

# **The President of the European Council**

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The most divisive issues in the debates that led to the Constitutional Treaty concerned executive power, and the ‘solutions’ embodied in that Treaty were largely carried over into the Lisbon Treaty.<sup>1</sup> The most divisive issue in relation to executive power concerned the Presidency of the EU, who should hold this office and the powers that should be attached thereto. The solutions in the Constitutional Treaty were, once again, carried over to the Lisbon Treaty.<sup>2</sup>

## **1 Process**

The contentious nature of the discussions about institutions was evident in the process used at the Convention. The Convention generally employed a three-stage methodology. There was the listening stage from March till June 2002. This was followed by the examination stage, in which Working Groups considered particular topics. This exercise occupied the latter half of 2002. There was then the proposal stage, in which the Convention discussed draft articles of the Constitution.

The process was very different in relation to institutions. There was no Working Group. It was felt that the issues were too contentious to be dealt with other than in plenary session. This is reflected in the fact that the title on Institutions was

empty in the original preliminary Draft Constitution. The Convention discussions about institutions only began in earnest in January 2003. It rapidly became apparent that there were serious divisions of opinion between the larger and the smaller states, with the Commission lining up with the latter group. The absence of a Working Group on institutions did not however lead to more detailed deliberation in the plenary sessions of the Convention.

The Praesidium submitted its proposals to the Convention in April 2003.<sup>3</sup> Full discussion of the draft articles only occurred in the plenary session on May 15-16 2003,<sup>4</sup> and this revealed serious differences of view. The Praesidium realized that it needed more time for reflection and therefore did not make any amendments to these articles in its initial global draft of May 28 2003.<sup>5</sup> There was no second reading in plenary of these articles. The Praesidium opted instead for consultations with the four constituent groups, governments, MEPs, National MPs, and the Commission, which took place on June 4 2003.<sup>6</sup> Formal text of the revised articles on the institutions only became available on June 10,<sup>7</sup> a mere three days before the concluding session on June 13.<sup>8</sup> It is clear moreover that the Praesidium, and the Secretariat, exercised considerable power in deciding on the ultimate content of these provisions and in deciding which amendments should be adopted.<sup>9</sup>

While the Convention process not perfect the decision to postpone discussion of institutions was nonetheless readily explicable. It was clear that this topic would be divisive. If it had been placed on the agenda in the latter part of 2002, then it would have over-shadowed the other work. The contrast with what occurred is instructive. The Convention, via Working Groups, concentrated on important issues. There were

differences of opinion on these matters, but they were less marked than those on institutions. Progress on issues assigned to Working Groups allowed the Praesidium to publish the preliminary Draft Constitution in the autumn of 2002. This strategy also enabled discussion about institutions to take place ‘off-line’ in 2002.

The issue of the institutional division of power, especially executive power, was however like Banquo’s ghost, ever present, lurking in the background. As Grevi notes, the key phrase in shaping the formal Convention agenda for 2002 may have been ‘everything but institutions’, but the key phrase for the debate in other circles was ‘nothing but power’.<sup>10</sup>

## 2 President(s) of the Union: Hats and Labels

The debate about the Presidency of the EU was, as stated above, the most divisive of the institutional issues considered in the Convention on the Future of Europe. There was much talk of ‘hats’.

A prominent version of the ‘single hat’ view was that there should be one President for the Union as a whole; the office of President should be connected formally and substantively with the locus of executive power within the Union; and the President of the Commission should hold this office. The Presidency of the European Council should continue to rotate on a six-monthly basis. The real ‘head’ of the Union would be the President of the Commission, whose legitimacy it was hoped would be increased by election.

A prominent version of the ‘separate hats’ view was that there should be a President of the Commission and a President of the European Council, and that executive power would be exercised by both. It was central to this view that the Presidency of the European Council would be strengthened. It would no longer rotate between states on a six-monthly basis. It was felt that this would not work within an enlarged Union, and that greater continuity of policy would be required. This view was advocated by a number of the larger states, but was opposed by some of the smaller states, which felt that the Presidency of the European Council would be dominated by the larger Member States.

The Convention proceedings were influenced by the external discourse on this issue. The membership of the Convention altered in late autumn 2002, with the ‘invasion of the foreign ministers’,<sup>11</sup> the French and German foreign ministers joined the Convention, followed by those from some other countries. Change inside the Convention was matched by political developments outside its portals. The larger Member States, Spain, the UK and France, made it clear that they subscribed to the ‘separate hats’ view. The idea of a longer-term strengthened Presidency of the European Council was central to the ‘ABC’ view, expressed by Aznar, Blair and Chirac.<sup>12</sup> In January 2003 Germany was brought on board. This was made clear in a Franco-German paper, in which Germany accepted the long-term Presidency of the European Council, the *quid pro quo* being that France accepted that the Commission President should be elected.<sup>13</sup>

The Franco-German paper, combined with the ‘ABC’ view, shaped developments inside the Convention in early 2003. It provoked a fierce reaction from

the smaller states, which saw the idea of long-term Presidency of the European Council as encroaching on the power of the Commission President, and as leading to acrimony and stalemate between the two Presidents.<sup>14</sup> While the revolt of the smaller states appeared to have dealt the Franco-German proposals a serious blow, it was nonetheless the case that the 'joint proposals were to be the template for all future discussions on the institutional settlement'.<sup>15</sup>

Giscard d'Estaing may well have inclined to the views of the larger Member States. The Franco-German paper, combined with the opinions of the UK and Spain, nonetheless had a marked impact on his thinking. He was not about to produce a Draft Constitution with key provisions about the institutional disposition of power that were opposed by the larger Member States. The announcement of the provisions on the Presidency of the European Council was nonetheless dramatic. The proposals were leaked to the press on April 22 2003, just as he was unveiling them to the Praesidium. The proposals 'provoked shock and awe in about equal measure, particularly among the integrationist Convention members from the European Parliament and some of the smaller Member States'.<sup>16</sup> It is safe to say that they were not welcomed by the Commission either.

The 'shock and awe' provoked by Giscard's proposals was explicable because they not only provided for an extended Presidency of the European Council, which was to be the highest authority of the Union, but also for a 'board' of seven including a Vice-President, the EU Foreign Minister, two other members of the European Council, plus the Presidents of Ecofin and the Justice and Home Affairs Council. This reconfigured European Council was to have its own bureaucracy.<sup>17</sup> The 'most

developed' form of these proposals did not survive long within the Convention. Substantial parts hit the 'cutting room floor' and those opposed to the 'separate hats' view congratulated themselves on curbing the Giscardian vision.

The result as expressed in the Constitutional Treaty nonetheless embodied the central feature of the 'separate hats' view. Article I-22(1) CT stipulated that the European Council shall elect a President, by qualified majority, for two and half years, renewable once. This same provision has been carried over into the Lisbon Treaty and is now contained in Article 15(5) TEU.

### 3 President(s) of the Union: Power and Authority

The victory for the 'separate hats' view is only part of the story. Article 15(5) tells us that there is going to be a long-term President of the European Council. It tells us nothing about the division of power between the President of the Commission and the President of the European Council. The nature of their respective powers *de jure* and *de facto* would be crucial in shaping executive power within the EU. It is therefore unsurprising that there was much contestation as to the powers of the President of the European Council. It is only through an understanding of the contending proposals that one can appreciate the provisions that were finally agreed on in the Lisbon Treaty.

#### **A The Far-Reaching Vision: The UK Paper and the Giscardian Vision**

A vision of the powers of the President of the European Council emerged from what Grevi has termed a non-paper leaked by the UK government in January 2003.<sup>18</sup> This paper envisioned the President of the European Council preparing and controlling its agenda; developing jointly with the Commission President the multi-annual strategic agenda; being head of the Council Secretariat that would become ‘his administration’; chairing the General Affairs Council; supervising the work of sectoral Council formations; approving agendas for sectoral Councils; chairing trialogue meetings with the Commission and the European Parliament; attendance at Commission meetings as observer when the President of the European Council so decided; ‘ownership’ of major summits with great powers; co-ordination and supervision on aspects of crisis management and defence.<sup>19</sup>

A similarly expansive view of the European Council and the role of its President were apparent in the original version of the institutional proposals submitted by Giscard d’Estaing to the Convention in April 2003.<sup>20</sup> The European Council was characterized as the ‘highest authority of the Union’, to be chaired by the long-term President who would hold the post for two and half years, renewable once. The President would ‘prepare, chair and drive’ its work, represent the EU to the outside world, and the General Affairs Council would be chaired by the Vice President of the European Council. The President of the European Council would be supported by a board, composed of the President, Vice-President, two members of the European Council, the EU foreign Minister, and the chairs of the ECOFIN Council and the Council on Justice and Security. This schema thereby provided for the European Council to be highest authority within the EU, to be run by a powerful cabinet, which

would be chaired by its new President. It is unsurprising that these proposals provoked fierce criticism,<sup>21</sup> more especially because they were part of a package of institutional provisions that diminished the role of the Commission and upset pre-established orthodoxy on qualified majority voting in the Council. The original version of Giscard's proposals survived for barely 24 hours, and revised drafts were produced by the Praesidium, which significantly modified the earlier schema.

### **B The Limited Vision: The Commission and the IGC**

The power accorded to the European Council and its President continued to be debated in the IGC convened to consider the draft Constitutional Treaty produced by the Convention.

The Commission had, not surprisingly, been opposed to the idea of a long-term Presidency of the European Council. When it became clear that this was embodied in the draft Constitutional Treaty produced by the Convention, the Commission focused its efforts in the subsequent IGC on limiting the power and authority that would be wielded by the new President. Thus the Commission stated that despite its reservations about the Presidency of the European Council 'the Commission does not propose to bring into question the compromise which the Convention reached after prolonged debate'.<sup>22</sup> It nonetheless expended considerable efforts in constraining the powers of the new Presidency.

It was vital, said the Commission, to maintain the balance of the President of the European Council's role defined by the Convention.<sup>23</sup> It argued that any extension



of the President's duties beyond chairing meetings of the European Council and representing the Union in relation to the CFSP 'would inevitably change the institutional architecture agreed in the Convention and create confusion as to how responsibility was shared'.<sup>24</sup> The President of the European Council should not organise the work of the Council, since a person 'who is not accountable for his/her action to any parliamentary assembly cannot exert influence over the *modus operandi* of the Council, which is supposed to be transparent and democratic'.<sup>25</sup> The extension of judicial review to acts of the European Council was a further element in the Commission's strategy for limiting its power.<sup>26</sup>

### **C A Via Media: The Lisbon Treaty**

The provisions concerning the distribution of power between the President of the European Council and the President of the Commission that finally emerged in the Constitutional Treaty were largely taken over into the Lisbon Treaty. They are central to the division of executive power, but are not however simple to divine.<sup>27</sup>

We can begin with the legal provisions relating to the European Council. These contain a subtle modification of established orthodoxy. Prior to the Lisbon Treaty Article 4 EU stated that the European Council shall provide the Union with the necessary impetus for its development and shall define the general political guidelines thereof. This has been modified by Article 15(1) TEU, which states that the European Council shall provide the Union with the necessary impetus for its development, and shall define its general political directions *and priorities*. It is the addition of the

reference to priorities that is the formal novelty in Article 15(1) TEU. This is subject to the caveat that the European Council does not exercise legislative functions.

Article 15(6) TEU specifies the powers of the President of the European Council. It states that the President shall chair the European Council and drive forward its work; shall ensure preparation and continuity of the European Council's work with the President of the Commission, and on the basis of the work of the General Affairs Council; shall endeavour to facilitate cohesion and consensus within the European Council; and shall present a report to the European Parliament after each of its meetings; and the President shall ensure the external representation of the EU on issues concerning its CFSP, without prejudice to the responsibilities of the Union Minister for Foreign Affairs.

The provisions concerning the Council, and its relationship with the European Council, are also vital for an understanding of the President's powers. The original Giscardian proposals for the European Council provided, as we have seen, for a crucial overlap with the Council, since the Presidents of Ecofin and the Justice and Home Affairs Council were to be members of the European Council. This would have enabled the European Council and its President to exert a direct influence on the workings of important Council formations, more especially because the original Giscardian proposals provided for the Vice-President of the European Council to chair the General Affairs Council.

The Lisbon Treaty does not encapsulate the degree of power for the European Council within the Council as envisaged either by the Giscardian or UK proposals. It is for the European Council acting by qualified majority to adopt the list of Council

configurations,<sup>28</sup> although pending this decision, the General Affairs Council, acting pursuant to transitional provisions in the Lisbon Treaty, produced a list of Council formations.<sup>29</sup> It is nonetheless clear from Articles 16(6) and 16(9) TEU that the Presidency of the Council configurations, other than Foreign Affairs, is to be held by Member States on the basis of the team Presidency, and a draft Decision to this effect was appended to the Lisbon Treaty.<sup>30</sup> This was to meet the fears of the smaller states that a long-term Presidency of the European Council would lead to domination by the larger states. The draft Decision setting out the team Presidencies has now been acted on.<sup>31</sup>

The essence of the scheme is that the Presidency of the Council, with the exception of the Foreign Affairs configuration, is held by pre-established groups of three Member States for a period of 18 months. The groups are composed on the basis of equal rotation among the Member States, taking into account their diversity and geographical balance within the Union. Each member of the group in turn chairs for a six-month period all configurations of the Council, with the exception of the Foreign Affairs configuration. The other members of the group assist the Chair in its responsibilities on the basis of a common programme. It is open to members of the team to decide alternative arrangements among themselves. The scheme also makes provision for chairing of preparatory bodies.<sup>32</sup> A Decision has been made by the Council to implement the regime on team Presidencies,<sup>33</sup> and the Council has modified its Rules of Procedure to accord with the new modalities.<sup>34</sup>

The influence of the European Council, and hence its President, is nonetheless still apparent within the Council. It is, as we have seen, the European Council that

adopts the decision establishing the Council configurations,<sup>35</sup> and the Presidency of those configurations, in accord with criteria in the Treaty.<sup>36</sup> The relationship between the European Council and the General Affairs Council (GAC) is especially significant. Article 16(6) TEU provides that the GAC is to ensure consistency in the work of different Council configurations. It also prepares and ensures follow-up to meetings of the European Council, in liaison with the Commission and the President of the European Council.

This is significant because of the centrality of the GAC to the functioning of the Council.<sup>37</sup> The obligation cast upon the GAC to prepare and ensure follow-up to meetings of the European Council provides the latter, and hence its President, with an important power. It was of course the case that even prior to the Lisbon Treaty the ‘conclusions’ reached by the European Council would frame detailed deliberations in the Council and in the Commission.<sup>38</sup> This was especially so where the European Council expressed specific policy objectives, as was increasingly common. Article 16(6) TEU is significant nonetheless. It creates a cognisable legal obligation on the GAC to ensure that the European Council’s conclusions are followed up. It creates a more formal mechanism than hitherto for the European Council to influence the priorities of the EU. It may enable it to press for legislation on specific issues, where this is necessary to effectuate conclusions reached by the European Council. The formal right of legislative initiative would remain with the Commission. The obligation on the GAC to ensure that the meetings of the European Council are followed up may nonetheless require legislation on specific issues deliberated on by the European Council.

The influence of the President of the European Council is also apparent in the proximate connection between the holder of this office and the regime of team Presidencies of the Council. Thus it is not fortuitous that the background briefing to a meeting of the GAC held on 7 December 2009, which dealt with the 18 month programme of the Spanish, Belgian and Hungarian delegations for January 2010- June 2011, stated that the programme would require close cooperation with the new President of the European Council and the High Representative.<sup>39</sup> This is evident once again in the new Council Rules of Procedure, which emphasize more generally that the draft 18 month programme of the three Member States taking on the Presidency of the Council is to be prepared in close cooperation with the Commission, the President of the European Council, and with the President of the Foreign Affairs Council with regard to that configuration's activities during that period.<sup>40</sup>

#### 4 Shared Executive Power: Contending Arguments

The Treaty deliberations concerning executive power were, as we have seen, contentious and complex. Shared executive power won the day. The rest as they say is history. It is nonetheless important to stand back and consider this picture of executive power in the EU.

##### **A The Argument against Shared Executive Power**

The principal argument against divided executive power was based on the simple proposition that two Presidents of the Union is one President too many. There should

as a matter of principle be one locus of executive power within the Union, by parity of reasoning with domestic polities, and this should be the President of the Commission, who is responsible to the European Parliament.<sup>41</sup> The EU should therefore embrace a more parliamentary-type system, in which there is a single locus of executive power, the holder of which is responsible to the electorate, albeit indirectly through election by the European Parliament. The voters will then be able to express their preferences by changing the composition of the European Parliament, which will impact on the person indirectly elected as the President of the Commission.

The divide in executive power was also deprecated on grounds of clarity and transparency. An aim of the Laeken Declaration was to render EU decision-making clearer and simpler. This has not been achieved in relation to executive power. An informed citizen, reading the Lisbon Treaty assiduously, would still find it difficult to understand the distribution of executive power. The lack of clarity as to the respective powers of the two Presidents will, it is argued, lead to confusion of responsibility.

The new Presidency of the European Council has also been opposed on the ground that it would have an adverse impact on the relationship between large and small states, and there is evidence of opposition to this institutional change by some smaller states in the Convention.<sup>42</sup>

## **B The Argument for Shared Executive Power**

The argument for shared executive power is premised on the nature of the EU. Inter-institutional balance of power, rather than the separation of powers, has always

characterised the EU. The major institutions represent different interests, such that it is consonant with principle for executive power to be shared by a body representing state interests, and a body representing the Union interest, each of which is legitimated in different ways. Viewed from this perspective the Lisbon Treaty is a continuation rather than a departure from the status quo, since shared executive power was the order of the day both *de jure* and *de facto* under the EC Treaty, even if the nature of the sharing may have altered to some degree under the Lisbon Treaty.

The contention that shared executive power will lead to confusion is based in part on the assumption that it would be a novel development. This does not accord with reality. Executive power in the EU has not hitherto resided in a single institution.<sup>43</sup> It was exercised in part by the Commission, which had a plethora of executive-type functions, including administration of legislative programmes, planning the legislative agenda, negotiation of Treaties with third parties, and framing the budget. The Council<sup>44</sup> and the European Council also wielded executive power prior to the Lisbon Treaty. The European Council was especially important in this respect.<sup>45</sup> The previous Treaties said relatively little about its powers. The reality was that nothing of major importance happened without its approval. It had a say in the legislative agenda, in setting the Union's priorities, and in deciding on the pace and direction of change within the Union. The division of executive power between the Commission and European Council may not be neat, but it has been the reality, especially since the SEA. Moreover the two institutions have for the last decade worked well symbiotically in developing the Union's agenda.

The attempt to impose a single executive power could have been counter-productive. Thus there might have been real tensions if there had only one President of the Union, the Commission President, more especially if the incumbent were to have chaired the European Council. The Commission President might be subject to conflicts of interest, resulting from the desire to press the Commission view, while at the same time retaining the confidence of the Member States within the European Council and articulating their views.

It should also be recognized that the consequences said to follow from a single locus of executive power would not have been feasible without radical change in the EU institutional structure. The voters would not have been able to remove those whom they disliked and thereby change policy, because even if the Commission President could be indirectly removed in this manner, that would still leave state representatives in the Council and the European Council, who would continue to have major input into agenda setting. The reality is that even if we had opted for the single Presidency located in the Commission, combined with the six-monthly rotation of Presidencies of the European Council, executive power would continue to have been divided between the Commission and European Council. The assumption that a single President for the EU located in the Commission would have meant a unitary locus of executive power is therefore a non-sequitur, and this is so even if the Commission President had chaired the European Council. The substance of executive power would still have remained divided between the Commission and the European Council.

It should moreover be acknowledged that clarity as to executive power in nation states is also imperfect. A national constitution may 'locate' executive power



within a certain institution. This does not however mean that the citizen will be clear as to who exercises particular aspects of executive power. The assumption that executive power in nation states is ‘unitary’ is often belied by legal and political reality. A more realistic picture would recognise that such power is exercised not only by ministers that form the ‘government’ plus the ‘formal bureaucracy’, but also by a plethora of other agencies and firms to which power has been contracted-out.

It is moreover not self-evident that smaller states would suffer under the new regime. The suggestion that the new Presidency would somehow inevitably be occupied by a candidate from the larger states has been belied by the first appointment to the post, Herman van Rompuy, the Belgian Prime Minister. There is no reason to believe that smaller states within the European Council will fare less well under the new Presidency as compared to the status quo ante. The approach within the European Council has generally been based on building consensus,<sup>46</sup> and it is not apparent why the concerns of smaller Member States in this process should be accorded lesser status as compared to the status quo ante where the Presidency was held in six monthly rotations by different Member States. It is true that under the Lisbon regime the smaller states lose the opportunity to chair the European Council for six months, but so too do the larger states. The six-monthly rotation may have had symbolic value for the smaller states, but we should surely keep this in perspective, given that in a Union of twenty seven states it would only come round every 13 years, and given also that it imposed significant financial and administrative burdens.

The argument for shared executive power also rests on the ‘lessons of history’. A constant theme in the EU’s history is that institutions have developed, often outside

the strict letter of the Treaties, as a response to concerns relating to the institutional balance of power. The European Council began life in this way, as did the Comitology committees. If executive power had been concentrated within a single Presidency of the Commission, and this did not prove acceptable to the Member States, then it could well have led to institutional developments outside the strict letter of the Treaty. Better therefore to recognize and structure shared executive power within the Lisbon Treaty, than have it develop outside this remit.

## 5 Shared Executive Power: Institutional Interaction

### **A President of European Council and President of Commission**

The Lisbon Treaty embodies a regime in which executive power is shared between the European Council, the Council and the Commission, with agencies also fulfilling executive functions within their assigned areas. This is, as we have seen, a continuation rather than a departure from the status quo, since the legal and political reality under the EC Treaty was that executive power was shared between these players. This does not however mean that the precise mode of sharing is the same post-Lisbon as it was hitherto. Nor does it tell us how the component parts of the executive will inter-relate in practice in the post-Lisbon world. The ‘answers’ to these issues will unfold over time. The Treaty provisions will frame the nature of this inter-relationship, but they will not be determinative in and of themselves.

The legal provisions affirm the regime of shared executive power and are delicately balanced. They frame but do not determine the inter-institutional balance of

executive power, which will be decided by political forces. It is likely that the President of the European Council will exert greater influence over priorities and the legislative agenda than before, because the office will be held for up to five years. The incumbent can develop a vision for the EU that was more difficult with the six-monthly rotation system, notwithstanding the reforms made by the Seville European Council, more especially because he will not be preoccupied with running a nation state at the same time.<sup>47</sup> Successive Presidents of the European Council may also wish to leave a ‘legacy’ on the EU, in the form of an agenda that they will press for during their term of office. Institutional support will be of importance. The European Council has not hitherto had an institutional support mechanism to rival that of the Commission, but this has not prevented it from exercising real input into the Union’s development. The Lisbon Treaty provides that the European Council is to be ‘assisted’ by the General Secretariat of the Council of Ministers.<sup>48</sup> It would be surprising if this did not blossom into institutional support suited to the needs of the ‘new’ European Council.

Having said this, it is clear that the Commission, and its President, will continue to be important in setting the EU’s overall agenda. It is the Commission that is to initiate the annual and multi-annual programming with the aim of securing inter-institutional agreement, and the Commission President co-operates with the President of the European Council in ensuring the preparation and continuity of the work of the European Council. The Commission President can moreover rely on the force of the Commission bureaucracy.

It is interesting to reflect on the likelihood of conflict or co-operation between the European Council and Commission, more especially in the light of the fears expressed in the Convention proceedings that a regime of two Presidencies would lead to acrimony and stalemate. It is possible that there will be conflict between the European Council and the Commission, redolent of the inter-institutional tensions between the Council and Commission in the late 1960s-1970s,<sup>49</sup> with the result that coherence would suffer, and any agreed initiatives would be partial and fragmentary. There will doubtless be issues on which the two Presidents disagree, and we should keep a watchful eye on any attempt by the President of the European Council to circumvent or bypass the Commission. There are nonetheless incentives for the Presidents to co-operate and develop a coherent agenda, as recognized and emphasized by van Rompuy.<sup>50</sup>

First, inter-institutional tension leading to failure to develop a coherent agenda would be detrimental to the EU, a consequence that would be in the interest of neither President. They would both be held responsible irrespective of whether the ‘objective reality’ was that one was more to blame than the other.

Second, if shared executive power fails the consequences for the two Presidents will be uncertain. They might hope that any future allocation of executive power would be more unequivocally in their favour, but they could not be certain. The only certainty would be that the future disposition of executive power would be uncertain. It might incline towards a single locus of executive responsibility, but the beneficiary would not be readily predictable. It might be the President of the Commission, but it might be the President of the European Council, along the lines of

the Giscardian vision presented to the Convention. This uncertainty will be a factor inclining the relevant players to co-operation rather than conflict and intransigence.

Third, the respective ‘constituencies’ of the President of the European Council and the President of the Commission is likely to be a further factor engendering co-operation. The fear of conflict is based in part on the assumption that each will lead a united team, which will have strongly opposed views. The reality is more complex.

The President of the European Council will undoubtedly occupy a powerful position, and ‘enhance a sense of shared direction’.<sup>51</sup> It should nonetheless be recognized that the interests of the President’s immediate constituency, viz the Member States, will not be homogenous. We know that the smaller states fear domination by their larger neighbours, and feel that they might be better ‘protected’ by the Commission. Nor should it be pre-supposed that the larger Member States necessarily have an identity of interest on the substantive direction of EU policy. The priorities that emerge from the European Council are likely therefore to be the result of compromise between the Member States. The European Council may be intergovernmental in institutional terms. It would however be mistaken to think that this will necessarily translate into intergovernmentalism and states’ rights in relation to the substantive direction of EU policy.

The President of the Commission’s ‘constituency’ under the Lisbon Treaty is equally interesting. The incumbent will have considerable power. The President may however also face contending pressures from his or her constituency. The indirectly elected President will have to take account of the interests of those in the European Parliament that voted him into office on the promise or expectation of certain policy

initiatives. The Commission President will however be wary of alienating those in the European Parliament of a different political persuasion, and wary of offending state interests if the President hopes for a second term. There may also be constraining influences from the other Commissioners. It would be surprising if they did not reflect some real diversity of opinion on the EU's priorities. This diversity will play out in the multi-annual agenda. It will be for the Commission President to balance the legitimating force that this can bring to the EU's agenda, with the need to fulfil the expectations of the European Parliament party or coalition that put him into power.

Fourth, the *modus operandi* of the European Council and Commission in the past is indicative of likely co-operation in the future. They have worked symbiotically and to good effect on many issues, especially since the passage of the SEA. The Commission has frequently fed policy initiatives that it wishes to advance to the European Council, and gained its imprimatur. The Commission's shift in thinking about the strategy for the single market in the 1990s is but one example of this.<sup>52</sup> Winning the European Council's approval for the general direction of policy in a particular area facilitates the Commission's task when fashioning more specific legislation to put that policy into effect. It is to be hoped that this co-operation will not change under the new order, notwithstanding the increased power of the President of the European Council. The inter-relationship between Commission and European Council in setting priorities and the multi-annual agenda may indeed lead to greater coherence than hitherto. The European Council's contribution to the overall policy agenda has been real, but somewhat fragmentary and unpredictable, because of the

six-month limit on the Presidency. The five-year Presidency of the European Council is intended to allow greater planning and coherence than hitherto.

The final factor in engendering a climate of co-operation rather than conflict is law. The legal provisions of the Lisbon Treaty embody shared executive power. This is not just in the very instantiation of the extended Presidency of the European Council alongside the President of the Commission, but also in their respective powers concerning the setting of priorities and the multi-annual agenda. These powers are delicately balanced in the manner adumbrated above. The European Council has express power to define priorities, while the Commission retains the duty to initiate the multi-annual agenda with a view to securing inter-institutional agreement. Neither side can therefore use the law to argue that it should have exclusive executive power, but both can resort to legal argument to delimit the sphere of executive power possessed by the other.

## **B Presidency of Council Configurations**

The discussion thus far has largely concentrated on the inter-institutional relationship between the Commission and the European Council in relation to setting the agenda and the priorities in the post-Lisbon world. We should not however forget the Council in this respect. We have already seen that initiatives have been taken to try to ensure a ‘fit’ between the Council programme, and that of the Commission and European Council.<sup>53</sup> This aspect of the inter-institutional triangle with regard to agenda setting and priorities may yet prove to be the most interesting and unpredictable.

The Commission and the President of the European Council are both there for the medium term. The Member State is part of a trio of states with responsibility for 18 months, but holds the Presidency of the Council for six months. It will therefore, as in the past, seek to prioritize and achieve certain goals within that period, as exemplified by the Spanish Presidency in the first half of 2010.<sup>54</sup>

The Spanish foreign minister stated in December 2009 that Spain would play a supporting role to the new President of the European Council and the High Representative.<sup>55</sup> There can nonetheless be strains with the President of the European Council and/or the Commission as to the issues that should be accorded priority during this short six month time-frame. There can also be tensions as to who ‘represents’ the EU, as revealed by the ‘disagreement’ between Spain and the President of the European Council as to who should meet President Obama and where this should take place.<sup>56</sup>

## 6 Shared Executive Power: Accountability

It is important to consider the emerging regime in terms of accountability. This inquiry could well occupy a book<sup>57</sup> in itself. What follows does not therefore purport to be an exhaustive analysis. The object is rather to identify some of the central issues concerning accountability.

### **A Legal Accountability: Closing the Gaps**



The Constitutional Treaty left the general structure of the ECJ's jurisdiction unchanged, but it did close a number of legal gaps by rendering agencies and other bodies subject to judicial review. This was taken over into Lisbon Treaty, thereby giving formal Treaty imprimatur to purposive judicial decisions to bring such agencies within the purview of legal accountability.<sup>58</sup>

The draft Constitutional Treaty that emerged from the Convention did not however render the European Council subject to judicial review.<sup>59</sup> This was anomalous given its powers. This matter was addressed by the IGC. The relevant Article was amended so as to render the European Council subject to review in relation to acts that are intended to produce legal effects vis-à-vis third parties,<sup>60</sup> with a similar amendment concerning failure to act.<sup>61</sup> The relevant provisions have been adopted in the Lisbon Treaty.<sup>62</sup> It is clear moreover that binding acts of the European Council could also be challenged indirectly through national courts via the preliminary ruling procedure. The European Council is an institution of the EU,<sup>63</sup> and hence is susceptible to this procedure in relation to the validity or interpretation of its acts.<sup>64</sup>

It should also be recognized that inter-institutional disputes concerning the disposition of executive power could end up before the ECJ. It has been argued above that there are cogent reasons to expect the European Council and the Commission to co-operate rather than conflict. If however co-operation breaks down then recourse to the ECJ will always be a possibility. The ECJ would have jurisdiction to hear such actions under Article 263 TFEU.

## **B Political Accountability: Securing Political Responsibility**

It can be accepted that political accountability within a regime of shared executive power will be more complex than in those regimes where such power is concentrated within the ‘unitary executive’. A regime of shared executive power will not have a single line of executive accountability. The force of this distinction must however be qualified in at least two ways.

First, the reality is that even in political systems where all executive authority can be formally traced to a single locus, most commonly the government in parliamentary systems, there will nonetheless be considerable problems in securing accountability given that executive power is now exercised in various ways by a plethora of bodies within the modern state. Thus a common feature in many political systems is for executive power to have been dispersed across a range of agencies and other bodies outside the core executive, and for some aspects of executive power to have been contracted-out to private bodies. This leads to constant challenges to decide how best to secure accountability within this more complex administrative state. The challenges in this regard are especially marked for those bodies accorded executive power where part of the very rationale for their creation is that they should have some decision-making autonomy in relation to the core executive.<sup>65</sup>

Secondly, Parliamentary political systems in which executive power is located within a ‘single’ executive may well foster electoral accountability: the electorate can throw out the party whose policies they dislike. It should also be recognized that systems with strong, unitary executive power can often lead to problems of political

accountability between elections. These problems have been especially prevalent in the UK, which has in the past been described as ‘elective autocracy’, whereby a government elected with a reasonable majority has very considerable power and the legislature’s influence is limited.

The appointment procedure for the Presidency of the European Council places the power firmly in the hands of that body. Thus the Lisbon Treaty provides that 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 the President's term of office by the same procedure.<sup>66</sup> The choice of the President of the European Council was always going to be intensely political in the broad sense of that term, as attested to by the politicking that preceded appointment of the Belgian Prime Minister, Herman van Rompuy, to the post.<sup>67</sup> Commentary on the appointment was largely critical, based in part on the procedure, with the decision being concluded over dinner by the heads of state, and in part on substance, in the sense that the chosen candidate was relatively unknown. Indeed critics over the EU did not know whether to cavil at the appointment of a person regarded as relatively light weight on the international scene, or to criticize the EU for the fact that it might have appointed someone such as Tony Blair, who would have been more ‘Presidential’, thereby fostering fears of a super state.

It would nonetheless be premature to draw conclusions concerning the role of the Presidency of the European Council under its first incumbent. Herman van Rompuy proved himself to be a skilled politician as Prime Minister of Belgium, helping to diffuse an impending crisis between the principal groups within that

country. Quiet diplomacy and negotiation skills will be valuable in the new job, and may well achieve much, both internally and externally, given the need for the President to forge consensus with the heads of state and to liaise with the Commission, Council and European Parliament.

The reality under the Lisbon Treaty is that the multi-annual agenda will be the result of a discourse between the major institutional players. This discourse will incorporate voter preferences partly through the Commission President, and partly through consultation with the European Parliament on the multi-annual agenda. The discourse will also include state interests as mediated through the European Council and the Council. This process may be ‘messier’ than that in states with a single executive power. It does however avoid the kind of executive dominance over the political agenda adverted to above. The dialogue fostered by shared executive power can be healthy in making actors re-think their own pre-conceived positions concerning the direction of EU development. The dangers of this leading to conflict between Commission and European Council are, as we have seen, more likely to be outweighed by factors that engender co-operation.

## 7 Conclusion

There was greater disagreement about the institutional provisions in the Convention on the Future of Europe than any other issue, the subsequent IGC devoted the majority of its time to them and they were taken over largely unchanged into the Lisbon Treaty. This is unsurprising. The detailed provisions on executive power

embody a view as to the nature of the EU polity, and the balance therein as between intergovernmental and supranational forces.

There is little doubt that some have been disappointed by the outcome. Those who hoped for a single locus of executive responsibility, the Commission President, legitimated through election by the European Parliament, with continuation of the six-monthly Presidencies of the European Council, will not be content with the outcome. There are undoubtedly arguments for this vision of the EU polity.

It has not however been incorporated within the Lisbon Treaty, which contains a regime of shared executive power. It has been argued that this vision is sustainable in principle and preferable in pragmatic terms. Moreover while there may inevitably be differences of view on a particular issue between the two Presidents, there are several factors inclining them towards co-operation rather than conflict. We should moreover avoid hasty conclusions based on a few months of the new regime. The relationship between the two Presidents will take time to settle and will evolve over time. It may well be that the more problematic part of the institutional triangle is the relationship between both Presidents and the Member State that chairs Council formations for a six-month period. The latter will have goals that it wishes to secure within its six-month tenure as the lead member of the team system introduced by the Lisbon Treaty. The EU is mindful of the need to ensure coherence between these goals and the more general EU objectives developed by the Presidents of the European Council and the Commission.<sup>68</sup> It remains to be seen whether this can be achieved.

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<sup>1</sup> P Craig, 'European Governance: Executive and Administrative Powers under the New Constitutional Settlement' (2005) 3 I-CON 407; Y Devuyst, 'The European Union's Institutional Balance after the Treaty of Lisbon: "Community Method" and "Democratic Deficit" Reassessed' (2008) 39 Georgetown Jnl Int Law 247.

<sup>2</sup> P Craig, *The Lisbon Treaty, Law, Politics and Treaty Reform* (Oxford, Oxford University Press, 2010) ch 3.

<sup>3</sup> CONV 691/03, Institutions, Brussels 23 April 2003; CONV, Summary Report of the Plenary Session – Brussels 24 and 25 April 2003, Brussels 30 April 2003.

<sup>4</sup> CONV 748/03, Summary Report of the Plenary Session—Brussels 15 and 16 May 2003, Brussels 27 May 2003. See also, CONV 709/03, Summary Sheet of Proposals for Amendments relating to the Union's Institutions, Brussels 9 May 2003.

<sup>5</sup> CONV 783/03, Summary Report on the Plenary Session – Brussels 30 and 31 May 2003, Brussels 16 June 2003.

<sup>6</sup> CONV 770/03, Part I, Title IV (Institutions) -- Revised Text, Brussels 2 June 2003; CONV 771/03, Consultations with the Component Groups, Brussels 2 June 2003.

<sup>7</sup> CONV 797/03, Revised Text of Part One, Brussels 10 June 2003.

<sup>8</sup> CONV 814/03, Summary Report of the Plenary Session – Brussels 11 and 13 June 2003, Brussels 19 June 2003.

<sup>9</sup> 00-00.

<sup>10</sup> G Grevi, 'The Europe We Need: An Integrated Presidency for a United Europe' (European Policy Centre, December 2002) 5.

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<sup>11</sup> P Norman, *The Accidental Constitution, The Making of Europe's Constitutional Treaty* (Brussels, EuroComment, 2nd edn, 2005) 129.

<sup>12</sup> *ibid* 110-111.

<sup>13</sup> *ibid* 143-144.

<sup>14</sup> *ibid* 148-149.

<sup>15</sup> *ibid* 149.

<sup>16</sup> P Norman, 'From the Convention to the IGC (Institutions)' (Federal Trust, September 2003) 3; Norman, *above n 11*, 189-192.

<sup>17</sup> Norman, *above n 11*, 190.

<sup>18</sup> G Grevi, 'Options for Government of the Union' (Federal Trust, March 2003) 6.

<sup>19</sup> Norman, *above n 11*, 112.

<sup>20</sup> *ibid* 190-194.

<sup>21</sup> *ibid* 194-195.

<sup>22</sup> A Constitution for the Union, Opinion of the Commission, pursuant to Article 48 of the Treaty on European Union, on the Conference of Representatives of the Member States' governments convened to revise the Treaties, COM(2003) 548 final, para 14.

<sup>23</sup> *ibid* para 14.

<sup>24</sup> *ibid* para 14.

<sup>25</sup> *ibid* para 14.

<sup>26</sup> *ibid* para 14 fn 6.

<sup>27</sup> House of Lords, Select Committee on the European Union, *The Future of Europe – The Convention's Draft Constitutional Treaty* (HL 169; 2003) para 153.

<sup>28</sup> Art 236 TFEU.

<sup>29</sup> Council of the European Union, 16520/09, 26 November 2009. The formations are: General Affairs; Foreign Affairs; Economic and Financial Affairs; Justice and Home Affairs; Employment, Social Policy, Health and Consumer Affairs; Competitiveness (Internal Market, Industry and Research);

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Transport, Telecommunications and Energy; Agriculture and Fisheries; Environment; Education, Youth and Culture.

<sup>30</sup> Declaration 9 LT.

<sup>31</sup> Council of the European Union, 16534/1/09, 27 November 2009.

<sup>32</sup> Coreper is chaired by a representative of the Member State chairing the General Affairs Council. The Chair of the Political and Security Committee is 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, is normally held by the member of the group chairing the relevant configuration.

<sup>33</sup> Council of the European Union, 16517/09, 30 November 2009.

<sup>34</sup> Council of the European Union, 16183/09, 17 November 2009.

<sup>35</sup> Art 236(1) TFEU.

<sup>36</sup> Art 16(9) TEU, Art 236(2) TFEU.

<sup>37</sup> F Hayes-Renshaw and H Wallace, *The Council of Ministers* (London, Macmillan, 2nd edn, 2006) 36-42.

<sup>38</sup> S Bulmer and W Wessels, *The European Council* (Basingstoke, Macmillan, 1987); P de Schoutheete and H Wallace, *The European Council* (Notre Europe, 2002), available at <http://www.notre-europe.asso.fr> ; P Ludlow, *The Making of the New Europe: The European Council in Brussels and Copenhagen 2002* (Brussels, EuroComment, 2004); P de Schoutheete, 'The European Council' in J Peterson and M Shackleton (eds), *The Institutions of the European Union* (Oxford, Oxford University Press, 2nd edn, 2006) ch 3

<sup>39</sup> Background, 2984<sup>th</sup> General Affairs Council, 7 December 2009.

<sup>40</sup> Council Rules of Procedure (n 34) Art 2(6).

<sup>41</sup> Devuyst, above n 1, 318-320; J Temple Lang, 'The Main Issues after the Convention on the Constitutional Treaty for Europe' (2004) 27 Fordham ILJ 544; J Leinen, 'A President of Europe is Not Utopian, it's Practical Politics' Europe's World (Summer 2007),



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<http://www.europesworld.org/EWSettmgs/Article/tabid/78/Default.aspx?Id=14db4079-1eb1-4110-9fo3-ed343139403d>.

<sup>42</sup> Norman, above n 11, 194-195.

<sup>43</sup> D Curtin, *Executive Power in the European Union, Law, Practices and the Living Constitution* (Oxford, Oxford University Press, 2009).

<sup>44</sup> Hayes-Renshaw and Wallace, above n 37, 324-326.

<sup>45</sup> Above n 38.

<sup>46</sup> Art 15(4) TEU.

<sup>47</sup> This was emphasized by the President of the European Council in a speech to the European Parliament, Brussels, 24 February 2010, PCE 32/10, available at [http://www.european-council.europa.eu/the-president/press-releases-\(new\).aspx?lang=en](http://www.european-council.europa.eu/the-president/press-releases-(new).aspx?lang=en).

<sup>48</sup> Art 235(4) TFEU.

<sup>49</sup> Hayes-Renshaw and Wallace, above n 37, ch 7.

<sup>50</sup> This was stressed by the President of the European Council in a speech to the European Parliament, above n 47.

<sup>51</sup> *ibid* 2.

<sup>52</sup> P Craig, 'The Evolution of the Single Market' in C Barnard and J Scott (eds), *The Law of the Single European Market, Unpacking the Premises* (Oxford, Hart, 2002) ch 1.

<sup>53</sup> See above ns 39-40..

<sup>54</sup> <http://www.eu2010.es/en/index.html?idioma=en>

<sup>55</sup> <http://www.euractiv.com/en/priorities/spain-vows-take-backstage-role-eu-president/article-188494>

<sup>56</sup> Independent Feb 3 2010.

<sup>57</sup> C Harlow, *Accountability in the European Union* (Oxford, Oxford University Press, 2002); Curtin, above n 43.

<sup>58</sup> Case T-411/06 *Sogelma - Società generale lavori manutenzioni appalti Srl v European Agency for Reconstruction (AER)* [2008] ECR II-2771.

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<sup>59</sup> Art III-270(1) Draft CT.

<sup>60</sup> IGC 2003-Naples Ministerial Conclave: Presidency Proposal, CIG 52/1/03, PRESID 10, Brussels 25 November 2003, Annex 7; Art III-367(1) CT.

<sup>61</sup> Art III-369 CT.

<sup>62</sup> Arts 263, 265 TFEU.

<sup>63</sup> Art 13 TEU.

<sup>64</sup> Art 267 TFEU.

<sup>65</sup> P Craig, *Administrative Law* (London, Sweet & Maxwell, 6th edn., 2008) ch 4.

<sup>66</sup> Art 15(5) TEU.

<sup>67</sup> <http://consilium.europa.eu/showPage.aspx?id=1823&lang=EN>

<sup>68</sup> Above ns 39-40.