

Principles of European Constitutional Law

Second Revised Edition

Edited by
Armin von Bogdandy
and
Jürgen Bast



• H A R T •
PUBLISHING



Verlag CH Beck

Published in the United Kingdom by Hart Publishing Ltd
16C Worcester Place, Oxford, OX1 2JW
Telephone: +44 (0)1865 517530 Fax: +44 (0)1865 510710
E-mail: mail@hartpub.co.uk
Website: <http://www.hartpub.co.uk>

Co-published with Verlag CH Beck oHG,
Wilhelmstraße 9
80801 München
Germany
Email: bestellung@beck.de

Published in North America (US and Canada) by
Hart Publishing
c/o International Specialized Book Services
920 NE 58th Avenue, Suite 300
Portland, OR 97213-3786
USA

Tel: +1 503 287 3093 or toll-free: (1) 800 944 6190
Fax: +1 503 280 8832
E-mail: orders@isbs.com
Website: <http://www.isbs.com>

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Publishing at the address below.

British Library Cataloguing in Publication Data
Data Available

ISBN: 978-1-84113-822-0 (Hart Publishing)
ISBN: 978-3-406-59584-4 (Verlag CH Beck)

Typeset by Forewords, Oxford

Printed and bound in Great Britain by
William Clowes Ltd, Beccles, Suffolk

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I. Introduction and Purpose

To analyse the institutions of the European Union is to do research on a moving object. Central parts of what is now the core of the Union's institutional system did not exist at the beginning of the process of European integration. The European Council or the European Parliament, for example, are today main actors in the institutional setting, but the former was not even mentioned in the Treaties of Rome, and the latter's role changed dramatically. Looking at this profound change, one might assume that the institutional system is still in flux, not yet matured—and thus difficult to interpret in a coherent way.

Yet, another view is possible. The institutional development of the Union can also be seen as variations on a fixed tune, a development inspired by the same melody, although in different keys and tempi. This will be the approach of this chapter. It will try to analyse the institutions as being shaped by a generally unchanged tune or, as might be the more appropriate term in this context: structure. This structure, so the underlying thesis here, works its way into the shape of the institutions and their inter-institutional dynamic, and at the same time poses inherent and thus recurrent problems. This structure is that of executive federalism.

The aims and purpose of this chapter are threefold. First, it will reflect upon past research that has been carried out in Germany on the topic of the European institutions. It will thereby try to describe how our current understanding of European institutions has been shaped.

Building on this foundation, the second aim will be pursued. The chapter tries to analyse the current institutional setting within a coherent conceptual framework, which is the structure of

executive federalism. Its basic features will be described first, then the next part of the chapter, which describes the individual institutions beginning with the Council, will analyse the other institutions, as they perform their tasks ‘under the spell’ of the institutional dynamic arising from the structure of executive federalism: the European Parliament, the Commission and finally the European Council. The chapter will then move away from single institutions to focus on the major question of principle concerning the institutions: legitimacy. It will present different aspects of this issue and conclude by proposing a new label to describe the distinctly European situation: the label of a ‘semi-parliamentary democracy’.

The third general aim of the chapter is to reflect on the possible future development of the institutional system under the Lisbon Treaty. The Treaty’s effect on the institutions will therefore be considered throughout. However, by way of conclusion, its general effect on the institutional system will be briefly summarised.

Before we assess past research, some definitions and clarifications are necessary. First, what do we mean by ‘institution’? Here, ‘institutions’ are the main organs of the Union, as set up by the founding Treaties and mentioned in Article 7 EC and Article 5 EU.¹ This chapter will not address all such institutions; rather, it will focus on those organs that are part of the regular political process of policy- and law-making. The Court of Auditors and the European Court of Justice (ECJ) therefore fall outside the scope of this chapter.² Certainly, one can argue that the ECJ is a political organ. It serves as a constitutional court and its case law has set fundamental guideposts for the political process. Nevertheless, the ECJ is not part of the regular process of policy- and law-making. The rules for appointing its members, its principal task and, last but not least, its understanding of its own role distinguish it sufficiently from institutions which evolve from party competition and elections, and which proactively shape policy.³

One final note. This chapter will try to develop a systematic and coherent perspective on the institutional system in the structure of executive federalism. To this end, it will stress those aspects which make the system work and will focus less on its evident failures. To some, this perspective will come across as apologetic; some might suspect Dr Pangloss at work.⁴ Perhaps that is true. It could also be the author’s German mindset, which always strives to build systems and to detect reason in accidental realities. But, perhaps, it could be that there actually is some sense behind this setting. Let’s see.

II. Past Research and Recurrent Questions

This volume on the principles of European constitutional law aims not only to describe the current law of the European Union,⁵ but also to reflect upon the ways in which the understanding of this law has been formed. Examining past German⁶ legal scholarship on institutions, however, requires a careful look. A first search for books on Community institutions seems to

¹ The terms ‘organ’ and ‘institution’ are used synonymously in this text.

² The European Central Bank and the European Council will become ‘institutions’ of the EU pursuant to the Lisbon Treaty (Art 13 TEU-Lis). Given the just-stated focus of this contribution, it will only deal with the European Council.

³ As to the ECJ, see generally J Bast, below chapter 10; FC Mayer, below chapter 11, both with references to further literature.

⁴ Cf M de Voltaire, *Candide* (1998).

⁵ On the notion of constitutional law in the European context, see C Möllers in this volume; for a general take on its methods, see P Dann, ‘Thoughts on a Methodology of European Constitutional Law’ (2005) 6 *German Law Journal* 1453, available at www.germanlawjournal.com.

⁶ This section on past research is restricted to a review of German literature not least because I simply lack sufficient knowledge of the discussions in other countries. It would, however, be interesting to learn whether the observations made in this section correspond to approaches and themes in other countries.

produce ambivalent results. Even though the Council, the most powerful of the new institutions, began receiving monographic treatment as early as in the early 1960s,⁷ a German monograph, analysing only the Commission as arguably the most original component in the new institutional setting, was published for the first time only in 1980.⁸

But this first look is deceptive. Typically for the German approach, and perhaps for any legal approach to institutions, scholars do not address them directly but instead through debates on legal principles. The separation of powers doctrine and the democratic principle in particular have been starting points for legal examinations of the supranational institutional system. This became relevant first with respect to Council and Commission.

1. Addressing Council and Commission through Principles and Procedures

By the 1950s, the debate on European institutions was characterised by the view of institutions seen through the lens of legal principles. In those days, heated debate arose with respect to the European Defence Community. The point in question was whether the new organisation had to observe the separation of powers principle. The debate was sparked by the argument that the German Constitution, which generally allowed the transferral of powers to international organisations, requires that the newly erected organisation must observe a 'structural congruence' with German constitutional law.⁹ As the Defence Community project collapsed, this debate spread to the EEC.

This debate was probably, at its core, concerned more with German constitutional law (and lawyers¹⁰) than with the EEC. Nevertheless, it initiated the first intense discussion of the institutional setting of the EEC, thus bringing the new organisation to the centre of attention in German legal scholarship.¹¹ In 1964, the preservation of the rule of law in international organisations even became a topic of the annual meeting of public law scholars,¹² always a certain indicator that a topic had made centre stage. However, the discussion had cooled off by that time. The opinion prevailed that the new Communities presented a new form of governmental and legal structure, in which the idea of separation of powers while applicable had found a new form.¹³

Early research on the institutions also went beyond this debate and provided groundwork, without, however, inspiring legal scholars to more conceptual aspirations. The analysis of the Council by Sigismund Buerstedde, to take the best example, gives a knowledgeable account of the foundation, organisation and mechanisms of this institution.¹⁴ It also shows that the struggle with the Council's complex organisation and cumbersome procedure is as old as the institution itself.

⁷ KH Friauf, *Die Staatenvertretung in supranationalen Gemeinschaften* (1960); S Buerstedde, *Der Ministerrat im konstitutionellen System der Europäischen Gemeinschaften* (1964).

⁸ H Schmitt von Sydow, *Die Organe der erweiterten Gemeinschaft—die Kommission* (1980).

⁹ H Kraus, 'Das Erfordernis struktureller Kongruenz zwischen der Verfassung der Europäischen Verteidigungsgemeinschaft und dem Grundgesetz' in Veröffentlichungen des Instituts für Staatslehre und Politik (ed), *Der Kampf um den Wehrbeitrag* (1953) vol II, 545; as to this debate, see Friauf, above n 7, 79–86.

¹⁰ Hans Peter Ipsen later scathingly remarked that the whole debate was yet another sign of the introverted nature of German legal scholarship: idem, 'Diskussionsbeitrag' (1964) 23 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 130.

¹¹ See, eg J Seeler, *Die europäische Einigung und das Problem der Gewaltenteilung* (1957); H Petzold, *Die Gewaltenteilung in den Europäischen Gemeinschaften* (1966) with further references.

¹² *Tagung der Vereinigung der Deutschen Staatsrechtslehrer*.

¹³ JH Kaiser and P Badura, 'Bewahrung und Veränderung demokratischer und rechtsstaatlicher Verfassungsstrukturen in den internationalen Gemeinschaften' (1964) 23 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 1 and 34, respectively.

¹⁴ Buerstedde, above n 7.

After receiving heightened attention in the first decade, research on Council and Commission slipped from the centre of attention—to which it would not return until the 1990s. The field became one of experts and practitioners. Another transformation took place. By the early 1970s there was general agreement that the EEC's institutional system was dysfunctional and needed reform. The question of how to change the institutions became a dominant topic. The work of Christoph Sasse is representative for this time.¹⁵ He saw two main problems: a lack of leadership and a lack of legitimacy. The Commission was regarded as the victim of a miscalculation according to which it was assumed that technocratic expertise alone would convince national publics and suffice as a basis for leadership. The Council, on the other hand, was marked as the villain. The dominance of national self-interest in its deliberations and the disrespect for the role of the Commission were seen as causes of the bleak situation.

In a different class was Hans Peter Ipsen's handbook on European law.¹⁶ Presenting a whole theory of European integration and its law, it also came close to offering a conceptual framework for the institutions. However, from today's perspective, the Ipsen book seems more like a dinosaur than the Owl of Minerva. For all its considerable length, it was unable to illuminate the changes that had occurred in the institutional system since the mid-1960s. Although Ipsen acknowledges the central role of the Council as an organ that embodies 'potency and risk' at the same time, he has no answer to the problems of the Commission.¹⁷

Perhaps wary of conceptual approaches during times of perceived stagnation, legal literature in the late 1970s and 1980s turned to topics that were located more at the core of legal analysis. The proliferation of organisations under the EEC Treaty raised questions about how this growing organisational structure could be understood and legally ordered.¹⁸ Meinhard Hilf's major study of the organisational structure of the Communities provides a formidable overview of the immense differentiation of the institutional system below the level of Treaty organs.¹⁹

At the same time, the creation of new inter-institutional procedures was discussed intensely. The focus of this discussion was the concerted action between the European Council, Commission and Parliament, which was agreed upon in 1975.²⁰ This is the beginning of an intense examination of law-making procedures within German legal scholarship.²¹ However, it is also part of the attention, which the pet object of German institutional scholarship, the European Parliament, has received.

¹⁵ See C Sasse, 'Die institutionelle Fortentwicklung der Gemeinschaften' in Wissenschaftliche Gesellschaft für Europarecht (ed), *Die institutionelle Entwicklung der europäischen Gemeinschaften in den siebziger Jahren* (1973) 61; see also idem, *Regierungen, Parlamente, Ministerrat* (1975).

¹⁶ HP Ipsen, *Europäisches Gemeinschaftsrecht* (1972).

¹⁷ For another general yet less influential approach, see L-J Constantinesco, *Recht der Europäischen Gemeinschaften* (1977).

¹⁸ See U Everling, 'Zur Errichtung nachgeordneter Behörden der Kommission der EWG' in W Hallstein and H-J Schochauer (eds), *Zur Integration Europas* (1965) 33.

¹⁹ M Hilf, *Die Organisationsstruktur der Europäischen Gemeinschaften* (1982); as to other questions of this development, see R Priebe, *Entscheidungsbefugnisse vertragsfremder Einrichtungen im Europäischen Gemeinschaftsrecht* (1979).

²⁰ See, eg B Beutler, 'Rechtsfragen des Konzertierungsverfahrens' in R Bieber (ed), *Das Europa der zweiten Generation* (1981) vol I, 311; R Bieber, 'Kooperation und Konflikt' in *ibid*, 327; M Bothe, 'Soft law in den Europäischen Gemeinschaften' in I Münch (ed), *Staatsrecht, Völkerrecht, Europarecht* (1981) 65; M Gauweiler, *Die rechtliche Qualifikation interorganschaftlicher Absprachen im Europarecht* (1988); T Läufer, *Die Organe der EG* (1990).

²¹ See, eg J Wurmeling, *Legislativer Trilog im institutionellen Dreieck der Europäischen Gemeinschaften* (1990); R Bieber, *Das Verfahrensrecht der Verfassungsorgane* (1992); H-P Folz, *Demokratie und Integration* (1999).

2. European Parliament: The Pet Object

Research on the European Parliament (EP) has always played a special role in German research on European institutions. Self-sustained interest produced a constant flow of literature, yet early research was also driven by a question of principle. The above-mentioned debate on a requirement of congruence between German and European constitutional law also raised the question of the democratic principle. This question was fenced off quicker than with respect to the separation of powers doctrine. The limited scope of autonomous Community powers, the influence of national parliaments and different forms of popular involvement, especially through the Economic and Social Committee, were regarded as safeguards of democracy.²² Hence, the EP was not (yet) considered the proper place to expect democratic reassurance.

Nevertheless, interest in the EP spread, producing several detailed studies.²³ Scholars faced a dilemma, though. The current legal position of the EP obviously deviated from the picture of 'normal' (ie national) parliaments, so that observers were torn between the description of the current and the prescription of an envisioned future legal state. Although the literature was characterised by sympathy for the experiment of a supranational parliament, most authors did not simply echo the highflying political rhetoric, which pictured the EP as the future parliament of a European Federation—and thus as a copy of national parliaments.²⁴ Instead, sober warnings against unrealistic expectations and a schematic transferral of national systems onto the European level were manifold. Manfred Zuleeg warned against the mechanic reproduction of a parliamentary system, which even at the national level was already confronted with severe problems.²⁵ As early as 1971 Roman Herzog pointed to the discrepancies between formal and social legitimacy, a trap in which the EP could be caught if its formal powers were enhanced without it enjoying the support of European civil society.²⁶

The focus of research changed with the announcement of direct elections to the EP. This step not only initiated the development of an election law, it also provoked new analysis of the general nature of the Parliament. Eberhard Grabitz's research on this question set new standards here.²⁷ Together with other scholars, he started to re-think the EP beyond traditional paths. Trying to locate the EP in the dynamic system of governance that had emerged in the Communities, they developed an analytical framework that would reflect this unique environment.²⁸

²² See again the reports given on the 1964 meeting of the public law scholars: Kaiser, above n 13, 31 and summary nos 3, 6 and 9; Badura, above n 13, summary nos 20–2; see also U Oetting, *Bundestag und Bundesrat im Willensbildungsprozeß der Europäischen Gemeinschaften* (1973).

²³ Only for the time before the direct election see A Reifferscheidt, *Die Ausschüsse des Europäischen Parlaments* (1966); T Harms, *Die Rechtsstellung des Abgeordneten in der beratenden Versammlung des Europarates und im Europäischen Parlament* (1968); C Sachsse, *Die Kompetenzen des Europäischen Parlaments und die Gewaltenteilung in den Europäischen Gemeinschaften* (1971); A Schaub, *Die Anhörung des Europäischen Parlaments im Rechtsetzungsverfahren* (1971); R Bieber, *Organe der erweiterten Gemeinschaft—das Parlament* (1974); E Reister, 'Parlamentarische Budgetrecht und Rechnungshof' [1976] *Europarecht* 69.

²⁴ An interesting approach to the EP's own understanding of his role is found in K Neunreither, 'Bemerkungen zum gegenwärtigen Leitbild des Europäischen Parlaments' (1971) 2 *Zeitschrift für Parlamentsfragen* 321.

²⁵ M Zuleeg, 'Die Anwendbarkeit des parlamentarischen Systems auf die Europäischen Gemeinschaften' [1972] *Europarecht* 1.

²⁶ R Herzog, 'Zur Legitimation der Willensbildung in den Gemeinschaften' in *Wissenschaftliche Gesellschaft für Europarecht* (ed), above n 15, 35; see also JA Frowein, 'Zur Legitimation der Willensbildung in den Gemeinschaften' in *ibid*, 83.

²⁷ See E Grabitz and T Läufer, *Das Europäische Parlament* (1980); E Grabitz et al, *Direktwahl und Demokratisierung* (1988); but see also P-C Müller-Graff, *Die Direktwahl des Europäischen Parlaments* (1979).

²⁸ See also O Schmuck and W Wessels (eds), *Das Europäische Parlament im dynamischen Integrationsprozeß* (1989); W Wessels, 'Wird das Europäische Parlament zum Parlament?' in A Randelzhofer et al (eds), *Gedächtnisschrift für Eberhard Grabitz* (1995) 879.

3. Changing Tides: Research on Institutions since the 1990s

The past 20 years have seen breathtaking political and institutional change in the EU and profoundly changed the field of institutional research. Only a few general remarks need be made.

First, the new dynamic meant a shift in stage. For the first time since the early 1960s, questions about European institutions again became a regular topic for general German public law scholars.²⁹ Thus, the circle of authors changed. EC law specialist and practitioners, who used to dominate the field, were now complemented by non-specialised public law scholars. This also contributed to an immense increase in the number of studies undertaken.³⁰

Secondly, the motor of the new debate was, again, a question of principle. Unlike in the 1960s, when questions about the rule of law motivated scholars, the democratic principle aroused German scholars in the 1990s.³¹ The debate also kicked off a new wave of studies on the institutions themselves. Within this literature, the EP once again attracted the most attention. Although sometimes short of a convincing general concept of the Parliament as a whole,³² the studies today provide a detailed picture of the EP's legal set-up.³³ In addition, other institutions and bodies have attracted new attention.³⁴

Finally, another change set in. Surprisingly, German legal scholarship on European institutions had, for years, neglected a comparative perspective. In particular, there had been no reflection on European institutions in contrast to institutions of evolving federations. This is particularly astonishing in the German context, since German constitutional and institutional history itself provides a major example of such an evolving entity.³⁵ However, research since the 1990s has brought about a growing awareness of the value of comparative approaches.³⁶

²⁹ As an indication for this renewed interests in questions of European integration, two of the annual meetings of public law scholars in the early 1990s were dedicated to such questions: see H Steinberger, E Klein and D Thürer, 'Der Verfassungsstaat als Glied einer europäischen Gemeinschaft' (1991) 50 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 9, 56 and 97, respectively; M Hilf, 'Europäische Union: Gefahr oder Chance für den Föderalismus in Deutschland, Österreich und der Schweiz?' (1994) 53 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 8; M Zuleeg and H-W Rengeling, 'Deutsches und Europäisches Verwaltungsrecht', *ibid.*, 154 and 202, respectively.

³⁰ An overview is provided in A von Bogdandy, 'A Bird's Eye View on the Science of European Law' (2000) 3 *European Law Journal* 208.

³¹ See W Kluth, *Die demokratische Legitimation in der EU* (1995); M Kaufmann, *Europäische Integration und Demokratieprinzip* (1997); with some distance, see U Schliesky, *Souveränität und Legitimität von Herrschaftsgewalt* (2004) 388, 589; focusing on parliamentary democracy in the EU, see P Dann, *Parlamente im Exekutivföderalismus* (2004).

³² See V Saalfrank, *Funktionen und Befugnisse des Europäischen Parlaments* (1995); B Suski, *Europäisches Parlament* (1996); D Reich, *Rechte des Europäischen Parlaments* (1999).

³³ See, focusing only on the relevant books, R Fleuter, *Mandat und Status des Abgeordneten im Europäischen Parlament* (1991); C Schultz-Bleis, *Die parlamentarische Immunität der Mitglieder des Europäischen Parlaments* (1995); I Beckedorf, *Das Untersuchungsrecht des Europäischen Parlaments* (1995); V Neßler, *Europäische Willensbildung—Fraktionen im EP* (1997); D Reich, *Rechte des Europäischen Parlaments* (1999); E Uppenbrink, *Das europäische Mandat* (2004).

³⁴ A Egger, *Das Generalsekretariat des Rates der EU* (1994); M Mentler, *Der Ausschuss der Ständigen Vertreter bei den Europäischen Gemeinschaften* (1994); D Fischer-Appelt, *Agenturen der Europäischen Gemeinschaft* (1999); F Rutschmann, *Der europäische Vermittlungsausschuss* (2002); J Staeglich, *Der Kommissionspräsident als Oberhaupt der Europäischen Union* (2007); J Wuermeling, 'Streicht die Räte und rettet den Rat' [1996] *Europarecht* 167; HC Röhl, 'Die Beteiligung der Bundesrepublik an der Rechtsetzung im Ministerrat der EU' [1994] *Europarecht* 409.

³⁵ S Oeter, 'Souveränität und Demokratie als Probleme in der Verfassungsentwicklung der Europäischen Union' (1995) 55 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 659, 588; A Boehmer, *Die EU im Lichte der Reichsverfassung von 1871* (1999) 73.

³⁶ Dann, above n 31, 8 and 43ff; H Kristoferitsch, *Vom Staatenbund zum Bundesstaat?* (2007).

III. Conceptual Framework: The Structure of Executive Federalism

The institutions of a political system do not stand separately and in isolation. Their interplay is as much a defining characteristic as are their powers and interior organisation. Furthermore, institutions are also embedded in a broader constitutional order, which must also be considered.

Looking at the institutions of the EU from this perspective, the multi-layered or federal nature of the Union is the first landmark to be seen.³⁷ Indeed, the federal structure can play a pivotal role in explaining the institutional setting of the EU, particularly when taking into account the distinct form of this federal order. The EU is shaped by a structure, which can be called an executive federalism. What characterises this federal scheme to make it of importance for the institutions? Abstractly speaking, it is the dynamic interplay between a vertical structure of interwoven competences and the horizontal set-up of separated but co-operating institutions.

On a more concrete level, executive federalism can be described as having three basic characteristics. First, it is rooted in a vertical structure of interwoven competences. That means that laws are made in the EU at the federal (supranational) level but those laws are enforced at the level of the Member States. Simply put: Union laws are implemented by Member States. The duty to implement is derived from Article 10 EC, which places on Member States the duty to ‘take all appropriate measures . . . to ensure fulfilment of the obligations arising out of this [EC] Treaty’, entailing a principle of sincere co-operation.³⁸ In effect, it means that the EU has almost no original competences to enforce EU law itself,³⁹ even though it is (heavily) involved in supervising and guiding the decentralised implementation of its law.⁴⁰ It should be noted, though, that (from a strictly legal perspective) the EC Treaty does not necessarily prescribe this specific ‘division of labour’. Another system of sharing enforcement competences could be equally lawful under the EC Treaty, eg to establish a more centralised mode of enforcement by way of secondary law. However, over time the political and legal development has confirmed the system of interwoven competences, so that today it is in practical terms a virtually unchangeable part of the constitutional order. It is as telling as it is consequential that the Constitutional Convention did not discuss, and the Lisbon Treaty will not alter, this system of competences.⁴¹

Initially, this first characteristic of executive federalism might seem like a subtle and rather dry aspect of the constitutional set-up. Nevertheless, it entails far-reaching consequences for the institutional system. Most of all, the system of interwoven competences requires extensive co-operation: co-operation in the process of negotiating and adopting law, co-operation in the procedures of implementing law, even co-operation in the process of reviewing the law.⁴² Moreover, equally important, the system determines who has to co-operate. It requires not

³⁷ Using the phrase ‘federal’ does not imply a state-like construct. Instead, federalism is regarded here as a general principle of organising multi-layered structures of governance, be they in a national, supranational or international sphere: see D Elazar, *Exploring Federalism* (1987) 34; A von Bogdandy, ‘The European Union as a Supranational Federation’ (2000) 6 *Columbia Journal of European Law* 27, 51–2; see also S Oeter in this volume.

³⁸ See Case C-476/93 *Nutril v Commission* [1995] ECR I-4125, para 14; K Lenaerts and P van Nuffel, *Constitutional Law of the European Union* (2005) para 5-047: see Art 4(3) TEU-Lis and Art 291(1) TFEU.

³⁹ Exceptions are, understandably, in the field of internal organisation (Art 274 EC, Art 317 TFEU) but also in the field of competition law (Arts 81ff EC, Arts 101ff TFEU). However, most powers of the Commission or European agencies to take part in the enforcement of Union law are based on legislative acts rather than Treaty provisions, see P Craig, *EU Administrative Law* (2006) 155.

⁴⁰ See Arts 211, 1st indent, 226 EC; K Lenaerts, ‘Some Reflections on the Separation of Powers in the European Community’ (1991) 28 *Common Market Law Review* 15; on the manifold interaction between EU and Member States in the implementation process, see E Schmidt-Aßmann and B Schöndorf-Haubold (eds), *Europäischer Verwaltungsverbund* (2005).

⁴¹ On this issue, see A von Bogdandy and J Bast, below chapter 8.

⁴² I Pernice, ‘Multilevel Constitutionalism and the Treaty of Amsterdam’ (1999) 36 *CML Rev* 703, 724.

only vertical co-operation between actors from both levels, but also the involvement of executive actors, especially at the Member State level. Since EU law is implemented by national administrations, it makes perfect sense to give these administrations a voice in the process of making these laws.⁴³

This last point leads to the second of the three characteristics of executive federalism mentioned above, namely the existence of an institution that organises and harbours the necessary co-operation as just described. This function is fulfilled by the Council, which can thus be regarded as the institutional complement of the system of competences. Finally, there is the third feature: a decision-making mode of consensus which facilitates co-operation in the Council and beyond.

Before we turn to the more detailed analysis of the institutions, beginning with the Council, a few remarks are necessary to put the concept of executive federalism in context and explain its status and purpose in the current analysis.⁴⁴ The notion of executive federalism can be contrasted with that of other multi-layer systems, most clearly the model of ‘dual federalism’, where each level autonomously organises the making and implementation of its laws, ie parallel at the federal and state level (eg in the US).⁴⁵ The contrast with this model underlines how different and distinct the multi-layered structure is in executive federalism in which the co-operation between the levels in all branches of government is a central feature. It should be pointed out that the European form of an executive federalism is by no means unique. Comparable federal systems can be found in Germany and to some extent in Switzerland and Austria.⁴⁶ The multi-level structure of the EU can therefore be regarded as an expression of a typical continental European form of multi-level organisation.

At the same time, it is important to note that executive federalism is used here as a descriptive and analytical tool, not as a teleological concept propagating a certain finality of the Union. It does not encapsulate a federalist vision of the Union’s development (and neither an intergovernmental or technocratic, for that matter); rather, by taking into account the structure of what is termed here the executive federalism of the EU, this contribution highlights certain elements (like competences or inter-institutional dynamics) and extrapolates their interplay and consequences. In doing so, it integrates a number of issues that are generally considered to be characteristic of the Union as such, eg the vast and persisting heterogeneity of the Member States and their interests in the Union or the immense importance of bureaucratic co-operation (or even fusion⁴⁷). Ultimately, looking at the political institutions with the awareness of the structure of executive federalism aims to understand the individual institutions in a wider context. On this basis, we can now turn to the analysis of separate institutions.⁴⁸

⁴³ See H Wallace, ‘Institutions of the EU’ in W Wallace and idem (eds), *Policy Making in the EU* (1996) 58; for further explanations of this system, see below section IV.1(a) and (b).

⁴⁴ In detail Dann, above n 31, 117ff.

⁴⁵ K Lenaerts, ‘Constitutionalism and the Many Faces of Federalism’ (1990) 38 *American Journal of Comparative Law* 205, 231; K Nicolaïdis and R Howse (eds), *The Federal Vision* (2001); MJC Vile, *Structure of American Federalism* (1961) 64; on the limits of this autonomy, see D Elazar, *The American Partnership* (1962).

⁴⁶ For more detail on structurally similar federal systems, see JA Frowein, ‘Integration and the Federal Experience in Germany and Switzerland’ in M Cappelletti et al (eds), *Integration through Law* (1986) vol 1, book 2, 573, 586; Lenaerts, above n 45, 230–33; on the historical roots of executive federalism, see S Oeter, *Integration und Subsidiarität im deutschen Bundesstaatsrecht* (1998); G Lehbruch, *Parteienwettbewerb im Bundesstaat* (1998); comparing federal structures in EU and Germany: FW Scharpf, ‘Community and Autonomy’ (1994) 1 *Journal of European Public Policy* 219; S Oeter in this volume; Dann, above n 31, 43ff.

⁴⁷ W Wessels, ‘The Constitutional Treaty: Three Readings from a Fusion Perspective’ (2005) 43 *Journal of Common Market Studies (Annual Review 2004/2005)* 11.

⁴⁸ Two disclaimers have to be posted: first, the concept proposed here is based on the analysis of the ‘Community system’. Thus it does not directly apply to the more intergovernmental structure of the

IV. The Institutional Framework

1. Council

a) Form Follows Function: Members, Organisation and Competences

In the structure of executive federalism, the Council of the European Union⁴⁹ is the institutional counterpart to the specific division of competences. Its composition, organisation and powers offer what the interwoven competences require: that is a meeting point for actors from the national and supranational levels, a meeting point for politicians and bureaucrats, and a place to negotiate and legislate. As such, it is the central institution of this political system.⁵⁰

The Council's special role derives first from its composition. The Council 'shall consist of a representative of each Member State at ministerial level'.⁵¹ Thus, its members are not directly elected but sent in their function as ministers of national governments. As such, they are generally appointed or nominated by their prime minister. This forms a sharp contrast to most other federal chambers (eg the US Senate), the members of which are directly elected.⁵²

Specific to the nature of the Council is also its mandate and its members' understanding of their specific role. Whereas US senators are elected politicians, free to take any position they want, Council members, in contrast, are representatives of their home government; they are authorised to 'commit the government of the Member State'.⁵³ Thus, they have to follow the mandate agreed upon in their cabinet and must negotiate within these margins.⁵⁴

Yet the Council is much more than the round of national ministers—they form only the top of a complex system, best described as a pyramid of groups, in which national actors convene. This pyramid has three principal tiers: the Council as meeting place of the ministers, the Committee of Permanent Representatives (COREPER⁵⁵) and the Working Groups. Their composition and functions are best explained by way of example: the negotiations on a new bill. This example will demonstrate the procedural logic evolving from the interwoven competences, the logic of executive co-operation:

CFSP (on specialties in this field, see D Thym in this volume) or similar aspects in the AFJS (on the respective specialties here, J Monar, below chapter 15, s III.4. Secondly, the following analysis describes primarily the institutions, and only to a lesser extent the decision-making procedures that are played out between these institutions. To focus on the latter would require another article, or perhaps even a book. See, eg P Craig and C Harlow (eds), *Lawmaking in the European Union* (1998); A Dashwood, 'The Constitution of the European Union after Nice: Law Making Procedures' (2001) 26 *European Law Review* 215.

⁴⁹ The former 'Council of the European Communities' decided after the ratification of the Maastricht Treaty to call itself the 'Council of the European Union', a term applicable to all its activities (Decision 93/591 of 8 November 1993, *OJ L281*, 18). In accordance with the language of the Treaties, the term 'Council' will be used as a shorthand.

⁵⁰ The best overviews of the Council are: F Hayes-Renshaw, 'The Council of Ministers' in J Peterson and M Shackleton (eds), *The Institutions of the European Union* (2002) 47; F Hayes-Renshaw and H Wallace, *The Council of Ministers* (2006); M Westlake and D Galloway (eds), *The Council of the European Union* (2004).

⁵¹ Art 203 EC (Art 16(2) TEU-Lis).

⁵² G Löwenberg and SC Patterson, *Comparing Legislatures* (1979) 121; G Sartori, *Comparative Constitutional Engineering* (1999) 185.

⁵³ Art 203 EC (Art 16(2) TEU-Lis).

⁵⁴ A von Bogdandy, 'Information und Kommunikation in der Europäischen Union' in W Hoffmann-Riem and E Schmidt-Aßmann (eds), *Verwaltungsrecht in der Informationsgesellschaft* (2000) 168; D Spence, 'Negotiations, Coalitions and the Resolution of Inter-state Conflicts' in Westlake and Galloway, above n 50, 256.

⁵⁵ This French acronym is commonly used to refer to this committee. It stands for *Comité des représentants permanentes*.

It is the sole right of the Commission to initiate legislation,⁵⁶ yet the first⁵⁷ and most important reality test for any legislative proposal comes when it is discussed in a Council Working Group, composed of national civil servants from each Member State, who are responsible for the specific matter.⁵⁸ They check how the proposal fits into the administrative and legal systems of their respective state. This can often take a long time, but it also addresses most of the often very technical complications arising from the fact that a bill has to be implemented in 27 different legal systems. A proposal then goes to the COREPER, which consists of the national ambassadors to the EU (thus career diplomats who stay for long terms in Brussels). Whereas Working Groups are put together flexibly and ad hoc to discuss one specific proposal, the COREPER is a permanent body.

The COREPER, sometimes regarded as the most powerful part of the EU, serves as a clearing-house: it checks every proposal, and negotiates those issues which remain unresolved in the Working Groups.⁵⁹ Since it is not split into specialised groups for every proposal,⁶⁰ it gathers a broad overview and accumulates immense expertise. Its broad exposure allows its members to strike more deals and settle more political issues than the Working Groups.⁶¹ Only highly political and non-negotiable topics are passed on by COREPER and negotiated by the national ministers.⁶²

One more important characteristic of the Council has to be added: it has no plenary. The ministers convene in accordance with their field of responsibility, as ministers of finance, as ministers of the environment, etc.⁶³ As a consequence, there is no place for general discussion, only for sectoral negotiation. It is an extremely complex system, with barely any hierarchy or hegemony to streamline processes—and is therefore hardly a very efficient institution.⁶⁴ Attempts to change this situation, mainly by strengthening the General Affairs Council (of foreign ministers), have not borne any fruit.⁶⁵

This organisational structure will remain generally untouched by the Lisbon Treaty. Changes that had been envisioned by the Convention's Draft, eg the introduction of an elevated 'Legis-

⁵⁶ Art 17(2) TEU-Lis.

⁵⁷ In fact, these proposals are often already prepared in close co-operation with national experts and bureaucrats: see W Wessels, 'Dynamics of Administrative Interaction' in W Wallace (ed), *The Dynamics of European Integration* (1990) 229.

⁵⁸ There are roughly 160 groups: see Westlake and Galloway, above n 50, 217.

⁵⁹ Art 16(7) TEU-Lis; on the COREPER: J Lewis, 'National Interests: Coreper' in Peterson and Shackleton, above n 50, 277; Mentler, above n 34.

⁶⁰ This is a simplification: the COREPER convenes in two formations: COREPER II is composed of the permanent representatives themselves and responsible for foreign, financial and horizontal matters; COREPER I is composed of deputies from the permanent representations and deals with most of the more technical legislation (Lewis, above n 59, 282–6). There are also other Committees, like the Political and Security Committee or the Economic and Finance Committee, which act beside the COREPER (Lewis, above n 59, 286; Westlake and Galloway, above n 50, 201, 208).

⁶¹ For the best account of the negotiating methods within the Council, see Spence, above n 54, 256ff.

⁶² Neither COREPER nor the working groups have the competence to formally decide a matter, yet about 80% of the matters are already materially decided before the ministers convene. These so-called A-points are decided without any further negotiation in the Council: see Art 3(6) of the Council's Rules of Procedure (Decision 2006/683, OJ L285, 47). Hayes-Renshaw, above n 50, 53; but Lewis, above n 59, 287.

⁶³ In the 1990s, 22 Council formations existed. This number was reduced to 16 in 2000. The current nine Council formations, introduced in 2002, are listed in Annex I to the Council's Rules of Procedure (above n 62).

⁶⁴ von Bogdandy, above n 37, 41–4: see generally D Curtin, 'The Constitution of the Union' (1993) 30 *CML Rev* 17, 26; as to the growing informality of Council negotiations, see U Puetter, 'Informal Circles of Ministers' (2003) 9 *ELJ* 109, 114.

⁶⁵ On previous attempts of reform, see W Wessels, *Öffnung des Staates* (2000) 227; J Kokott and A Rütth, 'The European Convention and its Draft Treaty Establishing a Constitution for Europe' (2003) 40 *CML Rev* 1315, 1332.

lative and General Affairs Council', were not taken up.⁶⁶ A hierarchy of Council formations to streamline procedures will only be weakly instituted.⁶⁷ However, a new system of team presidencies will likely be introduced by a decision of the European Council, based on the Lisbon Treaty.⁶⁸ The presidency will then be held by groups of three Member States for 18 months. This will certainly lead to more continuity in the Council's work and also (hopefully) to more transparency, which can only be welcomed.

Although composition and internal organisation are of salient importance, it is its powers which render the Council the central institution in the institutional setting of the EU. And it is this aspect which also renders it a highly characteristic feature of executive federalism in the EU: the Council's powers are spread from legislative to executive areas, thus defying a traditional separation-of-powers scheme, but serving the structure of interwoven competences.

With regard to law-making, the Council plays a dominant role, although it is not (as often falsely suggested) the sole centre of it. Despite the important influence of both the Commission⁶⁹ and the European Parliament,⁷⁰ the Council is not only the institution that has decision-taking powers in almost all procedures but is in all but one procedure the institution that has the final word.⁷¹ The Council also plays a major role with regard to the executive function, as it is involved in the task of executive rule-making.⁷²

In sum, it can be seen that composition and powers are closely connected to the structure of interwoven competences. The Council participates in law-making (and facilitates executive tasks), since it is the national authorities which ultimately implement and administer these policies. The early and influential involvement of national actors seems necessary to make these mechanisms work—and is thus entrenched in the interwoven structure of competences, hence the EU's executive federalism. Yet it is only the third element that renders this structure workable: the specific decision-taking method.

b) Mode of Decision-taking: Majority-voting and the Resilience of Consensus

It has occasionally been highlighted as specific to the supranational nature of the EU that the Council, as one of its major decision-making bodies, can take binding decisions not by unanimity, but by majority rule, distinguishing the EU from most comparable organs in international organisations.⁷³ Yet this is not the whole truth. Another line of the traditional narrative explains that, despite the often-applicable majority rule,⁷⁴ the Council mostly strives to act by consensus.⁷⁵ In this consensus mode, solutions are sought through ongoing negotiations, openness to compromise and the incorporation of as many parties as possible. This method is based on mutual trust and the expectation of gaining more by giving in to a certain extent

⁶⁶ Cp Art I-23(1) CT-Conv to Art 24(1) CT, and Art I-23(4) CT-Conv to Art 24(7) CT: see W Wessels, 'Die institutionelle Architektur der EU nach der europäischen Verfassung' [2004] *integration* 161, 165.

⁶⁷ Art 16(2) TEU-Lis.

⁶⁸ Art 236(a) TFEU, Declaration No 9 annexed to the Final Act of the Treaty of Lisbon.

⁶⁹ The Commission is a major law-maker; it is responsible for roughly half of all the laws that are enacted directly by the Commission, hence more than by the Council: see A von Bogdandy, F Arndt and J Bast, 'Legal Instruments in European Union Law and Their Reform' (2004) 23 *Yearbook of European Law* 91, 126ff.

⁷⁰ As to the role of the EP, see below section IV.2.

⁷¹ Arts 250ff EC (Arts 293ff TFEU); for an innovative empirical perspective, see R Thomson and M Hosli, 'Who Has the Power in the EU?' (2006) 44 *JCMS* 415.

⁷² See Comitology Decision 99/468/EC of the Council (as amended by Decision 06/512/EC [2006] OJ L184, 23); K Lenaerts and A Verhoeven, 'Towards a Legal Framework for Executive Rule-Making in the EU?' (2000) 37 *CML Rev* 645; Craig, above n 39, 99.

⁷³ Ipsen, above n 16, ch 2 para 44.

⁷⁴ As to the different forms of majority votes in the Council, see Westlake and Galloway, above n 50, 233.

⁷⁵ Hayes-Renshaw and Wallace, above n 50, 304; on the methods employed, see Spence, above n 54, 364; on voting patterns, see M Mattila and JE Lane, 'Why Unanimity?' (2001) 2 *European Union Politics* 31.

during one round of negotiations, with the expectation of being repaid in a later round. This method is considered to be based in no minor part on the secrecy and confidentiality of these negotiations.⁷⁶ In a sense, so the narrative concludes, the Council adheres to two rules: behind the formal majority rule there is an informal consensus method, or, as Joseph Weiler famously put it, it is decision-making ‘under the shadow of the vote’.⁷⁷

While this used to be a convincing analysis and one that also blends well with the structure of executive federalism (underlining as it does the importance of co-operation and consensus), one might wonder whether it is still valid. Did the enlargement of the Union, the heated debates on and reforms of majority voting in recent Treaty revisions and the drive to more transparency in Council decision-making leave this mode really unaffected? Or do we have to reconsider certain parts of it? Let us take a closer look.

EU’s enlargement to now 27 Member States vastly increased the Council’s size and heterogeneity. It certainly was (and is) a serious challenge to the consensus mode, and it is hence no surprise that studies on decision-taking in the Council since 2004 suggest that enlargement did have an impact.⁷⁸ Data show that the amount of legislation passed has decreased and that those bills which are passed often concern more marginal issues and have become longer. At the same time, however, the culture of consensus seems to have remained intact. In particular, the level of contestation has not increased significantly. One technique to accommodate the increased heterogeneity of interests seems to be formal statements of disagreement which are included in the minutes of the Council. These flag differences but are not recorded as no-votes.⁷⁹ Hence, even though decision-making certainly has become more difficult, the system of consensus in the shadow of the vote seems to have survived.

However, enlargement is not the only development to have challenged this distinct decision-making mode. It also triggered a far-reaching reform of voting rules in the Council. In fact, the Council’s voting rules were probably the most contested area of recent Treaty reforms that, according to the Lisbon Treaty, will lead to a considerable increase in the possibilities for majority votes.⁸⁰ But will this make consensus-building obsolete? It seems unlikely. The current voting rules, based on the Nice Treaty, prescribe a complex system of triple majorities and weighed votes of the Member States.⁸¹ In clear contrast, the Lisbon Treaty will abolish the weighed votes and introduce a much more transparent system of a double-majority, consisting of 55% (and at least 15) of the Member States, representing 65% of the population of the Union.⁸² This new mechanism will be the regular voting rule⁸³ and the most common form of decision-taking in the Council.

⁷⁶ See Arts 5 and 6 Council’s Rules of Procedure (Decision 2006/683/EC *Euratom* [2006] OJ L285, 47); see M Bauer, ‘Transparency in the Council’ in Westlake and Galloway, above n 50, 367, 372.

⁷⁷ JHH Weiler, ‘The Transformation of Europe’ in idem, *The Constitution of Europe* (1999) 72 (pointing out that both modes are intertwined, as decision-making by consensus is facilitated by the possibility of a majority decision); F Hayes-Renshaw et al, ‘When and Why the EU Council of Ministers Votes Explicitly’ (2006) 44 *JCMS* 161; see also M Mattila, ‘Contested Decisions: Empirical Analysis of Voting in the European Union’ (2004) 43 *European Journal of Political Research* 29.

⁷⁸ P Settembri, ‘The Surgery Succeeded: Has the Patient Died?’, Jean Monnet Working Paper 4 (2007), available at www.jeanmonnetprogram.org; S Hagemann and J De Clerck-Sachsse, ‘Decision-making in the Enlarged Council of Ministers’, CEPS Policy Brief 119 (2007), available at http://shop.ceps.eu/BookDetail.php?item_idem=1430 (accessed on 9 January 2009).

⁷⁹ Hagemann and De Clerck-Sachsse, above n 78, 3.

⁸⁰ With respect to the Constitutional Treaty, which in this respect was not changed by the Lisbon Treaty, see A Peters, ‘European Democracy after the 2003 Convention’ (2004) 41 *CML Rev* 55.

⁸¹ Triple majority stands for a majority of weighted votes of Member States, and in some cases of population, Art 205 EC and Art 3 of the Protocol on the Enlargement (2001). See A Moberg, ‘The Nice Treaty and Voting Rules in the Council’ (2002) 40 *JCMS* 259; M Hosli and M Machover, ‘The Nice Treaty and Voting Rules in the Council’ (2004) 42 *JCMS* 497.

⁸² Art 16(4) TEU-Lis.

⁸³ Art 16(3) TEU-Lis.

However, different considerations put these new rules in perspective and suggest that the heated discussions in the intergovernmental conferences hardly match the reality of decision-making on the ground. First, the Lisbon rules will only come into effect in 2014 and will be conditioned until 2017 by the possibility to invoke the old Nice rules for blocking minorities.⁸⁴ Secondly, even the Lisbon majority rules require large, highly sophisticated super-majorities, which could also be qualified as a form of consensus. Finally, relative power in the Council does not seem to depend only on voting weight; rather, qualitative analyses suggest that even though weight is important, it is so only to a limited extent. Negotiating skills, substance and situational circumstances also matter.⁸⁵

If consensual decision-making thus seems as necessary as ever, is it still possible? The confidentiality of Council negotiations has been considered to be an integral part of why the consensual Council system works. However, these rules have been a major target of critique, as it is deemed normatively untenable that the central law-making organ remains largely closed to the citizens.⁸⁶ In reaction, changes in the Council's Rules of Procedure (RoP) in 2006 have opened up the Council debates to an unprecedented degree.⁸⁷ Also, according to the Lisbon Treaty, the Council will 'meet in public when it deliberates and votes on a draft legislative act'.⁸⁸ Serious doubts remain, however, as to whether these changes effectively alter the dynamics in the Council. Such an effect seems unlikely especially if one takes into consideration that these changes only affect the uppermost level of the Council system and only a limited number of agenda points. As stated above, the vast majority of decisions are, and most likely will continue to be, reached elsewhere and confidentially, as so-called A-points.⁸⁹

On the basis of these considerations, one can assume that decision-making in the Council will remain a mostly consensual affair, spurred by the option to take a majority vote. Looking at the Council through the lens of executive federalism, its consensual and mostly non-majoritarian system seems to make perfect sense.⁹⁰ Three main reasons suggest that the interplay of executive federalism and consensual decision-making in the Council is an unchangeable fact of the EU:

1. There is, first, the federal heterogeneity of the EU, which seems to simply require an inclusive, consensus-based decision-making method. The theory of consensus democracy shows that some culturally, religiously, linguistically or otherwise divided societies have developed an original mode of decision-making that enables them to find a peaceful way of dealing with conflicts.⁹¹ This method is based on permanent inclusion of all relevant social forces, ie on political compromise in decision-making and on proportionate accommodation of all relevant parties in responsible offices of government. Thus, it forms a contrast to competition and temporary exclusion, which shape systems organised by majority rule.⁹²
2. If the consensus method in the Council is required by the diversity of interests, it is facilitated by the sociocultural similarity of the Council's members. As described above, negotiations in

⁸⁴ Art 16(5) TEU-Lis and Protocol (no 36) on the transitional provisions relating to the institutions and bodies of the Union. The Lisbon Treaty will not alter the substantive compromise on voting rules agreed upon in the Constitutional Treaty, but will solve the re-surfaced debate on such rules by providing a compromise along the timeline.

⁸⁵ Hayes-Renshaw et al, above n 77, 179–85; Thomson and Hosli, above n 71.

⁸⁶ On the debate, see ME de Leeuw, 'Openness in the Legislative Process in the European Union' (2007) 32 *EL Rev* 295; P Settembri, 'Transparency and the EU Legislator' (2005) 43 *JCMS* 637.

⁸⁷ See Art 8 Council's RoP.

⁸⁸ Art 16(8) TEU-Lis; on the Lisbon Treaty's concept of legislative acts, see Bast, below chapter 10.

⁸⁹ See above n 62.

⁹⁰ R Dehousse, 'Constitutional Reform in the European Community' (1995) 18 *West European Politics* 125.

⁹¹ See G Lehmbruch, *Proporzdemokratie* (1967); A Lijphart, *The Politics of Accommodation* (1968).

⁹² It might be added that this method may prevail even after these cleavages are gone. The best example is the case of Germany: see H Abromeit, *Der verkappte Einheitsstaat* (1992); Elazar, above n 37, 66.

the Council are mostly a deliberation of national and supranational civil servants. Despite linguistic, political or other differences, these civil servants very often share a common education (law, political science) and a common professional background (national administrations), and grow closer by virtue of their ongoing contact. This common habit creates a certain club spirit (*esprit de corps*), as it is called, that facilitates compromise and consensus.⁹³

3. Finally, the issue of implementation helps to explain why the consensus method is entrenched in the structure of executive federalism. One can assume that a solution is more acceptable if the different parties agree on it. In the EU, the implementation of norms rests with the Member States, their legislatures and their bureaucracies. Thus, Union regulations and directives will have a greater chance of being properly implemented by the national legislatures and bureaucracies if they were previously decided upon in consensus with the own government.⁹⁴

With regard to these observations, the consensus method can be regarded as a complementary element of executive federalism. As long as the overall structure remains in place, the consensual character of Council decision-making seems destined to stay in place as well. This point can be taken even further. Not only is the consensus method prominent in Council decision-making, but the EU in general can be characterised as a consensus democracy.⁹⁵ The method in the Council has a spill-over effect on decision-making procedures in other organs as well as between the organs. Perhaps the most striking example of this spill-over effect can be observed in the European Parliament.

2. European Parliament

In an almost revolutionary development, the EP has developed from a mere consultant assembly into an equal counterpart to the Council and the Commission.⁹⁶ At the same time, the EP has been something like a pet object at least of German institutional scholarship.⁹⁷ Yet despite ample material and analytical attention, a coherent interpretation of role and structure of the EP has not emerged.

Two means of analyses will be used here to approach the parliament: first, the EP will be described in the context of its institutional environment, within the conceptual framework of executive federalism; secondly, this chapter will try to grasp the EP's specific character by using a comparative matrix of two types of legislatures or parliaments. These two types, debating parliament and working parliament, can be described in the following manner.⁹⁸

⁹³ The master of studies of bureaucracies, Max Weber, has called this phenomenon *Kompromisskollegialität* [collegiality sustained by compromise]: idem, *Wirtschaft und Gesellschaft* (1972) 164; see D Chrysochoou, *The Consociational Dimension of European Integration* (1994) 26.

⁹⁴ J Schwarze et al, *Die Implementation von Gemeinschaftsrecht* (1993) 13; S Krislov et al, 'The Political Organs and the Decision-making Process in the United States and the European Community' in Cappelletti et al (eds), above n 46, 3, 53; N Nugent, *The Government and Politics of the European Community* (1994) 145.

⁹⁵ A Lijphart, *Patterns of Democracy* (1999) 42–7; Chrysochoou, above n 93; A Peters, *Elemente einer Theorie der Verfassung Europas* (2001) 728, 758; B Kohler-Koch, *The Evolution and Transformation of European Governance* (1998) 12; Oeter, above chapter 2.

⁹⁶ Describing this truly astonishing development D Judge and D Earnshaw, *The European Parliament* (2003) 26–64; A Kreppel, *The European Parliament and Supranational Party System* (2002) 52–90; see also B Rittberger, 'The Creation and Empowerment of the European Parliament' (2003) 4 *JCMS* 203.

⁹⁷ See above section II.2.

⁹⁸ See P Dann, 'European Parliament and Executive Federalism' (2003) 9 *ELJ* 549, 556; these notions are based on studies of Max Weber and Winfried Steffani: see M Weber, 'Parlament und Regierung im neugeordneten Deutschland' in idem, *Gesammelte politische Schriften* (3rd edn, 1971) 350; W Steffani, 'Amerikanischer Kongress und Deutscher Bundestag' in idem, *Parlamentarische und präsidentielle Demokratie* (1979) 333; see also ML Mezey, *Comparative Legislatures* (1979) 36. Both types (not notions) have also surfaced in the literature on the EP: see C Lord, *Democracy in the European Union* (1998) 65; R Corbett et al, *The European Parliament* (2007) 9.

A debating parliament is centred on its plenum, which serves as the forum of the nation and central stage of public political discourse. It is typical for parliamentary systems, where the majority party in parliament forms the government, leading to a 'fusion' of majority party and government. The political opposition uses the plenary session to attack governmental measures as well as to expound its own proposals. The British House of Commons is the pre-eminent example.⁹⁹ A working parliament receives its character and power from being somewhat separate from the government and from operating as a counterweight. Rather than the fusion of majority party and government, it is the institutional combat between legislature and executive which characterises this parliament. An incompatibility rule, which forbids members of the executive from sitting in the legislature, prevents public debates between government and opposition in the plenary. Instead, strong and specialised committees function as the main focus of activity in working parliaments. The US Congress is the classic example of this type.¹⁰⁰

Against this comparative background, the underlying goal of this chapter is to understand the EP as a working parliament. Separated personally from the Commission and not intertwined with it politically, the EP holds comparatively strong (and often underestimated) legislative and oversight powers, establishing itself as the centre of democratic control in the EU, structurally resembling the US Congress. To demonstrate this, the EP will be analysed in its elective, controlling and law-making functions.¹⁰¹

a) Co-Elector: Appointment Power and Negative Competence

The Parliament's influence on the appointment of the Commission and especially its President has increased considerably in the past years.¹⁰² Originally completely sidelined, the EP today has the power to approve the Commission's President as well as confirm the College of Commissioners.¹⁰³ The Lisbon Treaty will even state that the European Parliament 'shall elect the President of the Commission',¹⁰⁴ and prescribe that the European Council, before proposing a candidate for the Commission presidency, must take into account the elections to the European Parliament, thus underlining the link between election and composition of the Commission.¹⁰⁵ The EP also has a right of censure.¹⁰⁶

Considering this growing influence, a parliamentarisation of the EU has certainly taken place. But is it convincing to interpret this growing influence as the steady move towards a parliamentary system, ie a system in which the majority faction in parliament determines the head of the government and forms a close political link with the government (like in the UK or Germany)?¹⁰⁷ Or is it conclusive to argue that at least a special brand of parliamentary system

⁹⁹ As a classic account of this type, see W Bagehot, *The English Constitution* (1867, reprinted 1997).

¹⁰⁰ As a classic text here, see W Wilson, *Congressional Government* (1885, reprinted 1956).

¹⁰¹ As to its representational function, see below section V.1(b).

¹⁰² Corbett et al, above n 98, 266; A Héritier, *Explaining Institutional Change in Europe* (2006) 139ff; for a point of comparison see E Noel, 'New Institutional Balance?' in R Dehousse (ed), *Europe after Maastricht* (1994) 16, 20–1.

¹⁰³ Art 214(2) EC.

¹⁰⁴ Art 14(1) TEU-Lis. This is, however, only the formulation in the highly visible and therefore symbolically important first provision on the EP, which does not correspond to any new powers of the EP in the election process itself (cf Art 17(7) TEU-Lis). One might argue that even this new formulation will set in motion a certain dynamic. Nevertheless, in my opinion the most important change of mind now has to happen within the European parties. If they would nominate a Europe-wide candidate for the Commission's President ahead of the elections, this could certainly make the elections more relevant.

¹⁰⁵ Art 17(7) TEU-Lis.

¹⁰⁶ Art 201 EC (Art 234 TFEU); this is the oldest right of the EP in this context: see Art 144 EEC Treaty; Corbett et al, above n 98, 279.

¹⁰⁷ On the notion of 'parliamentary system', see Sartori, above n 52, 101ff; arguing in this direction see E Noel, 'Reflections on the Maastricht Treaty' (1992) 27 *Government and Opposition* 2; M Nentwich and

with some specific supranational features will emerge?¹⁰⁸ Even though executive federalism and parliamentary systems are not as such incompatible (as the German political system shows), such development in the EU seems unlikely. In fact, in the European institutional setting, which was not originally set up as a parliamentary system, elements of executive federalism seem to impede the emergence of such system. Three arguments underline this thesis:

1. The position of the Council structurally blocks the emergence of a full parliamentary system firstly because of its important role in appointing the Commission¹⁰⁹ and secondly, because of the Council's own role as part of a dual executive.¹¹⁰ The Council as a whole is generally beyond the reach of the EP.¹¹¹ This position and influence of the Council might not only be interpreted as a necessary aspect of the intergovernmental side of the EU system¹¹²—it also fits naturally into the structure of executive federalism, where the Council is a central partner of the Commission in law-making as well as executive functions.
2. A second argument derives from the way in which the EP conducts the approval procedure of a new Commission.¹¹³ It would be the 'natural' behaviour in a debating parliament for the majority party (or coalition) to elect the government without further discussion. In the EP, instead, there is no majority which perceives itself as a loyal parliamentarian base of the Commission. Especially in candidate hearings which the EP conducts before it approves of a new Commission, the EP presents itself more as a critical counterweight than as a loyal supporter of the Commission.¹¹⁴
3. A final argument against a parliamentarisation concerns the personal fusion between EP and Commission, ie the normal rule for a parliamentary system and its debating parliament that parliamentarians (MEPs in our case) are at the same time members of the government (the Commission in our case). Empirically, there is no such fusion between EP and Commission in the EU.¹¹⁵ Moreover, a fusion would not be legally possible. An incompatibility rule between a mandate in the EP and a seat in the Commission formally prohibits the appointment of MEPs to the Commission.¹¹⁶ *De lege ferenda* this could be changed. In addition, the rule's historical roots in the technocratic origins of the Commission are weak today. However, the incompatibility rule fits perfectly well into the structure of executive federalism. Here, the divide runs not between the political parliament and the technocratic Commission, but between the legislature and the executive branch.

G Falkner, 'The Treaty of Amsterdam', *European Integration online Papers* 7 (1997) 4, available at <http://eiop.or.at/eiop>; but see R Dehousse, 'European Institutional Architecture after Amsterdam' (1998) 35 *CML Rev* 595, 524–5.

¹⁰⁸ P Magnette, 'Appointing and Censuring the European Commission' (2001) 7 *ELJ* 292; reflecting the changes proposed by the Constitutional Treaty, see idem, 'European Democracy between Two Ages' in C Barnard (ed), *The Fundamentals of EU Law Revisited* (2007) 23–7.

¹⁰⁹ See Art 214 EC (Art 17(7) TEU-Lis).

¹¹⁰ Lenaerts, above n 40, 17–18.

¹¹¹ The national parliaments are, of course, responsible for the parliamentary accountability of the Council. However, each parliament elects and controls only one government, not the Council as such. Also, most national parliaments do not fulfil this role practically because European affairs play only a minor role in national politics: see P Dann, 'The Semi-parliamentary Democracy of the EU', Jean Monnet Working Paper 5 (2002), available at www.jeanmonnetprogram.org; on the national parliaments, see also below section V.1.

¹¹² Magnette, 'Appointing and Censuring', above n 108, 297–8.

¹¹³ S Hix and C Lord, 'The Making of a President' (1996) 31 *Government and Opposition* 62; A Maurer, *Parlamentarische Demokratie in der Europäischen Union* (2002) 172ff.

¹¹⁴ But see Magnette, 'Appointing and Censuring', above n 108, 298–9.

¹¹⁵ Ibid, 298; on other links between EP and Commission, see Corbett et al, above n 98, 323–24.

¹¹⁶ Art 6(1) 2nd indent, of the Act concerning the election of the representatives of the Assembly by direct universal suffrage ([1976] OJ L278, 5). This provision is based on Art 213(2) EC, which forbids that 'members of the Commission engage in other paid activities' and is interpreted as an incompatibility rule: see Dann, above n 111, 27.

Finally, the changes envisioned by the Lisbon Treaty will hardly change the basic dynamic of the election procedure. Despite several proposals and strong support from the more federalist side, these changes will not change the EP's role significantly as they do not abridge the Council's primacy in selecting a candidate.¹¹⁷ This dynamic might only change if European parties would start nominating their candidates before the election to the EP. This, however, seems unlikely from today's perspective.

In sum, a development into a parliamentary system in the strict sense seems unlikely. Nevertheless, the elective powers of the EP today or tomorrow are neither unimportant nor meaningless. Quite the contrary, they tell a lot about the specific role of the parliament in the EU. Although it cannot autonomously elect a Commission, it can always prevent one. It functions as a controlling force, holding a negative elective competence. This power makes perfect sense in the specific institutional and political setting of the EU. First of all, possessing this negative competence might ensure at least a basic standard of democratic accountability. More importantly from the perspective of the overall system, an increased influence on the election of the Commission would also require a stable coalition in the EP to carry this Commission. This is not only very difficult to achieve (and maintain!) but would endanger the federal diversity of the party system in the EP. And, thirdly, the fact that neither the EP nor its majority is bound to the Commission by party loyalty has positive effects on its independence when it comes to questions of control and law-making. Thus, the current position of the EP might not only correspond to its function, it also seems to fit normatively into the broader political system and executive federalism of the EU.

However, this interpretation of the EP's elective powers should not obscure a deep flaw in the elective system of executive federalism—the question of accountability. It is a central principle of democratic government that the people shall have a say in who governs. Democratic government is self-government. But looking at the EU, this principle is grossly violated. Here, the executive, located in the Commission and to some extent in the Council, is not elected by the EP but appointed by the EP and Council together. The Council itself is composed of national governments, thus elected separately by the respective national parliaments and their elections. Hence, every vote is several times counterbalanced and dispersed by other votes in other elections. It is barely possible to get rid of the governing class, since there is a de facto permanent all-party government.¹¹⁸

If parliamentarisation is hindered by the structure of executive federalism, would direct election, namely of the President of the Commission, remedy the problem? This could be argued, since it would enhance the transparency of the system and strengthen a clear line of responsibility.¹¹⁹ Yet the problem of accountability in the EU runs deeper. It is rooted in the federal structure, which necessarily demands co-operation between the federal levels and different governments. The problem of accountability and the federal structure of the EU are deeply intertwined.¹²⁰ Even a directly elected President of the Commission would have to bargain and make compromises with the national governments in the Council. Executive federalism entails this somewhat murky and non-transparent situation. What seems like an obvious violation of democratic principles on the one hand turns out to be the life insurance of the federal system on the other.¹²¹

¹¹⁷ See Kokott and R  th, above n 65, 1332–3.

¹¹⁸ JHH Weiler, 'To Be a European Citizen' in idem, above n 77, 350; K Neunreither, 'Governance without Opposition' (1998) 33 *Government and Opposition* 419.

¹¹⁹ Lord, above n 98, 131; F Decker, 'Parlamentarisch oder pr  sidentiel? Institutionelle Entwicklungspfade des europ  ischen Regierungssystems nach dem Verfassungsvertrag' (2007) 5 *Zeitschrift f  r Staats- und Europawissenschaften* 192.

¹²⁰ See also Oeter, above chapter 2.

¹²¹ For this problem in another system of executive federalism, the German, see E-W B  ckenf  rde, 'Sozialer Bundesstaat und parlamentarische Demokratie' in J Jekewitz (ed), *Politik als gelebte Verfassung* (1980) 188.

b) Oversight Function: Control via Organisation

The structure of executive federalism also has important consequences for the oversight function. The two types of parliaments sketched out in the beginning differ remarkably in this respect too: a debating parliament scrutinises the government primarily in public debate in the plenum; a working parliament does so by means of detailed control of government proposals, exercised by specialised committees.¹²²

How does the EP fare with respect to these types? Seen from a formal standpoint, the EP could easily qualify as a debating parliament. It has several formal powers to interrogate and scrutinise the Commission in plenum.¹²³ A look at the actual use of these powers, however, alters the picture. Although interrogation powers are undoubtedly popular,¹²⁴ their usage has shrunk, especially since the EP has gained legislative powers.¹²⁵ Thus these powers do not constitute the most vital part of EP procedures.

Instead, the working parliament approach grasps the EP much better. This approach is primarily based on organisational preconditions, namely an effective committee structure,¹²⁶ as exemplified by the US Congress.¹²⁷ Indeed, the EP's committees are of paramount importance.¹²⁸ Two aspects highlight their central position.

First, their role in acquiring and analysing information and in formulating political positions is central to the policy-formulation in the EP. Committees have the right to interrogate the Commission¹²⁹ and to hold hearings with special experts.¹³⁰ Through these instruments, committees have acquired specific expertise in their fields.¹³¹ On this basis, they file reports to be discussed in the plenum, predetermining most of the outcomes.¹³²

Secondly, their internal structure plays a pivotal role. They are small, specialised and targeted in their scope at the division of subject matters in the Commission. Of salient importance is their leadership structure. This consists of a chairperson and a rapporteur.¹³³ The latter is responsible for presenting a matter to the committee, drafting the report for the committee and arguing it in the plenum and with other institutions. A highly influential figure, the

¹²² K Bradshaw and D Pring, *Parliament and Congress* (1972) 355; Löwenberg and Patterson, above n 52.

¹²³ See Art 197(3) EC (Art 226 TFEU), rr 108–10 and 176 of the European Parliament's Rules of Procedure (EP's RoP), 16th edn, July 2004, [2005] OJ L44, 1; Corbett et al, above n 98, 283; Beckedorf, above n 33, 126. The EP also has extended powers to scrutinise the Council, which finds an explanation only in the special role that the Council plays in executive federalism, see Dann, above n 31, 360ff; J Lodge, 'The European Parliament' in SS Andersen and KA Eliassen (eds), *The EU: How Democratic Is It?* (1996) 198.

¹²⁴ In the fifth legislature (1999–2004) the Commission had to answer no fewer than 19,855 parliamentary questions (Corbett et al, above n 98, 285). For regular updates on these numbers, see the annual reports of the Commission; for an insightful early analysis, see L Cohen, 'The Development of the Question time in the EP' (1979) 16 *CML Rev* 46.

¹²⁵ A Maurer, *What Next for the European Parliament?* (1999) 54.

¹²⁶ From a comparative perspective, see K Strom, 'Parliamentary Committees in European Democracies' in L Longley and R Davidson (eds), *The New Role of Parliamentary Committees* (1998) 21.

¹²⁷ See C Deering and S Smith, *Committees in Congress* (1997); M Shapiro, 'The Politics of Information' in Craig and Harlow (eds), above n 48, 187.

¹²⁸ See Corbett et al, above n 98, 126–55; V Mamadouh and T Raunio, 'The Committee System' (2003) 41 *JCMS* 333; C Neuhold, 'The 'Legislative Backbone' Keeping the Institution Upright?', *European Integration online Papers* 4 (2001), available at <http://eiop.or.at/eiop>; S Bowler and D Farrel, 'The Organizing of the European Parliament' (1995) 25 *British Journal of Political Science* 226.

¹²⁹ EP's RoP, rr 109 and 187.

¹³⁰ *Ibid.*, r 183(2).

¹³¹ See K Collins et al, 'Policy Entrepreneurs' (1998) 19 *Statute Law Review* 1, 9–10; Bowler and Farrel, above n 128, 226–35.

¹³² Another important facet of the EP's scrutiny system are the Committees of Inquiry (Art 193 EC, Art 226 TFEU) that can be set up for special purposes and for a limited time: see Beckedorf, above n 33, *passim*; M Shackleton, 'The European Parliament's New Committees of Inquiry' (1998) 36 *JCMS* 115.

¹³³ Mamadouh and Raunio, above n 128, 341–8; Bowler and Farrel, above n 128, 242–3.

rapporteur is chosen in a complicated and hotly contested procedure.¹³⁴ Besides, the rapporteur creates clear responsibilities, giving the committee a distinct voice to communicate to the inside (between different committees and party groups) as well as to the outside (to other institutions). It renders committees especially suited to negotiate with other institutions.¹³⁵

The EP also resembles a working parliament with respect to its staff. One sign of a working parliament is that it acquires its expertise and level of scrutiny not least because of the support from an extensive staff. Compared to the US Congress, of course, the EP's staff looks petty, but compared to all the national parliaments in Europe, it is very well equipped with respect to its scientific staff.¹³⁶

c) Co-Legislator: Law-making by Co-operation and Consensus-building

Finally, the EP law-making function resembles that of working parliaments.¹³⁷ As such, it has a more powerful position as legislature than most national parliaments, acting in a parliamentary system.¹³⁸ Three aspects characterise its specific role: the need for inter-institutional co-operation, the need for compromise building within the EP and its role of a policy-*shaping*, not policy-making, actor.¹³⁹

(1) Law-making in the EU is characterised by an overriding need for co-operation between the involved organs. This follows (partly) from the strictly bicameral approach of co-decision procedure (Article 251 EC)¹⁴⁰ which the Lisbon Treaty will extend to even more areas of competence so that it is rightfully called the 'ordinary legislative' procedure (Article 294 of the Treaty on the Functioning of the European Union (TFEU)).¹⁴¹ Through two readings in EP and Council, and possibly a conciliation committee, a bill has to be agreed upon by both organs, EP and Council.¹⁴² In this often long bargaining process, the Commission acts as initiator and broker. The triangular game is facilitated by a range of informal meetings between the institutions, which have come to be known (and institutionalised) as 'trialogue'.¹⁴³ In fact, enlargement seems to have only increased the importance of such early and intensive consulta-

¹³⁴ Neuhold, above n 128, 7; Corbett et al, above n 98, 139–41.

¹³⁵ Another important aspect explaining their role is that EP committees convene principally in public (see EP's RoP, r 96(3)) and function as 'windows of the parliament': see Neuhold, above n 128, 8–9; Corbett et al, above n 98, 314–15, 334.

¹³⁶ See Shapiro, above n 127, 199–207; Corbett et al, above n 98, 191–201; for a comparative perspective, see Löwenberg and Patterson, above n 52, 159–64; altogether there are 4100 staff workers, 1200 of them translators. And there are even more sources: the EP has adopted a network concept to use external research institutions for European matters (the so-called STOA, Scientific and Technical Options Assessment: see Corbett et al, above n 98, 287). Moreover, there is the legal service of the EP, which provides valuable support in judicial proceedings and other legal matters.

¹³⁷ As to the differing approaches of parliaments to law-making, see Dann, above n 98, 566; Bradshaw and Pring, above n 122, 293.

¹³⁸ As to the specific development of the EP's legislative competences, see A Maurer, 'The Legislative Powers and Impact of the EP' (2003) 41 *JCMS* 227, 231–36; Héritier, above 102, 69.

¹³⁹ There is not enough space here to spell out details of the lawmaking procedures; for a brief overview, see Lenaerts and van Nuffel, above n 38, para 14-011; for an empirical assessment, see Maurer, above n 113, 131ff.

¹⁴⁰ Peters, above n 95, 45 and 49.

¹⁴¹ See, inter alia, Arts 43, 79 and 82 TFEU.

¹⁴² As to the conciliation committees, see extensively F Rutschmann, *Der europäische Vermittlungsausschuss* (2002); see also Corbett et al, above n 98, 223–5.

¹⁴³ Joint Declaration of EP, Council and Commission on practical arrangements for the codecision procedure (2007/C 145/02) OJ C145, 5; M Shackleton and T Raunio, 'Codecision since Amsterdam' (2003) 10 *JEPP* 171, 176–81; H Farrel and A Héritier, 'Formal and Informal Institutions under Codecision', *European Integration online Papers* 18 (2002) 7, available at <http://eiop.or.at/eiop>. The co-operation between the organs is also facilitated by a number of inter-institutional agreements: see I Eiselt and P Slominski, 'Sub-constitutional Engineering' (2006) 12 *ELJ* 209; F von Alemann, *Die Handlungsform der inter-institutionellen Vereinbarung* (2006).

tions,¹⁴⁴ with often problematic consequences for the transparency of proceedings and the ability of the general public to monitor and understand what is going on.

The need for ongoing co-operation has a second reason: although the Commission has the sole power to initiate legislation,¹⁴⁵ it has no steady parliamentary base to carry its bills through the deciding organs.¹⁴⁶ This reflects the Commission's role as a politically (and nationally) balanced institution. However, even if it had a steady parliamentary majority, structurally it cannot have one in the Council, which is not prearranged along party lines. Hence, the Council forms a roadblock of executive federalism against a smooth government-led legislative process, rendering it a highly consensual, co-operation-based process.¹⁴⁷

(2) The second aspect is the fact that the EP in itself is a compromise-prone or even consensual system.¹⁴⁸ Its committees serve as small, specialised fora for negotiations between the different party groups as well as with the other institutions.¹⁴⁹ The general leadership structure of the EP also provides it with a system appropriate for a consensual setting.¹⁵⁰

The EP is also a dominantly compromise-seeking actor because its party structure is especially diverse.¹⁵¹ To reach an agreement here already requires the art of compromise. Moreover, majority rules in the EP set high standards for reaching agreement.¹⁵² Both aspects force the EP to develop negotiating and compromise techniques for its interior arrangements, allowing it to thrive in the broader inter-institutional process as well. This diverse and rather consensual character of the EP implies that a parliamentary and majoritarian logic cannot really take root and thus does not conflict with the federal and consensual structure of the institutional process in the EU.¹⁵³ From this perspective, the 'political deficit' of the EP, as Renaud Dehousse has called it,¹⁵⁴ turns out to be the 'efficient secret' of decision-taking in the institutional setting of the EU.

(3) A third point has to be made to characterise the EP's comparatively powerful role in law-making. Since the EP has no power to initiate legislation, its influence is principally of an amending or blocking nature.¹⁵⁵ The EP's general role is therefore less that of a policy-making legislature, than a policy-*shaping* legislature. This does not (dis-)qualify it as a weak or incomplete parliament. In 'normal' parliamentary systems today, it is nearly exclusively the government that introduces bills. In contrast, the EP has developed an active agenda-setting behaviour; due to its political independence from the Commission and due to its organisational features (namely the committees), the EP is better able to rigorously scrutinise and amend bills

¹⁴⁴ Settembri, above n 78, 32.

¹⁴⁵ See Arts 250(1) 251(2) 252a EC (Art 17(2) TEU-Lis); see also C von Buttlar, *Das Initiativrecht der Kommission* (2003).

¹⁴⁶ Dehousse, above n 90, 126; S Hix and C Lord, *Political Parties in the European Union* (1997) 178.

¹⁴⁷ S Boyron, 'The Co-decision Procedure' in Craig and Harlow (eds), above n 48, 147.

¹⁴⁸ See also Farrel and Héritier, above n 143, 7; Kreppel, above n 96, 174–5, 215.

¹⁴⁹ The Commission is a regular participant of EP committee sessions, presenting and defending its proposals. Also, the Council (represented by the minister of the incumbent Presidency) is more and more often to be seen in these meetings to pave the way for later agreements, a situation codified in EP's RoP, rr 137 and 183(2): see Neuhold, above n 128, 10; Collins et al, above n 131, 6.

¹⁵⁰ Judge and Earnshaw, above n 96, 173–6.

¹⁵¹ Hix and Lord, above n 146, 77, 156 (table 6.7); Kreppel, above n 96, 215ff.

¹⁵² Arts 198, 251(2)(b) and (c) EC (Art 294(7)(a) and (b) TFEU).

¹⁵³ As to different experiences in the German executive federalism, see Lehmruch, above n 46.

¹⁵⁴ Dehousse, above n 90, 125; on the problem of opposition politics in the EP and its implication for the nature of constitutionalism in the EU, see also C Möllers, above chapter 5.

¹⁵⁵ As to its right to request that the Commission submits a proposal, Art 192 EC (Art 225 TFEU), and its rare use, see von Buttlar, above n 145, 190ff, 254; Corbett et al, above n 98, 238–9; M Westlake, 'The Commission and the Parliament' in G Edwards and D Spence (eds), *The European Commission* (1997) 244–5.

and thus shape legislation than parliaments in parliamentary systems, which have to loyally follow their government.¹⁵⁶

In sum, the EP, as the parliament in the structure of executive federalism, can best be understood as a working parliament—guided by strong committees, neither politically nor personally connected with the Commission, and exercising influence on law-making procedures through its political independence and veto power. Its relation to the Commission, however, is flawed by a lack of elective accountability, which surely has consequences for the question of gubernative leadership.

3. European Commission

a) The Problem of Leadership

Perceived through the lens of executive federalism, leadership poses an inherent problem. The principal equality of Member States and the absence of ideological coherence in the Council impede hierarchical leadership. Even though certain tandems or triangles of countries may serve as motor, there is no steady base for formal or informal hierarchy. In addition, the need for consensus veils responsibility. As most decisions are taken in agreement with all parties involved and negotiated confidentially, it is often hard to discern which party is responsible for any particular policy—a basic hallmark of leadership. Finally, the demand for co-operation prevents quick action. In the Union of 27, the agreement on policy initiatives and bills takes an enormous amount of time.¹⁵⁷ However, the institutional system of the EU offers two organs that have potential leadership functions: the European Commission and the European Council. How does the Commission, to start with the truly supranational organ, perform this function and how does it cope with the restraints of executive federalism?

Again, two lines of thought will be used to find answers. First, the role and functions of the Commission are examined in the frame of executive federalism. Secondly, we will once again use a comparative approach to get a clearer view on what type of institution the Commission is.¹⁵⁸ To that end, two types of governments shall be outlined: the majoritarian and the consensual type of government.¹⁵⁹

The majoritarian government is composed along lines of political affiliation. Based on the majority in parliament, which elects and supports the government, the ministers are selected from one party or a coalition of parties; ideological coherence is the essential characteristic of a majoritarian government. The internal organisation of the cabinet government is structured by a clear hierarchy, with a prime minister at the top. He assures ultimate responsibility to parliament. Examples of this type can be found in the British government or the German *Bundesregierung*.¹⁶⁰ The hallmark of the consensual government, as the second type may be called, is its proportionate composition, representing all relevant regional, cultural and political

¹⁵⁶ A von Bogdandy, above chapter 1, section V.4(b); see also K von Beyme, *Die parlamentarische Demokratie* (1999) 282ff.

¹⁵⁷ This view shall not foreclose other explanations for the problem, eg the institutional rivalry between Commission and Council: N Nugent, *The European Commission* (2001) 202–4.

¹⁵⁸ This chapter will only examine the political top of the Commission, ie the College and its President, but not the bureaucratic base, ie the services; for further information on them Nugent, above n 157, 134ff.

¹⁵⁹ Various concepts have been employed to grasp the Commission's nature, see D Rometsch, *Die Rolle und Funktionsweise der Kommission in der Ära Delors* (1999) 55; Nugent, above n 157, 8–9; L Cram, 'The European Commission as Multi-organisation' (1994) 1 *JEPP* 195; JH Matlary, 'The Role of the Commission' in N Nugent (ed), *At the Heart of the Union* (2000) 270.

¹⁶⁰ For a description of this form see M Schröder, 'Bildung, Bestand und parlamentarische Verantwortlichkeit der Bundesregierung' in J Iseensee and P Kirchhof (eds), *Handbuch des Staatsrechts* (1998) vol II, § 51; von Beyme, above n 156, 415ff. The fact that German governments are regularly coalition governments does not mean that they not ideologically coherent.

groups. It is not built on a parliamentary majority but based on the principle of fair representation of all parties and regions. Members of the government are equals and take collective responsibility. The federal government is elected by an assembly, composed of both houses of parliament, thus ensuring the federal balance of the election. This form of government is to be found in the Swiss *Bundesrat* (Federal Council).¹⁶¹

b) Organisational Structure: The Outlook of a Consensual Government

The composition of the Commission shows strong similarities to a consensual government. In the college of 27 members, every Member State is currently represented by one commissioner.¹⁶² Also, in terms of political composition, a form of proportionate representation (and not ideological coherence) prevails.¹⁶³ The sacrosanct status of these rules of proportionate composition can be estimated by following the discussions within the Convention on the Constitutional Treaty—and by assessing the result. Even though there was broad agreement that a college of 27 is hardly able to govern coherently, efficiently and with mutual trust, a reduction of Commissioners was postponed until the year 2014. Then, as prescribed by Article 17(5) of the EU Treaty of Lisbon (TEU-Lis), the number of Commissioners will be reduced to correspond to two-thirds of the number of Member States. However, even after this change, the Lisbon Treaty will provide a backdoor for the European Council to unanimously alter that number (Article 17(5) TEU-Lis), a backdoor through which one step has already been taken.¹⁶⁴ In any event, the equal representation (then based on a system of strictly equal rotation) cannot be impaired.

With respect to its internal hierarchy, we can observe a development from a consensual to a more majoritarian type. The Commission has a collegiate nature, with the Commission President traditionally being only marginally more important than other members.¹⁶⁵ Currently, the college takes decisions collectively.¹⁶⁶ However, past Treaty revisions have strengthened the role of the President. The Commission works now ‘under the political guidance of its President’, who can decide on its internal organisation and allocate responsibilities.¹⁶⁷ More importantly, perhaps, the President can influence the choice of ‘his’ Commissioners¹⁶⁸ and can dismiss a member of the Commission.¹⁶⁹

As to the mode of appointment, a close resemblance to the consensual type of government can be observed. The Commission is appointed in an intricate procedure that intertwines the role of the Council with the EP. Whereas the former has the power to nominate the President and then make a list of Commissioners, the latter has to confirm the choice of the President and then the college as a whole.¹⁷⁰ Thus, it is not the parliament that can autonomously elect

¹⁶¹ L Mader, ‘Bundesrat und Bundesverwaltung’ in D Thürer (ed), *Verfassungsrecht der Schweiz*, § 67.

¹⁶² Art 213(1) EC, Art 4 of the Protocol on the Enlargement (2001) as amended by Art 45(2)(d) of the Act concerning the conditions of accession of 2003 (OJ L236, 1); see also Art 17(4) TEU-Lis.

¹⁶³ It is a telling detail that the bigger states, which until the accession of the 10 in 2004 used to send two commissioners, chose two from different political camps, eg Neil Kinnock and Chris Patten: see Nugent, above n 157, 89; more explicit is the legal situation in Switzerland: see Art 175(4) Bundesverfassung (Swiss Constitution).

¹⁶⁴ In order to pacify the Irish voters, who had rejected the Lisbon Treaty in a referendum in June 2008, the European Council in December 2008 decided that ‘the Commission shall continue to include one national of each Member State’ (European Council, Presidency Conclusions, Council Doc 17271/08, para 2).

¹⁶⁵ Nugent, above n 157, 68–71.

¹⁶⁶ See Case 5/85 *AKZO Chemie v Commission* [1986] ECR 2585, para 30; see also Lenaerts and van Nuffel, above n 38, para 10-068.

¹⁶⁷ Art 217(1)(2) EC, G Falkner and M Nentwich, ‘The Amsterdam Treaty’ in K Neunreither and A Wiener (eds), *European Integration after Amsterdam* (2000) 15, 23ff.

¹⁶⁸ Art 214(2) EC (Art 17(7)(2) TEU-Lis).

¹⁶⁹ Art 217(4) EC; the current condition of obtaining the approval of the College will be dropped and the President’s role again strengthened according to the Lisbon Treaty: see Art 17(6) TEU-Lis.

¹⁷⁰ Art 214(2) EC (Art 17(7) TEU-Lis): see Maurer, above n 113, 171ff; S Hix, ‘Executive Selection in the EU’ in Neunreither and Wiener (eds), above n 167, 98.

the government, as in the majoritarian model, but a tandem of a unitary actor and a federal one.¹⁷¹

The stability of the term of office is another indicator of the nature of the Commission as a consensual government. The Commission comes close to this. The Council, as one part of the bicameral elector, has no power to dismiss the Commission. The EP, on the other hand, has the power to retire the Commission by a motion of censure,¹⁷² as such a typical instrument of parliamentary regimes. Its use is seriously hampered, though, by the requirement of a two-thirds majority of votes cast.¹⁷³ Especially in a parliament that is characterised by a very heterogeneous mix of parties, such a majority is almost impossible to organise.

c) Functions: Agenda-setter, Mediator and Guardian

Although the consensual aspects in the structure of the Commission have been demonstrated, the fingerprints of executive federalism have been less obvious so far. This changes, once we look at the functions of the Commission.

Every political system needs an institution that provides orientation and leadership. Within the EU, the institutional dynamic of co-operation and consensual agreement creates such a need. However, this need is confronted with a specific relation between the Commission and the law-making organs, which is characterised by two aspects. First, the Commission has no political base in the EP. In contrast to governments in parliamentary systems, it has no steady partner to carry through its political concepts. Secondly, even if it had such a parliamentary basis, this would not reach into the second house of the federal bicameral legislator, ie the Council. Hence, any institution of leadership in executive federalism must be able to reach out to both EP and Council. With that in mind, the tasks and powers of the Commission prove perhaps more convincing because they fit more effectively into the institutional system of executive federalism. Three functions of the Commission should be highlighted:¹⁷⁴

aa) Agenda Setting

First of all, the Commission serves as an agenda setter.¹⁷⁵ To that end, it employs several means of communication.¹⁷⁶ Just as important is its exclusive right of initiative in law-making procedures.¹⁷⁷ The Commission can decide whether, when and on what legal basis the Union should act. Even though the Council and the EP can request the Commission to submit proposals, the Commission is not obliged to do so.¹⁷⁸

bb) Mediating Interests

Secondly, the Commission serves as a broker and mediator between parties and institutions. Since leadership is hampered in executive federalism by a lack of hierarchy, the need for a

¹⁷¹ See the Swiss *Bundesversammlung* (Federal Assembly), Arts 157(1) 175(2) *Bundesverfassung* (Swiss Constitution); see also Mader, above n 161, 1051.

¹⁷² Art 201 EC (Art 234 TFEU).

¹⁷³ See Corbett et al, above n 98, 278ff.

¹⁷⁴ As to other functions, see Lenaerts and van Nuffel, above n 38, paras 10-056–10-061; JA Usher, 'The Commission and the Law' in Edwards and Spence (eds), above n 155, 155, 162–5; Nugent, above n 157, 297ff.

¹⁷⁵ Nugent, *ibid*, 217ff.

¹⁷⁶ Art 211, 2nd indent EC: see Art 17(1), 1st and 7th sentences TEU-Lis; Lenaerts and van Nuffel, above n 38, para 10-059.

¹⁷⁷ Art 17(2) TEU-Lis; Lenaerts and van Nuffel, above n 38, para 14-014.

¹⁷⁸ Arts 208 EC (Art 241 TFEU).

neutral third party rises.¹⁷⁹ The Commission is well equipped to serve this purpose.¹⁸⁰ By law, Commission and Commissioners must be independent and must perform their duties only in the general interest of the Community.¹⁸¹ The Commission mostly succeeded in being seen as an independent broker for sound solutions in the common interest.¹⁸²

Its ability as a neutral third party is also promoted by the Commission's procedural rights, as it takes part in all legislative procedures and has access to all institutions.¹⁸³ Flowing from its right of initiative, it has the power to amend a draft at any point or to simply withdraw it.¹⁸⁴ Thus, the Commission has utmost flexibility and often has superior information as to how an agreement between the actors involved could be achieved.

In this function as broker, the interplay between the functional demand of the executive federalism and the Commission's structure as a consensual government appears most striking. The specific structure of the Commission seems exactly shaped to fit into and promote the institutional dynamic of this multi-layered political system.

cc) Federal Guardian

A third function of the Commission is not only to serve as a voice of the federal interest in the realm of political decision-making, but also to ensure compliance through means of legal control. To this end, the first indent of Article 211 EC obliges it to monitor the compliance of the Member States or other institutions with Union law.¹⁸⁵ To this end, it is competent to institute infringement proceedings, or to bring actions for annulment or for failure to act in the Court of Justice. This task and powers fits well into the system of executive federalism, in which the Member States implement Union law. It seems evident that a federal organ has to supervise the implementation. It is a question not only of efficiency, but also of fairness between the Member States that a neutral institution ensures that all Member States comply.

d) Conclusion and an Unresolved Problem of Leadership

In sum, the structure and powers of the Commission can be explained coherently within the conceptual framework of executive federalism. As Walter Hallstein put it, the Commission is 'at once a motor, a watchdog and a kind of honest broker'.¹⁸⁶ It is interesting to observe how the organisational structure of the Commission and its tasks interplay and complement each other. Namely, the proportionate composition of the Commission seems essential in order to serve as the mediating or prosecuting third party, which is an essential task in the consensual system of executive federalism.¹⁸⁷

However, one question that has not been directly answered yet is that of leadership. Considering the specific problems of leadership arising from the structure of executive federalism described above, it seems that there are two answers—a more benevolent one and a more sceptical one. In a more benevolent light, one could argue that a consensual system like the European Union needs a specific form of leadership. Leadership within this federal system

¹⁷⁹ See FW Scharpf et al, *Politikverflechtung* (1976) 42ff.

¹⁸⁰ It should be emphasised that the neutrality of the Commission is interpreted here not as technocratic legacy or as a political task, but as a federal function.

¹⁸¹ Art 213(1) and (2) EC (cp Art 245 TFEU); as to the incompatibility rule between Commission and EP, see above section IV.2(a).

¹⁸² Nugent, above n 157, 210–11.

¹⁸³ Hayes-Renshaw and Wallace, above n 50, 192–4.

¹⁸⁴ Art 250 EC; but see Art 251(4) and (5) EC (cp Art 293(1) TFEU).

¹⁸⁵ See Art 17(1), 2nd and 3rd sentences TEU-Lis; Usher, above n 174, 165–8; still informative is Schmitt von Sydow, above n 8, 28ff.

¹⁸⁶ W Hallstein, *United Europe* (1962) 21.

¹⁸⁷ As to a comparison between the Swiss Bundesrat and the Commission, see also Oeter, above chapter 2, section VI.3.

cannot follow hierarchical (or majoritarian) models of command and top-down procedures. Instead, leadership here has to take on a more dialogical style, based more on the powers to initiate discussions, to set the agenda and to shape procedures. This type of leadership is not simply a soft version of power or yet another ‘European disease’; the powers of the President of the United States are seen as lying mainly along these lines, too.¹⁸⁸

The more sceptical observer would point out, though, that leadership by the Commission is weak, caused by a tension between the task of political leadership and the task of mediation. The Commission is torn between politicisation and federal accommodation, and in effect unable to lead in a strong sense. It seems, so the sceptic could argue, that an institution can either serve as a political leader with political goals, or as a neutral third party, but both together produce an unsatisfying intermediate result. The history of the Commission can demonstrate this. Whenever it took a strong lead in some policy field, it had to disguise its (political) intentions behind a facade of expertise and wrap it in rhetoric of the common interest. According to this view, the Commission is structurally an ineffectual leader.

Whatever view one might prefer, one sure consequence of the Commission’s role as neutral broker often is a political deficit. When political goals are pursued by technical deliberations, the open competition of opinion is over. This consequence follows from the structure of executive federalism and is yet another demonstration of a fundamental dilemma inherent to it. A system as heterogeneous and as consensually driven as the EU becomes less effective the more political and open a discussion is. Or, as it has been put before: a certain political deficit ensures the working of the institutions of executive federalism.¹⁸⁹ In that situation, an alternative could lie in tandem leadership with another institution, the European Council.

4. European Council

The European Council was not part of the original institutional set up of the European Communities. Instead, it grew out of a series of summits of the heads of governments in the 1960s, and was officially established as a regular meeting in 1974.¹⁹⁰ This development is of special importance to the understanding of what is today seen as the central stage for major policy decisions in the EU, and explains many of the functional deficiencies of the federal institutional structure. Last but not least, the European Council can be regarded as the ultimate confirmation of the structure and institutional logic of executive federalism in the EU.

a) Composition and Form: The Ideal of the ‘Fireside Chat’

A threefold impulse led to the creation of the European Council.¹⁹¹ Domestic pressure on the organisation of the welfare state, combined with rising international economic instability and a leadership gap within the European Communities, signalled an enhanced need for direct contact and co-operation between the heads of governments. However, the chance to create a truly helpful place for co-operation was crucially dependent on the institutional setting of the envisioned meetings.¹⁹² At the heart of the European Council therefore lies its form. The

¹⁸⁸ Against popular belief on this side of the Atlantic, the US President has rather limited constitutional resources of power, so that his office as bully pulpit and other means of persuasion are of central importance, as famously described by R Neustadt, *Presidential Power* (1960).

¹⁸⁹ See above section IV.2(c).

¹⁹⁰ Communiqué of the Heads of States or of Governments meeting in Paris on 9–10 December 1974, Bulletin EC 12-1974, point 1104(3); it convened officially for the first time as ‘European Council’ in Dublin in March 1975. For the development, see Westlake and Galloway, above n 50, 171; W Wessels, *Der Europäische Rat* (1980); J Werts, *The European Council* (1992).

¹⁹¹ S Bulmer and W Wessels, *The European Council* (1987) 16.

¹⁹² As to the models discussed, see Bulmer and Wessels, above n 191, 36; Werts, above n 190, 70ff.

European Council was meant to be something like a ‘fireside chat’, a forum as informal and private, but at the same time as high-ranking, as possible.¹⁹³ Today, the European Council has outgrown this original format, but its central organisational features still mirror this idea.

The European Council convenes only the most important actors, ie the heads of state or government as well as the President of the Commission, if necessary assisted by their foreign ministers and another member of the Commission.¹⁹⁴ Secondly, and equally important, the European Council adheres to special working methods, especially informality.¹⁹⁵ A ban on written records of the meetings is strictly observed. Very few actors are even allowed to enter the meeting room.¹⁹⁶ Central to the working methods of the European Council is also its strict use of consensus decision-taking.¹⁹⁷

However, the informal and almost private character of the meetings has found its limits as importance, agenda and (not least) the number of participants of European Councils have grown immensely. Considerable organisational problems are the consequence.¹⁹⁸ One central structural change is therefore planned by the Lisbon Treaty: in order to ensure the continuity and coherence of the European Council, the Treaty introduces the post of a President of the European Council,¹⁹⁹ to be elected for a (renewable) two-and-a-half-year term.²⁰⁰ Whether the President will fulfil the hopes set in the office remains to be seen. The position does not seem to be very strong, since it is not clear yet what (administrative and political) resources he can really draw on. Much will depend on the ambitions and abilities of the first office-holder and the other members of the European Council.²⁰¹

The original ‘fireside-chat’ idea led to another consequence—with special meaning for the legal observer. The European Council for a long time was kept beyond the law. Only 12 years after its creation, the European Council was first mentioned in primary law.²⁰² For another two decades, it has been only vaguely described in Article 4 EU, but not mentioned in Article 7 EC, which establishes the institutional framework of the Communities. Thus, the European Council is not an institution of the Community, and Community institutions are not legally bound by its decisions.²⁰³ Here, the Lisbon Treaty proposes significant change, as it will incorporate the European Council into the regular institutional and legal framework of the Union.²⁰⁴

As we look at the organisational structure, it is revealing to put on the glasses of executive federalism for a moment. It is not difficult to recognise certain aspects that fit into the federal system. The need for extended co-operation, which led to the creation of the European Council, can be located in the lack of political leadership so characteristic of the federal system. Also, the consensual form of decision-taking between executives plays well into the general

¹⁹³ This idea was based on the experiences that Giscard d’Estaing and Helmut Schmidt had made in the so-called library group: Westlake and Galloway, above n 50, 171, 175; see also Bulmer and Wessels, above n 191, 80.

¹⁹⁴ Art 4(2) EU (Art 15(2) and (3) TEU-Lis).

¹⁹⁵ See the Decision of the European Council meeting in London, Bulletin EC 6-1977, point 2.3.1, which lays down the organisation and form of meetings; see also P de Schoutheete, ‘The European Council’ in Peterson and Shackleton (eds), above n 53, 21, 30.

¹⁹⁶ See the vivid description by de Schoutheete, *ibid*, 25.

¹⁹⁷ Bulmer and Wessels, above n 191, 55; Art 15(4) TEU-Lis will explicitly state this form of decision-taking.

¹⁹⁸ de Schoutheete, above n 195, 41–4.

¹⁹⁹ Art 15(6) TEU-Lis: see P de Schoutheete, ‘Die Debatte des Konvents über den Europäischen Rat’ [2003] *integration* 468, 478–0.

²⁰⁰ Art 15(5) TEU-Lis.

²⁰¹ For a careful appraisal, see M Doughan, ‘The Treaty of Lisbon 2007’ (2008) 45 *CML Rev* 617, 529, 696.

²⁰² Art 2 Single European Act.

²⁰³ Lenaerts and van Nuffel, above n 38, para 2-018; to the legal force of its acts, see below section IV.4(b)(bb).

²⁰⁴ Arts 13, 15 TEU-Lis; especially with regard to the question of whether its actions can be brought before the ECJ for infringement of the Treaties, see Bast, below chapter 10, section V.2.

character of the system of executive federalism as consensual democracy. In a sense, the European Council can be seen as the re-birth of an original, confederate Council idea: a meeting point of executives, where negotiations take place in strict confidentiality and decisions are reached by consensus. Hence, the European Council is not so much shaped by the Council; instead, it actually replicates it.²⁰⁵

b) Functions

The functions and powers of the European Council had originally not been fixed. Even today, they are of rather elusive legal form. Article 4(2) EU (Article 15(1) TEU-Lis) confers on the European Council the task of providing ‘the Union with the necessary impetus for its development’ and with the task of defining ‘the general political guidelines’.²⁰⁶ Comprehension of its institutional role will therefore only follow from a closer look at its concrete functions. Three of these are of special importance.²⁰⁷

aa) *Steering Committee*

The central reason for creating the European Council was the need for closer co-operation and concerted leadership. Thus, providing direction and enabling major decisions is the main function of the European Council. It has developed into the central stage for launching and directing major steps in the integration project.²⁰⁸ The European Council is thereby not confined to any special policy fields, but has taken action in every area, greatly enlarging the scope of Union activities.²⁰⁹

bb) *Final Arbiter and Co-ordinator*

The European Council has not been confined solely to defining general policy directions. To an ever-greater extent, it has taken on decision-making powers and become a final arbiter of European affairs. Contrary to its original intention,²¹⁰ the European Council has become involved in deciding major policy deals or leftovers from sectoral councils.²¹¹ Moreover, the European Council has increasingly asserted the position of a final arbiter for problems for which the sectoral councils were unable to find solutions.²¹² This role as final arbiter falls naturally to it since the method of making such broad package deals is only available to the heads of governments sitting in the European Council.²¹³

Besides, the European Council has also become increasingly involved in co-ordinating the policies of the Council (of ministers). This rather unintended function was mainly caused by a

²⁰⁵ As to the relation between Council and European Council, see Hayes-Renshaw and Wallace, above n 50, 165ff; Werts, above n 190, 105ff; Bulmer and Wessels, above n 191, 104; but see P Sherington, *The Council of Ministers* (2000) 40.

²⁰⁶ See also its specific powers as laid down in Arts 99(2) 128 EC (Arts 121(2) 148(1) TFEU), and in Arts 13(1) and (2) 17(1) EU (Arts 26, 42(2) TEU-Lis).

²⁰⁷ For an overview, see de Schoutheete, above n 195, 33–40.

²⁰⁸ Eg the initiatives which led to the European Monetary System (1978–9), the beginning of the enlargement process with Eastern European countries (1993) or the Lisbon process (2000); an account of the actions taken by the European Council is provided by Bulmer and Wessels, above n 191, 85; Werts, above n 190, 177ff.

²⁰⁹ The Solemn Declaration on European Union of 19 June 1983 even states this as task of the EC: see point 2.1.2. of the Declaration, Bulletin EC 6-1983; see also Bulmer and Wessels, above n 191, 92.

²¹⁰ See Art 15(1), 2nd sentence TEU-Lis.

²¹¹ A precise account of these developments is given in MT Johnston, *European Council* (1994) 75.

²¹² This practice of shifting difficult problems up to the European Council (and thereby ensuring unanimity) has been even institutionalised in the area of the CFSP: see Arts 23(2) EU and Art 31(2) TEU-Lis.

²¹³ S Bulmer, ‘The European Council and The Council of the European Union’ (1996) 26 *Publius* 32.

failure on the side of the General Affairs Council (composed of Foreign Ministers), which is supposed to play a central co-ordinating role.²¹⁴

The legal implications of these developments are problematic. As has been mentioned, the European Council itself is not an organ of the Community. Thus, it can take legally binding decisions in this realm only if it acting as a regular council (thus excluding the Commission President).²¹⁵ In this case, however, it would also have to proceed in accordance with the requirements of the EC Treaty, ie to vote based on a Commission proposal and in co-decision with the EP. The European Council has so far not made use of this track. Instead, the Council formally enacts what follows from the conclusions of the European Council summits.²¹⁶

The development of the European Council as arbiter is not surprising. The growing complexity of the system created by an expanded range of covered policy areas leads to an enhanced demand of co-ordination and requires a certain degree of consistency between the sectoral policies. Whether the European Council fills this gap convincingly is another question.²¹⁷

The European Council has more successfully answered the need for a final decision-taker. This need is inherent to the consensual nature of executive federalism, which is prone to blockades, but the 'European Council has been able—not consistently but as the culmination of a cycle of package-dealing meetings—to provide an escape from the Council's earlier institutional "gridlock"'.²¹⁸

cc) Treaty Negotiator and Constitutional Motor

The European Council has also developed an increasing impact on the constitutional development of the Union, becoming to some observers the 'key forum for determining treaty reforms'.²¹⁹ This comes as a surprise. When the European Council was created, it was feared that the new institution would lead to a strengthening of intergovernmental politics in the Communities, thus blocking supranational development.²²⁰ Quite to the contrary, the European Council has turned out to be a major motor for EU integration. It is necessary, however, to distinguish (not least legally) between the European Council, where the way for some important Treaty reforms might be paved politically (eg the Declaration of Laeken²²¹ or the mandate for the revision of the Constitutional Treaty of Berlin²²²), and the Intergovernmental Conference, where the actual decisions are taken. In any event, the growing importance of the European Council as a constitutional actor is confirmed in the Lisbon Treaty by the incorporation of special powers of constitutional amendment granted to the European Council (the so-called simplified revision procedures according to Article 48(6) and (7) TEU-Lis).²²³

In a comparative perspective, the European Council finds no equivalent as an organ of constitutional change. However, there is an ironic twist to this situation, since the EEC, which was meant to be a system 'in the making', from the outset lacked an institution or mechanism to actually 'make it'. In the European Council, originally feared as a blockade to integration, it

²¹⁴ See Bulmer and Wessels, above n 191, 103.

²¹⁵ Lenaerts and van Nuffel, above n 38, para 2-018. This is different in the area of CSFP: see Art 13 TEU.

²¹⁶ Ibid.

²¹⁷ Bulmer and Wessels, above n 191, 94.

²¹⁸ Bulmer, above n 213, 31.

²¹⁹ H Wallace, 'The Institutional Setting' in Wallace and Wallace (eds), above n 43, 20.

²²⁰ Bulmer, above n 213, 31.

²²¹ European Council, Laeken Declaration on the Future of the European Union, 14/15 December 2001, SN 300/1/01 REV 1.

²²² European Council, Presidency Conclusions, 22 June 2007, Council Document 11177/07, Annex I.

²²³ See also Arts 17(5) and 31(3) TEU-Lis.

seems to have invented a congenial institution that provides what an overloaded Council and restricted Commission cannot deliver.²²⁴

c) Conclusions

According to none other than Jean Monnet, ‘the creation of the European Council is the most important decision for Europe since the Treaty of Rome’.²²⁵ At the end of this chapter we may briefly ask: why? To what extent did the creation of the European Council shift the institutional balance? How does the new institution fit into the structure and institutional system of executive federalism? And finally, which answer does it give to the question of leadership?

aa) *An Institution from the Playbook of Executive Federalism*

It has been suggested that the creation of the European Council was not designed along the lines of the ‘founding fathers’, ie the drafters of the EEC Treaty of Rome.²²⁶ That is, the expected reform would have been one within the existing institutional framework and probably more along the lines of technocratic reform. This may be true. However, one can argue that the creation of the European Council surely was consistent with the founding fathers’ principles, at least if their vision was one of executive federalism. Indeed, the creation of the European Council seems to have been composed according to the executive federalism’s playbook. Instead of strengthening the Commission, empowering the parliament or creating a European President, the solution has been to strengthen the executive branch. And not just that: the solution has been one of consensual executive co-operation. The European Council plays along the already well-known tune of co-operation and consensus, and thus decisively substantiates the logic and structure of executive federalism in the EU.

However, the European Council is not only a confirmation of this basic structure, but also a response to its deficits: adding a powerful organ that can provide leadership, serving as a motor of development and (at least partly) remedying the danger of gridlock in the Council. Most interestingly, the creation of the European Council cannot be understood as being anti-federal, or anti-supranational. The European Council has played a decisive role in advancing this supranational system. If proof be needed, the draft Constitution of the EP of 1984, often criticised as dreamy federalism, acknowledges the role of the European Council in its Article 32.

But how does the European Council relate to other institutions? The relation to the Council has been described above.²²⁷ With respect to the EP, the answer is ambivalent. At its inception, consent to the creation of the European Council was ‘bought’ from the smaller states with the promise (of the bigger states) to direct elections to the EP.²²⁸ Thus, the European Council stands at the cradle of the EP as the most directly legitimised institution of the EU. Moreover, the European Council as an actor in constitutional politics has been immensely helpful in pushing towards stronger powers for the EP. The direct relations between EP and European Council are, however, insignificant. Although Article 4(3) EU prominently mentions the duty of the European Council to report to the EP, the practical effect of that duty is minor.²²⁹

²²⁴ A practitioner’s insight in the need for the European Council is supplied by C Tugendhat, *Making Sense of Europe* (1986) 166.

²²⁵ Quote taken from *ibid*, 167.

²²⁶ Bulmer, above n 213, 30.

²²⁷ See above section IV.4(a).

²²⁸ Westlake and Galloway, above n 50, 171, 175; Werts, above n 190, 153.

²²⁹ On the practice of reporting, see Werts, above n 190, 158; see also Bulmer and Wessels, above n 191, 114.

bb) European Council and European Commission as Twofold Government

Original fears that the European Council would decisively diminish the role of the Commission²³⁰ have not come true.²³¹ Instead, today the European Council and the Commission can be regarded as two sides of a twofold government, complementing each other in providing different, yet crucial forms of leadership.

The European Council ensures guiding political leadership and major decision-making. This was a role originally envisioned for the Commission, but only the European Council combines the power of its participants to command their domestic governments with the legitimacy to stand accountable for the direction taken.

However, this dominant centre not only casts a shadow, it also offers the Commission a stage for launching ideas, since the Commission has learned to handle the European Council and to use it to its own ends.²³² First, the Commission profits greatly from the direct channel of information that it gets by being part of the European Council. Also, the Commission fills an important role in providing the European Council with reports, memoranda and basic information, described as the ‘technical authority’ in the European Council.²³³ But in some aspects, the role of the Commission goes beyond that. More than once, the Commission was able to launch broad policy initiatives by using the European Council.²³⁴ The Commission’s role within the European Council has thus, with reference to this capacity, convincingly been called ‘promotional brokerage’.²³⁵

d) A Threefold Government? The Lisbon Treaty and the New High Representative for Foreign Affairs and Security Policy

The Lisbon Treaty will complement as well as complicate this twofold structure by introducing a third governmental actor: a High Representative for Foreign Affairs and Security Policy.²³⁶ To be precise, such post has been in existence since the Treaty of Amsterdam, but to date it has been part of the dual role of the Secretary General of the Council (Article 207(2) EC, Article 26 EU). With the Lisbon Treaty, the High Representative will gain more institutional independence, since it will be cut free from its role in the Council secretariat and will be assisted by a new European External Action Service, comprising staff from different European institutions (the General Secretariat of the Council and Commission) as well as Member States.²³⁷ Quite uniquely, the High Representative will operate in different organs: appointed by the European Council with the agreement of the Commission’s President, the High Representative will be a Vice-President of the Commission, will chair the Council when it convenes as the Foreign Affairs Council and will take part in the meetings of the European

²³⁰ Eg J Lodge, ‘The Role of EEC Summits’ (1974) 6 *JCMS* 337, 339; Bulmer and Wessels, above n 191, 109–10.

²³¹ This seems to be the general perception: see CD Ehlermann, ‘Das schwierige Geschäft der Kommission’ [1981] *Europarecht* 335, 355; W Wessels and D Rometsch, ‘The Commission and the Council of the Union’ in Edwards and Spence (eds), above n 155, 233; P Craig, ‘Some Thoughts on the Role of the European Council’ in JMB Pérez and I Pernice (eds), *The Government of Europe* (2003) 55.

²³² Wessels and Rometsch, above n 231, 233; Bulmer, above n 213, 34.

²³³ Werts, above n 190, 143.

²³⁴ This especially depends on the personal standing of the Commission’s President: see Werts, above n 190, 144.

²³⁵ Wessels and Rometsch, above n 231, 233.

²³⁶ Art 18 TEU-Lis: see D Thym, ‘Reforming Europe’s Foreign and Security Policy’ (2004) 10 *ELJ* 5, 18–22. This is the one aspect where the failure of the Constitutional Treaty will directly impact the institutional system, since the original title of a Foreign Minister fell prey to the anti-constitutional cleansing. Substantive changes were not made though: see FC Mayer, ‘Die Rückkehr der Europäischen Verfassung?’ (2007) 67 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 1141, 1175, 1179.

²³⁷ Art 27(3) TEU-Lis.

Council.²³⁸ This post and its new institutional set-up is a response to the growing engagement of the Union in external matters and the so far confusing multitude of voices speaking for it. The new Representative ‘shall conduct the Union’s common foreign and security policy’ and thus provide the Union with a unified voice (Article 18(2) TEU-Lis).

However, the new office entails considerable risks. Its doubled institutional position will go well beyond the understanding of most observers. This poses a serious threat to the transparency of the institutional system. Together with the newly created President of the European Council and the Commission’s President, there will be three ‘faces’ representing the Union in international politics. Moreover, the division of competences between these three actors and their full system of instruments is not yet clear; institutional rivalries between the three are therefore likely.²³⁹

V. Legitimacy of the Institutional System

A description and conceptualisation of the institutional system of the EU would be incomplete if it ignored the question of legitimacy. At the same time, approaches and opinions with regard to this topic are myriad. A complete overview is thus beyond the scope of this chapter.²⁴⁰

Instead, this part will focus on one concept of legitimacy in the EU, the concept of parliamentary democracy.²⁴¹ While the current Treaties barely acknowledge even the principle of democracy as such (it is mentioned only in Article 6(1) TEU)²⁴², the Lisbon Treaty will change the picture, as it states that ‘the functioning of the Union shall be founded on representative democracy’ (Article 10(1) TEU-Lis). It will embrace the concept of a dual parliamentary basis of European public authority. Our analysis will now turn first to the national parliaments, then to the European Parliament. On the basis of this discussion, a concluding paragraph will suggest a label for the European institutional setting and its form of legitimacy: ‘semi-parliamentary democracy’.²⁴³

1. The Dilemma of the National Parliaments

National parliaments are supposed to infuse democratic legitimacy to European governance by controlling the national governments’ representatives in the Council.²⁴⁴ They are also considered the sovereign actors in constitutional matters, ratifying Treaty reforms and the

²³⁸ D Thym in this volume; see also M Cremona, ‘The Draft Constitutional Treaty: External Relations and External Actions’ (2003) 40 *CML Rev* 1347, 1350–61.

²³⁹ See Kokott and Rühl, above n 65, 1315, 1337–8.

²⁴⁰ For overviews, see Lord, above n 98; Kaufmann, above n 31; FW Scharpf, *Governing Europe* (1999); P Schmitter, *How to Democratize the European Union?* (2000); see also L Siedentopf, *Democracy in Europe* (2000).

²⁴¹ The mention of parliamentary democracy occasions a short remark on a terminological problem: in contrast to the notion of a ‘parliamentary system’ which is used *strictu sensu* here (above n 86), the term ‘parliamentary democracy’ should be understood more broadly, covering any form of legitimacy through the involvement of parliaments.

²⁴² See von Bogdandy, above chapter 1, section V.4.

²⁴³ On the wealth of other aspects of EU legitimacy (aside from the literature in nn 77 and 219), see A Verhoeven, *The European Union in Search of a Democratic and Constitutional Theory* (2002) 208–10; Lenaerts and van Nuffel, above n 38, paras 10-001ff; C Lord and P Magnette, ‘E Pluribus Unum? Creative Disagreement about Legitimacy in the EU’ (2004) 42 *JCMS* 183; E Eriksen and JE Fossum (eds), *Democracy in the EU* (2000).

²⁴⁴ The literature on the national parliaments is abundant: see, eg Dann, above n 31, 177–210; A Maurer and W Wessels (eds), *National Parliaments on Their Ways to Europe* (2001); O Tans et al (eds), *National Parliaments and European Democracy* (2007).

accession of new members—at least in theory.²⁴⁵ In practice, their supposed influence is dramatically undercut. Although this fact is well known, the reasons for it are obscure. The institutional logic of executive federalism might help to provide a coherent explanation for this state of affairs, and ultimately discloses an underlying dilemma. Three major problems arise.²⁴⁶

(1) Most fundamentally, the federal structure renders Member State parliaments mediated actors in European affairs. It is not national parliaments but national governments that are involved in the regular procedures of supranational law-making. Seen through the lens of executive federalism, this makes perfect sense, as has been explained above.²⁴⁷ In consequence, national parliaments have to watch the complex European law-making procedures from the sidelines. This deprives them of inside information and creates a timetable not geared towards the working rhythm of national parliaments and often prevents accumulation of in-depth expertise, all of which makes control cumbersome to ineffective.²⁴⁸

(2) The inter-institutional decision-making process in the EU is often based on confidential negotiations. This poses another major problem for control through the national parliaments.²⁴⁹ However, this confidentiality is a necessary ingredient of the institutional setting in executive federalism, as discussed and demonstrated above with regard to several of the EU institutions.²⁵⁰ Thus, the urge of parliaments to publicly discuss and control collides with the confidentiality of EU negotiations.

(3) Finally, executive federalism works largely by consensus, adding another two problems. First, the consensus method is based on fairly unbound actors. In order to reach agreements, every party has to be free to compromise and cannot be bound to a rigid mandate from their constituency. Parliaments, on the other hand, will aim at giving mandates or setting stringent conditions in order to maximise influence on the representative's behaviour in negotiations.²⁵¹ Thus, parliamentary mandates collide with governmental freedom to negotiate.

Secondly, and more fundamentally, consensus is based on compromise. Yet compromises are not black and white. They do not offer clear-cut options, but rather offer a complex combination. The logic of parliamentary politics, on the other hand, is based on a majoritarian and mainly binary mode.²⁵² Parliaments display the contrast of government and opposition, of contrasting policy options, and of winner and loser in concrete votes. National parliaments, which want to control what their governments do in Brussels, have to deal with a lot of consensual grey.²⁵³

In sum, national parliaments face a dilemma between their own right to control and the efficiency of Union procedures. The more they try to control their governments by means of supervision, the more they run the risk of blocking procedures.

Will this situation change once the reforms envisioned by the Lisbon Treaty come into force? The role of national parliaments was a central topic of past constitutional debates and

²⁴⁵ Arts 48, 49 EU (Arts 48, 49 TEU-Lis, as amended); Kaufmann, above n 31, 337–403.

²⁴⁶ See the detailed argument in Dann, above n 31, 210ff.

²⁴⁷ See above sections III and IV.1; as to the notion of implementation in the EU, covering the administrative enforcement but also the implementing legislation of the Member States, see Dann, above n 98, 10 (n 45).

²⁴⁸ See O Tans, 'Conclusion: National Parliaments and the European Union' in idem et al (eds), above n 244, 227, 232; as to the exceptional Danish case, see P Riis, 'National Parliamentary Control of EU Decision-making' in Tans et al (eds), above n 244, 185; still illuminating is A Moravcsik, 'Why the European Community Strengthens the State', *Harvard Working Paper Series* No 52 (1994).

²⁴⁹ P Birkinshaw and D Ashiagbor, 'National Participation in Community Affairs' (1996) 33 *CML Rev* 499, 521; Oeter, above n 35, 695, 703.

²⁵⁰ See above, sections IV.1(b), IV.1(c) and IV.4(a); the work of the political scientist Gerhard Lehbruch on consensus democracy has demonstrated how compromise and consensus are based not only on mutual trust but also on the freedom of the actors to strike deals: idem, above n 46, 19.

²⁵¹ See A Benz, 'Compounded Representation in EU Multi-level Governance' in B Kohler-Koch (ed), *Linking EU and National Governance* (2003) 82, 91–2.

²⁵² See Dehousse, above n 90, 125; Lehbruch, above n 46, 19.

²⁵³ Benz, above n 251, 105.

their better integration into the institutional structure of the EU (in order to enhance EU legitimacy) was a stated goal of Treaty reforms. In fact, changes with respect to the national parliaments are numerous:²⁵⁴ the Lisbon Treaty will, first of all, highlight the role and functions of Member State parliaments in a new and central provision (Article 12 TEU-Lis), and hence considerably improve their visibility.²⁵⁵ The new Treaty will also introduce a new ‘early warning’ mechanism.²⁵⁶ With this mechanism, national parliaments can raise their concerns *ex ante* with respect to any legislative proposal from the Commission if they see an infringement on the Union’s behalf to the principle of subsidiarity. If at least a third of the Member State parliaments signal concerns about the proposal, the Commission is obliged to review (but not to change) its proposal.²⁵⁷ Member State parliaments can involve the ECJ on the grounds of an infringement of the principle of subsidiarity.²⁵⁸ While this mechanism was already provided for in the Constitutional Treaty, the Lisbon Treaty strives to enhance their role even further, and will add another stage to the procedure. It provides that, if at least a simple majority of national parliaments raise concerns, the legislature (not just the Commission) has to take up the issue and, if necessary, can stop consideration of the proposal.²⁵⁹

Will these changes remedy the national parliaments’ dilemma? The new provisions are convincing to the extent that they give national parliaments higher visibility and a voice, which is of a certain symbolic value. The early warning mechanism also gives them a fair chance to halt processes at the European level. However, it is unlikely that these reforms will have a deeper impact and actually succeed in providing more parliamentary scrutiny and legitimacy. The envisioned mechanism can only be used successfully if national parliaments invest the massive resources necessary to examine early and competently, which legislative proposal might violate the principle of subsidiarity and endanger their competences. Herein lies the dilemma. National parliaments will still be mediated actors in the ongoing legislative procedure. Hence, they have to invest resources on matters which are not ‘theirs’. For a normal member of a national parliament, European matters will remain ‘alien territory’ and difficult to oversee. Therefore, I expect that the new system will mainly be of symbolic importance.²⁶⁰

2. The EP and its Representational Limits

As national parliaments have legally and practically only a very limited influence on the decision-making in the EU, the focus turns to the EP. As we have seen above, the EP has developed the organisational means and the competences to be taken seriously.²⁶¹ It surely offers the option for parliamentary legitimacy in the EU, despite not being—or, I would argue, precisely because it is not—likely to develop into a parliamentary system.

However, parliamentary legitimacy from the EP still has a weak spot: its representational function.²⁶² A first central aspect of this function is that a parliament is meant to serve as a

²⁵⁴ R Passos, ‘Recent Developments Concerning the Role of National Parliaments in the European Union’ [2008] *ERA-Forum* 31.

²⁵⁵ Two further protocols spell out their functions in detail: Protocol (no 1) on the role of national parliaments and Protocol (no 2) on the application of the principles of subsidiarity and proportionality.

²⁵⁶ Art 7 of Protocol (no 2).

²⁵⁷ Art 7(2) of Protocol (no 2).

²⁵⁸ Art 8 of the Protocol (no 2).

²⁵⁹ Art 7(3) of the Protocol (no 2).

²⁶⁰ For a similar conclusion, see Tans et al (eds), above n 258; arguing for a form of scrutiny that is based more on public deliberation than formal mandates is K Auel, ‘Democratic Accountability and National Parliaments’ (2007) 13 *ELJ* 487.

²⁶¹ See above section IV.2(b)–(d).

²⁶² There are formal and more communicative aspects to this function; for the first, see F Arndt, ‘Distribution of Seats at the European Parliament’ in A Bodnar et al (eds), *The Emerging Constitutional Law*

public forum or sounding board for the society it represents.²⁶³ This aspect has traditionally been regarded as a specific problem of the EP because it lacks a common language and a common civil society.²⁶⁴ However, different types of parliaments show that the public forum function can be performed very differently. Whereas, for countries with a debating parliament, to return to the two ideal types of parliaments discussed above, the plenary debates are effectively the central stage of political discussion,²⁶⁵ in countries with a working parliament the approach is very different:²⁶⁶ since the battle between government and opposition in parliament is prevented at the outset by the incompatibility rule, which forbids ministers from sitting in parliament, it is thus not the plenary session but rather the parliamentary committees that serve as public sounding boards.

Picturing the EP as a working parliament helps to clarify its representational function. It entails that the EP 'naturally' does not have such a vivid plenary culture as debating parliaments. This might be a flaw, but it is less a European deficiency than one common to all working parliaments. Looking at the committee culture in the EP easily underscores this point. It is the committees that attract most of the public recognition, by working openly, pooling expertise and involving the interested public via hearings.²⁶⁷

However, these arguments should not obscure the flaws of the EP. Conceptualising it as working parliament might explain some aspects, but it does not render it a perfect organ of representation. Worse, the situation of the EP appears more problematic because certain makeshift structures, which in national political systems help to remedy the weaknesses of such parliaments, are missing here. If plenary sessions as sounding boards are mute and committees reach out only to a specialised public, then there are normally specific agents of representation. There are mainly two models: either political parties serve as 'representative agencies', offering a clear and coherent programme that is infused into the parliamentary discussion and evaluated by the voters,²⁶⁸ or there are individual parliamentarians, who are seen by their constituency as responsible delegates.²⁶⁹ Especially where parties are rather loose and decentralised, providing little orientation for the voter, single parliamentarians are considered delegates of a specific constituency.²⁷⁰

The problem with these two models in Europe is that both fail.²⁷¹ First, there are only very loose European parties, which lack coherent European programmes.²⁷² European election

of the EU (2003) 93; Lord, above n 98, 44; for the latter, see Weiler, above n 77, 80–86; JHH Weiler, U Haltern and FC Mayer, 'Five Uneasy Pieces: European Democracy and its Critique' (1995) 18 *West European Politics* 6.

²⁶³ Bagehot, above n 99, 73–4; Löwenberg and Patterson, above n 52, 44–51, 182; E-W Böckenförde, 'Demokratie und Repräsentation' in idem, *Staat, Verfassung, Demokratie* (1992) 379.

²⁶⁴ D Grimm, 'Does Europe Need a Constitution?' (1995) 3 *ELJ* 292; P Kirchhof, 'Der deutsche Staat im Prozeß der europäischen Integration' in J Isensee and P Kirchhof (eds), *Handbuch des Staatsrechts* (1992) vol VII, § 183; Weiler et al, above n 262, 12.

²⁶⁵ A Adonis, *Parliament Today* (1993) 130.

²⁶⁶ Steffani, above n 105, 333; Bradshaw and Pring, above n 122, 360–2.

²⁶⁷ Neuhold, above n 128, 9; Corbett et al, above n 98, 314–15.

²⁶⁸ W Müller, 'Political Parties in Parliamentary Democracies' (2000) 37 *European Journal of Political Research* 309; P Mair, 'Political Parties, Popular Legitimacy and Public Privilege' (1995) 18 *West European Politics* 40.

²⁶⁹ M Marsh and P Norris, 'Political Representation in the European Parliament' (1997) 32 *European Journal of Political Research* 153; Löwenberg and Patterson, above n 52, 167.

²⁷⁰ This model has been especially used to explain representation in the US Congress; for a path-breaking American study, see W Miller and D Stokes, 'Constituency Influence in the US Congress' (1963) 57 *American Political Science Review* 45; a classic study is R Fenno, *Home Style* (1978).

²⁷¹ See extensively Dann, above n 31, 41ff.

²⁷² On transnational European parties, see D Hanley, *Beyond the Nation State* (2008); on the political composition of the EP, see Hix and Lord, above n 146, 54; see also Corbett et al, above n 98, 71–5.

campaigns have therefore been dominated by national topics.²⁷³ Moreover, empirical data show that MEPs are only barely representative of their electorate since they are much more ‘pro-European’ than their constituencies.²⁷⁴

The model of single parliamentarians also fails for another simple reason: the size of the constituency. Most Member States have electoral systems which provide for only one national constituency in EP elections (France, for example). This rules out any local basis for the parliamentarians.²⁷⁵ In addition, even if there are regional constituencies for European elections (eg the five constituencies in Italy), they are still very large. In effect, MEPs are hardly known in their constituencies. Thus, the model of parliamentarians being deeply entrenched in one region and thereby getting feedback and facing accountability is hampered by the EU structure.²⁷⁶

In sum, none of the models to provide representation works properly in the European context. In fact, we face a puzzling situation. Institutionally, the EP has to be regarded as a strong parliament. Sociologically, however, it barely exists in the European political mindset. Only (yet surely) time will change this.²⁷⁷

3. Concluding Proposal: A Semi-parliamentary Democracy

Looking back, it is obvious why legitimacy poses such a serious problem to the institutional system of the EU. In particular, questions of effective representation through parliamentary actors and of transparent lines of accountability are unresolved. It is evident that the structure of executive federalism has clear implications for the concept of legitimacy.

To put it less neutrally, the structure of executive federalism and its institutional dynamics are part of the problem. As we just saw, the mediated role of national parliaments and thus their exclusion from effective control is part of the federal set-up. Non-transparent responsibilities stemming from consensual agreements are typical for the federal system, and also render accountability a problem.

At the same time, this system is also part of the solution. The tendency towards consensus ensures a great deal of legitimacy. Also, the role of the EP is strong, because of the specific institutional division between it and the executive branch.

Hence, however one looks at it, the institutional system and its composite form of legitimacy represents a very distinct model. To highlight this unusual form, I propose to give it a special label—semi-parliamentary democracy—for the following reasons.

The relation between the executive and the legislative branch, determined primarily by the existence of appointment power (or the lack thereof), is normally used to label political systems.²⁷⁸ Applying this yardstick to the EU, we see neither a directly elected president nor an executive elected by parliament. Thus, the EU seems to be an undefined *tertium*. Looking closer, we find its principal characteristic: the negative appointment power of the EP. This power is not enough to justify the label ‘parliamentary system’. However, the negative power, a

²⁷³ K Reif and H Schmitt, ‘Nine Second-order Elections’ (1980) 8 *European Journal of Political Research* 3; F van der Eijk and MN Franklin, *Choosing Europe?* (1996) 367.

²⁷⁴ See J Thomassen and H Schmitt, ‘Policy Representation’ (1997) 32 *European Journal of Political Research* 165, 181; see also Lord, above n 98, 67.

²⁷⁵ Corbett et al, above n 98, 18–19; C Haag and R Bieber, in H von der Groeben and J Schwarze (eds), *Kommentar zum EU-/EG-Vertrag* (2004) post Art 190 EC, para 23.

²⁷⁶ M Marsh and B Wessels, ‘Territorial Representation’ (1997) 32 *European Journal of Political Research* 227.

²⁷⁷ Calling for a more republican understanding of parliamentarism in the EU, see Magnette, ‘European Democracy’, above n 108, 24–5.

²⁷⁸ Sartori, above n 52, 84, 101, 131; Lijphart, above n 95, 116.

sort of veto power in the appointment process and an emergency break in the running term, gives the parliament a decisive say—and the system a characteristic feature.

With respect to the Council as part of the executive branch, it is even clearer that the EU is ‘only’ semi-parliamentary, because the Council as such cannot be dismissed by the Parliament.²⁷⁹

The EU is semi-parliamentary also with respect to the influence of executive actors (in the form of the Council) on the law-making function. Traditionally, a parliamentary system would be one in which parliament is the supreme law-making authority. This is hardly the case here, where the EP is at best only a semi-legislator.

All the above arguments speak for the ‘semi’, if even that. However, there is a more ‘parliamentary’ aspect to the structure: the position and powers of the EP. The whole institutional and governmental system of the EU cannot be adequately described without addressing the EP’s influence on the creation of the executive branch, its control of that branch and, most of all, its participation in the law-making process. The whole system gets a very specific twist through the participation of the EP. The label ‘semi-parliamentary democracy’ might help to describe it.

VI. Summary and Prospects

The reform of the institutional system was at the core of the Constitutional Treaty and its rhetorically cleansed surrogate, the Lisbon Treaty.²⁸⁰ Even though the changes envisioned by this Treaty have been analysed throughout this chapter, we may now in summary ask how it will impact the system. The institutional system of the EU, as we have discovered in the course of this chapter, is shaped by the structure of executive federalism. This multi-layer feature of the EU, rooted in interwoven competences and the Council as the institutional counterpart to the structure of competences, creates an institutional dynamic of co-operation and consensus-seeking that works its way into the shape of the institutions and their inter-institutional dynamic, while at the same time posing recurrent because inherent problems.

Considering the underlying thesis of this chapter, it may not be surprising that, in my opinion, the Lisbon Treaty proposes mainly a continuation of existing institutional patterns. It is not a radical break, but leaves the basic structure and institutional dynamic of executive federalism untouched. But even without a radical break, will the numerous changes in the institutional system and the textual clarifications ameliorate the many ambivalent peculiarities of the system? This is unlikely. Instead, the continuation of existing patterns could have a rather puzzling effect. It could well be that the Lisbon Treaty both enhances the advantages of the current system and prolongs its suffering. How would this come about? The key to this puzzle lies in the dilemmatic nature of executive federalism. Its structure entails an aporia, which we have encountered time and again in the previous pages. This aporia is rooted in the interwoven structure of competences which create an institutional dynamic of co-operation and consensus. This dynamic has a double-effect: it infuses legitimacy by inclusion and at the same time drains

²⁷⁹ It is this aspect on which Paul Magnoste rests his qualification of the EU as semi-parliamentary democracy: *idem*, ‘Appointing and Censuring’, above n 108, 302.

²⁸⁰ For an analysis of the changes between the Constitutional and the Lisbon Treaty with respect to the institutional system (which are rather marginal in substance, yet significant in rhetoric), see Mayer, above n 236; on the Lisbon Treaty in general, see Doughan, above n 201; J Terhechte, ‘Der Vertrag von Lissabon’ [2008] *Europarecht* 143; for further articles on the Constitutional Treaty, see Kokott and Rühl, above n 65; Peters, above n 80; Wessels, above n 66; see also K Lenaerts and D Gerard, ‘The Structure of the Union According to the Constitution for Europe’ (2004) 29 *EL Rev* 289; for a thoughtful analysis of legitimacy of the Union after the failure of the Constitutional Treaty, see Magnoste, ‘European Democracy’, above n 108, 13.

legitimacy by blurring responsibilities. The Lisbon Treaty will not alter this fundamental character of the EU's institutional system. It will neither dramatically simplify nor clarify this structure, but will (most likely) increase its federal complexities and ambiguities. This is perhaps not surprising. The strength of this system has always been its co-operative and inclusive character, its weakness the often obfuscating aspects. The structure of executive federalism, the origin of many of these aspects, will thus likely continue to accompany and shape the Union's institutional system.