

# KLUWER LAW INTERNATIONAL

## COMMON MARKET LAW REVIEW

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**Aims**

The Common Market Law Review is designed to function as a medium for the understanding and implementation of Community Law within the Member States and elsewhere, and for the dissemination of legal thinking on Community Law matters. It thus aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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## EDITORIAL COMMENTS

### *The post-Lisbon institutional package: Do old habits die hard?*

Tuesday 1 December 2009 was a busy day on Rue de la Loi. As the Lisbon Treaty was coming into force, several EU acts were swiftly adopted to sort out (some of) the many missing details of the refurbished Union's institutional set-up. Only hours after he took office,<sup>1</sup> European Council President Mr Van Rompuy had already signed the European Council Rules of Procedure (freshly agreed by written procedure)<sup>2</sup> and the new arrangements on the exercise of the Council Presidency,<sup>3</sup> implemented straight away by Council Decision.<sup>4</sup> The same day, the Council agreed its own revised Rules of Procedure,<sup>5</sup> appointed its new Secretary-General,<sup>6</sup> set out the latter's employment conditions,<sup>7</sup> as well as those of the President of the European Council<sup>8</sup> and of the new High Representative for Foreign Affairs and Security Policy.<sup>9</sup> And other significant

1. European Council Decision (2009/879/EU) of 1 Dec. 2009 electing the President of the European Council (O.J. 2009, L 315/48).

2. European Council Decision (2009/882/EU) of 1 Dec. 2009 adopting its Rules of Procedure (O.J. 2009, L 325/51). The written procedure is permitted under Art. 7 of the said Rules of Procedure, "on an urgent matter ... where the President of the European Council proposes to use that procedure".

3. A draft of that decision was contained in Declaration 9 annexed to the Final Act of the IGC which has adopted the Lisbon Treaty. It also formally appointed the HR for Foreign Affairs and Security Policy [European Council Decision (2009/50/EU) taken with the agreement of the President of the European Commission of 4 December 2009 appointing the High Representative of the Union for Foreign Affairs and Security Policy (O.J. 2009, L 328/69)] and, later, the European Commission [Decision (2010/80/EU) of the European Council of 9 Feb. 2010 appointing the European Commission (O.J. 2010, L 38/7)].

4. Council Decision (2009/908/EU) of 1 Dec. 2009 laying down measures for the implementation of the European Council Decision on the exercise of the Presidency of the Council, and on the chairmanship of preparatory bodies of the Council (O.J. 2009, L 322/28). Declaration 9 also foresaw that the Council had to begin preparing the decision establishing the procedures for implementing the decision on the exercise of the Presidency of the Council as soon as the Treaty of Lisbon was signed, was asked to give its political approval within 6 months.

5. Council Decision (2009/937/EU) of 1 Dec. 2009 adopting the Council's Rules of Procedure (O.J. 2009, L 325/35).

6. Council Decision (2009/911/EU) of 1 Dec. 2009 appointing the Secretary-General of the Council of the European Union (O.J. 2009, L 322/37).

7. Council Decision (2009/912/EU) of 1 Dec. 2009 laying down the conditions of employment of the Secretary-General of the Council of the European Union (O.J. 2009 L 322/38).

8. Council Decision (2009/909/EU) of 1 Dec. 2009 laying down the conditions of employment of the President of the European Council (O.J. 2009, L 322/35).

9. Council Decision (2009/910/EU) of 1 Dec. 2009 laying down the conditions of employment of the High Representative of the Union for Foreign Affairs and Security Policy (O.J. 2009, L 322/36).

decisions are under way, the most attention-grabbing of which concern the organization and functioning of the European External Action Service.<sup>10</sup>

This composite post-Lisbon institutional package clarifies some of the institutional questions that the Treaty itself left open, such as the detailed “job description” of the President of the European Council, and the function of the remaining rotating Council Presidency. But there’s much more in there.

### *Stable president and rotating presidency*

One of the most visible novelties brought about by the Treaty of Lisbon is the “election” of a stable president of the European Council, often abusively, but symptomatically referred to as the “President of Europe”, or “President of the EU”. The *raison d’être* of this new creature is notably to ensure more continuity and consistency in the definition of the Union’s political agenda, while relieving the Member States’ top political figure(s) of an increasingly demanding and somewhat schizophrenic job.<sup>11</sup> Having established the President, the Treaty drafters did not dispose of the rotating Council Presidency. As before, it is held in turn by Member States, following the old six-month rotation system,<sup>12</sup> and in pre-established groups of three for a period of 18 months.<sup>13</sup> Thus, though not “President of the EU”, Mr Zapatero presently remains the President of its Council.

While the European Council Rules of Procedure elaborate the new President’s powers, they also confirm that the rotating Presidency retains, potentially, a significant role in EU governance, notably in relation to that President. For example, the tasks and powers of Mr Van Rompuy include the drafting of the agenda of meetings of the European Council, the guidelines for its conclusions, and possibly, its conclusions and decisions. However, the same

10. See Draft Council decision establishing the organization and functioning of the European External Action Service, doc. 8029/10, 25 March 2010. In this context, the Staff Regulation of Officials of the European Communities and the Conditions of Employment of other Servants of those Communities, and the Financial Regulation applicable to the General budget of the European Communities, are also being amended.

11. See Dougan, “The Treaty of Lisbon 2007: Winning minds, not hearts” 45 *CML Rev.* (2008), 617 at 628; Jacqué, “Le traité de Lisbonne. Une vue cavalière”, (2008) *RTDE*, 444 at 455.

12. According to the Council Decision, the order in which the Member States shall hold the Council Presidency as from June 2010 is as follows: Belgium, Hungary, Poland, Denmark, Cyprus, Ireland, Lithuania, Greece, Italy, Latvia, Luxembourg, The Netherlands, Slovakia, Malta, United Kingdom, Estonia, Bulgaria, Austria, Romania, Finland.

13. The Decision also foresees that the groups shall be made up on the basis of equal rotation among Member States, taking into account their diversity and geographical balance within the Union. Hence, the current pre-established group includes Spain, Belgium and Hungary; and the next group will comprise Poland, Denmark and Cyprus. The system of pre-established groups has been in existence since 1 Jan. 2007, and was already envisaged by the previous Council’s Rules of Procedure.

rules of procedure also emphasize that all these tasks have to be performed “*in close cooperation* with the member of the European Council representing the Member State holding the six-monthly Presidency of the Council” (emphasis added).<sup>14</sup> In the same vein, while the President has to ensure the “preparation” and the “continuity” of the work of the European Council, this, again, has to be done in close cooperation and coordination with the Presidency of the Council. Such cooperation should indeed be so close that in principle the Head of State or Government of the Member State holding the Council Presidency would replace the European Council President in cases of impediment, death or early end of his/her term of office.<sup>15</sup>

In other words, although Mr Van Rompuy is being endowed with significant power to influence the political agenda of the European Council, and thus of the EU, his role is shared with, and potentially circumscribed by, the Council Presidency. The rules of procedure do not specify the modalities of that cooperation, save that regular meetings should be held.<sup>16</sup> Much is therefore left to the discretion of the President, and the good will of his or her Council “collaborator”. To be sure, that coordination and cooperation will take different forms depending on what kind of personality the President is, but also on the Member State holding the Council Presidency, and more particularly on the style of its head, and whether s/he is keen on occupying the limelight. Indeed, the early days of Mr Van Rompuy’s presidency have been facilitated by the restrained stance adopted by the Spanish presidency, and in particular by its Prime Minister, who willingly plays a less prominent role than previous rotating presidents of the Council.<sup>17</sup>

There are other ways in which the rotating presidency can shape the work of the European Council President. For instance, the General Affairs Council, which continues to be chaired by the rotating presidency, has direct influence on the preparation of, and follow-up to the European Council meetings,<sup>18</sup> and thus on one of the key functions of its President.<sup>19</sup> In particular, it is in the light of the discussions held in that Council configuration that he should draw up the agenda of the (subsequent) European Council meeting.<sup>20</sup> In the same vein, the

14. Art. 3(1) European Council Rules of Procedure.

15. Art. 2(4) European Council Rules of Procedure.

16. Art. 2(3) European Council Rules of Procedure.

17. At the EU-Morocco Summit, which was the first post-Lisbon EU summit with a third State, Mr Van Rompuy was, together with Morocco’s Prime Minister, placed at the centre of the stage, while Mr Zapatero was (like Mr Barroso), on the side. However, in the preparation of a EU-US summit, meant to take place in Spain but which never occurred, it was agreed that Mr Zapatero would be the first EU representative to shake Mr Obama’s hand upon his arrival.

18. Art. 1, European Council Decision 2009/881/EU.

19. Art. 2, European Council Rules of Procedure.

20. It is the representative of the rotating presidency (i.e. President or Prime minister of the Member State holding the Council Presidency) that reports on the work of the Council to the

Coreper, “chaired by a representative of the Member State chairing the General Affairs Council”, is responsible for the work of all the meetings of the Council and for carrying out the tasks assigned to it by the Council, while ensuring consistency of the European Union’s policies and actions.<sup>21</sup> The rotating presidency thus keeps several levers it can activate to steer the work of the Council, and to push forward its own priorities on the agenda of the European Council, and thus of the Union.<sup>22</sup> Indeed, the Council Presidency is expected to produce and pursue its own priorities, which it is requested to present, as well the results achieved during the six-months period, to the European Parliament.<sup>23</sup>

That said, the rotating presidency has lost some margin of manoeuvre. It now has to work with, and persuade, the President of the European Council, in order to get things discussed and decided at the level of the European Council. The President can effectively temper the influence of the presidency on the activities of the European Council, and possibly tame hyperactive heads of State or government, in the name of consistency and continuity. Were the President to become a conservative force in the system, the European Council may nevertheless lose some of its steam, to the benefit of the Council.

On the whole, the added value of a stable president in terms of consistency and continuity in the work of the European Union will depend on whether the Member States agree in practice to let him play his role. In this context, and in view of his/her possible willingness to be appointed for another (short) mandate, the President may be more sensitive to the wishes of some Member States in his function in general, and in his interactions with the Council Presidency in particular.

While s/he has to work symbiotically with the Council Presidency, the European Council President also has to work smoothly with at least two other important figures. First, s/he is expected to cooperate closely also with the President of the European Commission, who has found a place in the European Council Rules of Procedure that is as prominent as that of the rotating presidency, particularly as regards preparation and follow-up of the European Council meetings, thus codifying a practice whereby the Commission has been

European Council, though in consultation with its president (Art. 4(1) European Council Rules of Procedure).

21. Art. 2, European Council Decision 2009/881/EU.

22. Art. 2(7) foresees that the Presidency which is to hold office in the relevant period shall establish, for each Council configuration, and after appropriate consultations, draft agendas for Council meetings scheduled for the next six-month period, showing the legislative work and operational decisions envisaged. These draft agendas shall be established at the latest one week before the beginning of the relevant six-month period, on the basis of the Council’s 18-month programme and after consulting the Commission.

23. Art. 5, European Council Rules of Procedure.

closely involved notably in the drafting of European Council conclusions. Again in the absence of elaborate modalities, much of the cooperation is likely to depend on the personal relationship between the two, and thus on their personalities. There is little doubt that Mr Barroso watches Mr Van Rompuy's initial moves closely, for fear of being overshadowed.<sup>24</sup> Apart from a weekly breakfast, more radical – though legally questionable – ways of handling possible rivalry are being mooted, such as the creation of a “double-hatted” president combining the functions of the existing two.<sup>25</sup>

An additional influence on the work of the President of the European Council, though at another level, may be exercised by the Secretary-General of the Council, a function hitherto played, at least in principle, by the High Representative for Common Foreign and Security Policy. It is a position that has not attracted as much attention as the other high profile jobs, apart from the occasional Machiavellian politician,<sup>26</sup> even if four of the December Decisions however directly or indirectly concern it.<sup>27</sup>

The Secretary-General indeed plays a powerful role in the Council, but also in relation to the European Council and its President. Thus, the European Council Rules of Procedure foresee that the incumbent, Mr de Boissieu, signs the Decisions adopted by the European Council (together with Mr Van Rompuy), as well as the minutes of the meetings, which he therefore attends.<sup>28</sup> He also puts his signature, alongside that of the President in office of the Council, on the text of Council acts, or acts adopted by the European Parliament and the Council in accordance with the ordinary legislative procedure,<sup>29</sup> and on the minutes of each Council meeting.<sup>30</sup>

24. In terms of status, the two presidents are on equal footing: the Council Decision laying down the conditions of employment of the President of the European Council foresees that the latter has the same conditions of employment as the President of the Commission. According to Art. 1(2), his basic monthly salary amounts to 138% of the basic salary of an official of the European Union at grade 16, third step. Yet in symbolic terms, things might look different: the EU decisions on the appointments of the Commission and of the HR, as well as the Rules of Procedure of the European Council and the Decision on the Council rotating Presidency have all been signed by the new President of the European Council, Mr van Rompuy.

25. Duff, “Who is Herman Van Rompuy?”, *Financial Times*, 23 Feb. 2010.

26. *Le Monde*, 27 Nov. 2009; <euobserver.com/?aid=29066>

27. Viz. the Council Decision (2009/911/EU) appointing the Secretary-General (O.J. 2009, L 322/37), the Council Decision (2009/912/EU) laying down the conditions of employment of the Secretary-General (O.J. 2009, L 322/38), the European Council Decision (2009/882/EU) adopting its Rules of Procedure (O.J. 2009, L 325/51) and the Council Decision (2009/937/EU) adopting the Council's Rules of Procedure (O.J. 2009, L 325/35).

28. Art. 13, European Council Rules of Procedure.

29. Art. 15, Council Rules of Procedure.

30. Art. 13, Council Rules of Procedure.

Beyond the power of the pen, the Secretary-General has the power of the purse. Article 13(3) of the European Council Rules of Procedure foresee that s/he “shall have full responsibility for administering the appropriations entered in Section II – European Council and Council – of the budget and shall take all measures necessary to ensure that they are properly managed”.<sup>31</sup> Hence, if the President of the European Council wants a bigger office, a new computer, or a laser printer, he has to ask the Mr de Boissieu!

*Tell me what you chair and I will tell you who you work for*

Another element of continuity brought about by the Lisbon Treaty is incarnated in the “President of the Foreign Affairs Council”. Hitherto chaired by the Foreign Minister (or equivalent) of the Member State holding the rotating presidency, the Foreign Affairs Council now has a stable chair in the person of High Representative Ashton. According to the Council Rules of Procedure, the Foreign Affairs Council is responsible for the whole of EU external action, viz. Common Foreign and Security Policy, Common Security and Defence Policy, Common Commercial Policy, development cooperation and humanitarian aid.<sup>32</sup> Qua president of that Council configuration, Mrs Ashton is thus well placed to ensure consistency between the different facets of EU external action; all the more so, since her remit as president is substantively wider than within the Commission,<sup>33</sup> or as head of the External Action Service.<sup>34</sup> And as a *stable* president, she can ensure continuity in EU external action, also because most preparatory bodies of the Foreign Affairs Council are in principle to be chaired by her representatives.<sup>35</sup>

A close look at the Council Rules of Procedure and at the Council Decision on the exercise of the Council Presidency, however, nuances the impression of a more streamlined system. First, the Rules of Procedure foresee that: “When the Foreign Affairs Council is convened to discuss common commercial policy issues, its President will ask to be replaced by the six-monthly Presidency as provided for in Article 2(5), second subparagraph.”<sup>36</sup>

31. See also Art. 23(5) of the Council Rules of Procedure.

32. Art. 2(5), Council Rules of Procedure.

33. Using his power to allocate portfolios, the President of the Commission has divided foreign affairs among various commissioners, viz. the Commissioner for Trade, the Commissioner for Enlargement and Neighbourhood Policy, the Commissioner for Humanitarian Aid, the Commissioner for Development Cooperation, hoping to leave the VP/HR with essentially coordination tasks within the Commission, and bilateral issues for the EEAS that she heads.

34. See Draft Council decision establishing the organisation and functioning of the European External Action Service, doc. 8029/10, 25 March 2010.

35. Pt. 6, Preamble of Council Decision 2009/908/EU.

36. Footnote to Art. 2(5).

Second, several important preparatory bodies of the Foreign Affairs Council are not chaired by Mrs Ashton's representatives. Hence, working parties in the area of trade and development,<sup>37</sup> as well as numerous "horizontal preparatory bodies"<sup>38</sup> continue to be controlled by representatives of the rotating presidency. Furthermore, a range of Council preparatory bodies, actually or potentially related to foreign affairs, are presided over by elected chairs that are neither representatives of the rotating presidency, nor appointed by the High Representative (e.g. the Military Committee Working Group, and the Economic and Financial Committee), while others, such as the Working Party on electronic communication, are chaired by the General Secretariat of the Council. The chairmanship of Council preparatory bodies is therefore based on a complex fourfold system of allocation *ratione materiae*.

Third, the agenda of the Foreign Affairs Council is not only determined by the European Council strategic guidelines, it is also defined in consideration of the rotating presidency's priorities. Hence, the Council Rules of Procedure foresee that the pre-established group of three Member States prepares, with the President of the Foreign Affairs Council, a draft programme of Council activities in the field of foreign affairs.<sup>39</sup> Indeed, the presidency could be present at an operational level too. While it is legally debatable, it has been suggested that the presidency could continue to play a role in the negotiation of external agreements. The ambiguity comes from paragraph 3 of Article 218 TFEU which vaguely stipulates that the Council takes a decision "nominating the Union negotiator or the head of the Union's negotiating team".

### *Plus ça change...*

A (combined) reading of the measures of the institutional package suggests the following. First, the rotating Presidency of the Council may continue to play a significant role in EU governance in general, and in relation to the European Council President, the Council, and the Foreign Affairs Council, in particular, even if that role will very much depend on the relevant Member State's ambition and ability. Second, the allocation of chairmanship of Council preparatory bodies will undoubtedly raise challenges of coordination, consistency and

37. Eleven Working Parties in total, including the ACP WP, the WP on Humanitarian Aid and Food Aid, the WP on Dual-Use Goods; see Annex II, Council Decision on Presidency.

38. Working Party for Foreign Relations Counsellors (RELEX), the Working Party on Terrorism (International Aspects) (COTER), the Working Party on the application of specific measures to combat terrorism (COCOP); the Working Party on Consular Affairs (COCON); the Working Party on Public International Law (COJUR); and the Working Party on the Law of the Sea (COMAR).

39. Art. 2, Council Rules of Procedure.

continuity, notably for the President of the Foreign Affairs Council, i.e. the High Representative.<sup>40</sup> Third, the Secretary-General of the Council is endowed with significance influence, particularly in relation to the President of the European Council, and the Presidency of the Council.

In the light of these observations, it may be wondered whether EU governance is clearer, and more streamlined, than it was under the pre-Lisbon dispensation. It does require an attentive (and patient) reading of the above decisions and rules of procedure to decrypt the way(s) in which the EU institutions will operate in the new legal context. Beyond the question of simplification, it remains to be seen whether the new arrangements will deliver on consistency and continuity in the definition of the Union political agenda. While the President of the European Council and, to some extent, the President of the Foreign Affairs Council could play a significant role in this respect, much will depend on how ambitious a rotating presidency is, and incidentally on the degree to which the trio presidency is able to coordinate its programme and work. After all, the 18-month period covers half of the mandate of the President of the European Council.

These elements could well limit the latitude of the new stable presidents. To operate effectively, Mr Van Rompuy as well as Mrs Ashton need cooperative relationships with the rotating presidency and with the Commission (President), not to mention the European Parliament,<sup>41</sup> all in a position to moderate significantly their power of initiative. This may be good news for those who feared the “presidentialization” of EU governance. In effect, a new system of checks and balances may be emerging in the Union.

40. Annex II of the Council Decision foresees that the scope and organization of the working structures in the area of foreign affairs are to be reviewed, particularly in the area of development, an exercise that may lead to turf battles, as typified by the current discussion on the EEAS.

41. See in that sense, European Parliament resolution on a revised Framework Agreement between the European Parliament and the Commission for the next parliamentary term, B70091/2010.

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