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Burial or resurrection?
The fate of EU "pillars" after Lisbon

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The Treaty of Lisbon is rightly commended for two beneficial innovations. In the first place, it has done much to simplify the basic legislative procedures of the Union and to apply them to an ever greater range of policy areas. In the second place, it has done away with the former so-called "pillar" structure.
Recalling the origin and functioning of the pillars since the adoption of the Maastricht Treaty and sketching out a map of EU policy-making introduced by the Lisbon Treaty, the article argues that the various clusters of rules and actors that are involved in policy-making are better understood as "regimes" rather than described through the traditional concepts of competences, procedures or pillars.

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1. Introduction

The Treaty of Lisbon is rightly commended for two beneficial innovations. In the first place, it has done much to simplify the basic legislative procedures of the Union and to apply them to an ever greater range of policy areas. In the second place, it has done away with the former so-called "pillar" structure.

This article will first recall the origin of pillars. It will present them looking at the supranational and intergovernmental dynamics of the policy-making, the four main legislative procedures of the first pillar and the main decisional procedures of the second and third pillar. It is certainly true that a growing literature has emphasised the existence of a cross-pillarisation process and that the pillar structure does not explain all the policy-making procedures adopted in the post-Maastricht EU. However, as it will be argued, if the abolition of the "formal" pillars was one of the main objectives of the Lisbon Treaty, this means that they were clearly rooted at least in the minds of the European political leaders.

Secondly, it will examine the new legislative landscape of the Lisbon Treaty – its actors, its processes – before sketching out a map of EU policy-making. It will show how the Union's continued organic evolution has led to a heartland of simplified procedures but that there nevertheless remains a complex hinterland in which actors have differing roles and prerogatives and where a variety of procedures still exist, with wider implications for the quality of policy-making. It will also demonstrate how this hinterland contains vestigial traces of the former pillar structure and will posit that these "kinks" will probably be gradually ironed out through pragmatic simplifications and positive contamination.

To make its case, the article will argue that the various clusters of rules and actors that are involved in policy-making are better understood as "regimes" rather than described through the traditional concepts of competences, procedures or pillars.

2. The birth of pillars[1]

Since the adoption of the Treaty of Maastricht, the EU has been pictured as a Greek temple: the TEU common provisions (art. 1-6) were the "roof", three different policy areas were the pillars, and the TEU final provisions (art. 46-53) were the basis. The first pillar reassembled the European Economic Community, the European Coal and Steel Community, and the EURATOM. It included the single market and all "flanking policies". The second pillar referred to the Common Foreign and Security Policy (Title V TEU), and the third pillar corresponded to the Justice and Home Affairs (Title VI TEU, which the Treaty of Amsterdam renamed and reduced to the Police and Judicial Cooperation in Criminal Matters[2]). The three pillars activated different policy-

[1] In the first section, the cited treaty articles refer to the consolidated version of the Treaty on the European Union (TEU) and the Treaty of the European Community (TEC) approved in Maastricht and changed by the Amsterdam and Nice Treaties (OJ C 321E, 29.12.2006). In the second paragraph, the cited articles are from the consolidated version of the Treaty on the European Union (TEU) and the Treaty on the Functioning of the EU (TFEU), as resulting from the Lisbon Treaty.

[2] The Treaty of Amsterdam transferred the policy on asylum, migration, visa, external borders control and judicial co-operation in civil matters to the Community pillar.

making procedures. The first pillar included the community method and some special policy-making procedures, whereas the second and third pillars were intergovernmental (Tab. 1).

Table 1 – The Pillar Structure of the EU.

First pillar **European Communities**	**Second Pillar** **Common Foreign and Security Policy (CFSP)**	**Third Pillar** **Police and Judicial Co-operation in Criminal Matters (PJCC)**
Customs union and Single market Common Agricultural Policy Common Fisheries Policy EU competition law Economic and monetary union EU-Citizenship Education and Culture Trans-European Networks Consumer protection Healthcare Research (e.g. 7th Framework Programme) Environmental law Social policy Asylum policy Schengen treaty Immigration policy European Coal and Steel Community (ECSC, until 2002): - Coal and steel industry European Atomic Energy Community (EURATOM): - Nuclear power	Foreign policy: - Human rights - Democracy - Foreign aid Security policy: - European Security and Defence Policy - EU battle groups - Helsinki Headline Goal Force Catalogue - Peacekeeping	Drug trafficking and weapons smuggling Terrorism Trafficking in human beings Organised Crime Bribery and fraud
Community method	*Intergovernmental method*	*Intergovernmental method*

In fact, things were more complicated. First of all, the pillars were never formalised. For this reason, they were considered neither the only nor the more precise way to describe the EU policy-making (see, among the others, Peterson and Bomberg 1999; Wallace 2005; Nugent 2006, 387-389). Second, the blurring of pillars' borders led to a process of crosspillarisation, with an ever changing equilibrium between supranationalism and intergovernmentalism in policy areas that did not clearly fell in one of the pillars (Stetter 2004; Sicurelli 2008).

2.1. The first pillar

The structure of the EU established in 1992 was rather complex and reflected the will and *desiderata* of national governments in the negotiations. For these reasons, there were different procedures for both different types of decisions and different policy areas (Wincott 1996). In the first pillar, the main policy-making procedure was that one known as Community method. In this method, the Commission formally had the power of legislative initiative, but its autonomy to exert it was based on its leadership capacity and its consent (Peters 2001). The European Council

decided the fundamental stages of EU development (i.e. enlargements, treaty reforms, great political agreements like the Lisbon Strategy etc.), whereas the elaboration of the legislative norms was mainly a duty of the Council of Minister. The European Parliament could propose amendments and, only under codecision procedure, could veto a proposal[3].

The Community method applied to the legislative procedures for the adoption of regulations, directives and decisions with legally binding effects and for the adoption of recommendations and opinions without legally banding effects (art. 249 TEC). In the Community method, the Commission was in charge of making a proposal and of deciding the legal basis determining the legislative procedure that would follow. Only the Commission itself and the Council (after a unanimous vote) could change the legal basis. There were four main legislative procedures that set up a different role for the Council and of the European Parliament: consultation, cooperation, codecision and assent. The only procedure that gave the Parliament co-legislating powers was codecision. According to this procedure, a European act could be approved only if there was the agreement between the two legislative bodies.

As its name suggests, under the consultation procedure the European Parliament was only consulted by the Council. Consultation was compulsory on all important subjects[4], not only when it was clearly stated in the treaties. At the same time, the well-known 1980 sentence Roquette frères et Maïzena c/ Conseil (Isoglucose) identified consultation as an "essential formality disregard of which means that the measure concerned is void"[5]. However, this sentence did not mean that the European Parliament could stop the policy-making process: it was in any case bound to loyal cooperation with the Council[6].

Second, after the approval of the Treaty of Amsterdam the cooperation procedure (art. 252 TEC) became very marginal, and was confined to the field of Economic and Monetary Union. Introduced by the Single European Act (1986), it gave the European Parliament greater influence in the legislative process by allowing it two "readings", the first one on the proposal of the Commission, the second one after the adoption of a "common position" of the Council. Given the fact that the Council had always the last say and the possibility to overcome the European

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[3] The European Commission clearly defined the Community method in the White Paper on European Governance (2001, 8): "The Community method guarantees both the diversity and effectiveness of the Union. It ensures the fair treatment of all Member States from the largest to the smallest. It provides a means to arbitrate between different interests by passing them through two successive filters: the general interest at the level of the Commission; and democratic representation, European and national, at the level of the Council and European Parliament, together the Union's legislature. The European Commission alone makes legislative and policy proposals. Its independence strengthens its ability to execute policy, act as the guardian of the Treaty and represent the Community in international negotiations. Legislative and budgetary acts are adopted by the Council of Ministers (representing Member States) and the European Parliament (representing citizens). The use of qualified majority voting in the Council is an essential element in ensuring the effectiveness of this method. Execution of policy is entrusted to the Commission and national authorities. The European Court of Justice guarantees respect for the rule of law".

[4] EP Resolution of 27/11/1959 in OJ 19/12/1959, p. 1267.

[5] More precisely, the sentence stated that "The consultation… is the means which allows the Parliament to play an actual part in the legislative process of the Community. Such power represents an essential factor in the institutional balance intended by the Treaty. Although limited, it reflects at Community level the fundamental democratic principle that the people should take part in the exercise of power through the intermediary of a representative assembly. Due consultation of the Parliament in the cases provided for by the Treaty therefore constitutes an essential formality disregard of which means that the measure concerned is void".

[6] Sentence 30/3/1995, Parliament c/ Council, rec. I-643.

Parliament's opposition, the Parliament has always tried to persuade the European Commission to incorporate its opinions directly in the initial proposal.

The third legislative procedure was codecision, that will become "ordinary legislative procedure" under the Treaty of Lisbon. Introduced by the Treaty of Maastricht, this procedure provided the European Parliament with full legislative power. The Parliament was granted the power to amend and eventually reject the proposal of the Commission modified by the Council. The Treaty of Amsterdam further strengthened the power of the Parliament by abolishing the power of the Council to overcome Parliament's opposition in a third reading with a qualified majority vote (ex-art. 189B of the Treaty of Maastricht). Since the enforcement of the Treaty of Maastricht, the number of the legal bases for application of the codecision procedure had widened. At the coming into force of the Treaty of Lisbon, codecision covered about 30 legal bases, stemming from the prohibition of discrimination on the ground of nationality (art. 12 TEC) to the freedom of movement for workers (art. 40 TEC), from the mutual recognition of diplomas (art. 47.1 TEC) to common transport policy (art. 71.1 and 80 TEC). Codecision has often attracted criticism because of its intricacies.

In any case, thic complexity did not prevent the EU to adopt about 900 acts between the entry into force of the Treaty of Amsterdam and 30 June 2009[7]. This result was possible thanks also to the joint declaration adopted on 4 Mai 1999 (JO C148/1 of 28 Mai 1999) in which the European Parliament, the Council and the Commission stated that "The institutions shall cooperate in good faith with a view to reconciling their positions as far as possible so that wherever possible acts can be adopted at first reading". This declaration was updated in 2007 and, by complementing the Interinstitutional Agreement on Better Lawmaking[8], it reinforced the role of the tripartite meetings ("trilogues") between the three institutions. The *trilogue* "has demonstrated its vitality and flexibility in increasing significantly the possibilities for agreement at first and second reading stages, as well as contributing to the preparation of the work of the Conciliation Committee"[9].

Finally, the assent procedure required the "assent" of the European Parliament in order to approve an EU legislative act. Introduced by the Single European Act in 1986, it was the procedure to be followed for the signature of association agreement, specific tasks of the European Central Bank, amendments of statutes of the European System of Central Banks or the European Central Bank, Structural Funds and Cohesion Funds, the uniform electoral procedure for the European Parliament, certain international agreements, the accession of new member states, approval of the President and the other members of the Commission.

In the first pillar, the four legislative procedures differed from some special procedures, such as those concerning the adoption of the EU budget and those related to the signature of international agreements. Even though these procedures were formally part of the first pillar, they were different from the "ordinary" Community method: the role of the Commission and that one of the Parliament were more limited, as well as the role of the European Court of Justice.

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[7] See http://ec.europa.eu/codecision/procedure/index_en.htm
[8] OJ C 321, 31.12.2003, p. 1.
[9] OJ C 145, 30.6.2007, p. 6.

The legal basis of the budgetary procedure included art. 279 TEC, specific financial regulations and some interinstitutional agreements signed since 1988 by the European Parliament, the Council and the Commission. Interinstitutional agreements aimed at improving the functioning of the budgetary procedure, providing it with continuity and flexibility. The last interinstitutional agreement, approved in May 2006, covered the 2007-2013 budget. The European Parliament had high potential of influence, even though the treaties tried to limit its autonomous discretion of increasing the financial figures decided by the Council. The Commission had not significant powers.

Another field of application of special procedure under the first pillar was that of the signature of international agreements (art. 300 TEC) in matters falling under the first pillar. In the negotiation phase, the Commission was the chief leader of the European delegation, since it represented the EU in the international arena; however, it was the Council who took the decision of opening negotiations at qualify majority voting, with the exemption of the association agreements, which required unanimity. The European Parliament has often failed in its attempts to participate in this phase: it was only informally informed about the opening of a negotiation. The Commission, the President of the Council or both of them (depending on the area) had to sign the agreements, while the Council authorized the signature. The European Court of Justice could intervene before the signature of the final agreement in order to verify its compatibility with the EU treaties. The conclusion of the international agreement had a binding effect over the member states and EU institutions. The Council consulted the European Parliament before concluding the agreements (art. 300 TEC) with the exception of agreements relating to the Common Commercial Policy (art. 133 TEC).

2.2. The second and third pillar

The European Commission and the Parliament had a limited role in the policy-making processes referring to the second and third pillars: the Council mainly decided under unanimity or, since the Treaty of Amsterdam, under qualify majority voting. The Treaty of Maastricht established the **Common Foreign and Security Policy** (CFSP) and the Treaty of Amsterdam strengthened it, by creating the operational arm for the CFSP, the European Security and Defence Policy (ESDP) (Cameron 2007). The Treaty of Nice further reinforced the CFSP. Common strategies, common actions and common positions were the main instruments through which the CFSP was conducted. Art. 13 TEU provided the Council with a wide role in the adoption of these instruments: the European Council defined the principles of and general guidelines for the CFSP, including for matters with defence implications; it decided on common strategies (setting out objectives, duration and the means) to be implemented by the Union in areas where the Member States have important interests in common; the Council took the decisions necessary for defining and implementing the CFSP on the basis of the general guidelines defined by the European Council, recommending common strategies to the European Council and implementing them, in particular by adopting joint actions and common positions.

National governments and the Commission could formally take the initiative (art. 22 TEU), but, in practise, the input went from the presidency and was submitted to the Council. Once prepared by the Council working group, the dossier was send to the Coreper and, after that, to the General Affairs and External Relations Council. More recently, art. 25 TEU created a Political and Security

Committee composed by *functionnaires* at ambassadorial level, that "keep<s> track of the international situation in the areas falling within the common foreign and security policy, help<s> define policies by drawing up 'opinions' for the Council, either at the request of the Council or on its own initiative, and monitor<s> implementation of agreed policies"[10]. In general, decisions coming from the Council's working groups used to stop by the PSC before going to the Coreper.
The European Commission flanked the Council in managing ESDP decisions. However, it lacked real influence (art. 27.1 TEU). The Council asked the European Parliament for advice "on the main aspects and the basic choices of the Common Foreign and Security Policy and shall ensure that the views of the European Parliament are duly taken into consideration. The European Parliament shall be kept regularly informed by the Presidency and the Commission of the development of the Union's foreign and security policy" (Art. 21 TEU).

In the third pillar, named later on the **Police and Judicial Cooperation in Criminal Matters** (PJCCM) pillar, the Council was the master of policy-making and the voting rule was usually unanimity. Art. 34 TEU stated that Member States informed and consulted one another within the Council with a view to coordinating their action. To that end, they established collaboration between the relevant departments of their administrations. Acting unanimously on the initiative of any Member State or of the Commission, the Council could: (a) adopt common positions defining the approach of the EU to a particular matter; (b) adopt framework decisions[11] for the purpose of approximation of the laws and regulations of the Member States; (c) adopt binding decisions for any other purpose consistent with the PJCCM objectives; (d) establish conventions recommended to the Member States for adoption.

The Council must consult the European Parliament before adopting any of the above mentioned measures and must give it adequate time to deliver its opinion. At the same time, the opinion of the Parliament was not mandatory (Art. 39 TEU). The Commission and any Member States could take the initiative for any PJCCM. However, once the initiative was taken, only the working groups of the Council followed the dossier and prepared the decisions of Coreper and the Council itself. The European Court of Justice could only give preliminary rulings on the validity and interpretation of framework decisions and decisions, as well as on the interpretation of conventions in the field of PJCCM and on the validity and interpretation of the measures implementing them.

If the Maastricht Treaty has been defined as one of the greatest achievement in EU history (Gilbert 2003), on the other side the pillar structure has been highly criticized for its intricacies and confusion. Someone has also written that this structure created a real "constitutional chaos" (Curtin 1993, 67).

3. The end of pillars?

[10] Council Decision of 22 January 2001 setting up the Political and Security Committee, in OJ L 27, 30.1.2001, p. 2.
[11] Framework decisions were binding upon the Member States as to the result to be achieved but left to the national authorities the choice of form and methods.

The dismantlement of the above pillar structure is rightly listed amongst the most important innovations brought about by the Lisbon Treaty. This novelty is usually presented in conjunction with another piece of information regarding the extension and the upgrade of the codecision procedure, now renamed the "ordinary legislative procedure". This might lead to believe that the former first pillar (where codecision and other supranational features were dominant) absorbed the other two pillars and that supranationalism and codecision now dominate post-Lisbon Europe, with Parliament and Council now fulfilling equivalent and symmetrical policy-making functions across the whole spectrum of EU activities.

Not only – as the rest of this paper will try to show – this is not the case, but the ways in which EU policy-making works under Lisbon might still be best understood through some distinct policy-making regimes similar to pillars, albeit of different nature. The real innovation of the Lisbon Treaty is to be found in the porosity between the different regimes and in the potential for positive contamination and convergence built into the system.

3.1 Beyond legislation and pillars

In order to understand how the former pillar structure has been integrated into the Lisbon Treaty it helps to acknowledge that the new legal environment defies straightforward simplifications and conclusions. Throughout the new treaty, general rules are often followed by strands of exceptions.

Although codecision is now more common and earned the label of "ordinary legislative procedure", several other "special" legislative and non-legislative procedures continue to exist. Although the pillars are formally abolished (in fact they were never formally created, as it has been demonstrated before), distinct modalities or regimes of policy-making continue to exist in many of the areas formerly falling under the second or third pillar and beyond them.

More important than these qualifications is the fact that legislation does not exhaust the notion of policy-making and that the pillars are a partial and potentially misleading metaphor of how the EU decides. EU policy-making remains complex and full of intricacies. The treaty innovations, moreover, are just part of the story: the shape policy-making will actually take in the future will depend on a number of factors, many of which in the hands of the legislators themselves.

To account for the diversity that survived the "simplification" provided by the Lisbon Treaty, but abandoning the reference to pillars, which no longer exist, it is suggested to resort to the notion of policy-making "regimes". This is based on the definition offered by Krasner (1983), whereby regimes are "principles, norms, rules, and decision making procedures around which actor expectations converge in a given issue-area". The advantage of this concept, compared to the well established notions of competences, procedures, voting rules or pillars, is that it does not define policy-making exclusively on the basis of formal rules laid down in the treaties. On the contrary, different policy-making regimes are here identified also on the basis of softer norms and informal behaviours by clusters of actors. Such norms and behaviours include the policy institutions adopt with regard to the transparency of their works, the decision to undergo an ex ante evaluation before presenting a policy proposal as well as choices regarding the involvement of organised civil society and national parliaments.

Based on formal rules enshrined in the treaties, one can *inter alia* identify:

a) different types of competences, each of which defines the limits of EU intervention[12];
b) the areas subject to the ordinary or special legislative procedures;
c) the areas still subject to unanimity rule, despite the significant extension of qualified majority voting.

Whereas the traditional pillars captured the main differences in EU policy-making for each of the above dimensions (competences, procedure, majority rule as well as supranationalism vs. intergovernmentalism), the dismantlement of the pillar structure leaves us without a powerful guide in determining the rule of the game in a given area. Hence the alternative notion of policy-making regime.

Wessel (2009) convincingly argued that the formal separation between pillars before Lisbon did not prevent significant cross-pillar permeability. It is submitted here that the formal "depillarization" brought about by Lisbon will increase the permeability between all areas of EU policy-making but will not as such replace the pillars with a uniform policy-making environment. The evolution is open and unforeseeable.

3.2. A tentative map of EU policy-making

If pillars no longer exist, how do we make sense of the policy-making complexity under Lisbon?

Sound and detailed accounts of legal acts and legislative procedures under the Lisbon Treaty are already available and several scholars have come forward with possible categorisations[13]. Many of them concur that even if the pillars formally no longer exist, they have left some fingerprints in the new legal framework.

There is little doubt, indeed, that the pillar structure has not been replaced by a homogenous system of policy-making based on the ordinary legislative procedure, with the formal equality between Parliament and Council[14]. In fact, one could argue that the former three pillars supposedly created by the Maastricht Treaty are replaced by other regimes of policy-making, which are not necessarily and exclusively based on selected policy areas but (also) on the nature of their acts and the properties of their procedures.

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[12] The Union is not authorised to legislate or act beyond its competences.

[13] Crowe (2008), for example, divides between legislative and budgetary acts, internal policies, the area of freedom, security and justice and external action (including CFSP).

[14] It is no surprise that the European Parliament insisted to secure, right before and as a precondition for approving the entire Commission for the period 2010-2014, a guarantee that the Commission will apply the basic principle of equal treatment for Parliament and the Council, especially as regards access to meetings and the provision of contributions or other information, in particular on legislative and budgetary matters (9 February 2010; see http://www.europarl.europa.eu/news/expert/infopress_page/008-68606-039-02-07-901-20100208IPR68605-08-02-2010-2010-false/default_en.htm).

Table 2 - Three levels of decision-making at EU level

EU treaty-making
(treaty-making and treaty-amending decisions)

EU policy-making
(the making of regulations, directives and decisions based on a treaty article)

Examples:

Legislation following the ordinary legislative procedure	Legislation following a special legislative procedure	Decisions concluding international agreements	Decisions implementing the Common Foreign and Security Policy

MAX MIN

SUPRANATIONALISM
DEMOCRATIC LEGITIMACY
TRANSPARENCY
ACCOUNTABILITY
SUBSIDIARITY
LEGISLATIVE QUALITY

Commission's exclusive right of initiative
Involvement of the European Parliament
Jurisdiction of the Court of Justice
Openness of Council deliberations
Publicity of Council votes
Publicity of votes in Parliament
Involvement of national parliaments
Access to documents
Prior public consultation
Ex-ante impact assessment
Ex-post evaluation

EU implementation
(implementing acts, delegated acts and other acts adopted on the basis of existing regulations, directives and decisions)

Rather than imagining a new pillar to accommodate each different combination of acts and procedures envisaged by the Lisbon Treaty, it might be more productive to picture EU policy-making as a sequence of different policy-making regimes, each with a different score in a predefined scale of values. Prior to this, however, it might help to clarify the exact perimeter of policy-making, which is defined in this paper as the making of regulations, directives and

decisions, including CFSP decisions, based on a treaty article[15]. This sets it clearly apart from two different phenomena: EU treaty-making, which encompasses treaty-making and treaty-amending decisions (including the various simplification clauses embedded in the Lisbon Treaty), and EU implementation, which includes implementing acts and other acts adopted on the basis of existing regulations, directives and decisions[16]. Delegated acts ex article 290 TFEU should also be part of the category of policy-making (Tab. 2).

Within the area of policy-making, one could imagine a continuum that goes from one extreme where a certain number of values are present and/or maximised to another where they are absent and/or minimised. Such values are, for instance, supranationalism, democratic legitimacy, effectiveness, transparency, accountability, subsidiarity and legislative quality. Between the two extreme, which mostly represent ideal-typical situations, the Lisbon Treaty offers a variety of policy-making contexts (or regimes), whose scores against these values are different.

The Commission's exclusive right of initiative and the full jurisdiction of the Court of Justice are taken as indicators of "supranationalism". The involvement of the European Parliament is an indicator of "democratic legitimacy". The provision for qualified majority voting is taken as an indicator of "effectiveness". The openness of Council deliberations and access to documents are proposed as examples of "transparency". The publicity of votes in Council and in Parliament are chosen as indicators of "accountability". The involvement of national parliaments epitomizes "subsidiarity", whereas the presence of an ex-ante impact assessment, of an ex-post evaluation and of prior public consultation are indicators of "legislative quality"[17].

It goes without saying that the relationship between these indicators and their respective values is neither linear nor exclusive. Holding public consultations prior to the preparation of a legislative proposal, for example, might also contribute to the democratic legitimacy of the process. The involvement of national parliaments might increase the democratic legitimacy of EU policy-making apart from responding to concerns of subsidiarity. It may also, nevertheless, decrease its effectiveness. In many cases these indicators should also be considered for their combined rather than individual impact. Voting by qualified majority rather than by unanimity, for example, does increase the effectiveness of policy-making but might be seen as reducing its democratic legitimacy. If combined with the full involvement of the European Parliament as co-legislator, however, the "loss" in democratic legitimacy is (possibly) lessened[18].

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[15] One might include, in this notion of acts adopted on the basis of a "constitutional" legal basis, decisions or other acts taken by the EU institutions in the context of international frameworks to which the EU and its Member States are parties, such as the Cotonou Partnership Agreement. Therefore, such acts as Council decisions concluding consultations with an ACP country and adopting appropriate measures under Article 96 of the Cotonou Agreement are covered by the definition of EU policy-making.

[16] Since the entry into force of the Lisbon Treaty all implementing acts shall have the word "implementing" in their title, as dictated by article 291(4) TFEU. The practice of establishing secondary legal bases has been condemned by the EU Court of Justice in its judgement of 6 May 2008 in Case C-133/06 (Parliament v Council).

[17] One should note that ex-ante impact assessment, ex-post evaluations, public consultations and other arrangements presented in this section are not necessarily dictated by the Lisbon Treaty. Nevertheless they are an essential part of several policy-making modalities under Lisbon.

[18] Both the list of values and of indicators are incomplete and they could be developed in various ways, for example by inserting into this model the role of the European Economic and Social Committee and the Committee of the Region.

Although the language used so far is value-loaded, it should be pointed out that there is no normative superiority of one extreme over the other. These values are simply listed and individually measured, but not weighted against each other. The reasons why certain areas are entrusted with a specific policy-making regime will not be discussed in this paper.

Let's now take four examples, ordered from the extreme that maximises values previously listed to the other. They in no way exhaust the vast variety of policy-making situations offered by the Lisbon Treaty, but they are believed to represent an important sample.

1. The typical legislative act adopted under the **ordinary legislative procedure** will originate from a Commission's legislative proposal, which had previously appeared in the Commission's work programme and had undergone an ex-ante impact assessment. A prior public consultation had already ensured the involvement of relevant and interested stakeholders. National parliaments will be notified of the proposal and will have the chance to "interfere" with the policy-making through the mechanism of "reasoned opinions". The proposal will be co-decided by Parliament and Council, with full transparency in both chambers (both in terms of deliberations and publicity of votes). Qualified majority will apply for voting in the Council. The interim acts leading to the adoption of the legislative act will be accessible to the general public. The whole process and its outcome will be subject to the jurisdiction of the Court of Justice. After some years, it will be subject to an ex-post evaluation.

2. The typical legislative act adopted though a **special legislative procedure** will be largely the same as in the previous example but the Council will most likely decide by unanimity and the European Parliament will be simply consulted. Moreover, there might be further "complications" such as the right of initiative entrusted to actors other than the Commission[19], transition periods, emergency brake clauses, enhanced cooperation opportunities, opt-in/opt-out mechanisms, etc.[20] In one case, the Court of Justice will have no jurisdiction[21].

3. The typical decision to conclude an important (non-CFSP) international agreement with a third country or an international organisation will be taken by the Council by qualified majority (with some remarkable exceptions). The proposal will come from the Commission, without prior public consultation, and will not be notified to national parliaments. It will not be subject to an open debate in the Council. It will have to obtain the consent of the European

[19] This encompasses initiatives from a group of Member States, initiatives from the European Parliament, requests from the Court of Justice, recommendations from the European Central Bank and requests from the European Investment Bank for the adoption of a legislative act.

[20] The 36 "special legislative procedures" present in the Lisbon Treaty can be grouped in two broad categories: 22 legal bases relating to specific policy areas ("policy" special procedures) and 14 references dealing with institutional, financial or horizontal issues ("constitutional" special procedures). All acts resulting from the 22 "policy" special procedures are Council acts. In 20 of such cases the Council decides by unanimity (in 2 by qualified majority) and only in 3 cases the consent of the European Parliament is required (for the others consultation applies). Of the 14 "constitutional" special procedures, 10 are acts of the Council (of which 6 are adopted by unanimity and consultation of the Parliament, 3 by unanimity with the consent of the Parliament and 1 by qualified majority with the consent of the Parliament), 3 of the Parliament (always with the consent of the Council and, in 1 case, also of the Commission) and 1 joint act (the Union budget).

[21] To review the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State of the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security (article 276 TFEU).

Parliament. The vote whereby the Parliament grants its consent and the Council adopts the decision will not be automatically recorded by roll call. Access to interim documents other than the final decision will not be granted, not even after the conclusion of the procedure. The Court of Justice will be fully involved and competent, before and after the conclusion of the agreement. Whether there will be an ex-ante impact assessment and an ex-post evaluation will depend on the circumstances[22].

4. The typical CFSP decision will be adopted by the Council, unanimously, without involvement of the European Parliament and without formal notification to the national parliaments. The proposal will come from the High Representative or by a Member State. The Council deliberations will be confidential and the result of votes will not be disclosed. Access to documents will be declined[23]. Ex-ante or ex-post assessments/evaluations as well as prior public consultation will be highly unlikely. The Court of Justice will, for the most part, have no jurisdiction (Tab. 3).

Table 3 - Comparison between four policy-making regimes.

	Legislation following the ordinary legislative procedure	Legislation following a special legislative procedure	Decisions concluding international agreements	Decisions implementing the CFSP
Commission's exclusive right of initiative	+++	++	+++	---
Involvement of the European Parliament	+++	+	++	---
Jurisdiction of the Court of Justice	+++	+++(*)	+++	--
Openness of Council deliberations	+++	+++	-	---
Publicity of Council votes	+++	+++	-	--
Publicity of votes in Parliament	+++	+++	-	n.a.
Involvement of national parliaments	+++	+++	-	-
Access to documents	+++	+++	--	--
Prior public consultation	++	++	-	---
Ex-ante impact assessment	++	++	+	---
Ex-post evaluation	++	++	+	---

Yes/full: +++; highly likely: ++; likely: +; unlikely: -; highly unlikely: --; no: ---; n.a.: not applicable.
(*) There is only one exception (article 275 TFEU).

[22] Evidence based on pre-Lisbon policy-making suggests that the chances of an ex-ante impact assessment in these areas are slim (http://ec.europa.eu/governance/impact/index_en.htm).
[23] The institutions shall refuse access to a document where disclosure would undermine the protection of the public interest as regards, inter alia, international relations and defence and military matters (Article 4.1(a) of regulation 1049/2001).

Beyond these examples the reality is more complex: the actual combinations of possible scores might differ in each case we may want to consider and are potentially infinite, even within the same policy area[24].

An ideal arena to grasp the variety of policy-making situations offered by the Lisbon Treaty is the Foreign Affairs Council. Chaired by the High Representative, it is responsible for the whole of the European Union's external action, namely CFSP, CSDP, common commercial policy, development cooperation and humanitarian aid. Its work will therefore range from one to the other end of the spectrum, from adopting fully-fledged legislation under ordinary legislative procedure (e.g. in development cooperation) to traditional CFSP decisions. This syncretism is also reflected in the simultaneous operation of rotating and permanent chairs, depending on the area, in the Council working parties preparing the Foreign Affairs Council.

Time will tell how the coexistence of these distinct policy-making regimes will evolve in the future, but the potential for contamination across them is enormous. For example, transparency arrangements imposed by the treaty on the legislative procedure might trigger demands for similar requirements also in other (non-legislative) situations, both in Council and Parliament. Based on the mechanism of reasoned opinions for legislative acts, national parliaments might develop equivalent mechanisms also for other acts, while other institutions might commit to respect them. Impact assessments, ex post evaluations, public consultations and other allegedly quality-enhancing devices might not only become a generalized practice in the Commission but also inspire emulation elsewhere. More importantly, none of the above requires a revision of the treaties.

4. Conclusion

The Treaty of Lisbon changes EU policy-making to an extent that makes the old pillar structure created by the Maastricht Treaty obsolete and potentially misleading. The pillars were instruments for conceptualising EU policy-making and making sense of its intricacies; at the same time, the notion of ordinary legislative procedure, with full equality of Parliament and Council, is far from being captured by a unique procedure. EU policy-making is in fact much more than legislation, being it ordinary or special.

As a guiding map to understanding EU policy-making under Lisbon this paper clarified the perimeter of EU policy-making, which is different from both the higher-level treaty-making or treaty-amending provisions and the lower-level implementing acts, following article 291 TFEU or other secondary legal bases.

The area of policy-making can be mapped as a continuum of different policy-making regimes between two extremes: the ordinary legislative procedure and the CFSP policy-making. Despite

[24] Economic policy is another interesting area where the features of a distinct policy-making regime can be detected. It includes, for example, the notions of recommendations presented by the Commission and adopted by the Council as well as of broad guidelines of economic policies, with discussions in the European Council and mere information of the European Parliament.

the fact that they operate within the same EU legal personality and that their acts have the same label, they score in opposite ways if measured against a number of values.

What is new compared to the old pillar structure are (1) the porosity of the boundaries between the different policy-making regimes and (2) the variety of situations – formally within the same "pillar" – that can be encountered between the two extremes. The examples of special legislative procedures and decisions concluding important international agreements have been provided.

The coexistence of various policy-making regimes presents at the same time opportunities and challenges. The evolution of EU policy-making in this specific juncture is an interesting phenomenon to observe. Past experience suggests that some degree of convergence took place even across legally separated pillars. Under Lisbon, trust (or distrust) can spill over more easily from one policy-making regime to another, possibly leading to positive (or negative) contamination between them and to convergence. The introduction of opportunities for simplified treaty revision will make it also easier to give constitutional stature to positive and trust-enhancing changes emerged in practice.

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