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SEPARATION OF POWERS IN THE EUROPEAN UNION'S INTERTWINED SYSTEM OF GOVERNMENT

A TREATY BASED ANALYSIS FOR THE USE OF POLITICAL SCIENTISTS AND CONSTITUTIONAL LAWYERS

by Jacques Ziller

1. *EU Treaty Reform and Some Taboo Concepts: Constitution, Federalism, Separation of Powers*

One of the merits of the Lisbon Treaty, which has been signed by all EU member states on 13 December 2007[1], is to shed more light on some features of the European Union's system of government – as was intended with its predecessor, the Treaty Establishing a Constitution for Europe of 2004 (Constitutional treaty)[2], which was abandoned at the European Council meeting of 21-22 June 2007. Whether or when the Treaty enters into force matters only marginally for this essay: the wording of the relevant clauses does not change dramatically the institutional setting or the policy cycle, but it is extremely useful in that it gives an authoritative presentation of the issues which I am trying to tackle here.

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[1] See amongst others F. BASSANINI & G. TIBERI (eds), *Le nuove istituzioni europee. Commento al Trattato di Lisbona*, S. GRILLER & J. ZILLER (eds), *The Lisbon Treaty – Eu Constitutionalism without a Constitutional Treaty?*, Vienna/New York, Springer, 2008; as well as J. ZILLER, *Il nuovo Trattato europeo*, Bologna, Il Mulino, 2007, and – *Les nouveaux traités européens: Lisbonne et après*, Paris, Montchrestien, 2008.

[2] See amongst many others G. AMATO, H. BRIBOSIA & B. DE WITTE (eds), *Genèse et destinée de la Constitution européenne - Genesis and Destiny of the European Constitution,* Bruxelles, Bruylant, 2007; G. AMATO & J. ZILLER (eds), *The European Constitution – Cases and Materials in EU and Member States' Law*, Cheltenham, Edward Elgar, 2007; as well as J. ZILLER, *La Nuova Costituzione Europea,* Bologna, Il Mulino, 2004; – *La Nouvelle Constitution européenne,* Paris, La Découverte, 2004; – *The European Constitution*, The Hague, Kluwer Law International, 2005.

The Lisbon Treaty is giving visibility – in the EUs founding legal document – to what was only accessible to specialists in the treaties of Rome (treaty establishing the European Community – EC) and Maastricht (treaty on the European Union – EU) in their post-Nice wording[3].

The Constitutional treaty of 2004 would have abolished the treaties of Rome and Maastricht and substituted them for a new single Treaty. The title of the treaty "Establishing a Constitution for Europe" might have hidden to many readers a crucial point, namely that the new EU would have been based on an international treaty, as the European Communities and EU always had been. As opposed to the Constitutional treaty, the Treaty of Lisbon has been drafted according to the traditional method of treaty amendment. The existing treaties are not replaced by a new treaty, but they incorporate almost all changes that had been agreed by the EU governments in 2003-2004 on the basis of the draft Treaty prepared by the European Convention in 2002-2003. The change of method and of form between the Constitutional treaty of 2004 and the Lisbon Treaty of 2007 did not hamper carrying through the work of clarification – which was intended by the European Convention four years earlier. This is easy to check on the basis of the 'consolidated treaties' which have been published by the Council of the European Union in the Official Journal n° C 115 of 9 may 2008 – a date that has not been chosen by chance, as 9 May is the anniversary of the Schuman Declaration of 1950, which started the process that lead to the establishment of the European Communities and the European Union.

An important caveat needs to be announced at the beginning this essay: since the negotiation which led to the adoption of the Maastricht Treaty, during the year 1991[4], some words have become taboo in European politics, amongst which 'federalism' and 'constitution', and maybe also 'separation of powers'; to sum it up, any expression that might lead to think that the EU might someday become a state.

[3] The Nice Treaty was signed on 26 February 2001, and came into force on 1 March 2003. It was not the last of a series of amending treaties, the most important of which being the European Single Act of 1986 – which entered into force on 1 July 1987 –, the EU Treaty of 1992 – which entered into force on 1 November 1993 –, the Amsterdam Treaty of 1997 – which entered into force on 1 May 1999. Politicians, journalists, many practitioners and some scholars misuse language when they talk or write about 'the Nice Treaty': what they usually mean is the treaties of Rome and Maastricht as amended lastly by the Nice Treaty.

[4] See J. Cloos, G. Reinesch, D. Vignes, and J. Weyland (eds), *Le traité de Maastricht – Genèse, Analyse,Commentaires*, Bruxelles, Bruylant, 1993.

Whether a constitution can be an international treaty, or vice-versa, is a never ending debate, which will not be dealt with here. It suffices to recall that for many Scottish lawyers and politicians, the constitutional basis of the United Kingdom is the Act of Union of 1707, which they tend to call "the Treaty of 1707"[5]. This implies for them that the powers of Parliament are limited by the clauses the 1707 Treaty, whereas, the more traditional English analysis according to the Sovereignty of Parliament could not have been limited by the 1707 Act.

The words 'federation' and 'federalism' have been systematically avoided in the EU context since 1991, upon the request of the British government. The British position contrasted with the Franco-German proposals during the 1991 negotiations which prepared the Maastricht treaty: they initially included a reference to a possible 'federal future' for the European Union. The British position also contrasted with the first draft article 1 of the Constitutional treaty as discussed in 2002 by the European Convention. The draft included the word 'federal': "The Union […] shall exercise in the *federal* way [*sur le mode fédéral*[6]] the competences they confer on it". This wording was later changed into "The Union […] shall exercise in the *Community* way [*sur le mode communautaire*] the competences they confer on it". Once again this had been done in order to accommodate UK demands.

The word 'constitution' had become fashionable after the speech held by the German Foreign Minister Joschka Fischer at the Humboldt University on 12 May 2000. It has been deleted from official EU vocabulary after the referendums of 29 May and 1 June 2005, where the French and Dutch electorate expressed a majority vote against the ratification of the Treaty signed in Rome on 29 October the year before[7]. Whether doing away with this vocabulary on tactical grounds has been a wise choice or not remains debatable. In the long run it does probably not contribute to clarity in the discussion over the EUs *finalité*[8]. It

[5] See C. R. MUNRO, *Scottish Devolution: Accomodating a Restless Nation*, in "International Journal on Minority and Group Rights", vol. 6, n° 1-2, 1999, p. 97 s.

[6] When commenting on the work of the European Convention 2002-2003, it is useful to bear in mind that the major part of drafting was done in French, and somewhat less in English, with only some communications of the Convention's members in other languages; see the Convention's website on european-convention.eu.int.

[7] See J. ZILLER, *Il nuovo trattato europeo*, cit. p. 116 s. and J. ZILLER, *Les nouveaux traités européens*, cit. p. 85 s.

[8] See E.-U. PETERSMANN, *The Reform Treaty and the Constitutional Finality of European Integration*, in S. GRILLER & J. ZILLER, *"*The Lisbon Treaty*"*, cit. p. 337 s., and N. WALKER,

would be however unfair to blame politicians for not using expressions which they consider as being too ambiguous, when scholars are not able to agree on their meaning.

As far as 'separation of powers' is concerned, there have been statements according to which such a concept is not applicable to the EU system[9]. This essay aims at demonstrating that there is and will be a genuine separation of powers in the EU system, and that its elements will become clearer in the basic treaties of the EU, due to the contribution of the European Convention, albeit the EU institutional setting will remain a very complex system. It is not my aim to try and assess the quality of this separation of powers: it is only too easy to point out the shortcomings of a system for which the expression 'democratic deficit' has been coined some twenty years ago[10].

Times are not ripe in 2008-2009 for new proposals for institutional change in the EU. If the Lisbon Treaty were not to enter into force[11], experience shows that the present institutional structure – as resulting from the amendments introduced by the Nice Treaty of 2000 in the Rome and Maastricht Treaties – would probably be kept as it stands. If the present institutional structure were to be changed by another treaty, replacing the Lisbon treaty, the changes would most probably be even less far reaching. At any rate the result would probably appear as being more complicated than what had been achieved by the European Convention in 2003, by the intergovernmental conference (IGC) that followed in 2003-2004 and again by the IGC of 2007. This essay's ambition is in that sense merely descriptive: an attempt to clarify concepts and to de-

After Finalité? – the Future of the European Constitutional Idea, in G. AMATO, H. BRIBOSIA & B. DE WITTE," Genèse et destinée de la Constitution européenne", cit., p. 1245 s.

[9] See amongst others P. PONZANO, *Les institutions de l'Union*, in G. AMATO, H. BRIBOSIA & B. DE WITTE," Genèse et destinée de la Constitution européenne", cit. p. 441, quoting the European Convention's Vice-president Giuliano Amato in his opening speech at the European Convention: "Montesquieu never went to Brussels".

[10] For a very balanced and refined analysis which takes into account the specific characters of the European Union, see J. TEMPLE LANG, *Checks and Balances in the European Union: The Institutional Structure and the 'Community Method'*, in "European Public Law", 12, 2006, p. 127 s.

[11] At the time of writing, the internal process of ratification has been completed in all EU member states, with the exception of Ireland and of the Czech Republic. In the latter, the Constitutional Court ruled on 26 November 2008 that there was no problem of compatibility with the Czech Constitution, but President Vaclav Klaus was known as an active 'eurosceptic'who would try and stop the process. Whether and when a new referendum might be held in Ireland was still not clear.

scribe the reality of EU institutions, on the basis of the new wording of treaty clauses which have been adopted in 2003, 2004 and 2007.

I want however to draw the reader's attention to some misunderstandings, which persistently are conveyed to the public by politicians and the press – and alas too often by scholars. The major misunderstanding consists in confusing the reality of separation of powers with its mythical representation. The mythical representation is that of a simplified version of Montesquieu's theory, i.e. the division of government in three autonomous branches, legislative, executive and judicial, corresponding each to a specific institution. The reality is and has always been far more complex, as historians, constitutional lawyers and political scientists know: what are separated are government functions, which are distributed in different ways amongst autonomous institutions, with a system of checks and balances designed in order to avoid any monopoly in decision making. Myth and reality are wide apart in parliamentary systems – especially those relating to the Westminster model, where the 'government' is usually the majority of members of the house who support the cabinet of the day. The same is true with the US presidential/congressional system – where Congress, and especially the Senate, participates in important executive functions, such as treaty making or appointment of higher civil servants, and where the President has important powers in the legislative function, through the possible use of his vetoing powers.

Furthermore, the tripartite division of powers, to which Montesquieu was supposedly referring, does not correspond with the complexity of government functions in modern democracies. Since 1809, the Constitution of Sweden is making a difference between the cabinet's executive function and the function of policy implementation attributed to autonomous government agencies[12]. Without going that far, the constitutions of all modern democracies are based on a diversity of government functions that is not less complex than in the present day EU system. What makes the EU system more complex than many states is its 'federal' nature, or, in order to avoid the word 'federal', the 'multilevel' nature of its system of government. The EU is not a state – differently from federations – it possesses a number of features which are similar to those of a state, especially as far as its system of government is concerned, but it lacks a population and a territory of its own:

[12] See J. Ziller, *European Models of Government: Towards a Patchwork with Missing Pieces*, in "Parliamentary Affairs", 2001, p. 102-119.

the population and territories belong only to its member states. Population and territory have been and remain two essential elements of the notion of state, not only for international law and constitutional law, but also, I submit, for political science.

2. *Community Actions, Conferral, Competences and the Division of Government Functions in the EU*

With the amendments introduced by the Lisbon Treaty, the wording of the treaty on the European Union (TEU) and of the treaty on the functioning of the European Union (TFEU – which will be the new name of the EC treaty), will emphasise the government functions in the EU system. The distribution of government functions between institutions at EU and at member state level will become clearer, far clearer than under the present version of the EU and EC treaties. Clarification of the government functions and their distribution will shed light on the checks and balances which are built into the system and which could nurture the analysis of the EUs executive federalism, judicial federalism, legislative federalism and beyond.

The functions exercised by the institutions of the European Communities and the EU have gradually evolved from those of a supranational regulatory agency with a specific policy focus – the High Authority of the European Coal and Steel Community –[13] to those of a complex system of government, in charge of actions in a growing series of differentiated fields. Hence the characterization of the EC as a "regulatory state" by Giandomenico Majone[14] came too late: it did not anymore describe the EC/EUs complex reality, at latest since the entry into force of the Maastricht treaty on 1 November 1993.

As far as the existing and future functions of the EU institutions are concerned, it was clearly the intention of the drafters of the Lisbon treaty to put the largest possible emphasis on the principle of 'conferral'[15], which differentiates most clearly the EU from a nation state,

[13] See P. REUTER, *La Communauté européenne du charbon et de l'acier*, Paris, LGDJ, 1953.

[14] G. MAJONE, *The Rise of the Regulatory State in Europe*, in "West European Politics", vol. 17, n. 3 (July 1994).

[15] On the principle of conferral and its application to treaty analysis, see P. CRAIG, *Competence: Clarity, Conferral, Containment and Consideration*, in "European Law Review", 29(3), 2004, p. 323-344.

even from a federal state. The principle of conferral is the central concept of international public law in the field of intergovernmental organisations. It bears some resemblance with the concepts which apply to the distribution of competences in some federal states, but there remain major differences, which are due to the fact that international organisations cannot have neither a general competence – i.e. without a specific focus, be it as vague as peace keeping, in the case of the United Nations – nor a 'territorial competence', i.e. legal powers linked to the control of the boundaries of a territory.

The Lisbon treaty's emphasis on 'conferral' starts with articles 4 and 5 of the amended TEU. It will underline in Article 4.1 that "In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States", a statement which is immediately repeated and reinforced by article 5.1: "The limits of Union competences are governed by the principle of conferral", according to which "the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States" (art. 5.2). The content of this statement is then repeated in all possible ways in various clauses of the TEU and of the TFEU as well as in the annexed protocols and in declarations, especially a "Declaration n° 18 on the delimitation of competences".

Beyond the fears of member states'governments in the context of the failed ratification of the Constitutional treaty of 2004, this obsessive insistence upon the content of the principle of conferral is clearly a result of the growth and diversification of EU competences[16]. It has to be underlined that this growth of competences has been accepted by those governments who insist most that the principle of conferral needs to be enforced[17].

[16] On competences in EU law and the process leading to the Constitutional treaty and the Treaty of Lisbon, see G. Amato & J. Ziller, *The European Constitution*, cit. p. 146 s.; H. Bribosia, *Subsidiarité et repartition des competences entre l'Union et ses Etats members*, in G. Amato, H. Bribosia & B. De Witte," Genèse et destinée de la Constitution européenne", cit., p. 187 s.; G. de Búrca & B. De Witte, *The Delimitation of Powers Between the EU and its Member States*, in A. Arnull & D. Wincott (eds), "Accountability and Legitimacy in the European Union", Oxford, Oxford University Press, 2002, p. 201 s.; S. Weatherill, *Competence*, in B. de Witte (ed), "Ten Reflections on the Constitutional Treaty for Europe", Florence, European University Institute, 2003, p. 45 s.

[17] See J. Ziller, *Il Nuovo trattato europeo*, cit., p. 167 s. and – *Les nouveaux traités européens,* cit., p. 119.

In the framework of the European Coal and Steel Community (ECSC), based upon the Paris Treaty of 1951 (which came to an end on 23 July 2002), or of the European Community of Atomic Energy (Euratom), based upon one of the Rome Treaties of 1957 (still in force), the scope of action of the Community institutions is focused in such a way that the principle of conferral should be obvious for the institutions and the public. This was to some extent also the case with the European Economic Community (EEC), at least until the development of environment policy in 1973 and of regional policy in 1974, with the proviso that managing the (internal) market is on its own a far less focused activity than most other European policies. It might be useful to emphasise that the more the Community and Union increased their fields of action, the more this has been done through the revision of the treaties and not through the use of the flexibility clause of article 308 EC (ex-article 235)[18].

The EC treaty of 1957 was using the vocabulary of 'Community actions' (using the plural in the English language, which is the right translation of singular used in the French, German and Italian languages: '*l'action de la Communauté*', '*die Tätigkeit der Gemeinschaft'*, '*l'azione della Comunità*[19]'). The vocabulary of 'actions' had been chosen on purpose, and it is coherent to the functional nature of EC/EU powers.

The vocabulary of 'competences[20]' (*competences, Zuständigkeiten, competenze*), which is more familiar to scholars dealing with constitu-

[18] Art. 235 EEC treaty – now art. 308 EC treaty – provides for the possibility to adopt 'actions'by unanimity vote in the Council in those cases where there is no appropriate specific legal basis in the treaty in order to achieve one of the 'scopes'of the Community. The use of this clause is submitted to judicial review by the European Court of Justice, which has set clear boundaries in this respect.

[19] In EU law, all treaty languages (23 since the accession of Bulgaria and Romania in 2007) have the same legal value. It is however useful to bear in mind that the Paris Treaty of 1951 had been drafted in French only. The Rome Treaties of 1957 were drafted simultaneously in French, German and Italian, and translated into Dutch during the ratification process. Since the first enlargement of 1973, amendments to the treaty are usually drafted in French and/or English, with a slight predominance of French, and translated into the other language before signature. This does not give any priority to the English or French language versions, but it is very useful in order to verify quickly whether concepts are easy to translate in the different EU languages or not.

[20] UK and Irish legal literature is more and more using the neologism of 'competence(s)' – not 'competency(ies)' – under the influence of EU law, as opposed to US legal literature which uses the vocabulary of 'powers'– as does the Constitution of the United States of America.

tions, has only recently appeared in the EC and EU treaties: in 1991 with the drafting of the Maastricht Treaty[21]. It is linked to the growing breadth and diversification of policy fields of the European Communities and European Union. In turn the diversification of policy fields has led to the growth and to the diversification of government functions which are exercised in the framework of the European Union.

As appears more clearly than earlier with the Lisbon treaty, there are five major government functions in the EU: legislative, executive, supervisory functions, direction, and organic function. Such a classification is reaching beyond the classical tripartite system of legislative, executive and judicial function. It might be further developed into a more complex typology, for instance: legislation, budget; executive regulation, implementation through administrative action; monitoring, judicial review; policy guidance, programming and institutional management. Furthermore it could be added that EU institutions also exercise a function of representation – as does usually the head of state in international relations. In this essay I will however stick to five major government functions, in order not to overload the picture and because there are good reasons to group the functions in such a way: the division is based upon the classical tripartite division and is only adding two new functions, distinct from the executive function, and which have a very specific shape in the EU framework.

3. *The Legislative Function: From Rule Making to Law Making*

The legislative function is probably the concept which entails the smallest problems of translation into the different EU languages. 'Legislative function' undoubtedly corresponds to '*fonction législative'* in French, to '*Gesetzgebung*' in German, or to '*funzione legislativa'* in Italian, to take just some examples. This is only logical, as the concept of legislative function is being used in constitutional law and political science and also in everyday language in all the relevant countries, often since more than two centuries. It is different when it comes to the word 'law', which may be translated either by '*loi, Gesetz, legge'*, corresponding thus to a 'statute', and more specifically to an 'Act of Par-

[21] On the Maastricht Treaty, its drafting process and the negociations which led to the final text, see J. Cloos, G. Reinesch, D. Vignes, and J. Weyland (eds), *Le traité de Maastricht – Genèse, Analyse,Commentaires,* cit.

liament' in British vocabulary ('law' in US vocabulary) or by '*droit, Recht, diritto'*.

It has taken quite some time before it was commonly accepted that the EU institutions are exercising a 'legislative function'. And this is still not too easily accepted by politicians, as demonstrated by the vicissitudes around the concept of 'European laws' since the European Convention of 2002-2003. To be more accurate, there has never been any doubt that EC/EU institutions had a 'rule making' function, but it took quite some time to accept that it had a 'legislative' function.

In the framework of the ECSC Treaty of 1951, the High Authority had the power to adopt 'decisions, recommendations and opinions' (art. 14 ECSC treaty: *décisions, recommandations et avis*[22]). This wording has however to be read in the light of French administrative law tradition, where the word *décision* applies as well to normative regulatory acts like decrees (*décrets*), as to so called individual acts (*actes administratifs individuels*), which are decisions of administrative authorities in the strict sense, when they exercise 'adjudication' as it is called in US administrative law, and more recently in British legal litterature. The 'recommendations' of the ECSC treaty were the equivalent of the future 'directives' of the EEC and Euratom treaties of 1957. It has to be emphasised that the use of the word 'decision' was perfectly in line with the nature of the ECSC High Authority. The High Authority was a supranational agency. As far as its functions were concerned, it was most comparable to some of the Federal Commissions which had been created before World War II in the United States. As the traditional 'executive agencies' (the US equivalent of ministerial departments, i.e. public administration), Federal Commissions were endowed with 'rule making' powers that were not of a legislative nature. There is a link between the ECSC High Authority and US federal agencies, namely the relationships between Jean Monnet and his team (who drafted the project of ECSC treaty) and a number or higher officials from the US administration, such as Harry Hopkins, who was one of the main advisers of F. D. Roosevelt[23]. With the EEC and Euratom treaty, the vocabulary was slightly different, but the instruments were the same: 'regulation', 'directive' and 'decision' (*règlement, directive et décision; Verordnung,*

[22] Only the French version of the ECSC treaty was authentic (legally binding).

[23] See Jean Monnet's *Mémoires*, Paris, Fayard, 1976; English translation: J. Monnet, *Memoirs*, Garden City, Doubleday, 1978; for a recent translation in the Italian language J. Monnet, *Cittadino d'Europa – Autobiografia,* Napoli, Guida, 2007.

Richtlinie, und Entscheidung (Beschluss[24]*); regolamento, direttiva, decisione*) are typically expressions recalling the powers of an executive agency, not those of a parliament.

The concept of 'legislative function' appeared in the EC treaty by the back door, with the amendments introduced by the Amsterdam treaty of 1997. Interestingly enough, while the Maastricht treaty had for the first time given a power of co-decision to the European Parliament, the words 'legislative function' or 'legislator', were not being used for the European Parliament, nor for the Council in the Maastricht treaty itself.

The Amsterdam treaty amended Art. 207 (3) EC treaty in order to state that "For the purpose of applying Article 255(3) […] the Council shall define the cases in which it is to be regarded as acting in its *legislative capacity*, with a view to allowing greater access to documents in those cases, while at the same time preserving the effectiveness of its decision-making process. In any event, when the Council acts *in its legislative capacity*, the results of votes and explanations of vote as well as statements in the minutes shall be made public" (emphasis added). The French or Italian versions of the treaty are more straightforward, as they use the formulation "*en sa qualité de législateur*", "*in qualità di legislatore*". However this was a narrow approach, as the only purpose of article 207 (3) was to define in which cases access to Council documents was to be granted on the same conditions as access to Parliament documents, and where the Council minutes had to indicate votes and statements of its members.

In 1997, the concept of 'legislation' was also being spelt out in the "Protocol on the application of the principles of subsidiary and proportionality", in "the Protocol on the role of national parliaments in the European Union", and in a "Declaration on the quality of the drafting of Community legislation," which were adopted as annexes to the Amsterdam Treaty. Points 4) and 9) of the Protocol on subsidiarity are referring to "proposed legislation", and point 6 mentions that "the Community shall legislate". Points 3, 5 and 6 of the Protocol on the role of national parliaments refers to "legislative proposals" and "activities" (n°

[24] The Lisbon Treaty will put an end to a discrepancy in the use of the words *Entscheidung* and *Beschluss* in the German version of Treaty, by substituting the first for the latter in article 288, which takes over article 249 EC Treaty (ex 189); the same is being done with the Dutch version. The German and Dutch versions remain more precise than the English, French or Italian versions, as they differentiate between the generic word of decision (*Entscheidung*) which applies to the ultimate phase of the decision-making process, and the technical instrument of 'decision'(*Beschluss*).

39) that were annexed to the treaty. The French or Italian versions of the protocols are here less straightforward than the English version, as they do not talk of legislation, but of "*texte législatif*" (not *acte législatif*!). The declaration, on the other hand, uses the words *legislation*, *législation, legislazione* in all three languages; but a 'declaration', contrary to the 'protocols', does not have the legally binding value of the treaties.

All this has only a minimal relevance for an analysis in EU law, where the characteristics of EC 'regulations', 'directives' and 'decisions' as well as EU 'framework decisions' matter far much than the words 'legislation'. From a political point of view on the contrary, these problems of wording are highly relevant. They underline the reluctance of many governments of EU member states when it comes to address in the open the issue of the powers which they have consciously accepted to delegate to EU institutions, with their signature and ratification of the Rome and Maastricht treaties, and the amending treaties which followed.

There is hardly any doubt that it has been the European Convention's merit to start calling a spade a spade, and a law a law. They have made it clear, with the vocabulary of the Constitutional treaty, that the European Parliament and the Council have indeed a 'legislative function'. The Treaty establishing a Constitution for Europe had therefore replaced the designations used since the Rome treaties, i.e. 'regulations' and 'directives', by 'European laws' and 'European framework laws'. It had rewritten the article on the co-decision procedure (article 251 EC), calling it 'ordinary legislative procedure'. It made apparent in article III-396 what is hidden in the wording of article 251 EC, namely that the European Parliament is first to adopt a position on a Commission proposal, while the Council adopts its own common position only afterwards.

As has been underlined by commentators[25], the 'ordinary legislative procedure' does not in substance differ from the present 'co-decision procedure'. Here again, the change introduced by the Constitutional treaty is far less useful for an EU law analysis than for a political analysis. Furthermore – and this change has also legal relevance – the Convention innovated in spelling out the procedure for the adoption of 'delegated regulations' and 'implementing regulations' by the European Commission. It therefore applied to EU legal instruments the tools that have been developed mainly in European countries between the two World Wars and in the aftermath of World War Two.

[25] See P. PONZANO, *Les institutions de l'Union*, cit.

Replacing 'regulations' by 'European laws' and 'directives' by 'framework laws' did not change the substance, but the use of the word 'regulation' with a meaning that was different from that of EC 'regulation' was potentially creating some supplementary confusion, while the Convention intended to highlight the difference between legislative and executive acts. This is however not the main reason why the change of vocabulary was not kept on this point by the Lisbon Treaty. The words 'European Law' and 'European framework law' did not survive the negative referendums in France and in the Netherlands on 29 may and 1 June 2005.

When discussions started (late 2006) about the way out of the crisis which had been opened by those referendums and by the British government's decision to put an end on 6 June to the ratification procedure it had earlier started[26], some members of the Dutch government took the initiative to ask for the withdrawal of the word 'law', which they deemed too closely linked to the idea of a 'constitution' and of statehood[27]. This claim was supported by the British government, and later by the entourage of the newly elected French President Nicolas Sarkozy. As none of the other governments of EU member states strongly objected, the 'European laws' and 'framework laws' were sacrificed in order to avoid referendums on the reform treaty that could be adopted in 2007. The drafters of what became the Lisbon Treaty, supported by the German Chancellor Angela Merkel, refused however to abandon the substantive innovations of the Constitutional treaty that were relevant to the 'legislative function'.

Furthermore, the drafters of the Lisbon Treaty were helped by the difficulties in finding an equivalent to the word 'legislative' that would not be a grammatical monster in most EU languages and therefore kept the expression 'ordinary legislative procedure'. With the wording adopted by the Lisbon treaty, the words 'legislative procedure' will be used throughout the TEU and the TFEU, not only in the clauses which lay down the powers of the institutions, but also in the legal bases which empower institutions to adopt the necessary actions.

The words 'legislative procedure' will appear 144 times in the future wording of the treaties, whereas in the present wording, since the

[26] See C. CHURCH, *The United Kingdom: A Tragy-Comedy in Three Acts*, in A. ALBI and J. ZILLER, "The European Constitution and National Constitutions: Ratification and Beyond", Alphen aan den Rijn, Kluwer Law International, 2007, p. 127 s.

[27] See J. ZILLER, *Il nuovo Trattato europeo,* cit., *p. 127 s.* and *Les nouveaux traités européens*, cit., p. 91 s.

treaty of Amsterdam, the word 'legislative' only appears twice in relation to EU acts. Statistics on the number of occurrences of words in a normative text usually have a very limited relevance. In the present case however they are significant. The occurrences of 'legislative procedure' will enhance the reference to the legislative function in the daily work of the EU institutions - where it is already common practice to speak of 'European legislation'.

The Lisbon Treaty also maintained the procedures designed in the Constitutional treaty for the adoption of 'delegated' and 'implementing' acts by the Commission (articles 290 and 291 TFEU), and it added the necessity to insert the relevant adjectives 'delegated' and 'implementing' in the title of those acts. With the entry into force of the Lisbon Treaty there will thus be a clear differentiation between the 'legislative function' and other types of rule making which usually are part of the executive function.

The European Convention had also done an in-depth work on the budgetary function, which is worthwhile mentioning under the heading of 'legislative function'. Indeed, what has been achieved by the European Convention – and has been maintained by the 2004 and 2007 IGCs – is the reform of the EU budgetary procedure. The budgetary procedure will be very similar to the ordinary legislative procedure, as it is the case from a formal point of view in most modern states. What the Convention did not achieve, and did not even dare undertaking, was another reform which would have been far more important in matters of statehood, namely giving the power to levy taxes to the European Institutions[28]. As a matter of fact, the budgetary procedure only applies to expenses. Article 310 of the amended TEU will keep the principle of the present article 268, according to which "The revenue and expenditure shown in the budget shall be in balance", and the Union's resources are established by a unanimous decision of the Council, which will have to be in line with the multiannual financial framework (art. 312 amended TEU). The multiannual financial framework, in turn will be adopted by special legislative procedure, the Council acting unanimously with a vetoing power of the European Parliament. Here again the balance of powers is not radically changed in relation to the EU treaty in the post-Nice version, but there is a gain of clarity as far as the legislative nature of the budgetary function is concerned.

[28] See M. J. Martínez Iglesias, *Les finances de l'Union*, in G. Amato, H. Bribosia & B. De Witte," Genèse et destinée de la Constitution européenne", cit., p. 599 s.

To sum up about the legislative function in the EU: what the Lisbon Treaty is making visible, is the existence of a legislative – and budgetary – function of the European Union, and the treaties precisely indicate how and by whom this function is being exercised (see points 8 and 9 of this essay).

4. *The Executive Function: Implementation of Common Policies*

The wording of the EC and EU treaties is until now even less transparent when it comes to the executive function than the wording which is relevant for the legislative function – especially that of the clause on co-decision. It is almost impossible to understand how the executive function is being exercised in the EU on the sole basis of the treaties which are applicable as long as the Lisbon Treaty has not entered into force.

The work of the Convention in 2000 showed that there were a number of linguistic problems deriving from political issues, in choosing between 'implementation' and 'execution' or 'application' (mise en oeuvre, execution ou application; *Implementierung, Durchführung, Durchsetzung, oder Ausführung etc.; attuazione, esecuzione, applicazione*). The main problem is not of a linguistic, but of a legal-political nature: is the 'implementation of Union law' limited to the transposition of EC directives and decisions the application of EC regulations and directives and the transposing instruments of directives, or does it include the application of principles and rules which are embedded in the treaties themselves or developed by the European Court of Justice[29]?.

In the pots-Nice wording of the EC and EU treaties, the only clause that is specially addressing the executive function is article 202 (formerly 145) EC treaty, according to which "To ensure that the objectives set out in this Treaty are attained the Council shall, in accordance with the provisions of this Treaty: […] - confer on the Commission, in the acts which the Council adopts, powers for the implementation of the rules which the Council lays down. The Council may impose certain requirements in respect of the exercise of these powers. The Coun-

[29] This point is being addressed, sometimes with passion, and not always with due respect to the nature of EC/EU law, by all commentaries of the Charter and by numerous articles in legal literature, see F. Picod, *Article II-111 Champ d'application*, in L. Burgorgue-Larsen, A. Levade & F. Picod,"Traité établissant une constitution pour l'Europe, Commentaire article par article", Bruxelles, Bruylant, 2005, Tome II, p. 643 s.

cil may also reserve the right, in specific cases, to exercise directly implementing powers itself. The procedures referred to above must be consonant with principles and rules to be laid down in advance by the Council, acting unanimously on a proposal from the Commission and after obtaining the Opinion of the European Parliament." As far as the clauses defining the Commission's tasks are concerned, Article 209 provides that "In order to ensure the proper functioning and development of the common market, the Commission shall: […] - exercise the powers conferred on it by the Council for the implementation of the rules laid down by the latter."

The wording of article 202 - 3rd indent EC treaty (quoted above) has generated quite some discussion amongst community lawyers. The issue at stake is whether the executive function belongs to the Commission – as implied by the use of the formula "EC executive" in daily language when referring to the Commission – or whether it belongs to the Council as a matter of principle, while the Commission only exercises it upon delegation by the Council. This discussion has not been confined to scholars, on the contrary. It has been a bone of contention since the negotiations which led to the amendments of the EC treaty by the Single European Act and the treaty of Maastricht. The Commission – and the European Parliament – were in favour of re-writing articles 145 (now 202) and 155 (now 209) in order to establish that the executive power lies with the Commission. This is why the IGC which drafted the Single European Act in 1985 decided to add a third indent to article 145 EEC treaty instead of replacing the last indent of article 155 by a due mention of the Commission's executive powers. Most of the member states'governments have since then remained very reluctant to do what had not been done in 1985, since article 202 provides the legal basis of 'comitology', i.e. the system whereby the Council in principle keeps the last word when it delegates executive powers to the Commission[30].

The exception to this scheme has always been in the field of competition rules, where the Commission's powers are directly based in

[30] The first comitology decision was adopted in 1987, in view of codifying practices before the entry into force of the Single European Act, but committees already existed since long, e.g. in the framework of the 1957 version of the EEC treaty, for commercial and agricultural policy. On comitology see, amongst many others, C. F. Bergström, *Comitology: delegation of powers in the European Union and the committee system*, Oxford, Oxford University Press, 2005.

explicit treaty provisions (articles 85, 86 and 88 EC). Saying that most governments of member states are not that happy with the powers thus given to the Commission is an understatement.

The distribution of powers between Council and Commission is only one aspect of the issue of the executive function in the EU. Another dimension will be addressed under point 9, that of the distribution between EU and member states' institutions.

The treaty of Lisbon will further contribute to the clarification of the concept of executive function, by the new wording given to article 17 TEU – which is based upon and replaces to a large extent the present articles 211, 214 and 217 EC Treaty, establishing the powers and functioning of the Commission. The Treaty of Lisbon goes further on the road of clarification, with articles 290 and 291 which also introduce new concepts in EU primary law.

The new wording of article 17 (1) TEU, which is taking over the wording of article I-26 of the Constitutional treaty of 2004, gives a far more comprehensive and more accurate description of the Commission's role than the present wording of article 211 EC treaty.

Article 17 (1) Treaty on the European Union (*post Lisbon –indents added to show the correspondence with article 211 EC*)	Article 211 Treaty establishing the European Community (ex Article 155)
The Commission shall promote the general interest of the Union and take appropriate initiatives to that end.	In order to ensure the proper functioning and development of the common market, the Commission shall:
It shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them.	— ensure that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied;
It shall oversee the application of Union law under the control of the Court of Justice of the European Union.	

It shall execute the budget and manage programmes. It shall exercise coordinating, executive and management functions, as laid down in the Treaties.	— formulate recommendations or deliver opinions on matters dealt with in this Treaty, if it expressly so provides or if the Commission considers it necessary; — have its own power of decision and participate in the shaping of measures taken by the Council and by the European Parliament in the manner provided for in this Treaty; — exercise the powers conferred on it by the Council for the implementation of the rules laid down by the latter.
With the exception of the common foreign and security policy, and other cases provided for in the Treaties, it shall ensure the Union's external representation. It shall initiate the Union's annual and multiannual programming with a view to achieving interinstitutional agreements.	

First, the reference to the proper functioning and development of the common market, which was not corresponding to reality any more since the Treaty of Maastricht.

Second, and this is most relevant for the point we are dealing with now, the TEU will clearly say that the Commission exercises executive functions and is executing the budget, whereas article 211 EC treaty only mentions *en passant* that the Council may confer to the Commission powers for the implementation of the rules it lays down, thus referring to article 202 EC.

Third, the Treaty of Lisbon clearly specifies other functions of the Commission, some of them corresponding to functions usually exercised by the executive branch of state governments, such as external representation and programming, one of them being far more specific of the Community method: ensuring and overseeing the application of EU law by the Member states.

Article 290 TFEU – taking over article III-340 Constitutional treaty – further develops the concept which was underlying the concept of 'delegated legislation', which had been developed to a certain extent in practice on the basis of articles 202 and 211, last indent, of the EC treaty. As mentioned above it clearly opts for a system of delegated legislation – as is known in most constitutional systems of Euro-

pean countries. The power thus delegated to government – in theory on a temporary basis – differs from the regulatory power that truly pertains to the executive branch.

Article 291 TFEU – taking over article III-340 Constitutional treaty – has no correspondence with an article of the EC Treaty. It is a major innovation in three ways.

First, it establishes in the wording of the treaty, and in the provision which is relevant to the executive function, that implementation of EU legislation is as a matter of principle the duty of member states. Article 291 (1) TFEU specifies that "Member States shall adopt all measures of national law necessary to implement legally binding Union acts." This is not only true for EU legislation but also for the provisions of the TEU and TFEU that are sufficiently clear and unconditional to be immediately applicable.

Under the post-Nice wording of the treaties, the principle of 'indirect execution' as it is often called by scholars[31], which was one of the fundamental features of the EEC and later EC system, could only be indirectly deduced from article 10 EC Treaty – the so-called loyal cooperation clause, which will migrate into article 4-3 of the new TEU. Article 10 says that "Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community." This statement might be seen as a description of the Member states'role in execution; however the same article 10 continues, stating that "They shall facilitate the achievement of the Community's tasks. - They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty." What comes out clearly of this wording is indeed the duty of loyal cooperation of member states, not the system of executive federalism which is inherent in the EU system (see point 10).

The statement of principle of article 291 (1) TFEU is reinforced by the second paragraph of the same article 291, which specifies that "Where uniform conditions for implementing legally binding Union acts *are needed*, those acts shall confer implementing powers on the

[31] See the literature on European Administrative Law, and specially J-B Auby and C Dutheil de la Rochère, *Droit administrative européen*, Bruxelles, Bruylant, 2006; M P Chiti, *Diritto Amministrativo Europeo*, Milano, Giuffrè, 3rd edition, 2008; P Craig, *EU Administrative Law*, Oxford, OUP, 2006; and J Schwarze, *European Administrative Law*, London, Sweet & Maxwell, Revised first edition, 2006.

Commission [...]" (emphasis added). This might be called principle of 'executive subsidiarity'.

Second, in line with the new wording of article 17 (1) TEU, article 291 (2) TFEU establishes that the executive function, when exercised at the level of EU institutions, pertains as a matter of principle to the European Commission: "Where uniform conditions for implementing legally binding Union acts are needed, *those acts shall confer implementing powers on the Commission*, or, in duly justified specific cases and in the cases provided for in Articles 24 and 26 of the Treaty on European Union, on the Council[...]" (emphasis added).

It should be added that the issue of scope and nature of comitology is being addressed by article 291 (3) TFEU as it establishes that "For the purposes of paragraph 2, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall lay down in advance the rules and general principles concerning mechanisms *for control by Member States of the Commission's exercise of implementing powers*." If read in combination with article 290 TFEU, this wording clarifies that comitology in the strict sense should be linked to the executive function, not to the legislative and that it is not a system by which the Council and or the Parliament are controlling the Commission, but the Member States – which are also the component of the Council, not of the Parliament[32].

Third, article 291 clarifies that the executive function in the EU is being exercised not only by individual implementing measures – adjudication in the terminology used in US administrative law – but also by general regulatory acts – rule making, again in the terminology used in US administrative law. This is the consequence of article 291 (2) and is being emphasised by article 291 (4) TFEU, according to which "The word "implementing" shall be inserted in the title of implementing acts." This clause as well as article 290 (3) TFEU[33], should further contribute to clarify the difference between legislative acts and executive acts, and thus to the delimitation of the EU executive function.

[32] For a first approach to the diversity of interpretations and to the issues which might arise of the new formulation of the treaties, see P. Craig, *The Role of the European Parliament under the Lisbon Treaty*, in S. Griller & J. Ziller (eds), "The Lisbon Treaty – EU Constitutionalism without a Constitutional Treaty?", cit., p. 109 s., and P. Ponzano, '*Executive' and 'delegated' acts: the situation after the Lisbon Treaty* in S. Griller & J. Ziller (eds), "The Lisbon Treaty – EU Constitutionalism without a Constitutional Treaty?", cit., p. 135 s.

[33] "The adjective "delegated" shall be inserted in the title of delegated acts."

5. *The Supervisory Function: Oversight and Judicial Review*

As mentioned earlier, the new wording of article 17 TEU, which will derive from the entry into force of the Lisbon Treaty, gives a far more precise account of the Commission's powers. This is not only true as far as the executive function is concerned. It is also true for another function which has always been exercised by the Commission and which is a major feature of the Community method, i.e. the oversight on the application of treaty obligations by the member states.

The Lisbon treaty gives most probably the best wording of the concept with the use of the word oversight (s*urveillance, Überwachung, vigilanza*); political science and legal literature hitherto tended to use expressions like warden of the treaties (*gardien des traités*), which could generate confusion with the concept of 'gatekeeper' which has become very fashionable in political science, but corresponds to a quite different function. The 'oversight' function which always existed, has remained to a large extent in the shadow of the reviewing function, which is being exercised by the European Court of Justice (ECJ). This is probably due to the fact that the ECJ's role seems far more familiar for scholars and the public if their starting point is a national constitutional setting, where reviewing is part of the judicial function.

Article 211 EC treaty is stating that the Commission shall "ensure that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied". This wording leaves it to the reader to find out how the Commission fulfils her task; how could (s)he know that (s)he would find the answer in the section of the treaty which is dedicated to the Court of Justice, i.e. in article 226? With the Lisbon Treaty, article 17 TEU, in its new formulation, becomes far more specific, as it adds that the Commission "shall oversee the application of Union law under the control of the Court of Justice of the European Union."

As I have already pointed out, the EU is not a state; it lacks a population and a territory of its own. The EU system of government bears some resemblances with the constitutional setting of states, e.g. its institutions are empowered to exercise legislative, executive and judicial functions. It has however to be added that the EU is based upon an agreement between states, in the form of treaties which are binding under international law. Those treaties contain mechanisms in charge of enforcing the obligations which have been accepted by member states: a judicial mechanism, which participates in EU judicial review, and an

institutional mechanism, separate from judicial review although connected to it.

The institutional mechanism for enforcement, which is at the basis of the oversight function, gave more power to the Commission in the framework of the ECSC Treaty than in the Rome treaties, and it is missing in the second and third pillars under the Maastricht Treaty. The ECSC High Authority had the power to adopt sanctions against member states which did not comply with their treaty obligations and member states could challenge the High Authority's sanctions (article 36 ECSC Treaty). In the framework of the EC and Euratom treaties (but not under the EU treaty, i.e. for second and third pillar obligations, for which the Commission may not ask the Court to rule on a member state's failure to fulfil its treaty obligations), the burden of lodging a court suit is reversed, to the detriment of the Commission which cannot directly sanction Member states but has to request a ruling of the Court (articles 226 and 228 EC treaty).

The Commission thus exercises a very specific function of oversight in the general interest of the Community, i.e. of the member states as a whole. This is very different from pre World War II multilateral treaties and of a majority of present day multilateral treaties including those which are setting up international organisation. In the framework of classical multilateral treaties, enforcement mechanisms, if any, are in the hands of member states only. The possibility of action by member states also exists in the framework of the EC treaty, but article 227 provides for the exercise of the oversight function by the European Commission, thus changing the nature of the procedure if compared to the classical treaty enforcement mechanisms. The drafters of the community treaties thought, on the basis of experience, that the relevant governments would normally not trigger the mechanism if they have no specific interest of their own at stake, and that they would most often renounce triggering such a mechanism, expecting the same from the government of the state which does not comply when it comes to a treaty breach of their own.

The oversight function is also present in the mechanism of preliminary ruling on the interpretation of the treaties (article 234 EC), as it has developed over time, generating a dialogue between courts which has been thoroughly analysed in literature[34]. One of the unresolved

[34] See, amongst many others, M. CLAES, *The National Courts' Mandate in the European Constitution*, Oxford, Hart Publishing, 2006.

problems of scholarship is to understand to what extent this mechanism of preliminary ruling is only part of the oversight function exercised by the Commission and the Court, and to what extent it may be assimilated to the function of judicial review which is clearly given to the Court by the statement of article 220 EC treaty: "The Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed."

The Lisbon Treaty emphasizes the complex distribution of the judicial function in the EU system when stating, in article 19 – 1 TEU (which takes over part of article 220 EC):

"The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed.

Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law."

Many commentators have regretted the confusion that might be created by the fact that the expression "European Court of Justice" includes the Court of Justice in the strict sense as well as the other courts. This might be the case in a continental European tradition, but it has to be pointed out that in the tradition of England and Wales, a Court is not necessary a single clearly identifiable institution, and may consist of a number of organs, as was the case for the 'Supreme Court of England and Wales', which traditionally includes the 'High Court of Justice', the 'Crown Court' and the 'Court of Appeal'. The problem here was that of finding the right equivalents in all treaty languages.

To sum up, what the Lisbon Treaty does is to shed more light on the complex reality of the EU system, instead of trying to hide it behind a misleading use of the notion of judiciary or judicial function.

6. *The Function of Direction: Policy Guidance and Programming*

While the legislative, executive and supervisory functions correspond to the classical tripartite division of powers, there is a major government function which only tends to be recognised in more recent constitutions – if any.

The leadership of the President of the United States or of the Westminster type Prime minister did not appear in the constitutions of the XVIIIth and XIXth century. The first major constitutional text to men-

tion policy guidance was the Weimar Constitution, where article 56 laid down the power to emanate policy guidelines of the Chancelor (*Richtlinienkompetenz des Reichskanzlers*), a provision which has been taken over into article 65 of the Basic law of 1949. With the growing personalisation of power in liberal democracies in the second part of the XXth Century, the common tendency has been a development of the policy guidance function in the hands of the head of the executive branch, head of state or head of government, whether this corresponds or not to the letter of the constitution. One of the last western countries where this has been achieved is Italy (since the second Berlusconi Cabinet which came into office in 2001), while there has been no change in the wording of the Italian Constitution to substantiate this change. In France, this has been achieved since General de Gaulle's return to power in June 1958. Policy guidance is normally being exercised by the President of the Republic, although the Constution of 4 October 1958 explicitly mentions that "the Government shall determine and conduct the policy of the Nation (article 20) and that "the Prime Minister shall direct the actions of the Government" (article 21).

The fact that in modern democracies the function of policy guidance has become more and more often located in the head of the executive branch is probably the reason why no effort has been made to clarify to a wider public that policy guidance is different from execution, as a function. It also explains the uneasiness of the wider public with the complex location of this function in the framework of the European Union, as well as some of the fears that have been expressed during the European Convention and afterwards at the prospect of a permanent presidency of the European Council.

In the framework of European integration, Jean Monnet has most probably been the person who most constantly thought about the necessity of a function of the kind. As his Memoirs make clear[35], he has been constantly in search of the right locus for policy guidance in the EC context. Having experienced that the Chair of the High Authority of the ECSC could not be this locus, he established, together with a number of European politicians, the "Comité d'Action pour les Etats-Unis d'Europe", which has been the major source of the institutionalization of meetings of Heads of State and Goverment of EC member states, under the name of 'European Council'.

[35] J. MONNET, *Mémoires*, cit.

As is well known, the existence of the European Council, which met for the first time in December 1969 and started meeting on a regular basis in 1974, has only been acknowledge in primary law with the Maastricht treaty of 1992. Article D of the Treaty on the European Union (article 4 EU treaty since the entry into force of the Amsterdam treaty) stated: "The European Council shall provide the Union with the necessary impetus for its development and shall define the general political directions".

At first reading, the innovations of the Constitutional treaty, and of the Lisbon Treaty, may seem limited in respect to the policy guidance function, as it only adds a few words in what will become Article 15 TEU: "1. The European Council shall provide the Union with the necessary impetus for its development and shall define the general political directions *and priorities thereof. It shall not exercise legislative functions*" (emphasis added). The main innovations in this respect are not in the description of the function of the European Council, but in its transformation into a fully fledged EU institution, with its own decision making powers, which will be submitted to judicial review, and in the establishment of a permanent presidency of the European Council. This being said, the two additions emphasised above should not be ignored. Setting the priorities not only reinforces the policy guidance, it also underlines that the European Council participates in the programming function, which is derived from policy guidance. The mention that the European Council does not exercise legislative functions furthermore emphasises the importance of policy guidance, which appears as the major role of the European Council.

Another innovation of the Constitutional treaty is the mention – which will be inserted into article 17 (1) of the future TEU that the Commission "shall initiate the Union's annual and multiannual programming with a view to achieving interinstitutional agreements." A combined reading of articles 15 (1) and 17 (1) shows that policy guidance and programming are closely related, combining into a more general function which might be called the function of direction.

The mention of programming in the TEU reveals a difference to the constitutions which mention policy guidance, which goes beyond the mere fact of mentioning programming in the basic text. The locus of the programming function is indicated as being the European Commission – not the European Council or the administrative apparatus which supports it. In modern democracies on the contrary, programming – if

it occurs – is usually located in the staff of the head of the executive who exercises the policy guidance function.

The new treaty clauses which are examined here do not innovate in content: they reflect the practice which has developed over the years, and especially since the institution of regular meetings of the European Council on the one side, and since the chairmanship of the Commission by Jacques Delors (1985-1995) on the other. Its most visible moment has probably been the setting up of the programme of completion of the internal market, with the presentation of Lord Cockfield's White paper to the Milan meeting of the European Council in June 1985[36], which decided to launch the intergovernmental conference that negotiated the European Single Act. The clauses which will be inserted into the TEU by the Lisbon treaty innovate in giving visibility to a major modern government function in the EÙs basic legal texts, and in specifying how different institutions participate in the function.

7. *The Organic Function: Institutional Development*

The endlessly unachieved character of the European Communities and European Union[37] leads to isolating a specific function which is rarely taken into consideration as a dynamic function by constitutions, although it appears intermittently with 'constitutional moments'[38] and is linked either to the adoption of new constitutions or constitutional amendments or to a new balance of powers in a given constitutional setting.

In the EC/EU setting the function of institutional development has been for a long time exercised almost only through amendments to the basic treaties, starting with the Treaty Establishing a Single Council and a Single Commission of the European Communities signed at Brussels 8 April 1965.

Almost only but not exclusively: interestingly enough, article 138 of the EEC treaty, which established a parliamentary assembly that was composed of delegates of member states'parliaments, also established that the Council would "lay down the appropriate provisions, which it

[36] COMMISSION OF THE EUROPEAN COMMUNITIES, *Completing the Internal Market – White Paper from the Commission to the European Council (Milan, 28-29 June 1985)*, Brussels, 14 June 1985, COM(85) 310 final.

[37] See note 8 on the European integration's 'finalité'.

[38] On the concept of 'constitutional moment'see B. ACKERMANN, *Constitutional Politics/Constitutional Law*, in "Yale Law Journal", vol. 108 (8), 1999, p. 2279.

[would] recommend to Member States for adoption in accordance with their respective constitutional requirements". As is well known, this led eventually the Council to adopt the Act of 20 September 1976 concerning the election of the Members of the European Parliament by direct universal suffrage.

Since the Single European Act of 1986, two parallel phenomenons develop in an incremental way with every amendment of the treaties: on the one side, the wording of the new treaty clauses become more and more detailed, leading to a stiffening of the basic treaty and on the other side so called 'passerelle clauses' are being introduced in the treaties, which, on the model of article 138 EEC treaty, allow for important institutional developments without treaty amendments. There is no mystery in this concomitance: the Milan European Council had decided to put an end to the use of unanimity in the Council – on the basis of the so-called Luxembourg compromise[39]. This decision led member states to shift the definition of policy objectives and content from legislation (secondary EC law) to treaties (primary EC law) while on the other hand they wanted to avoid the solemn method of the intergovernmental conferences when it came to adjust the institutional system to new contingencies.

Furthermore, the rise in power of the European Parliament with the Maastricht Treaty of 1992 and its further expansion with the Amsterdam Treaty led to new forms of arrangements which were not foreseen in the treaties but are becoming a major instrument for institutional development, namely 'interinstitutional agreements'[40].

The European Convention and later on the Constitutional treaty and the Lisbon treaty have duly acknowledged this phenomenon by giving the relevant decision-making power to the European Council in a series of specific treaty clauses. It failed however to give the same visibility to the relevant government function, as against the work accomplished by the Convention for the other functions which are discussed in this essay.

[39] On the application of the 'Luxembourg compromise' see J.M. PALAYRET, H. WALLACE, P. WINAND (eds) *Visions, Votes and Vetoes -The Empty Chair Crisis and the Luxembourg Compromise Forty Years On*, Bruxelles, Peter Lang, 2006.

[40] See amongst others F. SNYDER, *Interinstitutional agreements: forms and constitutional limitations*, Florence, European University Institute, EUI working papers - LAW, 95/4, 1995; F. VON ALEMANN, *Die Handlungsform der interinstitutionellen Vereinbarung: eine Untersuchung des Interorganverhältnisses der europäischen Verfassung*, Berlin, Springer, 2006.

There are probably two reasons for this gap. First, as mentioned before, the function of institutional development, differently from the function of direction, is not really being taken into account by current thinking on constitutions and state institutions, and was therefore not perceived as a concept of its own during the work of the European Convention[41].

Second, the Convention's Working Group n° 9 on Simplification refused the idea of establishing a new category of 'organic laws', as it was felt to go against the endeavour to reduce the number of acts that could be adopted by the EU institutions. The wording 'organic law' is derived from French constitutional law. It corresponds to a specific type of statutes in the Constitution of 1958, which are to be adopted accordingto specific procedures which include an automatic review of their constitutionality by the Constitutional council. They are intended to further develop institutions in a number of cases, like the general framework of budgetary legislation, the status of judges or the status of overseas territories. As the European Convention did not adopt the idea of specific organic laws, it has not been driven to discuss the concept of the corresponding function.

I nevertheless propose to call this function of institutional development 'organic function'. It is clearly recognizable for German language constitutional law and political science, which uses for instance the notion of '*Organstreitigkeiten'* in order to designate constitutional disputes between institutions. As already mentioned it is also clearly recognisable for French speaking lawyers and political scientists. Italian lawyers also are accustomed to the use the notion of '*funzione organica*', and so are Spanish speaking lawyers and political scientist – Spanish law also knows the concept of 'ley organica'.

To sum up: the Lisbon Treaty does not give to the organic function the same immediate visibility which it gives to the legislative, executive and supervisory functions as well as to the function of direction. It innovates probably more in developing the number of cases where this organic function has to be exercised (e.g. the designation of the President of the European Commission and a whole series of powers for the implementation of key institutional provisions), and in attributing the corresponding powers to the European Council in most cases.

[41] On the influence of constitutional concepts on the European Convention, see J. Ziller, *National Constitutional Concepts in the New Constitution for Europe*, in "European Constitutional Law Review", 2005, Volume I Issue 2, pp. 247-271 and Volume I Issue 3, p. 442-480.

8. *Government Functions and Separation of Powers I: Checks and balances between EU institutions*

Having established that there are five distinct major government functions in the EU institutional setting, and that the Lisbon Treaty gives more visibility to them – even if this is not being done in a thoroughly systematic way, the next step of our enquiry into the separation of powers in the EU will be to examine the pattern according to which the exercise of these functions are distributed amongst the institutions of the EU.

In the post-Lisbon versions the six EU institutions will be enumerated in article 13 TEU: European Parliament, European Council, Council, European Commission, European Court of Justice, European central bank. There are also other EU bodies, some of them established by the EU treaty (Committee of the Regions and Economic and Social Committee - ECOSOC, European Investment Bank), some of them by secondary law (agencies and other bodies).

For each of the five functions which have been identified previously, one may identify one or several institutions whioh are endowed in a primary way with exercising that function, as well as other institutions or organs or agency who have a decisive impact on the function, because they have impeding powers, and finally secondary players who participate in the exercising the function without being able to be veto players.

In order to illustrate this method, one might say that in the United States Federal system the Congress is endowed with the legislative power, while the President has a decisive impact on legislation through his veto, or that the President is normally endowed with the executive function while the Senate has a decisive impact on the appointment of senior federal officials (starting with the members of the Cabinet). Furthermore there are a number of secondary players such as 'independent' federal commissions[42]. Congress as a whole – and especially the House of Representatives – has sometimes a decisive impact on the exercise of the executive function and is always a secondary player on the work of executive agencies through its budgetary powers, and through the possibility of establishing special federal agencies that are independent from the President. The federal courts are endowed with the judicial function, while the President and the Senate may have a decisive impact through the appointment of federal judges (starting with the Supreme Justices). Etc.

[42] Usually known as regulatory agencies in European literature.

The endowment of the EU legislative function lies clearly with the Council and the Parliament. The situation remains however complicated even with the Treaty of Lisbon, as there are special legislative procedures which, contrary to the ordinary legislative procedure, do not imply co-decision by the Parliament. The Commission has a decisive impact on the exercise of the legislative function because it is normally the only institution which may propose legislation. This means first that the draft wording which will be discussed in the legislative process is chosen by the Commission. It also means that the Commission is in a position to withdraw its proposal if the legislator goes in a direction which it deems contrary to the EÙs interest. There is some discussion in the institutions and in literature as to the real extent of this power to withdraw a proposal. At any rate it has only been used a few times by the Commission, and the Court has not had to review such a decision. What is important is that the Commission may always point to the possibility of such a withdrawal. Secondary institutional players are in some instances the two Committees (Regions and ECOSOC), and in very specific cases relating their own status the ECB or the ECJ. Furthermore there are a lot of non institutional players, especially structured interest groups and lobbyists who play an important role during the process of drafting legislation and of its adoption.

An innovation of the Lisbon treaty, as already mentioned, is the possibility of delegating the legislative function to the Commission, with ex-ante and ex-post control by the legislator (article 294).

On the whole, the picture is not that different from a typical distribution of the legislative function in a national setting – as long as one only takes into consideration the EU level of institutions. The Lisbon Treaty adds some more clarity, to this distribution, especially through the new formulation of the ordinary legislative procedure in articles 289 and 294 TFUE. Contrary to the wording that resulted from the treaties of Maastricht, Amsterdam and Nice, it becomes clear that the Parliament and the Council are on an equal footing. The Lisbon Treaty furthermore adds clarity in reducing the cases where the ordinary legislative procedure does not apply, especially because of the suppression of the '3rd pillar', i.e. the exceptional procedures in matters of police and criminal justice.

As will be shown in the next section, the Lisbon Treaty not only clarifies the way the legislative function is being exercised. It also makes it more complex, if one is taking into account not only the EU level of institutions but also the member states.

As far as the executive function is concerned, the Lisbon Treaty certainly clarifies its distribution, although it does not suppress all ambiguities. Contrary to the pre-Lisbon situation where the Council is still in theory endowed with the executive functions, which it may delegate to the Commission, the Lisbon treaty clearly indicates that the Commission is in charge of execution. The European Council and the Parliament have a decisive impact, through their functions in the appointment of members of the Commission – and in their dismissal, as far as the Parliament is concerned. Secondary players are EU agencies, the existence of which will be acknowledged by the treaties.

Here again, the picture seems not that different from a typical distribution of the executive function in a national setting. However it should never be forgotten that the exercise fo the executive function by EU institutions (i.e. 'centralised execution'[43], if one uses the vocabulary of the EC financial regulation, article 53[44]) is only the tip of the iceberg. Once again, as will be shown in the next section, the Lisbon Treaty not only clarifies the way the executive function is being exercised at EU level. It also emphasises that it is essential to take into account not only the EU level of institutions but also the member states.

The supervisory function in the EU goes beyond the sole judicial function, as already mentioned. The treaty based nature of the EU explains why the ECJ and the European Commission are endowed with a specific function of oversight, different from the mere exercise of the usual functions of courts in a national constitutional setting. As already mentioned, the Lisbon treaty duly emphasises the role of the Commission in this respect, which always existed but was not explained as clearly in the treaty provision on the Commission's functions. The European Council and the Parliament have a potential impact on the exercise of oversight, through their powers in the appointment and dis-

[43] As explained in J. Ziller, *Exécution centralisée et exécution partagée: le fédéralisme d'exécution en droit de l'union européenne*, in J. B. Auby & J. Dutheil de la Rochère (eds), "L'exécution du droit de l'Union, entre mécanismes communautaires et droits nationaux", forthcoming, I prefer using the vocabulary of the EC financial regulation, i.e. 'centralised execution'and 'shared execution'rather than the more traditional but somewhat misleading wording of 'direct administration'and 'indirect administration'. See also P. Craig, *EU Administrative Law*, cit., p. 30 s.

[44] *Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities*, Official Journal of the European Communities, of 16. 9. 2003, subsequently amended, see P. Craig, *A New Framework for EU Administration: The Financial Regulation 2002,* in "Law and Contemporary Problems", vol. 68, 2004.

missal of the Commission. However, the combined roles of the Commission and the ECJ may be considered as reinforcing on the whole the checks and balances in favour of an independent exercise of the oversight function. Secondary players are the institutions and organs which may lodge a suit against the Commission, but also against the Council, the Parliament or even now the European Council. Once again, the member states' level has to be taken into account in order to get an overall picture of the supervisory function, especially as far as the judicial function is concerned, and the Lisbon Treaty gives some more clarity on the multi-level distribution of functions.

As far as the function of direction is concerned, the Lisbon treaty makes it clear that the European Council and Commission are endowed respectively with policy guidance and with programming. The European Parliament has a major impact on programming. Analysing the function of direction shows that a major ambiguity of the Eus system of government lies in the lack of any control of the European Parliament on the European Council. This is not different from the US presidential/conventional system, but – unlike in the latter – there is no clear mechanism of accountability of the European Council to the electorate in the European Union. This gap probably accounts for the biggest part of what is usually known as the Eus 'democratic deficit', while the supposed existence of such a deficit is one of the major arguments used by members of the European Council to reinforce its own power. Whether there is a possibility to fill the gap accounting for 'democratic deficit' without a full revolution of the EU, transforming it into a federal state, remains a totally unresolved question.

Unlike the three first functions which are examined in this essay, the entire function of direction is in the hands of EU institutions; or will be so, with the Lisbon treaty's innovation which elevates the European Council to a fully fledged institution. It does not change anything to the fact that the European Council is an expression of the member states' executives, even more than the Council. Having a permanent chair of the European Council might reinforce the intergovernmental nature of policy guidance in the EU; it might also, on the contrary, start giving an EU nature of its own to the exercise of this function. This will obviously depend upon the political circumstances as well as upon the holders of the relevant functions in the years and decades that will follow the entry into force of the corresponding treaty provisions. The constitutional history of so many na-

tions is showing how difficult it is to predict the evolution of this kind of institutional arrangements.

Turning to the last of the five functions which are analysed here, the organic function, it is necessary to indicate that there is no general pattern that applies to all institutions and all policy fields. Reading the detailed provisions of the TEU and TFEU it is only possible to indicate that in the majority of cases, the European Council is endowed with the organic function, the European Parliament having a major impact, as well as the European Commission when it has a corresponding power of proposal. But there are also cases where the function is being exercised by the Council, or by Council and Parliament. There is also no general pattern as far as the participation of member states is concerned – other than through their representatives in the Council and European Council.

To sum up, the distribution of powers amongst EU institution may seem different from the usual distribution of powers in a national setting if one focuses on the legislative function; this is because of the Commission's monopoly in legislative proposals, but it is not a difference of essence. Comparing the situation with constitutional settings of modern democracies on the basis of the five identified functions would help to see that the specificities of the EU institutions lie with their participation in the diversity of functions exercised – or co-exercised – by the Council, and in the absence of a clear mechanism of accountability of the main holder of the function of policy guidance. Furthermore, a central issue is the combined role of the Commission in the executive and legislative function while it has the major role in oversight. This is often overlooked by commentators who make a confusion between the executive and oversight function.

A double methodological error is made by those who identify a so-called 'democratic deficit' as being the major problem of the EU system of government. First, they do not take into account the difference between the myth of the separation of powers and the complex reality of the distribution of functions and of the checks and balances between institutions in a modern democracy. Second, and this is probably more important, they do not take into account that the distribution of functions and the checks of balances are to be considered not only at in the framework of EU institutions, but in the interaction between EU institutions and member states' institutions.

9. *Government Functions and Separation of Powers II: Checks and Balances between EU and Member States' Institutions*

The European Convention 2002-2003 was a melting pot of divergent visions and interests which had to try and reconcile some very divergent views on the nature and future of the European Union. It included champions of European federalism as well as eurosceptic 'sovereignists', supporters of the functionalist approach and the community method as well as defenders of intergovernmentalism, representatives of central state government as well as of sub-central governments[45]. They agreed on a series of compromises which clearly appear in the Convention's draft as well as in the Constitutional treaty of 2004 and eventually in the Lisbon Treaty of 2007.

Article 4 of the future amended TEU is the most visible expression of these compromises (emphasis added):

1. In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States.

2. *The Union shall respect* the equality of *Member States* before the Treaties as well as their *national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions*, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.

3. *Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.*

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives."

This wording, which takes over part of the traditional clause of loyal cooperation, which was inserted in article 10 EC treaty in the two last indents of section 3, is giving a good account of the EC/EUs very peculiar system of government, which I propose calling an 'intertwined system of government'.

[45] See J. ZILLER, *The European Constitution*, cit., p. 75 s.

'Intertwined government' better fits the political and legal reality of the EU than the fashionable 'multilevel governance'. 'Governance' remains too fuzzy a concept in order to be used for legal analysis, and furthermore, the adjective 'multilevel' bears the risk of evoking a hierarchy which does not exit: there is no 'upper level' of the EU as opposed to a 'lover level' of member states. The expression 'intertwined government' seems the most appropriate translation of the German '*Politikverflechtung*'[46]. It gives a clear idea of the interdependency between member states and the Union, which is not based upon a hierarchical link, and cannot be based upon such a link as long as the Union is founded on an international treaty in the sense of the Vienna Convention on the Law of Treaties of 23 May 1969[47]. Even the principle of 'primacy' is not based upon a hierarchy between the Union and its member states. It was a good idea of the drafters of the Conventions proposal to use the word 'primacy' – literal transcription of the French '*primauté*' – rather than the word 'supremacy' which inevitably leads to sterile discussions on the locus of sovereignty.

The intertwined nature of EU government specially comes to the forefront with the analysis of the way EU functions of government are exercised. The Lisbon treaty helps developping this analysis of the checks and balances between EU and member states'institutions – in the same way as it does for the checks and balances between EU institutions – by writing down the reality of the EU system and by innovating on some procedural and institutional details.

As is well know, the Lisbon Treaty enhances the role of National Parliaments in the legislative function. This occurs especially through the provisions of the two first protocols annexed to the TEU and TFEU, on the role of national parliaments and on the role application of the principles of subsidiarity and proportionality. The protocols establish a procedure which is intended to give National Parliaments the possibility to have a major impact on the ordinary legislative procedure. The drafters of the mandate of the 2007 ICG[48] resisted the Dutch request to

[46] See F. W. SCHARPF et al., *Politikverflechtung: Theorie und Empirie des kooperativen Föderalismus in der Bundesrepublik,* Kronberg/Taunus, Scriptor, 1976; F. W. SCHARPF, *The Joint-Decision Trap: Lessons from German Federalism and European Integration*, in "Law and State", 36, 1987, p. 7 s.

[47] It might be useful to recall that the Vienna Convention is a codification of traditional customary international public law, with only some specific innovations, which are not relevant to the present essay.

[48] See J. ZILLER, *Il nuovo Trattato europeo,* cit., p. 184 s.

transform national parliaments into veto-players, but there should be no doubt that national parliaments may be usefully participating in the legislative function, as already demonstrated by the work accomplished by some of them[49].

Focusing on National Parliaments only reveals part of the picture. The composition of the Council and of the European Council should never be forgotten, not only in those situations where unanimity voting gives each single member state's government a veto-player position, but also in the framework of qualified majority voting, where a coalition of governments representing a blocking minority transforms participating the member states into veto players. The European Council does not as such exercise the legislative function, as indicated by article 15 TEU. It has in some cases the typical role of a Head of State in parliamentary democracies, which may stop the legislative process by asking a new reading, e.g. the so-called 'emergency brake' of article 82 – 3 TFEU in the field of criminal justice cooperation.

The intertwined nature of EU government is especially apparent when it comes to the executive function. As indicated under point 4., the distribution of powers between Council and Commission is only one aspect of the issue of the executive function in the EU. Another dimension, quantitatively far more important, is only visible through article 10 EC treaty – the so-called loyalty clause: "Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. - They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty." It needs a skilled lawyer to understand that this means that in the EU, the executive function lies primarily with the member states.

A first step in the direction of making clear that member states fulfil the executive function has been accomplished by the Convention that drafted the EU Charter of Fundamental Rights in 2000. Article 51 – 1 of the Charter states that "The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only *when they are implementing Union law*" (emphasis added - "*lorsqu'ils mettent en*

[49] See for instance Le Sénat, *Actualités de la Commission des Affaires européennes*, Paris, monthly.

œuvre le droit de l'Union", "*nell'attuazione del diritto dell'Unione*", "*bei der Durchführung des Rechts der Union"*). The Charter was thus recording the fundamental role of Member States in the implementation of EU legislation[50]. The Charter, which was "solemnly proclaimed", did not acquire the value of primary law, unlike the treaties; it will only acquire this status with the entry into force of the Treaty of Lisbon.

As article 291 TFEU makes it clear, implementation of EU legislation is a primary responsibility of member states' institutions. With the exception of certain policy fields – such as the application of some of the treaty's rules on competition, implementation of EU legislation usually follows the pattern of 'shared execution' (in the vocabulary of the EC financial regulation[51]. Whether the relevant legislation is adopted in the form of regulations, of directives or of decisions is not relevant: the difference between regulations and directives is only that member states are obliged to take over the content of the latter in national binding law (laws or regulations) whereas they are prohibited to do so with regulations. The emerging use of the terminology of 'self executing directives' in practice and literature is confusing: the so-called 'self executing' clauses of some directives are simply clauses which respond to the characteristics required by the ECJ's doctrine on direct applicability and may thus be usefully referred to in court suits even if they have not been transposed in national laws or regulations, but member states are not dispensed from transposition. Furthermore most if not all regulations, directives or decisions need some action by member states' institutions in order to be implemented: allocating human and financial resources etc.

A second aspect of intertwined execution is also clarified by the Lisbon Treaty, when article 291 (3) TFEU establishes that "For the purposes of paragraph 2, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall lay down in advance the rules and general principles concerning mechanisms *for control by Member States of the Commis-*

[50] For an earlier use of the concept of implementation see H. SIEDENTOPF and J. ZILLER, *Making European Policies Work - The Implementation of Community Legislation in the Member States*, London, Sage, 1988, also published in French under the title *L'Europe des administrations? - la mise en oeuvre de la législation communautaire dans les États members*, Bruxelles, Bruylant - Institut Européen d'Administration Publique, 1988.

[51] See above note 44."

sion's exercise of implementing powers." This wording clearly reflects the reality of comitology, as committees are composed of representatives of member state governments, acting in this capacity[52], as opposed to groups of experts which are consulted by the Commission on own initiative in different phases of the policy making cycle.

The intertwined nature of EU government is also especially apparent when it comes to the supervisory function. The EC treaty has always given a special role to member states in the system of judicial remedies. They have always had unconditional standing in the annulment procedure of article 230 EC treaty, together with the Commission and the Council, whereas the European Parliament has only received this power with the treaty revisions from Maastricht onwards. Member states also have had also always the power to lodge a complaint against a non complying member state, together with the Commission (article 227 EC treaty), thus potentially participating in the oversight function. More significantly even, the preliminary ruling procedure of article 234 EC treaty is a mechanism of intertwined action. The ECJ has the monopoly on interpreting EC law provisions (if unclear) and of reviewing the conformity of derived law to the treaties, but in most cases, national courts and tribunals are dealing litigation where EC law applies. The drafters of the treaty have chosen to open a procedure for the discussion between both types of courts, but have avoided giving the ECJ a hierarchical position, like that of a Supreme Court: there is no possibility to appeal against the decisions of national courts or tribunals before the ECJ. The EC treaty does however not ignore the issue of enforcement of the ECJ's rulings, as there is always the possibility for the Commission – or a member state – to lodge a suit against a member state whose institutions are recalcitrant on the basis of articles 227 and 230 EC treaty.

Taking over the wording of the Constitutional treaty, the Lisbon Treaty further emphasises the role of member states'courts and tribunals in the judicial function by the provision which will be inserted in article 19 TEU, according to which "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law." The European Convention, which drafted this

[52] The wording of article 291 has generated quite some discussion, as demonstrated by the literature on the Constitutional treaty and on the Lisbon treaty quoted in previous notes; see amongst others P. CRAIG, *The Role of the European Parliament under the Lisbon Treaty*, cit., and P. PONZANO, '*Executive' and 'delegated'acts: the situation after the Lisbon Treaty,* cit.

new wording, did not go as far as stating that member states'courts and tribunals participate in the judicial function[53], which would have been even clearer to the non specialist. As noted by commentators, this new wording is giving an explicit treaty base to the ECJ's case law on the procedural autonomy of member states'courts and tribunals, which is another display of the intertwined nature of the EUs judicial function[54].

The intertwined nature of EU government appears in a less obvious manner from a legal point of view, but maybe in an even more obvious manner from a political point of view, when it comes to policy guidance. Although there is a tendency to overestimate the role of the Presidency of the European Council in public opinion, a number of episodes of the past years shows its importance, such as the failed approval of the Constitutional treaty under the Berlusconi presidency in December 2003, the approval of the mandate for a new IGC under the Merkel presidency in June 2007 or the already mentioned launching of the programme for the completion of the internal market in June 1986. The latter episode is especially revealing of the power of intertwined direction: policy guidance by the European Council – especially by the trio France-Germany-Italy, i.e. Mitterand, Kohl and Craxi as well as his foreign minister Andreotti – and programming by the European Commission's President Jacques Delors and the Commissioner in charge of the common market Lord Cockfield. The important point was their alliance in order to convince the British Prime minister Margaret Thatcher that the completion of the internal market was in the interest of the United Kingdom. What also clearly comes out from practice are the consequences of the absence of continuing leadership in the European Council, which allows for policy guidance to be superseded by programming. This is apparently what happened with enlargement since the end of the nineteen nineties, with as a consequence a lack of visibility of the political grounds for enlargement, which in turn explains probably a lot of the growing dissatisfaction of European citizens with the EU.

[53] In a previous essay, I had suggested the wording "Dans le cadre de leurs compétences respectives, les autorités juridictionnelles des Etats membres sont associées à la mission de la Cour de justice", see J. ZILLER & J. LOTARSKI, *Institutions et organes judiciaires*, in B. DE WITTE, "Ten Reflections on the Constitutional Treaty for Europe", cit., p. 70.

[54] See amongst others F. PICOD, *Article I-29 La Cour de Justice de l'UE*, in L. BURGORGUE-LARSEN, A. LEVADE & F. PICOD, "Traité établissant une constitution pour l'Europe, Commentaire article par article", Bruxelles, Bruylant, 2007, Tome I, p. 384 s., and M. P. CHITI, *La giurisdizione*, in F. BASSANINI & G. TIBERI (eds), "Le nuove istituzioni europee. Commento al Trattato di Lisbona", cit., p. 349 s.

As noted above, the distribution of the organic function in the EU does not follow a homogenous pattern. This is maybe less salient as far as intertwined government is concerned, as the Council – or in the future the European Council – is always the key player for this function. This being said, there are two types of exercise of the organic function: in a number of cases, national parliaments have a major impact as they have to authorise the ratification of the decisions which are being taken by the relevant institutions, whereas in other cases they have no say. This second pattern applies to the institutional adjustments concerning institutions other than the European Parliament. For the European Parliament, it has to be reminded that article 190 (4) EC treaty still requires ratification according to national constitutional provisions for changes to the electoral procedure – and so will article 223 TFEU which takes over article 190 (4) & (5) EC treaty.

To sum up, the intertwined nature of EU government is clearly apparent in the organisation of checks and balances between EU and Member states' institutions, and will be made more visible by the Lisbon Treaty. This is one of the major reasons why the Lisbon Treaty – as was already the case for the Constitutional treaty – is considered by many commentators as contributing to the complexity of the EU system, while the European Convention claimed that it had tried and managed to simplify the treaty system. It makes little sense to criticize the European Convention – except for some details – as it did not have neither the composition nor the political perspectives which would have allowed it to depart radically from the nature of the EC and EU as they have been conceived and have developed: the treaty based international agency of the ECSC has progressively developed into a confederation, while the ultimate goal of a European federal state has faded away, as demonstrated by the abandonment of the rhetoric of the United States of Europe, and, more recently of the word 'constitution'.

10. *Executive Federalism, Judicial Federalism and Legislative Federalism in the EU*

I do not intend to go into the nature of the EU in this essay: from a legal perspective, as long as the EU is based upon an international treaty in the sense of the Vienna Convention of 1969, it can only be a confederation, not a federal state. Neither do I intend to discuss the

possible future of the EU on the path towards a federation[55]. The only contribution of this essay to the discussion on federalism and the EU will be looking at the aspects of federalism which appear for each of the government functions which have been hitherto analysed.

The two basic models which scholars, politicians, as well the press and the public seem to have in mind when talking about federalism are US Federalism and German Federalism, sometimes a very sketchy representation of these models. From the point of view of government functions, the following might be recorded. In both the US and German model, there are two distinctly separate levels of governments when it comes to exercising the legislative function: federal legislation is being adopted by federal institutions and state legislation by state institutions. The two systems differ when it comes to the executive functions: in the US the execution of federal legislation is a task of federal institutions, whereas in Germany the principle is that federal legislation is being executed by state administration. The two systems are even more different when it comes to the judicial function. In the US the application of federal law is normally a matter for federal courts only, and the application of state law a matter for state courts only, with a special arbitral function for the Supreme (federal) court in case of conflicts between both levels of jurisdiction on the delimitation between federal and state powers. In Germany on the contrary, there is basically only one set of courts which deals both with federal law and state law: state courts for first instance and appeal, and federal courts as supreme courts of the system.

Furthermore, as is well known, the composition of the *Bundesrat* is at the heart of intertwined government in Germany, whereas the composition of the Senate does not lead to direct participation of state institutions in the US federal system, at least since the 1916 amendment which introduced the direct election of Senators – who were previously elected by the state legislature. The *Bundesrat*, like the Council of the European Union, is composed of representatives of the member states who are necessarily members of the executive in their country, and who thus exercise what the French lawyer Georges Scelle called functional split (*dédoublement fonctionnel*): they are at the same

[55] For a very recent summary of literature on these topics, see the references given by L.A. Rodrigues Heleno Terrinha, *Europe's Federalism*, Available at SSRN: http://ssrn.com/abstract=1299809. For a major comparative work, see K. Nicolaidis and R. Howse, *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union*, Oxford, Oxford University Press, 2001.

time fully fledged members of the *Land* executive – and thus responsible before the parliament of their Land – and fully fledged members of the federal Council. In Germany as in the EU, even though there is a weighting of the number of votes according (roughly) to the population of the different countries, the vote of one country cannot be split – even if the Land is governed by a coalition of parties who do not have the same alliances at federal level. In Germany as in the EU, the Council participates not only in the legislative function, but also in the executive function: the adoption by the Federal government of federal regulations (*Verordnungen*) which are impacting upon the *Länder* rights is subject to approval by the *Bundesrat*. It would however be wrong to think that the EU system follows entirely the pattern of the German federal system of government: there is no real institutional equivalent of the Federal cabinet (*Bundesregierung*) and of the Federal Chancelor (*Bundeskanzler*) at EU level; furthermore, a look at the distribution of government functions reveals that there are important differences which definitely put apart the EU system.

The EU legislative function is probably the most studied in legal scholarship, beyond EC/EU lawyers and in political science literature, because the specific nature of the Council of the European Union and its resemblance with the German *Bundesrat* are most perceptible in the field of legislation. Most strikingly, studies on the implementation of EU law are almost only concerned with the transposition of directives into national law[56], leaving aside the most interesting part of enforcement studies, i.e. the application of EC regulations and of the national laws and regulations transposing directives. However, there does not seem to be much literature which compares the patterns of US and German legislation with the pattern of EC/EU legislation. Amongst others, there has probably not been enough attention given to the differences between EC directives and German federal framework laws: the latter are being dramatically reduced as a consequence of the reform of German federalism in 2006. They were perceived as too much of centralising instruments. Looking to the other side of the Atlantic, there is no equivalent of directives, or of former German federal framework laws: this is most logical because the US constitution does not have a concept equivalent to that of shared powers, which is at the basis of Ger-

[56] See J. Ziller, *Europäische Implementierungsforschung Im XXI. Jahrhundert - La recherche sur la mise en œuvre du droit de l'Union européenne au XXième siècle*, Florence, European University Institute, EUI Working papers Law n° 2006/42.

man federal law since the ephemeral Imperial Constitution of Frankfurt of 3 April 1849 (known in Germany as *Paulskirchen Verfassung*). As is well known, the European Convention – following the developments in the ECJ case law and in EU law literature – has adopted the distinction between shared and exclusive competences, which will be introduced in the clauses of the TFEU relating to competences.

On the other hand, the US Constitution establishes the notion of supremacy in its Article VI.

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwith-standing."

This wording certainly canot account for the ECJ's doctrine of primacy, be it only because the latter doctrine only applies to the clauses of primary or secondary EC law which have the characteristics of direct applicability. The fact that English language scholars are usually using the word 'supremacy' for the concept of EC law 'primacy', tends however to foster confusion between the US supremacy and the EU primacy. There are less risks of confusion with the German concept of primacy, traditionally expressed by the phrase "*Bundesrecht bricht Landesrecht*", which is linked to the existence of a vast field of shared competences between the Federation and the states. However there are a series of distinctive features which are due to the fact that Germany is a federal state, with a clear hierarchy between the Federation and the states.

Far less attention has been given to the question of executive federalism. As already mentioned there are striking differences between the US model, where the executive function follows the legislative function, and the German model, where execution follows a pattern of its own, as the *Länder* are in charge not only of executing their own legislation, but also federal legislation. The historical roots of this system are easy to understand. One needs only to remember that at the time of establishment of the second German Empire, in 1871, the Kingdom of Prussia represented almost two thirds of the Reich, and had a longstanding tradition of strong administration. The other strong state was the Kingdom of Bavaria. It is comprehensible that neither of those two states wanted the other to have too much of an influence in the way government was operated on its territory: it seemed more than

enough to have common legislation and a common army and diplomacy.

The origins of the EU system of executive federalism are different from the German, but it shares the main feature of the Geman *Vollzugsföderalismus*, the principle according to which execution of EU law is normally a matter for national institutions. There is no link between this principle and the distribution of legislative competences, or the difference between directives and regulations. The principle is settled in article 83 of the German Basic Law on the principle of execution by the Länder (*Grundsatz der Länderexecutive*), but it was not clearly spelt out in the EC treaty, probably because it was only too obvious to the drafters of the Community treaties. As already mentioned, the Lisbon treaty reinforces the principle with the wording of article 291 TFEU which is setting strict limits to the use of the Commission's regulatory competences for uniform execution of EU law.

There is no change with the Lisbon treaty as regards the main difference between German and EU executive federalism: the German federation has a power of direct injunction (*Weisungsrecht*), which allows the federal government to direct the action of *Länder* administration, with previous agreement by the *Bundesrat* (article 37 of the German Basic Law on federal constraint – *Bundeszwang*). Nothing of the like exists in the EC and EU treaties: on the contrary it has to be emphasised that the Commission does not even have the tools for enforcement it hat under article 36 ECSC treaty, namely the possibility to directly impose sanctions on member states which it did not consider compliant. Its only possibility is to resort to the ECJ. It remains difficult to understand to what point this difference is important in practice, as there are no cases of application of direct injunction in Germany. The difference in principles has however a series of consequences often overlooked in the literature on the European Admistrative Space[57].

Judicial federalism has been and remains the *parent pauvre* of studies on federalism, as well in political science as in legal literature[58].

[57] See J. Ziller, *Bezugsquellen und Grundlagen des europäischen Verwaltungsrechts*, in S. Magiera, K.-P. Sommermann & J. Ziller (eds), "Verwaltungswissenschaft und Verwaltungspraxis in nationaler und transnationaler Perspektive. - Festschrift für Heinrich Siedentopf zum 70. Geburtstag.", Berlin, Duncker & Humblot, p. 173 s.

[58] Amongst the few studies which are explicitly mentioning the theme see J. Kinkaid, K. Le Roy, et al. (eds*), Legislative, Executive, and Judicial Governance in Federal Countries,* Montreal & Kingston, McGill-Queen's University Press, 2006; for a comparison with the European Community system the classical work is by E. McWhinney & P. Pescatore (eds), *Federalism, Supreme Courts and the integration of legal systems*. Heule, UGA, 1973.

Maybe this is due to the fact that unlike in the US model, in most other federal states, the typical articulation of powers in two levels is missing or very incomplete as far as the judiciary is concerned.

What is striking in the US model is the total separation between federal and state courts, with separate spheres of competence and without mechanisms to solve divergences. As opposed to the US, the German system of courts is largely based on a fiction as far as federalism is concerned, as it resembles the system of neighbouring countries with a unitarian government. The fact that the five German supreme courts (ordinary, administrative, labour, social and financial courts) are managed by the Federation and the first instance and appeal courts by the *Länder* does not influence the coherence of the branches of the judiciary. There is a clear hierarchy between the three level of courts for the exercise of judicial functions, due to the system of appeals.

The EC/EU system is entirely different. It differs probably most from the German system because there are no mechanisms of appeal and no common regulations of procedure for the member states' courts and tribunals and for the components of the ECJ. It differs from the US system because of the largely overlapping competences of both sets of courts: as in Germany, state courts are competent as well for the application of EU/federal law as for state law. This explains why there was a need for coordination, which has been solved with the system of preliminary rulings of article 230 EC treaty. These idiosyncrasies of the EU system of courts are being somewhat emphasised with the new provision of article 19 TEU on the obligation of member states to provide for remedies for the enforcement of EU law. They will probably remain ignored to a large extent by those judges and scholars who feel that the ECJ is encroaching too much on the final decision powers of national courts, without being in the formal position of a supreme court which may quash the decisions of lower courts[59].

As the function of direction and the organic function are not (yet) commonly used concepts, a survey of relevant literature makes very little sense. The question to be addressed might be: is federalism in the function of direction relevant? The organic function may have a federal dimension, as far as some federal institutions are concerned, but it seems that neither the United States nor Germany give clear examples to compare with the EU.

[59] For a very good account of these problems see K. M. Scherr, Florence, European University Institute, PhD thesis, 2008.

As far as foreign policy is concerned, the answer to the question of the relevance of federalism to policy guidance seems to be no, as demonstrated by the fact that foreign policy is usually an exclusive power in the hands of federal executives – even when there is some margin for foreign relations by the components of the federation, as in the case of Belgium or Canada. The EU experience only confirms this.

As for internal policies the precedent which comes to mind is that of the Second German Empire, and especially of Chancellor Bismarck, who cumulated the functions of Chancellor of the Empire and of the Kingdom of Prussia. This precedent immediately shows the limits of the question: cumulating these functions at federal and state level is not imaginable in present day Germany and even less in the United States of America. What the European Convention 2002-2003 did, on proposal of the French and German governments was also to depart from cumulating: in the pre-Lisbon system, the Presidency of the European Union by the Head of State or Head of Government during the semester of his or her country's presidency of the Council of the European Union might be useful in some circumstances, but it has clearly shown its limitations since 2000. At any rate, it seems obvious that a period of six months is meaningless for political guidance, and that it pushes the weight of direction on the organisations which have the necessary stability to organise and implement programming. These however are administrative organisations, without a political dimension.

To sum up: analysing the distribution of government functions and the checks and balances between EU and member state institutions might be a far more fertile approach to the study of the EU than brood over the questions whether the EU is a federation or not and whether it has a constitution or not.

Riassunto - Un'analisi del sistema di governo dell'Unione europea, svolta sulla base dei trattati costitutivi della Comunità e dell'Unione, conduce all'identificazione di cinque funzioni di governo, distribuite in un sistema complesso di controlli e contrappesi tra le istituzioni dell'Unione, e tra quelle dell'Unione e quelle degli stati membri. Queste cinque funzioni possono essere caratterizzate come funzione legislativa – trasformatasi da mera funzione normativa in una vera funzione legislativa –, funzione esecutiva ovvero di attuazione delle politiche comuni, funzione di sorveglianza, che consiste nel controllo giurisdizionale e nella vigilanza sul rispetto dei loro obblighi da parte degli stati membri, funzione direttiva, che combina indirizzo politico e programmazione, e funzione organica, cioè di sviluppo istituzionale. La nuova stesura delle rilevanti clausole dei trattati chiarisce la natura e la distribuzione delle cinque funzioni ed aiuta a comprendere il modo nel quale la separazione dei poteri è organizzata nell'Unione europea.