



The Treaty of Lisbon: Implementing the Institutional Innovations

November 2007

Joint Study



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INTRODUCTION

Over the last two years much intellectual energy has been devoted to the analysis of, and the potential solutions to, the constitutional impasse resulting from the failure to ratify the treaty signed in Rome on 18 June 2004. The European Council held in Brussels in June 2007 gave a conclusion to that effort by drafting a mandate which was to be “*the exclusive basis and framework*” for the work of a forthcoming Intergovernmental Conference drafting a “*Reform treaty*”. That conclusion was rightly considered to be a great success for the German presidency.

The fact is that, over that two year period, much less attention has been given to the practical implementation of new institutional proposals included in the proposed treaty. Even a cursory examination indicates that the implementation of some of these proposals is likely to be uneasy, and in some cases could be a source of future problems or difficulties. This is why three Brussels based think-tanks have thought it useful to join efforts in analysing potential implications of the most significant proposals in the field of institutions. Seven issues have been identified, shared out and debated in working groups, and this publication contains the results of that collective effort.

Our aim is to highlight, and if possible, clarify potential problems. We have worked on the basis of the Reform Treaty approved at Lisbon in October 2007, without wishing to cross the lines of the presidency or to pre-empt the conclusions of the ongoing process.

As in any collective effort, the three institutions involved share the general conclusions to which they come, but do not necessarily feel bound by specific formulations in each of the chapters. They hope that this collective effort will find some resonance among political leaders and public opinion.

THE EUROPEAN PARLIAMENT:
REASSESSING THE INSTITUTIONAL BALANCE

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Broadly speaking, the prerogatives of the European Parliament were increased by the Treaty establishing a Constitution for Europe (TECE)^[1], then the Reform Treaty^[2]. The EP would not only exercise, jointly with the Council, legislative and budgetary functions but also the functions of political control and consultation and elect the President of the Commission.

The mandate of the June 2007 European Council maintains those modifications and the aim of this paper is to determine to what extent new institutional provisions will change the role and functioning of the European Parliament, thereby affecting the institutional balance, and what are the problems that may occur.

1. LEGISLATIVE POWERS

With regards to its legislative powers, the EP has seen its prerogatives enlarged, and put on an equal footing with those of the Council of Ministers. The **co-decision procedure becomes the ordinary legislative procedure** for the adoption of legislative acts. The Constitution extends the co-decision procedure to virtually all fields of action of the Union where the Council has to decide by qualified majority voting. This represents around forty new areas^[3] and is particularly relevant in the area of Freedom, Security and Justice where the normal legislative procedure is extended to frontier controls, asylum, immigration, judicial cooperation in criminal matters, minimum rules for the definition of and penalties in areas of serious crime, incentive measures for crime prevention, Eurojust, police cooperation, Europol and civil protection.

Significant changes also apply to agricultural policy and external trade. There are however still a number of exceptions to the rule of co-decision.

Moreover an “emergency brake” allows, in some cases, a Member State who considers that a draft European legislation would affect fundamental aspects of its

^[1] Treaty establishing a Constitution for Europe, OJ C 310/01, 16 December 2004.

^[2] Draft Treaty amending the Treaty on European Union and the Treaty establishing the European Community, CIG 1/1/07 REV 1.

^[3] Thirty of the existing legal basis have been modified to submit their use to the co-decision procedure, and thirteen new legal basis have been introduced with the use of the co-decision procedure.

legal system to refer the matter to the European Council thereby suspending the co-decision procedure. This applies to criminal matters^[4] and social security^[5].

1.1 What Are the Consequences for the Union's Legislative Capacity?

The European Parliament's legislative powers will be increased in *quantitative* terms. There is a risk that, as a consequence, the work of the Parliament would suffer in *qualitative* terms. This would have a negative impact on the legislative procedure and on the image of the Parliament.

In order to avoid that risk some internal reform of the functioning of the EP is needed, particularly with regard to the functioning of its legislative committees. According to some MEPs an increased work load and more participants has led, in the committees, to a deterioration in working conditions and practices.

Working procedures and practices in all parliamentary committees should be examined and streamlined. For instance:

- more sub-committees could be established;
- the timing of interventions within the committees could be better organised;
- as also interventions during the legislative debate;
- the working period of parliamentary committees could be increased.

But it is to be expected that changes brought by the extension of the co-decision procedure will affect some committees more than others. Presumably the LIBE committee (Civil Liberties, Justice and Home affairs) would be most affected because the extension of co-decision and QMV to the area of Security and Justice will change the nature of the debate.

In another area, Article 188n of the Reform Treaty^[6] gives Parliament power of consent over any international agreement in fields which are subject internally to the ordinary legislative procedure: this could have considerable impact on the workload of the INTA committee (International trade).

The co-decision procedure itself should be looked at again and streamlined, with the objective of improving the current practice.

^[4] See Articles 69e § 3 and 69f § 3 of the Reform Treaty, CIG 1/1/07 REV 1, pp. 65-67.

^[5] See Article 42 of the Reform Treaty on Free Movement of Workers, CIG 1/1/07 REV 1, p. 55.

^[6] See Article 188n of the Reform Treaty, CIG 1/1/07 REV 1, pp. 107-108.

The question of giving to the European Parliament a right of legislative initiative was debated in the Convention. Neither the TECE nor the Reform Treaty make proposals in that direction, but it is not unreasonable to suppose that the matter could arise again. There are arguments pro and contra. On the one hand, if one million voters can propose legislation to the Commission, why should a given number of MEPs not be given the same right? On the other, such a right of initiative for the EP would further weaken the Commission's exclusive powers of legislative initiative, which have been an important element of the institutional balance since the beginning of the Community. The question is a theoretical one at the current stage but, if it were to be addressed, the exact wording of the provision would be of fundamental importance.

1.2 The Enhanced Role of the European Parliament in the New Comitology Procedure

A Council decision adopted in 2006 has enhanced the role of the European Parliament in the comitology procedure^[7]. This innovation has no direct link with the Reform Treaty but it will, in practice, be implemented at the time the treaty's new legislative procedures come into force. It is therefore worthwhile to consider them in conjunction.

The aim of the decision is clearly to increase the role of Parliament in comitology procedures, a point which had been requested by Parliament for some time. To that end the Commission is requested to inform it on a regular basis of committee proceedings in general, to transmit documents related to those activities and to inform it whenever the Commission transmits to Council proposals for measures to be taken.

Moreover the decision creates a new comitology procedure: the **regulatory procedure with scrutiny**. That procedure shall apply whenever the Commission puts forward measures of general scope designed to amend, delete or supplement non-essential elements of an instrument adopted under the co-decision procedure.

Under this new procedure, whenever the competent committee **approves** measures proposed by the Commission they must be forwarded to Council and Parliament. These institutions then have a three month period in which they can oppose the draft measures if they consider that the draft exceeds the implementing powers

^[7] Council Decision 2006/512/EC amending Decision 1999/468/EC laying down procedures for the exercise of implementing powers conferred on the Commission

foreseen in the basic instrument or do not respect the principles of subsidiarity or proportionality. Council shall act by qualified majority and Parliament by a majority of its component members. If no opposition is manifested the draft measures shall be adopted by the Commission.

A similar procedure applies if the committee **does not approve** the measures proposed by the Commission. It can then transmit its draft successively to the Council, who has a two month time limit to oppose it, and then to Parliament, who has a four month limit to do so. In the absence of opposition the draft measures can be adopted by the Commission.

It is obviously too early to assess the implications of this new addition to the comitology procedures but it could lead to a much greater involvement of Parliament in the implementation of legislation. The procedure is clearly more democratic, but also more time consuming (time limits can be extended if this is justified by the complexity of the measures, and they usually are complex) than present arrangements, and this may work against speedy implementation of legislation. The need for Parliament to find a majority of its component members to oppose a draft text is likely to act as a brake. Regular use of the scrutiny procedure would imply that Parliament streamline its internal committee procedures, a point which has already been made above. There is scope for litigation on the implementation of this new procedure and the Court may be called upon to settle disputes as it has done in the past^[8].

2. BUDGETARY POWERS

As far as the adoption of the budget is concerned, Articles 268 and 279b of the Reform Treaty^[9] extend the full co-decision procedure to the whole annual budget. The distinction between compulsory and non compulsory expenditure is done away with as the Reform Treaty gives the final word to the EP for all categories of expenditures. The EP preserves hereby an important increase of its powers, which was one of the more hotly debated issues in the 2004 IGC. But there is also now, as a form of compensation, an obligation to present a multiannual financial framework setting the amounts of the annual ceilings as well as the appropriations for the various expenditure and payment categories.

^[8] See ECJ, Case No C-378/00 and Case No C-122/04.

^[9] See Articles 268 and 279b of the Reform Treaty, CIG 1/1/07 REV 1, pp. 135-143.

What Are the Consequences for the Union's Capacity to Adopt a Budget?

A balance must be made between the increase in the Parliaments budgetary powers, where the EP has the last word, on the one hand, and the constraints resulting from the new rules on financial perspectives, where it is the Council that will have the final word, even if the European Parliament is not devoid of influence in this field.

The European Parliament has been living with the constraints of financial perspectives approved by the Council since the early nineties. This has not prevented it from exercising considerable influence on expenditure within the imposed framework. Some observers believe that with the new multiannual financial framework, the European Parliament would have less room for maneuver left. That is not a majority view in the European Parliament itself. Experience will tell.

What is clear is that the European Parliament will not, by itself, be in a position to impose a more sensible budget on the Union. It will have to respect the overall limit fixed by the multiannual framework. As has always been the case, any substantial reform in the budgetary field implies a decision of the Council, where a zero sum mentality pervades all discussion of the subject.

However at first sight the arrangement proposed is relatively balanced and does not introduce radical change to the present situation. It should not have a significant impact on the Union's capacity to adopt a budget.

3. POWERS OF REVIEW

Under the current Treaties, the EP's power of scrutiny consists in the power to approve the designation of the President of the Commission^[10], to set up a parliamentary commission of inquiry, and to vote a motion of censure against the Commission.

^[10] See also the chapter on the European Commission in this issue.

Under the new provisions (Article 9^[11] read with Article 9d^[12] of the Reform Treaty):

- the EP elects the President of the Commission on a proposal from the European Council, taking into account the elections of the EP and after having held the appropriate consultations,
- it approves the composition of the Commission, previously chosen by the designated President from a short list of three candidates chosen by the Member States,
- the powers relating to commissions of inquiry and censure of the Commission are maintained.

A Declaration No 6 on Article 9d (6) and (7) of the Treaty on European Union annexed to the Reform treaty^[13] states that:

“The Conference considers that, in accordance with the provisions of the Treaties, the European Parliament and the European Council are jointly responsible for the smooth running of the process leading to the election of the President of the European Commission. Prior to the decision of the European Council, representatives of the European Parliament and of the European Council will thus conduct the necessary consultations in the framework deemed the most appropriate. These consultations will focus on the backgrounds of the candidates for President of the Commission, taking account of the elections to the European Parliament, in accordance with the first subparagraph of Article 9d (7). The arrangements for such consultations may be determined, in due course, by common accord between the European Parliament and the European Council.”

What Are the Consequences for the Institutional Balance?

Being “commonly responsible” does not necessarily imply that both institutions will be involved to the same extent in the process leading to the election of the President of the Commission. The present distinction between the role of the Council (to propose a candidate) and the role of the EP (to elect the candidate) is a clearer one. The new role of the EP in this procedure could be interpreted as a mere ratification of a choice already made. Some authors see it not only as a continuation of current practices but rather “*along the lines of a more standard model of parliamentary govern-*

^[11] See Article 9 of the Reform Treaty, CIG 1/1/07 REV 1, p. 10.

^[12] See Article 9d of the Reform Treaty, CIG 1/1/07 REV 1, pp. 14-15.

^[13] See Declaration No 6 on Article 9d (6) and (7) of the Treaty on European Union, CIG 3/1/07 REV 1, p. 7.

ment, where the head of state, such as the Dutch or Belgian monarch, or the German or Italian president, officially 'nominates' the leader of the party that won the election as the formateur of the government"^[14]. There is a certain ambiguity in the formulation which time will doubtless clarify.

Parliament will certainly want to make optimal use of the new formulations. It is currently expected that the main political parties at European level will designate their candidate for the presidency of the Commission in the campaign prior to the next elections to the European Parliament in 2009. The personality of the candidate could presumably become a significant element in the political debate. The party winning the election would obviously put forward its candidate for the post of president of the Commission. This approach needs however to be reconciled with the treaty text which says that it is for the European Council to propose a candidate.

In any case it seems clear that there will be a link between the majority resulting from European Parliament elections and the appointment of the President of the Commission. That link is not entirely new: in 2004 Parliament already considered that the nomination of the president of the Commission should reflect its composition, even if that consideration was not entirely endorsed by the European Council. With the new provisions that link is more clearly reaffirmed. It will strengthen the hand of the Parliament vis-à-vis the European Council and, at a later stage, in relations with the President designated and the Commission.

However, such politicization of the appointment of the position of the Commission president implies potential problems in that it also brings with it mistrust by those on the other side of the political spectrum. For instance, because President Barroso was perceived as neo-liberal, he in the end had to bend over backward not to appear so, and instead to appear non-partisan, which is the traditional stance of the Commission president. A partial solution to this problem would be that once appointed, the Commission President should not be expected to be a partisan president, but rather, much as in national grand coalition governments, to be a more bi-partisan, or non-partisan, one.

Another issue to be considered is the case where the Council would have a majority different from that of the European Parliament, which can easily be the case if European elections occur at half term points. Double politicization of this sort would

^[14] S. HIX, A. G. NOURY and G. ROLAND, *Democratic politics in the European Parliament* (Cambridge, Cambridge University Press, 2007).

undoubtedly contribute to a real political debate and the creation of a “European political space”. But it might well affect the functioning of the Union.

Whatever its impact on the functioning of the institutions, European citizens may well consider that politicization of the designation of the Commission President increases democracy, transparency and accountability of the institutions, and is therefore a welcome development.

4. THE NEW COMPOSITION OF THE EUROPEAN PARLIAMENT

The composition of the Parliament is another important issue which was in the mandate of the 2007 IGC. The June 2007 European Council decided to raise the number of MEPs for the next legislature, 2009-2014, from 736 to 750. The draft reform treaty establishes a new procedure for determining the composition of the European Parliament under which there is an overall limit of 750 seats, with a maximum of 96 and a minimum of 6 per Member State, and the principle of “degressive proportionality”. Although, in practice, seats have always been allocated in accordance with a degressive proportionality principle, this is the first time this principle has been clearly established in the treaties. However, the European Council mandate did not provide for any definition of this principle. According to the proposal of the EP on its composition^[15], the “degressive proportionality” concept implies that any distribution of seats should obey a series of principles, including the principle of “European solidarity”, the principle of “justified flexibility”, and the principle of “national representation”.

Under the Reform Treaty^[16], Parliament’s new composition is to be decided by the European Council acting by unanimity, on the basis of Parliament’s proposal and after obtaining its consent. The October European Council decided to have 751 Europarliamentarians.

The composition of the European Parliament will in future require adjustment so as to take account of demographic changes and/or future enlargement. This could well lead to difficult political debate between Member States, especially when new enlargements imply a loss in the number of parliamentary seats allotted to incumbent members.

^[15] *Report on the composition of the European Parliament (2007/2169(INI))*, European Parliament, Committee on Constitutional Affairs, 3.10.2007, Final A6-0351/2007. Rapporteurs: Alain LAMASSOURE and Adrian SEVERIN.

^[16] See Article 9a of the Reform Treaty, CIG 1/1/07 REV 1, p. 11.

It should also be noted that the European Parliament itself asked for an overall revision of its composition at the in time for the 2014-2019 parliamentary term, in order take account of demographic changes. It also stresses the need to establish, in the near future, a more stable and fairer system for deciding on the allocation of seats, thereby avoiding “*the traditional political horse-trading between Member States*”.

However difficult those debates may be they should not impair the functioning of the Parliament. They are basically political problems between Member States, not institutional problems *stricto sensu*.

5. OTHER ISSUES

Parliament has a number of other competences where problems of application might arise. It must for instance give its consent to the agreement allowing the secession of a Member State^[17]. What happens if it refuses its consent? A Secession War?

Two Cases Are Worthy of Consideration: Enhanced Cooperation and Treaty Revision.

Enhanced cooperation: Article 280 specifies that the initial authorisation of a projected enhanced cooperation requires prior consent of the European Parliament (except in the field of CFSP where the Parliament is simply consulted)^[18]. There is no further indication in the treaty on the role of Parliament once an enhanced cooperation has been approved. The relevant articles have never been implemented so that we have no indication as to how it would work in practice. However article 10 of the Reform Treaty^[19] states that participants “*may make use of its (the Union’s) institutions and exercise those competences by applying the relevant provisions of the Constitution*”. In practice this means that participants in enhanced cooperation must^[20] operate on the basis of a legal basis in the treaty, and apply the relevant procedures. When those procedures are legislative they imply the intervention of the Council (limited to participating Member States: article 280e) and the full Parliament. This may be repugnant to Parliament (not wanting to be involved in legislation that applies only to some Member States) and most certainly to states involved

^[17] See Article 35 of the Reform Treaty, CIG 1/1/07 REV 1, pp. 37-38.

^[18] See also the chapter on Enhanced Cooperation in this issue.

^[19] See Article 10 of the Reform Treaty, CIG 1/1/07 REV 1, p. 17.

^[20] See Article 280 e of the Reform Treaty, CIG 1/1/07 REV 1, p. 145.

in enhanced cooperation (who will not want their legislation to be dependent on the votes of parliamentarians who are not concerned). This may well be one more obstacle on the already difficult path to treaty based enhanced cooperation, at least when legislation is required, thereby increasing the temptation to operate outside the treaty framework. The Treaty of Prüm^[21] may not be the last of its kind.

Treaty revision: Parliament is deeply involved in the treaty revision procedure. It can initiate such a revision (article 33). It is a major actor when the normal “convention” procedure is applied, and its consent is necessary if the European Council decides not to call a convention. That last point may well become a major political asset if, as many people believe, governments will, in future, want to avoid the convention procedure. In earlier treaty revisions Parliament had very limited influence: this has changed and it has now become a major actor. Future proponents of treaty revisions will have to take that fact into account in their evaluation.

CONCLUSION

Like all previous European treaties, texts presently in discussion result in a net increase of powers for the European Parliament. This is very clearly the case through the extension of the co-decision procedure and it is likely to lead to an increased work load in the legislative committees whose internal functioning should be streamlined. The new balance in budgetary powers has also strengthened Parliament’s role but should not affect the Union’s capacity to approve its budget. The consequences of new provisions regarding the appointment of the President of the Commission are not entirely clear but it does seem that they will increase the influence of Parliament on the Commission and its President. Finally Parliament has become a major actor in the treaty revision procedures. None of these developments should be a source of major problems. Their democratic content should be welcomed. But they should lead us to reassess the institutional balance which is undergoing appreciable change.

^[21] Convention between the Kingdom of Belgium, the Federal Republic of Germany, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands and the Republic of Austria on the stepping up of cross-border cooperation, particularly in combating terrorism, cross-border crime and illegal migration. Treaty signed at Prüm — Germany on 27.05.2005, see Council Secretariat 07.07.2005, 10900/05.

Annex 1 The European Parliament

(as envisaged by CIG 1/1/07 REV 1 October 2007: pp. 10-17)

Article 9a

1. 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.
2. The European Parliament shall be composed of representatives of the Union's citizens. They shall not exceed seven hundred and fifty in number. Representation of citizens shall be degressively proportional, with a minimum threshold of six members per Member State. No Member State shall be allocated more than ninety-six seats.
The European Council shall adopt by unanimity, on the initiative of the European Parliament and with its consent, a decision establishing the composition of the European Parliament, respecting the principles referred to in the first subparagraph.
3. The members of the European Parliament shall be elected for a term of five years by direct universal suffrage in a free and secret ballot.
4. The European Parliament shall elect its President and its officers from among its members.

Article 9c

1. 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.

Annex 2 Financial provisions

(as envisaged by CIG 1/1/07 REV 1 October 2007: pp. 10-17)

Financial provisions

Article 268 shall be amended as follows:

- (a) in the first paragraph, the words "..., including those relating to the European Social Fund, ..." shall be deleted and the three paragraphs shall become paragraph 1;

- (b) the second subparagraph shall be replaced by the following:
The Union's annual budget shall be established by the European Parliament and the Council in accordance with Article 272;
- (c) the following new paragraphs shall be inserted:
2. The expenditure shown in the budget shall be authorised for the annual budgetary period in accordance with the regulation referred to in Article 279.
 3. The implementation of expenditure shown in the budget shall require the prior adoption of a legally binding Union act providing a legal basis for its action and for the implementation of the corresponding expenditure in accordance with the regulation referred to in Article 279, except in cases for which that law provides.
 4. With a view to maintaining budgetary discipline, the Union shall not adopt any act which is likely to have appreciable implications for the budget without providing an assurance that the expenditure arising from such an act is capable of being financed within the limit of the Union's own resources and in compliance with the multiannual financial framework referred to in Article 270a.
 5. The budget shall be implemented in accordance with the principle of sound financial management. Member States shall cooperate with the Union to ensure that the appropriations entered in the budget are used in accordance with this principle.
 6. The Union and the Member States, in accordance with Article 280, shall counter fraud and any other illegal activities affecting the financial interests of the Union.

The Union's own resources

A Chapter 1 "The Union's Own Resources" shall be inserted before Article 269.

Article 269 shall be amended as follows:

- (a) the following new first paragraph shall be inserted: "The Union shall provide itself with the means necessary to attain its objectives and carry through its policies.";
- (b) the last paragraph shall be replaced by the following two paragraphs: "The Council, acting in accordance with a special legislative procedure, shall unanimously and after consulting the European Parliament adopt a decision laying

down the provisions relating to the system of own resources of the Union. In this context it may establish new categories of own resources or abolish an existing category. That decision shall not enter into force until it is approved by the Member States in accordance with their respective constitutional requirements. The Council, acting by means of regulations in accordance with a special legislative procedure, shall lay down implementing measures for the Union's own resources system insofar as this is provided for in the decision adopted on the basis of the third paragraph. The Council shall act after obtaining the consent of the European Parliament.”.

Article 270 shall be repealed.

Multiannual financial framework

The following new Chapter 2 and **new Article 270a** shall be inserted:

“Chapter 2 The Multiannual Financial Framework

Article 270a

1. The multiannual financial framework shall ensure that Union expenditure develops in an orderly manner and within the limits of its own resources. It shall be established for a period of at least five years. The annual budget of the Union shall comply with the multiannual financial framework.
2. The Council, acting in accordance with a special legislative procedure, shall adopt a regulation laying down the multiannual financial framework. The Council shall act unanimously after obtaining the consent of the European Parliament, which shall be given by a majority of its component members. The European Council may, unanimously, adopt a decision authorising the Council to act by a qualified majority when adopting the regulation referred to in the first paragraph.
3. The financial framework shall determine the amounts of the annual ceilings on commitment appropriations by category of expenditure and of the annual ceiling on payment appropriations. The categories of expenditure, limited in number, shall correspond to the Union's major sectors of activity. The financial framework shall lay down any other provisions required for the annual budgetary procedure to run smoothly.
4. Where no Council regulation determining a new financial framework has been adopted by the end of the previous financial framework, the ceilings

and other provisions corresponding to the last year of that framework shall be extended until such time as that act is adopted.

5. Throughout the procedure leading to the adoption of the financial framework, the European Parliament, the Council and the Commission shall take any measure necessary to facilitate its adoption.”.

See also Annexes in the Chapter on Enhanced Cooperation and the Chapter on the Commission.

THE EUROPEAN COMMISSION:
SMALLER, YET MORE LEGITIMATE?

THE EUROPEAN COMMISSION: SMALLER, YET MORE LEGITIMATE?

Concerning the European Commission, the Reform Treaty takes up all innovations that were already included in the Constitutional Treaty (CT).^[1] This means essentially two important changes for the institution: The election of the Commission President by the European Parliament, and a reduction of the College of Commissioners to 2/3 of the number of Member States.

While these are the two reforms that most directly affect the Commission, they need to be appreciated in the wider context in which the Commission operates side by side with other (old and new) EU institutions and has seen its own role evolve over time. For this purpose the next section first provides a characterization of the evolving place of the Commission in the EU institutional architecture. This will provide the background for the analysis of the two key reforms that follows, with most attention going to the reduction of the size of the College.

1. THE CONTEXT OF THE COMMISSION: THE EU'S FACILITATOR IN SEARCH OF LEGITIMACY

The nature of the Commission and its role within the EU has often been contested. The Commission certainly is not the EU's government, given its clearly delineated scope of competences, the technical nature of most of its tasks and its absence of executive resources. Then again, the Commission is clearly more than just a General Secretariat. In sharp contradiction to Montesquieu's doctrine of the *trias politica*, the Commission combines legislative tasks (in drafting legislation), with executive, regulative and adjudicative responsibilities. The essence of the Commission's role may be rather well captured by the opening sentence of the Commission article in the Reform Treaty: "*The Commission shall promote the general interest of the Union and take appropriate initiatives to that end*". However, the Commission's role is bound to be contested as there are different views of what constitutes the "general interest of the Union" and what initiatives are in fact required to that end. In particular, whilst it may be agreed that the Commission is essentially there to oil the wheels of European cooperation, opinions diverge on whether this requires the Commission to take the political lead or rather to adopt a more subservient role. In

^[1] See Annex for the main provisions in the Reform Treaty pertaining to the Commission.

essence this involves the question whence the Commission derives its mandate or, in other words: what are the proper sources of the Commission's legitimacy?

Unlike the Council or the European Parliament, the Commission does not have an electoral mandate. Instead the primary repository of its legitimacy lies in its independence and objective expertise. Thus the independence of the Commissioners is explicitly enshrined in the Treaty. This independence is crucial for the Commission to fulfil its regulatory and adjudicative tasks. Complementary to this independence is the Commission's claim to objective expertise. The Commission constitutes the biggest service of civil servants exclusively dedicated to the European Union. For that reason, the Commission is supposed to have the capacity to adopt a general, pan-European perspective, in contrast to national politicians and policy makers that are unavoidably wed to their national perspectives.

This question of the Commission's mandate is central to its relation with the Member States that are represented in the Council of Ministers and the European Council. Eventually the Member States can block any piece of legislation initiated by the Commission. Despite these constraints, it is generally agreed that the upsurge of European integration in the 1980s was actively coaxed by the Commission under the leadership of its President Jacques Delors. The Commission operated as a key driving force behind such initiatives as the Single European Act, the Single Market, European Union, and the initial steps towards Monetary Union. This active role could be legitimated on the basis of the claim that these initiatives indeed did embody general European interests and that the Commission was uniquely positioned and equipped to identify and develop them.

If the Commission's scope expanded during the 1980's and early 1990's, over the last decade it has been re-focused again. On the one hand, in response to the acceleration of the 1980s and 1990s the Member States have tended to rein the Commission in again. Notably, where cooperation evolved in the second and third pillar of the EU (foreign policy and justice and home affairs), the Member States have held the initiative to themselves or delegated executive tasks to the Council secretariat. On the other hand, the Commission itself has offloaded a number of technical tasks to separate agencies. Under the present President Barroso, the Commission has also again put the common market at the heart of its policy responsibilities. Still, the Commission continues to perform crucial tasks in furthering European integration, most notably in preparing key legislation and in preparing EU enlargement.

Besides its relation with the Council, the Commission's relationship with the European Parliament has evolved as well. Over the last two decades, the EP has come to

model its relationship with the Commission ever more on the cabinet-parliament model as it exists in parliamentary systems. It has intensified the scrutiny of the Commissioners, which culminated most dramatically in the resignation of the Santer Commission in 1999. Also the EP has claimed a voice in the appointment procedure of Commissioners by subjecting them to hearings upon their nomination, leading most notably to the retraction of the candidacy of Rocco Buttiglione in 2004. Parliament's claims have been honored in subsequent Treaty revisions that have formalized Parliament's right to approve (or reject) the nominees for Commission President and for the College.

To sum up, without an electoral constituency of its own, its independence and objective expertise have been crucial to the Commission's ability to act. However, over the last decade, instead of pulling ahead of the Member States, the Commission's effectiveness has come to depend more on its ability to align itself with the consensus within the Council. At the same time, the increased engagement of the European Parliament has come to impose an additional constraint on the Commission. Yet, this constraint may also be turned into a new source of political legitimacy. As the Commission's independence has become contested and constrained, we thus see it shifting towards a more refocused and more political role.

These trends are confirmed by the Reform Treaty. The Reform Treaty formalizes the extension of the Commission's powers in the domain of Justice and Home Affairs, but it notably refrains from giving it any substantial competences in the Union's Foreign and Security Policy and in macro-economic affairs. What is more, the Treaty establishes a full-time European Council President, who may be seen as an alternative source of power competing with the Commission. Furthermore, the Reform Treaty reinforces the position of the High Representative of the Union for Foreign Affairs and Security Policy, who will be a member of the Commission, but who will also administer part of his responsibilities outside the purview of the Commission. The Commission's scope of competences thus remains clearly circumscribed and the presence of the new alternative sources of power may well serve to further keep these limits in check.

In this context, the two major reforms affecting the Commission itself relate directly to its relationship with the two main political institutions of the Union. The changes in the election of the Commission President confirm the further politicisation of the relationship between Commission and European Parliament. Logically, this change in turn also affects the relationship of the Commission with the Member States in the Council. However, this latter relationship is likely to be even more affected by the second reform, the reduction of the size of the College.

2. AN ELECTED COMMISSION PRESIDENT

Already since the changes made by the Treaty of Nice, art 214.2 TEC states that the Commission President is nominated by the European Council with qualified majority (not unanimity anymore) and that *“the nomination shall be approved by the European Parliament”*. This provision gave the political parties in the EP considerable power which they already used at the first possible occasion: After their victory in the European elections in 2004 the parties of the centre-right (i.e. EPP-ED and the liberals) demanded that the Commission’s President would have to come from their ranks in order to get parliament’s approval. Still, it was the European Council that decided on the candidacy of José Manuel Barroso. Basically, then, the election of the Commission President is the object of a kind of codecision between the European Council and the European Parliament.

The Reform Treaty formalizes this situation but it also slightly reinforces the position of the European Parliament, as it will turn the simple “approval” of the person nominated by the Heads of State and Government (current provision in art. 214.2 TEC) into an election of the “proposed candidate” by a majority of the EP’s component members. The new provision also states explicitly that the European elections should be taken into account for the choice of the proposed candidate by the members of the European Council. Given the minor character of these changes, one might expect future Commission President appointments to follow the same logic of the 2004 procedure: the European Council selects the candidate whose political affiliation corresponds to that of the majority in the newly elected European Parliament, which subsequently confirms the appointment in a formal election vote.

Although the Reform treaty might not change much in formal power relations, the new provision may allow the election procedures to gain more visibility in the broader public. If political parties decide to give support to a certain candidate of their political camp even before, the European election campaign could become a lot more personalized and tangible for many voters. With a view to the 2009 elections, one could imagine the EPP-parties campaigning on a second term of José Manuel Barroso. Much will then depend on the position of the other parties.^[2] If the victorious party-group in the EP-elections would tie its campaign to a specific candidate for the Commission Presidency, it would be very hard for the European Council not to endorse this candidate.

^[2] An appealing scenario of how such a politicised campaign could play out is sketched by Simon Hix in his forthcoming book on *What’s Wrong With the European Union and How to Fix It* (Polity Press).

Note however that nothing in the present Treaties prevented the EP party groups to adopt such an approach in 2004. The changes in the Reform treaty make hardly a difference, even if they slightly shift the balance in favor of the European Parliament taking the initiative in the procedure. Rather than depending on formal Treaty changes, whether the Commission President will be genuinely elected essentially depends on the capacity of European party groups to turn the Commission President into a major cross-European issue in the EP-election campaigns *and* on the willingness of serious candidates to tie their fate to these campaigns. Up till now, the substantive coordination of EP-campaigns with European party-groups has been rather limited. It will not be easy for them to agree on any candidate. What is more, one may wonder whether serious candidates will thus want to risk their political reputation or rather leave their fate to the closed negotiations of the European Council.

The Reform Treaty thus confirms the existing trend of making the appointment procedure ever more liable to politicization. The potential for politicization was initially opened up by making the nomination the object of qualified majority voting, rather than “common accord”, in the European Council. The involvement of the European Parliament has further added to the potential for politicizing the appointment. Even if this potential is not fully played out for the time being, the consensual appointment of the Commission President is a forlorn opportunity. Obviously, however, politicization will undermine the Commission’s claim to independence and objectivity. A Commission President whose election is supported (only) by a majority of Member States will find her claim to be a defender of the “Community interest” and “guardian of the treaties” compromised.

Already today, however, the Commission and its president are perceived by many as political player with an own agenda. The fact that the president will be elected, will give the future officeholder a stronger position to formulate his/her political programme and defend it against resistance from all quarters. He/she will also find it easier to choose (or to refuse) certain candidates for his team, although his/her choice will still have to be made in agreement with the different capitals. Thus, over time we can expect the function of Commission President to trade-off its claim to independence and objectivity to one of electoral (or rather EP-) support.^[3]

^[3] In the long term such developments will have clear effects for the Commission’s ability to handle certain regulative and adjudicative tasks that rely essentially on its independence of specific national and political interests (competition control, infringement procedures). One would expect a more politicised Commission to have these responsibilities off to independent agencies.

3. THE REDUCTION OF THE COLLEGE SIZE

The size of the College has been a hotly disputed issue since the mid-‘90s. Together with the voting weights in the Council it was one of the central elements to be tackled in view of the EU’s Eastern enlargement. In the Constitutional Convention the settlement for a reduction to 2/3 of the number of Member States was only accepted as integral part of the overall “package deal” on institutional reform. A majority of smaller Member States were strongly opposed to a reduction of the College beyond the number of Member States, as they were afraid of losing “their” Commissioner in an institution seen as a strategic partner by many smaller countries. Especially the new Member States insisted on having a person from their country in the College after they joined the Union.

How sensitive and difficult this issue has always been can be seen, if one takes a look back even further: Already the Corfu European Council in 1994 mentioned the future number of Commissioners as an explicit issue for the “Reflection Group” that should prepare the ground for the 1996 IGC.^[4] However, the IGC itself came to no agreement on the size of the College, and the issue became thus one of the most prominent “Amsterdam left-overs”. In view of the imminent enlargement, an adaptation was made through the Treaty of Nice which led to the loss of the second Commissioner for the “big five” (France, Germany, Italy, Spain, and the UK) in the first Commission after the Eastern enlargement (i.e. the Barroso Commission in November 2004). The Treaty of Nice also introduced a “Protocol on Enlargement” according to which the first new Commission following the EU’s enlargement to 27 Member States should consist of a lower number of Commissioners than Member States. The exact system would still have to be agreed among Member States, but the protocol already stipulates that any rotation would have to be “equal” for all Member States. “Equality” in this context means that not just the smaller, but all Member States would have to renounce to a Commissioner equally often, i.e. during every second or third legislature depending on the agreed size of the College.

The Reform Treaty, following the Constitutional Treaty, is to retain the system of “equal rotation” and also determines the size of the College:

“The Commission shall consist of a number of members, including its President and the High Representative of the Union for Foreign Affairs and Secu-

^[4] BALDWIN, Richard, *Trail to Failure: History of the Constitutional Treaty’s Rejection and Implications for the Future*, CEPS Policy Brief No. 104, May 2006, at: http://shop.ceps.eu/BookDetail.php?item_id=1332.

rity Policy, *corresponding to two thirds of the number of Member States*, unless the European Council, acting unanimously, decides to alter this number [Emphasis added by the authors].”

Concerning the system of rotation resulting from this decision the Reform Treaty stipulates the following two principles:

- (a) Member States shall be treated on a *strictly equal footing* as regards determination of the sequence of, and the time spent by, their nationals as members of the Commission; consequently, the difference between the total number of terms of office held by nationals of any given pair of Member States may never be more than one;
- (b) subject to point (a), each successive Commission shall be so composed as to reflect satisfactorily the *demographic and geographical range* of all the Member States (Article 211, in CIG 1/07: p.112). [Emphasis added by the authors].

Differently from the “Protocol on Enlargement” introduced by the Treaty of Nice, however, the Constitutional Treaty and Reform Treaty both defer the introduction of the new system for a further five years. It will thus only apply for the Commission coming to office in 2014 instead of 2009.

3.1. What Could the Arrangement of the Reform Treaty Look Like in Practice?

The new arrangement still leaves open a lot of concrete aspects. It could possibly draw some inspiration from the balance of the current rotation scheme for the Council Presidency and it could be considered that countries having the Presidency of the Council configurations⁵¹ should not have a Commissioner during the corresponding legislature. According to the treaty’s provisions the new rotation system “*shall be established by a European decision adopted unanimously by the European Council*” that has to respect the principle of equality among Member States and must satisfy demographic and geographical representation in each College. Under these provisions it is most likely that three fixed groups will be established with a sound balance of Northern, Southern, Western, Eastern and Central European countries as well as a mix of small, intermediate and large Member States. Each College would

⁵¹ The rotation mechanism will only be abolished for the European Council and the Foreign Affairs Council, see Art 9c, Paragraph 9 of the revised TEU and Art 201 b(b) TFEU.

only be made up of Commissioners from two of the three country groups and they would rotate on an equal basis. The three groups could look as follows:

Table 1 Possible Groups for a Rotating Commission Membership*

GROUP	A	B	C
	Germany (82.5), C	France (60.9), W	UK (60.4), W
	Spain (43.8), S	Poland (38.1), E	Italy (58.8), S
	Belgium (10.5), C	Netherlands (16.3), C	Romania (21.4), E
	Czech Rep. (10.3), C	Greece (11.1), S	Portugal (10.6), S
	Bulgaria (7.7), E	Hungary (10.1), E	Sweden (9.0), N
	Finland (5.3), N	Austria (8.3), C	Slovakia (5.4), E
	Ireland (4.2), W	Denmark (5.4), N	Slovenia (2.0), C
	Latvia (2.3), E	Lithuania (3.4), E	Estonia (1.3), E
	Malta (0.4), S	Cyprus (0.8), S	Luxembourg (0.5), C
TOTAL	167 million	154.4 million	169.4 million
N	1	1	1
W	1	1	1
S	2	2	2
E	2	3	3
C	3	2	2

* Name of country, population in million, broad geographical orientation (West, East, North, South, Central). Population figures taken from: http://europa.eu/abc/european_countries/index_en.htm

If a new Member State joins the Union it would probably be counted into the relatively weakest of the three groups or the one where it best fits to keep the geographical balance. Thus Croatia with its 4.4 million citizens would be counted into either group A (due to geographical balance) or group B (due to the balance in population). The same would be true for the Former Yugoslav Republic of Macedonia (2.05 million citizens). The whole system would only have to be revised if a country with a greater population would join the EU (e.g. Turkey or Ukraine).

3.2. A Reasonable Solution?

Clearly, the current priority is to get the Reform Treaty agreed and ratified, so political leaders do not openly question the system of “equal rotation”. If the Reform Treaty is agreed, however, the issue of the exact settlement on the rotation system is very likely to become again a subject of major dispute — probably politicians from large Member States will raise the issue when a concrete solution has to be found

in 2012/13. (If the Reform Treaty is not ratified, the “Protocol on Enlargement” will put the issue on the agenda already in 2008/09.)

As already stated above, both the Reform Treaty and the Protocol on Enlargement foresee that the new rotation system “*shall be established by a European decision adopted unanimously by the European Council*”, thus the potential for blockades will be abundant. In particular, there are major doubts whether, when it actually comes to it, the bigger Member States are really willing to give up on a Commissioner of their nationality for a certain period.^[6]

In terms of political practicality one must indeed ask how strong political support for the Commission would be from the respective capitals, if the College does not include a British (or French, German, Italian, Polish, Spanish) Commissioner. At first sight this argument appears to reflect a misunderstanding of the actual job profile of a Commissioner: According to article 213 of the EC Treaty Commissioners are supposed to be “*completely independent in the performance of their duties*” and “*shall neither seek nor take instructions from any government or from any other body*”. While we do not intend to question that Commissioners take their mandate seriously, the practical importance of a good understanding between the governments of key Member States and the College should not be underestimated. Strong communicative links with the political leadership of the large countries are indispensable to gain the necessary political support — especially for rather contested or even unpopular legislative initiatives. Even Jacques Delors — who has widely been perceived as a particularly “strong” Commission President — depended on the support from France, Germany and Britain for his ambitious political agenda. During Delors’ time there were two Commissioners from each of these countries and it is difficult to imagine that his Commission would have had the same success with the single market programme or the cohesion funds if there had not even been one member from the aforementioned countries in his College.

The sense of affiliation with Commission initiatives by key governments might even be more crucial today, due to the importance of new procedures that depend much less on “hard law” (regulations, directives and decisions), but on “soft” coordination mechanisms, like the “Open Method of Coordination”. For example, one of the

^[6] Cf. European Commission, Bureau of Policy Advisers (BEPA), Group of Political Analysis (GPA): Institutional Settlement, Minutes of the Meeting on 27 February 2007, retrievable at: http://ec.europa.eu/dgs/policy_advisers/experts_groups/docs/summary_27_february_2007.pdf.

key problems of the Lisbon process identified by the 2004 Kok-Report was a lack of ownership by Member States.^[7]

The aspect of national support is also of particular relevance in view of the institutional balance, and more concretely, the creation of the new permanent President of the European Council. Although he/she will be more of a “chairman” than a “president” due to his/her limited legal powers, the person in this position could still become very influential. The Council President could even become a potential rival to the Commission President if he/she was to be a political heavy-weight who enjoys the trust and the respect particularly from leaders in large Member States. In such a constellation the Commission would inevitably lose political clout, if it did not have very good links with important capitals.

The composition of the Commission has some bearing on its internal decision making process. Article 219 TEC (amended by the Treaty of Nice) says that decisions can be taken by a simple majority of the number of Commissioners. In the seventies and eighties the Commission did in fact vote regularly if not frequently. The procedure was not questioned. Presumably Member States felt that the balance within the Commission (including between big and small Member States) was approximately right. Possibly the principle that Commissioners do not represent a Member State was more widely accepted and understood. Today, according to President Barroso, the Commission never votes. It is debatable whether this is a progress. But a situation in which Commissioners from 15 smaller Member States (representing 20% of the population) could outvote the others, may explain the reluctance to push for a vote. A strong Commission will need to be decisive, innovative, proactive even, at times, controversial. It is doubtful if consensus decision-making can by itself enable it to do that. It would be advantageous for the Commission to be composed in a way which does not in practice inhibit voting.

3.3. Alternative Solutions?

Alternatives that put into question the system of “equal rotation” are neither compatible with the wording of the “Protocol on Enlargement” nor with that of the provisions in the Reform Treaty. Such solutions would thus necessitate Treaty changes, which will be difficult to achieve. However, given the fact that the implementation of the current provisions also needs unanimous agreement, large Member States will have considerable means to put pressure on the smaller ones, too.

^[7] *Facing the Challenge — The Lisbon Strategy for Growth and Employment*, Report from the High Level Group chaired by Wim Kok, February 2004, p. 17, retrievable at: http://ec.europa.eu/dgs/policy_advisers/experts_groups/docs/summary_27_february_2007.pdf.

One alternative that might find the support of the larger Member States would give them one Commissioner, while small Member States would only have “half a Commissioner”. Inevitably it would result in a system of “unequal” rotation. For example, in a Union of 27, the six largest Member States would always have a Commissioner, while the other 21 Member States would have to rotate on an equal basis for the 12 remaining ones. If a small Member State did not have a Commissioner during the last legislature, it imperatively would have to have one during the following one. One can easily predict that such a system of “unequal rotation” would be an extremely difficult sell in the smaller Member States, especially since many of them even accepted the “equal rotation” only as part of the institutional package deal in the Reform Treaty. In defence of this system it can be said, however, that it would to some extent bring the EU back to its old rule where large Members States also had twice as many Commissioners as the smaller ones.

Another alternative has already been put forward in public. In a speech delivered in Brussels in September 2006 the French President Nicolas Sarkozy proposed that the composition of the College should be at the discretion of the future Commission President: “*Mais pour sortir du blocage, pourquoi ne pas avoir l'audace de réfléchir à une sorte de 'saut conceptuel', consistant à confier la composition de la Commission à son président?*”.^[8] Despite Sarkozy just being a candidate for his current office at the time, his proposal was already a first concrete signal of discontent from a large Member State. The proposal was certainly not altruistic, as Sarkozy (probably rightly) assumes that a Commission President would not ignore a French Commissioner candidate in order to ensure political support from the French government and high-level channels of communication with the French media.

However such a proposal would automatically also strengthen the position of the Commission President, because without the constraints of formal quotas, he could make a more strategic choice. It would help the Commission President to get the best team and the necessary political support for his/her political programme. Such a choice would automatically have to include a geographically sound balance of nationalities anyway, but having Commissioners from all large Member States in the College would be strategically clever and make life for the Commission President easier when gathering support for controversial initiatives. Although smaller Member States strongly resent such logic, it would help to mitigate a potential antagonism between the new President of the European Council as the preferred

^[8] Speech by Nicholas SARKOZY at the Robert Schuman Foundation and the Friends of Europe, Bibliothèque Solvay, Brussels, 8 September 2006, retrievable at: <http://www.robert-schuman.org/actualite/bruxelles/discours8sept.pdf> (Sarkozy was then still just a candidate for his current office).

interlocutor of the larger Member States and the Commission President as advocate of smaller countries.

While no unanimous agreement on such an approach is forthcoming at this moment, things may look different when a solution will be required by 2012/2013. Indeed if in the course of the 2009 EP-elections and in the run-up to the 2014 elections, the Commission President election would already have evolved into a much more politicised affair, it would appear more logical for him or her to compose his or her own team. The composition of the team could be subjected to specific principles to ensure demographic and geographic diversity and the regular presence of each nationality. And, obviously, the College would require the support of a (qualified) majority of both the European Council and the European Parliament.

CONCLUSION

The position of the European Commission in the EU's architecture has always been a precarious one. In the absence of political constituency of its own, it essentially relied on its independence and expertise to sustain its claim to act as the "guardian of the general European interest". With the evolution of European integration in general, as well as the evolution of the Commission in particular, its independence has come under increasing pressure. By now it is very hard not to see the Commission as a political player of its own in many of the fields it is active, with its own interests and its own political and, even, ideological affiliations.

The two formal changes that the Reform Treaty envisages for the Commission rather confirm its increasingly politicised nature. The strengthening of the role of the European Parliament in the election of the Commission President, even if formally rather marginal, is likely to lead (sooner or later) to the position of the President being wed to the ideological majority in the Parliament. In turn, the heads of government in the European Council will no longer control the nominations for Commission President, but at most be able to block a truly unacceptable candidate.

The intention to reduce the size of the College to two-thirds of the number of Member States may well be conducive to greater internal efficiency of the body, but is also likely to further loosen the bond between the Member States and the Commission. Especially Member States whose nationality is not present in the College may well come to approach the Commission with a certain suspicion. The gains coming from a reduced College are thus likely to come at the price of diminished political support from key governments and less visibility in the media of these

countries. Particularly, in view of the new permanent President of the European Council, the reduction of the college in combination with a system of equal rotation could spur a dangerous trend where especially large Member States see their interests better observed by the new post.

While the Commission needs not give up on its claim to speak for the general European interest, its claim to independence and objective expertise no longer suffice to grant legitimacy to its initiatives. (Some) politicisation seems inevitable to derive legitimacy from a closer alignment to electoral support. The strengthening of the role of EP-elections in the election of the Commission President corresponds to this objective. At the same time, it is important to ensure that the procedure retains a balanced, “codecision” character that still allows the Member States to bring their interests to bear and prevents the Commission President from becoming completely captured by the EP-majority. Under these circumstances there is also much to be said for allowing the incoming Commission President in 2014 to pick her or his own college subject to some well-set norms. In general, while the Commission can no longer position itself *above* the other institutions, its future legitimacy and effectiveness essentially rely on its ability to position itself *between* them in a well balanced way.

Annex The New Provisions on the European Commission and its President

(as envisaged by CIG 1/1/07 REV 1 October 2007: pp. 14-15)

Article 9d The European Commission and its President

1. 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 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.
2. Union legislative acts may be adopted only on the basis of a Commission proposal, except where the Treaties provide otherwise. Other acts shall be adopted on the basis of a Commission proposal where the Treaties so provide.
3. The Commission's term of office shall be five years.
The members of the Commission shall be chosen on the ground of their general competence and European commitment from persons whose independence is beyond doubt.
In carrying out its responsibilities, the Commission shall be completely independent. Without prejudice to Article 9e(2), the members of the Commission shall neither seek nor take instructions from any government or other institution, body, office or entity. They shall refrain from any action incompatible with their duties or the performance of their tasks.
4. The Commission appointed between the date of entry into force of the Treaty amending the Treaty on European Union and the Treaty establishing the European Community and 31 October 2014 shall consist of one national of each Member State, including its President and the High Representative of the Union for Foreign Affairs and Security Policy who shall be one of its Vice-Presidents.
5. As from 1 November 2014, the Commission shall consist of a number of members, including its President and the High Representative of the Union for Foreign Affairs and Security Policy, corresponding to two thirds of the

number of Member States, unless the European Council, acting unanimously, decides to alter this number.

The members of the Commission shall be chosen from among the nationals of the Member States on the basis of a system of strictly equal rotation between the Member States, reflecting the demographic and geographical range of all the Member States. This system shall be established unanimously by the European Council in accordance with Article 211 of the Treaty on the Functioning of the European Union.

6. The President of the Commission shall:

- (a) lay down guidelines within which the Commission is to work;
- (b) decide on the internal organisation of the Commission, ensuring that it acts consistently, efficiently and as a collegiate body;
- (c) appoint Vice-Presidents, other than the High Representative of the Union for Foreign Affairs and Security Policy, from among the members of the Commission. A member of the Commission shall resign if the President so requests. The High Representative of the Union for Foreign Affairs and Security Policy shall resign, in accordance with the procedure set out in Article 9e(1), if the President so requests.

7. Taking into account the elections to the European Parliament and after having held the appropriate consultations, the European Council, acting by a qualified majority, shall propose to the European Parliament a candidate for President of the Commission. This candidate shall be elected by the European Parliament by a majority of its component members. If he or she does not obtain the required majority, the European Council, acting by a qualified majority, shall within one month propose a new candidate who shall be elected by the European Parliament following the same procedure.

The Council, by common accord with the President-elect, shall adopt the list of the other persons whom it proposes for appointment as members of the Commission. They shall be selected, on the basis of the suggestions made by Member States, in accordance with the criteria set out in paragraph 3, second subparagraph, and paragraph 5, second subparagraph.

The President, the High Representative of the Union for Foreign Affairs and Security Policy and the other members of the Commission shall be subject as a body to a vote of consent by the European Parliament. On the basis of this consent the Commission shall be appointed by the European Council, acting by a qualified majority.

- 8.** The Commission, as a body, shall be responsible to the European Parliament. In accordance with Article 201 of the Treaty on the Functioning of the European Union, the European Parliament may vote on a censure motion on the Commission. If such a motion is carried, the members of the Commission shall resign as a body and the High Representative of the Union for Foreign Affairs and Security Policy shall resign from the duties that he or she carries out in the Commission.”

THE PRESIDENCY OF THE COUNCIL:
THE PARADOX OF THE NEW PRESIDENCY

THE PRESIDENCY OF THE COUNCIL: THE PARADOX OF THE NEW PRESIDENCY

1. A ROTATING PRESIDENCY FROM THE BEGINNING

Nothing is more ordinary than the concept of presidency. Every body, association and institution, large or small, domestic or international, political or otherwise, has a presidency that is responsible both for representing it and for making sure it works properly. The Council is a Union institution and obeys that rule; since the founding treaties were signed it has had a presidency held by each Member State in turn for six months. The main functions of the presidency, as described systematically for the first time in the 1979 report by the Three Wise Men^[1], are to supervise the practical organisation of the proceedings of the Council, the European Council and the Council's preparatory bodies, to represent the Council in dealings with the other institutions and with non-member countries, to play the part of an honest broker in negotiations and, within the limits of what is possible in the light of circumstances at the time and its partners' good will, to set the Union's political agenda.

It is traditional for analysts to lay stress on the radical evolution that has transformed the function of the Presidency since its beginnings. That is true only up to a point. In fact it is less the function itself that has evolved (there are numerous examples of significant Presidency initiatives taken during the early decades) than the context in which it has to be exercised. The continuous expansion of the Union's competences and responsibilities in the field of external relations has to some extent *automatically* burdened the function of Presidency with a series of representational and organisational tasks which many consider to be routine and procedural rather than having any policy content. In the same way the commitments which the Council has assumed over the years with regard to the European Parliament have added to the list of the Presidency's tasks a series of obligations in the form of appearances and various reports which consume an increasing amount of time and resources. In the case of relations with the Parliament the obligations of the Presidency have increased through the expansion of the co-decision procedure, which has extended the Presidency's role as honest broker in the sphere of interinstitutional relations.

^[1] [BIESCHEUVEL, B., DELL, Edm. and MARJOLIN, R.], *Report on European Institutions. Presented by the Committee of Three to the European Council* (October 1979) (Luxembourg, Office for Official Publications of the European Communities, 1980) http://aei.pitt.edu/999/01/Committee_of_Three_Report_1979.pdf.

Another, perhaps even more significant, reason for the strengthening of the Presidency is the role it has been called upon to play in the various intergovernmental conferences which have succeeded each other at an ever increasing rate since the 1980s (the Single Act, Maastricht, Amsterdam, Nice, the Constitutional Treaty). In fact, as a body provided for in the Treaty but not covered by its rules, the Intergovernmental Conference gives to the Presidency a role which is more than it is due in that, assisted by the Council Secretariat, it plays a central role in preparing the proposals submitted to the negotiating table and in seeking consensus. Of course, that particular role in principle only exists during the Conference and the activities directly linked to it, but it is easy to see that some of the habits acquired on that occasion have influenced Presidential practice during the more routine work within the Union.

Accordingly, over the years, less by design than as a result of a combination of favourable circumstances the role of the Presidency has gradually increased until it has become a key element in the functioning of the life of the Union. Paradoxically, just as the political profile of the Presidency function was becoming more firmly established, the six-month system was beginning to reveal its limitations, as well as the consequences of both its intrinsic defects and of the environment in which it had to operate.

The weaknesses inherent in the six-month-rotating Presidency are sufficiently well known that there is no need to go over them in detail here. The main one is undoubtedly the shortness of the mandate and the resulting lack of continuity in both representation and action, defects which are particularly prejudicial to the conduct of the Union's affairs at a time when, in an ideal world, the constant development of its responsibilities require stronger and more sustained leadership. That discontinuity, innate to the system, is sometimes exacerbated by an excessive "personalisation" of the function. In an attempt to compensate for the shortness of the mandate, the Presidency is exercised with greater *intensity*, leaving to disorganised and frequently unproductive activity, often driven by purely national concerns and interests. In short, the Presidency mechanism inherited from the founding treaties has rapidly emerged as the nub of all problems, and a convenient explanation (sometimes all too convenient) for the majority of the Union's failings.

It has to be said that in addition to the defect intrinsic to the system, a further complicating factor has been added which is linked to the rapid expansion of the Union, the number of whose members has grown almost five-fold. As a result, the rate at which the Presidency comes round has been reduced considerably. The interval is now fourteen years, which has several adverse effects: first, there is a lack

of experience in the performance of the duties combined with loss of institutional memory — even in the case of the older Member States — and an almost irresistible temptation to overexploit for domestic reasons an event which because it is less frequent has become more important politically. Furthermore, with twenty-seven nations around the negotiating table the Council is becoming more and more difficult to manage and control. In many respects, the Council of Ministers is today less like a conventional government cabinet than a small deliberative assembly whose interests are more and more varied. This complicates considerably the Presidency's task — particularly its traditional role as honest broker — in a political culture which is still very much dominated by the search for consensus.

2. ATTEMPTS TO ADAPT OVER TIME

Very early on, efforts were made to remedy the more obvious defects of the Presidency system, and in particular the lack of continuity and visibility, by trying to reconcile the sometimes contradictory requirement for permanence and legitimacy. That is how an impressive (and often repetitive, because they were simply not followed up) series of recommendations were accumulated over the years. These took the form either of relatively binding measures, taken in the context of the revision of the Treaties or of less solemn decisions by the European Council (cf. Seville in 2002)^[2], resolutions by the *General Affairs* Council and even, for more practical matters, simple conclusions by Coreper. Those initiatives, of very varied scope and lacking any overall plan, covered both the external aspect of the exercise of the presidential function and the conduct of internal policies.

In the external field, the principal innovation was the creation, in the Treaty of Amsterdam, of the post of High Representative for Common Foreign and Security Policy, which was supposed to solve the recurrent problem of the lack of the *single face and voice* for the Union on the international stage. Combined with the use of different forms of *troikas* introduced first in the 1980s (first, the Presidency-in-office with the preceding and succeeding Presidencies, then the Presidency-in-office with the High Representative and the Commission, and the possibility of the subsequent Presidency) and backed up by the appointment of special envoys for problem regions, that reform has helped significantly to increase the consistency and continuity of the Union's external action. Unquestionable diplomatic successes in the prevention and solution of various conflicts, some of them right on the Union's doorstep, testify to that.

^[2] European Council, Presidency Conclusions, Seville 21 and 22 June 2002.

As regards the Union's internal policies, the Council has attempted to begin to solve the problem of the continuity of its action by trying to *programme its activities and encourage cooperation between successive Presidencies*. The first step in that direction was the systematic preparation, at the beginning of each half year and for each session of the different Council formations, of *indicative agendas* intended to inform delegations of the Presidency's intentions in order to help them prepare properly and so improve the Institution's collective efficiency. Conscious that this innovation, however interesting, would have little effect as long as it was limited to a six-month time-frame, the Helsinki European Council (1999)^[3] proposed more systematic cooperation between the Presidency-in-office and the following Presidency which could, in certain cases, go as far as a real sharing of tasks, although how and to what extent, was left to the discretion of the Presidency-in-office, thereby considerably limiting its potential. The Seville European Council (2002) in turn confirmed and reinforced the practice of cooperation on programmes. It also specified that the following Presidency could, before the start of its mandate, chair certain working parties in the case of dossiers that would occupy the Council for more than half a year, the most obvious example being the establishment of the Union's annual budget. Finally, the chairs of certain technical working parties (albeit only a limited number) were entrusted to the Council Secretariat, with the possibility of extending that practice in the light of experience.

By way of concluding this brief survey of the efforts that have been made to reform the Presidency function over more than two decades, it has to be admitted that, apart from the creation of the post of High Representative, the impact of which on the effectiveness of the Union's external action has been undeniable, the impact of these initiatives, however useful, has been limited and even marginal. The reason for this is twofold. On the one hand, despite constant criticism of the system, politicians have had difficulty focussing on a problem that has long been regarded as secondary in importance, and when they eventually did, it quickly became obvious that behind the solid consensus on the failings of the system, views differed considerably on how it should be reformed. In fact, even if the drawbacks of the rotating Presidency were not challenged openly, resistance to abandoning the system of half-yearly rotation was still very strong — in particular on the part of many small Member States. This view rested on good arguments, such as the importance of preserving the unity of the chain of command, the visibility of the Union in the Member States, and a sense of competitive rivalry in the contribution each could make in the cause of European integration.

^[3] European Council, Presidency Conclusions, Helsinki 10 and 11 December 1999.

3. THE NEW CONCEPT

It is generally accepted that the European Convention that met in 2002 did not hold a real debate on the overall problem of the Council Presidency since attention quickly became focused exclusively on the fixed Presidency of the European Council, which was presented as a *panacea*, in particular by President Giscard d'Estaing, a long-term supporter of the creation of the post. Because this innovation, together with that of giving the chairmanship of the Foreign Affairs Council to the High Representative, was part of the draft Constitutional Treaty, the Intergovernmental Conference confined itself to approving the package as a whole, and did not address the more specific question of the Council Presidency, the sole exception being a rather confused episode concerning the concept of the Team Presidency, the outcome of which was that the half-yearly system applied to other Council formations was simply continued. The "false IGC" of June 2007 saw an attempt on the part of the UK to call into question the principle of the High Representative's chairing the Foreign Affairs Council, but to no avail.

The main feature of the new Presidency concept is undoubtedly its *definitively hybrid nature*. Successive IGCs were unable to decide between a *functional approach*, in which the Presidency would be completely detached from the Member States (institutionalised Presidencies and/or Presidencies elected *intuitu personae*), and a *purely national approach* in which Presidency responsibility is conferred entirely, for a short period (six months), to each Member State. The new treaty proposes a **mixed** system which introduces an institutionalised and therefore long-term Presidency where the requirement for continuity is regarded as greatest (European Council and External Relations Council) but preserves the rotating system where continuity is considered less important. It should be noted in passing that paradoxically it is the bodies regarded as most "intergovernmental" that have acquired institutionalised Presidencies when the opposite might have been expected.

The question that comes naturally to mind regarding any construction of this sort is whether it will have the effect of combining the advantages of the two systems or, on the contrary, whether it is more likely to combine the disadvantages. This requires first an analysis of the *possible dangers* of the new Presidency system before moving on to identify the *conditions* under which it could operate smoothly.

4. POSSIBLE WEAKNESSES

The first weakness of the system — although it is perhaps not what immediately springs to mind but it is still very real — has to do with the permanent nature of the new functions and the personalities of their holders (in a way, it is the other side of the coin). If by chance these innovations were not to become properly integrated into the current institutional framework either for structural reasons or because of the persons chosen, the entire Presidency system would suffer for a long time, with serious consequences for the smooth functioning of the Council in particular and the Union in general. One small but undeniable advantage of the present rotating system is that a bad Presidency (which can happen) cannot last more than six months, and one can always hope, based on experience, that the next one will be better. At the risk of straying into the trivial or even politically incorrect, this consideration ought to be taken particularly seriously when the persons who are to occupy the posts are chosen.

The second possible danger, which may be more obvious, is the destruction of what could be called *the unity of the Presidency*, which is undeniably one of the major advantages of the present system. By introducing various *different ways in which the Presidency functions*, the new arrangement cuts across the unity of the chain of command which results from the fact that for each six-month period one and the same country has total political and administrative responsibility for conducting the Presidency, which is, at least in theory, a guarantee of consistency and efficiency. In the new system, on the other hand, the Presidency will be split up into no less than five different and somewhat unconnected levels of responsibility namely: (1) *the President of the European Council*, (2) *the group of three Member States in the eighteen-month Presidency Team*, (3) *the Member State in the team holding the six-month Presidency*, (4) *the High Representative for foreign policy, President of the Foreign Affairs Council*, and (5) *the President of the euro group*.

Although it is difficult to assess, this fragmentation could have a negative effect on the preparation of the European Council in that the latter normally draws on the proceedings of sectoral Councils, themselves coordinated by the General Affairs Council, *all bodies which, because they will still be in the hands of the six-month Presidency, will not in principle be controlled by the President of the European Council*. This inconsistency, which is not often brought out in commentaries supporting the new system, could, if care is not taken to prevent it, have the effect of completely disconnecting the European Council from the rest of the Union's decision-making machinery, with the danger of either isolating it in a rather detached role consisting of issuing general political guidance, without any real grasp of the reality of the

dossiers or, on the contrary, turning itself into an “autonomous” decision-making body directly responsible at its own level for all politically sensitive dossiers. Both cases would be regrettable.

Another potential disadvantage of the new system lies in the danger of a degree of dilution of responsibilities. As the Presidency is no longer held by a single body, collectively answerable to national and European public opinion, each party involved in the new Presidency might be tempted to waste a great deal of energy on taking credit whenever there is a success and blaming others for failure, all devices that are unfortunately all too common in any political undertaking in which the responsibilities of individual parties are not clearly defined. The system almost guarantees some degree of rivalry, especially in the media, between the future permanent President of the European Council and the President of the Commission, each with his own band of supporters from among the Member States, seeing himself as legitimately responsible for the Union’s final destiny.

Still in the area of potential rivalries, the new arrangement will probably introduce an additional complication in the representation of the Union’s external action because of the inevitable overlapping of the various duties (or at least of how they are perceived) of a large number of players likely to compete with the activities of the High Representative. These include in particular the President of the European Council (of whom the treaty states — foreshadowing likely future tensions — that he represents the Union externally *at his or her level and in that capacity*), those Commissioners with portfolios separate — trade policy? aid? — from that of the President of the Commission, never slow in exercising his own role in this area, and, last but not least, the representatives of the six-month Presidency (head of government and minister for foreign affairs) who will be very reluctant to leave the stage completely and will try by any means, however artificial, to continue to exist. That’s a lot of heads for one body!

Finally, the new treaty will have the effect of placing the head of state or of government of the Member State holding the six-month Presidency in a rather delicate and, frankly, unenviable situation. As head of government, he will have to take direct or indirect political responsibility for the work done during his six months in all areas except external relations without, theoretically at least, having the slightest influence over the way in which it is handled at European Council level. This is an uncomfortable position, particularly for the leader of a large country. Some commentators, aware of this paradox, have even gone so far as to claim that the function of permanent President of the European Council would perhaps never have seen the light of day if by sheer luck, the six-month rotation had meant that the heads of

state/government of certain large countries had been its first victims! That is probably a slight exaggeration, but it is a sign of the uneasiness that could be expected in the case of certain Presidencies and certain easily identifiable persons.

At the end of this brief survey and without wishing to be a prophet of doom, it is safe to say that, besides the risks linked to an *excessive personalisation* of power in a structure which is as complex and, in some ways, as fragile as the Union itself, the new Presidency model has *systemic risks* which need to be identified and overcome if the reform is to bring real added value to the good governance of the Union.

5. THE PRESIDENT OF THE EUROPEAN COUNCIL

We have just seen that paradoxically, under the guise of unity and consistency, the new system will lead to a dispersal of the Presidency, with the inevitable risk that each time one of its components is weakened, the system as a whole will suffer. Given that this is the case, those responsible for implementing the reform will have a twofold task: firstly, to strengthen each part of the Presidency in terms of its *basic function* and, secondly, to strengthen the *group dynamic* whenever the Presidency as a whole is required to act.

Let us first examine the role of the President of the European Council. The description of his or her tasks is set out in Article 9 b of the Reform Treaty, which stipulates in paragraph (6) that the European Council President:

“(a) shall chair it and drive forward its work, (b) shall ensure the preparation and continuity of the work of the European Council in cooperation with the President of the Commission, and on the basis of the work of the General Affairs Council, (c) shall endeavour to facilitate consensus (d) shall at his or her 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 Minister.”

In the same way, Article 9 c § 6 provides that the General Affairs Council “*shall prepare and ensure the follow-up to meetings of the European Council, in liaison with the President of the European Council and the Commission*”.

These provisions, which have remained virtually unchanged compared to the text drawn up by the Convention, are the mirror-image of the highly delicate balance achieved during the negotiation between, on the one hand, those in favour of strengthening the Council by establishing a *permanent Presidency at the highest level* and, on the other hand, those who wished to strengthen the Commission by

creating a post of High Representative *coming under the Council via the Presidency of the General Affairs Council and under the Commission as a full member of the College (double hat)*. This balance, which was the fruit of a long and difficult negotiation, initially between France and Germany, must be fully borne in mind if the operational provisions on the establishment of the two new figures (President and High Representative) are to be adopted without too much difficulty. To respect this balance is to acknowledge that the High Representative participates in both the Council and the Commission, but also that the permanent President of the European Council has real political substance and brings an added value to both the functioning of the Council in particular and the Union in general.

If we accept these premises, the well-worn conflicting notions of, on the one hand, a President who is simply a *chairman*, and on the other hand, a President *in the fullest sense of the word*, loses much of its relevance. In accepting the political balance described above, the Member States sought to rule out both the notion of a single figurehead, in a role limited to giving people the floor and making appropriate declarations, and that of a supreme figure of authority, ultimately responsible for the fate of the Union, along the lines of that foreseen in the French Constitution of 1958. How then do we define his function if we discount these two extremes, both of which are equally unrealistic? The answer lies in giving real effect to the provisions in the text of the Constitutional Treaty as agreed by Member States' governments. The terms used in the Treaty describe the role of the President of the European Council precisely and unambiguously around four main tasks: preparing the work, conducting debates ("*he shall drive forward the work*"), drawing up common conclusions ("*he shall endeavour to facilitate consensus*") and following up the work ("*he shall ensure the continuity*"), in addition to the external representation of the Union, which is undoubtedly the point which is least clear.

These tasks correspond very broadly to those of the current six-month Presidency, with however the very important addition of the organisation of work in the medium and long-term, which is linked to the permanent nature of the function. It follows logically that the new-style President of the European Council must have, *mutatis mutandis*, the same *means* and the same *resources* as his predecessors, with regard both to his part in the institutional process and to the administrative instruments at his disposal.

As far as his part in the institutional process is concerned, the President must have a status within the *General Affairs Council* which allows him to perform the role conferred on him by the Treaty fully and effectively. This clearly presupposes a right to intervene and to make proposals in all areas directly or indirectly related

to the preparation and implementation of European Council decisions and the right to intervene *ex officio* in the same areas in all specialised Councils and in the GA Council. A refusal to grant the President these prerogatives or any limitation of their exercise would indirectly undermine the provisions in Article 9.

The President of the European Council must then be given the administrative and material resources needed to carry out his task. On the assumption that his responsibilities for preparing and following up conclusions will *mutatis mutandis* be identical to those of the current President, this means putting at his disposal a private office and an administrative team responsible for advising him and for *liaising* with others involved in the Presidency, with the other institutions, in particular the Parliament (which will probably make many more demands on him than on the six-month President!) and with the Member States. This administrative team should have some degree of autonomy but should be situated within the Council Secretariat, whose logistical resources would be put at the disposal of the President. The Secretariat would in effect be the only *real interface* (as well as a communication channel) between the permanent Presidency and the six-month Presidency, and will therefore play a more important role in the new system than hitherto.

6. THE NECESSITY OF COORDINATION

Having ensured that the President of the European Council has the prerogatives and resources needed to perform his tasks, it will be necessary to establish *an appropriate way of ensuring cooperation* between the permanent President and his rotating counterpart. This is important if the outcome of the proceedings of the sectoral Councils is to be available to the permanent President early enough to feed into the discussions of the European Council. Even if it is not its main aim, this systematic cooperation with the six-month Presidency should also help to alleviate the understandable frustration felt by the Head of State or of Government at no longer being in the Presidency chair, whilst also ensuring that he does not act as a rival to the President-in-office, which the Heads of Government of the larger Member States might well be tempted to do.

More generally, it will be necessary to put in place efficient *consultation and coordination procedures* for all those involved in the Presidency: the permanent President of the European Council, the Presidency of the Eurogroup if necessary, representatives of the rotating Presidency, the High Representative, the President of the Commission and the Secretary-General of the Council. Because of their vital importance for the coherence and smooth functioning of the Presidency, these procedures should,

without being excessively formalised, at the very least consist of constant contacts between those in charge at the highest level and regular meetings, held as often as necessary (weekly?) with their direct counterparts (with, of course, a specific role for the Chairman of Coreper). This will be the price to pay for a new system that is both viable and robust.

Another way of strengthening the coherence and predictability of the system as a whole would be to develop cooperation within the *18-month Presidency trio* on the basis of the various relevant provisions in the new Treaty. Other than being of obvious importance for the continuity of the work, a judicious use of the potential provided by the *Presidency trio* system would also help smooth relations between the permanent President of the European Council and the six-month Presidency which, like it or not, will always be a potential source of tension.

Furthermore, the provisions on the planning of the Council's work will have to be adapted to the new situation. A serious, indicative programme over two and a half years — covering at least the major topics on the *political agenda* — would have the advantage of being aligned with the term of the President's period in office and would represent a sort of *contract* between him and the rotating Presidencies, thereby helping pave the way for good cooperation. Against this background, the 18-month cycle loses some of its significance, but should be retained since it is already included in the Treaty where it provides the basis for the work of the *Presidency trio* (see above). The President of the European Council will of course have to be very closely involved in all procedures relating to the planning of the Council's work, whether it be a programme for two and a half years, one and a half years or six months.

Finally, the effectiveness of the Presidency will depend to a certain extent on the role given to the new *General Affairs Council*, which from now on will be enshrined in the Treaty and separate from the Foreign Affairs Council. This coordination instrument, which has until now never really been used for a number of reasons — not least the unproductive corporatism of the Foreign Affairs ministers — could, if finally taken seriously, become the best way of guaranteeing the political coherence of the whole system.

Another factor in the success of the new formula will be the Council's ability to reform its day-to-day working methods, which have particularly suffered as a result of the increase in its members and will have to be adapted to the new situation. *Last but not least*, whilst the basic outline of the Presidency model is fixed, it has several elements which can be adjusted which the Council will have to use with caution in the light of experience when considering, for example, the idea of widening

the tasks of the General Secretariat on a case-by-case basis or extending the use of elected Presidencies.

CONCLUSION

To sum up, it seems that the original desire to put in place a single Presidency will, paradoxically, impose a sort of *collegiality* between the various participants, since the retention de facto of the six-month rotation will result in an overlapping of their responsibilities.

To enable this semi-collegial Presidency to function smoothly, it will be necessary to give a *central place* to the President of the European Council, who should logically be its driving force and act as arbiter since he is ultimately accountable to the highest body. Choosing to ignore this political reality by making the President of the European Council a simple “chairman” with an ill-defined supporting role would not be in keeping with the spirit of the Treaty and would inevitably lead to serious disillusionment and, ultimately, to disorder and powerlessness.

Conversely, if the future President of the European Council were to show any signs of autocratic behaviour by ignoring or acting against the advice of those with whom he has to work in the exercise of his responsibilities or by avoiding the basic obligation to consult, he would quickly be criticised and sooner rather than later be confronted with a refusal to cooperate, which would also lead to confusion and paralysis.

Between these two temptations — which permeate the text of the new Treaty as a result of strong ulterior motives at play during the negotiations — *the path ahead is narrow* and, as is often the case, the choice of the first men or women to perform these new tasks will be decisive for the immediate and longer-term future of function of the Presidency.

Annex 1 The European Council and its President

(as envisaged by CIG 1/1/07 October 2007: pp. 12-13)

Article 9b

1. 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 shall not exercise legislative functions.
2. The European Council shall consist of the Heads of State or Government of the Member States, together with its President and the President of the Commission. The High Representative of the Union for Foreign Affairs and Security Policy shall take part in its work.
3. The European Council shall meet twice every six months, convened by its President. When the agenda so requires, the members of the European Council may decide each to be assisted by a minister and, in the case of the President of the Commission, by a member of the Commission. When the situation so requires, the President shall convene a special meeting of the European Council.
4. Except where the Treaties provide otherwise, decisions of the European Council shall be taken by consensus.
5. The European Council shall elect its President, by a qualified majority, for a term of two and a half years, renewable once. In the event of an impediment or serious misconduct, the European Council can end his or her term of office in accordance with the same procedure.
6. The President of the European Council: (a) shall chair it and drive forward its work; (b) shall ensure the preparation and continuity of the work of the European Council in cooperation with the President of the Commission, and on the basis of the work of the General Affairs Council; (c) shall endeavour to facilitate cohesion and consensus within the European Council; (d) shall present a report to the European Parliament after each of the meetings of the European Council. The President of the European Council shall, at his or her 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. The President of the European Council shall not hold a national office.

Article 9c

6. The Council shall meet in different configurations, the list of which shall be adopted in accordance with Article 201b(a), of the Treaty on the Functioning of the European Union.

The General Affairs Council shall ensure consistency in the work of the different Council configurations. It shall prepare and ensure the follow-up to meetings of the European Council, in liaison with the President of the European Council and the Commission.

The Foreign Affairs Council shall elaborate the Union's external action on the basis of strategic guidelines laid down by the European Council and ensure that the Union's action is consistent.

7. A Committee of Permanent Representatives of the Governments of the Member States shall be responsible for preparing the work of the Council.
8. The Council shall meet in public when it deliberates and votes on a draft legislative act. To this end, each Council meeting shall be divided into two parts, dealing respectively with deliberations on Union legislative acts and non-legislative activities.
9. The Presidency of Council configurations, other than that of Foreign Affairs, shall be held by Member State representatives in the Council on the basis of equal rotation, in accordance with the conditions established in accordance with Article 201b(b), of the Treaty on the Functioning of the European Union."

Annex 2 The European Council

(as envisaged by CIG 1/1/07 October 2007: p. 114)

Article 201a

1. Where a vote is taken, any member of the European Council may also act on behalf of not more than one other member.

Paragraph 4 of Article 9c of the Treaty on European Union and paragraph 2 of Article 205 of this Treaty shall apply to the European Council when it is acting by a qualified majority. Where the European Council decides by vote, its President and the President of the Commission shall not take part in the vote.

Abstentions by members present in person or represented shall not prevent the adoption by the European Council of acts which require unanimity.

2. The President of the European Parliament may be invited to be heard by the European Council.
3. The European Council shall act by a simple majority for procedural questions and for the adoption of its Rules of Procedure.
4. The European Council shall be assisted by the General Secretariat of the Council.

Article 201b

The European Council shall adopt by a qualified majority:

- (a) a decision establishing the list of Council configurations other than those referred to in second and third subparagraphs of Article 9c(6) of the Treaty on European Union;
- (b) a decision on the Presidency of Council configurations, other than that of Foreign Affairs, in accordance with Article 9c(9) of the Treaty on European Union.”.

Annex 3 Declaration on Article 9c(9) of the Treaty on European Union concerning the European Council decision on the exercise of the Presidency of the Council

(as envisaged by CIG 3/1/07 REV 1 October 2007: pp. 3-4)

The Conference declares that the Council should begin preparing the decision establishing the procedures for implementing the decision on the exercise of the Presidency of the Council as soon as the Treaty amending the Treaty on European Union and the Treaty establishing the European Community is signed, and should give its political approval within six months. A draft decision of the European Council, which will be adopted on the date of entry into force of the said Treaty, is set out below:

Draft decision of the European Council on the exercise of the Presidency of the Council

Article 1

1. The Presidency of the Council, with the exception of the Foreign Affairs configuration, shall be held by pre-established groups of three Member States for a period of 18 months. The groups shall be made up on a basis of equal

rotation among the Member States, taking into account their diversity and geographical balance within the Union.

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

Article 2

The Committee of Permanent Representatives of the Governments of the Member States shall be chaired by a representative of the Member State chairing the General Affairs Council.

The Chair of the Political and Security Committee shall be held by a representative of the High Representative of the Union for Foreign Affairs and Security Policy.

The chair of the preparatory bodies of the various Council configurations, with the exception of the Foreign Affairs configuration, shall fall to the member of the group chairing the relevant configuration, unless decided otherwise in accordance with Article 4.

Article 3

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

Article 4

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

**QUALIFIED MAJORITY
VOTING IN THE COUNCIL:
EXPLAINING AND ASSESSING
THE NEW RULE(S)**

QUALIFIED MAJORITY VOTING IN THE COUNCIL: EXPLAINING AND ASSESSING THE NEW RULE(S)

The qualified majority voting (QMV) rules in the Council of the European Union^[1] have been subject to constant debate and negotiations throughout the history of the Union. The various versions of the rules reflect the fundamental question of how best to balance the representation of small and large countries, as well as how to reflect the Union's dual identity as both a "Union of States" and a "Union of People". As a result, decisions by QMV have ever since the establishment of the European Economic Community in 1957 been characterised by a system of "degressive proportionality" where medium- and small members are given more weights proportionally to their population shares. In this way, the principle of degressivity is widely argued to give more legitimacy to the system due to the considerations of both governments and populations, and so far there has been no real questioning of this argument. However, the inclusion of a large number of members — particularly a large number of small and medium-sized members — in 2004 and again in 2007 once more opened up the issue of how to balance representation in the Council.

The QMV rules in the Reform Treaty are a bold departure from the Nice Treaty rules, which constitutes the current legal base for decision-making. The three criteria in the Nice rules are 1) that 255 of the 345 votes distributed between the members must be cast in favour of the proposal, 2) that 62% of the population must be represented, and 3) that a majority of countries must be supportive. Extensive analyses of these rules have been provided by a number of scholars and practitioners, with the dominant conclusions being that the Nice rules are rather complicated and inefficient; these characteristics are further emphasised as the membership of the Union has grown.

The rules included in the Nice Treaty were never considered an optimal solution that would last for many years. It had only been possible to agree to smaller changes during the Nice Inter-Governmental Conference (IGC) in 2000 and the general request to increase the efficiency of the system was left unfulfilled. It was on this basis, and in the context of the initiative taken in Laeken in 2001 to re-shape the entire treaty base of the Union, that the Convention on the Future of Europe in 2003 presented a proposal for a new simplified "double majority" system. This proposal was subsequently modified and adopted at an IGC in 2004 as part of the Treaty establishing a Constitution for Europe (commonly referred to as "the

^[1] Hereafter referred to as "the Council".

Constitutional Treaty”). The rules included in the Constitutional Treaty abolished the weighted voting system that has been included in all previous treaty texts, and instead stated that 55% of the Member States and 65% of the population must be represented in order for a proposal to pass.^[2] The rules in the new Reform Treaty stem from the outcome of this 2004 decision, which was later suspended due to the failed ratification of the Constitutional Treaty. Though, the new rules stipulated in the Reform Treaty include a few significant amendments to the rules formulated in 2004.

1. THE NEW QMV RULES

The qualified majority rule stipulated in the Reform Treaty (Article 9c) states that:

“As from 1 November 2014, a qualified majority shall be defined as at least 55 % of the members of the Council, comprising at least fifteen of them and representing Member States comprising at least 65 % of the population of the Union.

A blocking minority must include at least four Council members, failing which the qualified majority shall be deemed attained.”

In Article 205(2) of the Treaty on the functioning of the European Union this rule is further specified with the following:

“[...] as from 1 November 2014 and subject to the provisions laid down in the Protocol on transitional provisions, where the Council does not act on a proposal from the Commission or from the High Representative of the Union for Foreign Affairs and Security Policy, the qualified majority shall be defined as at least 72% of the members of the Council, representing Member States comprising at least 65% of the population of the Union.

[...] in cases where not all the members of the Council participate in voting, a qualified majority shall be defined as follows:

- (a) A qualified majority shall be defined as at least 55% of the members of the Council representing the participating Member States, comprising at least 65% of the population of these States.

^[2] The requirements were a majority of Member States and 60% of the populations in the proposal from the convention.

A blocking minority must include at least the minimum number of Council members representing more than 35% of the population of the participating Member States, plus one member, failing which the qualified majority shall be deemed attained;

- (b) By way of derogation from point (a), where the Council does not act on a proposal from the Commission or from the High Representative of the Union for Foreign Affairs and Security Policy, the qualified majority shall be defined as at least 72% of the members of the Council representing the participating Member States, comprising at least 65% of the population of these States.”

Furthermore, the text includes — in Protocol No 10 on Transitional Provisions, Article 3 — the specification that from 1 November 2014 to 31 March 2017 a transitional rule is in place that allows a Council member to request for the application of the current Nice rules if the proposal on the table is of particular political sensitivity to that Member State.^[3] Lastly, in the Declarations attached to the Reform Treaty, an article sets out the legal basis for the so-called modified Ioannina compromise (Article 4). This article has caused great headaches for the negotiators, not least for the previous German presidency and the current Portuguese, as some governments have had very strong — and diverging — preferences over both the wording, the legal status and the implementation of the compromise. As a last development before the article was unanimously adopted, a reference to how the article can be amended was after the October Council summit included in a Protocol. The full text of the article in the Declaration as well as the article in the Protocol is provided in Annex 1, while the content and background should be explained here.

The Modified Ioannina Compromise

A deadlock during the June 2007 summit negotiations led the European Council to agree to the inclusion of an article which stipulates the possibility for a minority of countries to request a deferral and re-examination of a decision in cases where

^[3] The application would be in a slightly modified version, but with the same implications as under the Nice rules: *“Acts shall be adopted if there at least 255 votes in favour representing a majority of the members where, under the Treaties, they must be adopted on a proposal from the Commission. In other cases decisions shall be adopted if there at least 255 votes in favour representing at least two thirds of the members.*

A member of the European Council or the Council may request that, where an act is adopted by the European Council or the Council by a qualified majority, a check is made to ensure that the Member States comprising the qualified majority represent at least 62% of the total population of the Union. If that proves not to be the case, the act shall not be adopted.

Until 31 October 2014, the qualified majority shall, in cases where not all the members of the Council participate in voting, [...] be defined as the same proportion of the weighted votes and the same proportion of the number of the Council members and, if appropriate, the same percentage of the population of the Member States concerned as laid down in [the] paragraph [above].”

these countries would oppose the decision, but are not quite enough to form a blocking group. According to the then German presidency, this deferral was not included to allow for any veto-like situation, but is rather intended to serve as a mechanism that would allow the Council members more time to build broader support for a given decision. The paragraph is in this way a modification of the so-called “Ioannina compromise” invented in 1994 prior to the enlargement of the EU to 15 Member States. The new version of this compromise, as included in the Reform Treaty, states that it is possible for Member States which represent 1) three quarters of the population share necessary to constitute a blocking minority, or 2) three quarters of the number of Member States necessary to constitute a blocking minority to request the Council to continue its work to find an agreement with broader support, if a minority is strongly opposed to a proposal. A second threshold applies for the period following 2017 with the requirement then being “[...] at least 55% of the population or at least 55% of the Member States necessary to constitute a blocking minority”.

The deferral of a decision has the limitation that it should be done “within a reasonable time without prejudicing obligatory time limits laid down by Union law” (please refer to Annex 1). EU decision rules generally have a three month limit for the Council to reach a decision on a Commission proposal or Parliament opinion, which could suggest that also decisions under the Ioannina compromise cannot be delayed by more than three months. However, the revival of the Ioannina compromise was due to a demand made by the Polish government, which after the presentation of the text for a short while threatened to not support the agreement as they argued that they had been promised a deferral period of up to two years would be included in the text. At the end, the Poles gave in on the issue after tense discussions with the presidency, and the Reform Treaty now has no explicit mentioning of the possible duration of the deferral period under the modified Ioannina compromise. Still, it is on this basis that the article is now placed in the Treaty’s Declarations rather than in a Protocol or the Treaty text itself. As mentioned, a reference stipulating that the article can only be amended by “consensus” is included in Protocol No. 9, but the placement of the article itself in a declaration provides the article with less legal status and effectively signals it to be an exception clause rather than the norm.

2. IMPLICATIONS

The naming of the Reform Treaty rules as a “double majority rule” may seem rather ironic at this point; the above outline of the different thresholds certainly

does not appear as a simple decision rule with only two criteria to be met. Even the “basic” voting rules that will be applied to the vast majority of decisions (i.e. the first article explained above under Article 9c) actually consist of three criteria, namely the population criteria of 65%, the Member State criteria of 55% and the blocking criteria of 4 Member States. Still, the rules are consistently referred to by this name mainly as a “left-over” from the convention and the rules included in the suspended Constitutional Treaty. There, the emphasis was on finding an “adequate” percentage level for both the population and the Member State criteria during the negotiations.

As in any democratic, political system, the decision rules stipulated in the Reform Treaty must be carefully evaluated not just on the basis of whether or not it was the best political deal that could be achieved at the eve of the negotiations. Rather, they must be addressed in the light of their direct implications for the transparency, efficiency and democratic legitimacy of the system.

This analysis seeks to address the topic from the point of how the new rules are likely to change the power balance and decision-making, compared to the current Nice rules. With this aim in mind, the remaining part of the paper is structured according to 4 topics: 1) General observations made regarding the definitions of the Reform Treaty rules, 2) expected changes in the efficiency of the system when compared to the current rules, 3) changes in the power balance between Member States, and 4) the sustainability and implementation of the rules.

3. THE PRIMACY OF THE POPULATION CRITERION

Turning from the explanation and definition of the new QMV rules to an analysis of the implications, the first point to raise is related to the actual definition of the three criteria for passing legislation.^[4] Why has the threshold ended with a 65% level for the representation of the populations, why are 55% of the Member States needed in support of a proposal, and why does it require at least 4 governments to form a blocking minority? The answer is perhaps rather disappointing: Although the initial logic was to have a simple system with only two criteria that could increase the efficiency and transparency of decision-making, the process obscured the simplicity and the political negotiations have now resulted in a rule which seeks to re-order the balance between small, medium and large Member States, but which is essentially a rather complicated system where no one government can

^[4] The population criterion, the Member State criterion and the blocking criterion.

easily predict their exact relative or absolute weights in the negotiations, let alone the weight of others. Though, one first conclusion to draw in this paper may go some way in easing these complexities: The dominant component of the three voting criteria is the 65% population quota, as there is a rather small probability that legislation would be different when passed based on the population criterion on its own compared to all three components of the rule.^[5] Especially the clause excluding blocking majorities with less than 4 members rules out just 10 possible coalitions.^[6] Therefore, as a basic rule, the population shares can serve as a good indicator for the distribution of influence, quite similarly as the weighted votes have been in all previous treaties. Still, since each of the criteria have to be met — and can be used as a blocking element if they are not — there may be situations where either of the criteria will play a role and they should as such therefore all be addressed.

A second conclusion to draw from the specifications of the Reform Treaty QMV rules is that, considering the fact that the population criterion is a dominant factor, it is rather concerning that no formal legislative specifications are provided from the EU level with regard to how the Member States should report their population figures. It is common for democratic political systems that rely on a population criterion for decision-making to have legal specifications for how to count and report on the number of people that can be categorised as part of the “population”. The US is but one example where such regulation is in place. In order to authoritatively establish what the absolute number associated with the 65% threshold is in the Reform Treaty, EU-wide censuses either have to be carried out on a regular basis, or a common legal base must be established to ensure a harmonised and accountable reporting by the governments to Eurostat, which currently provides the national statistical data for the EU. At present, the latter appears somewhat questionable as an authoritative basis for the purpose of determining the vote quota in the Council: With no legal framework from the EU level for the reporting of population sizes, there appears to be some differences between how the Member States report the numbers of “residents” and “citizens”, and to which extent “migrants” are uniformly counted and reported in the national figures. A legally founded definition of the population threshold should therefore be considered in order to avoid suspicions of statistical inaccuracy or even political manipulation. The recent row between Germany and Poland during the June EU summit over who should be counted in

^[5] Please recall from above that although the Reform Treaty rules are popularly referred to as the “double majority rule”, they do in fact consist of three components, namely the population criterion of 65%, the Member State criterion of 55% and the “blocking criterion” of at least 4 Member States.

^[6] These are: Germany and France and one of either UK, Italy, Spain or Poland; Germany and UK and one of Italy, Spain or Poland; Germany and Italy and one of Spain or Poland; France and UK and Italy. An 11th coalition would, based on the predicted demographic changes presented in Table 1, from 2025 be France, UK and Spain.

their respective countries, and the basis for how their respective votes in the Council should be determined, signifies the importance of having the legal rules in place.

Somewhat related hereto, another observation is that Europe's demographic changes over the next 20 years do not appear to have been considered during the negotiations over the decision threshold, and they may affect the voting system (if it remains in place) at some point after they have come fully into effect in 2014-2017. Table 1 below summarises how the population sizes will develop up until 2050.

Table 1: Population forecasts of current EU Member States (millions)

Country	2005	2010	2015	2020	2025	2030	2035	2040	2045	2050
Germany	82,6	82,8	82,9	82,7	82,1	81,1	79,9	78,4	76,7	74,6
France	60,2	61,5	62,6	63,6	64,4	65,1	65,7	66	65,9	65,7
UK	59,9	60,9	61,9	62,9	63,8	64,4	64,7	64,7	64,6	64,3
Italy	58,2	58,6	58,6	58,3	57,8	57,1	56,3	55,3	54,2	52,7
Spain	42,9	44,6	45,3	45,6	45,6	45,4	45,1	44,6	43,9	42,8
Poland	38,1	37,8	37,4	37,1	36,8	36,5	36,1	35,4	34,5	33,7
Romania	21,7	21,3	20,9	20,3	19,7	19,2	18,8	18,3	17,8	17,1
Netherlands	16,3	16,7	17	17,2	17,4	17,6	17,7	17,6	17,5	17,4
Greece	11,1	11,3	11,4	11,4	11,4	11,3	11,2	11,1	10,9	10,6
Portugal	10,5	10,7	10,8	10,8	10,7	10,7	10,6	10,4	10,2	10
Belgium	10,4	10,6	10,7	10,8	10,9	11	11	11	11	10,9
Czech Rep.	10,2	10,1	10	9,9	9,8	9,7	9,5	9,3	9,1	8,9
Hungary	10,1	10	9,8	9,7	9,6	9,5	9,4	9,2	9,1	8,9
Sweden	9	9,2	9,4	9,6	9,8	9,9	10	10,1	10,1	10,2
Austria	8,1	8,3	8,4	8,4	8,5	8,5	8,5	8,4	8,3	8,2
Bulgaria	7,7	7,4	7,1	6,8	6,5	6,2	5,9	5,6	5,4	5,1
Denmark	5,4	5,5	5,5	5,5	5,6	5,6	5,6	5,5	5,5	5,4
Slovakia	5,4	5,3	5,3	5,3	5,2	5,2	5,1	5	4,9	4,7
Finland	5,2	5,3	5,4	5,4	5,4	5,4	5,4	5,4	5,3	5,2
Ireland	4,1	4,3	4,6	4,8	4,9	5,1	5,2	5,3	5,4	5,5
Lithuania	3,4	3,3	3,3	3,2	3,1	3,1	3	3	2,9	2,9
Latvia	2,3	2,2	2,2	2,1	2,1	2	2	1,9	1,9	1,9
Slovenia	2	2	2	2	2	2	2	2	1,9	1,9
Estonia	1,3	1,3	1,3	1,2	1,2	1,2	1,2	1,2	1,1	1,1
Cyprus	0,7	0,8	0,8	0,9	0,9	0,9	0,9	1	1	1
Luxembourg	0,5	0,5	0,5	0,5	0,5	0,6	0,6	0,6	0,6	0,6
Malta	0,4	0,4	0,4	0,5	0,5	0,5	0,5	0,5	0,5	0,5
Total	487,7	492,7	495,5	496,5	496,2	494,8	491,9	486,8	480,2	471,8

4. EFFICIENCY

The lowering in the decision threshold by the new rules improves the efficiency of the EU in that it increases the probability of governments' approval of an act rather than their blockage. Also, the Reform Treaty text further extends the QMV rule to a number of new areas where the EU will gain new competences, as well as a number of existing areas currently under the unanimity requirement. Annex 2 lists all of these areas.

The decision to transfer areas already existing within the EU framework to the QMV decision rule from the unanimity rule is made on the basis that decision-making within these areas has essentially proved too inefficient amongst the Member States. The perhaps most debated area which in this way will experience substantial institutional revision is the area of freedom, security and justice that has been notorious for its inability to respond to its challenges under the existing institutional framework.^[7] Still, as pointed out in chapter "Enhanced Cooperation", a number of technocratic terms like "emergency brakes", "flexibility", "enhanced cooperation" and "opt-outs" (and even "opt-ins") mar the language around these otherwise well-intended transfers to the QMV rule, particularly within the Area of Freedom, Security and Justice. Hence, the Reform Treaty rules will in principle create an improved decision-making procedure for each of these areas, but it may be that the increased emphasis on flexibility mechanisms related to the QMV rules results in a system of "exceptionalism" rather than a de-intergovernmentalisation of these new policy areas.

Hence, the Reform Treaty rules will in principle create an improved decision-making procedure for each of these areas that will lead to a higher degree of efficiency, legal certainty, accountability and democratic control by the European Parliament.

Another point to take into account is the fact that in the case of the Council it is necessary to consider not merely the mathematical probabilities for approving legislation but also the effect on how everyday preparatory negotiations are carried out. In this regard, there is little doubt that the lowering of the decision threshold will alter also the informal negotiations, putting a pressure on the governments to "comply" more easily with the expected majority position as they can otherwise risk to be isolated in a losing minority without influence.

^[7] CARRERA S. and GEYER FL., *The Reform Treaty and Justice and Home Affairs* (Bruxelles, CEPS — Policy Brief, August 2007); see also chapter "Enhanced Cooperation" in this issue.

Still, it would be naïve to assert that the new rules will fully solve the current challenges the EU face in terms of efficiency. The new system will not enter into force until 2014/2017 and the effects of implementing the Ioannina compromise remain unknown. In effect, the risk is that the clause can be activated rather easily with the threshold being only 1/4 of the Member States and 1/5 of the population before it can be formally introduced. And even if the Ioannina clause does not lead to explicit blocking of legislation, there is a real chance that the threat of applying it may lead to a slower decision-making process in the Council due to a need for more bargaining between the Member States. It is on this basis that the new QMV rules can be concluded to generally increase the efficiency of decision-making in the Council granted that there is a certain “etiquette” from the governments’ side to refrain from invoking the Ioannina compromise. But, again, we will have to wait until 2014 and 2017 to see if such etiquette will indeed be possible in a Union of 27+.

5. EQUITY

The double majority rule (with the additional modifying clause) in the Reform Treaty does not allocate fixed votes to each country, but the dominance of the population criterion means that the number of votes for each government is, in effect, equal to the population of the given Member State. Now, as shown above, these figures change over time and are in fact not uniformly or precisely defined. Nevertheless, based on the latest available Eurostat population figures, Table 2 compares the Nice Treaty and Reform Treaty rules by listing the population sizes, the absolute number of votes allocated under the Nice Treaty, the distribution of relative voting power under each rule as well as the figures for how well this relative voting power corresponds with the governments’ population shares

According to a school of thought, this can generate problems of over/under-representation. Though this analysis is not shared by all of us, it deserves being mentioned.

Before concluding on the results in the table, a short explanation should be given on the method for estimating both the distribution of voting power and the over/under-representation: The “Voting power” columns in Table 2 are constructed on the basis of a commonly adopted — but much debated — assumption used in power analyses of the governments in the Council. Rather than comparing the number of votes that each government has in absolute terms, and which can lead to very misleading conclusions regarding how much power that provides a government with in real terms, the literature on voting power has developed various

ways of estimating how much influence the governments hold in terms of their probabilities for influencing a decision outcome. Much criticism has been voiced regarding this form of power analysis that is based on voting power indices, mainly due to its lack of consideration of empirical aspects such as the skills of negotiators, coalition blocks, years of membership and/or the preferences of the respective governments.

Deciding Powers

There are no doubts that certain countries have more influence than others based on such Assets.^[8] Nevertheless the implications of the voting rules should be considered both in their empirical, political context as well as on a basis independently of any other factors which may affect the negotiation process. The latter is what the columns in Table 2 provide the results for, whereas the political context will be considered in the text below.

Table 2: Changes in the QMV rules from the Nice Treaty to the Reform Treaty

Country	Popula- tion (mio.)*	Popula- tion (%)*	Nice Treaty: Votes	Nice Treaty: Voting power**	Nice Treaty: Over/ under represent- ation (%)***	Reform Treaty: Voting power**	Reform Treaty: Over/ under represent- ation (%)***
Germany	82.4	16.72	29	7.78	-17.8	11.65	23.1
France	63.0	12.78	29	7.78	-5.9	9.03	9.2
UK	60.4	12.25	29	7.78	-3.9	8.69	7.3
Italy	58.8	11.93	29	7.78	-2.6	8.49	6.2
Spain	43.8	8.89	27	7.42	7.5	6.55	-5.1
Poland	38.1	7.73	27	7.42	15.2	5.71	-11.4
Romania	21.6	4.38	14	4.26	-12.2	4.15	-14.3
Netherlands	16.3	3.31	13	3.97	-5.6	3.50	-17
Greece	11.1	2.25	12	3.68	5.8	2.88	-17.3
Portugal	10.6	2.15	12	3.68	8.7	2.80	-17.3
Belgium	10.5	2.13	12	3.68	9	2.80	-17.2
Czech Rep.	10.3	2.09	12	3.68	10.3	2.77	-17.1
Hungary	10.1	2.05	12	3.68	11.3	2.75	-17.0
Sweden	9.0	1.83	10	3.09	-1.5	2.63	-16.2

[8] see e.g. MOBERG A., *Is the double majority really double? The second round in the debate of the voting rules in the EU Constitutional Treaty* (Madrid, Real Instituto Elcano, WP 23/2007) for a discussion.

Austria	8.3	1.68	10	3.09	3.1	2.53	-15.5
Bulgaria	7.7	1.56	10	3.09	6.7	2.47	-14.8
Denmark	5.4	1.10	7	2.18	-10.2	2.19	-9.9
Slovakia	5.4	1.10	7	2.18	-9.9	2.18	-9.8
Finland	5.3	1.08	7	2.18	-8.7	2.17	-9.1
Ireland	4.2	0.85	7	2.18	1.9	2.04	-4.6
Lithuania	3.4	0.69	7	2.18	13.6	1.95	1.2
Latvia	2.3	0.47	4	1.25	-20.9	1.81	14.9
Slovenia	2.0	0.41	4	1.25	-15.5	1.78	20.6
Estonia	1.3	0.26	4	1.25	3.3	1.70	40.3
Cyprus	0.7	0.14	4	1.25	37.4	1.63	78.6
Luxembourg	0.5	0.10	4	1.25	76.1	1.59	124.7
Malta	0.4	0.08	3	0.94	42.9	1.58	138.6
Total****	492.9	100.00	345	99.95	-	100.02	-

QMV thresholds	Pop (%)	Votes	Members
Nice Treaty	62%	255 (74%)	14 (50+%)
Reform Treaty	65%-		55%

*Source: Latest Eurostat figures (2006) available from www.ec.europa.eu/eurostat.

** "Voting power" refers to the relative voting power distribution, meaning each government's ability to influence a decision and be pivotal for the forming of a majority. The relative voting power calculations have the advantage that, contrary to the absolute vote distribution, they allow for a direct comparison of the respective governments' power "shares". Relative voting power indices are a common tool for addressing questions related to the distribution of votes and is here calculated on the basis of the Banzhaf voting power index as reported in FELSETHAL D. S., MACHOVER M., *The QM rule in the Nice and EU reform treaties: future projections*, Project Report (London, London School of Economics and Political Science, 2007). Please refer to BANZHAF J. F., *Weighted voting doesn't work: A mathematical analysis*, *Rutgers Law Review*, Vol. 19, No. 2, 1965, pp. 317-343, FELSETHAL D. S., MACHOVER M., *The Measurement of Voting Power: Theory and Practise, Problems and Paradoxes* (Cheltenham, Edward Elgar, 1998) and MOBERG A., *Is the double majority really double? The second round in the debate of the voting rules in the EU Constitutional Treaty* (Madrid, Real Instituto Elcano, WP 23/2007) for explanations and discussions.

*** The over/under representation is estimated on the basis of the governments' share of voting power relative to their population sizes (i.e. by dividing the voting power for each government with the square root percentage of the population figures). The values are given in %s such that, for example, Germany is shown to have 17.8% less voting power under the Nice Treaty than what its population share would otherwise have indicated, whereas it gets 23.1% more under the Reform Treaty rules than the population share would have prescribed.

**** The totals in the "Voting Power" columns do not come to 100 due to rounding of the figures in the columns.

The distribution of votes and the thresholds defined under the Nice Treaty rules has on many occasions been criticised for favouring a number of medium- and small members, whereas the largest members have been found to be under-represented. This is confirmed by the figures in Table 2, although not in an entirely consistent pattern: Although the vote distribution under the Nice rules is decreasing from the largest to the smallest members in the column "Votes/Nice Treaty" as well as in the column listing the governments' relative voting power (the "Voting Power/Nice Treaty" column), the column showing the over- and under-representation of the Member States indicates that the four largest members are currently under-

represented compared to their population shares (particularly Germany), as are also Romania, the Netherlands, Sweden, Denmark, Slovakia, Finland, Latvia and Slovenia. Conversely, Spain, Poland, Greece, Portugal, Belgium, the Czech Republic, Hungary, Austria, Bulgaria, Ireland, Lithuania are all over-represented to varying degrees, with the four smallest members, Estonia, Cyprus, Luxembourg and Malta, being the most over-represented of all.

Under the Reform Treaty rules this changes and brings more power to the four largest and the seven smallest members, while the medium-sized countries lose out. All the countries ranging from Spain to Ireland are underrepresented by at least 4.6% (Ireland) up until more than 17% (Greece, Portugal, Belgium and the Czech Republic), whereas, for example, Malta stand out by having 138.6% more than what would have been allocated to it if the baseline measure had been the size of its population alone. Other studies^[9] have addressed this issue in more detail, and the conclusion is that overall, the new voting rule is rather unequal in the distribution of power when considered from the basis of the members' population sizes.

Of course, the proportional representation of the populations is not the only criteria to consider as a determinant of “equity” or “legitimacy” of the system. Nevertheless, decision-making in the Council has been characterised as a process taking place in “the shadow of the vote”, meaning that the voting rules are considered during the negotiation process, but that explicit voting rarely takes place. Before an act is put forward for a formal decision in the Council, it has been through a preparatory process of bargaining until an agreement is reached that is likely to be acceptable to at least the minimum number of members required to meet the decision threshold. A number of insiders have pointed out, partly as a criticism against voting power studies, that in this way the votes are “only potential weapons”.^[10] Instead, what the governments focus on is the blocking potential of any countries opposed to a decision. The “blocking power” rather than the “voting power” of governments is therefore often highlighted to be a much more powerful bargaining asset in the negotiations, mainly as politicians and officials see it as politically more important to be able to block unwanted decisions than to support desirable ones.

Each of these observations is highly relevant for analyses of power dynamics in the Council. However, two points should be clarified here: First, since the voting rules are indeed considered even in the preparatory processes of the policy process (by way of “backward induction”), they should also be at the core of any analysis

^[9] FELSENTHAL D. S., MACHOVER M., *The QM rule in the Nice and EU reform treaties: future projections*, Project Report (London, London School of Economics and Political Science, 2007).

^[10] MOBERG, *op. cit.*

of decision-making in the Council; subsequently, they must then of course also be addressed also in their political context, as is attempted in this paper. Secondly, together with the latest enlargements and the resulting formalisation of Council meetings^[11] the considerable lowering of the decision threshold in the Reform Treaty rules means that the dynamics in the Council are likely to turn away from the potential of blocking decisions to the possibilities for constructing majorities. In that scenario, the voting power rather than the governments' blocking power becomes even more important as a bargaining instrument to reach agreement.

Blocking Power

Although the blocking power is therefore likely to play much less of a dominant role in the political negotiators' estimations of when an agreement is likely to pass under the Reform Treaty rules, the figures for how much the governments' blocking potential changes from the current rules should naturally also be presented here.

Different methods have been presented for how to measure this kind of power. Here, a blocking power measure is used where no a priori assumptions are made about how likely certain blocking coalitions are compared to others.^[12] Therefore, the figures in Table 3 and 4 should not be interpreted too literally as such coalitions clearly do not form at random in the Council.^[13] On the other hand, the figures do show the average ease or difficulty that this process will encounter based on the decision rule, but without regard to either the members' preferences, coalition history or the proposal to be adopted.

Table 3 shows that all countries except for Malta lose in their blocking power due to the lowering of the decision threshold. The reason is that it is simply more difficult to successfully oppose a proposal since it takes fewer countries to form a winning majority. But at the same time, Table 4 indicates that the balance between the countries has also shifted: Relative to the distribution between all Member States, the larger countries are by far dominant in their possession of blocking power, which is also why the additional clause of having at least 4 countries in a blocking coalition was inserted in the Reform Treaty. The medium- and smaller Member States are in a different situation: there is a considerable difference between the distribution amongst the four to five biggest members and the rest of the countries (the power

^[11] cf. HAGEMANN S. and DE CLERCK-SACHSSE J., *Decision-making in the Enlarged Council of Ministers: Evaluating the Facts* (Bruxelles, CEPS — Policy Brief, January 2007).

^[12] The measure is the popular Coleman's measure for blocking power. Please see FELSENTHAL and MACHOVER (1998), *op. cit.*

^[13] cf. MOBERG, *op. cit.*; FELSENTHAL and MACHOVER (2007), *op. cit.*

distribution drops from Poland and onwards), meaning that, again, the medium sized countries are granted considerable less power proportionally to their population shares and compared to the power allocated to the smallest countries.

Table 3: Gain or loss in blocking power from the Nice Treaty to the Reform Treaty

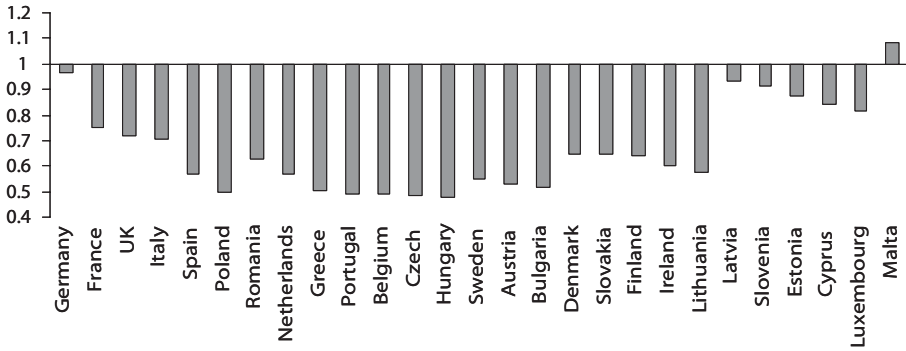
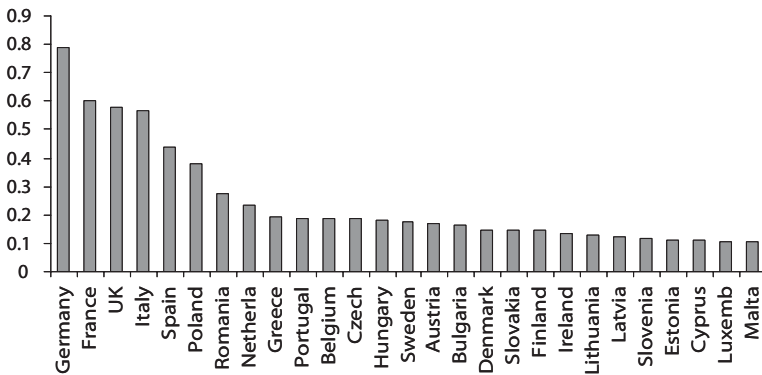


Table 4: Blocking power under the Reform Treaty rules



6. SUSTAINABILITY

One real advantage of having a decision rule defined by a certain percentage level of the Member State representation and the population share is that it — in principle — would allow the inclusion of new members without having to embark on difficult negotiations to re-weight the governments’ votes. However, particularly two issues may prove to obscure this positive element of the new voting rules: first, as the system will not enter into force in the next 7 to 9 years Croatia, and perhaps

a number of other smaller candidate countries, will simply have to be allocated a politically “adequate” number of votes under the Nice Treaty rules, depending on their possible accession dates. Second, having the population criterion as a determinant for influence, it seems very unlikely — even with a considerable political “squeezing” of the system — that Turkey could be included under the Reform Treaty system. Again, demographic changes should also be mentioned here since the fact that Turkey’s population is increasing while, for example, Germany’s is decreasing further undermines such possibilities: Turkey would soon after its accession become the EU’s largest Member State and would under the Reform Treaty rules by definition receive a large amount of voting power. This result is quite obviously an easy point to make by those existing members who are sceptical of a full Turkish membership.

CONCLUSION

The implications of the new rules are already a matter of dispute amongst internal as well as external analysts of the system. Some argue that very little changes will in effect be observed in the Council when the new rules enter into force, mainly due to the great emphasis on consensus building and the extensive preparatory processes in the Council. Others argue that, consensus building or not, the rules will have a direct effect for the negotiators as a lowering of the decision threshold simply indicates that governments have to “give in” earlier in the negotiation process in order to be part of the majority and able to influence the final decision outcome. The present study aims to address the question of whether the new voting rules are likely to change the power balance and decision-making in the Council from the current Nice rules. The following conclusions can be drawn from the analysis:

Efficiency

The extension of the QMV rule to 21 new legal areas and to 23 existing areas currently under unanimity is likely to ease the ability of the EU to pass legislation within those areas. The double majority rule included in the Reform Treaty will enhance the ability of the Council to decide. However, the intended effect of applying the QMV rules rather than the unanimity requirement will be constrained by the fact that it is the QMV rules as laid out in the Nice Treaty that will govern those areas for the first five to eight years: The extension of areas falling under QMV will take effect from 2009, whereas the reforms of the QMV rules will not follow through even for these new areas until 2014, and possibly 2017. Also the implementation of the extremely complex emergency brakes mechanisms (the Ioannina compromise)

may pose a challenge to the internal work processes in the Council and can indeed prove to have perverse effects for the decision-making capacity of the Union.

Power

The formal power balance between the governments in the Council shifts considerably when the Reform Treaty rules enter into force, both in terms of the distribution of the governments' relative voting power and in their blocking potential. This shift may have only a limited immediate effect for how majorities or blocking minorities are constructed due to the culture of consensus in the Council. But as consensus becomes increasingly difficult in the club of 27+, the governments' focus may shift from consensus building to the construction of only sufficient majority coalitions.

Sustainability

The definition of a decision threshold in the Council in terms of percentages rather than absolute voting weights allocated to each government is an important advantage of the new Reform Treaty rules. It should — at least in principle — make the system quite adaptable. Nonetheless, some questions remain unanswered: With the arguably most important criterion in the new double majority rule being defined by the countries' population sizes, the EU's lack of a common legal basis for how governments aggregate and report their population figures is an issue for concern. Related hereto, it is with interest that this paper observes that the projected demographic changes in Europe do not appear to have been explicitly addressed in the negotiations of the new QMV rules. Further enlargements have not been mentioned either in the Reform Treaty in relation to the QMV system, and hence suggests that any enlargement beyond the accession of Croatia — and possibly one or two other smaller candidate countries — would mean a re-opening of the allocation of the voting weights.

The conclusions drawn in this paper are therefore, in short, that the Reform Treaty takes an important step towards improving the ease with which decisions can be made in the Council, but leaves several important issues related to the QMV system unresolved. Politically, however, it seems that there will be quite some time before any issues related to radical changes of the decision rules will be put onto the Council negotiation table again.

Annex 1 Qualified Majority Voting in the Council
(as envisaged by CIG 1/1/07 REV 1 October 2007)

Declaration on Article 9c(4) of the Treaty on European Union and Article 205(2) of the Treaty on the Functioning of the European Union

The Conference declares that the decision relating to the implementation of Article 9c(4) of the Treaty on European Union and Article 205(2) of the Treaty on the Functioning of the European Union will be adopted by the Council within six months from the date of the signature of the Treaty amending the Treaty on European Union and the Treaty establishing the European Community and will enter into force on the day that Treaty enters into force. The draft decision is set out below:

Draft decision of the Council relating to the implementation of Article 9c(4) of the Treaty on European Union and Article 205(2) of the Treaty on the Functioning of the European Union between 1 November 2014 and 31 March 2017 on the one hand, and as from 1 April 2017 on the other

THE COUNCIL OF THE EUROPEAN UNION,

Whereas:

1. Provisions should be adopted allowing for a smooth transition from the system for decision-making in the Council by a qualified majority as defined in Article 3(3) of the Protocol on the transitional provisions, which will continue to apply until 31 October 2014, to the voting system provided for in Article 9c(4) of the Treaty on European Union and Article 205(2) of the Treaty on the Functioning of the European Union, which will apply with effect from 1 November 2014, including, during a transitional period until 31 March 2017, specific provisions laid down in Article 3(2) of that Protocol.
2. It is recalled that it is the practice of the Council to devote every effort to strengthening the democratic legitimacy of decisions taken by a qualified majority.
3. It is judged appropriate to maintain this decision as long as is necessary to ensure smooth transition to the new voting system provided for in the Treaties,

HAS DECIDED AS FOLLOWS:

Section 1 Provisions to be applied from 1 November 2014 to 31 March 2017

Article 1

From 1 November 2014 to 31 March 2017, if members of the Council, representing:

- (a) at least three quarters of the population, or
- (b) at least three quarters of the number of Member States necessary to constitute a blocking minority resulting from the application of Article 9c(4), first subparagraph, of the Treaty on European Union or Article 205(2) of the Treaty on the Functioning of the European Union, indicate their opposition to the Council adopting an act by a qualified majority, the Council shall discuss the issue.

Article 2

The Council shall, in the course of these discussions, do all in its power to reach, within a reasonable time and without prejudicing obligatory time limits laid down by Union law, a satisfactory solution to address concerns raised by the members of the Council referred to in Article 1.

Article 3

To this end, the President of the Council, with the assistance of the Commission and in compliance with the Rules of Procedure of the Council, shall undertake any initiative necessary to facilitate a wider basis of agreement in the Council. The members of the Council shall lend him or her their assistance.

Section 2 Provisions to be applied as from 1 April 2017

Article 4

As from 1 April 2017, if members of the Council, representing:

- (a) at least 55 % of the population, or
- (b) at least 55 % of the number of Member States necessary to constitute a blocking minority resulting from the application of Article 9c(4), first subparagraph, of the Treaty on European Union or Article 205(2) of the Treaty on the Functioning of the European Union, indicate their opposition to the Council adopting an act by a qualified majority, the Council shall discuss the issue.

Article 5

The Council shall, in the course of these discussions, do all in its power to reach, within a reasonable time and without prejudicing obligatory time limits laid down by Union law, a satisfactory solution to address concerns raised by the members of the Council referred to in Article 4.

Article 6

To this end, the President of the Council, with the assistance of the Commission and in compliance with the Rules of Procedure of the Council, shall undertake any initiative necessary to facilitate a wider basis of agreement in the Council. The members of the Council shall lend him or her their assistance.

Protocol (no 9bis) on the decision of the council relating to the implementation of article 9c(4) of the treaty on European Union and article 205(2) of the treaty on the functioning of the European Union between 1 November 2014 and 31 march 2017 on the one hand, and as from 1 April 2017 on the other

THE HIGH CONTRACTING PARTIES,

TAKING INTO ACCOUNT the fundamental importance that agreeing on the Decision of the Council relating to the implementation of Article 9c(4) of the Treaty on European Union and Article 205(2) of the Treaty on the Functioning of the European Union between 1 November 2014 and 31 March 2017 on the one hand, and as from 1 April 2017 on the other (hereinafter “the Decision”), had when approving the Treaty amending the Treaty on European Union and the Treaty establishing the European Community;

HAVE AGREED UPON the following provisions, which shall be annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union:

Single Article

Before the examination by the Council of any draft which would aim either at amending or abrogating the Decision or any of its provisions, or at modifying indirectly its scope or its meaning through the modification of another legal act of the Union, the European Council shall hold a preliminary deliberation on the said draft, acting by consensus in accordance with Article 9b(4) of the Treaty on European Union.

Annex 2 Nouveaux cas de vote à la majorité qualifiée

Sous réserve de certaines dispositions qui ne seraient pas *in fine* reprises dans le traité modificatif, les cas d'extension du vote à la majorité qualifiée prévus par l'accord de juin 2004 et listés ci-dessous devraient être intégralement repris [*mandat point 18*].

I — Liste des bases juridiques existantes qui passent à la majorité qualifiée

Présidences du Conseil — article 203 CE [*traité 2004 I-24.7*]

- (1) Modalités de contrôle de l'exercice des compétences exécutives de la Commission — article 202 CE [*traité 2004 I-37.3*]
- (2) Liberté d'établissement, accès aux activités non-salariées qui comporte une modification des principes législatifs dans un État membre — article 47.2 CE [*traité 2004 III-141*]
- (3) Violation GOPE ou atteinte à l'UEM^[14] — article 99.2 CE [*traité 2004 III-179.4*]
- (4) Constat d'un déficit excessif — article 104.6 CE [*traité 2004 III-184.6*]
- (5) Mesures pour contrer un déficit excessif^[15] — article 104.9 .10 et .12 CE [*traité 2004 III-184.9 .10 et .11*]
- (6) Modifications de certaines dispositions des statuts du SEBC — article 107.5 CE [*traité 2004 III-187.3*]
- (7) Définition des missions et objectifs des fonds structurels et du Fonds de Cohésion, après la première réforme du régime applicable au moment de la signature du traité modificatif (qui reste à l'unanimité) — article 161 CE [*traité 2004 — III-223.1*]
- (8) Dérogations dans le domaine des transports — article 71.2 CE [*traité 2004 III-236.2*]
- (9) Coopération administrative dans l'espace de liberté, de sécurité et de justice — articles 66 CE et 34.1 UE [*traité 2004 III-263*]
- (10) Contrôle aux frontières — article 67 CE [*traité 2004 III-265*]
- (11) Asile — article 67 CE [*traité 2004 III-266*]
- (12) Immigration — article 67 CE [*traité 2004 III-267*]

^[14] Il s'agit de la majorité qualifiée « ordinaire », à savoir celle applicable aux actes sur proposition de la Commission (bien qu'ici l'acte soit adopté sur recommandation de la Commission).

^[15] Il s'agit de la majorité qualifiée « ordinaire », à savoir celle applicable aux actes sur proposition de la Commission (bien qu'ici les actes soient adoptés sur recommandation de la Commission).

- (13) Eurojust — article 31.2 UE [traité 2004 III-273]
- (14) Coopération policière non opérationnelle — article 30.1 UE [traité 2004 III-275.2]
- (15) Europol — article 30.2 UE [traité 2004 III-276]
- (16) Mesures dans le domaine de la culture — article 151.5 CE [traité 2004 III-280.5]
- (17) Initiatives du Ministre des affaires étrangères en PESC à la demande du Conseil européen [traité 2004 III-300.2]
- (18) PESD, statut et siège de l'agence d'armements [traité 2004 III-311.2]
- (19) Nomination des membres du directoire de la BCE — article 112 CE [traité 2004 III-382.2].

MQ accompagnée par des mécanismes complémentaires (Emergency brake)

- (20) Libre circulation des travailleurs, prestations sociales — article 42 CE [traité 2004 III-136]
- (21) Coopération judiciaire en matière pénale — article 31.1, points a), b), c), d), UE [traité 2004 III-270.2 à 4]
- (22) Rapprochement des normes pénales, infractions et sanctions — article 31.1 point e) UE [traité 2004 III-271.2 à 4]

II — Liste des nouvelles bases juridiques à la majorité qualifiée

- (23) Liste des formations du Conseil [traité 2004 I-24.4]
- (24) Révision des règles relatives à la nature et composition du CdR et du CES [traité 2004 I-32.5]
- (25) Initiative populaire en vue de la proposition d'une loi européenne [traité 2004 I-47.4]
- (26) Mesures d'exécution du système des ressources propres [traité 2004 I-54.4]
- (27) Accord de retrait d'un EM [traité 2004 I-60.2]
- (28) Principes et conditions pour le fonctionnement des services d'intérêt économique général [traité 2004 III-122]
- (29) Mesures pour faciliter la protection diplomatique et consulaire [traité 2004 III-127]
- (30) Propriété intellectuelle et régimes centralisés [traité 2004 III-176.1]
- (31) EM dont la monnaie est l'euro, position commune et représentation unifiée sur la scène internationale [traité 2004 III-196.1 et .2]

- (32) Politique spatiale [*traité 2004 III-254*]
- (33) Énergie^[16] [*traité 2004 III-256.2*]
- (34) Mesures d'encouragement dans le domaine de la prévention du crime [*traité 2004 III-272*]
- (35) Tourisme [*traité 2004 III-281*]
- (36) Sport [*traité 2004 III-282*]
- (37) Protection civile^[17] [*traité 2004 III-284*]
- (38) Coopération administrative [*traité 2004 III-285*]
- (39) Établissement d'une coopération structurée permanente dans le domaine de la défense [*traité 2004 III-312.2*]
- (40) Admission d'un EM à la coopération structurée permanente dans le domaine de la défense [*traité 2004 III-312.3*]
- (41) Suspension d'un EM de la coopération structurée permanente dans le domaine de la défense [*traité 2004 III-312.4*]
- (42) Aide humanitaire^[18] [*traité 2004 III-321.3 et 5*]
- (43) Administration de l'Union européenne^[19] [*traité 2004 III-398*]

^[16] À noter que la plupart des mesures dans le domaine de l'énergie sont à présent adoptées sur base de dispositions qui prévoient déjà le QMV (art. 95 CE, art. 175 CE).

^[17] À noter que des mesures dans le domaine de la protection civile sont à présent adoptées sur base de dispositions qui prévoient déjà le QMV (art. 175 CE).

^[18] À noter que les mesures dans le domaine de l'aide humanitaire sont à présent adoptées sur base de dispositions qui prévoient déjà le QMV (art. 179 CE).

^[19] À noter que les mesures dans le domaine de l'administration communautaire sont à présent adoptées sur base de dispositions qui prévoient déjà le QMV (art. 283 CE).

NATIONAL PARLIAMENTS:
NATIONAL PARLIAMENTS AND THE
SUBSIDIARITY PRINCIPLE

NATIONAL PARLIAMENTS: NATIONAL PARLIAMENTS AND THE SUBSIDIARITY PRINCIPLE

The draft Constitution introduced a major innovation by proposing that national Parliaments should be directly involved in the work of the EU in monitoring the proper application of the subsidiarity principle.

The role of national Parliaments is further enhanced in the Reform Treaty:

- A new article 8c reflecting the role of the national Parliaments in the Union is to be inserted in Title II of the EU Treaty (See Annex 1). It concerns the proper application of the subsidiarity principle, policy evaluation in the area of freedom security and justice, revision procedure, accession procedure and inter-parliamentary cooperation.
- The simplified revision procedure (article 33 of the Reform Treaty) enables the European Council to decide unanimously to move from unanimity to Qualified Majority Voting or from the special legislative procedure to the normal one. However any national Parliament can block this passerelle by making known its opposition within six months of the proposal. The same procedure applies to legislation concerning family law with cross border implications where it is the Council which can activate the passerelle (See Annex 5).
- The two protocols introduced by the Amsterdam Treaty on the role of national Parliaments in the decision-making process and on the application of the principles of subsidiarity and proportionality are repealed and replaced by two new protocols increasing the role of national Parliaments (See Annex 3 & 4).

The effectiveness, practical consequences and merits of giving a role to national Parliaments in the Union's decision making process are addressed hereafter. It should be noted however that the new procedures also impacts on the internal constitutional order of Member States, including the sharing of powers. Belgian draft declaration 49^[1] reflects that fact. Some Member States (France, for instance) may have to modify their constitution because their parliament would receive powers which they do not possess under their national constitution.

^[1] CIG 3/1/07 REV I, page 24.

1. DOES THE NEW “EARLY WARNING” PROCEDURE EFFECTIVELY ENSURE A PROPER APPLICATION OF THE PRINCIPLE OF SUBSIDIARITY?

The procedure concerns “draft legislative acts” defined as proposals from the Commission, initiatives from a group of Member States, initiatives from the European Parliament, requests from the Court of Justice, recommendations from the European Central Bank and requests from the European Investment Bank for the adoption of a legislative act.

Draft legislative acts must be justified with regard to the principles of subsidiarity and proportionality. National Parliaments must be informed of such drafts and have a period of eight weeks to give a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity. The relevant institution must then review its proposal. There are some variations in procedure but basically the initiator may decide to withdraw, amend or maintain its draft and should explain its reasoning for final decision by the European Parliament and the Council of Ministers.

The underlying implication seems to be that violations of subsidiarity result frequently from legislative acts and can therefore be corrected by amendments to legislative procedure.

Many observers would question that implication and argue that the proposed texts are addressing the wrong target. It may occur that European legislation can be considered to violate subsidiarity, although appreciation on that point may well vary from state to state. But such violations will result much more frequently not from legislation, but from the implementation of legislation, either from the comitology procedures or from the exercise of executive powers by the Commission (in competition policy for instance) or from autonomous regulation of the Council (quasi-legislative acts).

There are each year approximately sixty or seventy new legislative texts, but between two and three thousand comitology decisions^[2]. In view of the numbers, it is obviously impossible to involve national Parliaments in the control of comitology decisions, though nothing prevents them from questioning their government on positions taken by national experts in such procedures.

^[2] Daniel GUEGUEN and Vicky MARISSIN, *The Comitology Reform: 70 legal texts adopted in co-decision annually, over 2500 regulations in comitology* (Brussels, EuroPolitics, September 2007).

It may therefore be the case that the new procedures will not have a major impact on perceived violations of the subsidiarity principle. This could well be a source of disappointment, especially for the Netherlands who were, in the last instance, the main advocates of this reinforced procedure.

2. IS THE NEW PROCEDURE LIKELY TO MAKE THE LEGISLATIVE PROCESS MORE CUMBERSOME?

In theory the addition of a new tier in the decision making process could be a source of complication and delay.

In practice this is unlikely to be the case. Firstly because the delay of eight weeks for introducing a reasoned opinion is not significant in view of the normal duration of the legislative process in the Union. Secondly because the formulation is vague and loosely drafted^[3]. It leaves plenty of space for interpretations: when confronted with a “reasoned opinion”, the Commission could for instance, make only cosmetic changes to its initial proposals and present them again to Council and Parliament with another “reasoned opinion”. Lastly, and more importantly, because on past experience, it is very doubtful whether national Parliaments, who do not, in general, show much interest for European affairs, will frequently want, as a matter of urgency, to draft a reasoned opinion on a European legislative proposal. That level of implication by national Parliaments would indeed be a revolution. The procedure will presumably be exercised only in a very limited number of cases, and that should not have a significant impact on the legislative process.

However article 8 of the protocol on subsidiarity should be considered with some attention (See Annex 4). It gives to the Court of Justice the position of final arbiter in matters of subsidiarity. Actions can be brought by Member States “*or notified by them in accordance with their legal order on behalf of their national Parliament or a chamber of it*”. In practice it might well be difficult for a Member State **not** to “notify” an action when his national Parliament, or a chamber of it, has decided that it wants to call on the Court. Some national Parliaments, frustrated perhaps by the relative ineffectiveness of the early warning procedure, might decide to systematically call on the court. Constant litigation would be a serious handicap for the legislative process. Even if article 8 does not imply that the initiation of a

^[3] For instance, Article 7.3.b of the protocol on subsidiarity says that if, by a majority of 55 % of the members of the Council or a majority of the votes cast in the European Parliament, the legislator is of the opinion that the proposal is not compatible with the principle of subsidiarity, the legislative proposal shall not be given further consideration. Does one really have to put in the treaty the fact that a proposal opposed by a majority vote in Council or Parliament is doomed?

Court action suspends that process, it might well inhibit Council and Parliament from moving forward on the disputed legislation.

Much will depend on the jurisprudence of the Court. It may consider that subsidiarity is frequently a question of opportunity or political appreciation, and refrain from passing judgment. In similar circumstances the German constitutional court has been very cautious. The subsidiarity principle has been part of European law since 1993^[4] but the Court has, to this day, never made use of it. Reluctance to pass judgment on subsidiarity would obviously discourage national Parliaments from systematically initiating judicial procedures.

3. HOW ABOUT THE *PASSERELLES* CLAUSES?

The articles proposed by the new treaty on the activation of *passerelles* for the simplified revision procedure or for legislation concerning family law with cross border implications give in effect a right of veto to any national Parliament. This is likely to be an even greater obstacle than unanimity in Council which is also required. In Council, unanimity can at times be attained by a negotiation on a *quid pro quo* basis, but a national Parliament is not a negotiating partner in Council, and the position it has taken will at times be used by the Member State concerned to make its position even more uncompromising. In those circumstances, it would need a very clear cut and overwhelmingly convincing case for a *passerelle* clause to be activated by an unanimous vote in Council and without a single national Parliament dissenting.

In practice such cases are not likely to occur and therefore those clauses will presumably remain *lettre morte*. This should not come as a surprise: *passerelle* clauses of this type have existed since the treaty of Amsterdam and have never been activated. This situation is likely to continue.

4. IS THERE AN IMPACT ON THE TREATY REVISION PROCEDURE?

National Parliaments have always played a fundamental role in treaty revision procedures in the sense that they have always had to ratify treaty changes.

A new draft article 33, replacing article 48 (See Annex 5), confirms that the ordinary revision procedure implies the convening of a Convention in which national

^[4] Maastricht Treaty (second paragraph of Article B of the Treaty on European Union, Article 3b of the EC Treaty).

Parliaments will have a major role. This certainly implies a significant increase in the capacity of national Parliaments to influence the negotiating process. It is a confirmation of the practice followed in negotiating the Constitutional treaty, and should cause no more problems (but no less) than the 2002-2003 Convention.

It is to be noted however that national Parliaments are not involved in the decision not to convene a Convention “should this not be justified by the extent of the proposed amendments”. That decision is taken by a simple majority in the European Council with the consent, of the European Parliament. Nor are national Parliaments involved in the simplified ratification procedure applicable to Part Three of the Treaty on the Functioning of the European Union relating to the internal policies and action of the Union. National Parliaments will of course be involved in the national ratifications of the treaty changes resulting from those procedures.

It remains to be seen if the “ordinary” procedure, implying the calling of a Convention, will become the rule or the exception in future treaty changes.

5. WHAT IS THE POLITICAL SIGNIFICANCE OF THIS PROCESS?

The current constitutional reform process was launched by a European Council held at Laeken in 2001^[5]. The declaration adopted on that occasion identifies “*the democratic challenge facing Europe*” and says that “*citizens are calling for a clear, open, effective, democratically controlled Community approach*” because “*they feel that deals are all too often cut out of their sight and they want better democratic scrutiny*”. European institutions should be closer to the citizen, more transparent, more democratic. The fact is that those ambitions are not being fulfilled in the present negotiating process.

However the implication of national Parliaments in the European legislating process does go some way in the direction indicated at Laeken by promoting greater transparency and more effective document dissemination at the national level. Interaction between the European institutions and national Parliaments could spread to national political parties and the representative actors of civil society thereby creating a new political process. At least it creates an opportunity which should be seized. The ambition should be to create a network including MEPs, national parliamentarians, party leaders and experts so that national political actors

^[5] Laeken Declaration on the Future of the European Union, see <http://www.euconvention.be/static/LaekenDeclaration.asp>.

become more structurally involved, and thus more aware of the EU integration process and its political life.

The inter-parliamentary cooperation established by the protocol on national Parliaments, if actively pursued and developed, could also have a significant impact in connecting the national political debate with the European one.

CONCLUSION

The implication of national Parliaments in the European legislative process is unappealing to the constitutional lawyer and may not have a major effect on the implementation of the principle of subsidiarity. It should not however have a negative impact on the functioning of the European institutions, except if one or more national Parliaments were to pursue a course of systematic litigation, and in that case the Court is unlikely to oblige. Its main advantage lies not in the results, but in the process itself, which brings the national political debate and the European political debate in closer contact. The gradual development of a political network, associating in various ways the European level and the national level, would be at least a partial answer to the democratic challenge identified six years ago by the Laeken European Council.

Annex 1 The Role of National Parliaments

(as envisaged by CIG 1/1/07 REV 1 October 2007: pp. 9-10)

Article 8c The role of national Parliaments

National Parliaments shall contribute actively to the good functioning of the Union:

- (a) through being informed by the institutions of the Union and having draft European legislative acts forwarded to them in accordance with the Protocol on the role of national Parliaments in the European Union;
- (b) by seeing to it that the principle of subsidiarity is respected in accordance with the procedures provided for in the Protocol on the application of the principles of subsidiarity and proportionality;
- (c) by taking part, within the framework of the area of freedom, security and justice, in the evaluation mechanisms for the implementation of the Union policies in that area, in accordance with Article 64 of the Treaty on the Functioning of the European Union, and through being involved in the political monitoring of Europol and the evaluation of Eurojust's activities in accordance with Articles 69k and 69h of that Treaty;
- (d) by taking part in the revision procedures of the Treaties, in accordance with Article 33 of this Treaty;
- (e) by being notified of applications for accession to the Union, in accordance with Article 34 of this Treaty;
- (f) by taking part in the inter-parliamentary cooperation between national Parliaments and with the European Parliament, in accordance with the Protocol on the role of national Parliaments in the European Union.

Annex 2 Judicial cooperation in civil matters

(as envisaged by CIG 1/1/07 REV 1 October 2007: pp. 65)

Article 65 shall be replaced by the following chapter and article: Chapter 3 - Judicial cooperation in civil matters:

Article 69d

3. Notwithstanding paragraph 2, measures concerning family law with cross-border implications shall be established by the Council, acting in accordance with a special legislative procedure. The Council shall act unanimously after consulting the European Parliament.

The Council, on a proposal from the Commission, may adopt a decision determining those aspects of family law with cross-border implications which may be the subject of acts adopted by the ordinary legislative procedure. The Council shall act unanimously after consulting the European Parliament.

The proposal referred to in the second subparagraph shall be notified to the national Parliaments. If a national Parliament makes known its opposition within six months of the date of such notification, the decision shall not be adopted. In the absence of opposition, the Council may adopt the decision.

Annex 3 Protocol (no 1) on the role of national Parliaments in the European Union

(as envisaged by CIG 2/1/07 REV 1 October 2007: pp. 3-6)

Title I - Information for National Parliaments

Article 1

Commission consultation documents (green and white papers and communications) shall be forwarded directly by the Commission to national Parliaments upon publication. The Commission shall also forward the annual legislative programme as well as any other instrument of legislative planning or policy to national Parliaments, at the same time as to the European Parliament and the Council.

Article 2

Draft legislative acts sent to the European Parliament and to the Council shall be forwarded to national Parliaments. For the purposes of this Protocol, “draft legislative acts” shall mean proposals from the Commission, initiatives from a group of Member States, initiatives from the European Parliament, requests from the Court of Justice, recommendations from the European Central Bank and requests from the European Investment Bank for the adoption of a legislative act. Draft legislative acts originating from the Commission shall be forwarded to national Parliaments directly by the Commission, at the same time as to the European Parliament and the Council. Draft legislative acts originating from the European Parliament shall be forwarded to national Parliaments directly by the European Parliament. Draft

legislative acts originating from a group of Member States, the Court of Justice, the European Central Bank or the European Investment Bank shall be forwarded to national Parliaments by the Council.

Article 3

National Parliaments may send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion on whether a draft legislative act complies with the principle of subsidiarity, in accordance with the procedure laid down in the Protocol on the application of the principles of subsidiarity and proportionality.

If the draft legislative act originates from a group of Member States, the President of the Council shall forward the reasoned opinion or opinions to the governments of those Member States. If the draft legislative act originates from the Court of Justice, the European Central Bank or the European Investment Bank, the President of the Council shall forward the reasoned opinion or opinions to the institution or body concerned.

Article 4

An eight-week period shall elapse between a draft legislative act being made available to national Parliaments in the official languages of the Union and the date when it is placed on a provisional agenda for the Council for its adoption or for adoption of a position under a legislative procedure. Exceptions shall be possible in cases of urgency, the reasons for which shall be stated in the act or position of the Council. Save in urgent cases for which due reasons have been given, no agreement may be reached on a draft legislative act during those eight weeks. Save in urgent cases for which due reasons have been given, a ten-day period shall elapse between the placing of a draft legislative act on the provisional agenda for the Council and the adoption of a position.

[...]

Article 6

When the European Council intends to make use of Article 33(1) or (2) of the Treaty on European Union, national Parliaments shall be informed of the initiative of the European Council at least six months before any decision is adopted.

[...]

Article 8

Where the national Parliamentary system is not unicameral, Articles 1 to 7 shall apply to the component chambers.

Title II - Interparliamentary Cooperation

Article 9

The European Parliament and national Parliaments shall together determine the organisation and promotion of effective and regular interparliamentary cooperation within the Union.

Article 10

A conference of Parliamentary Committees for Union Affairs may submit any contribution it deems appropriate for the attention of the European Parliament, the Council and the Commission. That conference shall in addition promote the exchange of information and best practice between national Parliaments and the European Parliament, including their special committees. [...] Contributions from the conference shall not bind national Parliaments and shall not prejudice their positions.

Annex 4 Protocol (no 2) - on the application of the principles of subsidiarity and proportionality

(as envisaged by CIG 2/1/07 REV 1 October 2007: pp. 7-10)

Article 1

Each institution shall ensure constant respect for the principles of subsidiarity and proportionality, as laid down in Article 5 of the Treaty on European Union.

Article 2

Before proposing legislative acts, the Commission shall consult widely. Such consultations shall, where appropriate, take into account the regional and local dimension of the action envisaged. In cases of exceptional urgency, the Commission shall not conduct such consultations. It shall give reasons for its decision in its proposal.

[...]

Article 5

Draft legislative acts shall be justified with regard to the principles of subsidiarity and proportionality. Any draft legislative act should contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality. This statement should contain some assessment of the proposal's financial impact and, in the case of a directive, of its implications for the rules to be put in place by Member States, including, where necessary, the regional legislation. The reasons for concluding that a Union objective can be better achieved at Union level shall be substantiated by qualitative and, wherever possible, quantitative indicators. Draft legislative acts shall take account of the need for any burden, whether financial or administrative, falling upon the Union, national governments, regional or local authorities, economic operators and citizens, to be minimised and commensurate with the objective to be achieved.

Article 6

Any national Parliament or any chamber of a national Parliament may, within eight weeks from the date of transmission of a draft legislative act, send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity. It will be for each national Parliament or each chamber of a national Parliament to consult, where appropriate, regional parliaments with legislative powers. If the draft legislative act originates from a group of Member States, the President of the Council shall forward the opinion to the governments of those Member States.

If the draft legislative act originates from the Court of Justice, the European Central Bank or the European Investment Bank, the President of the Council shall forward the opinion to the institution or body concerned.

Article 7

1. The European Parliament, the Council and the Commission, and, where appropriate, the group of Member States, the Court of Justice, the European Central Bank or the European Investment Bank, if the draft legislative act originates from them, shall take account of the reasoned opinions issued by national Parliaments or by a chamber of a national Parliament. Each national Parliament shall have two votes, shared out on the basis of the national Parliamentary system. In the case of a bicameral Parliamentary system, each of the two chambers shall have one vote.

2. Where reasoned opinions on a draft legislative act's non-compliance with the principle of subsidiarity represent at least one third of all the votes allocated to the national Parliaments in accordance with the second subparagraph of paragraph 1, the draft must be reviewed. This threshold shall be a quarter in the case of a draft legislative act submitted on the basis of Article 68 of the Treaty on the Functioning of the European Union on the area of freedom, security and justice. After such review, the Commission or, where appropriate, the group of Member States, the European Parliament, the Court of Justice, the European Central Bank or the European Investment Bank, if the draft legislative act originates from them, may decide to maintain, amend or withdraw the draft. Reasons must be given for this decision.
3. Furthermore, under the ordinary legislative procedure, where reasoned opinions on the non-compliance of a proposal for a legislative act with the principle of subsidiarity represent at least a simple majority of the votes allocated to the national Parliaments in accordance with the second subparagraph of paragraph 1, the proposal must be reviewed. After such review, the Commission may decide to maintain, amend or withdraw the proposal. If it chooses to maintain the proposal, the Commission will have, in a reasoned opinion, to justify why it considers that the proposal complies with the principle of subsidiarity. This reasoned opinion, as well as the reasoned opinions of the national Parliaments, will have to be submitted to the Union legislator, for consideration in the procedure:
 - (a) before concluding the first reading, the legislator (Council and European Parliament) shall consider whether the legislative proposal is compatible with the principle of subsidiarity, taking particular account of the reasons expressed and shared by the majority of national Parliaments as well as the reasoned opinion of the Commission;
 - (b) if, by a majority of 55 % of the members of the Council or a majority of the votes cast in the European Parliament, the legislator is of the opinion that the proposal is not compatible with the principle of subsidiarity, the legislative proposal shall not be given further consideration.

Article 8

The Court of Justice of the European Union shall have jurisdiction in actions on grounds of infringement of the principle of subsidiarity by a legislative act, brought in accordance with the rules laid down in Article 230 of the Treaty on the Functioning of the European Union by Member States, or notified by them in accordance

with their legal order on behalf of their national Parliament or a chamber of it. In accordance with the rules laid down in the said Article, the Committee of the Regions may also bring such actions against legislative acts for the adoption of which the Treaty on the Functioning of the European Union provides that it be consulted.

[...]

Annex 5 Article 33 Treaty revision procedures

(as envisaged by CIG 1/1/07 REV 1 October 2007: pp. 35-37)

An Article 33 shall be inserted to replace Article 48:

Article 33

1. The Treaties may be amended in accordance with an ordinary revision procedure. They may also be amended in accordance with simplified revision procedures.

Ordinary revision procedure

2. The government of any Member State, the European Parliament or the Commission may submit to the Council proposals for the amendment of the Treaties. These proposals may, inter alia, serve either to increase or to reduce the competences conferred on the Union in the Treaties. These proposals shall be submitted to the European Council by the Council and the national Parliaments shall be notified.
3. If the European Council, after consulting the European Parliament and the Commission, adopts by a simple majority a decision in favour of examining the proposed amendments, the President of the European Council shall convene a Convention composed of representatives of the national Parliaments, of the Heads of State or Government of the Member States, of the European Parliament and of the Commission. [...]

The European Council may decide by a simple majority, after obtaining the consent of the European Parliament, not to convene a Convention should this not be justified by the extent of the proposed amendments. In the latter case, the European Council shall define the terms of reference for a conference of representatives of the governments of the Member States. [...]

4. A conference of representatives of the governments of the Member States shall be convened by the President of the Council for the purpose of determining by common accord the amendments to be made to the Treaties.
The amendments shall enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements. [...]

Simplified revision procedures

6. The Government of any Member State, the European Parliament or the Commission may submit to the European Council proposals for revising all or part of the provisions of Part Three of the Treaty on the Functioning of the European Union relating to the internal policies and action of the Union.
The European Council may adopt a decision amending all or part of the provisions of Part Three of the Treaty on the Functioning of the European Union. The European Council shall act by unanimity after consulting the European Parliament and the Commission, and [...]. That decision shall not enter into force until it is approved by the Member States in accordance with their respective constitutional requirements.
The decision referred to in the second subparagraph shall not increase the competences conferred on the Union in the Treaties.
7. Where the Treaty on the Functioning of the European Union or Title V of this Treaty provides for the Council to act by unanimity in a given area or case, the European Council may adopt a decision authorising the Council to act by a qualified majority in that area or in that case. This subparagraph shall not apply to decisions with military implications or those in the area of defence.
Where the Treaty on the Functioning of the European Union provides for legislative acts to be adopted by the Council in accordance with a special legislative procedure, the European Council may adopt a decision allowing for the adoption of such acts in accordance with the ordinary legislative procedure. Any initiative taken by the European Council on the basis of the first or the second subparagraph shall be notified to the national Parliaments. **If a national Parliament makes known its opposition within six months of the date of such notification, the decision referred to in the first or the second subparagraph shall not be adopted.** In the absence of opposition, the European Council may adopt the decision.
For the adoption of the decisions referred to in the first and second subparagraphs, the European Council shall act by unanimity after obtaining the consent of the European Parliament, which shall be given by a majority of its component members.

ENHANCED COOPERATION:
FROM THEORY TO PRACTICE

ENHANCED COOPERATION: FROM THEORY TO PRACTICE

Briefly described, “enhanced cooperation” is a last resort mechanism created by the Amsterdam Treaty which can be triggered in cases “when (the Council) has established that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole”. A certain number of Member States can then be authorised by the Council to move ahead, between themselves, while staying within the constitutional framework of the Union. The only institutional adjustment concerns the Council: non participating Member States are not involved in the adoption of decisions implementing enhanced cooperation, they are not bound by such decisions, nor do they support relevant costs (other than administrative). According to the principle of openness, each Member State is entitled to join enhanced cooperation from the outset or at a latter stage.

Much time and effort was spent in devising the enhanced cooperation mechanism in the Amsterdam Treaty, then in reforming it in the Nice Treaty. It has however so far never been triggered as such. This does not imply that it has never been considered, let alone brandished as a threat, in the negotiation of a regulation. Neither does this imply, as is often heard, that enhanced cooperation does not formally exist in EU law. A form of enhanced cooperation comes into being each time a new measure is built upon the Schengen *acquis*, without the participation (which is optional) of the United-Kingdom, Ireland or even Denmark, in accordance with the *Protocol integrating the Schengen acquis into the framework of the European Union*.^[1]

What was the alleged purpose of enhanced cooperation?^[2] In view of the enlargement of the Union, it was conceived as a tool, to manage the growing heterogeneity of Member States. The Franco-German axis, supported at times by the Benelux countries and the European Commission, played a major role in promoting the concept which was supposed to reconcile the deepening and the widening of the Union. The main argument was that enlargement would increase the pressure for differentiation amongst Member States, which could lead to the creation of sub-groups like the Eurozone and the Schengen area. It was considered preferable that such sub-groups should develop within the institutional framework of the

^[1] More precisely, the initial authorisation for enhanced cooperation is deemed to have been granted, and the legal framework of enhanced cooperation is of residual application for issues which are not directly addressed by the said protocol.

^[2] On this question, see also Ph. DE SCHOUTHEETE, *Closer cooperation: Political background and issues in the negotiation*, in J. MONAR & W. WESSELS (eds.), *The European Union after Amsterdam* (London and New York, Continuum, 2001), in particular pp. 154-158.

Union, rather than outside it, as had often been the case. That argument was of course convincing for supranational institutions, because the community method and judicial control were preserved. But it also provided some safeguards for those Member States who are not taking part in enhanced cooperation.

Why has the enhanced cooperation mechanism not been implemented?

Lengthy considerations can be devoted to the reasons why the enhanced cooperation mechanism within the Union has never been triggered, in spite of high initial expectations.^[3]

Part of the answer lies in the fact that intergovernmental cooperation *outside* the Union has developed, for instance in the Prüm Treaty, sometimes known as “Schengen III”. Concluded by seven Member States, that treaty, addresses issues which are connected to the area of freedom, security and justice^[4], and which could have been an ideal topic for enhanced cooperation. It seems that the incentives for Member States to embark upon enhanced cooperation are not sufficient. In practice as long as enhanced cooperation and intergovernmental cooperation outside the Union are alternatives and as long as priority is not given to trying out enhanced cooperation first, the new mechanism is likely to remain a dead letter.

Part of the answer also lies in the fact that the treaties already provide numerous form of predefined flexibility, as described further on, which in many cases seem more appropriate or efficient than the general mechanism of enhanced cooperation.

The Reform Treaty has preserved a certain number of innovations coming from the Constitutional Treaty concerning the triggering and the functioning of enhanced cooperation within the constitutional framework of the Union, including relations with non-participating Member States. They are meant to make the mechanism easier to trigger, more useful, and more attractive. These now need to be considered.

^[3] For a comprehensive analysis, see H. BRIBOSIA, *Les coopérations renforcées: quel modèle d'intégration pour l'Union européenne?*, Thèse de doctorat (Florence, Institut universitaire européen, 2007).

^[4] Convention of 29 Augustus 2005 on the stepping up of cross border cooperation, particularly in combating terrorism, cross border crime and illegal migration.

1. IMPLEMENTING ENHANCED COOPERATION: INNOVATIONS AND ISSUES

1.1. The Formation and the Scope of Enhanced Cooperation

Three innovations are meant to facilitate the triggering of enhanced cooperation.

- Firstly, the last resort condition has been clarified and downgraded: a deadlock in the decision-making process can now be established by the Council in the initial decision authorizing enhanced cooperation.
- Secondly, the initial authorizing decision shall be enacted by qualified majority without further qualifications (except in CFSP).
- Thirdly, the authorizing decision may lay down conditions for participation, to test the capacity, or the good will, of the initial participating Member States. This aims at preventing the participation of unwilling Member States, only interested in keeping some influence on the development of enhanced cooperation, or even impeding it.

The fact that the minimum participation which had been set at eight Member States in Nice, a third of the Member States in the draft Constitution, is now set at nine in the Reform treaty is not very significant. Given that enhanced cooperation makes use of the common institutions, it might have been more reasonable to request the participation of a majority of Member States, as originally provided by the Amsterdam Treaty.

The treaty specifies that candidates Member States “shall address a request to the Commission, specifying *the scope and objectives* of the enhanced cooperation proposed”. This implies that enhanced cooperation is not necessarily limited to the adoption by some Member States of one single act blocked in the Council. The enhanced cooperation mechanism could thus create a structured and more or less “exclusive” sub-system like the Schengen area or the Euro zone, without having to predefine them through an IGC negotiation.

The Reform Treaty also clarifies to a certain extent the respective role of the European Commission and the candidate Member States in the initial stage of the procedure. Thus the Commission has the power of initiative but only after a request in that respect by the Member States concerned, and without challenging the composition of the initial group of participants. It also seems that the candidate Member States can define the scope of action of enhanced cooperation, but without necessarily depriving the Commission from any review. It is however less clear

who shall propose the conditions for participation (if any) which are to be set in the authorizing decision.

1.2. The Functioning of Enhanced Cooperation within the Constitutional Framework of the Union

Enhanced cooperation is implemented within the constitutional framework of the Union. One implication of that principle is sometimes overlooked: it means that nothing can be done in enhanced cooperation that the Union would not be entitled to do itself. Nor can anything be done in a different way from that which the Union could itself do. In other words, enhanced cooperation is governed by the same legal bases as those governing the Union, i.e. the same powers, the same instruments of action, and the same procedures. The fact that enhanced cooperation is a means of last resort confirms that principle.

As a result, enhanced cooperation can potentially be initiated in all areas covered by the treaties, but only in those areas. It can be argued that the issues which can be dealt with in enhanced cooperation are further limited by substantive conditions like those regarding non discrimination, the integrity of the internal market, and the *acquis communautaire*. On the other hand, nothing rules out that legal bases which tend to extend the competences of the Union be also used in enhanced cooperation. This is for example the case for the general flexibility clause^[5] and for a similar clause addressing the European citizens rights to move and reside freely in the Union.^[6] This is also the case for defining new aspects of criminal procedure or other areas or crime that could be addressed by “minimum rules” of the Union, and thus by enhanced cooperation.^[7]

Another implication is that enhanced cooperation is carried out in the same institutional setting as that of the Union. The composition of the institutions remains unchanged, except for the Council of ministers: non-participants are excluded from voting and the measures adopted by the Council are not applicable to them. They are however present in the room and can take part in the deliberations. This may lead participants to gather informally amongst themselves beforehand for the shaping of their decision, as the Euro Members States already do in the Eurogroup.

^[5] Article 308 TFU.

^[6] Including measures related to social security and social protection (article 18, § 3 TFU). The European Constitution was also referring to measures concerning passports, identity cards, residence permits or any other such document (comp. article III — 125, § 2).

^[7] Article 69 E, § 1 d) TFU (III — 270) and article 69 F, § 1, sub. 3 TFU (III — 271).

A point which may have been overlooked by negotiators concerns the application of QMV in the enhanced cooperation mechanism. The double majority system, in this case 55% (or 65%) of the Member States participating in enhanced cooperation and 65% (or 72%) of their population, would be applicable and it could lead to some odd consequences depending on the actual number of participating Member States and their respective population. In particular, the adaptation of the blocking minority condition may be problematic.^[8] The power balance between participating Member States, especially if their number is limited, may well be very different in enhanced cooperation from what it is in the Union as a whole.

The composition of both the Commission and the European Court of Justice is unaffected when they are called upon to intervene in an enhanced cooperation mechanism. This is quite appropriate, given their neutrality and their strong supranational features.

The question is more delicate as regards the European Parliament.^[9] No variable geometry is foreseen for the Parliament in enhanced cooperation, nor in the areas of predefined flexibility like EMU and the area of freedom, security and justice (AFSJ). Up to now that has not seemed very problematic because either just a few Member States were concerned by non-participation^[10], or the areas concerned did not fully involve the European Parliament. This may change, for example as regards the area of freedom, security and justice. Here the ordinary legislative procedure (co-decision) becomes the rule, whereas countries like the UK, Denmark, let alone Ireland, are largely exempted, and thus will not be bound by most legislation. The question arises as to the legitimacy of the participation of MEP's elected in those countries in the decision-making process. As for enhanced cooperation, the question would become even more sensitive if only nine or ten Member States were involved in enacting legislation. The European Parliament has always rejected the idea of a variable geometry in its composition, but this position may become a real obstacle to the development of enhanced cooperation.

As a rule the procedures applying to the decision-making process within enhanced cooperation are those provided for by the legal bases for the Union as a whole. However the Reform Treaty takes on board one of the most original proposals of the Constitution, namely a so-called *passerelle* system. Participating Member States

^[8] Article 205, § 3 TFU.

^[9] See also the section on the European Parliament above in this issue.

^[10] As far the single currency is concerned, a majority of the Member States have not adopted the euro, but apart from the UK and Denmark, this situation is supposed to be transitional so that their full involvement in the European Parliament is justified.

may amend amongst themselves, and just for themselves, the procedures which will govern the implementation of enhanced cooperation: either to switch from unanimity to qualified majority, or from a special legislative procedure to the ordinary legislative procedure.^[11] Such a prospect may be an incentive for integrationist Member States to embark upon enhanced cooperation. It may also be noted that the implementation of such a *passerelle* amounts to a simplified treaty amendment procedure, with such procedural changes eventually becoming part of the *acquis* of enhanced cooperation, potentially binding upon all future participants.

1.3. Relations with Non-Participating Member States and Later Participation

According to the principle of openness, all Member States are entitled to join enhanced cooperation at a latter stage: they then have to accept the *acquis* of enhanced cooperation. The new procedure for later participation has been streamlined by the European Constitution and the Reform Treaty. The Commission is supposed to confirm the participation of any new candidate. In case of refusal the candidate can refer the matter to the Council (which decides by QMV of the participants). A temporary refusal can only be justified by non-compliance with predetermined conditions for participation. This should avoid arbitrary decisions. In the case of CFSP, it is directly up to the Council to confirm later participation. Given that the intention was to render enhanced cooperation more inclusive with respect to later participation of the willing, the reference to unanimity voting in this case seems rather strange.

The procedure for later participation of Member States to enhanced cooperation raises delicate questions. Is it the only way for them to be involved in the matter dealt with in enhanced cooperation? To what extent does enhanced cooperation *de facto* pre-empt any concurrent action at Union level once it has been authorized? Legally speaking, the Commission could always try to make a proposal for the Union as a whole, notwithstanding previous failures. But it is very unlikely that the Member States taking part in enhanced cooperation will be motivated to reopen the negotiations, especially if they have already started adopting measures for themselves.^[12] They may indeed argue that the procedure for latter participation is always open to them.

^[11] Article 280h TFU.

^[12] If however a latter concurrent action was to be undertaken at EU level, there might be a conflict between the Union act and enhanced cooperation.

In practice, however, there are several precedents where alternatives to full participation have been devised. In EMU for example, the application of a rule has been extended to non participants in the single currency by referring to article 308 TEC.^[13] Before that, the four directives adopted under the Maastricht social protocol had been similarly extended to the UK when it decided to join in, on the basis of article 94 TEC.^[14] More recently, in the framework of Title IV TEC, the application of several regulations has been extended to Denmark by concluding a “parallel” (and incongruous) international agreement between the Community and Denmark.^[15]

Be it as it may, the *acquis* of enhanced cooperation may *de facto* predetermine future Union law, without all Member States having been involved in its elaboration. This consideration may weigh heavily on the initial authorizing procedure.

It is clear from the analysis so far that a serious effort has been made in the Constitution and the Reform Treaty to render the enhanced cooperation mechanism more attractive and effective, both at the initial stage (triggering mechanisms), at the functioning stage (*passerelle*) and in relations to non participants. However a number of uncertainties, ambiguities and potential problems remain. Some of these uncertainties are legal in nature. How will enhanced cooperation affect the judiciary system of the Union, e.g. in assessing the applicability of the decisions enacted in enhanced cooperation to situations involving in one way or another non participating Members States or their nationals? What will be the impact of enhanced cooperation on the external action of the Union and on further enlargements? What is eventually the legal nature of enhanced cooperation and its *acquis*?

^[13] See for example Council Regulation n° 1339/2001 of 28 June 2001 extending the effects of Regulation n° 1338/2001 laying down measures necessary for the protection of the euro against counterfeiting to those Member States which have not adopted the euro as their single currency, *OJL* 181, 2001, p. 11.

^[14] Former article 100 TEC. See for example the Council Directive 97/74/EC of 15 December 1997 extending, to the United Kingdom of Great Britain and Northern Ireland, Directive 94/45/EC on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees, *OJL* 10, 16 January 1998, p. 22.

^[15] See for example the “Agreement between the European Community and the Kingdom of Denmark on the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in Denmark or any other Member State of the European Union and “Eurodac” for the comparison of fingerprints for the effective application of the Dublin Convention”, *OJL* 66, 8 March 2006, p. 38.

2. POTENTIAL AREAS FOR ENHANCED COOPERATION

The first case where enhanced cooperation was seriously considered concerned the minimum taxation of energy products.^[16] It has also been envisaged to enact the Statute for a European company,^[17] and later the European arrest warrant.^[18] The European Commission, prompted by former Commissioner F. Bolkenstein, contemplated the use of enhanced cooperation to establish a common consolidated basis for taxation on company profits.^[19] In all those cases, unanimity was the voting procedure in Council and it is probably in such cases that opportunities for enhanced cooperation can still be found.

Three areas need to be considered separately^[20]: the area of freedom, security and justice, common foreign and security policy, and economic and monetary union. In those three areas, forms of flexibility other than enhanced cooperation *stricto sensu* are operational so that we have to consider how they could be supplemented or complemented.^[21]

2.1. The Area of Freedom, Security and Justice

A form of enhanced cooperation already exists with regard to the Schengen *acquis* and measures building upon it, as a result of the non-participation of the United-Kingdom, Ireland, and/or Denmark.^[22] A similar mechanism, concerning the same Member States, has been set up for implementing Title IV of the TEC on asylum, immigration and other policies related to free movement of persons.

^[16] See eventually the Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity, *OJ L* 283/51, 31 October 2003.

^[17] See eventually Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company, *OJ L* 294, 10 November 2001, p. 22.

^[18] See eventually Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, *OJ L* 190, 18 July 2002, p. 1.

^[19] Report from the Commission to the spring European Council — Delivering Lisbon — Reforms for the enlarged Union COM (2004), 20 February 2004, pp. 23-24.

^[20] Energy and environment related taxation might also become eligible for enhanced cooperation in the future, let alone further harmonisation of VAT.

^[21] On the potentialities of enhanced cooperation and other forms of flexibility in various policy areas, see also F. DEHOUSSE, W. COUSSENS and G. GREVI, *Integrating Europe. Multiple Speed — One direction?*, EPC Working Paper No. 9, April 2004, pp. 18-30.

^[22] See in the Reform Treaty the Protocol on the Schengen *acquis* integrated into the European Union.

In the European Constitution, and thus in the Reform Treaty, Denmark's exemption has been extended to all questions building upon the *acquis* falling under the area of freedom, security and justice, Schengen related or not.^[23]

As for the UK and Ireland, the scope of their special status is extended by the Constitution, notably to the collection storage, processing, analysis and exchange of relevant information.^[24] The Reform Treaty will extend further the UK status to all matters related to judicial cooperation in criminal matters and police cooperation. The scope of the exemption will thus cover the whole area of freedom, security and justice^[25], as is the case for Denmark (but the legal regime remains different). The status of Ireland will presumably be aligned on that of Britain.

The complexity and the many incoherencies resulting from those protocols are aggravated by the Reform Treaty. The United Kingdom has submitted to the Court of justice two cases linked to those protocols where it considers that its opt-in rights were not respected.^[26] The Court will have, for the first time, to dig into the interpretation and articulations of those protocols, and thereby may give some guidance for their implementation in the future.

Judicial cooperation in criminal matters, including minimum harmonisation of national criminal law, has also been considered as a potential area for enhanced cooperation. In the Constitutional treaty a so-called "emergency brake" to the legislative procedure has been devised, but in case of continuing deadlock, the authorisation to pursue enhanced cooperation "shall be deemed to be granted" to the willing Member States.^[27] The Reform Treaty has somewhat simplified that procedure^[28] and extended it to police cooperation as well as to the establishment of European Public Prosecutor's office.^[29] It is therefore the whole former third pillar (title VI of the TEU) which will be covered by that special procedure aimed

^[23] Thus, Denmark's exemption now covers all measures building upon the Schengen *acquis*, not only those that are based on Title IV TEC, but also those based on Title VI TEU (due to its "communitarization"). The exemption is thus equally extended to non Schengen related developments of Title VI TEU. The legal regime of Denmark's status is governed by the Protocol on the position of Denmark (including for most Schengen related issues).

^[24] Article 69 J, § 2, a) TFEU (article III — 275, § 2, a) of the Constitution, article 30, § 1, b) of the TEU).

^[25] Protocol on the position of the United-Kingdom and Ireland in respect of the area of freedom, security and justice.

^[26] See already the elaborate opinions of Advocate General TRSTENJAK delivered on 10 July 2007, on Cases C-77/05 and C-137/05. The first one addresses the Council Regulation n° 2007/2004 of 26 October 2004 establishing a European agency for the management of operational cooperation at the external borders of the Member States of the European Union. The second case addresses the Council Regulation (EC) No. 2252/2004 of 13 December 2004 on standards for security features and biometrics in passports and travel documents issued by Member States.

^[27] See article III — 270 and 271 of the Treaty establishing a Constitution for Europe.

^[28] Comp. articles 69 E and 69 F TFEU.

^[29] See articles 69 I and 69 J TFEU (article III — 274 and 275 of the Constitution).

at easing the creation of enhanced cooperation.^[30] The articulation of that special triggering procedure with the special status of the UK, Ireland, and Denmark will give some work to legal experts.

Do all those forms of flexibility preclude Member States from triggering the normal enhanced cooperation mechanism in this area? In our opinion, legally speaking they do not, although they may entail more procedural constraints.

Triggering enhanced cooperation in the area of freedom, security and justice could make sense if a given policy is opposed by more than just the three Member States with a special status. It might also make sense if participating Member States wanted to define a wide scope for their cooperation, or set conditions for participation, points which the “special” triggering mechanism (always linked to a specific draft directive or regulation) does not allow.

Finally, the extension of European citizenship rights could appear to be an interesting candidate for enhanced cooperation. The Nice treaty removed the exclusion of citizenship from enhanced cooperation. Enhanced cooperation could then be envisaged to enlarge the concept of freedom of movement and residence inside the Union to the benefit of European citizens, or even to recognize new rights, like, for instance, voting rights at national (and not only local) level.^[31]

2.2. Common Foreign and Security Policy (CFSP)

Another innovation of the Constitution taken up by the Reform Treaty concerns the extension of the scope of enhanced cooperation to CFSP, without confining it to mere implementation of common actions or positions in the name of the Union. However, given that an unanimous vote is required to trigger enhanced cooperation in CFSP^[32], it is unlikely ever to be implemented.

It is moreover debatable whether it would be politically feasible and desirable to apply enhanced cooperation to foreign policy, as this would contradict the necessary unity of action and external representation. The “constructive abstention” technique was specially devised by the Amsterdam Treaty for CFSP but it has never been

^[30] Except where measures concerning police cooperation are building upon the Schengen *acquis* (in which case the Schengen protocol or the UK/Irish protocol mentioned above should be applicable), see Article 69 J, last sentence.

^[31] Article 22, § 2 TFEU (although the necessary approval by the Member States in accordance to their constitutional requirement may be an obstacle to the setting up of enhanced cooperation).

^[32] Which is a regression in relation not only to the Convention draft (which had provided QMV), but also to the current treaties.

used either, although it is much lighter than enhanced cooperation, and purports not to affect the unity of the Union.

As formally part of CFSP, defence policy has also become a potential area for enhanced cooperation. However, given various existing forms of flexibility provided for in that area, both outside and inside the Union framework^[33], the enhanced cooperation mechanism, as such, is unlikely ever to be triggered in this field. The case of the most reluctant Member State, Denmark, had already been dealt with in the Danish protocol annexed to the Amsterdam Treaty: Denmark is considered as a non participant to “closer cooperation” in that area.^[34]

In the drafting of the European Constitution, enhanced cooperation was foreseen in order to establish the European Defence Agency. This agency, which has been set up in the meantime^[35] does indeed differentiate among Member States by “taking account of the level of effective participation in the Agency’s activities”^[36]. Enhanced cooperation was also kept in mind as a fall back position in case the concept of “permanent structured cooperation” were to fail by the end of the process. But the Reform Treaty has not made any changes on that issue. Permanent structured cooperation is still planned to be set up in order to increase and further integrate the forces of the participating Member States and to engage in the most demanding *Petersberg* missions

Permanent structured cooperation resembles enhanced cooperation in that it will be set up by a Council decision which will identify the participating Member States. It will be reserved to the willing Member States that fulfil the criteria and have made the commitments on military capabilities predefined in a protocol in that regard. The non-participants will be precluded from voting in the Council (whereas their right to take part in the deliberations is not expressly provided). And they can submit at a later stage to the Council their intention to participate.

The main difference lies in the fact that the scope of the “structured cooperation” is predefined and relatively wide, which makes it indeed more “permanent” than enhanced cooperation. Its creation, by a qualified majority vote, is likely to occur as soon as the Reform Treaty enters into force. It is not subject to a condition of last resort nor to any minimum threshold participation, nor to any substantive condi-

^[33] See also A. MISSIROLI, *CFSP, Defence and Flexibility*, EU-ISS Chaillot Paper No. 38, February 2000.

^[34] Article 6 of the protocol on the position of Denmark.

^[35] Council Joint Action 2004/551/CFSP of 12 July 2004 on the establishment of the European Defence Agency, *OJ/L* 245/17, 17 July 2004.

^[36] Article III — 311, § 2 (new article 30, § 2 TEU).

tion. The participation of a Member State can be suspended if the commitments on military capabilities are not complied with; conversely any participant has the right to withdraw from the structured cooperation.

In other words, permanent structured cooperation is another kind of predefined institutional flexibility, similar to the Euro zone or the Schengen area. Its creation confirms in a way the enduring shortcomings of the enhanced cooperation mechanism. The latter is perceived as more constraining, less exclusive, and thus not as attractive and useful.

The Reform Treaty has taken up from the Constitution another form of flexibility which formalizes a long standing practice.^[37] It consists of entrusting the implementation of a *Petersberg's* mission to a group of States “which are willing and have the necessary capability for such a task”, presumably in the name of the Union.^[38] Such missions are supposed to be carried out “within the framework of the Union”. The Council shall be kept informed and may amend the mandate of the mission. However the management of the mission remains in the hand of the group of States, “in association with the High Representative”. The involvement of the Political and security committee is but ensured at that level.

2.3. Enhanced Cooperation in the Economic and Monetary Union

Economic and Monetary Union (EMU) is a comprehensive predefined system of differentiation within the Union. Denmark and the UK have been exempted from adopting the single currency, whereas the participation of other Member States “with a derogation” is postponed until they meet the convergence criteria. This is still the case for Sweden as well as for the twelve new Member States, except for Slovenia which joined the Euro zone in January 2007.^[39] Apart from the UK, all the non-participating Member States basically enjoy the same status. Within the Union framework, their voting right is suspended for a number of questions that concern mainly the participants to the single currency, like for example the legal status of the Euro. For many other issues, they keep their voting right in the Council but decisions are shaped in the *Eurogroup* from which they are excluded. Within the European System of Central Banks, the national banks of the non-participants are not part of the *Eurosistem*; they are not involved in the Governing Council

^[37] And which recalls the main characteristic of enhanced cooperation in CFSP as it was devised in the Nice Treaty.

^[38] New article 29 TUE (articles I-41, § 5 and III — 310).

^[39] Cyprus and Malta will join in January 2008.

nor in the Executive Board. They are only consulted through the meetings of the General Council.

Enhanced cooperation could be envisaged in policies directly connected to EMU, like social policy, employment and taxation. Within the EMU chapter itself, there is presumably no room for enhanced cooperation in monetary and exchange rate policies, due the exclusiveness of EU powers in that area.^[40] But the coordination of national economic policies could be considered for enhanced cooperation, even though its implementation could not go beyond the powers attributed to the Union: enhanced cooperation is indeed confined to the constitutional framework of the Union.

The Reform Treaty, just like the European Constitution, develops the possibility of deepening further economic coordination amongst the Euro Member States. It does so by increasing the number of cases in which the Council suspends the voting right of non-participants and dispenses them from applying the resulting measures. This will be the case in the framework of multilateral surveillance, for the “adoption of the parts of the broad economic policy guidelines which concern the euro area generally”^[41], and for the “recommendations made to those Member States whose currency is the euro (...), including on stability programmes and warnings”^[42]. This will also be the case in the framework of the public deficit procedure, firstly in order to declare the existence of such a deficit, and secondly where the Council establishes “that there has been no effective action in response to its recommendations (...), including the decision to make those recommendations public”^[43]. And this will be the case for “measures to ensure unified representation within the international financial institutions and conferences”^[44].

In all those cases, it would have been possible to consider applying enhanced cooperation. But preference has been given to an extension of the predefined EURO system. That choice is significant.

What about the Stability and Growth Pact? Would it be conceivable for the Member States belonging to the Euro zone to engage into enhanced cooperation in order to strengthen their stability programmes?^[45] Or in order to regulate the

^[40] At least with respect to the States part of the Euro zone.

^[41] Article 116, § 2, a) TFEU (article III — 197, § 2, a), corresponding to article 99, § 2 TEC.

^[42] Article 116 § 4, a) TFEU (article III — 197, § 4, a), corresponding to article 99, § 4 TEC.

^[43] Article 116, § 4, b) TFEU (article III — 197, § 4, b), corresponding to article 104, §§ 6 and 7 TEC.

^[44] Article 116, § 2, j) TFEU (article III — 197, § 2, j), compare article 111, § 4 TEC.

^[45] In accordance to Council Regulation No. 1466/97, 7 July 1997.

sanctions related to the public deficit procedures, given that such sanctions do not concern Member States who do not participate in the Euro?^[46] In fact another choice was made for the reform of the Stability Pact in June 2005. The idea was not to strengthen cooperation, but to relax and make the Pact more flexible in order to take into account the particularities of each Member States. It is however interesting to observe that the Eurogroup played an important role in shaping the reform of the Stability Pact.

A more general question concerns the possibility of “formalizing” the Eurogroup and “repatriating” it in the EU institutional framework through enhanced cooperation. Given that the Eurogroup is able to shape the decisions without the interference of non participants, whereas enhanced cooperation would only suspend their voting rights in the decision-taking, the question could be formulated as follows: could the Eurogroup use enhanced cooperation in order to enact formally its decisions? The answer is yes: enhanced cooperation can always be used as long as it does so within the legal framework of the Union. However given that the Eurogroup deals at times with issues which go beyond the competences of the Union, these could therefore not be dealt with in the Ecofin Council nor in enhanced cooperation.

Two more issues are worth considering: prudential supervision and complementary legislation to the ESCB.

The Council, acting unanimously, may confer specific tasks concerning prudential supervision of financial institutions to the ECB.^[47] No such regulation has ever been adopted. If difficulties are forthcoming from some Member States, it might make sense to apply the enhanced cooperation mechanism. Participants might, or might not, be the same as Member States sharing the Euro.

Complementary legislation to the Statute of the ESCB operates in a complex legal system. In some cases, for instance the consultation of the ECB by national authorities^[48], or the collection of statistical information by the European Central Bank^[49], the Council, in its full composition, provides for two distinctive legal regimes depending on the participation or not to the single currency. For other regulations, the Council acts in its full composition, although acts adopted do not apply to the non-participants. Such is the case for the regulations concerning

^[46] In accordance to Council Regulation No. 1467/97, 7 July 1997.

^[47] Article 105, § 6 TEC.

^[48] Council Decision 98/415/CE of 29 June 1998, *OJ L* 189, 3 July 1998

^[49] Council Regulation No. 2533/98 of 23 November 1998, *OJ L* 318, 27 November 1998.

the application of minimum reserves by the ECB^[50], the powers of the European Central Bank to impose sanctions^[51], and further calls of foreign reserve assets by the ECB^[52]. At one moment in time, Euro States might seek an agreement amongst themselves to use the enhanced cooperation mechanism rather than the full Council, for adopting those regulations or legal regimes that apply only to themselves. This could be particularly the case in relation to Member States which are not actually committed to joining the single currency.

CONCLUSION

Since its creation in the Amsterdam Treaty, the enhanced cooperation mechanism has been driven by two logics.^[53] The initial aim was to circumvent blockages due to unanimity voting in the Council in order to pass single acts. A second motivation was to acquire the capacity to create new sub-groups like the Eurozone, the Schengen area, or the former social agreement. Of course both logics are not incompatible, but enhanced cooperation seems to be much too elaborate a mechanism to be used solely to render decision-making procedures more flexible in specific cases: simpler techniques exist in that respect, like “constructive abstention” and opt-outs. Using enhanced cooperation for single specific acts also raises the risk of fragmentation.

As indicated above the innovations of the European Constitution, fully taken up by the Reform Treaty, were meant to make enhanced cooperation more useful and more attractive. They increase the autonomy of the potential groupings of Member States at the moment of their creation, in their functioning, in the definition of their scope of action, and in setting conditions for participation. The fact remains that implementing enhanced cooperation may raise unexpected new legal questions.

Potential areas of application can be identified. In spite of the existing forms of flexibility, enhanced cooperation is not ruled out in the area of freedom, security and justice, nor in the EMU, notably to strengthen economic coordination between the Euro States. Other areas include Community policies governed by unanimity like taxation, social policy, but also European citizenship. Conversely, enhanced cooperation would seem to be of little use in the field of CFSP and Defence.

^[50] Council Regulation No. 2531/98 of 23 November 1998, *OJ L* 318, 27 November 1998.

^[51] Council Regulation No. 2532/98 of 23 November 1998, *OJ L* 318, 27 November 1998.

^[52] Council Regulation No. 1010/2000 of 8 May 2000, *OJ L* 155, 16 May 2000.

^[53] About this argument, see H. BRIBOSIA, cited above, 2007, pp. 496-513.

Compared to intergovernmental cooperation outside the Union, the enhanced cooperation mechanism is advantageous: it maintains the community method, parliamentary and judicial control, and guarantees for the non-participants. Compared to predefined systems of flexibility (Euro, Schengen): it can create functioning subsystem without needing an IGC, it is more general and coherent a system, and through the “passerelle” clause it can modify its internal decision making system.

Nevertheless intergovernmental cooperation outside the Union remains a strong rival to enhanced cooperation within the framework of the Union. Perhaps cooperation outside the Union should be better regulated or articulated with enhanced cooperation in order to make sense of the new mechanism. Perhaps the former should be considered as a second best, to be used in “last resort” only, when it is established that enhanced cooperation within the Union framework is not possible?

It is also the case that there is some reluctance in the European establishment, notably in the European Commission and the new Member States, towards implementing enhanced cooperation. Embarking upon enhanced cooperation is still perceived by some as a divisive “threat” rather than an “opportunity”^[54] for the dynamics of European integration.

It may well be that the combination of these elements will continue to inhibit in practice, as has been the case so far, any attempt at triggering the enhanced cooperation mechanism. Much effort would then have been spent in vain.

^[54] See already S. KURBAS, J. DE CLERCK-SACHSSE, J.I. TORREBLANCA, G. RICARD-NIHOUL, *From Threat to Opportunity: Making Flexible Integration Work*, EPIN Working Paper, No. 15/September 2006.

Annex The New Provisions on Enhanced cooperation
(as envisaged by CIG 1/1/07 REV 1 October 2007: pp. 143-147)

Title IV shall take over the heading of Title VII “PROVISIONS ON ENHANCED COOPERATION” and Articles 27a to 27e, Articles 40 to 40b and Articles 43 to 45 shall be replaced by the following Article 10:

Article 10

1. Member States which wish to establish enhanced cooperation between themselves within the framework of the Union’s non-exclusive competences may make use of its institutions and exercise those competences by applying the relevant provisions of the Treaties, subject to the limits and in accordance with the procedures laid down in this Article and in Articles 280a to 280i of the Treaty on the Functioning of the European Union. Enhanced cooperation shall aim to further the objectives of the Union, protect its interests and reinforce its integration process. Such cooperation shall be open at any time to all Member States, in accordance with Article 280c of the Treaty on the Functioning of the European Union.
2. The decision authorising enhanced cooperation shall be adopted by the Council as a last resort, when it has established that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole, and provided that at least nine Member States participate in it. The Council shall act in accordance with the procedure laid down in Article 280d of the Treaty on the Functioning of the European Union.
3. All members of the Council may participate in its deliberations, but only members of the Council representing the Member States participating in enhanced cooperation shall take part in the vote. The voting rules are set out in Article 280e of the Treaty on the Functioning of the European Union.
4. Acts adopted in the framework of enhanced cooperation shall bind only participating Member States. They shall not be regarded as part of the *acquis* which has to be accepted by candidate States for accession to the Union.

A Title III “ENHANCED COOPERATION” shall be inserted after Article 280. The following new Articles 280a to 280i shall be inserted:

Article 280a

Any enhanced cooperation shall comply with the Treaties and the law of the Union.

Such cooperation shall not undermine the internal market or economic, social and territorial cohesion. It shall not constitute a barrier to or discrimination in trade between Member States, nor shall it distort competition between them.

Article 280b

Any enhanced cooperation shall respect the competences, rights and obligations of those Member States which do not participate in it. Those Member States shall not impede its implementation by the participating Member States.

Article 280c

1. When enhanced cooperation is being established, it shall be open to all Member States, subject to compliance with any conditions of participation laid down by the authorising decision. It shall also be open to them at any other time, subject to compliance with the acts already adopted within that framework, in addition to those conditions.

The Commission and the Member States participating in enhanced cooperation shall ensure that they promote participation by as many Member States as possible.

2. The Commission and, where appropriate, the High Representative of the Union for Foreign Affairs and Security Policy shall keep the European Parliament and the Council regularly informed regarding developments in enhanced cooperation.

Article 280d

1. Member States which wish to establish enhanced cooperation between themselves in one of the areas covered by the Treaties, with the exception of fields of exclusive competence and the common foreign and security policy, shall address a request to the Commission, specifying the scope and objectives of the enhanced cooperation proposed. The Commission may submit a proposal to the Council to that effect. In the event of the Commission not submitting a proposal, it shall inform the Member States concerned of the reasons for not doing so.

Authorisation to proceed with the enhanced cooperation referred to in the first subparagraph shall be granted by the Council, on a proposal from the Commission and after obtaining the consent of the European Parliament.

2. The request of the Member States which wish to establish enhanced cooperation between themselves within the framework of the common foreign and security policy shall be addressed to the Council. It shall be forwarded to the High Representative of the Union for Foreign Affairs and Security Policy, who shall give an opinion on whether the enhanced cooperation proposed is consistent with the Union's common foreign and security policy, and to the Commission, which shall give its opinion in particular on whether the enhanced cooperation proposed is consistent with other Union policies. It shall also be forwarded to the European Parliament for information.

Authorisation to proceed with enhanced cooperation shall be granted by a decision of the Council acting unanimously.

Article 280e

All members of the Council may participate in its deliberations, but only members of the Council representing the Member States participating in enhanced cooperation shall take part in the vote.

Unanimity shall be constituted by the votes of the representatives of the participating Member States only.

A qualified majority shall be defined in accordance with Article 205(3).

Article 280f

1. Any Member State which wishes to participate in enhanced cooperation in progress in one of the areas referred to in Article 280d(1) shall notify its intention to the Council and the Commission. The Commission shall, within four months of the date of receipt of the notification, confirm the participation of the Member State concerned. It shall note where necessary that the conditions of participation have been fulfilled and shall adopt any transitional measures necessary with regard to the application of the acts already adopted within the framework of enhanced cooperation.

However, if the Commission considers that the conditions of participation have not been fulfilled, it shall indicate the arrangements to be adopted to fulfil those conditions and shall set a deadline for re-examining the request. On the expiry of that deadline, it shall re-examine the request, in accordance with the

procedure set out in the second subparagraph. If the Commission considers that the conditions of participation have still not been met, the Member State concerned may refer the matter to the Council, which shall decide on the request. The Council shall act in accordance with Article 280e. It may also adopt the transitional measures referred to in the second subparagraph on a proposal from the Commission.

2. Any Member State which wishes to participate in enhanced cooperation in progress in the framework of the common foreign and security policy shall notify its intention to the Council, the High Representative of the Union for Foreign Affairs and Security Policy and the Commission. The Council shall confirm the participation of the Member State concerned, after consulting the High Representative of the Union for Foreign Affairs and Security Policy and after noting, where necessary, that the conditions of participation have been fulfilled. The Council, on a proposal from the High Representative, may also adopt any transitional measures necessary with regard to the application of the acts already adopted within the framework of enhanced cooperation. However, if the Council considers that the conditions of participation have not been fulfilled, it shall indicate the arrangements to be adopted to fulfil those conditions and shall set a deadline for re-examining the request for participation. For the purposes of this paragraph, the Council shall act unanimously and in accordance with Article 280e. Article 280g Expenditure resulting from implementation of enhanced cooperation, other than administrative costs entailed for the institutions, shall be borne by the participating Member States, unless all members of the Council, acting unanimously after consulting the European Parliament, decide otherwise.

Article 280h

1. Where a provision of the Treaties which may be applied in the context of enhanced cooperation stipulates that the Council shall act unanimously, the Council, acting unanimously in accordance with the arrangements laid down in Article 280e, may adopt a decision stipulating that it will act by a qualified majority.
2. Where a provision of the Treaties which may be applied in the context of enhanced cooperation stipulates that the Council shall adopt acts under a special legislative procedure, the Council, acting unanimously in accordance with the arrangements laid down in Article 280e, may adopt a decision stipulating that it will act under the ordinary legislative procedure. The Council shall act after consulting the European Parliament.

3. Paragraphs 1 and 2 shall not apply to decisions having military or defence implications.

Article 280i

The Council and the Commission shall ensure the consistency of activities undertaken in the context of enhanced cooperation and the consistency of such activities with the policies of the Union, and shall cooperate to that end.

FOREIGN POLICY:
MANY OPPORTUNITIES AND A FEW
UNKNOWNS

FOREIGN POLICY: MANY OPPORTUNITIES AND A FEW UNKNOWN

Whatever the reasons that the citizens of France and the Netherlands gave for their “Noes” to the Constitutional Treaty in the spring of 2005, the new architecture of EU “foreign policy” it contained was not a significant factor. Moreover, public opinion in the EU consistently favours better cooperation among member states for common action in international affairs and for the defence of European values and interests in the wider world.

This is why the Reform Treaty includes practically the same provisions as the ill-fated EU “Constitution”. And the new Treaty offers many good opportunities — in terms of greater policy coherence, effectiveness and visibility — coupled with some unknowns related to its implementation.

1. WHAT IS THE BACKGROUND, AND WHAT THE ACQUIS SO FAR?

Since the very beginning, the European Community/Union’s external relations “system” has developed along two distinct paths and patterns.

On the one hand, the European Commission has gradually built a network of services to support and implement its development aid programmes in third countries, often in connection with privileged trade agreements. This translated i.a. into the creation of a growing number of EC Delegations covering all continents and also some international organisations.

On the other hand, first with the institutionalisation of the European Political Cooperation (EPC) in 1986, then with the establishment of the Common Foreign and Security Policy (CFSP) in 1991, the Council General Secretariat has progressively put in place a dedicated Directorate-General to deal with external relations.

These have come to be known and labelled as the two “pillars” of European “foreign policy”.

On the **Commission** side, the signature of the Maastricht Treaty prompted a specific reorganisation, intended also to “match” the parallel development of Council structures in the CFSP domain: a reorganisation that was centred upon the creation of DG I A (for external political affairs) as distinct from DG I proper (for external economic affairs) and under the authority of a dedicated Commissioner (Hans van

den Broek), and with the ensuing creation of a Unified External Service (1994) for the growing number of EC Delegations in third countries.

The Santer Commission (1995-99) reunited political and economic affairs and established four separate DGs with mainly geographical responsibilities: Central Europe/Russia/CIS (under Commissioner Hans van den Broek), industrialised world (Leon Brittan), Latin America/Mediterranean/Middle East/developing Asia (Manuel Marin), ACP countries/Lome' (Joao de Deus Pinheiro). A college-internal committee presided by Jacques Santer himself was due to coordinate external policies. Still, the new set-up entailed many grey areas, overlapping zones of competence (e.g. trade) and, more generally, unnecessary fragmentation: a further Commissioner (Emma Bonino), for instance, was in charge i.a. of humanitarian affairs.

The Prodi Commission (1999-2004) carried out a further internal reorganisation with the creation of DG RELEX proper (with a new Director-General) and the appointment of Chris Patten as a "primus inter pares" among the Commissioners in charge of external relations: Poul Nielson for development aid, Guenther Verheugen for enlargement, and Pascal Lamy for trade. This arrangement did not always work smoothly, but it certainly represented an improvement over the previous set up. Moreover, the Commission could count on more than 120 EC Delegations in approximately 150 countries, amounting to a total of 7,000 officials.

On the **Council** side, a new DG for External Relations was created in 1994 under Brian Crowe: one of his deputies led the new CFSP Unit, while another was in charge of external economic relations. When the European Security and Defence Policy (ESDP) was launched in 1999, this was expanded into DG E, devoted to External and Politico-Military Affairs, under Robert Cooper.

Before and alongside these new structures, a number of more informal fora, functions, preparatory bodies and groups took shape over the years: the regular meetings of the Political Committee (PoCo) in the framework of the EPC/CFSP, prepared by the European Correspondents based in the national Foreign Ministries; or the various Working groups/Parties and Task Forces convened periodically in Brussels, mostly prepared by the RELEX (since 1999 CFSP) Counsellors based in the Permanent Representations.

A significant boost to the size and scope of Council structures occurred in 1999 with the appointment of the High Representative for CFSP and Secretary-General of the Council (HR/SG), Javier Solana, and the dedicated Policy Planning and Early Warning Unit — both foreseen by the Amsterdam Treaty. The boost continued with the setting up, from 2001, of the new ESDP bodies foreseen by

the Nice Treaty — such as the Political and Security Committee (PSC), de facto replacing the PoCo but permanently based in Brussels, to deal with international crisis management — and also those, like most military bodies and the new Council agencies, that derived from the transfer of most functions of the Western European Union (WEU) to the EU.

With the exception of the PSC (and the Council “Special Representatives”, created already with the Maastricht Treaty), virtually all these new structures were set up through simple Joint Actions or Council decisions. They have come to include up to 500 individuals (including the politico-military bodies), plus the personnel engaged on the ground in the various ESDP operations around the world.

This new Brussels-based set-up worked reasonably well. Chris Patten’s pragmatic approach and attitude, in particular, helped smooth relations with the new player on the other side of Rue de la Loi, Javier Solana. The interaction between them and the *modus vivendi* established between their staffs prevented the in-built “dualism” of European foreign policy from negatively affecting its overall conduct at a difficult time. They even prompted many analysts to advocating the appointment of a sort of “Pattana” — as it was half-jokingly labelled — for the Union. This, in turn, fed more or less directly the discussions on institutional reform inside the Convention on the Future of Europe (2002-03).

That eventually led to the proposal — later incorporated in the Constitutional Treaty — to appoint a “Union Minister for Foreign Affairs” combining the “hats” of both Solana and Patten. S/he would be in the Commission as one of its Vice-Presidents (which Patten was not); would chair a newly established Foreign Affairs Council (resulting from the splitting of the current General Affairs and External Relations Council); and would be supported by a dedicated “European External Action Service” (EEAS). Preparation for the latter would start immediately after the signature of the new treaty.

In fact, far from “merging” the two roles and functions, the new figure was (and still is), basically, a *personal union*. The intrinsic dualism of EU’s foreign policy, in other words, was not suppressed, as separate procedures were (and are) maintained for CFSP proper, on the one hand, and the rest of Union’s external relations, on the other: it was only contained and “subsumed” in one individual.

The outcome of the subsequent Intergovernmental Conference (IGC), with the official signature of the Constitutional Treaty in Rome on 29 October 2004, had a direct impact on the make-up of the Barroso Commission (2004–). The existing DGs were maintained but the President took back the role of chairing the group

of Commissioners dealing with external policies, namely Olli Rehn (enlargement), Peter Mandelson (trade), Louis Michel (development aid), and Benita Ferrero Waldner, in charge of External Relations and also the recently established European Neighbourhood Policy (ENP).

This partial reorganisation was based on the assumption that the Constitutional Treaty would enter into force, as planned, on 1 November 2006: at that point in time — such at least was the reasoning, but no formal decision was ever made in this respect — the new “Union Minister for Foreign Affairs” would take over the RELEX services proper, while Benita Ferrero Waldner would remain Commissioner for the ENP, and possibly sit on the Foreign Affairs Council on behalf of the Commission (although no formal decision was taken in this respect).

For his part, Solana was “nominated” by the Council as the future “Union Minister for Foreign Affairs” as from 1 November 2006, while the role of Secretary-General of the Council — now separated from that of High Representative for CFSP — would be taken over by Pierre de Boissieu, Solana’s deputy in that function, thus re-establishing the bureaucratic tradition previously impersonated by Niels Erbsoll and Juergen Trunpf.

While personally pleased by the nomination, Solana did not conceal his worries about the fact that, in the new capacity, he would have been unable to do what he had been doing best during the first five years of his tenure, namely acting as a “roving” ambassador and trouble-shooter for the EU, cultivating personal contacts throughout the world, and limiting red tape.

At any rate, the crisis triggered by the French “non” and the Dutch “nee” to the Constitutional Treaty, in the spring of 2005, put everything on hold for a while. It also prompted the “hibernation” of the talks that had been hitherto conducted between officials from DG RELEX and the Council Secretariat — flanked by the Antici Group of the COREPER — over the possible scope and structure of the EEAS. A joint Progress Report was indeed presented in May 2005^[1], identifying a few agreed principles and general points of convergence, but it was soon set aside and almost forgotten. Ever since, little or no reflection has been conducted on the EU foreign policy set up — with the possible exception of the Commission’s June

^[1] *European External Action Service: Joint progress report to the European Council by the Secretary-General/High Representative and the Commission, Brussels, 9 June 2005, 9956/05, CAB 24 RELEX 304, DQPG.*

2006 Communication on “Europe in the World”^[2] — and the overall climate between the two sides of Rue de la Loi has hardly improved.

2. WHAT DOES THE REFORM TREATY SAY?

As already mentioned, the new Reform Treaty retains virtually all the CFSP/ESDP-relevant provisions of the Constitutional Treaty, with only two minor changes: the “Union Minister for Foreign Affairs” is renamed “High Representative of the Union for Foreign Affairs and Security Policy”; and not one but two new Declarations attached to the Treaty (30 and 31) underline i.a. that the new provisions (including the EEAS) “do not affect the responsibilities of the member states, as they currently exist, for the formulation and conduct of their foreign policy nor of their national representation in third countries and international organisations”; neither do they “prejudice the specific character of the security and defence policy of the member states” or “the primary responsibility of the Security Council **and of its members** for the maintenance of international peace and security” [emphasis added].

The second Declaration, in particular, not only ring-fences “the existing legal basis, responsibilities, and powers of each member state in relation to the formulation and conduct of its foreign policy, its national diplomatic service, relations with third countries and participation in international organisations, including a member state’s membership of the Security Council of the UN”. It also reiterates that no new powers in this domain are therewith given to either the Commission or the European Parliament.

The change in the title of the former “Minister” is purely cosmetic or, more precisely, symbolic, in that it aims to dispel the fears that the term could trigger. The second change is even less significant, in legal terms, as it states the obvious and reiterates existing norms. Still, taken together, the two changes in the *text* seem to herald a slight change in the *context*: inserted mainly at the request of the UK, they may in fact contribute to containing the possible spill-over effects of the “double-hatting” of the new High Representative and maintaining the traditional separation between the old EU “pillars”.

As for the rest, the new text reiterates the main changes already enshrined in the Constitutional Treaty:

^[2] *Europe in the World — Some Practical Proposals for Greater Coherence, Effectiveness and Visibility*, Communication from the Commission to the European Council of June 2006, Brussels, 08.06.2006, COM(2006) 278 final.

- the end of the rotational presidency in foreign relations, with some role for the President of the European Council (appointed for two and half years, renewable once) not only in protocol matters but also in crisis situations (new art.13);
- the creation of the double-hatted High Representative, also appointed by the European Council (with the agreement of the President of the Commission) acting, if necessary, by qualified majority, and also subject to a vote of consent by the European Parliament;
- the separation of such role and function from that of Secretary-General of the Council;
- the establishment the new Foreign Affairs Council, separate from the General Affairs Council;
- the establishment of the EEAS, set “to work in cooperation with the diplomatic services of the member states”, and comprising “officials from relevant departments of the General Secretariat of the Council and of the Commission as well as staff seconded from national diplomatic services of the member states” (Declaration 22, attached to the Treaty, reiterates also that “preparatory work” to this end should begin as soon as the new Treaty is “signed”);
- the adoption of a single “legislative” procedure, the Council’s “European decision” (thus overcoming the distinction between common positions, joint actions, and common strategies), but with virtually no change to the existing consensual rule;
- the expansion of the scope of ESDP, now called Common Security and Defence Policy (CSDP), and of its missions (new artt. 27 and 28), including: a “solidarity clause” and a “mutual defence” commitment, both with substantial qualifications and provisos; the possibility for the Council “to entrust the implementation of a task to a group of member states which willing and have the necessary capability” (new art.29); and the possible establishment of “permanent structured cooperation” in the field of defence (new art. 31);
- last but certainly not least, the establishment of a single legal personality for the Union.

3. WHAT CAN BE THE TREATY’S IMMEDIATE IMPACT?

A first question to be addressed concerns the likely new institutional “environment” in which the High Representative and Vice-President of the Commission (the acronym HR/VP seems both more appropriate and definitely more workable than HRUFASP) will operate. In fact, with the end of the rotational presidency in external affairs and with the double “hat”, most of the problems of fragmentation

and “dualism” associated with the current system seem solved, at least in principle: there will no longer be two or even three distinct EU representatives at international meetings — from the Middle East “Quartet” (thus often turned into a “Sextet”) to other diplomatic occasions — and there will no longer be a new personality representing the EU on the world stage every six months either.

Like the Constitutional Treaty beforehand, however, the Reform Treaty introduces another new institutional figure, namely the President of the European Council^[3]. She will take over some of the responsibilities — and arguably staff — of the Council Secretariat, and will also ensure some form of external coordination and representation as related to EU summits. As a result, the HR/VP will have to liaise very intensely and closely with the new institutional figure for all matters linked to the preparation of European Council decisions and events. At best, this will require a degree of duplication between their respective staff.

Moreover, it seems unlikely that the President of the Commission will entirely abstain from intervening in the sphere of foreign relations. There are so many policy areas the Commission is involved in which have an “external” dimension that it will be difficult to draw a line and keep its President out of this game, considering also the possible need for some coordination and *arbitrage* among Commissioners.

Finally, despite the suppression of the rotational presidency in external relations, the head of state and government and the foreign minister of the country in the Council presidency — to date mostly in charge of all EU affairs during the semester — may still keep some role in this domain. After all, the rotational presidency is likely to remain in place for both the General Affairs Council (which also deals with enlargement issues) and the COREPER, unquestionably a major player in foreign policy matters. And there are ever more Council formations that have a specific “external” policy dimension.

As a result, along with the two “hats”, the HR/VP may also have to carry a raincoat and umbrella. It will be very crowded indeed at the EU top, and the old formal *troika* may well be succeeded by a new informal one (the President of the European Council, the HR/VP, and the President of the Commission), while the new *trio* of successive Council presidencies will linger on the sidelines.

At the end of the day, the precise division of labour and even the chemistry inside this sort of new EU *troika* will depend also on the profiles and personalities of the incumbents. In fact, Solana’s case has already shown that the way in which an official

^[3] See also the chapter on the Presidency of the Council in this issue.

interprets and plays a role that is very much a blank sheet matters more than the actual competences and even the treaty language.

In this particular case, the modalities for the appointment of the three top EU officials will also matter, especially if it comes down to a “package deal” to be struck, probably, in the summer of 2009, in the wake of the elections for the European Parliament, or earlier. In fact, although the Reform Treaty is set to enter into force already on 1 January 2009, it is equally plausible that such personnel decisions be taken not one by one but in a comprehensive bundle, either in June 2009 or even earlier. While a special procedure has been agreed on the possible appointment of a temporary HR/VP already in December 2008, in fact, the choice of the President of Commission may have to follow the June 2009 elections, unless of course the incumbent is preliminarily confirmed for a second consecutive term. For its part, the appointment of the first President of the European Council is inevitably related to the willingness of the Czech Republic and Sweden to relinquish — at least in part — their role as the last “full” rotational EU presidencies in 2009.

But if a comprehensive “package” of nominations is to be delivered, there will be a need for some political balance and personal trade-offs between: a) party “families”, b) big and small countries, c) North and South, as well as East and West. And this could produce unpredictable results: the hope is that policy competence does not lose out to political expediency, and that legitimate personal (and national) ambitions do not hijack the overarching European interests. At any rate, there will inevitably be a trial period for all, in which adjustments and arrangements will have to be made.

4. HOW CAN THE NEW HR/VP OPERATE?

For his/her part, the HR/VP may also have to juggle the two “hats” — or even three, if one considers the implications of chairing the Foreign Affairs Council — more frequently than previously assumed. The new Declaration mentioned above, in fact, insists on the separation between the CFSP/ESDP pillar proper and the community one, and will therefore make it more difficult — politically rather than legally — to “mingle” the two with a view to achieving a more coherent and effective EU external policy.

This is a pity, also because precisely the experience of the past few years in such places as Afghanistan and Iraq has shown that international crisis management requires a varied and complex set of instruments and a high degree of synergy and coordination, rather than separate boxes, approaches, and staffs. Also, insofar as

they have not competed with each other, the two “pillars” of European foreign policy have proved quite complementary: what they still lack is a political synthesis and a joined-up framework.

In order also better to manage such a near-impossible brief, for instance, the HR/VP may have to have a *single cabinet* rather than two — to ensure coherence — and also to appoint *deputies*.

But how many — and what for?

One deputy could for instance cover ESDP (now CSDP) and crisis management proper — whose specifically military component, in turn, will remain more “compartmentalised” than any other aspect of foreign policy — and could also act as chairperson of the PSC.

The Reform Treaty already foresees that the latter be chaired by a “representative” of the HR/VP. This chairperson could either be appointed through a specific Council decision, as is the case with the EU Special Representatives, or be elected by (and arguably from within) the PSC itself. An interesting precedent in this respect was set in 2001 with the election of the Chairman of the EU Military Committee (MC). In the case of the PSC, however, the duration of the mandate — which is three years for the MC — should preferably be in line with that of the other relevant bodies: two and a half years, for instance, renewable once.

It is evident that such an option for the PSC risks separating the specifically ESDP/CSDP (operational) dimension of foreign policy from the CFSP (diplomatic) one. A dedicated deputy for CFSP, however, could also assist the HR/VP when s/he wears the third hat, i.e. chairing the Foreign Affairs Council, and in liaising with the Presidency of the European Council.

Further deputies could deal with those other policies — such as the ENP and, possibly, also development aid (much as the 2005 Progress Report did not include the latter, along with trade, in the likely sphere of competence of the then “Foreign Minister”) — that lie in the grey area across pillars, with shared and overlapping competences, and where some “contamination” may be not only inevitable but also necessary. Yet this will depend primarily on the way in which the next Commission (2009-14) shares out portfolios and responsibilities.

Last but not least, it remains to be seen where exactly to place: a) the coordination of the fight against terrorism, which cuts across competences and pillars; and, now, b) also “*the protection of [EU] citizens*” abroad, that the Reform Treaty has

inserted — at the request of France — among the objectives of the Union’s common external action.

5. HOW CAN THE EEAS BE ORGANISED?

How will all this reflect on the possible make-up of the EEAS? In this case, the wording in the treaty has not changed: its three structural components — *“officials from relevant departments of the General Secretariat of the Council and of the Commission as well as staff seconded from national diplomatic services of the member states”* — remain the same, as does their task (to “assist” the HR/VP in fulfilling his/her mandate).

For the future European “foreign policy chief”, arguably, the EEAS is expected to become at the same time a walking stick and a satellite navigator: it will be to the HR/VP what the Policy Unit has been to the HR/SG. Yet its precise composition, size and internal set-up are not spelt out in the treaty, and even the joint Progress Report from May 2005 says very little in this respect: it is reasonably clear about what the EEAS will probably *not* be, but quite unclear about what it could or should turn out to be.

Paradoxically, one unintended consequence of the UK demands in the treaty negotiations — resulting in the two new Declarations mentioned above — may be that the EEAS, in the end, cling much more onto the Commission’s side than initially imagined. If part of the Council Secretariat moves to the new Presidency of the European Council, in fact, and if another part (the politico-military structures) remains neatly separate from the rest of the external action machinery, it seems obvious that the bulk of the EEAS would come from (and/or rely upon) DG RELEX, and more indirectly also other Commission services that are increasingly relevant to the Union’s external action. If so, the “Vice-Presidential” hat will gain in importance and influence.

To this end, however, the Commission should first get its own act together. On the one hand, it should identify the “core” policy areas it is ready to integrate with the EEAS, starting of course with those in DG RELEX. While trade is likely to remain separate, development could well be, if not fully incorporated, certainly closely associated, as it is crucial for any comprehensive and coherent policy towards Africa.

On the other hand, the Commission should establish, if not a rigid and hierarchical internal “chain of command”, at least an identifiable line of accountability — e.g.

on budgetary and administrative matters — that confers the VP a tangible coordinating and supervisory role in this domain inside the college.

To achieve that, it would suffice to reform some internal rules whereby, for instance, certain decisions by individual Commissioners could be taken only “*in agreement with the Vice-President*”: easier said than done, in the light also of Chris Patten’s experience, but certainly not impossible. By doing so, the HR/VP would turn the Commission’s RELEX service into the organisational “hub” for all those common policies that have external ramifications.

And what could then be the functional and institutional whereabouts of the EEAS?

Generally speaking, it could become a sort of functional *interface* between all the main institutional actors of European foreign policy. For both political and functional reasons, it should not be placed in the Commission or the Council: as also the Progress Report of 2005 underlined, it should be *sui generis*, due also to the difficulty of making the legal and professional backgrounds of its three (or rather 2 + 27) components fully compatible and interoperable with one another. Like the European Defence Agency (EDA) established in 2004, for instance, it could have no tenured staff of its own, at least in its starting phase: but it could easily evolve, if proven effective, into a more stable structure. Unlike the EDA (that essentially hires people from national defence ministries), however, it should offer a common “home” — albeit temporarily — to officials from very different backgrounds.

It could initially include all the main *geographical* desks of both the Commission and the Council. This is a domain where a lot of duplication has been in place (or even created from scratch) over the past few years, and where some streamlining is in order and coordination necessary. Following the “interface” model, this should also include liaising with the Presidency of the European Council and assisting the relevant officials in the preparation of the General Affairs Council to ensure, once again, the necessary coherence.

And what legal status could the EEAS have?

Personnel issues are among the most intractable, although they do not normally grab the headlines, and there is definitely a risk that, over the next months, the entire EU foreign policy machinery be trapped into bureaucratic turf wars instead of remaining focused on delivery. Considering the transitional nature of the arrangements that will probably govern the EEAS at the start, however, a possible solution preserving its *sui generis* nature without opening the Pandora’s box of inventing a new status

for its staff could be based on seconded officials only: from the Commission, the Council General Secretariat, and the member states.

Accordingly, all EU *fonctionnaires* would preserve their status, career path and salaries: they would simply be placed with the EEAS for a few years. Officials from the member states could be either seconded as temporary agents or, possibly, be taken in as Seconded National Experts: this in fact would amount to an indirect form of co-financing that would significantly alleviate the initial costs of setting up the service without changing much (in the light of the experience made so far) the degree of EU “loyalty” of those officials.

The duration of the secondment, however, should be the same for all, whichever “component” they come from. And, presumably, some system of national quotas would be tacitly used, to guarantee the common “ownership” of the new service, but matched with a homogenous process of selection of candidates based on their professionalism.

Finally, the specific nature of the EEAS could be that of an EU agency: neither an EC agency, however, nor a Council one like the EDA, but rather a hybrid new agency, indeed *sui generis*. It could be established through a Council decision (though not through a CFSP instrument) and have its administrative costs covered primarily by the EU budget, thus involving also the European Parliament. This arrangement could well last until 2013, when the current Financial Perspectives expire, before being substantially reviewed in light of the experience.

By 2013, in fact, the whole set-up may have to be checked again: not only will a new EU budget have to be adopted, but the one-third reduction in the size of the Commission foreseen by the new Treaty for 2014 will impact also on the position of the HR/VP. This means that the EEAS *agency* would constitute only a first step towards the establishment of a European “foreign service” worth this name — which, in turn, may end up being not too dissimilar from other already existing “common services”, available to both Council and Commission, like for instance the EU interpretation service.

6. WHAT ABOUT THE RAMIFICATIONS IN THIRD COUNTRIES?

Most of the considerations made above refer primarily to the Brussels “headquarters” of the EEAS, so to speak. There is, however, also a very important external dimension to that, namely its possible articulation in the EU Delegations. In fact, the Reform Treaty maintains i.a. that the Union acquires full legal personality: this

is likely to have a strong impact on the role of the Delegations, although probably only over time.

The Delegations cannot be considered mere instruments of foreign policy, as they also deal with trade, development and now also other issues; nor can their Heads be seen — at least for the time being — simply as instruments of DG RELEX. Once again, the Reform Treaty (like the Constitutional Treaty beforehand) states that they will be placed under the authority of the HR/VP, but does not explicitly mention them in connection with the EEAS.

As a consequence, a degree of “double-hatting” may well have to be introduced also there: its articulation and implementation may vary according to the relative importance of economic or political affairs in the country in question. In some cases, for instance, there could be good reasons for continuing along more traditional lines (predominance of the old community “pillar” and project management: in some ACP countries, for instance), while in others the Head of Delegation could have a much stronger politico-diplomatic profile and background (e.g. in most Asian countries).

While no single rigid “template” needs to be designed in advance, in other words, some “pilot” formats could be put in place, tested, and subsequently reviewed. The objective would be to come to some sort of general reassessment and rationalisation in a few years time, in light of the experience made until then.

Needless to say, the unified regional desks in the Brussels HQs will have to be well connected with the local missions, and *vice-versa*. Good communication lines will have to be established with all the relevant Commission DGs, too, as well as with the services of the European Council’s President.

It will also be interesting to see whether the future Union Delegations are given consular representation, elaborating on both art.20 of the current Community Treaty and the new commitment to the “protection” of EU citizens abroad. Some proposals to this end were put forward in May 2006 — in a Report to the Council and the Commission by former European Commissioner Michel Barnier^[4], prompted by the Asian *tsunami* of December 2005 — in the context of the possible creation of a European civil protection force. They were not given much consideration, as they raised sensitive issues that nobody wanted to address at that time. But moving towards the creation of at least a few experimental “European consulates” would certainly bring the debate on the EEAS to a completely different level.

^[4] For a European civil protection force: Europe Aid, Report by Michel BARNIER, May 2006.

Last but not least, the provisions of the Reform Treaty may also have “cascading” effects on other aspects of the external machinery of the Union. Just to name one: who is going to chair the coordinating meetings of EU member states ambassadors in third countries (or international organisations)?

In the current system, such task falls to the rotating presidency, with additional arrangements for those capitals and regions where the country chairing the EU is not represented (for the time being, there are only three “third” countries in the world where all 27 member states have an embassy or consulate: the United States, Russia and China). In the new system enshrined in the Reform Treaty, could it fall to the local Head of the EU Delegation? After all, s/he would be accountable to the HR/VP, who in turn chairs the Foreign Affairs Council. This is unlikely to happen, however, in such places as Washington, Moscow or New York (at the UN), where the member states will be quite reluctant to be “coordinated” — and even less represented — by the EU s such.

7. WHAT FLEXIBILITY IN FOREIGN POLICY?

Finally, the Reform Treaty — following on the Constitutional Treaty — makes it easier to implement both CFSP and ESDP/CSDP flexibly.

With respect to the possibility of entrusting “*a group of member states*” with a certain operational task, it mainly certifies what has already happened in EU-led international crisis management missions, namely that participation is limited to a (bigger or smaller) number of interested member states, acting with the consensus and in the name of all. The terms of such “entrustment” are normally laid out and negotiated in advance, and therefore do not affect the equal rights of the Union members nor represent a blank check. Still, having such an eventuality mentioned in the new treaty confers more transparency and legitimacy to the existing practice.

As for enhanced cooperation, it remains to be seen^[5] whether it is likely to be “triggered” at all, especially in the domain of foreign policy (where no internal legislation is produced, and consensus is not only the rule but also the preferred option of national diplomacies); or whether it is in the Treaty only as a sort of institutional “deterrent of last resort” against political blockage. In fact, it is hard to imagine what specific functional or geographical area could become the object of such an initiative.

^[5] As illustrated in the chapter on Enhanced Cooperation in this issue.

“Permanent structured cooperation”, however, is a completely different story, as it looks inherently different from both enhanced cooperation proper — it is predetermined in scope rather than generally enabling, and has specific procedures (e.g. no minimum threshold of participants) — and other forms of flexibility based on voluntary contributions and peer pressure. In fact, the commitment is permanent, its nature is structured, and the eligibility assessment is based on performance. Interestingly, also, the traditional political taboo over the unanimity rule on all matters *“having military or defence implications”* is broken here, mainly in order to meet functional goals and overcome potential vetoes — although it resurfaces inside the scheme.

What still looks a bit fuzzy is the extent to which participation is (and will be) determined by political will and/or functional ability. As compared with the convergence criteria for joining EMU enshrined in the Maastricht Treaty, for instance, those listed in Protocol 4 to the Reform Treaty are less specific: they include the achievement of high military operational readiness through national or multinational force packages, and through pooling and/or specialisation of means and capabilities; participation in *“major joint or European equipment programmes”* and in the activities of the EDA; and increased cooperation with a view to meeting agreed objectives concerning *“the level of investment expenditure on defence equipment”*. As such, they leave much room for interpretation, which may well be precisely the point of keeping them a bit vague. There is no clear hierarchy among them either, although much emphasis is put on high military readiness.

What is *“permanent structured cooperation”* then for?

Its essential goal seems to be a general and uniform improvement of European military capabilities to be pursued through: a) explicit (but not “quantified”) functional benchmarks, and b) implicit political incentives (being “in” or “out”) that have all been set in common and in advance. This is indeed something the EU has proved to be good at in the past, although the challenge in this domain is particularly tough. Much will depend on the way in which the specific criteria for participation will be eventually set and implemented, as their degree of inclusiveness will determine also the ultimate shape and scope of the whole scheme.

CONCLUSION

In conclusion, there is now both a great potential for a joined-up common European foreign policy and a stronger demand for it, inside and outside the Union. The Reform Treaty provides a good legal basis for achieving that and giving the Union

the “*politics of scale*” that would permit it to play a more active international role, and one commensurate to its stated ambitions.

However, a few issues still remain unsettled, and the new treaty per se does not offer clear solutions: they concern the precise scope of the HR/VP’s mandate, especially with respect to that of the President of the European Council; the possible shape and status of the EEAS, both in the Brussels “headquarters” and in the EU Delegations; and, more generally, the coordination mechanisms and procedures between all these new bodies and functions in the EU foreign policy “system”.

While there will inevitably be a trial and testing period for all (at least until 2013/14), it would be useful to try and address at least some of these issues already in 2008, in parallel with the treaty ratification process, in order to prevent Brussels from being too busy with bureaucratic and personal turf wars in the years to come, and to allow these new actors to hit the ground running in 2009.

Annex The New Provisions on External Relations of the EU
(as envisaged by CIG 1/1/07 REV 1 October 2007)

Article 9e TEU

1. The European Council, acting by a qualified majority, with the agreement of the President of the Commission, shall appoint the High Representative of the Union for Foreign Affairs and Security Policy. The European Council may end his or her term of office by the same procedure.
2. The High Representative shall conduct the Union's common foreign and security policy. He or she shall contribute by his or her proposals to the development of that policy, which he or she shall carry out as mandated by the Council. The same shall apply to the common security and defence policy.
3. The High Representative shall preside over the Foreign Affairs Council.
4. The High Representative shall be one of the Vice-Presidents of the Commission. He or she shall ensure the consistency of the Union's external action. He or she shall be responsible within the Commission for responsibilities incumbent on it in external relations and for coordinating other aspects of the Union's external action. In exercising these responsibilities within the Commission, and only for these responsibilities, the High Representative shall be bound by Commission procedures to the extent that this is consistent with paragraphs 2 and 3.

Article 13a TEU

1. The High Representative of the Union for Foreign Affairs and Security Policy, who shall chair the Foreign Affairs Council, shall contribute through his or her proposals towards the preparation of the common foreign and security policy and shall ensure implementation of the decisions adopted by the European Council and the Council.
2. The High Representative shall represent the Union for matters relating to the common foreign and security policy. He or she shall conduct political dialogue with third parties on the Union's behalf and shall express the Union's position in international organisations and at international conferences.

Role of Commission in external representation

Article 9d TEU

1. (...) 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.

European External Action Service

Article 13a TEU

3. In fulfilling his or her mandate, the High Representative shall be assisted by a European External Action Service. This service shall work in cooperation with the diplomatic services of the Member States and shall comprise officials from relevant departments of the General Secretariat of the Council and of the Commission as well as staff seconded from national diplomatic services of the Member States. The organisation and functioning of the European External Action Service shall be established by a decision of the Council. The Council shall act on a proposal from the High Representative after consulting the European Parliament and after obtaining the consent of the Commission.

Union Delegations

Article 188q ECT

1. Union delegations in third countries and at international organisations shall represent the Union.
2. Union delegations shall be placed under the authority of the High Representative of the Union for Foreign Affairs and Security Policy. They shall act in close cooperation with Member States' diplomatic and consular missions.

Consistency of external action

Article 10a TEU

3. (...) The Union shall ensure consistency between the different areas of its external action and between these and its other policies. The Council and the Commission, assisted by the High Representative of the Union for Foreign Affairs and Security Policy, shall ensure that consistency and shall cooperate to that effect.

Joint proposals in the field of external affairs

Article 10 b TEU

2. The High Representative of the Union for Foreign Affairs and Security Policy, for the area of common foreign and security policy, and the Commission, for other areas of external action, may submit joint proposals to the Council.

Common Foreign and Security Policy

Article 11 TEU

1. The Union's competence in matters of common foreign and security policy shall cover all areas of foreign policy and all questions relating to the Union's security, including the progressive framing of a common defence policy that might lead to a common defence. The common foreign and security policy is subject to specific procedures. It shall be defined and implemented by the European Council and the Council acting unanimously, except where the Treaties provide otherwise. The adoption of legislative acts shall be excluded. The common foreign and security policy shall be put into effect by the High Representative of the Union for Foreign Affairs and Security Policy and by Member States, in accordance with the Treaties. The specific role of the European Parliament and of the Commission in this area is defined by the Treaties. The Court of Justice of the European Union shall not have jurisdiction with respect to these provisions, with the exception of its jurisdiction to monitor the compliance with Article [III-308] and to review the legality of certain decisions as provided for by Article [III-376, second subparagraph]. The IGC will agree the following Declaration:

“In addition to the specific procedures referred to in [paragraph 1 of Article 11], the Conference underlines that the provisions covering CFSP including in relation to the High Representative of the Union for Foreign Affairs and Security Policy and External Action Service will not affect the existing legal basis, responsibilities, and powers of each Member State in relation to the formulation and conduct of its foreign policy, its national diplomatic service, relations with third countries and participation in international organisations, including a Member State's membership of the Security Council of the UN. The Conference also notes that the provisions covering CFSP do not give new powers to the Commission to initiate decisions or increase the role of the European Parliament. The Conference also recalls that the provisions governing the Common Security and Defence Policy do not prejudice the specific character of the security and defence policy of the Member States.”

CONCLUSION

CONCLUSION

Where do we go from here? The answer to that question, which underlies this whole exercise, implies that we should first understand where we come from and how we got where we are.

The constitutional reform process, now hopefully coming to its conclusion, was launched in 2001 by the Laeken declaration. That document noted that “*citizens are calling for a clear, open, effective, democratically controlled Community approach*” and that therefore “*the Union needs to become more democratic, more transparent and more efficient*” in order to “*bring citizens, and primarily the young, closer to the European design and the European institutions*”. For this, it called for a broad and public debate inside the Convention. It also stated that “*simplification is essential*”.

There is no need to underline that the future Reform Treaty is in practice the exact opposite of what was deemed necessary six years ago: we are faced with complex unreadable texts, negotiated in secrecy, far from public scrutiny. Why did we move, in two or three years time, from a “constitutional” treaty, coherent if not concise, drafted in full transparency by a representative body of national and European elected officials, to the obscure document, substantially similar in content but totally different in form, that we are now submitting to national ratifications? It seems that rhetorical excesses and ambiguous formulations, political weakness and insufficient leadership, led a large part of European public opinion to perceive the Constitutional treaty as a threat and not as a help, as a problem and not as a solution. Governments, in the face of this political reality, then decided to move back to former methods of diplomatic negotiation and less ambitious formulations. The Laeken objectives regarding the public debate, transparency and simplification were abandoned.

In a moment of euphoria, towards the end of the Convention, participants were led to believe, and to state, that the treaty they had just drafted would last for decennia. In fact it was never to be ratified, which shows how difficult it is to be a prophet. How about the Reform Treaty? It would be sad to think that this complex document, full of cross references and after thoughts, protocols and declarations, is the last word in institutional reform. Hopefully, at some future date, it will be possible to codify, clarify and get approved, at least informally, a readable version of European rules and procedures. In the medium term, however, the most probable solution is that the present text will remain essentially as it is, with numerous minor modifications adopted by various flexible procedures it has introduced.

This apparent paradox results from two different aspects of political reality.

On the one hand it is clear that governments and public opinion have lost any appetite they might have had for institutional debate and constitutional reform. The general feeling, after the June and October summit meetings, is one of relief that the matter has been settled one way or another, that the crisis is over, even if some risks continue to loom over the ratification process. There is an implicit hope that it will be possible, for a number of years, to avoid the recurrence of tensions and conflicts in this field, and that the Union will be able to concentrate on policies and actions, rather than on institutions. Public opinion is aware, and presumably approves, of the fact that the normal procedure for treaty modification now implies the calling of a convention, followed by an IGC, but the general understanding is that this lengthy and unpredictable procedure, will, if at all possible, not be used in the near future.

The second element of political reality is, indeed, that the treaty introduces a variety of means whereby the working of the institutions, and if necessary, treaty texts, can be adapted to face new needs, opportunities or challenges without making use of the “ordinary” procedure indicated above (Convention + IGC). Many of these means are mentioned in different sections of this study. With the assent of the European Parliament, the European Council can avoid calling a Convention if this not “justified by the extent of the proposed amendments”. The same article of the Reform Treaty allows modifications of part three of the Treaty on the functioning of the Union (concerning the internal policies and action of the Union) by a unanimous decision of the European Council ratified by member states according to their constitutional procedures. This may seem cumbersome, but it does avoid the calling of a convention and of an intergovernmental conference and gives a sort of routine aspect to treaty modification. Furthermore a simplified revision procedure allows the European Council to decide unanimously to move from unanimity to QMV, or from the special legislative procedure to the normal one, if no national parliament opposes this within six months. Legitimate doubts can be formulated as to the implementation of these clauses, but the fact is that they open up possibilities which were formerly non existent.

Similarly, as indicated in the relevant section of this study, the treaty opens up new possibilities in the field of enhanced cooperation by making these more attractive and more effective, both at the initial stage, at the functioning stage and in relation to non-participants. In the framework of enhanced cooperation, member states can modify, for themselves, the procedures applying to the decision making process

(*passerelle* clauses). Here again doubts can be formulated as to the practical implementation of these innovations, but nevertheless new opportunities are on offer.

The most rational conclusion is that in the short to medium term the European Council will probably avoid making use of the “ordinary” revision procedure, and try to face up to new challenges by making full use of various new modalities of simplified revision procedures or, if applicable, enhanced cooperation.

However rationality is not always the best guide to future developments in the European Union. The implementation of some institutional reforms (on the composition of the Commission or QMV, for instance) has been postponed and this sign of weakness may, when the time comes, be a source of tension and uncertainty. Other reforms, on the presidency for instance, may begin to seem more problematic after a certain period of time. The institutional impact of future enlargements remains to be assessed. These elements of instability could, in given circumstances, combine to impose a new big institutional negotiation even if no single member state is really *demandeur*. In any case those problems will need to be addressed if the Union is to pursue its progress.

More fundamentally the estrangement of public opinion, identified at Laeken in 2001, is not likely to diminish, given that the causes of that estrangement have been, if anything, aggravated by a very technocratic solution to the constitutional crisis. The gradual emergence of a European political space or network, where democratic debate on issues of common interest can be pursued, would certainly bring citizens “closer to the European design and the European institutions” as suggested in the Laeken declaration. The Reform Treaty goes in that direction when it introduces a new role for national Parliaments, politicizes the designation of the Commission President and creates the instruments of a common foreign policy. We can only hope that member states and the common institutions will make full use of these potentialities.

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