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INSTITUTIONS, POWER, AND INSTITUTIONAL BALANCE

Paul Craig

The EU institutions have always been 'singular'. From the very inception of the EEC it has been difficult to fit the principal institutions within any neat ordering that corresponds to that within the traditional nation state. The very location of legislative and executive power in the Rome Treaty was problematic, and these problems were exacerbated over time as new institutions developed, often initially outside the strict letter of the Treaty, in response to complex political pressures.

Institutional balance, as opposed to strict separation of powers, characterized the disposition of legislative and executive power in the EEC from the outset. The concept of institutional balance has a rich history. It was a central element in the republican conception of political ordering, embodying the ideal that there should be a balance between different interests, which represented different sections within civil society. This was necessary to ensure that decision-making served the public good rather than narrow sectional self-interest. The concept of institutional balance was an important part of republican discourse in the fifteenth and sixteenth centuries,[1] shaping the desired structure of government in the Italian republics, exerting later influence in England[2] and the emergent United States.[3]

Institutional balance is not however self-executing. It presumes by its very nature a normative and political judgment as to which institutions should be able to partake of legislative and executive power, and what constitutes the appropriate balance between them. These normative underpinnings have altered over time in the EU, and continue to do so. These changes will be charted throughout the subsequent analysis and form the underlying theme of the chapter, which is divided into four temporal periods.

[1] J Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton, 1975) and *Virtue, Commerce and History* (Cambridge University Press, 1985); Q Skinner, *The Foundations of Modern Political Thought, Volume One, The Renaissance* (Cambridge University Press, 1978); R Bellamy, 'The Political Form of the Constitution: The Separation of Powers, Rights and Representative Democracy' in R Bellamy and D Castiglione (eds), *Constitutionalism in Transformation: European and Theoretical Perspectives* (Blackwell, 1996) 24–44.

[2] J Harrington, 'The Commonwealth of Oceana' in J Pocock (ed), *The Political Works of James Harrington* (Cambridge University Press, 1977); Sir W Blackstone, *Commentaries on the Law of England* (16th edn, 1825) Vol I, Book 2, 146–161.

[3] B Bailyn, *The Ideological Origins of the American Revolution* (Harvard University Press, 1967); G Wood, *The Creation of the American Republic, 1776–1787* (University of North Carolina Press, 1969); C Sunstein, 'Interest Groups in American Public Law' (1985) 38 Stan L Rev 29 and 'Beyond the Republican Revival' (1988) 97 Yale LJ 1539; F Michelman, 'Foreword: Traces of Self-Government' (1986) 100 Harv L Rev 4.

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The initial period runs between the Rome Treaty and the Single European Act 1986 (SEA). The discussion begins with the initial disposition of institutional power in the Rome Treaty, in which it was primarily divided between the Council and Commission, with the latter holding many of the 'legal' trump cards. The underlying theme is that the institutional balance shifted, such that Member State influence in the Council and European Council over primary legislation, secondary legislation, and the direction of Community policy increased. The analysis includes the ECJ's role, and how integration through law interrelated with integration through the political process.

The second section covers the period between the SEA and the Nice Treaty. Three themes were evident during this time, clarification, contestation, and complexity. There was clarification of the principles governing Community administration and the appropriate disposition of legislative power, with recognition that the European Parliament (EP) should properly have a role. The emerging consensus about the legislative process was not matched by agreement concerning the disposition of executive power. The period between the SEA and the Nice Treaty saw skirmishes as to the locus of executive authority, which played out in different ways in relation to Comitology, agencies, and the European Council. Institutional complexity was the third theme in this period, as exemplified by the variety of Community legislative procedures, the creation of new agencies, the Three Pillar structure, and emergence of new governance strategies. Thus viewed from the perspective of institutional balance, there was growing consensus in normative terms as to the appropriate disposition of primary legislative power, but continuing contestation as to power over secondary rule-making and the locus of executive authority.

These tensions were readily apparent in the third period, which covers the Constitutional Treaty and the Lisbon Treaty. Treaty reform is a continuation of politics by other means. It is not therefore surprising that institutional issues from the previous decade dominated debates on more comprehensive Treaty reform, including the appropriate distribution of legislative power, coupled with contestation as to the locus of executive power. These were the prominent themes in the debates on Treaty reform. It is clear that while most believed in institutional balance, they differed markedly as to what this should entail.

The fourth period runs from the advent of the Lisbon Treaty to the present. It was hoped that after a decade of Treaty reform, in which institutional issues dominated the agenda, that the EU could give closer attention to substantive issues. This aspiration was qualified by reality. The EU was beset by a series of crises, which had implications for the powers of the respective EU institutions and the institutional balance between them. The financial crisis, Brexit, the rule of law crisis, immigration, and the pandemic all tested the EU institutional machinery and wrought changes thereto.

A. ROME TO THE SINGLE EUROPEAN ACT: INITIAL DISPOSITION, DEVELOPMENT, AND CHANGE

Hindsight is a wonderful thing. It is tempting to view the current disposition of power between the major institutions as natural or inevitable. The reality is that the more particular nature of the 'institutional balance' within the EU has altered over time, and the current disposition was neither inevitable, nor necessarily foreseeable, at the inception of the EEC.

1. THE INITIAL DISPOSITION OF POWER: THE 'COMMISSION PROPOSES, THE COUNCIL DISPOSES'

It is important to appreciate the disposition of power in the original Rome Treaty. The Assembly was accorded limited power, and its only role in the legislative process was a right to be consulted where a particular Treaty article so specified. The principal institutional players were the Council and Commission, but in many respects the Rome Treaty placed the Commission in the driving seat in the development of Community policy. The Commission had the right of legislative initiative; it could alter a measure before the Council acted; its measurers could only be amended by unanimity in the Council;[4] it devised the overall legislative agenda; and it had a plethora of other executive, administrative and judicial functions. Thus, while the Council had to consent to proposed legislation, it was not easy to alter the Commission's proposal. The Commission might therefore have become something akin to a 'government' for the emerging Community.[5]

The Community's early years were, however, marked by tensions between an intergovernmental view of the Community, championed initially by President de Gaulle of France, but not necessarily shared by other Member States, and a more supranational perspective, espoused initially by Walter Hallstein, the Commission President. There were de facto changes in the nature of Community decision-making. Limitations were placed on the supranational orientation of the Commission through institutional developments, often outside the strict letter of the Treaty, which allowed greater input for the intergovernmental interests of the Council. This does not mean that Council/Commission relations should be characterized in crudely intergovernmental/supranational terms. It does mean that Member State 'principals' placed greater controls over their supranational 'agents'[6] than envisaged by the original Rome Treaty, in response to the reality of decision-making in the newly emergent Community.

2. THE LUXEMBOURG ACCORDS: DECISION-MAKING IN THE SHADOW OF THE VETO

The tension between Commission and Council erupted into crisis in 1965, the catalyst being the shift under the Treaty transitional provisions from unanimity to qualified-majority voting in the Council. De Gaulle objected to a Commission proposal for institutional reform, which was combined with a proposal to resolve a conflict over agricultural policy, whereby the Community would raise its own resources from agricultural levies and external tariffs, rather than national contributions. He strenuously objected to the 'federalist logic' of the proposal[7] and, after failure to reach compromise in the Council, France refused to attend further Council meetings and adopted what became known as the 'empty-chair'

[4] Art 250(1) EC.

[5] K Neunreither, 'Transformation of a Political Role: Reconsidering the Case of the Commission of the European Communities' (1971–1972) 10 JCMS 233.

[6] M Pollack, *The Engines of Integration, Delegation, Agency and Agenda Setting in the EU* (Oxford University Press, 2003).

[7] J Pinder, *The Building of the European Union* (3rd edn, Oxford University Press, 1998) 12.

policy. This lasted for seven months, from June 1965 until January 1966, after which a settlement was reached, known as the Luxembourg Compromise or the Luxembourg Accords.

These Accords were essentially an agreement to disagree over voting methods in the Council. The French asserted that even in cases governed by majority decision-making discussion should continue until unanimity was reached whenever important national interests were at stake, but the other Member States declared that the Council would 'endeavour, within a reasonable time, to reach solutions which can be adopted by all'.[8]

In practice, it seems that for many years the French view prevailed. Member States endeavoured to reach agreement in the Council, but pleading the 'very important interests' of a state was treated as a veto, which the other Member States would respect. Recourse to qualified-majority voting became the exception rather than the norm. The 'return to intergovernmentalism', with primacy being accorded to an individual Member State's wish even if it was opposed by the majority, affected decision-making in the following years, which was conducted under the shadow of the veto. Statistics as to when the power was used are only part of the story, since threat of the veto shaped the policies put forward by the Commission.[9]

3. COUNCIL INPUT INTO PRIMARY LEGISLATION: COREPER

The simple facts are the easiest to forget. The Member State representatives on the Council are just that, representatives with an important 'day job', most being ministers in their national governments. They attend a Council meeting for a day, two at most, and then fly home. If the Council was to understand, digest, and take a view on Commission legislative proposals it needed an institution in more 'permanent session' that could negotiate with the Commission on draft proposals and reconcile differences between the Member States themselves.

The framers of the Rome Treaty drew on experience from the European Coal and Steel Community (ECSC) Treaty, in which preparatory work was undertaken by a Commission for the Coordination of the Council of Ministers, 'Cocor'. Article 151 EEC allowed the Council's rules of procedure to provide for a committee of representatives of Member States, the competence of which would be decided by the Council. Such a committee was duly established at the inaugural meeting of the Council of Foreign Ministers in 1958, the first meeting of the Committee of Permanent Representatives, Coreper, took place the next day, and it has met more than 2,750 times since then. It was accorded more explicit recognition in the Maastricht Treaty, and was, prior to the Lisbon Treaty, governed by Article 207(1) EC.

Coreper is staffed by senior national officials and operates at two levels. Coreper II is the more important and consists of permanent representatives of ambassadorial rank. It deals with more contentious matters, such as economic and financial affairs, and external relations, and liaises with national governments. Coreper I is composed of deputy permanent representatives and is responsible for issues such as the environment, social affairs, and the internal market.

[8] Bull EC 3-1966, 9.

[9] Neunreither (n 5); P Dankert, 'The European Community—Past, Present and Future' in L Tsoukalis (ed), *The EC: Past, Present and Future* (Basil Blackwell, 1983) 7.

While Coreper cannot take substantive decisions in its own right,[10] it nonetheless evolved 'into a veritable decision-making factory'.[11] It considers draft legislative proposals from the Commission, and sets the agenda for Council meetings.[12] The agenda is divided into Parts A and B: the former includes items which Coreper has agreed can be adopted by the Council without discussion; the latter covers topics that require further discussion. Approximately 85 per cent of Council decisions prepared by Coreper fall in Part A.[13] Many working parties, approximately 250, composed of national experts, feed into Coreper. They are the lifeblood of the Council. These groups examine Commission legislative proposals, and report to Coreper or the Council. The Council also receives input from other specialist committees.[14]

It would be wrong to portray Coreper as exclusively intergovernmental in its orientation. Decision-making tends to be consensual, even where the formal voting rules specify qualified majority,[15] and Lewis notes that 'from a Janus-faced perspective, they act as both, and simultaneously, state agents and supranational entrepreneurs'.[16] This balanced perspective is important. Coreper was nonetheless a 'necessary' development if the Council was to take an informed view of Commission proposals. The Council's ability to influence primary legislation would have been severely limited without Coreper, which redressed an otherwise significant informational asymmetry between Council and Commission. This was more especially so given that the Council could only amend Commission proposals by unanimity, which rendered it more important that Commission proposals were thoroughly digested before being presented to the Council.

4. COUNCIL INPUT INTO SECONDARY NORMS: COMITOLOGY

The Luxembourg Accords enabled the Member States to block measures that injuriously affected their vital interests. Coreper allowed Council input into primary legislation. Member States also sought influence over secondary norms and created an institutional mechanism to facilitate this.

It is common in democratic statal systems for primary legislation to be complemented by secondary norms. The legislature may not be able to foresee all ramifications of primary legislation; it may have neither time, nor expertise, to address all issues in the original legislation; and measures consequential to the original statute may have to be passed expeditiously. The secondary norms may be individualized decisions. They will however commonly be legislative in nature, general rules applicable to those within a certain factual situation. The method by which such measures are made varies in Member States. The premise in some systems is that norms of a legislative nature should be legitimated through some legislative oversight. This legitimation from the 'top' via the legislature may

[10] Case C–25/94 *Commission v Council* [1996] ECR I–1469.

[11] J Lewis, 'National Interests, Coreper' in J Peterson and M Shackleton (eds), *The Institutions of the European Union* (2nd edn, Oxford University Press, 2006) ch 14.

[12] J Lewis, 'The Methods of Community in EU Decision-Making and Administrative Rivalry in the Council's Infrastructure' (2000) 7 JEPP 261; D Bostock, 'Coreper Revisited' (2002) 40 JCMS 215; Lewis (n 11) ch 14.

[13] F Hayes-Renshaw and H Wallace, *The Council of Ministers* (2nd edn, Palgrave, 2006) 77.

[14] ibid ch 3.

[15] Lewis (n 11) ch 14.

[16] ibid 289.

be complemented by legitimation from the 'bottom' through participation in rule-making by affected parties. The premise in other regimes is that the executive should have some autonomous power to make secondary norms, the principal check being judicial review. It is important to dispel any illusion that the primary legislation captures all issues of principle, while secondary norms address insignificant points of detail. This does not represent reality. Secondary norms may address controversial issues of principle or political choice.

This is especially so in the EU, which has been characterized as a regulatory state,[17] where secondary regulations will often deal with matters of principle or political contestation. This explains the birth of the committee system known as Comitology.[18] The Commission has articulated a picture of the 'Community method' in which it is the Community executive with principal responsibility for the making of such secondary norms.[19] We shall return to this picture below. Suffice it to say for the present that the original Treaty was ambiguous in this respect.

The disposition of primary legislative power in the Rome Treaty was relatively clear; the maxim the 'Commission proposes, the Council disposes' held true for most areas. The disposition of power over secondary norms was less clear. The Commission's claim for authority was based on Article 155 EEC, which provided that in order to ensure the proper functioning of the common market the Commission should, *inter alia*, 'exercise the powers conferred on it by the Council for the implementation of the rules laid down by the latter'. This was however an uncertain foundation for Commission authority. This was in part because, as the ECJ acknowledged,[20] Article 155 EEC was optional and became operative when the Council conferred power on the Commission. It was in part because of ambiguity as to the meaning of 'implementation'. The word could refer to the 'making' of secondary rules, or alternatively to the 'execution' of the primary regulation or directive, connoting the need for measures to ensure that the primary regulation or directive was properly applied.[21] We shall see that ambiguity in this regard persisted in later Treaty revisions. The reality was that the Rome Treaty provided little by way of definitive guidance on the making of secondary norms.

Political reality is nonetheless often the catalyst for legal development. Comitology was born in the context of the Common Agricultural Policy (CAP).[22] It rapidly became clear that administration of the CAP required detailed rules in ever-changing market circumstances. Recourse to primary legislation was impracticable. The Member States were,

[17] G Majone, 'The Rise of the Regulatory State in Europe' (1994) 17 West European Politics 77; G Majone, *Regulating Europe* (Routledge, 1996); G Majone, 'Europe's "Democratic Deficit": The Question of Standards' (1998) 4 ELJ 5.

[18] R Pedler and GF Schaefer (eds), *Shaping European Law and Policy: The Role of Committees and Comitology in the Political Process* (European Institute of Public Administration, 1996); C Joerges, K-H Ladeur, and E Vos (eds), *Integrating Scientific Expertise into Regulatory Decision-Making: National Traditions and European Innovations* (Nomos, 1997); C Joerges and E Vos (eds), *EU Committees: Social Regulation, Law and Politics* (Hart, 1999); E Vos, *Institutional Frameworks of Community Health and Safety Legislation: Committees, Agencies and Private Bodies* (Hart, 1999); M Andenas and A Turk (eds), *Delegated Legislation and the Role of Committees in the EC* (Kluwer Law International, 2000); C Bergstrom, *Comitology, Delegation of Powers in the European Union and the Committee System* (Oxford University Press, 2005).

[19] See text accompanying n 93.

[20] Case 25/70 *Einfuhr- und Vorrasstelle fur Getreide und Futermittel v Koster, Berodt & Co* [1970] 2 ECR 1161, [9].

[21] Case 16/88 *Commission v Council* [1989] ECR 3457, [11]–[13].

[22] C Bertram, 'Decision-Making in the EEC: The Management Committee Procedure' (1967–68) 5 CMLRev 246; P Schindler, 'The Problems of Decision-Making by Way of the Management Committee Procedure in the EEC' (1971) 8 CMLRev 184; Bergstrom (n 18) ch 2.

however, wary of according the Commission a blank cheque over implementing rules, since power once delegated without encumbrance generated legally binding rules without the option for further Council oversight. This wariness was heightened by tensions between Council and Commission in the mid-1960s leading to the Luxembourg Accords. The creation of the committee system also facilitated interaction between national administrators and resolution of disagreement between the Member States, who might agree on the regulatory principles for an area, but disagree on the more detailed ramifications thereof.

The net result was the birth of the management committee procedure, embodied in early agricultural regulations. The committee, composed of national expert representatives, was involved with the Commission in the deliberations leading to the secondary regulations, which were immediately applicable, subject to the caveat that they could be returned to the Council if they were not in accord with the committee's opinion. The Council could then take a different decision by qualified majority within one month. The committee methodology rapidly became a standard feature of delegation of power to the Commission. It was not long before the more restrictive version, the regulatory committee procedure, was created: if the committee failed to deliver an opinion, or if it gave an opinion contrary to the recommended measure, the Commission would have to submit the proposal to the Council, which could then act by qualified majority. There was a safety net or *filet*, such that if the Council did not act within three months of the measure being submitted to it, then the proposed provisions could be adopted by the Commission. The desire for greater political control reached its apotheosis in the *contre-filet* version of the regulatory committee procedure: the normal regulatory committee procedure applied, subject to the caveat that the Council could by simple majority prevent the Commission from acting, even after the expiry of the prescribed period.

The legitimacy of the management committee procedure was considered in *Koster*.[23] The German court asked whether the procedure was consistent with the institutional balance in the Treaty. If the ECJ had found against the procedure it would have created serious problems, given the importance attached by the Council to input into the making of secondary norms. The ECJ avoided any such conflict by upholding the legitimacy of the management committee procedure. It reasoned that Article 155 EEC accorded the Council discretion to confer implementing powers on the Commission, and that therefore the Council could determine the rules to which the Commission was subject when exercising such powers. Moreover, because the committee could not take any decision, but merely served to send the matter back to the Council, the ECJ held that it did not distort the institutional balance within the EEC. Judicial support for the political status quo was further evident in *Tedeschi*,[24] where the ECJ upheld the legality of the regulatory committee procedure.

Comitology has been much discussed by political scientists and lawyers. Rational choice institutionalists regard it as an exemplification of their principal/agent thesis. Member State principals delegate four functions to supranational agents: monitoring compliance; the resolution of incomplete contracts among principals; the adoption of regulations in areas where the principals would be biased or uninformed; and setting the legislative agenda so as to avoid the 'endless cycling' that would otherwise result if this power were exercised by the principals themselves.[25] The principals must, however, ensure that the agents do not stray

[23] Case 25/70 *Koster* (n 20).
[24] Case 5/77 *Carlo Tedeschi v Denkavit Commerciale Srl* [1977] ECR 1555.
[25] Pollack (n 6) 6.

from the preferences of the principals. Thus, on this view Comitology constitutes a control mechanism whereby Member State principals exert control over supranational agents. The Member State principals recognized the need for delegation of power over secondary norms to the supranational agent, the Commission, but did not wish to give it a blank cheque, hence the creation of committees through which Member State preferences could be expressed, with the threat of recourse to the Council if agreement could not be reached with the Commission. It is assumed that the representatives on Comitology reflect their Member State exogenous preferences and bargain within the committees.[26] The variants of committee procedure reflect the Member States' ability to impose the degree of control that best suits their interests.

This view was challenged by sociological institutionalists and constructivists. They contend that decision-making within Comitology is best viewed as a form of deliberative supranationalism.[27] Governments might be unaware of their preferences on particular issues. The national delegates on the committees often regard themselves as a team dealing with a transnational problem, and become part of an inter-administrative discourse characterized by mutual learning. Comitology is portrayed as a network of European and national actors, with the Commission acting as coordinator. The national representatives in the deliberative process are willing to call their own preferences into question in searching for a Community solution.[28]

There have not surprisingly been empirical studies designed to test these rival hypotheses.[29] We shall return to this debate in due course. Suffice it to say for the present that there may be something to both hypotheses. Thus, even if the creation of Comitology committees conforms to the rational choice hypothesis, this does not mean that the national representatives will necessarily always function in interstate bargaining mode. They might operate in a manner more akin to deliberative supranationalism. However, whether they do so may depend on the subject matter, and conclusions reached in the context of, for example, food safety committees, may not be applicable in other areas.

5. MEMBER STATE INPUT INTO THE DIRECTION OF COMMUNITY POLICY: THE EUROPEAN COUNCIL

The period between the Rome Treaty and the SEA also saw the emergence of the European Council as a political actor.[30] The Rome Treaty gave no institutional role to the heads of state, but meetings were common from the early 1960s. The decision to institutionalize such

[26] ibid ch 2.

[27] C Joerges and J Neyer, 'From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalization of Comitology' (1997) 3 ELJ 273; J Neyer, 'The Comitology Challenge to Analytical Integration Theory' in Joerges and Vos (n 18) ch 12; C Joerges, 'Good Governance through Comitology?' in Joerges and Vos (n 18) ch 17.

[28] Joerges and Neyer (n 27) 315.

[29] Pollack (n 6); F Franchino, 'Control of the Commission's Executive Functions: Uncertainty, Conflict and Decision Rules' (2000) 1 European Union Politics 63; M Pollack, 'Control Mechanism or Deliberative Democracy: Two Images of Comitology' (2003) 36 Comparative Political Studies 125.

[30] S Bulmer and W Wessels, *The European Council* (Macmillan, 1987); P de Schoutheete and H Wallace, *The European Council* (Notre Europe, 2002); P Ludlow, *The Making of the New Europe: The European Council in Brussels and Copenhagen 2002* (EuroComment, 2004); P de Schoutheete, 'The European Council' in Peterson and Shackleton (n 11) ch 3; Hayes-Renshaw and Wallace (n 13) ch 6; J Werts, *The European Council* (Harper, 2008).

meetings was taken in 1974 at the Paris Summit. The conclusion from the summit stated that such meetings would occur three times per year, normally outside the confines of the Council, but where necessary within the Council. These meetings continued to be held during the 1970s and 1980s, even though there was no formal remit until the SEA.

The rationale given for the institutionalization of the European Council at the 1974 Paris Summit was to ensure progress and consistency in the overall work of the Community. It has, as will be seen more fully below, grown into a major institutional player within the EU, such that nothing of real significance occurs without its approval. This is so notwithstanding the absence of Treaty foundation prior to 1986.

It provided an institutionalized forum for expression of Member State views at the highest level, which shaped subsequent Community policy, despite the fact that European Council conclusions were not formally binding. It allowed political leaders' input into the Community agenda, operated as a forum for Community response to external problems, and facilitated dispute resolution between Member States.

6. THE ECJ: DECISIONAL AND NORMATIVE SUPRANATIONALISM

The discussion thus far has been concerned with the evolving institutional relationship between Council and Commission prior to the SEA. The ECJ was however also important during this period. Detailed treatment of direct effect and the general role of the Court will be provided in later chapters.[31] The present discussion focuses on the ECJ's role in shaping the Community's institutional balance between the Rome Treaty and the SEA.

The Rome Treaty established the principles governing core concepts such as free movement, with the stipulation that regulations and directives should make these principles a reality. There was progress in this respect, as attested to by the legislation adopted in relation to negative integration. There were, for example, approximately fifty such measures enacted from 1962 to 1982, pursuant to the general programmes for the abolition of restrictions on freedom of establishment and the provision of services.

The passage of legislative initiatives nonetheless became increasingly difficult during the 1970s and early part of the 1980s. The Council rejected some social measures, and many others were stalled, awaiting a Council decision. Progress was slow in relation to positive integration through Community harmonization, since Article 100 EEC required unanimity, and prior to the SEA directives normally demanded Member State agreement on a detailed measure that was difficult to attain. There was growing concern that the Community's objectives were not being fulfilled. These difficulties led to what Middlemas termed a 'condition of immobility'.[32] The period from the early 1970s to the early 1980s was characterized as the 'dark ages' for the Community.[33] Dankert, the President of the European Parliament, bemoaned the jungle of half-implemented treaties, and neglected Treaty articles.[34] Wallace

[31] de Witte, Chapter 7 and Episcopo, Chapter 9 this volume.

[32] K Middlemas, *Orchestrating Europe, The Informal Politics of the European Union 1973–1995* (Fontana, 1995) 90.

[33] J Caporaso and J Keeler, 'The European Union and Regional Integration Theory' in C Rhodes and S Mazey (eds), *The State of the European Union, Building a European Polity?* (Longman, 1995) 37; S George and I Bache, *Politics in the European Union* (Oxford University Press, 2001) ch 9.

[34] Dankert (n 9) 8.

concluded that the Community had moved beyond other international regimes, but that it could drift towards them as 'recession at home and uncertainty abroad progressively undermine its authority'.[35]

Attainment of Community objectives through the normal political process was therefore difficult, and in this sense 'decisional supranationalism' was at low ebb during this period. This led, as Weiler argued,[36] to the growing significance of 'normative supranationalism', whereby the ECJ, through doctrines of direct effect and supremacy, ensured the continued development of Community law, notwithstanding the difficulties of securing legislation through the political process. It is important to understand how this occurred.

Direct effect enabled individuals to assert rights derived from Treaty articles and Community legislation before national courts, and to argue that national action was inconsistent with Community law. The national courts referred issues of Community law to the ECJ that arose in such disputes. The ECJ could then interpret the relevant Community provisions so as to ensure their continued vitality, notwithstanding infirmities in the political process.

Thus, the ECJ made clear that it was willing to deploy direct effect to enforce important Treaty provisions, notwithstanding the fact that implementing legislation had not been enacted because of difficulties in the political process.[37] This can be exemplified by *Reyners*,[38] which was concerned with freedom of establishment. The Member States argued, *inter alia*, that Article 52 EEC did not fulfil the conditions for direct effect as laid down in *Van Gend* because further action at Community level, in the form of directives, had yet to be taken, which would then have to be implemented by the Member States. They claimed that it was not for the 'court to exercise a discretionary power reserved to the legislative institutions of the Community and the Member States'.[39] The ECJ rejected the argument. The Court accorded primacy to the principle of non-discrimination within Article 52, and treated the further legislation as a way of effectuating this goal.

The Community legislation had not been promulgated within the requisite period because of Member State unwillingness in the Council to make the necessary compromises. This was the period of legislative malaise in which getting things through the Council operating under the shadow of the veto was problematic. The ECJ signalled that it was not willing to allow Article 52 to atrophy. The Court would develop the principle through adjudication should the detailed legislation not be forthcoming. The decision therefore constitutes a prime example of normative supranationalism being used to overcome the deficiencies of decisional supranationalism.

The Commission responded with a Communication to the Council in response to the *Reyners* decision.[40] It made clear that if the Council continued to delay passage of directives then recourse might be had to the ECJ. Directives designed to abolish restrictions based on

[35] W Wallace, 'Europe as Confederation: The Community and the Nation State' in Tsoukalis (n 9) 68.

[36] J Weiler, 'The Community System: The Dual Character of Supranationalism' (1981) 1 YBEL 267, and 'The Transformation of Europe' (1991) 100 Yale LJ 2403, 2412–2431; P Craig, 'Once Upon a Time in the West: Direct Effect and the Federalization of EEC Law' (1992) 12 OJLS 453.

[37] Case 33/74 *Van Binsbergen v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* [1974] ECR 1299; Case 43/75 *Defrenne v Société Anonyme Belge de Navigation Aérienne* [1976] ECR 455.

[38] Case 2/74 *Reyners v Belgian State* [1974] ECR 631.

[39] ibid [7].

[40] Commission Communication to the Council on the consequences of the judgment of the Court of Justice of June 21 1974, in Case 2/74 (Reyners and the Belgian State) on the proposals for Directives concerning the right of establishment and freedom to provide services at present before the Council, SEC (74) 4024 final.

nationality were unnecessary in the light of the *Reyners* case. The Council should, however, continue work on directives relating to Article 57 EEC and the mutual recognition of diplomas. The Commission therefore reinforced the Court's ruling. The principles in Article 52 could not be avoided, because of Member States' unwillingness to agree on implementing provisions. If the Member States continued to be tardy then the Court would fill out the more detailed meaning of this Article. If the Member States delayed in promulgating these legislative norms to ensure that they accorded perfectly with their interests, they might then have little say in the rules developed by the Court.

Normative supranationalism also supplemented decisional supranationalism by shaping the very nature of the regulatory process within the Community, as exemplified by *Cassis de Dijon*.[41] The ECJ held that Article 30 EEC could apply to national trade rules that did not discriminate against imported products, but which nonetheless inhibited trade because they differed from those in the country of origin. When goods had been lawfully marketed in one Member State, they should be admitted into any other state, unless the state of import could successfully invoke a mandatory requirement. The judgment therefore encapsulated a principle of mutual recognition and had a marked impact on the scope of Article 30 EEC. It was also the catalyst for a major re-orientation of Community regulatory strategy. The difficulties of securing the passage of harmonization measures that were vital for positive integration was in part because of the unanimity requirement and in part because prior to *Cassis* such measures sought to regulate in considerable detail the relevant product. It was therefore unsurprising that progress was slow. The *Cassis* decision led the Commission to reconsider its regulatory strategy, such that it would in general only try to regulate those issues that survived scrutiny under *Cassis*, these being national measures that were justified as mandatory requirements to protect public health, consumer safety, and the like.

The rationale for, and role of, the Community courts has been debated more generally by political scientists, and more detailed treatment can be found in the chapter by Kieran Bradley. Rational choice institutionalists argue that the ECJ can be best explained in terms of principal/agent theory, the hypothesis being that Member States principals were willing to delegate authority to the ECJ to render their collective commitments under the Treaty more credible, and to enable the ECJ to complete the details of the incomplete contract that constituted the Treaty.[42] Some contend moreover that ECJ decisions were in accord with the preferences of the major Member States such as France and Germany,[43] although later literature offered a more nuanced picture.[44]

The principal/agent view of the ECJ has however been vigorously challenged by those, such as Stone Sweet, who argue that the constitutionalization of the Treaties could not be explained by Member State preferences, but was rather driven by individual litigants who used the opportunities presented by direct effect and supremacy to contest national laws that interfered with Community rights and hindered free trade. This 'private enforcement' of Community law at the behest of individuals, in which national courts sent references to the ECJ and executed its rulings at national level, created the Community legal order. The

[41] Case 120/78 *Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.

[42] Pollack (n 6) ch 3.

[43] G Garrett, 'International Cooperation and Institutional Choice: The European Community's Internal Market' (1992) 46 International Organization 533.

[44] G Garrett, D Kelemen, and H Schulz, 'The European Court of Justice, National Governments and Legal Integration in the European Union' (1998) 52 International Organization 149.

ECJ exercised considerable autonomy in this respect and the results could not be captured by the principal/agent model.[45] This was more especially so given that Member States could only overrule ECJ decisions on Treaty interpretation through Treaty amendment.

We shall return to the role of the Court in due course. Suffice it to say for the present that the great majority of Community lawyers, while acknowledging the rationale for the ECJ cast in terms of credible commitments, would not accept the principal/agent hypothesis of the Court as some simple 'agent' carrying out Member State preferences. Its autonomy is manifest in all areas of Community law, and not just in relation to issues concerned with constitutionalization of the Treaties.

B. FROM THE SEA TO NICE: CLARIFICATION, CONTESTATION, AND COMPLEXITY

The SEA represents a watershed in Community inter-institutional relations for reasons that will become apparent below. The period between the SEA and the Nice Treaty witnessed a plethora of institutional changes, in which three themes were evident.

There was clarification of the principles governing Community administration and most importantly of the appropriate disposition of legislative power, with recognition that the EP should properly have a role. This was recognized initially in the SEA, and enhanced further by the Maastricht Treaty and the Amsterdam Treaty, most notably through the co-decision procedure.

The emerging consensus about the legislative process was not matched by agreement concerning the disposition of executive power. The period between the SEA and the Nice Treaty saw contestation and skirmishes as to the locus of executive authority, which played out in different ways in relation to Comitology, agencies, and the European Council. In principal/agent terms, the Commission as 'supranational agent' chafed at restrictions imposed by Member State principals.

Institutional complexity was the third theme in this period. The variety of Community legislative procedures, the creation of new agencies, the Three Pillar structure with different forms of legislation, and a different disposition of authority all served to render the EU difficult to comprehend even for the well-informed citizen. It is not therefore surprising that these three themes became central to discussions of institutional reform in the Constitutional Treaty and the Lisbon Treaty.

1. EUROPEAN COUNCIL: DIRECTION OF EU POLICY

It is fitting to begin with reference to the ever-growing importance of the European Council. It was accorded Treaty recognition for the first time in the SEA, and assumed ever-greater importance for the overall direction of EU policy. There can be few major institutions where

[45] A Stone Sweet and J Caporaso, 'From Free Trade to Supranational Polity: The European Court and Integration' in Wayne Sandholtz and Alec Stone Sweet (eds), *European Integration and Supranational Governance* (Oxford University Press, 1998); A Stone Sweet and T Brunell, 'Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community' (1998) 92 American Political Science Review 63.

the lack of correlation between mention in the Treaties and the significance of its role is more marked. The paucity of Treaty references to the European Council[46] should not therefore lead one to doubt its importance. It increasingly played a central role in setting the pace and shape of EU policy, establishing the parameters within which the other institutions operated, and providing a forum for resolution of tensions between the Member States.[47] This was reflected in lengthier conclusions from European Council meetings, which frequently contained detailed 'action points' for other institutional players, notably the Council and Commission. The fact that the European Council had no direct role in the legislative process did not prevent it from shaping legislative priorities and initiatives.

The European Council was central to Treaty reform, since the initiative for the establishment of an intergovernmental conference would normally come from the European Council, which would affirm or modify the conclusions reached in such negotiations. It was commonly the European Council that confirmed important changes in the institutional structure of the Community, such as the enlargement of the Parliament following German unification. It was the European Council once again that often provided the focal point for significant constitutional developments, such as Inter-institutional Agreements between the three major institutions. The European Council regularly considered the state of the European economy.[48] It played a role in the initiation or development of policy strategies, such as social policy, drugs, terrorism, asylum, and immigration. The European Council was in addition deeply involved in external relations, and determined the pace of new accessions to the EU.

However, the very fact that the chair of the European Council rotated every six months did little to enhance continuity of policy. This led to reforms introduced by the Seville European Council 2002. It provided that the six Presidencies concerned, in consultation with the Commission, should draw up a joint proposal, which was submitted to the General Affairs and External Relations Council (GAERC) for adoption by the European Council in the form of a multi-annual strategic programme lasting three years. The first such programme was produced in 2003.[49] This three-year programme led to annual operational programmes submitted by the two Presidencies to the GAERC, which would then finalize the programme.[50] This programme was influenced by the Commission programme, and by external events.[51]

2. COMMUNITY LEGISLATION: TRANSFORMATION AND INCLUSION

The SEA was primarily motivated by the desire to expedite completion of the internal market. It was nonetheless significant in institutional terms, notwithstanding Member State rejection of far-reaching proposals for Treaty reform advanced by the EP. The Member

[46] Art 4 EU.
[47] de Schoutheete (n 30).
[48] Lisbon European Council, Presidency Conclusions, 23–24 March 2000; Nice European Council, Presidency Conclusions, 7–9 December 2000; European Council, Presidency Conclusions, 22–23 March 2005.
[49] POLGEN 76, 15047/03, Multi-annual Strategic Programme, Brussels 20 November 2003.
[50] Seville European Council, Annex II, Brussels 24 October 2002, 23–24.
[51] Hayes-Renshaw and Wallace (n 13) ch 6.

States were however persuaded to accept some institutional reform, whereby the EP was given real power in the legislative process for the first time, through the creation of the co-operation procedure. The details of this procedure need not concern us here, but suffice it to say that it gave the EP two readings for measures that came within its ambit, enabling it to propose amendments and block legislation with the support of one Member State in the Council.[52] The advent of this procedure was all the more important, since it applied to single-market harmonization measures enacted under the new Article 100a EEC post 1986.

The cooperation procedure was largely overtaken by co-decision. It was however the co-operation procedure that began the transformation of the primary legislative process. The previous reality encapsulated in the maxim that the 'Commission proposes, the Council disposes' changed. There were now three players in the game. The Commission recognized the need for increased inter-institutional cooperation. It had to draft proposals with an eye as to what would 'play' with Parliament, as well as the Council.[53] Coreper, the gate-keeper for the Council, now had to consider the views of the EP, as well as the Council and Commission.[54] The EP's powers in the legislative process were 'transformed from the weak and essentially unconstructive power of delay to a stronger and potentially constructive role in the drafting of legislation'.[55]

It was but a few years later that the Treaty on European Union (TEU) introduced the co-decision procedure, Article 251 EC. It was revised by the Treaty of Amsterdam, which strengthened further the role of the EP.[56] It became the method for making much important Community legislation, and areas previously governed by the cooperation procedure were upgraded to co-decision.[57] It prevented a measure being adopted without approval of the Council and EP, and emphasized the reaching of a jointly approved text. The EP had two readings of a measure, the first of which occurred when it gave its opinion to the Council. The second reading took place on the assumption that the Council had not approved all the EP's first-reading amendments, or if it had other amendments of its own, which had to be passed unanimously in the Council. If this happened then the Council communicated its common position to the EP, which had the option at second reading to approve, reject, or propose amendments to the measure. The EP however limited the second-reading amendments that it would propose.[58] If the EP suggested amendments, not all of which were acceptable to the Council, then the Conciliation Committee came into operation. The EP and Council had to approve the joint text from the Conciliation Committee. The co-decision procedure could however be concluded at any of the earlier stages, provided that the EP and Council agreed.

The co-decision procedure was successful in practice, and accommodated the differing interests with a stake in the legislative process.[59] This was so notwithstanding disagreement about the 'power dynamics' within co-decision and about the relative power of the

[52] R Corbett, 'Testing the New Procedures: The European Parliament's First Experience with its New "Single Act" Powers' (1989) 27 JCMS 4.

[53] M Westlake, *The Commission and the Parliament: Partners and Rivals in the European Policy-Making Process* (Butterworths, 1994) 37–39.

[54] Lewis (n 11).

[55] Westlake (n 53) 39.

[56] Joint Declaration on Practical Arrangements for the New Co-Decision Procedure [1999] OJ C148/1.

[57] P Craig and G de Búrca, *EU Law, Text, Cases and Materials* (7th edn, Oxford University Press, 2020) ch 6.

[58] European Parliament, Conciliations and Co-decision, A Guide to how Parliament Co-legislates, DV/547830EN.doc, 2004, 6.

[59] A Dashwood, 'European Community Legislative Procedures after Amsterdam' (1998) 1 CYELS 25.

EP under co-decision and other legislative procedures.[60] The EP used its veto power under Article 251 EC sparingly, although decision-making still took place under its shadow. It is more difficult to generalize about the amendments secured by the EP. There is research indicating that EP amendments modified the Commission proposal, but did not significantly alter it.[61] This is to some extent unsurprising, since draft legislative proposals were discussed with the EP and Council/Coreper before Article 251 was initiated, thereby accommodating diverse opinion. Where this dialogic process still left major differences of view, the EP and Council could propose amendments, which forced the Commission to modify the measure significantly, as with the Services Directive.[62] The Commission also retained influence within co-decision: it could withdraw a proposed measure before it was adopted and/or submit a modified version; it routinely responded to proposed EP amendments, indicating those it could and could not accept; and where the Commission gave a negative opinion on EP second-reading amendments they could only be accepted by the Council if there was unanimity.

The co-decision procedure had a secure normative foundation. The EP had long pressed for a co-equal role in the legislative process with the Council. The attention placed on democracy and legitimacy in the 1990s helped to secure the EP this more equal role in the legislative process.[63] The co-decision procedure embodied an institutional balance in which the Commission, Council, and EP all played a role. It encouraged deliberative discourse between them. There were however concerns about the nature of this deliberative process, flowing from the institutionalization of trilogues.[64] They were originally meetings that preceded the Conciliation Committee, composed of representatives from the Council, EP, and Commission, to facilitate compromise. This is unobjectionable. The concern arose from the fact that such trilogues were moved earlier in the co-decision process, coinciding with the first reading of the measure, with the danger that compromises might be reached that inhibited contributions from those within the Council or the EP that were not party to the trilogue.[65] This led to institutional changes designed to enhance the accountability of trilogues.[66]

The SEA and the TEU signalled acceptance of the EP in relation to the passage of Community primary legislation, and clarified the inter-institutional distribution of power. The passage of Community primary legislation nonetheless remained complex, because numerous procedures other than cooperation and co-decision continued to exist. The

[60] G Garrett and G Tsebelis, 'Understanding Better the EU Legislative Process' (2001) 2 EUP 353; R Corbett, 'A Response to a Reply to a Reaction (I Hope Someone is Still Interested)' (2001) 2 EUP 361.

[61] A Kreppel, 'Moving beyond Procedure: An Empirical Analysis of European Parliament Legislative Influence' (2002) 35 Comparative Political Studies 784; R Thomson and M Hosli, 'Who Has Power in the EU? Council, Commission and Parliament in Legislative Decision-making' (2006) 44 JCMS 391.

[62] Proposal for a Directive of the European Parliament and of the Council, on services in the internal market, COM/2004/2 final/3; EP Committee on the Internal Market and Consumer Protection, A6-0409/2005, Rapporteur Evelyne Gebhardt; Amended Proposal for a Directive of the European Parliament and of the Council, on services in the internal market, COM(2006) 160 final.

[63] P Craig, 'Democracy and Rulemaking within the EC: An Empirical and Normative Assessment' (1997) 3 ELJ 105.

[64] Conciliations and Co-decision (n 58) 13–15; M Shackleton and T Raunio, 'Codecision since Amsterdam: A Laboratory for Institutional Innovation and Change' (2003) 10 JEPP 171, 177–179.

[65] D Curtin, 'The Council of Ministers: The Missing Link?' in L Verhey, P Kiiver, and S Loeffen (eds), *Political Accountability and European Integration* (Europa Law Publishing, 2009) ch 12; D Curtin and P Leino 'In Search of Transparency for EU Law-making: Trilogues on the Cusp of Dawn' (2017) 54 CMLRev 1673; G Rugge, 'Trilogues and Access to Documents: *de Capitani v European Parliament*' (2019) 56 CMLRev 237.

[66] Craig and de Búrca (n 57) ch 6.

applicable procedure could only be divined by reference to the relevant Treaty article dealing with the making of Community legislation in that area.

3. COMMUNITY LEGISLATION: NATIONAL PARLIAMENTS AND SUBSIDIARITY

The discussion thus far has been primarily concerned with the balance of power between the EC institutions, and hence has a primarily 'horizontal' dimension. The early 1990s saw increasing concern about the 'vertical' division of authority between the EC and the Member States. This provided the rationale for the inclusion of subsidiarity in the Maastricht Treaty, the basic idea being to limit the exercise of Community competence in accord with the criteria in Article 5 EC.

There were however real difficulties in making subsidiarity an effective limit on Community power. Subsidiarity only had to be considered for areas that did not fall within the EC's exclusive competence, but this was not easy to define, because the Treaty was not explicitly framed in such terms.[67]

The subsidiarity calculus was also problematic when it was considered.[68] It embraced three separate, albeit related, ideas: the Community was to take action only if the objectives could not be sufficiently achieved by the Member States; the Community could better achieve the action, because of its scale or effects; if the Community did take action then this should not go beyond what was necessary to achieve the Treaty objectives. The first two parts entailed comparative efficiency, while the third embodied proportionality. The Amsterdam Treaty fleshed out this calculus in a Protocol on the Application of the Principles of Subsidiarity and Proportionality,[69] imposing obligations on the Commission to justify proposed legislation in terms of the subsidiarity principle through qualitative and quantitative indicators. It was nonetheless relatively easy for the Commission to provide some justification for action at Community level, more especially when it could point to divergence in national approach that could be said to hinder the realization of a single market.

It also became clear that while compliance with Article 5 was susceptible to judicial review, the ECJ used a relatively light touch review in cases that came before it. This was so irrespective of whether the challenge was to a procedural aspect of subsidiarity,[70] or whether it was more substantive.[71] The light touch review left the ECJ open to the criticism that it effectively denuded the obligation in Article 5 of content. While the difficulties of more intensive review should not be underestimated, they could have been alleviated if the ECJ had required more from the Commission in procedural terms, which would have facilitated effective review.

[67] A Toth, 'A Legal Analysis of Subsidiarity' in D O'Keeffe and P Twomey (eds), *Legal Issues of the Maastricht Treaty* (Chancery, 1994) 39–40; J Steiner, 'Subsidiarity under the Maastricht Treaty' ibid 57–58.

[68] A Estella, *The EU Principle of Subsidiarity and its Critique* (Oxford University Press, 2002) 113–114.

[69] G de Búrca, 'Reappraising Subsidiarity's Significance after Amsterdam' Jean Monnet Working Paper 7/1999.

[70] Case C–233/94 *Germany v European Parliament and Council* [1997] ECR I-2405, [26]–[28].

[71] Case C–84/94 *United Kingdom v Council* [1996] ECR I–5755, [46]–[47], [55].

4. UNION LEGISLATION: PILLARIZATION AND COMPLEXITY

The overall institutional framework was rendered more complex by the creation of the Three Pillar structure in the TEU,[72] which is considered in detail in later chapters.[73] The rationale for this development was considered in the previous chapter.[74] The Member States wished for some established mechanism for cooperation in the areas of Common Foreign and Security Policy (CFSP) and Justice and Home Affairs (JHA). Individual ad hoc meetings could be cumbersome, time consuming, and involve heavy 'transaction costs'. The Member States were, however, unwilling to accept the supranational mode of decision-making of the Community Pillar. They therefore devised a decision-making structure that was more intergovernmental, in which they retained power, with the other Community institutions having a diminished role by comparison with the Community Pillar. The legal acts that could be adopted within the Second and Third Pillar were also distinctive.

The predominance of Member State interests and the distinctiveness of the legal acts are apparent in relation to the CFSP.[75] Thus, it was the European Council that defined the principles and general guidelines for the CFSP. It was the European Council that decided on common strategies for the EU. It was then for the Council to implement such common strategies through joint actions. The Council could request the Commission to submit proposals for implementation of joint action. The Commission had greater input into CFSP decision-making than apparent from the Treaty provisions. This should not however mask the dominance of Member State interests in the decision-making process.

The centrality accorded to Member State interests, coupled with a distinctive range of legal acts, was also apparent in the Third Pillar. The original JHA Pillar governed policies such as asylum, immigration, 'third country' nationals, cooperation on international crime issues and various judicial, customs, and police cooperation. This was altered by the Treaty of Amsterdam, which moved asylum, immigration, and third country nationals to EC Title IV, and subjected the remaining Third Pillar provisions to institutional controls closer to those under the Community Pillar. The Third Pillar and Title IV EC were together labelled the Area of Freedom, Security and Justice (AFSJ).

The formal legal instruments and the disposition of power in the Third Pillar nonetheless remained distinctive. These could be adopted by the Council acting unanimously on the initiative of any Member State, or the Commission.[76] Thus the Council could adopt: common positions, which defined the EU's approach to a given matter; framework decisions for the approximation of Member States laws, these being similar to directives, but without direct effect; decisions for any purpose consistent with Third Pillar objectives, which were binding but did not have direct effect; and conventions. The EP had to be consulted on such measures, with the exception of common positions. The ECJ was given jurisdiction over the Third Pillar, but it was more limited than within the Community Pillar.[77]

[72] E Denza, *The Intergovernmental Pillars of the European Union* (Oxford University Press, 2002); N Walker (ed), *Europe's Area of Freedom, Security and Justice* (Oxford University Press, 2004); S Peers, *EU Justice and Home Affairs Law* (4th edn, Oxford University Press, 2016).
[73] Peers ch 23; Storskrubb ch 24.
[74] See above, ch 2.
[75] Arts 11–16 TEU.
[76] Art 34(2) TEU.
[77] Art 35 TEU.

The intergovernmental nature of the Third Pillar should not however be over-exaggerated. It is certainly true that the European Council set major policy strategies,[78] the Justice and Home Affairs Council was an important institutional player,[79] and Coreper, together with working parties and other specialist committees, performed important gate-keeping and coordinating functions for the Member States.[80] The Commission was, however, important in this area. It was the principal source of legislative initiatives relating to the AFSJ,[81] and was charged by the Council with drawing up detailed plans to implement European Council initiatives such as the Hague programme.

It is nonetheless undeniable that the Three Pillar structure rendered decision-making more complex and difficult to comprehend. This problem was exacerbated by the increasing tendency for policy initiatives to involve measures enacted under more than one Pillar,[82] the corollary being contestability as to the legal foundation for the Community or Union action.[83]

5. NEW GOVERNANCE: EXPERIMENTATION AND COMPLEXITY

The discussion thus far has been primarily concerned with the 'Classic Community Method':[84] the exercise of legislative power by the EC following the Commission's exclusive right of initiative. It is classic hierarchical governance, characterized by top-down decision-making by the central institutional actors leading to binding, uniform rules.[85]

An additional dimension to the inter-institutional landscape in the 1990s and the new millennium was the emergence of 'new methods of governance'.[86] A core theme is the shift away from classic hierarchical governance, with policy being delivered 'top-down', and encapsulating binding legal norms. The Classic Community Method is still the norm, but there was growing reliance on other governing mechanisms. A multiplicity of new forms of governance are used in the EU, some of which exist alongside more classic hierarchical modes, others of which are employed instead of traditional methods of governance. In some instances the obligations are voluntary, in other instances they are backed by direct or indirect legal sanction.

New governance initiatives were used across the EU's terrain. The best known example of new governance is the Open Method of Coordination (OMC). While the OMC did not 'begin' with the Lisbon Summit in March 2000,[87] the meeting was nonetheless important,

[78] Tampere European Council, 15–16 October 1999; Brussels European Council, 4–5 November 2004, Hague Programme.

[79] Hayes-Renshaw and Wallace (n 13) 45.

[80] ibid 86–87.

[81] Peers (n 72) 23.

[82] S Stetter, 'Cross-pillar Politics: Functional Unity and Institutional Fragmentation of EU Foreign Policies' (2004) 11 JEPP 720.

[83] Cases C-402, 415/05 P *Kadi v Council and Commission* [2008] ECR I-6351.

[84] J Scott and D Trubek, 'Mind the Gap: Law and New Approaches to Governance in the European Union' (2002) 8 ELJ 1.

[85] Craig and de Búrca (n 57) ch 7.

[86] C Kilpatrick and K Armstrong, 'Law, Governance and New Governance: The Changing Open Method of Coordination' (2007) 13 CJEL 649; N Walker and G de Búrca, 'Reconceiving Law and New Governance' (2007) 13 CJEL 519; C Sabel and J Zeitlin, 'Learning from Difference: The New Architecture of Experimentalist Governance in the European Union' European Governance Working Paper, EUROGOV No C-07-02/10 May 2007.

[87] Lisbon European Council, Presidency Conclusions, 23–24 March 2000.

since the European Council gave its imprimatur to the OMC. The EU was 'to become the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion'.[88]

Implementation was to be secured in part by the OMC.[89] Member States, regional and local government, the social partners, and civil society would be actively involved.[90] The general features of OMC were said to be:[91] fixing guidelines for the Union combined with specific timetables for achieving the goals; establishing quantitative and qualitative indicators and benchmarks as a means of comparing best practice; translating European guidelines into national and regional policies by setting specific targets and adopting measures, taking into account national and regional differences; and periodic monitoring, evaluation, and peer review organized as mutual learning processes. The OMC was used, albeit in different ways, in areas such as economic policy, employment policy, and combating social exclusion.

6. SECONDARY COMMUNITY NORMS: CONTESTATION AND COMPLEXITY

The Community legislative process for the passage of primary legislation was, as seen, transformed post the SEA, the premise being that the three major institutional players all had a role to play. This premise was not shared in relation to the passage of secondary norms, and the period from the SEA to Nice and beyond saw continuing contestation as to power over the making of such provisions.

Prior to the SEA, Comitology was, as we have seen, based on an admixture of legislative choice, backed by judicial approval. The SEA legitimated Comitology via the new third indent of Article 202 EC, which stipulated that the Council should confer on the Commission, in the acts adopted by the Council, powers for the implementation of the rules which the Council laid down, and that it could impose certain requirements in respect of the exercise of these powers. Article 202 EC demanded that the committee procedures should take place in accord with rules laid down in advance, which was the catalyst for the first Comitology Decision in 1987.[92] It was an improvement on the status quo ante, reducing the basic committee procedures to three, advisory, management, and regulatory, with two variants of both the management and regulatory committee procedures, plus safeguard committee procedures. The beneficial impact of the Decision was qualified by the Council's insistence that it should not affect the plethora of procedures applicable to existing committees. The Commission and the EP were, however, dissatisfied with the Comitology regime, albeit for different reasons.

For the Commission, the Treaty amendment to Article 202 was a 'plus', insofar as it embodied the general principle that the Council should confer implementing power on the Commission. It was nonetheless a defeat for more far-reaching Commission ambitions, since it entered the SEA negotiations hoping to secure amendment to Article 211 EC,

[88] ibid [5].
[89] ibid [7].
[90] ibid [38].
[91] ibid [37].
[92] Council Decision 87/373/EEC of 13 July 1987 laying down the procedures for the exercise of implementing powers conferred on the Commission [1987] OJ L197/33.

whereby it would have implementing power without prior authorization from the Council.[93] This aspiration was reflective of deeper Commission concerns about Comitology. The Commission believed that passage of 'implementing' provisions was part of the executive function, the authority for which resided with the Commission. Thus, while it was content to accept advisory committees it was unhappy with management and regulatory committees that cramped what it regarded as its proper sphere of executive autonomy. The political and normative foundation for this assumption is contestable. It is premised on the argument that everything that occurs after the passage of the primary legislation should be regarded as part of the executive function. The reality is that while some secondary norms made pursuant to Comitology may be concerned with technical detail, in many other instances the primary legislation may leave issues of principle and political choice to be resolved through secondary norms that are legislative in nature. Given that this is so, the Commission's claim that such measures fall naturally within its sphere of 'executive' autonomy conceals more than it reveals.

For the EP, the 1990s also saw increased opposition to Comitology. It expressed disquiet over Comitology from the very outset, but the EP's opposition grew commensurately with its increased status in the making of primary regulations and directives. The reason is not hard to divine. It had been on the sidelines of the legislative process for the first three decades of the Community's existence. This changed with the cooperation and co-decision procedures. These gains were undermined by the EP's exclusion from the making of secondary norms, which would often entail important issues of principle, practical detail, or political choice.

The EP fought the battle against Comitology on the legal and political fronts.[94] It argued that Article 202 could not be regarded as the basis for Comitology where the primary acts were adopted pursuant to co-decision, but only for such acts adopted by the Council alone. The Council rejected this view,[95] as did the ECJ.[96] The ECJ held moreover that while the primary regulation or directive must embody its 'essential elements', this was interpreted loosely, thereby allowing a broad range of implementing measures to be adopted through secondary regulations from which the EP was effectively excluded.[97] The EP also contested the committee procedures through the political process.[98] The process of legislative attrition was wearing for all involved and hostilities were temporarily lessened through the *Modus Vivendi* in 1994:[99] the relevant committee of the EP would be sent general draft implementing acts at the same time as the Comitology committee set up by the basic act.

The position of the EP was improved by the revised Comitology Decision, made pursuant to Declaration 31 of the Treaty of Amsterdam. Its passage was difficult,[100] and it was finally

[93] C-D Ehlermann, 'The Internal Market Following the Single European Act' (1987) 24 CMLRev 361.

[94] K Bradley, 'Maintaining the Balance: The Role of the Court of Justice in Defining the Institutional Position of the European Parliament' (1987) 24 CMLRev 41; K Bradley, 'Comitology and the Law: Through a Glass Darkly' (1992) 29 CMLRev 693; K Bradley, 'The European Parliament and Comitology: On the Road to Nowhere?' (1997) 3 ELJ 230.

[95] J-P Jacque, 'Implementing Powers and Comitology' in Joerges and Vos (n 18) ch 4.

[96] Case C-259/95 *European Parliament v Council* [1997] ECR I-5303, [26].

[97] Case C-156/93 *European Parliament v Commission* [1995] ECR I-2019, [18]–[22]; Case C-417/93 *European Parliament v Council* [1995] ECR I-1185, [30].

[98] R Corbett, *The European Parliament's Role in Closer EU Integration* (MacMillan, 1998) 347–348.

[99] *Modus Vivendi* of 20 December 1994 between the European Parliament, the Council and the Commission concerning the implementing measures for acts adopted in accordance with the procedure laid down in Article 189b of the EC Treaty [1996] OJ C102/1.

[100] Bergstrom (n 18) 249–264.

adopted in 1999.[101] The management and regulatory committee procedures were simplified to some degree. There were efforts to make the system more accessible to the public. The EP was accorded a greater role than hitherto. It could indicate by resolution that draft implementing measures, made pursuant to a primary act adopted by co-decision, would exceed the implementing powers in that act. The EP was also given a right to be informed by the Commission of committee proceedings, receive committee agendas, voting records, and the like. The EP can moreover request access to minutes of committee meetings.[102]

The EP's position was further improved by the 2006 amendment to the 1999 Decision,[103] the catalyst for this was belated acceptance of the EP's objection to the 1999 Comitology Decision where co-decision applied.[104] It introduced a new 'regulatory procedure with scrutiny procedure', which gave the EP greater rights than hitherto.

7. AGENCIES: INNOVATION AND CONTESTATION

Agencies are a prominent feature of nation states.[105] They facilitate use of experts outside the normal bureaucratic structure; allow the parent department to concentrate on strategic policy; and insulate technical regulatory issues from the vagaries of political change, thereby increasing the credibility of the choices thus made.

Agencies have become an important institutional feature of the EU,[106] and detailed treatment can be found in Edoardo Chiti's chapter.[107] They deal with areas as diverse as air safety, medicines, border control, food safety, maritime safety, environment, trade marks, and fundamental rights,[108] and are also used in the Second and Third Pillars. The Commission's rationale for agency creation echoes that set out above, that agencies 'would make the executive more effective at European level in highly specialized technical areas requiring advanced expertise and continuity, credibility and visibility of public action',[109] thereby enabling the Commission to focus on policy formation.[110] Majone stresses similar themes, in

[101] Council Decision 99/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission [1999] OJ L184/23; K Lenaerts and A Verhoeven, 'Towards a Legal Framework for Executive Rule-Making in the EU? The Contribution of the New Comitology Decision' (2000) 37 CMLRev 645.

[102] Case T-188/97 *Rothmans v Commission* [1999] ECR II-2463.

[103] Council Decision 2006/512/EC of 17 July 2006 amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers by the Commission [2006] OJ L200/11.

[104] Proposal for a Council Decision Amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission, COM(2002) 719 final, 2.

[105] M Thatcher and A Stone Sweet, 'Theory and Practice of Delegation to Non-Majoritarian Institutions' (2002) 25 West European Politics 1.

[106] M Everson, 'Independent Agencies: Hierarchy Beaters?' (1995) 1 ELJ 180; A Kreher, 'Agencies in the European Community: A Step Towards Administrative Integration in Europe' (1997) 4 JEPP 225; M Shapiro, 'The Problems of Independent Agencies in the United States and the European Union' (1997) 4 JEPP 276; R Dehousse, 'Regulation by Networks in the European Community: The Role of European Agencies' (1997) 4 JEPP 246; E Vos, 'Reforming the European Commission: What Role to Play for EU Agencies?' (2000) 37 CMLRev 1113; E Chiti, 'The Emergence of a Community Administration: The Case of European Agencies' (2000) 37 CMLRev 309; G Majone, 'Delegation of Regulatory Powers in a Mixed Polity' (2002) 8 ELJ 319; E Chiti, 'Decentralisation and Integration into the Community Administrations: A New Perspective on European Agencies' (2004) 10 ELJ 402; M Busuioc, *European Agencies: Law and Practices of Accountability* (Oxford University Press, 2013); M Chamon, *EU Agencies, Legal and Political Limits to the Transformation of the EU Administration* (Oxford University Press, 2016); P Craig, *EU Administrative Law* (3rd edn, Oxford University Press, 2018) ch 6.

[107] Chiti, Chapter 5 this volume.

[108] <https://europa.eu/european-union/about-eu/agencies/decentralised-agencies_en>.

[109] The Operating Framework for the European Regulatory Agencies, COM(2002) 718 final, 5.

[110] ibid 2.

particular the credibility problem of traditional Community regulation, and the 'mismatch between highly complex regulatory tasks and available administrative instruments'.[111] Shapiro's view is more 'political':[112] if there are difficulties in direct routes to further political integration, then best proceed via small discrete technical units that have the added advantage of not being the Commission, and not being in Brussels.

The powers accorded to agencies vary.[113] Most have informational and coordinating functions, a few can take individualized decisions, and some have quasi-regulatory powers. None however are true 'regulatory' agencies as that term is normally understood, although some come close. They do not have powers to make rules and adjudicate in the manner that is common for agencies in the US. There are legal and political reasons for the limits on agency powers.

The principal legal constraint is the *Meroni* principle,[114] which stipulated that it was not possible to delegate power involving a wide margin of discretion, since it thereby transferred responsibility by replacing the choices of the delegator for those of the body to whom power was delegated.

The principal political constraint came from the Commission. It has been supportive of agencies, but wished to adhere to the legal constraints to preserve 'the unity and integrity of the executive function'. This was to ensure 'that it continues to be vested in the chief of the Commission if the latter is to have the required responsibility vis-à-vis Europe's citizens, the Member States and the other institutions'.[115] The participation of agencies should therefore be 'organised in a way which is consistent and in balance with the unity and integrity of the executive function and the Commission's ensuing responsibilities'.[116] The Commission has therefore been reluctant to create real regulatory agencies exercising discretionary power through adjudication and rule-making, since if such power could be delegated then the Commission's sense of the unity of the executive function vested in it would be undermined. The emphasis placed on the unity and integrity of the executive function located in the President of the Commission was not fortuitous, given that the 2002 Communication was issued during the Convention on the Future of Europe, where the location of executive power was the most divisive issue.[117]

The Commission's concern as to the unity of the executive function also played out in relation to agency decision-making structure. The composition of agency boards was crucial.[118] The Commission voiced concern about the balance between its representation on agency boards and that of the Member States.[119] It drafted an Inter-institutional Agreement on agencies in 2005,[120] which enshrined its preferred position on agency boards, but failed to secure the Agreement's passage and it was withdrawn in 2009.[121] The Commission

[111] Majone (n 106) 329.
[112] Shapiro (n 106).
[113] Craig (n 106) ch 6.
[114] Case 9/56 *Meroni & Co, Industrie Metallurgiche SpA v High Authority* [1958] ECR 133, 152.
[115] COM(2002) 718 (n 109) 1.
[116] ibid 1, 9.
[117] P Craig, 'European Governance: Executive and Administrative Powers under the New Constitutional Settlement' (2005) 3 I-CON 407.
[118] Craig (n 106).
[119] COM(2002) 718 (n 109) 9.
[120] Draft Interinstitutional Agreement on the Operating Framework for the European Regulatory Agencies, COM(2005) 59 final.
[121] [2009] OJ C71/17.

nonetheless adhered to the philosophy in the 2005 Draft Agreement,[122] stating that 'the degree of accountability of the Commission cannot exceed the degree of influence of the Commission on the agency's activities'.[123]

Institutional development will commonly throw into sharp relief the balance of power within a particular polity. The EU is no different in this respect. The Commission acknowledged the utility of agencies, but was concerned about their impact on what the Commission perceived to be the unity and integrity of its executive function. Agencies constituted a site in which the locus of executive power was contested.

8. EXECUTIVE AGENCIES: INNOVATION AND COMMISSION REFORM

Institutional crisis is often the catalyst for institutional reform. While the word crisis should be used with care, the resignation of the Santer Commission, precipitated by the report of the Committee of Independent Experts,[124] constituted a crisis for the Commission. The Committee's concluding paragraph, that it was 'becoming difficult to find anyone who has even the slightest sense of responsibility'[125] within the Commission, was widely reported. While the Commission was not blameless there was in reality scant evidence of nepotism, the principal difficulty being maintenance of control over those to whom power had been contracted out.[126]

Romano Prodi, the new Commission President, rapidly introduced a new Code of Conduct for Commissioners,[127] and set up the Task Force for Administrative Reform (TFRA). The TFRA produced a White Paper,[128] which was heavily influenced by important recommendations in the Second Report of the Committee of Independent Experts.[129] This led to a new Financial Regulation, which established the constitutional architecture for Community administration.[130] It is premised on the divide between centralized and shared administration.

Centralized administration covers those instances where the Commission implements policy directly through its departments, or indirectly. The Commission is not, however, allowed to entrust its executive powers to third parties where they involve a large measure of discretion implying political choices. Within these limits the Commission has the option of establishing an executive agency.[131] The objective is to foster flexible, accountable, and

[122] European Agencies—The Way Forward, COM(2008) 135 final, 9.
[123] ibid 8.
[124] Committee of Independent Experts, First Report on Allegations regarding Fraud, Mismanagement and Nepotism in the European Commission, 15 March 1999, [1.4.2].
[125] ibid [9.4.25].
[126] P Craig, 'The Fall and Renewal of the Commission: Accountability, Contract and Administrative Organization' (2000) 6 ELJ 98.
[127] The Formation of the Commission, 12 July 1999.
[128] Reforming the Commission, COM(2000) 200.
[129] Committee of Independent Experts, Second Report on Reform of the Commission, Analysis of Current Practice and Proposals for Tackling Mismanagement, Irregularities and Fraud, 10 September 1999, <http://www.europarl.europa.eu/experts/default_en.htm>.
[130] Council Regulation (EC, Euratom) 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities [2002] OJ L248/1.
[131] Council Regulation (EC) 58/2003 of 19 December 2002 laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programmes [2003] OJ L11/1.

efficient management of Commission tasks. Policy decisions remain with the Commission, implementation is assigned to the agency. Five executive agencies have been created thus far.[132] Such agencies are especially suited to the implementation of programmes involving multiple contracts, grants, or subsidies.

Shared administration or mixed proceedings is nonetheless the most common method for implementation of Community policy.[133] It connotes the situation in which both the Community and national administrations have obligations for the effective implementation of the relevant policy. This is used for areas such as the Common Agricultural Policy, Structural Funds, and market liberalization for utilities such as gas and telecommunications. The 2002 Financial Regulation established important principles for shared administration, which were strengthened subsequently.

The 2002 Financial Regulation produced a welcome clarification of the principles governing Community administration. The resulting picture was one of growing administrative complexity, with a plethora of modes of centralized administration and significant variety within shared administration.

9. COMMUNITY COURTS: THE ECJ AS INSTITUTIONAL ACTOR

Analysis of the period between the Rome Treaty and the SEA revealed the importance of the ECJ as an institutional actor in the Community disposition of power. It was equally important between the SEA and the Lisbon Treaty. Space precludes detailed assessment, but its significance was manifest in four ways.

First, normative supranationalism through direct effect and supremacy continued to exert a powerful force on integration and attainment of the single market.[134] This was particularly evident in relation to establishment, services,[135] persons,[136] and citizenship.[137]

Secondly, the ECJ used the concept of institutional balance as a background principle to resolve inter-institutional disputes. The concept featured in litigation involving the EP's role in the legislative process.[138] It was used by the ECJ to 'anticipate' future Treaty amendments, and held that the EP could be a plaintiff in annulment proceedings where its prerogatives had been infringed.[139] It was deployed yet again to conclude that the Parliament could be a respondent in annulment proceedings, even though it was not mentioned in Article 173

[132] <https://ec.europa.eu/info/departments>.

[133] E Schmidt-Aßmann, 'Verwaltungskooperation und Verwaltungskooperationsrecht in der Europäischen Gemeinschaft' (1996) Europarecht 270; E Chiti and C Franchini, *L'Integrazione Amministrativa Europea* (Il Mulino, 2003; S Cassese, 'European Administrative Proceedings' (2004) 68 LCP 21; Craig (n 106) ch 2.

[134] MP Maduro, *We the Court, The European Court of Justice & the European Economic Constitution* (Hart, 1998) 100–102; E Johnson and D O'Keefe, 'From Discrimination to Obstacles to Free Movement: Recent Developments Concerning the Free Movement of Workers 1989–1994' (1994) 31 CMLRev 1313.

[135] Case C-384/93 *Alpine Investments* [1995] ECR I-1141.

[136] Case C-415/93 *Bosman* [1995] ECR I-4921.

[137] Case C-184/99 *Rudy Grzelczyk v Centre Public D'Aide Sociale d'Ottignes-Louvain-la-Neuve (CPAS)* [2001] ECR I-6193, [31].

[138] Case 138/79 *Roquette Frères v Council* [1980] ECR 3333; Case 139/79 *Maizena v Council* [1980] ECR 3393; Case C–22/96 *European Parliament v Council (Telephonic Networks)* [1998] ECR I–3231; Case C–42/97 *European Parliament v Council (Linguistic Diversity)* [1999] ECR I–869; H Cullen and A Charlesworth, 'Diplomacy by Other Means: The Use of Legal Basis Litigation as a Political Strategy by the European Parliament and Member States' (1999) 36 CMLRev 1243; Bradley, Chapter 6 this volume.

[139] Case C–70/88 *Parliament v Council* (Chernobyl) [1990] ECR I–2041; Case C–187/93 *Parliament v Council* (Transfer of Waste) [1994] ECR I–2857.

EEC at that time.[140] These judicial developments were gradually incorporated into the EC Treaty following successive Treaty amendments.[141]

Thirdly, the Community courts refined judicial review to impose the degree of scrutiny that was felt warranted in different areas of EC law. Review for manifest error was an important doctrinal tool in this regard.[142] The most searching application of manifest error review was in the context of competition and risk regulation. In the context of competition, it was driven by criticisms of the Commission acting as prosecutor, judge, and jury. In the context of risk regulation, intensive review was designed to allay fears that the precautionary principle would be used as a disguised mode of arbitrary trade restriction. The Community courts looked closely at the Commission's reasoning process, and its evidentiary foundation. Process review was used to facilitate substantive review.

Fourthly, the Community courts also regularly used judicial review as the medium through which to construe Community policy in a teleological manner so as to best attain its objectives. We naturally think of judicial review as a mechanism for challenging the legality of legislative or administrative acts. Such cases however afford the courts with the opportunity to interpret the relevant acts in a manner best designed to achieve the underlying policy objectives. The significance of this judicial role is manifest across all areas of EC law, and is particularly marked in relation to Community policies, such as agriculture and the Structural Funds, where large sums of money are at stake and the regulatory regime is complex.[143]

C. THE CONSTITUTIONAL TREATY TO THE LISBON TREATY: LEGISLATIVE AND EXECUTIVE AUTHORITY

Treaty reform is a continuation of politics by other means. It is not therefore surprising that institutional issues on the agenda in the previous decade dominated debates on more comprehensive Treaty reform. The prevalent themes in the 1990s were, as we have seen, increasing consensus as to the distribution of legislative power, coupled with contestation as to the locus of executive power.[144] These were the prominent themes in the debates on Treaty reform in the new millennium and the results embodied in the Lisbon Treaty shaped the inter-institutional distribution of power.[145]

1. THE ROAD FROM NICE TO LISBON

The first decade of the new millennium was dominated by attempts at reform, which began as soon as the ink on the Nice Treaty in 2000 had dried. The Nice Treaty left over certain

[140] Case 294/83 *Parti Ecologiste 'Les Verts' v Parliament* [1986] ECR 1339, [23].
[141] Art 230 EC, Art 263 TFEU.
[142] Craig (n 106) ch 15.
[143] ibid ch 4.
[144] D Curtin, *Executive Power in the European Union, Law, Practices and the Living Constitution* (Oxford University Press, 2009).
[145] P Craig, *The Lisbon Treaty, Law, Politics and Treaty Reform* (Oxford University Press, 2010).

issues, such as the division of competence between the EU and the Member States, and the status of the Charter of Rights, for determination at the next Intergovernmental Conference (IGC), which would have been in 2004. However, in 2001 there was a growing consensus that such matters could not be divorced from broader issues concerning the EU, and that the legitimacy of such discussion would be enhanced if the decision-making process was more open than the traditional IGC.

These sentiments were evident in the Laeken Declaration 2001,[146] which was the catalyst for the establishment of the Convention on the Future of Europe. It was not pre-ordained that the Convention would produce a Constitutional Treaty,[147] and it was mentioned only tentatively in the Laeken Declaration. A Constitutional Treaty (CT) nonetheless emerged from the Convention, and was agreed to by the Member States after amendment.[148] It required ratification by each Member State, and was duly ratified by fifteen Member States, but the negative referenda in France and the Netherlands effectively sounded the death knell for the Constitutional Treaty.[149]

The European Council decided in 2005 that after these results there should be a 'period of reflection', and in 2006 it commissioned Germany, which held the Presidency of the European Council in 2007, to reconsider Treaty reform. The German Presidency sought agreement in the European Council in June 2007 on a revised version of the CT. The European Council set out the changes that should be made to the CT,[150] and this heralded the birth of the Reform Treaty. An IGC was convened to formulate the Reform Treaty, which was signed on 13 December 2007,[151] although the appellation was changed to the Lisbon Treaty (LT) in recognition of the place of signature.

The 2007 IGC was power politics with a vengeance. The Lisbon Treaty was forged by Member States and Community institutions, with scant time for further deliberation. This was because the LT was the same in most important respects as the CT. The issues had been debated in the Convention and the 2004 IGC. There was little appetite to re-open Pandora's Box in the 2007 IGC. The LT was finally ratified in 2009, after difficulties in securing the agreement of Ireland and the Czech Republic had been overcome.

Article 1 LT contained the amendments to the TEU. Article 2 LT amended the EC Treaty, which is renamed the Treaty on the Functioning of the European Union (TFEU). The EU is henceforth to be founded on the TEU and the TFEU, and the two Treaties have the same legal value.[152] The Union replaced and succeeded the EC.[153]

[146] Laeken European Council, 14–15 December 2001.

[147] P Norman, *The Accidental Constitution, The Making of Europe's Constitutional Treaty* (2nd edn, EuroComment, 2005).

[148] Treaty Establishing a Constitution for Europe [2004] OJ C310/1.

[149] R Dehousse, 'The Unmaking of a Constitution: Lessons from the European Referenda' (2006) 13 Constellations 151

[150] Brussels European Council, 21–22 June 2007.

[151] Conference of the Representatives of the Governments of the Member States, Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, CIG 14/07, Brussels 3 December 2007 [2007] OJ C306/1; Consolidated Versions of Treaty on European Union and the Treaty on the Functioning of the European Union, Council 6655/08, Brussels 15 April 2008.

[152] Art 1 para 3 TEU.

[153] Art 1 para 3 TEU.

2. LEGISLATIVE ACTS: PARTICIPATION AND TYPOLOGY

The provisions of the Lisbon Treaty concerning legislative acts largely replicate those in the Constitutional Treaty. The Commission retained its 'gold standard', the right of legislative initiative.[154] The EP and the Council both partake in the consideration of legislation on an increasingly equal footing. The voting rules in the Council set out in the Lisbon Treaty largely replicated those in the Constitutional Treaty. The EP and the Council are said to exercise legislative and budgetary functions jointly.[155]

The co-decision procedure became the ordinary legislative procedure,[156] and was extended to more areas than hitherto, including, for example, agriculture,[157] services,[158] asylum and immigration,[159] the structural and cohesion funds,[160] and the creation of specialized courts.[161] This development was welcome. The co-decision procedure had worked well, allowing input from the EP, representing directly the electorate, and from the Council, representing state interests. It provided a framework for deliberative dialogue between the EP, Council, and Commission. Its extension to new areas was a natural development, which enhanced the democratic legitimacy of Union legislation. This should, however, be read subject to the qualification concerning the increased use of trilogues at an early stage in the legislative process, thereby foreclosing more meaningful dialogue.[162]

The Lisbon Treaty, however, differed from the Constitutional Treaty in relation to the typology of legal acts. The Constitutional Treaty introduced a hierarchy of norms, which distinguished between different categories of legal act, and used terms such as 'law', 'framework law', and the like.[163] It was decided that the terms 'law', and 'framework law' should be dropped, because the Lisbon Treaty was not to have a 'constitutional character'.[164] It was decided to retain the existing terminology of regulations, directives, and decisions in the Lisbon Treaty.[165] The hierarchy of norms developed in the CT is however preserved in the LT, which distinguishes between legislative acts, delegated acts and implementing acts.[166]

3. LEGISLATIVE ACTS: SUBSIDIARITY AND NATIONAL PARLIAMENTS

The Lisbon Treaty modified the role played by national parliaments in relation to subsidiarity. Subsidiarity is contained in Article 5(3)–(4) TEU, which largely replicates Article 5

[154] Art 17(2) TEU.
[155] Art 14(1) and Art 16(1) TEU.
[156] Arts 289 and 294 TFEU.
[157] Art 43(2) TFEU.
[158] Art 56 TFEU.
[159] Arts 77–80 TFEU.
[160] Art 177 TFEU.
[161] Art 257 TFEU.
[162] see text accompanying n 64.
[163] Arts I-33-39 CT.
[164] Brussels European Council, 21–22 June 2007, Annex 1, para 3.
[165] Art 288 TFEU.
[166] Arts 289–291 TFEU.

EC. The novelty of the new regime is to be found in the Protocol on the Application of the Principles of Subsidiarity and Proportionality, which should be read in tandem with the Protocol on the Role of National Parliaments in the EU.

The Commission must provide a detailed statement of the financial impact of the proposed legislation, with qualitative and, wherever possible, quantitative indicators to substantiate the conclusion that the objective can be better attained at Union level. The ECJ has jurisdiction to consider infringement of subsidiarity under Article 263 TFEU.

The most important innovation is the enhanced role accorded to national parliaments. The Commission must send all legislative proposals to national parliaments at the same time as to the Union institutions.[167] A national parliament, may, within eight weeks, send the Presidents of the Commission, EP, and Council a reasoned opinion why it considers that the proposal does not comply with subsidiarity.[168] The EU institutions must take this into account.[169] Where this view is expressed by national parliaments that represent one third of all the votes allocated to such parliaments, the Commission must review its proposal.[170] It may maintain, amend, or withdraw the proposal, giving reasons for the decision.[171] Where this view is expressed by a simple majority of votes given to national parliaments, then the Commission view can be overridden by the EP or the Council.[172]

There will continue to be many areas where the comparative efficiency calculus in Article 5(3) TFEU favours Community action. The Lisbon schema depends on the willingness of national parliaments to devote the requisite time to the matter. It will be even more difficult for the requisite number of national parliaments to present reasoned opinions so as to compel the Commission to review the proposal.[173] The Commission is nonetheless likely to take seriously any such reasoned opinion, particularly if it emanates from the parliament of a larger Member State. National parliaments are not given any role in relation to the proportionality calculus in Article 5(4) TEU, which is regrettable.[174]

4. DELEGATED ACTS: CONTROL AND POWER

The EP emerged as a winner in the Lisbon Treaty in relation to legislative acts. The picture is less clear in relation to delegated acts. Delegated acts are said to be non-legislative acts of general application, whereby power to adopt such acts is delegated to the Commission by a legislative act.[175] These non-legislative acts can supplement or amend certain non-essential elements of the legislative act, but the legislative act must define the objectives,

[167] Protocol (No 2) On the Application of the Principles of Subsidiarity and Proportionality, Art 4.
[168] ibid Art 6.
[169] ibid Art 7(1).
[170] ibid Art 7(2). This threshold is lowered to one quarter in certain cases concerning the AFJS.
[171] ibid Art 7(2).
[172] ibid Art 7(3).
[173] P Kiiver, *The Early Warning System for the Principle of Subsidiarity: Constitutional Theory and Empirical Reality* (Routledge, 2012); M Goldoni and A Jonsson Cornell (eds), *National and Regional Parliaments in the EU Legislative Procedure Post-Lisbon: The Impact of the Early Warning Mechanism* (Hart, 2016); K Granat, *The Principle of Subsidiarity and its Enforcement in the EU Legal Order. The Role of National Parliaments in the Early Warning System* (Hart Publishing, 2018).
[174] S Weatherill, 'Better Competence Monitoring' (2005) 30 ELRev 23.
[175] Art 290 TFEU.

content, scope, and duration of the delegation of power. The essential elements of an area cannot be delegated. The legislative act must specify the conditions to which the delegation is subject. Such conditions may allow the EP or the Council to revoke the delegation, and/or enable the EP or the Council to veto the delegated act within a specified period of time. The distinction between legislative and non-legislative acts is formal in the sense that legislative acts are defined as those enacted via a legislative procedure; non-legislative acts are those not enacted in this manner. Delegated acts are nonetheless normally legislative in nature. This is recognized in the Lisbon Treaty, which speaks of delegated acts having 'general application'.[176]

This new regime for delegated acts had implications for the Comitology regime. There is a significant 'history' here. The Commission's primary goal was to dismantle the established Comitology regime. It supported the *ex ante* and *ex post* constraints on delegated acts in the hope that Member States might be persuaded to modify the existing Comitology oversight mechanisms for delegated regulations.[177] There is provision for Comitology controls over implementing acts.[178] The divide between delegated acts and implementing acts is, however, fraught with difficulty[179] and the reality is that Comitology hitherto operated in relation to what are now termed delegated acts.

The Commission was successful in removing management and regulatory committees from the arena of delegated acts. Consultation with national experts prior to the enactment of delegated acts has however reappeared. This is unsurprising, since the controls in Article 290 are dependent on understanding the draft delegated act, which requires expertise. The Commission must therefore consult Member State experts in the preparation of draft delegated acts.[180] Where the content of a draft delegated act is changed in any way, the Commission must give Member States' experts the opportunity to react to the amended version.

5. EXECUTIVE POWER: CONTESTATION AND RESOLUTION

There was, as we have seen, contestation concerning the locus of executive power in the 1990s. The Presidency of the Union was the most contentious issue in the deliberations that led to the Constitutional Treaty,[181] and its 'resolution' was carried over unchanged into the Lisbon Treaty. There were two main positions.

[176] Art 290 TFEU.

[177] European Governance, COM(2001) 428 final, [20]–[29]; Institutional Architecture, COM(2002) 728 final, [1.2], [1.3.4]; Proposal for a Council Decision Amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission, COM(2002) 719 final, 2; Final Report of Working Group IX on Simplification, CONV 424/02, Brussels 29 November 2002, 12.

[178] Art 291(3) TFEU.

[179] P Craig, 'Delegated Acts, Implementing Acts and the New Comitology Regulation' (2011) 36 ELRev 671; R Schütze, '"Delegated Legislation" in the (New) European Union: A Constitutional Analysis' (2011) 74 MLR 661; C-F Bergstrom and D Ritleng (eds), *Rulemaking by the European Commission, The New System for Delegation of Powers* (Oxford University Press, 2016); M Chamon, 'Institutional Balance and the Community Method in the Implementation of EU Legislation Following the Lisbon Treaty' (2016) 53 CMLRev 150; P Craig, 'Delegated and Implementing Acts' in R Schutze and T Tridimas (eds), *Oxford Principles of European Union Law, Volume I: The European Union Legal Order* (Oxford University Press, 2018) ch 22.

[180] Inter- institutional Agreement of 13 April 2016 on Better Lawmaking [2016] OJ L123/1.

[181] Craig (n 117).

The 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 Commission President 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 Commission President, whose legitimacy would be increased by election. This would, however, have been doubly problematic: the heads of state in the European Council would never have accepted such accretion of power to the Commission President; and the Commission President would have been placed in an impossible position, trying to represent the interests of both the Commission and the Member States.

The prominent version of the '*separate hats*' view was that there should be a President of the Commission and a President of the European Council, with executive power exercised by both. The Presidency of the European Council would no longer rotate between Member States on a six-monthly basis. This would not work within an enlarged Union, which required greater continuity of policy.

The latter view prevailed. The Lisbon Treaty, following the Constitutional Treaty, provided that the European Council should elect a President, by qualified majority, for two and half years, renewable once; that the European Council should define the general political directions and priorities of the EU; and gave the President of the European Council increased powers within the Council itself.[182]

The President of the Commission is nonetheless still central to this constitutional scheme. Thus, the Commission is accorded power to initiate annual and multi-annual programming to secure inter-institutional agreement, and the Commission President cooperates with the President of the European Council in preparing the work of the European Council.[183] The institutional inter-relation between the European Council, Council, and Commission is also personified in the High Representative of the Union for Foreign Affairs and Security Policy, who takes part in the European Council, chairs the Foreign Affairs Council, and is also a Vice-President of the Commission.[184]

The Constitutional Treaty created the post of EU Minister for Foreign Affairs, who was to 'conduct' the Union's CFSP.[185] The idea that executive power was divided between the European Council and the Commission was personified in this post. The nomenclature changed in the Lisbon Treaty, because some Member States were unhappy about the 'statist' connotations of the title 'EU Minister for Foreign Affairs',[186] and hence it was altered in the Lisbon Treaty to be High Representative of the Union for Foreign Affairs and Security Policy.[187] The substance of the provisions is however the same as that in the Constitutional Treaty. Thus the High Representative is integral to the work of the Council, the European Council, and is also a Vice-President of the Commission. The High Representative therefore wears 'two hats'.

[182] Art 15 TEU.
[183] Arts 16(6), 17(1) TEU.
[184] Arts 15(2), 16(9), 17(4)–(5) TEU.
[185] Art I-28 CT.
[186] Brussels European Council, 21–22 June 2007, Annex 1, [3].
[187] Art 18 TEU.

6. EXECUTIVE POWER: ELECTION OF THE COMMISSION PRESIDENT

The Commission had hitherto generally been opposed to election of its President, fearing the politicization that might result. It recognized however during the Convention deliberations that election would enhance the legitimacy of the Commission President, thereby strengthening the claim to be President of the EU.[188] It proposed that the Commission President should be elected by the EP, subject to approval by the European Council, and hence secure the political legitimacy of both institutions.[189] The EP favoured an indirectly elected Commission President. The European Council was, however, unwilling to surrender control over the Commission Presidency to the European Parliament.

The 'solution' in the Constitutional Treaty[190] was carried over directly into the Lisbon Treaty. Thus, Article 14(1) TEU states that the EP shall elect the Commission President. The retention of state power is however apparent in Article 17(7) TEU. The European Council, acting by qualified majority, after appropriate consultation,[191] and taking account of the elections to the EP, puts forward to the EP the European Council's candidate for Presidency of the Commission. This candidate shall then be elected by the EP by a majority of its members. If the candidate does not get the requisite majority support, then the European Council puts forward a new candidate within one month, following the same procedure.

The very fact that the Commission President is indirectly elected means that the person will have to secure the support of the dominant grouping within the EP, and hence have some agenda for the term of office. The Commission President would, moreover, under the draft Constitutional Treaty presented to the IGC, have chosen Commissioners from three names presented by each Member State, and could therefore have fashioned a Commission that cohered with his political credo, and that of the dominant grouping within the EP.[192]

The link with the results of the EP elections was heightened in 2014 when candidates supported respectively by the EPP and the Socialist Party actively campaigned for the Commission Presidency. The EPP secured the majority of votes and its candidate Jean-Claude Juncker was duly appointed as Commission President by the European Council, notwithstanding opposition from the UK and Hungary. The link with the party system was, however, weakened in relation to the election of Ursula von der Leyen as Commission President, although the matter was complicated by the fact that the degree of EP support for the respective candidates was not so clear cut.

The indirect election of the Commission President goes some way to alleviate the concern that voters cannot remove incumbents they dislike, which is a prominent aspect of the critique concerning the EU's democratic deficit.[193] There remain however real limits in this respect. The Commission President may be first among equals, but the other Commissioners are chosen by the Member States, in common accord with the President-elect of the Commission.[194] They have diverse political backgrounds/beliefs and Commission policy

[188] Norman (n 147) 120–121.

[189] CONV 448/02, For the European Union Peace, Freedom, Solidarity—Communication from the Commission on the Institutional Architecture, 5 December 2002, [2.3]; Peace, Freedom and Solidarity, COM(2002) 728 final.

[190] Arts I-20(1), 27(1) CT.

[191] Declaration 11 LT emphasizes consultation between the European Council and EP preceding choice of the candidate for Commission President.

[192] Art I-26(2) Draft CT.

[193] See ch 2.

[194] Art 17(7) TEU.

must be acceptable to the College of Commissioners as a whole. The Commission does not, moreover, have a monopoly over the direction of EU policy, with the European Council and Council both being important institutional players in this respect.

7. EXECUTIVE POWER: COMMISSION SIZE AND APPOINTMENT

There had been considerable debate concerning the overall size of the Commission, as to whether there should continue to be a Commissioner from each state, or whether there should be an upper limit combined with rotation. The composition and size of the Commission featured prominently in the Convention deliberations. It came to the fore because of pending enlargement. The issue was further complicated by the fact that mixed messages were forthcoming from the Commission itself.[195]

The Draft Constitutional Treaty embodied a compromise. It provided that there should be a small Commission, consisting of the President, the Union Minister for Foreign Affairs, and thirteen Commissioners selected in rotation between the Member States.[196] This was however undermined by the provision that the Commission President should appoint non-voting Commissioners from all other Member States. This 'solution' was fiercely opposed by the Commission, which described the relevant provisions as 'complicated, muddled and inoperable'.[197]

The Constitutional Treaty rejected this schema, and the replacement was taken over into the Lisbon Treaty. It provided in effect for one Commissioner per Member State until 2014,[198] and then a slimmed down Commission consisting of two thirds of the Member States, with all members having voting rights. The European Council could however modify the post-2014 system by unanimously voting to alter the number of Commissioners.[199] It promised Ireland prior to its second referendum that each Member State would retain a Commissioner.[200] The commitment was honoured through a European Council decision in 2013.[201] The European Council duly reviewed the matter when the von der Leyen Commission was appointed, and retained the regime of one Commissioner per Member State.[202]

The method of choosing individual Commissioners was also altered during the Treaty reform. The Convention proposed that the President-elect of the Commission would choose Commissioners from a list of three names put forward by each Member State, who would then be approved by the EP.[203] The President of the Commission would therefore

[195] CONV 448/02 (n 189) [2.3.2]; Norman (n 147) 228–229.

[196] CONV 850/03, Draft Treaty Establishing a Constitution for Europe, Brussels 18 July 2003; Art I-25(3) Draft CT.

[197] 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, [2].

[198] Art 17(4) TEU.

[199] Art 17(5) TEU.

[200] Brussels European Council, 10 July 2009, [I.2].

[201] 2013/272/EU: European Council Decision of 22 May 2013 concerning the number of members of the European Commission [2013] OJ L165/98.

[202] European Council Decision (EU) 2019/1989 of 28 November 2019 appointing the European Commission [2019] OJ L308/100.

[203] Art I-26(2) Draft CT.

have been in the driving seat as to the choice of the other Commissioners. Later developments 'ratcheted up' Member State control over choice of Commissioners. The Lisbon Treaty provides that Member States make suggestions for Commissioners, but it is now the Council, by common accord with the President-elect, that adopts the list of those who are to be Commissioners. The Commissioners are then subject to a vote of approval by the EP. However, the formal appointment of the Commission is made by the European Council, acting by qualified majority, albeit on the basis of the approval given by the EP.[204]

D. POST-LISBON: CRISIS AND INSTITUTIONAL CHANGE

Institutional change may be planned, as exemplified by Treaty reform. It may also result from shocks to the system, which require a response. The ink had barely dried on the Lisbon Treaty before the EU had to confront a series of crises. The financial crisis, Brexit, the rule of law, immigration, and the pandemic, all had implications for the powers of the respective EU institutions and the institutional balance between them. Space precludes detailed treatment of each crisis, which can be found in subsequent chapters. The focus in the ensuing analysis is on the principal institutional implications of these events. It is unsurprising that this has differed.

1. THE FINANCIAL CRISIS: SUBSTANTIVE CHANGE AND INSTITUTIONAL CONSEQUENCE

The EU was founded on the promise of peace and prosperity. This was the original Monnet vision, to be realized through technocratic-led expertise. The EU largely delivered on this vision. The financial crisis cast a very long shadow over this credo that lay at the heart of the EU.[205]

The Treaty provisions on economic and monetary union, EMU, were crafted in the Maastricht Treaty. They embodied an asymmetry between EU power over monetary as opposed to economic union, which reflected what Member States were willing to accept. Monetary union concerned the single currency, an independent European Central Bank (ECB), and the primacy of price stability.[206] Monetary policy was Europeanized, and fell within the EU's exclusive competence.[207] The Maastricht settlement in relation to economic

[204] Art 17(5) TEU.

[205] There is a very large literature, see in relation to books, eg, M Adams, F Fabbrini, and P Larouche (eds), *The Constitutionalization of European Budgetary Constraints* (Hart, 2014); K Tuori and Tuori, *The Eurozone Crisis: A Constitutional Analysis* (Cambridge University Press, 2014); A Hinarejos, *The Euro Area Crisis in Constitutional Perspective* (Oxford University Press, 2015); F Fabbrini, E Hirsch Ballin, and H Somsen (eds), *What Form of Government for the European Union and the Eurozone* (Hart, 2015); G Garzón Clariana (ed), *Democracy in the New Economic Governance of the European Union* (Marcial Pons, 2015); F Fabbrini, *Economic Governance in Europe: Comparative Paradoxes and Constitutional Challenges* (Oxford University Press, 2016); G Gerapetritis, *New Economic Constitutionalism in Europe* (Hart, 2019); M Markakis, *Accountability in the Economic and Monetary Union: Foundations, Policy, and Governance* (Oxford University Press, 2020); F Amtenbrink and C Herrmann (eds), *EU Law of Economic and Monetary Union* (Oxford University Press, 2020); Hinarejos, Chapter 22 this volume.

[206] Arts 127, 130, 282(3) TFEU.

[207] Arts 2(1), 3 TFEU.

policy was markedly different. It was built on two related assumptions, preservation of national authority and preservation of national liability. Member States retained fiscal authority for national budgets, subject to limited EU oversight, with the consequence that budgetary liability remained at the national level, reflected in the prohibition on bail-outs.[208]

The Maastricht 'deal' was left largely unaltered in the Lisbon Treaty. The Member States understood that the economic health of Member State economies could have a marked impact on the valuation of the euro, hence the need for oversight of national economic policy. They were, however, unwilling to accord the EU too much control over such budgetary determinations. It was only when the financial crisis hit that the Member States were willing to accept that greater control over national economic policy was a necessary condition for monetary union. While the EU should therefore be held accountable for the way it dealt with the financial crisis, the Member States bear considerable responsibility, since they shaped the Maastricht EMU architecture. It is important to disaggregate between the institutional consequences as the crisis unfolded, and the inter-institutional balance of power going forward.

We begin with the institutional implications of the financial crisis for EU decision-making as the crisis unfolded. Sergio Fabbrini provided an insightful analysis of this phase.[209] He contends that since the Maastricht Treaty there have been two modes of decision-making, supranational and intergovernmental. The former was applicable to the single market and other areas, the key features being the centrality of the Commission, the ordinary Community method, and the ECJ. The latter was manifest in relation to the Second and Third Pillar and economic union, the key features being greater concentration of power in the Council and European Council, no role or a reduced role for the ECJ, and substantive Treaty provisions that were couched in less hard-edged terms. Intergovernmental solutions were therefore at the forefront in tackling the crisis, as attested to by the centrality of Germany and France in finding a solution, but Fabbrini argues that there were nonetheless various shortcomings to this mode of crisis resolution, including difficulties of ensuring compliance and legitimacy.

There is force in this analysis, but it must nonetheless be qualified. This is because the central remedial response to the financial crisis was the supranational raft of legislative measures known as the six-pack and the two-pack, which were enacted by the normal legislative procedures as formal regulations and directives. The ideas were generated in part by the Special Task Force on EU Governance, chaired by President van Rompuy, but the Commission was not excluded from this process. To the contrary, it exercised the right of initiative, drafted the measures and piloted them through the legislative process. The EP participated in the shaping of this legislation.

We can now consider the inter-institutional balance of power resulting from the measures enacted to address the financial crisis. They were designed to assist Member States that were in financial difficulty, and to oversee more generally the budgetary situation in Member States. The EU constraints on national political action, whether in relation to fiscal policy, banking, or securities regulation, were significantly increased. The resulting macro-economic union is unrecognizable from its Maastricht ancestor. These measures to prevent

[208] Art 125(1) TFEU.

[209] S Fabbrini, 'Intergovernmentalism and its Limits: Assessing the European Union's Answer to the Euro Crisis' (2013) 46 Comparative Political Studies 1.

recurrence of a sovereign debt crisis go hand in hand with measures designed to render financial crisis precipitated by bank failure less likely. There have been real tensions between creditor and debtor Member States, which have played out within the EU institutions.

The duty to ensure compliance with these measures falls primarily to the Commission, the ECB, and the CJEU. It is the Commission that has a central role in relation to the six-pack, two-pack, and the European Stability Mechanism.[210] Nor should this come as a surprise. The European Council developed significantly since the Lisbon reforms, as did its support structure. It does not, however, have the institutional capacity to engage in systematic scrutiny as required by the new rules. It may, moreover, be content to let the Commission take centre stage in this respect, with the consequence that the latter takes the 'heat' for decisions that may not be popular at national level. The ratchet effect of increased economic oversight with the Commission in the driving seat carries dangers for the Commission. Increased power brings increased responsibility. The ECB responsibilities have also been significantly enhanced in the financial sector.[211]

2. THE BREXIT CRISIS: SUBSTANTIVE CHANGE AND INSTITUTIONAL TEST

The impact of Brexit on the EU was indubitably dramatic. It embodied reversal of the pattern of integration since its inception. The very fact that a Member State sought to leave, for whatever concatenation of circumstance, shook the system to the core.[212] It also operated as a real life test for EU decision-making, more particularly the system that was institutionalized in the Lisbon Treaty.

There was, as we have seen, much debate prior to the Constitutional Treaty as to whether the EU should have a single President, who would be the head of the Commission, or whether there should be separate Presidents of the Commission and the European Council. The Constitutional Treaty reflected the latter view, known in the jargon of the trade as the 'separate hats' view, and it was adopted in the Lisbon Treaty.

The opposition was based in part on apprehension that the European Council Presidency would be dominated by the larger Member States. This has not been borne out, given that the three initial incumbents of the European Council Presidency hailed from Belgium and Poland. The opposition to the separate hats view was also based on concern that the split of executive power would be inefficient and could lead to conflicts between the two Presidents. There was little post-Lisbon to bear out this fear, even if there were instances where they differed over detailed strategy.

[210] M Bauer and S Becker, 'The Unexpected Winner of the Crisis: The European Commission's Strengthened Role in European Governance' (2014) 36 LIEI 213; R Epstein and M Rhodes, 'The Political Dynamics behind Europe's New Banking Union' (2016) 39 West European Politics 415; R Dehousse, 'Why Has EU Macroeconomic Governance Become more Supranational?' (2016) 38 Journal of European Integration 617.

[211] Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions [2013] OJ L 287/63.

[212] P Birkinshaw and A Biondi (eds), *Britain Alone! The Implications and Consequences of United Kingdom Exit from the EU* (Wolters Kluwer, 2016); M Dougan (ed), *The UK after Brexit, Legal and Policy Challenges* (Intersentia, 2017); F Fabbrini (ed), *The Law & Politics of Brexit* (Oxford University Press, 2017); A Bakardjieva Engelbrekt and X Groussot (eds), *The Future of Europe, Political and Legal Integration Beyond Brexit* (Hart, 2019); F Fabbrini (ed), *The Law & Politics of Brexit II* (Oxford University Press, 2020); Armstrong, this volume Chapter 13 .

Brexit provided a real pressure test for the Lisbon institutional regime. The double Presidency worked to good effect in the Brexit negotiations. Both Presidents participated in this discourse, and supported each other. Donald Tusk, the President of the European Council, commonly took the lead. This was reflective of the centrality of that institution in Article 50 TEU, since it was the European Council to which the Member State gave its notice to withdraw, and it was the European Council that issued the guidelines for the negotiations between the EU and the UK. The very fact that the European Council had a long-term President gave it a natural authority, enabling it to operate as the voice of the twenty-seven heads of state. The difficulties of running Brexit negotiations over two years under the status quo ante, whereby the head of the European Council rotated every six months, would have been formidable, perhaps impossible.

There was, moreover, real interaction between the two Presidents, and the lead Commission negotiator, Michel Barnier. The negotiating mandate adopted by the European Council had significant input from the Commission, and hence its President. This was increasingly so as the talks became more advanced. Commission papers would commonly flesh out the detail of, for example, the arrangements that should prevail for EU citizens living in the UK and vice-versa in a post-Brexit world, or the transitional arrangements attendant on the UK's exit from the EU. The Commission President, Jean-Claude Juncker, was, moreover, vocal at various stages of the discourse, reaffirming Donald Tusk's view as to what was, and was not feasible, in the heated exchanges concerning the Northern Ireland backstop.

Brexit also tested the EU institutional system in a second sense, which was the preservation of unity between the twenty-seven Member States in the negotiation. This was rightly regarded as crucial. The EU should speak with one voice. It should be transmitted through official channels, which meant the triumvirate of Tusk, Juncker, and Barnier. There were to be no 'bilaterals', whereby the UK sought to engage in discussion with individual EU leaders and thereby circumvent official channels. The UK Prime Minister did have talks with some EU leaders, notably Macron and Merkel, but unity in the preceding sense nonetheless held firm. The UK Prime Minister was not able to cut deals with leaders of particular Member States, who were themselves cognizant of the dangers of such a strategy.

3. RULE OF LAW CRISIS: SUBSTANTIVE DEFAULT AND INSTITUTIONAL RESPONSE

The original Rome Treaty contained no mention of the rule of law, but the ECJ held in *Les Verts* that the EC was 'a Community based on the rule of law'.[213] However, Article 2 TEU makes express reference to the concept, which also features in Article 21(1) TEU concerning the EU's external action and the CFSP.

The EU's rule of law problem is primarily, although not exclusively, concerned with challenge to the independence of the judiciary in certain Member States, notably Poland and Hungary.[214] An independent judiciary is an especially significant component of the rule

[213] Case 294/83 *Les Verts v Parliament* [1986] ECR 1339, [23].

[214] See, from a large literature, eg, A von Bogdandy, M Kottmann, C Antpöhler, J Dickschen, S Hentrei, and M Smrkolj, 'Reverse Solange–Protecting the Essence of Fundamental Rights against EU Member States' (2012) 49 CMLRev 489; A von Bogdandy and P Sonnevend (eds), *Constitutional Crisis in the European Constitutional*

of law. It is central to any conception of the rule of law that the government should act on a basis that is deemed valid by that legal system. If the government exceeds the boundaries of its lawful authority, then its action will be invalid. There must be independent courts to assess objectively whether the limits on lawful authority have been exceeded. The judiciary must also be independent to give legal effect to other precepts of the rule of law, such as the proscription of retrospective laws, or protection for access to court. If the courts lack independence, then they will not protect these other principles that are integral to the rule of law.

Judicial independence is, moreover, especially pertinent in the EU context. Mutual trust between national courts is central to the European Arrest Warrant regime that constitutes the core of the AFSJ. In more general terms, national courts are essential to the regime of EU adjudication. They have the obligation to apply EU law within their jurisdiction, and operate the preliminary reference system in Article 267 TFEU, which lies at the core of the EU legal order. If national courts lack independence then EU adjudication will suffer in both respects. They may not apply EU law correctly, and may restrict the flow of preliminary references where there are challenges to national action that is contrary to EU law.

The rule of law crisis generated a plethora of institutional responses from the EU. These include invocation of Article 7 TEU, which constitutes the principal formal Treaty mechanism for dealing with Member States that breach Article 2 TEU; the Commission Justice Scoreboard; the Commission Rule of Law Framework; the Council's Annual Rule of Law Dialogue; legal actions before the CJEU; the Rule of Law Cycle; and monetary incentives for compliance with the rule of law. The issue of rule of law financial conditionality was connected to disbursements from the fund established to help Member States in the light of the pandemic, with proposals that such payments should be conditional on rule of law compliance.[215] Poland and Hungary resisted this, by threatening to veto the Own Resources decision, which provides the legal base for the budgetary appropriations.[216] This explains, in part, the limited scope of the rule of law conditionality regulation that was enacted.[217] These issues are examined in detail by Laurent Pech.[218] The very heterogeneity of these responses attests to the seriousness of the problem, and the institutional difficulties of addressing it at EU level.

The problem is serious because rule of law backsliding undermines the EU system of adjudication for the reasons set out above. The European Arrest Warrant regime based on mutual trust cannot operate where courts lack independence, and the objective application of EU law in such countries collapses. It calls into question the very status of such countries as EU Member States. This is more especially so given that the attack on the independence

Area: Theory, Law and Politics in Hungary and Romania (Hart, 2015); C Closa and D Kochenov (eds), *Reinforcing the Rule of Law Oversight in the European Union* (Cambridge University Press, 2016); D Kochenov and L Pech, 'Better Late than Never: On the European Commission's Rule of Law Framework and its First Activation' (2016) 54 JCMS 1062; A Jakab and D Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member State Compliance* (Oxford University Press, 2017).

[215] <https://www.europarl.europa.eu/news/en/press-room/20201104IPR90813/rule-of-law-conditionality-meps-strike-a-deal-with-council>.

[216] <https://www.ft.com/content/6868477d-38a2-464e-b1c4-188fd0a62b1a; https://euobserver.com/opinion/150103?utm_source=euobs&utm_medium=email>.

[217] Regulation (EU/Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality to protect the Union budget [2020] OJ L433 I/1.

[218] See Chapter 10 this volume.

of the judiciary commonly betokens a general shift to authoritarianism and away from democracy. The EU cannot tolerate Member States that are not democratic.

The problem is, however, difficult to address, which is borne out by the heterogeneity of responses thus far. To be clear, there is nothing untoward about there being a plethora of different responses. There is no reason why there should be a single institutional response. The range of techniques is a strength, not a weakness. It nonetheless attests also to the difficulty of addressing the problem, which resides in the relationship between the EU's responsibility and its competence.

Thus, it is felt that the EU should do 'something' about the problem, the very existence of which is felt to be partly the EU's responsibility, because the problematic country is currently a Member State of the EU. There are, however, competence limits as to what the EU can do. Moreover, if there are serious systemic failures in relation to the rule of law within a Member State, which are grounded in deep-rooted socio-political problems in that state, then there will perforce be political limits as to what can be done by the EU.

The preceding tension between responsibility and competence then has implications for which EU institution has the authority to address the problem. There have been strains between the Commission and Council in this respect. The Commission is, however, charged under Article 17(1) TEU with ensuring that the Treaties are observed, which includes the values in Article 2 TEU. Moreover, while the Council is the body that protects Member State interests, most Member States believe that the problems in Hungary, Romania, and Poland should be brought under control, because they do not agree with the illiberal measures that underpin the rule of law critique, and because they recognize the damage that such measures can have for the EU as a whole. Nor, however, is it surprising that the Council has been willing, after initial reluctance, to outsource some of this to the Commission, since a lesson from governance within nation states is that the executive may be willing to outsource regulatory power because it can thereby avoid the 'heat' that comes with the task. By the same token the European Council is content for the CJEU to address the matter through infringement actions.

4. IMMIGRATION CRISIS: EXOGENOUS SHOCK AND INSTITUTIONAL LIMITS

The advent of serious conflict in the Far East, Middle East, and North Africa led to very large numbers of refugees and migrants. The dividing line between the two categories has become ever more difficult to maintain, given that conflict can have a devastating effect not just on economic well-being, but also on the viability of economic survival in certain parts of the world. This led to an influx of refugees to the EU on a scale that had not been known hitherto. The EU has a system for asylum seekers, but it has been overwhelmed by the numbers involved. The situation has been exacerbated because of the inability of the Member States to agree on a way to deal with the problem, with the consequence that the Member States that are geographically in the front-line have borne the brunt of the burden, since they are the most proximate destinations sought by those fleeing conflict. The flow of irregular migrants entering the EU reached unprecedented levels during 2015–2016.

There has been no shortage of EU initiatives in this area, most notably by the Commission.[219] The approach has been multi-faceted. Thus, there have been proposals relating to protecting those in need of shelter; fighting people smuggling; curbing irregular migration; saving lives at sea; securing the EU's external borders; guaranteeing free movement of people within the Schengen area; better organization of legal migration; better integration of non-EU nationals into EU societies; and reform of the asylum system. These initiatives have been organized as part of the European Agenda on Migration[220] and the European Agenda on Security.[221]

These are complex issues, and the optimal EU response to each aspect thereof is contestable.[222] The salient point for the present chapter is, however, simple and foundational: EU initiatives must be accepted by Member States, and if this consent is not forthcoming there is ultimately little that can be done to advance the relevant policy.

This is readily apparent from Commission documentation in this area. Thus, in 2015 the Commission noted that emergency measures were necessary because collective European policy on the matter had fallen short. There were serious doubts about whether EU migration policy could cope with the pressure of thousands of migrants fleeing conflict zones.[223] It noted the unprecedented pressure on asylum systems, more especially because this was not spread evenly across Member States. The burden of dealing with the influx of migrants fell heavily on front-line Member States, such as Greece, Italy, and Cyprus.

The proposed response was eclectic, but a central component was for a redistribution scheme designed to alleviate the burden on front-line Member States. The core idea was for a temporary distribution scheme for persons in clear need of international protection, to ensure a fair and balanced participation by all Member States. The receiving Member State would be responsible for examination of the application in accordance with established rules and guarantees. There was to be redistribution based on criteria such as GDP, size of population, unemployment rate, and past numbers of asylum seekers and of resettled refugees.[224]

The reality is that such proposals, and related initiatives concerning reform of the asylum system, are dependent on Member State consent. This has been in short supply.[225] It has proven difficult to secure agreement on the suggested reforms, and there has been

[219] <https://ec.europa.eu/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package_en;https://ec.europa.eu/home-affairs/what-we-do/policies/european-agenda-migration/background-information_en>.

[220] <https://ec.europa.eu/home-affairs/what-we-do/policies/european-agenda-migration_en>.

[221] <https://ec.europa.eu/home-affairs/what-we-do/policies/european-agenda-security_en>.

[222] A Baldaccini, E Guild, and H Toner, *Whose Freedom, Security and Justice?: EU Immigration and Asylum Law and Policy* (Hart, 2007); S Peers, V Moreno Lax, M Garlick, and E Guild, *EU Immigration and Asylum Law, Vol 3: Asylum Law* (2nd edn, Brill, 2015); K Hailbronner and D Thym (eds), *EU Immigration and Asylum Law* (2nd edn, CH Beck/Hart/Nomos, 2016); S Peers, *EU Justice and Home Affairs Law, Vol II: EU Immigration and Asylum Law* (4th edn, Oxford University Press, 2016); C Costello, *The Human Rights of Migrants and Refugees in European Law* (Oxford University Press, 2016); A Geddes, 'The Politics of European Union Migration Governance' (2018) 56 JCMS 120; S Lavenex, 'Common Market, Normative Power or Super-state? Conflicting Political Identities in EU Asylum and Immigration Policy' (2019) 17 Comparative European Politics 567; Tsourdi and Costello, Chapter 25 this volume.

[223] A European Agenda on Migration, COM(2015) 240 final, 2.

[224] ibid 4.

[225] N Zaun, 'States as Gatekeepers in EU Asylum Politics: Explaining the Non-Adoption of a Refugee Quota System' (2018) 56 JCMS 44; E Thielemann, 'Why Refugee-Sharing Burden Initiatives Fail: Public Goods, Free-Riding and Symbolic Solidarity in the EU' (2018) 56 JCMS 63; R Baubock, 'Refugee Protection and Burden Sharing in the European Union' (2018) 56 JCMS 141.

non-compliance with obligations that have been enacted. Thus, progress on securing consent for reforms to the Dublin asylum system[226] has been hampered by Member State insistence that all proposals be treated as part of a package.[227] There have, moreover, been frequent Commission documents showing that Member States were not meeting targets for relocation and resettlement, with some Member States refusing to participate in the scheme at all, while others did so on a very limited basis.[228]

The difficulty of securing agreement on these issues is not surprising. Controls over entry into a state are particularly sensitive. Member States surrender such freedom with regard to nationals of other Member States when they join the EU. It is an integral part of the membership deal. Member States are, however, far more cautious when it comes to the terms and conditions of entry for those from third countries. This is more especially so when the numbers of such applicants reach the levels seen in the EU post-2015. The exogenous shock caused by this wave of immigration has rendered it difficult to secure agreement between the Member States on the core features of a reformed immigration and asylum system.

We should nonetheless be cautious in describing this as a failure of the EU, or to put the same point in a different way, we should be mindful of the import of this statement. The EU has not failed to proffer meaningful reform proposals. There has been no institutional failure in this respect. The failure resides in the unwillingness of the Member States to sign up to such initiatives. This betokens institutional failure in a different sense, in that it reveals the limits of some Member States' perceptions of solidarity, and their disinclination to regard the immigration crisis as a collective action problem for the EU as a whole. They may accept financial disbursement to front-line Member States,[229] but baulk at more far-reaching proposals that would require them to admit such migrants into their own state.

The Commission adopted a new migration initiative in September 2020, which is premised on recognition that the existing system is not working.[230] The proposed regime is based on more efficient and faster procedures and fair sharing of responsibility and solidarity. The latter entails flexible contributions from the Member States, which include acceptance of asylum seekers, relocation from the country of first entry, responsibility for returning individuals with no right to stay, and various forms of operational support. It remains to be seen whether the Member States are willing to accept this initiative.

5. PANDEMIC CRISIS: EXOGENOUS SHOCKS AND INSTITUTIONAL ACTION

The exogenous shock of the Coronavirus hit the EU in 2020. Its effects were felt especially strongly in Italy, Spain, and the UK, but all Member States were affected to some degree.

[226] <https://ec.europa.eu/home-affairs/what-we-do/policies/asylum/examination-of-applicants_en>.

[227] Progress Report on the Implementation of the European Agenda on Migration, COM(2019) 481 final, 18.

[228] <https://ec.europa.eu/commission/presscorner/detail/en/IP_17_348; https://ec.europa.eu/commission/presscorner/detail/en/IP_18_5712>.

[229] <https://ec.europa.eu/commission/presscorner/detail/en/FS_19_6076>.

[230] New Pact on Migration and Asylum | European Commission (europa.eu); European Agenda on Migration (europa.eu)

The issues raised by the virus are complex and cannot be examined in detail here. The primary focus is on what we learn concerning the EU's institutional response to the crisis. The general answer is that there were institutional constraints to the EU's capacity to act, that it performed reasonably in many respects, but that there were problems with the vaccine rollout

It is important at the outset to recognize that there were multiple dimensions to the crisis, as attested to by its impact on health, free movement, and macro-economic policy. The EU's competence differs in each area. Thus, in relation to health, the EU's competence is to complement that of the Member States,[231] while its competence in relation to EMU is bounded by the proscription of bail outs.[232] The CJEU interpreted the salient provisions teleologically to help save the euro during the financial crisis,[233] but there were nonetheless limits as to what could be done by the ECB and other EU institutions. The EU nonetheless did a considerable amount within the legal limits of its competence, and within the political constraints of what the Member States were willing to accept.[234]

Thus, in relation to health there were numerous EU initiatives. There was EU funding to support the healthcare systems of EU countries, with €3 billion from the EU budget, matched with €3 billion from the Member States, to fund the Emergency Support Instrument and RescEU's common stockpile of equipment.[235] There were measures to increase production of personal protective equipment (PPE), and to facilitate conversion of production lines so that more PPE could be supplied. The Commission requested that European Standardization bodies and their national members should make European standards for medical supplies freely available, to enable producers to get high-performing devices to the market more quickly. The Commission also facilitated joint procurement arrangements for PPE with Member States.[236] The European Centre for Disease Prevention and Control collaborated with national agencies.

There have been a range of economic initiatives. There were measures relating to state aid, whereby the Commission adopted temporary state aid rules so that governments could provide assistance to support citizens and companies, and thereby save jobs in the EU.[237] The Commission triggered the activation of the general escape clause of the Stability and Growth Pact (SGP) to allow Member States to undertake measures to deal adequately

[231] Art 168 TFEU.

[232] Arts 123, 125 TFEU.

[233] Case C-370/12 *Pringle v Government of Ireland, Ireland and the Attorney General* EU:C:2012:756; Case C-62/14 *Gauweiler v Deutsche Bundestag* EU:C:2015:400; Case C–493/17 *Weiss* EU:C:2018:1000.

[234] <https://ec.europa.eu/info/live-work-travel-eu/health/coronavirus-response/overview-commissions-response_en#documents>; D Dimitrakopoulos and G Lalis, The European Union's reaction to the Covid-19 pandemic—a preliminary assessment, <https://blogs.lse.ac.uk/europpblog/2020/03/27/the-european-unions-reaction-to-the-covid-19-pandemic-a-preliminary-assessment/>; P Dermine and M Markakis, Analysis—The EU fiscal, economic and monetary policy response to the COVID-19 crisis, EU Law Live, Weekend Edition No 11, 7–14, <https://ssrn.com/abstract=3563299>; K Purnhagen, M Flear, T Hervey, A Herwig, and A de Ruiter, 'More Competences than you Knew? The Web of Health Competences for Union Action in Response to the COVID-19 Outbreak' Amsterdam Law School Legal Studies Research Paper No 2020-13; T Tesche, 'The European Union's Response to the Coronavirus Emergency: An Early Assessment' LEQS Paper No 157/2020; A Barbier-Gauchard et al, 'Towards a More Resilient European Union after the COVID-19 Crisis' BETA No 2020-33.

[235] <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_476>.

[236] <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_523>.

[237] Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak, C(2020) 1863 final.

with the crisis, while departing from the budgetary requirements that would normally apply under the European fiscal framework. The ECB introduced a €750 billion Pandemic Emergency Purchase Programme of private and public securities during the crisis, in addition to the €120 billion programme decided earlier.[238] The European Stability Mechanism was deployed to provide assistance to Member States most affected by the crisis.[239] The European Investment Bank created a pan-European guarantee fund to support EU businesses, and there is discussion concerning establishment of a temporary Recovery Fund, to aid economic recovery.

The most controversial suggested macro-economic initiative was for 'corona bonds', whereby there would be a collective guarantee from all Member States, which would thereby facilitate access to funding.[240] This was supported by a number of Member States, but there was resistance from the 'frugal four' Netherlands, Denmark, Austria, and Sweden. A deal was finally brokered on 21 July 2020, after a lengthy European Council meeting.[241] It entailed a fund of €750 billion, of which €390 billion would be dispersed as grants, and €360 billion as loans. The schema was predicated on willingness to increase the EU's own resources ceiling by 0.6 per cent, the idea being that the bonds would be repaid between 2027 and 2058.

The European Council conclusions stressed that the schema was limited in size, duration, and scope as a response to the pandemic crisis,[242] and that the funds were to be used for the 'sole purpose' of coping with the crisis.[243] The expenditure of funds is moreover linked to the country-specific recommendations of the European Semester, as well as job creation and economic and social resilience.[244] Decisions concerning disbursement of funds are prima facie made by the Council, acting by qualified majority on a proposal from the Commission, but it is open to a Member State to object that there has been insufficient attainment of the milestones and targets, in which case the matter is referred to the European Council.[245] The precise funding arrangements for repaying the debt appear to be an admixture of sums taken from the EU budget during the intervening years, and possible new digital taxes, and taxes on companies operating in the EU.[246]

There will always be legitimate questions as to whether the EU should have done more when faced with a crisis. It is nonetheless important to maintain a balanced perspective. The EU has always had to act within the legal limits of its competence, and within the political constraints of what Member States are willing to accept. Viewed from this perspective, its achievements within the tight time frame were significant. There were, however, problems at EU level with vaccine rollout and this cast a shadow over the positive contributions made by the EU.

[238] <https://www.ecb.europa.eu/press/blog/date/2020/html/ecb.blog200319~11f421e25e.en.html?utm_source=cl_twitter&utm_medium=social&utm_campaign=200319_ecb_blog_cl>.
[239] <https://ec.europa.eu/info/live-work-travel-eu/health/coronavirus-response/overview-commissions-response_en#documents>.
[240] Europe's Moment: Repair and Prepare for the Next Generation, COM(2020) 456 final.
[241] European Council, Brussels 21 July 2020, EUCO 10/20.
[242] ibid [A4].
[243] ibid [A5].
[244] ibid [A13].
[245] ibid [A19].
[246] Commission, Financing the Recovery Plan for Europe, 27 May 2020.

6. POST-LISBON DEVELOPMENTS: NEW INTERGOVERNMENTALISM AND EU GOVERNANCE

There was discussion in the previous chapter concerning new intergovernmentalism in the post-Maastricht world.[247] It is interesting to reflect further on the problems faced by the EU in the post-Lisbon period, and the extent to which they reflect new intergovernmentalism. This inquiry is more difficult than might initially be thought, in part at least because new intergovernmentalism contains diverse strands. We should, moreover, be wary of assuming that the presence of intergovernmental actors betokens something new, or that there is some zero sum causality between an intergovernmental and a supranational impetus to any particular dimension of EU policy.

Consider in this respect the EU response to the financial crisis. The Member States both within and without the European Council helped to fashion the EU response to the financial crisis. It should nonetheless also be acknowledged that the principal instruments crafted to deal with the problem took the form of legal instruments, the six-pack and the two-pack, enacted through the ordinary legislative procedure on the basis of Commission proposals. These regulations and directives endowed supranational institutions with considerably greater power than hitherto, which is the reason why many regard the Commission as the principal beneficiary in terms of increment to its power.

Consider in this respect also the EU response to the pandemic crisis. There is no doubt that Member States in the European Council were centre stage, in the sense that their consent was crucial to acceptance of corona bonds and the overall EU budget. However, thus has it ever been so. Member State consent has always been crucial for decisions of this kind. We should, nonetheless, not underestimate the supranational dimension to the EU pandemic response. The Commission was the catalyst for many initiatives considered above. It was the Commission that pressed the idea of corona bonds.[248] It was the Commission yet again that did the work that underpinned the European Council detailed conclusions that appeared immediately after the summit on 21 July 2020, including the very specific figures for different kinds of assistance to different Member States.[249]

E. CONCLUSION

There has been significant evolution in relation to the inter-institutional disposition of power over the last half century. Some changes have resulted from Treaty amendment, others from developments outside the Treaty that have later been incorporated into the Treaty, yet others from alteration in the political balance of power without modification of the formal Treaty rules.

Institutional balance has characterized the disposition of legislative and executive power from the outset. The changes reflect shifting normative assumptions as to which institutions

[247] U Puetter, 'Europe's Deliberative Intergovernmentalism: The Role of the Council and the European Council in EU Economic Governance' (2012) 19 JEPP 161; U Puetter, *The European Council and the Council, New Intergovernmentalism and Institutional Change* (Oxford University Press, 2014); C Bickerton, D Hodson, and U Puetter, 'The New Intergovernmentalism: European Integration in the Post-Maastricht Era' (2015) 53 JCMS 703.

[248] Repair and Prepare for the Next Generation (n 240).

[249] European Council, Brussels 21 July 2020 (n 241).

should be able to partake of legislative and executive power, and what constitutes the appropriate balance between them. The story of the last sixty years reveals that the devil is in the detail. Thus, understanding contestation as to the locus of legislative and executive authority requires us to probe beyond the macro-level. It requires more than abstract determination as to which institution partakes in, for example, executive authority. It necessitates detailed inquiry as to the type of executive authority wielded by a particular institution, and the constraints exercised by the other institutional players. It is these factors that have shaped debates about issues such as Comitology and agencies.

The Lisbon Treaty is part of this continuing story. The disposition of primary legislative power has become clearer and sharper. The formal battles over the locus of executive authority have been 'settled' in favour of power being shared between the President of the Commission and President of the European Council. The impact of the rules relating to choice of the Commission President continue to develop. Institutional balance may provide the background principle against which these and other issues are resolved, but it can never obviate the need for reasoned inquiry into the normative and political assumptions that shape the desired balance.