

## EDITORIAL COMMENTS

### *An ever mighty European Council – Some recent institutional developments*

Who leads the European Union? Looking at current practice, and certainly if and when the Lisbon Treaty enters into force, the answer is simple: the European Council.<sup>1</sup> In fact, from 1961 onwards, the Heads of State and Government of Member States held regular meetings in order to discuss political sticky points in Community policy. At the Paris summit conference in 1974, they decided to hold such meetings at least three times a year, accompanied by their Foreign Ministers. The Single European Act enshrines this meeting in the treaties under the name “European Council”<sup>2</sup> and ever since the Treaty of Maastricht, the European Council acts as a specific organ alongside the Community institutions, with the tasks of providing “the Union with the necessary impetus for its development” and defining “the general political guidelines” (Art. 4(1) TEU). Sometimes, these guidelines are not that general – see the 16 pages annexed to the Presidency conclusions on its meeting in June 2007 defining the IGC mandate which eventually led to the Lisbon Treaty. The European Council also has some specific tasks in the context of the Communities’ decision-making process on the broad economic policy and social policy guidelines for Member States,<sup>3</sup> monetary policy,<sup>4</sup> as well as in the context of CSFP (general guidelines, common strategies)<sup>5</sup> including EDSP.<sup>6</sup>

Formally speaking, however, the European Council is not an institution, let alone an institution hierarchically superior to the five institutions mentioned in Article 7 EC.<sup>7</sup> In practice, it often takes that role – leaving it to the Council merely to formalize the “decisions” it has taken in areas outside those where it has decision-making powers under the treaties. The delimitation of its powers *vis-à-vis* those of the Commission, in particular the latter’s exclusive right of initiative in the First Pillar, is also increasingly blurred. Already in 1985, the Delors Commission began to take initiatives *within* the European Council, an

1. For a more nuanced but clearly affirmative reply to this question à *Traité constant*, see Werts, *The European Council* (John Harper Publishing, London 2008).

2. Art. 2 Single European Act.

3. Art. 99(2) EC and Art. 128(1) and (5) EC.

4. Art. 113(3) EC.

5. Art. 13(1) and (2) TEU.

6. Art. 17 TEU.

7. Lenaerts and Van Nuffel, *Constitutional Law of the European Union* (Thomson/Sweet & Maxwell, London 2005), p. 39 and 384 et seq.

opportunity which was facilitated by the fact that the President of the Commission is *à titre personnel* a member of the European Council<sup>8</sup> and in that capacity is (and will remain under the Lisbon Treaty<sup>9</sup>) part of the consensus by which the European Council takes certain decisions. This development becomes particularly clear, as will be illustrated in more detail below, when looking at the role the European Council recently played in relation to some politically sensitive issues: climate change, the Irish referendum and the financial crisis. It is submitted that the Lisbon Treaty not only formalizes, to some extent, the ensuing change of the institutional balance; it modifies it even further.

### *Climate change*

The EU's climate change policy was provided for the first time with the "necessary impetus for its development" in the sense of Article 4 TEU at the informal European Council hosted by Mr Blair at Hampton Court in October 2005.<sup>10</sup> So far, it has culminated in the legislative package adopted by Council and Parliament in April 2008,<sup>11</sup> which, in a nutshell, sets some legally binding targets for 2020: (i) cutting greenhouse gases by at least 20% of 1990 levels; (ii) increasing use of renewables to 20% of total energy production and cutting energy consumption by 20% of projected 2020 levels – by improving energy efficiency. Going back through the history books, one can find no reference at all to these targets before the European Council conclusions of December 2006.<sup>12</sup> Instead of immediately leading to Commission legislative proposals setting targets, these conclusions provided the backdrop to the Commission's January 2007 Communication, "Limiting Climate Change to 2°C".<sup>13</sup> This calls on the European Council to "decide on an integrated and comprehensive approach to the EU's energy and climate change policies"; on the other hand, it states:

8. Art. 4(2) TEU.

9. Art. 15(2) and (4) TEU Lisbon.

10. See for background information: [www.number10.gov.uk/Page8393](http://www.number10.gov.uk/Page8393); [www.europarl.org.uk/section/2005-archive/27-october-2005-preparation-informal-european-council-hampton-court](http://www.europarl.org.uk/section/2005-archive/27-october-2005-preparation-informal-european-council-hampton-court).

11. This voluminous package is published in O.J. 2009, L 140.

12. Presidency conclusions are available through the website of the Council, [www.consilium.europa.eu](http://www.consilium.europa.eu). See also Commission Communication "Winning the battle against global Climate Change" adopted a few months earlier (cf. COM(2005)180 of 9 Feb. 2005) responding to the request of the European Council at its March 2004 meeting to provide for a cost-benefit analysis taking into account both environmental and competitiveness considerations in this context.

13. Commission document COM(2007)2 final of 10 Jan. 2007.

“The Council should decide that the EU and its Member States propose a 30 % reduction in greenhouse gas emissions by developed countries by 2020 as part of an international agreement aimed at limiting global climate change to 2°C above pre-industrial levels. Until an international agreement is concluded, and without prejudice to its position in international negotiations, the EU should already now take on a firm independent commitment to achieve at least a 20% reduction of GHG emissions by 2020 compared to 1990 through the EU ETS, other climate change policies and actions in the context of the energy policy. This will signal to European industry that there will be a significant demand for emission allowances beyond 2012, and will provide incentives for investment in emission reduction technologies and low carbon alternatives.”

Two months later these targets were endorsed by the European Council. The Commission followed this up in January 2008, putting a number of legislative proposals to Council and Parliament.<sup>14</sup> This marked the beginning of very difficult discussions in different Council configurations and Parliamentary Committees and would never have led to an agreement between the two institutions in first reading had the European Council not given a rather precise guide to their debate through thirteen (!) paragraphs in the Presidency conclusions on its meeting of March 2008, and eventually arbitrated in a detailed manner on the outstanding key issues through the Presidency conclusions on its meeting of 11–12 December 2008.<sup>15</sup> At its plenary session four days later, an overwhelming majority of Parliament gave its final blessing to the political agreement on the legislative package as “brokered” by the European Council, ignoring written concerns expressed earlier by some of its *rapporteurs vis-à-vis* the French Presidency that, in giving guidelines, the European Council had disregarded the Parliament’s institutional prerogatives as co-legislator.<sup>16</sup>

### *Irish ratification*

In December 2008, the European Council seized the opportunity to help settle another issue of major political importance: it agreed to give certain legal guarantees on the concerns of the Irish people relating to the interface between the Lisbon Treaty and the right to life, family and education, taxation, security and defence. It did so in return for a commitment from the Irish Government

14. Commonly referred to as the “Package of Implementation measures for the EU’s objectives on climate change and renewable energy for 2020”, see in particular Commission documents COM(2008)16 final, COM(2008)18 final and COM(2008)19 final.

15. And a separate more technical document, to which the conclusions refer: European Council document 17215/08. Final *trilogues* between Council, Parliament and Commission took place on Saturday morning 13 Dec. but did not lead to substantial changes.

16. Parliament documents A6-0406, 414 and 496/2008.

to seek ratification of the Treaty by the end of the term of the current Commission. Highlighting just a few aspects of – in particular – the form which these guarantees took may help to illustrate the European Council's current institutional role, showing how it may act as an international negotiation forum, helping to solve a constitutional crisis.

The European Council agreed – at its meeting of June 2009 – on two arrangements which were annexed to the Presidency conclusions:

- A Decision of the Heads of State or Government of the 27 Member States, meeting within the European Council, on the concerns of the Irish people on the Lisbon Treaty.
- A Solemn Declaration on Worker's Rights, Social Policy and other issues.

In many respects, the solution resembles the arrangements agreed at the Edinburgh European Council of December 1992 in order to solve certain problems raised by Denmark on the Maastricht Treaty.<sup>17</sup> In both cases, the Presidency conclusions on the European Council meeting have, as an annex, a "Decision", which is drafted in legal form. It is done by the "Heads of State or Government, meeting within the European Council", which can take binding decisions (in contrast to the European Council itself which, as indicated earlier, cannot do so). In this respect, it is noteworthy that in the June 2009 conclusions, reference is made to the fact that the Heads of State or Government have declared that in the Irish case the "Decision is legally binding". No such statement was made for the Decision in the Danish case. In both cases, the "final provisions" say that the Decision will take effect on the date of entry into force of the Treaty – a typical final clause used in international treaty-making. Moreover, the United Kingdom and Denmark registered the Decision in the Danish case as an international treaty to the UN Secretary-General, according to Article 102 of the UN Charter<sup>18</sup> – a procedure which is reserved to international treaties. Under international law, a treaty can be brought into force by representatives of States in any form to which they agree.<sup>19</sup> Although it is most common to express consent to be bound by either signature or ratification, States may decide to do so by adopting unsigned "conclusions". If recourse is made to such an unsigned instrument, the will to assume legal rights and obligations must be deduced from the text of the instrument. All these indicators

17. O.J. 1992, C 348.

18. 1765 UN Treaty Series 98 (No. 30685). UK Treaty Series (1994) 2.

19. See Art. 11 of the Vienna Convention on the Law of Treaties: "The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or *by any other means if so agreed*" (our emphasis).

led some commentators to conclude that the “Decision” in the Danish case constituted an international treaty in simplified form.<sup>20</sup> Another view is that the primary purpose of the exercise was to clarify the existing text, without re-opening it. Hence, the intention may have been primarily to reassure Denmark that it could rely on a legally binding interpretation of the Maastricht Treaty. In that view, the Decision constitutes an “agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty”. Under Article 31(2)(a) of the Vienna Convention, such instruments can be used as context in the interpretation of the main Treaty. Indeed, a leading author concedes that the decision may be seen as such.<sup>21</sup>

Whatever view may prevail, the December 1992 conclusions clearly stated that the aim was to conclude the process of ratification in accordance with the respective constitutional requirements of Member States “without re-opening the present text” of the Maastricht Treaty,<sup>22</sup> while the June 2009 conclusions state in relation to the Irish case that the arrangements are “fully compatible with the Treaty”.<sup>23</sup> Nevertheless, in the Danish case the provisions of the Decision were eventually integrated into the Amsterdam Treaty. In the Irish case, the Heads of State or Government declared that at the conclusion of the next Accession treaty, the provisions of the Decision will be set out “in a Protocol to be attached, in accordance with their respective constitutional requirements, to the TEU and the TFEU”. Arguably, this statement is made in order to avoid the impression that by their decision, the Heads of State and Government meeting in the European Council circumvented the rules governing the procedure to be followed in case of a treaty change.<sup>24</sup>

### *Financial crisis*

Another major challenge for the EU is responding to “the deepest and most widespread recession of the post war era”.<sup>25</sup> This is an occasion for the

20. De Witte, “The process of ratification of the Constitutional Treaty and the crisis options: A legal perspective”, EUI Working Paper Law No. 2004/16, p. 13; Hummer and Obwexer, “Irlands ‘Nein zu Nizza’: Konsequenzen aus dem negatives irischen Referendum von 7. Juni 2001”, (1991) *Integration*, 237–249; O’Keeffe and Twomey (Eds.), *Legal Issues of the Maastricht Treaty* (Wiley, 1994), pp. 349, 353–358.

21. Aust, *Modern Treaty Law and Practice*, 2nd ed. (Cambridge 2007), p. 24, note 52. See also paras. 22–24 of the judgment in Case C-192/99, *Kaur*, [2001] ECR I-1237, which attaches a certain weight to the 1972 unilateral British declaration on its nationals in interpreting the scope of Community citizenship.

22. Edinburgh Conclusions on Denmark, para 1; reprinted in: European Union, *Selected Instruments taken from the Treaties* (1999), p. 875.

23. Para. 4.

24. Art. 48 TEU.

25. Para 11 Presidency Conclusions of the European Council of 18/19 June 2009.

European Council to show its ability to inspire a political plan for economic recovery, revealing interesting institutional developments. For instance, on 12 October 2008, the crisis prompted the Eurogroup to meet for the first time at the level of Heads of State or Government and included the Prime Minister of the UK, a non euro-Member State. This group has no legal basis in the current Treaty but was set up at the Amsterdam European Council, in June 1997; its tasks are described in the Presidency conclusions of the Luxembourg European Council of December 1997. The group was mentioned for the first time in the Presidency conclusions of the Nice European Council, and will obtain an official status under Protocol No 14 annexed to the Lisbon Treaty, providing for “informal” meetings between the Ministers of the Member States in the euro zone, including the Commission and the ECB. In December 2008, i.e. two months after the “high level” Eurogroup meeting, the European Council under French Presidency agreed, according to its conclusions “in line with the Commission Communication of 26 November 2008”,<sup>26</sup> an overarching “European Economic Recovery Plan”, with various components, some of which have a direct impact on the application of Community law, and were faithfully followed up by the Commission:

“11. As regards action by the EU, the European Council supports in particular:

- a temporary exemption of two years beyond the *de minimis* threshold for State aid in respect of an amount of up to EUR 500 000 and the adaptation of the framework as required to increase support for enterprises, especially SMEs, ...
- the use for 2009 and 2010 of the accelerated procedures in the public procurement directives, which is justified by the exceptional nature of the current economic situation, in order to reduce from 87 to 30 days the length of the tendering process for the most commonly-used procedures for major public projects.”

The action plan aims at providing a coherent framework for action at the EU level as well as for measures adopted by each Member State, and includes a complete overhaul of the regulation and supervision of financial institutions.<sup>27</sup> At its March 2009 meeting, the European Council agreed that the basis for action was the report from the High Level Group on financial supervision in the EU, chaired by Jacques de Larosière and mandated by Commission President

26. Commission Communication “A European Economic Recovery Plan”, COM(2008)800 final of 26 Nov. 2009.

27. See also on this subject, “Editorial comments, Weathering through the credit crisis. Is the Community equipped to deal with it?” 46 *CML Rev.* (2009), 3–12.

Barroso in October 2008.<sup>28</sup> Following the Commission Communication “European financial supervision”<sup>29</sup> and the Ecofin Council conclusions on that Communication,<sup>30</sup> the Presidency conclusions of the European Council in June 2009 dedicate ten very detailed paragraphs to what it calls “building a new order in financial markets”. In essence, it agreed on the establishment of a new framework for macro- and micro prudential supervision and therefore:

“19. ... supports the creation of: European Systemic Risk Board which will monitor and assess potential threats to financial stability and issue risk warnings and recommendations and monitor their implementation. The members of the General Council of the ECB will elect the chair of the European Systemic Risk Board”.

20. ... recommends that a European System of Financial Supervisors, comprising three new European Supervisory Authorities, be established aimed at upgrading the quality and consistency of national supervision, strengthen oversight of cross-border groups of supervisory colleges and establishing a European single rule book applicable to all financial institutions in the Single Market”.

As regards the powers to be conferred on these three agencies, it specified that decisions of the European Supervisory Authorities “should not impinge in any way on the fiscal responsibilities of Member States.” The European Council further agreed that the European System of Financial Supervisors should have binding and proportionate decision-making powers as to whether supervisors meet their requirements under a single rule book and relevant Community law, and also in the case of disagreement between the home and host State supervisors, including with colleges of supervisors.

In the next paragraph, the European Council “welcomes” the Commission intention to produce, by early autumn of this year, the legislative proposals to put in place this new framework, “fully respecting the balance of competences”. Undoubtedly, when designing the legislative rules on the scope of these agencies’ powers, the challenge will be to draft them in such a way that they are compatible with the case law of the Court of Justice.<sup>31</sup> In *Meroni*,<sup>32</sup> while the Court did not exclude the “possibility” of delegating of powers to a distinct body with separate legal personality (from this was deduced the power to establish an agency), it did exclude that the powers so delegated would

28. The report was published on 25 Feb. 2009 and is available at: [ec.europa.eu/internal\\_market/finances/committees/index\\_en.htm#delarosierereport](http://ec.europa.eu/internal_market/finances/committees/index_en.htm#delarosierereport)

29. COM(2009)252 final of 27 May 2009.

30. See press release of the Council of 9 June 2009.

31. See the Commission’s legislative proposals of 23 Sept. 2009, COM(2009)499–503 final.

32. Case 9/58, *Meroni* [1958] ECR 11.



involve discretionary power, a result the Court said was unacceptable since it “replaces the choices of the delegator with those of the delegate (and) brings about an actual transfer of responsibility”. Such a transfer of responsibility interferes with the normal institutional balance foreseen by Treaty. The Court has held that the implementing powers which the legislature can confer on the Commission under Article 202 include the power to make general rules, and, in *Romano*,<sup>33</sup> the Court cited Article 211 EC (which lays down that implementing powers are either for the Commission or exceptionally for the Council)) as excluding the Council delegating to another body the power to adopt acts having the force of law.<sup>34</sup>

### *Lisbon Treaty*

The Lisbon Treaty not only provides for a clearer legal basis for powers the European Council already exercises today but, if ratified, will lead to a further increase of its powers, thus altering the institutional balance:<sup>35</sup>

First, it converts the European Council into a formal institution (Art. 13 TEU Lisbon).

Second, its President will be appointed by qualified majority for a term of two and a half years, renewable once (Art. 15(5) and (6) TEU Lisbon). Unlike today, he/she will not have a national mandate and will, therefore, perform his/her function on a “full time” basis. Since the President will have no staff of his/her own, he/she will have to rely on the Council Secretariat when carrying out his duties, which are essentially three: (i) preparing, chairing and ensuring the follow up of the European Council meetings; (ii) driving forward its work and ensuring continuity; (iii) representing the EU at international summits for matters covered by CFSP (Art. 235(4) TFEU).

Third, as pointed out by Dougan and other commentators,<sup>36</sup> numerous provisions of the Lisbon Treaty give the European Council power to take, by

33. Case 98/80, *Romano*, [1981] ECR 1241.

34. See further in this *Review*, Chiti, “An important part of the EU’s institutional machinery: Features, problems and perspectives of European agencies”, 000–000.

35. See Rood, “De EU na het Verdrag van Lissabon: Naar een nieuw politiek en institutioneel evenwicht”, (2008) SEW, 132–135; See also paras. 12–20 of the so-called “Dehaene report”, i.e. the Report on the impact of the Lisbon Treaty on the development of the institutional balance of the EU, adopted at the EP’s plenary session of May 2009 (EP document A6-0142/2009), calling on the European Council to focus on its core task of providing the EU with the necessary impetus for the development of its policies.

36. Dougan, “The Treaty of Lisbon 2007: Winning minds, not hearts”, 45 CML Rev. (2008), 617–703; see also, Berramdane, “Le traité de Lisbonne et le retour des Etats”, (2008) JCP – La semaine juridique, 23–28.



consensus, unanimity or qualified majority, decisions of a “quasi-constitutional” or “high political” nature, both on substance and procedure.<sup>37</sup>

Fourth, although the European Council is strictly speaking not supposed to “exercise legislative functions”,<sup>38</sup> it plays an important role in issues having a clear and decisive impact on the EU’s future legislative process, such as mediating after the use by a Member State of an “emergency brake” within the Council, or in situations where lack of unanimity within the Council could lead to a group of Member States being exceptionally authorized to embark on an enhanced cooperation.<sup>39</sup> In this context, it should be noted that in its recent ruling on the compatibility of the Lisbon Treaty with the German Constitution, the Bundesverfassungsgericht held that the revision procedure under Article 48(6) TEU Lisbon “opens up to the European Council a broad scope of action for amendments of primary law”.<sup>40</sup>

### Conclusions

The above clearly illustrates how in practice European Council action can embody determinative policy choices directing the action of the EU institutions and even Member States.<sup>41</sup> It also suggests that ratification of the Lisbon Trea-

37. E.g. on the Council’s future configurations and system of rotation of presidencies (Art. 236 TFEU); the future composition of the European Parliament as regards the allocation of MEPs between Member States (Art. 14(2) TEU Lisbon); the future rotation of Commissionerships between Member States (Art. 17(5) TEU Lisbon and Art. 244 TFEU); proposing the candidate for Commission President and final appointment of the Commission after its nominees have received the consent of the European Parliament (Art. 17(7) TEU Lisbon); appointing the High Representative for Foreign Affairs – who will also be Vice-President of the Commission (Art. 18(1) and (4) TEU Lisbon); defining the strategic interests and objectives of the Union in the field of external relations (Art. 22(1) TEU Lisbon); adopting a common defence policy (Art. 42(2) TEU Lisbon); defining its strategic guidelines for action within the Area of Freedom and Justice (Art. 68 TFEU); expanding the powers of a future European Public Prosecutor’s Office (Art. 86(4) TFEU); and determining that a Member State is guilty of serious and persistent breach of the Union’s core values (Art. 7(2) TEU Lisbon).

38. Art. 15(1), last sentence TEU Lisbon.

39. Arts. 82(3), 83(3), 86 and 87 TFEU. Also as regards accession to/withdrawal from the Union and amendment of the Treaties by ordinary or various special revision procedure, Arts. 48–50 TEU Lisbon. See for an analysis of these new powers, Dougan *op. cit. supra* note 36, 5.2.4, 9.1 and 10.1–3.

40. Para. 311 of the judgment of the Second Senate of the Bundesverfassungsgericht of 30 June 2009 – English translation as provided by the Bundesverfassungsgericht.

41. The European Council has even become involved at the implementation stage, under comitology. Directive 2009/29, (O.J. 2009, L 140/63) amended Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community, adding a provision (Art. 10a(13)) “By 31 December 2009 and every five years thereafter, after discussion in the European Council, the Commission shall determine a list of the sectors or subsectors referred to ...”

ty, at least in matters of major importance, will not necessarily lead to a profusion of executive power in the EU, to be divided between European Council, Council, and Commission. Rather, the contrary may be expected. However, at personal level, some confusion cannot be ruled out. For instance, with respect to the relationship between the European Council and the Council, much will depend on the way the powers of the President of the European Council and the rotating President of the (General Affairs) Council will be delimited through the rules of procedures of the European Council and the Council respectively. An important issue in that respect concerns their more or less concurrent powers in relation to setting the agenda and following up European Council meetings,<sup>42</sup> and the question how the President of the European Council and the Head of State or Government of the Member State holding the rotating Presidency will interact at meetings of the European Council, even if it is clear that these meetings are chaired by the former.

As regards the interface between the President of the European Council and the President of the Commission there is also room for some confusion. Neither of them is to hold a national mandate, but only the President of the Commission is bound by an explicit duty of independence<sup>43</sup> and derives his mandate from both the European Council and the Parliament which elects him.<sup>44</sup> He is therefore genuinely *supra partes*. Both are members of the European Council, but while it is certain that the President of the European Council has no voting right, the Lisbon Treaty is not entirely clear as to whether the President of the Commission has, in particular when decisions are taken by simple majority or unanimity.<sup>45</sup> In the area of external relations, the situation is even more complicated insofar as the Lisbon Treaty establishes a binary system: at summit level, the President of the European Council ensures the external representation of the EU on CFSP matters; the President of the Commission represents the Union on all other matters, except on EMU issues where special rules apply. Consequently, when a summit deals with CFSP as well as non-CFSP matters, both the President of the European Council and the President of the Commission should attend.

In terms of democratic control, one may regret that the Lisbon Treaty contains so little on the relationship between the European Council and the European Parliament. The latter's President may be invited to be heard by the European Council,<sup>46</sup> and the President of the European Council will present a

42. Art. 16(6) TEU Lisbon.

43. Arts. 15(6) *in fine* and 17(3) TEU Lisbon.

44. Art. 17(7) TEU Lisbon.

45. Arts. 15(4) TEU Lisbon and 235(1) TFEU.

46. Art. 235(2) TFEU.

report to the Parliament after each of the meetings of the European Council.<sup>47</sup> An amendment of the current Regulation on Access to documents<sup>48</sup> would be required in order to extend its transparency regime to the European Council. Issues of financial control are not likely to arise as the European Council is expected to have only administrative expenditure and will not have a General Secretariat of its own. At any rate, the normal rules on budget and budgetary control (including on declaration of assurance by the Court of Auditors, discharge by the Parliament and investigations by OLAF) should apply.

In conclusion, from an institutional balance point of view, one can only welcome that the European Council's powers, certainly if they are extended following the ratification of the Lisbon Treaty, will in that event be counterbalanced by the extension of the Court's jurisdiction to cover acts of the European Council – though only insofar as they are intended to produce legal effects *vis-à-vis* third parties,<sup>49</sup> and in the context of CFSP only insofar as the Court is exceptionally competent.<sup>50</sup> Moreover, one can imagine further judicial control being exercised on the European Council through cases brought before the Court by e.g. the Parliament claiming that the European Council in a specific case has violated Article 40 TEU, a key provision to protect the integrity of the integrated/supranational elements of the Treaty from its intergovernmental CFSP parts.<sup>51</sup> Others may fear that the “institutionalization” of the European Council could well be at the cost of reducing its flexibility in terms of action.<sup>52</sup>

47. Art. 15(5)(d) TEU Lisbon.

48. Regulation (EC) No 1049/2001 of Council and EP (O.J. 2001, L 145) and Art. 15 TFEU.

49. See on actions for annulment Art. 263(1) TFEU, and for actions for failure to act Art. 265(1) TFEU.

50. Art. 275(2) TFEU. See Jacqu , “Le trait  de Lisbonne – Une vue cavali re”, (2008) RTDE, 455–456.

51. See “Editorial Comments: Mind the gap!”, 45 CML Rev. (2008), 317–322.

52. See Jacqu , op. cit. *supra* note 50: «L’institutionnalisation du Conseil europ en ... se fera sans doute au d triment de la souplesse de fonctionnement qui l’avait caract ris  jusqu’  pr sent .... L’avantage sera de situer davantage les travaux dans une optique ‘communautaire’».