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The European Union and the Treaty of Lisbon

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Abstract

With this cursory description of the European Council prior to the Treaty of Lisbon, this Essay turns to the major changes produced by that treaty. Space considerations require a limited focus. Part I discusses the impact of the European Council's new status as one of the institutions of the European Union ("EU"). Part II considers its designated power to take by qualified majority vote many important legally-binding decisions. Part III reviews two of its major roles: deciding when the Treaties should be amended and setting the procedure for amendment, and determining the timing and terms of accession of candidate nations. Part IV discusses the status and role of the new President of the European Council.

THE EUROPEAN COUNCIL AFTER THE TREATY OF LISBON

*Roger J. Goebel **

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Jean-Claude Piris served for over twenty years as Director General of the Legal Service of the Council, and accordingly as the effective general counsel of both the Council and the European Council. Skilled lawyers tend to act not only as advisors on technical legal issues or as the drafters of legally precise texts and opinions, but also as counselors on policy issues. When one considers that Jean-Claude Piris became Director General prior to the creation of the European Union and has served during a twenty-year period in which the European Union and the European Community have undergone extraordinary changes in composition, structure, and operations, then the importance of his contributions becomes manifest. It is highly appropriate that this Essay should reflect on the changes wrought by the Treaty of Lisbon to the European Council (“Lisbon Treaty”), which he has served so well.

INTRODUCTION: FROM THE HAGUE SUMMIT TO THE PRE-LISBON EUROPEAN COUNCIL

In December 1969 at The Hague, President Georges Pompidou of France and Chancellor Willy Brandt, together with the Prime Ministers of Belgium, Italy, Luxembourg, and the Netherlands, held a two-day summit meeting to consider crucial

issues confronting the still young European Economic Community ("EEC").¹ They succeeded in achieving agreement on the commencement of negotiations with Denmark, Ireland, and the United Kingdom for their accession, and upon the principle that the EEC should obtain its own financial resources from customs duties and other sources, rather than relying upon periodic contributions from the Member States or upon certain Common Agricultural Policy issues. The success of the summit quite naturally inspired further such gatherings.

Although the next two summits at Paris and Copenhagen produced no comparable achievements, that held at Paris in December 1974² under the leadership of President Valéry Giscard d'Estaing of France and Chancellor Helmut Schmidt of Germany was eminently successful, endorsing the direct election of the European Parliament, inaugurating a policy for regional development aid, and endorsing various legislative action programs. The Paris summit also agreed upon a regular pattern of three summit meetings a year. President Giscard d'Estaing coined the name "European Council" for such summit meetings.³ After the European Council invited Commission President François-Xavier Ortoli to its March 1975 Dublin meeting,⁴ the customary participation of Commission presidents in European Council meetings commenced. That the inclusion of the president of the Commission as essentially a nonvoting member of the European Council has proved highly beneficial was markedly demonstrated by the influence of President Jacques

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1. For an overview of this dramatic summit and its success, particularly in ending the French veto of the accession of the UK, see Professor Desmond Dinan's description of the early history of the EU in DESMOND DINAN, *EVER CLOSER UNION* 39–45 (4th ed. 2010).

2. For an overview of the Paris summit, see the recent comprehensive study, JAN WERTS, *THE EUROPEAN COUNCIL* 10–12 (2008).

3. President Giscard d'Estaing was quoted in the press as saying, "Les sommets sont morts, vive le Conseil Européen." ["The Summits are dead, long live the European Council."]. WERTS, *supra* note 2, at 11.

4. See MARTIN WESTLAKE & DAVID GALLOWAY, *THE COUNCIL OF THE EUROPEAN UNION* 176 (3d ed. 2004) (discussing the composition of the European Council).

Delors during 1985–1995,⁵ and by that of other vigorous Commission presidents, such as Roy Jenkins and Jose Barosso.

The Single European Act's ("SEA") Article 2 brought the European Council into the treaty framework, indicating that it should be composed of the Heads of Government or of State (to accommodate France, and later Finland), together with the President of the Commission, and prescribing mandatory biannual meetings.⁶ Article 4 of Maastricht's Treaty on European Union ("Maastricht TEU") replicated this, and added that the Member State government that held the rotating presidency of the Council of Ministers would provide the presidency of the European Council during the same six-month period.⁷ Article 4 also enunciated the European Council's dual role: to "provide the Union with the necessary impetus for its development" and to "define the general political guidelines."⁸ However, prior to the Lisbon Treaty, the European Council's policy decisions and resolutions had to be implemented either by a formal Council decision or by Commission action in implementation of a policy request by the European Council.⁹

The Maastricht Treaty also made innovative amendments to the European Economic Community Treaty, renamed as the Treaty Establishing the European Community ("EC Treaty"), which gave the European Council specific roles: to adopt "common strategies" in the Common Foreign and Security Policy ("CFSP") (Maastricht TEU Article 13(2)), to adopt conclusions on broad guidelines for the economic policies of the Member States and the Community (EC Treaty Article 99), to adopt

5. For a description of the unusually high level of influence of President Delors, see WERTS, *supra* note 2, at 49.

6. Single European Act art. 2, 1987 O.J. L 169/1, at 4 (amending Treaty Establishing European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11). Both in France and in Finland, the constitutional structure shares political and economic power between the President and the Prime Minister, so that the SEA Article 2 had to add "of State" to "Heads of Government" to permit both officials to attend meetings.

7. Treaty on European Union (Maastricht text) art. 4, July 29, 1992, 1992 O.J. C 191/1, at 7 [hereinafter Maastricht TEU].

8. *Id.*

9. See WERTS, *supra* note 2, at 30; FIONA HAYES-RENSHAW & HELEN WALLACE, *THE COUNCIL OF MINISTERS* 174 (2d ed. 2006). The Court of First Instance (now the General Court) held that the European Council had no power to take a legally-binding decision. See *Roujansky v. Council*, Case T-584/93, [1994] E.C.R. II-585 (challenging to the European Council's proclamation that the Maastricht TEU entered into force on November 1, 1993).

similar conclusions on employment policy (EC Treaty Article 128), and, formally acting as the Council, to decide upon the qualifications of Member States eligible to transfer their monetary policy control to the European Central Bank within the European Monetary Union, and to adopt the euro (EC Treaty Article 121).

For the last twenty years, the European Council has met twice in each Member State's six month rotating presidency, reaching "quasi-constitutional" agreements on when to open an Intergovernmental Conference ("IGC") or to resolve contentious issues in order to achieve treaty amendments;¹⁰ deciding when to commence accession negotiations, setting the conditions for accession, and determining when accession should occur for particular candidates;¹¹ and adopting major policy initiatives, such as the endorsement of the Commission's action program to achieve the internal market at the Milan European Council meeting in June 1985,¹² the Tampere European Council's

10. Thus, the European Council meeting at Milan in June 1985 agreed upon the Intergovernmental Conference ("IGC") that drafted the Single European Act ("SEA"), *see* Milan European Council, Conclusions of the Presidency, E.U. BULL., no. 6 (1985), that at Strasbourg in December 1989 agreed upon two IGCs, one to shape European Monetary Union and the other to revise the EC Treaty, *see* Strasbourg European Council, Conclusions of the Presidency, E.U. BULL., no. 12 (1989), and that at Brussels in June 2007 agreed upon the basic form of the Treaty of Lisbon and called the IGC to draft its final text, *see* Brussels European Council, Conclusions of the Presidency, E.U. BULL., no. 6 (2007). The European Council meeting at Maastricht in December 1991 reached the compromises essential to complete the Treaty of Maastricht, *see* Maastricht European Council, Conclusions of the Presidency, E.U. BULL., no. 12 (1991), as did that held at Amsterdam in June 1997 to enable the conclusion of drafting the Treaty of Amsterdam, *see* Amsterdam European Council, Conclusions of the Presidency, E.U. BULL., no. 6 (1997), and that at Nice in December 2000 to reach the compromises crucial for the final text of the Treaty of Nice, *see* Nice European Council, Conclusions of the Presidency, E.U. BULL., no. 12 (2000).

11. In addition to the December 1969 Hague Summit's decision to authorize accession negotiations with Denmark, Ireland, and the United Kingdom, the Fountainebleau summit in June 1984 set January 1986 as the accession date for Portugal and Spain. *See* DINAN, *supra* note 1, at 77. The June 1992 European Council at Lisbon held up negotiations for the entry of Austria, Finland, and Sweden until the Maastricht Treaty was signed and a new multi-year budget approved. *See id.* at 106. The Copenhagen European Council in December 2002 set May 1, 2004 as the entry date for ten Central European and Mediterranean nations. The European Council has also set conditions for accession, notably the "Copenhagen criteria" or conditions for the accession of the Central European nations set by the Copenhagen European Council in June 1993. *See id.* at 137.

12. DINAN, *supra* note 1, at 78–80.

adoption of the Action Program in the Area of Freedom, Security and Justice in October 1999,¹³ and the Lisbon European Council's creation of the Strategy for Employment, Economic Reform and Social Cohesion in March 2000.¹⁴

It should be emphasized that although the European Council has always been an intergovernmental body, acting by consensus, its policy decisions have significantly furthered the progress of European integration, rather than acting as a brake on such integration.¹⁵ Philippe de Schoutheete has accurately observed: "The European Council has largely fashioned the Union as we know it today . . . [E]ven if the European Council is basically intergovernmental in nature, the system it has so largely contributed to is not mainly intergovernmental."¹⁶ In their study of the European Council, Westlake and Galloway have accurately observed that the European Council has taken "most of the major political decisions of the European Community," including the creation of the Economic and Monetary Union ("EMU"), the endorsement of the SEA and the Maastricht Treaty, German unification, and further enlargements.¹⁷

With this cursory description of the European Council prior to the Treaty of Lisbon, this Essay turns to the major changes produced by that treaty. Space considerations require a limited focus. Part I discusses the impact of the European Council's new status as one of the institutions of the European Union ("EU"). Part II considers its designated power to take by qualified majority vote many important legally-binding decisions. Part III reviews two of its major roles: deciding when the Treaties should be amended and setting the procedure for amendment, and determining the timing and terms of accession of candidate nations. Part IV discusses the status and role of the new President of the European Council.

13. WERTS, *supra* note 2, at 133–35; *see also* Dinan, *supra* note 1, at 537–39.

14. WERTS, *supra* note 2, at 131–33; *see also* WESTLAKE & GALLOWAY, *supra* note 4, at 181–83.

15. Westlake and Galloway cogently remark: "[F]ar from discouraging the European Commission from embarking on major integrationist projects, . . . the European Council encouraged it in this role." WESTLAKE & GALLOWAY, *supra* note 4, at 179.

16. Philippe de Schoutheete, *The European Council*, in INSTITUTIONS OF THE EUROPEAN UNION 57 (John Peterson & Michael Shackleton eds., 2d ed. 2006).

17. WESTLAKE & GALLOWAY, *supra* note 4, at 177.

I. *THE EUROPEAN COUNCIL AS AN INSTITUTION*

Although formally recognized as a body by the SEA and the Maastricht Treaty, the European Council was not listed as one of the Community's political institutions in EC Treaty Article 4. Given the importance of the European Council's role in the 1990s and this century, both in taking the decisions allotted to it in the treaties and in providing policy guidance at the highest level, this has become increasingly anomalous. The characterization of the European Council as an EU institution in the Lisbon TEU's Article 13 can accordingly be seen as a welcome recognition of an operational reality. As Mr. Piris has observed: "The increasing powers and influence [of] the European Council [are] not due to legal provisions of a given Treaty, but to political reality."¹⁸ He further observed that "the European Council [has now] become an institution alongside or, to put it better, above the Council."¹⁹ The European Council has been brought into the EU structure with the other institutions, not left in some ambiguous penumbra.

The Lisbon TEU's Article 15 provides a highly desirable precision in the description of the European Council's composition, role, and mode of action, supplemented by other provisions that state its capacity to take specific decisions on institutional matters. Article 15(1) indicates that its fundamental role has changed to some degree: it no longer provides "political guidelines," presumably essential to the other institutions, but rather "define[s] . . . general political directions and priorities,"²⁰ which would seem to indicate an even more functional policy-setting role. Moreover, the European Council can now take decisions that have legally binding effect—although an important caveat, in Article 15(1), that it "shall not exercise legislative functions," prevents it from supplanting the Parliament, Council, and Commission in their respective roles in the legislative process.²¹ (Note that even in the "emergency brake" provisions in the legislative procedure for directives

18. JEAN-CLAUDE PIRIS, *THE LISBON TREATY: A LEGAL AND POLITICAL ANALYSIS* 236 (2010).

19. *Id.*

20. Consolidated Version of the Treaty on European Union art. 15(1), 2010 O.J. C 83/13, at 23 [hereinafter TEU post-Lisbon].

21. *Id.*

concerning judicial cooperation in criminal matters—Treaty on the Functioning of the European Union (“TFEU”) Articles 82(3), 83(3), and 86(1)—when the Council legislative discussion is suspended in order to refer issues to the European Council, the European Council may not itself amend or revise any draft text.)

The Lisbon TEU’s Article 15(2) naturally modifies the composition of the European Council in order to include its President as a nonvoting member and to refer to the High Representative of the Union for Foreign Affairs and Security Policy as “tak[ing] part in its work.”²² Article 15(3) continues the policy of two meetings every six months, with occasionally added “special meetings” (such as that held in September 2001 to adopt anti-terrorist policies after the 9/11 terrorist attack in New York²³). Article 15(3) does make a noteworthy change in eliminating the automatic assistance of the Ministers for Foreign Affairs at each meeting that had been provided for in the Maastricht TEU Article 4. Instead, the present text declares that the European Council members may each decide to be “assisted by a minister.”²⁴ This reflects current practice, enabling the Economic and Finance (“ECOFIN”) ministers to attend “when the agenda so requires,” as they have frequently had occasion to do in recent years, or perhaps the Agriculture, Environment, Justice, or other ministers.

It should be noted that the Conclusions of the 2002 Seville European Council continue to govern the operational structure of meetings,²⁵ so that the European Council members may have only one minister to assist them at any given time in a meeting—indeed European Council meetings always include a session in which only the Heads of State and Government participate (apart, of course, from interpreters and a limited

22. *Id.*

23. For a description of the meeting and consequent Council action, see WERTS, *supra* note 2, at 135–36 and Extraordinary Brussels European Council, E.U. BULL., no. 9 (2001).

24. TEU post-Lisbon, *supra* note 20, art. 15(3), 2010 O.J. C 83, at 23.

25. See Seville European Council, Conclusions of the Presidency, E.U. BULL., no. 6, Annex (2002). The Conclusions of the June 21–22, 2002 European Council meeting at Seville are also annexed to HAYES-RENSHAW & WALLACE, *supra* note 9, at 362–63. See generally DINAN, *supra* note 1, at 208–10; HAYES-RENSHAW & WALLACE, *supra* note 9, at 180–83 (describing the customary format of European Council meetings).

technical support staff). The European Council adopted formal Rules of Procedure²⁶ on December 1, 2009, shortly after the effective date of the Treaty of Lisbon. The Rules of Procedure stipulate that the Council shall meet in Brussels, customarily for two days in private sessions, with delegations limited in size to twenty persons.²⁷ The General Affairs Council has an important auxiliary role in assisting the president of the European Council in preparing an agenda and drafting the text of possible Conclusions.

Article 15(4) continues to prescribe that the European Council customarily acts “by consensus.” Decision by consensus is the norm for the European Council’s role in defining “political directions and priorities” in the EU generally, and in its identification of the Union’s “strategic interests” and “guidelines” in the CFSP.²⁸ However, TFEU Article 235(1) states that a European Council member’s abstention shall not prevent the European Council from taking an act that requires unanimity,²⁹ rather like an abstaining Member State’s use of a “constructive abstention” that permits the others to adopt a decision by unanimity within the CFSP under TEU Article 31(1). Presumably, on occasion Member States will not formalize a dissent from a consensus, permitting the European Council to adopt Conclusions concerning the issue discussed.

One immediate consequence of becoming an institution is that the Court of Justice of the European Union has acquired the power to review European Council decisions for their compatibility with the treaty under TFEU Article 263 when the acts are “intended to produce legal effects vis-à-vis third parties,”³⁰ or to review under TFEU Article 265 a complaint that the European Council has failed to act when it had a duty to do so. Although either proceeding is highly unlikely, the availability of judicial review may serve to enforce optimal procedural regularity in the decisions the Lisbon Treaty now allots to the European Council. Presently unforeseen circumstances may at

26. Council Decision No. 2009/882/EU (*Rules of Procedure*), 2009 O.J. L 315/51.

27. *Id.* art. 4, at 53.

28. TEU post-Lisbon, *supra* note 21, art. 26, 2010 O.J. C 83, at 31.

29. Consolidated Version of the Treaty on the Functioning of the European Union art. 235(1), 2010 O.J. 83/47, at 152–53.

30. *Id.* art. 263, at 162.

some point occasion a Court review of a European Council decision.³¹

II. ACTION BY QUALIFIED MAJORITY VOTE (“QMV”)

One of the most important innovations of the Lisbon Treaty is its specification of many significant operational decisions that the European Council may now take by a qualified majority vote (calculated in the same manner as a vote taken in the Council pursuant to TFEU Article 238(2)).

Thus, the European Council will now act by a QMV in electing its president (TEU Article 15(5)); in designating the High Representative of the Union for Foreign Affairs and Security Policy (TEU Article 18(1)), but “with the agreement of the President of the Commission,” a proviso necessary because the High Representative wears the dual hat of vice-president of the Commission, and all nominees for the status of commissioner must be chosen “by common accord” with the Commission president; in nominating a candidate for president of the Commission (TEU Article 17(7)), who then must obtain the approval of the Parliament; in appointing the entire Commission as a body (TEU Article 17(7)), after the Parliament has approved them through a “vote of consent”; and in designating the president and members of the Executive Board of the European Central Bank (“ECB”) (TEU Protocol 4 on the Statute of the European System of Central Banks and the European Central Bank³² Article 11(2)).

The European Council’s ability to nominate the president of the Commission by a QMV vote is particularly important because several qualified prime ministers or former prime ministers were vetoed as prospective Commission presidents for terms starting in

31. That the European Central Bank (“ECB”) should ever be the subject of a proceeding before the Court of Justice of the European Union (“Court of Justice” or “Court”) also initially seemed unlikely, but the Court had to define and delimit the nature of the ECB’s independence in *Commission v. European Central Bank*, Case C-11/00, [2003] E.C.R. I-7147. It is conceivable that the Court of Justice might have to decide whether the European Council has a treaty-granted power to take a particular legally-binding decision, or whether it has infringed the Council’s power to take legislative action.

32. Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, Protocol (No. 4) on the Statute of the European System of Central Banks and the European Central Bank, 2010 O.J. C 83/01, at 230.

1995 and 1999 by either France, Germany, or the UK.³³ Of course, it remains to be seen whether large Member States will continue to employ a sort of “Luxembourg veto” of prospective Commission presidents despite the treaty authorization for QMV voting.

TFEU Article 236 prescribes that the European Council shall act by QMV in taking two other important operational decisions: establishing the list of permissible configurations of the Council, and setting the sequence of rotation of the six month presidencies of the Council. Although the rotation of presidencies is currently set through 2020 by a 2004 Council decision,³⁴ and the Seville European Council’s limitation of Council configurations to nine is currently not questioned, at some point both subjects will require a new decision.

In contrast, the Lisbon Treaty requires the European Council to act by unanimity on certain institutional issues of a fundamental character. The prime example is a European Council Decision on the composition of the European Parliament, i.e., the size of each Member State’s delegation, for which the Lisbon TEU Article 14(2) requires unanimity. In view of the difficult discussions on this issue in Intergovernmental Conferences and in accession negotiations in the past, often only resolved at contentious European Council meetings,³⁵ the issue is so obviously a sensitive one that the requirement for a unanimous decision is not surprising. This is also true of the Lisbon TEU Article 17(5)’s requirement for a unanimous

33. See WERTS, *supra* note 2, at 136–39 (citing the UK veto of Belgian Prime Minister Jean-Luc Dehaene and Germany’s veto of Dutch Prime Minister Ruud Lubbers as successor to President Jacques Delors, and the UK veto in 1999 of Belgian Prime Minister Guy Verhofstadt as the successor to President Jacques Santer.). Also, president Jacques Chirac of France initially blocked in May 1998 the European Council’s designation of Wim Duisenberg, then the highly-respected president of the Netherlands Central Bank, as the first president of the European Central Bank, until he obtained agreement that Duisenberg would retire before the end of that stated six-year term and that Jean-Claude Trichet, president of the Bank of France, should be his successor.

34. The European Council acted in 2009 to set the rotation, divided into blocks of three successive presidencies, or “trios,” until 2020. Council Decision No. 2009/881/EU, 2009 O.J. L 315/50. The “trios” are intended to promote continuity through cooperation among the successive presidencies. See PIRIS, *supra* note 18, at 210–11.

35. The issue was particularly acute in allocating Member State delegations at the December 2000 Nice European Council meeting in anticipation of the Central European enlargement. See DINAN, *supra* note 1, at 237–41.

decision by the European Council in setting a system of rotation of Commission members among the Member States when the Commission membership should be reduced to two-thirds of the Member States. However, the European Council adopted a Decision in December 2008, reiterated at the European Council meeting in June 2009,³⁶ that this provision should not be carried out, a Decision taken in order to ensure that Ireland would not lose its Commissioner at any time, a subject of great concern to Irish voters in the prospective October 2009 Irish referendum on the ratification of the Lisbon Treaty. The Decision was presumably taken pursuant to the Lisbon TEU's Article 17(5), which authorizes the European Council, by unanimous action, to alter the two-thirds number. Another instance where the European Council must act by unanimity, but is highly unlikely ever to have occasion to do so, is in the determination under the Lisbon TEU's Article 7(2) that a Member State has committed a "serious and persistent breach" of the fundamental Union values stipulated in the Lisbon TEU's Article 2, notably those of democracy, respect for human rights and the rule of law.

Apart from setting its own rules of procedure under TFEU Article 235(3), the European Council is authorized to act by a simple majority vote on one major decision, that of creating a convention or calling an IGC in order to amend the Treaties. The Maastricht TEU's Article 49 authorized the Council to call an Intergovernmental Conference to amend the Treaties, but did not specify a voting requirement, which implicitly meant a simple majority vote would suffice. Indeed, the decision to call the Luxembourg IGC to amend the Treaties by the Single European Act was adopted at the June 1985 Milan European Council meeting despite the opposition of Denmark, Greece, and the UK.³⁷ Moreover, the European Council decision at Strasbourg to

36. Brussels European Council, Conclusions of the Presidency, E.U. BULL., no. 12 (2008); Brussels European Council, Conclusions of the Presidency, E.U. BULL., no. 6 (2009); see also Editorial, *An Ever Mighty European Council—Some Recent Institutional Developments*, 46 COMMON MKT. L. REV. 1383, 1386–87 (2009) (observing that the European Council's June 2009 Decision foresees that it will become part of a protocol to be adopted simultaneously with the next accession treaty).

37. See Milan European Council, Conclusions of the Presidency, E.U. BULL., no. 6 (1985); WERTS, *supra* note 2, at 87 (observing that in order to call the IGC, a prerogative of the Council, the European Council acted as the Council in its composition of Heads of State and Government); see also DINAN, *supra* note 1, at 80.

call an IGC to amend the EEC Treaty in order to create a monetary union was taken after Prime Minister Margaret Thatcher indicated that the UK opposed monetary union but would not hinder the IGC's creation.³⁸

III. MAJOR ROLES OF THE EUROPEAN COUNCIL

As previously noted, the European Council has always acted as the highest political and policy-making body of the European Union, taking many crucial (and sometimes controversial) decisions furthering its development. The Lisbon Treaty modifies its operation to some degree in two crucial roles.

First, commencing with the European Council decision to summon the Luxembourg IGC that drafted the Single European Act, the European Council has always taken the policy decision on when to call an IGC and set some guidelines for its agenda.³⁹ The Lisbon TEU's Article 48 sets out new procedures for treaty amendments and specifies the European Council's important role in each.

Lisbon TEU Article 48(4) retains an Intergovernmental Conference as the customary mode of proposing amendments to the Member States for ratification in accordance with their constitutional procedures. As previously observed, the European Council need only act by a majority vote in calling an IGC, although one may surmise that it will usually act by near consensus in order to ensure that the amendment process will ultimately be successful. The IGC itself is stipulated to act by consensus, a sensible precaution in view of the need to achieve ratification by all Member States. What is new is the provision in Article 48(3) that the European Council will in practice usually call a convention that would draft possible amendments for final deliberation by an IGC.

A convention was first employed to draft the Charter of Fundamental Rights ("Charter"). The European Council meeting at Cologne in June 1999 authorized the drafting of the Charter and that at Tampere in October 1999 set the composition of the convention that would prepare it under the

38. See Strasbourg European Council, Conclusions of the Presidency, E.U. BULL., no. 12 (1989); WERTS, *supra* note 2, at 88.

39. See, e.g., DINAN, *supra* note 1, at 145-50.

chairmanship of Roman Herzog, the former president of Germany. The convention was composed not only of representatives of Member State governments, but also of a Commissioner, a delegation from the European Parliament, and representatives of each national parliament. The convention worked with remarkable harmony to draft the Charter and present it to the European Council at Biarritz in October 2000, which endorsed it. The Charter was formally proclaimed by the presidents of the Commission, Council, and Parliament during the European Council at Nice in December 2000. However, the Charter was not given legal effect until the Lisbon TEU's Article 6 did so.⁴⁰

This success led to the employment of a convention to prepare the ill-fated draft Treaty Establishing a Constitution for Europe. The European Council meeting at Laeken in December 2001 convened a convention to amend the treaties in order to better achieve democracy, transparency, and efficiency. The convention, composed in a manner analogous to the prior convention, was chaired by former French President Giscard D'Estaing. The convention's ambitious text was largely endorsed by an IGC, with final crucial compromises achieved at the Brussels European Council, held under the Irish Presidency of Prime Minister Ahern, in June 2004. After signature at Rome on October 29, 2004, the draft Treaty Establishing a Constitution for Europe was ratified by fourteen Member State parliaments, but was abandoned after heavily adverse referenda in France and the Netherlands in 2005.⁴¹ Although media reports indicated that the negative votes were motivated in part by the unpopularity of the French and Dutch governments, and by voter dissatisfaction with EU policies on agriculture and the free movement of workers, considerations that had nothing to do with the draft Constitutional Treaty, certainly some voters felt that "federalist" elements in the text went too far.

While one might have thought that that experience would have suggested the advisability of employing only IGCs in the preparation of treaty amendments, because they would be less apt to accept amendments that might not be endorsed in the

40. See GEORGE A. BERMAN, ROGER J. GOEBEL, WILLIAM J. DAVEY & ELEANOR M. FOX, *EUROPEAN UNION LAW* 208–10 (3d ed. 2011).

41. See DINAN, *supra* note 1, at 145–50.

ratification process, the drafters of the Lisbon Treaty obviously felt that conventions do provide a worthwhile mode of obtaining input from qualified persons who do not only represent Member State government views. Article 48(3) specifies that a convention is to be composed of representatives of national parliaments, the European Parliament, and the Commission, as well as representatives of the governments.

The TEU's principal innovation in Article 48(6) and (7) is to enable amendments by European Council action in a "simplified revision procedure." Acting upon a proposal presented by any Member State, the Commission, or the Parliament, the European Council may amend, by unanimous action, any provision, or part thereof, in Part III of the TFEU. Inasmuch as Part III sets out all of the substantive fields of action of the EU (except for the CFSP), the European Council's power of amendment, without calling an IGC, could have great practical impact. Moreover, the European Council is specifically empowered to decide, again unanimously, to authorize the European Council to act by a QMV rather than unanimity in any decision taken in a Part III field of action, and even in the CFSP. Obviously, any such amendment would still require ratification by all Member States. Nonetheless, both modes of European Council action reflect a desirable pragmatic effort to accelerate the procedure for the adoption of specific amendments in particular fields.

Second, as previously noted, the European Council has always exercised a crucial role in authorizing negotiations with candidate nations, in setting essential terms for their accession, and in determining the date of accession. Thus, the initial 1969 Hague summit decision to authorize European Council negotiations for accession with Denmark, Ireland, and the UK led to the first enlargement of the EEC. Undoubtedly, the most noteworthy illustration of the role of the European Council in the accession process occurred with regard to the twelve Central European and Mediterranean nations that became Member States in 2004 and 2007. The June 1993 Copenhagen European Council set the famous three enlargement conditions or criteria—political, economic, and infrastructure—for the

ultimate accession of these nations.⁴² Subsequent European Council meetings at Luxembourg in November 1997 and at Helsinki in December 1999 authorized the launch of negotiations with the twelve candidate nations, and that in Copenhagen in December 2002 set the date of May 1, 2004 for the entry of ten of the candidates.⁴³ Recent European Council meetings have authorized negotiations with Croatia and Turkey for their accession.

Given this background, the Lisbon Treaty amendment to TEU Article 49, which governs the accession procedure, is decidedly modest, adding only: "The conditions of eligibility agreed upon by the European Council shall be taken into account" by the Council when acting unanimously to approve a new Member State.⁴⁴ It is not clear why the requisite approval should not be given by the European Council, which presumably is providing the crucial policy decision that the Council merely formally adapts.

An interesting innovation of the Lisbon Treaty that is immediately relevant is TEU Article 50, which for the first time sets a procedure for the voluntary withdrawal of a Member State from the Union. Although withdrawal is only a remote contingency, it is certainly sensible to provide a constitutional mechanism for its occurrence. Again, the European Council is to provide "guidelines" for the negotiations between the Council and the withdrawing Member State on the terms of withdrawal.

IV. *THE PRESIDENT OF THE EUROPEAN COUNCIL*

One of the most important innovations of the Lisbon TEU is the creation of the post of president of the European Council. The draft Constitutional Treaty initially proposed the office, and its text was essentially reiterated in the Lisbon Treaty. TEU Article 15(5) stipulates that the European Council shall elect its president by a QMV vote for a two and one-half year term, renewable once. Pursuant to TEU Article 15(6), the president shall chair European Council meetings and "drive forward its

42. *Id.* at 137.

43. *See* WERTS, *supra* note 2, at 114–16.

44. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Communities art. 1(57), 2007 O.J. C 306/01, at 40.

work,” “endeavor to facilitate [its] cohesion and consensus,” and provide continuity between meetings. In all these functions, the president is to cooperate with the president of the Commission and coordinate with the General Affairs Council, which customarily helps prepare the agenda of meetings and the text of resolutions or decisions. The president also is to present a report to the Parliament after each meeting, in effect representing the European Council to the Parliament.

The president is accordingly capable of exerting considerable influence upon European Council operations in general and specific decisions in particular. Political Science commentators emphasize the influence that presidencies of the Council and of the European Council have exerted in the past, notable through setting an agenda and leading discussion in relatively short meetings.⁴⁵ An adroit president can enhance this influence through regular visits to key Member State governments between European Council meetings. A president’s ability to convene an emergency session of the European Council is also of great practical importance.

Finally, the president is to serve as the formal representative of the EU within the context of the CFSP, “without prejudice to the powers of the High Representative of the Union for Foreign Affairs and Security Policy.”⁴⁶ Space considerations prevent any examination of the practical impact of this role. Suffice it to say that nations outside the EU are apt to welcome the ability to have a customary spokesperson of the European Council in international policy issues, rather than one who rotates every six months.

The decision to create the post of president was not taken without debate. The convention that drafted the Constitutional Treaty was rather divided as to the desirability of the office, and the issue was raised again in the preparation of the Lisbon Treaty. Former French President Giscard d’Estaing, as the convention chair, proposed the post, but seventy-nine out of

45. See especially the studies of Professor Jonas Tallberg, *The Agenda-shaping Powers of the EU Council Presidency*, 10 J. EUR. PUB. POL’Y 1, 1–19 (2003); *Bargaining Power in the European Council*, 46 J. COMMON MKT. STUD. 685, 685–708 (2008); *The Power of the Presidency: Brokerage, Efficiency and Distribution in EU Negotiations*, 42 J. COMMON MKT. STUD. 999, 999–1022 (2004).

46. TEU post-Lisbon, *supra* note 20, art. 15(6), 2010 O.J. C 83, at 23.

ninty-one speakers at the convention opposed it.⁴⁷ France, Germany, and the UK strongly favored the office, presumably feeling that a rotating presidency was not as effective, particularly in confronting major issues that have a considerable time duration. Most smaller Member State governments preferred a rotating presidency, presumably concerned that a long term president was apt to be more influenced by the views of the larger Member States, as well as being concerned that the new European Council president might overshadow the president of the Commission. They were also opposed to the loss of the rotation of governments in the presidency of the European Council. In point of fact, some commentators have pointed to evidence that several smaller Member State governments, notably those of Belgium, Denmark, Finland, Ireland, and the Netherlands, have consistently held highly successful Presidencies.⁴⁸ In any event, as Mr. Piris has observed, the initial proposal that the president should have a substantive functional role as the chair of the General Affairs Council, with the responsibility for coordinating other Council configurations, was abandoned, so that the president now only serves as chair of the European Council.⁴⁹

The designation of the Belgian Prime Minister, Herman Van Rompuy, as the initial European Council president came as a bit of a surprise, as many media commentators had expected former UK Prime Minister Tony Blair to be named. Apparently the European Council preferred a less controversial and lower-profile president.

Since his designation, President Herman Van Rompuy has been keen to fulfill his duties energetically, while assuaging some of the concerns felt by smaller Member States about the risks posed by the post. He has manifested the political skills that enabled him to be a successful leader of Belgium despite its ongoing internal political divisions. In Professor Dinan's appraisal, President Van Rompuy "has focused on improving the European

47. See WERTS, *supra* note 2, at 148–53; see also DINAN, *supra* note 1, at 224–25.

48. See, e.g., WERTS, *supra* note 2, at 155–57. In particular, the prime ministers of smaller Member States have been especially effective in brokering compromises necessary to achieve a consensus on the text of new treaties (although Germany's Chancellor Angela Merkel deserves the credit for promoting the compromises necessary to obtain the final text of the Treaty of Lisbon).

49. PIRIS, *supra* note 18, at 206–07.

Council procedurally by tightening its agenda, . . . inviting government ministers only on an ad hoc basis, shortening and sharpening summit conclusions, and ensuring better follow-through.”⁵⁰ President Van Rompuy has been particularly resourceful and energetic in helping to craft proposals intended to confront monetary crisis posed by the serious economic mismanagement of finances in Greece, and the serious recession’s impact on the finances of Ireland, Portugal, and Spain. He has also been keen to demonstrate collaborative efforts with Commission President Barosso, ECB President Trichet, and Euro-Group President Juncker in formulating monetary and economic proposals. Finally, he has exercised his power to call emergency sessions of the European Council to deal with the crisis.

CONCLUSION

In view of its status as the highest political body within the European Union, this Essay has attempted to review the impact of the Lisbon TEU concerning the European Council. By formally designating the European Council as an EU institution, the Lisbon TEU has, on the one hand, recognized its political and policy-making role, and, on the other hand, reduced its intergovernmental character to a significant degree by bringing it within the constitutional structure of the EU. This reduction in its intergovernmental character is particularly demonstrated by its shift to qualified majority voting in so many of its important decisions, although it will remain to be seen whether in practice the European Council will actually abide by QMV.

The Essay has also examined the European Council role in the most fundamental constitutional decision process, that of making treaty amendments, and noted the potentially valuable simplified revision process. Finally, the Essay has discussed the new post of President of the Union, the role of the president, the controversy over creating the post, and Herman Van Rompuy’s initial execution of his duties as the first president.

50. DINAN, *supra* note 1, at 226.