

The Institutional Development of
the EU post-Lisbon:
A case of *plus ça change...*?

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Abstract:

This paper offers a critical overview of the principal institutional changes contained in the EU's Treaty of Lisbon (TL) and evaluates their present and potential impact on the functioning of the Union's main institutions as well as on the inter-institutional balance of powers. It is argued that the TL does not mark a radical departure as it does not introduce a single revolutionary reform as regards the EU institutions responsible for making policy and adopting legislative measures. It does, however, codify the *tendances lourdes* of institutional change since the entry into force of the TEU: It further strengthens the legislative, budgetary and supervisory roles of the Parliament and in particular firmly establishes it, jointly with the Council, as a co-legislator; it also makes clear that the Council should continue to be viewed as the main (intergovernmental) decision-making body that acts on the basis of the political directions and priorities set by the (also intergovernmental) European Council, which is finally formally recognized as an institution of the EU. It is further submitted that the fact that the TL, for the most part, consolidates previous institutional trends, largely by means of 'recipes' introduced at earlier stages should not come as a surprise. At the risk of oversimplification, this paper defends the view that the unanimity requirement along with other constraining factors and the existence of contrasting forces explain why no drastic alterations were made to the composition, mode of appointment or the role and powers of the main EU institutions and why the most obvious institutional novelties such as the establishment of a new post of President of the European Council, from a purely formal point of view at least, constitutes a minor institutional change. Indeed, the TL may be said to further prove the resilience of the original, highly consensual and complex system of government set up under the EC Treaty. The TL also confirms the continuing influence of the contrasting forces mentioned above, the conflicting nature of which would appear to explain both the content and overall modest nature of the principal institutional changes introduced by the TL. Finally, this paper will seek to show that those modest changes nevertheless 'succeed' in further complicating the EU's institutional architecture, in particular by multiplying the number of senior positions, and in increasing the potentiality for inter-institutional conflicts by simultaneously solidifying the authority of the European Council, in the name of a more effective and coherent Union, and of the European Parliament, in the name of a more democratic Union.

Keywords:

European Union, Lisbon Treaty, Institutions, Institutional Reform, Democracy, Effectiveness

... *DESIRING to complete the process started by the Treaty of Amsterdam and by the Treaty of Nice with a view to enhancing the efficiency and democratic legitimacy of the Union and to improving the coherence of its action,*
HAVE RESOLVED to amend the Treaty on European Union, the Treaty establishing the European Community and the Treaty establishing the European Atomic Energy Community ...

Final recitals of the preamble to the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007

1. Introduction

To remain masters of their destiny, six European countries agreed to establish among themselves a European Economic Community (EEC) in 1957.¹ To remain masters of their creation, the national governments devised a rather unique institutional system whose fundamental features can only be amended by unanimity.² In fact, to enter into force, any amendment made to the European founding treaties has always required ratification by all the Member States in accordance with their respective constitutional requirements. Remarkably, this demanding procedural requirement has not precluded a spectacular ‘widening’ of the membership of what is now known as the European Union (EU) as well as a considerable ‘deepening’ of the competences conferred on the EU by its Member States. Indeed, from an organisation originally consisting of six countries with a narrow focus on economic matters, the EU has grown beyond recognition. Its 27 Member States now pursue an extensive and diverse set of objectives amongst which one may mention the promotion of balanced and sustainable development of economic activities, the implementation of a common foreign and security policy and the tackling of cross-

* The author would like to thank his colleague Anna-Louise Hinds as well as Professors Gavin Barrett (UCD Law School) and Bruno de Witte (Maastricht Law School) for their comments on earlier drafts of this paper.

¹ For the argument that the creation of the EEC ‘has been an integral part of the reassertion of the nation-state as an organisational concept’ and that ‘without the process of integration the west European nation-state might well not have retained the allegiance and support of its citizens in the way it has,’ see A. Milward, *The European Rescue of the Nation-State* (London: Routledge, 2nd ed., 1999), pp. 2–3.

² Strictly speaking, one may argue that the EEC’s institutional structure dates back to the European Coal and Steel Community (ECSC) Treaty of 1951 as the ECSC Treaty established indeed four institutions (a High Authority, an Assembly, a Council of Ministers and a Court of Justice) which were a model for those used by the EEC in 1957. See e.g. A. Dashwood, ‘The Institutional Framework and the Institutional Balance’ in M. Dougan and S. Currie (eds.), *50 years of the European treaties. Looking back and moving forward* (Oxford: Hart, 2009) pp. 2–4.

border crime. In order to effectively pursue these objectives, the EU has also gradually gained the power to legislate in the areas of monetary policy, social policy, environment, consumer protection, asylum and immigration, amongst other things.

Perhaps predictably, the continuous expansion of the EU, both geographically and functionally, increasingly strengthened the view that radical institutional reform was required. Indeed, in the late 1990s, most national governments appeared to agree that the Union's institutional system could not and had not in fact been intended to accommodate a large and disparate number of Member States, and that the time had come to improve its democratic credentials in the light of the ever-increasing expansion of the tasks conferred on the Union.³ This consensual orthodoxy largely explains why national leaders unanimously agreed in 2001 to call for a Convention on the Future of Europe to draft a new treaty with the obviously laudable aims of making the EU's functioning more democratic, transparent and efficient.⁴ The drafters of what became known as the Constitutional Treaty (CT) sought to achieve these objectives by replacing the EC Treaty of 1957 and the Treaty on the European Union (TEU) of 1992 with a brand new text. As is well known, the French '*Non*' and the Dutch '*Nee*' in 2005 proved ultimately fatal to the CT. In 2007, the Member States finally agreed 'that, after two years of uncertainty over the Union's treaty reform process, the time has come to resolve the issue and for the Union to move on.'⁵ In other words, it was agreed to abandon the 'constitutional concept' and to convene an inter-governmental conference to draw up what became known as the Treaty of Lisbon (TL). The TL, which did not repeal the EU's two founding Treaties but substantially amended them both, nevertheless retained nearly all the reforms contained in the CT. In the words of Bertie Ahern, then the Irish Prime Minister, '90 per cent of it [was] still there,'⁶ the most significant departure from the CT being the abandonment of the word 'constitution'.⁷ The fact that the institutional

³ In the words of the European Parliament, since the Treaty of Maastricht, the Member States have 'tried to settle the institutional structure of the Union' because they recognised the 'need to reform and strengthen the structures of the Union in order to consolidate [the Union's] achievements and to improve the capacity of a Union of twenty-seven, and potentially more, Member States to function effectively so as to enable it to face common new challenges and to be subject to greater democratic accountability.' European Parliament resolution of 20 February 2008 on the Treaty of Lisbon (2007/2286(INI)), points B and C.

⁴ See Treaty of Nice, Declaration on the future of the Union [2001] OJ C 80, p. 85 and European Council of Laeken, Presidency Conclusions, 14–15 December 2001, Annex I: Laeken Declaration on the future of the European Union, in *Bulletin of the European Union* 2001, No. 12, pp. 19–23.

⁵ European Council of Brussels, Presidency Conclusions, 21–2 June 2007, Doc. No. 11177/07, 23 June 2007, p. 2.

⁶ Editorial, 'Constitution no more', *The Irish Times*, 25 June 2007.

⁷ See e.g. G. Búrca, 'Reflections on the path from the Constitutional Treaty to the Lisbon Treaty' *Jean Monnet Working Paper* no. 03/08.

provisions in the TL almost entirely replicate those in the CT is not utterly surprising. First of all, the TL pursued similar aims: to enhance the efficiency and democratic legitimacy of the Union and improve the coherence of its action. Secondly, there was little appetite left amongst national governments to reopen the compromises that were painfully agreed during the negotiations on the CT.⁸

This paper focuses on the Union's institutional framework. It offers a critical overview of the principal institutional changes contained in the TL and evaluates their present and potential impact on the functioning of the Union's main institutions as well as on the inter-institutional balance of powers. Several concerns have indeed been expressed about the Union's 'institutional settlement' post-Lisbon. First and foremost, there is no consensus on whether the TL's institutional reforms are likely to improve or, on the contrary, disturb the functioning of the EU institutions. There is also disagreement as to whether they satisfactorily democratise its institutional structure or alter the pre-Lisbon institutional balance to the benefit of either the institutions representing the national interests such as the European Council or the supranational institutions such as the European Parliament, which directly represents EU citizens at EU level.

It will be argued here that the TL does not mark a radical departure from the past. Writing in 1999, Grainne de Búrca offered the view that the basic institutional framework enshrined in the foundational Treaties remained much as it was but that the practice of EU governance had been fundamentally affected by the formal creation of the EU in 1992 as well as the increase in formal and informal bodies playing a role within EU law-making and policy-making, with the consequence that the inter-institutional balance established under the EC Treaty of 1957 had been profoundly affected.⁹ This diagnosis remains valid. In fact, one may reasonably contend that the TL does not introduce a single revolutionary reform as regards the EU institutions responsible for

⁸ See e.g. P. Craig, 'The Treaty of Lisbon, process, architecture and substance' (2008) 33(2) *European Law Review* 137, p. 158. See also H. Bribosia, 'The Main Institutional Innovations of the Lisbon Treaty' in S. Griller and J. Ziller, (eds.), *The Lisbon Treaty – EU Constitutionalism without a Constitutional Treaty?* (Vienna/New York, Springer, 2008), p. 57. Bribosia contends that this is also because the substance of the institutional reforms contained in the CT did not explain its rejection in France and in the Netherlands.

⁹ G. de Búrca, 'The Institutional Development of the EU: A Constitutional Analysis' in P. Craig and G. de Búrca, *The Evolution of EU Law* (Oxford: Oxford University Press, 1999), p. 55. For a broadly similar diagnosis, see also J. Peterson and M. Shackleton, 'The EU's Institutions. An Overview' in J. Peterson and M. Shackleton (eds.), *The Institutions of the European Union* (Oxford: Oxford University Press, 2nd ed., 2006), p. 7.

making policy and adopting legislative measures.¹⁰ It does, however, codify the *tendances lourdes* of institutional change since the entry into force of the TEU:¹¹ It further strengthens the legislative, budgetary and supervisory roles of the Parliament and in particular firmly establishes it, jointly with the Council, as a co-legislator; it also makes clear that the Council should continue to be viewed as the main (intergovernmental) decision-making body that acts on the basis of the political directions and priorities set by the (also intergovernmental) European Council, which is finally formally recognised as an institution of the EU. In other words, and to summarise, the Parliament along with the couple European Council/Council may be described as ‘the institutional winners’ from what some pejoratively referred to as the latest period of EU’s ‘institutional navel gazing’.¹²

The fact that the TL, for the most part, consolidates previous institutional trends, largely by means of ‘recipes’ introduced at earlier stages (e.g. the co-decision procedure), should not come as a surprise. On the one hand, the European Convention, the body entrusted with the task of drafting the text of what became the CT, worked under the basis that the existing inter-institutional balance of powers between the Commission, Parliament and Council should be preserved.¹³ On the other hand, the unanimity requirement that has always governed treaty amendments in EU law explains why no drastic alterations were made to the composition, mode of appointment or the role and powers of the main EU institutions and why the most obvious institutional novelties such as the establishment of a new post of President of the European Council, from a purely *formal* point of view at least, constitutes a minor institutional change. Generally speaking, the unanimity requirement has led to compromises between the tenants of supranationalism and the defenders of intergovernmentalism, ‘the two polar forces whose constant cycle of confrontation and accommodation’ has driven ‘much of the EU’s institutional

¹⁰ See contra Y. Devuyt, ‘The European Union’s Institutional Balance after the Treaty of Lisbon: “Community Method” and “Democratic Deficit” Reassessed’ (2008) 39(2) *Georgetown Journal of International Law* 249, p. 289 (‘In comparison with this institutional framework of the 1950s, the Lisbon Treaty constitutes a revolution’ as it provides for the creation of the posts of European Council President and of High Representative of the Union for Foreign Affairs and Security Policy).

¹¹ In doing so, the TL merely follows in the steps of the CT. In support of this view, see P. Ponzano, ‘Les Institutions de l’Union’ in G. Amato and others (eds.), *Genèse et destinée de la Constitution européenne* (Bruxelles: Bruylant, 2007), p. 439 at p. 480.

¹² Interview with D. Miliband, then the UK Secretary of State for Foreign Affairs, in *Fabian Review*, Winter 2007, no. 8, p. 8.

¹³ See Ponzano, above n. 11, at p. 440.

and constitutional development'.¹⁴ It is important to stress, however, that other tensions and factors permeate and help make sense of institutional change in the EU.¹⁵ For instance, the redefinition of the appropriate balance amongst 'small' and 'large' countries has always been a contentious point in the history of EU institutional reform and efficiency concerns have generally not triumphed over the representative concerns expressed by the 'smaller' Member States. To give an additional example, the national governments, which have been keen to retain and reinforce their control over the EU's decision-making process, have nevertheless progressively admitted that the democratic legitimacy of the Union required the enhancement of the powers of an institution that may undermine or constrain their influence, the European Parliament.

As astutely observed by Dehousse and Magnette, 'the co-existence of these contrasting forces largely accounts for the schizophrenic character of an institutional evolution characterised at the same time by a consolidation of intergovernmentalism and the conferral of ever-larger powers on the European Parliament' and helps understand why the TL could not and did not in fact offer 'a radical simplification of the European institutional architecture'.¹⁶ Indeed, the TL may be said to further prove the resilience of the original, highly consensual and complex system of government set up under the EC Treaty, whose basic functioning will be described in Section 2. The TL also confirms the continuing influence of the contrasting forces mentioned above, the conflicting nature of which would appear to explain both the content and overall modest nature of the principal institutional changes introduced by the TL as will be shown in Section 3. Finally, this paper will argue that those modest changes nevertheless 'succeed' in further complicating the Union's institutional architecture, in particular by multiplying the number of senior positions and by increasing the potentiality for inter-institutional conflicts by simultaneously solidifying the authority of the European Council, in the name of a more effective and coherent Union, and of the European Parliament, in the name of a more democratic Union.

¹⁴ M. Dougan, 'The Treaty of Lisbon 2007: Winning Minds not Hearts' 45 *Common Market Law Review* (2008) p. 617 at p. 692.

¹⁵ For an exhaustive overview, see Devuyst, above n. 10 (the evolution of the Union's decision-making framework illustrates a permanent constitutional tension between a supranational and an intergovernmental motor of the integration process; between decision-making efficiency and national veto rights; between the supranational representation and personification of the Union and its representation and personification under Member State control; and, finally, between the protection of the smaller Member States and traditional power politics).

¹⁶ R. Dehousse and P. Magnette, 'Institutional Change in the EU' in J. Peterson and M. Shackleton (eds.), *The Institutions of the European Union* (Oxford: Oxford University Press, 2nd ed., 2006), p. 17 at p. 33. See also Dougan who argues that in the TL, 'each step towards greater supranational governance is counter-weighted by more effective checks and balances to protect Member State prerogatives,' above n. 14, at p. 692.

2. Overview of the pre-Lisbon functioning of the Union's institutional framework

Making sense of the Union's institutional framework is an exercise fraught with perils. As Piriš points out, it is essentially for political reasons 'that the complex system of governance of the EU and its many complicated decision-making rules have been established and refined by its Member States in successive treaties.'¹⁷ And indeed, whilst it is certainly true that the 'founding fathers' themselves thought of Europe in terms of a federal state in the making,¹⁸ the Union's institutional framework, to summarise, embodies a successive set of compromises between 'federalists', who favour a supranational scheme of integration for Europe, and 'sovereignists', for whom the EU must be based on an 'intergovernmental' logic which preserves national sovereignty as much as possible. These successive compromises have produced a rather unique entity, a supranational non-state polity, that continues to remain an 'experiment in transnational politics'.¹⁹ It is therefore unfortunate that even advocates of the 'European dream' still continue to rely so heavily on the concept of the sovereign state to make sense of the EU.²⁰ Lawyers' natural tendency to think of the EU in statal terms, however, is hard to resist, and this explains why it is so often analysed with particular regard to the principles of separation of powers and governmental responsibility before the legislative branch. Inexorably, a damaging diagnosis for the EU ensues,²¹ as its original and

¹⁷ J.-C. Piriš, 'Does the European Union have a Constitution? Does it need one?' *Harvard Jean Monnet Working Paper* 5/00, p. 60.

¹⁸ Robert Schuman, in his famous Declaration of 9 May 1950, set out the ultimate goal of European integration as follows: 'By pooling basic production and by instituting a new High Authority [currently known as the European Commission], whose decisions will bind France, Germany and other member countries, this proposal will lead to the realisation of the first concrete foundation of a European federation indispensable to the preservation of peace.'

¹⁹ See H. Wallace, 'Designing Institutions for an Enlarging European Union' in B. de Witte (ed.), *Ten Reflections on the Constitutional Treaty for Europe* (Florence: Robert Schuman Centre, 2003), p. 86. For further analysis on the constitutional 'status' of the EU, see L. Pech, *The European Union and its Constitution – From Rome to Lisbon* (Dublin: Clarus Press, 2008), part 1.

²⁰ 'Lest there be any doubt on this score, the EU's draft constitution ... makes clear that a new transnational political institution is being born that, in its every particular, is designed to function like a state,' J. Rifkin, *The European Dream* (London: Polity, 2004), p. 208.

²¹ See e.g. I. Ward, *A Critical Introduction to European Law* (Cambridge: Cambridge University Press, 3rd ed., 2009), p. 19: 'The new Europe is fundamentally undemocratic, and the reason for this lies in the institutional structure established in the Rome Treaty ... The institutional structure established in the Rome Treaty does not fit neatly into the kind of categories defined famously, in the early modern period, by the likes of Locke and Montesquieu ... the result of this ambiguity is a failure to respect the essential principle which lies at the heart of this constitutional tradition, the separation, and the balance, of powers.'

complex institutional framework, as we shall see below, leaves little margin for the straightforward and rigid application of these two venerable principles.²²

As a matter of fact, a rather mysterious ‘institutional triangle’ is said to preside over the EU’s decision-making. This academic concept, formally referred to by political actors in 1979,²³ was invented *ex post* to designate the group of three institutions originally created by the Treaties of Rome in 1957, i.e., the Commission, the Council and the Parliament, and to emphasise the *interdependent* and *balanced* nature of their relationship when it came to adopting EC measures. In addition, the notion of ‘Community method’ has been used to describe how these three institutions normally interact when exercising their decision-making powers under the EC Treaty: In basic terms, under the Community method, the Commission (the independent body representing the European interest) alone makes legislative and policy proposals to be adopted by the Council (the intergovernmental body representing the national governments) by simple or qualified majority voting and in association with the Parliament (representing the peoples of Europe), whose powers, as will be later shown, have been gradually and significantly increased over the last two decades. To these three institutions, one needs to add the Court of Justice, whose main mission is to ensure that the measures adopted by the EU institutions, and the Member States where relevant, are in conformity with the founding Treaties. An unsurprising feature in an organisation said to be based on the rule of law.²⁴

Perhaps more surprising is the fact that the basic institutional structure of the EC involves a bicameral legislature composed of the Council and the Parliament.²⁵ It may seem, at first, an odd one considering that the more powerful chamber, the Council is composed of national ministers

²² See e.g. K. Lenaerts, ‘Some Reflections on the Separation of Powers in the European Community’ (1991) 28 *Common Market Law Review* 11.

²³ For the first ‘official’ use of this concept, see Report on European Institutions, Presented by the Committee of Three to the European Council, October 1979 (Council of the European Communities, 1980). The report (part V) refers to a ‘triangular pattern that has already emerged in the years before Direct Elections, with the Parliament seeking to establish close and direct relations with the Council as well as Commission’ and argues that ‘this approach would be an efficient one in terms of Community functioning, insofar as it would create a more complete and stable institutional balance.’

²⁴ Art. 2 TEU (ex Art. 6(1) TEU).

²⁵ One may also speak of a ‘tri-cameral legislative system’ considering the agenda-setting role played by the Commission. See S. Hix, ‘The European Union as a Polity (I)’ in K. Jorgensen, M. Pollack and B. Rosamond (eds), *Handbook of European Politics* (London: SAGE, 2007) p. 151, at p. 146.

and that neither the Parliament nor the Council have the power to initiate legislation.²⁶ Anyone is entitled to deplore the fact that *Montesquieu* never went to Brussels²⁷ but it is important to realise that the Community method was devised for noble and compelling reasons: to protect the interests of ‘small’ countries²⁸ and overcome the traditional shortcomings of intergovernmental institutions and in particular, the paralyzing effect of the unanimity trap.²⁹ This explains in particular why an independent and unelected Commission was set up and why it was given the quasi-exclusive power to initiate legislative proposals, which would normally then be adopted by the Council by majority voting and where relevant, by the Parliament by majority voting as well. In the words of the Commission itself, the Community method ‘ensures the fair treatment of all Member States from the largest to the smallest’ and ‘provides a means to arbitrate between different interests by passing them through two successive filters: the general interest at the level of the Commission; and democratic representation, European and national, at the level of the Council and European Parliament, together the Union’s legislature.’³⁰ It is because the Member States realise that their national interests were and continue to be better served by an independent Commission with atypical powers (e.g. the Commission’s monopoly of legislative initiative or its enforcement powers), that, as we shall see, the Commission’s role, functions and powers have been left essentially unchanged since 1957. In any event, what is certain is that, as observed by Jean Monnet, ‘the resulting procedure for collective decisions is something quite new and, as far as I know, has no analogy in any traditional system. It is not federal because there is no central government: the nations take their decisions together in the Council of Ministers. On the other hand, the independent European body propose policies, and the common element is further underlined by the European Parliament and the European Court of Justice.’³¹ To argue that such a system is not democratic illustrates a failure to grasp that in fact the EC’s institutional framework

²⁶ J. Temple Lang, ‘Checks and balances in the European Union: The institutional structure and the ‘Community method’ (2006) 12 *European Public Law* 127, p. 134.

²⁷ See Ponzano, above n. 11, p. 441 citing a speech delivered by Amato as Vice-President of the European Convention.

²⁸ In the words of a former Irish Prime Minister, ‘this unique decision-making system has most effectively protected the interests of Europe as a whole, and in particular smaller countries ... from possible abuses of power by larger states’, G. Fitzgerald, ‘New Coalition to face shift in Europe’s power balance’, *The Irish Times*, 12 February 2011.

²⁹ Devuyt, above n. 10, p. 251.

³⁰ European Commission, *European Governance. A White Paper*, COM(2001) 428 final, 25 July 2001, p. 8.

³¹ J. Monnet, ‘A Ferment of Change’ (1963) 1 *Journal of Common Market Studies* 203, p. 206.

is merely ‘more consensus-oriented in its design than any polity in the history of democratic government’.³²

In order to assess the radical nature (or lack thereof) of the changes brought about by the TL, a brief and mostly descriptive account of the pre-Lisbon functioning of the Union’s institutional triangle will now be offered.

The independent European body mentioned above by Monnet is known as the Commission. In the institutional triangle, the Commission embodies the supranational logic at work in the EU. Originally consisting of nine members (one national from each of the ‘small’ Member States and two from the ‘large’ Member States), the Nice Treaty provided for one Commissioner per Member State until the Union reached twenty seven Member States. The Commissioners must act in the general interest of the EU and be completely independent in the performance of their duties. Among its numerous powers, as previously noted, the Commission alone has the right of legislative initiative, meaning that legislative acts may be adopted solely on the basis of a Commission proposal, except when provisions of the EC Treaty provide otherwise. Both the Council and the Parliament have nonetheless the formal power to ask the Commission to put forward a proposal.³³ In any event, the Commission’s power over the initiation of legislation should be understood in the light of the predominant role played by the Council of Ministers. On its website, the Council does not shy away from presenting itself as ‘the main decision-making body of the European Union’.³⁴ Formally known as the Council of the European Union, it has represented the intergovernmental element in the institutional triangle since the foundation of what is now the EU and has both legislative and executive functions. Consisting of a representative of each Member State at ministerial level, it is the Council’s responsibility to adopt

³² Hix, above n. 25, p. 145. The fact that Union does not operate according to the canons of the Westminster model does not necessarily mean it violates the democracy principle. It may be that the Union takes rather the form of a consociational democracy, that is, a system of government characterised by the joint management of affairs common to the national group as a whole through broad political coalition; the proportional representation of the main communities; broad autonomy for each community at the local level and the granting to each community of a series of veto rights to preclude the adoption of legislation deemed to affect their ‘vital interests’. See A. Lijphart, *Patterns of Democracies. Government Forms and Performance in Thirty-Six Countries* (New Haven: Yale University Press, 1999).

³³ In practice, and on average, more than half of the Commission’s proposals aim to adapt EU legislation or to implement international obligations, and about a quarter reflect requests emanating from the Council or Parliament. Accordingly, only a minority of legislative proposals reflect initiatives pushed by the sole Commission. See P. Magnette, *Le régime politique de l’Union européenne* (Paris: Presses de Sciences Po, 2003), p. 106.

³⁴ See <http://www.consilium.europa.eu> (accessed on October 1, 2010).

EU 'legislation', i.e. regulations, directives, decisions, etc. Depending on the area being regulated, the Council adopts legislative proposals by a simple majority, a qualified majority or by unanimous vote. The Council long remained the unique legislator at EC level. Indeed, the Parliament was, at first, a mere deliberative assembly composed of representatives of the national parliaments.

This was precisely the point raised by numerous critics who argued that the EC was suffering from a 'democratic deficit'. To answer this criticism, elections by direct universal suffrage were organised in 1979. From then onwards, the Parliament's 'standing' in the institutional triangle has progressively improved. Indeed, national governments gradually came to accept the Parliament's view that its powers were abnormally weaker than those of national legislatures whereas the competences transferred to the EC/EU were mostly of a legislative nature.³⁵ Starting with the Single European Act 1986 (SEA), the Parliament's legislative, budgetary and supervisory powers have therefore been incrementally enhanced. The introduction of the co-decision procedure in 1992 was a particularly critical change. This procedure, which progressively became viewed as the 'normal' legislative procedure, puts the Parliament on equal footing with the Council. If the Parliament does not agree to the adoption of a text, it cannot enter into force. The initial 'asymmetry' between the Council and the Parliament, as far as legislative power is concerned, had therefore been largely remedied before the TL. Starting with the Maastricht Treaty, the Parliament has furthermore seen its influence gradually enhanced in the process of nominating the President and members of the Commission. After some additional amendments made to the EC Treaty by the Treaties of Amsterdam and Nice, the nomination of the President had to be approved by the Parliament, and the Commission, as a body, had to be subject to a vote of approval.³⁶ In the pre-Lisbon EU, the Parliament, however, lacked the formal power to initiate legislative proposals and the exclusive power to adopt them. And whilst the Parliament has always had the power to censure the Commission – no motion of censure has ever obtained the required number of votes since 1957 – it was never given and could not be given the power to dismiss the most influential decision-making body, i.e. the Council, as it is made up of ministerial-level representatives from each of the Member State.

³⁵ See e.g. European Parliament, Resolution on the democratic deficit [1988] OJ C 187/229.

³⁶ Ex Art. 214 TEC.

The above developments concerning the so-called Community method should not lead us to forget that some significant areas of European cooperation have been determined by different methods of governance. One may refer, for instance, to the open method of coordination. Under this predominantly intergovernmental method, the Member States define common objectives to be achieved and compare each other's performance in areas such as employment and social protection, with the Commission's role being limited to monitoring progress. More importantly, one should recall that the EU was originally established by the Maastricht Treaty as an encompassing framework aimed at including the pre-existing European Communities and two newly born intergovernmental pillars: the Common Foreign and Security Policy (CFSP) and Justice and Home Affairs (JHA). The justification behind this awkward structure was to make clear that the CFSP and JHA would be operating according to methods different to the Community method. In other words, whereas the EC was governed by a supranational philosophy, by contrast, the CFSP and JHA were to be governed by intergovernmental methods of co-operation which 'preserve a role for individual member states which is stronger and less challengeable by the EU's institutions than is the case under the "Community method" of decision-making.'³⁷ As is well known, the division between the EC, the CFSP and JHA led to a common description of the EU as a 'three pillar' structure.³⁸ While a single institutional framework presided over the functioning of the EU, the respective powers of each institution varied considerably according to the pillar concerned.

Even if one only focuses on the pre-Lisbon EU's institutional structure, it is easy to understand the sensation of unease often felt by citizens when faced, for the first time, with a system of government not devised with the principles of separation of powers and governmental responsibility before the legislative branch in mind. Romano Prodi, the president of the European Commission from 1999 to 2004, once candidly admitted his initial difficulty in fully understanding the role of the Commission in this complex institutional structure:

³⁷ J. Peterson and M. Shackleton, 'Conclusion' in J. Peterson and M. Shackleton (eds.), *The Institutions of the European Union*, above n. 9, p. 340.

³⁸ The three-pillar structure created by the Maastricht Treaty represented a strange beast and represented for many EC lawyers 'a step backwards in the European integration process, since that name was used to cover two new forms of inter-state cooperation ... which were marked by a lesser degree of supranationalism than in the existing European Community,' B. de Witte, 'The Question of the Treaty Architecture: 1957–2007' in A. Ott and E. Vos (eds.), *Fifty Years of European Integration: Foundations and Perspectives* (The Hague: TMC Asser Press, 2009), p. 13.

[T]o know how this body works, you have to be inside. For me, it was a great surprise how complicated, how delicate this toy is. But this is why it's so fascinating, because it's not a government. It's not only an executive body because it also proposes legislation. It's not a legislative body because it cannot legislate alone.³⁹

Undeniably, within the pre-Lisbon institutional triangle, no institution exercised a function on an exclusive basis.⁴⁰ In fact, interpenetration of powers and compulsory collaboration between multiple institutional actors representing diverse interests are traditional and permanent features of the Community method of government. As a result, it is not surprising to see specialists referring to mysterious concepts such as 'multilevel governance' or 'intertwined government' to explain the functioning of the EC institutional framework, and other unique principles such as 'institutional balance' to make sense of the interplay between the EC institutions. In any event, it is essential to understand that by organising an institutional system where the decision-making process is extremely consensual as well as interdependent, the pre-Lisbon 'constitutional framework' created by the founding Treaties excluded, to a great extent, a parliamentary logic. For instance, the executive power has always been fragmented between the Commission and the Council. As a result, a key aspect of a parliamentary regime could not be implemented: the power of the legislative branch to dismiss a well-identified executive power, which also implies the right of the government to dissolve the Parliament. The legislative power has been similarly fragmented between the Council and the Parliament, hence the notion of 'co-legislator'. One should add, to the probable horror of Montesquieu, the presence of another intergovernmental institution, politically and judicially unaccountable: the European Council, which began acting as the supreme political organ of the EC in the 1970s although the EC Treaty made no mention of such body until 1986. The European Council, which brings together the Heads of State or Government of the Member States and the President of the Commission, has ever since been entrusted with the task of providing 'the Union with the necessary impetus for its development' and defining 'the general political guidelines thereof'.⁴¹ Whilst never formally part of the Community's institutional triangle and lacking any formal power to take legally binding

³⁹ Quoted in D. Staunton, 'Irish EU presidency 'paramount' for Prodi', *The Irish Times*, 23 October 2004.

⁴⁰ For further discussion, see J. Ziller, 'Separation of powers in the European Union's Intertwined System of Government. A Treaty Based Analysis for the Use of Political Scientists and Constitutional Lawyers' (2008) 73 *Il Politico* (Univ. Pavia, Italy) 133.

⁴¹ Ex Art. 4 TEU.

decisions, the pre-Lisbon political reality was that no major institutional, policy or legislative developments could occur without having been considered and approved by the European Council.⁴²

Parallel to the rise of the European Council as the political demiurge that guides the Union's strategic development and a kind of 'cabinet' that determines its political priorities,⁴³ the enhanced powers of the Parliament have also led to an increased 'parliamentarisation' of the Union's institutional framework, hence the 'semi-parliamentary' label occasionally used to describe its political regime.⁴⁴ National governments have been keen, however, to preserve both the consensual nature of the Union's system of government and its character as 'a constitutional order of states'.⁴⁵ This largely explains why the 'Masters of Treaties'⁴⁶ never seriously considered a complete parliamentarisation of the EU's institutional framework. The Commission, for instance, has not been transformed into a proper government and both the European Council and the Council have remained politically unaccountable at EU level. One may therefore argue that the fundamental features of the Community method have remained broadly unaltered over the years. Within the EC Treaty framework, little of importance could be agreed 'without the joint consent of the Commission, [Parliament] and Council – with appeal to the [Court of Justice] always likely when such consensus is *not* achieved.'⁴⁷ In fact, rather than trying to radically redefine the Community method, the Member States, as previously noted, created a horribly complex three-pillar structure in order to cooperate outside the constitutional framework created by the EC Treaty. Following the laborious yet ultimately successful ratification of the TL, the byzantine three-pillar structure has formally come to an end. This change is particularly significant as regards JHA, a policy area whose confusing if not awkward institutional arrangements have long been denounced on legitimacy, democratic accountability and rule of law

⁴² P. Craig and de Búrca, *EU Law. Text, Cases and Materials* (Oxford: Oxford University Press, 4th ed., 2008), p. 57.

⁴³ A. Dashwood, 'The Institutional Framework and the Institutional Balance' in M. Dougan and S. Currie (eds), *50 years of the European treaties. Looking back and moving forward* (Oxford: Hart, 2009) p. 1, at p. 6.

⁴⁴ See P. Magnette, 'L'Union européenne: Un régime semi-parlementaire', in P. Delwit and others (eds), *A quoi sert le Parlement européen?* (Bruxelles: Éditions Complexe, 1999), p. 25.

⁴⁵ To borrow the expression coined by A. Dashwood, 'States in the European Union' (1998) 23 *European Law Review* 201, p. 216.

⁴⁶ See para. 55 of the so-called 'Maastricht judgment' of the German Federal Constitutional Court, *Brunner v. The EU Treaty* (1994) 1 Common Market Law Reports 57.

⁴⁷ Peterson and Shackleton, above n. 9, p. 11.

grounds.⁴⁸ The following section, however, will only focus on the EU institutions and will not examine the post-Lisbon Treaty structure of the EU. As will be shown below, the institutional reforms introduced by the TL are hardly revolutionary. Indeed, they confirm the Community method as the ‘normal’ method whereby EU legislation may be adopted and they essentially codify previous trends by consolidating the role of the Parliament as a co-legislator on equal footing with the Council, and of the European Council as the key provider of political leadership at EU level.

3. The TL’s Institutional Reforms: Modest Solutions to Recurrent Problems

In a seminal speech at Humboldt University on 12 May 2000, Joschka Fischer, then the German Minister of Foreign Affairs, had ‘a very simple answer’ to the Union’s problems: ‘the transition from a union of states to full parliamentarisation as a European Federation’, meaning ‘nothing less than a European Parliament and a European government which really do exercise legislative and executive power within the Federation.’⁴⁹ As should be clear from the developments below, neither the CT nor the TL have answered Fischer’s call. On the contrary, it may be argued that the TL only offers a set of modest improvements at the margins. This outcome should not come as a surprise. Indeed, institutional change in the EU continues to be largely shaped by antagonistic interests and philosophies (e.g., supranationalism v. intergovernmentalism, enhanced democratisation v. preservation of national sovereignty, interests of small countries v. those of large countries), and compromises must be constantly sought to guarantee the unanimous ratification of any new treaty by the Member States. The co-existence of these contrasting interests and philosophies largely explains why the Union’s institutional framework has shown a high degree of stability over the years. It also helps one to understand why the TL does not mark a rupture with the past but offers, on the contrary, a series of incremental changes that seek to both improve the democratic credentials of the Union by enhancing the powers of the Parliament

⁴⁸ The CFSP remains subject to specific rules and procedures, which make clear that the CFSP continues to constitute an area of intergovernmental cooperation. For further analysis, see e.g. L. Pech, ‘A Union Founded on the Rule of Law: Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law’ (2010) 6 *European Constitutional Law Review* 359.

⁴⁹ J. Fischer, ‘From Confederacy to Federation: Thoughts on the Finality of European Integration’, in C. Joerges, Y. Mény and J. Weiler (eds.), *What kind of Constitution for what kind of Polity?* (Florence: The Robert Schuman Centre for Advanced Studies, 2000), p. 24.

and preserve, if not reinforce, the pre-eminence of the national governments in the Union's decision-making process.

3.1 The Union's Institutional Framework post-Lisbon

New Article 4 TEU defines the Union's institutional framework as comprising the following seven institutions: The European Parliament, the European Council, the Council, the European Commission, the Court of Justice of the EU, the European Central Bank and the Court of Auditors. The same provision also states that the Parliament, Council and Commission are to be assisted by two advisory bodies: the Economic and Social Committee and the Committee of the Regions.⁵⁰ By comparison to the previous applicable provision of the EC Treaty, the only significant change is that the European Council and the European Central Bank (ECB) have been elevated to the rank of formal Union institutions. Legally speaking, this essentially means that these institutions are now formally bound by all the Treaties' references to 'the institutions', which theoretically means, for instance, that the European Council and the ECB are under the obligation to 'maintain an open, transparent and regular dialogue with representative associations and civil society'.⁵¹ In the case of the European Council, it also means that, for the first time, the Court of Justice has jurisdiction to review the legality of its legally binding acts. Their respective roles, however, have been left substantially unchanged. Furthermore, it may be worth recalling that the European Council was set up in 1974 and acquired clear treaty status in 1992 when the TEU referred to it as the body that 'shall provide the Union with the necessary impetus for its development and shall define the general political guidelines thereof'.⁵² Similarly, the first treaty reference to the ECB is due to the TEU in 1992. Because the ECB and the Court of Auditors, which was established in 1975 and made a formal institution of the EC in 1992, lack general legislative decision-making power,⁵³ they will not be subject to further analysis. Their structure

⁵⁰ These two advisory bodies were created respectively in 1957 and 1992. They were designed to bring in the advice of social and economic interests and regional and local interests to EU decision-making. Amongst the other 'second-order' EU bodies and agencies that complement the Union's institutional framework, one may mention the European Investment Bank, the European Ombudsman, Europol, etc.

⁵¹ Art. 11(2) TEU.

⁵² Ex Art. 4 TEU.

⁵³ The ECB, however, has the power to make regulations or take decisions to the extent necessary to implement or carry out its tasks within its area of competence, monetary policy (see Art. 132 TFEU).

and functions remain, in any event, unaltered by the TL. Space constraints also preclude any consideration of the Court of Justice of the EU.⁵⁴

3.2 *The TL's Main Institutional Changes*

This section offers a succinct *tour d'horizon* of the main changes made to the provisions governing the role and powers of the EU's 'key players': The European Council, the Council, the Parliament and the Commission.

3.2.1 The Intergovernmental Duo: The European Council and the Council

The elevation of the European Council to the formal rank of a Union institution, a change that merely codified previous practice, did not lead to a revision of its main role. In fact, Article 15(1) TEU merely repeats the formerly applicable provision and reiterates that 'the European Council shall provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof.' It makes explicit, however, that it shall not exercise legislative functions, which means that it is still left to the 'institutional triangle' to eventually translate the European Council's political directions into legislative acts. As a result, it would be absurd to argue that the TL transformed the European Council into some kind of federal government of a new super-state. It is nonetheless true that 'numerous provisions of the revised Treaties give the European Council power to take legally binding decisions of a "quasi-constitutional" or "high-politics" nature.'⁵⁵ The formalisation of the role of the European Council may nonetheless be said to merely take stock of the pre-Lisbon political reality of a Union where the European Council has progressively emerged as the decisive player when strategic or controversial decisions ought to be taken. More significantly, the TL provides for the establishment of a new post of President of the European Council and of High Representative of the Union for Foreign Affairs and Security Policy (HR for FASP). This naturally explains why

⁵⁴ The TL makes no *major* changes as regards the composition, role and functions of the EU courts although it can be praised for enhancing and clarifying their jurisdiction. For further analysis, see e.g. R. Barents, 'The Court of Justice After the Treaty of Lisbon', (2010) 47 *Common Market Law Review* 709.

⁵⁵ Dougan, above n. 14, p. 627. For instance, any Member State wishing to withdraw from the Union must notify the European Council of its intention and it is for the European Council to define the guidelines on the basis of which the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal (Art. 50 TEU).

the pre-Lisbon provision on the composition of the European Council had to be amended. Following the entry into force of the TL, the members of the European Council are the Heads of State or Government of the Member States, together with the President of the Council and the President of the Commission. There is also a new reference to the HR for FASP, who is authorised to take part in its work.

The creation of the posts of President of the European Council and of HR for FASP, which were mostly justified by a need to guarantee more coherence in the work of the institution and strengthen the Union's external unity and representation, is often presented as the most considerable if not revolutionary institutional change brought about by the TL. A brief look at the new President's 'job description', as laid down in Article 15(6) TEU, should nevertheless suffice to temper any excessive enthusiasm or concern as the new full-time President of the European Council is expected to operate as the voice of the EU 27 national leaders. Indeed, the President must first be 'elected', in fact appointed, by the European Council for a two and a half year term, renewable once. Furthermore, the President has no real decision-making powers but must rather fulfil the functions previously exercised by the Head of State or Government of the rotating Presidency State. In other words, the President's role is to chair the European Council and to drive forward its work while seeking to facilitate cohesion and continuity within the European Council; to 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; and, finally, to ensure the external representation of the Union on common foreign and security policy (CFSP) issues without prejudice to the powers of the HR for FASP.

The creation of the post of HR for FASP may similarly be viewed as a rather modest if not peculiar institutional innovation as the new HR exercises, in foreign affairs, the functions that were previously exercised by the six-monthly rotating Presidency State, the High Representative for CFSP (office created in 1999) and the Commissioner for External Relations. This means that the new EU Minister for Foreign Affairs – the title previously used in the CT⁵⁶ – is first supposed to conduct the Union's CFSP on behalf of the Member States and contributes by his proposals to the development of that policy, but which he must carry out *as mandated by the Council*. To

⁵⁶ As some national governments were 'unhappy about the "statist" connotations of this title,' it was changed in the TL to be HR for FASP, Craig, above n. 8, p. 156.

guarantee an effective and coherent conduct of the CFSP, it was also agreed to give him/her the responsibility to chair the Foreign Affairs configuration of the Council. It is important to point out, however, that under the rather odd ‘double-hatting’ arrangement, the HR for FASP is not only answerable to the Council but is also a senior member of the Commission, answerable to the President of the Commission. This explains why the HR must be appointed by the European Council with the agreement of the Commission President, and why, as one of the Vice-Presidents of the Commission, the HR for FASP is also responsible within the Commission for responsibilities incumbent on it in external relations and for coordinating other aspects of the Union’s external action.

The fact that the HR for FASP must simultaneously work under two ‘masters’, i.e. the Council and the President of the Commission,⁵⁷ and fulfil a unique combination of functions may leave one puzzled as to whether the HR will be able to effectively discharge his numerous responsibilities. The potential for institutional conflicts between the President of the European Council, the HR for FASP and the President of the Commission has been another source of major concern.⁵⁸ But for the time being, the most important point is that the role of the European Council has been left substantially unchanged. The formal status of Union institution conferred on it may constitute a symbolically important development but it is certainly not ‘a revolutionary change’ as it represents the ‘culmination of a process, which was set in train by the TEU’.⁵⁹ In the same vein, whilst one may welcome the appointment of a new full-time President of the European Council and of a new EU ‘Minister for Foreign Affairs’ on effectiveness and coherence grounds, the holders of these two offices seem destined to act as implementing and consensual agents. An unsurprising outcome considering the fact the countries in favour of a more stable and stronger presidency of the European Council had to compromise with those fearing the marginalisation of the Commission and the dominance of the European Council by the largest Member States.⁶⁰

⁵⁷ For the argument that the ‘Council hat’ is likely to matter more than the Commission one, see A. Dashwood and A. Johnston, ‘The Institutions of the Enlarged EU under the Regime of the Constitutional Treaty’ (2004) 41 *Common Market Law Review* 1481, p. 1510. See also Dougan, above n. 14, p. 637. This, however, does not reduce the risk of ‘turf-wars’ and institutional loyalty problems.

⁵⁸ This question is addressed in s. 4.2.

⁵⁹ Dashwood and Johnston, above n. 57, p. 1490.

⁶⁰ See J-C. Piris, *The Constitution for Europe. A Legal Analysis* (Cambridge: Cambridge University Press, 2006), p. 93.

Consistent with the modest nature of the changes in respect of the European Council, the TL only offered a set of minor amendments in relation to the role and functioning of the Council with arguably one major exception, the change to a double voting system in the Council. As regards the Council's role and powers, the new Article 16(1) TEU might nonetheless be praised for offering a concise and yet more accurate description than the one previously offered by ex Article 202 TEC: 'The Council shall, jointly with the European Parliament, exercise legislative and budgetary functions. It shall carry out policy-making and coordinating functions as laid down in the Treaties.' No significant change, apart from this minor rephrasing, can be highlighted. As previously provided for in the Treaties, the Council continues to consist of a ministerial-level representative of each Member State who may commit the government of the Member State in question and cast its vote. The Committee of Permanent Representatives of the Governments of the Member States remains entrusted with the task of preparing the work of the Council. Furthermore, meetings of the Council continue to be presided over by the ministers of the Member State in charge of the rotating Council presidency, with the exception of the Foreign Affairs Council (FAC). This reference to the FAC is unprecedented as is the reference to the General Affairs Council and the mention that the Council is to meet in different configurations.⁶¹ Yet here the TL only formalises the pre-Lisbon position as the Council has always met, according to the subject being discussed, in different configurations. Similarly, the 'new' reference to the concept of team presidency, whereby 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,⁶² only codifies pre-Lisbon practice. Likewise, the 'new' provision providing that the Council shall meet in public when it deliberates and votes on a draft legislative act simply formalises anterior arrangements.⁶³

The principal institutional change concerns the rules governing how decisions are normally taken in the Council. Whereas the EC Treaty provided that the Council shall normally act by a majority of its Members, Article 16(3) TEU at present stipulates that the Council shall act by qualified

⁶¹ Art. 16(6) TEU.

⁶² See Declaration on Article 16(9) of the Treaty on European Union concerning the European Council decision on the exercise of the Presidency of the Council.

⁶³ Art. 16(8) TEU. Before the entry into force of the TL, all Council deliberations on legislative acts under the co-decision procedure had to be open to the public. See Council Decision of 22 March 2004 adopting the Council's rules of procedures [2004] OJ L106/22; Presidency Conclusions of the Brussels European Council, 16 June 2006, 10633/06, Annex I 'An Overall Policy on Transparency' and Council Decision of 15 September 2006 adopting the Council's rules of procedures [2006] OJ L285/47.

majority voting (QMV) except where the Treaties provide otherwise. In other words, QMV has become the normal voting procedure even though unanimity has been maintained in relation to some politically sensitive areas such as taxation, foreign policy and defence. This, however, reflects the regular extension of QMV to new policy areas since the SEA of 1986, a development that has been constantly justified on efficiency grounds, the argument being that unanimity is the best recipe for legislative paralysis in a constantly enlarging Union. Allegedly more revolutionary is the TL's new definition of QMV. The traditional system of weighted voting has always been criticised for being overly complex but reform proved elusive as the revision of the 'requirements for a qualified majority have always been a battleground between the Member States, and more especially between small, medium-sized and large Member States.'⁶⁴ What finally broke the camel's back was the fact that the post-Nice definition of QMV raised even higher the number of votes required before a qualified majority can be attained (about seventy two per cent of the total of votes allocated).⁶⁵ As a result, most national governments were in favour of instituting a new 'double-majority' voting system. Without entering into the details of the convoluted history of this reform, from 1 November 2014, a qualified majority will be defined as at least fifty five per cent of the members of the Council, comprising at least fifteen of them and representing Member States comprising at least sixty five per cent of the Union's population.⁶⁶ It is important to note, however, that this clearer definition of QMV, however, has been unfortunately 'polluted' by a series of transitional and permanent caveats, mostly to address the concerns of small and medium-sized countries.⁶⁷ Whilst those concerns might have been legitimate, the cumulative effect of these caveats is that the new QMV system lacks internal logic, is 'hopelessly complicated'⁶⁸ and is less transparent than the traditional weighted votes system. That being said, as most decisions in the Council are, in practice, taken without a vote, the new 'double-majority' voting system may not ultimately make much of a difference and should be welcomed only to the

⁶⁴ Craig, above n. 8, p. 154.

⁶⁵ See Table 4.1 on Weight of Council members' votes since 1957 in Piris, above n. 60, pp. 100–1.

⁶⁶ The new definition of QMV will not come into effect before 1 November 2014. And in the rare cases where the Council does not act on a proposal from the Commission or from the HR for FASP, the qualified majority is defined as at least 72% of the members of the Council, representing Member States comprising at least 65% of the population of the Union.

⁶⁷ For instance, it was agreed that a blocking minority should comprise at least four member states to prevent three of the biggest four countries (Germany, France, Italy, UK) from being able to block the adoption of relevant EU measures. And to satisfy the UK government, the extension of QMV in areas such as social security was made subject to so-called 'emergency brake' mechanisms, which allow any Member State to request that the adoption of a proposal by QMV be suspended and the matter referred to the European Council, which must decide by unanimity either to end the suspension or request the submission of a new draft.

⁶⁸ Dashwood and Johnston, above n. 57, p. 1499. For a similar argument, see also Piris, above n. 60, p. 105.

extent that it avoids the need to redefine voting weights each time a new country joins the Union – a recipe for undignified infighting between national leaders. In any event, it would seem reasonable to conclude that the new QMV system should not be viewed as a significant change although it has been regularly presented as one of the most far-reaching changes introduced by the TL.

3.2.2 European Parliament

The TL did not make any significant changes in respect of the composition and membership of the Parliament. For instance, the Nice Treaty provided for a Parliament of 732 members whereas the TL provides that it shall not exceed 751 in number, including the President of the Parliament. MEPs will continue to be elected according to a system of degressive or sliding proportionality and Article 14(2) TEU's explicit reference to this system merely reflects previous practice whereby the allocation of seats roughly reflected a Member State's population with smallest countries, however, guaranteed a minimum number of seats, which was actually increased from four to six to 'compensate' the smallest Member States for the then foreseen reduction in the size of the Commission.⁶⁹ Regrettably, the interesting and rather revolutionary idea of electing a number of MEPs on the basis of a European constituency via transnational lists has not been retained.⁷⁰ MEPs will continue to be elected in the context of national elections for a term of five years by direct universal suffrage in a free and secret ballot.

An interesting but nonetheless symbolic change can be noted in relation to who the MEPs are meant to represent: MEPs are now referred to as 'representatives of the Union's citizens' (Article 14(2) TEU) whereas they were previously described as representatives of the peoples of the States brought together in the Community (ex Article 189 TEC). The insertion of a new, clearer and more accurate provision describing the Parliament's remit, although welcome, is also essentially significant from a purely symbolic point of view:

⁶⁹ For further analysis on the composition of the Commission, see s. 3.2.3.

⁷⁰ See European Parliament resolution of 11 October 2007 on the composition of the European Parliament [2008] OJ C227E/132.

The European Parliament shall, jointly with the Council, exercise legislative and budgetary functions. It shall exercise functions of political control and consultation as laid down in the Treaties. It shall elect the President of the Commission.

The most significant and arguably unique reform concerns the renaming of the co-decision method of legislating and its extension to a wider range of areas. Where the more appropriately named ‘ordinary legislative procedure’ applies (Art. 189 TFEU), the Council and the Parliament, on the basis of a proposal from the Commission, must jointly agree for EU measures to be adopted. The renaming and extension of the ‘ordinary legislative procedure’ has proved relatively uncontroversial as most national governments equate such reforms with a strengthening of the democratic legitimacy of the Union’s institutional structure. However, there are several areas where the powers of the Parliament remain limited. For instance, the Parliament’s role remains only consultative when the Council intends to adopt EU measures concerning social security or social protection. Generally speaking, the legislative role of the Parliament continues to be limited in respect of areas thought to be too ‘sensitive’ by the national governments. More importantly, as regards the global impact of the TL on the role of the Parliament, one may reasonably argue that the TL merely continues a long-established trend and in fact only marginally extends the powers of the Parliament when compared to the changes introduced by previous Treaties. In other words, the TL is all about formalising and consolidating the role of the Parliament as a co-legislator. Whilst it also finally ensures the full parity between Parliament and Council as regards approval of the Union’s expenditure and, as will be shown below, solidifies the influence of the Parliament as regards the designation and appointment of the President of the Commission, of the new HR for FASP, and of appointing other members of the Commission, these changes can hardly be described as ‘ground-breaking’.

3.2.3 European Commission

The composition or rather the alleged unwieldy size of the Commission has become a recurrent and contentious topic of discussion following the extraordinary increase in size of the Union post-Maastricht.⁷¹ As a matter of fact, together with the definition of QMV, the issue of the size

⁷¹ The size of the Commission has however been long presented as one of the reasons for its institutional decline since the 1970s. For instance, in the 1979 report issued by the ‘Committee of the three wise men’, above n. 23, it was

of the Commission was ‘one of the most passionately debated’⁷² from the date the European Convention first met in 2002 until the TL entered into force in 2009. Most national governments from the most populated Member States have long argued that it was time to disconnect the number of Commissioners from the number of Member States. And indeed, after some difficult negotiations as several small states repeatedly argued for the maintenance of one Commissioner per Member State, the Nice Treaty finally provided that once the Union reached 27 Member States, there shall be fewer Commissioners than Member States. The CT provided for the reduction of the number of Commissioners to two thirds of the Member States, unless the European Council decided otherwise, and the nomination of those Commissioners on the basis of a system of strict equal rotation. The TL merely reproduced this reform but as is well known, a sizeable number of Irish citizens felt, similarly to what happened during the first referendum on the Nice Treaty in 2001, that this change would mean, inaccurately of course, that Ireland would be left with no voice at EU level.⁷³ History then largely repeated itself and in order to pave the way for a second Irish referendum, a series of guarantees and other assurances was agreed between the Irish Prime Minister and the Heads of State and Government of the other Member States. In particular, it was agreed that, upon the entry into force of the TL, a decision would be taken to the effect that the Commission shall continue to consist of one national of each Member State, including its President and the HR for FASP.⁷⁴

We are hence left with a rather modest set of changes in respect of the role and mode of appointment of the Commission. Indeed, amongst the most noteworthy novelties, one may merely mention a more accurate description of the Commission’s tasks and functions,⁷⁵ and the

submitted that ‘to continue to extend Commission membership on the present basis after enlargement could be fatal for the organisation's coherence and efficiency. Adequate portfolios could not be found for a total of 17 Commissioners and more and more Members would be relegated in effect to a ‘junior’ status. All hope of collegiate operation would be lost.’

⁷² Piris, above n. 60, p. 110.

⁷³ See e.g. L. Pech and P. Griffin, ‘Fixing a hole where the rain gets in: The Lisbon Treaty and the Irish “Legal Guarantees”’ (2009) 16 *Irish Journal of European Law* 5.

⁷⁴ See Presidency Conclusions of the Brussels European Council meeting (18 and 19 June 2009), Annex 1 and 2 respectively; Brussels 10 July 2009, 11225/2/09 – Rev 2 Council.

⁷⁵ See Art. 17(1) TEU: The Commission shall promote the general interest of the Union and take appropriate initiatives to that end. It shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall oversee the application of Union law under the control of the Court of Justice of the European Union. It shall execute the budget and manage programmes. It shall exercise coordinating, executive and management functions, as laid down in the Treaties. With the exception of the common foreign and security policy, and other cases provided for in the Treaties, it shall ensure the Union’s external representation. It shall initiate the Union’s annual and multiannual programming with a view to achieving interinstitutional agreements.

first treaty provision confirming that ‘Union legislative acts may only be adopted on the basis of a Commission proposal, except where the Treaties provide otherwise.’⁷⁶ The TL also alters but only slightly, the method of appointment of its President as the European Council must now formally take into account the results of the elections to the European Parliament before proposing to the European Parliament a candidate for President of the Commission. This candidate must then be ‘elected’, rather than ‘approved’ as was the case under ex Article 214(2) TEC, by the European Parliament by a majority of its component members. These changes can be said to be purely symbolic although it might lead to the unhealthy politicisation of the functioning of the EU’s institutional framework.⁷⁷ Once the Commission President is elected, as was previously the case, the Commission President has to agree on nominees for the other Commission posts. There is naturally a new reference to the HR for FASP who, as a member of the Commission, must also be appointed by the European Council with the agreement of the President of the Commission. The President, the HR for FASP and the other members of the Commission must then be subject, as a body, to a vote of consent by the Parliament. One may finally mention a series of provisions that merely make clearer the responsibilities and powers of the Commission President, in particular his power to sack individual Commissioners without the prior approval of the College of Commissioners, and explicitly confirm that the Commission, as a body, is to be responsible to the Parliament. As previously noted, the TL will not make any change to the current composition of the Commission following the ‘Irish deal’ of June 2009. In the absence of such a reform, it can be argued that for the most part, only cosmetic changes have been made in respect of the mode of appointment, role and powers of the Commission.

4. Overall assessment of the post-Lisbon’s institutional settlement

The institutional changes introduced by the TL, insofar as they represent ‘continuity with the past, rather than some radical new departure’,⁷⁸ have confirmed the resilience of the EU’s hybrid and interdependent system of government in which executive and legislative powers are basically shared between two intergovernmental institutions: the European Council and the Council, and

⁷⁶ Art. 17(2) TEU.

⁷⁷ This concern will be addressed in s. 4.2.

⁷⁸ Craig, above n. 8, p. 158.

two supranational institutions: the Parliament and the Commission.⁷⁹ These rather unique institutional arrangements reflect the fact that the EU continues to constitute a Union of Member States and of European peoples ‘on which the Member States confer competences to attain objectives they have in common’.⁸⁰ It was naïve in any event to expect a radical redesigning of the institutional settlement that governs the Union because national leaders were once again motivated by two somewhat contradictory impulses when devising the TL: They wanted to make the EU more democratic and efficient whilst avoiding any process of state-building.⁸¹ This explains why, for instance, the TL introduces elements that simultaneously consolidate the most intergovernmental body of the Union, the European Council, and a supranational institution such as the European Parliament. It may be that, taken as a whole, the TL offers a substantial improvement on the pre-Lisbon treaties as it brings more democratic accountability to the Union, enhances its decision-making and improves the functioning of its institutions.⁸² However, it is too apparent that the compromises that had to be negotiated – to simplify – between small and large Member States or those who favoured a more supranational EU versus those who wished to further enhance the pre-eminence of the national governments, have produced a more complex institutional framework. In addition, as will be shown later, the TL may have planted the seeds for a more dysfunctional institutional system by allowing an increased parliamentarisation of the Union’s decision-making process and multiplying ‘institutional *gros légumes*’⁸³ such as the President of the European Council or the HR for FASP.

4.1 Immediate impact of the TL: A more complex institutional system

In the Laeken Declaration on the Future of the European Union, the EU national leaders came to the conclusion that there was an imperative need to increase the democratic legitimacy and transparency of the Union’s institutions, to improve their efficiency in an enlarged Union, and finally, to better associate the national parliaments with the Union’s decision-making process as they contribute towards the legitimacy of the European project.⁸⁴ A certain number of reforms can be quickly highlighted to establish that the TL did offer some positive yet mostly modest

⁷⁹ *Ibid.*

⁸⁰ Art. 1 TEU.

⁸¹ This idea of double impulse is borrowed from Peterson and Shackleton, above n. 9, p. 14.

⁸² European Parliament resolution on the Treaty of Lisbon, above n. 3, point 1.

⁸³ Dougan, above n. 14, p. 691.

⁸⁴ Declaration on the Future of the European Union, above n. 4.

answers under all these problem areas. The drawback, however, is that they have also further complicated an already particularly complex institutional system.

As regards the democratic legitimacy and transparency of the Union, apart from the previously mentioned extension of the scope of application of the ‘ordinary legislative procedure’ and the requirement that the Council meets in public when considering and voting on legislative proposals, the inclusion of a new Treaty title dedicated to democratic principles may also be praised. New Article 9 TEU first provides, unsurprisingly, that the Union must observe the principles of democratic equality whereby all EU citizens are to receive equal attention from its institutions and other bodies. It further makes clear that the Union’s functioning is founded on the principle of representative democracy and recalls that citizens are directly represented at EU level in the Parliament and that national leaders and ministers participating in the European Council and Council are themselves democratically accountable, either through parliaments or directly to citizens (as is the case for the French President for instance).⁸⁵ This may merely be stating the obvious but this provision has the merit of concisely and neatly exposing the twofold democratic legitimacy of the EU as a Union of states and of peoples. Finally, and more originally, Article 11 TEU gives effect to the principle of participatory democracy. It does not, however, explicitly stipulate that the Union is also founded on this recently conceptualised principle but rather recognises a certain number of duties to European institutions such as the obligation for EU institutions to give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action.⁸⁶ More remarkably, the Member States’ wish to empower individuals and organisations has led to the introduction of at least one clearly innovative institutional change: In line with the CT, the TL provides that one million European citizens coming from ‘a significant number of Member States may take the initiative of inviting the Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties.’⁸⁷ The effective implementation of any citizens’ initiative clause may positively contribute to the creation of a European sphere of public debate, and may stimulate

⁸⁵ Art. 10(2) TEU.

⁸⁶ Art. 11(1) TEU.

⁸⁷ Art. 11(4) TEU. The procedures and conditions required for the so-called European citizens’ initiative, including the minimum number of Member States from which such citizens must come, were recently agreed. See Regulation no. 211/2011 of 16 February 2011 on the citizens’ initiative [2011] OJ L65/1. In accordance with the Regulation, the first European Citizens’ Initiatives can only be launched one year after its entry into force, i.e. 1 April 2012.

within the European population a much-needed sense of political control over the orientation of the Union. By comparison with national provisions that allow for the direct intervention of the people through constitutional or legislative referenda, the reform nevertheless remains quite timid in its scope and the EU ‘referendum’ cannot be described as genuine since it is merely consultative. It does not indeed allow for a pan-European vote to which all EU citizens can take part. Furthermore, the fact that the legal outcome of the procedure remains open-ended may seriously limit its decisiveness. And were the EU institutions to fail to act on the ‘initiatives’ they receive, voters’ scepticism about the Union may in fact increase. The potentially disturbing effect of a genuine EU referendum on the good functioning of the Union and the fear of exacerbating passions and of dividing the Union along geographical lines explain, and to some extent, justify the faint-hearted nature of the reform. All in all, the above-mentioned reforms should nonetheless ‘help carry the Union still closer to the democratic optimum that it is arguable any such supranational organisation could realistically hope to attain.’⁸⁸

As regards the efficiency of the Union’s institutions, the scheduled reduction of the number of members of the Commission to two thirds of the number of Member States was initially perceived as the most radical institutional change introduced by the TL. It was supposed to make it easier for the Commission to act and make it even clearer that Commissioners are representatives of European interests and not of those of their countries of origin.⁸⁹ To the well-voiced regret of Valéry Giscard d’Estaing, the former French President who served as President of the Convention on the Future of Europe,⁹⁰ the Irish government was able to convince other governments that the Commission should continue to include one national per Member State in order to ‘reassure’ Irish citizens before the holding of a second referendum. In the absence of any change made to the composition of the Commission, the extension and new definition of QMV can be arguably presented as the most significant reform in terms of greater institutional effectiveness. It promises, according to the orthodox view, to enhance efficiency in the Council by enabling, in most policy areas, the determined opposition of a small number of obstructionist States to be overcome. In a Union of twenty seven countries and growing, it was obviously important to limit the paralyzing effect of national vetoes in the Council but it remains to be seen whether the new system of double majority voting will change the current practice whereby

⁸⁸ Dougan, above n. 14, p. 690.

⁸⁹ European Parliament resolution on the TL, above n. 3, point 5(d).

⁹⁰ ‘Europe doit rejoindre le groupe des Etats-continentaux’, *Le Monde*, 19 June 2010.

consensus is always and painstakingly sought between the representatives of national governments.⁹¹ Furthermore, the TL has multiplied important qualifications on the extension of QMV. To give an example, the extension of QMV to measures relating to social security for migrant workers is subject to a so-called ‘emergency brake’.⁹² Another significant institutional reform that may strengthen the capacity of the EU institutions to carry out their tasks more effectively is the creation of the full-time posts of European Council President and of HR for FASP. The President of the European Council, elected by its members for a two-and-a-half-year term, may indeed be able to provide more coherence in the preparation and continuity of its work, and the appointment of the HR for FASP may also ensure more coherence in the external action of the Union by allowing an individual to speak for the Union on those subjects where the latter has been able – a not so common occurrence – to define a common position.⁹³ Empirical studies will be needed to demonstrate whether these goals have been satisfactorily attained. What may be already highlighted, however, is that the TL, by creating a number of new senior positions without clarifying how they must interact, may be leaving many hostages to fortune.

Last but not least, the TL also includes a number of important amendments that aim to strengthen the democratic legitimacy of the Union and bring more democratic accountability to the Union by enhancing the role of national parliaments. It has indeed long been argued that the Union is suffering from a double democratic deficit on the ground that there are EU policy areas in which powers of democratic control had been taken away from national parliaments without the European Parliament being offered the right to scrutinise those areas.⁹⁴ In line with the CT, the TL strengthens, albeit modestly, the provisions dealing with the scrutiny by national parliaments of their national governments when they act at EU level through the Council.⁹⁵ For instance, the

⁹¹ For a recent study and the argument that no stalemate can be detected following the 2004 enlargement of the Union, see R. Dehousse and F. Deloche-Gaudez, ‘Voting in the Council of Ministers: The Impact of Enlargement’ in A. Ott and E. Vos (eds.), *Fifty Years of European Integration: Foundations and Perspectives* (The Hague: TMC Asser Press, 2009) p. 21.

⁹² Art. 48 TFEU. This procedure allows any Member State to request that the adoption of a legislative measure by QMV be suspended and the proposal referred to the European Council, which must then decide by unanimity on whether to approve the suspended measure or ask the submission of a new draft.

⁹³ This reflects the views of the European Parliament as expressed in its resolution on the TL, above n. 3, points 5(c) and (e).

⁹⁴ European Parliament Resolution on improvements in the functioning of the Institutions without modification of the Treaties—making EU policies more open and democratic [1998] OJ C167/211.

⁹⁵ Following the entry into force of the Maastricht Treaty, a number of parliaments succeeded in securing a better involvement in the work of the EU through new information and consultation mechanisms. Greater parliamentary involvement was further guaranteed by the Amsterdam Treaty, which included a specific protocol annexed to the

Commission, rather than the national governments, is now directly responsible for forwarding all legislative proposals to the national parliaments at the same time as to the relevant Union's institutions and eight weeks must now elapse between a legislative proposal being made available to national parliaments and the date when it is placed on the Council's agenda for decision. The Protocol on the role of national parliaments also explicitly provides that no agreement may be reached on a draft legislative act during those eight weeks, another example of a modest but positive upgrading of the pre-Lisbon rules. Perhaps more significantly, the TL gives national parliaments, for the first time, a formal role to play in monitoring the application of the principle of subsidiarity. Under the so-called 'yellow card' mechanism, any national parliament may, within eight weeks of transmission of the Commission's proposal, issue a reasoned opinion stating why it considers that a legislative proposal does not comply with the principle of subsidiarity. This reasoned opinion must be taken into account by the EU institutions. The most remarkable aspect of this innovative procedure is that national parliaments, if they can gather at least one third of all the votes allocated to them, can demand that the responsible institution—in most cases the Commission—re-examine the relevant draft piece of legislation. If the responsible institution decides to maintain rather than amend or withdraw the contested legislative proposal, it must respond to the 'yellow card' by giving its reasons, thus increasing accountability.⁹⁶ An additional innovation is that the Court of Justice has gained jurisdiction to hear actions on grounds of infringement of the subsidiarity principle brought by a Member State on behalf of its national parliament. The Court may then issue a 'red card' by holding that the relevant legislation breaches this principle. Finally, the TL also enhances the role of national parliaments by enabling any of them to veto—under the so-called 'general passerelle' procedure—any move by the European Council to change from decision-making by unanimity to decision-making by QMV in a given area or to extend the scope of application of the ordinary legislative procedure. To conclude, the TL clearly confers an increased role on national parliaments. This might strengthen democracy and accountability at EU level but it also complicates and may dramatically slow down the Union's decision-making process. Furthermore, it may well be that 'the essential task

Treaty on the role of national parliaments. The protocol essentially called for national governments to ensure that their own national parliament receives Commission legislative proposals within a reasonable time period.

⁹⁶ The TL also provides for an additional procedure often known as the 'orange card'. If a simple majority (rather than one third as in the yellow card procedure) of national parliaments, where the codecision procedure is applicable, raise concerns, the Council of Ministers or the European Parliament – respectively by a majority of fifty-five percent of its members or a majority of the votes cast – have the power to override the Commission's decision to maintain its proposal.

of the national parliaments in the European context should not be to intervene as an additional factor of direct national control during the EU's decision-making process' but rather 'to exercise democratic control—at the level of the Member States—over the positions adopted by their national governments at the Council of Ministers and European Council.'⁹⁷ That being said, the 'yellow card' mechanism may well remain *lettre morte* as national parliaments are unlikely to ever develop the capacity, individually and collectively, to adopt the required number of reasoned opinions within the eight-week deadline. An eight month period would certainly have been a more realistic period for national parliaments to co-ordinate answers to a European legislative proposal. One may however easily understand that the drafters of the TL had to balance efficiency concerns – the European decision-making process being cumbersome enough – against legitimacy concerns.

In light of the above-mentioned reforms, it is submitted that the TL, whilst it provides satisfactory and at times, relatively original answers to the concerns identified in the Laeken Declaration on the future of the Union,⁹⁸ does not simplify the Union's institutional framework.⁹⁹ On the contrary, by transforming the European Council into a fully-fledged institution, creating the posts of President of the European Council and of HR for FASP, subjecting the extension of QMV to multiple qualifications and 'emergency brakes', facilitating participation by citizens and representative associations of civil society in the Union's decision-making process and enhancing the scrutiny and veto powers of the national parliaments, the TL has made the functioning of the EU more difficult to make sense of for anyone but the *cognoscenti*. It is important, however, to realise that the arcane and sometimes byzantine nature of the Union's institutional framework is the price we pay for the national governments' traditional aspiration to enhance the democratic nature and effectiveness of the EU institutions without radically altering the original system of checks and balances that has established the Union as a hyper-consensus polity where 'nothing

⁹⁷ Devuyst, above n. 10, p. 315.

⁹⁸ For further discussion, see J. Kokott and A. R  th, 'The European Convention and its Draft Treaty Establishing a Constitution for Europe: Appropriate Answers to the Laeken Questions?' (2003) 40 *Common Market Law Review* 1315.

⁹⁹ By contrast, the TL has relatively simplified and enhanced the coherence of the Union's constitutional framework. The establishment of a single legal entity, the abolition of the pillar structure and the overall extension of the ordinary legislative procedure to many more legal bases may indeed be said to have transformed the Union into a more coherent and unitary entity even though the TL maintains the largely intergovernmental character of the Union's CFSP and does not do away with enhanced cooperation, opt-ins, and opt-outs mechanisms. See L. Pech, 'The Fabulous Destiny of the EC Treaty: From Treaty to Constitution to Treaty Again?' (2008) 15 *Irish Journal of European Law* 49, p. 76.

can be done ... without overwhelming ‘consensus’ amongst all the main Member States, political parties and interest groups.’¹⁰⁰ If anything, the TL further accentuates the decisive importance of mutual sincere cooperation between the EU institutions¹⁰¹ as it has consolidated the interdependent and consensual nature of EU governance.¹⁰² This might well mean however that the TL has consolidated an institutional system ‘more effective at stalling decisions rather than facilitating them, and at encouraging deferral and (unavoidably small-scale) compromise solutions, rather than ensuring promptness of action and the prevalence of European interests.’¹⁰³

4.2 Potential impact of the TL: A more dysfunctional system?

The simultaneous reinforcement of the powers of the European Council and of the Parliament contributes to the long-established trend of balancing supranational and intergovernmental forces against one another.¹⁰⁴ Indeed, ever since the 1966 Luxembourg Accords, the institutional history of the EU shows that the Member States, through their participation in the Council and subsequently, in the European Council, have gradually replaced themselves ‘at the heart both of the Union’s legislative process and of its political process.’¹⁰⁵ The more prominent role offered to the national parliaments by the TL also seems to derive from the Member States’ permanent yearning to exercise ‘greater control over the Union’s institutions and competences’.¹⁰⁶ At the same time, the role of the European Parliament in the legislative and political processes has been continuously enhanced since the SEA of 1986 and the TL is no exception in this regard. In fact, the Parliament is frequently presented as the ‘winner’ of the latest round of EU institutional reform. The ‘victim’ of the successive treaties negotiated since 1986 may well be the Commission.¹⁰⁷ Whereas the original EC Treaty, in many respects, placed the Commission ‘in the driving seat as regards the development of Community policy’,¹⁰⁸ the first formal treaty reference to the European Council in 1986 made at last clear that this body had to be viewed as

¹⁰⁰ Hix, above n. 25, p. 147.

¹⁰¹ Art. 13(2) TEU provides that the EU institutions ‘shall practice mutual sincere cooperation.’

¹⁰² For a similar view, see Ponzano, above n. 11, p. 483.

¹⁰³ G. L. Tosato, ‘The Shape of Post-Lisbon Europe’ in S. Micossi and G. L. Tosato (eds.), *The European Union in the 21st Century* (Brussels: Centre for European Policy Studies, 2009), p. 277.

¹⁰⁴ Dougan, above n. 14, p. 692.

¹⁰⁵ A. Dashwood, ‘States in the European Union’ (1998) 23 *European Law Review* 201, p. 209.

¹⁰⁶ Dougan, above n. 14, p. 693.

¹⁰⁷ In their 1979 Report, the Committee of the three wise men already regretted that the balance of power between Commission and Council had shifted more and more in the latter’s favour and note that the Commission had lost much of its independent prestige. See above n. 22.

¹⁰⁸ Craig and de Búrca, above n. 42, p. 127.

the main locus of authority at EU level. Similarly, the progressive enhancement of the powers of the Parliament has constrained the Commission's freedom of action. Without giving countless examples, it may be worth mentioning that the European Council, since 2002, has sought to place constraints on the Commission's eminent power of legislative initiative by agreeing and revising annual and tri-annual legislative programmes every year and that the TL strengthens the right of both the Parliament and the Council to ask the Commission to make a legislative proposal by requiring that the Commission gives reasons if it does not accede to their requests.¹⁰⁹ The creation of the co-decision procedure, which the TL has transformed into the Union's 'ordinary legislative procedure', has similarly significantly undermined the Commission's central position in the legislative process by enabling the Council, following conciliation with the Parliament, to amend Commission proposals by qualified majority but without the agreement of the Commission.¹¹⁰ One may finally refer to the negotiation of the 2010 Framework Agreement on the inter-institutional relations between the Parliament and the Commission to further illustrate the point that the Commission's freedom of action has been further constrained by the TL. Indeed, in the eyes of the Parliament, the powers it gained from the TL have altered the pre-Lisbon inter-institutional balance in its favour.¹¹¹ The Commission appears to have acknowledged this as it committed itself to giving equal treatment to the Parliament and the Council, especially as regards to access to meetings and the provision of contributions or other information, in particular on legislative and budgetary matters, and undertaking to report on the concrete follow-up given to any legislative initiative requests further to the adoption of a legislative initiative report by Parliament, within three months of its adoption.¹¹²

Taken as a whole and with respect to the inter-institutional balance of powers, the TL can nonetheless be said to essentially represent continuity with the past. In other words, it embodies the latest attempt by the 'Masters of the Treaties' to improve the legitimacy and functioning of the EU institutions whilst preserving the non-state nature of the Union, the essential features of

¹⁰⁹ D. Chalmers et al., *European Union Law* (Cambridge University Press, 2nd ed., 2010), p. 62.

¹¹⁰ Devuyst, above n. 10, p. 265.

¹¹¹ See European Parliament, Committee on Constitutional Affairs, Report on the revision of the framework agreement on relations between the European Parliament and the European Commission (2010/2118(ACI)), Rapporteur: Paulo Rangel.

¹¹² The revised Framework Agreement, the fifth inter-institutional agreement of this type concluded between the Parliament and the Commission, was adopted by the Parliament on 20 October 2010. For the President of the Parliament, the revised agreement 'reflects the new more influential position of the European Parliament under the Lisbon Treaty', Europa Press Release IP/10/1358, 20 October 2010.

the Community method as well as the dominance of the European Council over the institutions that comprise the ‘institutional triangle’. The TL should not be blamed for the fact that national governments are intent on marginalising the Commission and that the current generation of political leaders persistently elevate national over European interests.¹¹³ Indeed, the TL does not shift the Union’s institutional balance in a more intergovernmental direction merely because, for instance, it formalises the position of the European Council or creates the positions of European Council President and of HR for FASP. The creation of these two posts may possibly represent the apotheosis of intergovernmentalism¹¹⁴ and contributes to the strengthening of the influence of the most populated Member States and their agents over the European integration process.¹¹⁵ One cannot exclude in particular that under the leadership of a new full-time President, the European Council may emerge as a more efficient and powerful agenda-setter to the detriment of the Commission. Formally speaking at least, the functions and powers of the President of the European Council and of the HR for FASP remain nonetheless extremely modest and strictly constrained. Furthermore, the rise of the national leaders as the key agenda-setters and ultimate decision-takers at EU level is not a recent phenomenon and it is a phenomenon that can essentially be explained by non-legal reasons such as their superior democratic legitimacy, the need for political leadership and the desire of national leaders to act and be seen by their respective electorates as the Union’s political masters.

The most problematic aspect of the TL is not that it may be favouring per se the emergence of a *directoire* of the larger Member States, an unconvincing view for this author as the TL mostly reinforced the consensual and interdependent nature of the Union’s decision making, but that it has increased the number of senior office-holders in the name of greater visibility and effectiveness. The increased politicisation of the Commission and of the decision-making process in order to answer the alleged Union’s democratic deficit and voters’ persistent apathy, may similarly produce adverse consequences. In introducing these changes, the TL may have indeed planted the seeds for a more conflict-prone and therefore, dysfunctional system as these reforms

¹¹³ J. Delors, ‘L’Europe attend les architectes’, *Le Figaro*, 15 June 2010. For a similar view offered by a former German Chancellor, see D. Marsh, ‘Helmut Schmidt: Europe lacks leaders’, *EU Observer*, 7 December 2010.

¹¹⁴ To use the formula of P. Sutherland quoted in J. Temple Lang, ‘The Main Issues After the Convention on the Constitutional Treaty for Europe’ (2004) 27 *Fordham International Law Journal* 544, p. 575.

¹¹⁵ Devuyst, above n. 10, p. 317.

could upset the functioning of a polity that continues to require an extensive degree of collaboration and consensus between all the key actors to get anything done.

As regards the relationship between the President of the European Council, the HR for FASP and the President of the Commission and lest not forget, the Head of State or Government of the Member State in charge of the rotating Council Presidency,¹¹⁶ the TL does not offer detailed provisions. Concerns have logically been voiced in relation to potential rivalries and turf-wars between those senior office-holders. The possible political marginalisation of the Commission President by the European Council President has also been mentioned. Thanks to the adoption of revised rules of procedures by the European Council and the Council and other documents setting out, for instance, the employment conditions of the President of the European Council and the HR for FASP,¹¹⁷ it has become however clearer that these two office-holders, to operate effectively, ‘need cooperative relationships with the rotating presidency and with the Commission (President), not to mention the European Parliament’ as they all are ‘in a good position to moderate significantly their power of initiative.’¹¹⁸ Disputes between the European Council President and the HR for FASP in relation to the respective roles in the external representation of the Union are also unlikely. In the absence of straightforward and elaborate rules in the Treaties,¹¹⁹ personalities will naturally matter. The selection of Mr Van Rompuy as European Council President and of Mrs Ashton as High Representative illustrate both the national leaders’ desire not to be outshone and understanding that the smooth functioning of the EU institutions require pragmatic personalities able to quietly work out any difference they may have regarding their respective mandates and competences. As long as the Member States,

¹¹⁶ One may wish to add the Secretary General of the Council to that list and note the ongoing debate about the possible creation of another (odd) senior post: a ‘Mr or Ms Euro’ who would take over the responsibilities that are currently shared by three people: the Commissioner in charge of economic and financial affairs; the finance minister of the country holding the rotating presidency of the Council and the finance minister of the country in charge of the eurogroup. Similarly to the current HR, the Mr/Ms Euro would owe his/her loyalty to both the European Council/Council and the Commission but unlike the current HR who is said to wear two hats – Mrs Ashton is both a vice-president of the European Commission and president of the Foreign Affairs Council – Mr/Ms Euro would constitute a triple-hatted position. See European Parliament, Special Committee on the Financial, Economic and Social Crisis, Report on the financial, economic and social crisis: recommendations concerning measures and initiatives to be taken (mid-term report) (2009/2182(INI)), Rapporteur: Pervenche Berès, 5 October 2010.

¹¹⁷ For a full list, see ‘Editorial comments: The post-Lisbon institutional package: Do old habits die hard?’ (2010) 47 *Common Market Law Review* 597.

¹¹⁸ *Ibid.*, p. 604.

¹¹⁹ See e.g. Art. 15(6) TEU: ‘The President of the European Council shall, at his level and in that capacity, ensure the external representation of the Union on issues concerning its common foreign and security policy, without prejudice to the powers of the High Representative of the Union for Foreign Affairs and Security Policy.’

through their national leaders, intend to remain ‘in charge’ and the European Council is careful to avoid selecting charismatic or authoritative figures, a drastic ‘presidentialisation’ of EU governance is virtually impossible.

Institutional conflict and paralysis are more likely in fact to be caused by other reforms. Whilst the potential disruptive effects of the yellow-card mechanism and of the citizen’s initiative over the Union’s decision-making process ought to be noted,¹²⁰ it is the yet untapped potential for an increased influence of the Parliament over the selection of the Commission President that is most likely to upset the Union’s interdependent and consensual mode of government and potentially, its legitimacy, at least in the eyes of those who believe that the lack of a European demos ought to imply that the EU should remain as much as possible a government of the Member States, by the Member States and for the Member States. This point requires some explaining. In line with the CT, the LT embodies the latest evolution towards a stronger and concomitant parliamentarisation and politicisation of the EU institutional framework.¹²¹ The European Council, acting by qualified majority, must now take into account elections to the Parliament, as reflected in the proportionate division of ideological allegiances, when proposing a candidate for President of the Commission. In turn, this candidate shall be elected by a majority of the component Members of the Parliament. The term ‘elected’ is new as the President of the Commission had merely to be ‘approved’ before the TL. This change, however, is mostly semantic. The new obligation for the European Council to consider the results of the Parliament’s elections represents a more significant change to the extent that potential now exists for European political parties to decisively participate in the designation of the Commission President.¹²² In

¹²⁰ The mechanisms are described above in s. 4.1. To give a single example, there would be no easy way-out in the situation where one or more national parliaments object to the adoption of a Commission legislative proposal reflecting a citizens’ initiative. For further analysis on the potential disruptive effects the application of this new institutional mechanism may have on the EU’s decision-making process and the regulatory role of the Court of Justice, see J-L. Sauron, ‘The European Citizens’ Initiative: Not such a good idea?’, *Policy Paper of the Fondation Robert Schuman* no. 192, 31 January 2011.

¹²¹ For a challenging discussion on whether more democratic politics would be positive or potentially catastrophic for the EU, see ‘Politics: The Right or the Wrong Sort of Medicine for the EU? Two papers by Simon Hix and Stefano Bartolini’, *Notre Europe Policy Paper* no. 19, March 2006.

¹²² The 2010 Framework Agreement between the Parliament and the Commission already reflects the increased influence of the Parliament over the Commission in the post-Lisbon era. In the name of improving the accountability of the ‘executive’, the Commission agreed, although the TL does not compel it to do so, that if the Parliament asks the Commission President to withdraw his confidence in an individual Member of the College, he must seriously consider whether to require the resignation of the Commissioner or explain his refusal to do so before the Parliament in the following plenary session. One may further mention that the Commission committed itself to give serious

other words, European political parties may well be going to the next parliamentary elections with proposed Commission Presidency nominees and push for the designation, as Commission President, of the leader of the European political group, or candidate sponsored by this party, having secured the biggest number of seats in the elections. Particularly significant is the fact that the Parliament is already working on a proposal to introduce a transnational list of twenty five MEPs for the 2014 elections with the view of making sure that Barroso's successor comes from this list.¹²³ What is certain is that the Parliament, if it so wishes, could reject all candidates selected by the European Council were the national leaders to fail to give a fair chance to the nominee favoured by the dominant political group in the Parliament. And in the situation where the European Council is left with no choice but to select the Parliament's nominee, it is likely that national leaders may seek to retaliate by instructing the European Council President to tame any Commission President wishing to satisfy the generally pro-integration bias of the Parliament. Only time will tell if this doomsday scenario will in fact play out. The main point here is that any significant party-politicisation of the Parliament and the assertive use of its powers could upset the institutional balance and the good functioning of the Union's institutional framework without necessarily enhancing European citizens' interest and/or loyalty. That being said, the obligation for the European Council to take into account the elections to the Parliament, and to hold appropriate consultations, may also be positively appraised to the extent it may finally allow a connection between the choices made by citizens all across the EU with the political colour of the selected candidate to the presidency of the Commission. And as pointed out by Craig, all major EU players 'have incentives to prevent institutional conflict emerging in the future.'¹²⁴

This in any event proves that the simultaneous pursuit of several objectives such as the enhancement of the efficiency and democratic legitimacy of the EU and the preservation of the Member States' pre-eminence is an eminently difficult exercise. Indeed, these objectives may not always be compatible with each other. As far as the Union's system of government is concerned,

consideration to the result of the consultation of Parliament where a Commissioner is to be replaced, before the President of the Commission gives his consent to the decision of the Council.

¹²³ See European Parliament, Draft report on a proposal for a modification of the Act concerning the election of the members of the European Parliament by direct universal suffrage of 20 September 1976 (2009/2134(INI)), 5 July 2010, Rapporteur: A. Duff. Felipe González, chairman of the Reflection Group on the Future of Europe, expressed such a wish, and Guy Verhofstadt, leader of the liberal ALDE group in the European Parliament, has expressed his interest to appear on the first-ever transnational list in order to revive his chances of becoming the next president of the European Commission. See 'Verhofstadt seeking to revive EU election hopes', *EurActiv*, 6 October 2010, available at: www.euractiv.com/en/print/future-eu/verhofstadt-seeking-revive-eu-election-hopes-news-498495.

¹²⁴ Craig, above n. 8, p. 153.

it is important to understand that any attempt to significantly parliamentarise it runs the risk of undermining the EU's functioning as a hyper-consensus polity as well as its legitimacy were the Union to end up with a dysfunctional institutional system. By enhancing the powers of the Parliament, strengthening the influence of national parliaments on EU decision-making and injecting a dose of direct democracy with the citizens' initiative, the TL might indeed produce a more democratic and politicised Union to the detriment of its stability and effective functioning of its decision-making. What is immediately clear, however, is that by failing to simplify the Union's institutional framework, the TL represents another missed opportunity to remedy people's decreasing confidence in the European project.¹²⁵

¹²⁵ According to the Spring 2010 Eurobarometer poll, fewer than half of the EU citizens see their country's membership of the EU as a positive thing and just 42 per cent say they trust the Union. See 'Europeans losing faith in the EU', *EurActiv*, 27 August 2010, available at: www.euractiv.com/en/pa/europeans-losing-faith-eu-news-497209.