

# *The European Council and the Multiannual Financial Framework*

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## **Abstract**

The European Council emerged as the dominant institution in the special legislative procedure that led to the adoption of the European Union's Multiannual Financial Framework (MFF) Regulation for 2014–20, even though it is not mentioned in Article 312(2) TFEU as an actor in the procedure and Article 15(1) TEU states that it 'shall not exercise legislative functions'. This article assesses the role played by the European Council in the MFF process for 2014–20 in light of the post-Lisbon Treaties and draws attention to the legal ambiguities that persist, as well as the practical challenges that will face the other Union institutions, notably the European Parliament, in seeking to counter that dominance in future MFF procedures.

**Keywords:** European Council, Multiannual Financial Framework, EU budget, institutional balance

## I. INTRODUCTION

In fulfilling its role under Article 15(1) TEU to 'provide the Union with the necessary impetus for its development' and to 'define the general political directions and priorities thereof', the European Council functions as the central institution in what the German Chancellor, Angela Merkel, terms the post-Lisbon 'Union method', which views the 'supranational' and 'intergovernmental' methods of integration as complementary and in which a varied legal 'toolkit' of instruments of international and national law is employed alongside Union secondary legislation to pursue common Union objectives.<sup>1</sup> In the context of the Euro crisis, for example, the

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<sup>1</sup> See 'Speech by Federal Chancellor Angela Merkel at the opening ceremony of the 61<sup>st</sup> academic year of the College of Europe', Bruges, 2 November 2010 (available online). See also Editorial, 'In Search of the Union Method' (2015) 11(3) *European Constitutional Law Review* 425. On the notion of the legal 'toolkit', see B De Witte, 'The European Union as an International Legal Experiment' in G de Búrca and JHH Weiler (eds) *The Worlds of European Constitutionalism* (Cambridge, 2012) pp 19–56; B De Witte, 'Euro Crisis Responses and the EU Legal Order: Increased Institutional Variation or Constitutional Mutation' (2015) 11(3) *European Constitutional Law Review* 434.

European Council adopted a Decision amending the TFEU;<sup>2</sup> it called on the Commission to bring forward legislative proposals on matters such as the banking union and a capital markets union;<sup>3</sup> it provided the political impetus for the adoption of intergovernmental legal instruments that serve Union purposes, such as the European Stability Mechanism<sup>4</sup> and the Treaty on Stability, Coordination and Governance in the EMU;<sup>5</sup> and it was the principal forum where the Heads of State or Government sought to coordinate their national responses to the crisis.<sup>6</sup>

When it comes to Union legislative matters, however, the European Council's scope of action is subject to constraints. Following the Treaty of Lisbon, the second sentence of Article 15(1) TEU stipulates that the European Council 'shall not exercise legislative functions'. As one of the seven Union institutions listed in Article 13(1) TEU, it is now also subject to the terms of Article 13(2) TEU, which requires that '[e]ach institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them'. Tensions regarding the role and influence of the European Council in legislative matters are nothing new,<sup>7</sup> but after Lisbon it is now possible to frame those tensions more clearly in legal terms, at least with regard to the phase that comes *after* the Commission's presentation of a formal legislative proposal.<sup>8</sup>

In that regard, the post-Lisbon practice of the European Council is, for the most part, consistent with the view that it should, in light of Articles 15(1) and 13(2) TEU,

<sup>2</sup> European Council Decision 2011/199/EU of 25 March 2011 amending Article 136 TFEU with regard to a stability mechanism for Member States whose currency is the Euro, [2011] OJ L91/1.

<sup>3</sup> See, notably, the European Council Conclusions of 29 June 2012 (EUCO 76/12) and 18 December 2014 (EUCO 237/14).

<sup>4</sup> Treaty establishing the European Stability Mechanism, concluded at Brussels on 2 February 2012.

<sup>5</sup> Concluded at Brussels on 2 March 2012.

<sup>6</sup> On the institutional role of the European Council post-Lisbon, see W Wessels, *The European Council* (Palgrave Macmillan, 2015); F Fabbrini, 'States' Equality v States' Power: the Euro-crisis, Inter-State Relations and the Paradox of Domination' (2015) 17(1) *Cambridge Yearbook of European Legal Studies* 3; U Puetter, *The European Council and the Council: New Intergovernmentalism and Institutional Change* (Oxford University Press, 2014); F Foret and Y-S Rittelmeyer (eds) *The European Council and European Governance: The Commanding Heights of the EU* (Routledge, 2013); F Eggermont, *The Changing Role of the European Council in the Institutional Framework of the Union* (Intersentia, 2012); P de Schoutheete, *The European Council and the Community Method* (Notre Europe, 2012), Policy Paper 56; F Michea, 'Le rôle du Conseil européen après Lisbonne: lecture critique des traités modifiés' (2012) 555 *Revue de l'Union européenne* 76. On the history of the European Council, see L Van Middelaar *The Passage to Europe: How a Continent Became a Union* (Yale University Press, 2013); J Werts, *The European Council* (Harper Publishing, 2008).

<sup>7</sup> In the pre-Lisbon context, see Editorial Comments, 'An Ever Mighty European Council – Some Recent Institutional Developments' (2009) 46 *Common Market Law Review* 1383.

<sup>8</sup> The relationship between the European Council's agenda-setting and impetus-giving powers and the Commission's power of initiative in the pre-legislative phase is beyond the scope of this article. See P Bocquillon and M Dobbels, 'An elephant on the 13<sup>th</sup> Floor of the Berlaymont? European Council and Commission Relations in Legislative Agenda Setting' (2014) 21(1) *Journal of European Public Policy* 20; P Ponzano et al, 'The Power of Initiative of the European Commission: A Progressive Erosion?' (Notre Europe, 2012), Studies & Research 89.

refrain from adopting detailed Conclusions on specific elements of a pending legislative proposal *after* the Commission has presented that proposal, except in those limited instances where the TFEU expressly provides that an ongoing legislative procedure may be suspended on the basis of an ‘emergency break’ clause so that the dossier may be referred to the European Council for a supreme political arbitration.<sup>9</sup> In practice, the European Council’s post-Lisbon Conclusions frequently encourage the European Parliament and the Council to accelerate their deliberations on pending legislative proposals or to adopt the legislation by a certain date,<sup>10</sup> thereby providing political impetus or ‘general’ direction, but they rarely address specific provisions of a pending legislative proposal.<sup>11</sup>

However, there is one highly significant exception in the post-Lisbon era, where the European Council flagrantly disregarded the constraints on its competences in respect of legislative matters. This was the special legislative procedure that led to the adoption of Council Regulation 1311/2013 laying down the Union’s Multiannual Financial Framework (MFF) for the years 2014–20.<sup>12</sup> The core element of the MFF is a table of figures setting out binding annual and overall ceilings for the major categories of Union expenditure over a period of several years. The MFF determines the maximum size of the Union’s annual budgets and the overall distribution of budgetary resources across policy areas and between Member States for the period it covers. It is, thus, ‘an expression of political priorities as much as a budgetary planning tool’.<sup>13</sup>

Prior to Lisbon, the procedure for adopting the MFF was rather informal. In line with the approach followed in the adoption of the first MFF in 1988, which was adopted with the aim of providing a stable budgetary framework for the implementation of the Single Market programme in the years up to 1992, the Heads of State or Government in the European Council would conduct a ‘package deal’ negotiation covering the MFF ceilings, the own resources legislation and the ‘national envelopes’ that are pre-allocated to each Member State in the

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<sup>9</sup> These situations are: where the balance of a Member State’s social security system may be threatened (Article 48 TFEU); where a proposal concerning judicial cooperation in criminal matters may affect fundamental aspects of a national criminal justice system (Articles 82(3) and 83(3) TFEU); where the establishment of a European Public Prosecutor’s office is proposed (Article 86(1) TFEU); and where proposals are made in the area of police cooperation (Article 87(3) TFEU). Article 86(4) TFEU also makes the European Council responsible for any decision to extend the powers of the European Public Prosecutor’s office.

<sup>10</sup> For example, the Conclusions of 26 June 2015 state that ‘the Data Protection package must be adopted by the end of this year’ (EUCO 22/15, point 12(a)), while the Conclusions of 18 December 2015 call ‘on the Parliament and the Council to reach rapid agreement’ on the first proposals aimed at establishing a Capital Markets Union (EUCO 28/15, point 16).

<sup>11</sup> An unusual, one-off, example is found in the Conclusions of 29 June 2012 relating to the Unitary Patent Package, where the European Council suggested to the Parliament and the Council that specific paragraphs of the pending legislative proposal should be deleted (EUCO 76/12, point 3).

<sup>12</sup> Council Regulation (EU, Euratom) No 1311/2013 of 2 December 2013 laying down the MFF for the years 2014–2020, [2013] OJ L347/884.

<sup>13</sup> European Commission, *European Union Public Finance*, 5<sup>th</sup> ed (EU Publications Office, 2014), p 159.

accompanying sectoral funding legislation, notably in agriculture and cohesion policy.<sup>14</sup> The final deal would be contained in a detailed set of European Council Conclusions. The MFF ceilings decided by the European Council would then be given legal effect through an interinstitutional agreement (IIA) concluded between the Parliament, the Council and the Commission, in which the three institutions would undertake to respect the ceilings in the annual budgetary procedure. In return for accepting to be bound by the European Council's ceilings, the Parliament tended to negotiate concessions from the Council on ancillary matters, such as the provisions of the IIA relating to the conduct of the annual budgetary procedure.<sup>15</sup>

After 1 December 2009, however, that informal procedure no longer applies. The Treaty of Lisbon introduced a legal basis in the Treaties for the MFF and formalised the procedure for its adoption. Article 312(2) TFEU now stipulates that the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the Parliament, shall adopt a regulation laying down the MFF. The only mention of the European Council is found in the *passerelle* clause of the second sentence of Article 312(2) TFEU, which allows it to decide that the Council may act by qualified majority when adopting the MFF Regulation. There is no emergency break clause. Nevertheless, the European Council, with the cooperation of the Council, proceeded to assume its customary, dominant role in the legislative procedure leading to the adoption of the MFF for 2014–20, as if nothing had changed with the entry into force of the Treaty of Lisbon.

This contribution traces the development of those first post-Lisbon MFF negotiations and outlines how the initial efforts to establish a new *modus operandi* for legislative negotiations between the Council and the Parliament, as envisaged in Article 312(5) TFEU, ultimately gave way to a process dominated by the European Council. It will be shown that the role played by the European Council is difficult to reconcile with the wording and spirit of the post-Lisbon Treaties and had practical consequences for the transparency and democratic accountability of the most important Union budgetary negotiations of the decade. In light of this experience, it will be suggested that the national governments were not yet ready to accept the 'communitarisation' of the MFF that Lisbon brought about. Moreover, this situation is likely to endure, thus raising the real risk that future MFF negotiations will be marked by interinstitutional conflicts over matters of procedure, notably between the European Council and the Parliament, which continue to emerge as 'the primary poles of power in the post-Lisbon institutional system'.<sup>16</sup> In this context, the article will conclude with a reflection on how future MFF procedures might be conducted differently.

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<sup>14</sup> For an account of the historical development of the MFF, see *ibid.*, Chapters 1–7.

<sup>15</sup> On pre-Lisbon MFF negotiations, see Eggermont, note 6 above, pp 195–209; Werts, see note 6 above, pp 117–122; A Baas, '25 Ans d'accords interinstitutionnels budgétaires' (2007) 18 (6) *European Business Law Review* 1283.

<sup>16</sup> J Monar, 'The European Union's Institutional Balance of Power after the Treaty of Lisbon' in *The European Union after the Treaty of Lisbon* (European Commission, 2011), p 86, as quoted by W Wessels, above note 6, p 88.

## II. THE MFF NEGOTIATIONS BETWEEN 2010 AND 2014

### A. *A new modus operandi for negotiations between the Council and the Parliament*

On 3 March 2010, four months after the entry into force of the Treaty of Lisbon, the Commission presented a proposal to ‘Lisbonise’ the existing MFF for the period 2007–13 by incorporating the contents of the IIA of 17 May 2006,<sup>17</sup> which laid down the MFF for 2007–13, into a new Council regulation, based on Article 312(2) TFEU, establishing the MFF for the same period.<sup>18</sup> The Commission and the Council envisaged that the table of figures setting out the MFF ceilings for the years up to 2013, which was annexed to the IIA, would be incorporated without amendment into the new MFF Regulation. The Parliament, by contrast, took the view that the entry into force of the Treaty of Lisbon necessitated an upwards mid-term revision of the 2007–13 MFF ceilings, since it increased the competences of the Union.<sup>19</sup> The Parliament was also concerned about a possible loss of budgetary flexibility in the transition from the IIA to a new MFF Regulation.

The Parliament therefore called for the opening of interinstitutional negotiations on the new MFF Regulation in accordance with Article 312(5) TFEU, which provides that ‘[t]hroughout the procedure leading to the adoption of the financial framework, the European Parliament, the Council and the Commission shall take any measure necessary to facilitate its adoption’. For the Parliament, Article 312(5) TFEU implies that the consent procedure under Article 312(2) TFEU is more than a mere ‘take it or leave it’ exercise, in which the Council presents the Parliament with a stark choice to accept or reject a text that has already been negotiated among the governments, without any prior consultation of the other institutions. In order to reduce the risks of a negative plenary vote at the end of the process, the Parliament interprets Article 312(5) as establishing what can be termed a ‘consent-plus’ procedure, according to which the Council must engage with the other institutions throughout the elaboration of the legislative text that will later be submitted for a vote of consent.<sup>20</sup>

In September 2010, the Parliament adopted a resolution in which it made clear that it would refuse its consent for any draft MFF Regulation for 2007–13 that did not guarantee ‘at least the current degree of flexibility’ and in which it called on the Council to open interinstitutional negotiations in accordance with

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<sup>17</sup> IIA of 17 May 2006 between the Parliament, the Council and the Commission on budgetary discipline and sound financial management, [2006] OJ C139/1.

<sup>18</sup> Proposal for a Council Regulation laying down the MFF for the years 2007–13, COM (2010) 72 of 3 March 2010.

<sup>19</sup> The Parliament had already called for a mid-term revision in its resolution of 25 March 2009 on the Mid-Term Review of the 2007-2013 Financial Framework, P6\_TA(2009)0174 [2010] OJ CE117/95.

<sup>20</sup> The text of Article 312 TFEU originates in the deliberations of the Convention on the Future of Europe’s Discussion Circle on the budgetary procedure. The Discussion Circle envisaged a ‘conciliation mechanism’, which would ‘facilitate negotiation and agreement between the Council and the Parliament’. This paragraph may be understood as a concession to those members of the Convention who would have preferred to see the MFF adopted under the ordinary legislative procedure. See Final report of the Discussion Circle on the budgetary procedure, CONV 679/03, 14 April 2003, p 5.

Article 312(5) TFEU.<sup>21</sup> On 18 January 2011, the Council went ahead and adopted its draft MFF Regulation for 2007–13 without opening interinstitutional negotiations.<sup>22</sup> On 6 July 2011, the Parliament voted by a large majority to refuse consent for the draft MFF Regulation for 2007–13.<sup>23</sup> The plenary resolution expressed the view that ‘the Council has not demonstrated any willingness to enter into negotiations on the Lisbon package, as provided for in Article 312(5) of the TFEU’.<sup>24</sup> Considering that ‘the reduction in the degree of flexibility in the multiannual financial framework proposed by the Council would curtail Parliament’s powers and prerogatives in relation to those which it currently enjoys’,<sup>25</sup> the resolution concluded that the Parliament ‘[d]eclines to consent to the draft Council regulation’.<sup>26</sup>

The failure of the special legislative procedure leading to the adoption of the MFF Regulation for 2007–13 and the fraught negotiations between the Parliament and the Council on the Union’s annual budget for 2011, which gave rise to an action before the Court of Justice,<sup>27</sup> illustrated the early difficulties in applying the new Title II of Part Six of the TFEU on Financial Provisions. Against this background, efforts would be made to ensure that the legislative negotiations on the MFF for 2014–20 would get off to a better start. Within the Council, an agreement on how to conduct the next MFF process was drawn up under the Hungarian Council Presidency in the first half of 2011.<sup>28</sup> Having regard to Article 16(6) TEU, it was decided that the General Affairs Council (GAC) would be responsible for the negotiations on the MFF Regulation for 2014–20 and the corresponding own resources package for the same period. The GAC would also ensure overall coordination of the various sectoral Councils that would work on the more than sixty accompanying proposals for legislative acts establishing Union funding programmes for 2014–20 in specific policy areas.<sup>29</sup>

With regard to the European Parliament, it was decided that the outgoing President-in-office of the Council would address a letter to the President of the Parliament, on behalf of his own presidency and the upcoming trio of Council presidencies from Poland, Denmark and Cyprus, in which he would propose a

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<sup>21</sup> European Parliament resolution of 22 September 2010 on the proposal for a Council regulation laying down the Multiannual Financial Framework for the years 2007–2013, [2012] OJ CE50/64, points 1(xvi–xvii).

<sup>22</sup> Draft Council Regulation laying down the multiannual financial framework for the years 2007–2013, 16973/3/2010, 21 December 2010.

<sup>23</sup> European Parliament legislative resolution of 6 July 2011 on the draft Council regulation laying down the Multiannual Financial Framework for the years 2007–2013, [2013] OJ CE33/362. Vote: + 581, – 27, o 74.

<sup>24</sup> *Ibid* Rec D.

<sup>25</sup> *Ibid* Rec E.

<sup>26</sup> *Ibid* Point 1.

<sup>27</sup> *Council v Parliament (Budget signature)*, C-77/11, EU:C:2013:559.

<sup>28</sup> Council of the European Union, *Multiannual financial framework – organisation of work in the Council*, 12184/11, 28 June 2011.

<sup>29</sup> *Ibid*, point 3. These sectoral acts would provide the legal bases for the MFF expenditure, as required by Article 310(3) TFEU.

mechanism aimed at ensuring compliance with Article 312(5) TFEU. The ‘Orbán letter’, as it came to be known, of 6 June 2011 began by stressing that the presidencies ‘express our determination to conduct the future work on the MFF in full respect of the provisions of the Treaty of Lisbon and in a spirit of openness and constructive cooperation’.<sup>30</sup> It went on to state that ‘[i]n line with Article 312(5) TFEU, throughout the procedure leading to the adoption of the MFF, our institutions will take any measure necessary to facilitate its adoption’. More concretely, the letter proposed:

to have an exchange of views between the trio presidencies and the representatives of the European Parliament before every General Affairs Council (GAC) meeting when the MFF is on the agenda. Conversely, the Presidency will debrief the representatives of the European Parliament after each GAC meeting on the outcome of discussions on the MFF. Such meetings will help ensure that each institution fully understands the position of the other. The Presidency will also ensure that Council documents submitted to the GAC or to the European Council will be handed over to the European Parliament to ensure optimal information.

For the Council, these ‘briefing and debriefing’ meetings would allow for a continuous exchange of views throughout the procedure leading to the adoption of the MFF Regulation, thereby ensuring that the Parliament’s concerns would be known to the Council during the preparation of the text that would ultimately be submitted for a vote of consent. The Parliament would later request that the Commission be invited to take part in these meetings too, thereby giving them a format similar to classical tripartite, or ‘trilogue’, meetings, as employed in ordinary legislative procedure negotiations. The Orbán letter also envisaged an important role in the process for the Article 324 TFEU meetings of the three institutional Presidents.<sup>31</sup>

### *B. The initial phase of negotiations on the MFF for 2014–20*

The Commission’s proposal for a new MFF Regulation for 2014–20 was presented on 29 June 2011.<sup>32</sup> In headline figures, the Commission proposed an overall ceiling of EUR 1025 billion for the period 2014–20, amounting to 1.05% of EU gross national income (GNI) in commitment appropriations, translating into EUR 972 billion, or 1% of EU GNI, in payment appropriations. The Commission also proposed certain shifts in spending priorities to align the sectoral ceilings with the Europe

<sup>30</sup> Letter from Viktor Orbán, Prime Minister of Hungary, to Jerzy Buzek, President of the European Parliament, Budapest, 6 June 2011 (recorded at the European Parliament as document PE 466.147/CPG).

<sup>31</sup> The special role played by the presidents in budgetary matters can be traced back to the Treaty of Paris of 1951, which provided in its Article 78 for a ‘Commission of Presidents’ to deliberate on the administrative budget of the Coal and Steel Community. In accordance with Article 324 TFEU, the Presidents continue to bear a special responsibility to ‘promote consultation and reconciliation of the positions’ of their respective institutions in budgetary matters.

<sup>32</sup> COM (2011) 398 final, *Proposal for a Council Regulation laying down the Multiannual Financial Framework for the years 2014–2020*, 29 June 2011; subsequently amended to take account of Croatian accession by COM (2012) 388 of 6 July 2012.

2020 goals.<sup>33</sup> With the sectoral funding programmes for the period 2007–13 scheduled to expire on 31 December 2013, the clock was now ticking to get the entire package of new MFF legislation adopted and into force by the end of 2012, so that the Commission and the competent national authorities would then have a period of one year in which to complete the necessary administrative preparations to allow for implementation of the new funding programmes on schedule as from 1 January 2014.

The briefing and debriefing meetings with the Parliament got off to a positive start under the Polish Presidency in the second half of 2011, beginning with an informal GAC held in Sopot in July 2011. The Parliament was represented at the meetings by a negotiating team composed of the Chair of the Committee on Budgets and the four co-rapporteurs responsible for the MFF and own resources dossiers.<sup>34</sup> Within the Parliament, the ‘MFF Contact Group’, chaired by the Parliament’s President and composed of the MFF negotiating team and the budget coordinators of all the political groups, coordinated the internal deliberations and gave a negotiating mandate to the Parliament’s representatives ahead of the meetings with the Council.<sup>35</sup> The institutions also endeavoured to promote a public debate on the MFF by hosting a major public conference bringing together representatives of governments, Union institutions, national parliaments, academia and civil society.<sup>36</sup>

Despite the good spirit in which the interinstitutional exchanges got underway and the apparent commitment on all sides to conduct the procedure in a transparent manner, it quickly became clear that the Council and the Parliament had very different understandings of where the process was headed. The role of the GAC under the second paragraph of Article 16(6) TEU is not only to ‘ensure consistency in the work of the different Council configurations’, but also to ‘prepare and ensure the follow-up to meetings of the European Council, in liaison with the President of the European Council and the Commission’. By the end of the Polish Presidency, it had become clear that the role of the GAC in the MFF process was as much about preparing a final overall deliberation on the MFF by the European Council as it was about coordinating the work of the sectoral Councils or engaging in exchanges with the Parliament.

A first Progress Report on the MFF was submitted by the Polish Presidency to the European Council of 8–9 December 2011.<sup>37</sup> The European Council welcomed the

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<sup>33</sup> See European Commission, note 13 above, pp 101–106.

<sup>34</sup> Chairman Alain Lamassoure (EPP, France) was accompanied by MFF co-rapporteurs Reimer Böge (EPP, Germany) and Ivailo Kalfin (S&D, Bulgaria) and own resources co-rapporteurs Jean-Luc Dehaene (EPP, Belgium) and Anne Jensen (ALDE, Denmark).

<sup>35</sup> See A Vitrey, ‘Le budget de l’UE et la négociation du prochain cadre financier pluriannuel, vus du Parlement européen’ in S Saurel, *Le budget et la négociation du prochain cadre financier de l’Union européenne* (2012) *Revue études européennes* (études européennes) Dossier thématique: <http://www.etudes-europeennes.eu>

<sup>36</sup> *EU Multiannual Financial Framework 2014-2020*: Brussels, 20–21 October 2011, A conference with national parliamentarians co-sponsored by the Polish Presidency of the Council, the European Parliament and the European Commission. Follow-up events would be organised in 2012 under the auspices of the Danish and Cypriot Presidencies.

<sup>37</sup> Council of the European Union, *Multiannual Financial Framework (2014-2020) - Report on progress of work within the Council in the second semester 2011*, 17448/1/11, 1 December 2011.



preparatory work done by the GAC and invited the incoming Danish Presidency ‘to press ahead with work aimed at developing a basis for the final stage of negotiations, to be discussed at the European Council of June 2012’.<sup>38</sup> Accordingly, the Danish Presidency undertook to produce ‘a solid basis for a substantial negotiation on the MFF at the European Council’.<sup>39</sup> The method chosen to prepare the final deliberation in the European Council was one that had been used in pre-Lisbon MFF procedures, namely the progressive completion, through meetings of the GAC, of a document known as the MFF ‘Negotiating Box’.<sup>40</sup> The Negotiating Box was a draft European Council Conclusions document, setting out detailed draft Conclusions on the contents of the MFF Regulation, the own resources package and the criteria for establishing national financial envelopes to be included in the sectoral MFF legislation.

The first draft of the Negotiating Box contained compromise proposals of the Council Presidency, presented in square brackets. Over the course of a series of GAC meetings during the first half of 2012 devoted to individual chapters of the Negotiating Box, the square brackets would gradually be replaced by final texts which were broadly acceptable to all the Council delegations.<sup>41</sup> A consolidated draft Negotiating Box of 46 pages in length was issued by the Danish Presidency on 6 June 2012.<sup>42</sup> At this stage, the Negotiating Box did not contain figures, with ‘X’ being inserted wherever a figure was required. The decisions on ceilings and the distribution of financial envelopes across policies and between Member States would be left to the European Council. This draft Negotiating Box was finalised by the Danish Presidency on 26 June 2012, for transmission to the European Council of 28–29 June 2012.<sup>43</sup>

<sup>38</sup> European Council, *Conclusions* of 9 December 2011, EUCO 139/1/11, point 20.

<sup>39</sup> Council of the European Union, *Multiannual Financial Framework (2014-2020) - Organisation of work within the Council in the first semester 2012*, 5032/12, 6 January 2012, para 2.

<sup>40</sup> See A Gillissen, ‘La négociation du cadre financier pluriannuel 2014-2020 au sein du Conseil’ in Saurel, see note 35 above.

<sup>41</sup> To trace the development of the Negotiating Box texts during the Danish Presidency, see Council of the European Union, *Multiannual Financial Framework (2014-2020) - Sections of Negotiating Box relating to Headings 1 (except cohesion and CEF), 3, 4, 5 and to horizontal issues*, 8057/12, 22 March 2012; Council of the European Union, *Multiannual Financial Framework (2014-2020) - Section of the Negotiating Box relating to Heading 1 (cohesion and CEF) - Section of the Negotiating Box relating to Heading 1 (cohesion and CEF)*, 8285/12, 30 March 2012; Council of the European Union, *Multiannual Financial Framework (2014-2020) - Section of the Negotiating Box relating to Heading 2 (Sustainable growth: natural resources)*, 8641/12, 16 April 2012; Council of the European Union, *Multiannual Financial Framework (2014-2020) - Section of the Negotiating Box relating to Headings 1 (cohesion and CEF), 2 and provisions relating to the funds under the Common Strategic Framework*, 8966/12, 20 April 2012; Council of the European Union, *Multiannual Financial Framework (2014-2020) - Section of the Negotiating Box relating to the revenue side*, 9627/12, 8 May 2012.

<sup>42</sup> Council of the European Union, *Multiannual Financial Framework (2014-2020) - Negotiating Box*, 10753/12, 6 June 2012.

<sup>43</sup> Council of the European Union, *Multiannual Financial Framework (2014-2020) - Negotiating Box*, 11539/12, 19 June 2012.

Not surprisingly, these developments in the GAC provoked some alarm in the Parliament. The Parliament's point of departure for the MFF process was the report of its Special Parliamentary Committee on the policy challenges and budgetary resources for a sustainable European Union after 2013 (the 'SURE committee'), which had deliberated in public over the course of one year between July 2010 and June 2011.<sup>44</sup> In line with the SURE deliberations, the Parliament's negotiators used the GAC briefing and debriefing meetings during the first half of 2012 to call for a 'bottom-up' approach to the MFF negotiations, with policy objectives to be discussed first and the amounts required to finance those policies to be settled afterwards. However, it became increasingly clear that the intention of the Council was to follow a 'top-down' approach. It would await a global deliberation on amounts in the European Council before adopting any firm positions concerning the policies that could be implemented within the limits of those amounts.<sup>45</sup> The Parliament's concerns were set out in a plenary resolution that was adopted on 13 June 2012.<sup>46</sup>

Ultimately, the European Council of 28–29 June 2012 did not address the MFF. On the one hand, the political agenda was already very full due to the Euro crisis, and on the other hand it was felt that the positions of the Member States were still too far apart on figures. In particular, a split had opened up between a group of about 18 Member States, known as the 'Friends of Cohesion', who advocated a generous MFF for cohesion policy, and a group of 8 net-contributor Member States, known as the 'Friends of Better Spending', who opposed any overall increase in the MFF.<sup>47</sup> The European Council therefore invited the Cypriot Presidency of the second-half of 2012 to continue work on the Negotiating Box within the GAC, with a view to a final deliberation in the European Council in November 2012.<sup>48</sup>

In the meantime, on 23 October 2012, the Parliament adopted an 'Interim Report', in which it set out its detailed position on the Commission's proposal for the MFF Regulation.<sup>49</sup> In terms of figures, the SURE Resolution of 8 June 2011 had estimated

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<sup>44</sup> See European Parliament resolution of 8 June 2011 on Investing in the future: a new Multiannual Financial Framework (MFF) for a competitive, sustainable and inclusive Europe (2010/2211(INI)), [2012] OJ CE380/89.

<sup>45</sup> On the 'bottom-up' and 'top-down' approaches, see N-J Brehon, 'Le budget européen: quelle négociation pour le prochain cadre financier de l'Union européenne?' (Fondation Robert Schuman, 25 May 2010, 31 May 2010) Questions d'Europe, 170 & 171, <http://www.robert-schuman.eu>

<sup>46</sup> European Parliament resolution of 13 June 2012 on the Multiannual Financial Framework and own resources, P7\_TA(2012)0245.

<sup>47</sup> On the different 'camps' of Member States, see J Chaffin, 'EU budget: the trillion euro split' (*Financial Times*, 20 November 2012); B Marzinotto, 'The long-term EU budget: size or flexibility?' (Bruegel, November 2012) *Bruegel Policy Contribution* 2012/20; Y Petit, 'Les oppositions entre États membres et institutions de l'Union européenne' (2014) 125 *Revue française de finances publiques* 3.

<sup>48</sup> European Council, *Conclusions* of 28–29 June 2012, EUCO 76/12, point 6.

<sup>49</sup> European Parliament resolution of 23 October 2012 in the interests of achieving a positive outcome of the Multiannual Financial Framework 2014–2020 approval procedure, [2014] OJ C68E/1. The resolution was adopted by a vote of + 517, – 105, o 63. After Croatian accession, the seventh legislature of the Parliament had 766 Members, so a majority of 384 Members would be required to grant consent for the MFF Regulation.

that an overall increase of 5% compared to the MFF for 2007–13 would be necessary to allow the Union to fulfil its tasks over the years 2014–20 and, in particular, to address perceived financing shortfalls in the headings for growth and employment, citizenship, including asylum, migration and borders, and external relations.<sup>50</sup> In the context of the economic crisis, the Interim Report of 23 October 2012 drew back from that level of ambition, but it nevertheless warned that ‘the Commission proposal, which represents a freeze of the MFF 2014–20 ceilings, will not be sufficient to finance existing policy priorities linked to Europe’s strategy for smart, sustainable and inclusive growth, the new tasks provided for by the Treaty of Lisbon, or unforeseen events, not to mention the political objectives and commitments set by the European Council itself’.<sup>51</sup>

On matters of procedure, the Interim Report reiterated that ‘according to the TFEU, Parliament and the Council are the legislative bodies and the European Council does not have the role of legislator’.<sup>52</sup> It asserted that ‘any political agreement reached at European Council level constitutes no more than a negotiating mandate for the Council’ and insisted ‘that fully-fledged negotiations between Parliament and the Council need to take place before the Council formally submits for Parliament’s consent its proposals on the MFF regulation’.<sup>53</sup>

### C. *Negotiations in the European Council*

Once the Negotiating Box had been finalised at a meeting of the Coreper on 31 October 2012,<sup>54</sup> the President of the European Council took over preparations for the European Council of 22–23 November 2012. He used the Negotiating Box as the basis for an intensive round of bilateral contacts with the Heads of State or Government. Following this initial round of bilateral contacts, President Van Rompuy circulated a confidential draft compromise proposal on figures for the attention of the national capitals, which aimed at bridging the gaps between the different camps of Member States.<sup>55</sup>

The MFF was the only item on the agenda of the European Council of 22–23 November 2012. It became clear during the course of the meeting that the package was too complex and the negotiating positions still too far apart to achieve a deal. Therefore, the meeting broke up without an agreement and no European Council Conclusions were issued. Rather, a ‘Statement by the Members of the European Council’ was released, which read as follows:

The European Council gives its President the mandate together with the President of the European Commission to continue the work and pursue consultations in the

<sup>50</sup> See note 44 above, points 129 and 163.

<sup>51</sup> Above note 49, point 18.

<sup>52</sup> *Ibid* point 79.

<sup>53</sup> *Ibid* point 78.

<sup>54</sup> Council of the European Union, *Multiannual Financial Framework (2014-2020) – Negotiating box*, 15599/12, 29 October 2012.

<sup>55</sup> See ‘Cameron gives no ground before budget summit’ (*Euractiv*, 22 November 2012) <http://www.euractiv.com/>

coming weeks to find a consensus among the 27 over the Union's Multiannual Financial Framework for the period 2014-2020.

The bilateral talks and the constructive discussion within the European Council show a sufficient degree of potential convergence to make an agreement possible in the beginning of next year.

We should be able to bridge existing divergences of views. A European budget is important for the cohesion of the Union and for jobs and growth in all our countries.<sup>56</sup>

The only official information made available to the public about the contents of the negotiations came in the form of a personal media statement of the President of the European Council.<sup>57</sup> President Van Rompuy explained that he had circulated a first proposal for the overall amount of the MFF a week earlier and he had put another proposal on the table during the European Council meeting. He had suggested a cut of EUR 80 billion compared to the Commission's proposal, which would be a real cut compared to the previous MFF. In recognition that the pre-Lisbon procedures for deciding the MFF through the European Council were still being applied, he told the media '[t]here's no need to dramatise: these budget negotiations are so complex they generally take two goes. That was also the case last time around, in 2005, when negotiations were first chaired by Jean-Claude Juncker and then finalised by the British Presidency'.<sup>58</sup>

The President of the European Council, together with the President of the Commission, continued private, bilateral negotiations with the national leaders ahead of a further European Council meeting devoted to the MFF, which would be scheduled for 7-8 February 2013. Apart from the speeches of the President of the Parliament at the opening of those European Council meetings, the Council and the Parliament were excluded from the process during this period and no further briefing or debriefing meetings took place after October 2012. The deliberations of the government leaders would continue behind closed doors in what the Chair of the Parliament's Committee on Budgets, Alain Lamassoure, would term a 'permanent conclave'.<sup>59</sup> Speaking at the closing session of the European Parliamentary Week meeting with national parliamentarians in January 2013, the same Chair would complain that parliamentarians, national and European, could obtain more information about the progress of the negotiations from the media than from other Union institutions. He accused the governments of negotiating the MFF as if it were an international agreement, to be concluded in secret between diplomats, rather than an act of Union legislation to be adopted in accordance with the procedures laid down in the Treaties.<sup>60</sup>

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<sup>56</sup> Statement by the Members of the European Council, Brussels, 23 November 2012.

<sup>57</sup> Remarks by Herman Van Rompuy following the European Council, 23 November 2012, EUCO 228/12, PRESSE 490.

<sup>58</sup> *Ibid* p 2.

<sup>59</sup> Alain Lamassoure, speaking at the public meeting of the Committee on Budgets of 20 February 2013.

<sup>60</sup> Alain Lamassoure, speaking during the public closing session of the European Parliamentary Week on the European Semester for Economic Policy Coordination, Brussels, 28-30 January 2013.

Following two and a half months of behind the scenes negotiations and bilateral ‘confessionals’ in the national capitals between the President of the European Council and the government leaders, the European Council reconvened for what would be a final round of negotiations on the MFF on 7–8 February 2013. When the white smoke finally emerged from the ‘conclave’ at the Council’s *Justus Lipsius* building on 8 February 2013, it took the form of a European Council Conclusions document that was 48 pages in length and that set out in great detail the figures and distribution criteria to be included not only in the MFF Regulation and Own Resources Decision, but also in various sectoral legislative acts that remained to be adopted under the ordinary legislative procedure, including 20 pages of detailed directions on the contents of the cohesion policy legislation and a further 7 pages on agricultural legislation.<sup>61</sup>

Summing-up the deal, the President of the European Council explained that ‘[f]or the first time ever, there is a real cut compared to the last MFF; we agreed it will be a cut of roughly €34bn for both commitments & payments (compared to the period 2007–2013), resulting in overall ceilings of €960bn in commitments and €908,4bn in payments. It means a cap on commitments at exactly 1% of total European GNI: a sensible and nicely-round number.’<sup>62</sup>

#### D. *The post-European Council negotiations*

As soon as the deal was concluded at the European Council, pressure began building on the legislative institutions to enshrine the outcome in legally-binding texts as quickly as possible. The European Council Conclusions had stressed that the legislative texts ‘now need to be adopted as soon as possible’<sup>63</sup> and the President of the European Council emphasised that ‘[b]eneficiaries and investors count on this new MFF from 1 January 2014. To avoid any delays and uncertainty, all legislative procedures must be swiftly closed by the Council of Ministers and the European Parliament.’<sup>64</sup>

The Conclusions of the European Council were presented to an enlarged public meeting of the Parliament’s Conference of Group Presidents on 18 February 2013. Aware of the criticism emanating from the Parliament about the role assumed by the European Council, President Van Rompuy explained that his institution had now ‘fulfilled its role under Article 15 of the Treaty to define the general political directions and priorities of the Union’.<sup>65</sup> He made clear that ‘all the European Council

<sup>61</sup> European Council, *Conclusions of 7–8 February 2013 on the MFF*, EUCO 37/13. On cohesion, see points 20–60 and 76–92 of the Conclusions. On agriculture, see points 61–75.

<sup>62</sup> Remarks by President Herman Van Rompuy following the European Council, 8 February 2013, EUCO 36/13, PRESSE 48, p 2. For a detailed breakdown of the figures decided by the European Council compared to the figures for 2007–13, see European Commission, see note 13 above, pp 111–113.

<sup>63</sup> See note 61 above, point 11.

<sup>64</sup> See note 62 above, p 2.

<sup>65</sup> Speech by President of the European Council Herman Van Rompuy at the European Parliament, Brussels, 18 February 2013, EUCO 41/13, PRESSE 60, p 4.

decided was a mandate – albeit a very strong one – for the ordinary Council and its Presidency to take forward in discussion with the Parliament'.<sup>66</sup> Speaking to the same audience some months earlier, he had justified the engagement of his institution in the process as follows: 'Under the Treaty, [the MFF] is a matter for the Council of Ministers and your Parliament. However, we all know from past experience that this is one of the areas in which the European Council will inevitably be called on to fulfil its role, under Article 15 of the Treaty, of defining the general political directions and priorities.'<sup>67</sup>

The President of the Commission, Mr Barroso, who was an active participant in the negotiations in his capacity as member of the European Council, explained that he had entered a declaration into the minutes of the European Council meeting stating that '[t]he levels agreed by the Heads of State and Government are below the level of ambition that the Commission considers desirable given the challenge of promoting growth and jobs across the EU in the coming years'.<sup>68</sup> Nevertheless, the European Council's figures could be accepted 'to the extent that we have specific and maximum flexibility' to transfer amounts between years and between headings.<sup>69</sup> It was implicit in Mr Barroso's speech that the Commission now considered the MFF figures and distribution of amounts across policy areas to be fixed and it expected the final round of legislative negotiations between the Council and the Parliament to focus on the details of how the flexibility mechanisms would function, within the parameters allowed by the European Council.

The reaction to these presentations from the Parliament's political group presidents was overwhelmingly negative, with one prominent group leader and former member of the European Council noting that the European Council's Conclusions contained 'more than 50 exceptions, exemptions, discounts, rebates, discounts on the rebates, and other special treatments'.<sup>70</sup> The suspicion arose that those Member States that had lost out due to the overall reduction in the MFF ceilings had been compensated through *ad hoc* side payments, or special 'gifts', especially in cohesion policy.<sup>71</sup> However, without access to the criteria that had been applied in granting those 'gifts', it was difficult for the Parliament to take a position on them. The formal reaction of the Parliament to the Conclusions would take the form of a resolution that

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<sup>66</sup> Ibid.

<sup>67</sup> Speech by Herman Van Rompuy, President of the European Council, to the European Parliament, Strasbourg, 3 July 2012, EUCO 129/12, PRESSE 312, p 3.

<sup>68</sup> Speech by President Barroso on the outcome of the European Council meeting on the Multiannual Financial Framework of 7-8 February 2013, Brussels, 18 February 2013, SPEECH/13/130. The European Council minutes, with the Commission's declaration annexed, are contained in document EUCO 4/13, PV/CO EUR 1 of 6 March 2013.

<sup>69</sup> Ibid.

<sup>70</sup> G Verhofstadt, 'Verhofstadt on EU budget: not a budget for the future' (*ALDE party press release*, 18 February 2013).

<sup>71</sup> See B Fox, 'MEPs attack carpet seller budget deal' (*EU Observer*, 18 February 2013). On the significance of compensation by side payments in the MFF negotiations, see J Stenbæk and M Dagnis Jensen, 'Evading the Joint Decision Trap: the Multiannual Financial Framework 2014–20' *European Political Science Review*, doi: 10.1017/S175577391500020X [first published online 23 July 2015].

was adopted in the plenary on 13 March 2013.<sup>72</sup> The resolution began by noting that the Conclusions ‘represent no more than a political agreement between the Heads of State and Government’ and stated that the Parliament ‘rejects this agreement in its current form’.<sup>73</sup>

The first post-European Council meeting of the GAC to discuss the MFF took place under the Irish Council Presidency on 22 April 2013.<sup>74</sup> The GAC implicitly took over the European Council’s Conclusions as the Council’s position on the MFF. The sectoral legislative Councils would do the same with regard to those parts of the Conclusions that concerned sectoral funding programmes. However, the GAC agreed that further exchanges with the Parliament would be necessary in order to secure a positive consent vote. The Irish Presidency was therefore given a restricted mandate to open negotiations on a limited number of issues where concessions could be made without reopening the package deal agreed in the European Council.<sup>75</sup>

Following a break of more than six months since the last briefing and debriefing meetings, negotiations between the Council Presidency and the Parliament’s MFF negotiators finally got underway on 13 May 2013. By this late stage, however, preparations for the implementation of the new funding programmes as from 1 January 2014 were already well behind schedule and severe political pressure was being brought to bear on MEPs to conclude the negotiations quickly in line with the European Council’s Conclusions. At one point, the possibility of a secret ballot to shield MEPs from undue pressure from their governments was even considered, but this idea was quickly abandoned.<sup>76</sup> The broader context of the Euro crisis no doubt also served to concentrate parliamentary minds.<sup>77</sup>

It was implicit in the negotiating mandate given to the Irish Presidency that the figures set out in the European Council’s Conclusions were to be regarded as non-negotiable and the scope of the negotiations would turn out to be extremely restricted. Over the course of the next five weeks, the Parliament’s negotiators would extract concessions on ancillary matters, such as a mid-term review/revision clause<sup>78</sup> and the setting up of an interinstitutional High Level Group to examine reform of the own resources system.<sup>79</sup> Ultimately, however, the negotiations would turn on the

<sup>72</sup> European Parliament resolution of 13 March 2013 on the European Council Conclusions of 7/8 February 2013 concerning the Multiannual Financial Framework, [2016] OJ C36/49. Vote: + 506, – 61, o 23.

<sup>73</sup> Ibid point 1.

<sup>74</sup> See Press Release on the 3235<sup>th</sup> meeting of the GAC, Luxembourg, 22 April 2013, 8577/13, PRESSE 153.

<sup>75</sup> See Council of the European Union, *New Multiannual Financial Framework – State of play*, 9486/13, 14 May 2013.

<sup>76</sup> T Vogel, ‘MEPs threaten to derail budget deal’ (*European Voice*, 14 February 2013); M Hennessy, ‘Cameron rejects idea of secret vote by MEPs’ (*Financial Times*, 12 February 2013).

<sup>77</sup> ‘Editorial: Parliament caught between a rock and a hard place’ (*European Voice*, 7 March 2013), p 10.

<sup>78</sup> Now found in Article 2 of the MFF Regulation 1311/2013, see note 12 above.

<sup>79</sup> Further to a Joint Statement of the institutions adopted with the MFF Regulation, the High Level Group would be established under the chairmanship of Mario Monti on 25 February 2014.

question of flexibility and the meaning of the phrase ‘specific and maximum possible flexibility’ in point 109 of the European Council Conclusions.

In this regard, the Parliament, with the support of the Commission, insisted that it would only accept the lower MFF ceilings proposed by the European Council if it could be assured of full flexibility to redeploy and carry-over amounts within the overall MFF ceilings across the seven years, thereby ensuring that the total global amounts of EUR 960 billion in commitments and EUR 908 billion in payments could be exhausted in full. In particular, the Parliament argued for a possibility to carry-over from one year to the next any unused payment margins remaining below the ceilings at the end of the year in the form of a ‘Global Margin for Payments’.<sup>80</sup> The Council was open to this idea, but insisted that the amounts that could be carried over from one year to the next would have to be capped. A provisional agreement between the negotiating teams was published by the Council on 20 June 2013.<sup>81</sup> The deal did not touch upon the figures decided by the European Council and the co-rapporteur representing the largest political group, who was frustrated all along by the restricted scope of the negotiations and the limited time available to negotiate, resigned from his role as he felt unable to defend the agreement.<sup>82</sup>

One last effort to improve the deal was made at an Article 324 TFEU meeting of the three institutional Presidents on 27 June 2013.<sup>83</sup> The Presidents agreed to a full carry-over of unused payments margins in the first four years of the MFF. There would also be a limited form of Global Margin for Commitments and a frontloading of appropriations for the Youth Employment Initiative and certain other symbolically important programmes.<sup>84</sup> In compliance with a package of Joint Statements adopted with the annual budget for 2013, the Council also undertook to adopt certain pending draft amending budgets in the 2013 budgetary year that were necessary to clear a backlog of unpaid bills that would otherwise be carried over into the new MFF period. The Council endorsed the deal the following day.<sup>85</sup> A Joint Resolution of the Parliament’s largest political groups granted provisional endorsement to the deal on 3 July 2013.<sup>86</sup>

The Parliament held back its formal plenary vote on consent for the MFF Regulation until the Council had fulfilled its commitments in respect of amending budgets for 2013 and until agreements had been reached in those ordinary legislative

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<sup>80</sup> The idea of a Global Margin had initially been presented in the Parliament’s SURE resolution, see note 44 above, point 149.

<sup>81</sup> See Council documents 11295/13, 11298/13 and 11307/13 of 20 June 2013.

<sup>82</sup> ‘Statement Reimer Böge on MFF’ (*EPP Group press release*, 20 June 2013); H Mahony, ‘Deal on EU budget in doubt’ (*EU Observer*, 20 June 2013).

<sup>83</sup> The Presidents were Martin Schulz for the Parliament, Enda Kenny for the Council and Manuel Barroso for the Commission.

<sup>84</sup> See European Commission MEMO/13/625, *Elements of the political agreement on the European Union’s future budget 2014-2020*, 27 June 2013.

<sup>85</sup> See a presentation of the package in the Council’s press release ‘Council approves MFF agreement’, 11732/13, PRESSE 307, 28 June 2013.

<sup>86</sup> European Parliament resolution of 3 July 2013 on the political agreement on the Multiannual Financial Framework 2014-2020, P7\_TA(2013)0304. Vote: + 474, – 193, o 42.



procedure negotiations, notably in cohesion policy and agriculture, where the Conclusions of the European Council also played a significant role. The draft MFF Regulation was finally put to a consent vote in the plenary on 19 November 2013 and was endorsed by a comfortable majority.<sup>87</sup> The Council duly adopted the MFF Regulation for 2014–20 on 2 December 2013,<sup>88</sup> less than a month before the MFF programmes for 2007–13 were due to expire. On 15 April 2014, the Parliament concluded the MFF process from its side with the adoption of a resolution entitled ‘MFF negotiations 2014–20: lessons to be learned and the way forward’, which was highly critical of the manner in which the procedure had been conducted.<sup>89</sup> The European Council, for its part, had long since turned its attention to other matters.

### III. ASSESSMENT OF THE ROLE PLAYED BY THE EUROPEAN COUNCIL

Writing after his retirement about the MFF negotiations for 2014–20, former European Council President Van Rompuy explained that ‘[i]t is customary in the Union that the three main questions – How large is the pot? Where does the money come from? Where is the money spent? – are settled by the Heads of State or Government.’<sup>90</sup> Notwithstanding the entry into force of the Treaty of Lisbon, the European Council and the Council conducted their negotiations on the MFF for 2014–20, for the most part, as if the procedure had not changed since the previous MFF negotiations in 2005. The role of the legislative institutions was perceived all along to be one of technical preparation and follow-up, in which the Conclusions of the European Council would be rubber-stamped and translated into legislative form.

When it comes to the MFF, it seems that customary practice prevails over the wording of the Treaties, for Article 312(2) TFEU states that the MFF Regulation shall be adopted by the Council, acting on a proposal from the Commission and after obtaining the consent of the Parliament. No mention is made of the European Council, except in the *passerelle* clause of the second paragraph of Article 312(2) TFEU. This can be contrasted with several other articles of the TFEU where a role is expressly envisaged for the European Council in respect of legislative matters. For example, the European Council is empowered to adopt strategic guidelines or conclusions in the area of freedom, security and justice (Article 68 TFEU), economic

<sup>87</sup> European Parliament legislative resolution of 19 November 2013 on the draft Council regulation laying down the multiannual financial framework for the years 2014–2020, P7\_TA(2013)0455. Vote: + 537, – 126, o 19.

<sup>88</sup> See note 12 above. See F Dintilhac, ‘Le nouveau cadre financier pluriannuel des dépenses de l’Union pour la période 2014–2020’ (2014) 2 *Revue du droit de l’Union européenne* 315; A Potteau, ‘Le cadre financier pluriannuel 2014–2020 ou l’austérité mâtinée de flexibilité’ (2014) *Revue trimestrielle de droit européen* 795.

<sup>89</sup> P7\_TA(2014)0378.

<sup>90</sup> Author’s translation from the French text: ‘*Il est d’usage dans l’Union que les trois questions principales – quelle est la taille du pot? D’où vient l’argent? Où vont les dépenses? – soient tranchées par les chefs d’État ou de gouvernement.*’ H Van Rompuy, *L’Europe dans la tempête: Leçons et défis* (Racine, 2014), p 68.

policy (Article 121(2) TFEU) and employment (Article 148(1) TFEU). In a limited number of policy areas, legislative procedures may be suspended by way of an ‘emergency brake’ in circumstances where especially sensitive interests of one or more Member States are at stake, so that the dossier may be referred to the European Council.<sup>91</sup> There is no such provision in Article 312 TFEU. This suggests that the authors of the Treaty of Lisbon simply did not envisage any role for the European Council in the procedure leading to the adoption of the MFF.

The legal basis put forward during the procedure to justify the European Council’s engagement was the phrase in Article 15(1) TEU stating that the European Council ‘shall define the general political directions and priorities’ of the Union. However, this ignores the second sentence of the same paragraph, which states that the European Council ‘shall not exercise legislative functions’. This latter sentence could be interpreted as merely confirming that the European Council may not legally substitute itself for the Council in the adoption of legislative acts.<sup>92</sup> However, the term ‘legislative functions’, which also appears in Articles 14(1) and 16(1) TEU, according to which it is the role of the Parliament and the Council to exercise ‘legislative and budgetary functions’, appears to imply more than the mere act of formal adoption. It may also be understood to cover those functions that the Parliament and Council are called upon to perform during the course of a legislative procedure, such as deliberating in public on the Commission’s legislative proposal<sup>93</sup> and adopting positions thereon.

In that regard, the case-law of the Court of Justice on the principle of institutional balance requires the institutions ‘positively, to assume fully the political responsibilities conferred on them by the Treaties and, negatively, to refrain from ‘abusing’ their powers, ie using them in a way that usurps the powers granted to the other institutions’.<sup>94</sup> If an article of the TFEU, in this case Article 312(2) TFEU, charges the Council, acting on a proposal from the Commission and after obtaining the consent of the Parliament, with the specific task of determining ‘the amounts of the annual ceilings on commitment appropriations by category of expenditure and of the annual ceiling on payment appropriations’, is it appropriate for the European Council to assume that same task for itself on the pretext of having to define the general political directions and priorities? If the role of the legislative institutions is simply to enshrine the Conclusions of the European Council in a legally-binding text, then what is the *effet utile* of the legislative procedure for which Article 312(2) TFEU provides?

<sup>91</sup> See note 9 above.

<sup>92</sup> On the exclusion of this possibility post-Lisbon, see J-P Jacqué, ‘Le traité de Lisbonne: Une vue cavalière’, (2008) 44 (3) *Revue trimestrielle de droit européen* 439–483, p 456.

<sup>93</sup> Article 15(3) TFEU provides that ‘[t]he European Parliament shall meet in public, as shall the Council when considering and voting on a draft legislative act.’

<sup>94</sup> K Lenaerts and A Verhoeven, ‘Institutional Balance as a Guarantee for Democracy in EU Governance’, in C Joerges and R Dehousse (eds) *Good Governance in Europe’s Integrated Market*, Collected Courses of the Academy of European Law (Oxford University Press, 2002), p 44. See also J-P Jacqué, ‘The Principle of Institutional Balance’ (2004) 41 *Common Market Law Review* 383; P Craig, ‘Institutions, Power and Institutional Balance’ in P Craig and G de Búrca (eds), *The Evolution of EU Law* (Oxford University Press, 2011).

It might be argued that a prior indication from the European Council that the overall level of the MFF should be increased or decreased, or that certain broad policy areas should be prioritised over others, could fall within the scope of its competence to define ‘general’ political directions and priorities, but a 48-page Conclusions document that lays down the precise ceilings and other figures to be inserted in the MFF Regulation and that contains, for example, 20 pages of detailed directions on the contents of ordinary legislative procedure regulations in cohesion policy, including amounts, co-financing rates and side payments for individual countries, and a further 7 pages on ordinary legislative procedure regulations in agriculture, can hardly be considered to provide mere ‘general’ directions and priorities. The instructions given to the legislative institutions by the European Council were extremely precise and detailed.

In essence, by suspending the legislative procedure and referring the entire MFF dossier to the European Council, the Council introduced a new step that is not foreseen in Article 312(2) TFEU. This runs counter to the case law of the Court of Justice to the effect that ‘the rules regarding the manner in which the EU institutions arrive at their decisions are laid down in the Treaties and are not at the disposal of the Member States or of the institutions themselves.’<sup>95</sup> In the case of the MFF, the Council assigned its legislative functions of adopting positions on the most significant elements of the Commission’s legislative proposals for the MFF Regulation, the own resources package and the sectoral funding legislation to the European Council, which in turn usurped those legislative functions of the Council.

Moreover, the European Council’s dominance was not without practical consequences. In the first instance, Article 16(8) TEU and Article 15(3) TFEU require the Council to meet in public when it deliberates on draft legislative acts. At its web-streamed meeting of 22 April 2013, the GAC took over the Conclusions of the European Council as its position ahead of the legislative negotiations with the Parliament, without any further public deliberation on the ceilings and the distribution of resources as decided by the European Council. In formal terms, the GAC satisfied its obligation to meet in public when deliberating on a draft legislative act, but in substance the most contentious elements of the Union’s budgetary framework for the next seven years, including all aspects related to figures, had been decided behind closed doors in the European Council, whose Rules of Procedure provide that its meetings shall not be public and whose deliberations are covered by an obligation of professional secrecy.<sup>96</sup>

The obligation to deliberate in public, which may be understood as a specific application of the general rule in Article 10 TEU that decisions should ‘be taken as openly and as closely as possible to the citizen’, must be considered to carry special significance in procedures relating to the Union’s budget, which ultimately, albeit indirectly, draws its revenue from the contributions of European citizen-taxpayers. In a judgment delivered on 13 December 2012, during the very period when the European Council’s ‘conclave’ was deliberating behind closed doors on the MFF,

<sup>95</sup> *United Kingdom v Council*, 68/86, EU:C:1988:85, para 38; and *Parliament v Council*, C-133/06, EU:C:2008:257, para 54; *Commission v Council*, C-28/12, EU:C:2015:282, para 42.

<sup>96</sup> Articles 4(3) and 11 of the European Council’s Rules of Procedure [2009] OJ L315/52.

the Court of Justice recalled that the Parliament, in the context of the annual budgetary procedure, must hold ‘a public debate in plenary sitting enabling the citizens of the European Union to acquaint themselves with the various political orientations expressed and, as a result, to form a political opinion on the European Union’s actions’.<sup>97</sup> The MFF Regulation frames and constrains the Union’s annual budgetary procedure and similar considerations of principle should inform the Council’s conduct when deliberating on the MFF. Instead, by transmitting the MFF dossier to the European Council and then taking over that other institution’s position as its own, without any further public deliberation on the figures, the Council circumvented its duty to deliberate in public when considering a draft legislative act.

It can be added that the European Council as an institution is not subject to parliamentary oversight. Although the President of the European Council reported to the Parliament after the European Council meetings on the MFF, as required by Article 15(6)(d) TEU,<sup>98</sup> the Parliament had no means to obtain full details of the European Council’s deliberations with a view, for example, to understanding the logic behind the various special ‘gifts’ that were granted to individual Member States in cohesion policy. National parliaments faced similar problems, being able only to hold their national representatives to account. The secretive conduct of the core negotiations on figures also undermined the ‘possibility for citizens to find out the considerations underpinning legislative action’, which according to the Court of Justice, must be considered ‘a precondition for the effective exercise of their democratic rights’.<sup>99</sup> In referring the Negotiating Box to the European Council, the Council pushed the core elements of the most important Union budgetary negotiations of the decade out of reach of parliamentary and public scrutiny.<sup>100</sup>

A further consequence of the European Council’s involvement was that the institutions that, according to Article 10(2) TEU, represent the interests of the Member States, the European Council and the Council, enjoyed a greater level of influence in the procedure than that provided for in Article 312(2) TFEU.<sup>101</sup>

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<sup>97</sup> *French Republic v European Parliament (Plenary calendar case)*, Joined Cases C-237/11 and C-238/11, EU:C:2012:796, para 68.

<sup>98</sup> On the European Council President’s relationship with the European Parliament, see H de Waele and H Broeksteeg, ‘The Semi-Permanent European Council Presidency: Some Reflections on the Law and Early Practice’ (2010) 49 *Common Market Law Review* 1039.

<sup>99</sup> *Sweden and Turco v Council*, Joined Cases C-39/05P and C-52/05P, EU:C:2008:374, para 46; *Access Info Europe*, C-280/11P, EU:C:2013:671, para 33.

<sup>100</sup> On the difficulties of parliamentary oversight of the European Council, see D Curtin, ‘Challenging Executive Dominance in European Democracy’ (2014) 77 (1) *Modern Law Review* 1; ML Sánchez-Barrueco, ‘El control del Consejo Europeo por el Parlamento Europeo (2009-2014): marco jurídico y práctica interinstitucional’ (2015) 1 *Revista Española de Derecho Europeo* 19; M Papi Boucher, ‘Las relaciones entre el Parlamento Europeo y el Consejo Europeo durante el mandato de Van Rompuy (2010-2014)’ (2015) 51 *Revista Catalana de Dret Públic* 122.

<sup>101</sup> On the dominant influence of the European Council in the MFF negotiations, see Stenbæk and Dagnis Jensen, see note 71 above; S Hagemann, *The EU Budget and Balance of Powers Between the European Parliament and the EU Governments* (Swedish Institute for European Policy Studies, 2014), Policy Analysis No 3.

The opposite may be said for the Parliament, representing the citizens directly. In strictly legal terms, the referral of the MFF dossier to the European Council did not undermine the Parliament's power of consent, but, in practice, it found itself frozen out of the core negotiations on the MFF ceilings and the distribution of resources. Faced with a Council that considered itself strictly bound by the European Council's Conclusions, and with time running out before the expiry of the funding programmes for 2007–13, the Parliament was in the end left with a stark and unappealing political choice between accepting the *fait accompli* package imposed by the European Council or provoking a major institutional crisis at a time when the Union already had more than enough crises on its hands.

In terms of possibilities for judicial redress, the short time remaining before the old MFF programme expired left little scope for a legal action that could be of immediate benefit. Moreover, although the Court of Justice is competent under Article 263 TFEU to review the legality of acts of the European Council that are intended to produce legal effects *vis-à-vis* third parties,<sup>102</sup> any action for annulment brought against Conclusions of the European Council, for example, on the ground that they were adopted *ultra vires* the European Council's powers under Article 15(1) TEU, would have to overcome the objection of inadmissibility that those Conclusions do not produce legal effects.<sup>103</sup> Similarly, the procedural routes to challenge the Council's 'outsourcing' of certain elements of its legislative tasks to the European Council were not obvious. In the context of the Euro crisis, there was little appetite to contest the validity of the MFF Regulation after it had been adopted. Nevertheless, the Court has ruled that it should be possible to penalise any breach of the institutional balance laid down in the Treaties<sup>104</sup> and it cannot be excluded that a legal action may come before the Court in the context of a future MFF procedure.

Ultimately, it is a matter of speculation whether the outcome of the MFF procedure would have been any different if the ceilings and distribution of resources had been decided by the Council instead of the European Council and if a longer period of time had been available for fully-fledged negotiations with the Parliament covering all aspects of the MFF package. However, certain developments since the start of the 2014–20 programming period do suggest that the general interest of the Union and real budgetary needs, considerations that the Parliament may have been expected to

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<sup>102</sup> The competence of the Court to review the validity of a European Council decision was confirmed in *Pringle v Ireland*, C-370/12, EU:C:2012:756, para 31.

<sup>103</sup> The Parliament itself maintained throughout the negotiations that the Conclusions were political in nature only. Nevertheless, the Court of Justice gives precedence to content over form in deciding whether an act may be reviewed under Article 263 TFEU and it cannot be excluded that a future challenge to the validity of European Council Conclusions might, depending on the circumstances, be ruled admissible. The Court has, for example, held that a Commission Communication (*France v Commission*, C-57/95, EU:C:1997:164) and an ECB Policy Framework (*UK v ECB*, T-496/11, EU:C:2015:400) could constitute challengeable acts, while in the *Gauweiler* preliminary reference the Court reviewed the validity of OMT decisions that the ECB itself argued were merely preparatory in nature (*Gauweiler*, C-62/14, EU:C:2015:400). On the notion of a reviewable act, see K Lenaerts et al, *EU Procedural Law* (Oxford University Press, 2014), pp 257–302.

<sup>104</sup> *European Parliament v Council (Chernobyl)*, 70/88, EU:C:1990:217, para 21.

promote, were insufficiently taken into account. For example, the Contingency Margin, which is a ‘last-resort’ instrument to respond to ‘unforeseen circumstances’, had to be mobilised above the MFF ceilings in the very first year of the new MFF period for an amount of more than EUR 3 billion in payments to enable the Union to honour its past legal commitments in accordance with Article 323 TFEU, thus distorting the budgetary profile of the MFF for later years of the programming period.<sup>105</sup> It is legitimate to ask whether this expenditure really could not have been foreseen in 2013, when the MFF Regulation was adopted, or whether the payments ceiling for 2014 was knowingly set at an unrealistically low level to satisfy the short-term political needs of certain government leaders.

Furthermore, the low ceilings and the rigidity of the MFF, caused in no small part by the desire of Member States to ‘lock down’ their national envelopes in agriculture and cohesion policy for the entire seven-year period, greatly reduces the Union’s capacity to respond promptly and efficiently to unforeseen events, a concern that was expressed throughout the procedure by the Parliament. In hindsight, it appears astonishing that the government leaders decided in 2013 to cut the MFF ceiling for Heading 3, which includes the Union’s asylum, migration and borders policies, but the real problem when the Syrian refugee crisis broke out in 2015 was that the MFF was insufficiently flexible to respond to events that could not have been programmed in 2013. Even then, rather than raising the MFF ceilings and calling up additional funds to the Union budget, the national governments resorted to trust funds<sup>106</sup> and coordination mechanisms<sup>107</sup> that left it to each Member State to decide how much it wished to contribute. In that regard, it is not only in the so-called ‘new areas of governance’ that preference is increasingly given to policy coordination among Member States over decision-making through classical ‘Community’ procedures.<sup>108</sup>

#### IV. CONCLUSION

The European Council assumed the dominant role in the special legislative procedure leading to the adoption of the MFF Regulation for 2014–20 even though Article 312(2) TFEU does not foresee any role for it in that procedure and Article 15(1) TEU states that it ‘shall not exercise legislative functions’. In practical terms, the European Council’s dominance distorted the institutional balance laid down in the

<sup>105</sup> Decision (EU) 2015/435 of the European Parliament and of the Council of 17 December 2014 on the mobilisation of the Contingency Margin [2015] OJ L72/4.

<sup>106</sup> Commission Decision of 10 December 2014 establishing a the ‘Madad’ Regional Trust Fund in response to the Syrian Crisis, C(2014) 9615; Commission Decision of 20 October 2015 establishing an Emergency Trust Fund for stability and addressing root causes of irregular migration and displaced persons in Africa, C(2015) 7293.

<sup>107</sup> See Commission Decision of 10 February 2016 on the Facility for Refugees in Turkey amending Commission Decision C(2015) 9500 of 24 November 2015, [2016] OJ C60/3; as well as the Common Understanding establishing a governance and conditionality framework for the Refugee Facility for Turkey, Council document 5845/16, 5 February 2016.

<sup>108</sup> C Bickerton et al, *The New Intergovernmentalism: States, Supranational Actors, and European Politics in the Post-Maastricht Era* (Oxford University Press, 2015).

Treaties for the adoption of the MFF Regulation and undermined the transparency and democratic accountability of the decision-making process.

In seeking to understand the continued reticence of the national governments to release the iron grip that they maintain, through the European Council, over the most important legislative instrument governing the expenditure side of the Union's budget, it is instructive to recall that the adoption of the first MFF in 1988 coincided with the introduction of the residual GNI-based own resource, which was necessary to cover a shortfall in Union revenue due to insufficient income from the traditional own resources.<sup>109</sup> Just as the system of own resources began to regress towards a system of *de facto* 'national contributions', so the government leaders seized direct control, though the European Council and the MFF, over the upper limits of the previously 'communitarised' expenditure side of the budget. In the intervening years, that regression has continued.<sup>110</sup> This suggests that efforts to promote a more 'communautaire' attitude on the part of the European Council and the Council to the expenditure side of the budget may need to be linked with a broader reform of the revenue side. The work of the High Level Group on Own Resources, established at the insistence of the Parliament, is finally serving to stimulate a debate on these important issues.<sup>111</sup>

Looking to the future, there is a real risk that the next MFF procedure will be characterised by interinstitutional power battles, refusals of consent and possible litigation over matters of procedure, as the Parliament, and maybe the Commission, push back against the dominance of the European Council and seek to oblige the national governments to come to terms with the fact that the MFF is now a legislative matter. Yet, what is perhaps most needed right now is a wider, pan-European conversation, extending beyond the confines of the Brussels institutional bubble, on what the Union budget is for and how it should function. In that regard, the procedure leading to the adoption of the post-2020 MFF may present a timely opportunity to stimulate a broader debate. The Commission must present its proposal for the post-2020 MFF Regulation before 1 January 2018.<sup>112</sup> This means that the Commission's proposal will be on the table over one year ahead of the European parliamentary elections in May or June 2019.

In this context, it would be open to the European Political Parties to adopt positions in advance of the elections on the three questions that, according to Mr Van Rompuy, are customarily settled by the Heads of State and Government: How large is the pot? Where does the money come from? Where is the money spent? The respective European party positions could then be presented to the Union's

<sup>109</sup> See D Strasser, *The Finances of Europe* (Office for Official Publications, 1992), pp 93–94.

<sup>110</sup> See First Assessment Report of the High Level Group on Own Resources, European Commission, Brussels, 17 December 2014, which estimates at p 13 that 83% of Union revenue is derived from contributions from the national budgets through the GNI or VAT-based resources.

<sup>111</sup> *Ibid.* For a German contribution to the reflections, see T Buettner and M Thöne, *The Future of EU-Finances: Research Project for the Federal Ministry of Finances* (FIFO Köln, 2016). See also G Benedetto and S Milio (eds), *European Union Budget Reform: Institutions, Policy & Economic Crisis* (Palgrave Macmillan, 2012).

<sup>112</sup> Article 25 of the MFF Regulation 1311/2013, see note 12 above.

electorate as alternative options among which to choose. The key point in the MFF negotiations – the point at which the dossier was on the last occasion transmitted to the European Council – will fall in the second half of 2019, just as the Parliament’s ninth legislature enters into office with a fresh electoral mandate, on the basis of which it would be strongly placed to refuse consent for any draft MFF Regulation that diverges excessively from the majority view that emerges from the elections, as expressed in the post-electoral position adopted by the plenary.<sup>113</sup>

Ideally, any such initiative would be undertaken with the support of the Heads of State or Government, the vast majority of whom are also active in their European political parties and who gather in party caucuses to coordinate their positions in advance of every European Council meeting. Just as the European parties play a key role in ensuring that any potential nominee for the post of Commission President enjoys the necessary majority support across both the European Council and the Parliament in the post-electoral nomination and election process under Article 17 TEU, so any European political party, or coalition of European political parties, holding majorities across the European Council and the Council, on the one hand, and the European Parliament, on the other, would be strongly placed to get its positions on the MFF adopted at Union level in a coordinated manner.<sup>114</sup>

In the longer-term, possibilities for reducing the duration of the MFF to five years and aligning it with the cycle of institutional renewals, in such a way that the MFF becomes a key issue in all European election campaigns, could be explored.<sup>115</sup> European elections focused on the MFF and the Union’s policy agenda for the next programming period could even develop into that much sought-after moment in Union’s civic calendar where citizens can enjoy a direct influence over Union policy choices.<sup>116</sup> In a similar vein, national parliaments could intensify their cooperation with a view to giving greater prominence to the common European good in the elaboration of national negotiating positions.

Ultimately, Member State interests, whether represented through the European Council or the Council, will continue to play a dominant role in the elaboration of the MFF, but a complementary deliberation oriented along pan-European and party political rather than national lines and given expression through the European elections and the post-electoral position of the Parliament could serve to mitigate the more negative consequences of that dominance by enhancing the transparency and democratic accountability of the process and increasing the likelihood that the general interest and real budgetary needs will be taken into account to a greater extent in future MFF procedures.

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<sup>113</sup> This position could take the form of an Interim Report under Rule 99(3) of the Rules of Procedure.

<sup>114</sup> As suggested in general terms in N Peñalver García and J Priestley, *European Political Parties: Learning from 2014, Preparing for 2019*, (Notre Europe, 2015) Policy Paper 132.

<sup>115</sup> Thus also avoiding a repeat of the situation where the eighth legislature of the European Parliament is bound for the entirety of its term of office, from 2014–2019, by an MFF Regulation on which it did not deliberate.

<sup>116</sup> JHH Weiler, ‘In the face of Crisis: Input Legitimacy, Output Legitimacy and the Political Messianism of European Integration’ (2012) 34 (7) *European Integration* 825, p 829.