

Post-Lisbon Treaty Europe: Reflections on the Institutional Impact of Certain Innovations

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An Open Introduction: From the Transparency and Simplification Mandate to the Need for a True “Anagnorisis” (Recognition) and “Catharsis” (Purgation) of the Model

Two years, two incredibly intense years, elapsed between the signing in December 2007 of the Lisbon Treaty – consisting of two conventions, the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), along with 37 final protocols and 65 declarations by Member States and other assorted institutions – and its entry into force on 1 December 2009. This was due not only to the (not so trifling) details that needed to be ironed out as a result of the different ratification processes and the rather singular exercise in some cases of the presidential powers provided for to this end in the constitutions of certain Member States, but also to the net change in both the global and European contexts between the two dates, which led to a certain *neglect* in the preparation of the priority agendas for the implementation of the new institutional and jurisdictional mechanisms to which everyone had subscribed and gave rise to the need to “rediscover” the steps to be taken in the immediate future.

The initial mandate, linked to the efforts enshrined in the Convention and carried out by earlier intergovernmental conferences (IGCs), required the reform to adapt or, more accurately, to make structural *adjustments* to a 27-member Union that had not yet closed the doors with regard to its capacity to absorb

new members. This was to be carried out in the name of *simplifying* decision-making procedures and the delimitation of powers, as well as increasing inward and outward *transparency* and achieving both greater *proximity* to European civil and political societies and a more clearly articulated democratic *legitimacy* by engaging national parliaments in the debate over how to control well-exercised subsidiarity.

The institutional, jurisdictional and procedural provisions are being implemented within the time frame of the Spanish Presidency and the Spanish-Belgian-Hungarian Trio Presidency, which is to span the 18-month period in which the aforementioned new institutional developments will be launched, amidst a series of major uncertainties at three different levels: 1) the Western financial crisis, with its more or less global repercussions, which specifically affects not only Western economies but also the developing economies and societies of the most fragile countries; 2) the economic and financial construction and social cohesion of the European Union, bound to Western financial architecture and global economic developments, wherein tasks are submitted to “groups of experts” for reflection, such as the group that, in February 2009, presented the 33 proposals contained in the *Larosière Report* regarding Europe and the transnational financial system to the Commission or the report commissioned in 2008 from the “reflection group” headed up by Felipe González, which has just now published its proposals for meeting Europe’s global structural challenges in the coming years; and 3) the more specific level of the inherent hazards of the eurozone and, in particular, the future of the euro, following the rash attacks by the international market against a Member State, namely, Greece (due to its high levels of debt and implacable deficit), which dragged down the economy of the entire 16-member-strong Eurogroup and, in so doing, revealed the dysfunctions and gaps in the system, as well as the im-

portance of the myriad interests (both domestic and purely speculative).

In short, the three levels of added uncertainty regarding the implementation of the Lisbon Treaty's provisions make fulfilment of the simplification and transparency mandate much more complicated than was originally foreseen (e.g., with regard to the adjustment of methods or the urgency of decision-making). Not only must the efficiency, legitimacy and visibility of the practical solutions to be implemented be addressed, but the additional mission clearly needs to be upgraded. Moreover, this upgrade should be linked to two crystal clear concepts drawn from Greek heritage – indeed, two concepts forming the core of Hellenic influence over the world, although the ancient Greeks were not the first to use them. In short, implementation of this *post-Lisbon Treaty Europe* calls for a process of anagnorisis, or “re-cognition”, that is, delving deeper into one’s understanding of oneself, and catharsis, or a true purging of the model. To sum up, the results of the amended legal texts need to be supplemented with recognition of oneself in the other, mutual trust and a series of refined adjustments: the club must be refashioned to thrive in a global world, and classical diplomatic techniques must be overhauled, without euphemisms, as will be seen below.

A Detailed Reflection on the Institutional Changes Implemented by the Lisbon Treaty: Increased Institutionalisation

a) The European Council and Its President; b) The High Representative of the Union for Foreign Affairs and Security

The negotiations for the institutional adjustment over the course of the 2007 IGC were ambitious. Renouncing terms that were excessively pompous or that made transfers of national sovereignty too visible, eschewing the common European signs and symbols of the Draft Constitutional Treaty, the Lisbon Treaty – throughout its complex wording – marches firmly and steadily onward towards an institutional change of considerable scope, steering a clear course of both greater institutionalisation and greater flexibility and differentiation of its different areas. A quick glance shows that the former institutional balance between the European Council, Commission and strengthened European Parliament has been clearly modified, placing greater emphasis on national parliaments and

giving a “boost” to the redoubled presence of the Committee of the Regions and local authorities, as will be seen below. Additionally, the circles have multiplied and the drive towards more comprehensive methods of *differentiated integration* has been made possible through the (most likely less exceptional) use of reinforced cooperation, largely aimed at ensuring efficient action by the Union. In any event, and by way of a brief initial assessment of the scope of its institutional impact, the Treaty places the Union in a new transitional phase characterised by a *lack of formal definition* of the scope of some of its modifications and new *inter-institutional dialectics* as it awaits implementation and empirical readjustment. Let us now examine this situation.

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First, the European Council is now a genuine institution rather than merely an institutional formation. This is a visible qualitative change indicative of the increased density at the top of the pyramid, of a top-down view or a “club of senior officials” – in the words of its first President – with a stable presidency vested with decision-making powers (both internal and organisational and, in some regards, external) subject to control by and, in any event, required to report to the European Parliament at the end of its sessions. Pursuant to Article 15.1 of the TEU, “The European Council shall provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof. It shall not exercise legislative functions.” Moreover, pursuant to Articles 235 and 236 of the TFEU, it shall reach its decisions by consensus, but may also vote on issues by simple or qualified majority. These articles also establish something of enormous practical importance in that they separate the General Affairs Council and the Foreign Affairs Council to the benefit of the former, which will collaborate more closely as an actual infrastructure of the European Coun-

cil. In fact, Foreign Ministers will only attend those General Affairs Councils of utmost importance, such as those addressing economic or energy matters. Again, there is greater institutionalisation of “fundamental” policies.

The Rules of Procedure of the European Council were adopted by the European Council Decision of 1 December 2009 (OJ L 315, 2.12.2009, p. 51). At its head, the President of the European Council, elected by the Council itself, shall, pursuant to Art. 15.6 of the TEU, chair and drive forward its work, in cooperation with the Commission, endeavouring to facilitate consensus and, as a result of the stability resulting from the term of office of two and a half years for which he or she is elected, essentially guarantee the *cohesion* and *continuity* of the Community’s work. Of course, as the first President, Herman Van Rompuy, himself could not help noting, the President of the European Council “is neither a spectator nor a dictator” vis-à-vis the Council itself. He thus left himself considerable leeway for spontaneity in his actions, including informal meetings and contacts with Heads of State and Government (who avoid him at all costs except in emergencies), an “unobtrusive” institutional presence in the media from the very start of his term of office, etc. Indeed, he seems determined to fill the gaps in the treaties by means of such impromptu practices, which might be described as calculated “extemporaneous organisation”.

The second visible institutional innovation, in which great hope had been placed, is the creation of the office of High Representative of the Union for Foreign Affairs and Security, not to be confused with a Foreign Affairs Minister, which basically has two main facets. First, the Representative is double-hatted in that she is both the Union’s most senior representative for foreign affairs, second only to the President of the European Council, and as such presides over the Foreign Affairs Councils, and a Vice-President of the Commission, who remains physically ensconced, along with much of her former cabinet, in her old office as Commissioner for Trade. Second, she has been tasked with setting up the European External Action Service, the new European diplomatic corps, to which end Lady Ashton reached the beginnings of a political agreement with the Union’s Foreign Ministers on 26 April 2010. The Service is to be configured as an autonomous body and is scheduled to begin operations in early 2011. It seems like the recent agreement will serve as the basis for immediate

consultations with the European Parliament, prior to its adoption by the Council, with the approval of the Commission. The applicable provisions (adaptation of the Financial Rules and Staff Statute, which have budgetary consequences) will be adopted by co-decision with the European Parliament.

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In addition to the inherent difficulties of creating any new instrument, much less one that is to be set up as a genuine EU Service, and of consolidating the Commission’s many Delegations, which to date have engaged in little more than representation and external management functions, a far cry from classic diplomatic and consular functions, this change gives rise to several questions, above all concerning the specific and genuine spirit of many of the national diplomatic corps in the performance of their functions, characterised by a strictly exclusive view that is both hard to share and hard to force to be shared. This *view*, whereby in many of the minor border conflicts with third countries – e.g., between Spain and Morocco, or between Italy or Greece and Albania – the “enemy” is most likely the Community neighbour, that is, it is the Community itself that is “stepping on toes” in Member States’ performance of domestic diplomacy, must be corrected. Additionally, the make-up of the quotas for each of the 27 Member States in the institutional Service (RELEX staff at the Commission and Council), a delicate practical task, is already generating tensions. However, the key question may be this: once the “toy” to be used to *channel* a genuine Foreign Affairs and Security policy has been established, an immensely important and difficult step, and once the Union is able to speak with a single voice in its spheres of competence, will it be able to agree to single, visible positions and content and thus successfully establish its external position? The road will not be easy, but the EU must formulate single positions and build the external dimensions of its different policies with a

single voice, one that is visible and sufficiently consistent both in a cross-cutting sense (diluting state specificities and rendering them invisible) and in terms of inward and outward coherence, like the exterior facet of any domestic policy.

Another extraordinarily important question concerns the *nature* of the European External Action Service under the direction of the High Representative. There are two possible models. One model would be an independent External Service with a legal nature more similar to that of a European Council and the Foreign Affairs Council, which would thus not be directly accountable to the other institutions as an intergovernmental emanation. The other model would be a Service subject to the control of both the European Parliament, with its new powers in the sphere of external action, and, above all, the Commission. The latter body would exercise this control in two ways: institutionally, for not in vain has the High Representative also been a Vice-President of the Commission from the start; and *ratione materiae*, at least in matters, such as trade policy or development aid, that clearly depend on its action.

Will the final model – and the nature thereof – ultimately be found to be strictly attached to the institution that heads it up, that is, the High Representative? For, pursuant to Art. 18 of the TEU, the latter's double-hatting is, to a certain extent, relative: in other words, and with the sole exception of the fact that, like the other members of the Commission, the High Representative must be approved by the European Parliament, it could be argued that the post is more closely linked to *the hierarchy entailed in the exercise of a Vice-Presidency* of the Commission than to membership in it, that is, than to the different Commissioners in their capacities as institutional members. For the post's true "hat," *ratione materiae*, is the one it wears in relation to the Foreign Affairs Council, which it heads up and whose mission it carries out under the authority of the Union's true external representative, the President of the European Council, to which end the second-to-last paragraph of Article 15 of the TEU provides that the President shall *at his level and in that capacity, ensure the external representation of the Union on issues concerning its common foreign and security policy, without prejudice to the powers of the High Representative of the Union for Foreign Affairs and Security Policy*. In my view, the phrase "without prejudice", with all the risks it entails, definitively places the body in the European Council's sphere of competence. That is the proper enclave to

better understand the nature of the office of High Representative.

A Detailed Reflection on the Institutional Changes Implemented by the Lisbon Treaty: c) New Inter-institutional Relations and Broader Powers for the European Parliament: Final Reflections

Needless to say, the system of rotating Presidencies continues: Spain took over on 1 January 2010. However, with a view to achieving greater institutionalisation and to ensuring continuity and coherence, the "troika" formations are now called rotating *Trio Presidencies*, and they have a common programme, debated and adopted for the entire 18-month period of their duration, although it is also, understandably and perceptibly, subject to the countless hazards of the moment. The question is: have the exercising presidents understood the adjustment made to this point by the new system governing the distribution of this facet of the Community's "institutional space"? Have they understood that greater *institutionalisation* of the European Council and the emergence of its President has displaced the "intergovernmental" quality in its classic sense and ushered back in the "genuinely European" one, heretofore deposited, albeit perhaps unbeknownst to them, in the Council, precisely due to its role as the potential embryo of a European "government"? Yes, a European government that, some years from now, may no longer need an outward dialectic with another institution (the Commission), but rather will undertake this mission itself, in an apparently intra-institutional dialectic. I fear they have not wished to understand anything of the sort.

Moreover, continuing in the vein of this brief reflection on the institutional adjustments implemented by the Lisbon Treaty, the European Commission is, for several reasons, the institution to undergo fewest changes, at least at first glance. As is well known, in an unacceptably self-serving act, Ireland imposed, as a condition for its ratification of the Lisbon Treaty, the maintenance *sine die* of an Irish Commissioner; thus, the institution's excessive 27-member composition was not altered. However, from an overall inter-institutional perspective, new hybridisations and inter-institutional contamination cast doubt on the Commission's future in the medium term.

First, in the political sphere, the Commission is no longer a true college, but rather seems more like a

club of *political representatives* of different national interests, languages and cultures. Thus, Commissioners are proposed who are too tempted to hold domestic political offices, that is, who are contaminated by electoral considerations that are far removed from the spirit of unity that marked the first 40 years of the existence of “European issues” as a working material and once characterised the Commission. Second, the Presidency (tasked with giving voice to the institution’s *essential concerns*) has been lacking in charisma of late, and inter-institutional relations have been rather subservient to the dictates, if not of the Council itself (never!), then certainly of the most powerful or demanding Member States, both present and future. Finally, there are the hybridisations and poorly understood double-hattings, which makes one think that the *institution as a whole* is in a state of – pardon the oxymoron – “stable” transition.

In this window onto post-Lisbon Treaty Europe, we must save a special spot for the European Parliament, which is the true winner of the Lisbon Treaty’s provisions, in terms of both powers and institutional presence

In short, in this window onto post-Lisbon Treaty Europe, we must save a special spot, albeit a brief one, due to the impossibility of noting here all the major adjustments that have been made to it, for the European Parliament, which is the true winner of the Lisbon Treaty’s provisions, in terms of both powers and institutional presence. Co-legislator and co-decision maker on budget matters, it will now play a much more prominent role in broad new spheres, including with regard to many of the Union’s external agreements. Co-decision will become the ordinary legislative procedure, which will be supplemented by an endless number of special procedures, particularly in

the sphere of the new Title V of the TFEU, concerning the Area of Freedom, Security and Justice, where, even prior to the entry into force of the Lisbon Treaty, the Parliament participated in the design and debate around the “Stockholm Programme,” adopted in December 2009 during the Swedish Presidency.

It is worth noting that the Parliament has been following, with even more impetus than in previous decades if possible, a bottom-up model with regard to the deployment of competencies, based on its effective budgetary powers, in a clear exercise of its democratic legitimacy since 1979. Its ability to intervene *ratione materiae* in foreign affairs, so often at its own initiative and, until quite recently, indirectly, has now been institutionally broadened and deepened in the spheres of development cooperation and humanitarian aid, technical and financial cooperation, common trade policy, and Association Agreements, among others. All of this paves the way for highly likely interventions in spheres of high *political density*, such as personal data protection, where it has specific legal grounds, or the laws governing third-country citizens. This is likewise true in the sphere of the bilateral relations that might be entailed, for example, by an effective implementation of the “Global Approach” on immigration issues, which remains in the Stockholm Programme and involves issues to which the Parliament has always shown itself to be quite sensitive.

Can an immediate impact of the European Parliament’s greater and better co-legislative and co-decision-making functions both inwards (expansion of the ordinary legislative procedure) and outwards (presence in the Union’s external action, which will now largely be subject to co-decision) already be seen? Let us take a simple, understandable and inevitable, yet nevertheless telling, example: lobbyists for the circuits’ different informal stakeholders have already begun to move from the “geographical environs” of the Commission to those of the Parliament. This is a visible change. And it seems like they will have plenty of work to do, although it may be of a different kind and will not always be free of problems.