/book/european-commission-2004-09-politically-weakened-institution-views-national-capitals; See also: *The next Commission: doing more and better,* EPC Challenge Europe Issue No. 19, June 2009, at http://www.epc.eu/PDF/Ce19.pdf, p. 15.

ing the Commission's powers to some extent, reflects a maturing of the traditional institutional triangle.

This should not mean that the long-term vision on the general interest of the Union which a "technocratic" Commission was able to bring to the political table is lost. The Commission remains in charge of translating the "grand political statements" in concrete policy measures, an exercise for which the other institutions remain highly dependent on its expertise, thus granting it substantial influence in the process.

3.2. Mediator or Facilitator

The Commission's reduced strategic policy making role should not necessarily be interpreted as a loss in terms of efficiency. Its defence of the common interest does not solely depend on its capacity to take the political lead but rather on its ability to act as a "broker of interests" who ensures that *all* interests can interact at the European level in a balanced manner.

Given its involvement in all stages of the legislative process, providing it with a thorough insight in the strategic considerations of the various institutions, the Commission finds itself in a unique position to mediate between these different institutional actors.[1] Moreover, in view of its relative independence from national and party-political influence, it is traditionally perceived as possessing the neutrality needed to act as an "honest broker".

In particular its right of legislative initiative endows the Commission with a strategically important instrument to conduct this brokering act and ensure that all interests are equally taken into account. Aside from the ability to reconcile various interests when shaping its legislative proposal, it can moreover exercise substantial pressure on the negotiating partners by means of its right to withdraw or modify its proposal. However, the rise of the ordinary legislative ("co-decision") procedure has encroached upon this power by preventing the Commission from withdrawing its proposal once it has become subject of a conciliation between the European Parliament and the Council. Moreover, the increased practice of the Council to seek agreement with the Parliament during the first and second reading of such a co-decision procedure clearly sidelines the Commission since it can hardly hold on to its proposal if both institutions have agreed on a different text. In addition, the increased accountability of the Commission towards the European Parliament has in some matters created the image — at least in the eyes of the Council — of

[1] Peterson, J. and Shackleton, M., *The Institutions of the European Union,* 2nd edition (Oxford, Oxford University Press, 2006), pp. 152-153.

a Commission acting as the spokesman of the European Parliament rather than an "honest broker".[1] Similarly, the consultation of the Member States — even before adopting a legislative proposal — has sometimes given an analogous feeling to the European Parliament.

It could thus be argued that also in its role of broker, the Commission has lost some of its influence. During the last years, at least in some debates such as the notorious Services Directive, the European Parliament has even taken over the role of mediating between the diverging Member State interests within the Council. In addition, the lack of genuine disagreement between the centre-right European Parliament and Council seems to have further reduced the need for a Commission's mediation between the institutions.

Despite these evolutions, the Commission's "oiling" role in the legislative process, even in a co-decision procedure, remains important. Its unmatched expertise and permanency simply make it an indispensable actor upon whom both the European Parliament and the Council rely to support the preparation of their legislative work as well as to streamline their negotiations. In view of this crucial task, it seems however preferable to advise against a further politicisation of the Commission which would jeopardize its independence.

3.3. Day-to-Day Manager

In a more day-to-day fashion, the Commission fulfils important "routine tasks" such as the administration of common policies, the organization and supervision of the implementation of EU legislation. However, the increase in policy areas to be dealt with has forced the Commission to "delegate" certain of its management tasks to agencies. Furthermore, the implementation of several of its core policies such as agriculture and structural funds has been increasingly decentralised.

In addition it acts as a legal guardian of EU law by filing infringement procedures against failing Member States and by instigating competition law inquiries of suspect economic actions. In respect of its core competence of competition policy, the Commission has arguably lost some power by reason of the decentralisation following Regulation 1/2003.[2] Yet during the recent financial and economic crisis it firmly established its authority in the area of State aid law.

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[1] Jacqué, J.-P., The Principle of Institutional Balance, *Common Market Law Review*, Vol. 41, No. 2, 2004, p. 390.

[2] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, *OJ* L 1, 4.1.2003.

Another non-negligible component of the Community's tasks is the external representation of the EU in several areas, the most far-reaching being external trade policy.[1] However, this role is certainly made more complex by the Lisbon Treaty, which has introduced new actors in that field[2].

Despite the necessity to delegate certain of its management tasks in the ever growing number of policy areas entrusted to it, the Commission with its unmatched technical in-house expertise thus still plays a pivotal role in managing these increasingly complex policy areas. Likewise its power in the enforcement of the competition law rules provides it with an important instrument to pursue the objective of a competitive internal market. Clearly, the legitimate exercise of both roles requires a sufficiently independent Commission.

To conclude, the observed "decline of the Commission"[3] is thus mainly based on the diminished action of the Commission as a *strategic policy maker or initiator*. However, if more recognition is given to the Commission's core tasks of acting as *broker* between the various interests and of taking on the *day-to-day management* of the Union's interests and policies, this does not seem quite as problematic. It does however require the Commission to reaffirm its traditionally relatively independent status

4. EVOLVING WEIGHT IN THE INSTITUTIONAL QUADRANGLE

Finally, the Commission's weight in the Union has been greatly influenced by the changes in powers and authority of the other institutions in the rectangle.

4.1. European Parliament

The traditional relationship between the Commission and the European Parliament has gradually changed over the decades. Indeed, in line with its growing influence, the European Parliament has little by little modelled its relationship on conventional cabinet-parliament interactions. It has continuously aimed to extend its *powers of scrutiny* over the Commission. Already at the start of Barroso I, it became clear how serious the European Parliament is about asserting its

[1] Note that since the Lisbon Treaty the High Representative for Foreign Affairs and Security Policy also wears the hat of Vice-President of the European Commission.

[2] See chapter on Foreign Policy.

[3] Jacqué, J.-P., Le traité de Lisbonne : une vue cavalière, *Revue trimestrielle de droit européen,* Vol. 44, No. 3, 2008, p. 458; See references in Peterson, J., Conclusion: where does the Commission stand today?, in Spence, D. (ed.), *The European Commission,* 3rd edition (London, Harper, 2006).

control over the Commission. Indeed, when Barroso took the ill-judged decision to keep supporting his nominee Commissioner Buttiglione who came under fire following some particularly conservative statements on homosexuality and women, the European Parliament refused to give in. This led to a somewhat embarrassing situation from which Barroso was ultimately saved by the tardy withdrawal of the Italian Commissioner.

The Lisbon Treaty has formalized the need for Parliamentary approval of a new Commission President to be nominated by the European Council in line with a majority in the European Parliament[1]. In addition, the European Parliament was formally charged with approving the proposed College of Commissioners before it can take office. Once again the European Parliament exercised its power to the fullest during the hearings of the nominees for the Barroso II College by seriously criticising the perceived incompetence of the Bulgarian candidate Jeleva leading to her pull-out, and by imposing a "retake-hearing" on a couple of other candidates; such as the Dutch ex-Commissioner Kroes.

The new draft Framework Agreement on the relations between the European Parliament and the Commission further strengthens these powers of scrutiny. For one, when the EP requests the Commission President to withdraw his confidence in an individual commissioner, he is obliged to take this into serious consideration and explain any decision to the contrary. Moreover, the practice of requiring individual Commissioners to appear before the Parliament and its committees is likely to be formalized through the introduction of a Question Hour.[2]

Likewise, the traditionally strong alliance between the European Parliament and the Commission in the legislative process has gradually been eroded. The expansion of the *co-decision* procedure has clearly contributed to this changed dynamic by allowing the European Parliament to deal directly with the Council on the basis of equality rather than to depend on the Commission as the interlocutor with the Member States to defend the Parliament's interests. As was illustrated by the Services Directive's saga, the European Parliament has at times even replaced the Commission as the power-broker between the Member States. Moreover, the increased practice of the Council to seek agreement with the European Parliament in the first and second reading clearly sidelines the Commission since it is much

[1] See *First Lisbon Study*, pp. 26-27.

[2] European Parliament resolution of 9 February 2010 on a revised Framework Agreement between the European Parliament and the Commission for the next legislative term, P7_TA(2010)0009. Other important victories for the European Parliament include the principle of equal treatment for the EP and Council, especially in respect of access to meetings and the provision of contributions or other information (in particular on legislative and budgetary matters), as well as the extended involvement of the EP in international negotiations.

more difficult to hold on to its proposal if both institutions have agreed on a different text.[1] Furthermore, the Parliament's right to request the Commission for a legislative proposal on a particular matter is likely to be strengthened by a 3-month timeframe for the follow-up to be included in the Framework Agreement. [2]

The original relationship between the Commission and the European Parliament has gradually been transformed into one characterized by an increasing dependency on the Commission's side. From the perspective of democratic legitimacy, this evolution has both positive and negative consequences. While acknowledging the inevitability of this move towards more political accountability within a maturing EU institutional framework, sight should not be lost of the threat it can pose to the Commission's traditional independence from national as well as party-political lines allowing it to credibly pursue the "general interest of the Union". Furthermore, from a purely functional point of view, the European Parliament is badly equipped to micro-manage the administrative and representative activities of the Commission. Hence, when strengthening its own position at the expense of the Commission's weight in the institutional rectangle, the European Parliament should be careful not to undermine its own overarching "integrationist and supranational" project by disarming a powerful ally in this quest. Within that context, for example, the European Parliament's demand for its President to be invited to the weekly meetings of the Commission College reflects more an outdated power-grabbing than a balanced interpretation of its role as a political legislative body.

4.2. Council

The evolution of the balance of power between the Commission and the Council is less clear.

On the one hand, the High Representative of the Union for Foreign Affairs and Security Policy, with his/her split personality, can be a source of weakening of the Commission. Although the impact of the new figure of the High Representative on the relationship and balance between the Commission and the Council will only become clear over the next few years, a strengthening of the position of the Commission President might prove necessary to provide counterweight against this potentially powerful figure. More generally, the Council has tried to steer the policy choices of the European Union more actively by making full use of its

[1] See in that sense, Jacqué, J.-P., The Principle of Institutional Balance, *op. cit.,* p. 390.

[2] European Parliament resolution of 9 February 2010 on a revised Framework Agreement between the European Parliament and the Commission for the next legislative term, P7_TA(2010)0009.

right to request the Commission to make appropriate legislative proposals[1] as well as its right to adopt opinions and resolutions capable of putting pressure on the Commission.[2] In addition, the closer cooperation between the Council and the European Parliament has sometimes reduced the Commission's strategic brokering role (and thus power) to reconcile diverging interests.

On the other hand, the further extension of qualified majority voting in the Council by the Lisbon Treaty gives the Commission additional strategic leverage to push through its proposals. Indeed, stripped from their veto, Member States will be more inclined to negotiate with the Commission to avoid being outvoted.

4.3. European Council and its President

Together with the European Parliament, the European Council is without a doubt among the institutions strengthened by the Lisbon Treaty. Indeed, aside from its formal recognition as an institution of the European Union, it is also granted a range of decision-making powers, and confirmed as carrying the overall responsibility for the Union's general political directions and priorities.[3]

Even more important is the introduction of a Permanent President who takes over the role of organizing and chairing the European Council meetings from the rotating presidencies. Such a permanent representative "at the heart of the Brussels' institutional scene" is likely to further reinforce the European Council's position and attempts to take over the political lead and initiative[4]. The first months of Van Rompuy's presidency already produced two particularly striking examples of this. Aside from the suggestion to hold monthly meetings of the European Council, the decision to take the forefront in establishing genuine economic governance by setting up a special task force[5] was a clear illustration of the intention of the European Council to impact more directly on the substance of the Union's policy-making.

From the Commission's perspective, it might thus be useful to strengthen even further its President's position so as to allow him to deal with this new public fig-

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[1] Art. 241 TFEU.

[2] Craig, P. and De Búrca, G., *EU Law: Text, Cases and Materials,* 4th edition (Oxford, Oxford University Press, 2008), p. 52.

[3] Art. 15 TEU.

[4] See chapter on the Presidencies Triangle.

[5] See Conclusions of the European Council of 25-26 March. Note the quick response by the Commission in drawing up its own proposals on economic co-ordination: Communication on Reinforcing economic policy coordination, COM(2010) 250 final, 12.5.2010.

ure on a basis of equality. Up to now, both figures seem to recognize the need for cooperation and have, for example, decided to meet weekly.[1]

After already having lost considerable political clout to the European Council, it can reasonably be expected that the arrival on the scene of the new figure of a Permanent President of the European Council will further challenge the Commission's remaining political leadership role.

5. CONCLUSION

Over the last ten years the position of the Commission has steadily become more difficult. It is important to distinguish the essential from the secondary causes of this evolution. The main causes would appear to be: the extension of the areas of EU intervention, the successive enlargements, the successive Treaty reforms — including increasing powers for the European Parliament and demands for more democracy in the system. In such a context, any Commission would have had trouble maintaining its position, whatever its size and whoever was leading it.

These underlying factors are mutually reinforcing and create a complex situation which is not easy to analyse in the abstract, just as it is not easy to manage on a daily basis. Given the fact that the Lisbon Treaty has only recently come into force, and that it entails a number of significant and simultaneous institutional changes impacting upon the Commission, it would be premature to attempt to draw definitive conclusions. The EU is visibly in a phase of substantial transformation.

It does, however, seem clear that the Commission has, over the last two decades, experienced a form of identity crisis linked to the gradual loss of legitimacy, in public opinion, of the European project as a whole. This loss has come to the fore in successive referenda since the 1990s, first in Denmark and Ireland, later — and most significantly — in France and the Netherlands, both founding members of the Community. The Commission's position as a main policy maker, initiator of legislation, broker of interests and guardian of the treaties, was inevitably challenged by this trend. Under its last three presidents, the Commission has tried to find new sources of legitimacy but with very limited results.

The institutional debates in the successive treaty negotiations have not been helpful. Negotiators from Member States, especially the smaller ones, have mainly

[1] Indeed, as explained in the contribution on the European Council, the "asset of time" allows a personal relationship between both Presidents to develop. This should further facilitate cooperation.

concentrated on maintaining their level of representation within the Commission. Yet it was obvious that the composition of the Commission was in no way the most important problem facing the institution. By concentrating on this issue Member States have perversely increased the public perception of the Commission as an intergovernmental body. There was moreover an inbuilt contradiction in this debate: the larger the Commission becomes, the more difficult it is to maintain the collegiality which was an essential characteristic of the institution, and a most valuable one for the smaller Member States. In a large Commission — as experience has shown — there is a greater need for strong presidential leadership. And strong presidential leadership inevitably diminishes the significance of "national" Commissioners. More time and energy should thus have been spent on maintaining the power and role of the institution as a whole, rather than on its composition.

The response — implicit in the Lisbon Treaty modifications — to this loss of legitimacy seems to consist in giving the Commission renewed political legitimacy through the increased roles played by the European Council and the European Parliament not only in its investiture, but also, up to a point, in its regular work. This is understood to give a more democratic political character to what was seen — certainly by some — as an essentially technocratic structure. There are risks in this approach of course. Indeed, it is at least arguable that the role of strategic political leadership, exercised by the Commission in former years, has now largely passed to the European Council. It is at least arguable that strong politicization of the Commission, which could be the result of an increased dependency upon the European Parliament, would hamper the institution's role as an independent broker.

Only experience will tell whether, in implementing the Lisbon Treaty, Member States and the various institutions concerned will be able to strike the right balance. It is not certain, however, that either the European Council or the European Parliament can offer a perfect substitute for the lack of the Commission's leadership. Indeed, the Commission has the benefit of a double source of legitimacy as well as of important and numerous technical and administrative means. It should find a way to advocate — more efficiently than the last 15 years — the need for and the added value of action at EU level.

THE PRESIDENCY TRIANGLE

1. THE BLUEPRINT

They thought they had discovered the philosopher's stone. From now on the Union was to be led by a stable president, reflecting a new resolve to map out the way ahead, while its interests would be pursued on the international stage by one face and one voice, those of the High Representative. This would put an end to the constant coming and going of presidencies, generally considered to be the source of all the Union's problems.

That revolution, together with the "simplification" which it offered, constituted one of the main selling points of the new Treaty. It was a point which was constantly plugged, in the first instance by the Convention Chairman, Valéry Giscard d'Estaing, who saw it as putting into effect, if not in reality then at least on paper, a long-cherished personal dream of his. It was subsequently picked up in the media, who with few exceptions joined in all those who sang the praises of an institutional breakthrough widely regarded as essential for the Union's future.

When the Lisbon Treaty finally reached the end of its problematic ratification process, the new blueprint for the presidency, long regarded as a panacea, ran up against harsh practical reality, which turned out, as often the case, to sit uneasily with the intentions of armchair constitution-makers. The introduction of the new system quickly exposed serious potential weaknesses and attracted swathes of criticism as harsh as the early reviews had been glowing.

2. INITIAL PRACTICAL EXPERIENCE

This process of gradual realisation falls into four broad stages. The first step was to select the cast. After much speculation as to the ideal profile for the posts: a president or just a chairman, a strong figure or a more consensual one, as well as the usual game of pushing particular favourites: Blair, Juncker, González, etc., the curious process of making appointments in the Union, based largely on a process of elimination, led to a result. It was to be Herman Van Rompuy for the senior post and Baroness Ashton as High Representative/Vice-President of the Commission/President of the Foreign Affairs Council. If the truth be told, apart from satisfaction amongst some that a decision had been reached at all, the overwhelming sense was one of disappointment, although it would be unkind to name those distinguished individuals who saw the appointments as a bitter blow to their earlier express wish to have the posts filled by charismatic figures. Only a few more far-sighted commentators understood at the time the reasons

for the choice, particularly that of Herman Van Rompuy, which inevitably seemed a curious choice to many. The latter included knowledgeable experts on European affairs, such as Jean-Louis Bourlanges, who had no hesitation in referring to a "*lie about visibility and simplicity*" and who concluded, for good measure, that "*Europe's leaders are very happy with their choice, as the appointment of two complete nonentities to take charge of their shared home fully satisfies their egos and strengthens their personal legitimacy*"[1]. This language reflects, albeit in a somewhat exaggerated way, a view which was widely held at that time by commentators and the media who had been conditioned by an overly idealistic view of the Lisbon Treaty which had dominated thinking up to that point.

Growing awareness of the realities of the new Presidency system increased when it was realised that the rotating Presidency was still alive and well. Although a cursory reading of the Treaty gave the impression that the Presidency now had only a walk-on role, Spain's arrival in the six-monthly chair was a forceful reminder that all Council configurations, apart from the Foreign Affairs Council, continued to be chaired by the Member State holding the rotating Presidency. Whilst Spain in no way sought to abuse that position, it had had to prepare for a conventional Presidency in the event that the Treaty would not be ratified, and in so doing had made arrangements (such as a number of meetings in Spain) which suggested to some that the entry into force of the new Treaty made little or no difference. That impression was further reinforced by the publication of a Spanish Presidency programme, presented as such by the Prime Minister. This prompted Valéry Giscard d'Estaing, ever eager to play the role of elder statesman, to say that *"Mr Zapatero has not read the Treaty properly; there are now only two political presidencies in Europe: the President of the European Council and the President of the Commission"*[2]. Although this is an overly succinct way of describing it, his point was not entirely unreasonable given some of the muddled thinking in the press and elsewhere, as can be seen from an article published shortly beforehand, which turned things completely on their head by stating that "*on taking charge of the European Union (sic) for six months, Mr José Luis Zapatero will have to come to an arrangement with the figures introduced under the Lisbon Treaty*"[3].

The revelation that the six-monthly Presidency continued to exist, combined with the arrival of new players in ill-defined roles, led to a third realisation. With the proliferation of figures able to speak on behalf of the Union on the

[1] *Le Figaro*, 23 November 2009.

[2] *Le Point*, *4* February 2010.

[3] *Le Monde*, 31 December 2009.

international scene (up to at least half a dozen), one of the most hackneyed slogans of the supporters of the Treaty, the notion of a single face and voice who would from now on represent the Union, was suddenly called into question.[1] This further disenchantment inevitably prompted some commentators to allude to Henry Kissinger's well-known quip about his European counterpart's phone number, making the point that, under the new rules, he would need an entire telephone directory. Leaving aside such deliberate exaggerations and malicious interpretations, this rather discouraging revelation was said by some to lie in part behind the decision of Barack Obama to stay away from the EU-US summit planned under the Spanish Presidency. The EU's partners, including the most important, were clearly worried about the way the new institutions would function! Since the real interest of the US certainly lies in having as reliable a European partner as possible, the paradox is only superficial.

One final incident linked to the Treaty's tentative beginnings saw the successor to the post held by Javier Solana sharply criticised for failing in her duties for not having visited Haiti in the immediate aftermath of the disaster, as well as for having stayed away from two meetings between the EU and non-member countries. High Representative (HR) Ashton was later accused of leaning too heavily in the direction of either the Commission or the Member States in the delicate negotiations on the European External Action Service (EEAS). Yet it was the Lisbon Treaty which gave Catherine Ashton two hats to wear (in reality three, as she is High Representative, Vice-President of the Commission and President of the Foreign Affairs Council all at once)[2], without giving her the capacity to be in more than one place at a time! And it was the same Treaty which led to her having to manage conflicting loyalties, without offering her any answer as to how to resolve the conflicts which this complex construction inevitably creates, apart from the vague notion of trying to be even-handed. Such criticism can only be addressed by referring to the old maxim: *"Tu patere legem quam fecisti"*.

3. FIRST APPRAISAL

Such a sophisticated construction cannot be assessed on the basis of an emotional reaction prompted more by pique than reasoned analysis. So what does the picture look like? While some caution is still needed, a combination of practical experience so far, the behaviour of the various parties concerned, some more reflective

[1] See already *First Lisbon Study*, p. 47.

[2] Article 18 TEU.

observations and even off-the-record remarks carefully gleaned from the media make it possible to make some assessment, albeit preliminary and tentative, about the future of the system.

3.1. The President of the European Council: Cometh the Hour, Cometh the Man

First, the *stable* Presidency of the European Council should be looked at. The Treaty provisions [Art. 15 (6) TEU] are clear, stating that "*the President of the European Council is to cooperate closely with the General Affairs Council in driving forward, preparing for and ensuring continuity in the work of the European Council; he is also, at his level and in his capacity, to ensure the Union's external representation*." Both the letter and the spirit of those provisions seem to have been respected on the first occasions at which they were applied. There would be no point in attempting, by analysing in detail the proceedings of the European Council meetings, to determine the different roles played by the various actors in the outcome, as the credit attributed to them depends on commentators' egos, interests and imagination. It is more helpful to take a close look at the *strategy* devised by Herman Van Rompuy in order to establish an influence which no-one contests. That strategy boils down to a twin approach: putting the European Council at the heart of the political process and then placing himself in the driving seat in the preparations of that process. This is perhaps paradoxical, given his reputation for modesty, something not found in abundance among his peers. His interest lies in making effective use of his power: i.e. achieving results for their own sake, rather than simply creating a reputation for himself.

His first aim was to place the European Council at the heart of the political process. The various ways in which the European Council's role under the Lisbon Treaty is strengthened have been considered in another contribution[1] and there is thus no need to repeat them here. What can be seen however from the brief experience of implementing the Treaty provisions on the European Council is how what was, after all, a mere presumption has quickly become firmly established in everyday political reality.

On the basis of the saying "if you want a thing done well, do it yourself", the European Council has assigned itself a key role in directing the *Europe 2020* strategy, which is the successor to the Lisbon agenda, and, more generally, in introducing real economic governance, which has turned out to be particularly

[1] See the chapter on the European Council.

pressing since the onset of the Greek crisis. The new permanent President of the European Council has stated in the clearest terms that the first result of the informal summit on 11 February had been to establish the European Council's place in the Union's economic governance. That aspiration was amply borne out by the European Council conclusions of 25 and 26 March 2010, specifying that *"the European Council's responsibility is to show the way ahead*" (sic).

Such systematic, early involvement of the European Council has necessarily meant *inverting* the process by which Council business is prepared. Instead of being invited passively to endorse decisions which have already been prepared in advance, the European Council has emerged as the main source of guidance for subordinate bodies, which are called upon to carry out specific mandates and follow the European Council's direction in their work. This *top down* rather than *bottom up* approach has already led the European Council to schedule a number of thematic discussions on the EU's strategy towards its main partners (16 September 2010), on research and innovation policy (October 2010) and on energy problems (early 2011). It is open to question, however, whether all Council configurations, particularly those such as the ECOFIN Council which have been traditionally reluctant to accept such guidance, will willingly go along with this new approach, even though it is entirely in keeping with the spirit of the Treaty (see Art. 6 TEU). This inversion in the sequence of the decision-making process also requires a degree of acceptance from the rotating Presidency, which could lead to tensions, although the six-monthly Presidency will tend to diminish as a political force. There are also some who consider that the intervention of the European Council early on in the decision-making process could undermine the power of initiative of the Commission.

Placing the European Council at the heart of the political process on its own would mean having 27 Heads of State or Government (who it has even been suggested should meet once a month!) all steering the Community vessel. Such a situation is inconceivable since it would inevitably lead sooner or later to a shipwreck. This is where the new permanent President comes in, cleverly operating at two levels. On one level he has addressed the issue of his role with modesty and self-effacement saying that he doesn't have any opinions or beliefs, being merely a facilitator seeking consensus within a very varied club. At the same time, he has discreetly yet actively participated in all of the work behind the scenes, guiding high level talks in order to establish the Union's position on issues as sensitive as the new *Europe 2020* strategy or the arrangements for assisting Greece.

One Brussels daily appropriately described Herman Van Rompuy as a President who operates *by stealth,* and that is how he is *best placed to perform* his role.[1] He does this in two ways; through understanding what his role is, and then by fulfilling that role by striking the right note, drawing on his personal qualities of astuteness and discretion. The clearest evidence of the trust which his peers have placed in him is in the statement of 25 March 2010 by the Heads of State or Government of the euro area, in which the President of the European Council is asked to *"establish, in cooperation with the Commission, a task force with representatives of Member States, the rotating Presidency and the ECB, to present to the Council, before the end of this year, the measures needed [for the] strengthening of surveillance of economic and budgetary risks and the instruments for their prevention, including the excessive deficit procedure, and consideration of a robust framework for crisis resolution, respecting the principle of Member States' own budgetary responsibility*". Against this background, such a mandate says far more about the place now occupied by the President of the European Council within the Union's machinery than any number of comments or declarations.

3.2. The Rotating Presidency: Moving Towards a "Functional" Presidency

Having been somewhat forgotten, the rotating Presidency made a strong comeback, to the discomfort of the purists, at the start of the Spanish Presidency. In fact it turned out to be a rather artificial comeback, driven by the initial need for Spain to plan for all eventualities, including the possibility that the Lisbon Treaty would not be in force. In general, the first half of 2010 should be regarded as a kind of *transition period*. Spain, followed by those Member States due to subsequently hold the Presidency, quickly realised that times had changed and the heyday of the six-month Presidency was drawing to a close. This existential crisis gave rise to a group therapy session led by the Finnish Minister for Foreign Affairs, Alexander Stubb, at an informal meeting with his counterparts in Lapland. It is perhaps understandable that Foreign Ministers were worried. Removed from the chair of the Foreign Affairs Council, stripped of their supporting role in the European Council, they also found themselves having to cope with the challenge of the transfer of work to the High Representative, and her supporting cast in the shape of the future External Action Service, as well as with the reality that President Van Rompuy would be speaking on a regular basis on behalf of the Union.

[1] *Le Soir,* 11 February 2010.

This reduction in status of Foreign Ministers as well as of the rotating Presidency more generally prompted some reflection on how to recover lost ground. This reflection focussed on the ideas of *association and delegation*. The first idea is already in the Treaty, which foresees that preparations for the European Council are carried out, *on an equal footing*, by the permanent President of the European Council and by the General Affairs Council, chaired by the rotating Presidency [Art. 15 (6) (b) TEU]. Early experience of this new arrangement does not seem to have given rise to any particular difficulties, with the permanent President initiating texts, in close consultation with the six-month Presidency. The same idea of association was taken further in the decision to ask President Van Rompuy and the Spanish Prime Minister Zapatero to prepare together the Union's position for the forthcoming G20 meeting in Toronto on strengthening global financial discipline. Similarly, the six-month Presidency was associated *ex officio* with the remit to President Van Rompuy to improve economic governance (see above). In fact, all of these apparently generous concessions are simply a logical consequence of the fact that, however one would like it, the rotating Presidency retains full responsibility for the smooth operation of all Council configurations (apart from the Foreign Affairs Council) and that the smooth functioning of the European Council depends in large part on the functioning of the Councils themselves.

The second way, in which the rotating Presidency could be revitalised, particularly in the area of foreign policy, is through *delegated power*. This is an arrangement very well-suited to Foreign Ministers. It was already raised by some of them (A. Stubb and B. Kouchner) at the meeting in Finland, where it was suggested that ministers could act as special envoys to trouble spots around the globe, instead of the current practice (which follows that of the US) of assigning such tasks to diplomats. The question then arises as to whether that privilege should be limited to the minister from the country holding the six-month Presidency or whether it should extend to all of his counterparts, depending on their own particular country's experience or historical connections with any particular part of the world. The presence of the French minister, representing HR Ashton, at a conference in Montreal on aid for Haiti appeared to presage such an arrangement, and created some uneasiness within the Spanish Presidency. Fortunately, the latter has since received a number of similar remits (in particular, Foreign Minister Moratinos' tour of the Caucasus and Central Asia in March 2010, or preparations for the tricky Euro-Mediterranean summit; although in this particular case it might be more accurate to say that the Presidency assigned this role to itself).

To complete the picture, it should be noted that there is a provision in the Council's Rules of Procedure [Art. 2 (5)] whereby the EU High Representative for

Foreign Affairs and Security Policy may, where necessary, ask to be replaced in the chair of the Foreign Affairs Council by the representative of the six-month Presidency. The picture to emerge of the rotating Presidency's role is therefore not a passive one, as some would have us believe, but rather an *auxiliary one.* It has in effect exchanged its former political and institutional role for a *functional* one, which might appear more prosaic, but is not insignificant.

This change in the six-month Presidency will be greatly helped by fortuitous timing. It is reasonable to assume that the Belgian Presidency (in the second half of 2010) will provide an opportunity for two compatriots to settle definitively the relationship between the rotating Presidency and the stable European Council Presidency in a way which will not necessarily be unfavourable to the latter! Coincidentally, too, the order of six-month Presidencies to come over the years ahead, apart from Poland in 2011, does not include any larger Member States which might risk overshadowing the rise of the two new "institutional" presidencies.

3.3. The High Representative

The question of relations between the HR and the rotating Presidency has been extensively dealt with in discussing the latter's role. That leaves her relations with the President of the European Council. For once, it appears, the Treaty is relatively clear on the matter, and there is no doubt at what is meant when it is said that the President shall represent the Union *at his level*, meaning that his presence is required when his peers — Heads of State or Government — are involved, whether the meeting is a multilateral or bilateral summit. This seems to have been the case up to now.

4. THE PRESIDENTIAL GALAXY

The analysis of the relationship between the different *points of the triangle* is not the end of the story as regards the arrangements provided for in the Lisbon Treaty. This three-part system, complicated enough as it is, includes further components which are in different ways related to the overall structure. Moreover, the triangle is itself subject directly or indirectly to outside influences that determine the behaviour of the main players. Only an overview of these additional elements and how they relate to the core can do full justice to the complexity of the system.

The High Representative post is in fact a *triangular arrangement in itself,* since it combines three functions: the High Representative for Foreign and Security

policy (in which capacity the High Representative is able to put forward proposals under her own responsibility and represent the Union at her level for external relations issues), Vice-President of the Commission (in which capacity alone she is subject to the Commission's rules of collegiality), and Chair of the Foreign Affairs Council.

This complexity has become apparent in particular in relation to the frequent question of how the High Representative is represented given the practical impossibility of fulfilling all three functions simultaneously. As High Representative she can in practice ask any Minister for Foreign Affairs to conduct a mission on her behalf (for example Bernard Kouchner at the Haiti Conference), as Vice-President of the Commission she can be replaced by another Commissioner, in line with the Commission's internal rules, and as President of the Council she can request the Foreign Minister of the rotating Presidency to chair in her place.

It will no doubt take some time for each of those concerned (and not least the High Representative herself) to find their place in this complex set-up. In the meantime, several tensions are obvious. In the Commission the responsibility of a politician of British nationality (and therefore by definition an inter-governmentalist!) for the coordination of all external policies is seen by some as a Trojan Horse. Equally, but conversely, the High Representative's function within the Commission continues to be viewed by some with suspicion.

4.1. The President of the Euro Group: a Man on the Up

The new Treaty makes the Euro Group official, but also extends the range and number of issues which are decided within the Council with only the euro area members voting. [1] The Euro Group is increasingly becoming a political decision-making body, with the ECOFIN Council the venue for informing the rest and making decisions official. A sign of the times: Mr Juncker has set out his presidency programme; he also has a website on which the "decisions" of the Euro Group are published (euphemistically described as "*terms of reference*"). [2]

The President of the Euro Group is therefore becoming increasingly an interlocutor of the European Council President, but without eroding his power. Thus Herman Van Rompuy has been asked to lead the Task Force on economic governance (see

[1] See Arts 136-138 TFEU and Protocol No 14.

[2] http://www.consilium.europa.eu/showpage.aspx?id=1825&lang=en.

above) and to chair the meeting of the Euro Group at the level of Heads of State or Government.

The relationship between the President of the Euro Group and the other presidencies does not in principle raise any particular problems. This is due *inter alia* to the particular position of Jean-Claude Junker who is both Prime Minister and Minister of Finance. The Euro Group and its President played an important role in addressing the Greek crisis in apparently close harmony with the political leaders of the Union.

4.2. The Presidential "Trio": Fact or Fiction?

Second presidential avatar: the team of three Member States that "share" presidential responsibility for 18 months (also known as the *trio*).[1] This arrangement, already in operation for several years but formalised by the Lisbon Treaty[2], has not so far attracted any significant attention from commentators. Apart from a general obligation of mutual assistance, notably in the event of unavailability, its main visible activity — the establishment of a common programme for the three Presidencies — has gone more or less unnoticed as everyone tends to look more at the national version of the programme which is circulated at the same time.

Seen from the perspective of the new presidential system, however, there are three points to be made about the trio: 1) it has the genuine merit of teaching national administrations how to work together — not a negligible consideration in making Presidencies more effective; 2) the inversion of the sequence of decision-making within the Council — *top down* rather than *bottom up* — requires greater continuity in implementing the guidelines set by the European Council, which can be facilitated by programming activities over 18 months, and 3) it is important to bear in mind that while the text of the decision on the functioning of the trio stipulates that each country is to chair *all* Council configurations (apart from the Foreign Affairs configuration) for six months, it also provides for the three Member States concerned to "decide alternative arrangements" — i.e. derogate from that rule. This seemingly banal clause theoretically opens the door to a Presidency set-up whereby each trio member would chair one third of the Council meetings for an 18-month

[1] See also *First Lisbon Study*, p. 44.

[2] Declaration 9 on Article 16 (9) of the Treaty on European Union concerning the European Council decision on the exercise of the Presidency of the Council.

period. If that happened — unlikely as it seems, at least for the time being — it would certainly have a major impact on the operation of the system as a whole.[1]

4.3. The Presidencies of Preparatory Bodies: a Mix of Genres

Third presidential avatar: the Presidency of the Council's preparatory bodies. This is not the place to go into the details of this complicated subject.[2] Suffice it to say that the Presidency of the "foreign affairs" preparatory bodies is shared between officials of the common external service and officials from the rotating Presidency. Conversely all the preparatory bodies in other areas, including COREPER, are chaired by the rotating Presidency, with the exception of a very limited number which have more permanently elected chairs.

There is an anecdote to relate here. Many members of COREPER were anxious to know who was to represent President Van Rompuy before their August Committee when it dealt with preparations for the European Council. Discussion resulted in the quite natural conclusion that it is of course the Chairman of COREPER who represents him by virtue of the principle of *unity of the presidential function*, even if it is manifested in different forms. This does not of course exclude the possibility of the Head of Cabinet of the President of the European Council maintaining close contacts with the Chair of COREPER and participating regularly in its meetings.

4.4. The President of the Commission: a Potential Rival?

The potential rivalry between the new President of the European Council and the President of the Commission was one of the arguments put forward by those — and there were many of them — who were unconvinced by the idea of a permanent presidency. This rivalry was all the more predictable, they argued, because the Commission President was strengthened politically by the Treaty through the enhanced legitimacy offered by endorsement from the Parliament. In other words, there was general concern that a battle of *egos* would break out between the two

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[1] Article 2 (2) of Council Decision of 1 December 2009 laying down measures for the implementation of the European Council Decision on the exercise of the Presidency of the Council, and on the chairmanship of preparatory bodies of the Council (2009/908/EU) *OJ L 322*, 9.12.2009, pp. 28-34.

[2] See European Council Decision of 1 December 2009 on the exercise of the Presidency of the Council (2009/881/EU) *OJ L 315,* 2.12.2009, p. 50; Council Decision of 1 December 2009 laying down measures for the implementation of the European Council Decision on the exercise of the Presidency of the Council, and on the chairmanship of preparatory bodies of the Council (2009/908/EU) *OJ L 322,* 9.12.2009, pp. 28-34, and annexes. Both decisions are found at the end of this chapter.

new leading lights of the Union over the *virtual* but ever-tempting position of *de facto* President of Europe!

There is no reason so far to suggest that there is a risk of this prediction becoming true. On the contrary, it seems that President Van Rompuy and President Barroso, conscious of the risks inherent in trying to upstage each other, are vying — at least in public — to demonstrate that particular care is being taken in public pronouncements to avoid giving offence, with the aim of portraying the image of a happy couple. This impression is confirmed by two initiatives that have been taken to avoid any conceivable risk of friction. The first, simple but effective, was for the two Presidents to decide to meet at least once a week to take stock of the most important issues. The second, more elaborate, was to draw up a *modus vivendi,* set out in writing, on the rules for the Union's external representation at presidential level (*see Annex I*). Both these initiatives show that the risks are real but equally that both are determined to overcome them. It remains that the existence of these two presidents certainly fails to provide a simplified external representation of the EU.

4.5. The Prime Minister/Head of State of the Country Holding the Six-Monthly Presidency: Frustration Recompensed?

Second theoretical threat to the integrity of the role of the new permanent President: the Prime Minister/Head of State of the country holding the rotating Presidency, who is the main loser under the new regime. After toying with various ideas such as having him chair the General Affairs Council (which was quickly abandoned), the European Council's Rules of Procedure limit his role to that of *Rapporteur*, both to the European Parliament, to which he presents his Presidency's priorities and the results achieved during the six-month term, and to the European Council itself, to which he reports on the proceedings of the Council [Arts 4 (1) & 5 para. 3]. Clearly, these limited prerogatives cannot disguise the fact that this is a serious demotion, a source of much frustration which all Heads of Government will seek to make up for in various ways. The organisation of high-profile political events — such as meetings with third countries — could help to mitigate this frustration without challenging the principle that *European Council meetings* should continue without exception to be held in Brussels.

4.6. The "Directorate": a Virtual Vice-Presidency?

President Van Rompuy will not only be faced with the occasional outburst of envy from his colleagues who have been ousted from the presidential chair. He will, on

a daily basis, have to contend with the often contradictory and to varying degrees reasonable (or unreasonable) demands of his *peers,* and find ways of dealing with them through seeking consensus. But some peers are more equal than others. Experience has already shown that in exercising this much-vaunted function of *facilitator*, the President of the European Council has had to take account of the vision of the Union's affairs held by the (somewhat elusive) "Directorate" of the large Member States, including the Franco-German duo (provided they settle their own differences). The ways in which recent European Councils have been organised demonstrate this clearly. But this must not become so intrusive as to undermine the lively independence of mind which, along with skill and intellectual rigour, is the mark of men of influence. The fact that President Van Rompuy said that no-one could prevent him from playing the role of facilitator before and during the Council is reassuring. *The Prince's hand* will not be at the service of one group at the expense of others, even if the principle of *realpolitik* means that no group can be completely overlooked.

4.7. The Secretariat: a Valuable Unifying Factor…

The General Secretariat of the Council (hereafter "GSC") is unique. It acts as a *common denominator* of all those who now embody the presidential function. It is above all in the relationship between the rotating *Presidency* and the *President of the European Council* that the GSC can help coordinate the various proceedings properly and ensure that the machine runs smoothly.

It is because it is equidistant — the word being very much in fashion — from the President of the European Council and the rotating Presidency that it can serve both actors fairly and effectively. The GSC can in particular help the President of the European Council to digest the mass of information coming from the Council bodies and, if necessary, sound a note of warning. Moreover, with its finger on the Council's pulse, it is well placed to inform President Van Rompuy of the collective view within the Council, and not just the individual positions of particular capitals.

In the external field the GSC's role will change as a result of the creation of the EEAS, to which some of its existing functions and resources will be transferred. But the GSC will keep its traditional tasks of a secretariat in the strict sense — continuing to serve the Foreign Affairs Council, as well as its preparatory bodies. This fact has been overlooked by many, but is important since it will help place the Secretariat and its Secretary General at the hub of the complex institutional

structure resulting from the Lisbon Treaty. As such, it will have a vital role to play in ensuring the effectiveness of the new presidential system.

5. CONCLUSION

The change in presidential system — along with the extension of co-decision (now the "ordinary legislative procedure") and the common external action service — is undoubtedly one of the major innovations of the Lisbon Treaty. There is no ideal solution to the question of the Council Presidency, only imperfect formulas. Forced to choose, the Convention and the Intergovernmental Conference decided to move away from a Presidency that was *monolithic but devoid of continuity* to a Presidency that is *lasting but multifaceted*…

It is doubtless too soon to be able to say whether this was the right choice. However, in the light of experience so far, there is reason to believe that the permanent presidency could prove to be better adapted to the requirements of the future, i.e. the need for longer-term management of Union affairs as well as greater continuity, for better linkage between internal policies and external action as well as more coherence in the latter.

However, these potential advantages will not materialise in the long term unless three conditions are met: 1) *good practice must bed down quickly*; the system will not work if the roles of the players are reinvented every six months; 2) *bona fide* application of the new rules; the system will not tolerate any constant vying for power or influence amongst the main actors; 3) regular consultation at the appropriate level between those in charge of the three presidencies. With the first six months of 2010 considered to be a transitional period, the Belgian Presidency will have particular responsibility for putting the system definitively in place, within the letter and the spirit of the above.

ANNEX I

Practical Arrangements between President Van Rompuy and President Barroso regarding External Representation of the European Union at Presidential Level
(16 March 2010)

The President of the European Council and the President of the European Commission agree to the following principles to ensure coherence and efficiency in the EU's external representation:

General principles:

- At international meetings at the level of Heads of State or Government (EU summits with third countries, G8 and G20 summits, etc.), the EU delegation will be composed of both Presidents in one single delegation. Their roles are complementary, in respect of their respective responsibilities.
- On each subject, only one of the two Presidents will state the position of the EU. The distribution of the interventions will be agreed between the two Presidents ahead of each meeting, taking into account Article 15 and 17 of the TEU.

G8/G20:

- For the preparation of G8 and G20 summits, both Presidents will nominate one personal representative each.
- The personal representative of the President of the European Commission will be the G20 sherpa, assisted by the personal representative of the President of the European Council. Conversely, the personal representative of the President of the European Council will be the G8 sherpa, assisted by the personal representative of the President of the European Commission. The sherpas will together define their working methods and also be assisted by other officials following existing practice, to be adapted if needed in agreement between the two Presidents.

ANNEX II

European Council Decision of 1 December 2009 on the exercise of the Presidency of the Council (2009/881/EU)

THE EUROPEAN COUNCIL,
Having regard to the Treaty on the European Union, and in particular Article 16(9) thereof,
Having regard to the Treaty on the Functioning of the European Union, and in particular Article 236(b) thereof,
Whereas:

(1) Declaration (n o 9) annexed to the Final Act of the Intergovernmental Conference which has adopted the Treaty of Lisbon foresees that the European Council adopts, on the date of entry into force of the Treaty, the Decision the text of which is contained in the said Declaration. (2) It is therefore appropriate to adopt that Decision,

HAS ADOPTED THIS DECISION:

Article 1

1. The Presidency of the Council, with the exception of the Foreign Affairs configuration, shall be held by pre-established groups of three Member States for a period of 18 months. The groups shall be made up on a basis of equal rotation among the Member States, taking into account their diversity and geographical balance within the Union.

2. Each member of the group shall in turn chair for a six-month period all configurations of the Council, with the exception of the Foreign Affairs configuration. The other members of the group shall assist the Chair in all its responsibilities on the basis of a common programme. Members of the team may decide alternative arrangements among themselves.

Article 2

The Committee of Permanent Representatives of the Governments of the Member States shall be chaired by a representative of the Member State chairing the General Affairs Council. The Chair of the Political and Security Committee shall be held by a representative of the High Representative of the Union for Foreign Affairs and Security Policy. The chair of the preparatory bodies of the various Council configurations, with the exception of the Foreign Affairs configuration, shall fall to the member of the group chairing the relevant configuration, unless decided otherwise in accordance with Article 4.

Article 3

The General Affairs Council shall ensure consistency and continuity in the work of the different Council configurations in the framework of multiannual programmes in cooperation with the Commission. The Member States holding the Presidency shall take all necessary measures for the organisation and smooth operation of the Council's work, with the assistance of the General Secretariat of the Council.

Article 4

The Council shall adopt a decision establishing the measures for the implementation of this decision.

Article 5
This Decision shall enter into force on the day of its adoption. It shall be published in the *Official Journal of the European Union*.

Done at Brussels,
1 December 2009.
For the European Council
The President

ANNEX III

Council Decision of 1 December 2009 laying down measures for the implementation of the European Council Decision on the exercise of the Presidency of the Council, and on the chairmanship of preparatory bodies of the Council (2009/908/EU)

THE COUNCIL OF THE EUROPEAN UNION,
Having regard to the Treaty on European Union, and in particular Article 16(9) thereof,
Having regard to the Treaty on the Functioning of the European Union, and in particular Article 236(b) thereof,
Having regard to the European Council Decision of 1 December 2009 on the exercise of the Presidency of the Council[1], and in particular Article 2, third sub-paragraph, and Article 4 thereof,

Whereas:
(1) Measures should be laid down for the implementation of the European Council Decision on the exercise of the Presidency of the Council (hereinafter referred to as "the European Council Decision").
(2) Those implementing measures include the order in which the pre-established groups of three Member States are to hold the Presidency in turn for consecutive periods of 18 months taking into account the fact that there exist since 1 January 2007, in accordance with the Council's Rules of Procedure, a system of Council 18-month programmes agreed between the three Presidencies which hold office during the period concerned.
(3) In accordance with Article 1 of the European Council Decision, the composition of the groups must take account of the diversity of the Member States and geographical balance within the Union.

[1] *OJ L 315*, 2.12.2009, p. 50.

(4) The division of responsibilities among the Member States within each group is determined by Article 1(2) of the European Council Decision. In either of the situations provided for in Article 2(1) of this Decision, the Member States within each group will by common accord determine the practical arrangements for their collaboration.
(5) In addition, those implementing measures should include specific rules with regard to the chairing of preparatory bodies of the Foreign Affairs Council as provided for in Article 2, third subparagraph, of the European Council Decision.
(6) Most of those preparatory bodies should be chaired by a representative of the High Representative of the Union for Foreign Affairs and Security Policy (hereinafter "the High Representative") while the rest of them should continue to be chaired by the six-monthly Presidency. Where the chair of such bodies is a representative of the High Representative, a transitional period may apply.
(7) Preparatory bodies which are not chaired by the six-monthly Presidency should also be listed in this Decision, as provided for in Article 2, third subparagraph, of the European Council Decision.
(8) The chairmanship of preparatory bodies not listed in this Decision will be chaired in accordance with Article 2 of the European Council Decision,

HAS ADOPTED THIS DECISION:

Article 1

The order in which the Member States shall hold the Presidency of the Council as from 1 January 2007 is set out in Council Decision of 1 January 2007 determining the order in which the office of President of the Council shall be held[1].
The division of this order of Presidencies into groups of three Member States, in accordance with Article 1(1) of the European Council Decision, is set out in Annex I to this Decision.

Article 2

1. Each member of a group as referred to in Article 1, second subparagraph, shall in turn chair for a six-month period all configurations of the Council, with the exception of the Foreign Affairs configuration. The other members of the group shall assist the Chair in all its responsibilities on the basis of the Council's 18-month programme.
2. The members of a group as referred to in Article 1 may decide upon alternative arrangements among themselves.

[1] *OJ L 1*, 4.1.2007, p. 11.

3. In either of the situations provided for in paragraphs 1 and 2, the Member States within each group shall by common accord determine the practical arrangements for their collaboration.

Article 3
The order in which the Member States will hold the Presidency as from 1 July 2020 shall be decided by the Council before 1 July 2017.

Article 4
The preparatory bodies of the Foreign Affairs Council shall be chaired in accordance with the rules set out in Annex II.

Article 5
The Council preparatory bodies listed in Annex III shall be chaired by fixed chairs as set out in that Annex.

Article 6
This Decision shall enter into force on the day of its adoption.
It shall be published in the *Official Journal of the European Union*.

Done at Brussels,
1 December 2009.
For the Council
The President

DELEGATED AND IMPLEMENTING ACTS UNDER THE LISBON TREATY: WHAT FUTURE FOR COMITOLOGY?

1. INTRODUCTION

The exercise and control of delegated authority[1] have proven to be an apple of discord in EU governance ever since the improvised inception of the comitology process in the 1960s. Before the entry into force of the Lisbon Treaty, the lack of a clear definition of the concept and the absence of Treaty-based procedures structuring its application caused a significant deal of ambiguity to become attached to its implementation in the Union's institutional framework.

1.1. Brief Overview of the Development of Comitology

Until the entry into force of the Lisbon Treaty, ex Article 202 TEC allowed the Council to delegate "*implementing powers*" to the Commission so that the latter could provide for "*implementation of the rules which the Council lays down*".

Ex Article 202 TEC, however, was silent as to the procedures that should govern the exercise of delegated authority. This lacuna allowed the Council to develop a myriad of committee-based procedures that advised, supervised and controlled the exercise of such authority by the European Commission; a process since referred to as "comitology".[2]

The Council therefore held a monopoly over the elaboration and implementation of comitology; a privileged position that was challenged by both the Commission and the European Parliament.[3] The Commission argued against aspects of comitology that it considered impinged upon its independence in the exercise of its executive functions, while the European Parliament (following the creation of the co-decision process in 1993) argued that as a co-legislator alongside the Council in legislation under which delegation was authorised, it should be entitled to play a role in the relevant comitology process. The European Court of Justice, however, successively upheld the legality of comitology as framed by the Council, provided the exercise of delegated authority be interpreted strictly in order to respect the interinstitutional balance.[4]

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[1] Such authority was generally referred to as "*implementing powers*" prior to the entry into force of the Lisbon Treaty, but shall be referred to as "delegated authority" for the purposes of this paper.

[2] Joerges, C. and Vos, E. (eds), *EU Committees: Social Regulation, Law and Politics* (Oxford, Hart Publishing, 1999); Bergström, C.F., *Comitology: Delegation of Powers in the European Union and the Committee System* (New York, OUP, 2005); see also Vos, E., *50 Years of European Integration, 45 Years of Comitology*, Maastricht Faculty of Law Working Paper 2009-3, February 2009, retrievable at: http://ssrn.com/abstract=1345729.

[3] For details on the European Parliament's challenges, see Corbett, R., Jacobs, F. and Shackleton, M., *The European Parliament,* 7th edition (London, John Harper Publishing, 2007), pp. 293-303.

[4] ECJ, Case 23/75 *Rey Soda v. Cassa Congualio Zucchero* [1975] ECR 1279 at para. 9.

Principal steps in the reform of delegated authority

- 1958: Article 155 of the Rome Treaty provides the relevant legal basis for delegated powers
- 1960s: informal development of "comitology"
- 1970s: Legality of comitology confirmed by the ECJ in cases such as *Köster* and *Rey Soda*
- 1986: Single European Act provides a legal basis for delegated powers by amending Article 145 TEC (renumbered 202 by the Amsterdam Treaty)
- 1987: first comitology decision adopted
- 1988: Plumb/Delors Agreement
- 1993: Maastricht Treaty introduces co-decision
- 1994: "Modus Vivendi" Agreement
- 1996: Samland/Williamson Agreement
- 1999: Amsterdam Treaty extends co-decision and commits to comitology reform
- 1999: second comitology decision
- 2001: Lamfalussy Process begins
- 2002-4: Convention on the Future of Europe proposes reform of delegated legislative power; adopted as part of the Constitutional Treaty
- 2006: third comitology decision
- 2009: Lisbon Treaty enters into force; reforms drafted by the Convention become legally binding in Articles 290 and 291 TFEU
- 2010: Commission proposes comitology regulation

1.2. Nature and Context of the Lisbon Treaty Reforms

The reforms contained in the Lisbon Treaty on delegated authority can trace their origins to the work of the Amato Group in the Convention on the Future of Europe, while the practical considerations relating to the implementation of this reform are influenced by the impact of the 2006 Comitology Decision.

1.2.1. Contribution of the Convention on the Future of Europe

Prior to the entry into force of the Lisbon Treaty, the exercise of delegated legislative authority via the comitology process could be grouped into two broad categories of acts:

(1) "quasi-legislative acts", which are acts that would otherwise fall within the competence of the Union legislature in that they alter an existing basic legislative act, but operate only to amend or supplement its non-essential elements; and

(2) "implementing acts", which are acts that would otherwise fall within the competences of the Member States in that they relate to the implementation of existing Union law (ex Article 10 TEC), but operate where a harmonised implementation is needed.[1]

The Lisbon Treaty formalises both categories in Articles 290 and 291 TFEU which respectively form the new legal bases for the first category (called "**delegated acts**", considered below in section 2) and the second (called "**implementing acts**", considered below in section 3).

Formalising such a distinction into two categories was considered a "cardinal necessity" by the Amato Group in the Convention on the Future of Europe, which drafted the substantive text of Articles 290 and 291 TFEU. The reasoning behind the creation of these Articles is well documented[2] and falls outside the scope of the present study. It is sufficient to note that the Working Group defined the two categories as follows:[3]

> 2. "Delegated" acts: these acts would flesh out the detail or amend certain elements of a legislative act, under some form of authorisation defined by the legislator. This would be in cases where the legislator felt that essential elements in an area, as defined by it, necessitated legislative development which could be delegated, although such delegation would be subject to limits and to a control mechanism to be determined by the legislator itself in the legislative act.
>
> 3. Implementing acts: acts implementing legislative acts […]. [I]t would be for the legislator to determine whether and to what extent it was necessary to adopt at Union level acts implementing legislative acts […], and, where appropriate, the committee procedure mechanism (Article 202 TEC) which should accompany the adoption of such acts.

The Working Group clearly foresaw a role for the continued use of comitology for implementing acts, but left the procedures for the supervision of delegated acts to be made subject to a form of "control mechanism" to be defined and controlled by the legislature.

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[1] The European Court of Justice has elaborated on the two-part distinction in implementing powers: see for example ECJ, Case 41/69 *Chemiefarma v. Commission* [1970] ECR 661; ECJ, Case 23/75 *Rey Soda v. Cassa Congualio Zucchero* [1975] ECR 1279 and ECJ, Case 16/88 *Commission v. Council* [1989] ECR 3457.

[2] See in particular working documents of the Convention's Working Group IX on Simplification, including *inter alia* Working Document 07, *How to simplify the instruments of the Union?*, 17 October 2002; Working Document 11, *Proposal for a "legislative/executive" delimitation within the institutional system of the European Union*, 29 October 2002; Working Document 16, *Proposal from the Commission's representative in the Working group to distinguish legislative and executive functions in the institutional system of the European Union*, 7 November 2002; and Final Report of Working Group IX, CONV 424/02, 29 November 2002.

[3] Final Report of Working Group IX, CONV 424/02, 29 November 2002.

1.2.2. The 2006 Comitology Decision

Influenced by the innovative use of delegated authority under the Lamfalussy process on financial services regulation and the proposed reform of delegated authority by the Amato Group in the Constitutional Treaty, the Council enacted a legislative reform of comitology in 2006.[1] The major change was the introduction of a regulatory procedure with scrutiny (commonly known by its French acronym, "PRAC"), thus introducing a fifth form of comitology in addition to the pre-existing advisory, management, regulatory and safeguard procedures. The PRAC bears many similarities to Article 290 TFEU delegated authority and is therefore considered in greater detail in section 2 below.[2]

1.2.3. Positions of the Institutions on Implementing Articles 290 and 291 TFEU

At the time of writing, the institutions had begun to set out their views on implementation of Articles 290 and 291 TFEU. The Commission set out its position regarding the implementation of Article 290 TFEU in a Communication of 9 December 2009,[3] which formed the basis of a unilateral Council declaration of 15 December 2009 and a draft report from the Legal Affairs Committee of the European Parliament (Szájer Report) of 2 March 2010.[4] With regard to the implementation of Article 291 TFEU, a regulation of the Council and the European Parliament is required to frame the operating conditions for implementing acts. The Commission produced a draft regulation on 9 March 2010.[5] A draft report of the European Parliament in response to the Commission's proposal is scheduled to be adopted in June 2010, with the regulation expected to be in place towards the end of 2010. In addition to these "prominent" documents, the implementation of Articles 290 and 291 TFEU have also been discussed in interinstitutional dialogue and in a number of documents of the institutions, some of which are mentioned below.

As an interim solution, the institutions agreed that the pre-Lisbon Treaty comitology rules would continue to apply to the existing *acquis* and to acts adopted from 1 December 2009 pending the enactment of the new comitology regulation under

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[1] Council Decision of 17 July 2006 amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission, 2006/512/EC *OJ L 200* p. 11, 22 July 2006.

[2] See also *First Lisbon Study*, pp. 9-10.

[3] COM(2009) 673 final.

[4] Szájer Report on the power of legislative delegation (2010/2021(INI)).

[5] COM(2010) 83 final.

Article 291 TFEU. Article 290 TFEU became applicable on 1 December 2009 and the existing *acquis* together with new legislative proposals are being adapted to its provisions on a case-by-case basis.

2. DELEGATED ACTS

Delegated acts are instruments adopted by the European Commission in the exercise of delegated authority that has been conferred upon it by the Union legislature. This means that authority stems from a basic legislative act rather than from the Council, which had been the situation under ex Article 202 TEC. The immediate change to note in this regard is therefore the increased authority of the European Parliament, which becomes an equal "co-delegator" with the Council where the ordinary legislative procedure applies, in which case it is equally responsible for determining the terms and conditions to which the exercise of delegated authority is subject.

2.1. Definition and Scope

A number of terms in Article 290 TFEU are not clearly defined, which leaves considerable room for manoeuvre (and institutional disagreements) when it comes to implementation. For the purpose of evaluating how delegated acts will be implemented in practice, it is worth examining aspects of Article 290 TFEU in closer detail.

2.1.1. "Non-Legislative Acts of General Application"

According to the terms of Article 290 (1) TFEU, delegated acts are classified as "*non-legislative acts of general application*". In the Constitutional Treaty however, delegated acts had been called "*delegated regulations*". The difference in nomenclature may be semantic, but in any case the qualifying term "*non-legislative*" in the Lisbon Treaty text of Article 290 does not *per se* exclude the likelihood that some delegated acts will be quasi-legislative in nature. Rather, it may be the case that "non-legislative" simply refers to the character of delegated acts as instruments not meeting the treaty definition of a legislative act [Article 289 (3) TFEU], i.e. instruments that are not adopted through the ordinary or special legislative procedures.[1]

[1] Craig, P., The European Parliament under the Lisbon Treaty, in Griller, S. and Ziller, J. (eds.), *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty?* (Vienna, Springer-Verlag, 2008), p. 113.

Delegated acts are required to be "*of general application*", which means they cannot be directed against any individual or single entity.

2.1.2. "Supplement or Amend Certain Non-Essential Elements"

Article 290(1) TFEU limits the scope of delegated acts to "*non-essential elements of the legislative act*", which is a clause also found in Article 2(2) of the Comitology Decision regarding the situations in which the PRAC should be used.[1] Neither the Treaties nor the Comitology Decision provide a definition of such terms. The European Court of Justice has defined "*essential elements*" of legislation as entailing "*provisions which are intended to give concrete shape to the fundamental guidelines of [Union] policy*",[2] although this formula does not provide any greater clarity.

The absence of any objective definition of "essential elements" is most likely a deliberate decision intended to provide the legislature with a wide room for manoeuvre should delegation be required. It may be the case that in the future a general trend emerges as to what constitutes essential elements of an act, but this may only be possible to discern once greater use has been made of Article 290 TFEU.

The definition of these two clauses — "supplement or amend" and "non-essential elements" — will likely form an initial ground of dispute between the Commission and the legislator, as the separation of delegated authority into either delegated acts or implementing acts will hinge on interpretation of these clauses. The Commission Communication on Article 290 TFEU considers that the means of separating the two categories of acts will be determined by a subjective appreciation of the act's nature and scope of powers; with a delegated act "*defined in terms of its scope and consequences*" and an implementing act defined by its rationale, which is "the need for uniform conditions for implementation".[3] In practice it is likely that the classification of delegated authority as either delegated acts or implementing acts will be determined by the strength of arguments put forward by the Commission, Council or European Parliament, but the ultimate decision on whether an act is to be classified as delegated or implementing will fall to the Council and the European Parliament. Indeed, the "ultimate power" of the legislature is a point borne out in the Szájer Report.[4]

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[1] Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (*OJ L 184* of 17 July 1999, p. 23) as amended by Council Decision 2006/512/EC of 17 July 2006 (*OJ L 200* of 22 July 2006, p. 11), consolidated version of *OJ C 255* of 21 October 2006, p. 4.

[2] ECJ, Case C-240/90, *Germany v. Commission* [1992] ECR I-5383 at para. 37.

[3] COM(2009) 673 final, p. 3.

[4] See Szájer Report, *op. cit.*, p. 7.

2.2. Conditions on Delegated Acts

Once a delegated act is authorised by a basic legislative act, Article 290 TFEU provides that the Council and the Parliament may adopt methods of control that condition the Commission's exercise of its delegated authority. Article 290 (2) TFEU requires that any such terms or conditions be "explicitly defined", meaning they must be included as part of each basic legislative act that allows for the adoption of delegated acts. The Sájzer Report has suggested that the terms and conditions meet four requirements: clarity; legal certainty; enable the Commission to exercise delegated authority effectively; and allow the legislator to scrutinise the use of such authority.[1] The Commission Communication states that any material or temporal limits on delegated acts should be clear, precise and detailed. The most important point to be stressed in this section is that the Council and the European Parliament are free to set the terms and conditions of Article 290 TFEU delegations on a case-by-case basis.

2.2.1. Methods of Control

Although methods of control are to be adopted on a case-by-case basis by the legislature, Article 290 (2)TFEU provides two examples of conditions that the legislature can include, namely a power to revoke the delegation (right of revocation) or to object to a proposed delegated act or an aspect of that proposal (right of opposition); the exercise of which may be invoked either by the Council or the European Parliament. The Sájzer Report considers that these two "rights" do not constitute an exhaustive list of the powers of the legislator and that other "control mechanisms" are likely to be envisaged.[2] The European Commission's Communication, however, seems to indicate that the list is an exhaustive one, stating that "*the new Treaty specifies the two conditions to which the legislator may subject the delegation of power*"[3]. The Commission, as the institution responsible for drafting legislation, may choose only to include the two rights mentioned in Article 290 (2)TFEU in its legislative proposals for the basic legislative acts. However, the Council and the European Parliament are likely to include other variants and determine their own preferences as the system develops.

Furthermore, the Commission Communication on Article 290 TFEU states a preference for the use of a right of opposition over a right of revocation, consider-

[1] See Sájzer Report, *op. cit.*, p. 8.

[2] See Sájzer Report, *op. cit.*, p. 9.

[3] COM(2009) 673 final at p.7.

ing the latter as an option of last resort. The right of opposition itself is likely to be made subject to a time limit set by the legislative act and should therefore be invoked before the expiration of the relevant time period in order to be effective. The Commission has proposed a standard window of two months in which the Council or the European Parliament may exercise a right of opposition, extendable by one month if requested (although the Szájer Report recommends an extension period of two months, while the Council recommends a standard period of three months where there is no urgency). The Commission Communication also foresees an "urgency procedure" in which the Council and the European Parliament will have a much shorter time in which to exercise a right of opposition, or a situation in which a delegated act enters into force subject to an *ex post* right of opposition.

A crucial point regarding the implementation of Article 290 TFEU that is not mentioned in the Treaty text concerns the right of scrutiny (*droit de regard*) for the Council and the European Parliament during the exercise of delegated authority. Such a *droit de regard* is in essence a means of *ex ante* control on the Commission's exercise of delegated authority. However, in their formal positions on implementation of Article 290 TFEU the institutions only foresee the use of *ex post* control, presumably as the use of a right of revocation is seen to be sufficiently powerful to prevent the entry into force of a delegated act, particularly if the right of revocation can be targeted at aspects of a delegated act rather than a general blanket veto. Even if such a *droit de regard* is not expressly provided for in a basic legislative act, a commitment to transparency nonetheless stems from Article 15 TFEU.

Where temporal limitations to Article 290 TFEU delegations are concerned, the Commission opposes the use of "sunset clauses" that had previously been used in the Lamfalussy process. Instead, the Commission foresees the introduction of a "system of short-term delegations" of "indefinite duration" that are subject to the rights of revocation of the Council and the European Parliament. For instance, the de Brún Report (see below) recommends a short-term delegation of five-year periods, to be automatically renewed unless the Council or the European Parliament revoke the delegation.

A draft regulation amending legislation on the non-commercial movement of pet animals contains the first use of Article 290 TFEU since the entry into force of the Lisbon Treaty. While the institutions explicitly exclude that its use constitutes a precedent as to how Article 290 TFEU may be used in the future, it nonetheless represents a tangible example as to how Article 290 TFEU delegations of authority are to operate in practice.

The de Brún Report[1] on the draft regulation accords five discernable categories of "rights" to the Council and the European Parliament that are to condition the Commission's use of delegated acts. Aside from the incorporation of Article 290 (2) TFEU suggested rights (a right of revocation and a right of opposition), the de Brún report proposes a right to require the Commission to carry out "*appropriate consultations during its preparatory work*"; a right to time-limit the delegation of authority; and a right to receive notification of each delegated act adopted by the Commission and a report from the Commission on its exercise of delegated authority prior to the scheduled expiration of the delegated authority.

2.2.2. The Need for a Model Delegation?

While it is likely that a form of "standard delegation" will develop over time, legislative freedom is a fundamental aspect of Article 290 TFEU delegations (a point stressed by both the Council and the European Parliament). The Commission, however, is in favour of establishing a "model method of delegation" as a means of providing a template for the use of Article 290 TFEU. This template contains four articles: (A) exercise of the delegation, which contains two options for either an indeterminate or time-limited delegation; (B) revocation of the delegation; (C) objections to a delegated act, which includes two options for either a two-month window extendable by a month or a three-month non-extendable window; and (D) urgency procedures.

The Council seems broadly in favour of a standard form of Article 290 TFEU delegation, which it considers would "*facilitate a coherent implementation of Article 290 during the initial phase of its application*".[2] The Szájer Report, on the other hand, tends to emphasise legislative freedom, while stating its preference for an informal "common understanding" between the institutions consisting of agreements in areas such as mutual exchanges of information; arrangements for the transmission of documents; and computation of time periods.[3]

2.2.3. PRAC and Article 290 TFEU Compared

Despite the terminological similarities between the PRAC and Article 290 TFEU delegated authority, it seems clear that past use of the PRAC is not to serve as a

[1] 2009/0077(COD) of 9 March 2010.

[2] Report by the Presidency to COREPER on the implementation of Articles 290 and 291 TFEU (Delegated acts and implementing measures) of 2 December 2009; Annex of INST 209 at p. 4.

[3] See Szájer Report, *op. cit.*, p. 5.

precedent for application of Article 290 TFEU. The European Commission for example has stated that although the terminology may be the same, "*the similarity of the criteria does not mean that they will be implemented in exactly the same way*" and "*[a]ny automatic duplication of precedents is therefore to be avoided*".[1] While there is little to be gained therefore in undertaking a subjective analysis of how the PRAC was used in practice,[2] the overall use of the PRAC is undoubtedly influential on the implementation of Article 290 TFEU.

There are however several notable distinctions between Article 290 TFEU and the PRAC.

In terms of the "rights" accorded to the legislature under the PRAC, the 2006 Comitology Decision only provided for a right of opposition (revocation was only available to the Council under the terms of ex Article 202 TEC). Under the 2006 Decision, opposition was all or nothing — the European Parliament or the Council had to oppose the entire Commission proposal for delegated authority, even if only an aspect of the proposal was considered objectionable. This form of "blanket opposition" is set to continue under Article 290 TFEU delegations judging by the positions of the institutions. It is curious, however, as to why the institutions did not consider allowing for opposition to be targeted at aspects of proposed delegated acts, rather than having to defeat the entire proposal.

Furthermore, the right of opposition under the PRAC was also limited to three instances, where the Council or the European Parliament could oppose the Commission proposal on the grounds that it: (1) exceeded the original scope of delegated authority; (2) infringed the principles of subsidiarity and proportionality; and (3) was not consistent with the aim of delegation.

In both the PRAC and Article 290 TFEU, the ability for the Council or the European Parliament to use a right of opposition is *ex post*. But in two cases under the PRAC, the Commission agreed to amend a proposed use of delegated authority at some point in the future based on a draft resolution of a European Parliament committee that had not yet been voted upon.[3] Although not quite an informal *ex ante* control on the use of delegated authority, should a similar practice emerge under Article 290 the efficiency of agreeing delegated acts could be improved.

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[1] COM(2009) 673 final p. 3 and EU-note - E 33 of 19 April 2010, European Affairs Committee, Folketing, http://www.eu-oplysningen.dk/dokumenter/ft/euu/eunoter/2009_2010/33/ at p. 3

[2] For a subjective analysis of the PRAC, see Hardacre, A. and Damen, M. *The European Parliament and Comitology: PRAC in Practice*, EIPAScope 2009/1, retrievable at: http://www.eipa.eu/files/repository/eipascope/20090709111448_Art2_Eipascoop2009_01.pdf, pp. 13-18.

[3] See Hardacre, A. and Damen, M. *op. cit*.

A further distinction between the PRAC and Article 290 TFEU concerns the use of a PRAC Committee in Article 5a(1) of the Comitology Decision that would advise and assist the Commission in preparing proposals under delegated authority. Article 290 TFEU does not expressly allow for the creation of a similar mechanism (although see section 4 below on the future of comitology), meaning that unlike the situation under the PRAC where opposition to a Commission proposal from a PRAC Committee would trigger an "appeal" to the Council, no such system for appeals can exist under Article 290 TFEU.[1]

Although the Commission is likely to continue its standard practice of consulting expert committees prior to making a formal proposal for a delegated act, such committees are unlikely to be required to take a formal vote on a Commission proposal, with agreement or opposition more likely to be reached by consensus or by a simple majority than in a vote by QMV. The informality of this new system raises questions as to how the expert committees will be composed in the future: will the Member States or the Commission nominate members of such committees, and will the European Parliament have any role in this regard? Declaration No 39 to the Lisbon Treaty indicated that where financial services regulation is concerned, the expert committees are to continue to be composed of national experts (one per Member State), but standard practice in other areas of delegation may deviate from this example.

2.3. Impact on Current Acquis

Article 290 TFEU on delegated acts does not require any secondary legislation to give effect to its provisions and therefore became directly applicable with the entry into force of the Lisbon Treaty on 1 December 2009. While legislation adopted after this date can allow for the use of delegated acts under Article 290 TFEU, the existing *acquis* is to be adapted, where appropriate, on a case-by-case basis. This is especially the case for existing and proposed PRAC procedures. The Swedish Presidency of 2009 began the adaptation process, proposing the adjustment of four PRAC proposals in the areas of energy labelling; energy performance of buildings; intelligent transport systems; and animals used for scientific purposes. Existing Article 5a PRAC procedures are to be maintained pending a future alignment of the relevant basic legislative act to Article 290 TFEU.

[1] Ponzano, P., 'Executive' and 'delegated' acts: The situation after the Lisbon Treaty, in Griller, S. and Ziller, J. (eds.), *op. cit.*, p. 137.

3. IMPLEMENTING ACTS

Article 291(3) TFEU most closely resembles the previous treaty basis for implementing powers (ex Article 202 TEC) in that it allows for the continued use of comitology. The primary difference concerns the scope of Article 291 TFEU. Although not expressly stated, implementing acts are presumably intended for technical measures that are considered necessary for giving effect to "legally binding Union acts".

3.1. Definition and Scope

Article 291(1)TFEU states the general principle that Member States are primarily responsible for the implementation of Union law (as stated in Article 4 (3) TEU and as had been the case under ex Article 10 TEC). Where "uniform conditions" are required to harmonise implementation of "legally binding Union acts" however, the Commission is authorised to adopt implementing acts on the basis of Article 291 TFEU, but subject to the overall control by the Member States.

As with the situation pre-Lisbon Treaty, Article 291 TFEU permits a situation where the Council may directly exercise implementing powers, but only in "duly justified specific cases" and under Articles 24 and 26 TEU which relate to the implementation of the common foreign and security policy. This is slightly different from the situation under ex Article 202 TEC, which permitted the Council to reserve implementing powers to itself. Article 291(2) TFEU, however, contains a clause very similar to Article 290 (1) TFEU, in that authority for the adoption of implementing measures stems from a legal instrument as opposed to from an institution.

A further change to the pre-Lisbon Treaty form of comitology relates to where the responsibility for operating the comitology system is to lie. Under ex Article 202 TEC, the Council was responsible for framing comitology, but Article 291(3) TFEU alters this and places the Member States in charge of controlling the Commission's use of implementing acts. The change was presumably a necessary one, as the traditional dominance of the Council could no longer justifiably be maintained in a system where almost all legislative acts are adopted through co-decision with the European Parliament. Therefore only national representatives will remain in respect of Article 291 TFEU comitology thus excluding the possibility of "appeals" from comitology committees to the Council as had been the case under the Comitology Decision.

3.2. The New Comitology Regulation

The current Comitology Decision (last amended in 2006) will be replaced by a comitology regulation. The Commission released its draft regulation on 9 March 2010[1] and anticipates its adoption by October 2010. The major change from the previous comitology decisions is that under Article 291 TFEU, the European Parliament is equally responsible alongside the Council for shaping the overall framework that applies to comitology, whereas previously the Council held a monopoly over how comitology was structured, with the European Parliament's role limited to delivering an opinion. The regulation will be adopted by a majority of votes cast in the European Parliament and by QMV in the Council (Article 291(3) TFEU removes national vetoes that had previously existed under ex Article 202 TEC, which required unanimity for the adoption of a comitology decision).

The draft comitology regulation proposes maintaining the advisory procedure from Article 3 of the Comitology Decision, while abolishing the management, regulatory and safeguard procedures (Articles 4, 5 and 6 of the Comitology Decision). The regulatory procedure with scrutiny (Article 5a of the Comitology Decision) is replaced in substance by Article 290 TFEU, but its provisions continue in force until each basic legislative act that creates a PRAC has been adapted to Article 290 TFEU (see section 2.3 above). In addition to maintaining the advisory procedure, the draft regulation adds a new "examination procedure" and an urgency procedure. As a result only three comitology systems will remain following the adoption of the Comitology Regulation.

3.2.1. Common Provisions

Article 3 of the draft regulation sets out common provisions to apply to all comitology committees. As with the situation under the Comitology Decision, comitology committees will continue to be "*composed of the representatives of the Member States and chaired by a representative of the Commission*". However, Article 3 (4) of the draft regulation expressly allows for an organic development of proposed implementing acts within a comitology committee, to the extent that the Commission "*may present amended versions of the draft measures in order to take into account the discussions within the committee*" until the committee has delivered its final opinion. This represents a significant increase in the powers of representatives of Member States in comitology committees, as representatives will now be in a position to directly seek amendments to Commission proposals for implementing measures.

[1] COM(2010) 83 final.

3.2.2. New Advisory Procedure

The advisory procedure (Article 4 of the draft regulation) is to be the standard procedure used in all situations where the examination or urgency procedures do not apply. It is identical to the advisory procedure from Article 3 of the Comitology Decision, with the only difference being the ability of the Commission to amend its proposed implementing act during committee proceedings. As with the advisory procedure from Article 3 of the Comitology Decision, the new advisory procedure does not allow for a committee to "appeal" to the Council in case of a negative opinion on a proposed implementing act. This factor, coupled with the generalisation of the advisory procedure, represents a significant gain in power for the European Commission, as the Commission will ultimately be free to decide whether to proceed with a proposed implementing act even in the event of a negative opinion from an advisory committee. In practice, the ability for representatives of Member States to seek changes to proposed implementing acts is likely to temper the Commission's freedom.

3.2.3. Examination Procedure

Article 5 of the draft regulation creates a new comitology procedure called the "examination procedure". According to Article 2 (2) of the draft regulation, an examination procedure may only be used for implementing measures of general scope or implementing measures relating to the common agricultural policy and the common fisheries policy; environment, security and safety or protection of the health or safety of humans, animals or plants; and the common commercial policy. The definition of "*implementing measures of general scope*" is likely to cause difficulties, especially as the formula bears close similarities to Article 290's "*non-legislative acts of general application*".

In terms of practical functioning, the examination procedure operates as follows: the Commission proposes an implementing act to the examination committee, which then delivers its opinion to the Commission, if necessary by taking a vote by QMV; in the event of a positive opinion or should the committee deliver no opinion, the Commission is able to adopt the implementing act (unless exceptional or new circumstances make adoption unadvisable); in the event of a negative opinion, the Commission is unable to adopt the implementing act and must either resubmit the proposal to the committee for further deliberations, or propose an amended implementing act. As with the advisory procedure, the draft regulation does not provide for appeals to the Council from the committee in the event of a negative opinion, but in the examination procedure appeals arguably become redundant

since the committee's negative opinion prevents the Commission from adopting a proposed implementing act. In exceptional circumstances where non-adoption of a proposed implementing measure "*would create a significant disruption of the markets or a risk for the security or safety of humans or for the financial interests of the Union*", the Commission would be able to set aside a negative opinion from the examination committee and adopt the proposed implementing act, which then has a one-month "trial period" of operation, during which time the examination committee may oppose the continued application of the act. In this case the Commission is required to repeal the act.

3.2.4. Urgency Procedure

A third and final procedure — an urgency procedure — is provided for in Article 6 of the draft regulation for implementing measures that the Commission believes should enter into force immediately on "imperative grounds of urgency". In this case a comitology committee has an ability to oppose the adopted implementing act, in which case the Commission must repeal the act.

3.3. Comitology Decision and Draft Comitology Regulation Compared

Compared to the existing Comitology Decision, the draft comitology regulation aims to simplify the use of comitology by providing for a standard comitology system with two exceptions for implementing measures of general scope (and for implementing acts in a number of policy areas) and measures that require urgent application. While the regulation creates a form of comitology that is comparatively less complex than the system under the Comitology Decision, it is the institutional reform of comitology foreseen under Article 291 TFEU that is likely to require a culture change in the way in which the institutions approach comitology.

In this regard, the Council is likely to be the most affected by the changes. Article 291 TFEU places comitology in the hands of the Member States, not the Council, which in practice means that national representatives will be responsible for operating the comitology system. But as the interests of the Member States and the Council evidently align, it is unclear as to whether the Member States may informally use Council committees such as COREPER in the new comitology system.

National representatives will be able to exert real power in comitology committees, for the first time being able to block a proposed implementing act in the case of the examination procedure. In the interests of equality between the Council and the European Parliament, Article 291 TFEU has removed the Council's privileged

position as an organ of appeal for decisions from certain classes of comitology committee.

The Commission gains significant powers of independent decision-making under Article 291 TFEU, being able to decide in the majority of cases (as a result of the generalisation of the advisory procedure) whether to proceed with an implementing act.

Furthermore, the European Parliament loses its *droit de regard* provided for in Article 8 of the Comitology Decision, which the Commission correctly states to be "*incompatible with Article 291*",[1] which provides for "*control by the Member States of the Commission's exercise of implementing powers*", with the role of the legislature left to framing the general conditions for comitology. The Commission does, however, state its intention to maintain a commitment to transparency by providing for the continued use of the existing Comitology Register[2] and by extending Article 15 TFEU transparency rights to comitology proceedings.[3]

3.4. Impact on the Current Acquis

Unlike Article 290 TFEU, no implementing acts may be adopted on the basis of Article 291 TFEU until the new comitology regulation has entered into force. Until this date, the institutions have agreed an interim solution allowing a *pro tempore* continued application of the Comitology Decision.[4]

Once the Comitology Regulation enters into force, Article 10 of the draft regulation (should it be maintained in the final version) proposes an automatic alignment of the *acquis* to its provisions, so that existing references in legislation to the Comitology Decision (with the exception of Article 5a) will be interpreted as references to the relevant section of the Comitology Regulation. This process of alignment is planned to run for two months following the entry into force of the Comitology Regulation.

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[1] COM(2010) 83 final at p. 5.

[2] Article 8 of the draft regulation. The Comitology Register is available at: http://ec.europa.eu/transparency/regcomitology/index.cfm.

[3] Article 7(2) of the draft regulation.

[4] Declaration of the European Parliament, the Council and the Commission concerning the implementation of Article 291 of the Treaty on the functioning of the European Union.

4. ASSESSING THE IMPACT OF THE NEW SYSTEM

The rationale behind Articles 290 TFEU and 291 TFEU is to give effect to the previous *de facto* division of ex Article 202 TEC "implementing powers" into two distinct categories of acts, each with its own institutional rules and procedures, while at the same time reforming these institutional and procedural rules applicable to the quasi-legislative and implementing measures. While the Lisbon Treaty succeeded in providing distinct legal bases for each category in Articles 290 TFEU and 291 TFEU, a number of issues remain open for interpretation.

4.1. What Separates "Delegated Acts" from "Implementing Acts"?

Article 290 TFEU and 291 TFEU are mutually exclusive in that an act of the Commission in the exercise of powers conferred upon it by the legislature must either be a delegated or an implementing act. A basic legislative act, however, may only provide for conferral of such authority in general terms, leaving the choice as to whether to classify an act as delegated or implementing to the Commission when it makes its proposal. In theory, delegated acts are instruments that would normally lie in the domain of legislative power whereas implementing acts are instruments that would otherwise fall within the implementing powers of the Member States. However, the division between the two categories is not necessarily so clear-cut, and the institutions are likely to argue over undefined terms in Articles 290 TFEU and 291 TFEU.

The potential for interinstitutional disagreements in this regard has already been shown in the recast Industrial Emissions (Integrated Pollution Prevention and Control) draft directive. Here the Commission criticised the proposed legal basis for the use of delegated legislative authority according to the following formula: "*the Commission does not share the views of the Council that Article 291 TFEU is the most appropriate legal basis for the adoption of the measures prescribed […]. Those measures are of general application and seek to supplement the basic act with certain new non-essential elements. As a result, their adoption should fall under the procedure of delegated acts (Article 290 TFEU)*".[1]

In the event of any serious difference of opinion between the institutions, it is foreseeable that the European Court of Justice will be called upon to adjudicate on the appropriate classification of a proposed use of delegated authority. In such an eventuality it remains to be seen what criteria the Court will apply in order to

[1] COM(2010) 67 final of 23 February 2010 regarding 2007/0286 (COD).

differentiate between delegated and implementing acts beyond the vague definitions provided in Articles 290 and 291 TFEU. A simple statement on its face that it is a delegated or an implementing act will not preclude a review of whether the proposed use of delegated legislative authority falls within the scope of Article 290 TFEU or Article 291 TFEU.

This problem should ideally be resolved during the legislative process, as a basic legislative act is required to state whether (and on what conditions) it allows for delegated acts to be adopted and whether implementing powers are to be conferred on the Commission. A careful demarcation of such powers into Article 290 and 291 TFEU competences in a basic legislative act may avoid subsequent institutional spats when the Commission chooses to exercise this authority.

4.2. Interinstitutional Balance in Articles 290 and 291 TFEU

The comitology system under ex Article 202 TEC was often criticised for its perceived imbalances in power between the institutions. The Council held a privileged position in the old system, being able to set the terms and conditions in which delegated authority should be exercised. Despite a series of agreements and comitology decisions that increased the role of the Commission and the European Parliament, the fact remained that the treaty rules foresaw a system led and shaped by the Council. The Lisbon Treaty instigates an entirely different approach, one based on equality between the Council and the European Parliament for the framing of comitology under Article 291 TFEU and for determining the conditions in which delegated acts may be adopted and policing their application under Article 290 TFEU. While the dominance of the Council has been superficially removed from the system, the fact that Member States gain a strong role under Article 291 TFEU means that the Council retains a *de facto* superiority over the European Parliament, despite the provisions of equality in the Treaty text. The European Commission also gains influence under Articles 290 and 291 TFEU, which allow for greater autonomy in decision-making free from "appeals" to the Council or *droits de regard* from the European Parliament.

In addition to preparing to the new system, a number of committees of the European Parliament will have to adapt to their new powers under Articles 290 and 291 TFEU. This is the case, for instance, concerning legislation adopted under the common agricultural policy, where delegated authority was authorised solely by the Council and which now must be adapted to take account

of the increased co-decision powers of the European Parliament.[1] The AGRI Committee has never had to deal with delegated authority in the field of the CAP, but has already begun to prepare for its new role under Articles 290 and 291 TFEU.

4.3. The Future of Comitology

In theory, nothing in Article 290 TFEU forbids the use of comitology as a form of control mechanism that could be created by the legislature in the context of policing the Commission's use of delegated acts. The important point in this regard, however, is the opinion of the three key institutions — the Commission, the Council and the European Parliament — as to whether they consider a comitology should apply under Article 290 TFEU. The Swedish Presidency reported in December 2009 that there was a consensus among Member States that the reintroduction of comitology would be "*incompatible with the Treaty*".[2] But just as the original Rome Treaty did not expressly prohibit the use of the comitology system, nothing in the Lisbon Treaty expressly excludes its reintroduction as "method of control" under Article 290 (1) TFEU. However, the Member States have clearly made a decision not to use comitology under Article 290 TFEU delegations for the time being. The Council and the European Parliament stress the need for the Commission to make use of expert advisory committees (whose opinions are non-binding), a recommendation with which the Commission is almost certain to comply.[3] A special case is delegated acts in the field of financial services regulation (the Lamfalussy process), where Declaration No 39 to the Lisbon Treaty requests that the Commission continue its practice of consulting national experts (i.e. individuals nominated by national governments and not the Commission). The Council, however, is of the view that expert committees should henceforth be composed of one representative per Member State, whereas normally the Commission selects the members of expert advisory committees. Their "nationalisation" may be a side effect of the removal of comitology for delegated acts.

Article 291 TFEU on the other hand expressly provides for the continued use of comitology, but its scope will only reach to implementing acts. The Commission's proposed regulation succeeds in simplifying the procedures used in comitology, but

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[1] Draft Opinion of the Committee on Agriculture and Rural Development (2010/0051(COD)) of 25 March 2010 by *rapporteur* Paolo De Castro.

[2] Report by the Presidency to COREPER on the implementation of Articles 290 and 291 TFEU (Delegated acts and implementing measures) of 2 December 2009; Annex of INST 209 at p. 3.

[3] Ponzano, P. "'Executive' and 'delegated' acts: The situation after the Lisbon Treaty", in Griller, S. and Ziller, J. (eds.) *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty?* (Vienna, Springer-Verlag Wien, 2008), p. 136.

the generalisation of the advisory committee has the effect of giving greater powers of decision-making to the European Commission without any checks and balances from the legislature or from the Member States. The examination and urgency procedures which allow for greater scrutiny by the Member States (but not by the legislature) have a limited scope of application, meaning that in most future cases under comitology, implementing measures will be adopted by the Commission. National representatives in advisory committees are able to voice an opinion (which may lead to amendment of the initial proposal by the European Commission), but lack a formal power of veto, which is a power reserved for examination committees only. The Commission's proposed regulation is currently being considered by the Council and the European Parliament, which are expected to adopt the Comitology Regulation before the end of 2010.

NATIONAL PARLIAMENTS & SUBSIDIARITY CHECK: A NEW ACTOR IN TOWN

The Treaty of Lisbon introduced a major innovation to the decision-making mechanism of the European Union. The national parliaments collectively have been equipped with a *de facto* power to veto European Commission legislative proposals before they are subject to adoption by the two legislative bodies, i.e. the European Parliament and the Council of Ministers. The cooperation between the national parliaments has over twenty years of history. The new "yellow" and "orange" card procedure aims to ensure respect for the subsidiary principle. Depending on how it is used, it could become a major obstacle in the European decision-making, but at the same time it could strengthen the European Union's democratic legitimacy. Therefore, the main questions are: *if* the national parliaments will use this new instrument; and if so, *how* — technically, but mainly in what policy fields — will they use it?

1. INTER-PARLIAMENTARY COOPERATION BEFORE 1 DECEMBER 2009

The cooperation between national parliaments was initiated in the 1980s in the aftermath of the first direct elections to the European Parliament held in 1979. Initially the dialogue was conducted purely on an *ad hoc* basis. In 1989 the inter-parliamentary "Conference of Community and European Affairs Committees" (COSAC) was established. Its existence was confirmed by the introduction of a Protocol on the role of national parliaments in the Amsterdam Treaty (1997). From the very first meeting of national parliaments the issue has been *how to increase national parliamentary control of EU affairs*.

COSAC enables a regular exchange of information, best practices and views on European Union matters between European Affairs Committees of national parliaments and the European Parliament. It holds meetings twice a year, where each parliament is represented by six members. The presidency of COSAC is linked to the rotating Presidency of the Council.

Apart from COSAC, the framework of the inter-parliamentary cooperation includes other formats, such as the Conference of Speakers of the European Union Parliaments, which meets annually. The President of the European Parliament takes part in those meetings. The Conference adopts rules of procedure for inter-parliamentary cooperation. In addition there are the regular meetings of the representatives of national parliaments to the EU (Monday Morning Meetings, MMM), the Joint Parliamentary Meetings on topics of common interest between the national parliamentarians and the members of the European Parliament, as well as the meetings of sectoral committees. The primary tool aimed at facilitating the cooperation is

the Inter-parliamentary EU Information Exchange (IPEX)[1]. It is a platform for the electronic exchange of EU-related information between national parliaments in the Union.

The Protocol on the role of national parliaments in the European Union attached to the Treaty of Amsterdam provided for the establishment of an information exchange between the European institutions and national parliaments. The Commission was mandated to send all its consultation documents to the national parliaments (Article 1 of the Protocol) and its legislative documents could be forwarded to the national parliaments by the national governments — yet there was no obligation to do so (Article 2 of the Protocol). Through COSAC the national parliaments could scrutinize the subsidiarity principle and inform the Commission, Council and the Parliament about their position (Article 6 of the Protocol). They could also examine any legislative proposal or initiative in the area of freedom, security and justice, which might have a direct impact on the rights and freedoms of individuals and send their comments to the Commission, Council and the Parliament (Article 5 of the Protocol).

The Amsterdam Treaty signified a formal recognition of the right of national parliaments to be engaged in the European process. National parliaments were not the only consultative body, as there were also the Committee of the Regions (CoR) or the European Economic and Social Committee (EESC). If Amsterdam levelled the powers of national parliaments (through COSAC) with those of EESC or CoR, the Convention on the Future of Europe and the subsequent Inter-Governmental Conferences have changed this dynamics considerably.

The composition of the Convention on the Future of Europe (2001-2003) was organised in an original way. The body included — as full members — representatives of national parliaments alongside representatives of the European Commission, the European Parliament and the national governments. This has had an important consequence: the negotiated draft Treaty establishing a Constitution for Europe created the "yellow" card procedure. It provided the national parliaments with a possibility of initiating a procedure to withdraw a Commission's legislative proposal before it is considered by the Parliament and the Council. The collapse of the draft Constitution and the emergence of the Treaty of Lisbon did not reverse the trend of strengthening the position of national parliaments vis-à-vis the existing treaties. It gave the national parliaments two more weeks

[1] IPEX's website is www.ipex.eu.

to consider using the subsidiarity check. More importantly, it also established a stronger "orange" card procedure.

2. PROVISIONS OF THE TREATY OF LISBON

According to the Treaty of Lisbon, the main task of the national parliaments' engagement in the European decision-making process is to "*contribute actively to the good functioning of the Union*" (Art. 12 TEU). The main instrument to deliver on this is the new clause on the subsidiarity check. More specifically, the Treaty provides for the following forms of engagement of national parliaments:

- Article 12 of the Treaty on the European Union ensures that the national parliaments have access to all draft legislative acts of the Union. It establishes the subsidiarity checks and provides for specific engagement of national parliaments in the area of freedom, security and justice, such as the political monitoring of Europol and the evaluation of Eurojust's activities. The national parliaments are also involved in the revision procedures of the Treaties and are fully informed about the accession applications. It also confirms the inter-parliamentary cooperation between national Parliaments and with the European Parliament.

- Protocol No. 1 on the role of national parliaments establishes a procedure, in which the Commission directly informs the national parliaments about its non-legislative and legislative proposals, including the annual legislative programme. Other actors with legislative powers also send their draft legislative proposals to the national parliaments. The national parliaments then have eight weeks to react to those proposals before the legislative process begins.

- Protocol No. 2 on the application of the principles of subsidiarity and proportionality establishes the rules of the subsidiarity check by national parliaments. If there is a suspicion of a breach of the subsidiary principle, each national parliament, or each chamber of a national parliament, has eight weeks to communicate to the Presidents of the European Commission, European Council and the Council the reasons why it considers that a given draft does not respect the principle of subsidiarity. Regional parliaments with legislative powers can also be consulted. There are two procedures which may follow such a subsidiarity objection:

- "Yellow" card [Art. 7 (2) of the Protocol]: if a third of European national parliaments (2 votes per country, 1 vote per chamber in bicameral systems) considers there to be a breach of the subsidiarity principle, a given draft legislation needs to be reviewed (a fourth in the justice, freedom and security area). The Commission — or any other legislative initiator for that matter — does not have to formally withdraw its proposal and can keep the original proposal in place. However, it will need to explain its decision. It will do so in the form of a Communication.
- "Orange" card [Art. 7 (3) of the Protocol]: should there be more than half of the national parliaments finding a breach of the subsidiary principle (but only in policy areas subject to the ordinary legislative procedure) and the Commission still wants to proceed with the unchanged text, then the national parliaments' opinions ("*why the proposal breaches the subsidiarity principle*") and the Commission's reasoned opinion ("*why the proposal respects the subsidiarity* principle") are transmitted to the Union legislators. The European Parliament and the Council will need to take a decision on the presence (or not) of a subsidiarity breach before dealing with the proposal itself. The Parliament decides by a majority of votes cast on the issue. The Council requires a 55% majority of votes to decide there is a subsidiary breach. If any of them shares the opinion of the national parliaments — then the legislative proposal shall not be processed. The Court of Justice of the European Union exercises a degree of oversight over the application of the principle of subsidiarity (Art. 8 of the Protocol).

- The national parliaments also gained the power to veto the application of the general *passerelle* clause [Art. 48 (7) TEU]. This clause can be used to change the decision-making mechanism in the Council from unanimity to majority voting or to change the special legislative procedure to an ordinary one (i.e. give greater oversight of a policy to the European Parliament). Such a decision can only be taken by a unanimous vote within the European Council. However, any national parliamentary chamber has an individual veto power within the six months following the proposal. The same procedure applies to the specific *passerelle* clause in Art. 81(3) TFEU which allows the Council to move from a special to the ordinary legislative procedure in respect of measures for judicial cooperation in civil matters concerning family law and with cross-border implications. Here as well any individual national parliamentary chamber can veto the decision within six months.

3. IMPLICATIONS FOR THE DECISION-MAKING PROCESS

Before an overall estimation of the likely impact of this involvement of the national parliaments on the EU decision-making process can be made, a few elements await further clarification. First, the Protocol does not include a precise definition of subsidiarity. Such a definition could be worked out by the national parliaments themselves and communicated to the Commission — so that it knows more precisely what to respect.

Second, there is a lack of clarity regarding the potential procedures for monitoring subsidiarity in the later stages of negotiations when the draft law enters the decision-making process in the Parliament and the Council. This remains uncertain even in respect of the Commission's own amendments. One monitoring device which will surely be available is the right to challenge EU laws in front of the European Court of Justice on the basis of a breach of the subsidiarity principle (Art. 8 of the Protocol No 2).

Third, the role of regional parliaments with legislative powers still needs to be clarified. It may constitute a major challenge for some national parliaments to meet the eight week deadline, or even to be able to scrutinise the impact correctly. This seems particularly important for Austria, Belgium, Germany, Italy, Portugal, Spain and the United Kingdom dealing with such regional actors.

Despite these unknowns, a couple of likely implications of this new procedure can already be identified. For one, it seems that, the new procedure will have a limited impact on the length of the legislative procedure in the European Union. The time for the national parliaments to react to legislative proposals has been extended from the previous six weeks to eight weeks. The only potential major time delay would flow from the use of the *passerelle* clauses — where the decision would be delayed by six months before coming into force.

Secondly, the Treaty might in fact empower certain parliamentary chambers beyond what is laid down in their national constitution. Indeed, the Treaty does not foresee any differentiation between national parliamentary chambers (in the bicameral systems) and treats them as equal regardless of their functions or powers: "*In the case of a bicameral Parliamentary system, each of the two chambers shall have one vote*" (Article 7 of Protocol 2). In many countries, however, the second chamber has limited — often specific — functions. Therefore, in some cases the Lisbon Treaty might in fact have empowered the chambers beyond the national constitutions.

4. THE IMPLEMENTATION PROCESS

4.1. The Try-Outs

The Treaty says that the national parliaments have eight weeks — in case a subsidiarity breach is suspected — to communicate this information to the EU institutions. The implementation question is thus how the national parliaments will organise themselves for this subsidiarity check. Unlike certain other preparations for the changes to be introduced upon the entry into force of the new Treaty, the national parliaments's preparatory activities were not suspended after the first Irish referendum on the Lisbon Treaty in June 2008.

Between 2005 and 2009 COSAC has conducted eight "subsidiarity checks" — try-outs of the incoming system aimed at verifying the national parliaments' capacity and dedication to make the new system work.[1] It also served as an occasion for exchange of ideas and to familiarise the national parliamentarians as well as national parliaments' services with the "yellow" and "orange" card procedures. In short, twice a year during its meetings COSAC took decisions to carry out an exercise on the application of the subsidiarity clause. The national parliaments examined the Commission's legislative programme and selected ("flag") those elements in the legislative plan, which could potentially contradict the subsidiarity principle. The moment the Commission put forward a legislative proposal previously preselected as potentially breaching the principle, the COSAC secretariat would initiate the consultation process. For the purpose of the exercise only two legislative proposals were selected every year. Even if the official deadline was eight weeks, in reality the national parliaments had more time to act — it is the national parliaments' interpretation that time starts running from the moment the official proposal is available in all EU official languages.[2] The checks are to be carried out by national Parliaments according to their own laws and procedures.

[1] More information on the exercise is available at http://www.cosac.eu/en/info/earlywarning/ [accessed on 5 May 2010].

[2] The XXXVIII COSAC has asked in October 2007 in its Contribution to the EU Institutions for a clarification of Article 6 of Protocol No 2 to the Treaty on European Union (Protocol on the Application of the Principles of Subsidiarity and Proportionality) to the effect that the timeframe of eight weeks for the subsidiarity check should begin only when a draft legislative act has been transmitted to national parliaments in all the official languages of the Union, Contribution of the XXXVIII COSAC, point 1.5; http://www.cosac.eu/en/meetings/Lisbon2007/plenary.

Table 1. Subsidiarity Checks organised by COSAC 2005-2009[1]

Try-out (draft legislative proposal):	Timeline	No. of participating Parliamentary Chambers	No. of participating States	No. of breaches found (per chamber)	No. of Votes (2 votes per chamber in unicameral parliaments)
1. 3rd Railway Package	Mar-Apr 2005	31/37	22/25	14/37	15/50 (EU-25)
2. Regulation on the applicable law and jurisdiction in divorce matters	Jul-Sep 2006	10/37	9/25	4/37	5/50
3. Directive on postal services	Nov-Dec 2006	10/37	9/25	1/37	2/50
4. Framework Decision on combating terrorism	Dec 2007-Jan 2008	25/40	20/27	1/40	1/54
5. Directive implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation	Jul-Sep 2008	17/40	15/27	1/40	2/54
6. Directive on on standards of quality and safety of human organs intended for transplantation	Dec 2008-Feb 2009	27/40	20/27	1/40	1/54
7. Framework Decision on the right to interpretation and translation in criminal proceedings	Jul-Sep 2009	21/40	17/27	3/40	5/54
8. Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession	Oct-Dec 2009	36/40	25/27	1/40	1/54

[1] More information on all subsidiarity checks is available at http://www.cosac.eu/en/info/earlywarning/.

Each of the national parliamentary chambers had the choice whether or not to participate in the try-outs. They were asked to provide information only if they considered there to be a breach of the subsidiarity principle. They were also instructed to scrutinize the proposals solely on the basis of the subsidiarity and not the proportionality principle. The last check ended after the Lisbon Treaty entered into force; 35 out of 40 national parliamentary chambers participated in the exercise within the deadline, three parliaments failed to meet the deadline. Clearly, the national parliaments have the capacity to trigger the subsidiarity control break should they consider it necessary. In these pilot projects, every participating chamber had to examine:

- if it wanted to participate in the exercise;
- how the legislative draft would be processed in the chamber :
    - what the role of the European committee was;
    - what the role of the specialised committees was;
    - whether the final decision should be taken by the plenary or by a committee;
- if there was a need to consult regional parliaments;
- if the breach existed.

4.2. Application of the Procedure

Following the pilot projects, the national parliaments are now organising themselves. If the meeting of the eight week deadline is to be taken seriously, some sort of organisation will be necessary. At its 43rd meeting in Madrid in May/June 2010, COSAC has decided to terminate the subsidiarity check try-outs, although these checks may be conducted on an *ad hoc* basis on the proposal of a rotating Presidency.[1] The cooperation between national parliaments will not be harmonised top-down, but rather the Conference "*urged national parliaments to intensify their use of IPEX and other forms of cooperation in order to provide mutual information concerning their respective activities and standpoints*".[2]

In practice this means that the coordination will be loose. The procedure will look as follows: each chamber of the national parliaments will receive a draft legislative proposal from the Commission and will initiate (or not) its own procedure. If it decides to scrutinise the draft law, it will transmit its opinion to the Commission. The Commission has proven to be open to cooperation with national parliaments

[1] Conclusions of the XLIII COSAC, http://www.cosac.eu/en/meetings/Madrid2010/ordinary.doc/conclus.pdf.

[2] *Ibid.*, point 1.5.

going beyond the subsidiarity checks and welcomes also non-subsidiarity related comments since the so-called Barroso Initiative in 2006.[1]

What is important is that each chamber will initiate the procedure individually. When doing so, it will inform other national chambers through IPEX. A problem might occur if the subsidiarity control were to be conducted on a constant basis by a few national chambers only, and the other chambers would look into the issue merely if a breach were to be found by the "initiators". Here, a timing problem might arise — that is, if a chamber which regularly scrutinizes all proposals suddenly "discovers" a breach, there might simply be insufficient time for other parliaments to complete their scrutiny before the expiration of the term.

Other procedural factors will also impact upon the feasibility of the deadline. The deadline of eight weeks will be suspended for the month of August. In many parliaments the final decision on a subsidiarity breach can be taken only by the full plenary or after many consultations with specialists committees. In some cases, however, the general European committees can take legally binding positions on behalf of the entire chamber. In certain Member States information on the position of the government on the issue might be required. In bicameral systems the cooperation between parliamentary chambers is envisaged. Finally, in countries where regional parliaments have legislative powers — it is up to a given Member State to determine the domestic procedure in such a way that the opinion could be provided within eight weeks.

5. POLITICAL CONSEQUENCES OF THE NEW SYSTEM

The more significant question concerns the impact of the new subsidiarity control mechanism on the decision-making of the European Union. Clearly, the primary function of the mechanism is to challenge the European Commission to improve its subsidiarity analysis. In the worst-case scenario, the Commission could become paralysed and all its proposals could be challenged by the national chambers. In the best case scenario, if the national parliaments initiate the procedure but do not find any breach of the subsidiarity clause, the Commission's position could be strengthened vis-à-vis the European Parliament and the Council. In any case, the national parliaments cannot stay ignorant and need to perform their task to scrutinize the draft European legislation. The already observable trend of increasing

[1] In 2009 alone, the Commission received 250 opinions from national parliaments on draft legislative proposals, *Annual Report 2009 on relations between the European Commission and National Parliaments*, COM(2010)291 final, Brussels, 2 June 2010.

communication between the Commission and national parliaments (200 opinions of national parliaments sent to the Commission in 2008 and 250 in 2009) might suggest a growing awareness in some of the national parliaments about the possibilities of influencing the EU decision-making process at an earlier stage.

This primary "negative" control function could have also other consequences. First, should the new mechanism become more centralized in the future (and, to a large extent, the *ad hoc* organization is left in the hands of rotating Presidencies), it could generate a Mr. or Ms. "NO" — speaker(s) of the parliament from the country holding the rotating EU Presidency (who normally leads the inter-parliamentary activities) to use the "shadow of the subsidiarity check" in the political debate.

Second, the nature of the relationship between the national governments and their national parliaments varies greatly across the EU. There might be cases where parliaments are working in political unison with their governments; hence there would be a risk of governments using the new mechanism to achieve political objectives (or to delay or even derail the process).

Third, most likely a new dynamic will arise and the much larger involvement of the national parliaments could contribute to enhancing the legitimacy of the adopted laws. There would be less room for political anti-Brussels accusations, as politically the national parliaments would now be co-responsible for the European legislation not only in the transposition phase, but also in the drafting of the original laws. This might stimulate a genuine public debate on the Commission's proposals in many member countries.

6. CONCLUDING QUESTIONS

The role of national parliaments in the system is not an exclusively negative one. They should also contribute constructively to the "good functioning" of the Union. Their negative empowerment gives the national parliaments a power-bargaining position. With time, when the mechanism settles in and, potentially, the feeling of co-responsibility becomes more widely shared among the national parliamentarians — this instrument could in fact also contribute to the constructive engagement of the national parliaments.

Only time will tell whether the new instruments (subsidiarity check, but also the citizens' initiative) will be employed as genuine new tools in the law-making process, or whether they will mainly serve as political instruments in the hands of political actors. In other words, will we witness national parliaments' vetoes on European

draft legislations, or will we rather observe the use of the new mechanism as leverage in the political bargaining process (shadow of a subsidiarity check)?

The appetite for engagement in the European decision-making process is reasonably high among at least some of the national parliaments. They have the capacity to act and seem to have the political motivation to remain alert in looking for subsidiarity breaches. There seems to be a feeling among the national parliaments that the subsidiarity check does not suffice and that they should be able to scrutinize draft legislation beyond those confines. The problem is, however, that their greater negative empowerment could further complicate the already complex European decision-making mechanisms. One idea floated among the national parliamentarians is to provide for greater involvement of national parliaments in the European foreign policy making. There are, however, very different traditions among the Member States with regard to the role accorded to national parliaments in this field. Another idea is to require the Commission to substantiate its responses to the opinions sent by national parliaments.

THE CITIZENS' INITIATIVE: OPPORTUNITIES AND CHALLENGES

1. INTRODUCTION

The uneasy relationship between the EU and its citizens has informed the debates on European integration since at least the early 1990s. For many citizens, the Union is a distant, bureaucratic apparatus that lacks appropriate institutional structures for democratic input. Bemoaning their inability to participate in and influence the EU's decision-making process, people feel like objects rather than sovereign subjects of European politics. The negative outcomes of successive referenda on EU Treaties, and the decline in support for European integration and trust in EU institutions documented by opinion polls and voter turnout at European Parliament elections, are all seen as signs of public apathy and growing estrangement.

These trends have increased awareness that the gap between the EU and its public challenges the success of the European project. The Laeken Declaration of 2001 reflected this idea by stating that "*within the Union, the European institutions must be brought closer to its citizens.*"[1] To this end, the Lisbon Treaty, which came into force on 1 December 2009, introduces *inter alia* the opportunity for greater interaction between the EU and its people by means of the so-called *citizens' initiative*. This instrument allows more than one million citizens from a "significant" number of Member States to invite the European Commission to submit a legislative proposal within the "*framework of its powers*" and "*for the purpose of implementing the Treaties*" (Art. 11 TEU).

The vague formulation of the Treaty's provisions on the citizens' initiative left many issues unsettled with regard to the actual implementation of the new instrument. Seeking to clarify how it should work in practice, the European Parliament adopted on 9 May 2009 a resolution calling upon the Commission to submit a proposal for a regulation on the citizens' initiative, as soon as the Treaty of Lisbon had entered into force.[2] On 11 November 2009, the Commission launched a public consultation to accompany its Green Paper[3] on the European citizens' initiative. Bearing in mind the significance of the new instrument and the complexities surrounding its implementation, the consultation elicited hundreds of replies from a wide range of stakeholders across Europe and ended with a public hearing on 22 February 2010 in Brussels. Drawing on the suggestions made by civil society, the Commission eventually presented on 31 March 2010 its proposal for a regulation of the

[1] European Council, Presidency Conclusions, Laeken, 14 and 15 December 2001: Annex I: Laeken declaration on the future of the European Union, in *Bulletin of the European Union*, No. 12, 2001, p. 20.

[2] European Parliament resolution of 7 May 2009 requesting the Commission to submit a proposal for a regulation of the European Parliament and of the Council on the implementation of the citizens' initiative, P6_TA(2009)0389.

[3] *Green Paper on a European Citizens' Initiative*, COM(2009)622.

European Parliament and the Council on the citizens' initiative.[1] In June 2010 the Council agreed on its general approach proposing certain amendments to the Commission's original draft. At the time of writing (July 2010) the ball was in the European Parliament's court, and a final decision was expected till the end of 2010 or early 2011.

The present paper scrutinises in the first section the Commission's draft regulation on the implementation of the citizens' initiative as well as the Council's proposed changes to it, and reflects in the second part on a number of more substantial implications that the new instrument is likely to have in practice.

2. SCRUTINISING THE TECHNICAL DETAILS

In laying down the ground rules of operation, the Commission's proposal for a regulation on the citizens' initiative seeks to incorporate the suggestions and requests made during the public consultation procedure following two guiding principles. First, the conditions should ensure that citizens' initiatives are "*representative of a Union interest*". Second, the procedures should be "*simple*" and "*user-friendly*", whilst "*preventing fraud or abuse*" and avoiding "*unnecessary administrative burdens*". In other words, the Commission's draft regulation looks to balance the accessibility of the citizens' initiative against the need to ensure the integrity of the new system.

The Commission's proposal specifies *inter alia* the minimum number of Member States, the minimum number of signatories per State, the registration and admissibility rules, the rules for the collection of support statements, the rules for the verification and authentication of signatories, the guidelines for the Commission's response, and introduces a review clause.

2.1. Minimum Number of Member States

The EU Treaty requires that a citizens' initiative be supported in a "*significant number*" of Member States but fails to specify the concrete number. The Commission's draft regulation stipulates that the one million signatories must come from one third of the European Union's members — i.e. 9 countries in the present EU composition of 27 States. This threshold is consistent with other provisions of the Lisbon Treaty, insofar as one third of EU members is also required to trigger the

[1] *Proposal for a Regulation of the European Parliament and of the Council on the Citizens' Initiative*, COM(2010)119.

flexibility instrument of *enhanced cooperation* or the subsidiarity procedure (in the latter case, one third of the votes of national parliaments is required).

As such, the Commission has disregarded suggestions put forward by some stakeholders during the public consultation procedure to lower the threshold to the level of, for instance, one quarter of Member States. The Commission's choice reflects its intention to guarantee that citizens' initiatives are supported in a large number of EU countries and that the new instrument fosters transnational debate and interaction.

2.2. Minimum Number of Signatories per Member State

"Successful" citizens' initiatives need to be backed by a minimum number of signatories in at least one third of Member States. To relax concerns that a fixed percentage for all Member States, independent of the size of their population, would not be equitable, the Commission proposes that the number of signatories be "*degressively proportional*" to the population of every EU country. More precisely, the minimum number of citizens from each country is calculated by multiplying the number of MEPs per EU member with the constant 750, which reflects the composition of the European Parliament agreed in the context of the 2007 Intergovernmental Conference. Thus, for example, the minimum number of signatories in Luxembourg is set at 4.500 — i.e. 6 x 750 — whereas in Germany at 72.000, i.e. 96 x 750. The exact numbers per EU country are listed in an Annex of the draft regulation.

This formula grants larger States a lower and smaller EU countries a higher threshold in terms of their population percentage. In the four biggest EU Member States — Germany, France, the United Kingdom, and Italy — the minimum number of signatories comes to about 0.09 per cent of each country's total population. In the case of the three smallest EU members — Malta, Luxembourg, and Cyprus — the minimum number amounts to 1.1 per cent (Malta), 0.9 per cent (Luxembourg), and 0.5 per cent (Cyprus) of their national population respectively.

The system of degressive proportionality is deemed more equitable because it encourages the organisers of citizens' initiatives to give consideration to both big and small States in their efforts to meet the required thresholds. In a proportional or fixed percentage mechanism, which would apply the same percentage in every EU country, organisers would have had to collect substantially more signatories in larger and much less statements of support in smaller States. Therefore, organisers could have been tempted to concentrate their efforts in a very limited number of

big EU countries in order to secure a high percentage of the required one million statements of support from there. To arrive then at the minimum number of Member States needed (i.e. nine in the EU27), they would have had to gather less signatories in smaller countries on the basis of a proportional or fixed percentage mechanism. Conversely, the system of degressive proportionality proposed by the Commission's draft regulation discourages such cunning use of the citizens' initiative, because it raises the threshold in terms of percentage for small(er) countries well above the one for big(ger) EU States.

2.3. Rules for the Registration and Admissibility of Citizens' Initiatives

At the start of the process, organisers need to register a citizens' initiative. As widely requested, the draft regulation provides for the online registration of any proposed initiative on a website made available by the Commission. The registration of initiatives can be done in any of the EU's official languages and before any evidence of support from citizens has been gathered. The organisers of an initiative will have to provide information about the title of the proposed initiative (100 characters), the subject matter (200 characters), the objectives of their proposal (500 characters), the legal base of the Treaties which would allow the Commission to act, and information about the sources of funding and support for the proposed initiative at the time of registration (Annex II).

In addition, the Commission specifies two registration criteria. The first seeks to ensure that proposals, which are "*abusive or devoid of seriousness*", are immediately removed. The draft regulation does not clarify the exact procedure for evaluating a proposal against this condition. However, it seems likely that this check would not require a high-level political decision in the Commission but could rather be done in a straightforward manner. The second criterion indicates that the Commission, which is explicitly mentioned in this context, shall reject initiatives that are "*manifestly against the values of the Union*". In this case, the decision on the appropriateness or exclusion of certain citizens' initiatives will have to be taken either by the College of Commissioners or some delegated authority acting on its behalf. If an initiative is rejected, the organisers arguably have the right to challenge the Commission's decision in an appeal to the European Court of Justice (ECJ) or appeal to the European Ombudsman, albeit this option is not explicitly specified in the draft regulation.

The Commission's proposal introduces also an admissibility check, which is not mentioned in the EU Treaty. After having collected 300.000 signatories in at least three Member States, the organisers of a citizens' initiative shall submit to

the Commission a request for a decision on the admissibility of their initiative. The Commission must decide then within 2 months (a) whether the proposed initiative concerns a matter where "*a legal act of the Union can be adopted for the purpose of implementing the Treaties*"; and (b) if it "*falls within the framework of the powers of the Commission to make a proposal*". The Council has proposed lowering this threshold from 300.000 to 100.000 signatories, and giving the Commission three months instead of two to complete the check.

One could argue that 300.000 or even 100.000 signatories are rather high thresholds in absolute terms. But the introduction of the admissibility check, whatever its final level, has two practical advantages. On the one hand, it can help reduce the bureaucratic burden of the Commission, as it releases it from the obligation to "check" every single initiative registered. On the other hand, it provides the organisers with the opportunity of receiving a timely answer on the admissibility of their initiative, thereby avoiding the frustration that would have likely accompanied a potential rejection after at least one million statements of support had been gathered.

2.4. Rules for the Collection of Support Statements

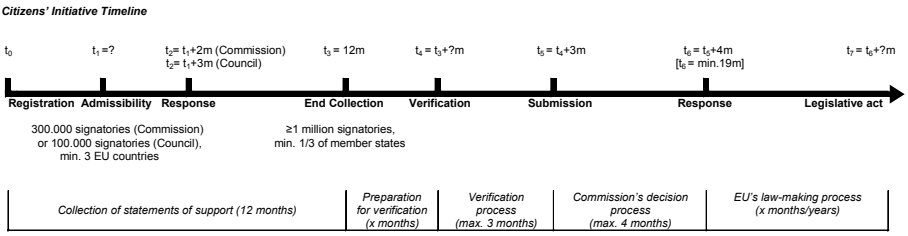
The Commission proposal lays down a number of rules concerning the collection of signatories. Although civil society representatives asked for at least 18 months, the Commission's proposal gives organisers 12 months after the date of registration to arrive at a minimum of one million supporters. In line with respective demands from civil society, the Commission sets no restrictions on how statements of support should be collected and explicitly allows online endorsement from the outset — presumably on websites set-up and operated by the initiators of the proposals. Adding to the Commission's draft, the Council compels organisers to certify the online collection system used before they can start collecting statements of support electronically.

The online collection of support statements will certainly facilitate the accumulation of signatories to meet the required thresholds. However, it might prove sensible in the future, especially after users have gained some experience with the new instrument, to cap the collection of signatories in "cyberspace" to a certain maximum number of support statements in order to promote active deliberation and campaigning within Member States and throughout the EU concerning any of the issues at hand. Cultivating a pan-European exchange of ideas and views in the "real world" about EU issues was after all part of the rationale behind the introduction of the citizens' initiative as well as an important prerequisite for promoting in the long-run the emergence of a European public sphere.

2.5. Rules for the Verification and Authentication of Signatories

The Commission does not propose any specific and collective rules concerning the verification and authentication of statements of support. The draft regulation merely specifies that each Member State must check their own national signatories within 3 months — even if the statements of support were dispensed in a different country. Deviating from the Commission's proposal, the Council has suggested that the country of residence of the signatories should also be allowed to verify statements of support, unless the identification document provided by the supporter was issued in a different Member State (non-EU residents are not considered as the Lisbon Treaty explicitly refers to citizens who are "nationals").

Both proposals might reduce the administrative burden for Member States that already have a system in place for such instruments. However, the absence of clear and standard rules for all EU countries could prove problematic for three reasons. First, without specific and collective rules, discrepancies in national practices stand to exacerbate the operation of a citizens' initiative from the organiser's perspective. The coordinator(s) of any initiative will have to submit the collected statements of support for verification in the Member States from where the signatories originate — either by virtue of citizenship or residence. As a consequence, the organiser(s) will have to become familiar with the different national procedures and authentication bureaus. While such credentials may not pose major problems to experienced and well-organised actors, they could discourage ordinary citizens or small national NGOs from attempting to use the instrument. Second, the lack of standard rules for all Member States might make the verification and authentication of signatories more susceptible to manipulation. Third, the fact that the draft regulation does not indicate a specific timeframe for submitting the statements of support for verification and authentication might prolong the actual submission of the initiative well beyond the 12-month period available for the actual collection of signatures. This would extend the entire process much beyond the minimum 19 months needed from the registration of an initiative to a potential response from the Commission (see timeline). Such a delay could test both the relevance of the issue in question as well as the patience of the organisers and signatories of a citizens' initiative.



2.6. Guidelines for the Commission's Response

Finally, the draft regulation sets a 4-month deadline for the Commission to examine a citizens' initiative that has been successfully submitted. Within this period, the Commission has to make its conclusions public in a Communication for the organiser(s), the European Parliament, and the Council, laying down the "*action it intends to take, if any, and its reasons for doing so*". By adding the words "*if any*" to the draft regulation, the Commission already indicates the possibility that it may decide to take no action whatsoever, even if a citizens' initiative has fulfilled all administrative criteria. The proposal does not lay down any specific criteria guiding the Commission's response, neither in terms of choosing among various legal instruments available for different issues nor in regard to drafting a suitable but potentially negative reply.

2.7. The Review Clause

Fully aware of the fact that the EU is entering uncharted territories with the citizens' initiative, the Commission has included into the proposal two provisions allowing for changes to the original regulation.

Firstly, the draft proposal introduces a review clause that obliges the Commission to present a report to the European Parliament and the Council on the implementation of the citizens' initiative five years after the entry into force of the regulation. The Council has suggested reducing this to three years from the date of the regulation's application. Indeed, a review might prove quite necessary once EU institutions, Member States, and (organised) citizens have gained experience with the new instrument in practice.

Secondly, the Commission has foreseen the possibility to amend the Annexes of the regulation by means of delegated acts. This option would allow for quicker and easier amendments, as the changes deemed necessary would not require the

adoption of a completely new regulation. Most pertinent in this regard is probably Annex 1 listing the minimum number of signatories per Member State.

The opportunity to make revisions might also open up the possibility to address and incorporate some of the issues that were raised during the public consultation procedure but in the end were omitted in the Commission's draft proposal. These include, for example, the introduction of compulsory hearings for the organisers of initiatives, which have successfully passed all hurdles, in order to allow them to properly state their case or the Commission to ask for clarifications. In a similar vein, the Commission might wish to go back on earlier suggestions to formally offer legal advice as a useful first filter of admissibility. The right to appeal to the European Court of Justice was also previously mentioned and could find its way into future amendments as a means to better specify options in case of rejection or unsatisfactory outcomes. Finally, the reimbursement issue might haunt the procedure and eventually compel the Commission to devise clearer financial requirements, including a potential compensation for the costs caused by a "successful" citizens' initiative.

3. ANALYSING THE SUBSTANTIAL IMPLICATIONS

The Commission's proposal has settled some of the more "technical" issues related to the implementation of the citizens' initiative. If the guidelines provided by the Commission's draft regulation lead to the smooth functioning of the new instrument in practice, then the European Union and its citizens stand to benefit in at least four ways:

- First, the introduction of the citizens' initiative adds an unprecedented dimension of public participation encouraging people from across Europe to mobilise in order to push the EU's "legislative button". The possibility to influence the Union's agenda by flagging and supporting concrete policy proposals can help counter public disengagement with EU affairs. Even if in the end the new instrument does not lead to the adoption of legislative acts, the citizens' initiative could still be a valuable tool for actors at the EU and national level to foster certain policy debates.
- Second, the new instrument can stimulate transnational dialogue and debate over concrete public concerns, as any successful citizens' initiative must gather support in nine or more Member States. Citizens or organised interest groups will have to cooperate with counterparts in other EU countries or even set-

up transnational networks, which could gradually evolve from an *ad hoc* to a more permanent status.[1]

- Third, the citizens' initiative can promote the Europeanisation of national public discourses, as the pros and cons of specific proposals might be discussed in national political arenas. Most notably, political parties could employ the new instrument in order to mobilise public interest and support for a specific cause.
- Last but not least, the new instrument might help citizens to get better acquainted with European policy-making. This latent "educational function" of the citizens' initiative could raise public awareness about the role and added value of the EU, and in particular, of the European Commission. A better understanding of the potentials and limits of the EU could benefit the ability of citizens to judge the Union's failures and successes more objectively and independently of their national media and political actors.

These potential benefits of the citizens' initiative can strengthen the link between the EU and its citizens, and thus increase the Union's public legitimacy. However, a number of unanswered but critical questions deserve special consideration.

3.1. Who Will Make Use of the Citizens' Initiative and Why?

Given the scale and resource-savvy nature of the citizens' initiative, it seems rather unlikely that "ordinary citizens" will make use of the new instrument. Europeans will instead have to rely on intermediaries, such as NGOs, interest groups, associations, trade unions, or lobby groups in order to articulate and drive their interests via citizens' initiatives. The new instrument provides these groups with the opportunity to directly influence the European policy process. It is expected that larger NGOs, which are represented in many EU Member States, will be able to conduct campaigns on their own. Smaller and national organisations, on the other hand, will probably have to establish networks with their counterparts in order to organise a Europe-wide citizens' initiative.

A plethora of citizens' initiatives are therefore likely to mirror a segmental interest pushed by a well-organised minority rather than the more general will of the European public. Policy-making could thus fall prey to a "tyranny of minorities" backed by resourceful interest groups, which are more easily able to collect the

[1] See Maurer, A. and Vogel, S., *Die Europäische Bürgerinitiative — Chancen, Grenzen und Umsetzungsempfehlungen*, SWP-Studie, No. S 28, October 2009, pp. 10-11, retrievable at http://www.swp-berlin.org/common/get_document.php?asset_id=6431.

required one million statements of support.[1] At first glance, one million signatories might sound impressive, but this figure accounts for a mere 0.2 per cent of the entire EU population or 0.3 per cent of all citizens eligible to vote. This represents a low threshold even compared to similar instruments in a number of Member States, where the average lies at around 0.89 per cent of the national population.[2] As a potentially valuable safeguard, it seems appropriate that the submission of a "successful" citizens' initiative be followed by public consultation with other interest groups and stakeholders before the Commission comes up with a legislative proposal or decides not to take up the initiative.

Likewise, it seems important to monitor who exactly supports a certain citizens' initiative in order to make sure that the instrument is not (mis)used to influence EU decision-making for commercial purposes. The Commission's draft regulation does not go far enough to avoid a potential abuse of the instrument by resourceful interest groups seeking to realise their narrow concerns. The draft proposal compels organisers to provide information about the "sources of funding and support" at the time of the registration of a citizens' initiative. However, as the Council recommends, the Commission should oblige organisers to supply well-documented evidence about the sponsors of a successful campaign prior to the Commission's decision on the admissibility of an initiative (i.e. after 300.000/100.000 statements of support in at least three Member States have been collected) as well as when the citizens' initiative is actually submitted.

Regarding the policy fields which are likely to breed citizens' initiatives, past and current campaigns (e.g. "Say no to genetic engineering", "Union citizenship for all residents", "For an efficient emergency number all over Europe", "European civil service", "Save our social Europe", "1million4disability", "For life quality and cultural variety in Europe", "Animal welfare initiative", "Europeans against nuclear power", "Help Africa", "One seat") suggest that the new instrument might prove especially attractive in the fields of health and consumer policy, justice, fundamental rights and citizenship, employment and social policy, education and culture, or foreign affairs.[3] However, any predictions on the basis of these campaigns are at best tentative since the records on their performance are often incomplete and the legal toolkit of rules and incentives provided by the

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[1] See Emmanouilidis, J. A. and Stratulat, C., *Implementing Lisbon: Narrowing the EU's 'Democratic Deficit'?*, EPC Policy Brief, March 2010.

[2] See Maurer, A. and Vogel, S, *op. cit.*, pp. 16-17.

[3] See Fischer, C. and Lichtblau, T., Europäische Bürgerinitiativen — Eine Zwischenbilanz, in Pichler, J. W. (ed.), *Verändern wir Europa!* (Vienna/Graz, Berliner Wissenschaftsverlag, 2008), pp. 361-381.

Lisbon Treaty and the draft regulation for such initiatives did not exist at the time of their launch. Noteworthy post-Lisbon exceptions include the ongoing "Work-free Sunday" campaign, started by the German MEP Martin Kastler in March 2010, and the "Financial Transaction Tax" campaign initiated by the German Social Democrats and supported by their Austrian counterparts in May 2010, but it is still quite early to forecast their success. Finally, the Treaties and the draft regulation do not explicitly specify whether citizens' initiatives could be used to change the EU's primary law. Yet, it seems rather clear that the new instrument will not be able to serve this purpose as it falls well outside the envisioned scope of implementing the Treaties.

3.2. The Response to Citizens' Initiatives — a Potential Source of Frustration?

Uncertainty hangs over the nature and quality of the Commission's response to successful citizens' initiatives. The EU Treaty states that an initiative merely "*invites*" the Commission to submit an "appropriate proposal" on a topic that falls within the framework of its powers. In the draft regulation, the Commission categorises the instrument as an agenda-setting device that shall oblige the Commission to give "*serious consideration*" to any submitted citizens' initiative. At the same time, the draft regulation underlines that the new instrument does not affect the Commission's formal right of initiative. In addition, neither the Treaties nor the draft regulation specify the "quality" of the Commission's response, which can vary from a concrete legislative proposal to a mere recommendation or opinion without any binding force. In the end, the Commission is free to command the outcome of the process, but the effects of its choice can vary considerably.[1] It therefore seems particularly important that the Commission strikes the right balance when it responds to a citizens' initiative. A "failure to deliver" would not only affect the image of the Commission, but it could also increase people's dissatisfaction and further alienate citizens from the European Union.

A simple adoption of an initiative would undermine the Commission's role in the legislative process. This scenario could be appealing in situations where the Commission might wish to avoid public disappointment and criticism. In those cases, it would seem easiest to just drop off proposals with the Council and the European Parliament, which as co-legislators have the final word at any rate. However, such

[1] See also Auer, A., European citizens' initiative, *European Constitutional Law review*, Vol. 1, No. 1, 2005, pp. 81-82.

a conduct would be inappropriate as it would challenge the Commission's formal right of initiative and its authority *vis-à-vis* other institutions.

The instrument might become a source of misunderstandings and frustration if organisers and signatories of a "successful" citizens' initiative come to believe that the Commission did not (adequately) respond to their proposal. This scenario is most likely if the Commission does not put forward any concrete proposal. The Brussels authority could then be accused of having turned a tin ear to initiatives even though they have met all formal requirements. But organisers and signatories might also grow impatient if the Commission offers a proposal that does not match their expectations in substance. Media or national political elites can exacerbate such a situation if they have stimulated unrealistic public expectations about the results of a citizens' initiative. After all, one cannot actually assume that the European public will be aware of the fact that the Commission is not the apex but a mediator and activator in the EU's decision-making process. As part of a complex negotiating system, the Commission is essentially obliged to consider and reconcile competing interests while pushing for common European policies.

To address the risk of public disenchantment with the Commission/EU, two things seem necessary. First, more concrete and objective criteria to guide the Commission's response to any given initiative should be devised after some initial experience with the new instrument in practice. Second, in case a citizens' initiative is discarded, the negative answer should include the precise reasons for the rejection as well as suggestions of alternative bodies and tools to consult thereafter.[1] Without proper explanations and instructions, refusals could actually widen the gap between citizens and EU institutions even further. Conversely, if the Commission is successful in its new capacity as "interlocutor" of the people, the Brussels authority might be able to sway more legitimacy in the eyes of European citizens. In certain cases, the Commission could even take advantage of the new instrument and encourage particular initiatives as a means of persuading Member States and/or the European Parliament to side with the public opinion on the respective proposal.

There are two other potential sources of frustration, which go beyond the role of the Commission. First, even if the nature and quality of the Commission's response matches the expectations of the organisers and signatories of a citizens' initiative, the proposed legislative act might be amended or rejected by the EU's two legislators, i.e. the European Parliament and/or the Council. Second, time could prove

[1] See also Kaczynski, P. M., *The European Citizens' Initiative: a Proper Response from the Commission*, CEPS Commentary, 8 January 2010, retrievable at: http://www.ceps.eu/book/european-citizens%E2%80%99-initiative-proper-response-commission.

problematic, as it would take years before a successful citizens' initiative will be implemented in practice (if ever). The entire application cycle of a "successful" citizens' initiative will require at least 19 months, i.e. 12 months to collect one million statements of support, 3 months for the verification and authentication of signatories, and 4 months for the Commission to come up with a response (see timeline). Adding to that, the Treaties and the draft regulation do not indicate a timeframe in which the Commission "must" come up with a concrete legislative proposal, nor can one specify how long it will take the co-legislators to decide on the issue in question. Ultimately, it will probably take a minimum of 3 to 5 years in most cases, and sometimes even longer, from the time of the registration of an initiative until the actual implementation of a legislative act proposed by the Commission. Such a long timeframe could challenge the importance of the issue in question as well as discourage the organisers and signatories of a citizens' initiative.

3.3. Will the Instrument Affect the Efficiency of the System?

The degree to which the new instrument will affect the work of the Commission and the efficiency of the EU as a whole will largely depend on how many citizens' initiatives will be put forward and successfully complete the entire application cycle. The formal requirements for any citizens' initiative, i.e. one million signatories in nine Member States seem rather accessible. However, it is somewhat difficult to predict at this point the likely popularity and accessibility of the new instrument. Many initiatives might surpass the threshold of 300.000/100.000 signatories in three Member States required by the admissibility check, but then fail to arrive at the mandatory one million statements of support within the one-year timeframe. Some organisers might not even be interested in bringing about a legislative proposal, but more concerned with signalling and politicising certain issues. It is also hard to anticipate if potential organisers will in the beginning shy away and decide to monitor the experience of others with the new instrument or whether they will anxiously seek to be among the first to exercise the new right, thus flooding the Commission with proposals. The positive/negative opinions formed during the first initiative(s) are also likely to determine the extent to which citizens will feel encouraged or discouraged to use the new instrument, with obvious implications for the amount of proposals subsequently directed to the Commission.

In case of a significant number of "successful" citizens' initiatives, the sheer volume could influence the workload of the Commission, as it will have to properly consider all proposals and to assess every initiative at least twice — once for the admissibility check and then to decide on the suitable reaction. This could distract the Commission from other commitments or cause it to approach a stricter course

of action, i.e. directly pass proposals through to the legislator or not to take any (adequate) action.

Deadlock may emerge if citizens' initiatives confront the Commission with diametrically opposed or contradictory requests in different policy fields. In principle, it is possible to imagine citizens' initiatives that simultaneously argue in favour or against a more ambitious reduction of CO2 emissions; in favour or against a more liberal immigration policy; in favour or against the use of GMOs; in favour or against banning the burqa throughout the Union; etc. Neither the Treaties nor the draft regulation provide specific guidelines on how to assess and handle opposing initiatives. In such controversial situations, the European Parliament, as the only EU organ with a direct popular mandate, could become a guardian of the new instrument. The European Parliament could provide information and a legal help desk, become an arena for debate on certain issues and/or function as a "filter" by coming up with a proposal of its own supporting a certain initiative on the basis of Article 225 TFEU, which allows the Parliament to request the Commission to submit a certain legislative proposal. In more general terms, other EU institutions but also civil society organisations could support the Commission in all phases of a citizens' initiative from registration to the actual submission and response to a successful initiative.

The increased pressure on the Commission to come up with specific legislative proposals could also prove inauspicious in two other respects. First, the potential expansion of legislative activity might run counter to the tendency witnessed in recent years towards "less regulation". Second, some initiatives could force issues on the agenda, which the Commission might have preferred not to take a stance on (e.g. limiting salaries of bank executives or opening accession negotiations).

The above examples illustrate that the new instrument can under certain circumstances encroach on the effectiveness and quality of EU decision-making. As a consequence, increasing popular democracy at European level might in some cases negatively affect the EU's output legitimacy. This is not to suggest that citizen participation must be at the expense of policy-making efficiency. However, failing to consider the potential risks of a trade-off between the two would be an equally ill-advised option.

3.4. Implications for the Quality of Democracy in the EU

The citizens' initiative is not likely to drastically transform the EU's democratic quality. While the new instrument may add an element of *participatory* or rather

advocacy democracy, the Union will continue to operate within the unconventional scheme of representative democracy in which it was already embedded.

The new instrument stands to enrich people's conventional participatory repertoire with a new style of *advocacy democracy*, whereby citizens can indirectly influence rather than outright determine the EU's policy process. This is due to the fact that the interests of citizens will not gain a "direct voice" at the European level but will depend on non-elected intermediary actors — e.g. organised interest groups, social movements, advocacy coalitions or other NGOs. Yet, the EU was already opened to and accessed by such actors, which seek to provide specialised and particularised alternatives to the classical modes of representation. But with the citizens' initiative in place, organised interest groups might claim more legitimacy as "delegates" of the people's interest. However, they will by no means substitute partisan or electoral channels at national and/or European level. At the same time, one must be aware of the risk that populists and nationalists could employ the citizens' initiative to advance their demagogic message in the national and/or European political arena.

In more general terms, the citizens' initiative will neither alter the model nor substantially improve the quality of representative democracy on which the European Union is founded and has functioned hitherto. Put more bluntly: the new instrument will in itself not substantially contribute to overcoming the EU's "democratic deficit". The citizens' initiative will not lead to a more democratically accountable system compared to national standards of partisan democracy. The degree of politicisation in the EU will not be affected by the introduction of the citizens' initiative. The new instrument will not fundamentally revise the fact that European political life (still) lacks the lifeblood of a thriving democracy, which prospers from the clash of colliding arguments and the personalisation of political conflicts as the essence of politics. As regards the European Commission, the citizens' initiative itself will not change the fact that the Commission is a "non-majoritarian" actor removed from the electoral or partisan process and largely driven by the notion of expert rule. The citizens' initiative will neither increase the political legitimacy nor the accountability of the Commission according to traditional democratic standards at national level. Instead, the Commission will be free to choose what initiatives to take up and how to react to the different proposals without concern that people could vote it "out of office" if they were unsatisfied with its performance. Yet, the citizens' initiative could raise public awareness about the role of the European Commission and even trigger a public or media-driven opinion-forming process about certain European issues on which the Commission will be compelled to take a position.

4. CONCLUSION

As the citizens' initiative has not yet been put into practice, it is too early to deliver a verdict on whether the new instrument will actually contribute to bringing people across Europe closer to the EU and to each other. There is real potential that the citizens' initiative will counter public apathy, stimulate transnational debate, and enhance people's awareness about the potentials and limits of the European Union. These virtues could increase the legitimacy of both the EU and the Commission, with the latter playing a key role in the implementation of the new instrument. The Commission's draft regulation on the citizens' initiative and the Council's general approach sought to facilitate the applicability of the new instrument by specifying user-friendly ground rules. However, some civil-society organizations still question the practicability of the instrument and the danger of abuse and frustration has not been fully dispersed by the technical clarifications provided in the draft regulation. Most notably, uncertainty still looms over the criteria that will guide the Commission's response to specific initiatives.

Ultimately, the success of the new instrument will very much depend on the results it will produce, in terms of how it will influence the performance and image of the Commission/EU and if it will benefit citizens in their everyday lives. It seems likely that the citizens' initiative will in many cases be employed as a political tool to influence debates at national and European level, and less as a legal instrument that changes or generates new legislative acts. In the end, the likelihood of disappointment could be high, especially if media and national actors inflate people's expectations about the results of certain initiatives or about the overall democratic merits of the new instrument, which in *itself* will not contribute significantly to overcoming the EU's "democratic deficit".

Bearing in mind the risks as well as the potential positive effects of the citizens' initiative, the implementation of the new instrument should be welcomed with a healthy dose of realism and with a readiness to find creative solutions for improvement, if they are deemed necessary.

EXTERNAL ACTION:
A WORK IN PROGRESS

1. INTRODUCTION

With justice and home affairs, the domain of external relations and foreign policy is, arguably, among the most affected by the new Treaty. But it definitely is the most affected one considering the administrative changes. It can also be said that the Treaty's actual implementation in this domain — inasmuch as it requires additional negotiations and trade-offs both among the Member States and between all EU institutions — could be as important as the original drafting of the Treaty text. The eventual shape of the new "system" — unlikely to become fully visible until 2013 — will define the Lisbon Treaty's ambition to make the EU a more coherent and effective international actor.

This said, a preliminary overview of the main innovations enshrined in the Treaty may be useful in order to understand where grey areas may lie and what outcomes may be expected following the implementation period. This applies to the main players, the institutions (old and new), and the provisions themselves. Such overview and related analysis will be followed by a broader assessment of the issues involved beyond the strictly legal and institutional dimension.

2. THE PRESIDENTS

To start with, the Treaty envisages a role in this domain for the newly created *President of the European Council*. The role, however, is not spelt out in detail in the text (probably intentionally, given the lack of consensus on the actual scope of the President's future mandate). Indeed, the formulation of Art. 15 TEU is rather vague and leaves plenty of room for conflict with other EU players, in terms of both "representation" of the EU in international fora and strategic orientation in matters of common foreign and security policy (CFSP).

This helped fuel the controversy which erupted in the aftermath of the eventual ratification of the Treaty in the autumn of 2009, over whether the appointee should be a "President" or rather a "Chairman" of the European Council. Both the choice of Herman Van Rompuy and the first steps he has taken in this particular domain seem to point to an intermediate option, which will be further tested in the months to come also in light of other developments.

Interestingly, Van Rompuy has tried so far to articulate an autonomous and original analysis of the new international environment in which the Union operates, especially highlighting the political effects of globalization and the challenges they

pose to Europe[1]; he has also sought to find his own role on the diplomatic scene, in particular at summit meetings, and to spur the Member States into discussing openly and at the highest level the current state and future of EU relations with the other big global players, starting with a special European Council meeting convened for 16 September 2010.

His role clearly eats into what once belonged to the *rotating EU Presidency*, to which the Lisbon Treaty now assigns virtually no role in the domain of external action. What looks legally neat, however, is likely to prove politically hard to implement. President Van Rompuy may have to combine — at least in his first years at the helm — greed and generosity: greed when it comes to claiming and asserting his powers where they exist; and generosity in exercising them.

Last, but certainly not least, the *President of the Commission* will continue to play a crucial role in external relations, especially if the widening range of policy issues coming under that heading is considered. The realities of the 21st century make the traditional notion of "foreign policy" — that of just being a combination of skillful diplomacy and military might — rather obsolete. By contrast, such issues as climate action, financial regulation, border and migration control, and international justice have climbed ever further up the global agenda. These shifting priorities are conferring on the Commission new functions in the wider realm of external policies, and on its President a key coordinating function — potentially also in terms of a role to play in international bodies.

This means that the external dimension of hitherto primarily *internal* common policies (single market, JHA, environment, energy, and of course trade) may well come to represent simultaneously an enrichment and/or a complication for the new institutional "system" created by the Lisbon Treaty.

3. THE HIGH-RERESENTATIVE/VICE-PRESIDENT (HR/VP)

Still, the cornerstone of the new EU system in the domain of external action is the creation of the position of High Representative (HR) of the Union for Foreign Affairs and Security Policy. This is a hybrid institutional figure combining: a) the pioneering role previously played by Javier Solana as High Representative for CFSP (1999-2009); b) that of a Vice-President (VP) of the Commission in

[1] See, for example, his speeches at the College of Europe (Bruges, 25 February 2010) and at the Brussels Forum of the German Marshall Fund (Brussels, 26 March 2010), available at http://www.consilium.europa/eu/uedocs/cms_data/docs/pressdata/en/ec/113067.pdf, and http://www.consilium.europa.eu/uedocs/csm_data/docs/pressdata/en/ec/113630.pdf respectively.

charge of external relations and coordinating other relevant portfolios; and c) the role hitherto played by the Foreign Minister of the country holding the rotating EU Presidency — which includes chairing the Council formation dealing with Foreign Affairs at large (Arts.17-18 TEU i.a.).

To these various responsibilities in the CFSP/ESDP (now CSDP) area should be added the chairing of the Boards of domain-relevant agencies such as the European Defence Agency (EDA), the EU Satellite Centre (EUSC), the EU Institute for Security Studies (EUISS) and the European Security and Defence College (ESDC).

The new *HR/VP*, however, is no longer also the Secretary-General of the Council of the EU. Indeed this is a function that Solana hardly carried out himself in practice during his ten-year mandate, preferring to leave this to his longtime deputy, Pierre de Boissieu[1].

Nor is the new HR/VP — contrary to Solana — also the Secretary-General of the Western European Union (WEU), if anything because the new Commission "hat" makes that impossible[2].

Finally, the new HR/VP has a legal right of initiative both as HR only (in strictly CFSP matters) and as double-hatted VP [Art. 22 (2) TEU]. Similarly, the HR/VP has also dual loyalties and accountabilities, as she is appointed first by the European Council (as HR) and then by the European Parliament as a member (and VP) of the new Commission.

Such a *multi-hatted* position represents a unique opportunity to bring coherence to the Union's "foreign policy" — but also a daunting challenge for the post holder, especially the first one. When Baroness Catherine Ashton accepted the European Council's nomination to the HR/VP post on 19 November 2009[3], she probably did not realize how intractable the job description was. A few months into it, she

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[1] de Boissieu was indeed appointed Council Secretary-General in November 2009 and will stay in office until June 2011. He will be succeeded by Uwe Corsepius, a close aide to German Chancellor Angela Merkel.

[2] For WEU a pragmatic solution was adopted, whereby the Head of the residual Secretariat in Brussels, Arnaud Jacomet, has been appointed Acting Secretary-General, while the Ambassadors to the EU Political and Security Committee from the ten WEU full members (Belgium, Britain, France, Germany, Greece, Italy, Luxembourg, the Netherlands, Portugal and Spain) have kept their second "hat" as Ambassadors to WEU.

[3] After UK Foreign Secretary David Miliband refused the post, in late October 2009, the British government came up with three names: Business Secretary Peter Mandelson (also former European Commissioner for Trade), former Defence Secretary Geoff Hoon, and notably Baroness Ashton, who had replaced Mandelson in the Commission a year earlier and, therefore, was already a member of the College. Art. 18 TUE would have allowed a ballot by QMV, but the appointment — which included Van Rompuy's — was consensual. Ashton started right away as HR but had to wait until the parliamentary confirmation of the whole new Commission to exercise fully her VP function, although she "switched" her Commission portfolio with that of the outgoing Commissioner for External Relations Benita Ferrero Waldner almost immediately. See i.a. http://www.consilium.europa.eu/uedocs/csm_data/docs/pressdata/en/ec/111343.pdf.

must now be aware of the urgent need to put in place a structure that would allow her to delegate administrative, operational and even representational tasks to a number of deputies (*de facto* if not *de jure*), leaving her more free to concentrate on policy coordination and strategic leadership.

Her beginnings in the new job have indeed been a bit shaky, due to a combination of factors: her own (and her old cabinet's) lack of experience in diplomatic affairs and CFSP matters; the institutional and procedural vacuum into which she was catapulted after Solana's departure; and the impossible agenda she has been confronted with from the start. A certain lack of strategic orientation and political compass has also been mentioned as contributing to the difficult "baptism of fire" of the new HR/VP. This is also why the establishment of the European External Action Service (EEAS) has taken centre stage since and has become the bedrock of the new "system" — as well as the quintessential catalyst of all the issues that have haunted European "foreign policy" for its first two decades.

Incidentally, following arrangements made after the entry into force of the Lisbon Treaty, the service is also expected — at least in principle — to support both President Van Rompuy and President Barroso (along with the whole Commission) in their external functions. Still, it cannot be ruled out that both Presidents develop their own structures — albeit on a much smaller scale and much less visibly — to meet their own specific needs in this domain.

Inside the College

The HR/VP is a full member of the *European Commission* and is expected to generate policy coordination and coherence not only within the College — albeit under the control of President Barroso — but also at Directorate-General (DG) level. When the new Commission was nominated by the President (27 November 2009) and later appointed by the European Parliament (9 February 2010), Catherine Ashton was conferred a role of a *"prima inter pares"* — if anything, by virtue of her double "investiture" — among her fellow College members dealing with external policies proper.

Interestingly, she was called upon to "coordinate" the Commissioners for Enlargement and Neighbourhood Policy (Stefan Fuele), for Development (Andris Piebalgs), and for International Cooperation, Humanitarian Aid and Civil Protection (Kristalina Georgieva)[1]. The EU Treaties do not allow for a formal hierarchy

[1] http://europa/eu/rapid/pressReleasesAction.do?reference=IP/09/1837.

among Commissioners (bar the President), but Ashton's special place has to some extent been acknowledged. For his part, Commissioner Piebalgs (the only one among those to have already served a full mandate in the Barroso I College) was designated to represent the Commission proper on the Foreign Affairs Council now chaired by the HR/VP.

Further details as to exactly how such "coordination" could work in practice were left to subsequent decisions, including those regarding the EEAS. It is worth mentioning here that the new Trade Commissioner (Karel De Gucht) was explicitly exempted from such coordination, thus leaving the President of the Commission (and the College as a whole) the ultimate task of bringing about coherence across the entire range of EU common policies with external ramifications.

Catherine Ashton is not the only VP of the new Commission: there are six others. However, she stands out as the most senior one, in part also thanks to her participation in the meetings of the European Council [Art. 15 (2) TEU] which, in turn, puts her also above the 27 Foreign Ministers, who are no longer entitled to attend them on a regular basis.

It is nevertheless worth noting that on 16 April 2010 the College approved the creation of a series of "Groups of Commissioners", starting notably with one on external relations chaired by Ashton and encompassing not only Piebalgs, Fuele, Georgieva, but also De Gucht and the Commissioner for Economic and Monetary Affairs Olli Rehn, with the possible association of others at a later stage[1].

3. THE EEAS

The establishment of the *EEAS* — as foreseen by the Treaty (Art. 27 TEU) — and its precise nature, status, scope and set-up were to (and have indeed) become the object of additional negotiations. Their outcome will inevitably mark the direction the EU will take in its external action in the next decade. Three paradoxes deserve therefore to be highlighted in this respect.

Firstly, while the broad elements of the EEAS had already been agreed upon in early 2003 (within the framework of the Convention on the Future of Europe), concrete talks over its actual implementation started only in early 2010. Thus

[1] The Groups of Commissioners are established to ensure an effective preparation of certain key initiatives. Each Group is chaired by a lead Commissioner and meant to work on the basis of a mandate from the President setting out its purpose and the "products" to be delivered. Groups are not to take decisions but to prepare for collegiate deliberations, and they will include the President's Cabinet and the Commission's Secretariat-General (*Note d'information de M. le President,* SEC (2010) 475, 16 avril 2010 — revised on 21 April).

many years were lost without engaging in serious discussion. The few preparatory meetings devoted to the EEAS in early 2005 (right before the failed referenda on the then Constitutional Treaty in France and the Netherlands brought them to a halt) produced very little indeed[1].

Similarly, the further paralysis generated by the first Irish referendum on Lisbon in June 2008 put all relevant talks on ice until the autumn of 2009. As a result, by early 2010 all players were under huge pressure to deliver quickly on an issue that raises intricate and at times intractable problems. The main institutional players, however, had used those five "wasted" years to consolidate, even reinvigorate their bureaucratic (red) lines of defence and resistance to change.

Secondly, the relevant provisions in the Treaty have proved to be at the same time too specific and too vague: too specific when the one-third rule of thumb was laid down whereby the EEAS should come to incorporate, in roughly equal shares, staff from the relevant Commission DGs, the Council General Secretariat (CGS), and the Member States' Foreign Ministries; and too vague regarding the possible nature and location of the EEAS in the EU "system".

On top of that, the array of players involved in making the relevant decision(s) is unusually wide, encompassing not only the EU-27 and the Commission (through the COREPER, the Council, and the entire College in its own right) but also the European Parliament — in particular regarding staff regulations and budgetary procedures (both subject to co-decision) — thus generating potholes and roadblocks rather than paving the way for progress.

Thirdly, and the final paradox: in late October 2009 a somewhat artificial deadline (30 April 2010) was set for the "founding" Decision on the EEAS. However, while it is expected that the EEAS be launched as soon as possible, its actual implementation and development will inevitably require constant monitoring, review and, quite possibly, further legislative and organizational adjustments in a few years. In other words, while the EEAS can only take shape gradually and as part of work in progress, its foundations must be laid down in a hurried and one-off legislative procedure. The sheer complexity of the issues to be addressed to make the service work properly demands time and adequate preparation. But, paradoxically, any major delay to its launch and implementation is likely to be (and has already been) seen — both inside and outside the Union — as evidence of infighting, disarray and lack of strategic vision.

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[1] The resulting papers can be consulted in the Annex to Avery, G. and Missiroli, A. (eds.) *The EU Foreign Service: How to Build a More Effective Common Policy,* EPC Working Paper No. 28 (Brussels, EPC, November 2007), pp. 82 ff.

3.1. The Making

The main steps in the establishment of the EEAS since the entry into force of the Lisbon Treaty (or, more precisely, since the "Yes" vote in the second Irish referendum, on 2 October 2009, that paved the way for its eventual ratification) have been the following:

- on 20 October 2009, MEP Elmar Brok presented the first draft Report on the institutional aspects of the creation of the EEAS. The main emphasis in both the Report and the ensuing discussion was on the (desirable) proximity of the new service to the Commission — with some MEPs arguing for its full inclusion in it — and on tight parliamentary control over its personnel and budget, especially regarding development aid policy. Slightly differing views were also expressed on the possible full incorporation of the existing politico-military structures in the EEAS. The report was eventually adopted in the EP Plenary Session on 22 October 2009 by 424 votes to 94;
- on 23 October 2009, in turn, the Swedish EU Presidency came up with its own Report, as broadly agreed upon in the COREPER (after preliminary talks at Antici Counselors' level). Although not strictly binding for the HR/VP and future deliberations, the Presidency Report set the stage for the ensuing debate by addressing the scope of the EEAS' activities, its legal status, staffing, financing, and the organization of EU Delegations abroad. It also mentioned 30 April 2010 as a tentative deadline for finalizing the relevant decision at General Affairs Council level, building on a draft proposal to be put forward by the new HR/VP[1];
- to this end, once Catherine Ashton was appointed and later confirmed by the European Parliament as a member of the new College of Commissioners, a dedicated "High Level Group" was formed to support the HR/VP in her initial task[2]. Shortly afterwards, a Special Adviser was also appointed to assist the HR/VP in her preparatory work, namely the former Danish Permanent Representative (and former Commission official) Poul Skytte Christoffersen;

[1] The full text is available at http://register.consilium.europa.eu/pdf/en/09/st14/st14930.en09.pdf. The April deadline was probably dictated also by concerns about a possible change of government in the UK (following parliamentary elections due in May 2010) and its repercussions on the whole Lisbon foreign policy "package" — although Conservative leaders later gave assurances as to their compliance with EU decisions in this domain.

[2] Chaired by Ashton, the group encompassed the two Secretaries-General, Catherine Day and Pierre de Boissieu; the two relevant Directors-General, Joao Vale de Almeida (DG Relex) and Robert Cooper (DG E); the Heads of the respective Legal Services; Patrick Child (Head of all EC/EU Delegations in third countries) and Helga Schmid (Director of the Council's Policy Unit); James Morrison, Ashton's Head of Cabinet; and representatives of the "trio" presidencies involved in the Council negotiations (Spain, Belgium and, from January 2011, Hungary) — that is, all the key players but the EP, whose formal role in shaping the decision was not on the same footing as Council and Commission.

- the following phase, from early February 2010 onwards, was characterized by the circulation of a number of draft documents (from the HR/VP-led steering group)[1], position papers and statements (mostly from MEPs) and media articles that conveyed an impression of lingering confusion and ongoing turf battles[2]. The general climate was hardly helped by the Commission's unilateral appointment, on 17 February 2010, of Joao Vale de Almeida (a close aide to President Barroso) as new Head of the EU Delegation to Washington DC. The appointment, although legally legitimate at that stage, was in fact seen as a sort of preemptive strike and raised loud political criticism from Member States;
- next, on the occasion of the 25 March General Affairs Council, the HR/VP tabled a "*proposal for a Council Decision*"[3], subsequently followed on 26 April 2010 by some amendments that reflected the outcome of further negotiations between EU bodies and among Member States. On the basis of this blueprint, formal consultations were opened with the European Parliament in the context of the so-called "quadrilogue" involving Ashton's aides, the Commission proper, the Spanish EU Presidency, and an informal delegation from the European Parliament including MEPs from the three main party groups (Elmar Brok for EPP, Roberto Gualtieri for S&D, and Guy Verhofstadt for ALDE);
- finally, on 21 June 2010 in Madrid, an agreement was reached between the four parties that included a number of amendments to the previous proposal as well as two separate Declarations by the HR/VP: one on political accountability and another on the basic structure of the EEAS central administration[4]. The agreement was then submitted for approval — as a joint report by Brok and Verhofstadt — to the EP plenary on 8 July 2010. An overwhelming majority of MEPs supported it — with 549 votes in favor, 78 against, and 17 abstentions — and everyone hailed the Madrid agreement as "historic".

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[1] In mid-late February, for instance, separate drafts were circulated on the "vision", the functioning and the organizational structure of the EEAS: they still presented alternative options for the most controversial points in the ongoing talks.

[2] In particular, MEPs Elmar Brok (Foreign Affairs Committee) and Guy Verhofstadt (Constitutional Affairs Committee) co-signed on 18 March 2010 a "non-paper" demanding i.a. a status for the EEAS that would still make its link with and eventual integration into the Commission possible, and the creation of three "political" deputies for the HR/VP alongside the three Commissioners Fuele, Piebalgs and Georgieva. Other MEPs demanded at some stage the separation between ACP countries (to remain with the Commission) and the other geographical desks (to be moved to the EEAS). Extensive reporting on these developments can be found in www.europeanvoice.com; www.euobserver.com; www.europolitics.info; www.euractiv.fr.

[3] http://eeas.europa.eu/docs/eeas_draft_decision_250310_en.pdf

[4] The relevant official joint statement (IP/10/771) can be found in the EU RAPID system.

The very last stage in this process includes the request by the Council (13 July) to the Commission to give its consent; the subsequent unanimous act by the College of Commissioners (20 July); and the formal approval of the Decision by the General Affairs Council (26 July). The adoption of the Financial Regulation and the Staff Regulations is expected to follow after the summer break, according to the co-decision procedure — but the groundwork has already been laid down during the "quadrilogue" talks.

3.2. The Design

After the inter-institutional deal of late June 2010, the likely *chassis* of the EEAS — defined in the draft Decision as "*a functionally autonomous body*" — would consist of a *sui generis* stand-alone structure, separate from both the Commission and the Council, i.e. a "service" in its own right whose status and *modus operandi* will be original and distinct from existing models, and whose budget would be comparable to that of an "autonomous institution".

As the tentative chart reproduced below tries to explain, such a structure will have an organizational "cockpit" encompassing the HR/VP as the "appointing authority" and a sort of "quadrumvirate" including:

a) an Executive Secretary-General (following the example of most national Foreign Ministries), in charge of key "horizontal" and management functions[1], flanked by two main deputies:
b) two deputy Secretary-Generals, whose precise and respective tasks are not spelt out in the Decision, although some options were discussed inside the "High Level Group"[2];
c) at the insistence of the Parliamentary delegation, a Director-General for Budget and Administration, who will oversee all financial, budgetary and auditing procedures in close cooperation with the relevant bodies and under European Parliament scrutiny.

Of all the members of the "quadrumvirate" (initially only a "triumvirate"), the fourth is the one that is most likely to come from the top ranks of the Commission.

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[1] The 25 March proposal mentioned simply a "Secretary-General" "assisted" by two deputies, but especially MEPs objected that only institutions (such as the Council and the Commission, but also e.g. NATO) have a proper SG. Some Member States also disliked such a pyramidal structure — typical for instance of the Quai d'Orsay — with an all-powerful administrative figure at the top.

[2] One of these entailed a distinction between a sort of Political Director and a Director of Operations, another one a separation between the geographical and the operational desks. In all likelihood, the division of labor will stem also from the specific profiles of the candidates for each job and the resulting balance between nationalities as well as institutions.

In the business language chosen by Catherine Ashton, this would be the EEAS Chief Operating Officer, whereas the Executive Secretary-General would be its Chief Executive Officer. Still, within such "cockpit" no formal hierarchy would be established, although the Executive Secretary-General would act as a "*primus inter pares*" (for instance, by deputizing for Ashton in her absence). With them, the HR/VP would form a sort of "corporate board" including also her Head of Cabinet. It remains to be seen exactly where the PSC Chairperson (who, according to Art. 38 TEU, must be a representative of the HR) and the Head of the new Strategic Planning Team (that will incorporate *inter alia* the Council's Policy Unit) might be placed.

Underneath them, a sort of "policy board" would encompass a number of specialized Directorates-General: geographic ones (three to five, depending on the criteria), a thematic one, another devoted notably to budgetary and administrative matters, and a number of horizontal "departments": for strategic planning and analysis, information and public diplomacy, and (yet again at the MEPs' insistence) inter-institutional relations and coordination.

The array of structures and bodies operating in the domain of crisis management and civil-military planning are also all expected to be brought within a dedicated Directorate-General, but the Decision does not specify what chain of command and what reporting lines may be established — especially with reference to the "corporate board" and its members.

In terms of staffing, officials from the Council Secretariat (especially DG E) and the Commission (mostly DG RELEX, plus some from DG DEV), will maintain their status and privileges, although some issues related to the mobility of Commission officials remain open. Interestingly, the one-third share laid down in the Treaty will be implemented more flexibly, in the wake also of the negotiations with the European Parliament. In fact, once the service is up to full speed (by 2013), EU officials proper "*should represent at least 60 % of all EEAS staff at AD level*" (including those diplomats from the Member States who will have become EU officials), while national diplomats should amount, in turn, to "*at least 33 %*".

The remaining gap between the two targets is probably meant to help manage the transition and deal with current temporary agents and especially with Seconded National Experts (SNEs), who were initially expected to play a bigger role in the overall set-up of the service yet are now being considered, instead, only for "*specific cases*" and in "*a limited number*".

All EEAS officials, however, will serve under the same rules and obligations. Especially those from the Member States, who are not to be transferred *en bloc* to the service, will be selected on the basis of "*merit whilst ensuring adequate geographical and gender balance*", as the HR/VP Report reads. This means that "*the staff of the EEAS shall comprise a meaningful presence of nationals from all Member States*" — a formulation that is now also included in the Decision, after lengthy and detailed negotiations within the "quadrilogue"[1]. For them, tours of duty in the service should in principle not exceed two four-year terms although, in exceptional cases, an extra two years can be granted. Yet mobility and rotation will be also ensured *within* the EEAS, in particular between the Brussels "headquarters" and the EU Delegations abroad.

In the initial phase, recruitment for the service will take place only from within the ranks of the three "founding" components, whereas after this date other officials and experts (including from the European Parliament) will also be entitled to apply. In terms of timing, the EEAS is expected to start with an immediate block transfer of some 800 AD officials from the Commission (three quarters) and the General Secretariat of the Council (one quarter, including the current Policy Unit). Some 100 new posts (20 in Brussels and 80 in the Delegations) may be added shortly — for a draft 2010 amending budget of roughly EUR 9.5 million, as agreed with the European Parliament[2] — and some 300 more from 2011.

The actual start of the EEAS — and the termination of DG RELEX as we know it — is therefore foreseen on 1 January 2011, namely one year (and one month) after the entry into force of the Lisbon Treaty.

Included in the EEAS will be also the 135-plus EU (formerly EC) Delegations in third countries and international organizations — although the Lisbon Treaty was hardly explicit about this. The Heads of such Delegations will be directly accountable to the HR/VP (Arts. 32 & 35 TEU) and her "corporate board". While a single chain of command is expected to be in place in each Delegation, further arrangements have been hammered out regarding the position of those officials belonging

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[1] The initial wording in the draft Decision referred in fact to "*the broadest possible geographical balance*" among the Member States, which is also the wording enshrined in the staff rules of both the Commission and the Council. The term "*adequate*" implies a less strict adherence to the principle of equality among the EU-27 and that no formal country quotas will be discussed or negotiated. The HR/VP, on the other hand, is committed to reporting every year on "*the occupation of posts in the EEAS*" to the Council and, now, also to the European Parliament. A comprehensive review is foreseen in 2013, including "*suggestions for additional specific measures to correct possible imbalances*" — as requested in particular by the new Member States (EU-12).

[2] In the initial stages of the drafting of the Decision, much emphasis had been put on the principle of "budgetary neutrality" (no new/extra expenditure in the EU budget). This soon proved unrealistic in light of the need to bring on board diplomats from the Member States and create new temporary EU posts for them.

to Commission Directorates-General (such as trade or development) that are not under Ashton's coordinating authority, and who have (and may wish) to receive separate instructions flowing down from their direct Brussels hierarchy. A similar procedure has been agreed for expenditure, combining the preservation of the Commission's own primary responsibility for its execution with the possibility of special transfers of power to Heads of Delegation whenever required.

The Council Decision on the establishment of the EEAS also includes an Annex with a detailed list of the existing departments and functions to be transferred directly to the service, including the Council's Policy Unit, most of the Commission's DG RELEX, the ACP-related geographic directorates of DG DEV — but not those in charge of budget execution, which remains a Commission prerogative, and neither Europaid or ECHO.

Indeed, the European Parliament has extracted some important concessions from the Council in this domain: the annual spending programs in the development and humanitarian aid sectors will be mainly drafted by the relevant DGs in the Commission, for instance, and the Commissioners themselves will have a substantial say at all stages (this, in turn, may have repercussions within the Commission and impinge upon Ashton's role). Furthermore, the Parliament has obtained scrutiny not only (as expected) over the EEAS' operational budget but also — albeit to a lesser extent — over its administrative budget proper.

Finally (and once again at the insistence of the European Parliament, broadly favorable to a "big" EEAS), the "support staff" in the Delegations will also be part, eventually, of the external service. This may be the reason why media reports in the wake of the Madrid agreement went as far as to mention an eventual overall size of up to 8,000 officials for the service. Size and figures, however, will inevitably depend on both the initial implementation of the EEAS and, above all, the direction that future negotiations over the next Multi-Annual Financial Framework (MFF) for the EU budget — due to start in late 2011 and be concluded by 2012 — will take.

3.3. The Questions

The "design" which has emerged from the "quadrilogue" negotiations will have to be tested — and probably adjusted — over time in light of its gradual implementation. As was to be expected, in fact, it does not solve all the potential functional problems generated by the creation of the EEAS. In some cases, it even creates some that did not exist in the previous "dual" structure.

To start with, the bureaucratic separation between geographic and operational Directorates-General will facilitate the transfer of staff from the Council and the Commission and also help reduce duplication and competition, but it risks setting up new barriers that go against the logic — inherent to the very concept of the EEAS — of an integrated and comprehensive policy approach. In other words, such compartments should not become silos, and *ad hoc* horizontal joint task forces may have to be established to fill possible gaps.

This is, incidentally, an area where a specific role could be found for the Special Representatives (Art. 33 TEU) and/or dedicated Special/Personal Advisors. Yet neither the Treaty nor the Decision clarifies what their status and role should resemble. Over the past decade, in particular, these have varied enormously in terms of profile, mandate, resources and timelines. In a couple of recent cases, interestingly, EU Special Representatives (EUSRs) were "double-hatted"[1], but it remains unclear where they could be placed (and what for) in the new "system".

Similarly, the functioning of the Council Working Groups that have existed so far has not been addressed (yet): exactly who is going to chair them is an unsolved issue at this stage — although the HR/VP is confirmed as the "appointing authority" — as is their precise number and scope in the new post-Lisbon "comitology" framework[2].

Moreover, some of the budgetary and auditing procedures inserted into the final version of the Decision on the basis of the "quadrilogue" deal appear cumbersome and potentially intricate. Hailed by the MEPs as a victory, they may turn out to be a complicating factor in terms of decision- and policy-making (and a source of turf wars inside Brussels).

Finally, it is not fully clear what balance will eventually emerge between effectiveness and accountability. It is certainly true that the European Parliament has scored some important points in this domain. For one, Catherine Ashton will have to submit a first report on the functioning of the EEAS — by the end of 2011 — not only to the Council, as initially foreseen, but also to the Commission and the European Parliament. This will further consolidate a *de facto* practice of co-decision for all things "architecturally" related to the service.

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[1] On the EUSRs see Grevi, G., *Pioneering Foreign Policy: The EU Special Representatives,* Chaillot Paper No. 106, (Paris, EUISS, October 2007).

[2] The formats of such Working Groups/Parties (currently more than 20) have varied a lot over time — some were chaired by the rotating Presidency, others by EU officials — and some reorganization may prove necessary anyway.

It is also true that the European Parliament has forced the HR/VP to make it explicit that, when addressing the plenary in Strasbourg, she can be "deputized" only by fellow Commissioners or, when the agenda is CFSP/CSDP-related, by a serving Foreign Minister, either from the current Presidency or from the so-called "trio" of rotating Presidencies[1]. Indeed, MEPs had spoken out firmly against the possibility that, were the HR/VP unable to attend, "unelected officials" would fill in for her.

Regarding top appointments in the EEAS (and other posts in the CSDP domain), however, the wording of the HR/VP Declaration on "political accountability" is much less firm. Hearings at and briefings to the European Parliament and its relevant Committees by appointed representatives in the EU Delegations and/or CSDP operations can be requested and, arguably, granted. Still, the text (whose legal value is hardly comparable to that of the Decision proper) stops short of defining the level at which an obligation to do so may begin or end.

Once again, in the months and years to come, concrete practice will probably establish quasi-legal precedents to this effect. It is also desirable that it generates on all sides an adequate "etiquette" for such sensitive inter-institutional relations. Both EU institutions and Member States should indeed bear in mind that, when all is said and done, the strategic rationale and ultimate ambition behind the establishment of the EEAS was (and still is) the creation of a common culture and practice among European officials and diplomats. In other words, beyond the current turf battles and bureaucratic politicking, the service is meant to become an instrument for the cross-fertilization of foreign policy-making across the EU and the interchangeability between national and European administrations.

The adjustments that the Decision on the EEAS introduces with respect to the strict "one-third" rule of thumb enshrined in the Lisbon Treaty reflect the sheer fact that, if one looks at the rough figures on the relative size of the three main components of the service, DG RELEX and the Delegations far outnumber the relevant staff from the Council General Secretariat (the ratio is in the region of 5:1 or higher) — with the arrival of a significant number of diplomats from the EU-27 inevitably putting additional pressure on the EEAS budget.

There are, however, huge imbalances also among the Member States, in terms of both quantity and quality of eligible personnel. The pool of available officials varies

[1] This formulation is meant to leave some flexibility for those cases in which the country holding the rotating EU Presidency may find itself in an awkward legal and political situation: in 2012, for instance, the EU Council will be chaired by Denmark (which has an opt-out clause on defence policy) and Cyprus.

enormously between, say, Germany and Malta, and so does their level of experience and expertise. As a result, the procedure of selecting national diplomats "fit for the service" is likely to be subject to innumerable factors and variables. This will prove particularly tricky especially in the start-up phase, when differences in background, culture, approach and also benefits — not only amongst the EU-27 but also between them and EU officials — will be biggest. Over time, as the EEAS develops and grows, such imbalances and differences are bound to narrow. Common training[1] and rotation on the job should contribute to reducing them further.

This is why it is certainly wise to plan — as has already been done — a first Report on the implementation of the EEAS already in 2011 (and not in 2012, as originally stated), and a more substantial and stringent review (possibly leading to a new Decision) by the end of 2013 — which would also fall within the context of the new MFF for the post-2013 budget.

Furthermore, any initial decision cannot possibly enshrine all the "evolutionary" aspects of the service — regarding *inter alia* recruitment and training requirements, career patterns inside and outside the EEAS proper, rotation between the Brussels "headquarters" and the Delegations — which are likely to trigger additional attempts to modify the overall structure in the months ahead.

In other words, the launch and development of the EEAS will probably occupy the entire term of *all* post-Lisbon institutions and possibly turn into one of the most important tests of their successful action and interaction.

4. THE NEW SYSTEM

Apart from and beyond the EEAS set-up, a number of political and functional unknowns still linger over the new external action "system" created by the Lisbon Treaty.

As already mentioned, some have to do with the internal functioning of the Commission and the overall scope of the Union's external action. Some others have to do with personalities, i.e. whether Van Rompuy, Barroso and Ashton will get along

[1] Here, too, the European Parliament has been pushing for the creation of a sort of single European Diplomatic Academy — but has encountered strong opposition from both the Commission and the Member States, especially those keen on preserving or even enhancing their national "champions" in this domain. It seems therefore more likely that, at least initially, the example set by the European Security and Defence College (ESDC) be followed, with specific modules being offered by different national and also EU centers (such as the College of Europe in Bruges/Natolin and the EUI in Florence) on a rotational and "virtual" basis.

(or not), and especially whether they will achieve a *modus vivendi* that is sustainable and, above all, beneficial for the EU as a whole.

There are unknowns regarding the Foreign Ministries of the Member States, who will be confronted with new challenges in terms of both influence and staffing. Some of them will face up to painful dilemmas: should they send "the best and the brightest" to the EEAS or keep them, and with what incentives in either case?

All of them will have to be offered terms of engagement conducive to making them responsible stakeholders in the new system. This will of course not apply only to the institutional set-up. In and of themselves, the HR/VP and the EEAS will not generate a common EU policy vis-à-vis, say, Russia or China: at best, they will facilitate its shaping and implementation. It is the Member States who must "buy" into the new system politically. Incidentally, this issue could become evident also in the field, notably in those third countries where some EU countries have strong interests while others do not (and may not even be represented diplomatically), and it could end up affecting significantly the way in which the local Heads of Delegation operate.

Some additional problems may still lie with the residual role and competences of the rotating EU Presidency. While the new system, once fully in place, will be entirely "Brussels-ised", in terms of both location and impulse, individual Member States will still be chairing on a six-month rotational basis both the COREPER and some Council formations that may be relevant for the Union's external action. This will demand the highest degree of inter-institutional coordination.

Politically also, as already mentioned at the beginning, some "niche" roles will maybe have to be studied — whether on an *ad hoc* basis or more systematically — for the rotating Presidency, once again, to keep them on board without reneging on the political rationale that led to the new Treaty provisions in this domain[1].

For its part, the European Parliament has already become a much more important institutional player in external action and foreign policy at large. Not only is it setting conditions on the establishment and further development of the EEAS proper, but it is also trying to have an ever bigger say on expenditure, appointments and policy guidelines. Its clout in adjacent policy areas has also increased, be it internal security (as the dispute over SWIFT has proven), trade (the European Parliament

[1] The Foreign Minister could for instance — the possibility has already been floated and partially tested during the Spanish Presidency — deputize for the HR/VP whenever her agenda makes attending a given event impossible. If turned into a formal rule, however, this could give the impression that the "old" system is still in place.

has acquired the right to approve or reject agreements), energy and even agriculture (now subject to co-decision).

Only time will tell whether all of this is sufficient to transform the European Parliament into a sort of "EU Congress", with all the repercussions that this could have in terms of inter-institutional relations and policy-making. In any case, it would be counterproductive for the European Parliament to begin micro-managing foreign policy, especially considering its high heterogeneity. An adequate balance will thus have to be found.

Tests and Trends

In terms of policy, it is still uncertain how the CSDP (formerly ESDP) dimension of the Union's external action may develop. The Lisbon Treaty creates a more "permissive" framework in this domain, where a number of enabling clauses would permit new arrangements and initiatives to be put in place.

Interestingly, the only case so far in which the new provisions have already had an impact is the decision, taken through a unanimous Declaration by the ten Ambassadors sitting on the WEU Council on 31 March 2010, to "terminate" the organization as an indirect consequence of the entry into force of Art. 42 TEU, which enshrines a qualified mutual defence clause[1].

Apart from this, most new Treaty articles basically envisage actions and developments that have already been launched well ahead of the entry into force of the Treaty, be it the expansion of the scope of the so-called "Petersberg tasks" (Art. 43), the conduct of EU peace-building operations by only some Member States (Art. 44), or the establishment of the European Defence Agency (Art. 45), already created in 2004. For its part, the scheme envisaging "permanent structured cooperation" (PESCO) in defence matters [Arts 42 (6) - 46 TEU and related Protocol] represents a novelty that will put the willingness of the Member States to cooperate and integrate further in this domain to a decisive test. In all likelihood, much will depend on the views that will prevail next in Great Britain — without whose full engagement and commitment CSDP would be hard to pursue effectively, both politically and functionally.

[1] The decision had already been floated by the Dutch government in 2003 (when it chaired both the EU and WEU Councils) in anticipation of the expected entry into force of the Constitutional Treaty, then put on ice until late 2009. Its actual implementation, however, may still take until late 2011, due especially to the complications related to the dismantling of the WEU Parliamentary Assembly based in Paris.

This said, the Lisbon Treaty does offer a unique opportunity to generate not only better coordination and coherence, but even synergy between all the different aspects of the Union's external action: within CSDP, between its civilian and military spheres; in the wider domain of "security", *inter alia* through the new so-called "solidarity clause" (Art. 222 TFEU), which establishes an operational link between its *internal* and the *external* dimensions; within CFSP, between diplomacy and crisis management proper; and, more broadly, between all the various levers and instruments of external action and "foreign" policy that the Union has, in principle, at its disposal.

A key test of the post-Lisbon system will indeed be the actual functioning of these new "hybrid" structures and figures, starting with the HR/VP and the EEAS. They represent the biggest innovation in the Treaty and, arguably, also its toughest challenge. Failure to produce significant added value or, worse still, an increase in personal and bureaucratic infighting would cast a gloomy shadow over the Union's international image and action, and it would also have negative repercussions on the broader EU internal political climate. Conversely, if the new system proves capable (over time) of improving on the effectiveness and also legitimacy of the Union on the international stage, the "hybrid" model could even be extended, both downstream and upstream.

Moreover, it is already apparent that both international relations at large and EU policy-making are becoming increasingly "presidential": the key decisions are taken by the Heads of State or Government, in line also with domestic developments. This is why another big test for the Lisbon Treaty will be the interplay between the two Presidents, Van Rompuy and Barroso; the way in which they will cooperate and/or compete; the way in which their role(s) will be perceived both internally and externally; and the extent to which they will rely (or not) upon the EEAS structures.

5. THE NEW ENVIRONMENT

This said, the ultimate test will probably come from outside the Union. The new Treaty and the resulting structures are only a necessary but still insufficient condition for a more effective external action of the EU. Their impact on the system remains difficult to assess in full, yet their implementation will not occur in a vacuum: it will be significantly influenced and shaped by external challenges.

Paradoxically, after fostering interdependence as a peace project (such was the essence of European integration over the past half century), the EU now feels vulnerable to interdependence at the global level. Interdependence, however, exists

not only between different areas of the world: it is growing also between policy issues, both within and across regions. Action against climate change cannot be effectively coordinated worldwide without addressing also energy- and trade-related problems. Regulation of financial markets in only one country (or continent) is virtually impossible and, at any rate, it requires tightly coordinated intervention on a large scale. Migration flows cannot be governed without adequate development and human security-related actions. Nuclear non-proliferation initiatives need to be credibly linked to shared global approaches to energy security. And durable peace cannot be secured without justice and reconciliation.

In other words, external and "foreign" policies are no longer what they used to be. For their part, the existing international institutions seem incapable of connecting all the dots: multilateral bodies are too specialized and too fragmented. The EU could make such connections, at least in theory, as it does have both tested and fresh mechanisms to do precisely that. However, in virtually all these bodies and fora, Europeans are largely over-represented, making for up to one third of UN Security Council and G-20 seats as well as voting weights in the IMF and World Bank. They are also, more often than not, under-performing, at least as a Union. And this contributes to weakening the multilateral system, as most emerging powers no longer accept the credibility of the current set-up.

Too Many Europeans, Too Little EU

A more effective "Europe" in the world needs the Lisbon Treaty as its starting point. Yet a more effective multilateral system needs fewer Europeans and more EU: in order to retain (or regain) its influence, Europe must streamline its presence. This is not simply a matter of quantity but also of quality, and it requires sensitive and sensible trade-offs both inside and outside the EU. It also becomes a very strong demand from most EU partners.

The Lisbon Treaty provides some building blocks, and the HR/VP and the EEAS are important cornerstones of the new edifice. The arrangement between Barroso and Van Rompuy on G-8/G-20 summits — whereby the EU as such will be represented by a single delegation[1] — is a small constructive inter-institutional step in that direction, although it leaves some grey areas that could lead to new frictions sooner rather than later and gives a good flavour of the high complexity of the new

[1] Each will speak on matters pertaining to his own legal and political competence. In principle, therefore, Van Rompuy is expected to be "first" President in the G-8, while Barroso continues to be spokesperson for issues falling under Commission competence (and "first" President) in the G-20.

institutional setting. Still, it may help pave the way for bigger and bolder ones in other international bodies.

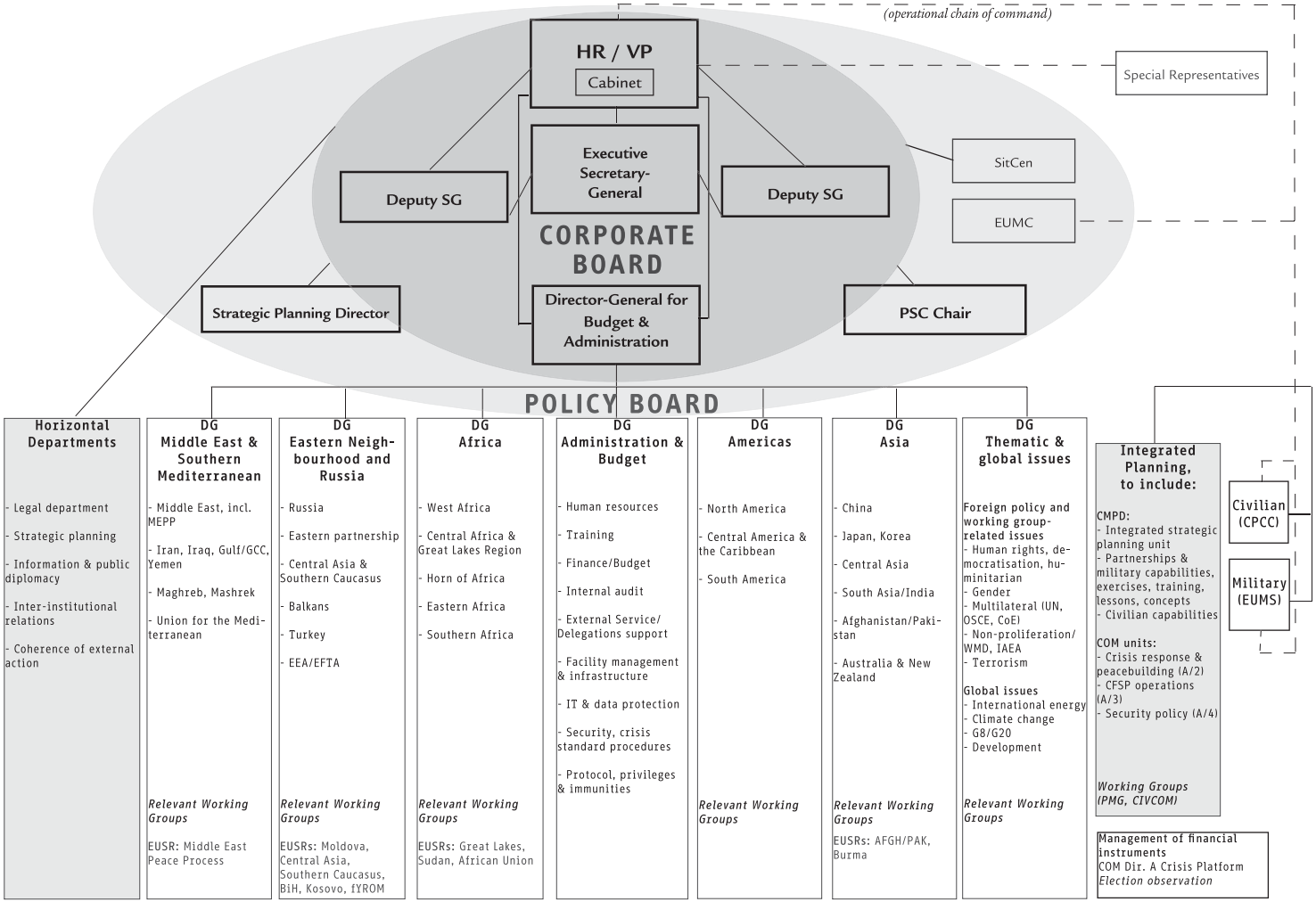
In terms of protocol proper, the fact that the EU has at long last acquired full legal personality in its own right (Art. 47 TEU) has changed little so far in terms of substance. Before Lisbon, for example, Ambassadors seeking accreditation to the EU presented letters of credence both to the President of the Commission (EC and Euratom) and to the rotating Presidency (EU proper), while only the Commission President signed the letters of credence and recall for Heads of EC Delegations abroad. Now Ambassadors continue to present their letters of credence to Barroso — accrediting them to the EU (into which the EC has been subsumed) and Euratom — but do the same also with Van Rompuy *instead of* the rotating Presidency.

The situation is much less clear and automatic when it comes to the Union's representation in international organizations and conventions. True, the nameplate "European Union" is now replacing that of "European Community" in various fora. Beyond the symbolism, however, a maze of very different arrangements governs the international presence of the EU proper.

In most multilateral bodies, all Member States are represented and the EC/EU has only observer status[1]; in the WTO and the FAO, the Commission has full status alongside the Member States; in a few highly specialized international agreements (on agricultural goods or metals), the EC/EU is a full contracting party on behalf of all the Member States: in the World Bank or the IMF, finally, the EU has no status whatsoever, while some member States are "clustered" in *ad hoc* groups.

Such a "patchwork Europe" is the combined result of pre-existing legal competences, political constraints, simple precedents, special agreements, administrative inertia as well as widespread reluctance to overhaul this state of affairs. Addressing it requires both pressure from outside and determination from inside. The external pressure already exists in abundance. On the other hand, a gradual upgrading and streamlining of the international presence of the Union (which often languishes

[1] The way in which the Member States coordinate (or not) within such bodies varies a lot already among those — like the OSCE or the Council of Europe — where the EU-27 alone make for nearly half of the overall membership. The most intricate case in point is arguably that of the United Nations, where the Union is considered an international organization in its own right. As a result, any possible enhancement of its status is seen as a precedent for others (e.g. the Arab League), and thus blocked. Recently, the previous EC Delegation to the UNO was merged with the Office of the CGS created a few years ago and put under a single "double-hatted" Head. Moreover, an *ad hoc* arrangement with the Spanish EU Presidency and the other EU members sitting on the Security Council allowed Catherine Ashton to take the floor there on behalf of the Union in early May 2010: perhaps not an absolute premiere (Javier Solana had done that on a number of occasions in the past), but certainly one for the HR/VP and the new EU. Finally, in late summer 2010 the EU-27 submitted to the UN General Assembly proposals to enhance the observer status of the EU by giving its representatives the opportunity to take the floor, circulate papers, and table amendments.


(operational chain of command)
HR / VP
Cabinet
Special Representatives
Executive Secretary-General
Deputy SG
Deputy SG
SitCen
EUMC
CORPORATE BOARD
Strategic Planning Director
Director-General for Budget & Administration
PSC Chair
POLICY BOARD
Horizontal Departments
- Legal department
- Strategic planning
- Information & public diplomacy
- Inter-institutional relations
- Coherence of external action
DG Middle East & Southern Mediterranean
- Middle East, incl. MEPP
- Iran, Iraq, Gulf/GCC, Yemen
- Maghreb, Mashrek
- Union for the Mediterranean
Relevant Working Groups
EUSR: Middle East Peace Process
DG Eastern Neighbourhood and Russia
- Russia
- Eastern partnership
- Central Asia & Southern Caucasus
- Balkans
- Turkey
- EEA/EFTA
Relevant Working Groups
EUSRs: Moldova, Central Asia, Southern Caucasus, BiH, Kosovo, fYROM
DG Africa
- West Africa
- Central Africa & Great Lakes Region
- Horn of Africa
- Eastern Africa
- Southern Africa
Relevant Working Groups
EUSRs: Great Lakes, Sudan, African Union
DG Administration & Budget
- Human resources
- Training
- Finance/Budget
- Internal audit
- External Service/ Delegations support
- Facility management & infrastructure
- IT & data protection
- Security, crisis standard procedures
- Protocol, privileges & immunities
DG Americas
- North America
- Central America & the Caribbean
- South America
Relevant Working Groups
DG Asia
- China
- Japan, Korea
- Central Asia
- South Asia/India
- Afghanistan/Pakistan
- Australia & New Zealand
Relevant Working Groups
EUSRs: AFGH/PAK, Burma
DG Thematic & global issues
Foreign policy and working group-related issues
- Human rights, democratisation, humanitarian
- Gender
- Multilateral (UN, OSCE, CoE)
- Non-proliferation/ WMD, IAEA
- Terrorism
Global issues
- International energy
- Climate change
- G8/G20
- Development
Relevant Working Groups
Integrated Planning, to include:
CMPD:
- Integrated strategic planning unit
- Partnerships & military capabilities, exercises, training, lessons, concepts
- Civilian capabilities
COM units:
- Crisis response & peacebuilding (A/2)
- CFSP operations (A/3)
- Security policy (A/4)
Working Groups (PMG, CIVCOM)
Civilian (CPCC)
Military (EUMS)
Management of financial instruments
COM Dir. A Crisis Platform
Election observation

with the rank of observer even where its competences may be substantial) should be on the agenda of European policy-makers and diplomats in the years to come.

Yet again, the Lisbon Treaty does offer a much better basis for this. Even with it, however, the EU will probably still have no single telephone number, nor will it speak with one voice. Still, a common, well-functioning, Brussels-based switchboard (connecting also Catherine Ashton and the EEAS) may prove crucial in helping the Europeans get their act together and may possibly contribute to shaping a better international system in line with the realities of the 21st century.

DEFENCE: PERMANENT STRUCTURED COOPERATION

1. THE ESDP'S FIRST DECADE: PROMISE UNFULFILLED

The first 10 years of European Security and Defence Policy (ESDP) have been a disappointment.

ESDP was conceived at the Franco-British summit at Saint-Malo in 1998, and born the following year at the European Council meeting in Helsinki, where EU leaders set an ambitious "Headline Goal" — that, by 2003, Europe should be able to field within 60 days a force of 60.000 and sustain it for a year of deployment.

By 2003, the European Council was also ready to endorse an equally ambitious European Security Strategy (ESS). Acknowledging that security for Europeans today lies not in manning the ramparts or preparing to resist invasion, but in tackling crises abroad before they become breeding-grounds for terrorism, international trafficking, and unmanageable immigration flows, Europe's leaders called for a Europe which is "*more active, more capable, more coherent*" in its approach to international crisis management.

Measured against these ambitions, ESDP's first 10 years have been a disappointment. A flurry of crisis-management operations have duly been undertaken — but were generally of limited scope and duration. The big intervention force promised by 2003 was not achieved — and the Helsinki Headline Goal has been quietly forgotten. The sustained effort of reform that would have been required to re-tool Europe's militaries for expeditionary operations has largely gone unmade.

In synthesis, ESDP's first decade has been characterised by a persistent gulf between rhetoric and behaviour. Member States and Brussels institutions have ignored the need for coherent strategies, improvised important operations, and taken refuge in process as an easier option than delivering real-world change. A lack of real resolve to pool resources, modernise armed forces and deploy them has hobbled ESDP's progress, whether in operations, crisis-management capabilities, or industrial capacities.

Operations. 24 operations to date (of which 7 military) demonstrate activity. And they have generally succeeded — in their own terms. But they have been limited and cautious, with equivalent impact — and almost all have been a nightmare to initiate, as Member States compete to avoid contributing. No strategy is discernible in the pattern of operations — so five operations over 5 years in Congo were followed by blunt rejection of the UN Secretary General's request for help in Eastern Congo in 2008. No serious retrospective evaluation has been attempted.

Capabilities. One reason for Member States' reluctance to contribute is incapacity. Europe's collective defence spending has run at around 200 billion euros per annum for a number of years up to the financial crisis — significantly more than the spending of Russia and China combined.

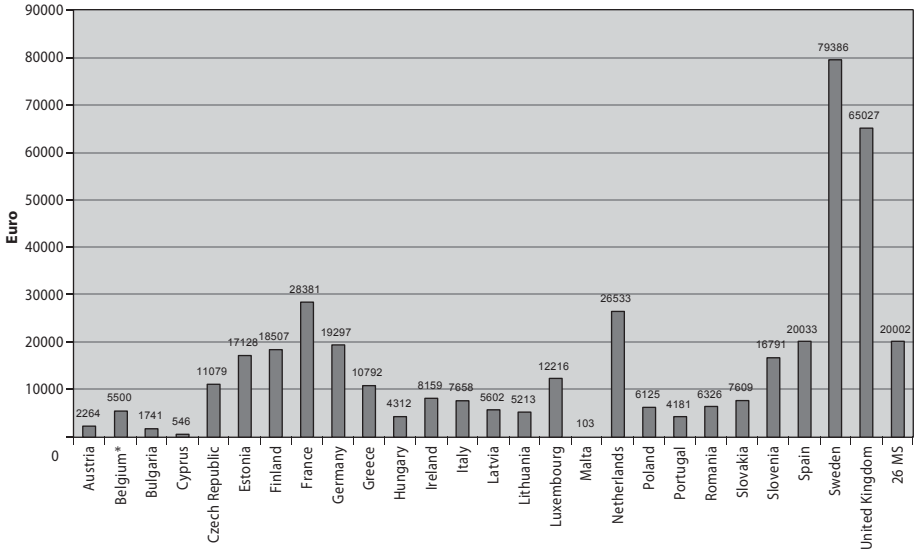
But it is largely wasted on static Cold War militaries. Everyone agrees that budgets should be directed away from heavy metal and high explosives towards mobile, well-protected and well-networked forces able to operate with precision and restraint, and in distant theatres. But conservatism and vested interests continue to favour tanks and fighter jets over helicopters and satellites. Three-quarters of Europe's 1.8 million military personnel cannot operate outside national territory. Europeans can routinely keep only 4% (some 80.000) deployed — the equivalent US figure is 210.000, or 15% of their 1.4 million uniforms.

Taken together, Europeans badly need to reduce their numbers in uniform and shift resources into equipment and research spend. An imperfect but indicative measure of progress in this regard is investment per soldier.

Only six Member States — Luxembourg, Sweden, the UK, the Netherlands, France and Germany — exceed the EU average of 24.000 euros per soldier. This sum is less than one-fifth of what the US invests in equipping each member of its fighting forces, present and future.

Fig. 1

European Investment (Equipment Procurement and R&D) per Soldier in 2006



Source: European Defence Agency, National Defence Data in 2008, p. 10, at http://www.eda.europa.eu/defencefacts.

It is often thought that Europe can make up for military feebleness by its civilian capabilities — the ability to send police, government experts, etc., to crisis-hit countries. Such elements of the so-called "comprehensive approach" to crisis management may indeed be as important as military force. But the belief that Europe is well-endowed with civilian capabilities is an illusion. With some 2000 personnel deployed on EULEX Kosovo, the cupboard is bare. The 400-post police training mission in Afghanistan remains chronically undermanned.

Industrial capacities. The picture is no happier here either. As European Defence Ministers have acknowledged, persistent underfunding of research and technology means that Europe is living of past investment. "*We recognize that a point has now been reached when we need fundamental change in how we manage the business of defence in Europe — and that time is not on our side*"[1]. The change they prescribe is the creation of a truly European defence technological and industrial base, which is more than the sum of its national parts — with Member States increasingly pooling their requirements, and satisfying them from an integrated European market. They also stress the need to "*spend more, spend better, and spend more together*" on defence research.

Some useful steps to integrate the defence market have been taken. Modest progress is being made, notably in the European Defence Agency (EDA), on promoting joint investment. But Europeans invest only one-sixth of what the US spends on Research and Development — and spend a trivial 1.25% of their total defence expenditure on Research and Technology. Unless this trend is rapidly corrected, the terminal decline of the European defence industry can be foreseen.

Meanwhile, the defence industry consolidation of the 1990s has stalled. Promotion of national industries especially in land- and sea-systems persists with the inevitable duplication and dissipation of effort and resources. In some ways we are moving backwards: if EADS (the Franco-German-Spanish conglomerate) did not exist, few believe it would be possible to create it today.

As a result of all this, much of Europe's defence spending is wasted. In terms of real, useful military (or indeed civilian) capability, Europe punches greatly below its weight — with the impact of continent-wide fiscal austerity still to work its way through into the inevitable further defence cuts.

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[1] *A Strategy for the European Defence Technological and Industrial Base* (Brussels, EDA, 14 May 2007), retrievable at: http://www.eda.europa.eu/genericitem.aspx?area=30&id=211.

2. THE GROWING TEMPTATION OF THE "BIG SWITZERLAND" OPTION

But, does this really matter? In the eyes of US Defence Secretary Gates, it certainly does: reflecting in early 2010 on what he saw as a growing pacifism in Europe, he declared that "*The demilitarisation of Europe, where large swaths of the general public and political class are averse to military force and the risks that go with it, has gone from a blessing in the 20th century to an impediment to achieving real security and lasting peace in the 21st*"[1]. So are European publics and elites essentially decadent? Or are they perhaps just smart enough to understand how the security environment is changing around them?

The passing of the occidental millenarian dream. It is hard now to recall the sense of optimism with which the old millennium closed. Liberal democracy had triumphed across the globe: the victors of the Cold War — predominantly America — seemed to have both the right and the duty to fare forth, right the world's wrongs, and generally make it a better place. Milosevic was humbled in Kosovo; NATO and the EU were enlarging, to establish a vast new swathe of stability and security in Eastern Europe. Tyrants everywhere were in retreat. Now, of course, most of this millenarian zeal has simply run into the sands of two debilitating Middle Eastern wars. Today public opinion increasingly feels that Afghanistan is not working; teaching the rest of the world to elect good men, in Woodrow Wilson's phrase, turns out to be a good deal harder than advertised. The policy of heroic interventionism has run its course.

Furthermore, not all Member States amongst the EU 15 were equally enthusiastic about the activist European Security Strategy when it was endorsed. Now the Union has 12 more members, none with a colonial history, and few with much appetite for foreign adventures. The practical experience of recent years, notably under NATO's flag in Afghanistan, has also dampened support for expeditionary operations.

The absence of any serious classical military threat. Yet, if not interventionism, what? For the reality is that Europe has become quite a safe place. War in Europe seems, for the foreseeable future, simply inconceivable. Russia, difficult neighbour though it may be, is no sort of conventional military threat. As Secretary Gates wrote in Foreign Affairs in 2009: "*Russia's conventional military, although vastly improved since its nadir in the late 1990s, remains a shadow of its Soviet predecessor.*

[1] Remarks as delivered by Secretary of Defence Robert M. Gates at NATO Strategic Concept Seminar *Future of NATO,* National Defence University, Washington, D.C., Tuesday, February 23, 2010, retrievable at: http://www.defence.gov/speeches/speech.aspx?speechid=1423.

And adverse demographic trends in Russia will likely keep those conventional forces in check"[1]. Only jihadist terrorism poses a direct risk — but we now know that the idea of rooting it out by military means is self-defeating. Of course, new threats (such as cyber warfare) can be conjured.

The coming budget onslaught. Furthermore, the defence sector will obviously be a primary target in the mother of all budget consolidations that Europe is now entering into. Squeezed between the enormous weight of their rapidly increasing debt and the proximate threat of aging on their future budgets, the Member States can be expected to contemplate ruthless cuts in defence orders and personnel.

All these factors might very reasonably argue for a less ambitious, and expensive, approach to European defence and security — an approach which took a leaf from the Swiss book and adopted the principles of stay home, keep your guard up as necessary, but mind your own business.

Such a conclusion would, however, fail to take account of the extraordinary, and extraordinarily rapid, changes in the wider geostrategic landscape which globalisation has triggered. America, so recently the "hyperpower", now finds itself *primus inter pares* in a genuinely multipolar world. The West, whether understood to mean free-market capitalism or democratic values, is no longer the unchallenged arbiter of global norms. A massive redistribution of global power to the south and east is underway, with the financial crisis acting as an accelerator. The full influence of the rising powers, most prominently China, India and Brazil, is only just beginning to be felt.

The point is not that the old demonology of the Soviet Union and Islamic jihadists should now be re-peopled with emerging powers. The point is that Europeans' almost effortless ability to shape global affairs to suit their own preferences, as junior partners of the US, is now slipping away from them. The real threat to European security, looking a decade or two ahead, is more insidious than any overt military menace — it is the threat of irrelevance, of being shoved to the margins of world affairs whilst the global future, and the rules by which it runs, are made by others.

Thus, keeping an efficient though limited military instrument is one essential way to retain a measure of influence in a world where the US is turning away from the Atlantic and "emerging powers" — led by China — are increasingly calling the shots. This is not just a matter of defending European interests, such as continued access to natural resources at a time of growing scarcity. It is also a matter of val-

[1] Gates, R. M., A Balanced Strategy, *Foreign Affairs,* Vol. 88, No. 1, Jan/Febr 2009.

ues — of continued projection of support for human rights and for the restraint of power by law in which Europeans continue to believe. Even "demilitarised" European publics continue persistently to confirm to pollsters their support for an active European role in international peacekeeping.

It is hard to say it better than former US Ambassador to NATO Victoria Nuland: "*Europe needs, the United States needs, NATO needs, the democratic world needs — a stronger, more capable European defence capacity. An ESDP with only 'soft power' is not enough*"[1].

3. THE BIG INNOVATION OF THE LISBON TREATY: THE PIONEER GROUP

The Lisbon Treaty could help significantly in different respects. It can strengthen Europe's appetite, and ability, to conduct a common foreign policy — because common external security and defence efforts need that context and framework. The Treaty also strongly emphasises the need for joint endeavours such as multinational formations, European equipment programmes, and other EDA activities. The ultimate aim, of course, is to improve defence capabilities across the board and to provide more operational forces, whether for rapid deployment (Battlegroups) or for longer-term advisory and local capacity-building work. The Petersberg Tasks have been extended to "*include joint disarmament operations […] military advice and assistance tasks*" and counter-terrorism actions. Finally, the Treaty provides for two other interesting (but not very impressive as far as their concrete effect!) amendments to the CFSP including the "mutual defence clause" — which obliges Member States to protect any other Member State under military attack — and a "mutual solidarity clause" — which urges greater cooperation between national diplomatic missions vis-à-vis EU delegations, and the protection of any Member State subject to terrorist attacks or natural disasters.

However, the fundamental progress comes from the recognition of the need for differentiation in the field of defence — the recognition that not all Member States will be either willing or able to move ahead at the same pace, and that means must therefore be found to permit a pioneer group, or groups, to push ahead with forms of cooperation which others may not wish or be able to join. This is the essence of the Treaty's provisions on "permanent structured cooperation" — PESCO — essentially Title V, Art. 42 para. 6 TEU, Art. 46 TEU and Protocol No 10.

[1] Speech to the Paris Press Club on 22 February 2008.

The PESCO concept acknowledges two fundamental truths about European defence which, in the absence of more flexible arrangements, will inevitably slow progress to a crawl. First, no Member State will allow itself to be forced to enter into a conflict, or to change how it spends its defence budget, by "Brussels" — whether an EU institution, or a majority of its partners. And second, a significant minority of Member States demonstrates, by their reluctance to make any serious investment in defence, or by their tendency to sit on their hands when the call goes out for contributions to crisis-management operations, that they really do not want to play.

Such sovereign decisions should be respected. But there is a corollary: non-players should not insist on a seat at the table, and on holding the enterprise back to the pace of the slowest. So, in defence, it is time to move on from the traditional "convoy" approach — to accept the reality of a "multi-speed" Europe, and to allow "pioneer groups" of the willing to move things forward when not all are ready to join in.

The debates taking place since the pioneer group concept first appeared in the "Constitution" have helped to clarify four key principles for the approach. First, just as no one should be forced to do what he does not want in defence, so no one should be allowed to hold back others who do. Second, the formation of pioneer groups needs to take account of the political willingness of different Member States; but it should be based on transparent and objective criteria, and specific commitments. Third, the formation of groups and the corresponding distribution of influence need to reflect the multi-faceted nature of European defence and security efforts, and the diversity of the Member States; the aim should be to include as many countries as possible, in any area where they have something worthwhile to offer. Fourth, inclusivity should nonetheless have its limits: non-contributing passengers should not be allowed to slow the caravan down, and influence should be proportional to the stake each Member State holds in the enterprise.

The Lisbon Treaty establishes a clear legal basis for that. It allows for a self-selecting group of Member States "*whose military capabilities fulfil higher criteria*" and which "*have made more binding commitments to one another in this area*" to establish PESCO (Art. 42 para. 6 TEU). The attraction is obvious: a vanguard will not be held back with the less competent or less committed. It remains to be seen whether this vanguard can be a small one, since non-participating countries take part in the launching vote. Member States will compete to avoid exclusion (a continuing effect, since promotion and relegation are envisaged).

The texts are relatively general but Protocol No. 10 establishes a few constraints. The PESCO is conditionally open to the Member States. Any State which wants to participate must undertake to "*(a) proceed more intensively to develop its defence*

capacities through the development of its national contributions and participation, where appropriate, in multinational forces, in the main European equipment programmes, and in the activity of the EDA" and "*(b) have the capacity to supply by 2010 at the latest, either at national level or as a component of multinational force groups, targeted combat units for the missions planned, structured at a tactical level as a battle group*". Point (a) suggests that commitments may be considered as satisfactory. Point (b) is more cut-and-dried, but in practice all Member States except Malta have found a place in the battlegroups initiative.

Essentially, structured cooperation in defence is thus more flexible than "enhanced cooperation". It is not conditioned by a minimal quorum of participants. No threshold is imposed to entrants: achievement of admission criteria can be deferred provided that the Member State concerned commits to achieve them over time. The construction of a multi-speed ESDP should be based less on past performance than on new commitments Member States are prepared to take on, as consensus develops on what criteria should be agreed, and what targets set for those who wish to be part of pioneer groups. So no-one is necessarily excluded. However, members which do not respect their commitments face suspension by qualified majority vote of the other participating Member States. Structured cooperation is launched by qualified majority vote. All implementation decisions are submitted to the unanimity rule amongst the participants.

To a significant extent, the PESCO concept is simply a development of approaches already implemented in the context of the European Defence Agency (EDA). Belonging to the Agency is a matter of choice for each Member State (though all except Denmark have chosen to do so). And under the EDA's "big tent", different groups of Member States are able to form cooperations as they wish, with transparency for all but no obligation on the initiators of specific projects to accept additional members if they do not want to.

Indeed, following the Lisbon Treaty's entry into force some Member States — unsurprisingly, mainly the relatively weaker defence performers who could find themselves embarrassed by having to choose between raising their game and finding themselves excluded from PESCO — have argued that PESCO is unnecessary, and that all the flexibility needed for small-group cooperation and differential speeds of advance is already available within the Agency. This, however, ignores three key points. First, the prospect of a degree of political exposure which these poorer performers find uncomfortable will by the same token be a useful incentive to discourage free-riding on the efforts of others. Second, as we discuss below, PESCO offers the opportunity to afford the relatively stronger performers a relatively bigger voice in the direction of the EDA, which will strengthen that organisation. And

third and most important, PESCO will encourage cooperation between Member States at the wholesale level, whereas the Agency operates at the retail level. That is to say, the EDA helps Member States to work together on a project-by-project basis; PESCO will enable them to cooperate programme-by-programme. On that basis, initial political decisions and financial commitments will allow cooperations to stride forward by the metre rather than shuffle ahead centimetre-by-centimetre as tends to be the case today.

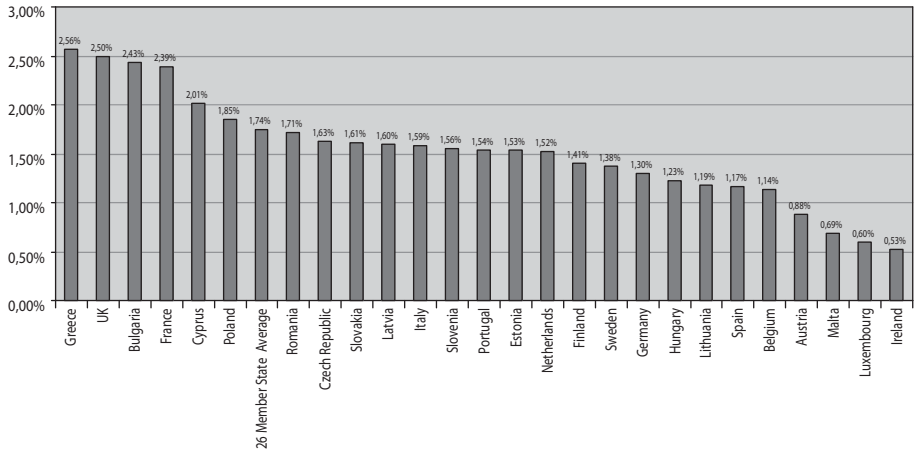
4. THE AVAILABLE OPTIONS

Three main steps are needed for the implementation of PESCO.

Selection. Some basic qualifying criteria should be set for securing a seat at the table. Three criteria seem fundamental: to spend enough on defence (measured by percentage of GDP); to take defence modernisation seriously, so as to produce useable armed forces (measured by investment per soldier); and to be prepared to use them (percentage deployed on operations). The two Figures beneath set out the data for levels of spending and deployment record, based on three-year averages.[1]

Fig. 2

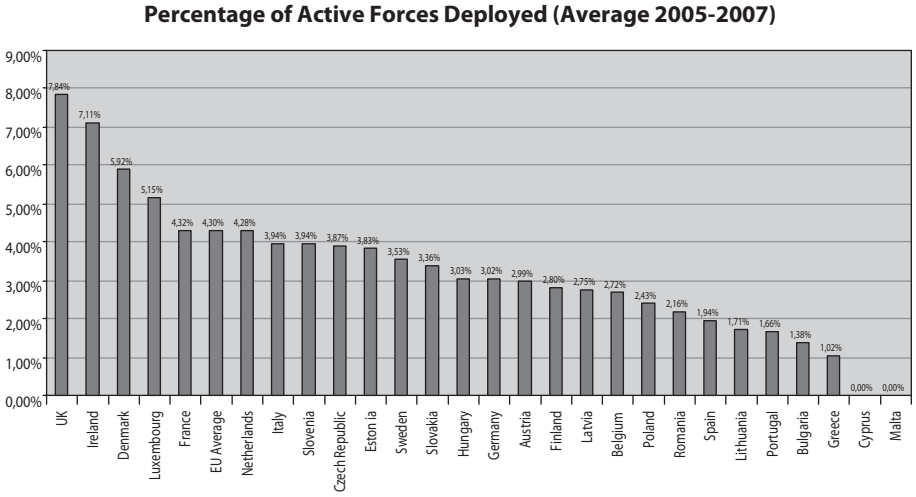
Defence Expenditure as a Percentage of GDP (2006-2007 Average)



Source: European Defence Agency (NB: Denmark does not provide data to EDA)

[1] An obstacle on the selection road remains the lack of proper information. Objective criteria and standards require reliable data and this is in short supply. The 2008 dossier of the International Institute for Strategic Studies on European Military Capabilities, the product of three years' research, is an important new source.; but it is already losing currency. There is, for example, no central record of who has contributed what to the 24 ESDP operations undertaken so far. The EDA has gathered some of the best data from Member States on the basis of collectively-agreed definitions, which the Agency, however, cannot verify independently. Some Member States refuse to release part of their data, but estimates are usually possible; Denmark, not being an EDA member, does not provide any.

Fig. 3



Source: IISS (European Military Capabilities, June 2008)

Against this background, the next decision is on "how high to set the bar". As noted above, pioneer groups do not need to be too exclusive. They are usually thought of as relatively small — maybe 6 or 8 — but would it really be sensible to discourage the majority of Member States by excluding them? Would not many take this as permission to give up? Would it not make better sense to reverse the proportions, excluding from PESCO only a minority of the worst performing Member States? For example, setting base criteria of 1% of GDP spent and 2% of troops deployed would, on the evidence of Figures 2 and 3 above, exclude only 10 Member States — Austria, Ireland, Luxembourg and Malta for spending too little, and Bulgaria, Cyprus, Greece, Lithuania, Portugal and Spain for staying home. And ideally of course the number would be lower still, when at least some reacted by improving their performance.

Definition of objectives. Specialist pioneer groups should be set up for each of the main arenas for boosting Europe's defence capabilities — military capability development, mutualisation of defence infrastructure, research and technology, armaments, and perhaps others. Each such group would have its own qualifying criteria, such as spending a minimum percentage of the national defence budget on R&D, and qualifying commitments, quantified where possible (to cooperate more closely, pooling efforts and resources).

Determination of a hard core. From these specialist groups, a core group could be established, embracing those Member States who contribute most to most areas of activity.

To put it more poetically, European defence would turn into a flower, composed of different petals. These would represent different areas of defence cooperation (for example, research and technology; or joint training; or shared capability planning). At the heart of the flower centre will be found the Member States who contribute most to most.

A key reason for troubling to identify such a core group lies in the relationship between PESCO and the EDA. The Treaty makes plain that this is to be close: participation in EDA projects is noted in the Treaty as a potential criterion (or commitment), and would certainly seem germane to several of the specialist groups suggested above. And it is the EDA which, under the Treaty, is to provide the objective assessments of Member State performance against criteria and commitments. The principle of strongest voice for strongest performers could therefore be given effective substance by affording each specialist group a privileged role in setting the EDA's agendas and preparing business for the Agency's Steering Board. The "core" group (the centre of the flower) would help prepare business for the Defence Ministers' Steering Board — and thus have privileged voices in setting the whole agenda and direction of the Agency.

To conclude, in this framework, three options may be contemplated. A restrictive approach will limit strongly the number of participating Member States. This would of course simplify the management of the cooperation. On the other side, PESCO will become less representative. This could also be interpreted as a tentative to dominate CFSP through the military instrument. An extensive approach will try to incorporate all Member States in PESCO. This huge heterogeneity would complicate the management of the cooperation and reduce the investment incentives. An intermediate approach, as suggested above, could gather a majority of Member States, with a minimal level of defence investment and commitment. It would be, hopefully, sufficiently representative and sufficiently efficient.

This is important, including for other realms than defence. The European Union has become quite difficult to manage with 27 Member States (and possibly 29 in a few years). Enhanced cooperation offers a path to smoothen this problem. PESCO could be seen, in that light, as an institutional laboratory for other projects. Its success would have a real impact.

Whatever approach is chosen, the coming years are going to be very challenging for the defence sector in Europe. The heavy pressure of public finances' consolidation in all Members States combined with the absence of a direct military threat could provoke quite a drastic reduction of the defence outlays. In that context, the Lisbon Treaty offers a very important opportunity to get more defence for less bucks. However, this will not happen without a strong political will to surmount the numerous bureaucratic and business obstacles that have been quite visible during the last 10 years. The ESDP's first decade has been disappointing, but if its lessons are correctly understood by the Heads of State or Government, the second one could still become more impressive.

SIMPLIFIED TREATY REVISION POSSIBILITIES WITHIN THE LISBON TREATY

1. INTRODUCTION

The long and painful process of ratifying the Lisbon Treaty illustrated, once again, the need - especially in an enlarged EU - for more flexible mechanisms to adapt the EU institutional framework and substantive policy options to the rapidly changing reality. Indeed, only six months into the Lisbon Treaty's existence, there have already been at least two debates in which talk of potential amendments to the Treaty figured prominently. Admittedly, the amendment of Protocol No 36 on the number of MEPs which was approved on the 23rd of June 2010 during a "fifteen minutes Intergovernmental Conference (IGC)"[1] was more due to the late entry into force of the Lisbon Treaty than to its substantive inadequacy.[2] Nonetheless, notwithstanding the adoption of an aid package for Greece on the basis of Art. 122 TFEU[3] as a provisional solution[4], Germany, supported to some extent by a proposal from the ECB[5], continues to propagate the need for a Treaty change to avoid future Eurozone crises by establishing the indispensible economic policy coordination and surveillance (possibly including a "European Monetary Fund"[6]).[7]

These examples indicate the illusionary character of any attempt to adopt "a Treaty revision which would end all Treaty revisions". Hence, the difficulty of obtaining unanimous agreement at an Intergovernmental Conference and subsequent ratification by all Member States according to their constitutional procedures (which includes referenda in some countries) seriously challenges the Union's adaptability, and is clearly exacerbated by its growing membership. The participants to the Convention were strongly aware of this problem and attempted to introduce alternative revision strategies to facilitate this process. Unfortunately, these simplified revision routes were already seriously crippled during the IGC adopting the Constitutional

[1] Which then still needed to be ratified by the national parliaments.

[2] See the Spanish proposal for amendment which was adopted as such, at: http://register.consilium.europa.eu/pdf/en/09/st17/st17196.en09.pdf.

[3] http://www.euractiv.com/en/financial-services/eu-sealed-plan-shield-euro-speculators-news-493956.

[4] See however the statements made in the *Financial Times of* 28 May 2010 by Pierre Lellouche claiming that this financial stabilisation mechanism does in fact amount to a Treaty amendment to the "no bail-out clause", retrievable at: http://www.ft.com/cms/s/0/d6299cae-69b5-11df-8432-00144feab49a.html.

[5] ECB, *Reinforcing Economic Governance in the Euro Area,* 10 June 2010, retrievable at: http://www.ecb.europa.eu/pub/pdf/other/reinforcingeconomicgovernanceintheeuroareaen.pdf; note also the suggestion to include such Treaty change in the accession Treaty for Croatia.

[6] http://www.euractiv.com/en/euro/eu-odds-treaty-change-european-monetary-fund-news-352202.

[7] http://www.bundeskanzlerin.de/nn_704284/Content/EN/Artikel/2010/03/2010-03-10-merkel-fillon__en.html; Both Commission President Barroso and European Council President Van Rompuy have, however, rejected the idea of Treaty revision at this stage: http://euobserver.com/843/30129; http://euobserver.com/18/30132.

Treaty. Yet, although highly insufficient, these simplified revision procedures and *passerelles*, in combination with the improved enhanced cooperation mechanism[1], might still provide some opening to make adaptations to the Lisbon Treaty and are thus worth taking a closer look at.[2]

2. "GENERAL" SIMPLIFIED REVISION PROCEDURE IN ART. 48 TEU

Aside from reforming the ordinary revision procedure to incorporate the Convention-method [Art. 48 (3) TEU], the Lisbon Treaty also introduces two general simplified revision procedures [Art. 48 (6)-(7) TEU].

2.1. In Respect of Part III of TFEU "Union Policies and Internal Actions" [Art. 48 (6) TEU]

A Member State, the European Parliament and the Commission can request the European Council for an amendment to all or part of the provisions of Part III of TFEU relating to Union Policies and Internal Actions. Such amendments are, however, subject to strict conditions. Indeed, the European Council has to adopt its amendment decision by unanimity and in doing so it cannot "*increase the competences conferred on the Union in the Treaties*". Even more importantly, these amendments will still need to be ratified by all Member States according to their constitutional procedures.

2.2. "General *Passerelle*" [Art. 48 (7) TEU]

An additional mechanism is the so-called "general *passerelle*" clause allowing the European Council to adapt, on its own initiative, the voting requirements or decision-making procedure laid down in a Treaty provision from unanimity to qualified majority voting (QMV) and from the special legislative procedure to the ordinary legislative procedure.

Again, however, this possibility is subject to important restrictions. For one, its application is limited to the provisions of the TFEU and Title V of the TEU.[3] Secondly, aside from the need for the European Council to adopt such a decision

[1] See *First Lisbon Study,* for an analysis of the improvements made to the enhanced cooperation mechanism, pp. 97-114.

[2] See also in that sense the Conclusion of the *First Lisbon Study*, pp. 145-147.

[3] Note that a move from a special to an ordinary legislative procedure logically does not apply to the CFSP (Title V TEU) since no legislative acts can be adopted in this area (see Art. 24 TEU).

by unanimity and obtain the consent of the European Parliament, the national parliaments *de facto* obtain the right to "veto" this decision within a six-month period.[1] Moreover, in respect of decisions with military implications or in the area of defence, no such adaptation from unanimity to QMV is permitted.

It should be noted that Art. 353 TFEU explicitly excludes the application of this "general *passerelle*" in respect of the voting and decision-making procedures laid down in the following articles: Art. 311 paras 1 & 4 TFEU relating to the decisions on the "own resources", Art. 312 (2), para. 2 TFEU on the adoption of Multiannual Financial Frameworks[2], Art. 352 TFEU incorporating the "flexibility clause" and Art. 354 TFEU on the suspension of membership rights.

3. ADDITIONAL *PASSERELLES* AND *PASSERELLE*-TYPE PROVISIONS THROUGHOUT THE LISBON TREATY

In addition to these general simplified revision procedures, the Lisbon Treaty also contains various specific provisions providing for the possibility to amend their content without the need to pass by the ordinary revision procedure.

3.1. Various Domains

- **Art. 31 (3) TEU**: Whereas, in principle, action within the Common Foreign and Security Policy remains subject to unanimity, the European Council is given the power to bring additional matters of this area under a QMV-rule.[3] Again, however, it cannot do so in respect of decisions with military implications or in the area of defence.
- **Art. 153 (2), para. 4 TFEU**: In line with the current Art. 137 (2) of the EC-Treaty, the Lisbon Treaty allows the Council to move from unanimity and

[1] See also Art. 6 of Protocol No 1 on the role of national parliaments in the European Union. This requirement was added at the 2003-2004 IGC and seriously reduced the potential added value of this general *passerelle*.

[2] As will be discussed below, this provision contains its own *passerelle* allowing the European Council to change the voting requirements in the Council to QMV, without the risk of this decision being vetoed by any national parliament.

[3] It should be noted that the relationship of Art. 31 (3) TEU with Art. 48 (7) TEU, which prescribes the involvement of the European Parliament and the national parliaments, is all but clear. Indeed if Art. 31 (3) TEU is considered the *lex specialis* this would render the general *passerelle's* reference to Title V superfluous since this Title V does not contain any provisions where unanimous voting in the Council is stipulated which are not already caught by the specific *passerelle* of Art. 31 (3) TEU. In addition, it would mean that no parliamentary supervision, be it European or national, on the amendment of the decision-making procedure in the sensitive area of CFSP would be present. Conversely, if primacy is given to Art. 47 (8) TEU, this would lead to the somewhat awkward situation that the EP obtains significant power in an area where it traditionally has little to say.

consultation procedure to co-decision procedure in respect of certain fields of social policy.[1] The decision to do so should be adopted by unanimity.

- **Art. 192 (2) TFEU**: Also in respect of certain environmental measures[2], the Council can adopt by unanimity a decision amending the decision-making procedure from the specific legislative procedure to the ordinary legislative procedure.
- **Art. 312 (2) TFEU**: In line with established practice, the Lisbon Treaty mandates the Council to adopt, in accordance with the special legislative procedure and by unanimity, a regulation laying down a Multiannual Financial Framework. However, the European Council may adapt these voting requirements within the Council to QMV. It is worth noting that Art. 353 TFEU explicitly excludes the use of the general *passerelle* of Art. 48 (7) TEU to move to the ordinary legislative procedure.
- **Art. 333 TFEU**: As part of the attempt to increase the attractiveness of the mechanism for enhanced cooperation, the Lisbon Treaty provides that the Council can adapt either the voting requirements from unanimity to QMV, or the decision-making procedure from a special to an ordinary legislative procedure. Although such an amendment to the Treaty provision to which the enhanced cooperation relates still requires unanimity within the Council, it will only be necessary to reach such unanimity among those Member States that participate in the enhanced co-operation.[3] Again, the Council cannot modify the procedures in respect of decisions with military implications or in the area of defence.

3.2. Area of Freedom, Security and Justice

Among the most influential changes brought about by the Lisbon Treaty is probably the merging of the remaining Third Pillar domain of Police and Judicial Cooperation in Criminal Matters with the First Pillar areas of "policies on border checks, asylum and integration" and "judicial cooperation in civil matters" into an Area of Freedom, Security and Justice under Title V of the TFEU. As a consequence, most of the residual "intergovernmental" processes in these domains will be replaced by the ordinary legislative procedure.

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[1] Such as employment protection, employee participation, third country nationals' employment.

[2] Such as fiscal measures, town and country planning, etc.

[3] Declaration 40.

- **Art. 81 (3) TFEU**: Given the particular national sensitivity to any interference with family law, measures for judicial cooperation in civil matters concerning family law and with cross-border implications are in principle to be established by the Council acting in accordance with the special legislative procedure. However, a *passerelle* allows the Council to modify this to the ordinary legislative procedure. Aside from unanimity within the Council, the decision to make use of this *passerelle* will also be subject to a "veto-right" of the national parliaments to be exercised within a six month period.[1]

- **Art. 82 (2)(d) TFEU**: In the area of judicial cooperation in criminal matters, the Council is granted the power to add further aspects of criminal procedure to the list of matters for which the European Parliament and Council can establish minimum rules in order to facilitate the mutual recognition of judgments. Once again, the Council will need to decide by unanimity and obtain the consent of the European Parliament.

- **Art. 83 (1) TFEU**: Likewise, the Council can supplement the list of areas of particularly serious crime with a cross-border dimension, by reason of either their effects or their need for common action, for which it is deemed useful to adopt minimum rules on the definition of the criminal offences and on their sanctions. It will need to decide by unanimity and obtain the consent of the European Parliament.

- **Art. 86 (4) TFEU**: In order to combat "*crimes affecting the financial interests of the Union*" the Council has the possibility to establish a European Public Prosecutor's Office [Art. 86 (1) TFEU]. After obtaining the consent of the European Parliament, the European Council can, acting by unanimity, extend the powers of any future European Public Prosecutor from "*crimes affecting the financial interests of the Union*" to include "*serious crime having cross-border dimensions*".

4. CONCLUSION

The simplified modification procedures of the Treaties did not catch a lot of attention during the ratification debates of the Lisbon Treaty, with the exception of the

[1] This involvement of the national parliaments was not yet provided for in the corresponding provision of the Treaty establishing a Constitution for Europe [Art. III-269 (3)].

extensive analysis of the Bundesverfassungsgericht in its Karlsruhe ruling[1]. They might however prove important in the long term, even if they represent only a limited simplification.

Although any definitive assessment as to the usefulness of these provisions will depend on the precedents created as well as the particular circumstances which could trigger a more "flexible" interpretation, there seems to be a rather broad consensus that the ***general simplified revision procedures*** do not add much in terms of facilitating the revision process given that the "double veto" is maintained. Indeed, any amendment will still require unanimity within the European Council and thus agreement among all governments, as well as ratification by all Member States according to their constitutional procedure [Art. 48 (6) TEU], or the forbearance on the side of all national parliaments to exercise their "veto-power" [Art. 48 (7) TEU]. Still, it could be hoped that the abandonment of the cumbersome IGC-process would facilitate matters to some extent.

Similarly, the ***specific passerelle clauses*** spread throughout the Lisbon Treaty suffer from a need for unanimity within the European Council or the Council. However, with the exception of Art. 81(3) TFEU on measures for judicial cooperation in civil matters concerning family law and with cross-border implications, no genuine ratification or unanimous approval by the national parliaments will be required. Moreover, within the context of enhanced cooperation, the application of the *passerelle* might be easier given that within the Council only the participating Member States will have to reach unanimity on the proposed amendments to the decision-making modalities. Hence, although limited in scope, these *passerelles* do provide some potential for more flexible adaptation.

In conclusion, although the general simplified revision procedure, with its requirement of either a ratification by the Member States according to their constitutional procedure [Art. 48 (6) TEU] or the absence of a "veto" imposed by any national parliament [Art. 48 (7) TEU], is unlikely to greatly facilitate the adoption of future amendments to the Treaties, the specific *passerelle* clauses seem somewhat more promising for adaptations in particular fields like cross-border criminal legal issues as well as the voting and/or decision-making requirements in the framework of enhanced cooperation. Indeed, although unanimity within the European Council

[1] BverfG, 2 BvE 2/08 from 30.6.2009, Absatz-Nr. (1-421), to be found at: http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html.

or Council remains a *conditio sine qua non* for any amendment[1], the evasion of a rigid IGC-process as well as of the need to involve the national parliaments (with the exception of matters concerning family law) could be expected to render those provisions more amenable to revision.

However, the reluctance towards such simplified revision possibilities exhibited by the German Bundesverfassungsgericht in the Karlsruhe ruling[2], where it held that the German government may not agree to the application of a *passerelle* or other simplified revision (as well as the flexibility clause, etc.) unless this has beforehand been approved by the Bundestag and, if necessary[3], the Bundesrat[4], would seem to undermine even this limited leeway for flexible Treaty adaptation.[5]

Still, the calls for amending the only 6-month-old Lisbon Treaty, be it to allow for a temporary increase in the number of MEPs or to introduce new economic governance instruments, show that there is a permanent need for flexibility. From this point of view, the financial crisis should be seen as a wake up call. Hence, if an IGC is convened, a genuine simplification of Treaty revisions and flexibility should be on the agenda.[6]

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[1] See Dougan, M., who notes that "*it remains true that in no case can the Union's fundamental constitutional arrangements be amended without the unanimous agreement of its Member States.*" (Dougan, M., The Treaty of Lisbon 2007: Winning Minds, not Hearts, *Common Market Law Review*, Vol. 45, No. 3, 2008, p. 690).

[2] See BverfG., *op. cit.*

[3] I.e. when it concerns a Länder competence or when a *de facto* Treaty amendment is at hand.

[4] Thus requiring an amendment of the German statute which regulated the involvement of the two chambers in the adoption of EU decision-making before the Lisbon Treaty could be ratified.

[5] See Kiiver, P., German Participation in EU Decision-Making after the *Lisbon Case:* A Comparative view on Domestic Parliamentary Clearance Procedures, *German Law Journal,* Vol. 10, No. 8, 2009, p. 1296. Note that in the United Kingdom the European Union (Amendment) Bill obliges the government to obtain the approval by the House of Commons and the House of Lords before it can agree to any use of *passerelles* or simplified revision procedures.

[6] Note however that the proposal for convening an IGC to amend Protocol No 36 clearly limited the scope for alteration to the question of the number of MEPs.

CONCLUSION

Treaties have a way of surprising their drafters. This will most likely also happen with the Lisbon Treaty. Not only is it a very complex Treaty introducing a huge number of changes simultaneously, but it moreover enters into force in a period of sizable and manifold challenges (financial crisis, climate threat, energy independence challenges, major changes in geopolitical balance…). For some changes it will most likely take years before their effects become fully apparent. Still, some general conclusions can already be drawn and some possible scenarios sketched out.

1. SOME TENTATIVE CONCLUSIONS

- The institutional system has become more complex.

There are different elements of simplification in the Treaty: the generalization of the ordinary legislative procedure (former co-decision); the extension of the "community method" to all matters of internal security; the change in the Council's voting system. However, all this must not hide — and cannot compensate for — the introduction of a multitude of new actors in the process: the President of the European Council, the multi-hatted High Representative, the national parliaments, and the citizens themselves. "Too many Europeans, too little Europe" could be a valid general evaluation of this new institutional setting. Furthermore, the boundaries between the powers of the Union and those of the Member States, and between intergovernmental procedures and the Community method, have sometimes been blurred. Joint powers and shared competences are clearly on the rise. Opt-out clauses, emergency brakes, and *passerelles* increase complexity. When one tries to explain to third parties — not always with success — the functioning of the European Union in the domain of economic governance or foreign policy, the example of Byzantium quickly comes to mind.

- The institutional balance has changed.

Two institutions have clearly been reinforced by the Treaty: the European Parliament and the European Council. The Parliament has received many new powers. The European Council has received a few new powers and a new President. One institution seems to have been weakened: the Commission — at least in its political role. This can be attributed both to structural factors (the strengthening of the Parliament and the European Council, the growing number of commissioners, the increased technicality of its core business) and to conjunctural factors (a very cautious approach by its President).

In a lot of commentaries on the European Union, it was customary to evoke the image of an "institutional triangle". It seems, however, that we have now entered the period of an institutional "quadrangle" (or, even more worryingly, an "institutional pentagon", if the European External Action Service develops into some kind of autonomous structure). Its precise shape may keep changing in the years to come while remaining fundamentally irregular. It is thus fair to argue that the Lisbon Treaty introduces the most significant institutional changes since the 1950s'.

Also some other actors have been weakened. This is true of the rotating Presidency (diminished by the stronger role of the European Council, which is now presided by someone else, and by the reinforced role of the High Representative in the field of foreign policy). The same can be said, more generally, of the Ministers of Foreign Affairs.

- Joint management is everywhere

The Lisbon Treaty reinforces and accelerates an evolution towards increased joint management which was already observable before. Shared competences between the Union and the Member States abound. In addition, the sharing of powers between the different institutions/organs has been strongly increased. The Presidency of the Council(s) provides a first forceful example of this. It is now divided between the President of the European Council, the High Representative and the rotating Presidency (associating three different Member States). The external representation of the Union is another case in point. Shared between the President of the Commission, the President of the European Council, the High Representative, the president of the Euro Group, and the rotating Presidency, it no doubt obliges Henri Kissinger's successors to substantially expand their telephone directory.

2. THE IMPORTANCE OF EVENTS

Meanwhile, the Union has to deal with multiple and growing challenges. Since 2005, the growth of its external energy dependency has become obvious. Next came the rise of commodity, and especially agricultural, prices. Since 2008, the EU has been confronted with its most brutal financial and economic crisis ever. Meanwhile, climate change and global warming have come to affect our daily lives, our environment and our societies. On top of all this, Europe is aging rapidly, which in itself would be sufficient to destabilize the Member States' public finances.

Revealingly, most of these pressures have strong external causes, and most of them concern the Union's external **economic** policies. This domain was not a priority of

the Lisbon Treaty and could land at the juncture of the potential problems created by the trend towards joint policy-making (presidencies + external representation). In any case it seems clear that the management of globalization is steadily rising to the top of the EU priorities. This trend is amplified by the very rapid changes in the world's geopolitical balance, which clearly go to the disadvantage of Europe. There have been repeated symptoms of this in Copenhagen, Washington, Beijing and Africa, for example.

3. TWO SCENARIOS FOR THE FUTURE

There are contradictory streams in the Lisbon Treaty. They could lead to (at least) two different outcomes.

Scenario A supposes that, after an adaptation period, the various actors involved will use certain potentialities of the new institutional system effectively. From the multiplicity of presidencies genuine leadership will arise (the best bet now would seem to be some kind of polarity of power between the President of the European Council and the European Parliament). Member States will better enforce the strategic orientations defined through "soft" methods (stability pact, open method of coordination, foreign policy strategies). The High Representative will finally find some kind of balance between the Member States, the Commission and the European Parliament. Simplified revisions, *passerelles* and enhanced cooperation in its various shapes and formats will be increasingly used to defuse the ever growing pressure of expanding membership and the risk of institutional and political gridlock.

Scenario B is based on the possibility that most of the above, after successive experiments, will finally appear unattainable. In that event, it may become necessary to go back to the basics of the "Community method", rationalize the institutional system much more radically, and ditch the symbiotic paradigm of shared and pooled powers created by the Lisbon Treaty. This could then trigger the setting up of various forms of strong differentiation inside the Union.

4. IN NEED OF A NEW SPIRIT

Both scenario A and scenario B will be a tall order. Either will require a change in the vision and behaviour of the present leaders. They need to realize that, in spite of ever more frequent meetings and photo-ops, Europe's standing in the world — political, economic, cultural — is now declining very quickly. There is an urgent

need for a mental reset. Leaders — in Brussels as well as the capitals — must also stop presenting European negotiations as a zero-sum game or, worse still, a negative-sum one.

A lot of time, energy and money has been spent during the last 10 years on improving the relationship between Europe and its citizens. Various changes in the Lisbon Treaty were introduced for that same reason (extension of co-decision, strengthening of national parliaments, citizens' initiative). However, this will probably not be enough to engender a real political debate — and a Demos — at the European level. Many recent elections, negotiations, or even judicial decisions, indicate that nationalism is on the rise. It is difficult to grasp, however, how this could help dealing with the numerous challenges mentioned above. It would be nice if Heads of State or Government emphasized this basic reality more often and more intensely.

In practice, no institutional system is fully optimal and entirely coherent. Any system reflects, to some extent, the different views of its architects, their contradictions, hesitations, doubts and ambiguities. The institutional edifice set up by the Treaty of Lisbon is no exception to this rule. It does, however, also reflect an additional complication attributable to the considerable time lag. The reforms now enshrined in it were conceived and largely drafted in 2002-2003; they are being implemented in 2010.

The spirit that prevailed in the first period was based on confidence and innovation: a new method (the "Convention"), new Member States, new participants in the political debate. A few referendums, the ruling of the German Constitutional Court, a systemic crisis in world finance and its cascading effects on the economy, tectonic shifts in the allocation of world power have created an entirely different atmosphere — a political "climate change" in its own right. Fear of the future and lack of self-confidence prevail in Europe today. They lead to a resurgence of nationalism with, as a quasi-natural corollary, an extension of euro-scepticism. This should be a major source of concern.

The implementation of the Lisbon Treaty will in no circumstances be easy. Provisions that are complex and sometimes ambiguous lead to technical challenges and legitimate questions and dilemmas. But, as is always the case, the spirit in which texts are implemented is essential.

If institutional innovations such as the *passerelle* clauses and simplified revision procedures are considered with suspicion; if enhanced cooperation is deemed discriminatory and majority voting divisive; and if opt-outs are presented as a success, then the implication is that the Lisbon Treaty changes are unwelcome. If unanimous

decision-making by Member States acting in an intergovernmental mode is to be the norm, and the Community method the exception (as a sort of relic from a past European dream), it could be argued that we do not really need to implement a new treaty. Even the best possible institutional framework cannot work without a high level of personal engagement and political commitment.

At present, these two core ingredients seem to be lacking. It should be the main task of the European institutions (including the Parliament and the various presidencies) to foster them and set the example. More fundamentally still, this should be the task of national leaders, not only in the framework of the European Council but also in their daily internal political action. No matter how often the media speak of "Brussels", the success of the Lisbon Treaty will be made — or unmade — in and by the national capitals.

LIST OF ANNEXES

EUROPEAN COUNCIL

- Rules of Procedure of the European Council adopted on 1 December 2009.

PRESIDENCY TRIANGLE

- Practical Arrangements between President Van Rompuy and President Barroso regarding External Representation of the European Union at Presidential Level (16 March 2010)
- EUROPEAN COUNCIL DECISION of 1 December 2009 on the exercise of the Presidency of the Council (2009/881/EU)
- COUNCIL DECISION of 1 December 2009 laying down measures for the implementation of the European Council Decision on the exercise of the Presidency of the Council, and on the chairmanship of preparatory bodies of the Council (2009/908/EU)

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