ES institūcijas

2

THE INSTITUTIONS

1 CENTRAL ISSUES

i. There are seven principal institutions listed in Article 13 TEU entrusted with carrying out the tasks of the Union: the European Parliament, the European Council, the Council, the Commission, the Court of Justice of the European Union, the European Central Bank, and the Court of Auditors. This chapter will consider their respective roles and the way in which they interrelate. We shall also consider other important institutions such as the Economic and Social Committee, the Committee of the Regions, and agencies. The EU's monetary institutions will, however, be discussed later.[1]

ii. This chapter should not be approached with any preconceptions about the traditional division of governmental functions into categories of legislative, executive, administrative, and judicial. Many of these duties are shared between institutions, thereby rendering it impossible to describe any one of them as the sole legislator, or the sole executive. The EU does not therefore conform to any rigid separation-of-powers principle of the sort that has shaped certain domestic political systems.

iii. The pattern of institutional competence within the EU has not remained static. It has altered both as a consequence of subsequent Treaty revisions and as a result of change in the political balance of power between the institutions over time,[2] including through the emergence of a web of committees and institutional actors beyond the original 'canonical' institutions.

iv. The Lisbon Treaty has made a number of significant changes to the internal organization of the EU institutions and their respective powers. These changes were hotly debated in the Convention on the Future of Europe that produced the Constitutional Treaty.

v. The principal issues on which opinion was divided during the deliberations leading to the Constitutional Treaty were: the election of the Commission President; the size of the Commission; control over the Council; whether there should be a long-term head of the European Council, and if so the powers attached to this office; and the locus of responsibility for EU external relations, including the Common Foreign and Security Policy.

vi. The resolution of these issues in the Constitutional Treaty was largely taken over into the Lisbon Treaty. The discussion in this chapter will reveal the contending arguments on each of these issues and the likely impact of such changes for the functioning of the EU.

[1] Ch 20.

[2] D Curtin, *Executive Power in the European Union, Law, Practices and the Living Constitution* (Oxford University Press, 2009); P Craig, 'Institutions, Power and Institutional Balance' in P Craig and G de Búrca (eds), *The Evolution of EU Law* (Oxford University Press, 2nd edn, 2010) ch 3.

2 THE COMMISSION

It is important to understand that the term Commission connotes both the College of Commissioners and the permanent Brussels bureaucracy which staffs the Commission services.[3] The discussion begins with the former.

(A) PRESIDENT OF THE COMMISSION

The Presidency of the Commission is of real significance. The holder is clearly first among equals as compared with the other Commissioners, and the President's powers have increased over subsequent Treaty amendments.

The Lisbon Treaty now provides for the Commission President to be indirectly elected. The Commission had hitherto been opposed to this idea, fearing the politicization that might result. Its attitude changed during the deliberations in the Convention on the Future of Europe,[4] primarily because it was felt that this would enhance the legitimacy of the Commission President, thereby strengthening his claim to be President of the Union as a whole.[5] The European Parliament was unsurprisingly in favour of a regime in which it would elect the Commission President. The Member States were, however, unwilling to surrender all control over choice of Commission President to the European Parliament.

The 'solution' in the Constitutional Treaty[6] was carried over directly into the Lisbon Treaty. Thus Article 14(1) TEU duly states that the European Parliament shall elect the President of the Commission. The retention of state power is however apparent in Article 17(7) TEU. The European Council, acting by qualified majority, after appropriate consultation,[7] and taking account of the elections to the European Parliament, puts forward to the European Parliament the European Council's candidate for Presidency of the Commission. This candidate shall then be elected by the European Parliament 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 'candidate' must secure support of the dominant grouping within the European Parliament. This was nonetheless the reality even prior to the Lisbon Treaty, as exemplified by the fact that President Barroso was the official candidate of the European People's Party when he secured re-election in autumn 2009.[8]

It is for the Commission President to lay down guidelines for the working of the Commission, decide on its internal organization, and appoint Vice-Presidents of the Commission.[9] The responsibilities incumbent on the Commission are allocated among the Commissioners by the President,

[3] N Nugent, *The European Commission* (Palgrave, 2001); A Stevens, with H Stevens, *Brussels Bureaucrats? The Administration of the European Union* (Palgrave, 2001); L Hooghe, *The European Commission and the Integration of Europe* (Cambridge University Press, 2002); M Pollack, *The Engines of European Integration: Delegation, Agency and Agenda Setting in the EU* (Oxford University Press, 2003); A Smith (ed), *Politics and the European Commission: Actors, Independence, Legitimacy* (Routledge, 2004); D Dimitrakopoulos (ed), *The Changing European Commission* (Manchester University Press, 2004); D Spence (ed), *The European Commission* (Harper, 3rd edn, 2006).

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

[5] P Norman, *The Accidental Constitution, The Making of Europe's Constitutional Treaty* (EuroComment, 2nd edn, 2005) 120–121.

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

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

[8] www.euractiv.com/en/future-eu/barroso-elected-lisbon-majority/article-185513.

[9] Art 17(6) TEU, other than the High Representative of the EU for Foreign Affairs and Security Policy.

who has power to reshuffle the portfolios,[10] but there will be negotiations, often intense, between the Commissioners, the President, and the Member States about 'who gets what'. The Commission President can moreover request the resignation of a Commissioner.[11]

The President plays an important role in shaping overall Commission policy, in negotiating with the Council and the Parliament, and in determining the future direction of the EU. How much is made of the post will depend on the personality and vision of the incumbent.[12] Jacques Delors had a strong vision for the Community's development. Many of the broader Community initiatives were in no small measure the result of his leadership within the Commission.[13]

(B) COLLEGE OF COMMISSIONERS

(i) *Size*

There had been considerable debate, going back at least to the Nice Treaty 2000, concerning the size of the Commission. In the IGC leading to the Nice Treaty opinion was divided as to whether there should continue to be one Commissioner from each state, or whether there should be an upper limit combined with rotation.[14] The argument for the latter view was that Commissioners do not represent their state, and that a Commission with twenty-seven Commissioners could cross the line between a collegiate body and a deliberative assembly.

The Lisbon Treaty, subject to the political caveat below, opted for the slimmed down Commission. It provides that the Commission will, until 31 October 2014, consist of one national from each Member State, including the President and the High Representative for Foreign Affairs.[15] After that date the Commission is to consist of members, including the President and the High Representative for Foreign Affairs, which correspond to two-thirds of the Member States,[16] unless the European Council, acting unanimously, decides to alter this number. Member States must be treated on a strictly equal footing as regards determination of the sequence of, and the time spent by, their nationals as members of the Commission. The composition of the Commission must reflect the demographic and geographical range of all the Member States.[17] This system is to be established by the European Council.[18] The basic position in the Lisbon Treaty is therefore that there will be a slimmed-down Commission in the medium term.

The 'political caveat' is however that the European Council can modify the post-2014 system by unanimously voting to alter the number of Commissioners.[19] The European Council could, for example, vote to retain one Commissioner per Member State post-2014, and it has made such a commitment as part of the deal struck with Ireland prior to its second referendum.[20] Thus assuming that the requisite unanimity is forthcoming in the European Council we shall see a continuation of the status quo, with one Commissioner per Member State. This would not however preclude the

[10] Art 248 TFEU.
[11] Art 17(6) TEU.
[12] J Peterson, 'The Santer Era: The European Commission in Normative, Historical and Theoretical Perspective' (1999) 6 JEPP 46.
[13] N Nugent, 'The Leadership Capacity of the European Commission' (1995) 2 JEPP 603.
[14] CONFER 4813/00, Presidency Note, 1 Dec 2000.
[15] Art 17(4) TEU.
[16] Declaration 10 specifies that when the Commission no longer includes nationals of all Member States, the Commission should pay particular attention to the need to ensure full transparency in relations with all Member States, and to ensure that political, social, and economic realities in all Member States are fully taken into account.
[17] Art 17(5) TEU, Art 244 TFEU.
[18] Art 17(7) TEU.
[19] Art 17(5) TEU.
[20] Brussels European Council, 10 July 2009, [I.2].

European Council from later voting unanimously for the slimmed down Commission that is the default position established by Article 17(5) TEU.

(ii) *Appointment*

The Convention on the Future of Europe proposed that the President-elect of the Commission would choose Commissioners from a list of three names put forward by each Member State, and that these would be approved by the European Parliament.[21] This would have put the Commission President in the driving seat as to the choice of the Commissioners, subject to approval of the entire package by the European Parliament.

The Lisbon Treaty has, however, retained greater Member State influence over the choice of Commissioners. The regime is that Member States make suggestions for Commissioners, and the Council, by common accord with the President-elect of the Commission, adopts the list of those who are to be Commissioners. The body of Commissioners is then subject to a vote of approval by the European Parliament. 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 European Parliament.[22] Prospective Commissioners are commonly subject to scrutiny by the relevant parliamentary committee before approval by the European Parliament. Commissioners hold office for five years, and this term is renewable.[23]

The Commissioners must be chosen on grounds of general competence and their independence must not be in doubt. They must be completely independent in the performance of their duties, and can neither seek nor take instructions from a government or any other body.[24] Thus while Commissioners come from the Member States they do not represent their own state. The Commissioners meet collectively as the College of Commissioners. The Commission operates under the guidance of its President, and the Commissioners take decisions by majority vote.[25]

The Commissioners have their personal staffs (or cabinets), consisting partly of national and partly of EU officials.[26] There will be approximately fifteen officials in these teams, although the President of the Commission may have a larger cabinet. The members of the cabinet perform a variety of functions: they liaise with other parts of the Commission, scrutinize draft regulations and directives, and keep the Commissioner informed about developments in other connected areas. There have, however, been tensions between the cabinets and the Commission bureaucracy, with the former being regarded as representing national rather than EU interests.

(iii) *Removal*

An individual Commissioner can be compulsorily retired if the person no longer fulfils the conditions for performance of the job, or for serious misconduct. This decision is made by the ECJ on application by the Council.[27] The difficulty of removing Commissioners was part of the problem leading to the downfall of the Santer Commission. This is the rationale for the provision whereby a Commissioner shall resign if the President so requests.[28] There are also provisions for filling Commission vacancies in the event of resignation, compulsory retirement, or death.[29]

[21] Art I-26(2) Draft CT.
[22] Art 17(7) TEU.
[23] Art 17(3) TEU.
[24] Art 17(3) TEU.
[25] Art 250 TFEU.
[26] Nugent (n 3) ch 5.
[27] Art 247 TFEU.
[28] Art 17(6) TEU.
[29] Art 246 TFEU.

(iv) *Decision-making*

The College of Commissioners operates in four different ways. Important matters are dealt with through meetings of the College, which occur weekly, normally on Wednesdays, and the agenda is prepared by the Secretariat-General.[30] These meetings will be preceded by discussion held by the Commissioners' *chefs de cabinet* to resolve differences in advance of the College meeting. There may also be meetings of Commission groups, designed to coordinate its activities.

The written procedure is used where 'deliberations in College do not seem to be necessary because all points have been agreed by the relevant DGs and approval has been given by the Legal Service'.[31] The proposal is sent to the Commissioners' cabinets, and if there is no objection within a specified period the decision is made. Any Commissioner can raise objections and request that the measure be considered at a College meeting.

A third mode of decision-making is empowerment, whereby the Commission empowers an individual Commissioner to make a decision, while respecting the principle of collective responsibility. There is finally the possibility of delegating decision-making to directors general and heads of service, who act on behalf of the Commission, which is used for routine business.[32]

(c) COMMISSION BUREAUCRACY

The permanent officials who work in the Commission, and who form the Brussels bureaucracy, are organized as follows. Directorates General (DG) cover the major internal areas over which the Commission has responsibility. There are now DGs for the following areas:[33] Agriculture and Rural Development; Climate Action; Competition; Economic and Financial Affairs; Education and Culture; Employment, Social Affairs and Equal Opportunities; Enterprise and Industry; Environment; Executive Agencies; Health and Consumers; Home Affairs; Information Society and Media; Internal Market and Services; Justice; Maritime Affairs and Fisheries; Mobility and Transport; Regional Policy; Research; and Taxation and Customs Union. There are DGs dealing with external relations, including: Development, Enlargement, EuropeAid-Cooperation Office, External Relations, Humanitarian Aid, and Trade. Financial matters are dealt with by the DGs for Budget and the Internal Audit Service.

There are also units which provide General Services across the spectrum of Commission activities. These include: the European Anti-Fraud Office (OLAF),[34] Eurostat, Communication, Publications Office, Translation Service, the Legal Service, Personnel and Administration, the Joint Research Centre, and the Secretariat-General of the Commission.

There are essentially four layers within the Commission bureaucracy.[35] There is the Commissioner who has the portfolio for that area. There is the Director General who is the head bureaucrat of a particular DG, with responsibility to the Commissioner. There are also Directors. A DG will have a number of Directorates, each of which will normally be headed by a Director who is responsible to the Director General. The final part of the administrative organization is the Head of Division or Unit. These Divisions or Units are parts of Directorates. Each Division or Unit will have a Head, who will be responsible to the relevant Director.

[30] http://ec.europa.eu/atwork/collegemeetings/index_en.htm.
[31] Nugent (n 3) 94.
[32] http://ec.europa.eu/atwork/basicfacts/index_en.htm.
[33] http://ec.europa.eu/about/ds_en.htm.
[34] This office is still at present part of the Commission, although it has an individual independent status for its investigative functions and is significantly more independent than the anti-fraud unit which it replaced, http://ec.europa.eu/dgs/olaf/index_en.html.
[35] Nugent (n 3) 138–142; A Stevens with H Stevens, *Brussels Bureaucrats? The Administration of the European Union* (Palgrave, 2001) ch 8.

Decisions and draft legislative proposals will normally emanate from a lower part of this hierarchy upwards towards the College of Commissioners. There will be detailed discussion of the legislative process later.[36] Suffice it to say for the present that a proposal will often originate within the relevant DG. Outside experts will often be used at this formative stage, and there will be consultation with national civil servants. The draft proposal will then pass up through the DGs to the cabinets of the relevant Commissioners, and on to the weekly meeting held by the *chefs de cabinet*. From there it will proceed to the College of Commissioners, which may accept it, reject it, or suggest amendments. Matters are more complex when a proposed measure affects more than one area, and hence more than one DG may be involved.

It is, moreover, not uncommon for the different DGs involved with a measure to have a 'different angle' on the problem. The term 'multi-organization' has been used to describe the priorities of different parts of the administration.[37] It is for this reason that consultations within the Commission will precede the meeting of the College of Commissioners. Formal meetings will be held by the *chefs de cabinet*, the object being to reach agreement before the College convenes. The meeting of the *chefs de cabinet* will receive input from discussion sessions held by the particular member of a cabinet who specializes in the relevant area. In addition there will be informal exchanges between opposite numbers within the bureaucracy at all levels, including the Commissioners themselves, members of differing cabinets, and officials who work in DGs with an interest in a measure. The Secretariat-General will also play an important role in coordinating the drafting of legislative initiatives within the Commission as a whole.

The basic principle within the Commission is for positions and promotions to be based upon merit, determined by competitive examination. This meritocratic principle is qualified by the fact that Member States will take a keen interest to ensure that their own nationals are properly represented, particularly in the senior posts. For this reason it has been traditional for an informal quota regime to operate in the allocation of such jobs.[38] Whether this can still survive is more doubtful, given that the Court has held that job allocation should not be predetermined and should be decided on merit.[39] We shall return to this issue when considering reform of the Commission.

There has been much carping over the years about the size of the Brussels bureaucracy. This is largely based on ignorance of the facts. In 2010 the Commission employed approximately 24,000 full-time officials, with a further 6,000 people on temporary contracts.

(D) POWERS OF THE COMMISSION

The powers of the Commission are set out in Article 17 TEU:

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

[36] Ch 5.

[37] L Cram, 'The European Commission as a Multi-Organisation: Social Policy and IT Policy in the EU' (1994) 1 JEPP 194.

[38] Nugent (n 3) 174–176.

[39] Case 105/75 *Giuffrida v Council* [1976] ECR 1395.

> 2. Union legislative acts may only be adopted on the basis of a Commission proposal, except where the Treaties provide otherwise. Other acts shall be adopted on the basis of a Commission proposal where the Treaties so provide.

The Treaty Articles have never been good at conveying the reality of the Commission's role. A 'bare' reading of Article 211 EC, the predecessor to Article 17 TEU, did little to convey the role played by the Commission. Article 17 TEU fares a little better in this respect, but still does not convey the full extent of the Commission's powers.

(i) *Legislative Power*

The Commission plays a central part in the legislative process, the details of which are discussed below.[40] The Commission is accorded the right of legislative initiative by Article 17(2) TEU, which places it in the forefront of policy development. Most proposals will have to be approved by the Council and the European Parliament, but the Commission's right of initiative has enabled it to act as a 'motor of integration' for the EU. The Council is, however, *de facto* the catalyst for many legislative initiatives.[41]

A second way in which the Commission impacts on the legislative process is that it develops the overall legislative plan for any single year.[42] The agenda-setting aspect of the Commission's work is significant in shaping the EU's priorities for the forthcoming year.[43] This role is both affirmed and qualified by Article 17(1) TEU, which is framed in terms of the Commission initiating the annual and multi-annual programme with a view to achieving inter-institutional agreement.

The Commission also affects EU policy in a third way, by developing general policy strategies. This is exemplified by the Commission's White Paper on the Completion of the Internal Market,[44] which shaped the Single European Act. Commission initiatives under the Presidency of Jacques Delors contributed to the development of Economic and Monetary Union. The Commission's Community Charter of the Fundamental Social Rights of Workers[45] (the Social Charter) was important in the debates about Community social policy. A further example is the Commission White Paper on European Governance.[46]

A fourth way in which the Commission exercises legislative power is through its capacity, in certain limited areas, to enact EU norms without the formal involvement of any other EU institution.[47]

Finally, the Commission exercises delegated power.[48] This is expressly contemplated by Article 290 TFEU. The Council and European Parliament delegate power to the Commission to make further regulations within particular areas.[49]

(ii) *Administrative Power*

The Commission has significant administrative responsibilities. This is reflected in Article 17(1) TEU, which states that the Commission shall manage programmes. Policies, once made, have to

[40] Ch 5.
[41] 45 below.
[42] http://ec.europa.eu/atwork/index_en.htm.
[43] 144–146 below.
[44] COM(85)310.
[45] Ch 11 below.
[46] European Governance: A White Paper, COM(2001)428, and Communication from the Commission on the Future of European Union—European Governance: Renewing the Community Method, COM(2001)727.
[47] Ch 5 below.
[48] Ch 4 below.
[49] Chs 4, 5.

be administered. Legislation, once enacted, must be implemented. This will commonly be through shared administration, using national agencies.[50] The Commission will maintain a general supervisory overview, to ensure that the rules are properly applied within the Member States. There can be difficulties in executing this supervisory role successfully, as will be seen below.[51] It has also become increasingly common for the Commission to exercise direct administrative responsibility for the implementation of certain EU policy.[52]

(iii) *Executive Power*

The Commission possesses responsibilities of an executive nature. Two are of particular importance: those relating to finance and those concerning external relations.

The Commission plays an important role in the establishment of the EU's budget. It also has significant powers over expenditure, particularly in relation to agricultural support, which takes a substantial share of the Union's annual budget, and structural policy, which is designed to assist poorer regions to convert or adjust declining industries, and combat long-term unemployment.

The Commission also exercises executive powers in the sphere of external relations. Nugent explains.

N Nugent, *The Government and Politics of the European Union*[53]

First, the Commission is centrally involved in determining and conducting the EU's external trade relations ... [T]he Commission represents and acts on behalf of the EU both in formal negotiations, such as those that are conducted under the auspices of the World Trade Organisation (WTO), and in the more informal and explanatory exchanges that are common between, for example, the EU and the USA over world agricultural trade, and between the EU and Japan over access to each other's markets.

Second, the Commission has important negotiating and managing responsibilities in respect of the various special external agreements that the EU has with many countries and groups of countries. ...

Third, the Commission represents the EU at, and participates in the work of, a number of important international organizations ...

Fourth, the Commission has responsibilities for acting as a key point of contact between the EU and non-member States. Over 160 countries have diplomatic missions accredited to the EU. ... The EU, for its part, maintains an extensive network of diplomatic missions abroad, numbering over 130 delegations and offices, and these are staffed by Commission employees.

Fifth, ... the Commission is entrusted with important responsibilities with regard to applications for EU membership. Upon receipt of an application the Council normally asks the Commission to carry out a detailed investigation of the implications and to submit an opinion. If and when negotiations begin, the Commission, operating within Council-approved guidelines, acts as the EU's main negotiator, except on showpiece ministerial occasions or when particularly sensitive or difficult matters call for an inter-ministerial resolution of differences. ...

[illegible]

The Commission possesses two kinds of judicial powers. The general foundation for such power is Article 17(1) TEU, which provides that the Commission shall ensure the application of the Treaties

[50] P Craig, *EU Administrative Law* (Oxford University Press, 2006) ch 3.

[51] See 39–40.

[52] Craig (n 50) ch 2.

[53] (Oxford University Press, 6th edn, 2006) 186–187.

and the law made pursuant thereto, and that it shall oversee the application of Union law under the control of the ECJ.

The Commission brings actions against Member States when they are in breach of EU law.[54] The actions will be brought under Article 258 TFEU and will assume the form of *Commission v UK* etc. Recourse to formal legal action will be a last resort and will be preceded by Commission efforts to resolve the matter through negotiation.

The Commission also acts in certain areas as investigator and initial judge of a Treaty violation, whether by private firms or by Member States. The two most important areas are competition policy and state aids. The Commission's decision will be reviewable by the General Court. Notwithstanding the existence of judicial review, the Commission's investigative and adjudicative powers provide it with a significant tool for the development of EU policy.

(E) DOWNFALL OF THE SANTER COMMISSION AND SUBSEQUENT REFORM

There had been concern for some considerable time about fraud and mismanagement, particularly in areas such as the Common Agricultural Policy.[55] This culminated in the setting up of a Committee of Independent Experts, under the auspices of the European Parliament and the Commission. The Committee produced its first report in March 1999,[56] the concluding paragraph of which stated that it was 'becoming difficult to find anyone who has even the slightest sense of responsibility' within the Commission.[57] The Report had an immediate, dramatic effect: the Commission resigned. The principal problem revealed by the Committee's Report was not fraud by the Commission. It was the difficulty of maintaining control over those to whom power had been contracted out,[58] which is an endemic problem for all systems of public administration.[59]

Romano Prodi took over as Commission President. He introduced a new Code of Conduct for Commissioners,[60] and set up the Task Force for Administrative Reform (TFRA). The TFRA produced a White Paper,[61] which was heavily influenced by valuable recommendations in the Second Report of the Committee of Independent Experts.[62] The general theme of the White Paper was the need for the Commission to concentrate on its core functions such as policy conception, political initiative, and enforcing EU law. Steps were to be taken to ensure greater linkage between priorities and resources. Activities would be delegated to other bodies, so as to enable the Commission to concentrate on its core activities.[63] 'Externalization' was to be used only where it was the most efficient option; it would not be used at the expense of accountability; and there would have to be sufficient internal resources to ensure proper control. There was to be a new type of implementing body, and there were recommendations about financial control.

[54] Ch 12.

[55] D Spence, 'Plus Ça Change, Plus C'est La Même Chose? Attempting to Reform the European Commission' (2000) 7 JEPP 1.

[56] Committee of Independent Experts, First Report on Allegations regarding Fraud, Mismanagement and Nepotism in the European Commission, 15 Mar 1999, [1.4.2].

[57] Ibid [9.4.25].

[58] P Craig, 'The Fall and Renewal of the Commission: Accountability, Contract and Administrative Organization' (2000) 6 ELJ 98.

[59] P Craig, *Administrative Law* (Sweet & Maxwell, 6th edn, 2008) ch 5; M Freedland, 'Government by Contract and Private Law' [1994] PL 86.

[60] The Formation of the Commission, 12 July 1999. See also Operation of the Commission, 12 July 1999.

[61] Reforming the Commission, COM(2000)200.

[62] Committee of Independent Experts, Second Report on Reform of the Commission, Analysis of Current Practice and Proposals for Tackling Mismanagement, Irregularities and Fraud, 10 Sept 1999.

[63] Reforming the Commission (n 61) Part I, 6.

The 2002 Financial Regulation adopted many of these ideas, providing a constitutional framework for much EU administration.[64] The idea that there should be a new breed of agency to oversee work contracted-out was accepted,[65] and a number of such agencies were created.[66]

(F) ROLE OF THE COMMISSION

The Commission has always been the political force most committed to integration.[67] It must perforce work with the Council and the European Parliament, and the pace of EU development has not always been steady because of this inter-institutional dimension.[68]

There is literature that sees the Commission's influence as in decline, as exemplified by its relatively low impact on the negotiations leading to the Treaty of Nice and the Constitutional Treaty.[69] A more positive picture has, however, been advanced by other writers, who focus on the continuing importance of the Commission bureaucracy.[70] The degree of power wielded by the Commission and the best way to explain the extent of Commission influence is therefore debated by political scientists. The following extract presents a spectrum of views.

J Peterson, The College of Commissioners[71]

If the Commission really was so weak, intergovernmentalist accounts of EU politics ... could be marshalled to explain why. First, it makes little difference who is Commission President. Second, the Commission is only powerful when and where national preferences converge. Third, the Commission is only empowered to the extent that member governments want to ensure the 'credibility of their commitments to each other'. There is little dispute, among scholars as well as practitioners, that the Commission has traditionally had little influence over most 'history-making' decisions about the broad sweep of European integration.

In contrast, institutionalist theory, now firmly established as the 'leading theoretical approach in EU studies' ... paints a portrait of the Commission that is often powerful in day-to-day policy debates ... According to this view, policy decisions in complex systems such as the EU are difficult to reverse, and policy often becomes locked into existing paths and 'path dependent' ... .

Some variants of institutionalism combine insights from rational choice and principal–agent theories ... They hold that the principal authorities in EU politics—the member governments themselves—make rational choices to delegate tasks to the EU institutions, which then become their agents in specific policy areas. This body of theory sheds light on the tendency for the EU to make

[64] 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.

[65] 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.

[66] Craig (n 50) ch 2; http://europa.eu/agencies/executive_agencies/index_en.htm.

[67] See, eg, the Commission's communication prior to the Laeken European Council, The Future of European Union—European Governance: Renewing the Community Method, COM(2001)727.

[68] See Chs 1, 5.

[69] H Kassim and A Menon, 'EU Member States and the Prodi Commission' in D Dimitrakopoulos (ed), *The Changing European Commission* (Manchester University Press, 2004) ch 5.

[70] See, eg, L Hooghe and N Nugent, 'The Commission Services' in J Peterson and M Shackleton (eds), *The Institutions of the European Union* (Oxford University Press, 2nd edn, 2006) ch 8; T Christiansen, 'The European Commission: The European Executive between Continuity and Change' in J Richardson (ed), *European Union, Power and Policy-Making* (Routledge, 3rd edn, 2006) ch 5; M Rhinard and B Vaccari, 'The Study of the European Commission' (2005) 12 JEPP 387.

[71] Peterson and Shackleton (n 70) 98–99; D Rometsch and W Wessels, 'The Commission and the Council of Ministers' in G Edwards and D Spence (eds), *The European Commission* (Longman, 1994) 203.

policy by means other than the traditional 'Community method' of legislating, according to which only the Commission can propose ...

Increased affinity for new policy modes is ... reflected in the creation of new regulatory agencies ... EU governments increasingly seem to want new kinds of agents—not just the Commission—to whom they can delegate cooperative policy tasks. Usually, however, the Commission retains the job of identifying and seeking to solve coordination problems within policy networks of ... private actors, consumer and environmental groups, and national and European agencies.

Advocates of multi-level governance as an approach to understanding the EU have long contended that the Commission enjoys a privileged place at 'the hub of numerous highly specialized policy networks of technical experts' even retaining 'virtually a free hand in creating new networks' ...

3 THE COUNCIL

(A) COMPOSITION

Article 16(2) TEU states that the Council shall consist of a representative of each Member State at ministerial level, who is authorized to commit the government of that state.[72] The members of the Council are, therefore, politicians as opposed to civil servants, but the politician can be a member of a regional government where this is appropriate. The Council meets when convened by the President of the Council on his or her own initiative, or at the request of one of its members, or at the request of the Commission.[73] Most Council meetings take place in Brussels, except for those taking place in April, June, and October, when they are held in Luxembourg. The meetings are more transparent than hitherto, as a result of changes introduced in June 2006.[74] The Lisbon Treaty now provides that Council meetings are divided into two parts, those dealing with legislative and non-legislative acts respectively. When a Council formation meets in its legislative capacity it must meet in public.[75]

Council meetings are arranged by subject matter with different ministers attending from the Member States, and are regulated by the Council's Rules of Procedure.[76] There are at present ten such Council configurations, having been reduced from the twenty-two that prevailed in the 1990s.[77] The General Affairs Council, GAC, deals with matters that affect more than one EU policy and also has the important job of preparing the agenda for the European Council. The Foreign Affairs Council is chaired by the High Representative for Foreign Affairs and Security Policy, and national foreign ministers will normally attend. It deals with external relations and matters relating to the Common, Foreign and Security Policy. The Economics and Finance Council (Ecofin), by way of contrast, is concerned with matters such as the budget, Economic and Monetary Union, and financial markets, and is attended by national finance ministers. There is a Council dealing with matters concerning Justice and Home Affairs.

The other Council configurations deal with sectoral issues: Transport, Telecommunications and Energy; Employment, Social Policy, Health and Consumer Affairs; Agriculture and Fisheries; Competitiveness; Environment; and Education, Youth, Culture and Sport. The ministers responsible

[72] M Westlake, and D Galloway, *The Council of the European Union* (Harper, 3rd edn, 2004); F Hayes-Renshaw and H Wallace, *The Council of Ministers* (Palgrave, 2nd edn, 2006).

[73] Art 237 TFEU.

[74] Brussels European Council, Presidency Conclusions, 15–16 June 2006, Annex 1.

[75] Art 16(8) TEU.

[76] Council Decision 2009/937/EU of 1 December 2009 adopting the Council's Rules of Procedure [2009] OJ L325/35.

[77] http://consilium.europa.eu/showPage.aspx?id=427&lang=en.

for these matters within the Member States will attend such meetings. They will be supported by their own delegations of national officials with expertise in the relevant area. The Commission attends Council meetings and has a particular role in relation to the GAC.[78]

(B) PRESIDENCY OF THE COUNCIL

There was considerable contestation in the debates that led to the Constitutional Treaty and Lisbon Treaty as to who should hold the Presidency of the Council.[79] The regime in the Lisbon Treaty is that the High Representative of the Union for Foreign Affairs presides over the Foreign Affairs Council, FAC.[80] The European Council decides by qualified majority on the list of other Council formations, and the Presidency of these formations.[81] The Presidency of Council formations other than the FAC must be in accord with the principle of equal rotation.[82]

A Draft Decision was included in the Lisbon Treaty, which embodies a 'team system' for the Presidency of Council formations other than the FAC.[83] The essence of this schema was that the Presidency of the Council, other than the FAC, was held by pre-established groups of three Member States for a period of eighteen months. The groups are made up on a basis of equal rotation among the Member States, taking into account their diversity and geographical balance within the Union. Each member of the group in turn chairs for a six-month period all Council configurations, except the FAC. The other members of the group assist the Chair in its responsibilities on the basis of a common programme. It is open to members of the team to decide on alternative arrangements among themselves.

The President will, seven months before taking office, set the dates for Council meetings in consultation with the Presidencies preceding and following its term of office.[84] Every eighteen months the three Presidencies due to hold office prepare, in consultation with the Commission, the High Representative, and the President of the European Council, a draft programme of Council activities for that period, which has to be endorsed by the General Affairs Council.[85] The incoming Presidency establishes, at least one week before taking office, indicative provisional agendas for Council meetings for the next six-month period, based on the eighteen-month programme and after consulting the Commission.[86] During the actual six-month tenure, the President sets the provisional agenda for each Council meeting, which must be sent to other Council members and the Commission at least fourteen days before the meeting.[87] The agenda is divided into legislative activities and non-legislative activities, and each part is further divided into Part A, covering matters that can be approved without discussion, and Part B dealing with those matters that require deliberation.[88] The provisional agenda is formally adopted at the Council meeting.[89]

[78] Art 16(6) TEU.

[79] P Craig, *The Lisbon Treaty, Law, Politics and Treaty Reform* (Oxford University Press, 2010) ch 2.

[80] Art 18(3) TEU.

[81] Art 16(6) TEU, Art 236 TFEU.

[82] Art 16(9) TEU.

[83] Declaration 9 LT; Council 16517/09, Council Decision laying down measures for the implementation of the European Council Decision on the exercise of the Presidency of the Council, and on the chairmanship of preparatory bodies of the Council, Brussels, 30 Nov 2009; Council 16520/09, Decision of the Council (General Affairs) establishing the list of Council configurations in addition to those referred to in the second and third subparagraphs of Article 16(6) of the Treaty on European Union, Brussels, 26 Nov 2009; Council Dec 2009/937 (n 76) Art 1(4).

[84] Council Dec 2009/937 (n 76) Art 1(2).

[85] Ibid Art 2(6).

[86] Ibid Art 2(7).

[87] Ibid Art 3(1).

[88] Ibid Art 3(6).

[89] Ibid Art 3(7).

The position of President of the Council has assumed greater importance in recent years,[90] for a number of reasons.[91] Strong central management became more necessary to combat the centrifugal tendencies within the Council. The growing complexity of the EU's decision-making structure necessitated more coordination between the institutions. The scope of EU power increased, demanding greater leadership in the Council. The Council's wish to take a more proactive role in the development of EU policy required initiatives which the President could help to organize. Westlake and Galloway capture the importance of the position when they state that 'the Presidency is neither an institution nor a body, but a function and an office which has become vital to the good working of the Council'.[92] The President may develop policy initiatives within areas of concern either to the Council, or to the Member State that holds the Presidency.

While the Presidency therefore gives considerable power to the incumbent, the office is not without its stresses and pitfalls.[93] Presidencies must since 1989 draw up their programmes and present them to the Commission and the EP. Six months is a short time in which to get things done. The eyes of the other Member States will be focused, often critically, on the incumbent to determine the use to which the office has been put. If a country tries to use its Presidency to achieve goals that do not accord with majority sentiment in the Council and which are too narrowly nationalistic, then the criticism is likely to be particularly harsh.[94]

It should however be emphasized that the Presidency of the Council has altered in a significant respect post the Lisbon Treaty. This is because prior to the Lisbon Treaty the President of the Council also held the Chair of the European Council, the importance of which will be considered below. This is no longer so. There is a separate President of the European Council, who holds office for two-and-a-half years, renewable once.[95] The policy pursued by the country that holds the Presidency of the Council must therefore cohere with, or at the very least take into account, the more general strategy for the EU articulated by the President of the European Council. The need for synergy in this respect has been recognized by the institutional players.[96]

(c) COMMITTEE OF PERMANENT REPRESENTATIVES

The Lisbon Treaty provides that the work of the Council is to be prepared by the Committee of Permanent Representatives (Coreper), and that it shall carry out the tasks assigned to it by the Council.[97] Coreper is also empowered to adopt procedural decisions in cases provided for in the Council's rules of procedure. It does not, however, have the power to take formal substantive decisions,[98] but in practice Coreper 'has evolved into a veritable decision-making factory'.[99]

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

[90] E Kirchner, *Decision-Making in the European Community: The Council Presidency and European Integration* (Manchester University Press, 1992).

[91] Westlake and Galloway (n 72) ch 18.

[92] Ibid 326.

[93] T Christiansen, 'The Council of Ministers, Facilitating Interaction and Developing Actorness in the EU' in Richardson (n 70) 155–159.

[94] Westlake and Galloway (n 72) 334–337.

[95] Art 15(5) TEU.

[96] Council Dec 2009/937 (n 76) Art 2(6).

[97] Art 16(7) TEU, Art 240(1)TFEU.

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

[99] J Lewis, 'National Interests, Coreper' in Peterson and Shackleton (n 70) ch 14.

Coreper plays an important part in EU decision-making,[100] because it considers draft legislative proposals that emanate from the Commission, and helps to set the agenda for Council meetings.[101] The agenda is divided into Parts A and B: the former includes those items which Coreper has agreed can be adopted by the Council without discussion; the latter covers topics which do require discussion. It has been estimated that approximately 70–80 per cent of all Council decisions prepared by Coreper and/or working groups are then taken formally through the Council as 'A' points.[102] Decision-making within Coreper tends to be consensual, even where the formal voting rules specify qualified majority,[103] and Lewis notes that 'from a Janus-faced perspective, they act as both, and simultaneously, state agents and supranational entrepreneurs'.[104]

A large number of working groups, approximately 150, feeds into Coreper. They are the lifeblood of the Council, and examine legislative proposals from the Commission. They are composed of national experts from the Member States or from the Permanent Representations. In addition to these working groups the Council receives input from specialist committees established under the Treaty and from committees created by EU legislation.[105] There can be 'turf battles' between Coreper and other preparatory bodies, such as the Political and Security Committee and the Economic and Finance Committee.[106]

(D) COUNCIL SECRETARIAT

In addition to Coreper the Council also has its own General Secretariat, under the responsibility of a Secretary-General, which provides direct administrative support to it.[107] The Secretariat has a staff of about 2,800, and of these roughly 250 are 'A' grade, diplomatic level. This body will furnish administrative service to the Council and also to Coreper and the working parties. It will prepare documentation, give legal advice, undertake translation, process decisions, and take part in the preparation of agendas. It will also work closely with the staff of the President of the Council, helping to smooth conflicts. The Secretary-General is an important figure and the Council Secretariat has become of increased importance over the years, especially in relation to EU Foreign and Defence Policy, Treaty negotiation,[108] and legal drafting.[109]

(E) POWERS OF THE COUNCIL

The Lisbon Treaty provides scant guidance as to the powers of the Council. Article 16(1) TEU merely provides that:

> The Council shall, jointly with the European Parliament, exercise legislative and budgetary functions. It shall carry out policy-making and coordinating functions as laid down in the Treaties.

[100] 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 99) ch 14.

[101] Council Dec 2009/937 (n 76) Art 19.

[102] Christiansen (n 93) 162.

[103] Lewis (n 99) ch 14.

[104] Ibid 289.

[105] Hayes-Renshaw and Wallace (n 72) ch 3.

[106] Lewis, 'National Interests' (n 99) 280–281.

[107] Art 240(2) TFEU.

[108] D Beach, 'The Unseen Hand in Treaty Reform Negotiations: The Role and Impact of the Council Secretariat' (2004) 11 JEPP 408.

[109] Christiansen (n 93) 164–167.

A simple reading of this provision does little to convey the reality of the Council's powers. The Council exercises an important role in the decision-making process in seven ways.

First and foremost, the Council has to vote its approval of virtually all Commission legislative initiatives before they become law. The vote will be by unanimity, qualified, or simple majority depending upon the particular Treaty Article, although it is deemed to act by qualified majority unless the Treaty stipulates to the contrary.[110] Moreover, the draft proposal from the Commission will be scrutinized by Coreper and the working parties.

Secondly, the Council has become more proactive in the legislative process through the use of Article 241 TFEU. This states that the Council may by simple majority request the Commission to undertake any studies which the Council considers desirable for the attainment of the common objectives, and to submit to it any appropriate proposals. If the Commission does not do so it must provide reasons. The Council has used this power to frame specific proposals that it wishes the Commission to shape into concrete legislation.[111] The Council has also used opinions and resolutions as a way of pressuring the Commission into generating legislative proposals.[112]

Thirdly, the Council can delegate power to the Commission, enabling the latter to pass further regulations within a particular area.[113] The Treaty rules relating to this topic have changed and will be analysed below.[114]

Fourthly, the increasing complexity of the EU's decision-making process has necessitated greater inter-institutional collaboration between the Commission, the Parliament, and the Council. This assumes various guises, from informal discussions concerning the shape of the legislative agenda to the use of Inter-institutional Agreements.[115]

Fifthly, the Council, together with the EP, plays a major role in relation to the EU's budget, on which many initiatives depend.

Sixthly, the Council concludes agreements on behalf of the EU with third states or international organizations.

Finally, the Council has significant powers in relation to the Common Foreign and Security Policy, CFSP. Thus, it will be the Council which takes the necessary decisions for defining and implementing the CFSP in the light of the guidelines of the European Council.[116] The Council has also played a major role in relation to the Area of Freedom, Security and Justice.

(F) ROLE OF THE COUNCIL

The Council represents national interests and always has. Whether the framers of the original Rome Treaty would have been surprised by the way in which the Commission and Council have interrelated since the inception of the Community is unclear. They hoped that the formation of the EEC would herald an era of greater collaboration in which sectional, national interests would diminish in relation to the collective interests of the Community as a whole. The original EEC decision-making structure certainly bore testimony to the central role accorded to the Commission, as is evident from the range of its powers. To be sure, the Council had to approve legislation, but the Commission was in the driving seat. This was because of the Commission's power to set the legislative agenda, because of its institutional resources for the development of Community policy, and because, while Council

[110] Art 16(3) TEU.
[111] Sir Leon Brittan, 'Institutional Development of the European Community' [1992] PL 567.
[112] Nugent (n 53) 193.
[113] Art 290 TFEU.
[114] Ch 4.
[115] Ch 5.
[116] Arts 24–26 TEU.

consent was required for the passage of legislation, unanimity was required for Council amendments to Commission proposals.

It would be wrong to depict the Commission and the Council as perpetually at odds with each other throughout the Community's history.[117] But it would be equally mistaken to view the two institutions as coexisting in perfect harmony. There have been real tensions between the federal pro-integration perspective of the Commission, and the more cautious, intergovernmental perspective of the Council. The Treaty framers might have hoped that these tensions would be short-lived.[118] If this was so it was too optimistic a forecast. There have been institutional changes, often initially outside the letter of the Treaty, whereby the Council strengthened its position in relation to the Commission. This 'temporal' perspective on decision-making will be charted below.[119] Suffice it to say for the present that the development of a veto power in the Council, the importance of Coreper, the creation of committees to oversee power delegated to the Commission, and the evolution of the European Council all played a part in this process.

The balance of power within the EU is however dynamic, not static. The institutions' formal powers and the actual way they interrelate have altered across time. The SEA was the catalyst for a change of attitude by the Member States as represented in the Council. There was a growing recognition that the threat of the veto if a measure did not conform to a state's interests was too negative. The SEA also made the European Parliament a more active force in decision-making than it had been hitherto. These developments did not mean that relationships between the Council and the Commission, or for that matter between the Council and the Parliament, were always smooth. It did mean that the inter-institutional relationships changed. Thus, as Christiansen notes, 'the Council may not (yet) be a supranational institution in its own right, but it has certainly moved on from being purely a site of decision-making and the forum for bargaining among representatives of national governments for which it was originally conceived'.[120] The same point is echoed by Hayes-Renshaw, who states that despite the Council being the EU's intergovernmental institution *par excellence*, it is, in reality, 'a unique blend of the intergovernmental and the supranational'.[121] This conclusion is also evident in the following extract.

F Hayes-Renshaw and H Wallace, The Council of Ministers[122]

The Council remains the fulcrum of the decision-making, and legislative process of the EU. This reflects the stubborn determination of member governments in the EU to maximize their involvement in framing the decisions and shaping the legislation that would have a bearing on their polities ... Yet, to view the importance of the Council as the victory of intergovernmentalism over supranationalism, or to expect the Council to be able to 'run' the EU, is to misunderstand the institutional constellation of the EU. The Council shares and diffuses power between countries, between different kinds of interests and constituencies, and between national and EU levels of governance. The Council cannot act alone, but is dependent on intricate relationships with other EU institutions. Since the mid-1990s, however these relationships have changed a good deal. The European Parliament (EP) has gained considerable power as co-legislator with the Council, the Commission has lost ground in what used to be the classic 'Council–Commission tandem', and the Council has gained a good deal more direct executive power in newer areas of EU collective policy-making. All these factors have made the Council both more interesting as an object of study and more diverse in its ways of operating.

[117] T Christiansen, 'Intra-institutional Politics and Inter-institutional Relations in the EU: Towards Coherent Governance?' (2001) 8 JEPP 747.
[118] Ch 1.
[119] Ch 5.
[120] Christiansen (n 93) 148.
[121] Peterson and Shackleton (n 70) 78.
[122] Hayes-Renshaw and Wallace (n 72) 321.

4 THE EUROPEAN COUNCIL

(A) COMPOSITION

The European Council[123] has evolved over the years. Meetings of Heads of Government took place during the 1960s, but they were institutionalized in 1974 at the Paris summit. They continued to be held during the 1970s and 1980s, even though there was no formal remit in the Treaty until the Single European Act. The governing provision is now Article 15 TEU:

> 1. The European Council shall provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof. It shall not exercise legislative functions.
> 2. The European Council shall consist of the Heads of State or Government of the Member States, together with its President and the President of the Commission. The High Representative of the Union for Foreign Affairs and Security Policy shall take part in its work.
> 3. The European Council shall meet twice every six months, convened by its President. When the agenda so requires, the members of the European Council may decide each to be assisted by a minister and, in the case of the President of the Commission, by a member of the Commission. When the situation so requires, the President shall convene a special meeting of the European Council.
> 4. Except where the Treaties provide otherwise, decisions of the European Council shall be taken by consensus.

Meetings of the European Council were in the past held in the country holding the Presidency of the Council, but are now normally held in Brussels. The European Council is mentioned on other occasions within the Lisbon Treaty. Thus, for example, it has a prominent role within the CFSP, and in the context of politically sensitive matters, such as coordination of the economic policies of the Member States.

(B) PRESIDENCY OF THE EUROPEAN COUNCIL

Prior to the Lisbon Treaty the Member State that held the Presidency of the Council also chaired the European Council for the same period. The single most divisive issue in the decade of Treaty reform concerned the locus of executive power in the EU and whether the pre-existing regime should be retained.[124] There were two main positions.

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

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, and that executive power would be exercised by both. The Presidency of the European Council would be strengthened, and would not rotate between Member States on a six-monthly basis. It was felt that this would not work within an enlarged EU, and

[123] S Bulmer and W Wessels, *The European Council* (Macmillan, 1987); P de Schoutheete and H Wallace, *The European Council* (Notre Europe, 2002), available at www.notre-europe.asso.fr; 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 70) ch 3; J Werts, *The European Council* (Harper, 2008).

[124] Craig (n 79) ch 3.

that greater continuity of policy would be required. This view was advocated by some larger states, but was opposed by some smaller states, which felt that the Presidency of the European Council would be dominated by the larger Member States.

The 'separate hats' view prevailed. The Lisbon Treaty, following the Constitutional Treaty, provided that the European Council should elect a President, by qualified majority, for two-and-a-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.[125] The first incumbent of the new position is Herman van Rompuy, who was previously the Belgian Prime Minister.

(c) RATIONALE

Member States' interests are already represented in the Council, and we must therefore press further to understand the rationale for the creation of the European Council. It was in part due to disagreements between the Member States themselves. These would normally be resolved through the Council, but if the disagreements were particularly severe on important issues, such as the budget, then resolution might be possible only by intervention at the highest level, through the Heads of Government themselves. The European Council was also due to the need for a focus of authority at the highest political level, in order that the general EU strategy could be planned, and that its response to broader world problems could be properly focused.

(d) ROLE

The relative paucity of Treaty references to the European Council should not lead one to doubt its importance. It plays a central role in shaping EU policy, establishing the parameters within which the other institutions operate. As Schoutheete states, 'management of the Union could not be assured without a top-level institution of this type: the European Council has played a fundamental role in European integration and will continue to do so'.[126] The issues commonly considered by the European Council can be grouped into the following categories.

The *European Council is central to the development of the Union*. Major changes in the Treaties will be preceded by an IGC. The catalyst for creation of an IGC will normally be a European Council meeting. The European Council will also affirm the consequential Treaty changes, as exemplified by the Nice European Council,[127] and it was central to debates about the Constitutional Treaty and the Lisbon Treaty.

The *European Council will normally confirm important changes in the institutional structure of the EU*. The final decision on the enlargement of the Parliament following German unification was taken by a summit of the European Council.

The *European Council can provide the focus for significant constitutional initiatives that affect the operation of the Union*. Inter-institutional Agreements between the three major institutions will often be made or finalized at a summit meeting. The Inter-institutional Agreement on Subsidiarity and the Declaration on Democracy, Transparency, and Subsidiarity were made at European Council meetings.

The *European Council will consider the state of the European economy as a whole*.[128] This is in part because Treaty provisions concerning closer economic union demand growing convergence between national economic policies. It is also because of the centrality of economic issues to the very health of

[125] Art 15(5)–(6) TEU.

[126] Schoutheete (n 123) 57.

[127] 8 Dec 2000.

[128] See, eg, Luxembourg Extraordinary European Council, 20 Nov 1997; Stockholm European Council, 24 Mar 2001.

the EU. Thus, the European Council frequently takes initiatives to combat unemployment, promote growth, and increase competitiveness, part of what is known as the Lisbon agenda.[129]

Conflict resolution is another issue addressed by the European Council. This was one of the rationales for its evolution, and continues to be important. For example, budgetary matters, 'who contributes how much, and who gets what financial benefits', continued to cause conflict between the Member States in the early 1980s, and then once again in the later 1980s.

The *European Council plays a role in the initiation/development of particular policy strategies.* Examples of this include the adoption of the Social Charter in 1989; policies aimed to combat problems concerning drugs and terrorism;[130] and the extension of the 'open method of coordination' to a range of social and economic policies.[131]

The *European Council is central in external relations.* It will, for example, consider important international negotiations, such as those with the World Trade Organization (WTO). It will be the European Council that issues declarations relating to more general international affairs, such as the civil war in what was Yugoslavia, or the conflicts in Lebanon and Iraq.

The *European Council will consider new accessions to the EU.* Thus, to take recent examples, the European Council affirmed that Bulgaria and Romania should be admitted to the EU in January 2007, and debated more generally the EU's approach to membership and enlargement.[132]

(F) ROLE OF THE EUROPEAN COUNCIL

The European Council is a classic example of change in the original institutional structure of the Treaty to accommodate political reality. It evolved from a series of *ad hoc* meetings outside the letter of the Treaty to a more structured pattern of summits. Treaty-recognition was originally accorded in the SEA and has been modified by later Treaty amendments.

The European Council is central to the EU's decision-making process. The reality is that no important developments internally or externally occur without having been considered by the European Council. The concluding resolutions do not have the force of law. They nonetheless provide the framework in which the other institutions consider specific policy issues. In the words of Westlake and Galloway, 'it is no exaggeration to say that, since 1975, most of the major political decisions of the European Community have been taken in the European Council'.[133]

The relations between the European Council and other EU institutions have evolved. The early European Council summits were viewed with suspicion by the Commission, since they were normally secret and the Commission was usually excluded. Matters are very different today. The European Council has been the institutional mechanism whereby the Commission can secure broad agreement from Member States for major initiatives.[134] The European Council's agenda is prepared by the General Affairs Council, GAC.[135] The Commission President is a member of the European Council, and many European Council initiatives are the result of Commission suggestions fed into the agenda prepared by the GAC. The President of the European Parliament has, since 1988, addressed a plenary session of the European Council.

The key issue in the post-Lisbon world will be the relationship between the President of the European Council, the President of the Commission, and the country that holds the Presidency of the Council

[129] Lisbon European Council, Presidency Conclusions, 23–24 Mar 2000; Nice European Council, Presidency Conclusions, 7–9 Dec 2000; European Council, Presidency Conclusions, 22–23 Mar 2005.

[130] Brussels Extraordinary European Council, 21 Sept 2001.

[131] (N 129).

[132] Brussels European Council, Presidency Conclusions, 15–16 June 2006, [52]–[53].

[133] Westlake and Galloway (n 72) 177.

[134] Ibid 179–180.

[135] Art 16(6) TEU; Council Dec 2009/937 (n 76) Arts 2(3).

for a six-month period. The interplay between them will shape the policies and priorities of the EU. It has been argued by opponents of the Lisbon regime that this will lead to confusion and divided responsibility, and will increase intergovernmentalism and reduce the supranational dimension of the EU. The elevation of the President of the Commission to be the 'sole' President of the EU would however have generated very real tensions and problems. The reality is that executive authority in the EU has always been divided, and in that respect the Lisbon Treaty represents continuity with, rather than departure from, past practice. There are moreover reasons why the three institutional players should seek consensus, rather than conflict.[136]

5 HIGH REPRESENTATIVE OF THE UNION FOR FOREIGN AFFAIRS AND SECURITY POLICY

(A) POWERS

The High Representative of the Union for Foreign Affairs and Security Policy is not listed in Article 13 TEU and is therefore not an EU institution in the formal sense of the term. It is nonetheless an important position, which should be considered in this chapter.

There were debates in the Convention on the Future of Europe as to the changes that should be made concerning institutional responsibility for external relations.[137] The Constitutional Treaty created the post of EU Minister for Foreign Affairs, who was to 'conduct' the Union's common foreign and security policy.[138] 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',[139] which was therefore altered in the Lisbon Treaty to be High Representative of the Union for Foreign Affairs and Security Policy.[140]

The substance of the provisions in the Lisbon Treaty is, however, the same as in the Constitutional Treaty. Thus the High Representative is appointed by the European Council by qualified majority, with the agreement of the Commission President.[141] The incumbent is one of the Vice-Presidents of the Commission, and is responsible for external relations and for coordinating other aspects of the Union's external action.[142] The High Representative conducts the EU's Common Foreign and Security Policy,[143] takes part in the work of the European Council,[144] chairs the Foreign Affairs Council,[145] and is also a Vice-President of the Commission. The High Representative therefore wears 'two hats', or perhaps three if one regards the role of chairing the Foreign Affairs Council as distinct from the other functions.

(B) ROLE OF THE HIGH REPRESENTATIVE

The idea that executive power within the Union is shared between the European Council and the Commission is personified in this post. It has been argued that the triple hats worn by the High Representative could lead to institutional schizophrenia, with the incumbent being subject to

[136] Craig (n 79) ch 3.
[137] CONV 459/02, Final Report of Working Group VII on External Action, Brussels, 16 Dec 2002, 19–23.
[138] Art I-28 CT.
[139] Brussels European Council, 21–22 June 2007, Annex 1, [3].
[140] Art 18 TEU.
[141] Art 18(1) TEU.
[142] Art 18(4) TEU.
[143] Art 18(2) TEU.
[144] Art 15(2) TEU.
[145] Art 18(3) TEU.

conflicting loyalties.[146] There are also legal grounds for concluding that the institutional loyalty owed by the High Representative to the Commission is limited, and constrained by her responsibilities in the Foreign Affairs Council and the European Council.[147] We should not, however, too readily assume that the Commission will be weakened by the creation of the new post. The High Representative is Vice-President within the Commission, with responsibility for external relations. The lessons and ideas generated by this 'front-line' work will inevitably impact on the proposals contributed by the High Representative to the more strategic development of common foreign policy, as decided on by the European Council and fleshed out by the Foreign Affairs Council. This is of course a 'two-way street'. The influence will operate the other way, such that the overall strategic focus of the European Council will impact on the way the High Representative discharges her responsibilities in external relations within the Commission.

6 EUROPEAN PARLIAMENT

The story of the European Parliament is one of gradual transformation from a relatively powerless Assembly under the 1952 ECSC Treaty to the considerably strengthened institution it is today.[148] The history is considered in Chapter 1, and its role in the legislative processes is examined in Chapter 5. The Assembly was given few powers under the ECSC Treaty and under the original EEC and Euratom Treaties. It was intended to exercise consultative and supervisory powers, but not to play any substantial legislative role.

However, although the elite 'government of technocrats' established under the ECSC Treaty was not replicated in the EEC Treaty, the institutions set up by the latter were not a model of democratic organization. We saw in Chapter 1 how the influence of the Parliament grew, with the two budgetary treaties of 1970 and 1975, and after the transition to direct elections with the 'cooperation' and 'assent' procedures under the Single European Act 1986 and the 'co-decision' procedure under the Maastricht Treaty 1992,[149] which was strengthened and extended under the Amsterdam Treaty and the Nice Treaty.[150] The European Parliament now exercises substantial powers of a legislative, budgetary, and supervisory nature. While changes in the legislative process have enhanced the power of the only directly elected European institution, the problems of the EU's democratic legitimacy are not thereby resolved.[151] The 'demos' question is a complex one,[152] and the issue of democratic legitimacy will be considered below.[153]

[146] Y Devuyst, 'The European Union's Institutional Balance after the Treaty of Lisbon: "Community Method" and "Democratic Deficit" Reassessed' (2008) 39 Georgetown Jnl Int Law 247, 294–295.

[147] Art 18(4) TEU; A Dashwood and A Johnston, 'The Institutions of the Enlarged EU Under the Regime of the Constitutional Treaty' (2004) 41 CMLRev 1481, 1504.

[148] R Corbett, *The European Parliament's Role in Closer Integration* (Palgrave, 1998); B Rittberger, *Building Europe's Parliament, Democratic Representation Beyond the Nation State* (Oxford University Press, 2005); R Corbett, F Jacobs, and M Shackleton, *The European Parliament* (Harper, 7th edn, 2007); D Judge and D Earnshaw, *The European Parliament* (Palgrave, 2nd edn, 2008).

[149] P Raworth, 'A Timid Step Forwards: Maastricht and the Democratisation of the European Community' (1994) 19 ELRev 16.

[150] A Dashwood, 'The Constitution of the European Union after Nice: Law-making Procedures' (2001) 26 ELRev 215.

[151] D Beetham and C Lord, *Legitimacy and the EU* (Longman, 1998); C Lord, *Democracy in the European Union* (Sheffield University Press, 1998).

[152] JHH Weiler, *The Constitution of Europe* (Cambridge University Press, 1999); P Schmitter, *How to Democratize the European Union ... And Why Bother?* (Rowman & Littlefield, 2000); E Smith, *National Parliaments as Cornerstones of European Integration* (Kluwer, 1996).

[153] 149–155.

(A) COMPOSITION AND FUNCTIONING

The Parliament sits in Strasbourg, but there is a secretariat based in Luxembourg and certain sessions and committee meetings take place in Brussels to facilitate contact with the Commission and Council.[154] Article 14(2) TEU states that:

> The European Parliament shall be composed of representatives of the Union's citizens. They shall not exceed seven hundred and fifty in number, plus the President. Representation of citizens shall be degressively proportional, with a minimum threshold of six members per Member State. No Member State shall be allocated more than ninety-six seats.
>
> The European Council shall adopt by unanimity, on the initiative of the European Parliament and with its consent, a decision establishing the composition of the European Parliament, respecting the principles referred to in the first subparagraph.

After much wrangling,[155] a Statute regulating important aspects of the rights and duties of MEPs was enacted in 2005.[156] The Statute took effect from the parliamentary term beginning in 2009 and deals with important matters of principle: MEPs shall be free and independent and agreements concerning the resignation from office of a MEP before the end of the parliamentary term are null and void; they shall be entitled to table proposals for EU acts; and can access the EP's files. The Statute also regulates practical matters relating to pay, insurance, and the like. The issue of pay has been of particular significance, since hitherto this was determined by national rates of pay, which differed markedly as between Member States.

The number of seats per country[157] ranges from ninety-nine for Germany to five for Malta.[158] The 'representativeness' of the European Parliament has nonetheless been criticized because the number of MEPs for each state is not proportionate to population size, and the smaller countries are disproportionately over-represented. A further cause for concern was that, despite holding direct elections since 1979,[159] the uniform electoral procedure originally envisaged was not created.[160] Article 223 TFEU requires the European Parliament to draw up a proposal concerning election of MEPs by direct universal suffrage in accordance with a uniform procedure in all Member States, or in accordance with principles common to all Member States.[161] This has not yet occurred, but there is a Decision specifying that MEPs are to be elected on the basis of proportional representation; that elections shall be by direct

[154] Case C-345/95 *France v Parliament* [1997] ECR I-5215, on the holding of plenary sessions in Strasbourg.

[155] Corbett, Jacobs, and Shackleton (n 148) 59–69.

[156] Decision 2005/684/EC of the European Parliament of 28 September 2005 adopting the Statute for Members of the European Parliament [2005] OJ L262/1; Decision of the Bureau of 19 May and 9 July 2008 concerning implementing measures for the Statute for Members of the European Parliament [2008] OJ C159/1; Decision of the Bureau of the European Parliament of 11 and 23 November 2009, 14 December 2009, 19 April 2010 and 5 July 2010 amending the Implementing Measures for the Statute for Members of the European Parliament [2010] C 180/1.

[157] www.europarl.europa.eu/members/expert/groupAndCountry.do?language=EN.

[158] These figures will have to be adjusted to comply with Art 14(2) TEU, and see Protocol (No 36) On Transitional Provisions, Art 2. There is however indication that the EP may seek a minor Treaty amendment relating to its composition. For the present, the European Council has agreed transitional measures regarding the addition of extra seats until the end of the 2009–2014 term, Brussels European Council, 17 June 2010, [28].

[159] Dec 76/787 [1976] OJ L278/1.

[160] Corbett, Jacobs, and Shackleton (n 148) 14–16.

[161] Art 223 further provides that the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the EP, which acts by a majority of its component Members, lays down the necessary provisions. The provisions then enter into force after approval by the Member States in accordance with their respective constitutional requirements.

universal suffrage; and that they shall be secret and free. Member States may set a threshold for the allocation of seats, provided it does not exceed 5 per cent of votes cast at national level.[162]

The Parliament's term is five years, like that of the Commission.[163] Following the Maastricht Treaty provisions on citizenship, citizens of the EU resident in any Member State gained the right to vote and to stand as candidates in European Parliament elections.[164] The turnout at EP elections has however been low,[165] which is worrying, given that the traditional EU discourse on democracy relies on the democratic legitimacy of the European Parliament. There is moreover significant disparity in voter turnout as between different Member States.[166]

MEPs sit according to political grouping, rather than nationality. There are currently seven political groups, the largest three being, respectively, the centre-right European People's Party (Christian Democrats and European Democrats) with 265 seats after the 2009 elections, the Party of European Socialists with 183, and the Group of the Alliance of Liberals and Democrats for Europe with eighty-five. The other parties are the Greens/Free Alliance with fifty-five MEPs, the European Conservatives and Reformists with fifty-four MEPs, the Confederal Group of the European United Left-Nordic Green Left with thirty-five, and the Europe of Freedom and Democracy Group with thirty. There were twenty-eight non-attached members.

Article 224 TFEU deals with European political parties. It provides that the European Parliament and Council acting in accordance with the ordinary legislative procedure shall lay down the regulations governing political parties at European level, and in particular the rules regarding their funding.[167] While the absence of properly constituted European-wide political parties has long been regretted by advocates of a genuine European political space, even this small step towards their establishment was not uncontentious.

The Parliament elects its own President, together with fourteen Vice-Presidents, for two-and-a-half-year terms,[168] and collectively they form the Bureau of Parliament.[169] The Bureau is the regulatory body responsible for the Parliament's budget and for administrative, organizational, and staff matters.[170] There are also five 'Quaestors', responsible for administrative and financial matters directly concerning members, who assist the Bureau in an advisory capacity.[171] The 'Conference of Presidents' consists of the President together with the leaders of the various political groups.[172] It is the political governing body of the Parliament. It draws up the agenda for plenary sessions, fixes the timetable for the work of parliamentary bodies, and establishes the terms of reference and size of parliamentary committees and delegations.[173]

The Parliament has twenty standing committees[174] on matters including foreign affairs; development; international trade; budgets; economic and monetary affairs; employment and social affairs; environment, public health and food safety; industry, research and energy; internal market and

[162] Council Decision 2002/772/EC, Euratom of 25 June 2002 and 23 September 2002 amending the Act concerning the election of representatives of the European Parliament by direct universal suffrage, annexed to Decision 76/787/ ECSC, EEC, Euratom [2002] OJ L283/1.

[163] Art 14(3) TEU.

[164] Art 22(2) TFEU.

[165] M Franklin, 'European Elections and the European Voter' in Richardson (n 70) ch 11.

[166] www.europarl.europa.eu/elections2004/ep-election/sites/en/results1306/turnout_ep/index.html.

[167] Regulation 2004/2003/EC of the European Parliament and of the Council of 4 November 2003 on the regulations governing political parties at European level and the rules regarding their funding [2003] OJ L297/1; [2008] OJ C252/1.

[168] www.europarl.europa.eu/parliament/public/staticDisplay.do?id=45&pageRank=2&language=EN.

[169] Rules of Procedure of the European Parliament, 7th Parliamentary Term, 2010, rule 22, available at www.europarl.europa.eu/omk/sipade3?PROG=RULES-EP&L=EN&REF=TOC.

[170] Ibid rule 23.

[171] Ibid rules 16, 26.

[172] Ibid rule 24.

[173] Ibid rule 25.

[174] www.europarl.europa.eu/activities/committees/committeesList.do?language=EN.

consumer protection; transport and tourism; regional development; agriculture and rur development; fisheries; culture and education; legal affairs; civil liberties, justice and home affair constitutional affairs; women's rights and gender equality; petitions; human rights; and security an defence. Sub-committees and temporary committees or committees of inquiry can also be establishe The Parliament is helped by a secretariat of approximately 3,500 staff, headed by a Secretary-Genera The committees are vital to the EP, since they consider legislative proposals from the Commission.[175] They can also produce their own-initiative reports.[176]

Article 232 TFEU states that the Parliament is to adopt its own rules of procedure,[177] and Articl 223(2) TFEU requires it to lay down the regulations and general conditions governing the perfor mance of its Members' duties.

(B) POWERS

(i) *Legislative Power*

The legislative process will be considered below.[178] Suffice it to say for the present that the EP's role ha strengthened over time. Prior to the Single European Act 1986 the general rule was that the EP onl had a right to be consulted on legislation, and that was only where the particular Treaty Article sc specified. The SEA introduced the cooperation procedure, which brought the EP into the legislativ process more fully than hitherto. The co-decision procedure was introduced by the Maastricht Treaty and in effect made the EP a co-equal partner, or something close thereto,[179] with the Council in th areas where it applied.[180]

It has been renamed the ordinary legislative procedure in the Lisbon Treaty[181] and its remit ha been extended to approximately forty further areas. The co-equal status of the EP and Council is affirmed in Article 14(1) TEU, which now states that the EP shall, jointly with the Council, exercis legislative and budgetary functions. There are in addition certain areas where the assent of the EP i required for legislation. The EP now has a veto power over delegated acts,[182] but the reality of this new regime is uncertain, as will be seen below.[183]

The changes in the EP's role in the legislative process, most especially through what is now the ordi nary legislative procedure, have brought it from the fringes of the EU to become a major player in th shaping of legislation. Its role has been further enhanced through regular meetings held by Council Commission, and EP in inter-institutional conferences, and through the EP's greater contribution t the framing of the overall legislative agenda.

The EP made frequent use of litigation in order to defend its role in the legislative process,[184] and to contest the choice of legislative procedure used for a particular measure.[185] The ECJ held, afte

[175] Rules of Procedure of the European Parliament (n 169) Rules 43–48.

[176] C Neuhold, 'The "Legislative Backbone" Keeping the Institution Upright? The Role of the European Parliamen Committees in the EU Policy-Making Process', European Integration online Papers, Vol 5 (2001) No 10.

[177] Rules of Procedure (n 169).

[178] Ch 5.

[179] A Kreppel, 'What Affects the European Parliament's Legislative Influence? An Analysis of the Success of E Amendments' (1999) 37 JCMS 521.

[180] Art 251 EC.

[181] Art 289 TFEU, Art 294 TFEU.

[182] Art 290 TFEU.

[183] Ch 4.

[184] Case 138/79 *Roquette Frères v Council* [1980] ECR 3333; Case 139/79 *Maizena v Council* [1980] ECR 3393.

[185] See, eg, Case C–22/96 *European Parliament v Council (Telephonic Networks)* [1998] ECR I–3231; Case C-42/ *European Parliament v Council (Linguistic Diversity)* [1999] ECR I–869; H Cullen and A Charlesworth, 'Diplomacy Other Means: The Use of Legal Basis Litigation as a Political Strategy by the European Parliament and Member Stat (1999) 36 CMLRev 1243.

some hesitation,[186] that the EP could be a plaintiff in annulment proceedings, although only where its prerogatives had been infringed.[187] The Court also famously included the Parliament as a respondent in annulment proceedings even though only the Council and the Commission were mentioned under what was Article 173 EEC at that time.[188] The judicial developments were gradually incorporated into the relevant provisions of the Treaty following successive Treaty amendments. Thus, for example, the EP has full *locus standi* alongside the Commission, the Council, and the Member States to bring annulment proceedings.[189]

The EP's role in relation to the Common Foreign and Security Policy is smaller.[190] It is now the High Representative that is charged with consulting the European Parliament on the main aspects of the CFSP, and must take its views into account. The European Parliament can ask questions of the Council, and make recommendations to the Council and High Representative.

(ii) *Dismissal and Appointment Power*

The Commission's accountability to the Parliament has gradually been strengthened. The EP has always had the power to censure the Commission and require its resignation.[191] This power has never actually been used, though various motions of censure have been tabled, including during the period prior to the resignation of the Santer Commission in 1999.

Since the Maastricht Treaty the EP has also had the right to participate in the Commission's appointment. Article 14(1) TEU states that the EP shall elect the President of the Commission. This must, however, be read with Article 17(7) TEU, which provides for European Council influence over the candidate put before the EP. Thus the regime now is that the European Council, acting by qualified majority, taking into account the EP elections and after having held appropriate consultations, proposes to the EP a candidate for President of the Commission. The candidate is then elected by the EP by a majority of its component members. If the candidate does not obtain the required majority, the European Council, acting by a qualified majority, shall within one month propose a new candidate, who shall be elected by the European Parliament following the same procedure. The President, the nominated Commissioners, and the High Representative are subject to a vote of consent by the EP, but the formal appointment of the Commission is made by the European Council, acting by qualified majority.[192]

Thus while this regime does not give the EP the right to choose the Commission President on its own, the candidate will commonly have to be accepted by the largest group in the EP.[193] The EP committees will question nominated Commissioners about their designated area, and this has led to persons nominated as Commissioners being replaced.

In the case of members of the Court of Auditors, and the President, Vice-President, and Executive Board of the European Central Bank, the Parliament is to be consulted by the Council and the Member States, but its approval is not required.[194]

[186] Case 302/87 *Parliament v Council (Comitology)* [1988] ECR 5616.

[187] 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.

[188] Case 294/83 *Parti Ecologiste 'Les Verts' v Parliament* [1986] ECR 1339, [23].

[189] Art 263 TFEU.

[190] Art 36 TEU.

[191] Art 234 TFEU.

[192] Art 17(7) TFEU.

[193] M Shackleton, 'The European Parliament' in Peterson and Shackleton (n 70) 110; S Hix, 'Executive Selection in the European Union: Does the Commission President Investiture Procedure Reduce the Democratic Deficit?' in K Neunreither and A Wiener (eds), *European Integration After Amsterdam* (Oxford University Press, 2000) 95.

[194] Arts 283, 286 TFEU; M Westlake, 'The European Parliament's Emerging Powers of Appointment' (1998) 36 JCMS 431.

(iii) *Supervisory Power*

The EP monitors the activities of the other institutions, principally the Commission, through the asking of questions and the establishment of committees of inquiry. The longstanding practices permitting the setting-up of committees of inquiry and the right to petition the EP were given Treaty status at Maastricht, and are now provided for under Articles 226 and 227 TFEU.[195]

The Maastricht Treaty also provided for the appointment by the Parliament of an Ombudsman. The Ombudsman is to receive complaints from Union citizens or resident third-country nationals or legal persons, concerning 'instances of maladministration in the activities of Union institutions, bodies, offices or agencies'[196] as well as to 'conduct inquiries for which he finds grounds, either on his own initiative or on the basis of complaints submitted to him direct or through a member of the European Parliament'.[197] The Ombudsman is appointed for the duration of the Parliament, and in the case of serious misconduct or non-fulfillment of the conditions of the office the ECJ may, at the request of the EP, dismiss the office holder.[198]

The EU Courts acting in their judicial role are excluded from the Ombudsman's jurisdiction, and the Ombudsman cannot undertake an own-initiative inquiry in relation to facts that are subject to legal proceedings. However the major limitation on the Ombudsman's jurisdiction is that only EU and not national institutions are subject thereto.

The EU bodies which are subject to the Ombudsman's jurisdiction must supply information requested and give access to files, except where grounds of secrecy are pleaded. The Ombudsman is empowered under Article 228 TFEU to conduct own-initiative inquiries, as exemplified by the 1996 inquiry into public access to documents held by a number of Community institutions.[199] The Ombudsman sends a report to the Parliament and to the institution under investigation, and the complainant is informed of the outcome. The Ombudsman has also adopted a number of special reports following the responses of the institutions to his draft recommendation on a complaint and has advised that his recommendations be adopted by Parliament as resolutions, or on occasion, such as in relation to the need for a Code of Good Administration, that an administrative regulation should be enacted.[200]

The Ombudsman has been a success and the office is increasingly seen as a source of administrative norms rather than simply a mediation facility for individual complaints.[201] Reference is made to the Ombudsman in Article 43 of the EU Charter of Fundamental Rights. The Ombudsman has referred frequently to the fundamental right to good administration contained in Article 41 of the Charter. The annual Reports from the Ombudsman contain a wealth of valuable information about the complaints received and their resolution.[202]

[195] E Marias, 'The Right to Petition the European Parliament after Maastricht' (1994) 19 ELRev 169; Report on the deliberations of the Committee on Petitions during the parliamentary year 2004–2005, Rapporteur Michael Cashman, A6-0178/2006.

[196] Art 228(1) TFEU; K Heede, *The European Ombudsman: Redress and Control at Union Level* (Kluwer, 2000); P Bonnor, *The European Ombudsman: A Novel Rule-source in Community Law* (PhD, Florence EUI, 2001).

[197] Art 228(1) TFEU.

[198] Art 228(2) TFEU.

[199] [1998] OJ C44/1.

[200] See the website of the Ombudsman for these special reports and recommendations: http://ombudsman.europa.eu/home/en/default.htm.

[201] P Bonnor, 'The European Ombudsman: A Novel Source of Soft Law in the EU' (2000) 25 ELRev 39 and Bonnor (n 196); I Harden, 'A l'écoute des griefs des citoyens de l'Union européenne: la mission du Médiateur européen' [200[illegible]] RTDE 573.

[202] Annual Report 2009, www.ombudsman.europa.eu/activities/annualreports.faces.

(iv) *Budgetary Power*

The EP also has important powers in relation to the budget. It used its power over the budget to pressure for more general changes in the inter-institutional allocation of power, and conflicts sometimes ended up in the Court.[203] The procedure for adoption of the budget is complex and is contained in Article 314 TFEU, which is a variant of the ordinary legislative procedure.

(c) ROLE OF THE EUROPEAN PARLIAMENT

The EP has undoubtedly become of greater importance in EU decision-making since the SEA. Its legislative, supervisory, and budgetary powers have increased, as have its power over the appointment of the Commission. The EP's influence has been most notable over primary legislation, and it has had less impact on either history-making decisions, such as Treaty revision, or policy-implementation, such as the passage of secondary rules made via Comitology.[204] The change in the EP's power is nonetheless marked.

R Corbett, F Jacobs and M Shackleton, *The European Parliament*[205]

The European Parliament's role in the Community's legislative procedure has increased from having, initially, no role whatsoever, to having a consultative role, to being a co-legislator with the Council. Parliament has demonstrated its ability to initiate new legislation in areas of concern to the public, to force substantial amendments to major legislative proposals and to oblige the Council to review important elements of several of the common positions it has adopted.

The European Parliament is not a sovereign Parliament in the sense of its word being final. On the other hand, it is not a Parliament whose powers are in practice exercised to legitimize a government's legislative wishes. It is an independent institution whose members are not bound to support a particular governing majority and which does not have a permanent majority coalition ...

The European Parliament is now a clearly identifiable part of an institutional triangle. This fact in itself is remarkable in historical terms. The term 'institutional triangle' was virtually unused two decades ago when most commentators referred to a bicephalous Community made up of the Commission and the Council. Now the argument is rather one about preserving and developing the equal status that the Parliament has won with regard to the other two institutions and of making European electorates aware of the contribution that the Parliament is increasingly making to the content of European laws affecting us all.

This leaves open the reason why the EP has been able to increase its power in this manner. Auel and Rittberger have proffered one explanation.[206] They argued that the driving force was the need to alleviate the legitimacy deficit. Input legitimacy connotes the idea that political choices are legitimate because they reflect the 'will of the people', which is normally identified through the legislature. Output legitimacy captures the idea that the political choices thus made effectively promote the welfare of that community.[207] Transfers of competence from Member States to the EU thereby created an asymmetry between input and output legitimacy, and hence a legitimacy deficit,

[203] See, eg, Case 34/86 *Council v European Parliament* [1986] ECR 2155; Case 377/87 *European Parliament v Council* [1988] ECR 4017; Case C-284/90 *Council v European Parliament* [1992] ECR I-2277.
[204] Shackleton (n 193) 113–118.
[205] Corbett, Jacobs, and Shackleton (n 148) 245.
[206] K Auel and B Rittberger, '*Fluctuant nec Merguntur.* The European Parliament, National Parliaments and European Integration' in Richardson (n 70) 125–129. The argument is developed in more detail in Rittberger (n 148).
[207] F Scharpf, *Governing in Europe, Effective and Democratic?* (Oxford University Press, 1999) 6–7.

since the normal mechanism for input legitimacy, through national parliaments, was reduced as increasing areas were regulated by the EU. One response was to foster closer involvement of national parliaments in EU decision-making.[208] Another response to this legitimacy deficit was to *increase the power of the EP.*

K Auel and B Rittberger, The European Parliament, National Parliaments and European Integration[209]

[W]e argued that political elites have—since the SEA—gradually empowered the European Parliament's legislative powers and thus its capacity to influence European policy-making. Even though the decisions by member states to increase the legislative powers of the European Parliament were all but uncontroversial, the introduction and transfer of sectoral policy decisions to the European level triggered what we coined a democratic 'legitimacy deficit': European political elites came to perceive that the centralisation of policy-making tasks at the European level undermined the power of domestic parliaments to control and influence their respective governments in European policy-making. The legislative empowerment of the European Parliament was thus considered to serve as a mechanism to 'compensate' for domestic 'de-parliamentarisation'.

4 EU LEGISLATIVE PROCEDURES

(i) Ordinary legislative procedure

(a) Central features of the ordinary legislative procedure

The ordinary legislative procedure (previously known as the co-decision procedure) is set o
in Article 294 TFEU. Its central elements are set out below.

Article 294 TFEU

1. Where reference is made in the Treaties to the ordinary legislative procedure for the adoption of an act, the following procedure shall apply.
2. The Commission shall submit a proposal to the European Parliament and the Council.

First reading

3. The European Parliament shall adopt its position at first reading and communicate it to the Council.
4. If the Council approves the European Parliament's position, the act concerned shall be adopted in the wording which corresponds to the position of the European Parliament.
5. If the Council does not approve the European Parliament's position, it shall adopt its position at first reading and communicate it to the European Parliament.
6. The Council shall inform the European Parliament fully of the reasons which led it to adopt its position at first reading. The Commission shall inform the European Parliament fully of its position.

[45] Commission Communications have been criticised for enabling the Commission to enshrine a particular interpretation of EU law without proper judicial control. S. Lefevre, 'Interpretative Communications and the

Second reading

7. If, within three months of such communication, the European Parliament:
   (a) approves the Council's position at first reading or has not taken a decision, the act concerned shall be deemed to have been adopted in the wording which corresponds to the position of the Council;
   (b) rejects, by a majority of its component members, the Council's position at first reading, the proposed act shall be deemed not to have been adopted;
   (c) proposes, by a majority of its component members, amendments to the Council's position at first reading, the text thus amended shall be forwarded to the Council and to the Commission, which shall deliver an opinion on those amendments.
8. If, within three months of receiving the European Parliament's amendments, the Council, acting by a qualified majority:
   (a) approves all those amendments, the act in question shall be deemed to have been adopted;
   (b) does not approve all the amendments, the President of the Council, in agreement with the President of the European Parliament, shall within six weeks convene a meeting of the Conciliation Committee.
9. The Council shall act unanimously on the amendments on which the Commission has delivered a negative opinion.

Conciliation

10. The Conciliation Committee, which shall be composed of the members of the Council or their representatives and an equal number of members representing the European Parliament, shall have the task of reaching agreement on a joint text, by a qualified majority of the members of the Council or their representatives and by a majority of the members representing the European Parliament within six weeks of its being convened, on the basis of the positions of the European Parliament and the Council at second reading.
11. The Commission shall take part in the Conciliation Committee's proceedings and shall take all necessary initiatives with a view to reconciling the positions of the European Parliament and the Council.
12. If, within six weeks of its being convened, the Conciliation Committee does not approve the joint text, the proposed act shall be deemed not to have been adopted.

Third reading

13. If, within that period, the Conciliation Committee approves a joint text, the European Parliament, acting by a majority of the votes cast, and the Council, acting by a qualified majority, shall each have a period of six weeks from that approval in which to adopt the act in question in accordance with the joint text. If they fail to do so, the proposed act shall be deemed not to have been adopted.
14. The periods of three months and six weeks referred to in this Article shall be extended by a maximum of one month and two weeks respectively at the initiative of the European Parliament or the Council.

The length of this provision makes the procedure look intimidating. It is best to think of the procedure as a series of four key features.

Joint agreement Joint adoption of legislation by the Council and Parliament can happen at three junctures during the procedure:

- First reading by the Parliament: the Commission makes a proposal. The Parliament issues an Opinion on it (the first reading). The Council can adopt the act by QMV if either the Parliament has made no amendments or it agrees with its amendments.
- Second reading by the Parliament: if there is no agreement after the first reading the Council can adopt a 'common position'. If it is adopting the Commission proposal, it does this by QMV. If it makes amendments of its own, it does this by unanimity. This common position is referred back to the Parliament for a second reading. If the Parliament does nothing for three months or agrees with the common position, the measure is adopted. Alternately, it may propose amendments. If the amendments have been approved by the Commission, they may be adopted by the Council by QMV. If, however, the Commission expresses a negative view of the Parliament's amendments, these have to be adopted by unanimity in the Council.
- Third reading: if there is no agreement following the second reading, a Conciliation Committee is established. It has six weeks to approve a joint text. This text must be adopted within six weeks, by both the Council by QMV and the Parliament, to become law.

Double veto of the Parliament The ordinary legislative procedure grants the Parliament a veto over legislation. The veto can be exercised at the second reading if the Parliament decides to reject the common position of the Council. The other possibility is at the third reading after the Conciliation Committee has provided a joint text on which it must vote. Technically speaking, it is not a veto that is being exercised here, but Parliamentary assent. It must positively agree to it at this point for it to become law.

Assent of the Council A measure will only become law if the Council agrees to it. The number of votes required will either be QMV or unanimity. If the measure has been approved by the Commission or by the Conciliation Committee, it will be QMV.[47] If the Council is proposing its own amendments, it must act by unanimity to adopt these amendments.

The Conciliation Committee As mentioned under 'Joint agreement' above, this is convened following the Parliament's second reading, where the Council is unable to accept the amendments proposed by the Parliament. Modelled on the German Mediations Committee,[48] it comprises twenty-seven members from the Council and twenty-seven MEPs. The Council members vote by QMV and the MEPs by simple majority.

(b) Legislative practice and the ordinary legislative procedure

Looking at the European Parliament, the most dramatic power it enjoys appears to be the veto. However, it has made only limited use of this. Between 1 May 1999 and 1 July 2009, Parliament only used the veto three times in 916 procedures, less than 0.33 per cent of the time.[49] There are a number of reasons for this. The veto can bring the worst outcome because, often, from the Parliament's perspective, imperfect EU legislation is better than no legislation.

47 Prior to Lisbon, there were a limited number of fields where unanimity was required in the Council, most notably culture.
48 N. Foster, 'The New Conciliation Committee under Article 189b' (1994) 19 *ELRev.* 185.
49 These statistics are from the EU Council's Consilium website, www.consilium.europa.eu/uedocs/cmsUpload/090622-bilan_general.pdf (accessed 4 September 2009).

Regular exercise of the veto would also be bad politics. Other parties also will not communicate with the Parliament if, in the end, its position is inflexible as there is nothing to talk about. This will be true not just of the Commission and the Council, but also of lobbyists, such as those in industry and NGOs, who will no longer see it as an effective opportunity structure. For the Parliament, it is not the veto which is important, but the shadow of the veto. By threatening to thwart other parties' objectives, it can secure input for itself. They have to listen to its policy preferences and it can secure influence for itself to realise outcomes it desires. This role is reinforced by a quirk in the legislative procedure. If the Commission agrees with the Parliament, it is easier for the Council to accept parliamentary amendments than to produce its own.

Article 293(1) TFEU

Where, pursuant to the Treaties, the Council acts on a proposal from the Commission, it may amend that proposal only by acting unanimously, except in the cases referred to in paragraphs 10 and 13 of Articles 294, in Articles 310, 312 and 314 and in the second paragraph of Article 315.[50]

Acceptance of amendments proposed by the Parliament only requires a QMV in the Council, whilst it requires unanimity to produce its own. To be sure, the Commission must agree with the Parliament's suggestions but, importantly, it cannot propose amendments of its own without withdrawing the proposal and starting again. Parliament is the only institution that has the opportunity to 'improve' the text. This has led to a number of authors talking of its being a 'conditional agenda-setter'; provided it sticks within the limit of what is acceptable to the other two institutions, it can seize the agenda.[51] Statistics seem to bear this out. The last statistics prepared by any of the institutions were in 1 May 2004 by the European Parliament. It found 23 per cent of parliamentary amendments were accepted by both of the other institutions in an unqualified form. A further 60 per cent were accepted in some compromise form. In other words, 83 per cent of parliamentary suggestions are taken on in some form in the legislation.[52]

There are, however, different forms of amendment. Some just dot 'i's; others radically change policy; some clump amendments together, whilst others are put through at the behest of the Council or the Member States. Careful research by Kardasheva, which looked at 470 proposals between 1999 and 2007, found that parliamentary input was high. It amended 87 per cent of the proposals, with amendments per proposal varying from 1 to 322. Instead of looking at formal amendments, Kardasheva identified 1,567 issues raised by the Parliament (discrete matters that were not tidying up exercises) and found parliamentary success in 65.2 per cent of the cases – a high rate.[53]

[50] These last four provisions are budgetary provisions.

[51] G. Tsebelis, 'The Power of the European Parliament as a Conditional Agenda Setter' (1994) 88 *American Political Science Review* 128; G. Tsebelis and G. Garrett, 'Legislative Politics in the European Union' (2000) 1 *EUP* 9; G. Tsebelis, C. Jensen, A. Kalandrakis and A. Kreppel, 'Legislative Procedures in the European Union: An Empirical Analysis' (2001) 31 *BJPS* 573.

[52] European Parliament, *Activity Report for 5th Parliamentary Term*, PE287.644, 14.

[53] Kardasheva, above n. 2, 242–4.

The position of the Commission under the ordinary legislative procedure is curious. On ie face of it, its influence diminishes as the procedure continues. As it plays no active ole in the Conciliation Committee, it would be possible for the Council and Parliament to earrange its proposals at that point.[54] In practice, its influence remains significant. This is ecause very few proposals require conciliation.[55] In the majority of instances, agreement is eached at first or second reading. At this point in the procedure, the Commission influence s considerable. Both the Council and the Parliament are working from its proposal and, in ractice, it is very difficult for them to deviate from the proposal without the Commission's icquiescence. Almost all successful parliamentary amendments require the Commission's igreement. Very few are adopted by the Council where there has not been prior approval y the Commission. Earlier studies found that there was an 88 per cent probability that a oarliamentary amendment would be rejected by the Council if the Commission rejected it, vhilst there was an 83 per cent probability that it would be accepted if the Commission approved it.[56]

A further counter-intuitive feature of the procedure is the effectiveness of the Conciliation Committee. The Committee would appear to have little mandate, as any Decision requires the subsequent approval of both Parliament and Council and it might be thought that, by the time it meets, institutional positions would be so entrenched there would be little possibility of movement and agreement. Yet, in almost all procedures,[57] the Committee had been able to propose a joint text accepted by both the Parliament and the Council. This might be because the Council is able to behave more proactively and recapture the agenda within the Committee, as it is able to make its own amendments and accept amendments by QMV.[58] An alternative might be that, as parties are aware of each other's positions, negotiation is easier. New amendments are not continually being thrown in, but there is a stable set of issues on which discussion can proceed.[59] Whatever the reason, the effect is an increase in the influence of COREPER, as it is members of COREPER, not Council ministers, who sit in the Conciliation Committee. COREPER is not just preparing the meeting here, but also adopting the joint text.

First reading and the trilogue

All the evidence discussed in the previous section suggests a picture significantly different from that provided by a simple reading of Article 294 TFEU, which would emphasise the role

[54] C. Crombez, 'The Codecision Procedure in the European Union' (1997) 22 *Legislative Studies Quarterly* 97.

[55] In the eighteen months to 30 June 2009 only 6 out of 203 proposals went to conciliation. EU Council, Consilium, above n. 49.

[56] G. Tsebelis *et al.*, 'Legislative Procedures in the European Union: An Empirical Analysis' (2001) 31 *BJPS* 573. For a case study see C. Burns, 'Codecision and the European Commission: A Study of Declining Influence?' (2004) 11 *JEPP* 1.

[57] Between 1 July 1999 and 30 June 2009, 112 proposals went successfully through conciliation. Only three failed. Above, n. 49.

[58] G. Tsebelis, 'Maastricht and the Democratic Deficit' (1997) 52 *Aussenwirtschaft* 26, 43–5.

[59] A. Rasmussen and M. Shackleton, 'The Scope for Action of European Parliament Negotiators in the Legislative Process: Lessons of the Past and for the Future', paper presented at 9th Biennial EUSA Conference, 31 March 2005. Rasmussen also has found that the Committee has tried to adopt positions that it knows are acceptable to both sides rather than asserting its own position. A. Rasmussen, 'The EU Conciliation Committee: One or Several Principals' (2008) 9 *EUP* 7.

of the parliamentary veto and the assent of the Council. Yet, even this understates the extent to which the balance of power is determined by a shared legislative culture, which has emerged with the evolution of the ordinary legislative procedure.

In 1999, the institutions adopted a Joint Declaration on practical arrangements for the procedure. This was updated by a 2007 Joint Declaration.[60] This Joint Declaration formalises two developments that have become a central part of institutional practice and have reshaped understandings in this area: the commitment to reach agreement at first reading and the trilogue.

The Joint Declaration commits the institutions to clear the way, where appropriate, for the adoption of the act concerned at an early stage of the procedure.[61] This is understood to mean that, wherever possible, they should try to secure agreement at first reading.[62] In the early days of this arrangement, they were only partially successful, with only about 28 per cent of the total agreed at first reading between 1 May 1999 and 30 June 2004.[63] Enlargement has had a significant effect on these figures, however. Concerns about the difficulties of getting twenty-seven states rather than fifteen to agree have led to an impetus to get agreement by first reading, so that between 1 July 2004 and 30 June 2009, 379 out of 484 dossiers, or 78.3 per cent, were agreed at first reading.[64]

This telescopes the procedure. It forecloses spaces for public debate, notably the second and third reading. It also changes the opportunity structures available as it means parties that wish to seek influence have to do so as early as possible. For first reading is no longer what it says: an opportunity for initial consideration. It is rather usually nearer to the moment of final decision. This clearly benefits parties that are well-organised, in the know and above all, have connections with the Commission, as in the period prior to first reading, the Commission's presence is particularly powerful.

This position is exacerbated by the dominance of the trilogue. Trilogues first emerged in 1995 to prepare the work of the Conciliation Committee.[65] A trilogue is composed of three parties: two or three MEPs, normally from the respective committee, a Deputy Permanent Representative, normally from the state holding the Presidency, and a senior Commission official. The job of the trilogue is to act as a forum where each side can explain its position to the other and, if possible, where agreement can be reached. They now operate at all stages of the procedure: before all the readings, after the Council common position and before the Conciliation Committee. Kardasheva has estimated that trilogues take place, in some form, on 76 per cent of Commission proposals under the ordinary legislative procedure.[66] Their value to the EU institutions is set out in the Joint Declaration.

[60] [1999] OJ C148/1 and [2007] OJ C145/2.

[61] *Ibid.* para. 4.

[62] *Ibid.* para. 11.

[63] European Parliament, *Activity Report for 5th Parliamentary Term*, PE287.644, 12–13.

[64] EU Council, Consilium, above n. 49.

[65] On the trilogue see M. Shackleton, 'The Politics of Codecision' (2000) 38 *JCMS* 325, 334–6; M. Shackleton and T. Raunio, 'Codecision since Amsterdam: A Laboratory for Institutional Innovation and Change' (2003) 10 *JEPP* 171, 177–9.

[66] Kardasheva above n. 2, 25.

: Declaration on Practical Arrangements for the [Ordinary Legislative] Procedure ı7] OJ C145/2

eration between the institutions in the context of codecision often takes the form of tripartite ings ('trilogues'). This trilogue system has demonstrated its vitality and flexibility in increasing icantly the possibilities for agreement at first and second reading stages, as well as contributing e preparation of the work of the Conciliation Committee.

trilogues are usually conducted in an informal framework. They may be held at all stages of rocedure and at different levels of representation, depending on the nature of the expected ssion. Each institution, in accordance with its own rules of procedure, will designate its ipants for each meeting, define its mandate for the negotiations and inform the other institutions angements for the meetings in good time.

r as possible, any draft compromise texts submitted for discussion at a forthcoming meeting shall culated in advance to all participants. In order to enhance transparency, trilogues taking place n the European Parliament and Council shall be announced, where practicable.

ıe growth of the trilogue has implications for the balance of power between institutions.[67] stances, where the trilogue is successful, Parliament and COREPER are acting as genuine gislators. It also has implications for the democratic quality of law-making within co- ıion. The trilogue is the biggest challenge to democratic legitimacy, for it centralises power .ose actors who represent the Council and Parliament at the trilogue. Farrell and Héritier , therefore, that small parties within the European Parliament are excluded by the trilogue, ıey are never represented at it and the committee structure and its attendant public de- s within the European Parliament are bypassed. They also noted that trilogues reinforce ɔower of COREPER, as they result in even less being decided by the Council of Ministers.[68] e is, in all this, a sidelining of checks and balances and a lack of formality and transpar- . A division is made between formal and substantive decision-making, with the locus of tantive decision-making being hidden away. Whilst formal decision-making takes place ıe Council or in parliamentary committees, in many instances substantive decisions are ed in these informal arrangements. The formal procedures do no more than rubber stamp ıgreements. Only very well-connected actors have the opportunity to lobby these informal esses because only they can know where they are taking place or who is important within ı. Furthermore, only they will have the resources to arbitrage between these centres of er, lobbying both central protagonists in the trilogue and other important actors in the ıcil, the Parliament and the Commission.

ı the trilogue see H. Farrell and A. Héritier, 'Interorganizational Negotiation and Intraorganizational Power in ared Decision Making: Early Agreements under Codecision and their Impact on the European Parliament and e Council' (2004) 37 *Comparative Political Studies* 1184; F. Häge and M. Kaeding, 'Reconsidering the European rliament's Legislative Influence: Formal vs. Informal Procedures' (2007) 29 *Journal of European Integration* 1.

rrell and Héritier, above n. 67, 1200–4.

(ii) Special legislative procedures

(a) Consultation procedure

The consultation procedure follows three stages:

(a) the Commission submits a proposal to the Council;
(b) the Council consults the Parliament;
(c) the Council adopts the measure, either by qualified majority or by unanimity, depending upon the field in question.

The most salient feature of the consultation procedure is the duty to consult the Parliament. In *Roquette Frères*, the Court of Justice stated that consultation was an expression of the cardinal principle of institutional balance:

> [Consultation] ... allows the Parliament to play an actual part in the legislative process of the Community, such power represents an essential factor in the institutional balance intended by the Treaty. Although limited, it reflects at Community level the fundamental democratic principle that the peoples should take part in the exercise of power through the intermediary of a representative assembly. Due consultation of the Parliament in the cases provided for by the Treaty therefore constitutes an essential formality disregard of which means that the measure concerned is void.[69]

From this principle of institutional balance, the Court has crafted a number of mutual obligations between Parliament and the Council. On the one hand, the Council is obliged to reconsult Parliament if the text is amended. This ensures that the text adopted by the Council does not differ substantially from the one on which the Parliament has been consulted, unless these amendments correspond essentially to the wishes of the Parliament.[70] By contrast, Parliament must not abuse its right of consultation. In *General Tariff Preferences*,[71] the Council sought to consult Parliament on a proposal to extend the Regulation on General Tariff Preferences, which gave preferential tax treatment to imports from less developed countries, to the states which had emerged from the collapse of the Soviet Union. The request was made in October 1992 and the dossier was marked 'urgent' by the Council, but the full decision was postponed until a further debate in January 1993, on the grounds that the Parliament's Committee on Development was not happy about including these states. The Council adopted the Regulation in December 1992, without further consultation, on the grounds that the matter was urgent. The Court noted that there was a duty on the Council to consult the Parliament but, correspondingly, duties of mutual cooperation also governed relations between the EU institutions. It noted that Parliament had failed to discharge these duties by refusing to take heed of the urgency of the file and by having regard to what the Court considered to be extraneous factors.

Parliament's powers under the consultation procedure are clearly more limited than under the ordinary legislative procedure. The Council is not required to take account of the Parliament's views and the lack of leverage over the Council also harms Parliament's relations with the Commission. As Parliament's views count for so little, there are no incentives for the Commission to coordinate or even consult with it. This marginalisation is further increased by

[69] Case 138/79 *Roquette Frères* v *Council* [1980] ECR 3333.
[70] Case C-65/90 *Parliament* v *Council* (*Cabotage II*) [1992] ECR I-4593.
[71] Case C-65/93 *Parliament* v *Council (General Tariff Preferences)* [1995] ECR I-643.

the fact that the Council is not required to wait until Parliament has been consulted, before it considers a proposal. The Court has even stated that the Council is making good use of time if it considers the matter pending consultation of the Parliament.[72]

Yet, it is wrong to argue that the Parliament's presence does not matter. At the very least, parliamentary hearings bring greater transparency to the process and provide an arena for actors whose voice might otherwise have been excluded to express their views. In addition, Parliament does make significant inputs of its own. It submits amendments to about 54 per cent of proposals and about 19 per cent of its amendments are accepted – not an insignificant proportion.[73] Notwithstanding the *General Tariff Preferences* judgment, it has acquired this influence by exercising a power to delay. It does this by inviting the Commission to withdraw a proposal or to accept amendment, and when the latter refuses, referring it back to a parliamentary committee to consider its response to this.

R. Kardasheva, 'The Power to Delay: The European Parliament's Influence in the Consultation Procedure' (2009) 47 *Journal of Common Market Studies* 385, 404–5

The power to delay allows the EP [European Parliament] to enjoy important benefits in the legislative system. First, through delay the Parliament manages to force concessions from the Council and the Commission. Delay allows the Parliament to see many of its preferences incorporated in the final legislative texts. Second, delay opens the door for informal negotiations between the Council and Parliament. While informal negotiations have become a typical element of Council–Parliament legislative work under co-decision, there are few incentives for Member States to seek informal contacts in consultation. However, when the EP delays its opinion and Member States need an urgent decision, the Council has an incentive to speed up the procedure through informal contacts. Third, delay gives the consultation procedure two readings. Formally, the consultation procedure consists of only one reading. However, by delaying its final vote, the EP gains an additional reading. The EP makes its position on the Commission proposal known, but the plenary refrains from issuing an opinion. Once aware of the EP's preferences, the Council and Commission negotiate with MEPs and adjust their positions in order to speed up the decision-making process. Thus, through delay, the EP transforms the simple consultation procedure into a decision-making procedure with two readings.

However, these features exert only a limited effect upon the broader institutional settlement, which revolves around the Commission-Council axis. Both the Commission and the Council are executive-dominated and the current safeguards for national parliamentary input are weak.[74] There is still the question of which 'executive' holds the balance of power in these procedures. Everything hinges on the vote required in the Council. If a unanimity vote is required, power would seem to remain in the hands of individual national governments, as any government can veto the measure. However, the position is more complicated. Twenty-six national governments do not have the power to push through a measure if

[72] Case C-417/93 *Parliament* v *Council (consultation with Parliament)* [1995] ECR I-1185.

[73] R. Kardasheva, 'The Power to Delay: The European Parliament's Influence in the Consultation Procedure' (2009) 47 *JCMS* 385, 392–4.

[74] See pp. 126–32.

one national government resists it. Power is, therefore, concentrated in the government that is most resistant to the measure, as it holds the decision on whether or not to go forward.[75] Yet power is also strongly vested in the Commission here. As the Council can only amend its proposals by unanimity,[76] its proposals have a 'take it or leave it quality' given that it will be rare that there will be consensus on the part of, or the resources available for, the Member States to put forward an alternative proposal that secures the agreement of all of them.

(b) Assent procedure

The assent procedure is the procedure in which Parliament enjoys greatest formal powers and brings together a number of heterogeneous procedures:

- The Commission does not enjoy a monopoly of initiative. Depending on the field, a proposal can also be made by the Parliament, Member States or the European Council.
- The proposal may come direct to the Parliament. Alternatively, there may be other institutions that have either to be consulted or to give their consent to the proposal first. The procedures depend on the legal base in question.
- The Parliament will then have to consent to the measure. There are no time limits on it to do so.
- In some instances, the Council or the European Council then has to consent to the measure before it can become law.

The uniting features of all these procedures, which allow them to be classified under the assent procedure umbrella, are first that in all cases Parliament has to affirm a legislative proposal before it can be adopted. This is different from the ordinary legislative procedure in that Parliament must actively say 'yes' to a proposal whereas the latter merely gives it a veto. Secondly, it has an indefinite time in which to do this. There must be a strong majority in Parliament in favour of immediate action, therefore, if a measure is to be agreed.

The assent procedure was downplayed before the Treaty of Lisbon as it was largely used for a limited number of institutional matters related to the European Central Bank and the Parliament itself. This is no longer the case. It now governs significant fields, which include EU anti-discrimination policy,[77] significant parts of EU criminal justice policy,[78] the budget,[79] many international agreements[80] and, perhaps most prominently, the flexibility principle, which allows measures to be taken to realise Union objectives where there is no other legal base and which, historically, has been deployed about thirty times per annum.[81]

The procedure is likely to be a prominent procedure. However, it is to be wondered if, in practice, it will differ that much from the ordinary legislative procedure. Agreement will be sought to be reached after the initial proposal through a trilogue with all parties aware that the proposal requires the cooperation of each to make it law.

[75] On this see *Report by the Ad Hoc Group Examining the Question of Increasing the Parliament's Powers* (Vedel Report), *EC Bulletin* Supplt. 4/72; Committee of Three, *Report on the European Institutions* (Luxembourg, Office for Official Publications of the European Communities, 1980) 74–5.

[76] Article 293(1) TFEU.

[77] Article 19(1) TFEU.

[78] Articles 82, 83(1), (6), 86(1), (4) TFEU.

[79] Articles 311 and 312 TFEU.

[80] Article 218(6) TFEU.

[81] Article 352 TFEU. For a fuller list see the Annex at the end of this chapter.

5 ENHANCED COOPERATION

Enhanced cooperation grew out of a debate that emerged prior to the Treaty of Amsterdam in which deep-seated differences between Member States about both the pace and ideological direction of integration emerged. It was agreed that some Member States should not be held back from developing common laws between themselves, should they so wish, and enhanced cooperation was established to enable this. It allows EU laws to be developed by as few as nine Member States where there is not a sufficient voting threshold for general legislation. Lowering the threshold in this way intrudes on general EU law-making as it raises the possibility of a 'hard core Europe', which develops laws for itself, excluding other Member States and creating a two-tier Union.[82] To prevent this, the provisions on enhanced cooperation put in place a number of safeguards.

Article 20 TEU

1. Member States which wish to establish enhanced cooperation between themselves within the framework of the Union's non-exclusive competences may make use of its institutions and exercise those competences by applying the relevant provisions of the Treaties, subject to the limits and in accordance with the detailed arrangements laid down in this Article and in Articles 326 to 334 TFEU.

   Enhanced cooperation shall aim to further the objectives of the Union, protect its interests and reinforce its integration process. Such cooperation shall be open at any time to all Member States, in accordance with Article 328 TFEU.
2. The decision authorising enhanced cooperation shall be adopted by the Council as a last resort, when it has established that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole, and provided that at least nine Member States participate in it. The Council shall act in accordance with the procedure laid down in Article 329 TFEU.

Article 326 TFEU

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

[82] On the debate see A. Stubb, 'The 1996 Intergovernmental Conference and the Management of Flexible Integration' (1997) 4 *JEPP* 37; F. Tuytschaever, *Differentiation in European Union Law* (Oxford and Portland, Hart, 1999) 1–48; E. Phillipart, 'From Uniformity to Flexibility: The Management of Diversity and its Impact on the EU System of Governance' in G. de Búrca and J. Scott (eds.), *Constitutional Change in the EU: From Uniformity to Flexibility?* (Oxford and Portland, Hart, 2000).

Article 327 TFEU

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

The provisions suggest a total of six substantive constraints:

- there must be nine Member States;
- it must not be in a field where the Union has exclusive competence;
- the measure must only be adopted as a matter of last resort;
- enhanced cooperation must comply with other EU law;
- it must not undermine the internal market or economic or social cohesion; in particular, it must not constitute a barrier to or discrimination in trade between Member States or distort competition between them;
- it must respect the rights, competences and obligations of other Member States.

These alone would suggest enhanced cooperation could only occur in very restricted circumstances. However, additional procedural constraints have been put in place, which grant vetoes to a number of actors. Any enhanced cooperation must be notified to the Commission, which must decide whether to put forward a proposal on it, giving its reasons if it does not.[83] The Parliament and Council must then assent to it, with the Council making the Decision by unanimity.[84]

The value of the measure is further eroded to the participating states by its being deemed not to be part of the EU legislative acquis.[85] Furthermore, they do not have freedom to negotiate between themselves as they must allow non-participating states to participate in the deliberations leading up to the adoption of legislation even if they cannot vote on it.[86] Finally, non-participating states can free-ride by waiting to see the effects of the measure and then joining later. Any state that did not take part initially can apply subsequently and is free to participate subject to verification that it meets the conditions for participation.[87]

In the light of this, it is unsurprising that for all the institutional and academic energy devoted to these procedures, there has yet to be a measure adopted under them.[88] Instead, resort had been made to arrangements outside this framework, some within the EU legal framework, and in some cases outside. These arrangements have thrown up real concerns both about fragmentation of the Union and about protecting the integrity of the Union's decision-making processes.

[83] Slightly different procedures apply in CFSP. The proposal is notified to the Council. It obtains an Opinion from the Commission and the High Representative. Parliament is also notified. The Council then makes a Decision by unanimity with only it and not the Parliament having a veto in this field: Article 329(2) TFEU.

[84] Article 329(1), (2) TFEU.

[85] Article 20(4) TEU.

[86] Articles 20(3) TEU and Article 330 TFEU.

[87] This is to be done by Commission authorisation in all fields other than CFSP. In CFSP it is done by the Council in consultation with the High Representative: Article 331 TFEU.

[88] On the one attempt to do so, see M. O'Brien, 'Company Taxation, State Aid and Fundamental Freedoms: Is the Next Step Enhanced Co-operation?' (2005) 30 *ELRev*. 209.

The central example of 'variable geometry' within the EU legal framework, in which only some Member States participate, is the Protocol on the Schengen Acquis integrated into the framework of the European Union. The Schengen Conventions of 1985 and 1990 were international agreements concluded between thirteen of the EU-15 Member States, Norway and Iceland. They provide for the abolition of frontier checks, a common external frontier and cooperation in the fields of migration of non-EU nationals, crime and policing.[89] All Member States are currently signatory to them except Ireland, United Kingdom, Cyprus, Bulgaria and Romania.[90] The Protocol integrates the measures agreed under the Schengen Acquis into EU law. It also defines the relationship between participating and non-participating states. Article 4 of the Protocol provides that non-participants may request to take part in any part or all of the acquis, so long as all other Member States consent. This is, of course, in contrast, to the procedures on enhanced cooperation, which require simple satisfaction of the conditions of participation.[91]

In the fields covered by the Schengen Protocol, certain Member States can therefore be excluded from subsequent involvement. Yet, this begs the question of the relation between this Protocol and the general provisions on immigration, asylum, policing and frontier controls, which form part of the Treaties and to which all Member States are party. How could it be that a Member State can be excluded from a field of policy that also forms part of EU law to which it is party? The relationship between the Protocol and the rest of the Treaties was considered in two cases brought by the United Kingdom against two measures: one establishing the European Agency for the Management of Operational Cooperation at the External Borders of the Member States (Regulation 2007/2004/EC), and the other introducing common security features and biometric identifiers into passports.[92] These had been adopted under the Schengen Protocol, thereby excluding the United Kingdom, even though Article 77(2) TFEU provides for the Union to develop legislation on external borders and the United Kingdom is party to that.

Case C-77/05 *United Kingdom* v *Council* [2007] ECR I-11459

77. ...by analogy with what applies in relation to the choice of the legal basis of a [Union] act, it must be concluded that in a situation such as that at issue in the present case the classification of a [Union] act as a proposal or initiative to build upon the Schengen acquis...must rest on objective factors which are amenable to judicial review, including in particular the aim and the content of the act...

83. It should be recalled...that both the title of the Schengen Agreement and the fourth recital in its preamble and Article 17 of the agreement show that its principal objective was the abolition of checks on persons at the common borders of the Member States and the transfer of those checks to their external borders. The importance of that objective in the context of the Schengen Agreements is underlined by the place occupied in the Implementing Convention by the provisions on the crossing of external borders, and by the fact that, under Articles 6 and 7 of that convention, checks at external borders are to be carried out in accordance with uniform principles, with the Member States having to implement constant and close cooperation in order to ensure that those checks are carried out effectively.

[89] For more on this see pp. 488–91 in particular.
[90] Cyprus is acceding in 2010. Romania and Bulgaria are to join when 'ready'. No date has been set.
[91] Article 331 TFEU.
[92] See also Case C-137/05 *United Kingdom* v *Council* [2007] ECR I-11593.

> **84.** It follows that checks on persons at the external borders of the Member States and consequently the effective implementation of the common rules on standards and procedures for those checks must be regarded as constituting elements of the Schengen acquis.
>
> **85.** Since…Regulation No 2007/2004 is intended, as regards both its purpose and its content, to improve those checks, that regulation must be regarded as constituting a measure to build upon the Schengen acquis…

This reasoning is open to criticism. It would seem that there are two possible legal bases: the Protocol and Article 77(2) TFEU. The responsibility of the Court was to mediate a conflict between these bases, which, as we have seen above, it does elsewhere. In this case it did not do this but deemed it sufficient for the matter to fall within the aegis of the Protocol for it to declare that the Protocol should prevail over other parts of the Treaty. No reasons were given for this, and it is a peculiar view of European integration, in which fragmentation and exclusion are chosen over commonality and inclusion.

The other feature to emerge is the conclusion of international agreements between limited numbers of states, who know others will subsequently join them as there will be significant exclusionary costs if they do not. Once this occurs, the international agreement is then subsequently transformed into an EU law, be it as a Regulation, Directive or Decision. This was indeed the template set out by the Schengen Protocol[93] and it was followed in 2005 by the Prüm Convention.[94] Signed between Austria, Belgium, France, Germany, Luxembourg, the Netherlands and Spain, this provides for greater exchange of DNA, fingerprint and vehicle data between security agencies than was previously possible. It is controversial at a number of levels: notably there are no common rules on collection of the data or (arguably) sufficient common rules on its protection.[95] Other security agencies were, of course, eager to have access to this pool of data as they saw it as a huge resource.

In 2008, the Prüm Convention was made part of EU law binding all Member States.[96] The difficulty with this is not simply the feeling that other states were bounced into something that, all things being equal, they might not have chosen, but also the short-circuiting of public debate. A document was agreed between seven interior ministries with little public debate in their own countries. It was then presented as a *fait accompli* to the EU legislative process in such a way that few amendments could be made, given the momentum behind the process.

[93] See pp. 488–91.

[94] Prüm Convention, EU Council Doc. 10900/05. For an interesting analysis, see R. Bossong, 'The European Security Vanguard? Prüm, Heiligendamm and Flexible Integration Theory', LSE/Challenge Working Paper, January 2007, available at www.2.lse.ac.uk/internationalRelations/centresandunits/EFPU/EFPUhome.aspx (accessed 5 November 2009).

[95] House of Lords European Union Committee, *Prüm: An Effective Weapon Against Terrorism and Crime?* (Session 2006–07, 18th Report, London, SO).

[96] Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime [2008] OJ L209/1; Decision 2008/616/JHA on the implementation of Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime [2008] OJ L210/12.

6 COMITOLOGY

(i) Comitology procedures

We saw in Chapter 2 that not merely 'technical', but highly significant questions are delegated to the Commission and that this delegation is also widespread.[97] In 2008 alone, the Commission undertook 2,022 measures.[98] Although this is not considered to be law-making under the Treaty, the measures are regulatory acts which still have legally binding effects and would be called delegated legislation in any other jurisdiction. The Commission adopts measures here under a set of procedures, known as comitology, in which it works in tandem with a committee of representatives of national governments whose role is to oversee it.[99] At the end of 2008, there were 270 committees in operation.[100] The role of the committee varies according to the procedure used and is set out in Decision 1999/468/EC.[101] Comitology establishes four central procedures: the advisory procedure, the management procedure, the regulatory procedure and the regulatory procedure with scrutiny. Each procedure gives the committee different powers. At the end of 2008, twenty-three advisory procedures, fifty-nine management procedures, eighty-three regulatory procedures and four regulatory procedures with scrutiny were in operation.[102] The criteria for determining which procedure is to be used is set out in article 2 of Decision 1999/468/EC.

Decision 1999/468/EC, article 2

1. Without prejudice to paragraph (2), the choice of procedural methods for the adoption of implementing measures shall be guided by the following criteria:
   (a) management measures, such as those relating to the application of the common agricultural and common fisheries policies, or to the implementation of programmes with substantial budgetary implications, should be adopted by use of the management procedure;
   (b) measures of general scope designed to apply essential provisions of basic instruments, including measures concerning the protection of the health or safety of humans, animals or plants, should be adopted by use of the regulatory procedure; where a basic instrument stipulates that certain non-essential provisions of the instrument may be adapted or updated by way of implementing procedures, such measures should be adopted by use of the regulatory procedure;

[97] See pp. 59–60.
[98] European Commission, *Report on the Working of the Committees during 2008*, SEC(2009)913, 6.
[99] For an excellent analysis of the evolution of comitology over the years see C. Bergström, *Comitology: Delegation of Powers in the European Union System* (Oxford, Oxford University Press, 2005).
[100] *Report on the Working of the Committees*, above n. 98, 4.
[101] [1999] OJ L184/23 as amended by Decision 2006/512 [2006] OJ L200/11. For discussion see 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. There is a further procedure, the safeguard procedure, which operates in the field of external trade: article 6. Only two committees are established under it, however, and it is not discussed further here.
[102] A further 100 committees operated under a mix of procedures and were therefore difficult for the Commission to categorise. *Report on the Working of the Committees*, above n. 98, 5–6.

(c) without prejudice to points (a) and (b), the advisory procedure shall be used in any case in which it is considered to be the most appropriate.

2. Where a basic instrument, adopted in accordance with the [ordinary legislative procedure] provides for the adoption of measures of general scope designed to amend non-essential elements of that instrument, inter alia by deleting some of those elements or by supplementing the instrument by the addition of new non-essential elements, those measures shall be adopted in accordance with the regulatory procedure with scrutiny.

The procedure under which the Commission has the most freedom on paper is the advisory procedure. Under this procedure, the role of the committee is to 'advise' the Commission, with the Commission required to give 'utmost account' to the view of the committee but, having done that, being ultimately free to disregard it.

Decision 1999/468/EC, article 3

1. The Commission shall be assisted by an advisory committee composed of the representatives of the Member States and chaired by the representative of the Commission.
2. The representative of the Commission shall submit to the Committee a draft of the measures to be taken. The committee shall deliver its opinion on the draft, within a time-limit which the chairman may lay down according to the urgency of the matter, if necessary by taking a vote.
3. The opinion shall be recorded in the minutes; in addition, each Member State shall have the right to ask to have its position recorded in the minutes.
4. The Commission shall take the utmost account of the opinion delivered by the committee. It shall inform the committee of the manner in which the opinion has been taken into account.

In all the other procedures, the committee has a fire-warning role. It has to decide whether or not the Commission draft should be referred to the Council. With the management procedure, the committee, if it is unhappy with a Commission draft, can, by QMV, refer the matter to the Council. It needs a QMV majority in favour of referral. The Council then has up to three months to adopt another Decision.

Decision 1999/468/EC, article 4(3), (4)

3. The Commission shall...adopt measures which shall apply immediately. However, if these measures are not in accordance with the opinion of the committee, they shall be communicated by the Commission to the Council forthwith. In that event, the Commission may defer application of the measures which it has decided on for a period to be laid down in each basic instrument but which shall in no case exceed three months from the date of such communication.[103]
4. The Council, acting by qualified majority, may take a different decision within the period provided for by paragraph 3.

[103] Decision 1999/468/EC, article 8.

There was concern that the majority of committee members could disapprove of the Commission draft, but it would still be adopted. To that end, the Commission issued a Declaration on adoption of the Decision stating that, with regard to the management procedure, it would never go against 'any predominant position which might emerge against the appropriateness of an implementing measure'.[104]

This danger does not exist in the regulatory procedure, where the committee must positively agree to the Commission draft by QMV. If it fails to do this, the draft is referred to the Council, which has up to three months to take a decision of its own.

Decision 1999/468/EC, article 5(3)–(6)

3. The Commission shall, without prejudice to article 8,[105] adopt the measures envisaged if they are in accordance with the opinion of the committee.
4. If the measures envisaged are not in accordance with the opinion of the committee, or if no opinion is delivered, the Commission shall, without delay, submit to the Council a proposal relating to the measures to be taken and shall inform the European Parliament.
5. If the European Parliament considers that a proposal submitted by the Commission pursuant to a basic instrument adopted in accordance with the [ordinary legislative procedure] exceeds the implementing powers provided for in that basic instrument, it shall inform the Council of its position.
6. The Council may, where appropriate in view of any such position, act by qualified majority on the proposal, within a period to be laid down in each basic instrument but which shall in no case exceed three months from the date of referral to the Council. If within that period the Council has indicated by qualified majority that it opposes the proposal, the Commission shall re-examine it. It may submit an amended proposal to the Council, re-submit its proposal or present a legislative proposal on the basis of the Treaty. If on the expiry of that period the Council has neither adopted the proposed implementing act nor indicated its opposition to the proposal for implementing measures, the proposed implementing act shall be adopted by the Commission.

The regulatory procedure contains its own perversity, which is the difference between the voting thresholds in the committee and those in the Council. A QMV majority must actively *support* the measure in the committee for it not to be referred to the Council. By contrast, a QMV majority in the Council must actively *oppose* the measure or support an alternative for the Commission draft not to become law. This leaves a space for the Commission to adopt measures unchecked. This is best illustrated by giving an example where fourteen out of twenty-seven Member States oppose a measure. They do not make a QMV majority but they do form a blocking minority. In such circumstances, the measure would be referred by the committee as a QMV majority would not be in support. The measure could still be adopted, however, as there is not a QMV majority opposing it or formulating an alternative. A Commission measure could therefore become law even if a majority of Member States oppose it. To be sure, given the Commission's Declaration in relation to the management committee, it is unlikely it would ever

[104] [1999] OJ C203/1.
[105] See p. 120.

pursue the measure in such circumstances, but it may, however, where there is a substantial minority against the measure, as it can point to a simple majority being in favour.[106]

(ii) The Parliament and comitology

The other issue raised in the regulatory procedure is the role of the Parliament. The ordinary legislative procedure, of course, provides for measures to be adopted by the Council and the Parliament. The Parliament had become increasingly uneasy during the 1990s about delegating powers to the Commission that it thought would be better exercised by the ordinary legislative procedure (at that time, the co-decision procedure). It was, therefore, agreed that regulatory measures based on a parent instrument adopted under the ordinary legislative procedure would be notified to the Parliament and it could object through a Resolution if it considered they exceeded the implementing power granted by the parent instrument. Under article 8 of Decision 1999/468/EC, the Commission committed itself to reconsider the measure taking the Parliament's Resolution into account. The Decision did not require the Commission to withdraw the measure but only to give reasons for its decision. In subsequent years, Parliament continued to feel its prerogatives were being ignored and this culminated in a 2005 exchange where the Commission admitted over fifty instances where it had failed to respect Parliament's rights under comitology.[107]

Following this exchange, the regulatory procedure with scrutiny was introduced. The procedure only applies to instruments which are perceived as 'amending' their parent instruments, where the latter had been adopted under the ordinary legislative procedure. Regulatory procedure with scrutiny begins the same way as the regulatory procedure, with the Commission submitting a draft to the committee which expresses an opinion on it. The process is convoluted after that but boils down to two processes depending on whether the committee agrees with the Commission draft or not.

If the committee agrees with the draft, either the Council or Parliament can veto the draft, but only on the grounds that it is too sweeping and therefore either exceeds the implementing powers granted to the Commission or breaches the subsidiarity or proportionality principles. If they fail to act, it is adopted.[108]

If the committee disagrees with the draft, the same possibilities exist except that this time the Council can decide to oppose the measure *for any reason* and this pre-empts any consideration by the Parliament, which only looks at the draft if the Council is inclined to accept it. The Council has two months to make its opposition known and the Parliament four months after that. If they both fail to indicate their opposition, the measure will be adopted.[109]

Both the Parliament and the Council have high thresholds to meet to register their opposition: an absolute majority of members and a QMV majority respectively. However, in 2008, seven measures were vetoed by one or other of these institutions on the grounds that the

[106] For a case study where this happened in relation to the regulation of genetically modified organisms see D. Chalmers, 'Risk, Anxiety and the European Mediation of the Politics of Life' (2005) 30 *ELRev*. 649.

[107] K. Bradley, 'Halfway House: The 2006 Comitology Reforms and the European Parliament' (2008) 31 *WEP* 837, 842–3.

[108] Decision 2006/512/EC, article 5a(3).

[109] *Ibid*. article 5a(4). For discussion see G. Schusterschitz and S. Kotz, 'The Comitology Reform of 2006: Increasing the Power of the European Parliament without Changing the Treaties' (2007) 3 *European Constitutional Law Review* 68.

Commission was exceeding its powers, just under 10 per cent of the measures proposed for regulatory procedure with scrutiny in that year.

It is the Council that has benefited most from the procedure, not the Parliament, vetoing all but one of them.[110]

The place of these procedures has been changed by the coming into force of the Lisbon Treaty, which grants additional powers to the Council and Parliament to place constraints on the Commission with regard to delegated measures.

Article 290(2) TFEU

Legislative acts shall explicitly lay down the conditions to which the delegation is subject; these conditions may be as follows:

(a) the European Parliament or the Council may decide to revoke the delegation;

(b) the delegated act may enter into force only if no objection has been expressed by the European Parliament or the Council within a period set by the legislative act.

Both the Council and Parliament will now have the opportunity to block the measure. This power is also to exist across other areas of legislative activity, not just across the ordinary legislative procedure. The other feature of Article 290(2) TFEU is the possibility it provides to both institutions to revoke a delegation. Up until now, this could only be done through deploying the formal legislative procedures to amend the parent instrument: so if it had been adopted by ordinary legislative procedure, it had to be amended by that procedure. Article 290(2) TFEU suggests more truncated procedures may be set for revocation of a delegation, which, importantly, do not require a Commission proposal for an amendment but can be done at either of the other institutions' behest. Consequently, the Commission may be exercising its powers under the shadow of the sword with the possibility that if it does something institutionally unpopular it will suffer the consequences.

The procedure in Article 290(2) TFEU only applies to delegated acts and not to implementing acts.[111]

Article 291(3) TFEU

...the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall lay down in advance the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers.

[110] Seventy-one measures were adopted. *Report on the Working of the Committees*, above n. 98, 6–7.

[111] The absence of an equivalent provision to Article 291(3) TFEU in Article 290 TFEU has led some authors to suggest that comitology is prohibited for delegated measures. We disagree. The absence of such a provision does not constrain the other institutions from introducing provisions any more than its absence in the earlier Treaties, and it would be difficult to see how they could police the measures otherwise; cf. K. Lenaerts and M. Desomer, 'Towards a Hierarchy of Legal Acts in the EU' (2005) 11 *ELJ* 744, 755.

This begs the question how Article 290(2) TFEU affects the different procedures set out in Decision 1999/468/EC. Implementing measures will continue to be subject to the same comitology regime, but for delegated measures the only procedure definitely covered by Article 290(2) TFEU is the regulatory procedure with scrutiny, as the jurisdiction of both extends to amending non-essential parts of the parent instrument. For the other procedures it is opaque; and this is extremely concerning, given that the regulatory procedure with scrutiny applies to less than 2 per cent of all the committees.

(iii) Dynamics of comitology and its concerns

Despite this debate on checks and balances, it is not clear that the other institutions either have the resources to police the Commission or that the committees have the inclination to refer the matter to the Council. In 2008, the committees gave 2,185 opinions but only seven references were made to the Council.[112] The central constraints lie in the interactions between the Commission and the committee. In pioneering work, Joerges and Neyer studied the interaction between the Commission and two such committees, the Standing Committee on Foodstuffs (StCF) and the Scientific Committee on Foodstuffs (SCF). They found that comitology did not consist of national checks on Commission decision-making but was, rather, a more fluid settlement centred around deliberative problem-solving in which actors took on board each other's suggestions, and concern focused on finding the optimal solution rather than representing different interests.

C. Joerges and J. Neyer, 'Transforming Strategic Interaction into Deliberative Problem-Solving: European Comitology in the Foodstuffs Sector' (1997) 4 *Journal of European Public Policy* 609, 618–20

Whereas the comitology system in the foodstuffs sector is far too small an arena to allow generalization, it is nevertheless indicative of how this relationship can work in practice and what its deficiencies might be. Three elements are of particular importance:

(a) The proposals which the Commission presents to the StCF are in general the result of extensive consultations with individual national administrations and independent experts. Particularly in committees like the StCF which act under qualified majority voting, proposals not only reflect the Commission's interest but also what it assumes to be in the interest of *more than a qualified majority* of the other parties involved. This becomes of crucial importance as the effectiveness of any measure adopted depends on member states transposing the measure adequately into their national legal systems without leaving too many opportunities for evasion and – more importantly – not invoking safeguard procedures. However, in an institutional environment without effective means of hierarchical enforcement, this is only likely to happen if delegates see their own legitimate concerns acknowledged and protected in decision-making.

(b) The importance of the SCF in supporting certain arguments does not derive from any formal power to decide issues of conflict (it has only an advisory status) but from the legal fiction of its scientific expertise and neutrality. To be sure, member states are well aware that the SCF is sometimes used by

[112] *Report on the Working of the Committees*, above n. 98, 6–109.

the Commission as an instrument for furthering its interests and, furthermore, that its experts do not always comply with the norm of objectivity. Moreover, the bovine spongiform encephalopathy (BSE) case has highlighted the fact that even scientific institutions can easily be captured by certain interest groups and instrumentalized for political purposes by the Commission. The Scientific Veterinary Committee was not only chaired by a British scientist; the available records of attendance also show the preponderance of UK scientists and officials, meaning that the Committee tended to reflect current thinking at the British Ministry of Agriculture, Fisheries and Food. Why do member state delegates nevertheless adhere to the fiction of objective science? To understand this, one needs to consider the functions of legal fictions: scientific findings are supposed to be accepted by all the parties concerned; science-based discourses have the power to discipline arguments; and they allow a clear distinction between legitimate and illegitimate arguments in cases of conflict over competing proposals. Therefore, the fact that the opinions of the SCF have never been seriously challenged by the StCF may be grounded less in the objectivity of its opinions than in the function of scientific discourses as a mechanism that is helpful in overcoming politically constituted preferences by relying on the fiction of objective science.

(c) International negotiations concerning common solutions to problems of interdependence generally involve two modes of interaction: strategic bargaining to maximize particular utilities at the expense of others and deliberative problem-solving to maximize collective utilities. Empirically, it is important to realize that the relative intensity of both modes may vary, and identify the conditions which influence them. Whereas the mainstream literature on international negotiations does not acknowledge the possibility of deliberative problem-solving but conceptualizes international negotiations as a pursuit of domestic policy goals by different means, recent contributions to the literature on epistemic communities highlight conditions where the grip which national politicians have on delegates is rather weak. The most prominent conditions mentioned are uncertainty about the distributive effects of certain policies, long-term interaction among delegates, as well as their mutual socialization into a community with common problem definitions and collectively shared approaches to dealing with them.

Under such conditions governments may be unaware of what their preferences are, or delegates, perceiving themselves as part of a transnational problem-solving community, may be able to change their governments' perceptions of interests or even simply bypass them. The condition of high uncertainty about the distributional effects of certain policies is surely not always met; often governments have clear perceptions of the costs that certain policy options might impose on them. However, in negotiations in the StCF – and even more so in the SCF – the particular economic costs of policies cannot be explicitly discussed, and information is primarily provided on nondistributional issues. *Ceteris paribus*, therefore, the knowledge of delegates about adequate problem-solving strategies will increase with the duration of negotiations, whereas their *relative* knowledge about economic effects will decline. This change in the perceptions and preferences of delegates becomes increasingly important for shaping national preferences as their informational advantage over their national administration increases over time. It is also important to note that negotiations sometimes last for years among nearly the same set of delegates. Moreover, delegates have frequent contacts outside the sessions of the Standing Committee, and have often previously met working on the preparation of a legislative proposal in negotiations about its adoption in Council working groups. During the course of this collaboration, delegates not only learn to reduce differences between national legal provisions but also to develop converging definitions of problems and philosophies for their solution. They slowly proceed from being representatives of national interests to being representatives of a Europeanized inter-administrative discourse characterized by mutual learning and an understanding of each other's difficulties in the implementation of specific solutions.

Subsequent studies have reaffirmed this characterisation. A study of Scandinavian officials found that whilst the overwhelming majority of those sitting on the committees saw themselves as government representatives, there was also a strong perception that they saw themselves both as independent experts and as persons acting on behalf of the collective European interest. Above all, there was a strong esprit de corps and loyalty to the committee and other members of the committee, which was particularly marked amongst those who participated most intensively on the committee.[113]

Understandings of comitology as an interactive network of administrators and experts rather than as a check on the Commission's powers have provoked a fierce debate about its democratic qualities.[114] There have been two central concerns. One is that its language is too technocratic. Delicate political and social questions are reduced to questions of expertise and risk assessment.[115] The other is that its make-up is insufficiently pluralistic. Administrators may 'up their game' by having to respond to other administrators' arguments but, as Gerstenberg and Sabel artfully put it, this may only 'improve government performance and renovate the role of the bureaucrat without much changing the role of the citizen'.[116] The rights of audience or participation of private parties before these committees, for example, are notoriously unclear.[117] Joerges has observed, in defence of the processes, that they contain many checks and balances that are generally unappreciated.

C. Joerges, 'Deliberative Supranationalism: A Defence' (2001) 5(8) *European Integration online Papers (EIoP)* 8–9

...comitology...interested us because of its links not just with the bureaucracies but also with the polities of the Member States, because of its complex internal structure in which government representatives, the representatives of social interests and 'the' economy all interact. Risk regulation in the internal market seemed to us to document the weaknesses of expertocratic models adequately, because the normative, political and ethical dimensions of risk assessments resist a merely technocratic treatment. Admittedly, in the debates about the tensions between the ideals of democracy and the constraints of the 'knowledge society', Columbus' egg has not been sighted so far. My mere status as a citizen does not qualify me for a qualitatively convincing (to me at least) technical decision, nor can it be seen how 'all' the citizens affected by such decisions are really to participate in them. What is true of risk policy is present as a problem in practically every corner of modern law. And what is true of

[113] J. Trondal, 'Beyond the EU Membership-Non Membership Dichotomy? Supranational Identities among National EU Decision-Makers' (2002) 9 *JEPP* 468. This has been found in other surveys: see J. Blom-Hansen and G. Brandsma, 'The EU Comitology System: Intergovernmental Bargaining *and* Deliberative Supranationalism?' (2009) 47 *JCMS* 719.

[114] R. Dehousse, 'Comitology? Who Watches the Watchmen?' (2003) 10 *JEPP* 798.

[115] J. Weiler, 'Epilogue, "Comitology" as Revolution: Infranationalism, Constitutionalism and Democracy' in C. Joerges and E. Vos (eds.), *EU Committees: Social Regulation, Law and Politics* (Oxford and Portland, Hart, 1999) 339, 345–6.

[116] O. Gerstenberg and C. Sabel, 'Directly-Deliberative Polyarchy: An Institutional Ideal for Europe' in C. Joerges and R. Dehousse (eds.), *Good Governance in Europe's Integrated Market* (Oxford, Oxford University Press, 2002) 289, 320.

[117] F. Bignami, 'The Democratic Deficit in European Community Rulemaking: A Call for Notice and Comment in Comitology' (1999) 40 *Harvard International Law Journal* 451.

risk policy in an EU Member State in which (relatively) dense communicative processes guarantee the ongoing political debate is true *a fortiori* for such a polymorphic entity as the EU.

The much-maligned comitology has the advantage over agencies of the American pattern in that it structures risk policy pluralistically, that national bureaucracies have to face up to the positions of their neighbour states, and that interests and concerns in Member States cannot be filtered out. Committees can be observed closely by the wider public and such politicisation has proved to be effective. This seems to be the situation: any conceivable argument can be brought to bear in the committee system. It tends to offer *fora* for pluralistic discussions. Its links with the broader public do, however, remain dependent on the attention that an issue attracts and on the insistence of the actors concerned on public debate.

This may be so, but it requires rather a lot to be taken on trust and there is the broader question of how others would know if what was said to be happening within the committees *was* actually happening. Since 1999, there have therefore been attempts to make the procedure more transparent. Public access to the documents and discussions of the committees is granted on the same basis as to other Commission documents.[118] The Commission has established a register of draft measures placed before the committees and of the agendas and voting records of the committees.[119] Disturbingly, an independent study found that this was something of a hollow commitment: 95 per cent of draft measures and 35 per cent of agendas were not published.[120]

The Lisbon Treaty also suggested that less trust was to be placed in these procedures. It is far easier to challenge them judicially. An individual may now challenge any 'regulatory act' simply if it directly concerns her.[121] This will be the case wherever the measure directly prejudices her legal rights.[122] The consequence is that it will be relatively easy for private parties to challenge delegated legislation. It remains to be seen whether this is a panacea for opening up comitology. Litigation is notoriously ad hoc and threatens the rationales for delegation in the first place, namely policy credibility and efficiency. Furthermore, judges are also non-majoritarian actors and poor substitutes for pluralistic processes if that is the centre of the concern.

7 THE 'DEMOCRATIC DEFICIT' AND THE LEGISLATIVE PROCESS

The question of democratic legitimacy, the 'democratic deficit' in Euro-speak, has dominated debate surrounding the Union's legislative processes. Such debate typically criticises EU law-making in three ways. First, there are concerns about the quality of representative democracy. Such concerns focus both on the parliamentary input in the processes and the extent to which EU law-making undermines parliamentary democracy at a national and regional level.

[118] See Decision 1999/468/EC, article 7(2). On public access to the work of the Commission see pp. 384–94.
[119] *Ibid.* article 7(5).
[120] G. Brandsma *et. al.*, 'How Transparent are EU "Comitology" Committees in Practice' (2008) 14 *ELJ* 819, 833.
[121] Article 263(4) TFEU. For other legislative measures, a private party must also show that it is of individual concern to her. This is quite a restrictive hurdle to meet. See pp. 413–28.
[122] Case C-486/01 P *Front National* v *Parliament* [2004] ECR I-6289.

Secondly, there are concerns about the quality of participatory democracy. EU law-making has been accused of being insufficiently plural, of not listening to enough interested parties, and of giving too great weight to some interests. Finally, concerns have been expressed about the quality of deliberative democracy: the quality of public debate that surrounds and informs the law-making processes. Here, it is often argued that law-making processes are far too characterised by strategic negotiation between interests rather than public debate between citizens.

(i) Representative democracy and national parliaments

Representative democracy was seen by the German Constitutional Court in its judgment on the Lisbon Treaty as central to any democratic system:

> The citizens' right to determine, in equality and freedom, public authority with regard to persons and subject-matters through elections and other votes is the fundamental element of the principle of democracy. The right to free and equal participation in public authority is anchored in human dignity... It belongs to the principles of German constitutional law that are laid down as non-amendable.[123]

A similar sentiment is expressed in Article 10(1) TEU which states that the functioning of the European Union is to be founded on representative democracy. It would seem, therefore, to be as central a filament of the Union's mission as it is to the German constitutional state. If so, it appears to fail miserably on two counts.

First, the institutions set out in the Treaty as embodying this idea are not clearly representative institutions.

Article 10(2) TEU

Citizens are directly represented at Union level in the European Parliament. Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens.

Governments, be they sitting in the Council or European Council, are not seen as representative institutions. Indeed, the history of representative democracy is a history of the development of institutions to curb and hold accountable the growth of executives. Notwithstanding its direct elections, doubts can also be held over the European Parliament for the reasons given by the German Constitutional Court. Citizens are not represented equally in it. There is low interest and involvement in it. And, finally, there is little popular commitment to it.

The second reason is even more of an indictment. Administrators dominate EU law-making. It is the Commission which proposes legislation. The proposal is negotiated by national officials in COREPER and it is adopted by government ministers in the Council. Swathes of delegated legislation are adopted by the Commission with national administrators through comitology.

[123] 2 BvE 2/08 *Gauweiler* v *Treaty of Lisbon*, Judgment of 30 June 2009, para. 211.

The European Union seems, therefore, to violate the most central foundation of democracy as seen by itself and the German Constitutional Court. This is a swingeing condemnation. And indeed it is largely the Euro-sceptic case. The solution does not seem simply to be to increase the powers of the European Parliament, as for the reasons just outlined it can only partially alleviate concerns about representation.

The 'representative deficit' has focused in recent years, instead, on the role of national parliaments in the law-making processes.[124]

Following the Lisbon Treaty, the Treaties do provide for an increased role for national parliaments. Significantly, this is in a separate provision, suggesting that they are not to be at the heart of the Union, but are instead to remain secondary players. It outlines, inter alia, their contribution to the law-making process.

Article 12 TEU

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

(a) through being informed by the institutions of the Union and having draft legislative acts of the Union forwarded to them in accordance with the Protocol on the role of national Parliaments in the European Union;

(b) by seeing to it that the principle of subsidiarity is respected in accordance with the procedures provided for in the Protocol on the application of the principles of subsidiarity and proportionality...

(f) by taking part in the interparliamentary cooperation between national Parliaments and with the European Parliament, in accordance with the Protocol on the role of national Parliaments in the European Union.

The first form of power is involvement in the pre-legislative and legislative processes to secure influence for individual parliaments in the decision-making process. The Protocol on the Role of National Parliaments seeks to realise this in a number of ways:

- All draft legislative acts will be sent directly to national parliaments, rather than to national governments to pass onto national parliaments.[125]
- National parliaments will also be sent the annual legislative programme, as well as any policy or legislative planning instrument.[126]
- All agendas and minutes of Council meetings will be sent to national parliaments.[127]
- An eight-week period will elapse between a draft legislative act being sent to national parliaments and its being placed on the agenda of the Council.[128]

[124] A. Maurer and W. Wessels (eds.), *National Parliaments on their Ways to Europe: Losers or Latecomers?* (Baden Baden, Nomos, 2001).
[125] Protocol on the role of national parliaments in the European Union, Article 2.
[126] *Ibid.* Article 1.
[127] *Ibid.* Article 5.
[128] *Ibid.* Article 4.

The central intention is that the provision of this information will allow parliaments to exercise influence over their national government in the Council in such a way that it can become a vehicle for their views. Two types of procedure have emerged for the expression of this influence. The *document-based* procedure does not mandate the national minister to take a position. Instead, on important proposals, it requires the minister not to agree to any proposal until a parliamentary committee has scrutinised it and published its findings. The other is the *mandate-based* system, whereby the national parliament authorises the government to take a position and the national government cannot deviate from that, or must provide reasons if it intends to do so.[129]

Auel and Benz have argued that the most suitable procedure depends also on the nature of government-parliament relations. They observed that in the United Kingdom, the document-based system worked well, as the party which was in government also usually had a large majority in parliament. If the mandate-based system were to be used, the party in government would just fill the committee with sympathetic MPs. However, the document-based system had allowed the parliamentary committees to be relatively non-partisan, mobilising them as points for civil society and expertise to coalesce around. In turn, this reputation enables some influence. By contrast, the mandate-based system has traditionally worked well in Denmark, as coalition governments in which all the main parliamentary parties are represented has been a feature of the post-war settlement. The mandate-based procedure allows all coalition partners as well as public debate to inform the position of the minister, thereby ensuring the position has not only parliamentary but also wider government support.[130]

For all this, the limits of each procedure indicate how difficult it is to exercise indirect influence over negotiations involving so many players. The document-based system relies on the idea of soft influence. The parliamentary committee understands that the government needs room to negotiate but rather seeks to bring out issues and interests to the fore that have not been publicly debated or thought through. Its weakness, however, lies in its lack of constraint. The mandate-based system secures a far more direct parliamentary influence on negotiations. Its problem lies in its lack of flexibility. It can lead to governments being disempowered in negotiations and awareness of this often leads the parliament to soften the mandate or use it highly selectively.

There are further difficulties, whichever procedure is used. It is often difficult for national parliaments to formulate a position. As national parliaments often have few supporting staff, contacts with the relevant minister and ministry might be minimal.[131] In this regard, it is doubtful whether the eight-week period national parliaments are given to consider drafts is sufficient to enable effective input into the process.[132] To put this in perspective, the Commission

[129] Austria, Belgium, Bulgaria, Cyprus, France, Germany, Ireland, Italy, Luxembourg, Netherlands, Portugal, Slovakia, Spain and the United Kingdom all adopt document-based systems. Denmark, Estonia, Finland, Latvia, Lithuania, Poland, Romania, Slovakia, Slovenia and Sweden use mandate-based systems. Other Member States use a mix of the two. COSAC, *Eighth Biannual Report: Developments in European Union Procedures and Practices relevant to Parliamentary Scrutiny* (Luxembourg, COSAC, 2007) 7–9.

[130] K. Auel and A. Benz, 'The Politics of Adaptation: The Europeanization of National Parliamentary Systems' (2005) 11 *Journal of Legislative Studies* 372.

[131] For criticisms see *Future of Europe Convention, Final Report of the Working Group IV on the Role of National Parliaments*, CONV 353/02, 4–5.

[132] House of Lords European Union Committee, *The Treaty of Lisbon: An Impact Assessment* (Session 2007–08, 10th Report, London, SO) paras. 11.50–11.53.

allows a period of eight weeks for private parties to make submissions in its consultative procedures.[133] Considering that national parliaments represent a wider array of interests and are charged with more significant responsibilities, giving them the same time period to intervene seems unjustified.

In addition to influence via their national governments, all national parliaments have direct relations with the Commission. Since 2006, the latter has instigated a procedure whereby it sends its proposals directly to national parliaments, who also return their opinions straight to the Commission.[134] Between September 2006 and the end of 2008, the Commission received 368 opinions from 33 national assemblies in 24 Member States. This is an impressive number, particularly as 200 opinions were given in 2008 alone.[135] However, whilst the number of opinions were substantial, four chambers (the Czech Senate, the German Bundesrat, the French Senate and the UK House of Lords) were responsible for 54 of the 200 in 2008. These are all second chambers, and their predominance suggests a danger of asymmetric representation where assemblies with stronger capacity or interest are more actively involved. The quality of opinion is also variable. The Portuguese Assembly of the Republic gave 65 opinions in 2008, but all were positive on the Commission proposal and none contained specific comments. The final observation made by the Commission was that parliamentary comments tended to follow those of the respective national governments.[136]

The second set of powers provided for national parliaments in the legislative process is to police the legislative process for compliance with the subsidiarity principle: the principle whereby the European Union is only to legislate if the objects of a measure cannot be realised by Member States acting unilaterally and could by reason of their scale or effects be better realised by EU action.[137] National parliaments seem to have a particularly important role in the process. It is the powers of national and regional parliaments that are most encroached upon by EU legislation. They seem to be among the biggest stakeholders in determining where its limits should be set.

Detailed provision is made for them in the Protocol on the application of the principles of subsidiarity and proportionality.

Protocol on the application of the principles of subsidiarity and proportionality, Article 6

Any national Parliament or any chamber of a national Parliament may, within eight weeks from the date of transmission of a draft legislative act, in the official languages of the Union, 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.

[133] European Commission, General Principles and Minimum Standards for Consultation of Interested Parties by the Commission, COM(2002)704, 21.

[134] European Commission, *A Citizens' Agenda:- Delivering Results for Europe*, COM(2006)211 final.

[135] European Commission, *Annual Report on Relations between the European Commission and Nation Parliaments*, COM(2009)343, 4.

[136] *Ibid.* 6.

[137] Protocol on the role of national parliaments in the European Union, Article 3.

The national parliaments of each Member State are also given two votes, which are shared out between chambers in the case of a bicameral system. Opinions suggesting a violation of the subsidiarity principle are then tallied up. If at least eighteen out of the current fifty-four votes suggest that it does (fourteen in the case of Article 76 TFEU), then the institution that proposed the measure may decide to withdraw it.

Protocol on the application of the principles of subsidiarity and proportionality, Article 7(2)

Where reasoned opinions on a draft legislative act's non-compliance with the principle of subsidiarity represent at least one third of all the votes allocated to the national Parliaments..., the draft must be reviewed. This threshold shall be a quarter in the case of a draft legislative act submitted on the basis of Article 76 TFEU on the area of freedom, security and justice.

After such review, the Commission or, where appropriate, the group of Member States, the European Parliament, the Court of Justice, the European Central Bank or the European Investment Bank, if the draft legislative act originates from them, may decide to maintain, amend or withdraw the draft. Reasons must be given for this decision.

Concern was expressed that national parliaments could issue only a 'yellow card' to the Union legislature, requiring it to reconsider a proposal, and not a 'red card', requiring it to abandon it. Criticism was also expressed that there is only optional involvement of regional assemblies, who will be consulted if the respective national parliament so decides.[138] Furthermore, national parliaments have no direct powers to protect their prerogatives under the procedures through bringing annulment actions before the Court of Justice, but must rely on national governments to do so.[139] These criticisms are, however, formalistic. It is politically inconceivable that the Commission or national governments could ignore opposition from one-third or one-quarter of national parliaments. Apart from anything else, it is doubtful whether a QMV majority will be available in many circumstances where that number do oppose.

A bigger challenge is the threshold of opposition required: that of one-third or one-quarter of national parliamentary chambers. Typically, EU legislation will not violate some bright red line drawn by all national parliaments, but will threaten some tradition, which is cherished in a particular Member State. This is regardless of whether they are measures prohibiting the use of snuff in Sweden, or imperial weights and measures in the United Kingdom, or measures allowing cheese to be marketed as feta not from Greece or beer to be marketed in Germany despite not being in accordance with German purity laws. A feature of these is that they are idiosyncratic. Their value is deeply felt in the state in question, but much less so elsewhere. It will be difficult, in such circumstances, for the national parliament of that state to persuade the parliaments in other states that there has been a breach of subsidiarity.

[138] For criticism, see House of Lords European Union Committee, *Strengthening National Parliamentary Scrutiny of the EU* (Session 2004–05, 14th Report, London, SO) paras. 183–203.

[139] Protocol on the application of the principles of subsidiarity and proportionality, Article 8. S. Weatherill, 'Better Competence Monitoring' (2005) 30 *EL Rev.* 23, 40.

In spite of this, the Member States decided a further procedure was necessary after the failure of the ratification of the Constitutional Treaty. The 'orange card' procedure was therefore introduced by the Lisbon Treaty.

Protocol on the application of the principles of subsidiarity and proportionality, Article 7(3)

Furthermore, under the ordinary legislative procedure, where reasoned opinions on the non-compliance of a proposal for a legislative act with the principle of subsidiarity represent at least a simple majority of the votes allocated to the national Parliaments..., the proposal must be reviewed. After such review, the Commission may decide to maintain, amend or withdraw the proposal.

If it chooses to maintain the proposal, the Commission will have, in a reasoned opinion, to justify why it considers that the proposal complies with the principle of subsidiarity. This reasoned opinion, as well as the reasoned opinions of the national Parliaments, will have to be submitted to the Union's legislator, for consideration in the procedure:

(a) before concluding the first reading, the legislator (the European Parliament and the Council) shall consider whether the legislative proposal is compatible with the principle of subsidiarity, taking particular account of the reasons expressed and shared by the majority of national Parliaments as well as the reasoned opinion of the Commission;
(b) if, by a majority of 55% of the members of the Council or a majority of the votes cast in the European Parliament, the legislator is of the opinion that the proposal is not compatible with the principle of subsidiarity, the legislative proposal shall not be given further consideration.

This new procedure seems unnecessary. It is almost inconceivable that the Commission would take forward a proposal where over half the national parliaments opposed it. As national governments are accountable to national parliaments, it is almost as unimaginable that such a proposal would receive a QMV majority in the Council. On its own terms, the procedure is somewhat bizarre. It only applies to the ordinary legislative procedure. Yet, if there is a problem with Commission discretion, surely it would generally affect the institution's role in all legislative procedures. The other odd feature is that a positive majority is needed to vote a measure incompatible with the subsidiarity principle. This is a high threshold as it means that a measure could be adopted, despite the fact that a majority of national parliaments and half the members of the Council (including all the large Member States) thought EU legislation should not be developed on the matter in question.

The Protocol looks as if it also might be the making of the Conference of Community and European Affairs Committees of Parliaments of the European Union (COSAC). Established in 1989, COSAC is a forum in which national parliaments and the European Parliament meet biannually to discuss the business of the forthcoming Council Presidency and to exchange information and best practice.[140] Since 2007, COSAC has become a more proactive and salient forum for securing the subsidiarity principle. It coordinates checks by national parliaments

[140] Its position is formalised in the Protocol on the role of national parliaments in the European Union, Article 10. See also Article 12(f) TEU.

where Commission proposals appear to touch particularly on national sensitivities. In 2008, three exercises were conducted on Commission proposals for legislation on terrorism; organ transplants; and amending the Framework Directive prohibiting discrimination. This led to forty-five opinions by national parliaments on the two proposals.[141] COSAC has also set itself up as a forum for national parliamentary concerns. All commit themselves to an early exchange of information through communicating any particular subsidiarity concerns to each other through COSAC.[142]