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John Temple Lang*

Eamonn Gallagher†

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Abstract

This Article discusses several developments concerning the position of the Commission in the institutional structures of the European Union (“EU”) that have occurred since then. It does not touch on the many other matters that influenced the debate on the draft Constitutional Treaty, leading to its failure at referendum in France and the Netherlands; these matters include the scope of the draft Treaty, questions concerning its economic, social, and political benefits or disadvantages, the working of the Stability Pact in the Eurozone and the ongoing debate on freedom of services legislation, the purposes for which the EU was originally created and their modification, further enlargement of the EU, and so on. These subjects require separate treatment.

THE COMMISSION, THE “COMMUNITY METHOD,” AND THE SMALLER MEMBER STATES

John Temple Lang & Eamonn Gallagher***

The Institute of European Affairs in Dublin published in 1995 Occasional Paper 7 by the present authors, entitled *The Role of the Commission and Qualified Majority Voting*, which explained that the European Commission was designed on the basis of mediation theory, specifically to provide a safeguard for the interests of minorities that might be harmed by qualified majority voting on new policy measures.¹ The Commission has been given various other tasks, but this is the most important one since it concerns new measures that the Member States have not previously accepted. The role of the Commission, exclusively authorized by the Rome Treaty to propose legislative measures to the Council (and now also the European Parliament), is the key feature of what has since come to be called the “Community Method.”²

This Article discusses several developments concerning the position of the Commission in the institutional structures of the European Union (“EU”) that have occurred since then. It does not touch on the many other matters that influenced the debate on the draft Constitutional Treaty, leading to its failure at referendum in France and the Netherlands;³ these matters include the scope of the draft Treaty, questions concerning its economic, social, and political benefits or disadvantages, the working of the Stability Pact in the Eurozone⁴ and the ongoing debate on freedom of services legislation, the purposes for which the EU was

* Cleary Gottlieb Steen & Hamilton LLP, Brussels and London; Professor, Trinity College, Dublin; Visiting Senior Research Fellow, Oxford.

** Former Director General in the European Commission; former EEC Ambassador to the United Nations, New York.

1. See JOHN TEMPLE LANG & EAMONN GALLAGHER, *THE ROLE OF THE COMMISSION AND QUALIFIED MAJORITY VOTING* 10-15 (Inst. of European Affairs, Occasional Paper No. 7, 1995).

2. See Eurojargon, http://europa.eu.int/abc/eurojargon/index_en.htm (last visited Mar. 26, 2006).

3. See Ralph Atkins et al., *Dutch Deal a Further Blow to EU Treaty*, FIN. TIMES (London), June 2, 2005, at 1.

4. See, e.g., MICHELE CHANG, *REFORMING THE STABILITY AND GROWTH PACT: SIZE AND*

originally created and their modification, further enlargement of the EU, and so on. These subjects require separate treatment.

I. *THE AMSTERDAM TREATY*

Until recently, the larger member States nominated two Commissioners. The Amsterdam Treaty (1997) provided that, following the next enlargement of the EU, the Commission should be composed of one member from each Member State, on condition that the system of voting in the Council be changed.⁵ In effect the larger Member States agreed to give up their second nominee in return for more votes in the Council.

II. *THE TREATY OF NICE*

The Commission proposed, before the Nice conference, that it should no longer be composed of at least one nominee of each Member State, although apparently it changed its mind later.⁶ This was bad for the Commission but even more serious for the smaller member States, which need a strong and effective Commission; it was, therefore, bad for the European Community as a whole because it would remove a necessary balancing mechanism between the larger and the smaller Member States.

The Treaty of Nice (2001)⁷ provided that, with effect from January 2005, the weighting of votes of the Member States would be altered to give more voting power to the larger Member States.⁸ Two new requirements were added: in addition to a majority of 170 votes in the Council out of a total of 237, a qualified

INFLUENCE IN EMU POLICYMAKING (2005), http://aei.pitt.edu/3159/01/Chang_2005_EUSA_paper.pdf.

5. See Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, Oct. 2, 1997, Protocol on the institutions with the prospect of enlargement of the European Union art. 1, O.J. C 340/1, at 111 (1997) (amending Treaty on European Union ("TEU"), Treaty establishing the European Community ("EC Treaty"), Treaty establishing the European Coal and Steel Community ("ECSC Treaty"), and Treaty establishing the European Atomic Energy Community ("Euratom Treaty") and renumbering articles of TEU and EC Treaty).

6. See *The Strained European Union*, N.Y. TIMES, Dec. 18, 1999, at A26.

7. Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, Mar. 10, 2001, O.J. C 80/1 (2001) [hereinafter Treaty of Nice] (amending TEU, EC Treaty, ECSC Treaty, and Euratom Treaty and renumbering articles of TEU and EC Treaty).

8. See *id.*, Protocol on the enlargement of the European Union art. 3(1), O.J. C 80/1, at 50 (2001).

majority must include at least sixty-two percent of the total population of the EU and must include a majority of the Member States.⁹

Also, a protocol on enlargement attached to the Nice Treaty provided that, when the EU reaches twenty-seven Member States, the number of members of the Commission should be lower than the number of Member States, the exact number to be decided then by the Council acting unanimously.¹⁰ The members of the Commission are to be chosen according to a system of rotation as yet not formulated but meant to treat all Member States equally; and each Commission should reflect the demographic and geographical range of all the Member States.¹¹ This is the Treaty provision that is now legally in being, although not yet acted upon. It is important and it is that this is *not* an agreement to agree. The Protocol automatically reduces the size of the Commission, although it does not say by how much. Only amendment or repeal of the Protocol can alter this. Unless there is an agreement on the reduced number of Commissioners, the Commission would not be properly constituted.

This proposed change in the number of Commissioners, if carried through, would be a serious mistake in at least three respects:

1. it would add a new layer of complexity to an institutional structure that is already a patchwork quilt of illogical compromises and which is far from the clarity and relative simplicity of the Commission as an autonomous and representative mediator;
2. it would make the Commission, for the first time, less than fully representative. At any one time there will always be Member States in a position to say that, unlike other Member States, they are not in any sense participants in the Commission—and that therefore, in its proposals, the Commission is

9. *See id.*

10. *See id.*, Protocol on the enlargement of the European Union art. 4(2), O.J. C 80/1, at 52 (2001). It has been suggested that if the Council fails to reach a decision, the Commission could continue with a full membership (i.e., twenty-seven or more). As this would not be consistent with the relevant Treaty provisions it is certain that the matter would come before the European Court. For example, a corporation could challenge a fine imposed by a Commission on the ground that the Commission was improperly constituted.

11. *See* Treaty of Nice, *supra* note 7, Protocol on the enlargement of the European Union art. 4(2)-(3), O.J. C 80/1, at 52 (2001).

not in a position to deal equitably with their interests; this could by itself be used to cast doubt on the validity of the proposals.

3. The Commission is one of the three European Community (“EC”) institutions that are necessarily and always involved in the Community legislative process. It would be unjustifiable, as a matter of principle, for a legislative institution to be without a nominee of every Member State at all times.

In the preparations for Nice, the Commission paid lip service to the “Community Method,” which necessitates a Commission of the traditional kind.¹² But the Commission itself underestimated the need for it to be fully representative of all the Member States. It suggested¹³ that one Commissioner per Member State would lead to an expanded college that would have to be differently organized, by modifying the present strict rules for collective decision-making based on the equal status of all Commissioners (formal decisions by the Commission are made by simple majority of the whole Commission). The Commission proposed, in regard to the future nomination of fewer Commissioners than the number of Member States, “a system of rotation that would treat all Member States strictly equally” because “what gives the Commission its cohesiveness and legitimacy is its operation as a collective body.”¹⁴ Nevertheless, the Commission recognized that one Commissioner from each Member State meant that citizens “more easily understand the role the Commission plays in European integration.”¹⁵

This and other confused and indecisive Commissioner statements understated the case for a Commission nominee from each Member State and overestimated the objections. The statement emphasized the Commission’s less important executive functions rather than its primary policy-forming/mediating roles.¹⁶ The Member State governments have always considered

12. Cf. Markus G. Puder, *Salade Nicoise from Amsterdam Left-Overs—Does the Treaty of Nice Contain the Institutional Recipe to Ready the European Union for Enlargement?*, 8 *COLUM. J. EUR. L.* 53, 62-63 (2002).

13. See Commission of the European Communities, *Adapting the Institutions to Make a Success of Enlargement*, COM (2000) 34 Final, at 10-12 (Jan. 2000), available at http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/com/2000/com2000_0034en01.pdf.

14. *Id.* at 13.

15. *Id.*

16. See *id.* at 11 (“The Commission is the Community’s executive, taking enforce-

that, although the Commissioner they nominate does not represent them, it is important that the standpoint of each Member State should be understood by at least one member of the Commission at all times. Moving away from this clear and fundamental principle would certainly undermine the Commission.

When an institution does not know its own *raison d'être*, there is a risk that others will believe that it no longer has one. The Commission did *not* say that there would not be enough real jobs for twenty-five or more Commissioners: as the EU becomes more active in the Common Foreign and Security Policy ("CFSP") and Justice and Home Affairs ("JHA") areas (now called police and judicial cooperation), there is plenty to do. Indeed the Commission's stated concern was only about its internal decision-making procedures. This was not and is not a sufficient reason for fundamental change.

The case for having one Commissioner from each Member State is most compelling in relation to the Commission's role in initiating legislation, but the need for full representativeness and autonomy applies to its other functions as well.

III. *THE PROPOSALS OF THE CONVENTION ON THE SIZE OF THE COMMISSION*

At the Convention and at the Intergovernmental Conference and European Councils following it in 2003/2004,¹⁷ there were essentially two conflicting views regarding the size of the Commission:

- the Commission should be composed of one nominee from each Member State, irrespective of the number of Member States, and this is essential for the Commission's policy-proposing tasks and for its law enforcing role for the foreseeable future as well as for ensuring that all member States have full confidence in the Commission at all times;¹⁸ and all Commis-

ment action, implementing the budget and managing Community policies and programmes.").

17. See Work of the IGC 2003/2004, http://europa.eu.int/scadplus/cig2004/index_en.htm (last visited Mar. 27, 2006).

18. Jacques Delors, former President of the European Commission, has said: Experience shows that, for the large majority of countries, the European Commission is the person who reassures, who guarantees that the situation of his/her country of origin is taken into consideration in Brussels, and, conversely, is

- sioners should have equal votes;¹⁹
- the larger Member States have repeatedly argued that a Commission of more than approximately fifteen members would be too large to be efficient; that Commissioners are not there to represent the interests of the Member States nominating them, so there does not need to be one from each State; and that it would be wrong to treat Luxembourg (population 460,000) in the same way as Germany (population eighty-two million) in this respect.²⁰

The Convention proposal that some States (maximum fifteen) should nominate voting members of the Commission for

the person who can explain to the government of his nationality all the ins and outs of each dossier.

Jacques Delors—Agence Europe Exclusive Interview, BULL. QUOTIDIEN EUR. (Belg.), Apr. 29, 2003, at 3. The Commission apparently now believes that there should be one Commissioner per Member State. But before Nice Commissioners took the view that the status quo was not an option and that the small States had to accept both “senior” and “junior” Commissioners or rotation of nominees. The entire discussion since before Nice has been confused because the Commission did not have a consistent position and did not seem to understand clearly what is its *raison d’être*. See generally JOHN TEMPLE LANG, *THE COMMISSION AND THE EUROPEAN PARLIAMENT AFTER NICE* (2001); JOHN TEMPLE LANG, *THE ROLE OF THE COMMISSION AND THE EUROPEAN PARLIAMENT* (2000); John Temple Lang, *The Commission: The Key to the Constitutional Treaty for Europe*, 26 *FORDHAM INT’L L.J.* 1598 (2003) [hereinafter *Key to the Constitutional Treaty*]; John Temple Lang, *Community Constitutional Law*, in *CONSTITUTION-BUILDING IN THE EUROPEAN UNION* 124 (Brigid Laffan ed., 1996); John Temple Lang, *How Much Do the Smaller Member States Need the European Commission?*, 39 *COMMON MKT. L. REV.* 315 (2002) (Gr. Brit.); John Temple Lang, *The Legal Aspects of the Two New “Pillars” Set Up by the Maastricht Treaty*, in *CONSTITUTION-BUILDING IN THE EUROPEAN UNION*, *supra*, app. at 217; John Temple Lang, *The Main Issues After the Convention on the Constitutional Treaty for Europe*, 27 *FORDHAM INT’L L.J.* 544 (2004); John Temple Lang & Eamonn Gallagher, *What Sort of European Commission Does the European Union Need?*, 1 *EUROPÄRTSLIG TIDSKRIFT* 81 (2002) (Swed.); John Temple Lang, *Institutional Changes in the European Union to Prepare for Enlargement: Which Role for the Commission?*, ERA-F. (F.R.G.), Fall 2000, at 2, 2-9. For further discussion, see also F. Lamoureux, *La Constitution “Pénélope”: une refondation pour en finir avec les replâtrages*, 2003 *REVUE DU DROIT DE L’UNION EUROPÉENNE* [REV. DR. EU] 13 (Fr.) (correctly describing the “Community Method” but omitting any reference to the sole right of initiative in describing the role of the Commission); A. Matera, *Les zones d’ombre du projet de Constitution dans l’architecture institutionnelle de l’Union: la composition de la Commission*, 2003 *REV. DR. EU* 5, 9 (Fr.) (assessing the Convention’s proposals on the Commission as a “solution fâcheuse pour grands et petits”).

19. See Memorandum from Presidency to European Council ¶ 9 (Mar. 24, 2004), <http://ue.eu.int/igcpdf/en/04/cg00/cg00070.en04.pdf>.

20. See *id.*; see also VALÉRY GISCARD D’ESTAING ET AL., *RELATIONS BETWEEN THE MOST POPULOUS AND THE LEAST POPULOUS STATES OF THE EUROPEAN UNION* 1 (2003), http://europa.eu.int/constitution/futurum/documents/other/oth131103_en.pdf; Memorandum from Presidency to Delegations to the Intergovernmental Conference pt. 3 (May 13, 2004), <http://ue.eu.int/igcpdf/en/04/cg00/cg00075.en04.pdf>.

five years and the others should nominate non-voting Commissioners emerged, for the first time, towards the end of the Convention.²¹ This was in spite of the efforts of a loose group of the smaller Member States called the “Friends of the Community Method.”²²

Therefore, the key issue was, and is, whether the Commission should be a fully representative body or a small, supposedly more efficient, but not fully representative body.²³

The second view clearly indicated what the Nice Treaty provisions on the size of the Commission are likely to lead to—there would be no point in having a Commission only one or two members short of the number of Member States.

IV. THE PROPOSALS OF THE INTERGOVERNMENTAL CONFERENCE ON THE SIZE OF THE COMMISSION

The formula of “non-voting Commissioners” was rejected, rightly, by the Intergovernmental Conference.²⁴ Instead the draft Treaty on the Constitution visualized a Commission of a maximum of eighteen members when there are twenty-seven Member States.²⁵ In that case, each Member State would have a nominee for ten out of fifteen years, i.e., for two out of every three five-year periods; two of the six largest Member States would be without a nominee in each five-year period.²⁶ However, these convenient figures, eighteen out of twenty-seven, mask a real problem—that if and when the number of Member States is a number like twenty-nine or thirty-one, it becomes mathematically impossible to ensure equality of nominations to the Commission in any reasonable number of five-year periods.

Although the number of Commissioners envisaged by the

21. See The Outcome of the European Convention, http://europa.eu.int/scadplus/european_convention/introduction_en.htm (last visited Mar. 28, 2006).

22. See Paul Magnette & Kalypto Nicolaïdis, *Coping with the Lilliput Syndrome: Large vs. Small Member States in the European Convention*, 11 EUR. PUB. L. 85, 90 (2005) (Gr. Brit.), available at <http://users.ox.ac.uk/~ssfc0041/lilliputsyndrome2.pdf>.

23. Commissioners are not “representatives” of the countries that nominated them, but collectively represent the Union as a whole.

24. See The Intergovernmental Conference 2003/2004: The Composition of the Commission, http://europa.eu.int/scadplus/cig2004/debates1_en.htm#COMMISSION (last visited Mar. 28, 2006).

25. See Draft Treaty establishing a Constitution for Europe art. I-26, Dec. 16, 2004, O.J. C 310/1, at 21 (2004) (not yet ratified) [hereinafter Draft Treaty].

26. See *id.*

draft Treaty is eighteen, no suggestions have yet been made and no mechanism or formula has been mentioned to say how a Commission of eighteen members could “reflect satisfactorily the demographic and geographical range of all the Member States,”²⁷ twenty-seven or more very diverse entities. Presumably the President and Foreign Minister would be treated as nominees of the States from which they came, in each five-year period.

V. *BUT HAS THE ROLE OF THE COMMISSION REALLY CHANGED?*

A résumé of the arguments in favor of a smaller Commission begins with the assumption that the Commission’s policy-proposing role is no longer important since the EU no longer needs to develop new policies, and that the Commission should not be involved in developing new policies within the spheres of foreign policy and justice and home affairs. This assumption suggests that the law enforcing, quasi-judicial tasks of the Commission and its responsibilities for handling the EU budget (which are, inaccurately, referred to as “executive” tasks) are now its only tasks and that a smaller Commission would perform them more efficiently.

This view has formed for several reasons:

- there has been genuine and widespread ignorance, even among members of the Commission and Commission officials, about why the Commission was originally constituted as an autonomous and fully representative institution. The role of an independent policy-proposing mediator originated in mediation theory, not political science, and there was no European equivalent of the Federalist Papers in the United States to explain it;
- there has been a deliberate effort, not least in the United Kingdom, to downplay the Commission’s role by describing it as a civil service, a secretariat, or an “executive,” which ought merely to be carrying out the instructions of the Parliament or the Council, thus ignoring its primary role as a policy-proposing think-tank and mediator;
- the Commission has three different functions. Each of them, for different reasons, requires a fully representative Commis-

27. *Id.* art. I-26(6)(b), O.J. C 310/1, at 22 (2004).

sion equally independent of all the Member States. These are policy-proposing, law enforcing, and managerial functions.²⁸ Its policy-proposing tasks could be performed by a group composed of one nominee policy-maker from each Member State; its law enforcement tasks could be performed by a group of lawyers and economists. But just as it is accepted that the Court of Justice should consist of one judge from each Member State, it should also be accepted that there ought to be one nominee from each State for law enforcement tasks. For budget and other managerial functions, however, it is said that a smaller Commission would be more efficient. This latter assumes that a smaller Commission, with nominees from only some of the Member States at any time, would generally be regarded as an impartial body. This is a crucial assumption; on the face of it, it is most unlikely to be correct.

It is argued that the balance between the Commission's policy-proposing role and its role in executing policy has shifted towards executive functions, that a Commission of thirty cannot be a collegiate executive, and that the Commission's executive function should be further strengthened. The implication seems to be that reducing the Commission, apparently for executive convenience, is desirable even if it involves sacrificing the Commission's capacity for its more important tasks of policy-proposing or for law enforcement. Even less convincingly, it has been suggested that the exclusion of nominees to the Commission from a substantial number of Member States could be balanced by compensatory arrangements to ensure fair treatment. This compensation would be achieved through some, presumably new, kind of accountability of the reduced Commission to Parliament and Council—that is, by making the Commission less autonomous as well as less representative—ignoring the fact that this would make it even less capable of providing a safeguard for minority interests;

- there is a view that the Commission no longer needs to propose new economic policies. This view assumes that because the Single Market and an array of other EU policies have been completed, the EU will not need to develop any new policies for any purpose either within the EU or in its relations with the

28. See GEORGE A. BERMAN ET AL., *CASES AND MATERIALS ON EUROPEAN UNION LAW* 42-43 (2d ed. 2002).

rest of the world. It is self-evident that this view is wrong. While much of the necessary policies have been put in place, many of them are still incomplete, and almost all of them need to be kept up-to-date and adapted to changing circumstances. With ten new Member States and more to come, and with rapid changes in the world economy foreseeable, revised policy proposals, even if not completely new policies, will certainly be needed. In addition, the EU will continue to need an impartial body to handle international economic negotiations on its behalf;

- it seems to be taken for granted that the Commission should not be entrusted with responsibilities much beyond existing First Pillar (mainly economic) competences, for example, that it should *not* have a significant policy-proposing role in JHA matters or in developing the EU's future CFSP.²⁹ This is a particularly odd assumption, especially on the part of the smaller Member States, as it lends support to the notion that the larger Member States are better qualified to develop such policies and can safely be entrusted with them for the EU as a whole.

In fact, a Commission of twenty-five or even thirty members is not so large when it is kept in mind that:

- the more Member States there are, the more heterogeneous the EU becomes, bringing with it more complex problems;
- policy issues of increasing complexity need to be considered by the full range of national views that only a fully representative Commission can provide;
- members of the Commission need to spend much more time than they have done in the past explaining policy proposals to national Parliaments and electorates—and not only their own;
- the recent accession of ten Member States and foreseeable future enlargements will give rise to much more work than earlier enlargements as the new Member States, and those to come will require considerably more back-up from the Commission than previous entrants, due to their relative lack of preparedness for membership;
- there is already ample evidence that the Commission will have greatly increased responsibilities in the areas of police and ju-

29. See generally Denis Chaibi, *The Foreign Policy Thread in the European Labyrinth*, 19 *CONN. J. INT'L L.* 359, 362-66 (2004) (discussing the pillar structure of the EU).

dicial cooperation.³⁰

It is not mathematically possible, as stated earlier, to have nominees of more than four larger Member States as members of the Commission in each five-year period under the eighteen/twenty-seven formula (i.e., two of the larger Member States would on average be without nominees), nor can the requirements of equality and representativeness of the relevant Nice, Convention, and the Constitutional Treaty clauses be met. The complexities and difficulties of implementing these formulations appear to have been neither seen nor understood. In the Convention, as in the subsequent Intergovernmental Conference and European Council and previously at Nice, an inadequately considered, simple-sounding, but essentially inoperable formula was adopted.

VI. CONSIDERATIONS CONCERNING THE CONSTITUTIONAL TREATY FORMULA

The first and most basic objection to the Constitutional Treaty formula is that it misses the point. The issue is not whether the Member States are treated equally but whether the formula causes the Commission to be (or to be regarded as) an unsatisfactory mediator. If it does, then it would not matter that the States were all treated equally, even if that were technically true. A Commission on which one-third or more of the Member States have no nominees is highly unlikely to be seen as an impartial mediator, representative of the whole EU and equally independent of all the Member States; it is much more likely that the formula would be seen to prevent the Commission from fulfilling its role satisfactorily. The fact that the formula was accepted suggests either that it was not carefully considered, or that those who accepted it did not understand the Commission's role in the "Community Method," or did not think it important that the Commission would be unsatisfactory. All three explanations are probably correct, but for different actors.

The Commission does not merely initiate or propose policies. As explained in Occasional Paper 7, it also acts as a facilitator and mediator between Member States when they disa-

30. See, e.g., Daniel T. Murphy, *Closer or Enhanced Cooperation: Amsterdam or Nice*, 31 GA. J. INT'L & COMP. L. 265 (2003) (discussing enhanced police and judicial cooperation).

gree, and between the Council and the Parliament when their views need to be reconciled, as they do increasingly often in co-decision procedures.³¹ The Commission's roles in these respects are essential to make the EU work smoothly, and indeed to make it work at all. *These tasks will be more necessary than ever in the future with twenty-seven or more Member States.* For these continuing roles the Commission must be, and must be seen clearly to be, indisputably objective and impartial in a way that a Commission composed of only eighteen members could not be.

In addition, it is hard to imagine any large Member State accepting that the Commission could possibly "reflect satisfactorily the demographic and geographical range of all the Member States"³² if it had no nominee. When the U.K. and either France or Germany (or any two or three larger member States) are without nominees, it is impossible to imagine that they will accept that the Commission "reflects" them adequately or at all.

Whatever compromises might ultimately be devised, it is obviously impossible to design any Commission of eighteen members that would "reflect satisfactorily" an EU of twenty-seven or more very different States.

This would mean that at any one time, the Commission would lack the confidence of one-third or more of the Member States. In the long term, this means that the Commission, and therefore the "Community Method," will be considered unsatisfactory.

The second, simple and fundamental, objection to both the Nice Protocol and the Constitution formula is that they are based ostensibly on a "principle of equality." It is unrealistic to believe that a small Member State without a nominee is "equal," in any meaningful sense, to a large Member State without a nominee. The larger Member States have many means to ensure that their interests are taken into account at all times, while smaller Member States lack the weight to ensure this. Much has been made of the fact that the six most populous States (with more than thirty-eight million inhabitants each) represent seventy-four percent of the EU population.³³ It is, however, inconsistent with this argument to assume that any two or three large States

31. See TEMPLE LANG & GALLAGHER, *supra* note 1, at 10-11, 21.

32. Draft Treaty, *supra* note 25, art. I-26(6)(b), O.J. C 310/1, at 22 (2004).

33. See GISCARD D'ESTAING ET AL., *supra* note 20, at 3.

representing thirty to forty percent of the population³⁴ can be expected to accept that a Commission excluding their nominees in any five-year period “reflects” all the States.

The argument of “legal equality” of States is a naïve self-deception for small States that have not yet seen the harm done to the “Community Method” and their own interests by the Nice Treaty and the Constitutional Treaty formulas. This may explain the failure of some of the smaller States to understand the significance and ill-effects of the proposal. This self-deception, however, is unlikely to last as it becomes increasingly clear that:

- the proposal would give States, in particular larger Member States, an excuse to object to Commission proposals and decisions (e.g., on State aids)³⁵ that they dislike, on the ground that they had been adopted by a Commission that was insufficiently representative of the whole EU;
- the objection that the Constitution formula gives more influence to the larger States is made more serious because it also proposes a re-weighting of the votes in the Council in favor of the larger States. Until now, smaller States had votes out of proportion to their populations. As the scope of majority voting and co-decision by the Parliament seems likely to widen further, the need for the safeguard provided by the Commission (which is needed precisely because of demographically justified majority voting in the other two legislative institutions) becomes even greater.

All this has several other consequences. First, it lowers the status of the Commission, because at any time one-third or more

34. Mr. Giscard d'Estaing repeatedly pointed out that Germany has a larger population than California, and that Luxembourg and Malta have populations smaller than Rhode Island. In Europe, apart from the six large States with seventy-four percent of the population, there are eight States (Netherlands, Greece, Portugal, Belgium, Sweden, Austria, the Czech Republic, and Hungary) having populations of between eight million and sixteen million, forming together nineteen percent of the total, and eleven smaller States (Denmark, Finland, Ireland, Luxembourg, Lithuania, Latvia, Estonia, Slovenia, Slovakia, Cyprus, and Malta), which only represent seven percent of the population. See CENT. INTELLIGENCE AGENCY, *THE WORLD FACTBOOK* (2005), available at <http://www.cia.gov/cia/publications/factbook/>. But the Convention proposal means, among other odd results, that the three Baltic States (seven million inhabitants) will always have one voting nominee in the Commission, while the eighty-two million Germans will not.

35. In 2001, State aids in the fifteen Member States amounted to eighty-six billion Euros, almost as much as the EU budget. The importance of effective control by the Commission of this flow of money is self-evident.

of the Member States will not feel confidence in it. Second, it reduces the safeguard for the smaller Member States, which has so far been provided under the "Community Method" by a Commission composed of nominees from each Member State.

This is not surprising. The Commission was the only institution that the larger Member States wished to reduce in size because the Commission was the institution whose authority they wished to weaken. The U.K. was frank about this, and the fact that this was the long-term French objective also became very clear. The argument made at one stage that larger Member States ought to have nominees in the Commission at *all* times showed that the larger States were indifferent to even formal equality of States in this respect.

The proposal to reduce the size of the Commission is an unfortunate example of what the Convention was intended to avoid: an ill-considered, illogical compromise instead of a rational legal construction. Nobody setting out to write a Constitution would have devised such a complex, unsatisfactory, and clumsy arrangement. This was partly due to the fact that the institutional issues were the only ones that were *not* carefully prepared and considered by a working group within the Convention.³⁶

Another less obvious disadvantage of the Constitutional Treaty proposal is that it will make it harder to find suitably experienced Presidents of the Commission. A potential President could be chosen only from those eighteen member States that have the right to nominate in the next five-year period; those left out cannot propose a candidate from their own States. Very often it would be better to appoint as President someone who had previously been a Commissioner, although Heads of State

36. Apparently the Convention did not ask for a working group on institutional questions, but that did not prevent the Praesidium from setting one up. Because the Commission was never united on consistent and clear policy on its own composition and appointment, the natural majority in the Praesidium in favor of the Commission gradually broke up, and Mr. Dehaene in particular came to control what the Commission proposed. See Kirsty Hughes, *A Dynamic and Democratic EU or Muddling Through Again? Assessing the EU's Draft Constitution* 6, 12 (European Policy Inst. Network, Working Paper No. 8, 2003), available at http://shop.ceps.be/download.php?item_id=1052 (rightly criticizing the inadequacy of the institutional debate in the Convention, and describing non-voting Commissioners as an "unhappy compromise," and the overall institutional compromise as "a recipe for ongoing turf fighting and confusion").

and Government have shown little appreciation of this, and seem to prefer to nominate someone from among themselves.

A longer-term but even more serious consequence of the unrepresentative nature of a reduced Commission is that the Commission's sole right to propose legislative measures (which is essential to make majority voting acceptable) is likely to be put into question. The European Parliament itself encroaches on the "Community Method." Many parliamentarians ask why an unelected body should have the sole right of legislative initiative.³⁷ The answer (that the Commission safeguards the interests of minorities, which the Parliament cannot do) seems to have been forgotten, and would be less convincing in any case if it comes from an unrepresentative Commission. The lip service paid by the Convention to the "Community Method" will not recall it.

VII. CONSEQUENCES OF THE NICE TREATY FORMULA FOR THE NEXT ENLARGEMENT

It seems likely that the next enlargement of the EU will involve only Bulgaria and Romania³⁸ (perhaps, further down the line, western Balkan States and Turkey will be admitted).³⁹ At that point it will be necessary to decide (unless the Nice Treaty protocol is amended or repealed) how many Commissioners there should be, and which Member States will be the first to lose their right to nominate a Commissioner under the Nice Treaty (or the Constitutional Treaty if it is ratified). After each future enlargement more States will lose their right to nominate a Commissioner in each five-year period, and equality of nomination among Member States cannot be mathematically maintained except over such a long time as to be essentially meaningless. Those who endorsed this process failed to see even into the near future. The jockeying for position that would ensue, with consequential effects on the credibility of the exercise, will be

37. See, e.g., Elisabeth Zoller, *The Treaty Establishing a Constitution for Europe and the Democratic Legitimacy of the European Union*, 12 *IND. J. GLOBAL LEGAL STUD.* 391, 394-96 (2005).

38. See Draft Treaty, *supra* note 25, Declaration concerning the Protocol on the transitional provisions relating to the institutions and bodies of the Union, O.J. C 310/1, at 470 (2004).

39. See Stefan Wagstyl, *EBRD Chief Warns Against Enlargement Confusion*, *FIN. TIMES* (London), June 24, 2005, at 8.

recurrent and will exasperate electorates, and be incomprehensible to them.

VIII. *OTHER DEVELOPMENTS AFFECTING THE COMMISSION AND THE "COMMUNITY METHOD"*

Several steps that have not involved Treaty changes have weakened or eroded the "Community Method" in a number of ways quite apart from actual or proposed Treaty provisions⁴⁰:

- in the co-decision procedure, when majorities in Council and Parliament agree, they can amend a Commission proposal, at the conciliation stage, without the Commission's agreement. This is now the most commonly used legislative procedure for the First Pillar matters;⁴¹
- the President of the Commission, and the Commission as a whole, now must be approved by the Parliament before they take office.⁴² This makes the Commission much less independent from the majority in the Parliament than it was, and than it was intended to be;
- the President has also acquired the power to obtain the resignations of members of the Commission without giving reasons and without judicial review, but subject to the agreement of the whole Commission.⁴³ An obvious result of this is that the President could come under pressure from the majority in the Parliament to get rid of an individual Commissioner whom the majority disliked, although the Parliament has (and should have) no direct power to remove individual Commissioners from office. The President undertakes to "consider seriously whether he should request that Member to resign" if the Parliament has expressed a lack of confidence in a member of the

40. Magnoste & Nicolaidis say that the Treaty for a Constitution "implies a revision of the founding model which sacrifices some of its major features." Magnoste & Nicolaidis, *supra* note 22, at 86. Later they say that the Convention made the divide between large and small Member States "more visible than ever before in the Union's history." *Id.* at 92. This was largely due to Valéry Giscard d'Estaing and Jacques Chirac. Mr. Nicolas Sarkozy, who is a prominent candidate to become the next President of France, goes considerably further by proposing that the six largest member States should become the motor of the Union so that "Europe would act . . . under the impulse of responsible politicians, not anonymous bureaucrats." John Thornhill, *Sarkozy in Call for "Hard Core G6" to Lead EU*, *FIN. TIMES* (London), Sept. 26, 2005, at 14.

41. See BERMANN ET AL., *supra* note 28, at 99-100.

42. See *id.* at 43.

43. See *id.*

- Commission.⁴⁴ This weakens the independence and collegiality of all the members of the Commission;
- the Parliament has tried by formal agreement with the Commission to obtain the right to require individual Commissioners to resign. This is contrary to the principle of the collegiality of the Commission and to the President's right to get individual Commissioners to resign only if the other Commissioners agree;⁴⁵
 - the formal agreement also obliges the Commission to re-examine proposals rejected by the Parliament and to explain the reasons if it decides to maintain its proposal. This gives Parliament a power to obstruct even where it has no right of co-decision;
 - there is now a High Representative of the EU for foreign policy and security purposes whose status is effectively considered superior to that of the Commissioner for External Relations.⁴⁶

In addition to these formal institutional changes, several other changes have been made that have weakened the Commission and therefore weakened the "Community Method" and the safeguards it provides:

- the apparent understanding at European Council level that Presidents of the Commission should be chosen from among Heads of State or Government unduly restricts choice and emphasizes their intention to control the principal representative of the Commission, who is likely to be constrained by agree-

44. European Parliament, Rules of Procedure R. 10, O.J. L 44/1, at 119 (2004).

45. See Consolidated Version of the Treaty Establishing the European Community art. 217, O.J. C 325/33, at 121 (2002).

46. Sir Brian Crowe says that because the EU Foreign Minister would also be Vice-President of the Commission for External Relations "by transgressing the separation of powers inherent in the EU's institutional arrangements until now, it will cause frictions which the incumbent will be hard put to manage." BRIAN CROWE, FOREIGN MINISTER OF EUROPE, at vii (2005), available at <http://fpc.org.uk/fsblob/395.pdf>. He later indicates how serious and confusing this "transgression" would be, by pointing out, without comment, that the Foreign Minister "is to have his own bureaucratic support in an External Action Service answerable to him as Minister and composed of officials from the Council Secretariat, Commission, and member states." *Id.* at 3. Crowe, writing diplomatically but skeptically, and confining his comments to the subject of the Foreign Minister, revealingly describes the difficulties and tensions inevitable in an institutional structure in which roles are so confused and lacking in coherence.

See Alan Dashwood, *The Draft EU Constitution—First Impressions*, 5 CAMBRIDGE Y.B. EUR. LEGAL STUD. 395, 414-15 (2002); Alan Dashwood & Angus Johnston, *The Institutions of the Enlarged EU Under the Regime of the Constitutional Treaty*, 41 COMMON MKT. L. REV. 1481, 1503-04 (2004) (Gr. Brit.).

- ments entered into in his previous role, e.g., the current President's acquiescence in the draft Constitutional Treaty;
- the resources of the Commission for permanent staff have been repeatedly reduced in relation to its responsibilities, which have greatly increased in geographical scope and in complexity, most recently as a result of the accession of ten new Member States.⁴⁷ Salary levels in the Commission have been, relatively, reduced and this is likely to continue.⁴⁸ Apart from making the Commission under-resourced and over-worked, this has led to its being weakened in another way: an increasing number of the officials working in the Commission at any one time are national civil servants on secondment.⁴⁹ These civil servants cannot be expected to be independent of their national administrations, and of course they are not. The Commission as a whole is therefore both weaker and less independent.
 - Changes suggested in the draft Treaty for a Constitution concerning a long-term European Council President⁵⁰ and a Union Minister for Foreign Affairs⁵¹ are likely to have similar effects. In both cases the terms of office and relationship with the Presidency of the Commission are sufficiently vague as to suggest as little accountability as possible. For example, the EU3 of France, Germany, and the United Kingdom dealt with Iran, ostensibly as the European Union, but with no clear mandate and no Commission participation.⁵²

In short, the independence of the Commission has been weakened both by the increased powers of the Parliament over it in the areas in which both institutions operate and by governments' steps to reduce the Commission's effectiveness and influence. As a result, the safeguards that the Commission is intended to provide have been eroded.

Some of the erosion of the "Community Method" has re-

47. See The 2004 Enlargement: The Challenge of a 25-Member EU, <http://europa.eu.int/scadplus/leg/en/lvb/e50017.htm> (last visited Mar. 29, 2006).

48. See Reforming the Commission: Pay, Social Security, Working Conditions, http://europa.eu.int/comm/reform/2002/summary_chapter6_en.html (last visited Mar. 29, 2006).

49. See *id.*

50. See Draft Treaty, *supra* note 25, art. I-22, O.J. C 310/1, at 20 (2004).

51. See *id.* art. I-28, O.J. C 310/1, at 23 (2004).

52. See ALDO ZAMMIT BORDA, IRAN AND THE EU3 NEGOTIATIONS 7 (2005), <http://www.uaces.org/E53Borda.pdf>.

sulted from the Parliament's efforts to obtain greater powers. It is not clear how far the Parliament understood the serious consequences of what it was doing. Some Members of the European Parliament ("MEPs") certainly have talked as if they did not understand that there was any reason for the autonomy of the Commission and as if there was no reason for the Commission's exclusive power to propose First Pillar measures.⁵³ Parliament has weakened the Commission, and therefore weakened the Community, without increasing its own powers vis-à-vis the Council.

But even the cumulative effects of all these changes may be less damaging to the European Union in the long term than the fact that the "Community Method" has deliberately not been adopted in several areas, in particular in the area of Common Foreign and Security Policy, in which the draft Constitutional Treaty did not even confirm the Commission's existing *concurrent* power to make proposals.

IX. COMMENTARY AND CONCLUSIONS

A. Future Use of the "Community Method"

The proposed reduction in the number of Commissioners and the presumably intended and inevitable reduction in the standing of the Commission have serious long-term implications. As already explained, a fully representative Commission equally independent of all the Member States is essential to the "Community Method." For some years to come the EU will take economic decisions according to the "Community Method" and foreign policy and security measures according to the intergovernmental method; justice and home affairs issues will remain in an intermediate zone. The devaluation of the Commission necessarily devalues the "Community Method" and so makes it less likely that, whenever the EU decides to take all kinds of decisions by one method, the "Community Method" (or some variation of it) will be adopted.

This is extremely unfortunate. When the European Community was organized in the 1950s the "Community Method" was considered essential for several reasons. First, as already ex-

53. See GIOVANNI GREVI, SIMPLIFYING INSTRUMENTS AND PROCEDURES (2002), <http://www.theepc.be/en/default.asp?TYP=ER&LV=437&see=&PG=TEWN/EN/directa&AI=111&CAT=51>.

plained, it was necessary to make majority voting on important matters acceptable, both in principle and in practice.⁵⁴ Second, it was necessary to have a fully representative and independent Commission in order to create an institutional structure in which large and small Member States could co-exist satisfactorily.⁵⁵ That had never previously been possible, and is not now possible, on an intergovernmental basis. Devaluing the Commission and the “Community Method” devalues the key feature that made the Community effective and which made it acceptable even to Member States that were outvoted. What has been unfortunately agreed is likely to make the EU both ineffective (because States without voting nominees will be less likely to accept Commission proposals and decisions) and unacceptable (because States will be less likely to accept being outvoted).

It will always be unsatisfactory for the EU to have two entirely different decision-making procedures—whatever their exact scope. The foreign and security procedure provides neither the legal nor the political safeguards that exist for First Pillar matters under the “Community Method.” Nobody drafting a rational constitutional structure would knowingly create such a situation, because it can only lead to controversy over which procedure properly applies. Furthermore, there will always be a temptation for Member States in a hurry to favor use of the intergovernmental procedure, which does not require a Commission proposal or Parliamentary discussion and is not subject to legal challenge in the Community Courts.⁵⁶ Examples exist already.⁵⁷

B. *What Has Gone Wrong?*

It is important to grasp several points about all this:

- the Commission was invented to do a job. It was not invented for its own sake or for the purpose of having a new powerful

54. See TEMPLE LANG & GALLAGHER, *supra* note 1, at 37.

55. See *id.* at 23-25.

56. See Panos Koutrakos, *Constitutional Idiosyncrasies and Political Realities: The Emerging Security and Defense Policy of the European Union*, 10 COLUM. J. EUR. L. 69, 72 (2003) (noting that with respect to intergovernmental procedures under the Common Foreign and Security Policy (“CFSP”), the “Commission . . . does not enjoy the exclusive right of legislative initiative, while the role of the European Parliament is significantly limited”).

57. See generally *id.* (discussing use of intergovernmental procedures).

- institution in Europe. The Commission's powers are to propose new legislative measures, to execute negotiating directives given to it by the Council, and to apply existing rules;
- the Commission's independence is a political safeguard for the objectivity of its proposals. There is no *legal* method of ensuring that its proposals are always wise or well thought out: the merits of proposals are not justiciable. Wisdom cannot be legislated for;
 - the independent Commission provides a safeguard for small Member States and for minority interests, against unwise or harmful new policies of majorities or larger Member States, and against the possibility of domination by larger Member States;
 - the Commission ensures that the rules that have been adopted are obeyed by all the Member States and not only by the smaller ones;
 - the "Community Method" was carefully designed, legally and politically. Together with judicial control of all acts with legal effects adopted by the Community institutions, it provides comprehensive safeguards for all minority interests in a diverse Community. It ensures that when Community measures have been adopted, they are carried out even by large Member States, which may have voted against them;
 - no other method of safeguarding minority interests has ever been suggested, except requiring unanimity. But it is well understood that requiring unanimity, except for very important decisions, would lead to inertia and impotence.

This is *not* a question of traditional "separation of powers" into legislative, executive, and judicial. The "Community Method" is more precisely designed than that, but because it is not clearly understood it is easy to erode it without the significance of the changes being immediately noticed.

C. *The Significance of the Composition of the Commission for Future Referenda*

It is likely that future Treaty changes will be the subject of referenda in at least some Member States. This has several important implications:

- it cannot be assumed that the present degree of ignorance

- about the role of the Commission in the "Community Method" will continue;
- no formula is possible to make a Commission composed of nominees of two-thirds or less of the Member States "reflect" all of them. Certainly no formula could be imagined that an electorate would find clear or satisfactory. Electorates will, rightly, understand simply that their country will no longer have a Commissioner, for five years at a time;
 - no intelligent electorate will accept that a small State without a nominee Commissioner is "equal" to a large State without one;
 - all electorates will understand without difficulty that their Member States will lose their rights to nominate Commissioners, and will be almost certain to object, and to vote against the governments which gave up this right and against the referendum proposal in question;
 - electorates can no longer be expected to take on trust what their political leaders propose. They will want explanations and they are likely to discuss thoroughly what a new Treaty actually says. No doubt there will be, as there were in past referenda, misrepresentations by those opposed to the EU. But nobody will be able to argue convincingly that a Commission of nominees from two-thirds or less of the member States is a satisfactory Commission;
 - at Laeken, before the Convention, it was stated that one of the aims of Treaty reform was greater transparency and comprehensibility.⁵⁸ That is still desirable, but neither the Constitutional Treaty provisions nor the Nice Treaty provisions can provide it;
 - transparency makes it necessary to explain, among other things, the *raison d'être* of the Commission. Once explained, it is not difficult to understand. Proper explanations would help to make the EU institutions seem less remote and less complicated;
 - future referenda may not be about a whole new Treaty, in which undesirable features might be accepted to avoid a veto of the whole. They are likely to involve a small number of spe-

58. See Cécile Barbier, *Laeken Declaration*, TOMORROW EUR. (Observatoire Soc. Européen, Brussels, Belg.), Dec. 2001, at 1, http://europa.eu.int/constitution/futurum/documents/contrib/cont001201_en.pdf.

cific changes, the merits or demerits of which will be clearly visible;

- the divergence between the interests of the larger and the smaller Member States is the basic institutional problem of the EU. The problem cannot be solved by giving the larger Member States the predominant influence in the Commission that they increasingly have in the Council and through the Parliament, as the smaller member States cannot be expected to acquiesce in this. This is a much more serious problem in the EU than it was in the United States in 1776, for various reasons.⁵⁹ A properly constituted Commission is the only way the problem of size differences in the EU can be contained.

Broadly, each of the following institutional scenarios is possible in theory:

- repeal or modify the Nice Treaty protocol formula;
- continue on the basis of the Nice Treaty and implement any non-controversial parts of the Treaty for a Constitution;
- persuade the French and Dutch peoples to approve the Treaty for a Constitution, in new referenda, and follow with referenda in all the other Member States that had planned them;
- negotiate a Treaty limited essentially to institutional matters;
- negotiate a wholly new Treaty.

The issues discussed in this Article would arise, sooner or later, in each of these situations, although in different contexts and in different forms.

D. *A Lesson from the Negotiations on the EU Treaties*

The European Community Treaties as originally written provided well-considered and complete legal and political safeguards, based on the Commission and the "Community Method," for First Pillar matters. However, recent Treaty negotiations, summarized here, have revealed a procedural weakness that had not previously been noticeable.

Any institutional arrangements that provide a system of safeguards or checks and balances necessarily create a degree of tension among the institutions and entities involved. It is therefore a defect in the system when revision of Treaty provisions can be carried out by one of the groups of institutions and entities

59. See Temple Lang, *Key to the Constitutional Treaty*, *supra* note 18, at 1615-17.

whose powers the Treaties are intended to limit. This is the position in the European Union. Treaty amendments can be agreed between the governments of Member States without being proposed by the Commission or discussed in detail by the European Parliament. The events of the last few years have shown that Treaty amendments can be seriously ill-considered and can be imposed, as some features of the Nice Treaty were imposed, by a large member State holding the Presidency even when the proposed changes are seriously unsatisfactory (not least from the point of view of that State itself).⁶⁰ These events also show that at least some governments will use any discussion of Treaty changes to alter the balance that the "Community Method" was carefully designed to guarantee. The Nice Treaty negotiations also show how profoundly unsatisfactory it can be when Heads of State and Government improvise forms of words at the last moment, such as the formula about equality of Member States in the rotation of Commissioners,⁶¹ whose complexities have not been seriously considered.

The Convention (an idea that had never been tried before but which, in principle, is an attractive one) did not overcome this weakness. The Convention failed to deal satisfactorily with institutional issues concerning the Commission, partly because it did not even set up a committee or working group to consider them. The result was the wholly ridiculous idea of non-voting "Commissioners"⁶² and other proposals inconsistent with the "Community Method," which some prominent members of the Convention either did not understand or did not wish to maintain.

No doubt, when negotiations to get out of the present impasse resume, as they may do before the end of 2006, some States will want to maintain their negotiating gains, however destructive they may be of the EU's capacity to maintain a necessary harmony between the divergent interests of its Member States. It is for the smaller Member States that wish to retain the protection of the "Community Method" to prepare the ground for the future debate. In particular, they need to be wary of last

60. See Thomas Fuller, *In a Europe of 25 Equals, No Consensus on a Charter*, N.Y. TIMES, Oct. 6, 2003, at 4 (noting disproportionate voting power under the Treaty of Nice).

61. See *supra* notes 11, 14 and accompanying text.

62. See *supra* note 21 and accompanying text.

minute proposals—for example, permanent membership of the Commission for the nominees of the six largest Member States (the others rotating temporary places among themselves) in return for amending the Nice formula for Council votes that over-favored Spain and Poland. While there is an obvious case for relating votes in the Council to population size, there is no similar case for diminishing the Commission.

Unfortunately, in the last few years, the importance and role of the Commission in the “Community Method” have not been understood, even by members of the Commission and certainly not by members of the Parliament. The “Community Method” has been weakened in a number of ways and, in a number of new areas of European Union activity, Member States have deliberately chosen *not* to adopt the “Community Method” but without adopting any other kind of safeguard, whether political or legal.

The introduction to Occasional Paper 7, written eleven years ago, noted that “[e]xperience had . . . shown that no construction based on sovereignty expressed intergovernmentally—such as had been tried in the Council of Europe and the League of Nations and found wanting—could for long contain and defuse divergent interests.”⁶³

Under pressure at Nice and in the Convention on the future of Europe, this lesson appears to have been ignored by the principal authors of both—respectively the current and a former President of France.

63. TEMPLE LANG & GALLAGHER, *supra* note 1, at 9.