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Panel 'Inside the EU institutions (III): Influence in and beyond Inter-institutional Relations'.

When Agreements Lead to Conflict:
Interinstitutional Agreements and the Institutional
Balance, a Coherent Relationship?

Desmond Johnson

University of Copenhagen
Faculty of Law
PhD Research Fellow

I. Introduction

The institutional balance is the quintessential concept involving interinstitutional relations among European Union (EU) institutions.¹ Designed to ensure and maintain an apposite distribution of powers between EU institutions, the concept was established by the Court of Justice of the European (CJEU) in 1958 in the notorious *Meroni* decision.² Since then, vigorous debates that are among the most contentious in the EU have occurred over the precise meaning of the concept and its legal, political, governance, and decision-making implications in the EU.³

Fundamental issues involving the institutional balance include establishing or determining what precisely the balance is, which institutional actors can alter the balance, and how, or through what mechanisms institutional actors can alter the balance. What is extremely evident in the instruments completed by the main EU institutions, case law governing the relationship between institutions, and academic literature is that a clear answer to these questions does not currently exist in the EU. Importantly, key interinstitutional disputes in the EU involve the ability and the mechanisms available for institutional actors to alter the institutional balance, either through means within the formal rules of the Treaty or through more informal mechanisms outside the Treaty Revision procedure.

A vital aspect of the debates on the institutional balance, include what instruments or mechanisms can alter the balance. Interinstitutional agreements are instruments that have arguably altered the balance in the EU. Intended to enhance the relations between the main institutions and provide a

¹ When referring to the EU, this paper also includes its predecessors, the European Economic Community and European Community, unless otherwise stated.

² Though the ECJ did not actually utilize the term institutional balance in *Meroni*, the principle was established in that Case when the Court ruled “the objective set out in article 3 are binding not on the High Authority, but on the “institutions of the Community ... within the limits of their can be seen in the balance of powers which is characteristic of the institutional structure of the Community a fundamental guarantee granted by the Treaty in particular to the undertakings and associations of undertaking to which it applies.” Case 9/56 *Meroni & Co v High Authority of the European Coal and Steel Community*, (1958) ECR; Case 70/88 *European Parliament v Council (Chernobyl)*; Case 138/79, *Roquette Freres v. Council*, (1980) and Case 139/79, *Maizena v. Council* (1980).

³ As Jean-Paul Jacque states “The balance between the institutions can be envisaged in two different ways, one legal, the other political. From a legal point of view, institutional balance is a constitutional principle which must be respected by the institutions and the Member States; infringements may be condemned by the Court of Justice. From a political view, it can be envisaged as a means of describing the way the institutions is organized.” see, Jacque, J.P. *The Principle of Institutional Balance*. Common Market Law Review 41 (2004). Pp. 383-391, p.383; Craig, P. *Institutions, Power and Institutional Balance in the Evolution of EU Law*. Oxford University Press. (2011). pp. 41 – 84; Smismans, S. *Institutional Balance as Interest Representation. Some Reflections on Lenaerts and Verhoeven* (2002) in *Good Governance in Europe’s Integrated Market*, Oxford: Oxford University Press, pp. 89-108: available online at <http://users.pandora.be/stijnsismans>.

smooth functioning of the EU institutional framework, such agreements also provide an excellent example of situations where intense interinstitutional disputes occur. Evidently, all interinstitutional agreements do not provide for the smoother functioning of the EU institutional framework. Instead, but some agreements may actually initiate interinstitutional quarrels.⁴ So what happens when the main EU institutions have a disagreement over the legality of certain provisions of an interinstitutional agreement or the impact of certain provisions on the institutional balance? This leads to key questions that increase interinstitutional tensions, instead of augmenting cooperation. Vivid illustrations of the interinstitutional debates over these agreements are found in disputes over their function, validity, legality, as well as what is their impact, if any, on the institutional balance.

Such complex issues are found in various types of interinstitutional agreements, but the 2010 Framework Agreement on the relations between the European Parliament and the Commission provides a clear illustration of such interinstitutional conflict and is used to demonstrate the uncertainty surrounding the interinstitutional agreements after the Lisbon Treaty. This is evident based on the different institutional perspectives regarding the legal and political implications of the Framework Agreement and its impact on the institutional balance.⁵ The uncertainty regarding the ramifications of interinstitutional agreements and their impact on the institutional balance is increasingly relevant since various stakeholders, ranging from institutions, scholars, practitioners, and the EU citizenry have placed a greater emphasis on establishing methods to enhance good governance in interinstitutional relations in the EU.

The main thesis of this article is that a new interinstitutional agreement framework must be established to create a more coherent interinstitutional agreement framework, address interinstitutional issues that lead to uncertainty in the current framework, and explicate the legal and political implications such agreements have on the institutional balance. The need for a new structure is demonstrated through an analysis of the 2010 Framework Agreement and the different institutional perspectives provided by the European Parliament, the Commission, and the Council on the Framework Agreement's impact on the institutional balance.⁶ Although, the Lisbon Treaty has recently modified the interinstitutional agreement structure by providing in the main text of the Treaties a legal basis for interinstitutional agreements, article 295 TFEU the ambiguity surrounding the Agreements' impact on the

⁴ See, Interinstitutional Agreement between the European Parliament, the Council, and the Commission on budgetary discipline and improvement of the budgetary process including the EP resolution on the conciliation. O.J. 1999 No. L 185, 33 v. 15.7.1988, No L 185, p. 33 of.7.1988; Interinstitutional Agreement of the European Parliament, Council, and the Commission on "Better Regulation". AO.J. 2003 No. C 321, c.31.12.2003. Comitology, Budget, other Interinstitutional Agreements

⁵ See, the 2010 Framework Agreement on Relations between the European Parliament and the Commission. 20.11.2010, L 304/47; the Council Statement on the Framework Agreement on relations between the European Parliament and the Commission. 23.10.2010. C 287/1

⁶ These three institutions are collectively referred to as the institutional triangle. See, Jacques, J.P. *The Principle of Institutional Balance*. Common Law Review 41: 383-391, 2004.

institutional balance demonstrates changes to the existing structure are necessary.

The aim of this article is to provide a better understanding of the uncertainties and ambiguities that exist in the current relationship between interinstitutional agreements and the institutional balance, demonstrating that a new interinstitutional agreement structure needs to be developed to clarify the current structure. Importantly, the Framework Agreement demonstrates the importance of understanding the institutional perspectives, expectations, and viewpoints the various EU institutions regarding the conceptualization of the institutional balance, as well as their understandings of the interinstitutional agreement structure.⁷ The unilateral and multilateral actions completed by the main institutions illustrate how the various conceptualizations of the institutional balance by the main institutions shape interinstitutional dynamics and the relations among the institutions.⁸ This conceptualization is often formed when the institutions complete unilateral and multilateral actions, which present their own views on the respective roles and functions of each institution and how the institutions should interact with one another. Such unilateral and multilateral actions frequently reveal an institution's perspective, particularly with issues related to the institutional balance.

The structure of the paper flows as follows: at the outset a very brief overview of the concept known as the institutional balance is provided, along with the function and role of interinstitutional agreements to illustrate their the relationship between the two. This succinct discussion on the connection between interinstitutional agreements and institutional balance demonstrates why the 2010 Framework Agreement illustrates the challenges associated with deciphering the legal and political consequences of such agreements, as well as determining the legitimacy of using such agreement that may alter the institutional balance in a manner that is not fully set out in the Treaties. Next, the article moves on to the Framework Agreement showing that the Agreement is an excellent illustration of an interinstitutional agreement that highlights pressing issues and led to increased tensions. Finally, the article concludes by addressing whether a new interinstitutional agreement structure is necessary.

⁷ By main institution, the paper refers to the European Commission, the European Parliament, the European Council, the Council of Ministers and the Court of Justice of the European Union. Though the decision-making institutions with legislative competence, those in the institutional triangle are the primary focus in this article. Importantly, this does not include every institutional entity within the EU institutional framework. For instance, the European Central Bank, the Court of Auditors Ombudsman and National Parliaments, among others are not covered in this paper.

⁸ By unilateral action, the paper refers to actions that can be completed autonomously by one main EU institution, without the assistance of another institutional entity. Unilateral actions consist of codes of conduct, recommendations, opinions, resolutions, conclusions and certain soft law instruments, and play a fundamental role in both the formal and informal decision-making process within the EU. Alternatively, multilateral action refers to actions that can only be completed with the assistance of another institutional entity; examples include interinstitutional agreements and joint declarations.

Accordingly, the article deciphers institutional perspectives from the main institutions with legislative functions in the EU, the European Parliament, the Commission, and the Council, also referred to as the institutional triangle, with regard to the Framework Agreements impact on the institutional balance. This occurs in order to address the following questions: First, what is the relationship between interinstitutional agreements and the institutional balance? Second, are the legal and political implications of the Framework Agreement and its impact on the institutional balance clear? Thirdly, is a modification to the existing interinstitutional agreement framework necessary to clarify the relationship between the interinstitutional agreements and the institutional balance?

II. The Relationship Between Interinstitutional Agreements and Institutional Balance: Ambiguous or Coherence?

1. The EU's Conceptualization of Balance: the Institutional Balance

Balance is in the eye of the beholder. Each institutional stakeholder has their own view about their role and function in the EU institutional framework, as well as how each institution relates to one another. As a result, a perplexing problem frequently occurs in the EU when the numerous institutional stakeholders have different institutional perspectives on the institutional balance. The noted scholar, Hellen Wallace, demonstrates the difficulty involved with deciphering a clear and coherent conceptualization of the balance when stakeholders have different notions of the concept of institutional balance when stating “these varied images suggests that we are unlikely to find a clear notion of “institutional balance” within the EU political system”.⁹ As Wallace suggests, in reference to discussions on institutional reforms, the debate surrounding the institutional balance and the appropriate manner in which to modify the balance can be conceptualized differently depending on the perspectives of the actors involved.¹⁰ Further, “the absence of detailed rules in the Treaty to regulate the relations between the institutions has been described as the source of a greater degree of institutional conflict in the Community than would be expected in a typical constitutional system.”¹¹ Indeed, Stijmans proclaims “the gap between institutional reality and formal constitution as expressed by the institutional balance is so big that one can question whether the latter can (still) be assumed to ensure the rule of law and the legitimacy of European governance.”¹² Clearly, the institutional issues regarding the relationship between explicit Treaty provisions and interinstitutional practice are essential when evaluating the institutional balance and the proper mechanisms in place to alter it. Therefore, it is evident that the array of institutional perspectives and the lack of precision in Treaty provisions can lead to substantial confusion in regards to the relationship

⁹ Wallace, H. *The Council: An Institutional Chameleon? Governance: An International Journal of Policy, Administration, and Institutions*, Vol. 15, No.3. (2002), pp. 325 -344. p 327

¹⁰ Wallace, H. *The Council: An Institutional Chameleon? Governance: An International Journal of Policy, Administration, and Institutions*, Vol. 15, No.3. (2002), pp. 325 -344. p 327

¹¹ See, Bradley, K. *Maintaining the Balance: The role of the Court of Justice in Defining the Institutional Position of the European Parliament*. *Common Market Law Review* 24. (1987) (41-64). pp 41

¹² Smismans, S. (published in Christian Joerges and Renaud Dehousse (eds) (2002). *Good Governance in Europe's Integrated Market*, Oxford: Oxford University Press, pp. 89-108: available online at <http://users.pandora.be/stijmsismans>. p. 3

between interinstitutional agreements and the institutional balance, not just among EU and Member State stakeholders, but also among scholars, citizenry, and interested stakeholders outside the EU.

2. The Changing Landscape of Interinstitutional Agreements Post Lisbon

Interinstitutional agreements are a vital part of EU interinstitutional relations, influencing various aspects of EU decision-making.¹³ Intended to reduce the possibility of interinstitutional conflict and ensure smooth interinstitutional relations, such agreements aim to create dynamic solutions to pressing institutional issues, while also improving EU governance by making decision-making process more transparent, effective, efficient, and legitimate.

Significantly, the main institutions that complete such agreements aim to improve their own respective institutional position, as well as governance within the EU. This explains why it is imperative to comprehend that each institution has their own specific objectives for participating in such agreements. Thus, institutional actions, whether unilateral or multilateral, are institutional perspectives that express the views of one institution in a unilateral act or two or more institutions in a multilateral act.

Importantly, interinstitutional agreements are increasingly relevant, not only growing in number, but also in significance, as they impact a variety of aspects of interinstitutional dynamics and involve extremely contentious policy areas that lead to spirited interinstitutional debates. Despite the substantial amounts of literature available on the EU institutional framework, literature involving the relationship and effect of interinstitutional agreements on the institutional balance is minimal. Often overlooked originally, interinstitutional agreements now cover a wide-range of policy areas including budgetary procedures, comitology, better-lawmaking, and external relations, to name a few.¹⁴ These debates involve extremely contentious policy areas that lead to spirited interinstitutional debates.

Despite frequent usage of interinstitutional agreements in the EU, such agreements have only recently been part of the primary law in the Union.¹⁵ Importantly, the question whether interinstitutional agreements had a formal legal basis was continually asked prior to the Lisbon Treaty and the latest Treaty revision clarifies this issues. Interinstitutional agreements have gone from an informal agreement that included an exchange of letters between the Presidents of the decision-making institutions to more formalized agreements that involve detailed interinstitutional negotiations.¹⁶ This remarkable institutional development demonstrates the great importance the decision-

¹³ See, Kietz, D. and Maurer, A. *The European Parliament in Treaty Reform: Predefining IGCs through Interinstitutional Agreements with the Commission and Council*. Paper Based on EU-Consent Workshop `The Commission and the European Civil Service. (2006). pp. 1-9

¹⁴ For an extensive look at instruments classified as interinstitutional agreements, until 2005. See, Hummer, W. *Annex: Interinstitutional Agreements Concluding During the Period 1958 – 2005*. European Law Journal. Volume 13, Issue 1. (2007) pp. 92–109.

¹⁵ See, Declaration No. 3 to Article 10 TEC appended to the Nice Treaty

¹⁶ See, Monar, J. *Interinstitutional Agreements: The Phenomenon and its New Dynamics after Maastricht*. Common Market Law Review. 31 (1994) pp. 693-719 p. 696.

making institutions currently place on interinstitutional agreements and their increasing ability to shape EU governance. Furthermore, interinstitutional agreements are now explicitly mentioned in the Treaties in article 295 TFEU of the Lisbon Treaty, as opposed to an appendix as it was in Declaration No. 3 of the Nice Treaty.¹⁷ A description of some of the reasons why interinstitutional agreements are used in the EU is now provided.¹⁸

3. Why Do institutions Use Interinstitutional Agreements?

An observer of the EU institutions may ask whether it is an inherent contradiction of EU law, if Union institutions are capable of concluding interinstitutional agreements that alter the institutional balance? This is a fundamental issue involving EU governance, since interinstitutional agreements generally go through a much less strenuous decision-making procedure than the ordinary legislative procedures in the Treaties or in the Treaty Revision procedure.

In the EU, interinstitutional agreements may provide a less effective method to ensure institutional accountability, than the ordinary legislative procedure or Treaty revision procedure, perhaps allowing institutions to sidetrack checks that are normally in place when more formal procedures are used. Good governance and democratic legitimacy issues are of paramount importance when the institutions use decision-making procedures provided for in the Treaties and perhaps even more important when decision-making procedures are not provided for in the Treaty or instruments, such as interinstitutional agreements are used, which still do not have a clear legal status despite the inclusion of such agreements in the Treaties.¹ This is especially problematic, since the lack of transparency, accountability, and the perceived democratic deficit are very significant issues in which the EU and its institutions are often rigorously criticized, as a result. Thus, institutions that are not involved a particular agreement, may have less time to understand and scrutinize the agreement at issue and then make well-informed decisions regarding the implications of such an agreement.

Despite the various perspectives on the institutional balance and the uncertainty involving interinstitutional agreements it is clear that common objectives exist for EU institutions to complete interinstitutional agreements, instead of other instruments found in the Treaties.¹⁹ For instance, in intergovernmental conferences and Treaty Revision Procedures the European Parliament and the Commission have more reserved roles, though both institutions may suggest changes to the Treaty, their role is not determinative of the final outcome on Treaty provisions.²⁰ This is of profound importance, as it helps explain why the two decision-making institutions, which are generally considered to represent European interests in the EU, the European Parliament and the Commission, often seek less formal mechanisms than the more strenuous ordinary legislative process found in the

¹⁷ 295 TFEU

¹⁸ See, Chapter on Soft Law, Klabbers, J. *Informal Instruments Before the European Court of Justice*. *Common Market Law Review* 3 (1994): pp. 997-1004.

¹⁹ See, Chapter on Soft Law, Klabbers, J. *Informal Instruments Before the European Court of Justice* *Market Law Review* 31: (1994) pp. 997-1004.

²⁰ See, Article 48 TEU

Treaties in an attempt to augment governance in the EU and improve their institutional position. Since these two institutions have few formal powers to ensure their objectives are met and prerogatives protected at intergovernmental conferences or during the Treaty revision process²¹, at least compared to the ordinary legislative process, they regularly attempt to bypass the more demanding decision-making procedures in article 289 TFEU and 294 TFEU of the Treaties.

Alternatively, the Council, European Council, and the Member State have significant formal powers during intergovernmental conferences and the Treaty revision Procedure. Throughout most of European integration, this has made it easier for the Council to protect its interests, prerogatives, and attempt to maintain its institutional position when modifications to the institutional framework occur through more formal methods. This is perhaps the most important reason for the Council to resist the use of less formal measures, such as certain interinstitutional agreements,²² since it has generally attempted to maintain the status quo, where it has traditionally held a preferential position compared to the Parliament, at least with respect to legislative and budgetary matters. Though, numerous changes to the Treaty have occurred over the last thirty years, particularly with the introduction of the Single European Act, granting the Parliament more competences in such fields and eventually making the default position in the EU, where the European Parliament and the Council operate as co-legislators.²³

Thus, these contentious issues over the proper method to enact legislation are classic illustrations of the numerous debates between the European Parliament and the Council regarding the institutional balance and the correct approach to decision-making. Importantly, a common theme involving interinstitutional tensions has been the European Parliament's desire to obtain coequal legislative competences with the Council, which includes enhancing the Parliament's decision-making competences in all areas. The Parliament has utilized both formal rules explicitly in the Treaties and informal rules outside the Treaties in order to augment its institutional position. The Council, on the other hand, has been more reluctant to use such a dynamic approach, instead tending to use means that are formally recognized in the Treaties as it attempts to maintain its institutional position. Meanwhile, the Commission's approach seems to lie somewhere in between not necessarily trying to augment or maintain its competences in all areas, but more concerned with protecting areas of great self-interest, for instance, soft law or comitology. Nonetheless, the Commission regularly participates in interinstitutional agreements if it is under the impression such instruments enhance EU governance or augment its institutional position.²⁴

To conclude this section, it is evident that the unilateral and multilateral institutional actions completed by the institutions in the interinstitutional

²¹ See, Article 48 TEU

²² See, the 2010 Framework Agreement on Relations between the European Parliament and the Commission. 20.11.2010.

²³ See, Article 289 TFEU and 294 TFEU

²⁴ While the Framework Agreement did not necessarily improve the Commission's permission it did lead to the approval of the Commission by the European President.

triangle attempt to augment their institutional position. As later sections demonstrate, the institutions are often at add odds with one another over the impact of the measure and how it impacts the institutional balance. This often presents an unclear framework with regard to how certain instruments impact the institutional balance.

4. Unique Challenges Presented by Interinstitutional Agreements

The legal status of interinstitutional agreements has been assessed sparingly in the literature, but a few sources have completed detailed analysis.²⁵ However, much of this analysis occurred prior to the enactment of the Lisbon Treaty, highlighting the need for more research in the area. A key example is Hummer's extensive empirical examination of interinstitutional agreements where he "endeavored to discover and document IIAs".²⁶ Moreover, scholars in the field including Driessen, Monar, Mauer, and Kietz consider vexing issues associated with determining the legal effects of interinstitutional agreements from various approaches.²⁷ For instance, existing literature has documented the diversity of interinstitutional agreements, which makes it difficult to assess their legal status.²⁸ As Driessen states, "the legal nature of interinstitutional arrangement differs wildly."²⁹

Furthermore, the ambiguity surrounding the proper definition of interinstitutional agreements, lack of precision regarding the role and function of such agreements are compounded by the variety in type, form, participating parties, designation, and scope of interinstitutional agreements. This complicates matters when one attempts to categorize interinstitutional agreements and determine their legal and political implications.

The complexity is magnified by the increasing use of various instruments that are regularly categorized as interinstitutional agreements, without a clear explanation of the legal and political implications of the divergent instruments. For instance, Resolutions, Solemn Declarations, Reports, Programs, Interinstitutional Declarations, Communications, Recommendations, Codes of Conduct, Guidelines, and Interpretative Notices are examples of instruments that may fit under a broad definition of an

²⁵ See, This includes in a detailed study of the 123 agreements throughout the history of the European Union that could be considered interinstitutional agreements, up until the time of the study. Hummer, W. *From 'Interinstitutional Agreements' to 'Interinstitutional Agencies/Offices'?* Driessen, B. *Interinstitutional Conventions in EU Law*. Cameron May. (2007) European law Journal, Vol. 13 No. 1. (2007) pp. 49-53 p.49; Kietz, D. and Maurer, A. *The European Parliament in Treaty Reform: Predefining IGCs through Interinstitutional Agreements with the Commission and Council*. Paper Based on EU-Consent Workshop 'The Commission and the European Civil Service. P. 1-9

²⁶ Hummer, W. *From 'Interinstitutional Agreements' to 'Interinstitutional Agencies/Offices'?* European law Journal, Vol. 13 No. 1 (2007) pp. 49-53 p. 49

²⁷ Hummer, W. *From 'Interinstitutional Agreements' to 'Interinstitutional Agencies/Offices'?* European law Journal, Vol. 13 No. 1 (2007) pp.49 -53, p. 49

²⁸ Driessen, B. *Interinstitutional Conventions and Institutional Balance*. European Law Review. 33 (2008). pp. 550-562

²⁹ Driessen, B. *Interinstitutional Conventions and Institutional Balance*. European Law Review. 33 (2008). pp.550-562

interinstitutional agreement.³⁰ This often complicates matters when trying to determine the legal characteristics of an interinstitutional agreement, since these types of agreements may have opposing legal effects.³¹

Nevertheless, perhaps the most important reason why determining with any true precision the implications of EU instruments is a thorny issue is that the legal nature and legal effects of an instrument do not necessarily coincide.³² What often becomes more evident after evaluating the literature and assessing the impact of formal and informal measures in the EU is that in certain situations the binding or nonbinding distinction (or legal nature) is not always pertinent when discussing the impact of measures (legal effect) and may only act as a nominal distinction, perhaps even acting as a distraction, under certain circumstances. Instead, the legal effects, or lack thereof, that certain instruments have and others do not obtain may be of greater significance.

Moreover, what is also of great importance is assessing whether the current interinstitutional agreements structure allows such agreements to alter the institutional balance when implemented, regardless of whether the instrument is binding or nonbinding. Clearly, the modification of the institutional balance can occur through formal means, such as Treaty revisions, but it is debatable whether less formal mechanisms can alter the institutional balance by affecting the way institutions operate in practice. Some scholars have attributed the complexity involved with determining the legal characteristics in theory and in practice of interinstitutional agreements to the ambiguous nature of the agreements, that are somewhere between legal, quasi-legal, and political. As Monar argues, certain interinstitutional agreements fall somewhere between political undertakings and hard law.³³ Exactly where the agreements fall is unclear. Driessen argues that this makes interinstitutional agreements similar to Constitutional Conventions in the Member States.³⁴

Moreover, similar to other informal instruments used by the core legislative decision-making institutions, a central issue that frequently appears in the literature addressing interinstitutional agreements is the attempt to establish a general principle that states whether interinstitutional agreements are legal,

³⁰ See, Klabbers, J. *Informal Instruments Before the European Court of Justice*. Common Market Law Review 31: 997-1023; also, Senden L.A.J. *Soft Law and its Implications for Institutional Balance in EC*. Utrecht Law Review.

³¹ See, Klabbers, J. *Informal Instruments Before the European Court of Justice*. Common Market Law Review 31: 997-1023; See, Florian von Alemann, *Die Handlungsform der interinstitutionellen Verienbarung*. (2006) pp. 459 – 470 . Summary in English *Interinstitutional Agreements: A Legal Instrument of EU Constitutional Law*.

³² For a detailed analysis of the way the Court addresses informal instruments. Klabbers, J. *Informal Instruments Before the European Court of Justice*. Common Market Law Review 31 (1994): pp. 997 – 1023,

³³ See, Monar, J. *Interinstitutional Agreements: The Phenomenon and its News Dynamics After Maastricht*. Common Marker Law Review 31 (1994): 696 – 704.

³⁴ Driessen, B. *Interinstitutional Conventions and Institutional Balance*. European Law Review. 33 (2008). pp.550-562

quasi-legal, or political.³⁵ By determining the legal nature, or lack thereof, of an interinstitutional agreement it is often assumed that the practical implications of the distinction between these types of instruments is then evident. For example, if an instrument is of a legally binding nature it is presumed it must have legally binding effects and if an instrument is of a political or nonbinding nature than it fails to be of a legal nature and therefore has no legal effects. Unfortunately, this is not always the case and the interinstitutional agreements structure is closer to gray than a black or white dichotomy.

Notably, albeit to a much lesser extent, the literature has examined how the unclear legal status of interinstitutional agreements also complicates the ability to accurately assess their impact on the institutional balance, if any.³⁶ Disagreements exist in the literature regarding what types of instruments constitute an interinstitutional agreement, which lead to reservations over whether such agreements alter the institutional balance.³⁷ Nevertheless, numerous scholars have concluded that interinstitutional agreements actually change interinstitutional dynamics in practice and as a result, the institutional balance; according to various sources, this frequently occurs primarily to the benefit of the Parliament and to the detriment of the Council.³⁸ As Mauer and Kietz argue, when describing Hummer's work and the European Parliament's continuous ability to obtain greater institutional competences using different methods throughout the Treaty reform process, "despite considerable variation in denomination, form, content and impact, IIAs nevertheless have one common feature: they grant the European parliament decision-making competences which were not contained in the founding treaties."³⁹ Of course, the European Parliament counter this argument by proclaiming that interinstitutional agreements they take part in do not modify the institutional balance, but instead clarify how the participating institutions to an agreement cooperate within one another in order to augment governance.

The uncertainty regarding the legal and political implications of interinstitutional agreements has led to various accounts as to what precisely are the legal effects of interinstitutional agreements and, if any, whether it is permissible for them to alter the institutional balance. Though the substantial effort put forth by EU institutions and Member States, during the arduous ratification process, first, during negotiations for the failed Constitutional

³⁵ See, Florian von Alemann, *Die Handlungsform der interinstitutionellen Verienbarung*. (2006) pp. 459 – 470 . *Summary in English Interinstitutional Agreements: A Legal Instrument of EU Constitutional Law*

³⁶ Supra 5, supra 2,

³⁷ Driessen, B. *Interinstitutional Conventions in EU Law*. Cameron May. (2007) *European law Journal*, Vol. 13 No. 1. (2007) pp. 49-53 p.49; Kietz, D. and Maurer, A. *The European Parliament in Treaty Reform: Predefining IGCs through Interinstitutional Agreements with the Commission and Council*. Paper Based on EU-Consent Workshop 'The Commission and the European Civil Service'. P. 1-9

³⁸ See, Kietz, D. and Maurer, A. *The European Parliament in Treaty Reform: Predefining IGCs through Interinstitutional Agreements with the Commission and Council*. Paper Based on EU-Consent Workshop 'The Commission and the European Civil Service'. p. 1-9

³⁹ See, Kietz, D. & Mauer, A. *The European Parliament in Treaty Reform: Predefining IGCs through Interinstitutional Agreements with the Commission and Council*. Paper Based on EU – Consent Workshop 'The Commission and the European Civil Service'.

Treaty and later during the negotiations, ratification, and implementation of the Lisbon Treaty is commendable, numerous institutional quandaries involving interinstitutional agreements are still left unresolved after the most recent treaty revision. As shown in more detail later, the complexity illustrated with the recent Framework Agreement on Relations between the Parliament and the Commission demonstrates that the demarcation line between legal and political still remains unclear. Thus, the new legal basis, article 295 TFEU fails to clarify the relationship between the interinstitutional agreements and the institutional balance.

5. Institutional Innovations in the Lisbon Treaty

Interinstitutional agreements have commonly been referred to as informal instruments.⁴⁰ However, this portion of the paper addresses how this designation, whether referring to legal nature or legal effects, is inaccurate or at least incomplete, not just because some interinstitutional agreements prior to the Lisbon Treaty had a legal basis that could be derived from the Treaties, under Declaration No. 3 appendixes to the Nice Treaty, but also because the Lisbon Treaty creates the possibility of a more formal nature for *certain* interinstitutional agreements, under Article 295 TFEU.

When considering such issues, it is important to ask the question, does the Lisbon Treaty provide a coherent framework in which to assess the legal and political implications of interinstitutional agreements? What requirements do institutions have to fulfill to satisfy article 295 TFEU and what does this mean for the institutional balance? Evidently, the Lisbon Treaty attempts to clarify the legally status of interinstitutional agreements and establish if and how, such agreements can alter the institutional balance.⁴¹ The institutional innovations regarding interinstitutional agreements in the Lisbon Treaty are illustrated most prominently in article 13.2 TEU and even more specifically, article 295 TFEU.⁴²

The former codifies the most important case law from the Court of Justice of the European Union involving the institutional balance, such as the notorious *Chernobyl* decision, where the Court describes most explicitly its definition of the term institutional balance. In addition, article 13.2 TEU obliges the institutions to practice mutual since cooperation.⁴³ Meanwhile, the latter expressly grants the ability for the European Parliament, the Commission, and the Council to consult one another and then conclude interinstitutional agreements that maybe of a binding nature, as long as such agreements are in compliance with the Treaties.

This section demonstrates that despite the laudable effort by the framers of the Lisbon Treaty, most notably the EU institutions and the Member States to

⁴⁰ See, Klabbers, J. *Informal Instruments Before the European Court of Justice*. Common Market Law Review 31 (1994). pp.997.

⁴¹ See, Riekman, S. *The Cocoon of Power: Democratic Implications of Interinstitutional Agreements*. European Law Journal, Vol. 13, No. 1 (2007), pp. 4-19; See, Monar, J. *Interinstitutional Agreements: The Phenomenon and its New Dynamics after Maastricht*. Common Market Law Review 31 (1994). pp. 693-719, p. 696.

⁴² Article 13.2 TEU and Article 295 TFEU

⁴³ Article 13.2 TEU and Case C-70/88 *European Parliament v Council (Chernobyl)*

elucidate the legal characteristics of the interinstitutional agreements the Treaty creates a whole range of captivating issues that may leave the relationship between interinstitutional agreements and the institutional balance in the EU even more unsettled than prior to the implementation of the Treaty. Thus, to address whether interinstitutional agreements have legal effects after the implementation of the Lisbon Treaty, several issues must be examined: important questions still remain after Lisbon, regarding the number of parties needed to complete interinstitutional arrangements, the binding or nonbinding nature of instruments, as well as their legal, quasi-legal, or political implications both in theory and in practice. These issues are crucial as they have the ability to impact the behavior of the institutions, their interaction with one another, and the institutional balance.

6. The Changing Landscape for Interinstitutional Agreements: Assessing Article 295 TFEU and Article 13.2 TEU as the Legal Basis

An essential element of EU law is that all measures must have a proper legal basis in order for the EU, and therefore EU institutions to take action.⁴⁴ Prior to the Lisbon Treaty it was often intensely debated whether the interinstitutional agreements had a formal legal basis. “Indeed, in other case law concerning interinstitutional agreements, such as 1986 Budget and Greece v. Council (C-204/86), the Court essentially referred to the political process.⁴⁵ Thus, an intriguing issue involves the implications of the Treaty explicitly, providing for the possibility that interinstitutional agreements may be of a binding nature under article 295 TFEU. The text of article 295 TFEU reads as follows:

“The European Parliament, the Council and the Commission shall consult each other and by common agreement make arrangements for their cooperation. To that end, they may, in compliance with the Treaties, conclude interinstitutional agreements which may be of a binding nature.”⁴⁶

As aforementioned, the Lisbon Treaty attempts to provide a clearer legal status for interinstitutional agreements. The institutions can now refer to the Treaty, more specifically to article 295 TFEU as the legal basis when negotiating and concluding, such agreements. Although the article attempts to elucidate the proper function and role of interinstitutional agreements in EU interinstitutional relations, as well as the parties involved in such agreements, the Lisbon Treaty only partially achieves this objective. Nevertheless, the Treaty does resolve some issues involving interinstitutional agreements, primarily that the three institutions *may* complete interinstitutional agreements that *may* be of a binding nature, after consultation with one another.

Yet, the Treaty does not explicitly address whether all three institutions must participate and conclude an interinstitutional agreement for it to be of binding

⁴⁴ Schutz R. *The European Community's Federal Order of Competences – A Retrospective Analysis*. Hart Publishing. (2009) pp. 63-92 p. 63

⁴⁵ See, *ibid*; Driessen, B., *Interinstitutional Conventions and Institutional Balance*. European Law Review 33. (2008). pp. 550 – 562

⁴⁶ Article 295 TFEU

nature or whether the three institutions may complete an interinstitutional agreement that is of a nonbinding nature? Similarly, the article does not address, if a bilateral agreement can be concluded as an interinstitutional agreement; nor whether it is possible for such a measure to be of a binding nature? Unfortunately, these fundamental questions are left unanswered by the Lisbon Treaty. This demonstrates that the Treaty has substantial shortcomings when it comes to clarifying the role and function of interinstitutional agreements.

Moreover, as De Witte points out, it is important that article 295 TFEU does not appear in the section of the Treaty that addresses legal instruments, but instead it is included in the section that addresses decision-making procedures.⁴⁷ This raises additional issues regarding the legal status of interinstitutional agreements. “So, IIA’s are seen as an ancillary legal mechanism to be used in the specific context of the inter-institutional decision-making procedures. That makes it questionable whether such agreements are a true legal instrument that could be used to deal with questions that have an extra-institutional dimension.”⁴⁸

This portion demonstrates that confusion still surrounds interinstitutional agreements in the aftermath of the Lisbon Treaty, regarding the legal status of such agreements remains unclear. EU stakeholders that participated in the Treaty revision process could have clarified the legal status by placing interinstitutional agreements in the section the legal acts of the Union in order to prevent such uncertainties. As it stands in the aftermath of the Lisbon Treaty, interinstitutional agreements are still in no mans’ land, neither truly legal nor completely political, instead the agreements still must be evaluated on a case by case basis.

7. Clarity Involving the Number of Institutions in an Interinstitutional Agreement after the Lisbon Treaty?

The issue involving the number of parties involved in an interinstitutional agreement is an important one, especially since a contradiction seems to appear between the explicit text of article 295 TFEU and some interpretations in the literature that allow for unilateral decisions and bilateral agreements to be considered interinstitutional agreements. For instance, in Hummer’s analysis of the interinstitutional agreements completed in the Union, he includes both unilateral and bilateral instruments.⁴⁹ Although it seems a paradox one would argue a unilateral instrument completed by one instrument should be considered an interinstitutional institutional agreement. As interinstitutional, at a minimum implies, if not explicitly, illustrates an agreement between at least two institutions. Meanwhile, unilateral instruments seems more like an intrainstitutional statement, documenting an

⁴⁷ See Chapter 2 Section 1 TFEU The Legal Acts of the Union and Chapter 2 Section 2 TFEU Procedures for the Adoption of the Adoption of Acts and Other Provisions; De Witte, B. *Legal Instruments and Law-Making*. The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty. Springer Wein New York. (2008). pp. 102-103

⁴⁸ De Witte B. *Legal Instruments and Law-Making*. The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty. Springer Wein New York. (2008). pp 102-103

⁴⁹ See, Hummer, W. *Annex: Interinstitutional Agreements Concluding During the Period 1958 – 2005*. European Law Journal Vol. 13, Iss.1, (2007). pp. 92–109.

institutions' perspective on a particular issue or addressing how different functions of the same institution shall interact with one another. As a result, it is less debatable whether a bilateral agreement between two members of the institutional triangle is an interinstitutional agreement. Though the legal and political implication, including its binding nature may still be intensely disputed, even after the implementation of article 295 TFEU. Declaration No. 3 appended to in the Nice Treaty attempted to clarify this issue by stating that all three institutions must conclude an instrument for it to be considered an interinstitutional agreement, but unfortunately this is left unclear in the Lisbon Treaty, once again demonstrating the uncertainty of such agreements leaving numerous issues unresolved.

Questions that remain after Lisbon include, is it a requirement for the three decision-making institutions listed in Article 295 TFEU Lisbon Treaty, to take part in every interinstitutional agreement? Can an institution that is excluded from an instrument or disapproves of an interpretation of an interinstitutional agreement go to Court and seek an action for annulment? What type of measure is formed when only two of the decision-making institutions participate and conclude an instrument? Do interinstitutional agreements have to follow a specific procedure before it is concluded or are there several procedures available; for instance, do all three institutions have to participate in the negotiations leading up to interinstitutional agreements?⁵⁰

The consequences of the number of parties involved in an interinstitutional agreement are significant. Trilateral interinstitutional agreements seem to be less contentious after their completion, though problems may still arise do to the implementation, or lack thereof, of certain provisions in an interinstitutional agreement. This is primarily because all three institutions are intimately involved in the negotiating process when a trilateral interinstitutional agreement is concluded; presumably, those representing the institutions raise objections if they disagree with a provision or are under the impression that provisions in the agreement harm the institution that they represent. Accordingly, both the European Parliament and the Commission are more likely to utilize the broader and more flexible definition that provides for bilateral measures to be designated as interinstitutional agreements. Meanwhile, the Council and the European Council seem to be increasingly in favor of trilateral agreements that include all three decision-making institutions with legislative functions. Perhaps, the main reason for this is that the Council does not want to be left out of discussions involving an important interinstitutional issue, if it determines that the institutional balance established in the Treaties may be modified. Now that a discussion involving some of the most pressing issues related to the institutional balance and interinstitutional agreements have occurred, the analysis shifts to a particular interinstitutional agreements, which is the 2010 Framework Agreements on relations between the European Parliament and the Commission.

⁵⁰ This is especially relevant when looking at areas where the Treaty grants the Council greater competence than the European Parliament and the former is not a party to an instrument. For example, bilateral measures permissible in areas that impact fields where the Council has primary decision-making authority, such as Common Foreign and Security Policy or international negotiations. See, the 2010 Framework Agreement on Relations between the Parliament and the Commission.

III. The Framework Agreement: Is a Clear Structure in Place to Decipher the Implications for the Institutional Balance?

1. Framework Agreements and Codes of Conduct: Interinstitutional Agreements Impacting Institutional Practices in the EU?

The existing Framework Agreement structure started in 1990. The initial agreement on the relations between the European Parliament and the Commission, a Code of Conduct Agreement, was designed to augment interinstitutional cooperation between the two institutions.⁵¹ After this Code of Conduct Agreement, an agreement has been completed between the two institutions every five years in order to govern their relations and augment interinstitutional cooperation between them. The second Code of Conduct Agreements was completed in 1995 and since then more detailed Framework Agreements completed in 2000 and 2005, before the latest one in 2010. This information on previous Framework Agreements is provided in order to put such agreements in their appropriate context among interinstitutional agreements, as well as describe how such instruments may impact the institutional balance. This occurs by illustrating the diverse nature of interinstitutional agreements and the potential for ambiguity in such agreements, even after the implementation of the Lisbon Treaty and more precisely article 295 TFEU that was designed to alleviate such concerns. This analysis allows for an assessment of whether a coherent interinstitutional agreement exists in the aftermath of the Lisbon Treaty.

The Framework Agreement be seen as another attempt in the long line of interinstitutional agreements that the institutions in the institutional triangle have used as an attempt to augment its institutional position. Notably, the institution that has been the most successful at augmenting its institutional position the most through interinstitutional agreements is the EP. By frequently working with the Commission, Council, or both the EP has been able to obtain competences that are not explicitly provided for in the Treaties. Of course, the European Parliament has not always been successful in its endeavor to attain greater co-equal legislative and budgetary matters. Nevertheless, it has been the European Parliament that has routinely been able to augment its institutional position by utilizing interinstitutional agreements as means to an end. First, the enacting an interinstitutional agreement or unilateral instrument that contains provisions that augment the European Parliament has been able then get those provisions into Intergovernmental Conference and then finally into Treaty.

2. Different Institutional Perspectives on the Framework Agreement

A salient point involving the different institutional perspectives on the Framework Agreement, is that institutional actions taken by the main institutions in the EU are not impartial, whether unilateral or multilateral, the actions are intended to augment the role, function, and competences of the

⁵¹ See, Code of Conduct of the European Parliament and the Commission to improve relations between the two institutions, including the balance of the application of the Code. 1990 04/03/1990 SG (90) D/30450, No. 09 829

applicable institution.⁵² This is crucial when assessing the impact, if any the Framework Agreement has on the institutional balance.

The Framework Agreement coauthored by the European Parliament and Commission states it “should be interpreted in conformity with the institutional framework as organized by the Treaties.”⁵³ Essentially, this means that the Agreement must comply with article 13.2 TEU and the institutional balance established in the Lisbon Treaty, regardless of whether the Agreement has legal effects, constitutes an interinstitutional agreement, or is merely considered a bilateral agreement that does not meet the requirements sets under article 295 TFEU. Evidently, both institutions understand the significance of this, as they proclaim “this Framework Agreement does not affect the powers and prerogatives of Parliament, the Commission or any other institution or organ of the Union but seeks to ensure that those powers and prerogatives are exercised as effectively and transparently as possible.”⁵⁴

In essence, the disagreement over the legality of the Framework between the European Parliament and the Commission on one hand, and the Council on the other, rest primarily on this point. If this is correct, that the “powers and prerogatives of Parliament, the Commission or any other institution or organ of the Union” are not altered the Framework Agreement must be deemed valid, as it would fail to alter the institutional balance. In what appears to be a rebuttal to allegations that the Council was surely to make, the Agreement is clear to indicate that according to the European Parliament and Commission’s viewpoint, not only is their institutional position the same as under the Lisbon Treaty in the Agreement, but also all other institutional entities are in an identical position, after the Framework passed. However, this is not necessarily the case, if the powers of any Union institution or organ are indeed altered in a manner that is incompatible with the Treaty as the Council claims, the Framework agreement must be annulled, as it would upset the institutional balance. The Council threatens to take legal action, if the European Parliament, the Commission, or both act in a manner that upsets the institutional balance according to the Council’s view. Despite the outcome of a potential case before the Court of Justice of the European Union or another solution to institutional questions concerning the Framework Agreement, the tensions over the particular institutional issues in the Framework Agreement have strained interinstitutional relations, perhaps

⁵² For an analysis of how the European Parliament have used interinstitutional agreements in various policy areas to augment their powers. See, “ One of the key features of the EU’s constitutionalization process has been the incremental parliamentarization – i.e. the increased delegation of supervisory, budgetary and legislative powers to the European Parliament (EP) – of more and more policy fields since the Single European Act (SEA) in 1987. In four Intergovernmental Conferences (IGCs) – 1985/1987, 1991/1993, 1996/1999, and 2000 – the EP has seen its own position strengthened.” See, Mauer, A, Kietz, D., Volkel, C. *Interinstitutional Agreements in the CFSP: Parliamentarization through the Back Door?* European Foreign Affairs Review 10 (2005). pp. 175- 195 p.175

⁵³ See, *the 2010 Framework Agreement on relations between the European Parliament and the European Commission*. Section D

⁵⁴ See, *the 2010 Framework Agreement on relations between the European Parliament and the European Commission*.

changing the way that these decision-making institutions interact with each other in the future.⁵⁵

Nonetheless, according to the European Parliament, the Agreement is “an important breakthrough for the Parliament in its cooperation with the Commission”.⁵⁶ The President of the European Parliament, Buzek, concurs, declaring that the Agreement addresses the changes made in the Lisbon Treaty granting it a better institutional position and that the Agreement is of particular importance because Europe needs to be led by dynamic institutions.⁵⁷ This seems particularly relevant in a time of great economic and political uncertainty in Europe and throughout much of the world, it is important the EU institutions have the ability to meet daunting challenges that occur. From this viewpoint, the Agreement provides the EU institutions the capability to meet rapidly changing circumstances, which the latest Treaty revisions were unable to take into account.⁵⁸ It is clear that the Commission has a similar interpretation also claiming the European Parliament’s role has increased with the latest Treaty revision. “It is evident that the increased rights and competences of Parliament under the new Treaty have in many ways an impact on our Institutions’ working relations.”⁵⁹ Essentially, both the European Parliament and the Commission argue that this agreement is designed to explicate how the two institutions operate in practice in a manner that is much clearer and more precise than the institutional setup established in the Treaty that often include opaque or ambiguous provisions, while adhering to the institutional balance.⁶⁰

Despite the European Parliament and Commission’s proclamations, it is debatable whether the Agreement actually clarifies interinstitutional practices. Evidently, the Council takes a completely different viewpoint than the European Parliament and the Commission on the Framework Agreements’ impact on the institutional balance. “The Council notes that several provisions of the Framework Agreement have the effect of modifying the institutional balance set out in the Treaties in force, according the European Parliament prerogatives that are not provided for in the Treaties and limiting the autonomy of the Commission and its President.”⁶¹ The Council emphasizes that the “Treaties define exhaustively the respective powers conferred on the

⁵⁵ This is evident from the Council’s response to the Framework Agreement. See, the Council’s Legal Service Opinion

⁵⁶ European Parliament Decision of 20 October 2010 on the revision of the Framework Agreement on Relations between the European parliament and the European Commission. 2012/C 70 E 12.

⁵⁷ European Commission Note to Members of the Commission. European Parliament Debate on the new College of Commissions and on the revision of the Framework Agreement 9. 2 (Feb). 2012

⁵⁸ For instance, in regards to the Lisbon Treaty recent developments that were not fully taken into account in those Treaty negotiations include the Euro Crisis, the Arab Spring that has the potential to significantly impact EU Foreign Policy.

⁵⁹ SPEECH/10/569 by Maroš ŠEFČOVIČ Vice-President of the European Commission Responsible for "Inter-Institutional Relations and Administration" Plenary debate on the revised Framework between the Commission and Parliament Plenary Discussion Framework Agreement Strasbourg, 18 October 2010

⁶⁰ Article 295 TFEU is an excellent illustration of an imprecise Treaty provision.

⁶¹ Council Statement Framework Agreement on relations between the European parliament and the Commission

Institutions (Article 13(2) TEU).⁶² Moreover, the Council states “those powers may not be modified or supplemented by the Institutions themselves either unilaterally or by agreement between them.”⁶³ Interestingly, this means that even if the Council was a signatory to the agreement, the agreement is invalid and should be annulled since, according to it, it modifies the institutional balance. Of course, the Council could counter that argument by stating that, if it were involved in negotiations and then later signed the Agreement, then it would have ensured the Agreement did not modify the institutional balance. Nonetheless, according to the Council’s own interpretation it is irrelevant whether an action is a unilateral or multilateral action, it cannot modify the institutional balance, unless it goes through the proper means established in the Treaty, which include, for instance, either the ordinary revision procedure or special revision procedure.

An organ of the Council, the Council Legal Service at the request of the Committee of Permanent Representatives (COREPER), goes further and has written detailed response on preparatory work leading up to the Framework Agreement that strongly criticized the Agreement in order to protect the Council’s prerogatives and demonstrate the Council’s perspective on the Framework Agreement.⁶⁴ Essentially, the main argument against the Framework Agreement according to the Council Legal Service Opinion is that the agreement alters or has the potential to alter the institutional balance. Furthermore, the Council Legal Service states “there is a clear lack of balance between the number of commitments made by the Commission to the European Parliament and the number of commitments made in turn by the latter”.⁶⁵ This is an indictment on the neutrality of the Agreement and according to the Council, this enhances the European Parliament’s institutional position to the detriment of the Commission, but the Council may also be negatively affected. The European Parliament and the Commission argue it was the Lisbon Treaty altered the European Parliament’s institutional position and the Framework Agreement just takes the necessary measures to ensure that interinstitutional practices are consistent with the latest Treaty revisions.

Significantly, in the Councils’ Statement on the Framework Agreement it declares that the Agreements cannot be applied to the Council and threatens legal action before the Court of Justice of the European Union, if either institution, the Parliament or Commission, “performed in application of the provisions of the Framework Agreement that would have an effect contrary to the interests of the Council and the prerogatives conferred upon it by the

⁶² Council Statement Framework Agreement on relations between the European parliament and the Commission

⁶³ Council Statement Framework Agreement on relations between the European parliament and the Commission

⁶⁴ See, Draft Council Statement from the General Secretariat of the Council to COREPER/Council on the Framework Agreement on relations between the European Parliament and the Commission. 18 October 2010, 15018/10 INST 405 + Rev 1 (en) ...check to make sure accurate.

⁶⁵ See, footnote 1 of the Opinion of the Legal Service of the Council of the European Union on the Draft Framework Agreement between the European Parliament and the Commission. Point 13-15. Brussels, 17 September 2010.

Treaties.”⁶⁶ Moreover, the Council proclaims that not only does the Agreement contradict provisions explicitly in the Treaty, but it also goes against the intentions of the Treaty. As a result, “the Council expects the European Parliament and the Commission to take these legitimate concerns into account and to refrain from any application of the provisions not in accordance with the spirit and the letter of the Treaties.”⁶⁷ This is important, here the Council considers both the explicit and implicit institutional set up in the Treaty, not just what the Treaty states, but the manner in which the Treaty intends the institutions to operate in practice are also taken into account as part of the understanding of spirit and letter of the Treaties, using this viewpoint.

The Legal Advisor of the Council makes a similar proclamation to the aforementioned statement that institutional perspectives are biased reflections of an institutions’ perception, when stating in reference to the Framework Agreement that “this text is not an impartial interpretation of the Treaty”.⁶⁸ Here the Council Legal Service argues that the Framework Agreement is an incorrect interpretation of certain provisions in the Lisbon Treaty.⁶⁹ Further, the Council Legal Service proclaims that the Agreement augments the European Parliament’s institutional position at the expense of the Commission, and other institutions not participating in the Agreement, namely the Council, and thus modifies the institutional balance.⁷⁰ The Council is arguing here that the Agreement aims to upset the institutional balance in favor of the Parliament. This is what the Council means when it states that the Framework Agreement attempts to “accord powers to the Parliament not conferred upon it by the Treaties”.⁷¹

The Agreement requires that the Commission “take due account of the respective roles conferred by the Treaties on Parliament and the Council, in particular with reference to the basic principle of equal treatment”, particularity with regard to the role the Parliament and Council play in legislative and budgetary matters. Once again, from the viewpoint of these two institutions, the agreement takes into account the changes in the Lisbon Treaty, which augments the role and function of the European Parliament and enhances the legitimacy of the Commission.⁷² The Council correctly points out that the Treaty mentions no such ‘principle of equal treatment’ between the European Parliament and the Council.⁷³ Though the default decision-making mechanism after the Lisbon Treaty is now the ordinary legislative process, where the European Parliament and Council are coequal, that does not mean there is a principle of equal treatment, as in many situations the European Parliament and the Council are treated differently and not identical. For instance, the European Parliament has much fewer competences in when

⁶⁶ Council Statement Framework Agreement on relations between the European parliament and the Commission.

⁶⁷ Draft Letter to the President of the European Parliament and the President of the Commission on the Framework Agreement.

⁶⁸ The Council Legal Service Opinion pp. 9

⁶⁹ Council Legal Service Opinion

⁷⁰ Council Legal Service Opinion

⁷¹ Council Legal Service Opinion pp. 12

⁷² See, article 289 TFEU and article 294 TFEU

⁷³ Council Legal Service Opinion

compared to the Council in the area of Treaty revision, foreign policy, and comitology to name a few, while the European Parliament plays a crucial supervisory function in regards to the Commission.

The Framework Agreement also mentions a ‘special relationship’ between the European Parliament and the Commission; for instance, “to better reflect the new ‘special partnership’ between Parliament and the Commission.”⁷⁴ The Agreement has a number of provisions intended to implement the ‘special relationship’ between Parliament and the Commission.⁷⁵ Accordingly from the viewpoint of the Council, this suggestion of a ‘special partnership’ between the European Parliament and the Commission in the Framework Agreement is an example of precisely what happened a modification to the institutional balance in a manner that is inconsistent with the Treaty. In response to this terminology a number of key issues are presented in which the Council Legal Services raises are at least implies the following questions: what exactly is this special partnership that the two institutions refer to throughout the Framework Agreement? If these two institutions have a special relationship, what type of relationship do they have with other institutions and why are other institutional relationships not special? Does the ‘special relationship’ alter obligations the institutions have to one another or other institutions or modify the institutional balance? How do two institutions obtain a ‘special relationship’ without altering the current institutional balance?

This section has provided an overview of the different institutional perspectives regarding the Framework Agreement, taken by the European Parliament and the Commission on one hand and the Council on the other, illustrating how various institutional understandings related to how the Agreement impacts the institutional balance. What is clear from these initial observations is that both sides have strong arguments regarding why the Framework is consistent with institutional balance or upsets the balance depending on their perspective. Further, that the way to determine, if and how, whether the institutional balance has changed due to an interinstitutional agreement is not clearly defined. The analysis shifts to the debate surrounding contentious issues in the Agreement to provide for a better understanding of whether a valid structure is in place to assess whether interinstitutional agreements affect the institutional balance.

3. Is There a Valid Test in Place to Determine if the Agreement Modifies the Institutional Balance

Similar to other interinstitutional agreements, the number of signatories is also an important issue with the Framework Agreement. The Council’s displeasure with its lack of inclusion in negotiations involving the Framework Agreement is evident and one of the main reasons why it was not a signatory. Apparently, the Council encourages the European Parliament and the Commission to utilize an alternative mechanism to the Framework Agreement, if such measures are to be implemented within the EU. For instance, the European Parliament and the Commission could use the ordinary or special legislative procedure to implement some form of

⁷⁴ See, *the 2010 Framework Agreement on the Relations Between the European Parliament and the Council*, p 2

⁷⁵ Council Legal Service Opinion

legislation, i.e. a regulation, directive, or decision, instead of using an interinstitutional agreement. Further, the EU could have attempted to use the Treaty revision procedure to put specific provisions in from the Framework Agreement in to the Primary Law of the Union. The Council plays a prominent role in the decision-making process in each of these alternative mechanisms and the other two institutions must obtain the Council's consent before the provisions would go into effect. As the Framework Agreement illustrates, this is not necessarily the case with the Framework Agreement; if the Council objects to the completion of an interinstitutional agreement it is unlikely to accept the content of the agreement in a more formal measure without substantial modifications. This demonstrates why the European Parliament and the Commission went along with the Framework Agreement, despite the Council's objection. Regardless, the Council would like to take part in negotiations and perhaps sign an agreement, such as the one at issue, as generally institutional entities prefer to be part of the negotiations, so that they can influence decision-making before signing an interinstitutional agreement.

The Framework Agreement also raises key questions that involve the legal effects of an interinstitutional agreement that are applied to this analysis including: the intention of the institutions, for example, whether they wanted to make the agreement legally binding or a political commitment? This can help explicate the legal effects, if any, of an interinstitutional agreement.⁷⁶ Accordingly, one important aspect involved in distinguishing between hard law, soft law, and political undertakings that can be used as part of the assessment of the Framework Agreement is the amount of respect the EU institutions pay to the measure. Another method that has been used to distinguish between hard law and political agreement is whether potential mechanisms exist for enforcement and sanctioning in the case of non-compliance.⁷⁷ Here the argument that the political undertakings are not enforceable in the Courts is commonplace. Importantly, the noted constitutional scholar, Dicey, claims that conventions are distinguishable from law precisely by their non-enforcement in courts of law. He speaks of conventions as "understandings, habit, or practices...not enforced by the courts."⁷⁸ Yet, non-enforcement by the Courts is clearly not the case for all interinstitutional agreements as the ECJ has upheld the use of interinstitutional agreements, prior to the Lisbon Treaty (*FAO*), and under the Lisbon Treaty interinstitutional agreements now have a formal legal basis, explicitly in the Treaty. Moreover, enforcement mechanisms, such as an action for annulment exist that allow for the institutions to test the legality of the Framework Agreement.⁷⁹

Importantly, a key decision by the Court of Justice of the European Union may decisively settle disputes regarding the understanding of

⁷⁶ Mognar. J. *Interinstitutional Agreements: the Phenomenon and its News Dynamics after Maastricht*. Common Market Law Review p.697 Fn 12

⁷⁷; Monar. J., *Interinstitutional Agreements: The Phenomenon and its New Dynamics after Maastricht*. Common Market Law Review 31. 1994 p. 697

⁷⁸ See, Marshall commenting on Dicey. Marshall G. *Constitutional Conventions: The Rules and Forms of Political Accountability* commenting . Oxford University Press. p. 3-20

⁷⁹ For instance, an action for annulment under 263 TFEU

interinstitutional agreements and institutional behavior. However, this does not mean that the institutions do not have the power to maintain or modify a Court's decision in this area. Institutions are free to pass legislation or more informal measures in congruence with a Court's decision or explicitly countering a Court's ruling. Of course, an institutional entity or another EU stakeholder may be able to challenge, such a measure, but that does not mean such options are not available. Further, the institutions are also able to codify Court decisions in this area, explicitly making them part of the Treaty or go through the often-tedious process of amending the Treaties in order to overturn a decision by the Court.

Accordingly the Court's case law is relevant for determining the characteristics, legal, quasi-legal, or political, of an interinstitutional agreement, but one shall remember that the other institutions have options to counter a Court's action.⁸⁰ It is also important to note that the Court rarely enters into discussions on interinstitutional agreements. A key exception is *FAO*, where the Court States that it is clear "from the terms of the Arrangement that the two institutions intended to enter into a binding commitment towards each other. Nor has the Council contested its effect at any moment in the proceedings."⁸¹ As a result of the *FAO* Judgment, an institution may distinguish a situation where one of the institutions do not contest a bilateral agreement between two main legislative parties and one where the institution does contest a bilateral agreement. In *FAO*, the Council does not contests an interinstitutional agreement between the European Parliament and the Commission, yet in the present situation the Council objects to the Framework Agreement and rejects the notion that the latter two institutions can conclude the Agreement and simultaneously adhere to the Treaties. By highlighting that the Court specifically states "nor has the Council contested its effect at any moment in the proceedings", it can be inferred that if the Council either concurred with the European Parliament and the Commission or were indifferent to that particular interinstitutional agreement. Clearly, the situation is different in the present Agreement where the Council rigorously objects to the Agreement.

Consent is an interesting factor evaluating the legality of institutional actions and their legal effect, if any, of an instrument. An important question in this regard is what happens when two or more of the aforementioned institutions conclude an interinstitutional agreement, does that mean the agreement is of a legal nature because the acting institutions consented to the agreement? Simply put, no, the consent of the European Parliament and the Commission is not determinative in deciding whether the agreement is of a binding nature. This situation is different than a situation where the three institutions conclude an interinstitutional agreement they believe to be of binding character or when two of the institutions conclude an interinstitutional agreement and the third institution does not object to the binding nature of the agreement then it is likely the measure would have legal effects, in

⁸⁰ See, Marshall G. *Constitutional Conventions: The Rules and Forms of Political Accountability*. Oxford University Press. p. 11

⁸¹ See, *ibid*; Driessen, B., *Interinstitutional Conventions and Institutional Balance*. European Law Review 33. 550 – 562 p. 552 fn 16

practice, even if the measure was not legally binding.⁸² The latter situation where the consent of the three institutions has been obtained or a third institution fails to contest the legality of the measure means that all three institutions at least implicitly agree, to the validity of the measure and its consistency with the Treaty. Yet, the Council's opposition to the Framework Agreement means this situation is different than *FAO*. Here, the European Parliament and the Commission could not make a valid argument that the *FAO* decision should be used as the determining factor in the present case regarding the Framework Agreement as the Council explicitly objects to the Framework Agreement.

IV. Conclusion

The diversity of interinstitutional agreements and the complications of ascertaining the legal effects of such agreements, have led to numerous debates over the proper characterization of interinstitutional agreements, presenting fascinating questions that impact not only the legal and political effects of interinstitutional agreements, but their ability, if any, to alter the institutional balance. The article illustrates the unique challenges involving the interinstitutional agreements, including issues involving institutional accountability, characterization of interinstitutional agreements, and number of parties involved in an agreement, and impact of interinstitutional agreements on the institutional balance. Despite the increasing literature and increased attention that has been placed on interinstitutional agreements by decision-making institutions the last few decades, key questions still remain as the Lisbon Treaty currently allows for an unclear interinstitutional agreements' structure to exist.

Utilizing the case of the Framework Agreement, this article sets out to assess whether a clear standard is in place that allows one to test the legal and political implications of interinstitutional agreements, with particular focus on their impact on the institutional balance, if any. The article demonstrates that the existing interinstitutional agreement structure is both ambiguous and unclear, leading to serious questions regarding what this means for the institutional balance and the manner in which institutions operate in practice. After providing an overview of the institutional quandaries involving interinstitutional agreements, the article moves on to assess the different institutional perspectives in the institutional triangle in regard to the Framework Agreement. The main problem here is that there is no clear answer explaining what the relationship is between interinstitutional agreements and the institutional balance. Essentially, both sides, the European Parliament and the Commission on the one hand, and the Council on the other have valid arguments regarding their respective position on whether the Framework Agreement alters the institutional balance. Therefore, there is no easy or viable solution to what the relationship between interinstitutional agreements and the institutional balance is under the current situation, leaving a chaotic interinstitutional structure.

Thus, the Framework Agreement confirms the thesis statement that a new interinstitutional agreement structure is necessary in order for EU

⁸² *FAO* (c-25/94) (1996) E.C.R. I – I1469

stakeholders to better understand the vital relationship between interinstitutional agreements and the institutional balance. Further, the ambiguity present in the Framework Agreement illuminates a flaw in the entire IIA structure, as the structure allowed for an unclear agreement to be negotiated, passed, and then implemented. What is important is that institutions can make an agreement with one or more institutions in the institutional triangle and the outcome of the agreement would be unclear. Thus, under the current approach two institutions can create an agreement under art. 295 TFEU, even when the third institution in the triangle objects to the completion of the interinstitutional agreement. The ambiguity presented in the IIA structure is unacceptable, if the EU is serious about meeting the good governance standards it attempts to achieve, in the Treaties.⁸³ Though the article does not address in detail what the modified interinstitutional agreement structure should look like a few main suggestions can be provided here.

The interinstitutional agreement structure should provide a clear framework, while still maintaining some level of flexibility for the institutions to address persistent governance issues in the EU. A change in the Treaty or a trilateral instrument passed through the ordinary legislative procedure should clearly define the criteria an instrument must meet to be designated an interinstitutional agreement. Secondly, the Treaty should require parties involved in an agreement to announce whether a measure shall be considered binding or nonbinding. If an institution, which is not a party to the agreement, disagrees with the assessment of the parties of the agreement, that institution shall state the reasons for its objection.

However, the new IIA structure should not be so rigid that it prevents the institutions from having a certain amount of flexibility when attempting to augment the decision-making process through the use of interinstitutional agreements. A clear distinction between interinstitutional agreements with all three institutions and instruments that are of a bilateral nature should occur. Accordingly, interinstitutional agreements of trilateral nature shall have binding effects since all three institutions are involved in the process and mechanisms shall be in place to ensure that each institution can make objections, if it is under the impression the institutional balance is altered. This also gives an incentive for all three institutions to participate in interinstitutional agreements. Additionally, if it is a bilateral agreement and third institution in the triangle objects then the latter institutions should be free to challenge, such measures before the European Courts. This is likely to provide the proper balance of flexibility and accountability, while also allowing for a more comprehensible interinstitutional agreement structure in the future.

In conclusion, the article is intended to improve the discourse involving interinstitutional agreements and the institutional balance. After addressing the aforementioned issues it is evident that a new IIA structure is necessary in order to provide a clearer apparatus in which to evaluate the impacts of interinstitutional agreements. In short, this article concludes by proclaiming

⁸³ See, Article 9 -13 TEU, dealing with provisions on democratic principles and provisions on the institutions. These articles are intended to ensure good governance in the EU.

that the current structure allows for an incredibly large degree of ambiguity and confusion. However, clarity is needed in order to prevent interinstitutional conflicts and to provide better understanding of the relationship between interinstitutional agreements and the institutional balance. An array of avenues are available to solve the lingering problems in the IIAs structure, but whatever choice is selected it definitely needs to be done in a manner that does not allow for current structural problems to continue. Of course, all problems would not be solved under a new IIA structure, but the new structure could along way in providing a coherent interinstitutional agreement structure in the EU and providing a better understanding of the relationship between interinstitutional agreement and the institutional balance.