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## **THE EUROPEAN UNION'S INSTITUTIONAL BALANCE OF POWER AFTER THE TREATY OF LISBON**

### **Introduction**

It is one of the most distinctive features of the European Union (EU) that its institutions – unlike those of traditional international organisations - have been vested with real powers to achieve the objectives defined by its founding treaties. The very substance and extent of these powers – which can create enforceable rights and obligations for individuals – have made their division between the institutions a constitutional necessity right from the start of the European construction as the interests of national governments had to be balanced by the ‘common’ interest of the construction as such, as well as (increasingly) those of citizens subject to European legislation and (indirect) taxation. The balance of powers between the institutions has evolved considerably since the 1950s – and it had to because of the massive expansion of competences and policies as well as the overall progress of European political integration. Treaty revisions have been the primary catalysts of change in the institutional balance. This both happened by responding to pressure for change – such as by the European Parliament (EP) trying to assert its role or national governments trying to design specific solutions for new sensitive policy-making domains (such as justice and home affairs) – and by creating the potential for further change through the practice of inter-institutional relations on the basis of the new treaty provisions.

The Treaty of Lisbon continues the tradition of European Union treaty revisions bringing changes to the institutional balance – and the range of institutional reforms introduced is much more extensive than in the case of the previous reforms under the Treaty of Nice. This contribution is intended to provide an assessment of the shifts in relative power occasioned by the new treaty changes between the European Union institutions which exercise legislative and/or executive power, i.e. the European Parliament, the European Commission, the Council and (as newly formally codified ‘institution’ of the European Union) the European Council. This will allow us, at the end, to draw some conclusions regarding the overall implications of these shifts for the further evolution of the European Union's system.

The following analysis is in need of a prior clarification of the concept of ‘institutional balance’ on which it is based. The concept originally emerged as a legal principle according to which the European Community (later the European Union) institutions have to act within the limits of their respective powers in the context of a division of powers defined by the Treaties.<sup>10</sup> The implication of this legal principle, to which the Court of Justice clearly referred to for the first time in the *Meroni* case,<sup>11</sup> is that the institutional balance is maintained as long as every institution does not exceed its respective powers to the detriment of the others – and disrupted in any case to the contrary. This concept is thus an essentially normative and static one concerned by the respect of the extent and limitations of the powers of each institution as defined by the treaties.

As already indicated above, this contribution is aimed at identifying and assessing the likely changes in the balance of power between the institutions resulting from the Lisbon Treaty reforms. The concept of institutional balance applied in the following is therefore – in contrast with the above mentioned legal concept - a positive and dynamic one as it refers to the relative power positions of the European Union institutions in respect of each other and the changes brought about to these by the recent treaty reforms.

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<sup>10</sup> See Jean-Paul Jacqué: The principle of institutional balance, in: *Common Market Law Review*, Vol. 41 (2004), pp. 283-287.

<sup>11</sup> The Court held that “the balance of powers which is characteristic of the institutional structure of the community” can be seen as a “fundamental guarantee granted by the Treaty in particular to the undertakings and associations of undertakings to which it applies”. Case 9/56, *Meroni* [1958] ECR (English special edition) 133, at 152.

### **The increased complexity of the European Union's institutional balance of power**

For the first two decades of the institutional development of the original European Communities the institutional balance of power was essentially of a bi-polar nature as only the Council and the Commission were institutions vested with real powers.<sup>12</sup> This changed, with the granting of budgetary powers to the European Parliament which had until then been limited to a purely consultative role through the amending treaties of 22 April 1970 and 22 July 1975. As a result a tri-polar Council-Commission-European Parliament institutional balance emerged, with the 'third' pole – the European Parliament – acquiring increased legislative powers – especially through the introduction in 1993 and subsequent extensions of the co-decision procedure – and increased powers over the appointment of the Commission with the successive reform rounds of the Single European Act (1987), the Treaty of Maastricht (1993), the Treaty of Amsterdam (1999) and the Treaty of Nice (2003).

The Treaty of Lisbon not only continues the strengthening of the Parliament's position – especially through a new massive extension of the fields to which legislative co-decision applies (see below) -, but it also transforms the tri-polar into a four-polar system as it gives to the European Council for the first time the official status of an institution (Article 13(1) TEU) which is also vested with powers it had not been provided with explicitly before, such as, for example, the power to “define the strategic guidelines for legislative and operational planning within the area of freedom, security and justice” (Article 68 TFEU).

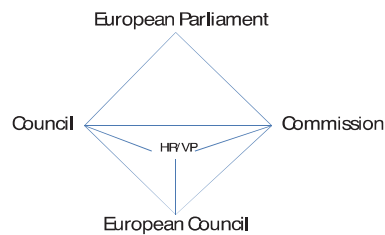
The 'institutionalisation' of the European Council adds already a degree of increased institutional complexity to the institutional balance as the European Council adds a second formal institutional representation of the interests of national governments to that already provided by the Council, although at a more senior level and with tasks which are clearly separated in the Treaties. Yet even more complexity is added by the introduction of the new combined position of the “High Representative of the

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<sup>12</sup> Here and in the following the Court of Justice will not be considered a part of the institutional balance of power because of the purely judicial nature of its functions. The Court may be regarded as a guardian and arbitrator of the institutional balance – but not as one of its poles.

Union for Foreign Affairs and Security Policy” and Vice-President of the European Commission (HR/VP) whose task is to “conduct” and “put into effect” the Union’s Common Foreign and Security Policy (CFSP) as well as to represent the Union in this field (Articles 18(2), 24(1) and 27(2) TEU). Appointed by the European Council (Article 18(1) TEU) in whose work the High Representative/Vice-President of the Commission “takes part” (Article 15(2) TFEU) and who also defines the “strategic interests and objectives” of the European Union in the Common Foreign and Security Policy’s domain (Article 22(1) TEU), the High Representative/Vice-President of the European Commission is mandated by the Council (Article 18(2) TEU) whose foreign affairs formation the HR/VP presides (18(3) TEU). Yet the incumbent is at the same time responsible within the Commission as one of its Vice-Presidents for external relations and for coordinating other aspects of the Union’s external action and in this respect fully bound by the Commission’s procedures (Article 18(4) TEU). The Treaty of Lisbon has thus assigned to the High Representative/Vice-President of the European Commission a position somewhere in the middle between the institutional sub-triangle of Council, European Council and Commission, creating an extraordinarily hybrid position whose direct relationship to the European Parliament – as the fourth pole in the institutional balance – is limited to consultation and information duties with no binding effects on action (Article 36 TEU). With this hybrid element and its four poles (see graph 1) the post-Lisbon institutional balance bears thus little resemblance to the bi-polar system of the original European Communities, and the pre-Amsterdam triangle has become a quadrangle:

**Figure 1: The post-Lisbon institutional quadrangle**



## **The different dimensions of the European Union's institutional balance of power**

Power is one of the most complex phenomena of political systems, and – unsurprisingly – the vast political and social sciences literature dealing with this phenomenon has so far failed to arrive at a clear and consistent definition. The array of definitions ranges from Max Weber's forceful – but slightly crude – definition of power as “as every chance to carry out one's will in a social relationship even against resistance, regardless of the basis on which this chance rests”<sup>13</sup> to highly sophisticated differentiations between components of power, such as the no less than 14 different dimensions of power identified by Gareth Morgan,<sup>14</sup> some of which, however, - like the “management of gender relations” – would seem to be of limited relevance to our assessment of changes to the power balance between the European Union institutions. In order to pragmatically limit and focus the scope of this analysis we will in the following investigate six dimensions of the post-Lisbon relative power positions of the European Union institutions of which the first four are based on the respective formal powers of the institutions as defined in the Treaties in line with the principle of conferral (Article 13(2) TEU). These are:

(A) Power relating to the **constitutional position** of each institution. This dimension covers all powers with systemic relevance to the European Union as whole, i.e. powers regarding treaty changes, the budgetary framework, key appointments and the relative degree of autonomy any of the institutions is given with regard to the others.

(B) Power relating to **policy initiation**. This dimension covers all powers given to the institutions in respect of the initiation of both policies and legislation, it is widely

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<sup>13</sup> Max Weber: *Wirtschaft und Gesellschaft. Grundriss der Sozialökonomik. III. Abteilung*, Tübingen (J.C.B. Mohr) 1922, p. 28 [own translation].

<sup>14</sup> Gareth Morgan: *Images of Organization*. Executive edition, San Francisco (Berrett-Koehler/Sage) 1998, pp. 162-174.

recognised that agenda-setting powers – and not just “voting power” in the decision-making process - can have a major impact on eventual policy-outcomes.<sup>15</sup>

(C) Power relating to **decision-making**. This dimension covers all formal decision-making powers provided for by the Treaties, including both binding decisions (legislation, annual budget) and non-binding decisions (e.g. “recommendations” and certain Common Foreign and Security Policy decisions).

(D) Power relating to **implementation**. This dimension covers all powers of implementation in the legislative and budgetary fields as well as powers of control regarding the implementation of European Union measures by the Member States. To these four dimensions two additional ones will be added which are related to relative power increases or decreases likely to result for the institutions from treaty reforms regarding their internal organisation and the enhanced or reduced visibility resulting from their redefined powers and organisation:

(E) Power linked to **institutional strength**. This dimension covers any changes in political impact possibilities an institution might derive from treaty changes to its internal organisation which enhance or decrease its abilities to fulfil its tasks and – wherever possible – provide political leadership.

(F) Power linked to **public visibility**. This dimension covers the changes in political impact possibilities of an institution resulting from treaty changes likely to increase or decrease its public visibility as such visibility – if effectively mediated – can play a major role in creating and sustaining a basis for support.<sup>16</sup>

In the next sections we will look at the Treaty of Lisbon related power position changes of each of the four institutions within each of those six dimensions. As there is no scientific way of measuring power exactly in units or percentage points, and we will only try through our analysis to ascertain relative changes of the power position with regard to the pre-Lisbon situation. Any identified increase in the power position will be retained as “plus” (+) factor for the overall assessment in section 10, an

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<sup>15</sup> See George Tsebelis/Geoffrey Garrett: Agenda Setting Power, Power Indices, and Decision Making in the European Union, in: International Review of Law and Economics, vol. 16, number 3, 1996 , pp. 345-361

essentially unchanged position as a “zero” (0) factor and any likely decrease as a “minus” (-) factor.

### **The constitutional dimension of the institutional power balance**

The Treaty of Lisbon strengthens the European Parliament's significantly - and this in six ways:

*First*, by extending its powers under the ordinary treaty revision procedure. The Parliament now has a right to submit formal proposals for the amendment of the Treaties to the Council (Article 48(2) TEU), must be represented in the revision Convention<sup>17</sup> and must give its consent to any decision by the European Council not to convene a Convention (Article 48(3) TEU).

*Second*, by extending the Parliament's powers under the *simplified revision procedures*. Under the latter the Parliament has gained a right of initiative as well regarding any revisions of Part Three TFEU relating to the internal policies and action of the Union (Article 48(6) TEU) and the right to give its consent to the use of ‘passerelle’ provisions which allows the European Council to authorise the Council to pass from unanimity to qualified majority voting in the domain of Title V TEU (Common Foreign and Security Policy)<sup>18</sup> and to move from a *special legislative procedure* to an *ordinary legislative procedure* in the context of the TFEU (Article 48(7) TEU).

*Third*, by extending the Parliament's powers regarding the launching of *enhanced cooperation frameworks*<sup>19</sup> between Member States to which the Parliament has now to give its consent (Article 329(1) TFEU).

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<sup>16</sup> On the power dynamics of mediated visibility see John B. Thompson: The new visibility, in: *Theory, Culture & Society*, vol. 22, number 6, 2005, pp. 31-51.

<sup>17</sup> The Parliament was represented in the 2002/2003 Constitutional Treaty Convention, but its right to be represented in any future Convention had not been codified in the Treaties before.

<sup>18</sup> With the exception of decisions with military implications or those in the area of defence.

<sup>19</sup> Excepted are fields of exclusive competence and the CFSP.

*Fourth*, by giving the Parliament powers of constitutional importance regarding European Union competences and structures in the field of criminal justice cooperation: The Parliament has to give its consent to any Council decision extending the number of aspects of criminal procedural law which can be the object of common rules (Article 82(2)(d) TFEU) or identifying other areas of serious cross-border crime that may be subject to legislative approximation measures (Article 83(1) TFEU) as well as to the establishment of the European Public Prosecutor's Office (Article 86(1) TFEU).

*Fifth*, by enhancing the Parliament's powers in the appointment process of the Commission: The European Council now has to take into account the elections to the European Parliament and hold "appropriate consultations" in this regard before proposing a candidate to the Parliament as President for the European Commission - who now has to be formally "elected" by the Parliament. The High Representative/Vice-President of the European Commission is also subject to a vote of approval by the Parliament together with all other Members of the European Commission (Article 17(7) TEU).

*Sixth*, by extending the budgetary powers of the Parliament: The removal of the distinction between compulsory and non-compulsory expenditure in revised Article 314 TFEU now puts the Parliament on a perfectly equal footing with the Council regarding the adoption of the European Union's annual budget, a major constitutional function.

As a result of the above changes the Parliament has a significantly increased role regarding constitutional change, the extension of European Union powers not requiring treaty revision, the appointment of the Commission and the European Union's budgetary framework – which together clearly accounts for a major "plus" in the institutional balance.

The same positive assessment cannot be made for the changes to the constitutional position of the Commission: While both the European Parliament (see above) and the European Council (see below) have seen their constitutional position strengthened in several respects, the Commission has not gained any increased



powers of constitutional significance and has to face more political competition on key issues, such as by the Parliament's newly gained right to make formal proposals for treaty revisions (Article 48(2) TEU) and the Parliament's new power to potentially block an enhanced cooperation even after a favourable opinion of the Commission (Article 329(1) TFEU). In addition, the creation of the new hybrid position of the High Representative/Vice-President of the European Commission has for the first time ever given a place at the table of the College of Commissioners to a person who – as regards Common Foreign and Security Policy responsibilities – is directly “mandated” by the Council (Article 18(2) TEU), which can be regarded as an encroachment upon the traditional institutional autonomy and homogeneity of the Commission. As a result, the Commission's overall constitutional position must be regarded as having been weakened by the Lisbon reforms – which makes a clear “minus” on the institutional balance.

The European Council, by contrast, has been constitutionally strengthened: Not only has it been given for the first time the formal status of a European Union institution (Article 13(1) TEU), but it has at the same time been transformed from an essentially deliberative body into an institution which can take binding legal decisions of constitutional importance. It can now – without convoking a Convention or transforming itself into an IGC - adopt a decision amending all or part of the provisions of Part Three TFEU (Article 48(6) TEU), decide on any move of certain fields of decision-making from unanimity to qualified majority voting or from a special legislative procedure to the ordinary (co-decision) legislative procedure (Article 48(7) TEU). In addition the Treaty of Lisbon strengthens the European Council's supreme political orientation function for the entire European Union edifice by a stronger wording (the definition of “general political guidelines” replaced by “general political directions and priorities”, Article 15(1) TEU), by adding a “strategic interests and objectives” definition function to the European Council's functions in the Common Foreign and Security Policy's domain (Article 22(1) TEU) and by providing for the first time explicitly for the European Council to “define the strategic guidelines for legislative and operational planning within the area of freedom, security and justice” (Article 68 TFEU).<sup>20</sup> Finally, it is also the European Council which appoints and

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<sup>20</sup> This guidelines function regarding the area of freedom, security and justice has already been exercised by the European Council before through the 1999-2004 Tampere and 2005-2009 Hague programmes, but Article 68

dismisses the High Representative/Vice-President of the European Commission (Article 18(1) TEU) – arguably the most important new position created within the ambit of the Treaties. It can only do so with the agreement of the President of the European Commission, but the power of appointment clearly rests with the European Council which did not even care to mention the agreement of the Commission's President Barroso when the choice of Catherine Ashton was formally announced in a press communication on 19 November.<sup>21</sup> It should also be noted that in case of a motion of censure of the European Parliament being carried against the European Commission the High Representative/Vice-President of the European Commission has only to resign from his/her duties in the European Commission (Article 17(8) TEU), which allows the European Council to keep its appointee in office as HR even against a vote of the Parliament. The fact, that the newly “institutionalised” European Council now comes for the first time under the jurisdiction of the Court of Justice (Article 263 TFEU) may be regarded as new constraint with regard to its former role “outside and above” the European Union's legal system, but it does not substantially detract from the overall major “plus” which the treaty changes have brought for the European Council on the constitutional side of the institutional balance.

The Council's overall position is not altered in any significant way: While the formal ‘institutionalisation’ of the European Council places it more clearly in a hierarchical position under the latter as the ‘second-ranking’ institution representing the interests of Member States’ governments, the European Council has to decide on Common Foreign and Security Policy's “strategic objectives and priorities” on the basis of the recommendations of the Council (Article 22(1) TEU), a formalisation of its preparatory function of European Council Common Foreign and Security Policy decisions not previously provided for by the Treaties. The Council has lost its final say regarding compulsory budgetary expenditure because of the abolition of the expenditure category distinction in the budgetary procedure (Article 314 TFEU), but still no part of the budget can be adopted against its will, and it has gained powers of constitutional change together with the Parliament as regards the extension of European Union competences in the criminal justice domain and the establishment

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<sup>21</sup>TEU now formally defines this power and adds guidelines for “operational planning” to the European Council's remit.

of the European Public Prosecutor's Office (Articles 82(2)(d), 83(1) and 86(1) TFEU). The new High Representative/Vice-President of the European Commission position means that for the first time a member of the Commission will chair a Council formation – the Foreign Affairs Council (Article 18(3) TEU) -, but as the HR/VP is “mandated” by the Council (Article 18(2) TEU) this can hardly be seen as a weakening of the Council's constitutional position vis-à-vis the Commission. Taken together the power effects of these changes can be regarded as being of roughly equal weight on the positive and the negative side, so that one can conclude on an overall “zero” effect regarding the institutional balance.

### **The policy initiation dimension of the institutional power balance**

The new Treaty does still not give the Parliament an independent right of legislative initiative, but it strengthens its position vis-à-vis the European Commission which is now formally forced to give its reasons to the Parliament if it does not submit a proposal in response to a request of the Parliament to do so (Article 225 TFEU). This increases the pressure on the Commission to act upon parliamentary requests regarding legislative initiatives, and the impact of this change can be clearly discerned in the revised Framework Agreement on Relations between the European Parliament and the Commission which is currently under negotiation: As part of the new “special relationship” with the Parliament, Commission has accepted at the outset the Parliament's demand – as formulated in the Resolution of 9 February 2010<sup>22</sup> – for the Commission to report on the concrete follow-up of any legislative initiative requests following the adoption of a legislative initiative report pursuant to Article 225 TFEU, within three months following adoption. The Commission shall then come forward with a legislative proposal at the latest after one year or shall include it in the next year's Annual Work Programme. If the Commission does not submit a proposal, it shall give the Parliament a detailed explanation of the reasons.<sup>23</sup> The expectation is now clearly that the Commission will act upon the

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<sup>21</sup> Council of the European Union: Informal meeting of the Heads of State or Government, Press Release, Brussels, 19 November 2009.

<sup>22</sup> European Parliament document B7-0091/2010, point 3(c).

<sup>23</sup> European Parliament: Revision of the Framework Agreement between the European Parliament and the Commission, Phase II, Results of the meetings between the EP working party and Vice-President Sefkovic, Version of 29 June 2010, p. 9 (unpublished internal document – the revised agreement still needs to be formally approved by both institutions).

Parliament's proposals, and that any non-action will require a politically uncomfortable justification. In addition, the new "special relationship" is to comprise a "regular dialogue" between the President of the European Parliament and the President of the Commission "on key horizontal issues and major legislative proposals" involving also invitations to the President of the Parliament to attend the Commission's meetings<sup>24</sup> which could enhance the Parliament's influence on legislative programming. The Parliament will also gain a greater influence on the Commission's own initiatives as a result of the extension of the Parliament's co-decision powers (see below) as the Commission will have to take greater account of the Parliament's positions to give the substance of its proposals a chance to be adopted in the end. Overall this amounts to a "plus" for the Parliament on the institutional balance.

The Commission's traditional position as the main initiator of European Union legislation can already be regarded as slightly weakened by the strengthened position of the European Parliament as identified above. Yet its – at least in the 'Community' domain – traditionally exclusive right of initiative is further undermined by the newly introduced citizens' initiative (11(4) TEU). While the Commission remains free not to act upon a successful citizens' initiative it could find itself under considerable pressure, especially if the initiative was backed by the Parliament.<sup>25</sup> The principle of the Commission's exclusive right of initiative in the 'Community' has also be undercut by the fact that the Treaty of Lisbon has maintained a right of initiative for the Member States in the newly 'communitarised'<sup>26</sup> fields of police and judicial cooperation in criminal matters of former Title VI TEU, although these now have to act with a quarter of their number (Article 76 TFEU).

A further challenge for the Commission's right of initiative is connected with new possibilities for national parliaments to control the compatibility of new legislative proposals with the principle of subsidiarity: According to Article 6 of the "Protocol on

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<sup>24</sup> Ibid., p. 7.

<sup>25</sup> A working document on the citizens' initiative of the EP Committee on Constitutional Affairs of 22 June 2010 suggests that the Parliament might react to such initiatives systematically and even if they have not been successful (Working document on a proposal for a regulation of the European Parliament and of the Council on the citizens' initiative. Committee on Constitutional Affairs. Rapporteur: Zita Gurmai and Alain Lamassoure, document PE443.095v01-00).

<sup>26</sup> The application of the term 'communitarised' appears justified as the Union has replaced and succeeded the European Community and both community legal instruments and decision-making procedures are now applicable in these two fields.

the Application of the Principles of Subsidiarity and Proportionality<sup>27</sup> Any national Parliament or any chamber of a national Parliament may, within eight weeks from the date of transmission of a draft legislative act send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity. If such reasoned opinions are submitted by parliamentary chambers totalling least one third of all the votes allocated to the national Parliaments, the draft must be reviewed. If they represent at least a simple majority, the Commission must justify any decision not to withdraw the legislative proposal in question which can then be thrown out by a majority of 55 % of the members of the Council or a majority of the votes cast in the European Parliament before concluding the first reading.<sup>28</sup> This gives national parliaments for the first time a possibility to question and potentially even block the Commission's legislative initiative.

Of lesser constitutional significance but still worth noting is a weakening of the Commission's non-exclusive right of initiative in the Common Foreign and Security Policy's domain: Whereas before the Treaty of Lisbon the Commission had a formal right to submit proposals to the Council in the Common Foreign and Security Policy's domain<sup>29</sup> this has now been replaced by proposals made by the High Representative/Vice-President of the European Commission "with the Commission's support" (Article 30(1) TEU). As the High Representative/Vice-President of the European Commission can also make proposals purely on his/her own and is at least partially under the authority of the Council<sup>30</sup> this provision can be regarded as having deprived the Commission of an autonomous right of initiative in the Common Foreign and Security Policy context.

The post-Lisbon balance-sheet for the Commission's powers of initiative is therefore overall clearly more negative than before this latest treaty revision – and must count as a "minus" on the institutional balance.

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<sup>27</sup> OJ C306/150 of 17.12.2007.

<sup>28</sup> Ibid., Article 7 of the Protocol.

<sup>29</sup> Former Article 22(1) TEU.

<sup>30</sup> As mentioned before the HR/VP is "mandated" by the Council (Article 18(2) TEU).

The European Council, again, fares better on this account: As already mentioned the wording of its general political guidance function in Article 15(1) TEU has been strengthened, which gives it even more of a mandate deciding on major political initiatives. More important is the newly introduced explicit power for the European Council to “define the strategic guidelines for legislative and operational planning within the area of freedom, security and justice” (Article 68 TFEU). As “legislative planning” can arguably have a decisive influence on which initiatives are to be submitted and when, this puts the European Council at least formally in a stronger position than the Commission regarding the Union’s legislative agenda in this important policy-making field. Also in terms of policy initiation, therefore, the European Council comes out with a “plus” on the institutional balance side.

The Council’s pre-Lisbon right of legislative initiative in matters of police and judicial cooperation in criminal matters will be more difficult to use now as at least a quarter of the Member States will now have to get together to make use of this possibility (Article 76 TFEU). Yet its initiative function is strengthened in the Common Foreign and Security Policy’s domain as the European Council now has to decide on Common Foreign and Security Policy’s “strategic objectives and priorities” on the basis of the recommendations of the Council (Article 22(1) TEU), but its own margin of initiative regarding the implementation of the Common Foreign and Security Policy remains bound by the European Council guidelines (Article 26(2) TEU), so that one cannot deduct from that any significant shift of initiation power in favour of the Council. Overall the changes to the Council’s position as regards policy initiation appear too slight to have a significant impact on the institutional balance, so that a “zero” factor can be retained.

### **The decision-making dimension of the institutional power balance**

In no other dimension is the strengthening of the position of the European Parliament as a result of the Treaty of Lisbon reforms as evident as in that of the decision-making powers: The Parliament’s co-decision powers under what is now called the *ordinary legislative procedure* (OLP) have been extended to 40 new fields which include major areas such as agriculture, fisheries, structural fund, justice and home

affairs and transport.<sup>31</sup> Of at least equal significance is that the consent of the Parliament to the conclusion of international agreements has now become the rule rather than – previously – the exception: According to Article 218(6)(v) the Parliament's consent is now required for all agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required, which – in conjunction with the major extension of the fields to which the ordinary legislative procedure applies means a massive extension of the Parliament's decision-making power in the domain of European Union's external relations. By its rejection of the provisional European Union-United States "SWIFT" agreement on 11 February 2010 the Parliament has already shown that it is willing and capable to use these extended powers.<sup>32</sup> Last but certainly not least, the Treaty of Lisbon has also put the Parliament on an equal footing with the Council in decision-making under the European Union's budgetary procedure by the removal of the distinction between compulsory and non-compulsory expenditure (Article 314 TFEU). The overall "plus" on the institutional balance for the Parliament as regards decision-making powers could hardly be more obvious.

The Commission's position, by contrast, has been weakened as a direct result of the Parliament's major gain in co-decision powers: If the ordinary legislative procedure (the former "co-decision" procedure) goes into the conciliation phase, the Parliament and the Council can agree on a compromise irrespective of the Commission's position, and in the conciliation phase the Commission can also not exercise its traditional right to withdraw legislation at any point in the legislative procedure. Although this does not mean that the Commission has become "irrelevant" in the fields covered by co-decision<sup>33</sup> as it still retains significant agenda-setting and gate-keeper possibilities,<sup>34</sup> the Commission has to operate under a "structural

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<sup>31</sup> See on this extension House of Lords, European Union Committee: *The Treaty of Lisbon: An impact assessment*, 10th Report of Session 2007–08, HL Paper 62-I, London (The Stationery Office) 2008, Vol. I, p. 66, and Fondation Robert Schuman: *The Lisbon Treaty*, Paris 2009, pp. 39–46 (list of fields) [available at: <http://www.robert-schuman.eu/doc/divers/lisbonne/en/10fiches.pdf>].

<sup>32</sup> See Jörg Monar: *The Rejection of the EU-US SWIFT Interim Agreement by the European Parliament: A Historic Vote and its Implications*, in: *European Foreign Affairs Review*, Vol. 15/2, 2010, pp. 143–151.

<sup>33</sup> As this was argued in Christophe Crombez: *The Treaty of Amsterdam and the Co-decision Procedure*, in: Gerald Schneider/Mark Aspinwall (eds.): *The rules of integration. Institutional approaches to the study of Europe*, Manchester (Manchester University Press) 2001, p. 101.

<sup>34</sup> See Charlotte Burns: *Charlotte Burns: Codecision and the European Commission: A study of declining influence?*, in: *Journal of European Public Policy*, Vol. 11/1, 2004, pp. 1–18.

disadvantage<sup>35</sup> under the ordinary legislative procedure, and with the latter's extension to 40 new fields by the Treaty of Lisbon one cannot conclude on a substantial "minus" for the Commission on the institutional balance.

The European Council, although to a lesser extent than the Parliament, can be regarded as having come out of the Lisbon reforms with a "plus" as regards decision-making powers: Not only is the European Council now vested with important constitutional decision-making powers as a formal institution of the Union, but the Treaty has also assigned to it important reserve powers as regards legislative and Common Foreign and Security Policy decision-making. In the legislative field these are the referral procedures in the domains of the "area of freedom, security and justice" and social security. The first variant of these allows a Member State to activate what has been called an "emergency brake" against draft directives in the fields of criminal procedural law and approximation of substantive criminal law<sup>36</sup> in case it feels that it affects "fundamental aspects of its criminal justice system" (Articles 82(3) and 83(3) TFEU) or against social security measures related to the freedom of movement<sup>37</sup> in case it feels that these "affect important aspects of its social security system" (Article 48 TFEU) by referring the text to the European Council. The second variant allows a group of at least nine Member States, if the necessary unanimity in the Council cannot be reached, to refer to the European Council the draft regulation establishing the European Public Prosecutor's Office (Article 86(1) TFEU) and any measures concerning operational cooperation between police forces (Article 87(3) TFEU). In all five of these referral cases the appeal to the European Council has the effect of suspending the applicable ordinary or special legislative procedures which then has four months to arrive at a consensus solution before the draft legislative act in question is either sent back to the Council for adoption or opens a pathway for adoption of the act by way of an "enhanced cooperation". By suspending normal legislative procedures to await the outcome of European Council deliberations and by giving to the Heads of State or Government the possibility to determine a compromise solution on the respective legal act the European Council assumes thus the role of a quasi legislator which it never had

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<sup>35</sup> See Anne Rasmussen: The Role of the European Commission in Co-decision – A strategic facilitator operating in a situation of structural disadvantage, *European Integration online Papers (EIoP)* Vol. 7, 2003, no. 10.

<sup>36</sup> Now coming under qualified majority voting.

<sup>37</sup> Now coming under qualified majority voting as well.



formally before. The new reserve power in the Common Foreign and Security Policy domain is laid down in Article 26(1) TEU according to which the President of the European Council, “if international developments so require”, can convene an extraordinary meeting of the European Council in order to define the strategic lines of the Union's policy in response to these developments. In this case as well the treaty-defined normal Common Foreign and Security Policy decision-making process handled by the Council and the High Representative/Vice-President of the European Commission is interrupted by and subjected to a direct intervention by the European Council. Special European Council meetings as a result of international crises have taken place before, a recent example is the extraordinary meeting on 1 September 2008 in relation with the crisis in the Caucasus,<sup>38</sup> but this has now been transformed in a formal procedure which adds to the formal decision-making powers of the European Council.

The Council's relative power position is affected negatively by the increase of the both the Parliament's and the European Council's decision-making powers: The extension of co-decision to 40 new fields means as many fields in which the Council has now to seek compromises with the Parliament on an equal footing, and the Council has also lost its final say over compulsory budgetary expenditure as a result of the abolition of the former expenditure categories under new Article 314 TFEU. Vis-à-vis the European Council, its position is weakened by the fact that the European Council's decision-making powers can have a formal suspensive and priority effect on ordinary Council legislative decision-making in the above mentioned referral procedures of Articles 48, 82(3), 83(3), 86(1) and 87(3) TFEU, as well as on ordinary Common Foreign and Security Policy decision-making in case of international emergencies according to Article 26(1) TEU. The overall effect can clearly be regarded as a “minus” for the Council on the institutional balance side.

### **The implementation dimension of the institutional power balance**

The Lisbon Treaty has introduced substantial changes to the procedures and categories applying to the implementation powers which can be conferred upon the

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<sup>38</sup> See Council of the European Union: Brussels European Council, 1 September 2008, Presidency Conclusions, Council document 12594/2/08 REV 2, 6 October 2008.

Commission.<sup>39</sup> The Parliament's role regarding Commission implementation acts – which was not recognised by the Council until 2006<sup>40</sup> – has been strengthened by the Treaty of Lisbon in three respects: Acts adopted under legislative delegation (“delegated acts”)<sup>41</sup> can now only enter into force if no objection has been expressed by the Parliament within a period set by the legislative act (Article 290(2)(b)), the Parliament can revoke the delegation at any time (Article 290(2)(a) TFEU), and the Parliament has also gained full co-decision rights with the Council regarding the regulations which lay down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers through legislative “implementing acts”<sup>42</sup> (Article 291(3) TFEU) – which puts the Parliament on an equal footing with the Council regarding the determination of new the post-Lisbon “comitology” system. The Parliament has already used its new powers regarding “delegated acts” by rejecting on 19 May 2010 the Commission's Draft Directive amending the Annexes to Council Directive 95/2/EC on food additives regarding the authorisation of the use of “meat glue”.<sup>43</sup> Taken together the Parliament's new control over Commission implementation powers clearly amounts to a “plus” for the Parliament in the implementation power dimension of the institutional balance.

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<sup>39</sup> A thorough analysis is provided in Paolo Ponzano: ‘Executive’ and ‘delegated’ acts: The situation after the Lisbon Treaty, in: Stefan Griller/Jacques Ziller (eds.): *The Lisbon Treaty*, Wien (Springer) 2008, pp. 135-141.

<sup>40</sup> Through the introduction of the „Regulatory Procedure with Scrutiny“ by the Council Decision of 17 July 2006 amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission, OJ 200/11 of 17.07.2006. See on this earlier reform and its limitations Gregor Schusterschitz/Sabine Kotz: *The Comitology Reform of 2006. Increasing the Powers of the European Parliament Without Changing the Treaties*, in: *European Constitutional Law Review*, Vol. 3/1, 2007, pp. 68-90.

<sup>41</sup> I.e. non-legislative acts of general application to supplement or amend certain non-essential elements of a legislative act which are adopted under powers delegated to the Commission for this specific purpose. As these fall under the competence of the EU legislator the control is up to Council and Parliament.

<sup>42</sup> I.e. legislative acts aimed to ensure uniform implementing conditions of EU legislative acts at the level of the Member States. As the Member States are responsible for the implementation they also responsible for controlling the respective implementing powers of the Commission.

<sup>43</sup> European Parliament resolution of 19 May 2010 on the draft Commission directive amending the Annexes to European Parliament and Council Directive 95/2/EC on food additives other than colours and sweeteners and repealing Decision 2004/374/EC (European Parliament document B7-0264/2010).

The Commission comes out of the Lisbon Treaty reforms with its implementation powers being subject to enhanced scrutiny powers of the Parliament,<sup>44</sup> but the increased powers of the Parliament may also have a positive side for the Commission: The Parliament has in fact always opposed the “management” and “regulatory” procedures of the “comitology” system and could well use its new co-decision powers regarding framework regulations on the Commission’s exercise of implementing powers to reduce the possibilities of the national experts in the committees to block Commission implementing acts. Clearly counting on the support of the Parliament, the Commission has in fact already proposed in its March 2010 Communication on the post-Lisbon “comitology” system that a newly defined “advisory procedure”, which would not be binding on the Commission, should become the “general rule”, and that an “examination procedure”, which would allow national experts to block a Commission draft measure, the exception applicable only if a number of criteria are met.<sup>45</sup> This, and a number of other procedural changes, could make it distinctly easier for the Commission to pass implementing measures.<sup>46</sup> The Szajer draft report of the Parliament’s Legal Affairs Committee on the new Regulation of May 2010 has already endorsed the Commission’s proposition to make the “advisory procedure” the standard procedure and the “examination procedure” the criteria bound exception, although it also provides for a possibility for the Parliament and the Council to indicate to the Commission at any time that they consider a draft implementing act to exceed the implementing powers provided for in the basic act.<sup>47</sup>

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<sup>44</sup> Which the Commission seems somewhat reluctant to fully accept. According to the Szajer Report on legislative implementation of March 2010 which was adopted by the Parliament on 5 May 2010 the Commission “appears to understand neither the extent nor the significance of the changes” (European Parliament document A7-0110/2010, p. 11).

<sup>45</sup> European Commission: Proposal for a Regulation laying down the rules and general principles concerning mechanisms for control by Member States of the Commission’s exercise of implementing powers, COM(2010)83 final of 9 March 2010.

<sup>46</sup> See Jessica Koch: Committee proceedings for the control of implementing powers, Centrum für Europäische Politik, Kurzanalysen, may 2010 (available at: [http://www.ccp.eu/fileadmin/user\\_upload/Kurzanalysen/Durchfuehrungsbefugnisse\\_Art\\_291\\_AEU/PB\\_Control\\_of\\_Implementing\\_Powers\\_Art\\_291\\_TFEU.pdf](http://www.ccp.eu/fileadmin/user_upload/Kurzanalysen/Durchfuehrungsbefugnisse_Art_291_AEU/PB_Control_of_Implementing_Powers_Art_291_TFEU.pdf)).

<sup>47</sup> European Parliament, Committee on Legal Affairs: Draft Report on the proposal for a regulation of the European Parliament and of the Council laying down the rules and general principles concerning mechanisms for control by Member States of the Commission’s exercise of implementing powers, 2010/051(COD), 20 May 2010.

While the Commission's likely gain of more freedom from control by national experts is still subject to the ongoing legislative process, its position on the implementation side has already been clearly strengthened by the extension of its right to launch treaty infringement procedures under Article 258 TFEU against Member States in the fields of police and judicial cooperation for any failure to comply with European Union law, which had not been provided for former Article 35 TEU for these "third-pillar" fields. As there have indeed been serious implementation deficits at the national level in these fields, this clearly strengthens the Commission's hand in ensuring effective implementation. On the whole one can therefore conclude on at least a slight "plus" for the Commission on the institutional balance side as regards implementation.

The European Council – as a result of its supreme constitutional orientation function in the European Union system – has not been vested with any implementation powers. Its position in the post-Lisbon institutional balance can therefore be recorded with a "zero" effect.

The situation is clearly different for the Council as it now has to share its controlling powers regarding the implementation of European Union measures by the European Commission to a much greater extent with the Parliament than before. The likely evolution of the "comitology" system towards more "advisory" procedures as a standard could also weaken the Council's position on the implementation side, especially as any appeal to the Council in case of the Commission overriding the opinion of a national expert committee seems excluded now as new Article 291(3) TFEU refers to a control of the Commission's exercise of implementing powers by the Member States only. The Council therefore ends up with a "minus" on the institutional balance as regards implementation powers.

#### **The institutional strength dimension of the institutional power balance**

The only Treaty of Lisbon change of potential importance to the institutional strength of the European Parliament is the reduction of its Members from 785 to a maximum of 751 by virtue of Article 14(2) TEU. While the reduction of the size may make a

small contribution to rendering the Parliament internally more manageable and the plenary less disparate, this also has cost-side to it by slightly reducing cross-national representation in committees and increasing the already huge number of voters per Member of the European Parliament even further. Positive and negative effects can be considered as roughly equal, and with the reduction in maximum membership accounting for less than 5% of total membership the overall impact is likely to be so limited that the impact on the institutional balance may be safely considered as “zero”.

The Commission, on the other hand, has come out of the Lisbon Treaty reforms institutionally slightly strengthened: The leadership position of the President of the European Commission has been clearly reinforced because of its new power to ask a Commissioner to resign even without the approval of the College, a power which also applies to the High Representative/Vice-President of The European Commission, although the latter’s term in office is then formally ended by the European Council (Article 17(6) TEU). The former explicit power of the President to reshuffle Commissioners’ portfolios (former Article 217(2) TEC) has disappeared but can be regarded as covered by the President’s general power regarding the internal organisation of the Commission (Article 17(6) (b) TEU). The reduction of the number of Commissioners from currently 27 to two-thirds of the number of Member States from 2014 onwards, provided for by new Article 17(5) TEU could have made a contribution both to the internal effectiveness of the Commission and to the de-nationalisation of Commissioners’ posts, but it was shelved by a decision of the European Council of 12 December 2008<sup>48</sup> as a concession to the second Irish referendum campaign. As this merely means the continuation of the current system, it cannot really be seen as a weakening in comparison with the pre-Lisbon system, but future enlargements will as a result clearly make the Commission more unwieldy as an executive institution. Overall one can conclude on a – clearly rather slight – “plus” for the Commission’s institutional strength because of the President’s enhanced leadership position within the College.

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<sup>48</sup> Council of the European Union: Brussels European Council, 11/12 December 2008, Presidency Conclusions, Council document 17271/1/08 REV 1, 13 February 2009, point 2.

The European Council has emerged from the Lisbon Treaty also with a “plus” on the institutional balance side as regards institutional strength, but arguably with a much bigger one than the Commission: The main reason is obviously the introduction of the new post of President of the European Council with a period in office of two and half years. Although a lot will always depend on the incumbent, this clearly provides the European Council with an enhanced continuity and leadership potential. Article 15(5) TEU provides explicitly for the President to „drive forward“ the European Council’s work, to ensure “continuity” and to “facilitate cohesion”. The leadership potential the position provides the European Council with was effectively demonstrated by Herman Van Rompuy’s role in securing the European Council’s statement on the Greek sovereign debt crisis on 11 February 2010 which provided a much needed reassurance on solidarity within the Eurozone.<sup>49</sup> In addition to the role of the new President the possibility for the Heads of State or Government to be “assisted” by ministers of different Council formations (Article 15(3) TEU) – and not only by the foreign ministers as traditionally – could increase the direct impact on the respective Council formations and thus add to the European Council’s leadership strength.

It can be argued that passing from decision-making by consensus or unanimity to taking decisions by qualified majority voting also constitutes a factor of institutional strength as common decisions can less likely to be blocked by individual interests of Member States and are less likely to result in least common denominator compromises. In this respect as well the change for the European Council is quite significant: Qualified majority voting applies now to the election of the President of the European Council (Article 15(5) TEU), the proposal of a candidate for the position of President of the Commission to the Parliament and the subsequent appointment of the European Commission (Article 17(7) TEU), the appointment of the High Representative/Vice-President of the European Commission (Article 18(1) TEU), the adoption of the list of configurations of the Council of Ministers other than those of the General Affairs Council and of the Foreign Affairs Council, in accordance with the decision on the Presidency of Council configurations, other than

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<sup>49</sup> See the analysis in Peter Ludlow: Van Rompuy saves the day – The European Council of 11 February 2010, Eurocomment Vol 7.6., 3 March 2010 (available at <http://www.eurocomment.be/2010/03/03/vol-76-van-rompuy-saves-the-day-the-european-council-of-11-february-2010/>).

that of Foreign Affairs (Article 236 TFEU), the appointment of the President, Vice-President and the other members of the Executive Board of the European Central Bank (Article 283(2) TFEU), and finally the European Council votes by simple majority on procedural issues and on the adoption of its Rules of Procedure (Article 235(3) TFEU). For an institution formerly functioning purely on the basis of consensus this amounts to a quite substantial shift towards majority voting – and adds to its institutional strength in terms of decision-making capacity.

The impact of the Lisbon Treaty reforms on the Council in terms of institutional strength is one of the most difficult to assess in the context of our analysis: On the one hand the Council also gains institutional strength in terms of decision-making capacity – and this quite significantly so - because of the passage to qualified majority voting in no less than 38 old and new fields.<sup>50</sup> But on the other hand, there are some likely weakening effects in terms of institutional strength and coherence linked to the new Presidency system: The Presidency of the Council which will still rotate with the exception of the Foreign Affairs Council (chaired by the High Representative/Vice-President of the European Commission, Article 27(1) TEU) has lost its former direct link with the Presidency of the European Council which is now not any longer assured by the country holding the Presidency. This entails an enhanced risk of lack of coherence and priority differences between the European Council Presidency and the Presidency of the different Council formations, and the Council Presidency is likely to have less authority over fellow ministers in the Council as it lacks the former direct “national” connection with the European Council Presidency. Problems of coherence could also emerge between the Foreign Affairs Council “permanently” chaired by the High Representative/Vice-President of the European Commission and other Council formations chaired by the rotating Presidency ministers. As a result – although these different elements are difficult to measure against each other – one can feel justified in concluding that there are both strengthening and weakening effects which are sufficiently in balance with each other to conclude on an overall neutral (“zero”) effect on the institutional balance.

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<sup>50</sup> Fondation Robert Schuman: The Lisbon Treaty, Paris 2009, pp. 27-38 (list of fields) [available at: <http://www.robert-schuman.eu/doc/divers/lisbonne/en/10fiches.pdf>]. The table of the Schuman Foundation lists correctly 44 new fields coming additionally under qualified majority voting, but six of those apply to the European Council so that total for the Council is 38.

### **The visibility dimension of the institutional power balance**

In terms of public visibility the European Parliament clearly comes out of the Lisbon Treaty with a “plus”: Its increased constitutional, budgetary and legislative powers all offer a substantial potential to make it appear more often than before as an important or even decisive actor on the European stage. The extensive media coverage given to its aforementioned rejection under its new post-Lisbon powers of the provisional European Union-United States SWIFT agreement in February 2010 is an example for that. The extended co-decision powers also guarantee the Parliament more attention by lobbying interest groups (whether welcome or not), and under the new “regular dialogue” with the Commission the latter appear more often as seeking the support of the Parliament which will add to its perceived importance. Even third-countries will regard the Parliament as a more important player on the European Union side because of its extended powers regarding international agreements and are likely to seek more direct contacts with it.<sup>51</sup> Although extension of the Parliament’s powers have in the past not prevented the nearly continuous decline in voting turnout in European elections the Parliament has come out of the Lisbon Treaty with such a strengthened overall position that the resulting enhanced visibility might provide new opportunities in this regards.

The Commission, by contrast, has to face more “visibility competition” as President Barroso has now a new competitor in the public perception in guise of the new (semi-permanent President of the European Council who may well be seen as carrying occasionally more weight than the Commission President because of aura of European Union supreme which comes with the European Council (see also below). This potential “presidential competition” as regards visibility might also be a challenge for the Commission President outside of the Union because of the European Council President’s external representation function in the Common

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<sup>51</sup> The increased importance of the Parliament for the future of EU-US relations was forcefully underlined by Philip H. Gordon, the US State Department Assistant Secretary responsible for European Affairs, when giving evidence on the Treaty of Lisbon implications to the Subcommittee on Europe of the US House of Representatives Foreign Affairs Committee on 15 December 2009 (see US Department of State: The Lisbon Treaty: Implications for Future Relations Between the European Union and the United States, Washington, December 2009 (available at <http://www.state.gov/p/eur/rls/rm/2009/133583.htm>).



Foreign and Security Policy domain (Article 18(6) TEU).<sup>52</sup> There is also a significant risk that the High Representative/Vice-President of the European Commission, although being a member of the Commission and being responsible for external relations aspects under the Commission's competence, might be primarily associated with the Council in terms of public visibility because of its chairing of the Foreign Affairs Council and close association with the European Council whose meetings the High Representative/Vice-President of the European Commission attends (Article 15(2) TEU).<sup>53</sup> The Commission can therefore be regarded as ending up with a relative "minus" on the institutional balance side after the Lisbon Treaty.

The European Council's visibility will benefit from the enhanced continuity and leadership potential of its new (semi-)permanent President. Whereas before the Lisbon Treaty much of the publicity of the preparation, holding and aftermath of European Council meetings focused on the role of head of state or government of the country holding the Presidency (duly flagged up on the Presidency's website), there has already been a distinct shift of the attention to Van Rompuy instead, helped in part by Spanish Prime Minister Zapatero of setting a precedent during the recent Spanish Presidency for yielding the primary role to him.<sup>54</sup> The European Council's visibility would certainly also benefit from more frequent meetings which Van Rompuy clearly favours and which according to him could go up to 10 meetings per year.<sup>55</sup> In terms of visibility the European Council therefore comes out of the Lisbon Treaty reforms with a "plus".

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<sup>52</sup> In his speech before the European Parliament on 24 February 2010 Van Rompuy himself said that "Public opinion and third countries may well find it difficult to grasp the difference between the President of the Commission and the President of the European Council" (Council document PCE 32/10, 24 February 2010).

<sup>53</sup> When welcoming HR/VP Ashton for her first visit in her new capacity in Washington on 21 January 2010 US Secretary of State Clinton, for instance, welcomed her as "High Representative for the Foreign and Security Policy" without making any reference to her position in the Commission in spite of her making reference to issues under Commission competence – such as reconstruction aid to Haiti (see US Department of State: Remarks With EU High Representative for Foreign Policy Catherine Ashton, Washington, January 2010 (available at <http://www.state.gov/secretary/rm/2010/01/135530.htm>).

<sup>54</sup> See Carlos Closa: Institutional Innovation in the EU: The Presidency of the European Council, ARI Analysis 47/2010, Real Instituto Elcano, Madrid, March 2010 (available at [http://www.realinstitutoelcano.org/wps/portal/rielcano\\_eng/Content?WCM\\_GLOBAL\\_CONTEXT=/elcano/elcano\\_in/zonas\\_in/ari47-2010](http://www.realinstitutoelcano.org/wps/portal/rielcano_eng/Content?WCM_GLOBAL_CONTEXT=/elcano/elcano_in/zonas_in/ari47-2010)).

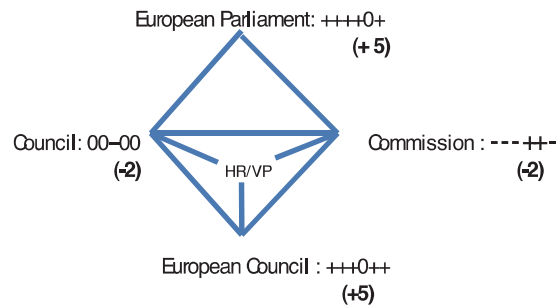
<sup>55</sup> A figure given in his speech before the European Parliament on 24 February 2010 (Council document PCE 32/10, 24 February 2010).

For the Council the picture is, again, a more mixed one: On the one hand the Council might benefit from the likely association of the High Representative/Vice-President of the European Commission with it rather than the Commission (see above). The general passage to deliberations in public provided for by new Article 16(8) TEU can also add to its public visibility. On the other hand, however, the reinforced constitutional position and powers of the European Council as well as its new non-rotating President makes the Council appear more than ever before as a “subordinate” institution of the European Council and inevitably diverts public attention than before more to the latter. The continuing rotation and weaker position of the Council Presidency can also hardly be seen as a positive factor on the visibility side, so that positive and negative effects together may overall result in a “zero” factor on the institutional balance.

**Conclusions: The shifts in the institutional power balance and its consequences**

If one enters the power change factors identified above for each of the six dimensions analysed into the post-Lisbon institutional quadrangle one arrives at a strikingly clear overall picture regarding the main shifts of power. The European Parliament and the European Council emerge with five “plus” and one “zero” each as the main – and indeed very important - beneficiaries of the Treaty of Lisbon reforms whereas the European Commission with four “minus” and two “plus” and the Council with four “zero” and two “minus” emerge as the clear losers of the new institutional balance. If one assigns one positive point for each “plus”, no point for a “zero” and a negative point for each “minus” the difference between the European Parliament and European Council with a plus of five points on the one hand and the Commission and the Council with minus of two points on the other become even more obvious:

**Figure 2: The post-Lisbon institutional balance**



Several conclusions can be drawn from these clear shifts in the institutional balance:

*The first* – and rather obvious one – is that the European Parliament and the European Council emerge as the primary poles of power in the post-Lisbon institutional system. This means that the evolution of the Union – both as regards its constitutional framework and its policies – will depend more than ever before on the extent to which both institutions agree on strategic objectives and priorities of the Union. There is hence a need for developing cooperation between the Parliament and the European Council, this all the more so as the relationship between the two is the least defined between any two of the European Union institutions in the Treaties. President Van Rompuy’s oral report on 24 February 2010 to the European Parliament on the results of the informal European Council meeting of 11 February - although Article 15(6)(d) TEU only obliges him to do so after formal meetings – was therefore a step in the right direction, and no less constructive are the contacts he has initiated with political group leaders of the Parliament and his monthly meetings with the President of the Parliament.<sup>56</sup> Yet, in order to arrive at a more regular and effective dialogue, the two institutions could consider working on a formal framework

<sup>56</sup> See Carlos Closa: Institutional Innovation in the EU: The Presidency of the European Council, ARI Analysis 47/2010, Real Instituto Elcano, Madrid, March 2010 (available at [http://www.realinstitutoelcano.org/wps/portal/rielcano\\_eng/Content?WCM\\_GLOBAL\\_CONTEXT=/elcano/elcano\\_in/zonas\\_in/ari47-2010](http://www.realinstitutoelcano.org/wps/portal/rielcano_eng/Content?WCM_GLOBAL_CONTEXT=/elcano/elcano_in/zonas_in/ari47-2010)).

agreement defining information and consultation mechanisms, this also in the light of the fact that the European Council is now a formal institution which could become formally part of an inter-institutional agreement.

*The second* and hardly less obvious conclusion is that of the relative decline in power of the Commission, especially in the legislative field (extension of co-decision) and in external relations (High Representative/Vice-President of the European Commission more under the control of the Council than the Commission). The Commission is clearly facing a stronger Parliament and a stronger European Council, and appears more and more squeezed between the two, with its formerly primary function of political and legislative initiative coming more under the influence of the former and – at least as regards strategic political initiatives – being even more taken away by the latter. As a strengthened European Council might see the Commission more and more as an executive instrument of its supreme guidelines it might be in the Commission's best interest to seek a closer cooperation with the Parliament also strategic objectives and programming. The new "regular dialogue" between the Commission and the Parliament under the soon to be approved revised Framework Agreement between the two institutions comprises already some elements going in that direction.

*The third* conclusion is that the Lisbon Treaty reforms have also put the Council on a path of relative declining power, mainly because of the ascendancy of both the Parliament and European Council. Now operating under the European Council with increased formal powers and a greater continuity and leadership potential because of the (semi-)permanent Presidency, the Council could gradually develop into an institution fulfilling more and more the function of a "super-COREPER" vis-à-vis the European Council. The fact that Member States can now formally appeal to the European Council under Articles 48, 82(3), 83(3), 86(1) and 87(3) TFEU for supreme arbitration with a suspensive effect on Council legislative procedures marks clearly a step in this direction.

*The fourth* conclusion is that the new High Representative/Vice-President of the European Commission's position is by far the most complex and – from an inter-institutional perspective - tension charged innovation of the Treaty of Lisbon. Quite

apart from the huge international demands which come with her job, Baroness Ashton might not be envied for her uneasy institutional position within the institutional sub-triangle of Commission, Council and European Council with its multiple dependencies. The overall institutional context suggest that the High Representative/Vice-President of the European Commission will be drawn more into the power ambit of the Council and European Council – which will not make Baroness Ashton's position within the Commission any easier.

*The fifth* and final conclusion relates to the possible categorisation of the post-Lisbon institutional balance. There has been a long tradition of interpreting changes of the institutional balance as shifts along the lines of a more supranational or intergovernmental orientation of the European Union's institutional system.<sup>57</sup> After the Treaty of Lisbon reforms this supranational vs. intergovernmental categorisation seems increasingly obsolete as supranational and intergovernmental elements are now so intermingled and the distinction at least partially diluted that they are difficult to apply to the institutional reality. The new position of the European Council is a case in point: Traditionally it has been seen as the very embodiment of intergovernmentalism, so that the strengthening of its position in the post-Lisbon system should be tantamount to a shift towards more intergovernmentalism. Yet the European Council has now become a fully-fledged European Union institution subject to the jurisdiction of the Court of Justice, chaired by a non-rotating President and voting by qualified majority. It can surely not any longer be regarded as an intergovernmental body in the classic sense, although it surely still represents the power of national governments at their highest level. The same difficulties with the supranational/intergovernmental categorisation can be encountered on supranational side of the divide: The Commission has traditionally been regarded as the archangel of the supranational principle within the European Union's institutional structure, but no one can seriously deny that the Commission is exposed to major influences from the side of national governments, and with the principle of one Commissioner per Member State now being confirmed also for the post-Lisbon period a purely

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<sup>57</sup> For an interpretation of the post-Lisbon institutional balance according to the supranational/intergovernmental dichotomy see Youri Devuyst: The European Union's institutional Balance After the Treaty of Lisbon: "Community Method" and "Democratic Deficit" Reassessed, in: Georgetown Journal of International Law, Vol. 39/2, 2008, pp. 247-325.

supranational view of the Commission seems hardly to correspond to institutional reality.

Rather than trying to fit a constantly evolving institutional system, whose purpose is to transform a wide variety of interests of citizens, governments, societal and economic actors, national and European administrations (to name only a few) into common policies, into the Procrustean bed of abstract categories, it is worth asking whether the Union's most recent major institutional reform has given more or less weight to the sources of power which can claim the greatest legitimacy in the European Union system. As the Union is based on the double legitimacy of that of its citizens and of the Member States it seems that the significant strengthening of the European Parliament – which represents the former – and of the European Council – which represents the latter at their highest level corresponds to the very nature of the European construction as it has emerged from sixty years of development. This, however, does not yet guarantee that the changed institutional balance will be more efficient and effective in terms of policy results. Much will depend on the practice of inter-institutional cooperation and the efforts of each institution over the next few years to make the new elements of the institutional balance work.