

THE SEMI-PERMANENT EUROPEAN COUNCIL PRESIDENCY: SOME REFLECTIONS ON THE LAW AND EARLY PRACTICE

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1. Introduction

One of the most salient innovations provided for by the Treaty of Lisbon has undoubtedly been the creation of a “semi-permanent” or “stable” Presidency of the European Council. Whereas the general media have been quick to tag the new post and its incumbent as “President of the European Union”, most legal scholars have been equally quick in rejecting this designation.¹ At the same time, it has been noted that the Treaties are conspicuously vague with regard to the content of the new post, leaving considerable room for conflicting interpretations and inter-institutional skirmishes.² As usual, this lack of clarity mirrors the inability of the contracting parties to reach consensus on a strong definition or delineation. This should not necessarily be considered problematic, as it enables real-time developments to take over; the exact limits of the new function may thus be settled in practice, with any nascent “presidentialist” tendencies to be codified or curtailed at a later stage.

In contrast, the position of the organ to be presided has never been clearer. With the Treaty of Lisbon, the European Council has solidified as one of the official EU institutions, ostensibly nestling itself at the top of the political hierarchy.³ Some commentators assert that the law has already taken over from the facts here, and that the body may justifiably be perceived as the “European government”.⁴ Though such statements still seem overly bold and slightly

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1. See e.g. Tomuschat, “Calling Europe by phone”, 47 CML Rev. (2010), 3.

2. Koutrakos, “New links in the Union’s institutional chain”, 35 EL Rev. (2010), 1. See also Van Elsuwege, “EU external action after the collapse of the pillar structure: In search of a new balance between delimitation and consistency”, 48 CML Rev. (2010), 992; Rood, “De EU na het Verdrag van Lissabon: Naar een nieuw politiek en institutioneel evenwicht?”, 56 SEW (2008), 135.

3. Cf. Arts. 13 and 15 TEU.

4. Eijsbouts and Claes, “From confederacy to convoy: Thoughts about the finality of the Union and its Member States”, 6 EUConst (2010), 1. The sentiment has been expressed before; see e.g. Peterson and Bomberg, *Decision-Making in the European Union* (Palgrave Macmillan, 1999), p. 33.

premature, the institution's rising dominance is patently clear.⁵ This in turn makes one wonder whether the European Council President has contributed anything to this development during his first term of office, and in what way the broader momentum has been giving shape to his constitutional position.

This paper looks at both topics through a single lens, appraising the Union's system of government in the post-Lisbon setting while simultaneously focusing on the role and powers of the refurbished European Council Presidency. In keeping with Roscoe Pound's famous distinction between the rules in theory and the law in action, we combine an unravelling of the black-letter competences with some analysis of their exercise in practice, so as to scrutinize the internal dynamics of the office, as well as its interaction with other EU actors and bodies.

During his first term, the current President has been engaged in myriad activities, and utilized the means available to him with great zeal. However, as will become apparent, his actual clout is likely to be contingent on many factors, amongst which, the track-record of the person appointed to the office, the strength or weakness of the (heads of) other institutions, and the amount of discretion afforded by the members of the body he chairs. Therefore, while the true import of a particular function can never be fathomed solely on the basis of the official rulebook, it requires a favourable alignment of these meta-elements for him (or his successor) to grow into a pivotal figure. Yet, as was recently argued, the constitutional structure of the EU can be properly understood in federal terms.⁶ Correspondingly, it is not implausible for the Union's newly emerging governmental system to be assigned, in due time, a genuine presidential epithet. Interwoven in our narrative below are comments and observations on the role and performance of the European Council and its chieftain in the past years, which may serve to underpin that hypothesis.

The contribution is structured as follows. First, we sketch the general background to the new office, taking a mildly unorthodox view of its origin, coming into being and popular terminology (section 2). Hereafter, we examine the modalities for the election and dismissal of the European Council President, and after a summary analysis of the pertinent rules, investigate how the appointment procedure was put into operation for the very first time (section 3). We next proceed to gauge his competences, sketching

5. Werts, "The unstoppable advance of the European Council", in Curtin, Kellermann and Blockmans (Eds.), *The European Constitution: The Best Way Forward?* (TMC Asser Press, 2005), pp. 297–307; Eggermont, *The Changing Role of the European Council in the Institutional Framework of the European Union* (Intersentia, 2012).

6. Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (OUP, 2009). See also Laursen (Ed.), *The EU and Federalism: Politics and Policies Compared* (Ashgate, 2010); Cloots, De Baere and Sottiaux (Eds.), *Federalism in the European Union* (Hart Publishing, 2012).

their formal purview as well as (the limits to) their exercise in practice; and then subject the inter-institutional linkages to review, in an attempt to assess how the EU's other main actors measure up to the new office (section 4). In combination, these reflections should provide us with a well-rounded picture of the President's position within the wider constitutional framework. As usual, in the concluding paragraph, the various threads are drawn together (section 5).

2. The European Council and its President: Origins, evolution, terminology

2.1. Birth and evolution of the European Council

The office of President of the European Council was established on 1 December 2009, at the entry into force of the Lisbon Treaty. Of course, this new and stable Presidency still needs to be distinguished from that of the Council, which is, as before, held by one of the Member States.⁷ For all the grand rhetoric of change, at Laeken and beyond, the latter continue to pass the helm between themselves, thus perpetuating the trusted six-month rotation system.

As known, the origins of the European Council, and by consequence of its Presidency, date back to the early 1960s. The institutional architecture of the Communities originally did not provide for recurrent gatherings of the Heads of State or Government of the Member States. Therefore, the first European Council sessions, convened in Paris and in Bonn in February and July 1961, took place without the Treaties providing any legal authorization. The conferences were mainly organized for negotiating issues on which the Council of Ministers could not reach agreement, and with an eye to resolving any avoidable stagnation in the integration process.⁸ The organization of this type of summit reflected a looming desire for institutionalized political cooperation at the highest level, as underscored by the fact that the 1961

7. Art. 16(9) TEU; Art. 236 TFEU; European Council Decision of 1 Dec. 2009 on the exercise of the Presidency of the Council, O.J. 2009, L 315/50; Council Decision of 1 Dec. 2009 laying down measures for the implementation of the European Council Decision on the exercise of the Presidency of the Council, and on the chairmanship of preparatory bodies of the Council, O.J. 2009, L 322/28.

8. Werts, *The European Council*, 2nd ed. (John Harper Publishing, 2008), pp. 3–5; Eggermont, *op. cit. supra* note 5, pp. 3–12. More generally, Bulmer and Wessels, *The European Council* (Macmillan, 1987); Taulègne, *Le Conseil européen* (PUF, 1993); de Schoutheete, “The European Council”, in Peterson and Shackleton (Eds.), *The Institutions of the European Union* (OUP, 2006), ch. 3.

meetings quickly received their follow-ups. For, already at the inception of the integration process, in cases of persistent deadlock, none of the existing actors possessed the necessary standing to take decisive action.⁹ In retrospect then, one may say that it was an incremental practical need, more than anything else, that sparked the European Council's creation. Correspondingly, the move has been hailed as a classic example of change to accommodate political reality.¹⁰

The phenomenon was formalized at the Paris summit of 1974, where the blueprint was agreed for half-yearly conferences under a rotating presidency. The 1975 European Council in Dublin was the first to meet under this new regime. Only in 1987, with the entry into force of the Single European Act, was the existence of the European Council acknowledged in the EEC Treaty. With the entry into force of the Maastricht Treaty in 1993, its role was elaborated in more detail; Article 4(1) TEU couched its task in familiar terms when it instructed the European Council to "provide the Union with the necessary impetus for its development and define the general political guidelines thereof". It was thus designed to take a "helicopter view", and come up with answers to the paramount questions of European integration.¹¹ In legal doctrine this has been distinguished further, with multiple different functions being identified, among which: the facilitation of (informal) exchanges of information and opinions; the fostering of personal understanding between the respective members; the forging of a common approach and endeavouring to accommodate any divergent national policies; acting as a supreme arbitrator on delicate problem dossiers; the launching and coordinating of some of the grandest EU projects.¹² The European Council was eventually endowed with official decision-making powers by the Amsterdam Treaty.¹³

The pace with which the European Council shaped up from a cuckoo in the nest to a centripetal force remains astounding. Though its formal legal position was, for a long time, only articulated very weakly, it has through the years exerted a continuous, overriding and indispensable political pressure.¹⁴ Nowadays, no major development in the EU takes place without its official blessing, or at least tacit approval. This is all the more remarkable considering that its most regular output, the "Conclusions" published at the end of every summit, never enjoyed a "hard law" status. In the span of just two decades, the meetings have evolved rapidly, from their initial informal character to the present structural gatherings prescribed by the EU Treaties. At the entry into

9. Werts, *ibid.*, 3.

10. Craig and De Búrca, *EU Law: Text, Cases and Materials* (OUP, 2011), p. 51.

11. Werts, *op. cit. supra* note 8, p. 18.

12. *Ibid.*, pp. 18–19 and 37–43.

13. (Ex) Arts. 13 and 15 TEU.

14. See e.g. Eijssbouts, "Constitutional sedimentation", 23 LIEI (1996), 57.

force of the Treaty of Lisbon, this high-speed evolutionary trajectory has reached its provisional apogee, with the European Council becoming one of the Union's seven official institutions.¹⁵

2.2. *Origin and background to the "stable" Presidency*

As such, the idea of a "European President" is definitely not new: the creation of this function was suggested as early as 1975, at a meeting of the European Council, by the then President of France, Giscard d'Estaing.¹⁶ The establishment of such a post remained a French desideratum ever since, but the conception took quite a long time to materialize. It was only in January 2003 that French President Chirac managed to obtain the backing of the German Chancellor Schröder for the idea of a stable and full-time chair of the European Council.¹⁷ A few months later, a similar proposal was tabled by Giscard d'Estaing, this time in his capacity of President of the European Convention.¹⁸ In the meantime, similar schemes had emerged pleading for the creation of a single post, combining the Presidency of the European Council with that of the Commission.¹⁹ Such a President would provide all the political initiatives, represent the EU in international relations, and guide the EU executive, overseeing its entire administration. Such an office would be inherently multi-faceted, and capable of tearing down various walls. However, this rendition has always encountered much resistance, with the main problem being thought to lie in the innately conflicting allegiances: after all, the President would have to side with the Heads of State or Government (whom he serves and directs), with the Commission (which he would preside), but also with the Parliament (to which he would be accountable).²⁰ This effectively comes down to asking him to bridge the unbridgeable; and in any attempt, he is likely to expose himself to relentless critique, considering the impossibility of placating everybody at once.²¹

15. Art. 15(1) TEU.

16. Sap, "The European President", 1 EUConst (2005), 47.

17. Van Gerven, *The European Union, A Polity of States and Peoples* (Hart Publishing, 2005), p. 294. The subsequent French-German paper, published as CONV 489/03, linked this to the idea of a Commission President elected by the Parliament. See also Norman, *The Accidental Constitution* (EuroComment, 2003), pp. 174–183.

18. Werts, op. cit. *supra* note 8, p. 148.

19. E.g. "Contribution by Mr Andrew Duff and Mr Lamberto Dini – A proposal for a unified Presidency", CONV 524/03.

20. Werts, op. cit. *supra* note 8, pp. 158–159. See also section 5.3 *infra*.

21. We should note here that in this contribution, we do not employ a gender-neutral terminology. In so doing, we follow the EU Treaties, which also structurally employ the male form when referring to the President of the European Council (and the High Representative for

Ultimately, provision was made in the Constitutional Treaty (CT) for the installation of a European Council President elected by a qualified majority for a period of two-and-a-half years.²² The incumbent was barred from simultaneously holding a national office, and could be re-elected once. A consensus had arisen in the European Convention on establishing the office on these terms, grounded on the idea that it would serve to improve the preparation and coordination of European Council meetings, and lead to an increased visibility of the Union on the world stage.²³ Moreover, the weaknesses of the rotating presidency system in handling the day-to-day activities of the EU had become too poignant, with the highly inefficient follow-up of earlier policy initiatives and decision-making standing out, necessitating further change.²⁴

The current TEU and TFEU provisions regarding the office are the product of an additional round of negotiation in the second half of 2007, prior to the genesis of the Treaty of Lisbon. By that time, the resistance against a permanent Presidency was largely academic, and once again proved unproductive. The arguments in favour of the new post were more or less the same as before: the desire to let the EU speak with one voice and attribute a single person with both internal and external authority, who may go on to function as a personification of the Union (“Mr Europe”), presenting a lofty image of continuity and coherence.²⁵ Proponents pointed besides to the harrowing complexity of managing a European Council spanning twenty-seven members, and the overriding need for firm leadership. A stable president could draw up common positions with greater efficiency, guarantee accelerated decision-making in cases of urgency, constantly searching for compromises, while remaining receptive to initiatives from the Commission or national delegations.²⁶ Similar sentiments may be assumed to have prevailed among the participants at the 2007 IGC, as at the end of the day, the CT regime was integrally copied into the Lisbon Treaty.

the CFSP). We are of course not oblivious to the fact that these offices may be held by women; for “he” and “him(self)”, one may therefore also read “she” and “her(self)”.

22. Art. I-22 CT.

23. Craig, *The Lisbon Treaty: Law, Politics and Treaty Reform* (OUP, 2010), pp. 81–82.

24. See e.g. Sap, *op. cit. supra* note 16, 48; Barents, *Het Verdrag van Lissabon. Achtergronden en Commentaar* (Kluwer, 2008), pp. 410–411. Nevertheless, as regards international representation, the rotating Presidency did function adequately, notably in organizations that the EU is not a member of itself, such as the UN; see Rasch, *The European Union at the United Nations: The Functioning and Coherence of EU External Representation in a State-Centric Environment* (Martinus Nijhoff, 2009), pp. 21–94 and 219–300.

25. Blavoukos, Bourantonis, and Pagoulatos, “A President for the European Union: A new actor in town?”, 45 *JCMS* (2007), 231–252; Curtin, *Executive Power of the European Union: Law, Practices, and the Living Constitution* (OUP, 2009), p. 77.

26. Werts, *op. cit. supra* note 8, pp. 149–50.

2.3. “President” or “chairman” . . . what’s in a name?

As in the past, the qualification of the CT as either a constitution or a treaty proved to be a rich source of confusion and debate,²⁷ a somewhat similar situation appears to have arisen with regard to the Union’s new top office. Indeed, while institutions such as the Court, the Parliament and the Commission have all had a semi-permanent “president” from the very beginning, some Member States objected to the use of that designation in the context of the European Council. What surfaced instead was a keen preference for a less ambitious terminology, so as to refute the claims that the EU was surreptitiously being transformed into a federal or unitary State with an all-powerful overseer. Correspondingly, at the European Convention, Mr Giscard d’Estaing repeatedly stressed the quality of the European Council President as a mere “chairperson”. Initially, in similar diminutive fashion, the heading above the original provision in the Constitutional Treaty (Art. I-21) simply read “the European Council Chair”.²⁸ In fact, the Dutch authentic version of the EU Treaty still refers to the office as that of a “voorzitter”, which translates to “chairman”, not “president”.²⁹ Consequently, politicians, scholars and media sources in the Netherlands were quick to point out that there is nothing to suggest the creation of a truly presidential function: this job of “voorzitter” does not amount to more than that of a humble moderator.³⁰ In the same vein, some authors belittlingly qualify the post as no more than a “handmaiden of the national governments”.³¹

While we should not make too much of it, commentators adopting this particular reasoning do appear to have fallen victim to a slight case of myopia. After all, there is a direct equivalent of the term “president” in a majority of Treaty languages (e.g. French, English, German, Polish and Swedish).³² True, this term is employed in several of these languages because they have no

27. Weiler, “On the power of the word: Europe’s constitutional iconography”, in Curtin, Kellermann and Blockmans, op. cit. *supra* note 5, pp. 3–20; Barents, “Hoe constitutioneel is de Grondwet voor Europa?”, 52 SEW (2004), 2-17.

28. Van Gerven, op. cit. *supra* note 17, p. 367.

29. Of course, linguistically, one could point to the basic etymology of the term “president”, which goes back to the Latin verb “prae-sedere” (meaning “sitting before” or “chairing”); one might then be inclined to conclude that both words actually refer to one and the same thing. However, from a legal perspective, the terms “president” and “chairman” are not identical, and neither are the powers commonly attributed to the two different functions.

30. See e.g. Amtenbrink and Goudappel, “Er komt helemaal geen president van Europa”, *NRC Handelsblad* 14 Nov. 2009; de Waele, “Voorzitter of President van Europa?”, 84 NJB (2009), 2887.

31. Chalmers, Davies and Monti, *European Union Law: Text and Materials*, 2nd ed. (CUP, 2010), p. 79.

32. Respectively “Président”, “President”, “Präsident”, “Przewodniczący”, “Ordförande”.

different word for the function of president and that of a chairperson (e.g. Italian, Spanish, Danish, Portuguese and Greek).³³ Nevertheless, in most of the languages that *are* able to distinguish between these two functions, the choice was still made in favour of the term “president” – for instance, significantly, the German and the English authentic versions, which do not employ the terms “Vorsitzende(r)” or “chairperson”. This seems to indicate that a deliberate choice was made for the word with the greater gravity. Of course, since the treaties are equally authentic in all languages, the Dutch choice of “chairperson” must also be correct.³⁴ Though undeniable, this cannot alter the fact that the prevailing vocabulary is a consciously presidential one. It may then be noted that the chosen term holds a certain promise, at least from a linguistic point of view, and that it might signify a more than auxiliary function.

3. Appointing and dismissing the semi-permanent President

After this brief portrayal of the new office’s origins, we now proceed to analyse the President’s specific position in the institutional framework. The current section commences by assessing the procedure and relevant conditions for his appointment and dismissal. The conclusions drawn on the basis of this assessment will subsequently serve as bedrock for a review of his competences, and a study of his relations with the Union’s other main actors.

3.1. *Eligibility for appointment*

To be eligible for appointment as European Council President, one has to fulfil but one requirement: the person concerned may not hold a national office.³⁵ In view of the rationale of the provision concerned (*viz.* to guarantee the incumbent’s impartiality), this would seem to encompass every type of national political function, regardless of the level of government the office is situated (local, regional, etc.). It does however not extend to other European or international offices. Therefore, it presents no real bar to, for instance, the same person serving simultaneously as President of the Commission. Further

33. Respectively “Presidente”, “President”, “Formand”, “Presidente” and “προεδρος”.

34. Art. 55(1) TEU.

35. Art. 15(6) TEU *in fine*. Declaration (No 6) on Article 15(5) and (6), Article 17(6) and (7) and Article 18 TEU (O.J. 2010, C 83/338) proclaims that “[i]n choosing the persons called upon to hold the offices of President of the European Council, President of the Commission and High Representative of the Union for Foreign Affairs and Security Policy, due account is to be taken of the need to respect the geographical and demographic diversity of the Union and its Member States”, but this boils down to a statement of intent, not a binding requirement.

reflections on the feasibility and probability of this scenario can be found below.³⁶ For the moment, suffice to say that, from a separation of powers perspective, it would of course be wholly undesirable to attempt a combination with the chairs of the Union's legislative or judicial institutions. In the interest of efficiency, the same would go for any executive agencies, bodies and organs.³⁷

The single, modest requirement imposed by the Treaties only applies to the formal moment of appointment. Thus, a President-elect may still hold a national office provided that he has stood down at the moment he formally takes up his new position. Correspondingly, the first European Council President, Herman Van Rompuy, could be elected on 19 November 2009 while still serving as prime minister of Belgium.³⁸ He was formally appointed on 1 December 2010, only a few days after retiring from his national post (on 25 Nov. 2009).³⁹

Strikingly, the Treaties do not stipulate anything with regard to the age, gender, criminal record, nationality, citizenship or country of birth of a would-be President.⁴⁰ It is theoretically possible for the office holder to be, for example, a convicted octogenarian holding a Chinese passport, with habitual residence in Peru.⁴¹ One should pause for a moment on the unprecedented liberality of this regime. It stands in stark contrast to the situation in national States, where candidates for the function of president have to fulfil many more conditions, e.g. having reached a certain age, possessing the nationality of the country concerned, or even having been born there (thus excluding denizens and naturalized persons). Such requirements can for example be found in the

36. *Infra*, section 5.3.

37. This is only marginally less so with regard his activities in various working groups, or his chairing of the "Euro Summit meetings"; see further *infra*, section 4.2.

38. See "Press release – Informal meeting of EU heads of State or Government", Brussels, 19 Nov. 2009, available at <www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/111343.pdf>.

39. European Council Decision 2009/879/EU of 1 Dec. 2009 electing the President of the European Council, O.J. 2009, L 315/48.

40. As mentioned above, the Treaties continuously employ the male form when referring to the function, but there is no rule to the effect that the President cannot be female.

41. As regards the absence of a nationality requirement, similar observations have been made concerning candidates for appointment to the Court of Justice. See e.g. Kennedy, "Thirteen Russians! The composition of the European Court of Justice", in Campbell and Voyatzis (Eds.), *Legal Reasoning and Judicial Interpretation of European Law: Essays in honour of Lord Mackenzie-Stuart* (Trenton Publishing, 1996), pp. 69–92.

laws of the United States,⁴² Russia,⁴³ France,⁴⁴ Finland,⁴⁵ Italy,⁴⁶ Turkey,⁴⁷ Estonia,⁴⁸ and India.⁴⁹ Far from imposing excessive demands, such clauses appear to be entirely sensible, for the desired qualities may well be considered intrinsic to the symbolic nature of the function. Viewed in this light, one could characterize the single and summary condition contained in the constitutional Treaties of the EU as deficient. After all, regardless of his legal competences, the President of the European Council has a representative function that measures up to that of his national peers. It would therefore seem apt to introduce a rule that prescribes (at the very least) that the persons eligible for appointment to the office hold the nationality of a Member State.⁵⁰ He would accordingly also hold Union citizenship.⁵¹ Of course, the current flimsy requirement might be considered sufficient for an essentially innocuous

42. Art. II, Section 1, Clause 5 of the US Constitution states that the President must be a natural born citizen of the United States, at least thirty-five years old, and have been a permanent resident in the country for at least fourteen years.

43. Art. 81(2) of the Russian Constitution provides that one must be a citizen of the Russian Federation, at least thirty-five years of age, and who has resided in the Russian Federation for at least ten years.

44. The *Loi organique n°2006-404 du 5 avril 2006 relative à l'élection du Président de la République* stipulates that one must have the French nationality, not be disqualified to vote, be at least twenty-three years of age, must have fulfilled his military service obligations and dispose of an attest of good conduct.

45. Art. 54 of the Finnish Constitution provides *inter alia* that the President has to be a native Finnish citizen.

46. Art. 85 of the Italian Constitution states that the President must have Italian citizenship, be at least 50 years of age, and not barred from holding political office.

47. Art. 101 of the Turkish Constitution requires that the President has completed higher education, be at least 40 years of age, be a member of the Turkish Grand National Assembly (for which one must have Turkish nationality) or a Turkish citizen eligible to be a deputy. Art. 76 of the Turkish Constitution outlines the requirements for the latter, and excludes, among others, persons who have failed to perform compulsory military service and those who have been convicted for dishonourable offences. Judges, civil servants, and members of the armed forces are not eligible unless they resign from office.

48. Art. 79 of the Constitution of Estonia determines *inter alia* that one must be a native Estonian citizen of at least 40 years of age.

49. Art. 58 of the Constitution of India states that the President must be a citizen of India, at least 35 years of age, and qualified to become a member of the Lower House of Parliament. Furthermore, a person shall not be eligible for election as President if he holds any office of profit under the government of India or the government of any State or under any local or other authority subject to the control of any of the said governments. Three office-holders are however permitted to stand as Presidential candidates, namely the incumbent Vice-President, the Governor of any Indian state, and a minister of the Union or of any Indian state.

50. At the European Convention, the Benelux countries at one time expressed as their common view that the President would have to be chosen from among the ranks of those sitting on the European Council (see CONV 457/02); yet the desired stability of the office would have been hard to attain if the person elected had to combine a national mandate (which could be terminated prematurely) with his EU post.

51. Art. 9 TEU; Art. 20 TFEU.

position in an international organization – but leaving it at that suggests the EU does not aspire to be anything more.

3.2. *The appointment procedure and its first application*

With regard to the procedure for appointment, the Treaties also contain only scant instructions. The one sentence devoted to the issue stipulates that the President of the European Council shall be elected by a qualified majority, for a term of two and a half years, renewable once.⁵² Again, it may be assumed that the brevity is intentional, allowing the competent actors to give shape to complementary rules and conventions in practice.⁵³

Whereas it has been made possible to elect a President in the absence of consensus, the first incumbent was elected by unanimity.⁵⁴ From the outset, it was more than evident that the only electable candidate would be the person backed by both France and Germany. In the run-up to the November 2009 election, several different names had been aired, including those of the prime ministers of Austria, Luxembourg, the Netherlands, and Belgium. The latter is generally believed to have prevailed by way of compromise, though there were some misgivings about his relative lack of experience of international affairs at the highest level.⁵⁵ Initially, the UK had stuck to its own candidate, Mr Tony Blair, who definitely fitted that bill. In October 2009 however, the socialist party leaders in mainland Europe struck a deal with the European People's Party, agreeing that a centre-right politician would take the office, with the post of High Representative for Foreign and Security Policy being secured in exchange for someone of centre-left descent.⁵⁶ Nonetheless, the eventual consensus on the figure of Mr Van Rompuy only emerged after some additional haggling, and alternative suggestions for persons considered equally suitable were mooted up until the very last.⁵⁷

52. Art. 15(5) TEU, first sentence.

53. Possibly cemented in the European Council's Rules of Procedure, though inter-institutional accords could also be resorted to (e.g. to take into account the results of elections to the Parliament, and the dominant political group there). See, generally, Driessen, *Interinstitutional Conventions in EU Law* (Cameron May, 2007). For an intriguingly different take, see Beukers, *Law, Practice and Convention in the Constitution of the European Union*, PhD thesis, University of Amsterdam, 2011.

54. General Secretariat of the Council of the EU, "Press release – Background – President of the European Council", Nov. 2009, available at <www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/111298.pdf>.

55. Barber, "The appointments of Herman Van Rompuy and Catherine Ashton", 48 *JCMS* (2010), 56.

56. *Ibid.*, 61.

57. *Ibid.*, 59–62.

From a legal point of view, this course of affairs is somewhat remarkable. After all, whatever objections any Member State may harbour against a proposed candidate for the Presidency, no country possesses a power of veto; a majority, albeit qualified, suffices for his election.⁵⁸ For that reason, there is less need for horse-trading than recent practice would suggest.⁵⁹ The proclaimed consensus was possibly pursued for PR reasons, since any preventable divisions at the election of the very first President would have unnecessarily damaged the EU's stature.⁶⁰ While such concerns do seem perfectly legitimate, the perceived risks were mostly aerial, as the proceedings took place behind closed doors, and there is no legal duty whatsoever to inform the public-at-large with regard to the distribution of votes.

The possibility for QMV is incontestably useful, as deliberating "under the shadow of the vote" traditionally prevents endless blockades or foot-dragging, and ensures that when all is said and done, a decision is taken. At the same time, a President that has not received the unequivocal backing of all the Member States does not enjoy a total internal support; his authority among his peers is likely to suffer, which may in turn hamper his overall efficacy. All this makes a compelling case for pursuing consensus at all times. Nevertheless, it should be realized that it is far from uncommon in national constitutional systems that the head of State is elected with the support of only the larger part of the electorate. In fact, no federal system in the world imposes a requirement of absolute unanimity among the constituent parts for the election of the president. Moreover, in unitary States, the backing of a relative or absolute majority of the population or of the members of parliament regularly suffices.⁶¹ Since the EU has evolved beyond the stage of an ordinary international organization, it ought not be considered crippling for the legitimacy of its President if at one point, the QMV possibility is actually employed, and a person who fails to carry the vote of every Member State is appointed to the office nevertheless.

58. Unless one were to assume that the "Luxembourg compromise" is applicable here (cf. Bull. EEC 3/66), but it seems improbable for Member States to invoke a "vital national interest" during these particular deliberations.

59. It has been remarked that the possibility for an election by QMV serves to diminish the risk that the largest Member States strike a deal amongst themselves on the person to be elected: see Barents, *op. cit. supra* note 24, 256. This reasoning strikes one as slightly odd however, since the best "insurance policy" for the smaller Member States would have been a consensus requirement.

60. Some reports point to a supposed gentleman's agreement entered into by the French, German and British governments, which entailed that they would only back a candidate they could all agree to; see Chaltiel, "L'identité européenne se précise, le pouvoir des États se réaffirme – À propos des Conseils européens d'octobre et novembre 2009", RMC (2009), 630.

61. This holds e.g. for Finland, Turkey, France and Cyprus.

Except for premature termination, the head of the European Council serves in office for at least two-and-a-half years. Correspondingly, Mr Van Rompuy's first mandate ran until 31 May 2012. Pursuant to his (unanimous) re-election in March 2012, other things being equal, his second extends from 1 June 2012 to 30 November 2014.⁶² In keeping with Article 15(5) TEU, he cannot be appointed for a third time. The relatively short term of office prevents the rise of any dignitaries of *longue durée*, but this reflects a very conscious choice. In the European Convention, contrasting positions had been taken on the subject. A Franco-German proposal envisaged either a five-year-term, or a once-renewable tenure of two-and-a-half years.⁶³ A British-Spanish proposal aimed at a four-year-tenure, or one of two years, renewable once.⁶⁴ Most of the smaller countries were united in their preference to retain the rotating Presidency, possibly for a longer period than six months.⁶⁵ If a permanent President necessarily had to be installed, the solution that proved to be palatable for all was to go for a restricted term of office.⁶⁶ Consequently, the Union's system of government once again flaunts its exceptionalism; for, in national systems, a president's standard tenure runs to four or five years minimum, supplemented by the possibility of re-election. To be sure, fetters are often placed on the number of times a president can be (consecutively) re-elected.⁶⁷ In sum however, but for untimely decease, resignation or dismissal, most national presidents are in office for a much longer period than the President of the European Council. The latter can never hold out for more than five years, whereas for many national presidents, this period denotes merely the length of their first term. While it did appease those who preferred to keep the rotation system, as well as those that sought to make sure that the incumbent does not grow too attached to his position, the rapidity with which he has to disappear from stage will quite likely continue to bemuse most casual observers.

62. Conclusions of the European Council of 1–2 March 2012, EUCO 4/12, p. 15; “Herman Van Rompuy re-elected President”, EUCO 37/12, Brussels, 1 March 2012.

63. CONV 489/03.

64. CONV 591/03.

65. CONV 467/02 and CONV 646/03.

66. Norman, *op. cit. supra* note 17, pp. 283–284. A comprehensive account of the struggle between the two opposing camps is provided by Bunse, Magnette and Nicolaidis, “Shared leadership in the EU: Theory and reality”, in Curtin, Kellermann and Blockmans, *op. cit. supra* note 5, pp. 275–296.

67. E.g. in the U.S., Russia, and Brazil; compare however in France, Israel and Italy. If the bar only applies to consecutive re-elections, there is no legal impediment for former incumbents to run for office immediately after a successor has taken their place. Conversely, the wording of Art. 15(5) TEU appears to rule out any third term for the European Council President, regardless of whether it would be a consecutive or non-consecutive one.

3.3. *End of tenure and procedure for dismissal*

Though the pertinent scenarios have not materialized so far, the mirror image of the appointment procedure also merits further discussion. The TEU foresees two situations in which the President's term of office can be terminated: first, in case of an "impediment" or, second, in the case of "serious misconduct". The Treaties supply no definition of either term.

Examples of serious misconduct are not too hard to imagine. It is appreciably more difficult to grasp the nature of the "impediment" that requires sanctioning. Logic dictates that it covers at least those instances in which the eligibility criterion is no longer fulfilled, i.e. in the eventuality the incumbent takes up a national office.⁶⁸ Also included would be those situations in which the mandate of the person concerned has already been renewed earlier, since one cannot be reappointed twice. The impediment could however also be physical – a supposition that is all the more relevant in light of the fact that no age limit has been fixed. The European Council's Rules of Procedure speak of an impediment "because of illness" when detailing who may replace or temporarily fill in for the President, if the need arises.⁶⁹ Nevertheless, the impediment does not have to be one which stands in the way of his good functioning – at least, the text of the TEU provision does not make this explicit. It also makes no mention of the possibility of a voluntary resignation.⁷⁰ Still, an *unwillingness* to carry on could probably also be qualified an "impediment". Lastly, the term of office ends as a matter of course in the event of the death of the incumbent, in which case a replacement also has to step in (if only temporarily).⁷¹

The sole institution with the power to dismiss the President is the body that elected him to the office, the European Council itself. This stands in marked contrast to the procedure for members of the Commission, who can be dismissed by the Parliament or the Court of Justice; it also diverges from the procedure pertaining to the Ombudsman or members of the Court of Auditors,

68. Analogous to what has been stated in section 4.1, the *election* to a national office does not necessitate ending his term of office as president immediately; after all, Art. 15(6) TEU *in fine* only states that one may not *hold* a national office at the same time. Besides, the elected person could still decide to abstain from taking up the national mandate, and should be given due opportunity to contemplate this course of action.

69. Art. 2(4) of the Annex to European Council Decision of 1 Dec. 2009 adopting its Rules of Procedure, O.J. 2009, L 315/51 (hereinafter: the Rules of Procedure).

70. In contrast to e.g. Art. 246 TFEU in relation to members of the Commission.

71. Art. 2(4) of the Rules of Procedure determines that the President shall then be replaced by the member of the European Council that represents the country holding the rotating presidency of the Council.

who can only be dismissed by the ECJ.⁷² Obviously, this places him in a robust and comparatively less assailable position. Moreover, the construction effectively turns the European Council into a college of prince-electors.⁷³ Of course, this is merely the black-letter law as it now stands; as will be explored further below, it cannot be ruled out that more profound accountability relations with other institutional actors will take shape over time.

3.4. *Interim conclusion*

As ascertained in the foregoing, the eligibility criteria for being elected European Council President are curiously terse, and the prescribed term of office is notably short. When judged from an appointment-and-dismissal perspective, the President appears nevertheless to be in a relatively strong legal position. For one thing, he can be invested rather efficiently, without the involvement of other institutions, and if need be by a qualified majority of representatives. Additionally, as flagged above, only one entity is competent to force him to step down; the President is currently not accountable to anyone but the European Council members themselves. In other words, should he go astray, only very few are capable of reining him in. This might seem a disquieting assertion; yet there would only be cause for alarm if the office is able to exert a sizeable influence in the Union's law and policy-making process. In the next section, we will inquire whether that is indeed the case.

4. The European Council President's constitutional position

While politically many a Member State has made quite a racket when holding the rotating European Council Presidency, the legal tasks that came with that role were always rather limited. The head of State or government presiding was but the *primus inter pares vis-à-vis* the other members; the Presidency was expected to set the agenda, chair the meetings of the Council and the European Council, report to Parliament and represent the EU externally. By and large, the role of the novel semi-permanent President does not appear that

72. The former on the basis of Art. 234 TFEU and (on the request of the Council or the Commission) Art. 247 TFEU; the latter on the request of respectively the Parliament and the Court of Auditors itself, see Art. 228(2) TFEU and Art. 286(6) TFEU. Art. 17(6) TEU also provides that the Commission President may request individual Commission members to step down.

73. Thus not unlike the *Kurfürsten* assembly of the Holy Roman Empire, but rather more powerful, since the latter were formally only competent to appoint the new ruler (the Roman King, later the Holy Roman Emperor). Cf. Begert, *Die Entstehung und Entwicklung des Kurkollegs. Von den Anfängen bis zum frühen 15. Jahrhundert* (Duncker & Humblot, 2010).

different. He mainly serves to coordinate the work of the European Council, organize and preside over the sessions, and report back to Parliament after every summit.⁷⁴ To an extent, he also represents the EU externally on issues regarding the Common Foreign and Security Policy. Although this may seem wholly unimpressive, there is more here than meets the eye. Precisely because the Treaties offer no details on the remit of the roles assigned, the primordial question becomes to which extent they might be stretched. It subsequently becomes of interest to determine whether they have indeed been stretched by the first incumbent.

The current section provides a synopsis of the President's competences, and a rough sketch of his position with regard to the Union's other actors. We also pay due regard to the various informal means at his disposal to transmit suggestions, promote original initiatives, channel the overall policy-making and control the course of events. At the same time, observations are made on the actual exercise of his competences and his inter-institutional dealings in the past two-and-a-half years, so as to confront the rules *in abstracto* with the first experiences in practice, and examine his place within the wider constitutional framework.

4.1. *Position and competences within the European Council*

As set down in Article 15(3) TEU, the President is required to convene the European Council in an official session twice every six months. Moreover, he is bound to do so in situations where a special meeting is required, e.g. if international developments necessitate an urgent decision on the strategic lines of the Union's policy.⁷⁵ Since mid-2010, the latter stipulation has been applied generously, with several extraordinary sessions taking place.⁷⁶ It must be noted here that one of the first acts of the incumbent after his election was to call an informal meeting, thereby exhibiting, in the words of two commentators, that "he had the capacity and the will to bring together the members of the European Council whenever he thought that useful".⁷⁷ He is equally at liberty to settle the duration of a summit. Pursuant to Article 4(1) of

74. Cf. Eggermont, op. cit. *supra* note 5, pp. 31–34; Curtin, op. cit. *supra* note 25, pp. 77–80.

75. Art. 26(1) TEU. See also Art. 1(1) of the Rules of Procedure.

76. From spring 2010 up to the autumn of 2011, in particular due to the unfolding economic and monetary crisis, formal and informal gatherings were staged with unprecedented frequency, resulting in the Union's heads of State and government meeting no less than 14 times over a period of 20 months.

77. Kaczyński and ó Broin, *The Treaty of Lisbon: A Second Look at the Institutional Innovations* (CEPS/Egmont/European Policy Centre, 2010), p. 23. See also Barber, op. cit. *supra* note 55, 63–64.

the Rules of Procedure, the President may decide to depart from the rule that meetings run for a maximum of two days. No such decisions have hitherto been taken, but Mr Van Rompuy has not shied away from bringing forward the starting date.⁷⁸

Article 4(2) of the Rules of Procedure adds that the President may, in exceptional circumstances, organize a “meeting in the margins” of the European Council sessions with representatives of third States or international organizations. The European Council members have to agree with this unanimously beforehand. During Mr Van Rompuy’s first term of office, representatives of international organizations, in particular the International Monetary Fund, were repeatedly involved, without this leading to an official, clearly separated “meeting in the margins”. The Treaty of Accession with Croatia was however signed at a true “margins meeting” taking place on 19 December 2011, and the same is true for the Treaty on Stability, Coordination and Governance in the EMU, signed on 2 March 2012.⁷⁹

Article 3(1) of the Rules of Procedure stipulates that the President of the European Council, in close cooperation with the representative of the Member State holding the rotating Council Presidency and the President of the Commission, has to submit an annotated draft agenda to the General Affairs Council at least four weeks before every ordinary meeting. In theory, this competence puts him in a relatively strong position, as it enables him to set as well as manipulate said agenda.⁸⁰ In addition, Article 3(1) ordains that the President (in similar close cooperation) is to prepare draft guidelines for the European Council conclusions, draft those conclusions as well as European Council decisions, which are subsequently to be discussed in the General Affairs Council. Moreover, the President presides all meetings of the European Council and draws up the provisional agenda for the final meeting of the General Affairs Council. Article 2(1) of the Rules of Procedure states that the European Council President shall ensure the preparation and continuity of the work of the Council in cooperation with the Commission President, on the basis of the work of the General Affairs Council. According to Article 2(2), the latter shall prepare and ensure the follow-up meetings of the European Council, in liaison with the President of the Council and the Commission. According to Article 12(1), the President signs all the decisions that are adopted by the European Council. Finally, as Article 4 (4) states, he is

78. E.g. with regard to the summit planned for Friday 9 Dec. 2011, which, as he decided, was to commence on the evening before.

79. Conclusions of the European Council of 9 Dec. 2011, EUCO 139/1/11 REV 1, p. 1; Conclusions of the European Council of 1–2 March 2012, EUCO 4/12, p. 1.

80. Werts, op. cit. *supra* note 8, p. 172.

responsible for the application of the Rules of Procedure, and for ensuring that discussions are conducted smoothly.

Article 15(6) TEU elaborates his powers further. As regards his internal competences, the following provisions are most noteworthy: the President chairs the European Council and drive forward its work (a); he shall ensure the preparation and continuity of the work of the European Council (b); he shall endeavour to facilitate cohesion and consensus within the Council (c).⁸¹ Especially the provision under (a) must be read in conjunction with Article 15(1) TEU, which states that the European Council “shall provide the Union with the necessary impetus for its development”, “define the general political directions and priorities thereof” and “not exercise legislative functions”.

However tedious the prose, on the basis of these clauses, the office of European Council President can be characterized as a centripetal force that is ultimately – albeit indirectly – rendered responsible for the determination of the EU’s overall course. *Prima facie* though, this inference is immediately diluted by various stipulations in the Rules of Procedure. Whilst Article 6(1) states that the President takes the initiative when the European Council adopts a decision and holds a vote, he is required to start a voting procedure on the initiative of a member of the European Council, provided that a majority of the members agrees. Following Article 6(3), the President has to check whether there is a quorum.⁸² Also, he may not take part in the vote himself. Yet, it does need to be mentioned that this provision is only applicable when it truly comes to a vote.⁸³ In every other situation, the President may considerably influence the decision-making, or even persuade the members not to let the matter come to a vote, so as to maximize his own role. Additionally, under Article 7, he may himself propose to stage a written vote on urgent matters.

Little is known with regard to the actual deployment of these procedures and the conduct of the incumbent during European Council meetings, as the latter take place behind closed doors, the proceedings are kept confidential, and the official conclusions do not shed light on any of these matters. For now, suffice to say that Mr Van Rompuy appears to have been duly carrying out these tasks in his first term, with no deviations or anomalous occurrences coming to the fore.

81. Cf. Chalmers, Davies and Monti, *op. cit. supra* note 31, p. 79, distinguishing here an “*ex ante*” and “*ex post*” dimension in the President’s “mission”.

82. The President himself and the Commission President are not taken into consideration in the calculation of whether there is a quorum.

83. Cf. Barents, *op. cit. supra* note 24, 259.

4.2. *Roles and activities beyond the European Council*

External to the institution he presides and beyond the formal remit of his powers, there is a very visible aspect of his work that merits special attention. Of late, the European Council has developed a habit of establishing ad hoc working groups, not referred to in the Treaties, in order to study specific issues and come up with suggestions for their resolution. In the past years, the European Council President has almost automatically been appointed head of several such working groups. In March 2010, Mr Van Rompuy was seconded to lead a taskforce entrusted with drafting proposals for stronger economic governance. The taskforce's Final Report, which recommended the establishment of a permanent crisis mechanism, increased fiscal discipline, a broadening of economic surveillance, deeper coordination and stronger institutions, was endorsed at the October 2010 European Council summit.⁸⁴ Mr Van Rompuy was then entrusted to explore the possibility and draft a concrete proposal for a limited revision of the Treaties, so as to deliver tighter fiscal discipline and allow for the creation of a permanent bail-out fund for eurozone countries. He also completed this mission successfully, with the report of this taskforce receiving unanimous backing at the European Council summit in December 2010.⁸⁵ One year later, he was mandated to explore the possibilities for a further strengthening of economic convergence and deepening the economic union.⁸⁶ This led to an Interim Report, and

84. See, respectively, "Strengthening economic governance in the EU. Report of the task force to the European Council", Brussels, 21 Oct. 2010, and the Conclusions of the European Council of 28–29 Oct. 2010, EUCO 25/1/10 REV 1.

85. Conclusions of the European Council of 16–17 Dec. 2010, EUCO 30/10. Media reported that the President had carried out "an enormous amount of preparatory work", which meant that these conclusions "were almost entirely agreed in advance" (<euractiv.com/en/future-eu/quiet-summit-could-crown-van-rompuys-mastership-news-500662>). See also Invitation letter by President Van Rompuy to the European Council, Brussels, 15 Dec. 2010, PCE 310/10: "I sent you last week the conclusions I draw from the consultations held with all Member States, in particular as regards the parameters of such a Treaty change. In the light of this, a draft decision of the European Council has been prepared and circulated to all Member States. We need to reach an agreement on a draft decision at our meeting in order for procedures to be launched as fast as possible, both at the EU and national levels, so that this decision can enter into force on 1 January 2013". The amendment was finalized in European Council Decision of 25 March 2011 amending Art. 136 TFEU with regard to a stability mechanism for Member States whose currency is the euro, O.J. 2011, L 91/1, and correspondingly subjected to ratification by the Member States.

86. Conclusions of the European Council of 23 Oct. 2011, EUCO 52/11, p. 5. See also "Main results of Euro Summit", Brussels, 26 Oct. 2011, Annex 1, "Ten measures to improve the governance of the Euro area", p. 10.

subsequently to the Treaty on Stability, Coordination and Governance in the EMU, signed in March 2012.⁸⁷

On a related note, since March 2010, Mr Van Rompuy has been in the business of chairing the regular gatherings of the countries whose common currency is the euro, though the Treaties do not make any mention of this either. Originally, these meetings were organized at the behest of the French President and the German Chancellor.⁸⁸ They were canonized at the European Council summit in October 2011, and are nowadays to take place (at least) twice a year.⁸⁹ These so-called “Euro Summit Meetings” bring together the Heads of State or Government of the Euro area and the President of the Commission. Overseer of proceedings is a “President of the Euro Summit” or “Mr Euro”, whose term of office – *ceteris paribus* – coincides with that of the European Council President.⁹⁰ Already in August 2011, the French President and the German Federal Chancellor invited Mr Van Rompuy to take up this position structurally. He was designated chair ad interim two months later, and officially appointed in March 2012.⁹¹

87. “Statement by the Euro area heads of State or Government”, Brussels, 9 Dec. 2011; “Interim report: Towards a stronger economic union”, 6 Dec. 2011; “Remarks by Herman Van Rompuy, following the first session of the European Council”, EUCO 155/11, Brussels, 9 Dec. 2011; Conclusions of the European Council of 1–2 March 2012, EUCO 4/12, p. 1. The Treaty as such was drafted under the auspices of the Eurogroup Working Group (a configuration of the Economic and Financial Committee), chaired by Mr Thomas Wieser.

88. Before 2010, such a summit took place at one earlier instance, in the autumn of 2008, when the credit crunch first impacted on the EU’s largest financial institutions. This led to the “Declaration on a concerted action plan of the Euro area countries” (Paris, 12 Oct. 2008).

89. As far as possible, immediately after European Council meetings; moreover, the President can call extra meetings. See “Main results of Euro Summit”, Brussels, 26 Oct. 2011, Annex 1, “Ten measures to improve the governance of the Euro area”, p. 11, point 1.

90. *Ibid.*, point 2: “The President of the Euro Summit will be designated by the [Heads of State or Government] of the Euro area at the same time the European Council elects its President and for the same term of office”. This should be distinguished from the function of “Mr Eurogroup”: cf. point 5, “The President of the Eurogroup is elected in line with Protocol no. 14 annexed to the Treaties . . . The President of the Euro Summit will be consulted on the Eurogroup work plan and may invite the President of the Eurogroup to convene a meeting of the Eurogroup, notably to prepare Euro Summits or to follow up on its orientations”. This phrasing sheds doubt on whether the functions of “Mr Eurogroup” and “Mr Euro” can be combined. Cf. Art. 12 of the Treaty on Stability, Coordination and Governance in the EMU, which is inconclusive in this regard. As such however, nothing prevents a “Mr Eurogroup” appointed from outside the select club of eurozone finance ministers (wherewith the position could also be awarded to e.g. the Commissioner for Economic and Monetary Affairs).

91. Conclusions of the European Council of 23 Oct. 2011, EUCO 52/11, p. 5; “Main results of Euro Summit”, Brussels, 26 Oct. 2011, Annex 1, at 11; “Herman Van Rompuy re-elected President”, EUCO 37/12, Brussels, 1 March 2012. See moreover “Remarks by President of the European Council Herman Van Rompuy at the European Parliament”, EUCO 117/11, p. 4. The joint invitation letter can still be found on <www.elysee.fr/president/root/bank_objects/111207Lettre_adresse_a_M_Herman_Van_Rompuy.pdf>.

Generally, what we are facing here are “grey zones”, left unregulated by the Treaties or EU secondary law, whereby it is far from clear what the proper role and conduct of the European Council President should be. At present of course, after two-and-a-half years of institutional practice, it is still early days; original customs and conventions may well take root and form over time.⁹² Furthermore, it should not be forgotten that historically, the European Council started its own life in a comparable “grey zone”.

The President’s actual powers in the various ad hoc working groups, and the extent of his control over their other members, should probably not be overstated. Nonetheless, these “extra-curricular” activities would seem to allow him to not only set the agenda and inform the decision-making within the European Council itself, but also to steer discussions on topics in external fora, in preparation or follow-up to official European Council meetings. These side-jobs may thus serve as an effective and invaluable extension of his formal competences. From a legal vantage point, he is perfectly entitled to function in such external capacities, provided they do not collide or overlap with his primary function.⁹³

The same cannot unreservedly be said with regard to his position as “Mr Euro”. For a start, although for the moment, the “Euro Summit meetings” cause little or no institutional friction, hard-liners may still entertain doubts on the legality of the arrangements.⁹⁴ In any event, from a political standpoint, the separate and structural gatherings risk undermining the respect for, and authority of, all EU institutions – including the European Council and (a fortiori) its helmsman.⁹⁵ As long as the functions of “Mr Euro” and European Council President are combined, this is hardly vexing, and the additional responsibilities can actually be seen as enhancing the latter’s stature. In the long run however, in the absence of an enduring nexus, incorporated in the Treaty architecture, the two are uneasy bedfellows.⁹⁶

92. Cf. *supra*, note 53.

93. As indicated above, Art. 15(6) TEU merely bars the President from simultaneously holding a national office.

94. Cf. Art. 3(c) TFEU; see also “Editorial comments – Some thoughts concerning the draft Treaty on a reinforced economic union”, 49 CML Rev. (2010), 4–9.

95. The European Council President does not necessarily have to chair these meetings in the future, as he will not always inevitably be a national of a country belonging to the Eurogroup.

96. Cf. Art. 16 of the Treaty on Stability, Coordination and Governance in the EMU, aiming at such incorporation.

4.3. *Position vis-à-vis other EU actors*

4.3.1. *Relations with the Council*

At first glance, the European Council might seem to occupy a hierarchically superior position in relation to the Council, which could lead one to think that the latter invariably has to bow to the instructions of the former.⁹⁷ By consequence, the European Council President would be cast in a paramount role. Upon closer inspection however, the legal picture proves to be rather more complicated. To begin with, when creating a stable European Council Presidency, the drafters of the Lisbon Treaty (and the CT) unfortunately did not decide to disband the revolving Presidency of the Council. The six-month rotation system was left intact, albeit that pre-arranged groups of three Member States are to operate in close collaboration and follow up on one another's activities.⁹⁸ Thus, instead of promoting efficiency and transparency, "Lisbon" created an unhelpful *dédoublement*.⁹⁹ As a result, the role of the rotating Presidency in the governance of the Union cannot be blotted out yet.¹⁰⁰

To ensure a smooth interplay between the President of the European Council and the (Presidency of the) Council, the European Council's Rules of Procedure prompt its President to establish a close cooperation and coordination with the Presidency of the Council, in particular by staging regular meetings.¹⁰¹ This would seem to underscore the theorem that there exists, in principle, equivalence between the two functions. It is however hazardous to draw inferences on these grounds without more intimately taking the respective competences into regard. As before, the European Council provides the Union with the necessary impetus for its development, and it is to

97. Cf. Eggermont, *op. cit. supra* note 5, pp. 128–130.

98. See Art. 16(9) TEU; Art. 236 TFEU; European Council Decision of 1 Dec. 2009 on the exercise of the Presidency of the Council, O.J. 2009, L 315/50; Council Decision of 1 Dec. 2009 laying down measures for the implementation of the European Council Decision on the exercise of the Presidency of the Council, and on the chairmanship of preparatory bodies of the Council, O.J. 2009, L 322/28 (corrigendum in O.J. 2009, L 344/56).

99. With the Foreign Affairs Council having yet another helmsman in the form of the High Representative for the Common Foreign and Security Policy (see Art. 18(3) TEU). However, Art. 2(5) of Council Decision 2009/908/EU (see previous footnote) adds that discussions in the Foreign Affairs Council on Common Commercial Policy issues will be chaired by the six-monthly rotating Presidency. In addition, if the HR is unable to attend a session, he will be replaced by respectively the Commissioner for Enlargement, Development or Humanitarian Aid, who act as his deputies. Finally, it also stipulates that the foreign minister of the Member State holding the rotating Presidency may also step in, should the need arise.

100. In the same vein, "Editorial comments – The post-Lisbon institutional package: Do old habits die hard?", 47 CML Rev. (2010), 598–600.

101. Art. 2(3) of the Annex to the Rules of Procedure also instructs him to establish such cooperation (and with the President of the Commission).

define the general political directions and priorities. As Article 15(1) TEU affirms, it does not exercise legislative powers, and consequently, the European Council President cannot do so either. It can however take legally binding decisions on – to indicate but two “high politics” dossiers – the composition of the Parliament and the appointment of the High Representative.¹⁰² Again, at least in theory, this enables the person chairing the relevant deliberations to pre-cook the decision-making, and attempt to spin it in a certain direction. Significantly perhaps, even if he does not formally participate himself, all the decisions taken do carry his signature.¹⁰³

As noted earlier, the preparation and continuity of the work of the European Council is to be ensured by its President. However, this has to be done on the basis of the work of the General Affairs Council.¹⁰⁴ Moreover, the responsibility for the preparation and follow-up to meetings of the European Council rests equally with the General Affairs Council.¹⁰⁵ Crucially, the European Council President lacks the competence to issue binding instructions to the members of the Council and/or its Presidency. Last but not least, the Council enjoys its traditional broad gamut of legislative competences. Obviously, all this diminishes the scope of the powers of the European Council, and therefore of its President.

When pitted against the Council and its rotating Presidency, the European Council and its President nevertheless do appear to retain a certain primacy for three different reasons. To start with, in providing the aforementioned impetus, it is the European Council and not the Council, nor the latter’s Presidency, that determines the general course of the EU.¹⁰⁶ Secondly, even when it has not been attributed any legislative competences, as a matter of fact, all decisions taken by the European Council are of a “high politics” or “quasi-constitutional” nature.¹⁰⁷ Thirdly and lastly, the Council is fated to share the bulk of its legislative powers with the Parliament, and in most of the

102. Art. 14(2) TEU; Art. 18(1) TEU.

103. As well as the signature of the European Council’s Secretary General. Yet, analogous to national constitutional practice, whereas the signature of the President can be perceived as the decisive “political” signature (the binding of politics to the decision), the Secretary General’s signature is merely a “civil” signature (binding the civil service to the decision).

104. Art. 15(6) (b) TEU, reproduced in Art. 2(2) of the Rules of Procedure.

105. Art. 16(6) TEU (second sentence of second subparagraph), reproduced in Art. 2(1) of the Rules of Procedure. See also the “Editorial comments”, *op. cit. supra* note 100, 599.

106. Cf. Eijsbouts, *op. cit. supra* note 14, 57: “There is no doubt that the European Council is presently the most powerful body in the Union structure. Its action is crucial to the Union”; de Schoutheete, *op. cit. supra* note 8, 57: “[M]anagement of the Union could not be assured without a top-level institution of this type: the European Council has played a fundamental role in European integration and will continue to do so”.

107. Dougan, “The Treaty of Lisbon 2007: Winning minds, not hearts”, 45 *CML Rev.* (2008), 627.

areas where it enjoys those powers, it cannot act autonomously. In some cases of deadlock, it even has to take a step back and refer the dossier to the European Council.¹⁰⁸ Thus, from a theoretical point of view, it is the latter institution that occupies the more prominent position. Of course, while the powers of the European Council and its President must not be conflated, the foregoing assertion does have a bearing on the clout of the latter, as he plays a pivotal role in scripting sessions, chairing them, steering the course of the deliberations, possibly even cajoling voters, therewith co-determining how the institution proceeds in the exercise of its powers.

4.3.2. *Relations with the High Representative*

As the TEU details, the High Representative conducts the Common Foreign and Security Policy, takes initiatives for its further development, chairs the Foreign Affairs Council, and also functions as one of the Commission's vice-presidents.¹⁰⁹ Though Article 15(6) TEU does supply a potential bone of contention by stipulating that the European Council President is to ensure the external representation of the Union on issues concerning the CFSP, on the basis of the black-letter law, few clashes between his office and that of the High Representative are to be expected.¹¹⁰ After all, Article 15(6) demands that the President acts "at his level and in that capacity" and "without prejudice to the powers of the High Representative". A different provision instructs the High Representative to represent the Union for matters relating to the CFSP, conduct political dialogue with third parties on the Union's behalf, and express its position in international organizations and at international conferences.¹¹¹ Article 15(6) stipulates that the President has to respect the powers of the High Representative in this domain, which entails that he is bound to attune the exercise of his external competences to the latter, and minimizes the potential for animosity. The Treaties do not provide total clarity though, in particular due to the misty phrase "at his level and in that capacity". Thus, a few remaining turf wars might still need to be fought, whereby in practice much depends on the personalities of the incumbents, and their willingness to work things out amongst themselves.¹¹² At present, everything

108. See e.g. Art. 48(b) and Art. 82(3) TFEU.

109. Art. 18 TEU.

110. As regards the European External Action Service, harmony has been imposed by charging it to assist the High Representative, the European Council President, the Commission President as well as the Commission in the exercise of their respective external functions: see Art. 2(1) and (2) of Council Decision 2010/427/EU establishing the organization and functioning of the European External Action Service, O.J. 2010, L 201/30.

111. Art. 27 TEU.

112. As opined by Riccardi, "Two shortcomings in the Lisbon Treaty require reasonable compromise from Van Rompuy, Barroso and Ashton", *Agence Europe* Bulletin No. 10326 (2

suggests Mr Van Rompuy and Ms Ashton have established a fairly good *rapport*.

With regard to the legal institutional question of “who controls who”, it could overall be posited that the constitutional position of the President is of slightly greater weight than that of the High Representative. To be sure, this conclusion cannot be based on any autonomous powers he enjoys *vis-à-vis* the HR, for none exist. His position at the head of the European Council may nevertheless serve as a decisive factor; after all, it is this institution that sets down the objectives and general guidelines for the CFSP, with the Council being bound to frame that policy and take the decisions necessary for defining and implementing it.¹¹³ The High Representative merely “takes part” in the European Council’s work, puts the CFSP into effect, and has to carry out all his tasks within the mandate provided by the Council.¹¹⁴ The European Council, chaired by the President, has the final say on the priorities for the CFSP, and holds the power to define, alter and limit the mandate of the High Representative. The European Council – potentially at the instigation of the President – is also able to dismiss him, and may proceed to do so on an unlimited number of grounds.¹¹⁵ Theoretically then, the President prevails, largely by virtue of the weight and force of the institution he presides.¹¹⁶

March 2011): “Reasonable and pragmatic behaviour from the figures involved is the only remedy that exists if conflicts are to be avoided”.

113. Art. 26(1) and (2) TEU.

114. Art. 26(3) TEU; Art. 18(2) TEU.

115. Art. 18(1) TEU.

116. During his first term of office, the European Council President has *de facto* functioned as the “voice of the Union” on several instances; together with the High Representative, but also with some prejudice to the latter’s position. E.g., in early 2011, in the run-up to the military intervention in Libya, Mr Van Rompuy made little attempt to dodge the public eye and take a backseat to Ms Ashton; in so doing, he appears to have stretched his mandate with regard to the Union’s external representation beyond the official parameters. Correspondingly, while they did issue a joint statement on 17 March 2011 welcoming the approval of UNSC Resolution 1973, the media appear to have attached comparatively greater importance to the views of the President, often exclusively relying on his comments without making mention of statements by the High Representative. See e.g. “EU calls special summit on Libya and North Africa”, <www.euractiv.com/en/global-europe/eu-calls-special-summit-libya-north-africa-news-502659>; “Libyan rebels fear fresh attack on Ajdabiyah”, <uk.reuters.com/article/2011/04/17/libya-idUKLDE73F0E720110417>. Similarly, Mr Van Rompuy’s remark at a plenary session of the Parliament that the EU should take credit for the effective concerted action and the prevention of a bloodbath (see <euobserver.com/9/32128>) triggered much more (online and offline, positive and negative) comments than any public statement of Ms Ashton. Most tellingly perhaps, in its overview of the EU’s response to the developments in Libya, even the Presidency of the Council has ventured to place a greater emphasis on the role of Mr Van Rompuy: see <www.eu2011.hu/developments-libya-overview-eus-response>. See also *infra*, note 123 and accompanying text.

4.3.3. *Relations with the Commission*

In the Treaties, the only direct nexus between the Commission and the President of the European Council is the provision stipulating that the Commission's President is a member of the European Council.¹¹⁷ As mentioned above, the European Council's Rules of Procedure add to this that the European Council President has to establish close cooperation and coordination with the Commission President, particularly through regular meetings.¹¹⁸ Further, according to Article 15(6)(b) TEU, he has to ensure the preparation and continuity of the work of the European Council in cooperation with the President of the Commission, on the basis of the work of the General Affairs Council. After each European Council meeting, the outcomes have to be reported to Parliament.¹¹⁹ These provisions have all been faithfully implemented, with a weekly breakfast taking place between the two Presidents, outcomes of summits quickly receiving the necessary follow-ups, and said reports finding their way to Parliament in timely fashion.¹²⁰ In addition, after each European Council meeting, the European Council President has made a habit of debriefing the press and the Parliament jointly with the President of the Commission.¹²¹

As regards the external sphere, the current incumbents have struck an (informal) agreement with regard to the EU's representation at international meetings.¹²² The exact details remain shrouded in secrecy, but a structural pattern is emerging for some settings, with Mr Van Rompuy and Mr Barroso deciding on a case-by-case basis who will present the Union's views on other

117. Art. 15(2) TEU.

118. Art. 2(3) Rules of Procedure.

119. Art. 15(6)(d) TEU; see also Art. 5 of the Rules of Procedure. The presentation rule is not new; cf. Art. 4 TEU in the Nice wording.

120. During his tenure as "Mr Euro", Mr Van Rompuy is also tasked to ensure the preparation of Euro Summit meetings in close cooperation with Mr Barroso; they have been made jointly responsible for communicating the decisions taken, and are to meet regularly with the "Mr Eurogroup": see "Main Results of Euro Summit", Brussels, 26 Oct. 2011, Annex 1, "Ten measures to improve the governance of the Euro Area", pp. 10–11, points 1, 6 and 10. Cf. Art. 12(4) and (5) of the Treaty on Stability, Coordination and Governance in the EMU.

121. They have also made a habit of issuing joint statements and declarations; see e.g. "Joint statement by European Council President Van Rompuy and European Commission President Barroso on the EU accession referendum in Croatia", EUCO 10/12, Brussels, 22 Jan. 2012; "Joint declaration by European Commission President Barroso and European Council President Van Rompuy on the occasion of the anniversary of the great East Japan earthquake", MEMO 12/72, Brussels, 9 March 2012.

122. As acknowledged by Mr Van Rompuy himself in the general activity report "The European Council in 2010" (available at <www.european-council.europa.eu/media/161695/qc3010507enc.pdf>), p. 12.

occasions.¹²³ Evidently, here too, the smoothness of the collaboration depends to a sizeable extent on the quality of the match between the personalities holding the respective posts; and again, an unmistakable *compatibilité des humeurs* can be observed in recent practice.¹²⁴

Whilst the President of the European Council is expected to work together with the Commission and its President, the central structure of the relationship has been typified as a competitive one, since both have an independent agenda-setting role and are keen to assert their preferences and prerogatives.¹²⁵ Indeed, from a legal-theoretical perspective, it is not immediately clear who is outshining who here. To start with, the executive competences and the right of initiative of the Commission need to be set off against the “high politics” decision-making powers of the European Council. In this respect, the political reality is that the Commission has in the past decades gradually come to be overshadowed by the collective of the Heads of State or Government.¹²⁶ The Lisbon Treaty can be viewed as a recognition and further elaboration of this trend.¹²⁷ Also, at official meetings, the Commission

123. E.g., at G20 meetings, they form part of the EU delegation together, taking the floor depending on the subject of the discussions (CFSP or not). See further Van Elsuwege, *op. cit. supra* note 2, 992. They also jointly participated in the last two EU-US Summits, on 20 Nov. 2010 and 28 Nov. 2011 (see respectively <www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/116192.pdf> and <www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/125792.pdf>).

124. Their skilful defusing of the “Deauville pact” offers another excellent illustration of their synchronized approach. The eponymous Franco-German accord spelled out strict budgetary rules for the EU Member States and strong sanctions for countries failing to comply (see <www.elysee.fr/president/root/bank_objects/Franco-german_declaration.pdf>). The Sarkozy-Merkel tandem unveiled its proposal at a high-profiled press conference in February 2011, in the margin of a European Council summit originally convened to discuss energy policy issues. In the same month, Van Rompuy and Barroso disbursed a paper outlining competitiveness targets that were appreciably more flexible than the Franco-German plans. In itself, this immediate response proved efficacious, for in March 2011 the Heads of State and Government of the Euro area adopted the “Euro Plus Pact”, which more closely resembled the Barroso-Van Rompuy initiative (see Conclusions of the Heads of State or Government of the Euro Area, 20 March 2011, Annex 1).

125. Chalmers, Davies, and Monti, *op. cit. supra* note 31, p. 79. See also the “Editorial comments”, *op. cit. supra* note 100, 601.

126. As one authoritative commentator puts it, “[A]nyone who studied the relationship between the European Council and the Commission over the years will reach the conclusion that the Commission has been forced into a subservient role” (Werts, *op. cit. supra* note 5, p. 304). See also Ponzano, Hermanin and Corona, “The power of initiative of the European Commission: A progressive erosion?”, *Notre Europe Studies and Research No. 89*, Jan. 2012, p. 43: “[T]he political influence of the European Council ha[s] undoubtedly pushed the Commission’s main role more and more from that of a powerful initiator to that of an ‘honest broker’, on the one hand, and from that of an autonomous initiator to that of a reactive initiator, on the other”.

127. See e.g. Rood, *op. cit. supra* note 2, 134.

President reports to the European Council, chaired by the President, not the other way around.¹²⁸ At the same time, as he is a member of the European Council, it is formally necessary that the Commission President subscribes to its Conclusions – otherwise, these qualify only as “Conclusions of the Heads of State or Government of the EU”. On top of this, if public relations count for anything, it deserves to be mentioned that the Commission’s chief delivers the annual “State of the Union” address.¹²⁹ Numerous other arguments pro and contra can be proffered here, but a definite and completely “objective” verdict seems impossible to attain. Consequently, one is tempted to conclude that the scales stay in balance, and that the Commission and European Council President stand roughly on a par.

4.3.4. *Relations with the Parliament*

The legal interconnections between the President and the Parliament are few and far between. Nonetheless, the provision that stipulates that the former shall present a report to the latter after every meeting of the European Council creates one central link.¹³⁰ This rule codifies a standing practice which dates back to 1987.¹³¹ Importantly, the Rules of Procedure add that the President shall represent the European Council before the Parliament.¹³² This “representation” is however essentially noncommittal; it does not entail a formal accountability relationship, for the Parliament has not received any powers of sanctioning *vis-à-vis* the European Council, nor in relation to its President. Thus, the latter remains free to ignore any possible negative feedback from MEPs, even if these were to command a parliamentary majority. In fact, the Parliament utterly lacks a guarantee that the President will be attending in person to deliver and elaborate on his report. The fact that Mr Van Rompuy has actually decided to do so may be considered a generous favour on his part.

Conversely, the Parliament’s President may be invited to be heard by the European Council.¹³³ The Rules of Procedure prescribe that this exchange of views is to take place at the start of every meeting.¹³⁴ In reality, such audiences

128. See e.g. “Invitation letter by President Herman Van Rompuy to the European Council”, Brussels, 15 June 2010, PCE 127/10.

129. José Manuel Barroso, Speech/10/441, “State of the Union 2010”, Strasbourg, 7 Sept. 2010; Id., Speech/10/607, “European renewal – State of the Union 2011”, Strasbourg, 28 Sept. 2011.

130. Art. 15(6)(d) TEU, reproduced in Art. 5 of the Rules of Procedure (second sentence).

131. See Werts, *op. cit. supra* note 5, p. 303.

132. Art. 5 Rules of Procedure (first sentence).

133. Art. 235 TFEU, reproduced in Art. 4(2) of the Rules of Procedure.

134. Unless, as Art. 4(2) of the Rules of Procedure spells out, a different decision is taken by unanimity.

have become a standing practice since 1981.¹³⁵ Again though, nothing more has been granted than a special privilege which can be revoked at any time.¹³⁶ The Lisbon Treaty has thus not transformed the settled practice into a hard and fast rule; as a result, it continues to depend on the goodwill of the European Council's members.

On these grounds, the bonds between the Parliament and the President of the European Council may be rightly characterized as weak. The former has no powers to sanction the actions of the latter, nor to keep him in check.¹³⁷ True reciprocal duties of information do not exist either. This legal constellation further reinforces the comfortable and relatively carefree position of the European Council President. The absence of any relation of accountability entails that he is not "hindered" by MEPs when exercising his (formal or informal) powers, following instructions from his peers, or pursuing his own preferences. Unsurprisingly, in various quarters of the Parliament, discontent has arisen on the fact that, when attending a session, Mr Van Rompuy merely elaborates on the positions the European Council has adopted, and expounds on matters that have already taken their course; he does not defend the relevant policy lines, nor does he commit himself to a future course of action.¹³⁸ At first and final instance, only the European Council can scrutinize the President's conduct, but as highlighted above, its possibilities for sanctioning him are still severely limited. At the end of the day, whereas the President's array of competences may not be grand, there are little or no democratic constraints on their exercise, so that attempts to stretch them cannot easily be thwarted.

4.4. *Interim conclusion*

The preceding permits several conclusions with regard to the constitutional position of the European Council President. These are partly premised on his competences, partly on how these have of late been exercised, and partly on the formal and informal relations entertained with the other main players in the Union's institutional framework.

135. According to Werts, *op. cit. supra* note 5, p. 303. But cf. Priestley, *Six Battles That Shaped Europe's Parliament* (John Harper Publishing, 2008), p. 27, who suggests the practice only took root and form six years later, at the European Council summit of 29–30 June 1987.

136. As attested by the use of the verb "may".

137. Cf. Eggermont, *op. cit. supra* note 5, p. 34, who rightly points to the budgetary powers of the Parliament, but admits that any limiting of the President's financial resources only allows it to "exercise some control on the description of [his] powers".

138. Remarks by former Green/EFA MEP Kathalijne Buitenweg at the seminar "Constitutional Convention and Democracy in the European Union", University of Amsterdam, 21 April 2011.

Clearly, the office was intended as a means to improve and maintain cohesion, and designed to drive forward the European Council's work. The President has not been attributed decision-making powers proper; legally, all such competences are exercised by the European Council, leaving him to serve as an arbiter of sorts between the different Heads of State or Government.¹³⁹ The official autonomous powers he does possess are largely internal ones, meaning that they relate overwhelmingly to the organization and management of European Council meetings. His drafting and agenda-setting powers are fairly significant here, although these must mostly be exercised in close cooperation with other actors, including members of the European Council itself; for instance, the countless extraordinary sessions, convened during the first stages of the economic and financial crisis, sprang from the initiative of the French President and the German Federal Chancellor. Yet, he plainly functions as an important "totem figure" who is able to have a formidable impact behind the scenes, e.g. by coordinating policy dossiers, (re-)shuffling priorities, spearheading taskforces, regularly visiting and (pre-)consulting Heads of State or Government – thereby *de facto* overshadowing other actors and stakeholders.

With regard to his legal interrelations with other institutions and offices, whilst the European Council cannot be considered hierarchically superior to the Council in every respect, as we have seen, it does appear on the whole to enjoy a primordial position. Even if an absolute preponderance of the European Council President cannot be established on the basis of this supposition, it may allow him to stake a comparatively larger claim to authority notwithstanding. Equally, it would probably go too far to assume a total subordination of the office of High Representative. Most importantly, the HR does not answer directly to the President. Yet, by virtue of the fact that the President sits at the helm of the institution that determines the CFSP's priorities, the High Representative does remain under his control indirectly, despite the absence of any formal powers of instruction. Moreover, in the conduct of the Union's external policy, the European Council President legally does not always have to take a backseat to the HR, and he has regularly taken the lead on the world stage in practice.

Matters are even more convoluted concerning the linkages with the Commission and its President. In the post-Lisbon era, the Commission continues to enjoy important executive competences, but for the adoption of legislation its hands are still tied to the Council and the Parliament.¹⁴⁰ To be

139. Tomuschat, *op. cit. supra* note 1, at 4; see also Dougan, *op. cit. supra* note 107, 628–629.

140. Regardless of its autonomous competences *ex Art. 45(3)(d) TEU and Art. 106(3) TFEU*.

sure, the European Council does not wield total control over the Commission, but of course the latter's initiatives can never come to much without the support of the former. On top of that, unlike the European Council, it does not itself determine, but can only attempt to adjust the Union's general course. All the same, as was asserted above, no unambiguous answer can be given to the question of which president eclipses the other, which led to the conclusion that their constitutional power base would seem to be largely equivalent.

As observed, the European Council President is not answerable to the Parliament, and there exist only weak duties of information between the two. Looking through a legal prism, this can qualify as a grave defect; in practice, it gives the President a relatively free rein, enabling him to exercise his competences without *ex ante* or *ex post* having to seek the approval of (a majority of) MEPs. Above, it was illustrated how the present incumbent has conducted himself in a slightly more forthcoming, but not totally complaisant manner.

All in all, from a pure "law in the books" vantage point, the European Council can be said to outrank most of the other Union offices and institutions. Yet, whereas the formal competences of its President are undeniably limited, his informal powers have been repeatedly stressed, and these should definitely not be overlooked. In their deployment, he ought to prove capable of making a substantial impact on the decisions and policies adopted by the body he presides, and in multiple ways, he seems able to leave an actual mark on the meetings he chairs; for unlike most of the other institutional actors, he profits from direct access to the Heads of State or Government, can continually put out a feeler about particular issues, ignite new discussions, promote original proposals, and attempt to attune the positions of the European Council members.¹⁴¹ In sum, the semi-permanent President clearly occupies a

141. The experiences in practice also corroborate these suppositions. E.g. it should be noted that it was the European Council, not the Member States autonomously, that agreed on the financial "rescue packages" for Ireland, Greece and Portugal; and that Mr Van Rompuy was responsible for organizing and chairing the preparatory high level meetings (see respectively "Statement of the Heads of State or Government of the Euro Area", 7 May 2010; "Statement by the Eurogroup and ECOFIN Ministers", 28 Nov. 2010; "Statement by the Eurogroup and ECOFIN Ministers", 16 May 2011). Similarly, in March 2011, shortly before the session of the UN Security Council where the resolution authorizing the use of force in Libya was adopted, he decided to convene an extraordinary meeting of the European Council; in the announcement of this special summit, Mr Van Rompuy remarked publicly that he would himself propose the strategic lines of the EU's reaction to the developments in Libya and the Southern Neighbourhood (see "Herman van Rompuy, President of the European Council, convenes an extraordinary European Council on Friday 11 March 2011", Brussels, 15 Dec. 2010, PCE 055/11). This served to align the positions of the various Member States, including the permanent (France and the UK) and non-permanent Security Council members (Germany and Portugal). Of course, he hardly always gets his cake: for example, at the Dec. 2011 European Council Summit, Mr Van Rompuy had to retract his strikingly original proposal to pursue a

prominent constitutional position. Moreover, the current incumbent appears to have succeeded in becoming an influential actor in his own right, through a dutiful exercise of his official powers, clever exploitation of some legal “grey zones”, and tactful dealings with the Union’s other institutional players.

5. Conclusion: Three dimensions of “European Presidentialism”

5.1. *How it is*

Notwithstanding the fact that it was never the intention to introduce an all-powerful “President of Europe”, the expectations with regard to the office have been spectacularly high.¹⁴² At the same time, some were apprehensive that the introduction of the office would usher in an irreversible “presidentialization” of EU governance. So far, by taking small steps instead of giant leaps, the present incumbent has simultaneously been dashing those hopes and stemming those fears. On the whole, the first European Council President has duly carried out the intended role of “reasonable moderator”, delivering the much-needed consistency and follow-up that was previously lacking.¹⁴³

Nevertheless, as indicated above, this widely held view of Mr Van Rompuy might be a bit too one-sided, and the President’s (slender) array of competences should by no means be considered decisive. In order to gauge the true impact of the refurbished Presidency, one also needs to pay due regard to the dynamics that have been taking shape in practice, consider how he has been exercising his formal and informal competences, and managed to demarcate his own distinctive space in the Union’s constitutional framework. Both in theory and in reality, albeit conditional on the support of his peers, he has proved capable of exerting a more direct and profound influence on European Council decisions and policies. Diplomats have given him credit for the resolution of several (major and minor) internal issues.¹⁴⁴ On the external

simple amendment of Protocol No 12 on the excessive budget procedure, due to lack of unanimous support (see “Remarks by President of the European Council Herman van Rompuy at the European Parliament”, EUCO 158/11, Strasbourg, 13 Dec. 2011).

142. Koutrakos, op. cit. *supra* note 2, 1; Tomuschat, op. cit. *supra* note 1, 3.

143. Cf. Tomuschat, op. cit. *supra* note 1, 5.

144. E.g. a spat between Poland and the Commission on pension reform (see <euractiv.com/en/future-eu/quiet-summit-could-crown-van-rompuys-mastership-news-500662>). See also Mahony, “More treaty talk”, *EUObserver* 26 Oct. 2011, <blogs.euobserver.com/mahony/2011/10/26/more-treaty-talk/>, quoting an anonymous diplomatic source: “There seems to be general agreement that without his attention to detail and fair reflection of all the views in the Council, the rift between the euro ins and outs would be much worse than it actually is. . . . [H]e has also been instrumental in making sure that what comes out in

front also, he has functioned as an important figurehead, taking precedence over the High Representative on some eye-catching occasions.¹⁴⁵ On top of this, a *de facto* shift in the balance of powers in the Union, to the benefit of the institution he presides, has been taking place for years – reinforcing earlier qualifications of the European Council as a “proto-presidential body”.¹⁴⁶ In the wake of this development, the core potential of the European Council Presidency has grown further still. Thus, merely by deciding to install a semi-permanent President, the EU’s institutional architecture already appears to have been critically altered – irrespective of how the new office has been functioning so far, and how it may further evolve in the future.¹⁴⁷

5.2. *How it could have been*

It is no secret that for most Member States, the main reason for electing Mr Van Rompuy as European Council President lay in his unassuming demeanour.¹⁴⁸ Indeed, in public, the first President has shown a supremely modest disposition. Precisely because of this humility, he has as yet given little cause for discomfort, even if behind closed doors, he were to put on a different face. This first of all begs the question of whether his successors are likely to take a more conspicuous role, since the first occupant of a new office often leaves a singular stamp on it. Secondly, by not appointing a more ebullient character, the political clout of the European Council President is definitely not as palpable as it otherwise would have been. In this regard, some deplore the choice that was made in December 2009, and emphasize the salubrious effects that the election of an elder statesman would have had – resulting in a true “Mr Europe”, instantly recognizable both inside and outside the Union.¹⁴⁹ During his first term, Mr Van Rompuy has chosen to adhere to a low profile, confining the presidentialist tendencies to the undertow. All the same, his

European Council Conclusions reflects the balance of the views of Member States and not just those of one or two”. On a similar note, in the further implementation of the Europe2020 agenda, Mr Van Rompuy secured the involvement of the Committee of the Regions, single-handedly adding a phrase to this effect to the European Council conclusions of March 2011 (see “Speech by Herman van Rompuy to the Plenary Session of the Committee of the Regions”, PCE 110/11, 11 March 2011, 4).

145. Cf. *supra*, notes 116 and 123.

146. Eijsbouts, *op. cit. supra* note 14, at 58.

147. In the same vein Curtin, *op. cit. supra* note 25, pp. 76–7, who contends that the Lisbon Treaty has led to “the formal institution of a new actor . . . that in many respects is to be considered at the very pinnacle of executive power in the EU”.

148. Cf. Barber, *op. cit. supra* note 55, 56.

149. Compare the oft-quoted remarks by former UK foreign secretary David Miliband, that the EU needs a President who “stops the traffic when he or she lands in Beijing, Washington or Moscow” (*The Guardian*, 25 Oct. 2009).

successors remain entirely at liberty to diverge from this course, as no binding customs or conventions have emerged so far that would oblige them to uphold this self-effacing posture.¹⁵⁰

Conversely, the proponents of electing a renowned, shrewd and seasoned politician are perhaps too quick in discounting the risks and drawbacks associated with such a move. For one thing, a world celebrity would have had to drag his past and well-known opinions around with him.¹⁵¹ Consequently, the EU's reputation would quite easily suffer under any older resentment international partners might harbour.¹⁵² Secondly, tensions are bound to arise with the political leaders of the large Member States, as he would constantly threaten to steal their glory, as well as with those of the smaller Member States, who risk being increasingly overlooked, if not utterly marginalized.¹⁵³

5.3. *How it might become*

If the European Council itself constitutes “a classic example of change in the original institutional structure of the Treaty to accommodate political reality”,¹⁵⁴ the story of its reformed Presidency may become another. Certain processes in the EU do tend to repeat themselves; the European Council evolved from a variegated ad hoc meeting into an all-powerful institution, regardless of an (initial) lack of formal rules, contrary predictions, and numerous substantial grievances. Eventually, if only because of the fuzzy limits to the powers of office, the Presidency could turn into a “formidable new fulcrum of power”.¹⁵⁵ With considerable caution, some early experiences may already be seen as underpinning that inference.

Naturally, further steps in this development raise sundry problems from the perspective of the rule of law and the principle of attributed powers – calling for the rapid establishment of an improved set of checks and balances.¹⁵⁶ Unfortunately, while indeed the rise of presidentialism increases the need for sufficient democratic legitimacy, at present the contrary is the case. At least when the rotation system still applied to the European Council, the Presidency was subjected to a diluted form of parliamentary scrutiny, as a relationship of accountability existed *vis-à-vis* the popular assembly of the Member State

150. Cf. *supra*, note 53.

151. Riccardi, *op. cit. supra* note 113.

152. But the same applies with regard to e.g. the High Representative or the Commission President.

153. Cf. Chalmers, Davies and Monti, *op. cit. supra* note 31, p. 79.

154. Craig and de Búrca, *op. cit. supra* note 10, p. 51.

155. Dougan, *op. cit. supra* note 107, at 628; in the same vein Rood, *op. cit. supra* note 2, 133.

156. Similarly Dougan, *op. cit. supra* note 107, 628; Sap, *op. cit. supra* note 16, 50.

concerned. With the entry into force of the Lisbon Treaty however, even this highly feeble set-up was obliterated. *Pour comble de malheur*, while a stronger form of parliamentary oversight is now more needed than ever, the occupant actually finds himself in a position that verges on the unassailable.

An unusual way to remedy this situation, and a solution that does not require an amendment to primary law, would be to merge the functions of President of the European Council and President of the Commission.¹⁵⁷ As noted, the idea has been mooted before, but was not regarded a serious option at the end of 2009. Yet, for many it continues to hold an irresistible appeal.¹⁵⁸ To be sure, if ever it were to be implemented, one would need to time the exercise carefully.¹⁵⁹ As a result of such a move, the Parliament would finally be able to exercise direct control, although officially, it still could not hold the “double-hatted” President to account for his dealings within the European Council. Interestingly, whereas the European Council has from the moment of its creation been subverting and corroding the “Community method”, the merger of the two Presidential offices may spark a top-down infusion of supranationalism, and integrally transform the traditional stronghold of national autonomy. Precisely for that reason, the Member States are unlikely to ever allow it. Moreover, the vicissitudes of the “multi-hatted” High Representative demonstrate that one would need to appoint a person of unparalleled dexterity, and even then, one may still be charging that intrepid soul with a mission impossible. Finally, such a vast concentration of power in the hands of a single person arguably requires his direct election by the people.¹⁶⁰

Overall, during his first term, the first semi-permanent European Council President has cut a fine figure, exploited his chances and ensured the true stability of his office, despite an ambiguous legal framework and unimpressive array of powers. At this point, one can but sketch the contours of

157. This has been dubbed “legally questionable” in the “Editorial comments”, op. cit. *supra* note 100, 601, but no grounds accompanied that statement. Clearly, the intention of the framers of the Lisbon Treaty was that both posts are taken up by different persons (one could e.g. point to Declaration No 6, cited *supra* note 35). At the same time, one seeks in vain for an explicit provision obstructing the possibility of both functions being fulfilled by one and the same person.

158. E.g. Internal Market Commissioner Michel Barnier (Speech 11/317, “Towards a new Europe”, Humboldt University Berlin, 9 May 2011, available at <europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/11/317&format=HTML&aged=0&language=EN&guiLanguage=en>). See also Honor Mahony, “A van Barroso?”, *EUObserver*, 15 Apr. 2010, available at <blogs.euobserver.com/mahony/2010/04/15/a-van-barroso>, referring to statements by MEPs Andrew Duff and Richard Corbett.

159. The possibility only arises at the moment the twin terms of office expire, i.e. currently not before Dec. 2014 (unless earlier that year, Mr Van Rompuy were to succeed Mr Barroso as head of the Commission, in his final months as European Council President).

160. Van Gerven, op. cit. *supra* note 17, p. 367.

what is taking shape and await how things will pan out in the long run. If the European Council were to grow more powerful still, the President may concomitantly rise in stature. One is however reminded here of Max Weber's dictum on politics as a "slow boring of hard boards". The Union presently finds itself at a critical junction, bound to either move closer towards a fully-fledged federation, or founder on the rocks of the financial crisis and turn into an atypical "failed State".¹⁶¹ The fate of the revamped European Council Presidency will be decided accordingly. At this instant though, it is equally good to remember that the US Presidency knew humble beginnings too, and was threatened by almost instant failure.¹⁶² In contrast, the rules and early practices in the EU are rather more congenial: in essence, they point to a position that, if consolidated, enables Mr Van Rompuy and his successors to leave an ever greater imprint on the supranational policy-making process. Rather than eroding the Union's constitutional foundations, today's economic troubles could serve as a catalyst for a further, more dramatic evolution, of which his recent anointment as "Mr Euro" forms an emphatic portent. Consequently, in due time, the EU's system of government might well be ascribed a genuine presidential epithet.

161. Cf. Ruffert, "The European debt crisis and European Union law", 48 CML Rev. (2011), 1804–1805.

162. Sap, op. cit. *supra* note 16, 51.