The Detailed Mandate and the Future Methods of Interpretation of the Treaties

Paul Craig[*]

This chapter will address the detailed mandate that led to the Lisbon Treaty and will then consider the ways in which the modes of treaty interpretation might change or be modified if the Lisbon Treaty is duly ratified.

I. Detailed Mandate

1. Input

In one sense the detailed mandate for the 2007 IGC was quite simple: achieve consensus on a Treaty that all Member States would be willing to ratify. It is of course well known that the European Council decided that a period of reflection would be advisable in the light of the negative referenda in France and the Netherlands. It however also became clear that the intent was that the German Presidency in the first half of 2007 would 'kick-start' the reform process, and it succeeded in doing so.

It achieved this through astute diplomacy and careful planning. Thus prior to the European Council meeting in June 2007 discussions were held with each Member State via a questionnaire that in effect provided the foundations for what the Member States were willing to accept within a modified version of the Constitutional Treaty, CT. The German Presidency sought agreement in the European Council meeting in June 2007[1] on the outlines for a revised version of the CT, which led to the birth of the Reform Treaty. The European Council concluded that "after two years of uncertainty over the Union's treaty reform process, the time has come to resolve the issue and for the Union to move on".[2] It was agreed to convene an IGC,[3] which was to carry out its work in accord with the detailed mandate provided in Annex I of the conclusions of the European Council, and conclude its deliberations

* Professor of English Law, St John's College, Oxford.

1 Brussels European Council, 21-22 June 2007.

2 *Ibid* para 8.

3 *Ibid* para 10.

by the end of 2007.[4] The IGC was to be conducted under the overall responsibility of the Heads of State or Government, assisted by members of the General Affairs and External Relations Council. A representative of the Commission was to participate in the Conference, and the European Parliament was to be closely "associated with and involved in the work of the Conference with 3 representatives".[5]

The amount of work that had been done prior to the June 2007 meeting was readily apparent from the detailed mandate in Annex I drawn up for the IGC that was to take place in the second half of 2007. Annex I began with 'general observations' about the next stage of Treaty reform. The IGC was asked to draw up a Treaty to be called the Reform Treaty, which would amend the existing Treaties with a "view to enhancing the efficiency and democratic legitimacy of the enlarged Union, as well as the coherence of its external action".[6] The Reform Treaty was to contain two principal substantive clauses, which amended respectively the TEU, and the EC Treaty, the latter of which would be renamed the Treaty on the Functioning of the European Union, TFEU. The Union should have a single legal personality and the word 'Community' throughout would be replaced by the word 'Union'.[7]

The 'general observations' within the Annex were also structured to excise the 'C' word, constitution, from the Reform Treaty. Thus the Reform Treaty would operate as an amendment to the existing treaties, rather than by way of repealing all existing treaties as envisaged by the Constitutional Treaty.[8] The TEU and TFEU that were to make up the Reform Treaty were not to have a constitutional character. This was said to be so for a number of reasons:[9] the term 'constitution' was not to be used; the 'Union Minister for Foreign Affairs' was to be called High Representative of the Union for Foreign Affairs and Security Policy; the terms 'law' and 'framework law' were to be abandoned, and the existing terminology of regulations, directives and decisions was to be retained; there was to be no flag, the anthem or the motto; and the clause in the Constitutional Treaty concerning the primacy of EU law was to be replaced by a declaration.

The European Council's reasoning in the preceding paragraph may be readily explicable in political terms: the imperative was to conclude this stage of Treaty reform, and insofar as the constitutional terminology of the Constitutional Treaty was felt to be a political obstacle then it was to be ditched. One can accept this and nonetheless recognize that the arguments set out above as to why the Reform Treaty was not to have a constitutional character were, in analytical terms, weak to say the very least. Insofar as the Constitutional Treaty partook of the nature of a constitution, none of the changes identified by the European Council were significant. A constitu-

4 *Ibid* para 11.
5 *Ibid* para 12.
6 *Ibid* Annex I, para 1.
7 *Ibid* Annex I, para 2.
8 *Ibid* Annex I, para 1.
9 *Ibid* Annex I, para 3.

tional document does not cease to be so because the words law or lawmaking are not used, nor because of the change in nomenclature of the Union Minister for Foreign Affairs, nor for any of the other reasons listed. There is of course room for genuine debate as to whether the Constitutional Treaty was truly a constitutional document,[10] but insofar as it was the reasons for differentiation provided by the European Council were largely unconvincing.

The remainder of the European Council's mandate for the 2007 IGC consisted of sixteen pages of detailed provisions concerning modifications that were to be made to the TEU and the TFEU. They related to matters such as competences, the CFSP, the enhanced role of national parliaments, the Charter of Fundamental Rights and the area of freedom, security and justice. This did not however mask the fact that the great majority of the changes introduced by the Constitutional Treaty looked set to remain within the Reform Treaty.

Matters then moved rapidly. An Intergovernmental Conference was convened in order to take forward the formulation of the Reform Treaty. The Portuguese held the Presidency of the Council in the second half of 2007 and were keen that the matter should be concluded during its Presidency, in part because the President of the Commission was from Portugal, and in part because Portugal could then attach its name to the amending Treaty.

The 2007 IGC was power politics with a vengeance. We had grown accustomed to the fact that even traditional IGCs would be relatively open, with discussion papers available on the internet and time for the 'people' to form some view as to the reforms that were being planned. This was further fuelled by the more inclusive process used in relation to the Charter of Fundamental Rights and the Constitutional Treaty. The Lisbon Treaty was, by way of contrast, forged by the Member States and Community institutions, and there was scant time afforded for any further deliberation. Thus the detailed version of the Reform Treaty, as it was then termed, which appeared in October 2007, allowed only two weeks before the Member States were required to signal their consent, and scant time for any one else to digest its detailed provisions.

The justification for this accelerated process was of course evident when one perused the content of the Lisbon Treaty, but it was, for obvious reasons, a justification that those engaged in the IGC could not too openly avow. The justification for the accelerated process was that the LT was indeed the same in most important respects as the CT. The issues had been debated in detail in the Convention on the Future of Europe that produced the CT after a relatively open discourse, and they were considered once again in the IGC in 2004. There was therefore little incentive or appetite for those engaged in the 2007 IGC to re-open Pandora's Box. This justification could not however be pressed too explicitly by those engaged in the 2007 IGC, since they would be open to the criticism that they were largely re-packaging provisions

10 *Griller*, Fundamental Approach of the Lisbon Treaty: Is this a Constitution? (forthcoming).

that had been rejected by voters in two prominent Member States,[11] more especially given that key Member States sought to press forward with ratification of the LT without recourse to any (further) referendum.

The 2007 IGC produced a document that was signed by the Member States on 13 December 2007,[12] although the appellation was changed to the Lisbon Treaty in recognition of the place of signature. The Lisbon Treaty, LT, amends the Treaty on European Union and the Treaty Establishing the European Community.[13] The LT itself has 7 Articles, of which Articles 1 and 2 are the most important, plus numerous Protocols and Declarations. Article 1 LT contains the amendments to the Treaty on European Union, TEU. It should be made clear, as will be apparent from the subsequent discussion, that the amended TEU contains material concerning some of the principles that govern the EU, as well as revised provisions concerning the CFSP and enhanced cooperation. Article 2 LT amends the EC Treaty, which is renamed the Treaty on the Functioning of the European Union, TFEU. The EU is henceforth to be founded on the TEU and the TFEU, and the two Treaties have the same legal value.[14] The Union is to replace and succeed the EC.[15]

2. Output

In terms of output, the Lisbon Treaty retains a great many of the central reforms proposed in the earlier Constitutional Treaty.[16] These include:

1) The long-term Presidency of the European Council.
2) The voting rules for Council decisions.
3) The empowerment of the EP, by making it co-legislator with Council and by extending the reach of co-decision procedure to new areas in the form of the ordinary legislative procedure.
4) The post of a 'double-hatted' High Representative of the EU for Foreign Affairs and Security Policy.
5) The reduction in the number of Commissioners from 27 to two thirds of the number of Member States by 2014.
6) A legally binding Charter of Rights.

11 This was so regardless of the fact that the reasons for the no vote in France and the Netherlands may have had relatively little to do with the new provisions contained in the CT.

12 Conference of the Representatives of the Governments of the Member States, Treaty of Lisbon amending the Treaty on European Union and the Treaty Establishing the European Community, CIG 14/07, Brussels 3 December 2007; [2007] OJ C306/1.

13 *Craig*, The Lisbon Treaty: Process, Architecture and Substance, (2008) 33 ELRev 137.

14 Art 1 para 3 TEU.

15 Art 1 para 3 TEU.

16 *Craig*, n 13.

7) Provisions concerning the hierarchy of norms.
8) Provisions concerning categories of competence.
9) Strengthening of national parliaments by giving them the right to raise objections against draft EU legislation (so-called orange card) as a reinforced control mechanism for the principle of subsidiarity.
10) Single legal personality for the EU.
11) Relative de-pillarisation in the sense that the Area of Freedom, Security and Justice will henceforth be generally subject to the same rules as other parts of the EU legal and political order, although the CFSP remains largely subject to distinctive rules.
12) The provision of a formal exit clause for a Member State wishing to leave the EU.

It may also be helpful at this juncture to note the principal differences between the Constitutional Treaty and the Lisbon Treaty.[17] Some of these have been touched on above.

1) The 'constitutional symbols' in terms of flags, anthems etc have gone.
2) The framers of the Lisbon Treaty favoured two treaties, the TEU and the TFEU, rather than the single structure embodied in the Constitutional Treaty.
3) The Minister of Foreign Affairs is renamed the High Representative for Foreign Affairs and Security Policy.
4) The supremacy clause in Article I-6 CT has been dropped, replaced by a Declaration noting the ECJ's jurisprudence.
5) The terminology of law and lawmaking has been dropped from the hierarchy of norms, and that of regulations, directives and decisions has been reinstated.
6) There is reference in the amending clause of the Lisbon Treaty to the possible reduction of Union competences.
7) The coming into effect of the weighted majority voting procedure in the Council is postponed.
8) The Charter of Rights had formed Part II of the CT, but it is not contained in the Lisbon Treaty itself, although Article 6 TEU accords it the same legal status as the Treaties. There is a Protocol on the position of Poland and the UK in relation to the Charter, which limits to some extent the application of the Charter in these Member States.
9) The jurisdiction of the ECJ over the existing Third Pillar *acquis* is postponed for up to 5 years.
10) The phrase on 'free and undistorted competition' has been omitted from the objectives clause in Article 3 TEU.

17 *de Burca*, Reflections on the Path from the Constitutional Treaty to the Lisbon Treaty, Jean Monnet Working Paper 03/08.

11) The provisions on enhanced cooperation can be triggered by nine Member States, rather than the one third of Member States as required under the CT.
12) There is reference to new challenges such as climate change and energy solidarity.

II. Future Methods of Treaty Interpretation: Courts

It remains to be seen whether the Lisbon Treaty, if duly ratified, will lead to any marked change in the way in which the legal and political institutions of the EU operate. There may of course be no cognisable change, in which case it will be 'business as usual' for the legal and political institutions. It is nonetheless worth speculating whether the new Treaty might lead to changes in this respect. The Community courts will be considered within this section, the political institutions in that which follows.

There is unlikely to be any general change in the interpretative technique of the courts. It can be accepted for the sake of argument that the general approach of the Community courts has been to read the Treaties teleologically and purposively, rather than in some black-letter purely textual manner. It can be accepted also that this mode of Treaty interpretation is more subtle than often depicted. It will often be marked by 'variable speeds' within different subject matter areas covered by the Treaties.

This is evident by the recent surge of judicial activism concerning the citizenship provisions of EC Treaty, even though the basic Treaty articles have not changed markedly since their inclusion within the Treaties. It is exemplified also by the earlier period of judicial activism in relation to the internal market provisions, which saw the Community courts using their judicial power via direct effect and supremacy to ensure that these central Treaty provisions were not left unfulfilled at a time when legislative malaise in the Council rendered it very difficult for the Commission to secure the passage of the regulations and directives needed to flesh out the bare Treaty articles.

When viewed at this level of abstraction there is no reason for any of this to change under the Lisbon Treaty, and we can expect the Community courts to continue to ensure, as they have done hitherto, that the central precepts of the Lisbon Treaty are met. There may nonetheless be some changes in the interpretative challenges facing the Community courts.

1. Impact of Charter of Rights

The fact that the Charter of Rights is rendered binding by the Lisbon Treaty may well alter the profile of judicial review within the EU, and pose new challenges for

the Community courts. They have of course fashioned the fundamental rights jurisprudence and been required to adjudicate on some complex and contentious issues. The role of rights-based claims within judicial review may nonetheless expand very considerably forcing the Community courts to adjudicate on an increasing number of complex claims relating to both Community action and national action.

An analogy with recent developments in the UK is interesting. The UK enacted the Human Rights Act in 1998 and it came into effect in 2000. Prior to that the UK courts had made it clear that fundamental rights were embedded in the common law and would be protected by the UK courts in judicial review actions. The advent of the Human Rights Act 1998 has nonetheless fundamentally transformed judicial review in the UK. There has been a very significant expansion in the number of cases that raise rights-based arguments in the context of judicial review actions. Indeed, the situation is now such that the majority of judicial review actions entail some claim based on the Human Rights Act. The 'message' or 'lesson' from this is that enshrining fundamental rights in statutory form has a marked impact on the extent to which they will be relied on in legal actions. This is not surprising. Claimants and their legal advisors are likely to feel on more secure foundations when relying on a statute that clearly lists rights and has received Parliament's imprimatur.

The analogy with the EU is interesting. In the EU there has been a 'common law style' development of fundamental rights by the Community courts since the 1970s. The number of such cases has nonetheless remained limited. The very existence of the Charter has, as is well known, prompted claimants, Advocates-General, the CFI and ECJ to rely on it for interpretative guidance. The fact that the Charter is now rendered legally binding by the Lisbon Treaty will in all likelihood increase the profile of rights-based claims within judicial review actions. Claimants will be able to point to a clear set of rights, which are legally binding on EU institutions and Member States. The Community courts, like their counterparts in the UK, will then be faced by a change in the profile of judicial review actions, with an increasing number of such claims having a strong rights-based component.

It is of course true that the analogy between the UK and the EU cannot be pressed too far. There are obstacles to bringing actions within the EU whether directly or indirectly, and these obstacles will serve to limit the number of actions that can be brought. This can be accepted. However even if there is no net increase in the number of judicial review actions in the EU legal order, the nature of the claims raised in such cases is nonetheless still likely to change, with an increasing number of such cases having a strong rights-based component.

There are moreover reasons to think that the overall number of cases will in fact increase, and that many will entail rights-based arguments in reliance on the Charter. This is in part because of the modification of the standing rules for direct actions, whereby the Lisbon Treaty, following in this respect the Constitutional Treaty, has loosened the grip of individual concern that has been such a block to actions hitherto.

It is in part because of the very breadth of the Charter itself. It should be noted

that the developments charted above in relation to the UK occurred in the context of the UK incorporating the provisions of the European Convention on Human Rights into UK law. The list of rights contained in the ECHR is considerably narrower than that included in the Charter, and that is so notwithstanding the fact that some of the Charter provisions are deemed to be principles rather than rights. The very breadth of the Charter provisions will therefore, other things being equal, act as the catalyst for the emergence of claims testing their meaning, scope and interpretation.

A further reason why the number of rights-based claims involving complex issues is likely to increase if the Lisbon Treaty is ratified is because of the 'de-pillarisation' of the Third Pillar. In substantive terms the fact that the Area of Freedom, Security and Justice is brought within the general framework of EU law, including judicial control, is one of the best things to emerge from the Lisbon Treaty. It also has important implications for the present discussion. Many AFSJ measures involve actual or potential conflicts with classic civil and political rights. The Community courts have, prior to the Lisbon Treaty, done their best to maintain control over measures enacted under the Third Pillar, but even the court's efforts at teleological interpretation of their own jurisdictional capacities have limits, and gaps in judicial protection remained. The fact that the AFSJ is, subject to the transitional provisions, brought within the general framework of the EU legal and political order, including the applicability of the Charter, is therefore likely to generate further rights-based claims before the Community courts and require them to grapple with complex issues concerning the interplay between civil and political rights and the needs of a political order seeking to impose controls over matters ranging from asylum to terrorism.

The binding Charter of Rights may in addition have a 'second order' impact in the following sense. The fundamental rights jurisprudence of the Community courts has generally been regarded in positive terms. The nature of this point should be made clear. There have of course been commentators that have criticized the ECJ's case law for not taking rights seriously or on similar grounds. Notwithstanding this the very fact that the ECJ articulated a fundamental rights case law has generally been regarded as legitimate. It has been seen as positive in enhancing the accountability of the EC. The fact that the ECJ thereby struck down Community legislation was not regarded as especially problematic, in large part because the legislation thereby annulled was often democratically deficient, in the sense that it was normally made with little if any input from the European Parliament. The maxim that the 'Commission proposes, the Council disposes' certainly captured the essence of the legislative process prior to the SEA. The counter-majoritarian objection voiced against rights-based constitutional review in some legal orders, viz, that the court is replacing its judgment over the meaning of contestable rights for that of the democratically elected legislature, did not therefore apply in the EC when the fundamental rights jurisprudence was developing, precisely because the legislation subject to review had little in the way of meaningful democratic input.

We should at the very least note the change that the Lisbon Treaty will make in

this respect. Many of the provisions challenged before the Community courts will have been made in accord with the ordinary legislative procedure with input from the Commission, Council and EP. The extension of the ordinary legislative procedure, and the symbolic change in name from that of co-decision, has strengthened the role of the EP in the EU political order and further enhanced the democratic legitimacy of the norms made. This means that on an increasing number of occasions the Community courts will be adjudicating on Charter rights when the norm under scrutiny has been enacted by means of the ordinary legislative procedure and partakes of democratic legitimacy. The interpretation of the Charter right may well be contestable and there will inevitably be cases in which the Community courts substitute their view for that of the Community legislature on the meaning and interpretation of such a right. The counter-majoritarian aspect of constitutional review will therefore be more apparent than hitherto.

There are of course various responses that could be made to this point, and there is a veritable wealth of literature on this theme.[18] It could be argued that courts are justly accorded the ultimate protection of rights within a democratic polity, which should be conceived not just in simple majoritarian terms. It could be maintained that the preoccupation with the legitimacy of constitutional review is a peculiarly common law phenomenon and that it does not feature prominently within the academic or judicial discourse in civil law countries. On this view the fact that under the Lisbon Treaty the Community courts will ever more frequently be reviewing legislative acts that have received considered input from the players in the ordinary legislative procedure will have no impact on the legitimacy of judicial review. This may be so, time will tell. We should nonetheless at the very least be aware of the changed circumstances in which fundamental rights review will take place under the Lisbon Treaty.

2. Impact of Constitutional Principles

It is certainly true that even prior to the Lisbon Treaty the ECJ has drawn on principles, some written, some unwritten, found embedded in the Community legal order. We should nonetheless be mindful of the structural change made by the Constitutional Treaty and the Lisbon Treaty.

The Constitutional Treaty was clearer in this respect than the Lisbon Treaty. The CT had a clear set of constitutional principles delineated in Part I of the Treaty. The Lisbon Treaty does contain constitutional principles in the TEU, although these are

18 See, eg, *Dworkin*, Law's Empire; *Dworkin,* Freedom's Law: The Moral Reading of the American Constitution, 1996; *Waldron*, Law and Disagreement, 1999.

not as fully articulated as the principles contained in Part I of the CT. Some of these principles find more detailed elaboration in the TFEU part of the Lisbon Treaty, others do not.

The interesting interpretative issue will be the extent to which the ECJ chooses to draw on these principles and the use it makes of them, more especially when the TFEU says little about the salient point at issue. An example will make this clear. It is of course true that the Lisbon Treaty states that the TEU and the TFEU should have the same legal value.[19] This does not however render the present inquiry moot. The fact that the provisions of the TEU and TFEU are formally of the same value does not preclude the ECJ from drawing on more abstract/general principles when interpreting more specific provisions of the TFEU, nor does it prevent reliance on general principles contained in the TEU from being used to fashion more concrete obligations even where there are no detailed Treaty articles covering the issue in the TFEU. The interpretative potential of the principles contained in Articles 10 and 11 of the TEU can be taken by way of example.

Article 10 TEU deals with representative democracy, copying the relevant provision from the CT.[20] It stipulates: that the functioning of the Union is founded on representative democracy; that citizens are directly represented at EU level by the European Parliament; that Member States are represented in the European Council by Heads of State or Government and in the Council by their governments, which are themselves democratically accountable either to their national Parliaments, or to their citizens; that citizens shall have the right to participate in the democratic life of the Union and that decisions shall be taken as openly and as closely as possible to them; and that political parties at European level contribute to forming European political awareness and to expressing the will of citizens of the Union.

Article 11 TEU follows once again the provision in the CT dealing with participatory democracy,[21] although the Lisbon Treaty omits the actual heading 'participatory democracy'. Article 11 TEU provides that: the institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action; the institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society; the European Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent; and prescribes conditions whereby EU citizens can invite the Commission to submit a proposal for action in a certain area.

19 Art 1 para 3 TEU.
20 Art I-46 CT.
21 Art I-47 CT.

Article 12 TEU draws together the different ways in which national parliaments play a role in the EU, including: through scrutiny of draft EU legislative acts;[22] by ensuring respect for subsidiarity; by taking part, within the framework of the area of freedom, security and justice, in the evaluation mechanisms for the implementation of the Union policies in that area, and through being involved in the political monitoring of Europol and Eurojust's activities; by taking part in the revision procedures of the Treaties; by being notified of applications for accession to the Union; and by taking part in the inter-parliamentary cooperation between national Parliaments and the European Parliament.

The provisions concerning representative and participatory democracy received relatively little attention in the Convention on the Future of Europe, or in the academic commentary on the Constitutional Treaty. The general feeling was that Articles I-46-47 CT were really just rhetorical flourishes, with little if any substance. It is nonetheless decidedly odd to ignore these Treaty Articles when evaluating the overall picture of democracy within the EU. This is more especially so because they are expressed in mandatory language and might well have more bite to them than is captured by the imagery of rhetorical flourish.

Thus, to take but one example, the fact that there is no consultation outside of Comitology for delegated regulations, and that it does not fall within the Commission's more general guidance on consultation,[23] does not sit well with the injunction in Articles 11(1)-(3) TEU that citizens and representative associations shall have the opportunity to make known their views in all areas of EU action, that there should be open, transparent and regular dialogue between EU institutions and civil society, and that the Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent.

It is of course impossible to predict exactly what the Community courts would make of any such claim placed before it. This is more especially so given that the future of Comitology itself is very likely to change in the light of Articles 290-291 TFEU. This does not however alter the force of the point being made within this section. Articles 10-11 TEU are expressed in mandatory language and they will almost inevitably be relied on by claimants in litigation. The ECJ will necessarily be compelled to face difficult interpretative issues as to the concrete implications that are drawn from these principles. The Community courts might interpret them narrowly, concluding that the obligation on the EU institutions that citizens should have the opportunity to make their views known and publicly exchange their views in all areas of Union action could be satisfied by such techniques as 'Your Voice in Europe'. This reading of Article 11 would however be difficult to sustain since although the 'Your Voice in Europe' initiative is valuable it will not normally touch

22 This is to be done in accord with the Protocol on the Role of National Parliaments in the European Union, LT.

23 *Craig*, EU Administrative Law, 2006, Chap 10.

the making of the more detailed provisions that citizens will often wish to comment on because those provisions affect their lives in some direct manner. Such an interpretation would moreover send a very negative message about the nature of participatory democracy in the EU, and risk turning a provision that was meant to convey a very positive feeling about the inclusive nature of the EU and its willingness to engage with its citizenry, into a provision that carried the opposite connotation.

The precise interpretation of Articles 10-12 TEU will be for the Community courts post-ratification of the Lisbon Treaty. The very fact that the Lisbon Treaty contains principles of this nature, which are expressed in mandatory language will present the Community courts with interesting challenges. I am not claiming that these interpretative challenges are wholly different from anything that the Court has had to confront hitherto. That argument would not be sustainable. The existence of a wider range of principles within the TEU than hitherto nonetheless raises interesting issues concerning their interpretation. This may arise either where the principles contained in the TEU or indeed in the TFEU receive more concrete expression in other Treaty articles and the Community courts have to interpret the relationship between the two sets of provisions, or where the mandatory principles articulated in the TEU do not find more concrete expression in the TFEU, and the Community courts are forced through litigation to determine the concrete consequences flowing from the abstract principles.

III. Future Methods of Treaty Interpretation: Political Institutions

We should also be aware of possible ways in which the Lisbon Treaty will affect future modes of Treaty interpretation by the political institutions. The cautionary note expressed in relation to future modes of interpretation and the Community courts should be noted also in this juncture. There is little if any reason to expect the Commission's general approach to Treaty interpretation to differ from what it was under the Nice Treaty. The Commission will continue to regard itself as the guardian of the Treaties, charged with the dual objective of ensuring that the obligations contained in the Treaties are discharged in good time, and charged also with the obligation to ensure that infractions of the Treaty are duly punished, if necessary by resort to legal action. Having said this, the institutional provisions and dynamics of the Lisbon Treaty can nonetheless be expected to raise a range of interpretative challenges that are different in degree if not in kind from those that existed hitherto. Three brief examples can be sketched here.

In terms of competence, we can begin by noting one issue concerning Treaty interpretation that is less likely to arise in the post-Lisbon legal order. There is less likely to be resort to Article 352 TFEU, the successor to Article 308 EC, because the Lisbon Treaty, like the Constitutional Treaty, gives explicit competence to legislate in areas that it had not done hitherto. There are also likely to be fewer inter-

institutional fights between Council, Commission and European Parliament over the proper Treaty basis for particular action, because the ordinary legislative procedure has been extended to a wider range of areas and hence the EP is secured the greater participatory rights that flow from that procedure on most important issues. The new provisions on competence may nonetheless force the Commission to make difficult strategic and interpretative choices as to legal base in certain areas, more especially when it is debatable as to whether the subject matter falls within the area of shared competence, or whether it only allows the Community to intervene to supplement or coordinate Member State action.

In terms of the provisions concerning the hierarchy of norms, there will be difficult interpretative issues to be faced concerning the inter-relationship between Articles 290 and 291 TFEU, which concern respectively delegated acts and implementing acts. The political controls relating to the two kinds of acts differ markedly. Delegated acts are subject to *ex ante* controls in the sense that the legislative act must define the objectives, content, scope and duration of the delegation of power, with the consequences that the essential elements of an area cannot be delegated; they are also subject to *ex post* controls in the sense that the EP or the Council can be allowed to revoke the delegation, or veto the delegated act within a specified period of time. Implementing acts are not subject to these controls, but will be subject to some modified form of Comitology procedure. Delegated acts can supplement or amend the legislative act, whereas implementing acts are intended to capture pure implementation. There will therefore inevitably be instances in which disputes arise as to whether it was correct for the Commission to regard the relevant norms as delegated rather implementing acts, or vice-versa. These may well end up in court, since, for example, the EP has some significant powers over delegated acts, but far less over implementing acts.

In broader institutional terms, there will be interesting interpretative issues concerning the respective roles and powers of the European Council President and the President of the Commission. The very fact that executive power is divided, both de jure and de facto, as between the two will lead to political manoeuvres on both sides as they define the new political ordering against the backdrop of the new Treaty provisions. A modus vivendi will almost certainly emerge, although its very nature and content may well alter over time depending in part at least on the respective strengths and personalities of the incumbents of the two posts.