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Altneuland: The EU Constitution in a Contextual Perspective

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European Governance: Executive and Administrative Powers under the New Constitutional Settlement

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The inter-institutional balance of power within the EU is central to the new constitutional order, when viewed from the perspective of legitimacy/democracy, and from that of efficacy. It is not therefore surprising that this topic has been contentious. The Member States agreed to the Treaty establishing a Constitution for Europe at the Brussels European Council in June 2004.¹ The discussion which follows will take account of the changes made to the provisions concerning executive power by the IGC.²

Part 1 of this paper begins by examining the process in the Convention for deliberation about the institutional aspects of the Draft Constitution. This is followed in Part 2 by analysis of the differing issues relating to executive power considered by the Convention. It is clear that the Draft Constitution embodies a regime of shared executive power and Part 3 considers how this might operate in relation to different aspects of the executive function. The focus then shifts in Part 4 to discussion of the provisions relating to executive power from the perspectives of principle and pragmatism. The final part of the paper considers the regime of shared executive power in terms of legal and political accountability.

Part 1: Process

The contentious nature of the discussions about institutions was evident in the process employed at the Convention. The Convention's three-stage methodology is well known. There was the listening stage from March till June 2002. This was followed by the examination stage, in which Working Groups considered particular topics. This exercise occupied the latter half of 2002. There was then the proposal stage, in which the Convention discussed draft articles of the Constitution.

The process was very different in relation to institutions. There was no Working Group. It was felt that the issues were too contentious to be dealt with other than in plenary session. This is reflected in the fact that the title on Institutions was empty in the original preliminary Draft Constitution. The Convention discussions about institutions only began in earnest in January 2003. It rapidly became apparent that there were serious divisions of opinion between the larger and the smaller states, with the Commission lining up with the latter group. The absence of a Working Group on institutions did not however lead to more detailed deliberation in the plenary sessions of the Convention.

The Praesidium submitted its proposals to the Convention in April 2003.³ Full discussion of the draft articles only occurred in the plenary session on May 15-16 2003,⁴ and this revealed serious differences of view. The Praesidium realised that it needed more time for reflection and therefore did not make any amendments to these articles in its initial global draft of May 28 2003.⁵ There was no second reading in plenary of these articles. The Praesidium opted instead for consultations with the four constituent groups,

governments, MEPs, National MPs, and the Commission, which took place on June 4 2003.⁶ Formal text of the revised articles on the institutions only became available on June 10,⁷ a mere three days before the concluding session on June 13.⁸ It is clear moreover that the Praesidium, and the Secretariat, exercised considerable power in deciding on the ultimate content of these provisions and in deciding which amendments should be adopted.⁹

The Convention process in relation to institutions can obviously be criticised. It should however be placed in perspective. This may not serve to justify the process in this respect, but it does help us to understand what occurred. It was not self-evident that the Convention would seek to draft a Constitution. Many of the Member States felt that it might be nothing more than a high-level talking shop.¹⁰ It nonetheless became evident that the Convention had aspirations to produce a formal constitutional document. The decision to postpone discussion of institutions is readily explicable. It was clear to all that this topic would be divisive. If it had been placed on the agenda in the latter part of 2002, then it would have over-shadowed the other work. The contrast with what occurred is instructive. The Convention, via Working Groups, concentrated on important issues. There were differences of opinion on these matters, but they were less marked than those on institutions. Progress on these matters allowed the Praesidium to publish the preliminary Draft Constitution in the autumn of 2002. This may well have been a skeletal document, but it reinforced the sense that the Convention was going to produce a constitutional document, and allowed the national players to absorb the idea.

This strategy also enabled discussion about institutions to take place ‘off-line’ in 2002. The issue of the institutional division of power was like Banquo’s ghost, ever present, lurking in the background. As Grevi notes, the key phrase in shaping the formal Convention agenda for 2002 may have been ‘everything but institutions’, but the key phrase for the debate in other circles was ‘nothing but power’.¹¹

Part 2: Executive Power: The Issues

It is important to note at the outset that there is no precise definition of executive power in the EU. We know, in formal terms at least, that legislative power under the Constitution captures the making of EU laws and EU framework laws.¹² There is no analogous formal definition of executive power to be found within the Constitution. The nature of executive power is moreover more difficult to define in substantive terms, since it varies as between nation states. We can nonetheless identify a core set of tasks that are commonly undertaken by the executive branch of government. The executive will usually plan the overall priorities and agenda for legislation. It will normally have principal responsibility for foreign affairs and defence. The executive will have an important say in the structure and allocation of the budget. It will also have responsibility for the effective implementation of agreed policy initiatives and legislation.

There were a number of dimensions to the debate about executive power in the EU that must be disaggregated. There is the issue of the election of the Commission President; the internal organisation of the Commission; the internal operation of the

Council; the Presidency or Presidencies of the Union; and the creation of an EU foreign minister. These issues will be considered in turn.

1. The Election of the Commission President

The Commission has in the past generally been opposed to the idea that its President should be elected. It feared the politicisation that might result. It has more recently changed its view, and accepted that some form of elected President would enhance its legitimacy within the Union institutions, and thereby strengthen the claims of the Commission President to be the President of the Union as a whole. The argument for electing the Commission President has also been supported on democratic grounds, since the voters would then be able to ‘throw out’ the incumbents of political office they disliked. The voters’ inability to do this at present is one aspect of the critique concerning the EU’s democratic deficit.

The debate then shifted as to who should elect the Commission President. Such an election could be direct, taking place at the same time as elections to the EP, with voters choosing the President by direct vote. The election could be indirect, the decision being taken by the EP.

There were differences of view about the consequences of any such change. There were some who felt that direct or indirect election would not markedly affect the *modus operandi* of the Commission. It would be very much business as usual, except the Commission would have added legitimacy from election of its President. There were

others who accepted that election would significantly alter the character of the Commission. They acknowledged that election would lead to politicisation, since a directly or indirectly elected President would have a political platform or agenda. They nonetheless regarded such a development with equanimity. They argued that the legislative and executive powers of the Commission inevitably entailed political choices. The exercise of these powers could not be politically neutral, any more than could such exercise in domestic politics. Better then for this to be out in the open so that voters could make their considered choices.

The election of the Commission President might however have further ramifications. Consider the following two issues.

It is questionable, in the medium term, whether the EP or the voters would be content simply with an indirectly elected Commission President. The assumption has been that the Commission President would be indirectly elected, but not the other Commissioners. This is certainly possible. There are examples of elected executives who appoint other members of their team, who have not been elected. The point is nonetheless the possible repercussions of an indirectly elected Commission President within the EU. The EP already exerts power, *de jure* and *de facto*, over the Commission team. If the Commission President were to be indirectly elected by the EP, then it might then press for other Commissioners to be elected.

It is also questionable whether the Commission would continue to retain its ‘gold standard’, the near monopoly of legislative initiative, if the Commission President were elected. It could be argued that the retention of this monopoly would be strengthened if

the Commission President of the Commission were elected, since the incumbent would represent those within the EP that had voted in his or her favour. The fact that a member of the executive is elected by the legislature does not however mean that the latter will accept with equanimity that the executive thus chosen has a legal monopoly over the introduction of legislation. The EP might feel that it has more direct democratic credentials than those of an indirectly elected Commission President, and that it should also have the right to initiate legislation. The nature of such a right would then be a matter for further debate. It might exist in parallel to that exercised by the Commission President, such that the EP could draft its own legislation, which would become law subject to approval from the Council. The EP might alternatively press for a right to initiate legislation that would then be drafted by the Commission. We should not forget that the EP has frequently pressed for a right of legislative initiative in the past. The fact that it has not done so on other occasions is explicable on the ground that it wished to prioritise other issues, rather than any change of heart about the issue itself.

The solution in the Constitution brought a sharp dose of political reality to the debate. The EP was in favour of an indirectly elected Commission President. It was however always doubtful whether the Member States would be willing to accept a regime in which they surrendered control over the Commission Presidency to the EP. The Member States were, unsurprisingly, not willing to surrender this power. Article I-20(1) states that the EP shall elect the President of the Commission. The retention of state power is however apparent in Article I-27(1). The European Council, acting by qualified majority, after appropriate consultation, and taking account of the elections to the EP,

puts forward to the EP the European Council's candidate for Presidency of the Commission. This candidate shall then be elected by the EP by a majority of its members. If the candidate does not get the requisite majority support, then the European Council puts forward a new candidate within one month, following the same procedure.

The result is that the Commission President is indirectly-indirectly elected. It is difficult to believe that this will do much to enhance the legitimacy of the Commission, insofar as this is felt to be a desired or necessary objective. Nor will it do much to enhance the democratic credentials of the Union, in the sense of allowing the voters to throw out those whom they dislike, and install another person with a different policy agenda.

2. The Internal Organisation of the Commission

(a) The Convention's Proposed Solution

There has been considerable debate, going back at least to the Nice Treaty 2000, concerning the overall size of the Commission. This issue came to the fore because of enlargement. In the IGC leading to the Nice Treaty opinion was divided as to whether there should continue to be one Commissioner from each state, or whether there should be an upper limit combined with rotation.¹³ The argument for the latter view was that Commissioners do not represent their state, and that a Commission with 25 or 27 Commissioners could cross the line between a collegiate body and a deliberative

assembly. The Nice Treaty embodied a compromise. The Protocol on Enlargement provided that from January 1 2005 Article 213(1) EC should be amended to provide that the Commission should consist of one national from each state. The Council, acting unanimously, could alter the number of members of the Commission. When the Union had 27 Member States Article 213(1) would be further modified such that the number of Commissioners would be less than the number of Member States. The Council, acting on the principle of equality, would adopt a rotation system, and would decide on the number of Commissioners.

The Draft Constitution as it emerged from the Convention on the Future of Europe embodied a different compromise. It provided that the Commission should consist of a College comprising the President, the Union Minister for Foreign Affairs, and thirteen Commissioners selected on the basis of a rotation system between the Member States.¹⁴ The system of rotation was to be established by a European decision of the European Council, on the basis of two principles. There was a state equality principle,¹⁵ which mandated that Member States should be treated on an equal footing as regards the sequence of, and time spent by, their national as Members of the College. There was also a demographic and geographic equality principle, which mandated that subject to the first principle, each successive College of Commissioners should be so composed as to reflect satisfactorily the demographic and geographical range of all Member States.¹⁶

These provisions of the Draft Constitution reflected the view that there should be a small Commission, with a number of Commissioners that was less than that of the

Member States. This was however undermined by the provision that the Commission President should appoint non-voting Commissioners from all the other Member States. This regime was said to take effect from November 1 2009.

(b) Difficulties with the Convention Solution

The 'solution' embodied in the Draft Constitution was problematic. It would have led to a two-tier Commission, with voting and non-voting Commissioners. This would have been the worst of all possible worlds. It would not have produced a coherent, smaller Commission, since the views of the non-voting Commissioners would inevitably have had a major impact even if they did not have the vote in the College. It would moreover necessarily have produced tensions between the two groups. It is important to realise that non-voting Commissioners could still head a particular DG within the Commission. A non-voting Commissioner might therefore have developed a legislative initiative, but have no formal vote within the College. The tensions that this could produce would be considerable. They would be exacerbated if the College were to reject the proposal or suggest modifications when the Commissioner responsible was not able to vote.

It is therefore not surprising that the Commission expressed its opposition in the strongest possible terms. It described the relevant provisions as 'complicated, muddled and inoperable'.¹⁷ It argued that 'if the members without voting rights manage a portfolio, one cannot see how they could effectively exercise their responsibilities

without being able to participate in the collective decision'.¹⁸ If they 'don't have a portfolio, one wonders what their role within the College would be'.¹⁹

The Commission also pointed to significant points that were unclear as to the status of non-voting Commissioners. The general approach in Part III of the Draft Constitution is that European Commissioners, who have the vote, and other Commissioners who do not, were otherwise subject to the same responsibilities.²⁰ This still left open, as the Commission rightly noted, a plethora of issues on which the Draft Constitution was unclear.²¹ Thus it was not apparent whether non-voting Commissioners could attend meetings of the College and take part in its discussions. Nor was it clear whether they could take decisions on behalf of the Commission. This latter issue is of particular importance, given that only about 3% of approximately 10,000 Commission decisions per annum are made by the College of Commissioners through the 'oral procedure' at its weekly meetings. The great majority of such decisions, approximately 60%, are made either by 'empowerment', whereby a Member of the Commission is empowered to take management decisions on its behalf; or 'delegation', whereby decisions are taken by a Director General to whom power has been delegated by the Commission.²²

The Commission's proposed solution was shaped by the politics of the Convention. The constitutional provisions reflected opposition within the Convention to the idea of a small, slimmed-down Commission. This was recognised by the Commission, which was nonetheless strongly opposed to the divide between voting and non-voting Commissioners. The Commission's alternative solution was premised on each

Member State having a Commissioner, with the same rights and obligations.²³ Some restructuring of the College would however be necessary within an enlarged EU. The way forward was to build on current practice, whereby informal groups of Commissioners deal with related subject matter. The Commission proposed that this should be formalised, by structuring the College into a number of groups of Commissioners. The College of Commissioners, which would contain all members of the Commission, would consider only the most important issues.²⁴ The Commission drafted amendments, which encapsulated its preferred solution.²⁵ There was much to be said for the Commission's proposal, given that a slimmed-down Commission of 15 Commissioners did not seem acceptable. The proposal was certainly preferable to that in the Draft Constitution.

(c) The Solution Contained in the Constitution

The Italian Presidency of the IGC addressed a questionnaire to the Member States, asking whether the two-tier regime of Commissioners proposed by the Convention should be retained.²⁶ The Irish Presidency of the IGC brokered a compromise now embodied in the Constitution. The first Commission appointed under the new Constitution will have a Commissioner from each Member State, plus the President of the Commission and the Union Minister for Foreign Affairs.²⁷ After the first term of office, the Commission is to consist of members including the President and the Minister for Foreign Affairs, corresponding to two thirds of the Member States, unless the European Council acting

unanimously decides to alter this figure. Selection is to be based on equal rotation taking account of the state equality principle and demographic and geographic equality principle in the Convention draft.²⁸ Thus unless the European Council decides otherwise the net effect is that there will be a slimmed down Commission in the medium term, and all members thereof will have voting rights. This is an improvement on the Convention draft, and does not preclude formalisation of the present arrangements for groups of Commissioners dealing with related matters.

The IGC also made significant changes to the appointment of the Commissioners. The Convention proposed that the President-elect of the Commission would choose Commissioners from names put forward by Member States, and that these would be approved by the EP. The IGC revisions accord more power to the Council and the European Council. Member States make suggestions for Commissioners, but it is now the Council, by common accord with the President-elect, that adopts the list of those who are to be Commissioners in accord with the two principles set out above. The body of Commissioners is then subject to a vote of approval by the EP. However the formal appointment of the Commission is made by the European Council, acting by qualified majority, albeit on the basis of the approval given by the EP.²⁹

3. The Internal Organization of the Council

In the Draft Constitution there was to be a Legislative and General Affairs Council, LGAC.³⁰ When it operated in its General Affairs function it would ensure consistency in

the overall work of the Council. There was also to be a Foreign Affairs Council, chaired by the Union Minister for Foreign Affairs. The European Council was to adopt a decision establishing the further Council formations. The Presidencies of these Council formations, other than Foreign Affairs, were to be held by representatives of Member States within the Council on the basis of equal rotation for periods of at least one year. It was to be for the European Council to adopt a European decision establishing the rotation rules.

The IGC modified this scheme,³¹ and the changes were accepted in the Constitution.³² The combined LGAC was rejected. There is instead a General Affairs Council, GAC, with the task of ensuring consistency in the work of the different Council formations. The GAC prepares and ensures the follow-up to meetings of the European Council. This is now to be done in liaison with the President of the European Council as well as the Commission.³³ The provisions concerning the Foreign Affairs Council, FAC, remain the same.³⁴ The European Council makes by qualified majority the decision concerning the list of other Council formations.³⁵ Specific provision is made for the Committee of Permanent Representatives. A consequence of discarding the LGAC is that each Council formation will vote on legislation within its area. Meetings of Council formations will therefore be divided into two parts dealing with legislative and non-legislative functions.³⁶ The method of choosing the Presidency of the Council formations has also been altered.³⁷ They are, other than that of Foreign Affairs, to be held by Member State representatives in the Council on the basis of equal rotation, in accord with conditions established by a European decision of the European Council acting by

qualified majority. The Constitution includes a Draft Decision which will be adopted when the Constitutional Treaty enters into force. It embodies in essence a ‘team system’ for the Presidency of Council formations, other than the FAC.³⁸

There is much to be said for the IGC view that the General Affairs and Legislative functions should be separated. The two are distinct.³⁹ There is more room for debate about whether it would have been desirable for there to have been a dedicated Legislative Council.⁴⁰

4. The President(s) of the Union: Hats and Labels

Perhaps the most significant debate about executive power has been concerned with the Presidency of the Union as a whole. This has at times bordered on the arcane, and much of the discussion smacks of a ‘milliner’s’ tale: the talk was of one hat, two hats, shared hats and the like. This should not mask the issues of real power that were at stake. Two main positions can be identified.

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

A prominent version of *the 'separate hats' view* was that there should be a President of the Commission and a President of the European Council, and that executive power would be exercised by both. It was central to this view that the Presidency of the European Council would be strengthened. It would no longer rotate between states on a six-monthly basis. It was felt that this would not work within an enlarged Union, and that greater continuity of policy would be required. This view was advocated by a number of the larger states, but was opposed by some of the smaller states, which felt that the Presidency of the European Council would be dominated by the larger Member States.

The Convention proceedings were influenced by the external discourse on this issue. The membership of the Convention altered in late autumn 2002, with the 'invasion of the foreign ministers':⁴¹ Fischer and de Villepin joined the Convention. Change inside the Convention was matched by political developments outside its portals. The larger Member States, Spain, the UK and France, made it clear that they subscribed to the 'separate hats' view. The idea of a longer-term, strengthened Presidency of the European Council, was central to the 'ABC' view, expressed by Aznar, Blair and Chirac. In January of 2003 Germany was brought on board. This was made clear in the Franco-German paper, in which Germany accepted the long-term Presidency of the European Council, the *quid pro quo* being that France accepted that the Commission President should be elected.

The Franco-German paper, combined with the 'ABC' view, shaped developments inside the Convention. Giscard d'Estaing may well have inclined to this view in any event. The Franco-German paper, combined with the opinions of the UK and Spain,

nonetheless had a marked impact on his thinking. He was not about to produce a Draft Constitution with key provisions about the institutional disposition of power that were opposed by the larger Member States. The announcement of the provisions on the Presidency was nonetheless dramatic. The proposals were leaked to the press on April 22 2003, just as he was unveiling them to the Praesidium. The proposals ‘provoked shock and awe in about equal measure, particularly among the integrationist Convention members from the European Parliament and some of the smaller Member States’.⁴² It is safe to say that they were not welcomed by the Commission either.

The ‘shock and awe’ provoked by Giscard’s proposals was explicable because they not only provided for an extended Presidency of the European Council, which was to be the highest authority of the Union, but also for a ‘board’ of seven including a Vice-President, the EU Foreign Minister, two other members of the European Council, plus the Presidents of Ecofin and the Justice and Home Affairs Council. This reconfigured European Council was to have its own bureaucracy. The ‘most developed’ form of these proposals did not survive long within the Convention. Substantial parts hit the ‘cutting room floor’ and those opposed to the ‘separate hats’ view congratulated themselves on curbing the Giscardian vision.

The result as expressed in the Constitutional Treaty nonetheless embodies the central feature of the ‘separate hats’ view. Article I-22(1) stipulates that the European Council shall elect a President, by qualified majority, for two and half years, renewable once.

5. The President(s) of the Union: Power and Authority

The victory, albeit qualified, for the ‘separate hats’ view is only part of the story about executive power within the EU. Article I-22(1) tells us that there is going to be a long term President of the European Council. It tells us nothing about the division of power between the President of the Commission and the President of the European Council. It is the nature of their respective powers *de jure* and *de facto*, that will shape executive power within the EU. This can be demonstrated from three related perspectives. We can consider proposals for the division of power that emerged in the background to the Convention; the political manoeuvring in the IGC; and we can analyse the articles of the Constitution. These will be considered in turn.

(a) The UK Paper

A vision of the powers of the President of the European Council emerged from what Grevi has termed a non-paper leaked by the UK government in January 2003.⁴³ This paper envisioned the President of the European Council preparing and controlling its agenda; developing jointly with the Commission President the multi-annual strategic agenda; being head of the Council Secretariat that would become ‘his administration’; chairing the GAERC; chairing teams of sectoral Council formations; approving agendas for sectoral Councils; chairing triologue meetings with the Commission and the EP; attendance at Commission meetings as observer when the President of the European

Council so decides; ‘ownership’ of major summits with great powers; co-ordination and supervision on aspects of crisis management and defence.

This does not represent the position in the Constitution. It did reflect a vision from one of the ‘ABC’ group as to what the powers of the President of the European Council might have been. If these powers had been accorded to the President of the European Council it would have had far-reaching consequences for the inter-institutional balance within the EU.

(b) The Deliberations in the IGC

The Commission’s strategy was not to challenge directly the issue of ‘hats and labels’, but rather to focus on ‘power and authority’. The Commission would doubtless have supported any move to undo the extended Presidency of the European Council. This was not however its principal focus. It stated that despite the reservations that it had on the Presidency of the European Council ‘the Commission does not propose to bring into question the compromise which the Convention reached after prolonged debate’.⁴⁴

The Commission rather concentrated its attention on seeking to constrain the power and authority of the President of the European Council. It was vital, said the Commission, to maintain the balance of the President of the European Council’s role defined by the Convention.⁴⁵ It argued that any extension of the President’s duties beyond chairing meetings of the European Council and representing the Union in relation to the CFSP ‘would inevitably change the institutional architecture agreed in the Convention

and create confusion as to how responsibility was shared'.⁴⁶ The President of the European Council should not organise the work of the Council, since a person 'who is not accountable for his/her action to any parliamentary assembly cannot exert influence over the *modus operandi* of the Council, which is supposed to be transparent and democratic'.⁴⁷ The extension of judicial review to acts of the European Council was a further element in the Commission's strategy for limiting its power.⁴⁸

(c) The Provisions of the Constitution

The constitutional provisions concerning the distribution of power between the President of the European Council and the President of the Commission are central. They are not however simple to divine.⁴⁹

We can begin with the legal provisions relating to the European Council. These contain a subtle modification of established orthodoxy. The TEU, Article 4, states that the European Council shall provide the Union with the necessary impetus for its development and shall define the general political guidelines thereof. Article I-21(1) of the Constitution states that the European Council shall provide the Union with the necessary impetus for its development, and shall define its general political directions *and priorities*. It is the addition of the reference to priorities that is the formal novelty in Article I-21(1). This is subject to the caveat that the European Council does not exercise legislative functions. Article I-22(2) then specifies the powers of the President of the European Council.⁵⁰ It states that the President shall chair it and drive forward its work;

shall ensure its preparation and continuity with the President of the Commission, and on the basis of the work of the General Affairs Council; shall endeavour to facilitate cohesion and consensus within the European Council; and shall present a report to the European Parliament after each of its meetings; and the President shall ensure the external representation of the EU on issues concerning its CFSP, without prejudice to the responsibilities of the Union Minister for Foreign Affairs.

The provisions concerning the Council, and its relationship with the European Council, are also vital for an understanding of the President's powers. The original Giscardian proposals for the European Council provided for a crucial overlap with the Council, since the Presidents of Ecofin and the Justice and Home Affairs Council were to be members of the European Council. This would have enabled the European Council and its President to exert a direct influence on the workings of important Council formations.

The result in Article I-24 does not encapsulate the degree of power for the European Council envisaged either by the Giscardian or UK proposals. It is clear from Article I-24(7) that the Presidency of the Council formations, other than Foreign Affairs, is to be held by Member States on the basis of the team Presidency. This was to meet the fears of the smaller states that a long-term Presidency of the European Council would lead to domination by the larger states.

The influence of the European Council, and hence its President, is nonetheless still apparent within the Council. It is the European Council that is to adopt a decision establishing further formations in which the Council may meet.⁵¹ The European

Council's strategic guidelines on foreign policy are to be fleshed out by the Foreign Affairs Council.⁵² We have seen moreover that the European Council formally appoints the Commission.

The relationship between the European Council and the General Affairs Council (GAC) is especially significant. Article I-24(2) as revised by the IGC provides that it shall prepare and ensure follow-up to meetings of the European Council. This is to be done in liaison with the Commission *and* the President of the European Council. This is significant because of the centrality of the GAC to the functioning of the Council.⁵³ The obligation cast upon the GAC to prepare and ensure follow-up to meetings of the European Council provides the latter, and hence the President, with an important power. It was of course the case that even prior to the Constitution the 'conclusions' reached by the European Council would frame detailed deliberations in the Council and in the Commission. This was especially so where the European Council expressed specific policy objectives, as was increasingly common. Article I-24(2) is significant nonetheless. It creates a cognisable legal obligation on the GAC to ensure that the European Council's conclusions are followed up. It creates a more formal mechanism than hitherto for the European Council to influence the priorities of the EU. It may enable the European Council to influence the detail of executive matters. It may also enable it to press for legislation on specific issues. It is true that the formal right of legislative initiative would remain with the Commission. The obligation on the GAC to ensure that the meetings of the European Council are followed up may however require legislation on specific issues deliberated on by the European Council.

Part 3: The Disposition of Shared Executive Power in the EU Constitutional Order: The Reality of Power Sharing

Shared executive power has been retained in the final Constitution. This does not tell us who will and should do what, nor does it tell us how the component parts of the executive will inter-relate in practice. The ‘answers’ to these issues will not be known until we have experience as to how the system will operate. We can nonetheless make headway on the information presently available. The discussion is best conducted by distinguishing different aspects of executive power.

1. The Setting of Priorities and the Planning of the Legislative Agenda

(a) Setting Priorities and Planning the Legislative Agenda: The Legal Framework

We can begin by looking at the legal provisions of the Constitution as they relate to the European Council and the Commission respectively.

In relation to the European Council, the change in Article I-21 from Article 4 TEU was noted earlier. The Constitution provides that the European Council shall define the EU’s priorities, as well as defining its general political directions. This language is mandatory, and the additional task of defining the EU’s priorities is not expressly qualified by the adjective ‘general’.⁵⁴ It might be open to the ECJ to read the word ‘general’ onto priorities, but nothing requires this conclusion. The existing formulation

makes sense as it stands: if the framers of the Constitution had wished to limit the European Council they could have said ‘and shall define ... its general priorities’. The connection between the extended tasks of the European Council and the President’s role is obvious: the President must, *inter alia*, chair the European Council and drive forward its work.⁵⁵ The work of the European Council now includes setting priorities for the EU, and hence the President will have the obligation to drive this forward. These legal provisions are a classic example of law catching up with political reality, given that the European Council has been playing an important role in relation to priorities for some considerable time.

In relation to the Commission, the main legal provision is Article I-26(1), which provides, *inter alia*, that the Commission shall initiate the EU’s annual and multi-annual programming with a view to achieving inter-institutional agreements. Thus while the Commission is accorded a general right to initiate particular pieces of Union legislation,⁵⁶ it also has the right and duty to initiate the Union’s more general programming strategy. The language of Article I-26(1) serves to reinforce the sense of shared executive power: the Commission initiates the Union’s annual and multi-annual programming with a view to achieving inter-institutional agreement. We need to understand the status quo ante to determine how far Article I-26(1) signals a change.

The pre-existing position can be summarised as follows. The Commission produces its annual work programme in the autumn of the year before it is to take effect. While this programme is designed, *inter alia*, to influence the EU’s policy agenda the extent to which it achieves this goal should not, as Nugent states, be exaggerated.⁵⁷ This

is in part because the work programme is determined by pre-existing commitments, and in part because Council Presidencies have their own work programme/priorities that influence the Commission agenda. The Council will establish its own annual work programme at the beginning of each year, although as Hayes-Renshaw and Wallace note this will be influenced by the Commission programme, and by external events.⁵⁸ The Council has, since the Seville European Council,⁵⁹ developed a multi-annual programme. The first such programme was produced in 2003,⁶⁰ and the process is regulated by the Council's Rules of Procedure. These rules provide that the GAC recommends to the European Council a multi-annual programme for the next three years, which is based on a joint proposal drawn up by the Presidencies concerned in consultation with the Commission.⁶¹ In the light of this multi-annual programme, it is for the two Presidencies that hold office in the following year to submit jointly a draft annual programme for that year.⁶²

It is unclear how far Article I-26(1) is intended to alter the previous legal landscape. The 'strong view' would be that the Commission is in the driving seat in relation to the annual and multi-annual programme. Article I-26(1) states that the Commission shall initiate the Union's annual and multi-annual programming with a view to achieving inter-institutional agreements. The Article is framed in terms of the *Union's* annual etc programming, not just the Commission's. It could be argued further that the Seville strategy whereby the Council develops its *own formal* multi-annual programme would be inconsistent with Article I-26(1). The Commission in fulfilling its remit to initiate the annual etc strategy will undoubtedly engage in detailed discussions with state

interests and those of the EP. The ‘alternative view’ would acknowledge the Commission’s right to initiate an annual/multi-annual programme for the Union, but would maintain that this should not be regarded as the exclusive method whereby such strategic visions are developed. It would therefore still be open to the Council to frame its formal programme, with the caveat that the Commission document should be taken into account. The ‘strong view’ is probably more consonant with the wording of the Constitution, although the ‘alternative view’ may accord better with political reality.

It is clear that the legal provisions affirm the regime of shared executive power. The very fact that the European Council’s tasks are defined so as to include setting the priorities for the Union necessarily empowers the President of the European Council. It is impossible to argue in legal terms that this should be the exclusive preserve of the Commission, as does the fact that the Commission’s power is to initiate multi-annual programming with a view to securing inter-institutional agreement, not the imposition of a *fait accompli*. It should also be recognised that the relevant legal provisions are ‘delicately balanced’ and give comfort to the Commission too. Thus while the priority-setting task of the European Council is not limited by the adjective ‘general’, it can be argued that the European Council cannot initiate its own formal multi-annual programme, since this would trespass on the Commission’s power of initiation. In that sense, it is for the Commission to ‘factor in’ the European Council’s decisions about priorities into the annual and multi-annual programming the initiation of which remains its preserve. Moreover the Commission has an explicit constitutional mandate to initiate the annual and multi-annual strategy for the Union as a whole.

(b) Setting Priorities and Planning the Legislative Agenda: The Political Framework

We can turn now to consider how the European Council and the Commission will inter-relate in practice when setting the policy priorities and agenda.

It is likely that the President of the European Council will exert greater influence over priorities and the legislative agenda than before, because the office will be held for up to five years. The President can develop a vision for the EU that was not possible with the six-monthly rotation system.⁶³ It is also predictable that successive Presidents will wish to leave a 'mark' on the EU, in the form of an agenda that they will press for during their term of office. Institutional support will be of importance. The European Council has not hitherto had an institutional support mechanism to rival that of the Commission, but this has not prevented it from exercising real input into the Union's development. The Constitution provides that the European Council is to be 'assisted' by the General Secretariat of the Council of Ministers.⁶⁴ It would be surprising if this did not blossom into institutional support suited to the needs of the 'new' European Council.

Having said this, it is clear that the Commission, and its President, will continue to be of great importance in setting the EU's overall agenda. It is the Commission that is to initiate the annual and multi-annual programming with the aim of securing inter-institutional agreement.⁶⁵ The Commission President co-operates with the President of the European Council in ensuring the preparation and continuity of the work of the European Council.⁶⁶ The Commission President can moreover rely on the force of the Commission bureaucracy.

(c) Setting Priorities and Planning the Legislative Agenda: Conflict-Co-operation and Coherence

We can however press further in assessing shared executive power against the criteria of conflict-co-operation and coherence. The relationship between the Presidency of the European Council and the Commission will evolve over time. It is interesting to reflect on this relationship through the lens of conflict-co-operation, in order to see which of these is likely to predominate, and to reflect also on the implications of shared executive power for the coherence of the EU's agenda.

The worst case scenario is that there will be conflict between the European Council and the Commission, and that this will lead to inter-institutional tensions redolent of those that beset Council/Commission relations in the late 1960s and through the 1970s. The result would be that the coherence of the EU executive agenda would necessarily suffer, such that any agreed initiatives would be partial and fragmentary.

It should however be recognised that there are numerous incentives for the two players to co-operate and to develop a coherent agenda. There are a number of reasons why this is so.

The first is that inter-institutional tension leading to failure to develop a coherent agenda would be detrimental to the EU, a consequence that would be in the interest of neither player. They would both be held responsible irrespective of whether the 'objective reality' was that one was more to blame than the other.

There is a second reason which is closely related to the first. If shared executive power fails the consequences for the powers of the two Presidents will be uncertain. They might respectively hope that any future allocation of executive power would be more unequivocally in their favour, but they could not be certain. The only certainty would be that the future disposition of executive power would be uncertain. It might incline towards a single locus of executive responsibility, but the beneficiary would not be readily predictable. It might be the President of the Commission, but it might be the President of the European Council, along the lines of the Giscardian vision presented to the Convention. This uncertainty will be a factor inclining the relevant players to co-operation rather than conflict and intransigence.

The respective 'constituencies' of the President of the European Council and the President of the Commission might be a third factor engendering co-operation between the parties. The fear of conflict is based in part on the assumption that each will lead a united team, which will have strongly opposed views. The reality is more interesting.

The President of the European Council will undoubtedly occupy a powerful position. It should nonetheless be recognised that the interests of the President's immediate constituency, viz the Member States, will not be homogenous. We know that the smaller states fear domination by their larger neighbours, and feel that they might be better 'protected' by the Commission. Nor should it be pre-supposed that the larger Member States necessarily have an identity of interest on the substantive direction of EU policy. The priorities that emerge from the European Council are likely therefore to be the result of compromise between the Member States. The European Council may be

intergovernmental in institutional terms. It would however be mistaken to think that this will necessarily translate into intergovernmentalism and states' rights in relation to the substantive direction of EU policy.

The President of the Commission's 'constituency' under the new constitutional order is equally interesting. The incumbent will have considerable power. The President may however also face contending pressures from his or her constituency. The indirectly elected President will have to take account of the interests of those in the EP that voted him into office on the promise or expectation of certain policy initiatives. The Commission President will however be wary of alienating those in the EP of a different political persuasion, and wary of offending state interests if the President hopes for a second term. There may also be constraining influences from the other Commissioners. It would be surprising if they did not reflect some real diversity of opinion on the EU's priorities. This diversity will play out in the multi-annual agenda. It will be for the Commission President to balance the legitimating force that this can bring to the EU's agenda, with the need to fulfil the expectations of the EP party or coalition that put him into power.

The modus operandi of the European Council and Commission in the past is a fourth factor that provides indication of likely co-operation in the future. They have worked symbiotically and to good effect on many issues, especially since the passage of the SEA. The Commission has frequently fed policy initiatives that it wishes to advance to the European Council, and gained its imprimatur. The Commission's shift in thinking about the strategy for the single market in the 1990s is but one example of this.⁶⁷

Winning the European Council's approval for the general direction of policy in a particular area facilitates the Commission's task when fashioning more specific legislation to put that policy into effect. It is to be hoped that this co-operation will not change under the new constitutional order, notwithstanding the increased power of the President of the European Council. The inter-relationship between Commission and European Council in setting priorities and the multi-annual agenda may indeed lead to more overall coherence than before. The European Council's contribution to the overall policy agenda has been real, but somewhat fragmentary and unpredictable, because of the six-month limit on the Presidency. The five-year Presidency of the European Council is intended to allow greater planning and coherence than hitherto.

The final factor in engendering a climate of co-operation rather than conflict is law. The legal provisions of the Constitution embody shared executive power. This is not just in the very instantiation of the extended Presidency of the European Council alongside the President of the Commission, but also in their respective powers concerning the setting of priorities and the multi-annual agenda. These powers are delicately balanced in the manner adumbrated above. The European Council has express power to define priorities, while the Commission retains the right to initiate the multi-annual agenda with a view to securing inter-institutional agreement. Neither side can therefore use the law to argue that it should have exclusive executive power, but both can resort to legal argumentation to delimit the sphere of executive power possessed by the other.

2. Development of Policy Choices through the Council

The discussion thus far has focused on the way in which shared executive power might operate in relation to the setting of the EU's priorities and the planning of the agenda. It is equally important to consider how shared power will play out in relation to the development of policy choices.

The role of the President of the European Council within the Council is especially important in this respect.⁶⁸ We have already seen that the Giscardian plan, and the proposals from the UK in January 2003, accorded the President considerable control over the Council. The totality of these proposals was not incorporated within Article I-24. The role of the President of the European Council within the Council nonetheless continued to concern the Commission, which feared that the President would exert greater influence than hitherto. Thus in its comments on the Draft Constitution it sought to confine the President's duties to chairing the European Council, and representing the Union in the CFSP,⁶⁹ while excluding the President from organising the work of the Council.⁷⁰ The EP expressed similar concerns.⁷¹

While the more far-reaching Giscardian plan was not incorporated in the Constitution, the President of the European Council may nonetheless be able to exert greater influence over the development of policy initiatives because of his role within the General Affairs Council (GAC). This Council formation is of central importance. It is charged with ensuring consistency in the work of the other Council formations, and with preparing and ensuring the follow up to meetings of the European Council. The centrality

of the GAC explains the manoeuvring by key players. Some Member States sought to have the President of the European Council be the President of the GAC.⁷² The Commission sought to modify the provision so that the consistency task of the GAC should be performed in conjunction with the Commission.⁷³ Neither side won out. The Presidency of the GAC is according to Article I-24(7) to be held for six months by each of the members of the team Presidency. The Commission did not secure a formal role when the GAC performs its task of ensuring consistency in the work of the different Council formations, although it may exercise an informal role.⁷⁴

The President of the European Council has nonetheless a key role in the work of the GAC, which was strengthened by the IGC. Prior to the Constitution the GAERC had the obligation to prepare the European Council meetings and to ensure that they were followed-up. This obligation was embodied in the Council's Rules of Procedure.⁷⁵ The agenda for the European Council was drawn up by the GAERC on a proposal from the Presidency,⁷⁶ and the Presidency would normally also submit position papers on the key issues placed on the agenda.⁷⁷ This approach was incorporated in Article I-22(2), which stated that the President of the European Council should, in co-operation with the Commission President, ensure the preparation and continuity of work of the European Council, on the basis of the work of the GAC. The Draft Constitution provided that the GAC should in liaison with the Commission prepare and ensure follow-up to meetings of the European Council. The obligation cast on the GAC to ensure follow-up to the European Council would, even in this version, have enhanced the power of its President, since he or she could point to a constitutional obligation on the GAC to carry forward

European Council policy. The position of the President of the European Council has been further strengthened by the revised version of Article I-24(2), which provides that preparation and follow-up to meetings of the European Council is to be done in liaison with the President of the European Council as well as the Commission. The influence of the President may be felt directly and indirectly.

The direct impact is self-evident. The follow-up to meetings of the European Council may often require work by the other sectoral Councils. The President of the European Council, when liaising with the GAC, will therefore be able to exert influence over the detailed initiatives required to carry European Council policy into action. It should be remembered that a significant number of legislative initiatives have their origin in suggestions from the Council, which are then routed to the Commission via Article 208 EC, now Article III-345.⁷⁸ The President of the European Council, reinforced by the obligation on the GAC to ensure follow up to meetings of the European Council, will be in a strong position to press other Council formations to take the necessary steps to carry through the detail of European Council policy.

The indirect impact of the President of the European Council within the GAC is more speculative. It concerns the GAC's role in ensuring consistency in the work of the other Council formations. It is clear, in formal terms, that the President of the European Council does not have a role in this aspect of the GAC's work. It remains to be seen whether this divide is sustainable. It is foreseeable that there will be overlap between the two, such that consistency of work by Council formations may be necessary for the efficacious follow-up to European Council meetings, or that the follow-up to those

meetings may have implications for all Council formations. The indirect influence of the President of the European Council, and indeed the Commission President, over both aspects of the GAC's work may be further enhanced by institutional factors relating to the GAC itself. Concerns have been voiced that the GAC has not in the past performed the consistency task adequately. Its members were commonly national foreign ministers, who were too busy to give proper attention to ensuring consistency in the work of Council formations. If this tendency were to persist in the new constitutional order it would increase the likelihood that the President of the European Council and the Commission President would exercise greater influence to fill this 'relative vacuum'.

3. Delegated Rule-making

It is also important to touch on the new regime for the making of delegated regulations. The Constitution provides for what are termed non-legislative acts.⁷⁹ A European regulation is a non-legislative act of general application for the implementation of legislative acts and certain specific provisions of the Constitution. It may either be binding in its entirety and directly applicable in all Member States, or be binding as regards the result to be achieved, on all the Member States to which it is addressed, but leaving the national authorities free to choose the form and means of achieving that result. The Commission is empowered to enact delegated regulations to 'supplement or amend certain non-essential elements of the law or framework law'.⁸⁰ The objectives, content, scope and duration of the delegation must be defined in the laws and framework

laws, and the delegation may not cover the essential elements of the subject matter, which is reserved for the law or framework law. The European Parliament or the Council may decide to revoke the delegation; or the delegated regulation may enter into force only if no objection has been expressed by the European Parliament or the Council within a period set by the law or framework law.⁸¹

Space precludes a detailed analysis of these provisions, and their implications for the inter-institutional balance of power within the EU. This can be found elsewhere.⁸² The relevance of this topic for the present analysis of executive power can nonetheless be highlighted as follows.

The constitutional strategy has been to regard delegated regulations as a species of executive power exercised by the Commission, subject to the constraints above. The constitutional strategy also led to hopes by some that the new category of delegated regulations would lead to the dismantling of Comitology, or at least the removal of the management and regulatory committees. The idea is therefore for the Commission in its executive capacity to be able to enact the relevant regulations, subject to the possibility of call back by the Council or EP.

It should however be noted that delegated regulations are only non-legislative in the formal sense that they are not primary laws. This does not mean that they are not legislative in nature. They clearly are, and this conclusion is reinforced by the fact that they are said to be of general application, and that they can supplement or amend certain elements of primary law. The reality is therefore that a European regulation will often be what would be regarded in domestic legal systems as secondary or delegated legislation.

The Commission will therefore have significant power over complex regulatory choices, with relatively little input from the Council and the EP. The controls will be difficult to monitor and enforce. The pre-existing regime was based on generalized ex ante input into the making of the delegated norms, with the possibility of formal recourse to the Council in accord with the Comitology procedures, with some control by the EP. We are switching to a system based on ex ante specification of standards in the primary law, combined with the possibility of some control ex post should the measure not be to the liking of the EP or Council, but this latter control will only operate where it is written into the primary law.

The efficacy of these controls is questionable. It will often be difficult for the Council and the EP to specify with any exactitude the criteria that should guide the exercise of delegated power by the Commission, more especially if primary laws become more abstract and less detailed. Moreover, if Comitology is dismantled then it may not be easy for the Council or the EP to decide whether to exercise their powers relating to revocation of the delegation, or entry into force of the particular regulation, since they might not have the information on which to make this decision.

4. The EU Foreign Minister and the CFSP

It is necessary to consider how the regime of shared executive power will operate in relation to the CFSP.

The principal institutional innovation in the Constitution is the creation of the post of EU Minister for Foreign Affairs, who is to ‘conduct’ the Union’s common foreign and security policy.⁸³ The idea that executive power within the Union is divided between the European Council and the Commission is personified in this post. The Minister for Foreign Affairs is appointed by the European Council by qualified majority, with the agreement of the Commission President.⁸⁴ The EU foreign minister is one of the Vice Presidents of the Commission, and is responsible for handling external relations and for co-ordinating other aspects of the Union’s external action.⁸⁵ The EU Foreign Minister therefore wears a ‘shared hat’. The holder of the office takes part in the work of the European Council,⁸⁶ chairs the Foreign Affairs Council⁸⁷ and is also a Vice-President of the Commission.

In order to understand the disposition of executive power in this area it is important to view the Minister for Foreign Affairs within the general framework of the CFSP. It is clear that executive authority within this area continues to reside with the European Council and the Council. It is the European Council that identifies the strategic interests and determines the objectives of the CFSP through strategic guidelines.⁸⁸ It is primarily the Council that adopts the decisions to implement the strategic guidelines of the European Council.⁸⁹ It is the Council that adopts decisions that define the EU’s approach to a particular matter of a geographical or thematic nature.⁹⁰ The primacy of place accorded to the European Council is even more marked in relation to defence.⁹¹ It would seem therefore that executive authority within the EU in relation to CFSP continues to rest primarily with institutions of an intergovernmental nature, the European

Council and the Council, and that this is so notwithstanding the creation of the Minister for Foreign Affairs who operates within the European Council, the Council and the Commission. While this conclusion is basically correct, it may however need to be qualified for legal and political reasons.

In legal terms, while the ECJ is generally excluded from the CFSP⁹² it does have jurisdiction to ensure that the exercise of power pursuant to CFSP does not trespass on other heads of competence, and vice versa. To this extent, decisions made by the European Council and the Council will be subject to legal scrutiny.⁹³ The ECJ also has jurisdiction in relation to review of the legality of restrictive measures against natural or legal persons adopted by the Council.⁹⁴

In political terms, there may be reasons why the creation of the Minister for Foreign Affairs will enhance de facto the power of the Commission. The pre-existing regime for CFSP concentrated executive power in the European Council and the Council. It was however clear that the Commission exercised greater influence over CFSP matters than might have been apparent from the bare face of the provisions in the TEU.⁹⁵ The interesting issue is how the creation of the Minister for Foreign Affairs will change matters for the future. This remains to be seen. It is however difficult to imagine that it will weaken the impact of the Commission on the development of foreign policy as compared with the status quo ante. The Minister is to be a Vice-President within the Commission, and will perform many of the important functions undertaken by the Commissioner for External Relations, which include, but are not limited to, foreign policies. The lessons and ideas generated by this ‘front-line’ work will inevitably have an

impact on the proposals contributed by the Minister to the more strategic development of common foreign policy, as decided on by the European Council, and fleshed out by the Foreign Affairs Council. It must of course be recognised that this is a ‘two-way street’, and that the influence will operate the other way, such that the overall strategic focus of the European Council will have an impact on the way the Minister discharges more front-line responsibilities in external relations from within the Commission. This can be accepted. It does not however remove the force of the point being made here. The EU’s foreign policy work, as undertaken by the Commissioner for External Relations, covers a wide range of important initiatives, as the web-site will confirm. The fact that the Minister for Foreign Affairs will be responsible for these matters,⁹⁶ and that he will have a central place within the Council and the European Council is likely to increase and not decrease the Commission’s overall influence in this area, notwithstanding that formal decision-making powers remain with the European Council and the Council.

5. Financial Resources and the Budget

The direction of EU policy is not wholly dependent on money. The EU is rightly regarded as a regulatory state, and many initiatives do not require expenditure from EU funds. This can be readily accepted, while at the same time acknowledging that control over the EU’s resources and its budget are also matters of importance. The disposition of power in the Constitution is interesting.

In relation to resources, the Constitution largely preserves the status quo ante. The Council of Ministers establishes the limits and categories of Union resources. The relevant European law is not directly applicable: it enters into force only after it is approved by the Member States in accord with their constitutional requirements. The Council of Ministers acts unanimously after consulting the EP.⁹⁷ This generally replicates the pre-existing position.⁹⁸

In relation to the budget, it is necessary to distinguish between the multi-annual financial framework and the annual budget. The multi-annual financial framework, which is to be established for a period of at least five years, is designed to ensure that EU expenditure develops in an orderly manner and within the limits of its resources.⁹⁹ It determines the amounts of the annual ceilings for commitment and payment appropriations. This framework is laid down in a European law made by the Council acting unanimously after obtaining the consent of the EP.¹⁰⁰ The European Council acting unanimously may adopt a European decision allowing the Council to act by qualified majority when adopting subsequent multi-annual frameworks.¹⁰¹ The annual budget must comply with the multi-annual financial framework.¹⁰² Executive power in relation to setting of the financial framework is therefore shared principally between the Commission and the Council, since the European law made by the Council will be based on a proposal from the Commission.¹⁰³ The annual budget is, by way of contrast, made through a European law jointly by the EP and the Council on a proposal from the Commission.¹⁰⁴ Space precludes a detailed analysis of the provisions relating to the passage of the annual budget.¹⁰⁵ Suffice it to say for the present that the procedure is a

modification of the ordinary legislative procedure. The EP's powers have been increased because the distinction between 'compulsory' and 'non-compulsory' expenditure has been abolished.

Part 4: The Disposition of Executive Power in the EU: Principle and Pragmatism

The deliberations concerning executive power were contentious and complex. It is important to stand back from the particular issues and to consider the emerging picture of executive power in the EU. We can assess this disposition of power from the perspective of principle and pragmatism. Two major views can be identified.

1. The Argument against Shared/Divided Executive Power

The principled argument against divided executive power is as follows. Two Presidents of the Union is one President too many. There should as a matter of principle be one locus of executive power within the Union, by parity of reasoning with domestic polities, and this should be the President of the Commission, who is responsible to the EP. It is therefore fitting for the EU to embrace a parliamentary-type system, in which there is a single locus of executive power, the holder of which is responsible to the electorate, albeit indirectly through election by the EP. The voters will then be able to express their preferences by changing the composition of the EP, which will likely lead to change in the person indirectly elected as the President of the Commission.

The divide in executive power is also deprecated on principled grounds relating to clarity and transparency. An aim of the Laeken Declaration was to render EU decision-making clearer and simpler. This has not been achieved in relation to executive power. An informed citizen, reading the Constitution assiduously, would still find it difficult to understand the distribution of executive power.

The principled arguments against shared executive power are reinforced on pragmatic grounds, the argument being that the division will lead to confusion of responsibility as between the two Presidents, since their respective executive responsibilities are not clearly defined.

2. The Argument for Shared/Divided Executive Power

The principled argument for shared executive power is premised on the nature of the EU. Inter-institutional balance of power, rather than the separation of powers, has always characterised the EU. The major institutions represent different interests, with the consequence that it is acceptable in principle for executive power to be shared by a body representing state interests, and a body representing the Community interest, each of which is legitimated in different ways. The attempt to impose a single executive power could moreover be counter-productive. Thus there might be real tensions if there were only one President of the Union, the Commission President, who would chair the European Council. The Commission President might be subject to conflicts of interest, resulting from the desire to press the Commission view, combined with the need to retain

the confidence of the Member States within the European Council and articulate their views. Furthermore, the assumption that executive power in nation states is ‘unitary’ is an assumption that is often belied by legal and political reality. A more realistic picture would recognise that such power is exercised not only by ministers that form the ‘government’ plus the ‘formal bureaucracy’, but also by a plethora of other agencies and firms to which power has been contracted-out.

It should also be recognised that the principled consequences said to follow from a single locus of executive power would not be feasible without radical change in the EU institutional structure. The voters would not be able to remove those whom they disliked and thereby change policy, because even if the Commission President could be indirectly removed in this manner, that would still leave state representatives in the Council and the European Council, who would continue to have major input into agenda setting.

The principled critique of shared executive power based on clarity undoubtedly has force. It was always going to be difficult to deliver on this aspiration from the Laeken Declaration in relation to executive power, more especially once it was decided that there would be two Presidents for the EU. It should nonetheless be acknowledged that clarity about executive power in nation states is also imperfect. The national constitution may ‘locate’ executive power within a certain figure or institution. This does not however mean that the citizen will be clear as to who exercises particular aspects of executive power, for the reasons set out above.

The argument for shared executive power also rests on pragmatic grounds. The contention that this will lead to confusion is based in part on the assumption that it would

be a novel development. This does not accord with reality. Executive power in the EU has not hitherto resided in a single institution. It is exercised in part by the Commission, which exercises a plethora of executive-type functions, including administration of legislative programmes, planning the legislative agenda, negotiation of Treaties with third parties, and framing the budget. The Council and the European Council also wield executive power. The European Council is important in this respect. The Treaties may say relatively little about its powers. The reality is that nothing of major importance happens without its approval. It has a say in setting the legislative agenda, in setting the Union's priorities, and in deciding on the pace and direction of change within the Union. The division of executive power between the Commission and European Council may not be neat, but it is the reality, especially since the SEA. Moreover the two institutions have for the last decade worked well symbiotically in developing the Union's agenda.

The pragmatic argument for shared executive power also rests on the 'lessons of history'. A constant theme in the EU's history is that institutions have developed, often outside the strict letter of the Treaties, as a response to concerns relating to the institutional balance of power. The European Council began life in this way, as did COREPER and the Comitology committees. If executive power were to be concentrated within a single Presidency of the Commission, and this did not prove acceptable to some Member States, then it could lead to further institutional developments outside the strict letter of the Constitution. Better therefore to recognise and structure shared executive power within the Constitution, than have it develop outside the constitutional remit.

Part 5: Accountability in a Regime of Shared Executive Power

It is important to stand back and consider the emerging regime in terms of accountability. This inquiry could well occupy a book¹⁰⁶ in itself. What follows does not therefore purport to be an exhaustive analysis. The object is rather to identify some of the central issues concerning accountability.

1. Legal Accountability

The Draft Constitution as produced by the Convention left the general structure of the ECJ's jurisdiction unchanged. The European Council was not subject to judicial review. This was anomalous given its powers. This matter was addressed by the IGC. Article III-365(1) was amended so as to render the European Council subject to review in relation to acts that are intended to produce legal effects vis-à-vis third parties,¹⁰⁷ with a similar amendment concerning failure to act. It is clear that binding acts of the European Council could also be challenged indirectly through national courts via the preliminary ruling procedure.

It should also be recognised that inter-institutional disputes concerning the disposition of executive power could end up before the ECJ. It has been argued above that there are cogent reasons to expect the European Council and the Commission to co-operate rather than conflict. If however co-operation breaks down then recourse to the

ECJ will always be a possibility. The ECJ would have jurisdiction to hear such actions under Article III-365.

2. Political Accountability

It can be accepted that political accountability within a regime of shared executive power will be more complex than in those regimes where such power is concentrated within ‘the executive’. A regime of shared executive power will not have a single line of executive accountability.

There is another proposition which is somewhat less obvious, but which should also be borne in mind. Parliamentary political systems in which executive power is located within a ‘single’ executive may well foster electoral accountability: the electorate can throw out the party whose policies they dislike. It should also be recognised that systems with strong, unitary executive power can often lead to problems of political accountability between elections. Thus commentators in the UK have referred to the system as one of ‘elective autocracy’, in which a government elected with a reasonable majority has very considerable power over and the legislature has little influence.

We can now turn to political accountability within the emerging constitutional order. This is best examined by considering accountability in relation to the setting of the overall political agenda, and in relation to the implementation of policy choices.

In relation to accountability for the overall political agenda, the multi-annual programme, combined with the multi-annual financial framework, it will not be possible

for the voters to express their dislike and put another party into office with a different agenda. The fact that executive power over agenda setting is shared between the Commission and the European Council prevents such direct transmission of voter preferences. It would nonetheless be mistaken to believe that such preferences will have no effect. The Commission President is elected by the EP and the European Council must take account of the election results in deciding which person to put forward to the EP as Commission President. Thus, if the electorate dislike the direction of EU policy they can express this through a change in the EP, which will have some impact on the European Council's decision as to the candidate for Commission President.

It is moreover important to be realistic about how far voter preferences could lead to a change of policy even if the Constitution had opted for a single President of the EU, this being the President of the Commission, indirectly elected by the EP. This would have accorded the voters greater electoral influence over the policy agenda. There would however still have been constraints flowing from the Council and European Council. The President of the Commission, acting as the sole President of the EU, would still have to take account of Member State preferences in the European Council, as well as voter preferences expressed by MEPs. It might be argued that the 'solution' should then have been to do away with the European Council completely. There is, however, no possibility that this will occur. Nor is it self-evidently desirable: legitimation within the EU has always been conceived in terms of representation of both state and voter interests, through the European Council/Council and EP respectively.

The reality under the Constitution is that the multi-annual agenda will be the result of a discourse between the major institutional players. This discourse will incorporate voter preferences partly through the Commission President, and partly through consultation with the EP on the multi-annual agenda. The discourse will also include state interests as mediated through the European Council and the Council. This process may be ‘messier’ than that in states with a single executive power. It does however avoid the kind of executive dominance over the political agenda adverted to above. The dialogue fostered by shared executive power can be healthy in making actors re-think their own pre-conceived positions concerning the direction of EU development. The dangers of this leading to conflict between Commission and European Council are, as we have seen, more likely to be outweighed by factors that engender co-operation.

Let us now turn to consider political accountability in relation to the implementation and execution of policy choices. There are different aspects of this process that must be disaggregated. The annual and multi-annual agenda will be developed in part through European laws and framework laws, which are legitimated through the ordinary legislative procedure initiated by the Commission. New-style delegated regulations will also be used. There are, as we have seen, problems in this respect, which are reflective of the difficulty of rendering secondary rule-making both workable and legitimate. We must also consider separately the issue of accountability as it relates to the implementation/execution of agreed policy choices. The Commission clearly has the primary responsibility for policy implementation.¹⁰⁸ It is subject to a plethora of differing constraints. The EP can exercise control, through a Committee of

Inquiry, through scrutiny by its regular committees, with the long stop of forcing the entire Commission out. The Ombudsman can investigate cases of maladministration. The Commission is moreover subject to the important rules contained in the new Financial Regulation, which covers matters such as fiscal and policy responsibility, audit, delegation, contracting out and the like.¹⁰⁹

Part 6: Conclusion

There was greater disagreement about the institutional provisions in the Convention than any other issue, and the IGC devoted the majority of its time to them. This is unsurprising. The detailed provisions on executive power embody a view as to the nature of the EU polity, and the balance therein as between intergovernmental and supranational forces. The very fact that the outcome was a Constitution or Constitutional Treaty upped the stakes.

There is little doubt that many have been disappointed by the outcome. Those who hoped for a single locus of executive responsibility, the Commission President, legitimated through election by the EP, who would then chair the European Council, which would continue with its six-monthly Presidencies, are especially critical of the outcome. There are undoubtedly arguments for this vision of the EU polity.

It has not however been incorporated within the Constitution, which contains a regime of shared executive power. The preceding discussion has sought to shed light on how this might operate in relation to the different aspects of executive power. It has addressed the principled and pragmatic considerations that relate to this power sharing,

and has assessed it in terms of legal and political accountability. It remains to be seen whether the Constitution will be ratified in accord with the constitutional requirements of the Member States.

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¹ Council of the European Union, Brussels European Council, Presidency Conclusions 10679/04, ADD 1, CONCL 2, Brussels 18 June 2004.

² The version used in this paper is Conference of the Representatives of the Governments of the Member States, *Treaty Establishing a Constitution for Europe* CIG 87/04, Brussels 6 August 2004. The text agreed to by the European Council is based on the version produced by the Convention as modified by the group of legal experts and by the IGC itself. The version modified by the legal experts is contained in Conference of the Representatives of the Governments of the Member States, *2003 IGC – Draft Treaty Establishing a Constitution for Europe (following editorial and legal adjustments by the Working Party of IGC Legal Experts)* CIG 50/03, Brussels 25 November 2003. The modifications agreed to by the IGC are to be found in: Conference of the Representatives of the Governments of the Member States, *IGC 2003 – Meeting of Heads of State or Government, Brussels, 17-18 June 2004* CIG 85/04, PRESID 27, Brussels 18 June 2004, and in Conference of the Representatives of the Governments of the Member States, *IGC 2003 – Meeting of Heads of State or Government, Brussels, 17-18 June 2004* CIG 81/04, PRESID 23, Brussels 16 June 2004.

³ CONV 691/03, *Institutions*, Brussels 23 April 2003; CONV, *Summary Report of the Plenary Session – Brussels 24 and 25 April 2003*, Brussels 30 April 2003.

⁴ CONV 748/03, *Summary Report of the Plenary Session—Brussels 15 and 16 May 2003*, Brussels 27 May 2003. See also, CONV 709/03, *Summary Sheet of Proposals for Amendments relating to the Union's Institutions*, Brussels 9 May 2003.

⁵ CONV 783/03, *Summary Report on the Plenary Session – Brussels 30 and 31 May 2003*, Brussels 16 June 2003.

⁶ CONV 770/03, *Part I, Title IV (Institutions) -- Revised Text*, Brussels 2 June 2003; CONV 771/03, *Consultations with the Component Groups*, Brussels 2 June 2003.

⁷ CONV 797/03, *Revised Text of Part One*, Brussels 10 June 2003.

⁸ CONV 814/03, *Summary Report of the Plenary Session – Brussels 11 and 13 June 2003*, Brussels 19 June 2003.

⁹ P. Craig, 'Constitutional Process and Reform in the EU: Nice, Laeken, the Convention and the IGC' (2004) *EPL*.

¹⁰ P. Norman, 'From the Convention to the IGC (Institutions)' (Federal Trust, September 2003), p. 2.

¹¹ G. Grevi, 'The Europe We Need: An Integrated Presidency for a United Europe' (European Policy Centre, December 2002), p. 5.

¹² Art. I-33.

¹³ Presidency Note, CONFER 4813/00, 1 December 2000.

¹⁴ CONV 850/03, *Draft Treaty Establishing a Constitution for Europe*, Brussels 18 July 2003, Art. I-25(3).

¹⁵ CONV 850/03, Art. I-25(3)(a).

¹⁶ CONV 850/03, Art. I-25(3)(b).

¹⁷ Communication from the Commission, *A Constitution for the Union, Opinion of the Commission, pursuant to Article 48 of the Treaty on European Union, on the Conference of Representatives of the Member States' governments convened to revise the Treaties* COM(2003) 548 final, para. 2.

¹⁸ *Ibid.* p. 2.

¹⁹ *Ibid.* p. 2.

²⁰ CONV 850/03, n. 14, Arts. III-250-257.

²¹ Communication from the Commission, *A Constitution for the Union*, n. 17, para. 3, n.3.

²² *Ibid.* Annex 1.

²³ *Ibid.* para. 3.

²⁴ *Ibid.* para. 4.

²⁵ *Ibid.* Annexes 2 and 3.

²⁶ Conference of the Representatives of the Governments of the Member States, *Preparation of the IGC Ministerial Meeting on 14 October 2003: Questionnaires* CIG 6/03, Brussels 7 October 2003.

²⁷ Art. I-26(5).

²⁸ Art. I-26(6).

²⁹ Art. I-27(2).

³⁰ CONV 850/03, n. 14, Art. I-23.

³¹ Conference of the Representatives of the Governments of the Member States, *Questionnaire on the Legislative Function, the Formations of the Council and the Presidency of the Council of Ministers* CIG 9/03, PRESID 1, Brussels 15 October 2003; Conference of the Representatives of the Governments of the Member States, *Reply from the Commission to the Questionnaire on the Legislative Function, the Formations of the Council and the Presidency of the Council of Ministers* CIG 35/03, DELEG 26, Brussels 15 October 2003; Conference of the Representatives of the Governments of the Member States, *Council Presidency and Council Formations* CIG 39/03, PRESID 5, Brussels 24 October 2003.

³² Art. I-24.

³³ Art. I-24(2).

³⁴ Art. I-24(3).

³⁵ Art. I-24(4).

³⁶ Art. I-24(6).

³⁷ Art. I-24(7).

³⁸ This means that the Presidency of Council formations will be held collectively by pre-established groups of three states, for a period of 18 months. Each Member in the group chairs for a six-month period all configurations of the Council, with the exception of the FAC, with the other two members providing assistance. It is however open to the team members to decide on alternative arrangements.

³⁹ Conference of the Representatives of the Governments of the Member States, *Reply from the Commission to the Questionnaire on the Legislative Function, the Formations of the Council and the Presidency of the Council of Ministers* CIG 35/03, DELEG 26, Brussels 15 October 2003, p. 2.

⁴⁰ The main arguments in favour are that it would engender greater legislative coherence, and emphasize the two-chamber character of the legislative process. The arguments against are that it might lead to loss of expertise by way of comparison with exercise of legislative power by the sectoral Council formations, and that it could lead to an odd division of responsibility as between primary laws and delegated regulations.

⁴¹ Norman, n. 10, p. 2.

⁴² *Ibid.* p. 3.

⁴³ G. Grevi, 'Options for Government of the Union' (Federal Trust, March 2003), p. 6.

⁴⁴ Communication from the Commission, *A Constitution for the Union*, above n. 17, para. 14.

⁴⁵ *Ibid.* para. 14.

⁴⁶ *Ibid.* para. 14.

⁴⁷ *Ibid.* para. 14.

⁴⁸ *Ibid.* para. 14, fn 6.

⁴⁹ A point noted also by House of Lords, Select Committee on the European Union, *The Future of Europe – The Convention's Draft Constitutional Treaty* (HL 169; 2003), para. 153.

⁵⁰ The title of Art. I-22 has been revised to read 'The European Council President' as opposed to the 'European Council Chair'.

⁵¹ Art. I-24(4).

⁵² Art. I-24(3).

⁵³ Prior to the Constitution the General Affairs and External Relations Council (GAERC) was viewed as the senior Council formation, which would act so as to co-ordinate the work of the Council as a whole, F. Hayes-Renshaw and H. Wallace, *The Council of Ministers* (Macmillan, 1997), pp. 29-30. Examples of its work can be found in reports of its meetings, see, e.g., 2532nd Council Meeting, General Affairs (Luxembourg, 13098/03 (Presse 291), 13 October 2003); 2526th Council Meeting, General Affairs (Brussels, 12293/1/03 REV 1, (Presse 251), 29 September 2003).

⁵⁴ Art. I-21(1): the operative phrase is ‘shall define the general political directions and priorities thereof’.

⁵⁵ Art. I-22(2).

⁵⁶ Art. I-26(2).

⁵⁷ N. Nugent, *The European Commission* (MacMillan, 2001), pp. 223-224.

⁵⁸ F. Hayes-Renshaw and H. Wallace, *The Council of Ministers* (MacMillan, 1997), pp. 185-186.

⁵⁹ POLGEN 52, 13463/02, *Seville European Council*, Annex II, Brussels 24 October 2002, pp. 23-24.

⁶⁰ POLGEN 76, 15047/03, *Multi-annual Strategic Programme*, Brussels 20 November 2003.

⁶¹ Council Decision of 22 July 2002 adopting the Council’s Rules of Procedure, Dec. 2002/682, [2002] OJ L230/7, Art. 2(4).

⁶² *Ibid.* Art. 2(5).

⁶³ Nugent, n. 57, pp. 186-187.

⁶⁴ Art. III-341(4).

⁶⁵ Art. I-26(1).

⁶⁶ Art. I-22(2).

⁶⁷ P. Craig, ‘The Evolution of the Single Market’, in Catherine Barnard and Joanne Scott (eds.), *The Law of the Single European Market, Unpacking the Premises* (Hart, 2002), Chap. 1.

⁶⁸ For a general overview of the relationship between the European Council and the Council, see, Hayes-Renshaw and Wallace, n. 58, Chap. 6.

⁶⁹ Communication from the Commission, *A Constitution for the Union*, n. 17, para. 14.

⁷⁰ *Ibid.* para. 14.

⁷¹ European Parliament, *Report on the Draft Treaty establishing a Constitution for Europe and the European Parliament's Opinion on the Convening of the Intergovernmental Conference* A5-0299/2003/Final, para. 20.

⁷² Conference of the Representatives of the Governments of the Member States, *Reply from the UK to the Questionnaire on the Legislative Function, the Formations of the Council and the Presidency of the Council of Ministers* CIG 34/03, DELEG 25, Brussels 15 October 2003.

⁷³ Communication from the Commission, *A Constitution for the Union*, n. 17, para. 17. The Commission gives the impression that this was the position in the Draft Constitution. This was not so. The Commission has to *liaise with* the General Affairs Council for the purposes of ensuring follow up to European Council meetings. It is the General Affairs Council itself that has the task of ensuring consistency of the Council's work under Art. I-24(1).

⁷⁴ The Council's Rules of Procedure provide that the Commission shall be invited to attend Council meetings, Council's Rules of Procedure, n. 61, Art. 5(2), and Commissioners will always attend the GAERC meetings.

⁷⁵ Council's Rules of Procedure, n. 61, Art 2(2)(a).

⁷⁶ *Ibid.* Art. 2(3)(a).

⁷⁷ *Seville European Council*, n. 59, Annex 1, para. 4.

⁷⁸ Ex Art. 152.

⁷⁹ Art. I-33(1).

⁸⁰ Art. I-36.

⁸¹ Art. I-36(2).

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- ⁸² P. Craig, ‘The Hierarchy of Norms’, forthcoming.
- ⁸³ Art. I-28.
- ⁸⁴ Art. I-28(1).
- ⁸⁵ Art. I-28(4).
- ⁸⁶ Art. I-21(2).
- ⁸⁷ Art. I-28(4).
- ⁸⁸ Art. I-40(2) and Art. III-295(1).
- ⁸⁹ Art. I-40(3) and Art. III-295(2).
- ⁹⁰ Arts. III-297-298.
- ⁹¹ Art. I-41.
- ⁹² Art. III-376.
- ⁹³ Arts. III-308, 376(1).
- ⁹⁴ Art. III-376(2).
- ⁹⁵ See, eg, the Commission initiatives in relation to defence-related matters.
- ⁹⁶ Art. I-28(3).
- ⁹⁷ Art. I-54(3).
- ⁹⁸ Art. 269 EC.
- ⁹⁹ Art. I-55(1) and Art. III-402(1).
- ¹⁰⁰ Art. I-55(2).
- ¹⁰¹ Art. I-55(4).
- ¹⁰² Art. I-55(3).
- ¹⁰³ Art. I-26(2).
- ¹⁰⁴ Art. I-56.
- ¹⁰⁵ Art. III-404.

¹⁰⁶ See, e.g., C. Harlow, *Accountability in the European Union* (Oxford University Press, 2002).

¹⁰⁷ *IGC 2003-Naples Ministerial Conclave: Presidency Proposal* CIG 52/1/03, PRESID 10, Brussels 25 November 2003, Annex 7; CIG 50/03, n. 2, Art. III-367.

¹⁰⁸ Art. I-26(1).

¹⁰⁹ P. Craig, 'The Constitutionalisation of Community Administration' (2003) 28 *ELRev.* 840.