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on the impact of the Lisbon Treaty on the development of the institutional balance of the European Union

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EXPLANATORY STATEMENT

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Impact of the Lisbon Treaty on the development of the institutional balance of the European Union

A political analysis of the changing relations between the European Parliament, the Council and the Commission

The Treaty of Lisbon creates a political Union with legal personality and a single institutional framework. Following the enlargement that brought about its reunification, Europe needed this relaunch in order to address the challenges, such as globalisation, facing it in the 21st Century. In much the same way as the Treaty of Rome was a response to the new situation obtaining after the Second World War, the Treaty of Lisbon may be seen as an attempt by Europe to face up to the new environment brought about by the end of the Cold War. By continuing to pursue its goal of peace and stability while fostering closer social and economic integration, the European Union can offer its citizens an area of freedom, security and justice and play a part, as a global player, in building a fairer and more sustainable world. In order to be able to do so, the 27-Member State EU needed to 'become more democratic, more transparent and more effective' (Laeken Declaration).

To this end, the Lisbon Treaty amends the Treaty on European Union (Treaty of Maastricht) and the Treaty establishing the European Community (Treaty of Rome, as subsequently amended), which will become known as the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) respectively. The TEU establishes the Union's constitutional framework, while the TFEU establishes how the Union is to operate in practice. The two Treaties have the same legal value. It would be more logical if the TFEU were, at a later stage, to be subordinated to the basic Treaty establishing the European Union, the TEU, thus enabling a more flexible procedure to be used for revision of the TFEU than for revision of the basic Treaty.

The Lisbon Treaty will not enter into force until it has been ratified by all the Member States. Making preparations for implementation of the Treaty does not in any way prejudice the outcome of the ratification process. On the contrary, not doing so would result in late implementation once the Treaty has been ratified. Each of the EU institutions is therefore fully justified in not waiting for ratification to take place before looking into the Treaty's implications for its own workings and for interinstitutional relations.

This report looks at the Lisbon Treaty's impact on the development of the EU's institutional balance. It highlights the importance of implementing the new provisions and making the first appointments.

The report focuses on relations between Parliament, the European Council, the Council and the Commission. It assesses the overall balance between these institutions. This assessment is not confined to the other institutions' relations with Parliament. The report is a political

analysis that sets out practical recommendations.

The report does not deal with the organisational changes within Parliament that implementation of the Treaty will require. These will be addressed in later reports. While it looks at the way in which the Union's external action is organised, it does not touch upon the organisation of the European External Action Service, which will be dealt with in a separate report¹. Lastly, it does not go into relations with national parliaments. Although they have an extremely important role to play - and one which is enhanced by the protocols annexed to the Treaty -, national parliaments do not, as such, form part of the EU institutions. Relations with national parliaments will therefore be dealt with in a separate report.

The report looks at how relations between the Union's political institutions are likely to change under the new Treaty. Following an overview of the historical background to the new Treaty, the first part of the report analyses the main Treaty provisions concerning each of the institutions. It then looks at interinstitutional relations, (first) appointments, interinstitutional programming and the Union's external action.

A. A CHANGING INSTITUTIONAL BALANCE

The European Parliament, the Council and the Commission are the three political institutions that were established by the Treaty of Rome at the European Community's inception.

Parliament had a mainly consultative role and was made up of members of national parliaments. As a rule, the Council acted unanimously. The Commission initiated and implemented European legislation.

The first direct elections to the European Parliament were held in 1979.

The Single European Act (1986) enabled the Council to act by a qualified majority when adopting most of the directives laying down harmonisation measures required for the establishment of the single market. It also introduced a procedure for cooperation with Parliament on such directives.

The Maastricht, Amsterdam and Nice Treaties systematically extended majority decision-making within the Council and, at the same time, established and then extended the procedure for codecision with the European Parliament.

The Maastricht Treaty extended the Commission's term of office from four years to five, to bring it into line with the EP's five-year term. Parliament's role in the appointment of the President and Members of the Commission has grown with each new Treaty. Similarly, the Treaties and, above all, practice, have strengthened the Commission President's position within the team of Commissioners.

Up until the Maastricht Treaty, the European integration process focused mainly on social and economic issues. The Single European Act and, even more so, the Maastricht Treaty, which

¹ Brok report on the institutional aspects of creating a European service for external action, currently being drawn up within the Committee on Constitutional Affairs.

established the European Union incorporating the areas of foreign policy, justice and citizenship, gave the process a new political dimension. However, the two new 'pillars' had an essentially intergovernmental dimension which greatly restricted the role played by the Commission and Parliament. The Treaty of Amsterdam established the office of High Representative for the CFSP and also took the first step towards bringing migration-related aspects of JHA within the Community sphere.

The first European summit meetings were informal meetings of Heads of State or Government. From 1975 onwards, such meetings were held on a regular basis and became known as European Council meetings, gradually gaining a more formal footing. The Maastricht Treaty formally established the European Council's role as a driving force and as the body responsible for laying down general policy guidelines. The European Council did not, however, become an institution in legal terms, nor was it given the status of a Council configuration.

In taking over the main proposals put forward by the European Convention, the Lisbon Treaty reshapes the institutional balance within the Union. The new Treaty on European Union formally abolishes the pillar structure. The European Union, as a body, is given legal personality. The Community institutions become the Union institutions. The Treaty redefines the role and competences of each of the institutions. It makes the European Council an institution of the Union, separate from the Council. It makes codecision the normal legislative procedure (subject to exceptions), including for the adoption of the budget (albeit under a special procedure).

In so doing, the Lisbon Treaty strengthens the 'Community method' and transforms it into the 'Union method', under which, in essence:

- the European Council defines the general political directions and priorities (driving role);
- the Commission promotes the general interest of the Union and takes appropriate initiatives to that end (right of initiative);
- the European Parliament and the Council jointly exercise legislative and budgetary functions (parliamentary bicameralism).

This method is extended to cover, in particular, budgetary matters and what was known as the justice and home affairs (JHA) sphere, which is to be replaced by an area of freedom, security and justice under the new Treaty. The only area that remains essentially intergovernmental in nature is the common foreign and security policy (CFSP).

B. ANALYSIS OF THE MAIN (NEW) PROVISIONS BY INSTITUTION

1. European Parliament (Article 14 TEU)

1.1. The European Parliament is to exercise legislative and budgetary functions jointly with the Council, as well as functions of political control and consultation.

The Treaty on European Union thus confirms that the Union operates to a large extent in

accordance with the principles underpinning a parliamentary system.

- 1.2. The 'ordinary legislative procedure' will be codecision between the European Parliament and the Council, on a proposal from the Commission. This procedure, with a few adjustments, is also to be used for the expenditure side of the budget.

The Lisbon Treaty reaffirms and consolidates the 'Community method' and, in particular, strengthens the 'bicameral' system (European Parliament and Council).

- 1.3. Parliament's sphere of competence is also extended by the abolition of the pillar system. The ordinary legislative procedure is to be used as a general rule in the area of freedom, security and justice, although a number of special arrangements will apply.

The Lisbon Treaty also specifies the Union's competences in the energy field.

Parliament will have an important role to play even in the CFSP, which remains largely intergovernmental in nature (see below).

In that regard, Parliament will have greater powers in connection with the adoption of international agreements, because its approval will be necessary for all agreements dealing with matters which come under the ordinary legislative procedure at the internal level.

- 1.4. Parliament's full involvement, on an equal footing with the Council, in control of the exercise of delegated powers by the Commission is confirmed and clarified. The Lisbon Treaty makes a distinction between delegated acts and implementing acts. Article 290 TFEU empowers Parliament and the Council to revoke delegated acts adopted by the Commission on the basis of a legislative delegation. Article 291 TFEU stipulates that 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 of the Commission's exercise of implementing powers. Under Article 202 of the current EC Treaty, the Council alone is empowered to take such decisions (known as 'commitology' decisions), after having obtained Parliament's opinion.
- 1.5. Parliament's consent will also be required for a whole range of European Council or Council decisions of central political importance to the operation of the Union, including decisions on the use of specific clauses enabling decisions to be taken by a qualified majority instead of unanimously (or the ordinary legislative procedure to be used in place of special legislative procedures) and decisions on flexibility mechanisms.

Recommendation

Parliament will need to make appropriate organisational and procedural adjustments in response to the extension of its powers. A number of reports setting out relevant recommendations are currently being drawn up.

1.6. Parliament is to elect the President of the Commission.

This changes the whole nature of the appointment process. The Commission President's election by Parliament will give the former substantial democratic legitimacy and strengthen his or her position within the Union's institutional setup.

The Treaty stipulates that the European Council is to propose a candidate for President of the Commission, 'taking into account the elections to the European Parliament and after having held the appropriate consultations' (Article 17(7) TEU). This provision endorses and places on a formal footing the ad hoc procedure used to appoint the President of the Commission in 2004.

Declaration 11 (on Article 17(6) and (7) TEU) states that 'the European Parliament and the European Council are jointly responsible for the smooth running of the process leading to the election of the President of the European Commission. Prior to the decision of the European Council, representatives of the European Parliament and of the European Council will thus conduct the necessary consultations in the framework deemed the most appropriate. These consultations will focus on the backgrounds of the candidates for President of the Commission, taking account of the elections to the European Parliament, in accordance with the first subparagraph of Article 17(7). The arrangements for such consultations may be determined, in due course, by common accord between the European Parliament and the European Council'.

Specific arrangements therefore need to be laid down as a matter of urgency. The report outlines a number of possibilities (see section D below).

1.7. The President, the High Representative and the other Members of the Commission are to be subject as a body to a vote of consent by Parliament.

Parliament set out standard procedures for hearings of Commissioners-designate in an earlier report¹.

1.8. Enhanced cooperation proposals are to be subject to the consent of Parliament (Article 329 TFEU).

Recommendation

The Committee on Constitutional Affairs could, at a subsequent stage, draft an own-initiative report on Parliament's role in the initiation – and, above all, the implementation – of enhanced cooperation arrangements.

1.9. The Lisbon Treaty gives Parliament a right of initiative in connection with revision of the Treaties.

¹ A6-0179/2005: Report on guidelines for the approval of the European Commission (7 June 2005, Andrew Duff).

Parliament, the Commission or any Member State may submit to the Council proposals for the amendment of the Treaties (Article 48(2) TEU). If it adopts a decision in favour of examining the proposed amendments, the European Council must convene a Convention, which will include EP representatives.

The European Council may decide not to convene a Convention, but must obtain Parliament's consent before doing so.

The Treaty does not, however, contain any provisions on Parliament's role in the conduct of the IGC. It might be useful for the institutions to lay down principles governing Parliament's involvement, naturally making sure that it is at least as closely involved as it was in the last IGC.

Recommendation

The new revision procedure giving Parliament greater powers could also, at a later stage, be the subject of an own-initiative report by the Committee on Constitutional Affairs.

Parliament might suggest that an interinstitutional agreement be concluded on the organisation and conduct of IGCs, specifying, among other things, Parliament's role.

2. European Council (Article 15 TEU)

2.1. Under the Lisbon Treaty, the European Council is to become an institution

The European Council is not an institution under the current Treaty. It is seen in some quarters as a form of 'super Council'. Although it works in close cooperation with the Council (the Council Secretariat also acts as secretariat for the European Council), the European Council has never been a Council configuration.

By making it an institution and stipulating that it has no legislative functions, the Lisbon Treaty confirms and consolidates the European Council's special position within the institutional setup. This is all the more true of the European Council Presidency, which is currently the same as that of the Council, whereas under the Lisbon Treaty the European Council will have a stable Presidency that will be separate from the Council Presidency.

The new institution will need to have its own budget, like the other EU institutions. Proposals for this will probably be put forward in the 2009 budget.

The Treaty stipulates that the Council Secretariat will act as secretariat for the European Council (Article 235(4) TFEU). There will therefore not be a new administration. It would, however, appear appropriate to make provision within the European Council's budget for a private office for the President of the European Council which could, with suitable adjustments, be modelled on the President of Parliament's Private Office.

The Council Secretariat, which will also act as secretariat for the European Council, will in practice play an important role in relations between the European Council and the Council, acting as a form of 'interface'.

2.2. Composition

The European Council will 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 will take part in its work.

The Lisbon Treaty changes the composition of the European Council. The current Treaty stipulates that the members of the European Council shall be assisted by their Ministers for Foreign Affairs, whilst the Lisbon Treaty states that the members of the European Council may decide each to be assisted by a minister. There is therefore no longer a hard and fast rule (the European Council would be perfectly entitled to take such decisions on a case-by-case basis).

Given the increase in the number of Member States, it would be advisable, with a view to ensuring the smooth operation of the European Council, for the members alone to be seated at the conference table, with guests seated away from the table.

2.3. General remit

The European Council's remit is to provide the Union with the necessary impetus for its development and define the general political directions and priorities thereof. The Treaty stipulates that the European Council has no legislative functions¹.

The description of the European Council's general remit is identical to that to be found in the current Treaty. The explicit stipulation that the Council has no legislative functions was added by the Convention and subsequently taken over by the IGC, in order to avoid any confusion between the role of the European Council and that of the Council.

2.4. Specific competences

In addition to this general driving role, under the Lisbon Treaty the European Council will play a significant role in the common foreign and security policy sphere and will have a number of important constitutional tasks. Under the current Treaty, such tasks are in many cases performed by the 'Council meeting in the composition of the Heads of State or of Government'. There is no reference to such a body in the Lisbon Treaty.

As a general rule, decisions of the European Council are to be taken by consensus, which is a broader concept than unanimity. In respect of specific tasks, the Lisbon Treaty establishes the majority by which European Council decisions are to be taken. In such

¹ The European Council's intervention in specific legislative procedures (see below) cannot be deemed to entail the exercise of legislative functions, given that all that is involved is taking a decision on the conduct of the procedure where specific problems are hampering its progress, rather than interfering in laying down the substance of a given piece of legislation.

cases, the President of the European Council and the President of the Commission may not vote.

2.4.1. Under the new Treaty, the European Council will be responsible for taking a number of 'constitutional' decisions.

2.4.1.1. Decisions taken unanimously

- Composition of the European Parliament (Article 14 (2) TEU)
- Rotation system for the appointment of Commissioners. Composition of the Commission from 1 November 2014 (Article 16(9) TEU)
- Amendment of rules on voting within the Governing Council of the European Central Bank (Protocol No 4, Article 40(2))
- Establishment and extension of powers of the European Public Prosecutor's Office (Article 86(4) TFEU)
- Application of 'bridging clauses' ('passerelles') substituting qualified-majority voting for unanimous voting (subject to Parliament's consent) or replacing special legislative procedures with the ordinary legislative procedure (subject to Parliament's consent) (Article 48(7) TEU)¹
- Revision of all or part of the provisions of Part Three of the TFEU (Union policies and internal actions) (subject to Member States' approval) (Article 48(6) TEU)

2.4.1.2. Decisions taken by a qualified majority

- Council configurations (Article 236 TFEU)
- Rotation of the Council Presidency troika (Article 236 TFEU)

2.4.2. 'The European Council shall identify the strategic interests and objectives of the Union' (Article 22 TEU). 'The European Council shall identify the Union's strategic interests, determine the objectives of and define general guidelines for the common foreign and security policy, including for matters with defence implications' (Article 26 TEU). In both these instances, the European Council may take decisions, but those decisions may not take the form of legislative acts.

The Treaty provisions on the Union's external action are examined in section F below.

2.4.3. 'The European Council shall define the strategic guidelines for legislative and operational planning within the area of freedom, security and justice' (by consensus) (Article 68 TFEU).

Unlike in the common foreign policy sphere, no strict relationship is established between the work of the European Council and that of the Council.

¹ This are also a number of specific clauses providing for this, such as Article 312(2), second subparagraph of the Treaty on the Functioning of the European Union, on switching to qualified-majority voting for the adoption of the multiannual financial framework, and Article 31(3) of the Treaty on European Union, on switching to qualified-majority voting for the adoption of CFSP decisions.

- 2.4.4. The European Council will be empowered to suspend the legislative process under an 'emergency brake' procedure for social security matters (Article 48 TFEU) and under the arrangements for judicial cooperation in criminal matters (Arts. 82 and 83 TFEU).

In the event of disagreement within the European Council, the procedure will be *de facto* suspended. This infringement of the principle that the European Council has no legislative powers is to be regretted.

Under Articles 82 and 83 TFEU, enhanced cooperation may be initiated in the JHA sphere under a simplified procedure¹.

- 2.4.5. The European Council will act by a qualified majority in

- electing its President (Article 16(5) TEU)
- proposing to Parliament a candidate for President of the Commission (Article 17(7) TEU)
- appointing the Commission after obtaining Parliament's consent to the list of Commissioners that the European Council proposed to it by common accord with the Commission President-elect (elected by Parliament) (Article 17(7) TEU)
- appointing the High Representative of the Union for Foreign Affairs and Security Policy, with the agreement of the President of the Commission. This appointment will be put to Parliament, together with the list of Commissioners, for its consent (Article 18(1) TEU)
- appointing the members of the European Central Bank's Executive Board (Article 283(2) TFEU)

- 2.4.6. The European Council will adopt its Rules of Procedure by a simple majority (Article 235(3) TFEU).

It would be advisable for those Rules of Procedure also to lay down provisions governing relations between the European Council and Parliament, with particular reference to attendance by the President of Parliament at European Council meetings.

2.5. Presidency

- 2.5.1. The European Council will elect its President, by a qualified majority, for a term of two and a half years, renewable once.

The overall possible length of the President's term of office is the same as those of Parliament and the Commission. Given the unavoidable political links between the three functions, it would be useful for the three terms to start at the same time.

¹ The same applies under Article 86 in connection with the extension of the powers of the future European Public Prosecutor's Office. In this instance, however, the European Council will act more as a 'catalyst' than an 'emergency brake'.

The President of the European Council may not hold a national office. The Treaty does not, however, specify that he or she may not hold some other office at European level. It was the Convention's express intention to leave the way open for the President of the Commission to serve as President of the European Council. However, the suggestion made during the Convention to the effect that the Presidency of the European Council should be held only by a Prime Minister who has been involved in the work of the European Council for at least two years has not been taken up in the Treaty. The range of possible candidates for President of the European Council is therefore extremely wide.

- 2.5.2. The President of the European Council's first duty will be to chair and drive forward the European Council's work, ensure the preparation and continuity of that work and facilitate cohesion and consensus (Article 15(6) TEU).

The Treaty states that the President 'shall chair' the European Council. The President is therefore not – contrary to the wishes of some people – President of the Union. The President's election by the European Council alone would anyway not have given him or her the democratic legitimacy required of a President of the Union.

Furthermore, a clear distinction is made between the office of President of the European Council and that of President of the Council.

The task of preparing and ensuring the continuity of the work of the European Council will require regular contacts between the President of the European Council, the President of the Commission and the President of the General Affairs Council. The High Representative will also need to be involved. It would be advisable to lay down formal arrangements for such contacts.

- 2.5.3. The President of the European Council will be required to present a report to Parliament after each European Council meeting (Article 15(6) TEU).

This provision confirms the arrangement that is already in place. Parliament should, however, be mindful of the distinction between the Presidency of the European Council and the Council Presidency. The work of the Council, which is co-legislator with Parliament, is of at least as much importance to Parliament as that of the European Council. Therefore, although this is not specifically provided for in the Treaty, there is every reason to invite the Council Presidency, represented by the Prime Minister, to present its programme to Parliament at the start of the Presidency's term of office and to report on the outcome of the Presidency at the end of its term of office.

- 2.5.4. 'The President of the European Council shall, at his level and in that capacity, ensure the external representation of the Union on issues concerning its common foreign and security policy, without prejudice to the powers of the High Representative of the Union for Foreign Affairs and Security Policy' (Article 15(6) TEU).

This provision reaffirms the current practice, albeit in a different context. At present, the Prime Minister of the Member State holding the Council Presidency performs this external representation role with the assistance of his or her Foreign Minister. In future, neither will have an external representation role to play.

The external representation role played by the President of the European Council will be confined to the common foreign and security policy sphere. The Commission will be responsible for representing the Union in the other areas of external action (coming within the Community sphere).

With a view to avoiding misunderstandings and possible conflicts of competence, within the common foreign and security policy sphere the meaning of 'representation' by the President of the European Council 'at his level and in that capacity' needs to be clarified without prejudice to the remit of the High Representative, to whom Article 27(2) gives extremely extensive representation competences.

- 2.5.5. It should be noted that the Lisbon Treaty does not give the Prime Minister of the Member State holding the Council Presidency any specific role within the European Council, whereas, at present, his or her main role is to chair the European Council. There have been some suggestions that this oversight should be rectified by giving the Prime Minister the chair of the General Affairs Council, which, under the Treaty, is to play an important role in the preparation and continuity of the work of the European Council. This would enable the Prime Minister of the Member State holding the Council Presidency to make preparations for and ensure follow-up to European Council meetings, in cooperation with the President of the European Council and the President of the Commission.
- 2.5.6. Following the adoption of a decision by the European Council with a view to amending the Treaties, the President of the European Council will convene a Convention and/or an IGC (Article 48(2) TEU).

The Treaty does not specify whether the President of the European Council will have a role to play in this.

In the past, the Chairman of the Convention has been appointed either by the Convention itself or by the European Council. At each Convention, the chairman has played an extremely important role. It would be advisable to continue to have a specific Convention chairman.

IGCs are currently chaired by the Council Presidency, which also chairs the European Council. Although the Treaty does not specifically provide for this, there is nothing to prevent the President of the European Council from being invited to chair an IGC. Similarly, it is not incompatible with the new Treaty for the Council Presidency to continue to chair IGCs.

Recommendation

Parliament could propose that an interinstitutional agreement be concluded with the European Council, placing Parliament's role in IGCs on a formal footing. Care must, however, be taken to ensure that Parliament is no less closely involved than it was at the last IGC.

3. Council (Article 16 TEU)

3.1. The Council will, jointly with the European Parliament, exercise legislative and budgetary functions.

The Treaty explicitly gives the Council the role of a legislative chamber, on the same footing as Parliament. This is a logical consequence of the extension of codecision.

It follows that Parliament should have the same privileges that the Council has in respect of the work of Parliament and of the Commission (e.g. involvement in certain working parties and access to certain documents).

Along the same lines, the Treaty stipulates that the Council must meet in public when it deliberates and votes on a draft legislative act.

3.2. The Council will act by a qualified majority except where the Treaties provide otherwise.

The Treaty includes a number of 'bridging clauses' ('passerelles') empowering the European Council (acting unanimously) to authorise the Council to use, in specific areas, qualified-majority voting instead of unanimity and the ordinary legislative procedure instead of a special legislative procedure. Although little, if any, use has been made of such bridging clauses, their inclusion is indicative of the direction in which the Member States meeting within the IGC wished to move.

3.3. The Council will meet in different configurations, a list of which is to be adopted by the European Council.

The Treaty nonetheless makes specific reference to two such configurations, namely the General Affairs Council and the Foreign Affairs Council (Article 16(6) TEU). It does not do so by chance, since the intention was to stress that the two configurations play a central role in the workings of the Council. The Treaty gives each of the two configurations a specific remit.

At present, the General Affairs Council and the Foreign Affairs Council are both made up of the Foreign Ministers. Since the introduction of the common foreign policy under the Maastricht Treaty, the Foreign Affairs Council has pushed the General Affairs Council into the background. The Convention wished to stress the essential role that the General Affairs Council has to play in the new institutional setup.

3.3.1. The General Affairs Council will play a fundamental, threefold, role in the new institutional balance, involving:

- ensuring consistency in the work and activity of the different Council configurations;
- coordinating the Council's work with that of the Commission and Parliament;
- preparing and ensuring the follow-up to meetings of the European Council, in liaison with the Presidents of the European Council and the Commission.

Furthermore, the General Affairs Council will have its own specific areas of responsibility, namely institutional matters and matters (e.g. enlargement) affecting a number of policy areas.

Consideration might also be given to making the General Affairs Council responsible for adoption of the budget and the multiannual financial perspectives.

The General Affairs Council will be the political equivalent of Coreper. As part of its coordination remit, it will need to settle matters under discussion which, at present, are too easily referred to the European Council owing to a failure on the General Affairs Council's part to take the necessary action.

- 3.3.2. The Foreign Affairs Council will have responsibility for all of the Union's external action, and not just the CFSP.

One specific issue needs to be addressed in connection with the common security policy. The Treaty stipulates (Article 42 TEU) that the common security and defence policy is an integral part of the CFSP. It would therefore not be appropriate to set up a specific Council configuration covering security and defence. It would be preferable to continue with the current practice of inviting Defence Ministers to Foreign Affairs Council meetings, particularly since the High Representative has responsibility for both policies. What is more, Declaration 9 (on Article 16(9) TEU) stipulates that the Chair of the Political and Security Committee is to be held by a representative of the High Representative.

- 3.3.3. In so far as the General Affairs Council and the Foreign Affairs Council have very different remits, they should have different compositions. While the Foreign Ministers should clearly make up the Foreign Affairs Council, it is less clear why they should be also members of the General Affairs Council, as is currently (for historical reasons) the case. The Foreign Affairs Council's workload has become so heavy that it is unrealistic to ask the same people to be involved in the two configurations. It is to be hoped that the Member State governments will draw the appropriate conclusions.

The Prime Ministers could also play a role in the General Affairs Council, in particular in preparations for European Council meetings when their Member States hold the Council Presidency. They could thus, together with the President of the Commission, help to prepare and ensure the continuity of the work of the European Council.

- 3.4. The Chair of all the Council configurations (with the exception of the Foreign Affairs Council) will be held by representatives of Member States on a basis of equal rotation.

At first sight, the Treaty of Lisbon confirms the present arrangements. However, the draft decision of the European Council implementing a number of Treaty articles, in particular Declaration 9 (on Article 16(9)) contains an important provision, namely that the Presidency will be held by pre-established groups of three Member States. Unlike the current troika arrangements, under which one Member State joins and another leaves every six months, under the Treaty of Lisbon the group will remain the same for a period of 18 months.

The European Council decision naturally specifies that the groups will be formed with due regard for their diversity and geographical and demographic balance.

The troika could, in consultation with the Commission and Parliament under the multiannual programming arrangements, draw up an 18-month programme, which would ensure greater continuity of action (see section E below).

Recommendation

Parliament should invite the Prime Ministers of the Member States forming the troika to present their 18-month programme. During the 18-month period, the Prime Minister of the Member State holding the Presidency would appear before Parliament at the beginning of the Presidency's term, to present its programme, and, at the end, to report on the outcome.

- 3.5. A new protocol places the Euro Group on a formal footing, with a stable two-and-a-half-year presidency.

The President will be elected by the group. The President's priority will need to be to ensure the provision of information to and coordination with the Ecofin Council. It would be advisable for the President to be invited to attend European Council meetings when economic and monetary policy is being discussed.

Although it uses the wording 'special provisions for enhanced dialogue', this protocol could be a model for enhanced cooperation arrangements. This also applies to the provisions specific to Member States whose currency is the euro, which are set out in Chapter 4 of Title VIII (Economic and Monetary Policy) of Part Three of the TFEU.

These provisions enable the Euro Group to adopt 'appropriate measures to ensure unified representation within the international financial institutions and conferences' (Article 138(2) TFEU).

4. Commission (Article 17 TEU)

- 4.1. The Treaty of Lisbon (Article 17 TEU) confirms and clarifies the Commission's remit and tasks (as they have developed over the years), setting them out in greater detail than the current Treaty does.

The fact that the Treaty explicitly gives the Commission responsibility for initiating the Union's annual and multiannual programming and suggests that interinstitutional agreements be concluded thereon is extremely important. Given that the Community's competences have been extended, particularly in the JHA sphere, it is crucial for the new Commission to draw up a programme for the legislative term as soon as it is appointed (see section E below).

The Treaty also gives the Commission a representation role within its spheres of responsibility. This makes it the third entity, after the President of the European Council and the High Representative, with responsibility for representing the Union. Coordination will clearly be required.

Article 17(2) TEU confirms the Commission's right of legislative initiative. In practice, therefore, the Commission retains its quasi-monopoly powers in this area.

- 4.2. The principal new provision of the Treaty of Lisbon in regard to the Commission relates to its composition. From 1 November 2014, the Commission should have a number of members corresponding to two thirds of the number of Member States.

The European Parliament has considered since the 2004 IGC that the reduction in the number of Commissioners is an essential reform, and in fact found it regrettable that this would not become operative until 2014.

The European Parliament considered that the number of Members of the Commission needed to be cut in order to preserve the collegial nature of the Commission.

However, the European Council of December 2008, pointing out that the treaties in force required the number of Members of the Commission to be cut in 2009, agreed that, on condition that the Treaty of Lisbon entered into force, a decision would be taken, in accordance with the necessary judicial procedures, for the Commission still to include a national of each Member State.

The conclusions of the European Council of December 2008 therefore make it clear that, if the Treaty of Lisbon is not ratified, Article 213 of the Treaty of Nice continues to apply.

- 4.3. The Treaty of Lisbon enhances the role of the President of the Commission who, as one Treaty has followed another, has moved from being a '*primus inter pares*' to a true 'president' of the body. The agreement secured at the December 2008 European Council to retain a Commissioner for each Member State will help strengthen the role of the President even more. Hence the new Treaty stresses that it is the President who will decide on the internal organisation of the Commission. The President must give his or her consent to the appointment of the High Representative. Furthermore, Commissioners must resign at the President's request. The Treaty of Lisbon enhances the President's legitimacy by providing for his or her election by the European Parliament and by requiring the European Council to take account of the elections to the European Parliament before putting forward a candidate. This gives the President of the Commission genuine democratic legitimacy. It is felt by some that political parties could further enhance this legitimacy by putting forward their candidate for President during

the EP election campaign.

Conclusion

In response to the Treaty of Lisbon, the EU's political institutions will need to seek a new interinstitutional balance.

The Treaty reaffirms and strengthens the parliamentary principles underpinning the Union's operation.

Parliament will be fully involved in legislative work following the extension of codecision. The scope of its legislative powers will include JHA matters. It will have full budgetary powers – at least over expenditure. It will be fully involved in the Union's external action.

The European Council will become an institution. It will need to determine where it stands in the institutional setup vis-à-vis the other institutions, particularly since it will not be involved in law-making, which will be the exclusive preserve of Parliament and the Council (on a proposal from the Commission). The European Council will play an important role as a driving force and will identify the strategic interests and objectives of the Union's external action.

The Council will become a legislative chamber, on the same footing as Parliament. In fact, it will have slightly more extensive legislative powers than the European Parliament, particularly in budgetary matters, and will play an essential role in the CFSP sphere. Special attention should be drawn to the General Affairs Council's crucial coordination role.

Despite the efforts to secure a more stable and simplified Council Presidency, the Treaty of Lisbon in fact makes the system more complicated. In future, there will be three stable presidencies (European Council, Foreign Affairs Council and Commission), plus the President of the Euro Group and a rotating presidential troika within the Council. Cooperation and good relations between the holders of these offices will have a crucial bearing on the smooth operation of the Union. It would be advisable for such cooperation to be suitably structured.

C. INTERINSTITUTIONAL RELATIONS

1. For relations between the various EU institutions to be properly organised, it is important for the Treaty to provide a sound legal basis for the conclusion of interinstitutional agreements (Article 295 TFEU). The Treaty states that such agreements may even be binding.
2. Multiannual and annual programming of legislative and budgetary work is essential in order to enable the institutions to work together effectively. The Treaty explicitly gives the Commission responsibility for initiating annual and multiannual programming. It suggests that interinstitutional agreements should be concluded thereon. This report suggests that a framework agreement should be concluded between the Commission, the Council and Parliament in accordance with Article 17(1) TEU (see section E below).
3. The Treaty on European Union uses almost exactly the same wording to define the remit

of the European Parliament (Article 14) and the Council (Article 16), thus emphasising the 'bicameralism' of the Union's parliamentary system. The provisions on, among other things, access to information and involvement in working parties therefore need to be aligned.

4. The fact that the European Council will become an institution in its own right will bring about a change in interinstitutional relations, with particular reference to relations with the Council, which are at present strongly influenced by the fact that the European Council and the Council share the same presidency. The Treaty of Lisbon establishes a separate presidency for each of the two institutions.

4.1. The European Council will elect its President by a qualified majority for a term of two and a half years, renewable once. The President of the European Council will be responsible for ensuring the preparation and continuity of the work of the European Council in cooperation with the President of the Commission and on the basis of the work of the General Affairs Council.

4.2. The Treaty on European Union reorganises the Council Presidency.

4.2.1. Under Article 1 of the draft decision of the European Council (Declaration 9), the Presidency of the Council, with the exception of the Foreign Affairs configuration, will be held by pre-established groups of three Member States for a period of 18 months. Each member of the group will in turn chair for a six-month period all configurations of the Council (with the exception of the Foreign Affairs configuration) and Coreper.

The troika is an innovation that could help to ensure greater continuity in legislative work.

4.2.2. The High Representative of the Union for Foreign Affairs will chair the Foreign Affairs Council.

Conclusion: the European Council, the Commission and the General Affairs Council will have a stable presidency throughout the legislative term. The Council will have a rotating presidency.

5. The Council's rotating presidency could find itself at a disadvantage to the three stable presidencies. This is not the Treaty's intention, but is something that might happen in practice. A weaker presidency could result in a weaker Council. The Council Presidency plays an important role both in coordinating the Council's work and in cooperation and codecision with Parliament and the preparation of European Council meetings. Now that codecision has been extended, a well-organised Council is in Parliament's interest.

6. The Treaty emphasises the crucial role that the General Affairs Council and its Chair are to play in coordinating the Council's work. The General Affairs Council will have an essential role as regards both coordination within the Council and the Council's relations with the other institutions. It will be Coreper's political equivalent. It also needs to return to being the body that settles disputes within the Council, thus breaking the habit of referring many such disputes to the European Council, which unnecessarily clutters that body's agenda.

The Treaty also highlights the role to be played by the General Affairs Council in the Council's relations with the other institutions and, specifically, in preparations for and the follow-up to European Council meetings.

Over recent years, the General Affairs Council, which has the same composition as the Foreign Affairs Council, has been pushed onto the sidelines by the increase in the Foreign Affairs Council's workload. It is to be hoped that Member State governments will understand that the General Affairs Council must have a different composition from the Foreign Affairs Council if it is to be able to return to playing its proper role.

Parliament should invite each Council Presidency to present and review its programme in plenary. Contacts between the Presidency and EP committees need to be maintained and even stepped up. The Council is, with the Commission, Parliament's codecision partner.

7. Declaration 6 stresses the need for the choice of the holders of the three stable presidencies to respect the 'geographical and demographic diversity of the Union and its Member States'. Although the declaration does not say so, due account should also be taken of the need for a political balance and a gender balance. A calendar and procedure for striking the best balance are suggested in section D below.

Recommendation

1. The Treaty provides a 'constitutional' basis for interinstitutional agreements forming the legal basis for agreements between the institutions. It would be advisable to negotiate, in accordance with the Treaty, a number of framework agreements underpinning basic relations between the institutions.
2. Parliament, the Council and the Commission should come to an agreement on how to organise multiannual (parliamentary term) and annual programming and on a timetable for appointments at the start of the legislative term (see sections D and E below).
3. As co-legislator with the Council, Parliament should have the same rights, including as regards access to specific documents and involvement in specific working parties.
4. Parliament considers that the Council Secretariat, which, under the Treaty, is to act as secretariat for the European Council, should include a department with specific responsibility for assisting the European Council. Furthermore, it would be advisable for the European Council's budget to include funding for a private office for the President of the European Council modelled on the President of Parliament's Private Office.
5. The European Council's Rules of Procedure should establish the arrangements for relations between the European Council and Parliament, to include arrangements for attendance by the President of Parliament at European Council meetings. Consultations should be held between the President of the European Council and the President of Parliament towards this end.

6. Parliament's Rules of Procedure should stipulate that the Prime Minister of the Member State holding the Council Presidency will present the Presidency's programme to Parliament at the beginning of the Presidency's term of office and provide Parliament with an assessment of the outcome at the end of that term of office. It should, furthermore, stipulate that the presidential troika will also present its programme for the next 18 months.
7. Contacts between the Council Presidency and EP committees need to be stepped up.
8. Parliament draws attention to the crucial role that the Treaty gives the General Affairs Council and its Chair in the new interinstitutional balance. The General Affairs Council will be Coreper's political counterpart and will have an essential role to play in coordination both within the Council and with the other institutions.

The General Affairs Council will need to play an essential role in coordinating the work of the various Council configurations and settling any disputes within those configurations, which must not be systematically referred to the European Council. Parliament stresses the importance of Prime Ministers being involved, particularly when their Member States are holding the six-month Council Presidency.

Parliament stresses that, in accordance with the Treaty, the General Affairs Council must be a Council configuration separate from the Foreign Affairs Council. These are two key Council configurations with very different remits and two different Chairs. Each should therefore have its own separate membership. Being a member of both Council configurations will no longer be viable in the new institutional setup, because membership of one will always detract from the effectiveness of membership of the other. Parliament urges the Member States to note the need to restore the General Affairs Council to its rightful role and to take appropriate steps to ensure this.

9. Parliament draws attention to the important role to be played by the Commission as the initiator of annual and multiannual programming in the legislative as well as the financial and budgetary spheres.
10. Parliament stresses the importance of regular structured consultations between Parliament, the (General Affairs) Council and the Commission on the organisation of legislative and budgetary work.

D. (FIRST) APPOINTMENTS

1. Declaration 6 specifies that 'in choosing the persons called upon to hold the offices of President of the European Council, President of the Commission and High Representative of the Union for Foreign Affairs and Security Policy, due account is to be taken of the need to respect the geographical and demographic diversity of the Union and its Member States'. To which may be added: 'as well as political diversity and gender balance'.

Given that Article 17 TEU stipulates that the European Council will propose a candidate for President of the Commission, 'taking into account the elections to the European Parliament', it would be advisable not to start the appointment process until after the EP elections have been held, in order to be in possession of all the information required in order to achieve the balance referred to in Declaration 6.

The election of the President of the Commission (in July) would be followed by the appointment of the Commission together with the High Representative/Commission Vice-President (in October). The cycle would end with the election of the President of the European Council (in November).

That order of events would have the advantage that the results of the EP elections would be known from the outset. Furthermore, the outgoing President of the European Council (who, once in his or her second term, cannot be reappointed) will be in the best position to organise the necessary consultations between Parliament and the European Council before the candidates are proposed for President of the Commission, High Representative and the other Members of the Commission. With that system, it is the outgoing President of the European Council who holds consultations with Parliament prior to the decision by the European Council on the proposal of a candidate to be put forward for election by the European Parliament.

This would give us the following timetable:

First week in June: European Parliament elections

- weeks 1 and 2: political groups are formed
- week 3: the President of the European Council holds consultations concerning the President of the Commission with the political group chairmen
- weeks 4 and 5: the European Council, acting by a qualified majority, proposes a candidate for President of the Commission

Mid-July: the President of the Commission is elected by Parliament following a hearing

- July - August - September: the President-elect submits the list of Commissioners to the European Council for approval. The European Council proposes a candidate for High Representative, with the agreement of the President of the Commission
- before mid-October: Parliament gives its consent to the composition of the Commission, including its President and the High Representative

Mid-October: the Commission is appointed by the European Council

November: Election of the new President of the European Council

We should recall that Parliament has asked in a resolution¹ for the date of the elections to be brought forward by a month, i.e. to mid-May, in order to facilitate the procedure suggested above. This would leave more time for consultations in preparation for the election of the President of the Commission.

Recommendation

An agreement should be concluded between the European Parliament and the European Council on the timetable and procedure for appointments. Parliament might suggest that the process could kick off with the EP elections, as proposed above.

2. Article 17 TUE states that the Commission President shall be elected by the European Parliament. Nominations are made by the European Council 'taking into account the elections to the European Parliament and after having held the appropriate consultations'. The Treaty, correctly, does not refer to a formal consultation of Parliament. Declaration 11 nonetheless makes it clear that Parliament has to be involved: 'the European Parliament and the European Council are jointly responsible for the smooth running of the process leading to the election of the President of the European Commission. Prior to the decision of the European Council, representatives of the European Parliament and of the European Council will thus conduct the necessary consultations in the framework deemed the most appropriate. These consultations will focus on the backgrounds of the candidates for President of the Commission, taking account of the elections to the European Parliament, in accordance with the first subparagraph of Article 17(7). The arrangements for such consultations may be determined, in due course, by common accord between the European Parliament and the European Council'.

Parliament and the European Council could agree on the following procedure. The European Council would meet with the outgoing President of Parliament and, separately, each of the political group chairmen (accompanied or not by the president of the party concerned or a small delegation). These consultations would take place three weeks after the elections, thus enabling the groups to organise themselves over the first two weeks. The European Council could mandate its President to carry out the consultations and report back to it. This procedure would avoid Parliament having to take a formal position (which would be contrary to the Treaty), while allowing the European Council to be fully informed on the positions of the political groups in Parliament.

This procedure would have to be undertaken under severe time constraints. Obviously, should the European Parliament elections take place, as Parliament would like them to, in mid-May (rather than mid-June as is now the case), the timetable for the procedure would be less tight.

¹ Resolution on guidelines for the approval of the Commission (paragraph 3), adopted on 11 December 2005 on the basis of the report by Andrew Duff.

Recommendation

The following proposals are made for 'appropriate consultations' (Article 17(7) TEU) after the elections with a view to the nomination of a candidate by the European Council for the Commission presidency: Parliament should be allowed two weeks after the EP elections for the forming of its political groups; over the third week, the (President of) the European Council would consult the outgoing President of Parliament and, separately, each of the political group chairmen (accompanied or not by their party chairman or by a small delegation).

3. Commission

It is to be borne in mind that, following the Duff report¹ on guidelines for the approval of the European Commission, Parliament's Rules of Procedure with respect to the approval of the Commission have been amended².

4. First appointments

It is now clear that, even if the ratification process is successfully completed in Ireland, that will not happen before the European elections in June 2009. Hence the Treaty of Lisbon will, at best, not enter into force until after the European elections in June 2009, when the next Parliament is already in place. Amongst the issues that raises are its implications for Parliament itself and for the appointment of the next Commission.

The conclusions of the December 2008 European Council on resumption of the ratification process in Ireland have provided new points of reference, in the light of which the transition can be reconsidered with a view to the Treaty of Lisbon probably entering into force towards the end of this year or right at the start of 2010.

4.1. European Parliament

This report does not, in principle, deal with the composition of the European Parliament. However, it is worth considering briefly whether the position defined by Parliament in the Lamassoure-Severin report has been taken into account in the conclusions of the December 2008 European Council. It should be borne in mind that, with the sole addition of one Member (750, plus the President³), the Lisbon European Council had confirmed the European Parliament's political proposal in that report. Logically, the European Council notes that the elections will in any event have to be conducted in accordance with the Nice system (which provides for 736 Members, with a maximum of 99 for Germany and a minimum of five for Malta). That means that, if the Treaty enters into force some time after the elections, the number of Members for certain Member States will need to be increased in accordance with

¹ A6-0179/2005: Report on guidelines for the approval of the European Commission (7 June 2005, Andrew Duff).

² A6-0198/2008: Report on amendment of Parliament's Rules of Procedure with respect to the approval of the Commission (29 May 2008).

³ With a maximum of 96 and a minimum of 6 per Member State, the distribution of seats between Member States being based on 'degressive proportionality'.

the European Parliament's proposal¹. However, it will not be possible to reduce the number of German Members during the term of office. Hence the only reasonable solution is the one specified by the European Council, i.e. that the number of Members is to be provisionally increased (until the 2014 elections) to 754 (+3). That could be done, for example, by incorporating in a protocol a transitional rule whose ratification should not present any problems².

In the meantime, provided that the Treaty of Lisbon is approved, those Members could be invited to sit as observers, without voting rights.

4.2. Procedure for appointment of the Commission

4.2.1. The European Council of December 2008 stipulated that the procedure for appointing the future Commission, in particular the appointment of its President, would be started without delay after the election of the European Parliament in June 2009.

In principle, that means that the procedure for appointing the future Commission would be commenced in accordance with the provisions of the Treaty of Nice. Since the decision of the European Council of December 2008 only refers explicitly to the appointment of the President of the Commission, the question arises as to whether it is the intention of the European Council that the whole procedure should be conducted according to the same rules.

Clarification is therefore needed as to how the procedure for the appointment of the next Commission is to be conducted, particularly in the light of the calendar and the different implications of the various phases of the procedure, in accordance with the Treaty of Nice or the Treaty of Lisbon.

4.2.2. If the process of appointing the next Commission, particularly as regards the appointment of its President, is initiated without delay after the European Parliament elections in June 2009, the process will be starting at a time when the Treaty of Lisbon has not yet been ratified; in practice, the powers of the European Parliament in the process for the appointment of the Commission President are considerably strengthened by the Treaty of Lisbon.

According to the Treaty of Nice, the President of the Commission is to be nominated

¹ A6-0351/2007: Report on the composition of the European Parliament (3 October 2007, Alain Lamassoure and Adrien Severin).

² Public statements by certain European leaders, including President Sarkozy, suggest the possibility of doing so when the treaty for the accession of Croatia is signed. That might be possible if the Treaty were signed and ratified in time for the composition of the European Parliament to be adapted on a date close to that on which the Treaty of Lisbon entered into force. However, such an adaptation would then have to be coupled with the addition of the number of Members to be allocated to Croatia, which would increase the number of Members of the European Parliament to over 754, even during the 2009-2014 parliamentary term. That might be conceivable, on condition that a political agreement had informally been secured with the European Parliament (as was done before the adoption of the Treaty of Lisbon), bearing in mind that, after the entry into force of the Treaty of Lisbon, it will be for the European Parliament, on its own initiative and with the approval of the European Council, to decide on the composition of the European Parliament, and in particular to decide on a redistribution in order to revert to 751 by the 2014 elections, in accordance with the principles and procedure laid down in the Treaty of Lisbon.

by the Council in the composition of Heads of State and Government and the nomination approved by the European Parliament, whilst the Treaty of Lisbon provides that the President shall be elected by the European Parliament on a proposal by the European Council, after appropriate consultations.

Parliament therefore needs to take particular care to ensure that its prerogatives are not called into question and that a situation is not reached in which a President is appointed 'in accordance with the Nice procedure' to exercise powers 'in accordance with the Lisbon procedure'.

If the European Council adheres to its decision of December 2008, the European Parliament must insist that the Heads of State and Government (informally) take account of the new powers acquired by Parliament under the Treaty of Lisbon in respect of the appointment of the Commission President. In particular, the election results must be taken into account and consultations held with the main political groups represented in the European Parliament. If the European Council wishes to take such action, it must allow sufficient time for consultation after the European Parliament elections in order to propose to the European Parliament a candidate for President of the Commission. That procedure would have the advantage that it would be substantially consistent with the new rules of the Treaty of Lisbon, without being unlawful according to the Treaty of Nice currently in force¹.

If the Treaty of Lisbon is ratified, the European Parliament will then be able to elect the President of the Commission formally, having previously approved the nomination in accordance with the procedure laid down in the Treaty of Nice, particularly since the European Council will have followed the consultation procedure provided for by the Treaty of Lisbon when nominating the candidate after the European elections.

- 4.2.3. The position is different in the case of the Commission, in that the Treaty of Nice provides that there will be fewer Commissioners than Member States (which, according to the declaration by the European Council of December 2008, would no longer be the case if the Treaty of Lisbon entered into force). Furthermore, the Treaty of Nice, unlike the Treaty of Lisbon, does not provide for a Vice-President/High Representative.

If the Irish ratify the Treaty of Lisbon in a further referendum, it does not seem clear that the new Commission is to be appointed in accordance with the Treaty of Nice. The Commission would have to be formally appointed and take up office in the configuration and with the competences provided for by the Treaty of Lisbon after it entered into force. In other words, taking the most optimistic view and assuming that

¹ In fact, that would more or less be simply a repetition of the 2004 scenario, which already informally corresponded to a large extent to what was advocated in the Constitutional Treaty that had just been concluded and was subsequently confirmed in the Treaty of Lisbon. The European Council would be demonstrating political will by showing a willingness to take account of the wishes of the European electorate. Furthermore, it must not be forgotten that, even without providing for the President of the Commission to be elected by the European Parliament, the Treaty of Nice already stipulates that the candidate nominated by the European Council is to be approved by the European Parliament, whose decision is not only political but also legally binding (with another important difference: whereas the Treaty of Lisbon requires an absolute majority for that person's election, according to the Treaty of Nice, approval requires only a simple majority).

the Irish referendum is held by October 2009 at the latest, at the beginning of 2010.

- 4.2.4. In fact, according to the Treaty of Nice¹, the term of office of the present Commission ends on 31 October 2009. The only way to alter that arrangement would be to amend primary law (protocol, etc.), which does not appear to be a priority for the 27. If, on the other hand, a new Commission had not yet been appointed by that date, the present Commission would have to remain in office, but its powers would then, in all probability, have to be confined to the administration of current business. It might be possible to allow that situation to continue for a few weeks or even a month or two, but not longer.

In those circumstances it will be for the new Parliament to conduct the procedure for appointment of the new Commission as best it can, in consultation with the European Council, to enable it to proceed with due regard to the new configuration and new competences of the Commission and the new powers conferred on the European Parliament by the Treaty of Lisbon.

- 4.2.5. It is also necessary to consider the possibility that the referendum will not have a positive outcome and the Treaty of Lisbon cannot enter into force at the beginning of 2010. It must be borne in mind that the rules of the Treaty of Nice would remain applicable and that, as provided in the Protocol on the Enlargement of the European Union, the European Council would have to adopt the decision fixing the number of Members of the next Commission (which has to be less than the number of Member States of the Union) and the conditions for rotation based on the principle of equality provided for in the Protocol.

Recommendation

The political role assigned to the European Parliament in the election of the President of the Commission and the appointment of the whole Commission – including the High Representative – must, in any event, be substantially in line with the arrangements laid down in the Treaty of Lisbon, even if the procedure starts under the Treaty of Nice. The institutions would need to reach a political agreement in order to achieve that aim.

5. With regard to the Presidency of the European Council, a declaration in the annex to the conclusions of the European Council of December has laid down the following transitional measures:

In the event that the Treaty of Lisbon enters into force at a date when a six-monthly Presidency of the Council has already begun, the European Council agrees that, as a matter of transition, in order to take into account the preparatory work and ensure harmonious

¹ As amended by the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded (Article 45(c)).

continuity of work:

- the competent authorities of the Member State holding the six-monthly Presidency of the Council at that time will continue to chair all the remaining meetings of the Council and the European Council, as well as third-country meetings, until the end of the period of office;
- the following six-monthly Presidency of the Council will be in charge of taking the necessary specific measures relating to the organisational and material aspects of the Presidency of the European Council and of the Foreign Affairs Council during its period of office, in conformity with the Treaty. On these issues, close consultation will be established between this Presidency and the President (elect) of the European Council and the High Representative (designate) of the Union for Foreign Affairs and Security Policy.

E. TOWARDS AN INTERINSTITUTIONALLY PROGRAMMED LEGISLATIVE TERM

To date, we have had several effectively separate strategic and operational programming exercises among the institutions. As things stand, the Commission develops a dialogue on strategic and legislative programming with Parliament, and a parallel dialogue with the Council. However, it never happens that the two branches of the legislative authority undertake a substantial dialogue on their political priorities and the operational programming of their respective activities. The generalisation of codecision and the new provisions of the Treaty of Lisbon make it desirable that there should be interinstitutional programming of this type.

1. The innovations introduced by the Treaty of Lisbon

The modifications introduced by the Treaty of Lisbon with regard to programming make it possible to improve this state of affairs if the political will exists.

- 1.1. With regard to the Commission, the institution which essentially has the right of legislative initiative, Article 17 states that it shall 'initiate the Union's annual and multiannual programming with a view to achieving interinstitutional agreements'.
- 1.2. With regard to the European Council, Article 15(1) TEU states: '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'.

This general task is complemented by a specific task relating to the area of freedom, security and justice. Article 68 TFEU states: 'The European Council shall define the strategic guidelines for legislative and operational planning within the area of freedom, security and justice'.

- 1.3. With regard to the Council, Article 16 TEU states that 'it shall carry out policy-making and coordinating functions as laid down in the Treaties'.

Declaration 9 contains a draft European Council decision on the exercise of the Council presidency, whose Article 1(2) states: 'Each member of the group shall in turn chair for a six-month period all configurations of the Council, with the exception of the Foreign Affairs configuration. The other members of the group shall assist the Chair in all its responsibilities on the basis of a common programme. Members of the team may decide alternative arrangements among themselves'.

Article 3 of the same draft decision adds: 'the General Affairs Council shall ensure consistency and continuity in the work of the different Council configurations in the framework of multiannual programmes in cooperation with the Commission. The Member States holding the Presidency shall take all necessary measures for the organisation and smooth operation of the Council's work, with the assistance of the General Secretariat of the Council'.

- 1.4. The Treaty of Lisbon also provides a legal basis for multiannual financial programming (cf. point 3 below). This implies a link between political and legislative programming, even if such a link is not explicitly stated in the Treaty.

2. Some questions on the scope and content of programming

- 2.1. Programming is, by its nature, a necessary interinstitutional exercise: were each EU institution to pursue its own political agenda in splendid isolation, not consulting with the other institutions, and define its own calendar following its own priorities, articulation between the institutions would be very difficult, and both the coherence of the Union's policies and the implementation of procedures would suffer. Programming is, then, a practical necessity, as a requirement entailing coordinating the different institutions' activities around certain jointly defined objectives. However, in no circumstances does it mean calling in question either the specific powers of each institution or the decision-making procedures laid down in the Treaties - still less the deadlines established by those Treaties, which are mandatory.
- 2.2. This is clear from the formulation of Article 17: the Commission has powers of initiative in respect of programming, and the latter can, but does not have to, result in interinstitutional agreements.

Formal recognition has at last been given to interinstitutional agreements in Article 295 TFEU, which states: 'The European Parliament, the Council and the Commission shall consult each other and by common agreement make arrangements for their cooperation. To that end, they may, in compliance with the Treaties, conclude interinstitutional agreements which may be of a binding nature'.

It is hardly difficult to deduce from this provision that interinstitutional agreements may or may not be binding, depending on the parties' intention. It is also equally clear that such agreements, even where they are recognised as binding, cannot constrain the powers of the institutions as defined in the Treaties.

- 2.3. With regard to the scope and content of programming, one may also distinguish between:
 - a) strategic programming initiatives with an essentially political content, defining the

Union's political objectives and priorities for a certain period;

- b) initiatives aimed more at the operational programming of activities (organisation of work, definition of calendars, exchange of information on the following of procedures, etc). The present report will concentrate on the requirements of the first type of programming, while not denying the importance of the second type for achieving the objectives defined via strategic programming.

2.4. Declaration 9 could cause confusion insofar as its Article 3 refers to 'multiannual programmes' in the context of the role of the General Affairs Council, while its Article 12 speaks of the 'common programme' (for 18 months) of the groups of three presidencies. The obvious interpretation would be that 'multiannual programming' refers to that which is initiated by the Commission (Article 17(1) TUE), and 'common programme' to the joint programmes of the presidential troikas, which are to be integrated into the multiannual programming. It would be useful if the Council could specify more clearly the relationship between these two types of programming.

2.5. When one speaks of programming, one thinks above all of the trio Commission/Parliament/Council. However, two other players must be taken into account, namely: the European Council, in view of its role of political dynamisation; and the High Representative, in his capacity as President of the Foreign Affairs Council.

3. The link between strategic programming and financial programming (multiannual financial framework)

3.1. It is also essential to establish a link between strategic programming and financial programming, the latter now being explicitly recognised in the Treaties for the first time, even being defined as legally binding with regard to the annual budget. The Treaty provides for the adoption by the Council, with the approval of Parliament, of a regulation setting out the multiannual financial framework, to cover at least five years. The political and legislative nature of multiannual financial programming is clear: it defines the Union's political priorities (in the areas of activity to receive financial support), as well as the means for realising them. The definition of a multiannual financial framework is, besides, always accompanied by a legislative package in which the Commission lays down the initiatives required to equip the Union with the operational programmes for which the appropriations are foreseen.

3.2. Legislation having a financial impact is not, however, the only kind of legislative activity of the Union over the period concerned. Half of EU legislation might be considered not to have a financial impact. This includes: a large part of internal market legislation; legislation on the approximation or harmonisation of national law in diverse areas; fiscal legislation; legislation on judicial cooperation in the fields of civil and criminal law, etc. It is thus important that strategic programming should take account of such legislation. In addition, for some major legislative projects of this kind the duration of the procedure can be much longer than that of the term of office of both Commission and Parliament (a case in point is the European company statute), and particular monitoring is thus required. Moreover, certain long-term political projects concerning the future of the Union - an example being the Lisbon strategy - may extend over several legislative terms.

4. Towards a contract/programme for the legislative term

- 4.1. In this context, it is recommended that interinstitutional programming should be part of a full-blown 'contract' or 'programme for the term', embodying a strategic programme for the legislative term agreed among the institutions. To this end, the Commission should, at the beginning of its term, present the political priorities and strategic objectives for the five years of its term of office.

When making this presentation, which should be done before the end of the calendar year in which it assumes office, the Commission should also include the initial elements relating to the necessary evolution of the Union's finances in the context of supporting its strategic objectives.

On the basis of the priorities and objectives presented by the Commission, the institutions - Commission, Parliament and Council - could then agree on a full 'programme' or 'contract for the term' which would guide the Union's action over the period.

This 'contract' or 'programme' could take the form of a 'joint programme' or a special type of 'joint declaration'.

The question is whether such a programme could be made binding. Even if it can be considered as a kind of interinstitutional agreement, it would seem more logical to see it more as a political commitment: if it were called in question, the fallout would be limited to a disturbance of the mutual trust between the institutions. Nonetheless, where the relationship of trust is institutionalised, as it is between Parliament and the Commission, its disturbance could of course have significant political consequences.

- 4.2. On the basis of this common 'contract' or 'programme', the Commission could then, by the end of the month of June of the year following the beginning of its term, present its proposals for the multiannual financial framework, accompanied by the list of legislative initiatives required for implementing the specific executing programmes. The negotiations on the framework could continue over the second half of that year, such that it could be adopted by the end of that year and would thus come into force at the start of the next year (N+2 if N is the year of election of the European Parliament¹).

Given that the Treaty of Lisbon provides for a financial framework of at least five years, the above calendar would have the advantage that the period covered by the multiannual financial framework would correspond to the term of office of Parliament and the Commission.

To achieve this, it would, however, be necessary to replace the present seven-year financial programming model by a five-year one. This would require a transitional phase: the most reasonable solution would be to extend the existing financial framework (which currently goes up to the end of 2013) by an additional two years, i.e. bringing it up to the end of 2015².

¹ See, in this connection, the Böge report on the political challenges and budgetary resources of an enlarged Union (2007-2013), and also the Guy-Quint report.

² Interinstitutional agreement on budgetary discipline and sound financial management of 17 May 2006.

This is easily achievable, since the Treaty of Lisbon requires that the existing ad hoc arrangements based on interinstitutional agreements be replaced by a legislative act (a regulation) adopted under a special legislative procedure. This shift will in any case have to happen once the Treaty is in force. This would be an excellent moment for reaching an agreement on the proposed prolongation, a process which could go in tandem with the evaluation required under the existing interinstitutional agreement.

- 4.3. The 'contract' or 'programme' for the legislative term would constitute, together with the multiannual financial framework, the essential content of the multiannual programming foreseen in Articles 1, 2 and 3 of the draft decision included in Declaration 9 with regard to the Commission and the General Affairs Council.

Thus conceived, these would serve as a framework for the other programming exercises provided for in the Treaty of Lisbon, notably:

- the common programmes of each presidential troika for the 18 months of their total term (including the individual programmes of each presidency for its six-month term)¹; in this connection, from the viewpoint of Parliament, which would already have endorsed the 'contract' or 'programme for the legislative term' and the multiannual financial framework, it would be desirable to strengthen the dialogue with the presidency of the General Affairs Council and with the presidential troika in order to ensure that Parliament's voice can be sufficiently heard in the preparation of the programming. The European Parliament could also, possibly, organise debates (in committee and plenary) and take a position (via a resolution) on each of the programmes.
- the annual programming, as embodied in the presentation of the Commission's work and legislative programme; in this connection, Parliament must insist on the need to reinforce the mechanisms for dialogue concerning the presentation of the Commission's programme that now exist under the Parliament/Commission framework agreement. The Commission also discusses its programme in detail with the Council. One could consider strengthening the authentically interinstitutional aspect of this procedure in such a way that the programme ultimately becomes the outcome of a commitment by the three institutions, or else the three assume a common position on the annual programme.

- 4.4. These different strategic programming exercises must be accompanied by the necessary mechanisms regarding the existing operational programming and legislative coordination, which should, indeed, be reinforced in order to ensure a closer dialogue between the EP and the various players. This could be done both through the plenary and through the Conferences of political group chairs and committee chairs. One possibility to be looked at in detail would be to set up a high-level institutional group (e.g.: a vice-president of Parliament and/or the chair of the Conference of Presidents + the General Affairs Council presidency + a Commission vice-president), which could meet regularly to deal with operational planning, exchange of information on priority dossiers, etc.

¹ Thus conceived, the Commission's role with regard to the annual programming of the General Affairs Council corresponds to the terms of Declaration 9 and to those of the interinstitutional agreement on better legislation..

We here once more stress the importance of the General Affairs Council and its presidency in the context of such cooperation. Its role would be reinforced if, as suggested earlier in the report, the General Affairs Council took responsibility for approving the multiannual financial framework and budget.

Recommendation

1. The programming activities could be conceived as follows:

- once in place, the new Commission presents, no later than the end of the year, its political priorities and strategic objectives for the five years of its term, together with a general forecast regarding the legislative initiatives it intends to take and the evolution of the Union's finances required for achieving its proposed objectives;
- this programme is discussed with Parliament and the Council and is covered the subject of a 'contract for the legislative term' between the three institutions;
- the Commission then presents, before the end of the first half of the year following its taking office, its proposals for the multiannual financial framework, which should have a duration of five years. These proposals are accompanied by a package specifying the legislative initiatives required for finalising the programmes implementing the financial decisions. The multiannual financial framework should then be adopted by the end of the year by Parliament and the Council, so that it can come into force at the beginning of the following year (N+2, N being the year of the European Parliament elections).
 - this implies a transitional phase for the shift from the existing financial programming based on seven-year interinstitutional agreements to legally binding planning on a five-year basis; to this end, the institutions should reach agreement on the transformation of the financial framework contained in the existing interinstitutional agreement into a regulation containing the financial framework on the basis of prolonging the existing financial framework (2007-2013) up to the end of 2015, so that the next multiannual financial framework can come into force in early 2016 and cover the period up to the end of 2020.
- on the basis of the 'contract for the legislative term' and the multiannual financial framework:
 - the troika groups draw up, in cooperation with the Commission and in dialogue with Parliament, the common programme for their eighteen months of activity; on the basis of this common programme, each of the three presidencies draws up the programme of activities for the six months of its presidency, in cooperation with the Commission and in dialogue with the European Parliament;

- the Commission draws up its annual work and legislative programme, in close dialogue with the Council and Parliament;
 - Parliament and the Council adopt the annual budget;
 - the three institutions deepen the interinstitutional dialogue in order to coordinate their operational programming and their respective calendars, especially as regards the legislative calendar.
2. The institutions establish a framework agreement defining the main lines of these different programming activities.

F. THE UNION'S EXTERNAL ACTION

1. Unlike the constitutional treaty, the Treaty of Lisbon does not group all the provisions on the Union's external action in a single chapter. The former text included those provisions in Title V of its third part (corresponding overall to the Treaty on the Functioning of the European Union). The Convention's aim here was to stress the unity of external action.

By including the provisions on the CFSP in the Union Treaty (Title V TEU)¹ and those on *external action in areas other than the CFSP* in the fifth part of the TFEU, the 2007 IGC clearly expressed the intention to distinguish between the two. In addition, Article 40 TEU states that the implementation of each of the two policies must not affect the procedures and scope of either.

Even if the difference is essentially symbolic and without major practical effects - given, notably, that with the Union's acquisition of legal personality the pillars disappear, and Article 1(2) TFEU clearly states that the two Treaties have strictly the same legal force - it does nonetheless bear witness to an approach and sensibility that are divergent.

The goal, nonetheless, obviously remains the global coherence of external action. This is explicitly stressed by the Treaty of Lisbon: Article 21 TEU uses a formulation similar to that of the two parts referring to foreign policy (Article 23 TEU and Article 205 TFEU): 'The Union's action on the international scene, pursuant to this Chapter, shall be guided by the principles, shall pursue the objectives of, and be conducted in accordance with, the general provisions laid down in Chapter 1' (Articles 21 and 22 TEU - Title V of the Union Treaty).

The main principle with regard to ensuring the coherence of the Union's external action as a whole is, certainly, the creation of the post of High Representative for the CFSP, to be backed up by a newly established common service for external action (the European Service for External Action - ESEA). In this way the Treaty aims to create, both politically and administratively, a structural link between the various fields of the Union's external action

¹ Despite being named 'General provisions on the union's external action and specific provisions on the common foreign and security policy', this title contains only two articles defining in general fashion the guiding principles of the EU's external action as a whole: the rest concern the CFSP.

with a view to ensuring their coherence.

2. The High Representative for the common foreign and security policy

- 2.1. At present, the High Representative is (officially) the Secretary-General of the Council. In practice, he does not perform that role, and concentrates his activity on the function of High Representative as created by the Treaty of Amsterdam. Thanks to the High Representative's actions, the Union's foreign and security policy now has a higher profile. The Convention took the view that, on this basis, the office requires further boosting.

First innovation: the High Representative will chair the Foreign Affairs Council.

The aim is to increase the continuity and coherence of the Council agenda, which, under the system of rotating presidencies, has been lacking in those qualities and has been over-influenced by the specific agenda of the Member State occupying the presidency. The Treaty of Lisbon states that where there is a vote on the Foreign Affairs Council the High Representative shall not vote.

A person delegated by the High Representative is to chair the Policy and Security Committee (PSC), and his delegates may also chair the working groups preparing the Foreign Affairs Council.

Second innovation: the High Representative will simultaneously have the role of Commission Vice-President.

The purpose sought is to achieve coherence for the Union's external action while also mobilising all available means and instruments for realising the Union's objectives. It is necessary to avoid divergences between the common foreign policy's intergovernmental and Community manifestations, and to strengthen the CFSP by mobilising initiatives and resources at the Community level.

This 'two-hat' arrangement presupposes that the High Representative should enjoy the political confidence of the Council as well as, in his role as Commission Vice-President, that of the Commission President and the President of Parliament. This is obviously a derivative of the appointment procedure: the High Representative is appointed by qualified majority by the European Council with the agreement of the Commission President (Article 18(1)), and must be approved by a vote of the Commission as a whole (as well as going through the hearings process like any other Commissioner) (Article 17(7) TEU).

The High Representative may be removed by the European Council following the same procedure (this means that, should he lose his position as Commission Vice-President following a motion of censure of Parliament on the Commission, a decision of the European Council by qualified majority will also be necessary for his removal).

The importance of relations of political trust between the different institutions and the High Representative is evident. Also crucial is the relationship of trust between the Commission President and the High Representative, if the Union's external action is to operate smoothly.

Third innovation: the High Representative will be able to draw on the services of a European Service for External Action (ESEA).

This is the cornerstone of the new institutional edifice for the Union's external action. The report now being drawn up by the Committee on Constitutional Affairs sets out Parliament's position on the ESEA.

Fourth innovation: this concerns representation - under the Treaty of Lisbon, the High Representative will be directly in charge, whereas under the existing Treaty he merely assists the Council presidency.

It is thus clear that the role of the High Representative is fundamentally changed by the new Treaty. He will now have the task of conducting the Union's common foreign and security policy (including the common security and defence policy). He will contribute to its definition with his proposals, and to its execution as being mandated by the Council. He will also be responsible for ensuring the coherence of the Union's external action. Hence, within the Commission, he will assume responsibility in the field of external relations and the coordination of the other aspects of external action.

His 'two-hat' status and the back-up role of a single service for external action should enable him to ensure the coherence, continuity, efficiency and effectiveness of the Union's external action as a whole.

- 2.2. The existing Treaty does not give the High Representative the right of initiative. The new TEU will fill this gap. In the definition of the CFSP, the Member States and the High Representative, or the High Representative supported by the Commission, may approach the Council and submit initiatives or proposals. In addition, Article 22 stipulates that the High Representative and the Commission may submit concrete proposals in the context of the Union's external action. The Treaties provide for certain cases where such joint proposals will even be obligatory - adoption of restrictive measures (Article 215(2)) and means of activating the solidarity clause (Article 222(3) TFEU).

The philosophy of the Treaty thus implies that the High Representative should make all efforts to harmonise his action with that of the Commission. The Treaty of Lisbon encourages the High Representative and the Commission to act by joint agreement and draw up joint or common proposals - both in the CFSP and the 'communitarised' context - in order to reinforce the coherence of the Union's external action as a whole and thus facilitate the adoption of the acts proposed.

- 2.3. The High Representative will have an extremely busy agenda. This is clear from the number of meetings he is expected to attend by virtue of his prerogatives as laid down in the Treaty. He will have to chair the Foreign Affairs Council, act as Commission Vice-President, represent the Union in the context of the CFSP, defend the Union's external action before Parliament, take part in the European Council, etc. His task may be eased by certain practical measures, such as the following:
 - the Foreign Minister of the Member State occupying the Council presidency could, at the request of the High Representative, chair the Foreign Affairs Council in his

absence; similarly, the High Representative could entrust the Foreign Ministers of the troika with certain CFSP tasks, including representation;

- other Commissioners could take part in Council meetings and be responsible for defending the Commission's position (in coordination with the High Representative): this would facilitate the exercise of the presidency. Equally, other Commissioners could be entrusted with external representation in the Community areas;
- for the CFSP, the Treaty of Lisbon states that the Council may, on a proposal by the High Representative, appoint special representatives (Article 33 TEU). As things stand, those representatives play a regional role. The new Treaty conceives their role in terms of 'a mandate in relation to particular policy issues'. The creation of Union embassies will reduce the need for special representatives at regional level; these representatives could be entrusted with horizontal tasks instead. In this connection, they could also be given certain external representation responsibilities related to their mandate. These special representatives will also work under the authority of the High Representative, and may be heard by Parliament. Their appointment could be accompanied by an EP hearing.

Recommendation

Parliament stresses that a relationship of political trust between the Commission President and the High Representative is vital for the success of the latter's role.

The High Representative and the Commission should, as far as possible, present joint initiatives, whether in the area of external action or in the more specific field of the CFSP, in order to reinforce the coherence of the Union's external action in line with the general European interest.

Measures are needed to facilitate the High Representative's tasks in practical terms.

3. A reinforced role for the European Parliament in external actions

Article 36 TEU specifies the role of Parliament in relation to the CFSP. The High Representative is to consult Parliament on the main aspects and basic options of the CFSP and CSDP and inform it of how those policies evolve. He is also to ensure that Parliament's views 'are duly taken into consideration'. The special representatives are also to participate in informing the EP. Parliament may also make recommendations to the Council and the High Representative on both CFSP and CSDP matters, and shall hold a debate twice a year on the progress made.

The EP will also be responsible for approving the Union budget in respect of administrative and operational expenditure regarding the CFSP, since the distinction between compulsory and non-compulsory expenditure has been abolished.

Parliament must also be kept informed throughout the process when international agreements are concluded in the CFSP sphere.

With regard to the other areas of external action, Parliament will exercise its usual prerogatives, participating in the adoption of legislative acts on the basis of the Treaties (generally, the normal legislative procedure, which will now be extended even to external trade). Parliament also adopts the Union budget. Regarding international agreements, it will approve, prior to their adoption by the Council: i) association agreements; ii) the agreement on accession of the EU to the European Convention on Human Rights; iii) agreements creating a specific institutional framework by organising cooperation procedures; iv) agreements having significant budgetary implications for the Union; and v) agreements covering areas governed by the normal legislative procedure (or by a specific legislative procedure where required).

It would seem desirable to establish a close link between the EP and the High Representative, who should be regularly invited to take part in the debates in plenary - in addition to the two annual debates on the evolution of the CFSP and the CSDP - and in those of the relevant committees. This practice should be extended to the special representatives and to the Commissioners responsible for specific areas of the EU's external action, as also to certain officials of the ESEA (European Service for External Action) occupying posts of obvious political importance. While Parliament must of course abide by the requirements of discretion as regards dealing with certain sensitive CFSP data, especially in the defence field¹, there will be, in parallel, opportunities for a new role for the EP in the area of external action, in the form of organising a new type of public hearing on external relations, with the participation of representatives of the various institutions or the ESEA, as well as of third countries, international organisations, etc.

4. The Treaty defines three categories of decision in the framework of the Union's external action:

- decisions in the framework of external action as a whole (Article 22 TEU);
- decisions in the framework of the CFSP (Article 26 TEU);
- decisions in areas of external action outside the CFSP.

4.1. Decisions in the framework of external action as a whole (Article 22 TEU)

The European Council is to take decisions on the definition of the EU's strategic interests and objectives in the field of external action as a whole (Article 2(1) TEU) which could concern the CFSP as a whole or the other fields of external action. It is to decide unanimously, on a recommendation by the Council adopted in accordance with the procedures in force for each area.

4.2. Decisions in the framework of the CFSP (Article 26 TEU)

The European Council is to adopt decisions identifying the strategic interests and the general guidelines and objectives of the CFSP (Article 26(1) TEU). The Council is to

¹ The entry into force of the new Treaty will also necessitate a revision of the interinstitutional agreement on Parliament's access to sensitive data in the security and defence field (interinstitutional agreement of 20 November 2002 between Parliament and the Council on Parliament's access to sensitive data in the security and defence field).

determine the CFSP and take the decisions required for its definition and implementation. These decisions will also be taken by unanimity (Article 26(2)).

The Council will also decide on the actions to be taken (Article 28(1)) and take decisions on the Union's position on specific geographical or thematic issues (Article 2(1)). These decisions too are to be taken by the Council by unanimity (Article 31(1)), unless they are based on a decision of the European Council relating to the Union's strategic objectives and interests under Article 22(1), they are taken on a proposal by the High Representative following a specific request to him by the European Council (on its own or his initiative), or they implement a decision defining an action or position of the EU (Article 31(2)). The European Council may decide by unanimous vote that the above decisions may be taken by QMV. However, none of these exceptions shall apply where the decisions have military or defence implications.

Decisions to name a special representative shall also be taken by QMV (Article 33).

The decision to create the ESEA will be taken by the Council by unanimity, on a proposal by the High Representative and subject to the approval of the Commission and the opinion of Parliament (Article 27(3)) (see above).

The Council will also adopt by unanimity (consulting the EP) the decision establishing the procedures for rapid access to EU budget appropriations for urgent CSFP initiatives. On the other hand, decisions on the arrangements for creating and financing the start-up fund, as well as its management and financial control aspects, are to be taken by QMV (Article 41 TEU).

Decisions by which the Council adopts international agreements in the field of the CFSP shall, in general, be taken by unanimity.

4.3. Decisions in areas of external action outside the CFSP

The general rule under Article 22(1) by which the European Council is to adopt, by unanimity, decisions identifying the Union's strategic objectives and interests also applies to areas of external action outside the CFSP. However, the definition and implementation of EU policy in those areas falls within the scope of the existing 'communitarised' procedures, i.e.: legislative acts adopted under the ordinary legislative procedure or a special procedure, in line with the Treaty provisions; or conclusion of international agreements, on which, as a rule, the Council decides by QMV after obtaining the approval of Parliament. Unanimity is, however, the rule in the case of certain agreements relating to the common commercial policy: trade in services, trade aspects of intellectual property, and foreign direct investment, where the agreements include provisions for which unanimity is required for adopting internal rules (Article 207(4) TFEU); trade in cultural and audiovisual services where the agreements could jeopardise cultural and language diversity in the Union; and, in certain circumstances, agreements on social services, education and health (Article 207(4)(b) TFEU). Unanimity also applies to association agreements, economic, financial and technical agreements with candidate countries, and agreements on subjects for which unanimity is required for internal decisions. The same applies to the agreement on accession to the European Convention on Human Rights (which decision has also to be adopted by all Member States in line

with their constitutional provisions before it can come into force - see Article 218(8) TFEU).

Recommendation

All decisions in the field of foreign policy should clearly indicate within what framework (and under which Treaty article) they are taken, with a view to ensuring full awareness of the procedure to be followed for both preparation and execution.

5. The Union's external representation has, under the Treaties, three dimensions:

- the President of the European Council shall ensure, 'at his level and in that capacity', the external representation of the Union on subjects relating to the CFSP, 'without prejudice to the powers of the High Representative' (Article 15(6) TEU);
- the High Representative for the CFSP shall 'represent the Union for matters relating to the common foreign and security policy' and 'conduct political dialogue with third parties on the Union's behalf and shall express the Union's position in international organisations and at international conferences' (Article 27(2) TEU);
- the Commission shall ensure the external representation of the Union, 'with the exception of the common foreign and security policy, and other cases provided for in the Treaties' (Article 17 TEU), and shall, more particularly, be responsible for external representation in areas of Community competence;
- with regard to the euro, the Treaty states that the Council, on a proposal by the Council, may adopt appropriate measures for ensuring a unified representation vis-à-vis international institutions and conferences relating to finance. The Council shall decide after consulting the ECB. The Commission has correctly insisted in a recent communication¹ that in order to bring the euro's international role into line with its economic weight it is necessary to develop common positions and consolidate representation, with the ultimate aim of securing a single seat in the international financial institutions and forums.

At first sight, the Treaty seems not to fully clarify the somewhat confused state of affairs that give rise to the famous question attributed to Henry Kissinger: 'What number do I call for Europe?'. However, this impression requires qualifying: it is the case that all Member States also have more than one post with responsibility for international representation.

It appears from the above that the representative functions will be exercised primarily by the President of the European Council. The formulation 'at his level and in that capacity' suggests that he has the role of representing the European Council in the CFSP context. He would therefore be empowered to represent the Union in its CFSP-level contacts with foreign heads of state and to ensure the organisation and/or representation of the European Council at high-level international meetings, as is at present done by the prime minister of the Member State

¹ Commission communication of 7 May 2008 on the tenth anniversary of the introduction of the euro.

presiding the European Council. However, this does not give him powers of initiative for the CSFP, nor does it make him a privileged interlocutor for the taking of political decisions in the name of the Union: that role, as far as the CFSP is concerned, clearly belongs to the High Representative.

In addition to the provisions already referred to, in particular Article 27(2) TEU, paragraph 1 of the same article confers on the High Representative the role of contributing through his proposals to the definition of the CFSP and to its execution, in his capacity as being mandated by the Council. The text adds that the High Representative shall do the same for the CSDP.

One may thus conclude that the High Representative is responsible for representing the EU in all aspects of the preparation and execution of the CFSP, including defence policy and also including the conduct of dialogue with third parties and the expression of the EU's position in international forums.

The creation of the posts of President of the European Council and High Representative means that under the Treaty of Lisbon no role of representing the Union accrues any more to either the prime minister or the foreign minister of the Member State occupying the presidency: the latter will no longer chair the Foreign Affairs Council. This does not prevent the President of the European Council and High Representative from entrusting either of those figures with certain representative tasks.

That therefore clarifies the role of the High Representative as Commission Vice-President. The Commission is responsible for representing the Union externally, other than for the CFSP.

Concerning the High Representative's role as Commission Vice-President, the Treaty states that he 'shall be responsible within the Commission for responsibilities incumbent on it in external relations and for coordinating other aspects of the Union's external action.'. The organisation of the Commission remains, nonetheless, a prerogative of its President. As Commission Vice-President, the High Representative is subject to the authority of the Commission President and to the rules governing the Commission as such. The Commission President may, of course, decide to chair meetings of the Commissioners responsible for external affairs himself.

The Union's external representation in the areas relevant to the Commission will be ensured as follows:

- directly by the Commission President (notably at prime ministerial level); or
- by the Vice-President responsible for external affairs in the Commission context and for coordinating other areas of the Union's external action. The Vice-President should also represent the Union to the external world with respect to the 'communautaire' aspect of its external relations at ministerial level (these aspects may in some cases go in tandem with CSFP matters); or
- in the case of specific portfolios having an external dimension, by one of the Commissioners responsible for a given field (the High Representative will coordinate the other aspects of the Union's external relations, but will not supplant the Commissioners

responsible for external trade, development, etc).

This interpretation is confirmed by Article 218(3) TFUE on the negotiation of international agreements, which states: 'The Commission, or the High Representative of the Union for Foreign Affairs and Security Policy where the agreement envisaged relates exclusively or principally to the common foreign and security policy, shall submit recommendations to the Council, which shall adopt a decision authorising the opening of negotiations and, depending on the subject of the agreement envisaged, nominating the Union negotiator or the head of the Union's negotiating team.'

It would seem to make sense that the negotiator for agreements falling entirely or mainly within the scope of the CFSP should be either the High Representative directly (or someone responsible to him), or else the High Representative and the Commission together, and that in other cases it should be either the High Representative in his capacity as Commission Vice-President or else the Commission through the relevant Commissioner, depending on what the Commission itself proposes.

In view of the above, one may conclude in favour of an approach fairly similar to that put forward at the beginning of this chapter.

Recommendation:

Parliament considers that the external representation of the Union should be organised around the following principles:

- the President of the European Council has a role in representing the Union on CFSP matters, while not having powers of political leadership. Where relevant, he also has a specific representative role with regard to the European Council, notably in contacts with third-country heads of state;
- the Commission - and in particular its President - should have a role in representation in the field of external relations as a whole and for the specific policies falling under the Union's external action (external trade, development, etc);
- the High Representative should, at the same time, have the role of conducting the CFSP (initiative and execution), especially in terms of representing the Union in contacts with third parties and in international forums; here, he should also take on the role currently held by the President-in-Office of the Foreign Affairs Council (in principle, the foreign minister of the Member State holding the presidency). He should also have a representative role with regard to external action as a whole or areas of that action other than the CFSP, but in such cases he will be under the authority of the Commission President and will be subject to the decisions of the Commission as a whole for those other aspects of external action.

The President-in-office of the Council or of the General Affairs Council - in particular the prime minister of the Member State holding the Council presidency - may also be called on to play the role of representing the EU at international level, by agreement with the President of the European Council or the High Representative.

6. The common security and defence policy (CSDP)

On the subject of the common security and defence policy (CSDP) as a specific area of the CFSP, the Treaty of Lisbon marks some significant advances, notably the possibility, for those Member States having the political will and the military capacity to do so, of creating a permanent structured cooperation in the defence field. This could, in the long term, lead to a common defence.

However, on the institutional level, other than the appearance of the High Representative with his new functions, there are no substantive changes.

The area remains essentially an intergovernmental one, with the Member States deciding on most issues by unanimity.

The European Council has the role of identifying the Union's strategic interests, setting the objectives and defining the general guidelines for the CFSP, including matters having defence implications within the general terms of Article 2(1) TEU. It is also for the European Council to take, when the moment comes, the decision to introduce a genuine common defence system (Article 42(2)). Such a decision will need to be taken by unanimity and approved by all the Member States in line with their specific constitutional provisions in order to take effect.

All other decisions relating to the definition and implementation of the CSDP are the responsibility of the Council, and will in almost all cases be made by unanimous vote (generally on a proposal by or after consultation with the High Representative). Exceptions are: a decision to create a permanent structured cooperation in the defence field for those Member States having the political will and the military means; and a decision relating to the status, seat and operational arrangements of the European Armaments Agency.

A specific problem is posed by this dominant role of the Council on CSDP matters: should the General Affairs Council be responsible for defence questions, or should a specific Council of defence ministers be created? Given that the CSDP is part and parcel of the CFSP and that the Treaty specifies that the CFSP is the responsibility of the Foreign Affairs Council (with the High Representative in the chair as the competent authority), and recalling also that the High Representative is competent as regards the execution of the CSDP and external representation in that area, it should logically follow that CSDP matters should fall under the umbrella of the Foreign Affairs Council. Obviously, the defence ministers would take part in the case of discussion of specific defence-related subjects. The same principle should guide the internal organisation of the European Parliament on the matter.

While Parliament does not have a specific role in this area, the High Representative nevertheless has a general duty to keep it informed of the main developments of the CFSP and to take its views into consideration. The Commission, equally, has only ancillary powers to make proposals on CSDP matters, together with the High Representative (regarding the use of Union instruments for missions in that field (Article 42(4)) and cooperating where necessary with the European Armaments Agency (Article 45(2)).

Recommendation

With a view to ensuring coherence between foreign policy and its defence aspect, matters relating to the CSDP should also be dealt with by the Foreign Affairs Council, in whose meetings the defence ministers should participate where specific defence-related issues are on the agenda.