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The Treaty of Lisbon:
Assessment and Prospects as of Summer 2011

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Studies & 87 Research

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After completing a CFJ diploma at the Paris School of Journalism, Alain Dauvergne began his career as a journalist with the Agence France Presse (AFP), later moving on to the newspaper *Combat*. He was assistant editor-in-chief with RTL for many years. A specialist in European affairs, he went on to become assistant editor-in-chief at the magazine *Le Point*.

Alain Dauvergne tracked the work of the Convention on the Future of Europe on *Notre Europe*'s behalf for sixteen months and subsequently published a book on the subject in 2004 entitled *L'Europe en otage ? Histoire secrète de la Convention*.

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Preface

The Lisbon Treaty is the result of lengthy negotiations which began in the 1990s and which were particularly intensive at the time of the Convention on the Future of Europe, in which it fell to me to represent the European Commission together with Michel Barnier. The treaty came into force less than two years ago, so it is still not easy to clearly make out the extent or the direction in which it has changed the way the European Union works or the balances established between its various institutions.

Notre Europe has attempted to analyse the consequences of the treaty's implementation by producing a series of publications discussing the main European institutions and by organising a debate on the evolution of the Community method. It is in our DNA to continue paying a great deal of attention to these issues, which may seem to be mere technicalities but which are in actual fact of crucial importance for the European Union's legitimacy and effectiveness.

In this context, the great merit of the study produced by Alain Dauvergne is that it offers criteria on the basis of which we can identify the lessons to be learned from the treaty's implementation, while pointing at the same time to the numerous

uncertainties still remaining at this stage. As an observer familiar with recent European institutional negotiations, Mr. Dauvergne offers us a series of very enlightening impressions and analyses, all of which contribute to a common debate that is all the more crucial in these difficult times.

António Vitorino, President of *Notre Europe*

Summary

The first eighteen months that have gone by since the Lisbon Treaty's implementation are probably too short a time to allow us to formulate any final judgement, yet it is also long enough for us to see how the various players have "penetrated" the treaty and how they have proven either capable of, or even eager to, benefit from it; and to attempt to conduct an initial review of both the positive contributions and the shortcomings that these months have brought to light. The main lessons that this analysis suggests are the following:

1. With the European Council's institutionalisation, the triangle – Parliament, Commission, Council of the Union (council of ministers) – that traditionally represented the framework for the Union's institutional functioning has given way to a "trapezium" in which the unfolding of events has identified two winners – the European Council and Parliament – and two losers, the Commission and the Council of Ministers.

2. The heads of state and government leaders have clearly taken over the running of the Union's affairs. This can be explained by the change in the European Council's legal status, but also by the fact that it now has a full-time

President (Herman Van Rompuy, who was appointed at an extraordinary summit on 19 November 2009); and also, indeed possibly above all, by the fact that the crises that have followed on from one another since 2008 have demanded the kind of political decisions that can only be taken at the highest level.

3. The European Parliament was perfectly geared up to make use of its new powers. Whether it is the Union's budget, its own prerogatives in respect of the Council of Ministers or the Commission, international agreements over which at this juncture it enjoys the right of veto, or indeed any other area over which it has jurisdiction, Parliament is closing ranks to avoid giving an inch where its rights are concerned, even papering over the political differences between the various groups for the purpose.

4. By comparison, the Council of Ministers has lost ground on two counts. As the European Council firmed up its grip on the running of daily business, the Council of Ministers' role suffered a certain amount of erosion. The Council of Ministers is, of course, a co-legislator with Parliament, but in the power struggle that traditionally pits one institution against another, the MEPs have managed to push through a kind of ongoing agreement with the Commission that puts them in a favourable position.

5. In a situation of – undeclared but nonetheless real – rivalry with the permanent President of the European Council, or on occasion even with the High Representative, Commission President Barroso is suffering. The Commission, the driving force behind European construction and endowed for that very purpose with a monopoly on legislative initiative, appears to have lost its nerve. In a difficult economic situation that restricts the Union's budgetary possibilities and in a political climate that works to the advantage of the European Council's intervention and authority, it is true to say that its position has become tricky. The national political leaders have taken over at the helm.

6. The High Representative has come in for a good deal of criticism from the outset: "incompetence", "flimsiness" and "lack of reactivity" are the charges

levelled at her. It would have been fairer to wait a little before assessing her performance, especially as it took almost a year of hard work for the totally new "European diplomatic service" to timidly see the light of day. Moreover, Europe has no common foreign policy, thus the High Representative's job demands something of an acrobat's skills to perform it…

7. Some of the democratic progress enshrined in the Lisbon Treaty, with citizens' initiative heading the list, has yet to be implemented. In addition, some of the institutional developments taking place are still uncertain, for instance with regard to the implementation of the Charter of Fundamental Rights, the organisation of the Schengen area or the management of the Common Agricultural Policy.

The developments described in the study are still unstable and thus this assessment of a work in progress will need to be updated in the coming years. This, among other reasons, because several important measures contained in the Lisbon Treaty are not due to come into force until 2014, in particular the adoption of a qualified majority vote in the Council and the Commission's makeup. That, too, is going to be a very important appointment for the Union, indeed it may even prove to be another turning point.

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Introduction

Signed on 13 December 2007, the Lisbon Treaty[1] came into force two years later, on 1 December 2009. Intended to replace the Constitutional Treaty which France and The Netherlands rejected in 2005, it is less ambitious than its predecessor yet it nevertheless entails numerous changes capable of modifying the course of European political life in some depth. "And about time too!", one is tempted to exclaim.

This, because the Treaty was not spawned by any desire for Europe, by some sudden, collective burst of enthusiasm. It came at the end of a lengthy and chaotic process under the constraint of necessity: the fall of the Berlin Wall on 9 November 1989 entailed a historic duty to open up Community Europe to the Eastern European countries that had thrown off the yoke of Soviet dictatorship. But for the European adventure to be able to continue after an enlargement of that magnitude – which was to ensue fifteen years later, in 2004 – it was necessary to adapt the European Union's institutions and its way of operating to the new situation. That meant rising to (at least) two major challenges. There was the challenge implicit in the sheer

1. Lisbon Treaty: http://eur-lex.europa.eu/JOHtml.do?uri=OJ%3AC%3A2010%3A083%3ASOM%3AEN%3AHTML

number of new members: how was it going to be possible to achieve increased efficiency despite the growth in the number of Member States? And there was the democratic challenge: how was it possible to check, and possibly even overcome, the grassroots disenchantment recorded by Eurobarometers and at European elections?

Throughout the 1990s, the heads of state and government leaders vainly thrashed around searching for a suitable answer. Treaties came and went, the Nice Treaty followed on from the Treaty of Amsterdam, without the broader European interest managing to prevail over national interests. Tired of waiting, it was finally decided, at Laeken in December 2001, to change method: "to avoid getting bogged down in their traditional bickering over the structure of powers, the European government leaders decided to entrust others, rather than themselves, with the task of submitting a blueprint for a constitution for a Europe enlarged to cover the whole continent"[2], wrote Jacques Delors.

After almost sixteen months of intensive debating, the Convention assembled for the purpose produced a blueprint for a Constitutional Treaty, which was probably the best possible compromise at the time. The draft, somewhat watered down by the Intergovernmental Conference (IGC) that followed on from the Convention, had to be jettisoned after the French and Netherlands electorates' rejected it. But it was revived – in a new and somewhat shrunken format – and subsequently adopted under the name of Lisbon Treaty.

But while it was less ambitious than the initial text, it is not merely a "simplified Treaty", as many have chosen to call it. It entails numerous changes likely to alter the course of European political life in some depth. Basically, these changes can be grouped into two categories: those that impact the Union's machinery with new posts, new institutions and new ground rules; and those that modify the balance of power within the institutional triangle comprising the Parliament, the Council and the Commission, thanks, in particular, to the establishment of new competences for the EU and of new parliamentary rights. Long an isosceles triangle with Parliament playing the short side in view of its limited powers, the triangle became (or almost

2. Preface to Alain Dauvergne's *L'Europe en otage ? Histoire secrète de la Convention*, published by Editions Saint-Simon, 2004.

became) equilateral when the Maastricht Treaty imparted a major boost to the European Parliament's place and importance in the Union's legislative activity. But with the Lisbon Treaty, which raised the European Council to the rank of an institution (and a leading one, as we shall see) and seriously boosted Parliament's prerogatives once again, the triangle turned into a trapezoidal quadrilateral in which the European Council and Parliament are the dominant players, while the Commission and the Council (of Ministers) have lost some of their influence, in other words some of the weight that they carried in the European decision-making process.

Without claiming to be in any way exhaustive, this study proposes to examine the ways in which the institutions and the holders of new posts have used their first eighteen "Lisbon" months, the extent and the manner in which the Treaty's implementation has changed the playing field of European politics, and lastly, whether the democratic approach of the institutions and their management – of the Treaty's first major objectives – have made any real progress[3].

3. The role played during this period by the financial and economic crises that have hit the Union's Member States (or at any rate very many of them) and the need to address those crises, has been considerable. But we are not going to deal with that role separately here; rather, it will show through in the way in which the various players have decided, been able to, or proven equal to benefiting from circumstances.

I. The European Union's New Leading Players

1.1. Herman Van Rompuy and the European Council

The post of "permanent President" of the European Council is a creation of the Convention on the Future of Europe, which was held in 2002 and 2003 and which led to the blueprint for a Constitutional Treaty, subsequently shelved following negative referenda in France and in The Netherlands. Kept on in the Lisbon Treaty, the post is a "full-time" function, in other words the post's holder, who is appointed by the European Council for two and a half years renewable once only, cannot also occupy another post or hold national office at the same time. It is in this context that the European Council, meeting in Brussels on 19 November 2009, appointed Belgian Prime Minister Herman Van Rompuy as first holder of the post. He became the effective "stable" (or "permanent") President of the European Council twelve days later, when the Treaty came into force on 1 December. Article 15 in the Treaty on European Union (TEU) stipulates that the President of the European Council "shall chair it and drive forward its work" of the Council, that he shall prepare Council meetings and ensure their continuity, that he shall endeavour to facilitate consensus among its members, and that he shall "ensure the external representation of the Union on issues concerning its common foreign and security policy), without prejudice to the powers of the High Representative (of the Union for Foreign Affairs and Security policy) […]".

1.1.1. Installation and Frictions

Despite having become titular permanent President on the day the Lisbon Treaty came into force, 1 December 2009, Herman Van Rompuy only really took office on the first day of 2010. Familiar with the workings of the European Council, of which he was a member for a year in his capacity as Belgian Prime minister, he also knows the Community machinery and Commission President Barroso, given that the latter was confirmed in office after an initial five-year mandate. In the first few weeks of his presidency, Herman Van Rompuy toured Europe to take the pulse of its capital cities, and he convened a European Council meeting – or "summit" as it is known – on 11 February, primarily for the purpose of discussing the economic crisis in which Europe was enmeshed, the climate, and Haiti which had been devastated by an earthquake on 12 January and which was short of just about everything.

The Lisbon Treaty states that the European Council must meet at least four times a year (Article 15(3) TEU). From the first day he took office, Herman Van Rompuy made it clear that he was going to convene it more often – some people mentioned the figure of ten times a year – for theme-based "summits" (to use the popular term). In a report for 2010 that he drafted[4], Herman Van Rompuy lists them: "The European Council met on six separate occasions between 11 February and 16-17 December – one informal meeting and five formal meetings. Two meetings of heads of state and government leaders of the euro zone, which I chaired, were also held".

For 2011, five summits are planned – the first on 24-25 March and the last on 9 December – but others may be organised as events dictate. The two euro zone Member States' summit meetings are an innovation. One had been held in the second semester of 2008, when France held the Union's six-monthly duty presidency, but it was convened under the pressure of an emergency on account of the financial crisis rocking Europe.

4. "Around the Table", *The European Council in 2010*, http://www.consilium.europa.eu/uedocs/cms_data/librairie/PDF/QC3010507ENC.pdf

European "summits" since 2004

2010 was the first year in which the European Council exercised its functions as reorganised under the Lisbon Treaty – thus with a permanent President, Herman Van Rompuy, chairing it. During the course of the year, the 27-strong "summit" met six times, in other words every two months on average. So it was a high-frequency year because the Treaty only provides for four annual meetings. This particular density, however, was due at least as much to the economic and financial urgency as to any deliberate strategy on Mr. Van Rompuy's part. This can be seen from the table below: the heads of state and government leaders met with the same frequency – and for the same reason – in 2008 and 2009, thus well before the Treaty came into force.

Year	Summit dates[5]					
2004	25 March		17 June	4 November		16 December
2005	22 March		16 June	27 October		15 December
2006	23 March		15 June	20 October		14 December
2007	8 March		21 June	18 October		14 December
2008	13 March	19 June	13 July	1 September	22 October	7 November
2009	1 March	19 March	5 April	17 September	19 November	10 December
2010	11 February	26 March	17 June	16 September	28 October	16 December
2011	11 March		23 June	23 October		9 December

Extraordinary Euro zone Summits

Year	Extraordinary Euro zone Summit Dates			
2008	12 October (following the collapse of Lehman Brothers)			
2010	25 March (extraordinary, separate euro zone summit, followed by the 27-strong European Council on 25 and 26 March)	6 May		
2011	11 March (informal 17-strong euro zone summit, meeting on the same day as the extraordinary 27-strong European Council meeting on Libya)	21 July	23 Oct.	26 Oct.

5. According to Wikipedia.

On joining the game, Herman Van Rompuy encountered two obstacles in his path: on the one hand, his relations with Commission President José Manuel Barroso were potentially at odds because the Treaty is unclear regarding the share-out of tasks between the two presidents – particularly with regard to representing the Union in the outside world. Also, Spain was not too happy with this new European Council President, a permanent President, who took office on the very day Spain was due to take up its six-monthly (thus transitory) duty presidency of the Union. It quite rightly saw the post as impinging on the role that it had been getting set to play for so long – and indeed Madrid even acknowledged this, through the mouthpiece of its Foreign minister, Miguel Angel Moratinos, who put it diplomatically: "We prepared our duty presidency without any certainty as to the Treaty's coming into force"[6].

While cohabitation between the two presidents, Van Rompuy and Barroso, remained delicate throughout the year, the European Council President benefited in the second semester of 2010 from the most favourable terms for completing his full installation. The Union's rotating duty presidency was held by Belgium from July of that year, which entailed a threefold advantage: Herman Van Rompuy is himself a Belgian (and a former Prime minister); Belgium is one of the EU founding members and thus its politicians and its civil service have been capable of handling European duty presidencies for a long time; and lastly, Belgium is in a state of crisis, the legislative election on 13 June having failed to produce a majority, and Yves Leterme, now a caretaker premier, said that his country intended to exercise a "facilitating" rather than a "declamatory" duty presidency[7]. Belgium, which had been preparing its duty presidency for over two years, and its political class as a whole were bent on making a success of it. Modesty was chosen as a rule of conduct, with the express goal of "containing our duty president's role, because we must leave Herman Van Rompuy and Catherine Ashton (High Representative) some elbow room"[8].

It was precisely in connection with the topic of their respective elbow room that friction between Barroso and Van Rompuy began to rise to the surface until it

6. Philippe Ricard and Jean-Pierre Stroobants, "Les débuts laborieux du nouveau pouvoir européen", *Le Monde,* 28.01.2010.
7. Philippe Ricard and Jean-Pierre Stroobants, "Un gouvernement belge en sursis prend la présidence de l'Union européenne", *Le Monde,* 01.07.2010.
8. *Le Soir,* cited by Alain Jean-Robert, "Belgium, in search of a government, to assume EU presidency", AFP, 27.06.2010.

became perfectly visible, to the point where one major newspaper ran the headline "Lisbon Treaty Exacerbates Power Rivalries in Brussels", reporting that the two men "have crossed swords on numerous issues" and adding, in particular, that Van Rompuy "who is supposed to represent the Union 'at his level' in the foreign policy field, cannot move without being chaperoned by Mr. Barroso, who is defending his prerogatives in the fields of trade and of development aid"[9].

The Treaty's authors have *de facto* left the two men to sort out the muddle amongst themselves. Have they managed to do this? In a review of his own performance in 2010, Herman Van Rompuy points out that: "Together with the Commission President, the European Council President acts as the Union's representative, at his level, in relations with third countries."[10] – which is more or less what Article 15 in the Treaty (TEU) says. Later on, he completes this quote with a phrase which is hardly more explicit: "Thanks to [...] an agreement between the President of the Commission and myself on how best to represent the Union in various international meetings, the Commission President and I can truly speak (and listen) on behalf of the 27". According to this role share-out, which is not openly specified in the text, foreign policy and diplomacy fall to Van Rompuy while economic and trade issues are the province of Barroso.

Thus, this is now the double act that embodies the Union in the eyes of third countries at bilateral "summits": with Brazil on 14 July; with China on 6 October; with the United States on 20 November, and so on. These meetings with the world's leading players may enhance the two European representatives' standing, but the Union's partners do not always see them that way. Thus at the Europe-Asia summit (the ASEM counts 46 Member States) held in Brussels in early October, the Asian delegation found it hard to accept the fact that Herman Van Rompuy should be chairing the talks on the EU's behalf. As for Barack Obama – who had snubbed the summit that was due to be held in Spain in the spring – he finally granted Van Rompuy and Barroso a two-hour audience in Lisbon, where he was attending a NATO summit...

9. Philippe Ricard, "En un an, le traité de Lisbonne a exacerbé les rivalités de pouvoir à Bruxelles", *Le Monde,* 02.12.2010.
10. "Around the Table", *The European Council in 2010*, http://www.consilium.europa.eu/uedocs/cms_data/librairie/PDF/QC3010507ENC.pdf

1.1.2. Acquiring Confidence and Establishing a Position

Despite these displays of lack of consideration, or this wariness of Van Rompuy displayed by the outside world, the European Council's new President has taken pains and deployed great skill in marking out his European turf and, on occasion, even in extending it. When he was appointed, and even in the months immediately thereafter, pundits painted a picture of Van Rompuy as a grey, colourless figure. Indirectly, speaking only rarely in the first person but clearly identifying the institution he chairs, he is making every effort to prove them wrong. In the sober document that he published under the title *The European Council in 2010*, Herman Van Rompuy shows by successive stages that, at this juncture, he is at the very heart of the European game.

He begins by saying that, with the Treaty, "the European Council formally became a fully fledged institution" with a "permanent President" to impart greater consistency and continuity to its work, and "the first year has proven that this idea was worthwhile". Moreover, this new institution is without doubt the institution of the leaders: "in our meetings, only the leaders and the High Representative [of the Union for Foreign Affairs and Security Policy] take part in the work […]".

The vagaries of politics ensure that the members of this little get-together change fairly frequently: over the years "we welcomed six new colleagues [more than 20% of the total], and said goodbye to six former ones". That observation can be interpreted as a modicum of personal trumpet-blowing by Van Rompuy because it amounts to highlighting, by contrast, the usefulness of having a President like himself, who is "permanent".

Events have dictated that the European Council, and Van Rompuy himself, have made the most marked progress in the economic field (*see below: The Crisis and the Treaty*). In his review, Herman Van Rompuy dwells in particular on summarising the numerous decisions reached in the course of several summits, in order to address the Greek debt crisis (for a start) and the euro crisis, highlighting the fact that "the decisions we have taken, notably in May, October and December, constitute the biggest reform of the Economic and Monetary Union (EMU) since the euro was created".

He remains relatively discreet, however, with regard to his own profile. Yet Herman Van Rompuy summoned (on being urged to do so, on at least one occasion, by the German Chancellor and the French President) and chaired two euro zone member country summits, on 25 March and 7 May. These two meetings are a new development. A similar meeting had been held in the second semester of 2008, when France held the Union's six-monthly duty presidency, but it was convened by the French President under the pressure of urgency, in view of the financial crisis which was rocking Europe in the wake of the US Lehman Brothers bank's failure. Another consequence of the crisis was that Herman Van Rompuy was the man tasked by the European Council with chairing a task force on the economic governance of the Union in March.

The "permanent" President took up a stance very early on in the breach opened up by the financial and economic earthquakes that had rocked the Community edifice. He had barely taken office when he convened an informal "summit" on 11 February to discuss the climate and the economy. Three weeks later he shattered a taboo by telling the students at the College of Europe in Bruges[11]: "All the members of the European Council were willing to take more responsibility for these economic issues. […] The first result is that the European Council becomes something like the '*gouvernement économique*' [economic governance] of the EU, as some would call it."

Speaking in Lille a month and a half later, he was even more explicit: "The members of the European Council think, as I do, that the European Council must play an economic governance role […]". Given that the expression "economic governance" – and indeed the very concept, of French origin – irritated Berlin, "setting his seal of approval" on it in the Council's name was not an obvious or an easy thing to do.

Turning to international policy (*see below: Catherine Ashton and the European External Action Service*), in addition to the bilateral summits that took place throughout the year and to the two European Council meetings devoted to international policy mentioned above, Herman Van Rompuy specified, in his review

11. Herman Van Rompuy's address to the College of Europe in Bruges, 11.02.2010: http://www.coleurop.be/file/content/news/Speeches/20100225_Speech%20VanRompuy.pdf

of the year, that he attended the NATO and OSCE summits, and even boasted of having travelled twice to the western Balkans and having met with the Ukrainian President on fully four separate occasions….

1.1.3. Progress and Hesitation

If we consider the ground covered by Herman Van Rompuy from when the European Council appointed him in mid-November 2009 to the spring of 2011, we can see that he has worked, and manoeuvred with skill and expertise. The Lisbon Treaty, in its (probably deliberate) vagueness, allowed the first holder of the permanent President's post a broad margin for appraisal and freedom of movement. Maintaining a very low profile, Van Rompuy wasted no time in deciding that he was going to multiply the number of "summits" – some people have even mentioned the figure of ten or so summits a year –, then he proved capable of grasping opportunities as soon as they presented themselves (in this case, the economic and financial crisis) in order to give himself a more substantial role than he was expected to play (or certainly, than many expected him to play). Yet we may surmise that his personal skill has benefited from precious support in certain capitals: Berlin and Paris, in particular, have often given the impression that they are "rooting for" the permanent President of the European Council rather than for the Commission President.

He has also carved out a certain amount of room for himself in the field of international policy – necessarily less rewarding because there is no such thing as a European foreign policy in any real sense of the term –, and he has been incidentally helped in this task by the shilly-shallying of the European External Action Service (*see below*).

In the efforts that he has been making to forge the context and content, on a day-by-day basis, of a function that the Treaty fails to describe in any detail, the permanent President has inevitably encountered obstacles. He hinted at them in an interview carried in *Le Monde*[12]: "I have managed to avert the emergence of clashes among the institutions and among individuals. The Lisbon Treaty is a good treaty but there

12. Interview with Herman Van Rompuy, "Van Rompuy: 'Nous serons prêts à intervenir en Grèce'", *Le Monde*, 10.04.2010.

are a lot of gaps in it, also regarding my own function". He goes on to illustrate his argument with examples.

His ties with the Commission President? "We have come to an arrangement over the Union's external representation. The Commission is in charge of its own areas of authority, while I am in charge of external and security policy. But there are certain grey areas where the division is not clear. […] We have concluded a written agreement and I think it will work. It all depends on relations between the individuals involved. And given that those relations are good, I assume that we will be able to settle the whole thing in a pragmatic fashion […]".

Things are not exactly simple regarding the Union's rotating presidency either (the six-monthly duty presidencies do indeed continue to exist): "The President of the European Council [i.e. Van Rompuy himself] provides political input on behalf of the heads of state and government leaders, but he does not play a role in either the executive or the legislative powers. This is really a very unique case. He has no links with one of the Union's vital institutions, namely the European Council as such, which continues to be in the hands of the rotating duty presidency. So I need to make sure that I am on good terms with every member of the rotating duty presidency, in other words not only with the Prime minister of the country holding it but also with that country's cabinet ministers […]".

His considerations need to be set in context: when Herman Van Rompuy uttered those words, he was chairing the European Council for the first time and Spain, which held the EU's rotating duty presidency, was not taking particularly kindly to the innovation. Van Rompuy's life undoubtedly became easier under the Belgian presidency in the second semester of the year. But the fact remains that the reasons behind the institutional awkwardness experienced by the permanent President are unlikely simply to disappear, in part at least, because they are rooted in the text of the Treaty itself.

Herman Van Rompuy has attracted a great deal of criticism for failing to establish his leadership, for failing to impart the desirable profile to the presidential post whose first holder he is. The famous anecdote in which Kissinger asks: "What is Europe's phone number?" has been dragged back out of the cupboard, with people saying

either scornfully or regretfully that Kissinger still would not get an answer to his question today… This criticism, generally levelled at him by the press or by certain MEPs, appears to be somewhat premature, however, because Herman Van Rompuy has only been in office for just over a year and he basically has to invent his job in its entirety. It is also rather unfair because, on account of the economic crisis in particular, he has been more than the mere "chairman" provided for in the Treaty. His role is not an easy one to carry off, because if he adopts too high a profile he is in danger of antagonising all of the other European Council members.

On the other hand, even though his real power is limited, the slightest lapse on his part can have major repercussions in view of his title and function. We saw this on 16 November 2010 when this man who generally weighs his words and chooses them with the greatest care, gave an unfortunate reply to journalists questioning him on the balance of forces between the various capitals and the European institutions. Journalist Philippe Ricard wrote: "In his irritation, the European Council President made it clear that there were more important issues to address at a time when the euro zone was 'struggling to survive'."[13] His reaction did not go unnoticed! Thankfully the markets did not take him literally, but we probably came very close to a catastrophe on that day.

What should we think, in the longer term, of this new function that is the permanent presidency of the European Council? It seems likely that Van Rompuy will be confirmed for a second two-and-half-year mandate in mid-2012. If he is, then he will have become a kind of set feature of a group whose members are bound to change fairly often due to the ground rules of democracy. On the other hand, he will have designed the suit his successor is going to have to don, and he will have established a code of relations with the other European institutions and their policy-makers. So his responsibilities are certainly not trivial.

Will we be seeing the functions of the European Council's permanent President and those of the Commission's President being merged one day, as Commissioner Michel Barnier recommended that they should be on 9 May 2011? The idea of

13. Philippe Ricard, "En un an, le traité de Lisbonne a exacerbé les rivalités de pouvoir à Bruxelles", *Le Monde*, 02.12.2010.

this "double hat" was debated at the Convention on the Future of Europe. The representatives of certain demographically small or medium countries were in favour. The larger countries, on the other hand, were overtly hostile, because the holder of this dual presidency would enjoy the kind of power that would cast far too large a shadow over them. Nor, indeed, is it a foregone conclusion that such hostility can be overcome in the near future.

1.2. Catherine Ashton and the European External Action Service

In addition to the creation of a "permanent" President of the European Council, the Lisbon Treaty also established a second high-profile post, that of High Representative of the Union for Foreign Affairs and Security Policy – or, for the sake of brevity, the High Representative. The title itself already existed before the Treaty, but the holder's function was developed enormously. The title was maintained because several governments, with London heading the list, rejected the appellation of European Foreign minister used in the Constitutional Treaty nixed by the French and the Dutch in 2005.

But while the devising and installing of a European Council President was easy to achieve fairly rapidly, things were to prove very different for the High Representative.

The permanent President is a single individual and a single function. The High Representative, on the other hand, is a single individual who performs several functions: he or she is in charge of foreign policy and is appointed by the European Council for that purpose; he or she is also Vice-President of the European Commission and permanent President of the Foreign Ministers' Council. In addition, this individual, known as "three-hatted" on account of his or her triple function, heads up another body spawned by the Lisbon Treaty: the European External Action Service (EEAS). Article 27 in the Treaty specifies that the diplomatic service must comprise "officials from relevant departments of the Secretariat General, of the Council and of the Commission as well as staff seconded from national diplomatic services of the Member States". It has been stipulated that national diplomats must account for at least one-third of overall staff by 2013. Until 1 July

2013, recruitment will be restricted to officials from the Commission and from the Secretariat General of the Council. The size of the full complement of staff – 3,500 officers in June 2011 – is to be set each year in the context of budgetary procedure.

1.2.1. Development and Controversies

Taken all together, these criteria have raised a number of technical, budgetary and political difficulties – many of which are at least partly overlapping – which explains why the EEAS only saw the light of day a full year after the Treaty came into force. Britain's Catherine Ashton, who was appointed to the post of High Representative by the European Council, had to begin by working on a blueprint for the organisation of her diplomatic service. She put forward her proposal in March 2010. That was followed by a lengthy period of debate and negotiation with the Council, the Commission and Parliament. A political agreement on the future service's establishment was only reached on 21 June and it took well over a month more before the decision was published in the *Official Journal of the European Union*. But the obstacle race was by no means over yet. Parliament wanted to be able to have its say in the running of the EEAS, so it unsheathed the budgetary weapon: it only gave the go-ahead in October, after changes had been made to the Union's financial regulation, to the staff regulations, and to the 2010 budget. The Council then had to ratify these decisions (which it did on 17 November 2010) for this laborious birthing process to be considered complete.

In parallel with the obstacle race that the High Representative had to address in order for "her" diplomatic service to be able finally to take its first steps, she also had to cope with an avalanche of often violent criticism from all sides levelled both at her performance (or rather, at the lack thereof, as her adversaries put it) and at her personally.

No sooner had she been appointed than we saw a spate of unflattering commentaries both in the press and in Brussels circles targeting her lack of experience in the field of international politics, her lack of personal charisma, and, in the background, her nationality: many felt it was ironic that a Briton, of all people, should head up the European diplomatic service.

That criticism became even sharper and more specific after she took office, even before the European Commission (whose Vice-President she is) had won Parliament's investiture. The reason was the tragic situation in Haiti, which had been devastated by an earthquake on 12 January 2010. Ashton, who was preparing her first trip to the United States, did not feel the need to visit Port-au-Prince: "I am neither a doctor nor a fireman", she replied to those criticising her in that connection[14].

To take full possession of her office and to take up her position on the international stage, she began to travel: Haiti on 4 March, six weeks after the catastrophe, and Gaza and Israel on 14 March, but she had "bunked off" on the EU-Morocco meeting a week earlier. Lastly, she travelled to China between the end of August and early September, but French Minister Kouchner and the EPP (European People's Party; center-right) floor leader in the European Parliament both faulted her for failing to opt, instead, to attend the resumption of negotiations between the Israelis and the Palestinians in Washington…

1.2.2. First Steps

The first appointments to the European External Action Service were made at the end of October 2010, consisting of an executive secretary general (Pierre Vimont), an administrative director general (David O'Sullivan), and immediately thereafter two deputy secretary generals (Helga Schmid and Marciej Popowski). All four took office on 1 December 2010, exactly one year after the Treaty had come into force. But the service itself did not become officially active until a month later, on 1 January, after being endowed with a budget (464 million euro for 2011).

The personnel situation gradually began to fill out with the appointment of the chiefs of the six geographic and theme-based directorates general and with the first appointments of Union's representation heads, making a total network of 136 "ambassadors" under Catherine Ashton's authority. Choosing her principal aides and mission chiefs was a sensitive task because it was necessary to combine competence, nationality and gender parity with institutional origin (Commission,

14. Philippe Ricard, "En Europe, premières critiques contre Mme Ashton à l'occasion du séisme en Haïti", *Le Monde,* 23.01.2010.

Council Secretariat, national diplomatic services), as far as possible, and all under the watchful eye of the governments and of Parliament.

In accordance with the Lisbon Treaty, given that the High Representative is in charge of the Union's external action, several commissioners come under her guiding hand, theoretically at least: the Commissioner for Development (Andris Piebalgs), the Commissioner for Enlargement and Neighbourhood policy (Štefan Füle), the Commissioner for International cooperation, Humanitarian aid and Crisis response (Kristalina Georgieva) and in part at least, also the Commissioner in charge of Trade (Karel de Gucht). But out of pragmatism – and probably also to avoid humouring them – her relations with them have not been coerced into any kind of hierarchy whatsoever. In Brussels they call it "interservice cooperation and an obligation to inform regarding everything to do with external action". Catherine Ashton also has to coordinate the various tools for external aid – in other words, she calls the shots with regard to managing the funds[15] that the Union devotes to the countries it wishes to support.

1.2.3. A Poorly Defined Post, an Ambiguous Role

The Lisbon Treaty spawned both the office of High Representative and the diplomatic service attached to it. Its implementation, after just over a year has gone by since it came into being, has produced a great deal of bitterness, as voiced in particular by the MEPs. The parliamentarians levelled strong criticism at Ashton, for instance, for failing to call for Egyptian President Mubarak's departure when protests were being staged in Cairo to achieve his downfall; for failing to travel to Oslo in December to attend the ceremony in the course of which Chinese dissident Lin Xiaobo was awarded the Nobel Peace Prize; for both her and her diplomatic service having proven unequal to the Egyptian and Tunisian "springs" – the parliamentarians are calling for a review of the European Neighbourhood Policy (ENP), an idea to which the High Representative has subscribed; and so forth.

15. These are the instruments for development cooperation, for good-neighbourhood and partnership, for cooperation with industrialised countries, for stability, for democracy and for human rights, the instruments relating to cooperation on nuclear safety, and lastly the European Development Fund (EDF).

What all of this proves, at a moment in history so rich in international developments, is that the fact that we now have a European officer in charge of foreign policy has not lived up to people's expectations so far. *Le Monde*[16] cruelly voiced this broadly-felt sense of disillusionment thus: "There is a joke going the rounds in Brussels. In the olden days the United States didn't know Europe's phone number. Now they call Mrs. Ashton, and in her absence, an answering machine tells them: for France's position, press 1; for Germany's position, press 2; for the United Kingdom's position, press 3, and so on."

De facto, the Lisbon Treaty does not appear to have made the distribution of roles any clearer within the EU. For instance, when the street protesters in Cairo were calling for Mubarak's departure, Catherine Ashton chaired a Foreign Ministers' Council meeting (on 31 January) which issued a statement to the effect that "it is necessary to urgently respond to the aspirations" of the population. But two days earlier, on 29 January, David Cameron, Angela Merkel and Nicolas Sarkozy had issued a joint statement calling on Hosni Mubarak to "rapidly" implement "reforms" and to call "a free and fair election"[17]. Addressing MEPs on 2 February, the High Representative said that "change [in Egypt] must come now". The very next day Berlin, London and Paris issued another statement, also subscribed to on this occasion by Italy's Berlusconi and by Spain's Zapatero, saying that the transition process "must begin now."

Two weeks earlier, referring to the issue of a common foreign policy at a conference organized by Socialist MEPs, Catherine Ashton had explained that "the Union must not speak with a single voice but with 27 voices putting the same message across…". In this case those voices were indeed convergent, but the voices that people hear are those of the governments – or to be precise, those of the "larger" Member States.

In early March 2011 Berlin, London and Paris were working on imparting a fresh thrust to peace negotiations in the Middle East ahead of an upcoming meeting of the Quartet. Mrs. Ashton's name was not even mentioned, even though the Quartet

16. Jean-Pierre Stroobants, "Les Vingt-Sept tardent à formuler une réponse commune", *Le Monde*, 02.03.2011.
17. Natalie Nougayrède, Philippe Ricard, "Londres, Paris et Berlin appellent à un 'processus de changement' en Egypte", *Le Monde*, 01.02.2011.

is a diplomatic group in which it is the EU that sits alongside the United States, Russia and the United Nations. In the past the EU has always been represented by the commissioner for external relations (a position which has now merged with the High Representative's office).

On 23 February the Commission President met with the UN High Commissioner for Human Rights at the United Nations in New York. He took the opportunity to state that the repression being practiced by Colonel Al-Qadhafi on the Libyan protesters who were calling for freedom was "intolerable". He called for a stop to the Libyan Army's violence and, referring to the liberation movement, he added: "We have the tools and the means to help this struggle". In adopting that stance, José Manuel Barroso was unquestionably in line with the Union's overall sentiment – but when foreign policy is involved, it is the job of the High Representative, or of the European Council's permanent President "at his level", to voice the Union's opinion. We may be justified in fearing a "blurring" effect: the issue of who exactly embodies Europe may well not be totally clear yet to the Union's partners.

It is true to say, however, that the Union's position itself was not clear. In fact, it even came across as a cacophony: on 10 March 2011 Parliament approved a resolution virtually ordering Catherine Ashton to establish ties with the National Transitional Council (NTC) representing the rebels; on 27 March the Twenty-seven demanded Al-Qadhafi's immediate departure… but less than a week earlier, at a UN Security Council meeting, Germany failed to back France and the United Kingdom in their call for military intervention. In the end, the Member States said that they wished to act "as a team" – but each one in his own way: the French and the British side by side, with the Germans, the Poles and few others remaining on a different wavelength. Under such circumstances it is difficult to speak in everyone's name.

But by contrast with these various developments, which have not always been totally positive, the High Representative has introduced two dynamic notions: a European Neighbourhood Policy (ENP) rethought, revised and adapted to cater for the changes that have taken place on the Mediterranean's southern rim (changes generally lumped together under the name of "Arab spring") – and indeed the Commission and its President José Manuel Barroso are working on this policy;

and a new notion that goes by the name of "deep democracy"[18], which Catherine Ashton first mentioned in a column in the press and which is worth clarifying and developing.

And lastly, in the plus column we should add, for this period, the fact that the Union as a political entity won initial recognition on 3 May 2011, when the UN General Assembly offered it observer status (by 180 votes to 2, with 10 abstentions). In that capacity, it cannot take part in voting, put forward candidates or append its signature to resolutions or decisions, but its representatives can take part in sessions and working groups, they can register on the speakers' list and they can exercise the right to reply. This is very probably a consequence of the Lisbon Treaty and of the changes that it has wrought. According to the Commission services, the High Representative is the person who will be putting forward the European Union's viewpoint at the United Nations.

1.3. The Trio, Joint European Presidencies

In an effort to ensure the continuity of Europe's diplomatic action, it became customary in the 1970s to form a "*troika*" of Foreign ministers (or their aides) comprising the ministers of the previous, current, and subsequent duty presidencies. The Amsterdam Treaty replaced this trio with a different triple act comprising the current duty presidency, the Secretary general of the Council and the High Representative for a Common Foreign and Security Policy (CFSP).

In the same spirit, but without being restricted to foreign policy, the Member States holding the Union's rotating duty presidency have adopted the habit in more recent years of working with the two presidencies situated upstream and downstream of their own. The Lisbon Treaty has both formalised the association of three successive rotating duty presidencies and modified the composition of what has been christened "the trio": "The presidency of the Council, with the exception of the Foreign Affairs configuration, shall be held by pre-established groups of

18. Article by Catherine Ashton, "The EU wants 'deep democracy' to take root in Egypt and Tunisia", *The Guardian,* 04.02.2011.

three Member States for a period of 18 months. [...] Each member of the group shall in turn chair for a six-month period all configurations of the Council [...]"[19].

This measure was inaugurated, as soon as the Treaty came into force, by a trio comprising Spain, Belgium and Hungary. Poland, which holds the duty presidency in the second half of 2011, is associated with Denmark and with Cyprus – its two successors. All three also agreed to consult with the next trio (Ireland, Lithuania and Greece) when they started working on their agenda, so that the Union will then be working on a three-year outlook.

The unforeseen events that commonly pepper our lives will unquestionably lead to changes in the agenda, but all the same, the establishment of a trio comes in addition to the permanent presidency of the European Council and to the High Representative's five-year mandate, to counterbalance as much as possible the fragmentation in the actions and statements of a Union of twenty-seven Member States with different interests, traditions and political timetables.

Thus Europe's citizens should benefit from greater consistency in their leaders' political actions, while the EU's partner countries should find it easier to interpret Europe's inclinations.

19. Declaration (n° 9): Declaration on Article 16(9) of the Treaty on European Union concerning the European Council decision on the exercise of the presidency of the Council.

II – A Conquering European Parliament

Jacques Delors once compared the European Union to a UPO – an unidentified political object… While its institutional system does indeed bear no resemblance to any other, it does have a certain kinship, nonetheless, with the representative democracies of which it is in some ways a product – especially in its Parliament, which has been elected by direct universal suffrage since 1979.

Even if the heads of state and government leaders enjoy unquestioned democratic legitimacy inasmuch as they hold their power from the electorate, it is the parliamentarians who most closely represent the citizens. And progress in Europe's democratic life is measured largely by the yardstick of parliamentary power. That is why successive treaties have regularly expanded the MEPs' powers – and the Lisbon Treaty has perhaps done so to a greater extent than any of the others, because it has made Parliament a co-legislator on an equal footing with the governments in virtually every field other than foreign and defence policy.

No sooner had the Treaty come into force than Parliament endeavoured to make full use of all the new powers offered to it – showing no hesitation in even using some of its new rights, if it felt the need to do so, as a means of bringing pressure to bear on its institutional partners in the course of negotiations.

Parliament has shown itself to be very active and effective towards the rest of the world in connection with such international treaties as the TFTP (or "Swift"), the PNR or the ACTA *(see below)*.

The MEPs have been equally aggressive in connection with the Union's institutional life, in other words in their relations with the Council and the Commission. Here are a few examples of such conduct.

2.1. The Agreement between the Parliament and the Commission

In March 1999 the Commission chaired by Jacques Santer, charged with mismanagement and threatened with a motion of censure by Parliament, ended up throwing in the towel. In acting in this way, the MEPs were attempting to gain the upper hand over the Brussels-based Commission. They reaped the benefits of this operation later by forging an agreement with the Commission, a kind of contract for the legislative term involving mutual commitments – but in general terms the Commission gave more ground than it gained.

Strengthened by the Lisbon Treaty, the European Parliament elected in 2009 continued to pursue that path and the Commission President made no attempt to hinder it. This state of affairs spawned a framework accord, signed on 20 October 2010 by Commission President José Manuel Barroso and by Parliament Speaker Jerzy Buzek (published in the *Official Journal of the European Union* a month later).

Now, the governments (in other words, the EU Council) felt that Mr. Barroso had gone too far in making as many concessions to the MEPs as he did. They questioned the agreement the very day after it was signed, voicing the view that some of the things enshrined in it went beyond the stipulations of the Treaty – especially with regard to international negotiations (the Commission bound itself, for instance, to

take the MEPs' views and comments into account throughout such negotiations) or to the potential dissemination of confidential information to the MEPs, including during international negotiations.

The Council had felt concern as early as in July when it first learned of the framework agreement, and it had voiced that concern to the Belgian duty presidency. It feared that the accord might modify the institutional balances as set out in the Treaty: the Council members apparently thought that Parliament might end up gaining too much of an ascendancy over the Commission and that the two institutions were possibly planning to forge some kind of alliance which would acquire excessive clout by comparison with the Council itself. When the agreement was finally signed, with no regard for the fears voiced by the Council, the Council warned that it would appeal to the Court of Justice if, in flagrant disregard for the Treaty, the agreement's implementation led Parliament and the Commission to encroach on its prerogatives.

2.2. The Budget Battle

Until the Lisbon Treaty came into force, the European Parliament had very few rights in budgetary affairs. It had traditionally been the case, since 1975, that a distinction was made between two spending categories: compulsory expenditure (CE) – which basically boiled down to agricultural policy – and non-compulsory expenditure (NCE). The Council had authority over the CE, which was far and away the heftiest slice of the cake, while Parliament held sway over the NCE, the smaller portion of the budget. The Lisbon Treaty has abolished that distinction: budgetary procedure demands that the European Parliament and the Council adopt the EU budget jointly; yet this procedure differs in some ways from the "ordinary legislative procedure" in force for legislation. On the spending side, Parliament's budgetary power has thus been strengthened in a big way – even to the point where, in the event of a disagreement between the governments and Parliament, Article 314(7) (d) (TFEU) states that, under certain circumstances, it is the MEPs rather than the Council who have the last word.

On the income side, the situation has not move forward in the same way: the power of decision-making rests with the Member States, not with the MEPs. The Union's

income basically comes from "its own resources", with a ceiling set at 1.24 percent of Europe's Gross National Income (GNI). That income comes from four different sources: agricultural levies, customs duty and a percentage of VAT, which were joined in 1988 by Member States paying a fraction of their gross domestic product (GDP). But when times are hard, the governments fight tooth and nail to avoid increasing their financial contribution, or even to have it cut. They tend to debate the issue of "net balances", in other words the difference between what they pay into the Union and what they get back – a budgetary rationale that is a move away from the notions of community and solidarity[20]. In an effort to counter this trend, Parliament has been campaigning for the creation of a new resource of its own, for instance a carbon tax, which the Union would collect directly and which would thus make it possible to shelve the debate on net balances. This has become a possibility under the Lisbon Treaty, in which Article 311 (TFEU) states that the Council may, "unanimously and after consulting the European Parliament", decide to create a new source of income. The MEPs insisted with the Commission that this article be implemented, and in late 2010 Commission President José Manuel Barroso promised them that he would make a proposal in that sense in mid-2011.

No sooner had the Treaty come into force than the MEPs decided to assert their new rights without delay. In this particular instance, given that the governments opted in this time of lean years for a 2011 budget that was only slightly up on 2010 (+2.9% for payment appropriations), the MEPs chose a strategy based on not seeking to up the stakes but on accepting that proposal. This, however, only on condition that they were given pledges for the following year. Budget Committee Chairman Alain Lamassoure was quite clear on that score: "In our view, the negotiation of the budget for 2011, the first budget since the Lisbon Treaty came into force, must be accompanied by a political agreement guaranteeing the future funding of the Union's policies"[21]. Among other things, the MEPs voiced the hope that the Council agrees to introduce a certain amount of "flexibility" in the budget's implementation so that emergencies can be addressed, and that it accepts the principle of involving Parliament in debates on the future multiannual financial framework and the Union's own resources (the idea, thanks for instance to the

20. In this connection see Jacques Le Cacheux, "European budget : the poisonous budget rebate debate", Study N°41, Notre Europe, December 2005: http://www.notre-europe.eu/uploads/tx_publication/Etud41-en.pdf
21. European Parliament, Debates, 19.10.2010: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20101019+ITEM-012+DOC+XML+V0//EN&query=INTERV&detail=2-313

"carbon tax" mentioned above, being to ensure that the EU has a direct resource of its own that is independent of national budgets).

In the course of this trial of strength, the MEPs were able to rely on the Commission for support because its President, José Manuel Barroso, broadly backed their position – to the point where, in the end, on 15 December 2010 Parliament approved the budget after what its services described as a victory: "Beyond the 2011 budget, Thursday's decision was made possible through a decisive deal reached with the EU presidency which safeguards Parliament's involvement in future budget negotiations as foreseen by the Lisbon Treaty. The Member States assuring the EU presidency over the next two years have undertaken to involve it in the preparation of the forthcoming long term financial framework, which will be negotiated in parallel with the re-examination of the budget's Own Resources", a communiqué states[22].

Thus MEPs are going to be playing a major role in defining the next multiannual financial framework (MFF), which is supposed to cover the period 2014-2020, although some people would like to see that period reduced to five years to make the MFF's duration coincide with the duration of both the parliamentary legislative term and the Commission's five-year term of tenure. But right now they are eager to make their mark on the Union's next annual budget. At the start of the procedure the different institutions' viewpoints frequently tend to diverge to a considerable degree. Thus the Commission (whose job it is to submit the draft budget), the Council and Parliament endeavour to bring their positions closer to one another in an effort to thrash out a point of balance at the end of their attempt at conciliation. It is with this in view that a trilogue, or debate among these three institutions, has been planned for 11 July 2011.

To make sure that its positions were quite clear to everyone, Parliament approved a resolution[23] on 23 June 2011, which is a mandate for these negotiations. For instance, Parliament says that it is "disappointed that no payment appropriation has been proposed by the Commission" in the spheres which the Lisbon Treaty has

22. European Parliament, "EU budget for 2011: towards the final decision": http://www.europarl.europa.eu/en/headlines/content/20100923FCS83457/2/html/EU-budget-for-2011-towards-the-final-decision
23. European Parliament, Resolution, "2012 budget: mandate for the trilogue", 2011/2019 (BUD), 23.06.2011: http://www.europarl.europa.eu/oeil/file.jsp?id=5893562&noticeType=null&language=en

opened up to shared authority between the Union and the Member States [and thus also to Parliament's new authority], the spheres in question being "energy, tourism and space". The resolution also states that Parliament "really wonders whether the draft budget presented by the Commission constitutes an appropriate and updated answer to the current challenges facing the EU, not least in the context of the ongoing events in the Southern Mediterranean [...]".

This initial skirmishing suggests that in coming years, and in the first instance when work begins on preparing the next MFF, the MEPs will be conducting a tough battle to win a budgetary effort from the Council, making the most of the new legal tools they now have at their disposal.

2.3. The Fertile Hunting Ground of International Treaties

2.3.1. The Swift Saga

From the very first day of the "Lisbon" era, MEPs were eager to show that they have no intention of allowing the new powers with which the Lisbon Treaty has endowed them to go unused. To do this, their chosen terrain was what was known in Community jargon as the Swift agreement – both a logical and a judicious choice.

It was a logical choice because the substance of that agreement, which went back quite a long way but had only recently acquired a certain notoriety, had already been pitting Parliament and the Commission against the Council, in other words against the governments, for some time. Thus it was a matter of using an existing dispute to highlight the changes wrought by the Treaty in the balance of forces holding sway within the institutional triangle.

And it was a judicious choice because the agreement, concluded in about as untransparent a manner as one could imagine, made it possible to allow the United States access to what was supposed to be confidential financial data regarding European citizens. Thus it was a sensitive topic and Parliament's action in connection with it was both perfectly legitimate, in the name of democracy, and

necessary because, without its intervention, the agreement in question would have been confirmed without many (or indeed any) changes.

Swift (*Society for Worldwide Interbank Financial Telecommunication*) is a cooperative company whose purpose is the transmission and exchange of banking and financial information as well as fund transfers among its subscribers. First set up in 1973 but really only fully operational in 1977, this company, headquartered near Brussels, claimed on its website in early 2011 to have over 9,000 subscribers – financial institutions, businessmen and so forth – in 209 countries. What the company's website does not tell you is that, following the terrorist attack which destroyed the Twin Towers in New York on 11 September 2001, the Swift network secretly allowed the American counterterrorism authorities to access the data that had been entrusted to it.

The existence of the so-called "Swift" agreement (its official title is an acronym, TFTP, which stands for *Terrorism Finance Tracking Program* – a programme designed to track the funding of terrorism) was revealed by the American media in June 2006. The European Parliament responded by calling for a resolution on the establishment of a framework making it possible to guarantee the protection of data regarding European citizens – this, so that any information transmitted is not used for any purpose other than the struggle against terrorism.

Small changes were subsequently made to the agreement, or to its implementation, but the turning point came in July 2009 when it was learned, again through the media, that a new agreement was in the process of being negotiated. Replying to the members of the appropriate parliamentary committee – the Civil Liberties Committee – who had asked him for an explanation, Justice Commissioner Jacques Barrot said that the new agreement (which was indeed being negotiated) would only be a provisional accord so that the EU could then renegotiate the whole affair in accordance with the rules enshrined in the Lisbon Treaty. The European Parliament, for its part, adopted a resolution in September demanding that the agreement provide for the processing of personal data to be in line with European standards and insisting that Parliament be formally involved in the negotiations. The Council responded by agreeing to reopen negotiations with the United States in 2010.

Despite this, the negotiations carried on and a new agreement – the provisional accord mentioned by Commissioner Barrot – was finally signed by the Council on 30 November 2009 when the Lisbon Treaty, which gives the European Parliament new powers in connection with the forging of international agreements, was due to come into force on 1 December: i.e. the very next day!

The European Parliament considered this to be something of a provocation and was inevitably irked by it, particularly in view of the fact that the MEPs had asked for the Council to postpone its adoption of the agreement precisely in order to allow them to exercise their new prerogatives. Despite this, the implementing provisions were published in the *Official Journal of the European Union* on 13 January 2010, for implementation on 1 February for a duration of nine months. A few days later, after Parliament Speaker Jerzy Buzek had addressed several letters to the current duty presidents (Sweden in the second half of 2009, and then Spain), the file was finally submitted to Parliament for its approval.

On 4 February, the agreement having already been in force for three days, Parliament's Civil Liberties Committee refused to give its approval (by 29 votes to 23) despite strong American pressure: Secretary of State Hillary Clinton is even reputed to have contacted Parliament Speaker Jerzy Buzek before the vote. In plenary session a week later, on 11 February, Parliament embraced its committee's view and adopted a resolution rejecting the agreement, by 378 votes to 196 and with 31 abstentions. (Diplomatic cables subsequently disclosed by Wikileaks reveal that Angela Merkel brought pressure to bear on the German MEPs, but to no avail).

Following this vote, the Union's Foreign ministers officially buried the provisional accord on 22 February, and the Commission voiced the hope that new negotiations might begin soon. Spain, which held the Union's duty presidency at the time, joined in the chorus, and the United States agreed shortly after to resume the debate. Parliament had entered the game.

It flagged out its territory by examining the negotiating mandate put together by the Commission for the resumption of talks with Washington. This mandate, adopted in mid-May, had been ballasted along the way by a number of conditions

which the future agreement would be bound to honour if the MEPs were to approve it when the time came. A month later, when the Commission adopted a blueprint for a long-term agreement with the United States on the bank data held by Swift, Parliament obstructed and called on the Spanish duty presidency to partially renegotiate the text initialled by the Commission. Finally, after a few final adjustments, the Union and the United States signed a new accord in late June and Parliament approved it on 8 July 2010 by a very broad majority: 484 votes to 109, with 12 abstentions. Initially valid for five years, the TFTP agreement, known as the "Swift accord", has to be renewed annually thereafter.

The ins and outs of this story are too numerous to go into here, but the upshot is that the Commission had to take heed of Parliament's demands, and the United States had to accept a strengthening of European monitoring of its trackers' work as well as certain restrictions on those trackers' use of European citizens' personal data whether it liked it or not. This, at least, in theory… because in practice the Americans are reputed to only moderately honour their pledges and Europe's oversight bodies hardly excel in stringency. Or at least that is what certain MEPs claim, arguing that they have been "betrayed". At any rate, an assessment with which the Commission has been tasked should make it possible to gauge the exact situation. So the "Swift affair" may not be over yet. Especially as other dossiers, the main thrust of which is similar – namely the protection of citizens' personal data – have attracted Parliament's attention and stirred it into action. This is the case, in particular, of the so-called PNR (*Passenger Name Record*) agreement on the personal data of airline passengers. Here again, EU-US relations and the struggle against terrorism are at the core of the whole issue.

2.3.2. The Thorny Issue of Airline Passengers

The European Union and the United States thrashed out an agreement on the transfer of data gathered by airlines in 2004, but that agreement was invalidated by the European Court of Justice two years later. The European Parliament had been highly critical of the text, both on account of the potentially invasive nature of some of the data involved – civil status, address, bank details, medical information, religion (all it takes is for the passenger to request a special meal), and so forth – but also because the data could be held and used for a very long period of time.

A new agreement was reached in July 2007 in replacement of the earlier accord. This agreement, which envisaged a duration of seven years, was not approved by Parliament. Once again, just as happened with the Swift affair, the Lisbon Treaty's entry into force had changed everything. MEPs were now co-legislators in the spheres of Justice and Home Affairs (JHA in Community jargon) and international accords could no longer be adopted without their agreement (Article 218(6) TFEU). So fresh negotiations loomed and Washington, which up until that moment had been very hostile to the whole idea of the 2007 text being questioned, appears to have resigned itself to the prospect. US Homeland Security Secretary Janet Napolitano, a realist, agreed on 9 December 2010 that the accord "can always be improved upon". So the European Parliament is going to have another opportunity to "flag out its territory".

In this case, Parliament is probably going to push its role forward in cooperation with the Commission rather than at its expense. Justice Commissioner Viviane Reding would like to forge a framework agreement with the Americans covering all of the issues relating to the transfer (and protection) of personal data. That may take years of negotiating to achieve, but if she devotes her full energy to the task, she should be able to count on the MEPs' support[24].

The right of veto over international agreements, which the Lisbon Treaty has bestowed on Parliament, is not merely a fantastic weapon for allowing it to vie with the other institutions (the Commission, the Council and even the European Council); it also allows it to assert itself with third countries, and thus to achieve a higher profile in the international arena. This became clear in connection with the TFTP (Swift) and PNR agreements. Both cases were essentially (though not exclusively) examples of a diplomatic showdown between the Union and the United States. The ACTA (*Anti-Counterfeiting Trade Agreement*) accord, on the other hand, is a different matter altogether both in its scope and in its nature.

24. In this context, one might also note that there is an internal debate within the Union regarding the kind of data conversation telecommunications companies (telephone and Internet) are obliged to comply with in the context of the struggle against terrorism and organised crime. This is regulated by a directive of 2006, which defines its principles and regulates its operation, but which is disputed by several Member States and very poorly implemented. Theoretically, the text is due to be modified in the course of 2011.

2.3.3. Intellectual Property Rights: The ACTA Agreement

This occasion saw the Union battling against ten other countries (Australia, Canada, South Korea, the United States, Japan, Morocco, Mexico, New Zealand, Singapore and Switzerland). The object of the dispute was the protection of intellectual property rights, in the broadest sense of the term because they cover not only apparel, spare parts, medicinal drugs and so forth, but also music or images (films) illegally downloaded off the Internet. The Europeans also wanted to include, among other things, registered designations of origin and copyright.

The existence of these negotiations, which got under way in 2007, was only discovered in May 2008 thanks to the community website Wikileaks. Secrecy, however, was maintained with regard to the negotiators' meetings and, above all, with regard to the substance of their talks[25]. The Union's representatives – in this case Karel De Gucht, the Commissioner in charge of Trade, and his team – and the representatives of the ten other countries involved in the negotiations continued to pursue their talks without stopping […] and without providing any information. But the Lisbon Treaty came into force in the fullness of time, and the MEPs seized on the topic with alacrity. On 10 March 2010 Parliament almost unanimously (633 votes to 13, with 16 abstentions) approved a resolution calling the college of commissioners to order, because the Treaty specifies that it must keep Parliament constantly updated as international negotiations move forward. To achieve a proper balance, the governments (the Council) and the Commission were kindly requested to honour their obligation of transparency by sending the MEPs all documents relating to the draft agreement, and to abandon the secrecy which had been the rule hitherto. Their determination was all the more marked because only the day before, Commissioner De Gucht had argued the principle of the talks' confidentiality before a plenary assembly. For the rest of 2010 the negotiators carried on with their work and finally achieved an agreement in the course of a session held in Tokyo from 23 September to 2 October. A final technical meeting in early December then allowed the negotiators to (theoretically) wrap up the ACTA agreement. But that may not be the end of the story. The accord has yet to be signed and ratified by the countries party to it, and also to be formally approved

25. This is reminiscent to some extent of the MIA (Multilateral Investment Agreement) affair conducted under the aegis of the OECD in 1995, revealed by the American press and certain aspects of which caused a scandal in France and in several other European countries, to the point where the project was effectively abandoned.

by the European Parliament. Now, while Parliament approved a resolution in favour of the accord in November 2010 (and moreover, only by a narrow majority, with 331 in favour and 294 against) on the strength of the argument that it was a step in the right direction, that is still a very different matter from giving it the final go-ahead. Several major political groups continue to be unhappy with it, and the MEPs will probably attempt to win a few more concessions before giving the agreement their final approval.

2.3.4. A Power Tool for Parliament With a Huge Potential

So the European Parliament has immediately discovered an ideal terrain on which to assert its authority by taking advantage of the new powers with which it has been endowed by the Lisbon Treaty. The MEPs, who know the Lisbon Treaty like the back of their hands – they contributed massively to the drafting of the Constitutional Treaty (which the French and the Dutch threw out), and the Lisbon Treaty is an offshoot of that –, were also familiar with the Swift agreement because they evinced concern over its existence the moment the American media first started talking about it in 2006.

In fighting for the protection of European citizens' personal data, the MEPs are clearly playing their proper role. It is a good cause, and the level of interpretation is exactly that of the European Union because the agreement was thrashed out by Washington and the Twenty-seven – or rather the Fifteen, because the whole thing got under way after the terrorist attack on 11 September 2001, thus before the Union's massive expansion to include Eastern Europe. And what is more, they now have the right tools to work with, because the Lisbon Treaty stipulates that international agreements now require the European Parliament's endorsement in the form of its "assent procedure", which is tantamount to giving it the right of veto. In addition, Parliament's sphere of authority in the field of police and justice has expanded considerably. In defending a just cause and having the power to say "no", in addition to being already familiar with the broader outlines of the issue, the MEPs were perfectly positioned to go on the offensive on 1 December 2009, the day the Lisbon Treaty came into force.

The same thing is true of the PNR agreement, even if it did follow a different narrative. But above and beyond these two specific agreements, the European Parliament generally pays a great deal of attention to the diplomatic debate which, on a broader level, the European Union and the United States are devoting to the thorny issue of personal data protection. The two parties are going to find it tough to come up with an accord because it is a highly sensitive topic that involves both the struggle against terrorism – thus countries' security – and the protection of citizens' private lives as envisaged on either side of the Atlantic (although Washington notoriously takes a different view according to which side of the ocean it is talking about). But the Lisbon Treaty has also complicated the matter. Thus in the course of a ministerial meeting devoted to the issue in the American capital in December 2010, US Homeland Security Chief Janet Napolitano was accompanied by Attorney General Holder, while the Europeans were represented by the Belgian duty presidency in its final days (three people), by the Hungarian duty presidency which was about to take its place (three people), by Home Affairs Commissioner Cecilia Malmström and by Justice Commissioner Viviane Reding. This kind of asymmetrical situation is nothing new in transatlantic relations, but at this juncture another major player has appeared in the background: the European Parliament, which the European negotiators have a theoretical obligation to keep constantly updated and which, when all is said and done, has the final word…

The ACTA agreement on intellectual property rights is of a different nature – it is a multilateral negotiation involving 37 countries (counting the Union's Member States) and concerning trade – and for that very reason it allows Parliament, in its defence of European citizens' interests and of their fundamental rights, to parade its new capacity as a necessary interlocutor even more widely on the international stage.

Yet Parliament's presence in international affairs is going to be felt increasingly, well beyond the protection of European citizens' rights and interests. It gave us an indication of that, for example, at a bilateral summit between the European Union and Russia on 9 June 2011. On that occasion, Parliament's political groups warned the governments of their wish to peg all future trade, cooperation or visa policy agreements with Moscow to the guarantees provided (or not) by the Russian Government regarding respect for human rights…

2.4. Delegated Acts: Parliament's Rivalry With the Council

Power struggles between institutions are neither new nor surprising: in democratic systems they constitute the warp and weft of political life. Thus it is only natural that a new treaty, in modifying the previous balance between the various institutional players as it does, should give rise to differences of interpretation, not to say downright disputes. Some of these remain hidden from the public eye despite the fact that they are of potentially enormous political consequence.

This explains why, for months now, Parliament and the Council have been at daggers drawn over the issue of "delegated acts", a class of acts created by the Lisbon Treaty (Article 290 TFEU). This instrument was put forward at the Convention on the Future of Europe, by the working group tasked with the simplification of texts under the guidance of Italy's Giuliano Amato, who also happened to be the Convention's deputy chairman. The article has been applicable since 1 December 2009, the day the Treaty came into force. Its role and functioning have been explained in an article drafted by the European Parliament services and published on its website[26].

According to this article: "It is worthwhile dwelling on one of the measures in the Lisbon Treaty that reforms the procedure known as 'comitology'. The European Parliament's right of scrutiny, democratic oversight and transparency are increased in the decision-making procedures [...] The legislative (the Council and Parliament acting jointly) can delegate implementing powers to the executive (the Commission) [...] That was the purpose of the procedure known as 'comitology': experts would meet under the aegis of the Commission to specify legislative acts, but their power has often been described as being too vast in view of the lack of democratic legitimacy." Henceforth, the article goes on, "comitology has been abolished" and replaced by delegated acts "which can only be adopted after the legislator has explicitly delegated power" and "whose scope will be restricted". Thus, the author concludes, "the requirement for democratic oversight has been re-established".

26. According to European Parliament, "What is comitology and does it still have a role under Lisbon Treaty?" made available on line on 6/4/2010, ref: 20100406STO72095: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+IM-PRESS+20100406STO72095+0+DOC+XML+V0//EN

The change introduced by the Lisbon Treaty is no minor affair, because comitology's lack of transparency sometimes allowed important decisions to be adopted with excessive discretion. An example mentioned in the article illustrates this: "It was using this method [comitology] that the Commission lifted the moratorium on genetically modified maize in 2004, going against the opinion of a majority of Member States and without the European Parliament having a say in the matter".

It has yet to be agreed exactly what issues are or are not covered by delegated acts, and that question conceals a major power issue. Thus Parliament has engaged in a tough battle with the Council on the "humanitarian" terrain. The MEPs want to be able to exercise stronger oversight over the projects and operations that the Union funds in third countries. What is at issue here, in official jargon, are three "financial instruments for external aid". One of the instruments involved is known as the "European Instrument for Democracy and Human Rights (EIDHR)". With funding worth 1.104 billion euro for the period 2007-2013, the initiative can make it possible, for instance, to aid the partisans of the Tunisian democratic movement.

In order to fully exercise its oversight over the Commission's handling of this issue (and in order to allow it to have a say on the same footing as the governments), Parliament wishes to resort to the "delegated acts" method – this new tool created by the Lisbon Treaty, where Article 290 in the TFEU states: "A legislative act may delegate to the Commission the power to adopt non-legislative acts of general application […]". It goes on: "The objectives, content, scope and duration of the delegation of power shall be explicitly defined in the legislative acts [adopted by the Council and by Parliament]" (Article 290-1). The Council is opposed to this claim on Parliament's part, because in adopting such a procedure Parliament would enjoy virtual mastery over part of the policy that Europe pursues in developing countries. An initial parliamentary amendment in that sense was approved in October 2010 but was subsequently rejected by the Council. The MEPs however went back on the warpath at a second reading in the course of a plenary session in February. Irish Gay Mitchell, the rapporteur for the cooperation and development "instrument", highlighted exactly what is at stake in the showdown: "If we lose this battle", he said, speaking at the debate in February, "we may have to wait for a new treaty before we finally get the powers that the Lisbon Treaty gives us right now". The last word had not yet been uttered as this publication went to press.

2.5. BITs: The Parliament and the Council's Rivalry With the Commission

Alliances are not carved in stone in the institutional game, they vary in accordance with the fundamental interests of one or the other party. This means, for instance, that we find the Council and Parliament side by side and pitted against the Commission in connection with bilateral investment treaties (BIT). The Lisbon Treaty has made these agreements the exclusive province of the Brussels college. One of the grounds listed in a legislative resolution that Parliament adopted on 10 May 2011 puts it very clearly indeed: "Following the entry into force of the Treaty of Lisbon, foreign direct investment is included in the list of matters falling under the common commercial policy. In accordance with Article 3(1) (e) of the Treaty on the Functioning of the European Union (hereinafter 'the Treaty'), the Union has exclusive competence with respect to the common commercial policy. Accordingly, only the Union may legislate and adopt legally binding acts within that area."[27]

In view of this, and in accordance with Articles 206 and 207 in the TFEU, the Commission submitted a draft regulation on 7 July 2010 obliging Member States to apprise it of the totality of their existing BITs (there are over 1,000) so that it might study them[28]. In principle, these BITs are authorised to remain in force until their expiry date, but the Brussels executive could review that authorisation if it felt it necessary to do so after studying them. Feeling that the Commission was being too "greedy", the Council and Parliament voiced their disagreement. Brussels's proposal followed the normal legislative procedure and ended in a vote in Parliament on the 10 May draft resolution. The parliamentary version tends to offer greater protection to BITs' signatory countries. But it is a resolution that has only been adopted after a first reading – thus the legislative procedure has to pursue its course and therefore the outcome of this power struggle within the institutions is still uncertain.

27. European Parliament legislative resolution of 10 May 2011 on the proposal for a regulation of the European Parliament and of the Council establishing transitional arrangements for bilateral investment agreements between Member States and third countries: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0206+0+DOC+XML+V0//EN
28. European Commission, "Proposal for a regulation of the European Parliament and of the Council establishing transitional arrangements for bilateral investment agreements between Member States and third countries", 07.07.2010, COM (2010) 344 final: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0344:FIN:EN:PDF

III. The Treaty's Other Areas of Implementation

3.1. New Opportunities As Yet Ungrasped

At the Convention on the Future of Europe, which produced the Constitutional Treaty blueprint that was to spawn the Lisbon Treaty, a strong desire was voiced to see national grassroots opinion play a greater role in European political life. Many of the Convention's members felt that in order to achieve that, it was necessary to forge some kind of interpenetration between the national and European levels in political life, that it was not sufficient simply to endow the MEPs with more extensive powers. Thus two new measures were adopted: the first has spawned a "European citizens' initiative", while the second has given national parliaments the opportunity to intervene in the European legislative effort.

3.1.1. Citizens' Initiative, a Painful Birth

Article 11(1) TEU states that "the institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action". So that is the ultimate aim, and Article 11(4) informs us of the means chosen to achieve that aim: "Not

less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties […]".

This deliberately very unspecific formulation is completed by Article 24(1) TFEU: "The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure [in other words, co-decision], shall adopt the provisions for the procedures and conditions required for a citizens' initiative […] including the minimum number of Member States from which such citizens must come […]". It certainly was not a painless birth.

It required extensive negotiations between the Commission, the Council and Parliament (or rather, its Constitutional Affairs Committee) for all three parties to agree on a compromise and for the regulation finally to be solemnly signed in the parliamentary auditorium on 16 February 2011 – a regulation[29] which, in some ways, constitutes the "right to petition" that the people of Europe have been waiting for. While failing to establish the rules of the game, the text of the Treaty does raise several important questions. What is a "significant" number of Member States? How old does a citizen have to be to sign a petition? What is the minimum number of signatories required for any given Member State (clearly, the same answer cannot apply to Malta and to Germany, for example)? How long can signatures be collected for? And so forth. It is hardly surprising that the three institutions took so long to start singing to same hymn sheet.

The Council and the Commission wanted petitioners to hail from at least one-third of all Member States, while Parliament was talking about one-fifth. They finally settled on one-fourth of all Member States. The Commission wanted to verify a petition's acceptability – petitions can only question aspects of the Treaty's application, not demand any changes to the Treaty itself – after 300,000 signatures have been submitted. The MEPs managed to ensure that that verification is conducted the moment a petition is submitted, which will avoid a pointless waste of time and

29. Regulation of the European Parliament and of the Council nº 211/2011 dated 16.02.2011 concerning citizens' initiatives.

effort. It was agreed that Member States are to retain authority over decisions regarding information and ID required; the minimum age is the same as that required to vote in European elections (18 in every Member State except for Austria, where it is 16); a table lays down the minimum number of signatures required in each of the seven Member States (at least) submitting the petition – thus, 3,750 for Malta and 74,250 for Germany. These minimum thresholds have been obtained by multiplying by 750 the number of MEPs elected in each country (for instance, in Germany's case: 99 x 750), although the Commission is empowered to rectify the figures in relation to any changes that may occur in Parliament.

These measures are due to be reviewed after three years, and given that the Member States have a year to build this regulation into their national codes of law, it will not be possible to launch an "inaugural" petition before 1 April 2012, in the best-case scenario. But we may expect to see requests for petitions flooding in as of day one, because numerous citizens, groups and associations are gearing up for the event. One example may suffice: Two NGOs, Greenpeace and Avaaz, issued a document in early 2010 (and the organisations' officially claim that over one million citizens in the twenty-seven Member States have already signed it) calling on the European Commission for a moratorium on GMOs. The initiative is extremely premature, in fact it may well be too early for it to be acceptable in its original form, because the regulation organising the whole process did not exist at that time.

3.1.2. National Parliaments' New Rights

The President of the Convention on the Future of Europe, Valéry Giscard d'Estaing, said that he would like to see the creation of a "Congress of the Peoples of Europe", which would meet once a year and comprise 700 members of parliament from the Union – one-third of whom should be MEPs and two-thirds national parliamentarians – to hold a debate on the "state of the Union" and, one day perhaps, even to elect a President of Europe. No sooner had he voiced this idea than it came under such a strong and varied barrage of opposing fire that it was rapidly jettisoned. It was triggered by a belief held by Mr. Giscard d'Estaing to the effect that, in his view, it is necessary to get national parliamentarians more closely involved in the Union's political circuit in order to bridge the gap between the national and European spheres.

The answer that the Convention finally came up with for this concern is enshrined in the first two protocols attached to the Lisbon Treaty: national parliamentarians must to some extent be the guarantors of the proper application of Article 5(1) in the Treaty (TEU) which states that: "The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality". To allow them to exercise this oversight, the Commission has to send them copies of any white-paper or green-paper style documents and of the annual legislative programme, just as they must also receive all draft legislation, whether it comes from the Commission, from the European Parliament, from the Council or from any other institution (European Central Bank, Court of Justice and so forth). National parliamentarians have eight weeks within which to examine the bills submitted to them and to say whether or not they judge them to be in keeping with the principles of subsidiarity: "National Parliaments may send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion on whether a draft European legislative act complies with the principle of subsidiarity […]"[30]. This principle is defined thus in Article 5(3) in the Treaty (TEU): "[…] in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States […]". Where the principle of proportionality is concerned, it states that "the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties" (Article 5(4) TEU). In accordance with a procedure and with terms laid down in the Treaty[31], national parliamentarians may demand that a draft bill with which they disagree be re-examined, changed if need be, or even abandoned.

These measures are of especial interest to citizens because, in addition to involving their national representatives in the European legislative process to ensure that the Union does not overstep the bounds of the powers conferred on it, they also state that: "Draft legislative acts shall take account of the need for any burden, whether financial or administrative, falling upon the Union [and on the] national governments […] to be minimised […]"[32].

30. Protocol on the role of national parliaments in the EU, art. 3.
31. Protocol on the application of the principles of subsidiarity and proportionality, articles 6 and 7.
32. Art. 5 in the same protocol.

However, this new right, which appears to be of genuine interest, had not yet been exercised by any of the national parliamentarians in the Twenty-seven as of late Spring 2011.

3.2. The Charter of Fundamental Rights

Initially part and parcel of the draft blueprint for a Constitutional Treaty, the Charter of Fundamental Rights no longer enjoys the same status in the Lisbon Treaty. Yet Article 6(1) in the Treaty (TEU) specifies that it has "the same legal value as the treaties". Moreover, Declaration No. 1 attached to the Charter stresses that it has "legally binding force". Yet in response to requests from several Member States, the same article 6 also states that "the provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties".

Taking its cue from these provisions, the European Commission adopted, on 19 October 2010, "a strategy to ensure that the EU Charter of Fundamental Rights [...] is effectively implemented. The Commission will verify that all EU laws are in compliance with the Charter at each stage of the legislative process – from the early preparatory work in the Commission to the adoption of draft laws by the European Parliament and the Council, and then in their application by EU Member States [...]"[33].

Inasmuch as the Commission is the guardian of the treaties, it is part of its role to ensure that they are applied and complied with. Thus this strategy is quite naturally a part of the Brussels college's duties. But the Brussels communiqué adds this specific detail: "In so doing [i.e. in applying this strategy], the Commission is responding to calls from the European Parliament." As though the Commission were attempting to find support from (and shelter with) the parliamentarians...

In fact on occasion, the implementation of the Treaty may well give rise to disputes because apart from Article 6, and in order to comply with requests lodged by

33. European Commission, "European Commission adopts strategy to ensure respect for EU Charter of Fundamental Rights", press release, IP/10/1348, 19.10.2010: http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1348&format=HTML&aged=1&language=EN&guiLanguage=en

certain Member States (the United Kingdom in particular), the text states that: "The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined by the Treaties"[34]. Thus Member States will be tempted to block, and report to the Court of Justice, even the slightest attempt by the Commission to cross that boundary.

3.3. Schengen and Free Movement of Persons

The Union and its Member States welcomed the explosion of the "Arab spring" – a "spring" at once both premature, because it started in Tunisia at the beginning of the year, and contagious because it went on to reach Egypt, Libya, Yemen and Syria, with very different outcomes. However, the Member States – Italy in particular – showed considerably less enthusiasm when illegal immigrants by the thousand (estimates vary from 10,000 to 25,000 people in all) started pouring into their territory from the shores of Tunisia in the hope of finding jobs and an income in Europe. Most of those who did not drown on the way, landed at the end of their tether on the small Italian island of Lampedusa, where accommodation is extremely limited. Rome called on the European Union for assistance and, probably as a way of bringing pressure to bear on its partners and on Brussels, it decided at the same time to issue temporary residence permits to all illegal immigrants who reached Lampedusa before 5 April, thus giving them free access to the countries in the Schengen area[35]. The openly avowed aim of a large number of these refugees (who were French-speaking and who had relatives or friends in France) was to reach French soil. Thus hundreds of them headed for France, but France was not prepared to let them into the country and that sparked the beginning of a political crisis between Rome and Paris. The French police boosted its border controls and immigrants coming from Lampedusa were packed off back to Ventimiglia, on the other side of the border.

34. Article 51(2), Item VII in the Charter and the First Declaration attached to the Charter.
35. All EU Member States are members of the "Schengen Area" except for the United Kingdom, Ireland, Cyprus, Romania and Bulgaria; Iceland, Norway and Switzerland are associate members.

The Franco-Italian dispute was bolstered by the Commission's reprimands to France in connection with Article 2(1) in the Convention regulating the implementation of the Schengen agreement[36], which prohibits police controls that can be likened in any way to border-guard patrols. Paris responded by pointing to Article 2(2) in the same Convention, which authorises Member States to temporarily reinstate borders in exceptional circumstances (the World Cup championship and so on) and on condition that Brussels agrees. Now, Home Affair Commissioner Cecilia Malmström had not been consulted, and doubts were voiced in any case as to whether or not the situation could be considered to be truly exceptional. Yet despite this, several Member States sided with France and, like France and Italy, they voiced the hope that the regulations governing the Schengen area would be revised and the safeguard clauses expanded to allow the reinstatement of border controls in certain cases.

In response, the Commission put forward a proposal in early May 2011 for the "improved management of migration toward the European Union"[37]. The ideas put forward in this document include the intention to "[propose] a better evaluation mechanism to ensure that the external borders are effectively controlled". In addition, the document states that "it may also be necessary to foresee the temporary re-introduction of limited internal border controls under very exceptional circumstances".

For its part, the European Council, meeting in Brussels on 23 and 24 June 2011, devoted an "in-depth debate" to the issue and expressed the will for change in its conclusions. Thus it said[38]: "The European Council set orientations for the development of the EU's migration policy, as regards the governance of the Schengen area, the control of external borders, the development of partnerships with the countries of the [...] neighbourhood [...]. The enforcement of common rules, in particular through the Schengen evaluation system, should be further improved

36. The agreement dates back to 1985. Initially an intergovernmental cooperation agreement linking five of the Union's Member States, it was built into the EU's legal framework by the Treaty of Amsterdam in 1997, and it has gradually expanded to embrace a majority of the Member States.
37. European Commission, "Commission proposes better management of migration to the EU", press release, IP/11/532, 04.05.2011: http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/532&format=HTML&aged=1&language=EN&guiLanguage=en
38. Conclusions of the European Council, June 2011: http://register.consilium.europa.eu/pdf/en/11/st00/st00023.en11.pdf

and deepened […]. The future Schengen evaluation system will provide for the strengthening, adaptation and extension of the criteria based on the EU *acquis*".

Is this going to lead to a modification of the Schengen agreement? In this particular case that may well prove to be difficult, because it would require not only the unanimous approval of the Member States but also a favourable vote from the European Parliament, because – and this marks a considerable change – the Lisbon Treaty has made Parliament a co-legislator in the sphere of justice and home affairs.

3.4. The Common Agricultural Policy

First devised in 1957, the Common Agricultural Policy (CAP) became a fully-fledged reality in 1962. The Lisbon Treaty confirmed this half-century of existence in Article 38(1) TFEU: "The Union shall define and implement a common agriculture and fisheries policy […]".

But while the Treaty does not modify the CAP *per se*, the same cannot be said of the procedures that govern its implementation: Articles 42 and 43 in the TFEU situate agriculture within the framework of ordinary legislative procedure, in other words in the sphere of co-decision between the Council and Parliament. The latter, which has had little say in the matter before now, has thus become a leading player in the whole issue.

The MEPs have always paid the utmost attention to – and indeed, on occasion, even waxed very critical of – agricultural policy. But their powers in that area were limited. Decisions were taken by a qualified majority of the governments in the Council. Parliament simply played a consultative role. With the Lisbon Treaty the situation has changed. Apart from the fixing of prices and subsidies, in particular, agricultural policy has now become part and parcel of the "framework of ordinary legislative procedure"[39], in other words, of the sphere of co-decision between the Council and Parliament. Thus at this juncture the parliamentarians' opinion needs to be taken into serious consideration. And Parliament has wasted no time in

39. Article 38 TFEU.

speaking out on the issue, for instance in a resolution approved on 23 June 2011[40]. Here is a brief excerpt just to give you an idea: "[…] Parliament recognises the need for further reform of the CAP in line with the changing nature of the farming industry in the EU27 and the new international context of globalisation. It calls for the continuation of a strong and sustainable CAP with a budget commensurate with the ambitious objectives to be pursued in an effort to meet the new challenges and firmly reject any moves towards a renationalisation of the CAP".

Less spectacularly, the application of the Treaty to agricultural policy has also sparked a major power struggle among the institutions. The dispute is over whom it falls to make decisions regarding support for rural development and direct aid [for farmers]. Article 43(3) in the TFEU states that "the Council, on a proposal from the Commission, shall adopt measures on fixing prices, levies, aid and quantitative limitations […]". Thus in this instance the co-decision sphere is abandoned. The Commission considers that eight measures concerning the Common Market Organisation (CMO) fall into this category (for instance, aid for skimmed-milk powder, fixing export refunds and so forth). Thus it has proposed that it be the one to make all decisions concerning those measures, in accordance with the "implementing acts" procedure provided for in Article 291 TFEU.

The various institutions' lawyers are still battling over this issue and their sophisticated quibbling is beyond anyone who is not an expert in the field. But as is so often the case, here too politics lurks just below the surface of the legal debate. The farming world, which is used to such arcane, will undoubtedly be awaiting the outcome of the discussions under way with interest.

3.5. The Crisis and the Treaty

The financial crisis which has been rocking Europe since 2008 – and which is dragging on into the sovereign debt crisis now affecting a number of Member States in addition to Greece – has had very important repercussions on the Union's economic

40. European Parliament, Draft resolution, "CAP towards 2020: meeting the food, natural resources and territorial challenges of the future", 2011/2051(INI), 23.06.2011: http://www.europarl.europa.eu/oeil/file.jsp?id=5902612&noticeType=null&language=en

and budgetary policy. The decisions which have had to be taken by the authorities of the Twenty-seven, or by the Seventeen in the euro zone, have been taken in response to the urgency of a situation that arose subsequent to the Lisbon Treaty. That is why it is not the efforts to resolve the crisis that have benefited from the Treaty but, on the contrary, the Treaty itself which has been affected by the decisions reached – and by one in particular: the creation of a European Stability Mechanism (ESM) devised to replace, within the euro zone and on a permanent basis, the European Financial Stability Facility (EFSF) set up in 2010 to hasten to the rescue of Member States with extremely high debts.

Yet in order to set the ESM up, it is necessary to modify the Lisbon Treaty. The decision was made in principle by the European Council meeting in October 2010, it was given the green light at the following European Council meeting in December, and it was formally adopted at the European Council meeting on 24 and 25 March 2011, after the European Parliament had given it the go-ahead the day before. No such procedure had been required for the EFSF: given that it was a temporary measure, the extremely punctilious German Constitutional Court had not placed any obstacle in its path. But the court could hardly allow a permanent mechanism to come into effect without changing the Treaty. Changing a treaty is always a hazardous enterprise because one has to get the agreement of all parties to it, and when the parties number twenty-seven that is no easy task.

To circumvent this obstacle, it has been decided to resort to the simplified review procedure provided for in Article 48(6) TEU which allows any article concerning the Union's internal functioning to be revised on condition that the European Council, Parliament, the Commission and, if appropriate, the European Central Bank (ECB) all agree, which in this case they do. The text to be modified is Article 122 TFEU, which authorises aid for Member States in a spirit of solidarity if they are threatened by serious difficulties (in the supply of certain products, or in the event of natural disasters and so forth). All it requires is for a few words to be added to the text for the ESM to become legally acceptable. Yet there is one important condition attached to the mechanism's creation: Article 122 in its modified version has to be ratified by the Twenty-seven. In principle, all of the Member States agree, but a modicum of uncertainty is going to remain right to the end… in other words, until mid-2013 because that is the cut-off date mentioned in the European Council's conclusions.

Conclusion

Many questions were asked about the Lisbon Treaty before it came into force: Is it really going to make major changes to the way the Union works in general? And if so, what changes? Some eighteen months later, the answer is clearly: "Yes, it is." Two forces have gained a clear ascendant over the entire system: the European Council, which has taken in hand the running of the Union thanks to the frequent meetings which its permanent President, Van Rompuy, has taken the initiative of convening, and thanks also to the institutional legitimacy imparted to it by the Treaty; and the European Parliament, which has been elevated to the rank of (virtually all-round) co-legislator and whose field of action has greatly expanded.

By contrast, the Commission appears to have been weakened, as has the Council in its various versions apart from the Ecofin, the Finance Ministers' Council. The Central Bank has also been playing a more important role, but on account of the financial crisis rather than of the Treaty proper.

The High Representative has had to invent her job from scratch, a task made even more difficult by the fact that the Member States are still forging and pursuing their own foreign policies – except when a few of the "big boys" get together to

apprise the whole world of positions which they have not taken the time to thrash out with their partners. Jacques Delors used to say, many years ago now, that there could be only common foreign policy actions because the time was not yet ripe for a common foreign policy. That truth, echoing out of the past, still applies today. Catherine Ashton has been unconvincing to date, but it would be a mistake to cast the first stone at her so soon; and as for the diplomatic service, it is still under construction, still dithering, and thus it would be even more premature to sit in judgement on it.

On the other hand, it seems clear that the High Representative cannot convincingly fulfil the different roles she has been given (the "triple hat"): in the future it is going to be necessary to take her costume in hand again and to shorten it, or perhaps to split her function into two separate posts.

The economic and financial crises, followed by the sovereign debt crisis, have very much complicated the job of the Union's leaders, as crises have a way of doing, prompting them to take initiatives pointing in the direction of integration that would have seemed impossible barely a year earlier.

But the fact remains that centrifugal forces are at work. The Treaty (or its use, at any rate) has made it easier for the heads of state and government leaders to take in hand the running of the Union's everyday affairs and has thus *ipso facto* led to a more intergovernmental management of the entire European edifice. This trend has been facilitated and amplified by the crisis, which is having a contradictory effect: on the one hand, it is imparting a greater thrust toward the adoption of "more Europe", but at the same time it is fuelling nationalist and xenophobic instincts in many Member States, with the attendant temptation for them to fold in on themselves, to demand "less Europe".

The construction of Europe has entered a "turbulent zone", as an airline pilot might put it. A critical *rendez-vous* may lie ahead of us, in 2014: on account of the Lisbon Treaty, which has set that date as the deadline for the entry into force of the "dual

majority"[41] for voting procedures in the Council, and a potential reduction in the number of commissioners[42]; on account of the timetable, which provides, in that year, for the implementation of the new multiannual financial framework; and on account of the elections to the European Parliament. What destiny are the Twenty-seven going to choose for the Union? Their answer will show in the changes that they may (or may not) make to the Brussels college and in the budgetary decisions that they take between now and then.

41. Article 238(3)(a) TFEU: "A qualified majority is defined as being equal to at least 55% of the Council members representing participating Member States, corresponding to at least 65% of the population of those states. A blocking minority must include at least the minimum number of Council members representing over 35% of the population of participating Member States, plus one member, failing which the qualified majority is deemed to have been achieved".
42. Article 17(5) TUE. At the European Council meetings on 11-12 December 2008 and 17-18 June 2009, the heads of state and government leaders announced on each occasion that a "decision would be taken in accordance with the necessary legal procedures to allow the Commission to continue including a national from each Member State".

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Notre Europe also receives the financial support of the French Government, the Compagnia di San Paolo, the Macif and the Grand Duchy of Luxembourg.

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Vision of Europe

The Treaty of Lisbon: Assessment and Prospects as of Summer 2011

At the beginning of the last decade, the prospect of membership for the countries that had shaken off the Soviet yoke made it necessary to reform the European Union's institutions and its operational rules. The treaty so laboriously thrashed out at the European Council meeting in Nice in late 2000 having failed to provide any satisfactory response, it proved necessary for the EU to turn its hand to the task once again, while also seeking to respond to the democratic challenges now facing it. The solution was the Convention on the Future of Europe and its blueprint for a "constitutional treaty". This was subsequently rejected and replaced by the Lisbon Treaty.

Though signed in December 2007, the treaty did not officially come into force until 1 December 2009. It contains some striking innovations, including institutional status for the European Council, an expansion of the European Parliament's powers, the creation of the offices of Permanent President of the European Council and of High Representative of the Union for Foreign Affairs and Security Policy, the establishment of a European diplomatic service and so forth.

Have these new measures already had an impact on the course of European construction? What impact have they had on the development of the political and institutional balances that underpin negotiations in the heart of what is no longer an institutional "triangle" but a "trapezium"? This study attempts to answer those questions by conducting an enlightening review of the first eighteen months in the Lisbon Treaty's implementation, and by taking a look at future prospects.

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