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The Strengthening of the Commission
Competences by the Constitutional Treaty
and the Principle of Balance of Power

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and the Principle of Balance of Power*

EVA NIETO

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In order to preserve a clear focus within this broad theme, the scope of the Forum was limited to four distinct but complementary themes, each of which had its own coordinator. Theme 1: 'The Idea and the Dynamics of the European Constitution' was coordinated by Professor Neil Walker; Theme 2: 'The 'East' Side of European Constitutionalism' was coordinated by Professor Wojciech Sadurski; Theme 3: 'The Constitutional Accommodation of Regional and Cultural Diversity' was coordinated by Professor Michael Keating; and Theme 4: 'The Market and Countervailing Social Values in the Constitution of Europe' was coordinated by Professor Martin Rhodes.

Abstract

A lot has been written about the European Commission as the main administrative institution of the European Community: about its work, competences, its organisational problems and the administrative reform initiated by President Prodi after the resignation *en masse* of the Commission of President Jaques Santer.¹ This paper will, therefore, not attempt to repeat what has been explained about an institution which has been the motor of European integration representing the Community interest against the national interests of the Member States of the European Union. The aim of this paper is to analyse the reform of the Commission in the context of the work on the Treaty to establish a Constitution for Europe (hereinafter the Constitutional Treaty) and the potential effect of the strengthening of the Commission in the European constitutional process with regard to the principle of the balance of powers among the Community institutions. The new powers of control of the European Parliament with respect to the Commission, along with the Commission's political accountability to the European Parliament at constitutional level, are decisive factors which lead to the conclusion that there is no immediate risk of an infringement of the principle of the balance of powers by the constitutional process.

Keywords

EU Constitutional Treaty, Balance of power, Commission competences

1 See, among others, Stevens, A, 1997, *The European Commission: Nature, Role and Future*, Working Paper NR 2 (13), University of Economics, Poznań; Tomkins, A, 1999, 'Responsibility and Resignation in the European Commission', *The Modern Law Review*, pp. 744-765; Egeberg, M, 2002, *The European Commission, The Evolving EU Executive*, Working Paper N. 30, Norway, Advanced Research on the Europeanization of the Nation- State; Craig, P, 2000, 'The Fall and Renewal of the Commission: Accountability, Contract and Administrative Organisation', *European Law Journal*, pp. 98-116 ; Nieto, E, 2002, 'El Proceso de reforma de la Comisión Europea', *Gaceta Jurídica de la Unión Europea y de la Competencia*, nº 218, pp. 66- 80. For a summary of the administrative reform of the Commission see Harlow, C, 2002, *Accountability in the European Union*, Oxford, OUP, pp.53-57.

I. Introduction: Preliminary Observations of the Reform of the Commission in the Constitutional Process*

There is little information available about the discussions regarding the reform of the institutions in the work of the Convention.² Unlike the developments which occurred in other areas, such as the granting of legal personality to the Union, the Charter of Fundamental Rights and the competences of the Union, there was no Working Group set up to deal with the institutional reform of the EU.³

An analysis of the Constitutional Treaty⁴ permits, in a general sense, a first observation; the Commission has been strengthened by the Constitutional Treaty. This is so for two reasons: on the one hand, because its competences have been increased in the field of 'The Union's External Action' and the areas of 'Freedom, Security and Justice', which correspond to the matters currently within the Second and Third pillars of the EU;⁵ on the other hand, because the Constitutional Treaty has intensified the role of the Commission not only with respect to its executive competence, but also with respect to its normative competence. The normative powers along with the competences regarding implementation or administration of the Commission have been expanded in the Constitutional Treaty with the creation of two new legal instruments: delegated regulations and implementing acts.⁶

Before analysing the strengthening of the competences of the Commission in the Constitutional Treaty and its consequences on the institutional structure of the EU, the weakest aspect of the reform of the institution will be discussed; the composition of the Commission. An analysis of the composition of the Commission provided for in the Constitutional Treaty, along with the expansion of its competences, will allow for a clear picture of its constitutional reform.

II. The Composition of the Commission

Until 1st May 2004, the College was made up of twenty Commissioners, each one from an EU Member State, except for the large Member States and Spain which have two Commissioners each. This was a concession granted to Spain on its accession to the European Community as a consequence of its relatively weak voting power in the Council, bearing demographic considerations in mind.⁷ Since the enlargement of May 2004, the College has been constituted by thirteen Commissioners: one from each new Member State plus the twenty previous ones. Commissioners from new Member States without specific portfolios but who take a full part in the Commission decision-making process have the same voting weight as those of the others. Due to the transitional and short-term nature of their mandate, 'they are associated with the work of an existing Commissioner in order to ease their

* An earlier draft of this paper was the author's contribution to the 2003-2004 European Forum, titled 'Constitutionalism in Europe'. The author wishes to thank the director of the Forum, Prof. B. De Witte, the theme coordinators, specially Prof. N. Walker, and colleagues for their useful comments. The usual disclaimer applies.

2 The Convention on the Future of Europe was convened by the Laeken European Council of 14-15 December 2001. *The future of the European Union- Laeken Declaration* of 15.12.2001, pp. 4-5. Available at: http://europa.eu.int/futurum/documents/offtext/doc151201_es.htm

3 A list of the Working Groups of the Convention, along with their documents and final conclusions is available at: http://european-convention.eu.int/doc_wg.asp?lang=EN

4 *Treaty Establishing a Constitution for Europe*, IGC 87/2004 REV 2, Brussels 29 October 2004. Available at: <http://ue.eu.int/uedocs/cmsUpload/cg00087-re02.en04.pdf>

5 Visas, asylum, immigration and judicial cooperation in civil matters are currently within the first pillar.

6 Art. I-36 and Art. I-37 of the Constitutional Treaty.

7 Alonso García, R. 2001, *Tratado de Niza y versiones consolidadas de los Tratados de la Unión Europea y de la Comunidad Europea*. Estudio Preliminar, Madrid, Civitas, p.XX.

integration into the Commission's work'.⁸ Their mandate goes from the enlargement to the 31st October, when the Commission led by Prodi would have ended its term of office.⁹

The *Protocol on the Enlargement of the European Union* in the Treaty of Nice provided that, from January 2005, the College will be composed of a Commissioner from every Member State, which will be maintained until the EU is made up of 27 Member States.¹⁰ Then, according to the second section of Article 4 of the Protocol, the membership of the College will be less than the number of Member States, and will be selected according to a system of equal rotation among Member States and the demographic and geographical range of all the Member States of the EU.¹¹

First draft of the Constitutional Treaty¹² (Draft) established an executive of 15 Members along with non-voting Commissioners. According to the Draft, the future Commission would consist of a College made up of a President, a Minister for Foreign Affairs of the European Union, which would hold the Vice-presidency or one of the vice-presidencies, and thirteen European Commissioners chosen according to a system of rotation observing the principle of equality among the Member States.¹³ One decision of the Council would establish a system of rotation, based on two principles:¹⁴ First, the principle of equality with respect to the sequence and duration of service. Secondly, the composition of the College should at all times adequately reflect the demographic and geographic dimensions of all the Member States of the EU.¹⁵ Finally, the last paragraph of the third section of Article I-25 of the Draft provided that the President of the Commission would appoint non-voting Commissioners, chosen according to the aforementioned principles, who would come from all the other Member States not having a Commissioner in the College.

Reconciling the principle of efficiency with the nature and structure of the supranational entity of the EU was not an easy task for the Presidium. In fact, the composition of the Commission has been one of the most polemical aspects of the Draft. Criticisms on the model proposed by the Convention have not only revolved around the fact that Member States would not accept a model which would deprive them of a national representative in the Commission, but also because it is perceived as a model which would create tensions between the voting and non-voting Commissioners, who would not even be present at the sessions of the College although they had initiated the debate.¹⁶ The proposal of the Convention did not resolve essential questions to ensure the effective functioning of the Commission such as for example:¹⁷ whether or not the non-voting Commissioners would be members of the College; whether non-voting Commissioners could attend meetings of the College and participate in the debates; and whether this class of Commissioner would be able to take decisions on behalf of the Commission.

8 Speech of Prodi, R. 'The first Commission of the new Europe', of 5 May 2004. Reference Speech/04/255, p. 2.

9 The crisis provoked by President Barroso's proposal on his Commissioners has extended the term of office of Prodi's Commission.

10 Art. 4.1 of the *Protocol on the Enlargement of the European Union*, OJ 10.3.2001.

11 Article 4 (3) (a) and (b) of the Protocol.

12 *Draft Treaty Establishing a Constitution for Europe* of 18.07.2003, CONV 850/03 available at: <http://european-convention.eu.int/docs/Treaty/cv00850.en03.pdf>

13 Ibid, Article I-25 (3).

14 Part of the criteria adopted in the Treaty of Nice of 26 February 2001, which amended the Treaty on European Union, The constitutive Treaty of the European Communities, and certain related acts (OJ 10.3.2001). The actual criteria can be found in the *Protocol on the enlargement of the European Union*, Article 4 (3). See *infra*.

15 Article I-25(3)(a) and (b), CONV 850/03. The second principle makes a College made up of individuals who do not come from one of the most populous MS impossible: viz. Germany, France, the United Kingdom and Italy.

16 Craig, P, has described the model contained in the Constitutional Treaty as 'the worst of all possible worlds'. See, *The Constitutional Treaty: Legislative and Executive Power in the Emerging Constitutional Order*, EUI Working Paper LAW 2004/07, pp.16-17. The Commission itself has called the system proposed by the Constitutional Treaty as 'complicated, confused and unworkable'. *Commission Communication: A Constitutional Treaty for the Union* 17.9.2003. COM (2003) 548 final, p.5.

17 COM (2003) 548 final, n. 3.

The Commission itself made alternative proposals from those contained in the Draft Constitutional Treaty which, on the one hand, respected the agreements reached in the Nice Treaty whereby each Member State will have one Commissioner, while at the same time prioritising the efficiency of the institution.¹⁸ The Commission itself proposed to ‘generalise and formalise the decentralisation of the decision making procedure in the Commission through the restructuring of the College in a number of groups of Commissioners’.¹⁹ In this way the College, comprised of all the Members of the Commission, and to which only the most important decisions would be submitted, would only have to adopt a limited number of decisions. In fact, currently only about 3% of some ten thousand decisions adopted annually by the Commission are adopted by the plenary College after debate in its weekly session.²⁰ The Commission proposed the decentralisation of decision making procedures by dividing the College into groups of Commissioners. Each group would be made up of at least seven members. However, only the President could be part of more than three Groups. According to the Commission’s proposal, the President would decide upon the make up of the groups and could nominate a President for each group. The Minister for Foreign Affairs would preside over the group charged with the external action of the Union. If this proposal had been implemented, it is likely that the majority of the decisions would have been taken by the group of Commissioners responsible for the relevant subject matter of their group.²¹ Only the most important decisions stipulated in the internal Regulation would have been adopted by the entire College of Commissioners, such as, for example the annual programme, draft budget for the Union, financial perspective and referral of judicial proceedings.²² However, this proposal was not accepted in the modified version of the Constitutional Treaty signed by the Member States on 29th October, 2004.

As foreseen in Nice, from 1st January, 2005, the College will be made up of 25 Commissioners, one per Member State of the EU. The advantage of this as compared with that proposed by the Convention, is that there will be a College made up of 25 Commissioners with the same rights and obligations, even though they will have to find a way to reconcile their large number with the principle of efficiency. The Constitutional Treaty establishes that the first Commission appointed under its provisions shall consist of one national from each Member State. At the end of its term (five years), the following Commission shall consist of a number of members, including its President and the Union Minister for Foreign Affairs, corresponding to two thirds of the number of Member States, unless the European Council decides otherwise.²³ The members of the College shall be selected from among the nationals of the Member States on the basis of a system of equal rotation between the States. The system will be established by a European decision according to two principles: equal footing among Member States as regards the determination of the sequence and the time of office of their nationals as members of the Commission and the reflection of the demographic and geographical range of all the Member States.²⁴

Among all the doubts arising from the composition of the College the most important is the division of labour amongst the twenty five Commissioners. However, the tasks contained in Articles 13 to 17, along with other horizontal functions such as public relations, administrative reform and the implementation of the budget, should provide sufficient work to allow every Commissioner to have some sort of portfolio.²⁵

18 Ibid, p.3.

19 Ibid, p. 6

20 Ibid, p. 17

21 The Group would adopt decisions by the majority of its members. COM (2003) 548 final, Annex III, p. 21.

22 Ibid, p. 19.

23 Article I-26 (6) of the Constitutional Treaty.

24 Ibid. These criteria come from the Protocol on the enlargement of the European Union, n. 10.

25 Ponzano, P., ‘Commission européenne: sa composition et son rôle dans le système institutionnel de l’Union’, unpublished, pp. 11 and 12.

With regard to the Presidency of the Commission in the Constitutional Treaty, there are certain elements which (a) strengthen this position and (b) weaken it.

1. The President of the Commission is a position which was strengthened in the Treaty of Nice, for example, with regard to his or her power over the political direction of the Commission. Some powers declared in the Treaty of Amsterdam were reinforced in Nice e.g. the hitherto tacit agreement between Mr. Prodi and the Commissioners was explicitly stated whereby a Commissioner would agree to resign if so requested by the President.²⁶ However, the amendments introduced with the Treaty of Nice required that the decision of the President be supported by the College. This requirement has been erased from the Constitutional Treaty.²⁷ Therefore, in the Constitutional Treaty a request for the resignation of a Commissioner will be the exclusive preserve of the President of the Commission. However, on the resignation of the Minister for Foreign Affairs of the Union, the vice-president of the Commission, the President needs the European Council's agreement.²⁸ That amendment has been introduced to underline the dependence of this Minister both on the Commission and on the European Council.²⁹
2. The establishment of a permanent President of the Council is a factor which weakens the institutional position of the President of the European Commission. This is something that would not happen if the President of the Commission were at the same time President of the Council: an eventuality which caused the amendment of the original draft of Article I-22.3 of the Constitutional Treaty, which enjoined the President of the Council from exercising functions in any other European institution. The current Article I-22.3 provides that the President of the Council cannot follow a national mandate but there is no impediment to his or her having a mandate in another European institution, particularly in the Commission.

With regard to the functions of the President, these relate not only to the political outlook of the Commission, but also the determination of the internal organisation of the institution:³⁰ the appointment of the vice-presidents among the members of the College (other than the Union Minister for Foreign Affairs), the adoption of the list of persons proposed for appointment as members of the Commission by common accord with the Council and the structuring and allocation of the responsibilities of the Commission among its members.

With regard to the appointment of the President of the Commission, the Constitutional Treaty introduces a change to the powers of the institution which will appoint the President of the Commission: that is, the strengthening of the role of the European Parliament in the appointment procedure. Whereas the current practice involves the Council choosing the President by qualified majority with the assent of the European Parliament, in the Constitutional Treaty, the European Parliament will elect the President of the Commission by a majority of its members on a proposal from the Council.³¹ This means that the ultimate decision regarding the selection of the Commission's President, according to the Constitutional Treaty, will lie with the European Parliament.³²

26 See Article 217(4) EC Treaty and Article I-27 (3) of the Constitutional Treaty.

27 Article 217(4) ECT and Article I-27(3) of the Constitutional Treaty.

28 Articles I-27 (3) and I-28 (1) of the Constitutional Treaty.

29 See CIG 52/03 ADD 1, p. 9 and CIG 73/04, p. 23.

30 Articles I-27 (2) (3) and III-350 of the Constitutional Treaty

31 Article I-27(1) of the Constitutional Treaty. There is a Declaration attached to Article I-26 (current Article I-27) pointing out both the EP and the EC responsibility for 'the smooth running of the process leading to the election of the President of the European Commission'. The Declaration underlines the importance of the EP in the process by obliging the EC to consult to the EP before proposing a candidate. See CIG 73/04, p.28.

32 See Part 4 of this paper on the principle of the balance of powers of the Community Institutions.

III. The Strengthening of the Role of the Commission: Consequences

The competences which Article I-26 (1) (2) of the Constitutional Treaty award to the Commission are more or less, in a general sense, similar to those contained in the current Article 211 EC.³³ However, these provisions in the Constitutional Treaty are more clearly drafted than the current Article 211 EC, explicitly providing for certain functions such as initiation of the Union's annual and multi-annual programming, the implementation of the budget and the management of programmes. The competences of the Commission can be summarised according to the scheme proposed by M. Barnier;³⁴ the Commission will have the right of initiative, be responsible for the implementation of Union policy and the implementation of Council laws and regulations and the budget. It will represent the Union in the international arena except with regard to Union Foreign and Security policy³⁵ and will ensure compliance with Community law.³⁶ This paper does not purport to analyse all of the Commission's competences but, will only discuss those which have been strengthened or areas in which the Commission has been awarded new competences. First of all, the strengthening of the normative and executive powers of the Commission will be examined and, then, areas where such powers have been included *ex novo* within its remit.

A. Legislative and Executive Powers

Apart from the right to legislative initiative, the Commission is also charged with adopting delegated regulations and implementing acts, where an obligatory act of the Union so provides. In the following section the extent of these competences will be analysed.³⁷

The current Treaties award the Commission with the competence to initiate legislation with regard to Regulations and Directives.³⁸ The Constitutional Treaty grants the Commission the right of legislative initiative, that is, the right to propose European laws and European framework laws which will be adopted jointly by the Council and the European Parliament according to the ordinary legislative procedure contained in Article III-396 of the Constitutional Treaty. The right of legislative initiative is shared between the Commission and the Member State (at least one quarter of these) in the field of judicial cooperation in criminal matters and police cooperation.³⁹

Moreover, according to the Constitutional Treaty, the Commission will be charged with adopting European Regulations and European Decisions in particular in the instances provided in Article I-36 and 37.⁴⁰ Thus, the Commission has competence, not only with regard to legislative initiative, but also a normative and executive competence which I will now examine.

33 For a clear exposition of this subject, See: Della Cananea, G., 2003, 'L'Amministrazione Europea', *Trattato di Diritto Amministrativo a cura di S. Cassese, Diritto amministrativo generale, tomo secondo*, 2nd ed., Milano, Giuffrè editore, pp. 1819 to 1823; Díez- Picazo, L.M., 1986, 'La Comisión de las Comunidades Europeas', *Tratado de Derecho Comunitario Europeo, Tomo I*, Madrid, Civitas, pp. 129-138; Craig, P, De Búrca, G. 2003, *EU Law. Text, Cases and Materials*, 3rd ed., Oxford, OUP, pp. 59-62.

34 Former Commissioner for Regional policy and Institutional reform and current Foreign Minister of France.

35 The Union representative for foreign and security policy will be the President of the European Council, Article I-22 (1) of the Constitutional Treaty.

36 *Notes d'intervention de Michel Barnier sur le rôle de la Commission. Convention sur l'avenir de l'Union*, 5 juin 2003, p.1.

37 Regarding Delegated regulations and Implementing acts see NIETO, E. 2006, *European Administrative Law in the Constitutional Treaty*, forthcoming, Oxford, Hart Publishing, chap.1.

38 For example, Article 39 EC which relates to Regulations on the free movement of workers and Article 86 EC regarding Directives guaranteeing competition in the field of services of general economic interest. On this subject see *inter alia*, P. Craig & G. De Búrca, n.33, p. 162

39 Article III-264 of the Constitutional treaty.

40 Article I- 35(2) of the Constitutional Treaty.

1. Delegated Regulations under Article I-36 of the Constitutional Treaty

One of the most important innovations with regard to the regulatory power of the Commission is contained in Article I-36, which permits European laws and European framework laws to delegate to the Commission ‘the power to adopt delegated regulations to supplement or amend certain non-essential elements of the law or framework law’.⁴¹

This provision creates a new type of Community norm: delegated regulations which will be passed exclusively by the European Commission.⁴² This is where there is a real extension of the normative competence of the Commission,⁴³ which can pass norms that supplement primary legislation without having to submit the text to the scrutiny of the Regulatory Committee. First, I will explain which are the requirements and limits imposed by Article I-36 to the Delegated regulations. Second, I would like to make some remarks on why that provision has been introduced in the Constitutional Treaty and on its consequences.

a. Requirements and Limits

The Constitutional Treaty requires, first, that the law or framework law explicitly provides for delegation to the Commission and, second, that the law expressly stipulates ‘the objectives, content, scope and duration of the delegation’.⁴⁴

Article I-36(2) lays down the limits of delegation providing that delegated regulations cannot affect the essential elements of European laws or framework laws. The essential aspects of a given matter will be regulated by a European law or framework law exclusively. With regard to the essential elements of a particular subject matter, the jurisprudence of the European Court of Justice has elucidated upon this concept. For example, in the Köster case⁴⁵ the Court held that the basic elements of a particular area (the common agricultural policy) should be adopted according to a specific procedure contained in Article 43 (now Article 37) of the ECT.⁴⁶ The judgment showed that the basic elements of a subject were those which involved a specific policy decision.⁴⁷ Therefore, only the exercise of executive competence can be delegated.⁴⁸

In the *Meroni* case, the ECJ held that the exercise of discretionary powers could not be delegated to bodies other than Community Institutions.⁴⁹ The only competences which can be subject to delegation are specifically defined executive competences which are under the control of the Commission.⁵⁰

Both requirements, as well as the above mentioned limits, can be subject to the control of the ECJ which can annul the delegated regulation as *ultra vires*.

41 Section 1 of Article I-36 of the Constitutional Treaty.

42 The Constitutional Treaty attempts to introduce a principle of hierarchy of norms in the EU judicial system which is considered to be opaque and complex, with little correlation between legal instruments, the procedure for adopting legal norms and the type of action aimed. CONV 162/02, p. 13. On this subject see also n. 64.

43 See also the next section dealing with Implementing Acts.

44 Section 2 of Article I-36 of the Constitutional Treaty.

45 Case 25/70, Köster, [1970] ECR 01161

46 Ibid. para. 6

47 Lenaerts, K., Desomer, M. 2003, ‘Simplification of the Union’s Instruments’, in B. De Witte (ed), *Ten Reflections on the Constitutional Treaty of the European Union*, EUI, Robert Schuman Centre, p. 110

48 Haibach, G., 2002, ‘Separation and delegation of legislative powers: a comparative analysis’, in *Delegated legislation and the Role of Committees in the EC*, M. Andenas, A. Turk (eds), Kluwer Law, p. 58.

49 Case 9/56 (paragraph III.c and b) and 10/56, *Meroni* [1957-58] ECR 133. Also in paragraph III.b, the Court found that competences which were not attributed to an institution under the Treaty could not be delegated by that Institution.

50 Ibid.

b. Why the Convention Introduced Article I-36 in the Constitutional Treaty and What the Consequences may be.

One problem of the Union legislation discussed by the Convention was its excessive detail, which impinges a quick adaptation to a changing environment in certain economic areas. Therefore, the Convention was confronted with a dual requirement regarding the Union legislation: first of all, the legislative process should have democratic legitimacy and, secondly, it should be able to respond 'rapidly and effectively to the challenges and demands of the real world and therefore retaining a degree of flexibility'.⁵¹ The first requirement was satisfied by choosing the co-decision procedure as the ordinary legislative procedure, where the EP plays an important role. The election of the co-decision procedure as the ordinary legislative procedure will have consequences for the future redundancy of the Regulatory Committee (see below). The second requirement was satisfied introducing a hierarchy of norms within the Union legal system. A hierarchy of norms where, after European laws and framework laws, the Union may use the Delegated regulation to *supplement or amend* certain non-essential elements of a European law or framework law. The Commission may respond rapidly to the challenges of certain very variable economic areas, especially as it will not need the approval of the proposal by the Regulatory Committee.

Regarding the consequences that Delegated regulations will produce on the normative process of the Union, they will determine the future redundancy of the Regulatory Committee.⁵² More specifically, with respect to the work of the Regulatory Committee, the Commission has expressed publicly that this committee constituted an important limit on its freedom of action.⁵³ Currently, the Commission cannot pass the measures it proposes if the Committee is not in favour of them.⁵⁴ The Regulatory Committee, composed of representatives of the Member States, and presided over by a representative of the Commission, oversees the adoption of measures proposed by the Commission which 'apply essential provisions of basic instruments or adapt or update certain non-essential provisions of a basic instrument'.⁵⁵

What is clear is that Comitology emerged in order to attempt to reconcile the necessity of delegating competences of the Council to the Commission, as a result of the increase in competences of the former, with the maintenance of the institutional structure of the Community and the respect of balance of powers between the institutions.⁵⁶ The designation of the co-decision procedure as the ordinary legislative procedure in the Constitutional Treaty is directly related to the gradual elimination of the Regulatory Committee. Both, the Council and the Parliament, should be capable of controlling the exercise of the legislative delegation provided for in European laws and framework laws to the Commission.⁵⁷

The current Comitology system, in which the Council exercises *ex ante* control over the updating of basic acts, is destined to disappear, at least with respect to the Regulatory Committee and the Management Committee.⁵⁸ Under the Constitutional Treaty, the Member States will lose some control over the Commission that they previously exercised through the Council, viz. the control mechanisms

51 CONV 424/02, p.8.

52 See *Final Report of Working Group IX 'Simplification'* (CONV 424/02) in p. 12. The activity of the Commission is controlled by various Committees regulated by Council Decision of the 28 June 1999, which established the procedures for the exercise of the competence of implementation attributed to the Commission, better known as the Comitology decision. This Decision has replaced the Decision 87/373/EEC.

53 SEC (89) 1591 final.

54 Article 5 of the above-mentioned decision.

55 Decision 1999/468/EC, para.7.

56 On the origin of Comitology see, among others, Vos, E., 1999, *Institutional Frameworks of Community. Health and Safety Regulation. Committees, Agencies and Private Bodies*, Oxford, Hart Publishing, p. 113.

57 Lenarts, K., Desomer, M., n. 47, pp. 116 and 117.

58 Regarding the progressive erosion of the Management committee, see the following section on the implementing acts of the Union.

of the Regulatory Committee regarding the normative development and implementation of the basic acts of the Council. Instead of the Regulatory Committee, Article I-36.2 establishes that European laws and framework laws will determine the type of control exercised regarding delegation to the Commission. The control established by the European law may make provision for the revocation of the delegation by the European Parliament or the Council,⁵⁹ or it may establish the conditions for the entry into force of the delegated regulation where no objections emerge from the Parliament or the Council. These controls are consistent with the role assumed by the Parliament in the Constitutional Treaty with regard to Union legislation.⁶⁰

The system of control proposed has been criticised with respect to its questionable efficiency because it transforms what was originally *ex ante* control (exercised by the Member States) to a possible *ex post* control, which must be established by European Laws on a case by case basis.⁶¹ Neither the Council nor the Parliament may have the necessary know how or time to precisely define the parameters which will have to be developed by the delegated regulations.⁶² Nor is it possible to predict if the ECJ will develop a jurisprudence which will allow for the annulment of measures which exceed the limits of the delegation.⁶³

Notwithstanding these criticisms, what is important for the aim of this paper is to underline the strengthening of the Commission competences by Article I-36 of the Constitutional Treaty. Under this provision, the Commission will have not only the right of legislative initiative, but also the possibility of developing European laws in the terms prescribed by the legislation. Under Article I-36 of the Constitutional Treaty, the Commission would have the power to *supplement or amend* non-essential elements of a European law or framework law, if a European law or framework law authorises it, whereas currently the Commission can only submit a proposal to the Regulatory Committee in order to *adapt or update* certain non-essential provisions of basic instruments. The terms used in Article I-36 (*supplement or amend*) show explicitly the extension of the current Commission's delegated normative competence (*adapt or update*) provides for the Constitutional Treaty.

2. Implementing Acts under Article I-37 of the Constitutional Treaty

The competences of the Commission are again strengthened by the Constitutional Treaty with regards to the regulation of implementing acts. First paragraph of Article I-37 lays down the presumption on the Member States implementing powers. However, the second paragraph creates a new text for conferring implementing power to the Union. Article I-37(2) states that:

Where uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission or, in duly justified specific cases and in the cases provided for in Article I-40, on the Council.

According to Article I-37(2) of the Constitutional Treaty, the purpose of these implementing acts would be to establish uniform conditions of implementation of the obligatory acts of the Union, that is, of European laws and European framework laws as well as Regulations and Decisions of the Union. Although the provision permits the extension of the administrative competence of the Commission, until now, criticism has centered on the difficulty in identifying the ambit in which the determined

59 This is known as the 'call-back' system.

60 Another kind of control debated by the WG was a sunset clause but, at the end, it wasn't accepted. See CONV 424/02, p. 11.

61 Craig describes the system of control established by Art. I-36 of the Constitutional Treaty as 'difficult to monitor and enforce'. Craig, P. 2004, 'The Hierarchy of Norms' in Tridimas, T., Nebbia, P (eds), *European Union Law for the Twenty-First Century, Rethinking the Legal Order*, Oxford, Hart Publishing, chap. 5, (pp. 10-11 of the draft).

62 Ibid, p. 11.

63 Ibid, p. 11.

implementing powers will operate, taking into account the current sources of Union law.⁶⁴ There has been no debate on the increment of the Commission's power involved and the consequences of this on the institutional balance of powers.⁶⁵

a. Areas Where Implementing Acts might be Used

The *Final Report of the Working Group on Simplification* enables us to see how these acts will allow the Commission to introduce technical specifications which guarantee the effectiveness of Union legislation.⁶⁶ Along with the examples contained in the current Treaties, the Constitutional Treaty itself provides for some further examples regarding the areas where implementing acts could be used:⁶⁷ For instance, in the area of Freedom, Security and Justice. Regarding judicial cooperation in civil matters a provision establishes that the Union might adopt measures 'for the approximation of the laws and regulations of Member States'.⁶⁸ These measures shall be adopted by European laws and framework laws for ensuring, among others, the mutual recognition and enforcement among Member States of judgments and decision in extrajudicial cases and the cross- border service of judicial and extrajudicial documents.⁶⁹ The Commission drafting a European Law might observe the lack of uniform conditions among Member States which could undermine the European law purpose. Under these circumstances the European law might make a delegation of power on the Commission for adopting an implementing act. For instance, the Union has adopted regulations establishing uniform conditions among Member States for the effectiveness of its asylum policy: For applying the Dublin Convention,⁷⁰ it was necessary to know the identity of applicants for asylum and of persons apprehended in relation to unlawful crossing of the external borders of the Union. To this aim, it was necessary to set up a system for the comparison of fingerprints of applicants for asylum. That system is called Eurodac: a central unit established in the Commission which operates as a computerised central database of fingerprint data. A Council Regulation of 2000⁷¹ created Eurodac and laid down rules on how Member States shall collect and transmit fingerprint data (e.g. they shall transmit to the Central Unit the fingerprint data relating to all or at least the index fingers or the prints of all other

64 Craig, P., analyses the possibility of implementing acts establishing uniform conditions of implementation in areas regulated by a European law arriving at the conclusion that, given the nature of the latter which are equivalent to current Community Regulations, it should be for the MS to set down the necessary conditions to ensure their effectiveness. In Craig's opinion it would be more apt to use implementing acts to implement European Framework laws which would be the equivalent of the current Community Directives. However, in this case, the adoption of uniform implementing measures by the Commission would contravene the characteristic of European Framework laws, that is, the discretion granted to the MS to choose the measures to adopt with the aim of achieving the objectives specified in the legal norm. These arguments, opposing the passing of implementing acts of the Commission for the establishment of uniform conditions for the implementation of European Laws and of European framework laws, have been used by Craig to question the utility of these legal instruments when the issue at hand deals with the implementation of European Regulations described by Article I-33(1)(4) Constitutional Treaty. See n. 61.

65 See Part 4 of this paper.

66 CONV 424/04, p. 8.

67 Apart from the aims contained in the *Final Report of the Working Group*, some commentators have identified in the ECT, provisions which would facilitate the Commission in the use of the above mentioned legal instruments. Thus, for example, the adoption by the Council of acts for the purposes of Articles 87 and 88 ECT regarding aid granted by MS referred to in Article 89 ECT, will be regulated in the future by the adoption of European laws and European framework laws through the ordinary legislative procedure, which, in turn, can authorise the Commission to adopt acts (delegated regulations) which may contain the legal basis for further Commission action in specific cases in the form of implementing acts. These and other examples can be seen in Lenarts, K., Desomer, M., n. 47, annex, pp. 128-131.

68 Article III-269 (1) of the Constitutional Treaty.

69 Article III-269 (2)(a)(b).

70 Convention on the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities, signed in Dublin on 15 June 1990 (hereafter, the Dublin Convention), OJ C 254, 19.8.1997.

71 Council Regulation (EC) No 2725/2000, 11 December 2000, establishing Eurodac for the comparison of fingerprints for the effective application of the Dublin Convention

fingers if indexes are missing⁷²). The procedure on collection, transmission and comparison of fingerprints is established by Council Regulation No 407/2002, 28 February.⁷³ This Regulation sets up a definition of transmission and rules on comparison and transmission of results. Also it establishes rules on communication between Member States and the Central Unit in the Commission.

Under the Constitutional Treaty some of these rules and definitions might be established by an implementing act with the form of European implementing regulations or European implementing decisions. Doing so, it will introduce some degree of flexibility in the European normative system: a Council regulation will not be necessary to establish or to modify technical details.

b. The Form and Mechanism for the Control of Implementing Acts

It must be taken into account that implementing acts must be adopted with a basis in the obligatory acts of the Union the legal nature of which can be normative or purely executive (administrative acts). Therefore, with regard to the form of these instruments, Article I-37(4) of the Constitutional Treaty provides that 'Union implementing acts shall take the form of European implementing regulations or European implementing decisions'.⁷⁴ These measures occupy the third and final position in the hierarchy of norms introduced by the Constitutional Treaty.⁷⁵

With regard to the mechanisms for control of implementing acts by Member States, the Constitutional Treaty refers to the establishment of control beforehand in European laws.⁷⁶ That is, a European law will be passed which will replace current decisions of the Council regarding Comitology, which establishes the current Committees of control of acts adopted by the Commission in the development or implementation of a basic act of the Council. Article I-37(3) of the Constitutional Treaty is consistent with the decision of the Convention to adopt the co-decision procedure as the ordinary legislative procedure: the Parliament will participate as a co-legislator not only delegating power to the Commission to adopt delegated regulations and implementing acts, but also establishing in advance in a European law the mechanisms for control of these measures. The mechanism or system of control will depend on the political implications for implementing acts. The options will range from acts of a consultative committee which would advise the Commission, to cases where the Council of Ministers itself would exclusively implement the act (situations relating to the implementation of Common Foreign and Security Policy, among others).⁷⁷

72 Ibid, Article 11(2).

73 Council Regulation (EC) No 407/2002 of 28 February 2002 laying down certain rules to implement Regulation (EC) No 2725/2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention.

74 Decisions are defined in Article 249 ECT as binding in its entirety upon those to whom it is addressed. The majority of decisions are executive acts but it cannot be forgotten that certain decisions have a normative character like, for example, the Comitology decision.

75 Currently there is no official hierarchy of norms between Community Regulations and Directives (art. 249 EC); however Working Group IX considered that the simplification and systemisation of the legal instruments of the Union necessitated the introduction of a normative hierarchy. See CONV 424/02, p. 8 and 9. This is not the first time an attempt has been made to create a definitive hierarchy of norms in Community law. In the Maastricht IGC, Italy proposed the following hierarchical order in Community law: Constitutional Treaty norms, legislative norms, administrative regulations and acts. The Nice IGC saw a proposal from the Portuguese regarding a hierarchy of norms which stipulated that legislative acts should always be adopted through the co-decision procedure with a limited content, establishing the essential norms and principles of a particular field. See Document CONV 162/02, p. 14, n. 17.

76 Article I-37(3) of the Constitutional Treaty.

77 Article I-37(2) *in fine* of the Constitutional Treaty.

B. External Action of the Union and the Area of Freedom, Security and Justice.

One of the areas in which the most important progress has been made in the Constitutional Treaty with respect to the process of European integration is the inclusion of intergovernmental elements, such as the Second Pillar (Common Foreign and Security Policy) and the Third Pillar (Police and Criminal Cooperation in Judicial matters)⁷⁸ in the institutional framework. However, the policies which fall under the headings *External Action of the Union*⁷⁹ and *the Area of Freedom, Security and Justice*⁸⁰ are not limited to the subject matter of the current Second and Third Pillar.

The Commission's powers have been augmented especially with regard to the Third Pillar, which becomes part of the *Area of Freedom, Security and Justice*.⁸¹ The following policies fall under this chapter:

- Policy regarding control of borders, asylum and immigration.
- Judicial cooperation in civil matters
- Judicial cooperation in criminal matters.
- Police cooperation.

The adoption of European laws and European framework laws on these policies will follow the ordinary procedure: that is, the right of initiative and the elaboration of a proposal will remain with the Commission and the promulgation of laws will take place through the ordinary legislative procedure under Article III-396. In the areas of judicial cooperation in criminal matters and police cooperation, the right of legislative initiative will not only lie with the Commission, but also with a quarter of the Member States.⁸²

In certain specific sectors of the policies contained in this area, the Constitutional Treaty provides for an exception to the application of the ordinary legislative procedure, whereby the law that will regulate these specific sectors will be a law, unanimously adopted by the Council, with the prior consultation of the European Parliament. Specific reference is made to measures relating to areas of family law with cross-border repercussions, the establishment of a European Public Prosecutor's Office from Eurojust or the measures concerning operational police cooperation among Member States.⁸³ This exception has its provenance in a request from the Irish Government which attempted to ensure, by this method, that Irish family law would not be affected by measures adopted in this area.

The Common Foreign and Security Policy is communitarized in Title V of the third part of the Constitutional Treaty, which is included, along with other policies, under the general heading of *External Action of the Union*. However, unlike what was established with respect to the policies included in the *Area of freedom, security and justice*, in the Common Foreign and Security Policy, European laws and framework laws may not be used.⁸⁴ These may be used in the rest of the policies contained under the heading of External Action of the Union, such as, for example, a common external commercial policy,⁸⁵ development co-operation,⁸⁶ and economic, financial and technical co-operation with third countries⁸⁷ or humanitarian aid.⁸⁸

78 The Treaty of Amsterdam communitarized part of the Third Pillar in the area of cooperation in justice and home affairs.

79 Title V of the third part of the Constitutional Treaty.

80 Chapter IV, Title III, third part of the Constitutional Treaty.

81 Ibid.

82 Article III-264 of the Constitutional Treaty.

83 Articles III-269 (3), III-274 and III-275 (3) of the Constitutional Treaty.

84 Art. I-40 (6) of the Constitutional Treaty excludes the use of European law and framework law on the CFSP.

85 Article III-315(2) of the Constitutional Treaty.

86 Article III-317(1) of the Constitutional Treaty.

87 Article III-319 (2) of the Constitutional Treaty.

88 Article III-321 (3) of the Constitutional Treaty.

Common Foreign and Security Policy will be organised through European decisions of the European Council and the Council of Ministers, adopted unanimously except where the Constitutional Treaty otherwise provides.⁸⁹ The right of initiative in this area will lie with a Member State, the Minister for Foreign Affairs of the Union or the Minister for Foreign Affairs along with the support of the Commission:⁹⁰ that is, the Minister for Foreign Affairs can present proposals before the Council of Foreign Affairs without the support of the Commission. However, this is an unrealistic perspective taking into account that the Minister for Foreign Affairs will be one of the vice-presidents of the Commission, nominated by the European Council with the approval of the Commission's President.⁹¹ The Minister for Foreign Affairs might also present proposals related to these policies before the European Council.

In the other policies falling under the rubric of *External Action of the Union*, the Commission will have the right of initiative along with the Minister for Foreign Affairs.⁹²

IV. Constitutional Treaty Reform and the Principle of the Balance of Powers.

One of the debates sparked by the amendment of the constitutive Treaties concerns the implications of the reform process for the balance of powers.⁹³ The reform which the Constitutional Treaty proposes to introduce has polarised this debate, particularly by the strengthening of the competences of the Commission involved.⁹⁴ However, it is submitted that these fears are unfounded and are based on an incomplete analysis of the Constitutional Treaty. The aim of this section is to re-examine the characteristics and the functions of the principle in the European legal system and highlight the elements of the Constitutional Treaty which provide a counterbalance to the strengthening of the role of the European Commission. This will be done by discussing some elements which mitigate the impact of the proposed constitutional reform on the principle of the balance of powers.

A. Characteristics and Functions of the Principle of Balance of Powers

The principle of the balance of powers appeared for the first time in the Community legal system in the celebrated *Meroni* decision by the European Court of Justice, where the Court had to decide if the High Authority had, by its Decision No 14/55, delegated to the Brussels agencies powers which they were ill-qualified to exercise. Interpreting Article 3 of the ECSC Treaty, the Court held that:⁹⁵

The objectives set out in Article 3 are binding not only on the High Authority, but on the institutions of the Community [...] within the limits of their respective powers, in the common interest. From that provision there can be seen in the balance of powers which is characteristic of the institutional structure of the Community, a fundamental guarantee granted by the Treaty in particular to the undertakings and associations of undertakings to which it applies.

Since then, the Court has considered this principle on several occasions finding that 'the Treaties set up a system for distributing powers among the different Community institutions, assigning to each

89 Article I-40 (6) (7) of the Constitutional Treaty.

90 Article I-40 (6) of the Constitutional Treaty.

91 Article I-28 (1) of the Constitutional Treaty.

92 Art. III-194.2 Constitutional Treaty.

93 See *inter alia*, D. Nickel, M. Petite, 1998, *Amsterdam and European Institutional Balance. A Panel Discussion*, Harvard Jean Monnet Working Paper Series 14/98; X. A. Yataganas, 2001, *The Treaty of Nice: The Sharing of Power and the Institutional Balance in the European Union – A Continental Perspective*, Jean Monnet Working Paper Series 1/01.

94 Craig has analysed the effect that delegated regulations in the Constitutional Treaty could have on the principle of the balance of powers. The author shows that the effects depend on three factors: The detailed or abstract drafting of European Laws and European Framework laws, the controls that the laws themselves establish and finally, the continuation of the Regulatory and Management Committees albeit in a consultative capacity. See n. 61, p. 13.

95 Case C-9/56, *Meroni*, n.49, p. 152

institution its own role in the institutional structure of the Community and the accomplishment of the tasks entrusted to the Community'.⁹⁶

With regard to the meaning of the principle, the Court found that '[the] observance of the institutional balance means that each of the institutions must exercise its powers with due regard for the powers of the other institutions. It also requires that it should be possible to penalize any breach of that rule which may occur'.⁹⁷

The principle of the balance of powers is a structural principle which governs the relationship between the Community institutions, a distinct principle from the separation of powers.⁹⁸ The distribution of power in the European Union is not based on the principle of the separation of powers formulated by Montesquieu in the eighteenth century.⁹⁹ According to the institutional provisions of the founding Treaties, the concept of the separation of powers does not fit into the powers attributed to the institutions. There is no clear distinction between the institution which would correspond with the legislative power (Council, Commission and Parliament) and that which would exercise executive power (Commission, Council), not to speak of the national administrations which share the executive power with the Community administration.¹⁰⁰ The judicial power is the only power which can be identified within a single Community institution, that is, the Court of Justice of the European Communities.

The aim of the principle of the separation of powers in liberal democratic systems cannot be adapted to the supranational structure of the Union either. The aim of the principle is still the guarantee of political freedom avoiding the concentration of power in one place, which is the definition of a despotic government.¹⁰¹ However, in the Union, the distribution of powers and competences between the institutions is not designed to guarantee political freedom, but ensures that the Commission, the institution which represents the Community interest, does not accumulate excessive power with regard to the Council and the Parliament, where national interests are more directly represented. The principle of the balance of powers guarantees a balance interaction among the different interests represented by the Institutions of the Union.¹⁰² Doing so, the principle leads discussions into an institutional frame 'in which, it is hoped, the narrow pursuit of self-interest can be overcome and replaced by a more emphatic, constructive debate on the public good within the European Union'.¹⁰³

The function of the principle of the balance of powers is not limited to ensuring that Community institutions do not exceed the powers granted to them by the Treaties through judicial enforcement. It also guarantees the protection of the competences of the Member States and their citizens by prohibiting the infringement of Member State competences and by ensuring the respect of the rights of

96 Case C-70/88, *European Parliament v. Council*, [1990] ECR I-02041, para. 21

97 *Ibid.*, para. 22.

98 Guillermin, G. 1992, 'Le principe de l'équilibre institutionnel dans la jurisprudence de la Cour de justice des Communautés européennes (1)', *Journal du Droit International*, no. 1, p. 319

99 Commentators admit that the tripartite (Pescatore) or organic (Lenaerts) version of the principle of the separation of powers does not correspond to the distribution of powers established in the constitutive treaties. Pescatore attempts a revision of the classic principles adapting the structure to a quadripartite one, which the Communities had at the beginning, in 1978, 'L'Executif communautaire: justification du quadripartisme institué par les Traités de Paris et de Rome', *Cahiers de Droit Européen*, n. 4, pp. 388 and 389. For his part, Lenaerts proposes a functional concept of the principle of the separation of powers for the Union, in 1991, 'Some reflections on the separation of powers in the European Community', *CMLR* 28, pp. 13 and 14.

100 Lenaerts, K., n.99, p. 15.

101 Dehousse, R. 1994, 'Comparing National and EC Law: The Problems of the Level of Analysis', *The American Journal of Comparative Law*, vol. 42, pp. 776.

102 Lenaerts, K., Verhoeven, A., 2002, 'Institutional Balance as a Guarantee for Democracy in EU Governance' in Joerges, C., Dehousse, R., (eds), *Good Governance in Europe's Integrated Market*, Oxford, OUP, p. 43.

103 *Ibid.*

citizens by prohibiting Community institutions from acting outside their ambit.¹⁰⁴ However, the jurisprudence of the European Court of Justice restricted itself to highlighting the application of the principle on a horizontal level, preserving the competences attributed to each institution by the Treaties against the acts of the other Community institutions.¹⁰⁵ In this sense, the operation of the principle as an instrument of control at the disposal of the Court in order to support its decisions was highlighted in cases like the well-known *Parti Écologiste 'Les Verts'* case.¹⁰⁶ The Court recognised the legitimising role of the Parliament by including it as an institution against which an action for annulment could be brought, even though ex-Article 173 ECT (now Article 230) only referred to acts of the Council and of the Commission. The Court also based its decision on the need for the possibility of judicial review of whatever decision of the European Parliament adopted under the scheme of the ECT, where such a decision constituted an infringement of the competences of another Community institution or the Member States.¹⁰⁷ However, the reference to the balance of powers, as an instrument of control of the competences of each institution available to the Court of Justice, can be found in later case law, particularly *Parliament v. Council*.¹⁰⁸

The application of the principle of the balance of powers referred to above, along with the character of the Union as a Community based on the rule of law, has allowed the Court of Justice to give a constructive interpretation of the Treaties filling in any lacunae which they may contain.¹⁰⁹ Hence, the principle of the balance of powers occupies an elevated position in the Union legal system. Indeed, the centrality of this principle in the Union legal system means that every amendment of the Treaties which affects the powers and competences of the institutions sparks a debate about the possible infringements of the principle which the amendment may cause.¹¹⁰ The importance of the principle has been identified in the working papers of the Convention.¹¹¹ The constitutional process has caused the resurgence of the debate on the balance of powers among the Community institutions within the European Union.¹¹²

B. The Political Control of the Commission by the European Parliament

This paper will restrict itself to pointing out that, despite the strengthening of the Commission, it is possible to find other elements in the Constitutional Treaty which serve as a counter balance to this fortification.¹¹³ First of all, it must be borne in mind that the principle of the balance of powers is not a

104 The principle of the balance of powers acts like a protective shield of the competences of the MS against the institutions of the Union. Vos, E., n. 56, p. 88

105 According to the Court of Justice, the aim of the principle was not only to maintain the distribution of powers among the institutions, but also to protect the interest of private individuals. However, Jacqué, J.P., refers to the judgment where the Court changed this approach (case C-282/90, *Vreugdenhil BV v. Commission*, [1992] ECR I-01937, paras. 20-22), 2004, 'The principle of Institutional Balance', *CMLR* 41, pp. 385- 386.

106 Case C-294/83, *Parti écologiste 'Les Verts' v. European Parliament*, [1986] ECR 01339. Previously the Court had found certain regulations of the Council, whose promulgation did not respect an essential element of the legislative procedure stipulated in the Treaty (the consultation of the Parliament) to be invalid. See case C-138/79, *SA Roquette Frères v. Council*, [1980] ECR 03333, para. 32-36. The same reasoning was applied in the case C-139/79, *Maizena GmbH v. Council*, [1980] ECR 03393, para. 33-37.

107 'Measures adopted by the European Parliament in the context of the EEC Treaty could encroach on the powers of the Member States or of the other institutions, or exceed the limits which have been set to the Parliament's powers, without its being possible to refer them for review by the Court. It must therefore be concluded that an action for annulment may lie against measures adopted by the European Parliament intended to have legal effects via-à-vis third parties'. *Ibid.*, para. 25 *in fine*.

108 See n. 96 and the text corresponding to n. 97.

109 In this respect see Guillermin, n. 98, p. 341.

110 See n. 93.

111 CONV 770/03, p. 2

112 Craig, P, n. 16, p. 1.

113 With regard to the increase in the competences of the Commission see Part 3 of this paper.

static but a dynamic principle, which can be altered with subsequent amendments of the Treaties. The system of the distribution of powers between the institutions of the Community established in the Treaties, as well as the competences and tasks assigned to each institution, can be subject to later amendment.

The key to the maintenance of the principle of the balance of powers in the Constitutional Treaty, specifically with the reform of the Commission contained in the Constitutional Treaty, could be found in the way in which the Parliament has been granted more control over the Commission.¹¹⁴ The strengthening of the powers of the Parliament, which will become the ordinary co-legislator with the Council and the control which can be exercised over the Commission might reinforce the principle of the balance of powers in the Union legal system.

It is not the purpose of this paper to study the amendments that the Constitutional Treaty has made to the competences of the European Parliament, but it will rather focus on what I have called the mechanisms of control of the European Parliament over the Commission comparing the current situation with the amendments in the Constitutional Treaty.

In the current version of the Treaties, it is difficult to understand clearly the political responsibility of the Commission before the European Parliament.¹¹⁵ In fact, the Treaties emphasize the apolitical nature of the Commission (Article 213 ECT) and the independence of the institution providing, however, for the possibility of a motion of censure by the Parliament over its activities (Article 201 ECT).

The Treaties of Amsterdam and Nice introduced amendments tending to reinforce the political control of the President over the College of Commissioners. The Amsterdam Treaty awarded the President the power of veto over the nomination of new Commissioners from the Member States.¹¹⁶ The Treaty of Nice, for its part, expressly included the tacit agreement between Mr. Prodi and his Commissioners, whereby Commissioners are obliged to resign their post if the President so requests. The reform introduced by the Treaty of Nice, granted the President of the Commission the competence to nominate Vice-presidents with the consent of the College of Commissioners.¹¹⁷

The amendments introduced by the reforms in Amsterdam and Nice along with the external intervention from the Court of Justice of the European Communities¹¹⁸ and the European Parliament,¹¹⁹ reinforce the authority of the President of the Commission over the College of Commissioners.¹²⁰ In this sense, the Constitutional Treaty reiterates the point that the responsibilities of the Commission will be structured and allocated among its members by the President and that the Commissioners exercise their duties devolved upon them by the President under his or her authority.¹²¹

More specifically, the procedures of nomination and resignation or dismissal of Commissioners, only slightly modified with the latest Treaty amendments, make progress in this area by introducing a more discernable political and managerial responsibility of the College.¹²²

114 Jacqué, J.P., has pointed out to what extent the history of the Community is marked by the progressive growth of the powers of the Parliament to the detriment of those of the two other Institutions, n. 105, pp. 387- 391.

115 Harlow, C., n. 1, p. 58

116 Current Article 214 (2) ECT.

117 Article 217 ECT

118 Article 216 ECT provides that any member of the Commission who no longer fulfils the conditions required for the performance of his duties can be compulsorily retired by the Court of Justice on application from the Council or the Commission.

119 Article 201 ECT regulates the motion of censure of the European Parliament over the activities of the Commission.

120 Harlow, C., n. 1, p. 59.

121 Article III- 350 which is the version modified by the Constitutional Treaty of Article 217(2) ECT, according to the consolidated version of the Treaty of Nice.

122 Regarding the difficulties faced when exercising disciplinary action and hierarchical control in the heart of the European Commission, see Harlow, C., n. 1, p. 59.

The current version of the Treaties provides that:¹²³

The Council, meeting in the composition of Heads of State or Government and acting by a qualified majority, shall nominate the person it intends to appoint as President of the Commission; the nomination shall be approved by the European Parliament.

The Council, acting by a qualified majority and by common accord with the nominee for President, shall adopt the list of the other persons whom it intends to appoint as Members of the Commission, drawn up in accordance with the proposals made by each Member State.

The President and the other Members of the Commission thus nominated shall be subject as a body to a vote of approval by the European Parliament. After approval by the European Parliament, the President and the other Members of the Commission shall be appointed by the Council, acting on a qualified majority.

The nomination of the President of the Commission and the other members of the College, will be made by the Council by qualified majority.¹²⁴ However, the nomination of all these must also be approved by the European Parliament.

In contrast with the procedures just described, in which the European Parliament only plays a secondary role (that of approving a decision made by the Council), the procedure established in the Constitutional Treaty reinforces the role of the European Parliament.¹²⁵ The Constitutional Treaty gives the Parliament control over the European Commission in three essential steps: 1. In the nomination of the President. 2. In the composition of the College. 3. The continuing supervision for the duration of the term of the Commission.

1. With respect to the appointment of the President of the Commission, the European Council must make a proposal to the European Parliament taking into account the result of the elections in the European Parliament.¹²⁶ However, it will be the Parliament itself which will elect the President on the Council's proposal by a majority of votes in favour of the candidate. If the Parliament rejects the Council's proposal, which would occur if the Presidential candidate did not obtain a majority in the Parliament, the European Council must propose an alternative candidate within one month. This is an important change from Article 214.2 ECT, where the European Council appoints the President of the Commission by qualified majority, with the approval of the European Parliament. The amendment of the procedure of the election of the President of the Commission provided for in the Constitutional Treaty highlights a conscious effort to increase the weight of the European Parliament within the institutional structure of the Union.¹²⁷ According to the Declaration for incorporation in the Final Act proposed by the Irish Presidency:

Prior to the decision of the European Council [on the candidate to be proposed to the EP], representatives of the European Parliament and of the European Council will thus conduct the necessary consultations in the framework deemed the most appropriate. These consultations will focus on the

123 Article 214(2) ECT.

124 The Treaty of Nice introduced the rule of qualified majority voting in the place of the unanimity previously required in this area.

125 I am considering not just Article I-27 of the Constitutional Treaty but also the Declaration on that provision introduced by the Irish Presidency, CIG 73/04, p. 28.

126 Procedure contained in Article I-27.1 of the Constitutional Treaty. The rule attempts to increase the democratic legitimacy of the Commission by obliging the Council to take into account the results in the European Parliamentary elections when proposing a candidate for the President of the Commission to the Parliament. Furthermore, the Declaration of Irish Presidency on Article I-26.1 (current Article I-27.1) says expressly that 'the EP and the EC hold joint responsibility for the smooth running of the process leading to the election of the President of the European Commission', CIG 73/04, p. 28.

127 P. Craig considers that the procedure of appointing the President of the Commission provided for in the Constitutional Treaty does not improve the democratic legitimacy of the institution as the European Council continues to dominate the proceedings. The Council proposes the candidate and the procedure does not allow members of the Parliament to decide upon the dismissal of the President of the Commission where it does not agree with his or her political direction and replace him or her. See n. 16, p. 14.

backgrounds of the candidates for the Presidency of the Commission, taking particular account of the elections to the European Parliament, in accordance with Article I-26 (1) [current Article I- 27 (1)].¹²⁸

2. The Council and the President shall adopt the list of members of the College. Candidates shall be selected on the basis of the suggestions made by the Member States, in accordance with the criteria set out in Article I-26 (4)(6) of the Constitutional Treaty.

The Constitutional Treaty provides that the President and the members of the College, including the Minister for Foreign Affairs of the Union, are subject to an overall vote of approval by the European Parliament. This is an adaptation of the Constitutional Treaty to the rule currently contained in Article 214(2)(3) ECT. The innovation is that the Parliament can reject the composition of the College if any of the Commissioners appointed by the President are not considered competent to exercise their duties, do not meet the requirements of independence or where their European commitment is in doubt.¹²⁹ It is submitted that the Constitutional Treaty makes available certain control mechanisms to the Parliament at the time of approving the composition of the College. The Constitutional Treaty enhances, therefore, the mechanisms of control of the Parliament over the composition of the College.

3. Thirdly, the control of the European Parliament over the Commission is not limited to the appointment of the President and the composition of the College, but is extended over its five year term to all the activities carried out by the institution. Along with the possibility of passing a motion of censure, contained in the current Article 201 ECT, the Constitutional Treaty mentions expressly that the Commission, as a College, shall be responsible to the Parliament (Article I-26.8). This constitutes an important formal recognition of the principle of political accountability of the Commission to the European Parliament which has, among its functions, the exercise of political control (Article I-20 (1)). The Draft Constitutional Treaty of July 2003 expressly stipulated that the President of the Commission would be responsible to the Parliament for the activities of the Commissioners. A provision eventually erased from the Constitutional Treaty. However, the Constitutional Treaty maintains the provision of Article 197 ECT, which says that ‘the Commission shall reply orally or in writing to questions put to it by the European Parliament or by its members’ (Article III-337).

Of particular importance will be the accountability of the President, and the Commission in general, with regard to the correct and efficient implementation of Community policies. Certain Community policies will be defined by European laws and European framework laws or by Community regulations and the other legal instruments of the Union, but will be executed by the European Commission. In cases of alleged contraventions or maladministration in the implementation of Union Law the European Parliament can set up a temporary Committee of Inquiry to investigate them.¹³⁰

Nonetheless, although the Constitutional Treaty increases the political mechanisms by which the European Parliament may control the Commission, it is also true that the new provisions could have gone further in terms of legal overview, e.g., by giving standing to the Parliament before the ECJ to bring an application to retire a Commissioner who is guilty of serious misconduct.¹³¹

V. Conclusion

This paper has analysed the reform of the European Commission as contained in the Constitutional Treaty: the strengthening of the role of this institution by virtue of the increase in both its normative

128 CIG 73/04, p. 28.

129 These factors must be taken into account by the President for the purposes of the appointment of the members of the College from the candidates provided by the Member States (Articles I-26(4) and I-27(2) of the Constitutional Treaty).

130 Article III-333 of the Constitutional Treaty and current Article 193 ECT.

131 Article III-349 of the Constitutional Treaty, as current Article 216 ECT, gives standing to the Council and the Commission but not to the European Parliament.

and executive powers, and through the communitarization of the policies contained in the current Second and Third Pillars of the European Union.

The purpose of this analysis was not simply to describe the new competences of the institution but also to examine whether these reforms could violate the principle of the balance of powers which forms the basis of the Union's institutional structure. A doctrinal analysis along with the pronouncements from the ECJ regarding the principle of the institutional balance of powers highlights the fact that we are dealing with a dynamic principle, which can be altered by Treaty amendment. Therefore, it is up to original Community law to determine the conditions for safeguarding the principle. In this sense, the Constitutional Treaty does not only fortify the role of the Commission, but also strengthens the role of the European Parliament which, on the one hand, becomes the ordinary co-legislator with the Council and, on the other hand, receives stronger control mechanisms with regard to the Commission. The analysis of the Constitutional Treaty allows for the organisation of the control mechanisms of the European Parliament over the Commission divided into three stages: firstly, in the appointment of the President; secondly, with regard to the composition of the College and finally, the control exercised during the term of the Commission.

All in all, the conclusion which this paper reaches is that the Constitutional Treaty tries to maintain the principle of the institutional balance of powers, given that the strengthening of the Commission is counteracted by the increase in political control of the European Parliament over the institution.

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