

# Lisbon *Fado*: The European Union under Reform



Joaquín Roy and Roberto Domínguez (eds)

Prefaces by José Sócrates and  
José Manuel Durão Barroso

Jean Monnet Chair, University of Miami  
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To address the uncertainties surrounding the Treaty of Lisbon, this book examines several issues from various angles. Regardless of the results of the second referendum in Ireland and the pending ratifications in Poland, the Czech Republic and Germany, the European Union (EU) will not be the same after the Lisbon Treaty. If it comes into effect, Europeans will enter into a new stage in the deepening of the integration process; if it is rejected, the first decade of the 21st Century will represent a period of institutional stagnation in Europe's integration. Nonetheless, the chapters in this book share the consensus that, despite its limitations, the Lisbon Treaty will make the EU decision making process more efficient, enhance regional democracy and strengthen its international voice.



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## **I. Institutional Prefaces**



## Signing of the Lisbon Treaty\*

José Sócrates

Today we sign the Treaty of Lisbon. And the idea that motivates us in this ceremony for the signature is quite simple: to advance the European project. A project that has always been generous in its purposes and ambitious in its objectives. A project that has proven to be at the service of peace, development and the affirmation of the values we share.

It was this project of European construction that many generations dreamed of and others before us erected, with a sense and a vision of the future. But it is this project that we want, today, to take further, reinforce and develop. And that is what the people of Europe, those we represent here, expect from us.

Today we need a stronger Union. Stronger to respond to the longings of the European citizens, to promote the European economy and defend European values. But a more ambitious Europe is also the most important contribution we can give to a better world.

Perhaps History will not mention the words that will be uttered in this ceremony. But I am certain of one thing: what we are doing here is already part of History. History will remember this day as a day when new paths of hope were opened to the European ideal.

With the Treaty of Lisbon Europe finally overcomes the political and institutional impasse that limited its capacity to act during the last few years. The overcoming of that impasse started when, facing doubts and uncertainties, the Trio of Presidencies – German, Portuguese and Slovenian – undertook as a priority the elaboration of a new Treaty.

It is only right to recognize, also, that this process was successful just because, at the right time, relied on the engagement of Chancellor Angela Merkel, who reached a mandate without which it would not have been possible to follow through this path.

During all this process we could rely on the European Commission. I wish to thank the President of the Commission, Mr. Durão Barroso, all the help he gave the Portuguese presidency to conclude this Treaty.

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\* Speech given at the ceremony for the *Signature of the Treaty of Lisbon*, Lisbon, Portugal, December 13, 2007.

I also thank the President of the European Parliament, Hans-Gert Pöttering and the Parliamentary Groups the support they always gave us during the difficult negotiations that preceded this agreement.

But what truly brought about the achieved result in the Lisbon Summit, what really carried us to the Treaty we are signing here today, was the political will of all the European leaders and the trust they always displayed in the development of the European project.

The Treaty of Lisbon meets a central challenge. The challenge of European citizenship. Yesterday, in Strasbourg, the Council, the Commission and the Parliament adopted the Charter of Fundamental Rights of the European Union. This Treaty of Lisbon recognizes the full legal value of this Charter. Here we reaffirm our compromise with the identity values of the European project. Democratic legality, respect for fundamental rights, communitarian freedoms, equal opportunities, solidarity, access to justice, respect for the pluralism and diversity of our societies. These were the values that inspired the founding fathers of the European project and that we proudly reaffirm here today.

The European project is a project founded on the equality among States, mutual respect, close cooperation and tolerance. The European project does not eliminate nor minimize national identities, nor the States' specific interests; rather, it offers a multilateral framework of regulation from which benefits can be drawn for the whole and for each of the parts that participate in the project. This is the reason why the project of the European political and economic Union is still a source of inspiration for other continents and a reference guide for a world in need of institutions, principles and rules that are capable of contributing for a regulation on a global scale.

But this Treaty also meets the challenge of improving efficiency in the decision process. During these fifty years, we always knew that the European project becomes legitimate through its results. And only a Europe that is capable of deciding will be a Europe that is capable of getting results. In a world of accelerated change, in a global economy that is ever more demanding, it is absolutely imperative and urgent to adopt institutional reforms that allow Europe to meet the challenges it is facing.

Europe wants to be an open economy, which faces the challenge of global competitiveness. Which bets on Europeans' qualifications, research and innovation. Which bets on an economic growth that creates jobs and is friendly to the environment and also bets on a more efficient energy policy that is capable of fighting against climate change.

In all these areas the Treaty of Lisbon speeds up the decision processes, increases the number of decisions by qualified majority, extends the conditions of democratic participation in the European Parliament, reinforces the role of our national parliaments and safeguards the central position of the European Commission and the European judicial system.

But the Treaty of Lisbon also defines a new institutional architecture: the new permanent president of the European Council; the High Representative for external affairs and defense; the new composition of the Commission and the reinforcement of its democratic legitimacy; the new system of weighting of votes in the Council. These changes represent a new equilibrium among States and offer an improvement in the functioning of the institutions, guaranteeing new conditions for Europe to assert its voice, its economy and its values.

The Treaty of Lisbon includes the best in the tradition and heritage of the European project but is not a Treaty for the past; it is a Treaty for the future. It is a Treaty for the construction of a more modern, efficient and democratic Europe.

For us Portuguese, this ceremony represents a return to the Jerónimos Monastery. It was here that, in 1985, Portugal signed the Accession Treaty to the European project. It was here that Portugal became a part of the European family.

I want you to know that it is an honor for my country the fact that it is precisely here, in the same place, that we sign the new Treaty for the future of Europe. And it is an even greater honor the fact that this Treaty shall be known by the name of Lisbon, a city where the 27 Member States sealed their agreement.

Lisbon has always been a city of openness and a meeting point. Its history is also the history of the discoveries, which this moment evokes. With the Treaty of Lisbon this city will also be linked to the history of the European construction.

This Treaty, however, is not the end of History. There will always be more History to be written. But this Treaty is a new moment in the European adventure and of the European future. And we face this future with the same spirit we always had: certain of our values, confident in our project, strengthened in our Union.



## **The Treaty of Lisbon: A Treaty for the 21<sup>st</sup> Century Europe**

Jose Manuel Durão Barroso\*

Lisboa, tantas vezes ponto de encontro da Europa com o Mundo, é hoje ponto de encontro da Europa consigo própria. O Tratado de Lisboa é o resultado desse reencontro. Neste velho continente, nasce uma nova Europa. Uma Europa alargada a 27 Estados Membros, reunificada em torno da liberdade e da democracia. Ao resolver as suas questões institucionais, a Europa prepara-se para enfrentar os problemas globais.

Já há muito que a Europa não é o centro do mundo. Aliás, é duvidoso que o mundo actual tenha um verdadeiro centro. Mas se à capacidade de agir que nos confere o Tratado de Lisboa juntarmos a vontade política de agir, a Europa estará mais bem colocada que qualquer outro país ou grupo de países não para impor, mas para propor, as soluções globais de que o mundo urgentemente necessita.

En signant le traité de Lisbonne, nous mettons un terme à six ans de débats sur nos institutions. Je veux saluer l'engagement de tous les gouvernements et du Parlement européen au cours de la conférence intergouvernementale. La Commission, fidèle à sa vocation d'interprète de l'intérêt général européen, est aussi fière de l'impulsion qu'elle a donnée à ce processus.

Qu'il me soit permis de mettre l'accent sur la contribution exceptionnelle de la Présidence allemande du Conseil qui, à la suite de la Déclaration de Berlin, a rassemblé les volontés des États membres autour du mandat de la Conférence intergouvernementale, ainsi que sur la compétence et la détermination de la Présidence portugaise du Conseil, qui ont rendu possible ce Traité de Lisbonne.

Pour arriver à ce résultat, tous les gouvernements ont fait preuve de courage politique. Je vous invite maintenant à faire preuve de la même détermination pendant la période de ratification.

Il est particulièrement important de communiquer sur la valeur ajoutée du traité et sur le gain d'efficacité qu'il apporte à notre processus de décision, le gain de démocratie qu'il apporte à nos institutions et le potentiel de cohérence accrue qu'il apporte à notre action extérieure.

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\* Speech given at the ceremony for the *Signature of the Treaty of Lisbon*, Lisbon, Portugal, December 13, 2007.

Maintenant, il est temps d'avancer. L'Europe doit relever de nombreux défis, tant intérieurs qu'extérieurs, et nos citoyens veulent des résultats. La mondialisation est le dénominateur commun à tous ces défis.

Si nous voulons assurer aux Européens et aux Européennes la prospérité et la justice sociale, la liberté et la sécurité, il faut que l'Union européenne ait une capacité d'action décisive au niveau mondial.

Si nous voulons un ordre international fait de sociétés et d'économies ouvertes et justes, de sécurité collective, de bonne gouvernance, de droits de l'homme et de développement durable pour assurer l'avenir de notre planète, notamment face au défi majeur que représente le changement climatique, il faut que l'Union européenne ait les bons outils pour façonner la mondialisation.

Si nous voulons des rapports stratégiques avec nos partenaires et les moyens de défendre avec fermeté nos intérêts dans nos relations avec d'autres grandes puissances, il faut que l'Union européenne soit unie et forte. Comme le disait déjà le grand poète Fernando Pessoa en 1917, "l'Europe a faim de création et soif d'avenir". Et il ajoutait: "l'Europe veut, de simple désignation géographique, devenir une personne civilisée".

The Treaty of Lisbon will reinforce the Union's capacity to act and the ability to achieve those goals in an effective way. As such, it will help the Union to deliver better results to European citizens.

The Treaty of Lisbon will also strengthen European democracy and the community method, by giving more competences to the European Parliament, but will also reinforce the respect for subsidiarity through an increased role of national parliaments in European matters.

The Treaty of Lisbon will give further legal protections to European citizens through the Charter of Fundamental Rights, thus reinforcing the principles and values which define us as a "community of law".

The Treaty of Lisbon will also provide increased coherence in our external action. A good illustration of this is the fact that the High Representative will also be Vice-President of the Commission.

But the Treaty of Lisbon also has a very special political significance. It is the Treaty of an enlarged Europe from the Mediterranean to the Baltic, from the Atlantic Ocean to the Black sea. A Europe that shares common values and common ambitions. For the first time, the countries that were once divided by a totalitarian curtain, are now united in support of a common Treaty that they had themselves negotiated.

The enlarged European Union gives us a new economic, political and strategic dimension. This dimension makes each Member State stronger. And it makes Europe, united in its diversity, better equipped to promote its interests and values in the world.

But dimension is not enough. We need increased coherence, which can only be achieved if we are able to match the new capacity to act with a renewed politi-

cal will. The Treaty of Lisbon gives the Union this capacity to act. But the determination to act requires political will and committed leadership.

Fifty years after the Treaty of Rome, we can be proud of what we have achieved in the past. Today, as we sign the Treaty of Lisbon, we can be confident about what we will achieve in the future.

Let us now work together – European institutions, Member States – to make freedom, prosperity and solidarity a reality for the every day life of European citizens.



## **II. Introductory Thoughts**



## **Lisbon *Fado*: Fate and Hope**

Joaquín Roy

Pessimistic leaders and cynical observers of the European Union's evolution could easily predict the (provisional?) new derailment of the European constitutional process. Eurosceptics and nationalists would claim loud and clear: I told you so! When the French and the Dutch electorates rejected in 2005 the new treaty, which was branded as a Constitution and designed to reform the institutional framework of the Union, opponents to the project certified the death of that new bold step. The stealth-and-action method that Schuman and Monnet plotted so well at the end of World War II had failed. Since the 2005 constitutional disaster, commentators have warned that with this rejection Europe lost confidence in itself and its future, a feeling that became exacerbated by the worsening of the financial crisis that exploded in 2008 (Fischer 2009, Esparza 2009). However, Mark Twain's words then resonated: the news about the EU constitutional death was largely exaggerated. Federalists and common sense leaders tenaciously went back to the drawing board, facing a "period of reflection." Germany felt the pressure during its EU presidency, in the first part of 2007. The German government responded to the historical responsibility. Then, the relay baton was passed to the Portuguese presidency for the rest of the year.

The governments of the Member States and constitutional experts rolled up their sleeves and rushed to salvage the precious load that still was stored in the bowels of a sinking Titanic (Roy 2007, 2008, Mangas 2007). Drafters produced a new document that, in essence, was a smaller clone of the Constitution (Conference 2007, European Union 2008, Foundation 2008, House of Lords 2008, Official Journal 2007). It was a shorter text, but not so much to appease the liking of many observers. It had some simple cosmetic changes, - according to the judgment of strict critics. It suffered some humiliating cuts, to the dismay of the ever ambitious federalists. The result, anyway, was a compromise. The Who's Who of the EU, which always counts in its evolution, thought that it was a reasonably good idea to provide a solution. If not a "Constitution", the alternative was one more reforming treaty of the essential "Constitution" (the combination of the Treaties of Rome and Maastricht), while the others could be considered simply as amendments. On December 13, the European Council signed the new Reform Treaty, justly re-baptized as the Treaty of Lisbon, for the site of its official birth. As in other stages of European history, scholarly production was set in motion even before the premature legal birth of the Treaty (Bertocini 2007, Bronzini 2008, Egmon 2007, Hynková 2008, Law Society 2008, Ziller 2007,

Holmes 2008). Media, governments, and think tanks felt that some basic aspects of the Treaty were required to have some degree of summarization for the sake of the common citizen. (Independent 2008, BBC News 2009, Ratification Monitor, Europedia).

But events in EU history detest finality. Political scientists, economists, and legal scholars have given up a long time ago in desperation trying to define the nature of the EU (Roy 2005). Is it a superstate, a federation, a confederation, one more international organization, a regional state? Theorists have thrown in the towel after fighting amongst themselves, reinforced by the weapons of functionalism, neofunctionalism, intergovernmental realism, liberal intergovernmentalism, even reasonable “fusion” innovative analysis and close attention to what appears to be a hybrid entity, or one-of-a-kind (Chrysochoou 2001, Diez 2004, Haas 2004, Mariscal 2003, Mitrany 1996, Moravcsik 1998, Nelsen 2003, Rosamond 2002). The only consensus is that the EU is a process, much as an unfinished symphony or a medieval cathedral. As opera buffs have said for decades, “it ain’t over ‘til the fat lady sings.” In the EU process, that only happens when a document (the EU is, after all, a community of law) is legally finalized. But, unlike non-rewriteable CDs, the EU can be amended. However, each treaty step needs to be ratified by each one of the member states. Skeptics were lurking behind the light fog that rarely disturbs the perennial Lisbon blue skies. Then the Irish electorate said NO to the Lisbon Treaty on June 12, 2008, just at the end of the Slovenian presidency. It was the writing on the wall. It was its destiny. The Portuguese *fado* (destiny, fate) had killed the Lisbon Treaty.

According to tradition, and sometimes to contradictory and supplementary interpretations, the *fado* is simply a musical genre detected as early as 1820, but suspected of having much older roots. African and Arabic rhythms are claimed to be in its genealogy. Listeners can feel its melancholic tunes and words, expressing *saudade* (nostalgia for something or someone missing). Its content gives the impression that the sea and the existence of the poor people are the center of concern. The feeling of sadness and softness is ever present. There is neither remorse, nor desire for revenge, deceit and treacherous behavior. References to concrete historical events beyond the reverence for identifiable *bairros* (neighborhoods) of Portuguese cities are rare. Its universal appeal seems to be devoid of social and political overtones, an impression that historians claim to be the result of the censorship during the long Salazar dictatorship. In any event, the focus is the role of fate and unstoppable destiny, *fado*.

This script seemed to dominate the process of the drafting, the arduous ratification process and the eventual failure of the Lisbon Treaty. However, the geographical setting was significant and worthy of meditation. Not so fast for an early burial. Portugal resisted, as a conscientious judge, to seal the coffin in which the treaty was placed. The Treaty of Lisbon was “destined” to overcome its apparent fate. As the oldest nation-state of Europe, with its physical limits, ethnic cohesion, linguistic unity and distinguished customs, Portugal could not

allow this death to happen. Other governments and leaders of the European Union institutions were of the same opinion. Moreover, scholars and think tank analysts got down to the task of scrutinizing the situation and offering alternatives. The Treaty of Lisbon had a second chance.

This sentiment (wishful thinking for some?) is, in a way, present in most of the speeches, comments and studies compiled in this volume. While several authors are critical of the process and the content of the treaty itself, all have a vested interest in seeing the EU move ahead. This kind of ‘accident’ is a recurring phenomenon in the EU’s recent history. In fact, it happened in other occasions with the same actors. Once, the Irish electorate rejected the Maastricht Treaty that needed a new ratification referendum. This second chance appears to be the best and perhaps the last alternative to avoid the burial of the Reform Treaty.

The chapters of this volume are divided into five basic parts. The first is composed of addresses made by two Portuguese political personalities, the Prime Minister of Portugal and the President of the EU Commission. José Socrates had all the satisfaction of closing the presidency of the EU in December of 2007 with a political coup. The failed Constitution had reincarnated into the Treaty of Lisbon. This transformation was also the positive example of a *fado* with a happy ending. What Sócrates did not know was that the Irish electorate was going to derail the train that had left the station. This accident was also feared by José Manuel Barroso, who in Brussels crossed his fingers over the uncertainty of the polls taken in Ireland previous to the referendum. The Portuguese “team” is completed with the contribution of Professor Pitta e Cunha, who at the closing of his long teaching and research law career, offers a perceptive analysis on the Treaty, and Luís Silva Morais, professor at the University of Lisbon’s Law School, who was instrumental in the organization of a conference where the inspiration for the volume was born.

The next part contains in-depth studies drafted with the intention of clarifying important issues derived from the nature of the treaty, its ratification process or future consequences, if approved. The final bloc is dedicated to angles and dimensions that, for lack of other grouping criteria, are to be considered as external ramifications or consequences of the Treaty itself.

As a confirmation of the motto of the EU, subtly absent in the text of the new Treaty (the same as the non-explicit reference to the flag and anthem), the volume shows “unity in diversity.” There is not only diversity in the different points of analysis and various approaches used, but also in the national origin of the authors and the location of their corresponding universities and think tanks. The authors trace back their countries of birth to Portugal, Spain, the United States, the UK, Denmark, France, Italy, Germany, and Mexico. While seven reside in U.S. institutions, others are located in Portugal, the UK, Canada, Italy, France, Belgium, and Spain.

We hope that this compilation will contribute to the enrichment of the debate on the latest (not the last) episode of the long and fruitful history of the European Union. We feel that we are not the only ones who are concerned with the difficult birth and evolution of this treaty and we know that our effort will be followed by others (Siebersson 2008).<sup>1</sup> The bibliography on the subject will surely grow, most especially in the event of the subsequent final ratification.

While individual authors have their own reason for crediting assistance and help in composing their own works, the co-editors would like to explicitly recognize the help rendered by the team of the Computer Support Services of the College of Arts and Sciences at the University of Miami (most especially Luis Vidal and James Aggrey), who would always find solutions to frequent consultations. In the final stages of the preparation of the compilation, special gratitude should be given to Astrid Boening, María Lorca, Alberto Lozano, Vanessa Marzo Martín, Jorge Rebolledo, Borana Hajnaj, Aimee Kanner, Meredith Santurio, Zachary Tate and Eloisa Vladescu. Because they elected to remain anonymous, individual mention cannot be done to the assistance given over the years by a number of key officers and parliamentarians of the European Union.

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<sup>1</sup> For a selection of analytical contributions through the process of crafting the Lisbon Treaty, see Roy 2007 and 2008b, c.

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## Reflections on the Lisbon Treaty

Paulo de Pitta e Cunha

1. The dawn of the new century in Europe witnessed the rising of the project of a new revision of the European Treaties. This task was aimed at adapting them (mainly at the institutional level) to an EU about to enlarge to twenty-five or twenty-seven members. The European Convention intended to offer member states' governments a broad interpretation of the mandate conferred by the Laeken Declaration at the end of 2001. This intention revealed the ambition to prepare a full length Treaty, leading to a Constitution for Europe, which would then replace both the European Union and the European Community Treaties. This Constitutional Treaty, signed by the Government representatives of the then twenty-five members, eventually capsized in the referendums held in France and in the Netherlands in May and June 2005, respectively.

2. A two-year period of reflection followed. On June 2007, the German Presidency took the initiative of proposing a "Reform Treaty" with no constitutional reference. It included the institutional changes for the Treaties in force without repealing them. As a result, the "Community" would cease to exist and the integration process would become centered on the European Union. Furthermore, the Treaty of Rome would be re-designated as the "Treaty on the Functioning of the Union." A mandate was then conferred upon the Portuguese government (which held the EU Presidency during the second semester of 2007) to outline a draft for a Reform Treaty, based on the detailed recommendations to be made to the existing Treaties.

3. These changes were based on the text of the Constitutional Treaty. This move revealed the delicately veiled intent to restore to life the project conveyed by the constitutional text. In fact, at the end of the European Council in June 2007, the Prime Minister of Ireland stated that it had been possible to preserve at least 90% of the original content of the European Constitution.

There was a great concern to avoid referendums as a means of ratification. This was reflected in the explicit renunciation of the "constitutional" reference and the subsequent adoption of the rather harmless designation of the "Reform Treaty." The cumbersome hindrance, which electoral consultations represented, was hereby subtly avoided, except in Ireland, where a constitutional requirement mandated a referendum. In contrast, with the difficult cases of France, the Netherlands – and the United Kingdom – it would be possible to follow the much safer path of parliamentary approval. This "artful" move might not be received well by the electorate of those countries that had held referendums or were en-

gaged to follow this formula, given the certificate of “political minority” conferred upon such electors.

4. The lines of the new Treaty revealed the survival of two negative characteristics of the Constitutional Treaty, from the viewpoint of medium size and small countries. The first one is the enhanced prevalence of big States regarding the elimination of the present weighting coefficients of the Qualified Majority Voting within the Council. These coefficients reflect an over-representation of medium and small Member States and their replacement by a demographic formula. This point is even more significant in so far as unanimity in voting requirements has been removed in a considerable number of cases. The gap between big countries and the rest of the states would therefore become deeper, and lack of a political body, in which all Member States are represented equally, would be felt even more gravely than in the past. In other words, there would not be a “High Chamber” or a “Senate”, in addition to, or in place of, the present European Parliament (as is the case in true federations).

5. The second negative point of the new Treaty concerns the absence of any significant mechanism to revise the regime of the Economic and Monetary Union, e.g. regarding the establishment of mechanisms of financial solidarity among Member States. This improvement was necessary, due to pressures in those comparatively less developed countries, which were facing a highly competitive neighboring environment. This aspect was completely omitted in the project of the European Constitution. In contrast, since the Reform Treaty addressed only institutional issues, questions related to policies were excluded from the terms of reference of the new text.

6. Another characteristic attribute is the excessive thrust given in the Constitutional Treaty towards a supranational trend, which is viewed critically by those who, despite being “pro-Europe”, do not share the European federalism view. Here, in spite of the similarity with the substance of the failed Treaty, it must be recognized that the elimination of symbols that made the Union almost parallel to a State has somehow mitigated the problem.

In fact, the Reform Treaty omitted not only the constitutional reference, but all mention of the flag, the anthem, the motto and the commemoration day, as enshrined in the previous project. At the same time, it dropped the designations of “law” and “framework-law” (the traditional names “regulation” and “directive” being maintained). In contrast, the explicit reference contained in the European Constitution of the primacy of the Union’s rules over domestic legislation was not maintained. Furthermore, the Charter of Fundamental Rights was removed from the text of the Treaty.

It might be argued that we are dealing here with some essentially symbolic and terminological aspects. However, the effect of softening the federal aspect that stood out from the lines of the Constitutional Treaty cannot be neglected.

7. Nonetheless, the institutional structure, as presently proposed, coincides substantially with that of the European Constitution, to the extent that the up-

grading of supranational elements persists. One only needs to keep in mind several fundamental aspects:

- The first is the enshrining of a more stable presidency for the European Council. This would result in the subsequent disappearance of the rotating system in which Portugal has played a prominent role. This active leadership was revealed during the crafting of the “Strategy of Lisbon”, adopted in 2000, and in the Reform Treaty itself – the “Treaty of Lisbon”. The new text was approved by the Governments (signed on December 13, 2007 upon the conclusion of the Portuguese Presidency.)
- The second outstanding dimension is composed of the powers conferred upon the High Representative for External Policy, who ultimately will not be designated as Minister of Foreign Affairs of the Union, but will maintain the same functions assigned to him/her under the Constitutional Treaty.
- The reduction of the number of situations, in which unanimity voting is required, should also be noted.
- The strengthening of both the political and legislative role of the European Parliament is also maintained.
- Finally, due credit should be given to the ambitious formulation, in accordance with a federal perspective, of listing the exclusive competences of the Union along the shared competences. However, the text also admits for the first time the hypothesis of reducing the powers kept by the European institutions.

It is also worth noting that the new Treaty maintains the intergovernmental aspects that had already been adopted by the European Constitution itself. These items were particularly cherished by the British Government, the creator of the famous “red lines” formula. A clear example is visible in sensitive issues such as taxation, where the unanimity voting rule is still in force. It also applies to the requirement for a favorable vote from all Member States for the revision of the Union’s basic Treaties. Hence, intergovernmentalism is visible in the differentiation among the participating countries, notably through the increase in the number of exceptions granted specifically to the United Kingdom.

9. Through the mitigation of the “federal lines” – stronger in symbolism than in substance – the Reform Treaty has postponed the moment in which Member States would have to face some crucial decisions concerning the prospect of a federation. This point seems to be particularly sensitive for countries formed centuries ago. They have a modest status of medium size states in the context of the European Union, but also enjoy a high degree of national cohesion. These states, despite being strongly involved in the integration process and recognizing the inevitability of eroding sovereignties, have apparent difficulties to accept the loss of identity of Nation-States as subjects of international law.

10. With the Reform Treaty, the hybrid aspects of the European construction, i.e. the combination of supranationalism and intergovernmentalism, are not (yet?) overcome by the full triumph of the former. The federal lines, however, even if not openly accepted (as they were not even avowed in the European Constitution), benefit from a new reinforcement. Little by little, from the Single European Act to Maastricht, from Maastricht to Amsterdam, from Amsterdam to Nice, from Nice to Lisbon (?), the integration process is gradually assuming greater intensity.

Despite the reproduction of the contents of the European Constitution text, the Reform Treaty formally resumes a line of continuity with the other existing Treaties, to which the European Constitution intended to put an end by way of a full “re-foundation”.

11. Clearly, if the “Lisbon Treaty” had aimed, like the Constitution, at replacing the existing Treaties its historical impact would have been much stronger. Instead, the changes proposed now (in view of their incorporation in the same Treaties) will be kept in force, similar to the preceding revisions of the European Treaties. Therefore, the references to the Primary Law of the European Union will still be the Maastricht and Rome Treaties, with all their developments and updates. This is likely to disperse the relevance attributed to Amsterdam, Nice and (in time to come) Lisbon.

12. It is hard to believe that the Reform Treaty will contribute in bringing the European Union closer to the citizens of the Member States. Due to its opacity, it can not be understood by the majority of the population. By its intentional “grayish” style, it put aside any propulsive idea, such as that endorsed by the States when they proposed the approval of a Constitution for Europe in 2004.

13. The system of governance established in the Reform Treaty, as a duplicate of what was outlined in the European Constitution, represents a further step on the centralization of the process of integration, through the reinforcement of the power of the institutions of the Union. The suppression of the symbols is clearly insufficient to erase the impression that the Union is increasingly more structured and in accordance with the conventional image of a state.

14. The alternative vision of an entity different from a State, characterized by what is known as “multi-level governance”, where the Union is basically performing the role of a regulator, seems to have been put aside. The categories of the Union’s actors remain restricted to the dualist concept of positing national governments vis-à-vis supranational institutions, intensifying thus the power of the latter.

Of course, the tactical escape from resorting to referendums for the ratification of the new Treaty is not expected to awaken the interest of the citizens. In the present context, such Treaty may be viewed as an example of the traditional method of “progressing by stealth”

15. It can be concluded that the Reform Treaty will bring greater efficiency to the decision making system of the Union. But the appeal of a grand idea and the perception of what the European Union will be in the future, are not present in its text.



## Re-inventing the EU after the Irish ‘No’<sup>\*</sup>

Vivien A. Schmidt

The EU can’t go on like this. Whether the Lisbon Treaty ultimately succeeds or fails, the Irish referendum will have taught us one thing: unanimity and uniformity are things of the past. The EU is now too diverse to expect all member-states of the EU to ratify any given treaty or to participate in all areas of EU activity.

### **The Problem: Competing Visions of Europe**

Member-states have competing visions of the EU, and are increasingly divided over what they would be willing to sign up to (Schmidt 2009). Is the EU to be mainly an ever-enlarging, borderless free market and security zone run by inter-governmental decision-making—as the British, the Scandinavians, and many of the Central and Eastern European countries would have it? Is it instead to be more of a values-based community with ever-deepening politics and economics and identifiable borders stopping before Turkey, Georgia and the Ukraine—as Germany, France, Austria, and many other Continental European countries would like? Should it rather be a borderless rights-based union open to all democratizing countries on its borders and increasingly democratic in its decision-making—as the Commission, human rights groups, and philosophers like Habermas hope (Sjursen 2007)? And can it also be a global strategic actor ‘doing international relations differently’ (Howorth 2007) by promoting democracy, free markets, community values, and human rights around the world through its ‘normative’ power, whatever its borders—as the EU and national leaders have been proposing?

For the moment, the clashes resulting from strong arguments in favor of one or the other first three visions applied to the questions of the day (in particular on the issue of enlargement farther east) have been submerged by the fourth. This last vision has become the one projected lately by member-state leaders, whether they depict the EU as a ‘project’ rather than a ‘process’ (Sarkozy) or as ‘projects’ (Brown), as they propose to deal with global challenges such as economic crisis,

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<sup>\*</sup>A shorter version of this essay was published as a Comment in the *Financial Times*, July 22, 2008; an earlier version was published on the website of the online French think-tank Telos ([www.telos-eu.com](http://www.telos-eu.com)) July 7, 2008. A slightly different version was published in the *EUSA Review* (Fall 2008).

climate change, poverty, and terrorism. But agreement on ‘what to do’ can always be undermined by disagreements on ‘what the EU is’ and ‘how far it should expand’—whether as widening free market, deepening values-based community, or democratizing rights-based union.

The EU branding process was right to replace ‘ever closer union’ with ‘unity in diversity.’ But that unity is itself again in question. The Irish ‘No,’ by stopping the institutional compromise of the Reform Treaty, risks reopening the debate about what the EU should *be* at a time when what the EU needs is to open the debate about what the EU should *do*. Policies, not institutions, must be the focus of the day if the EU is to move forward. But whatever happens with regard to the Lisbon Treaty, it will not solve the underlying problem of: how to accommodate member-states’ differing visions of the EU?

### **The Solution: Give up Unanimity and Uniformity**

There is one way: give up unanimity and uniformity. This is easier to do than one might think, since the EU has already breached the principle of unanimity in the wide range of areas covered by qualified majority voting. And it has already given up on uniformity in areas other than the Single Market. Thus, the UK and Denmark have opt-outs from the Maastricht Treaty. Schengen includes non-members like Iceland, Norway, and shortly even Switzerland, while members like UK and Ireland remain out, as do Bulgaria and Romania temporarily. Denmark is not a member of the European Security and Defense Policy. The eurozone encompasses 15 of the EU 27. The freedom of movement of workers excludes Romania and Bulgaria for six more years. The Lisbon Treaty would exempt Britain and Poland from the Charter of Fundamental Rights.

The member-states themselves also acknowledged the impossibility of a unanimously agreed, uniform future by introducing the principles of deeper cooperation among select groups of member-states in successive treaties since the Amsterdam Treaty. The Lisbon Treaty makes these workable for two or more countries with ‘permanent structured cooperation’ for defense and security policy and ‘enhanced cooperation’ for any nine or more.

The push toward uniformity through unanimity was absolutely necessary, in the early years of the EU, to create a common set of policies in a free market, a sense of community with common standards and shared values, respect for human rights, and a global actor. But the unanimity rule, begun by a union of six nation-states, now stops the treaty process dead in its tracks while the uniformity ideal, the product of a Commission dreaming of a federal state, chokes off differentiated integration. Neither is necessary today. Rather, it would be better to have opt-outs in place of vetoes as the *modus operandi* for EU ‘treaties’ and to see differentiated integration as a virtue rather than a vice.

This should not be all that hard to imagine, since the EU has already breached the principle of unanimity in the wide range of areas covered by quali-

fied majority voting and in the occasional opt-outs for member-states with regard to treaties—the UK with the Maastricht Treaty on the Social Chapter and EMU, and more recently the Charter of Fundamental Rights in the Lisbon Treaty; Denmark with Maastricht on EMU and ESDP; and now Ireland, if it passes the Lisbon Treaty, on neutrality, abortion, and its own Commissioner (as agreed in the December 2008 Council meeting). Abandoning the unanimity rule would help avoid the hazards of the current process, in which individual member-states have been able to hold the others hostage, delaying the entry into vigor of treaties approved by all the others and often watering down measures desired by large majorities in futile attempts to engineer compromise (as in the Social Charter, which was watered down in an effort to get the UK to buy in rather than veto, but which then negotiated an opt out anyway).

In short, what we need is a *'treaty to end all treaties,'* such that opt-outs substitute for vetoes in the 'treaties' and in selected areas not covered by qualified majority voting. Without the unanimity rule, member-states could reach agreement on the big policy issues by allowing the occasional negotiated opt-outs for those members with legitimate reservations about participation in a given area. Exit through opt-out would help avoid the dead-ends on policies, which only one or two member-states object, and/or their dilution in the search for compromise. This, however, would not apply to the Single Market, where exceptions to the rules are allowed only in very exceptional circumstances (as in the case of GMOs for Austria and Hungary, which the member-states upheld against the Commission proposal to lift the ban in March 2009). Furthermore, it would not apply to smaller groups of countries interested in deepening their ties beyond where the majority wishes to go, which is covered by the different forms of 'enhanced cooperation' discussed below. The 'Catch-22' in this is that, to end the unanimity rule, the EU would require member-state unanimity in its 'treaty to end all treaties'.

An end to the unanimity rule goes hand in hand with the acceptance of a more differentiated integration for the member-states, and an end to the uniformity ideal. This would again recognize the reality on the ground, that is, that the EU has already given up on uniformity in policy areas other than the Single Market, such as EMU, Schengen, ESDP, and the Charter of Fundamental Rights, as well as in territory through its range of openings to non-members through 'economic areas,' 'neighborhoods,' and 'partnerships'.

The beginning of the end of the uniformity ideal (much as with unanimity) came with the UK opt-out of Maastricht on the Social Chapter and EMU. But the principle of differentiation was officially recognized when 'enhanced cooperation' was written into the Amsterdam Treaty (albeit in unworkable form), modified marginally in the Nice Treaty, and made workable in the Lisbon Treaty through 'permanent structured cooperation' for defense and security policy and 'enhanced cooperation' for all other policy areas. It would allow for important advances in a range of areas, whether to produce greater fiscal harmonization

among interested eurozone countries; to allow for the creation of ‘immigration zones’ that group together countries with similar immigration or asylum policies, e.g., the CEECs, the Mediterranean countries, and Continental European; even create ‘pools’ for health care provision or swapping for countries with similar policy regimes (Schmidt 2009). Interestingly enough, enhanced cooperation has already been proposed in divorce law in July 2008, under the more stringent Nice Treaty rules, by eight member-states in response to frustration with the obstruction of liberal countries like Sweden (with very progressive divorce laws) and conservative countries like Malta (which does not recognize divorce).

Such differentiated integration is only increased by the ‘outside insiders’ like Norway, Iceland, and Switzerland which participate in the Single Market as well as in a range of other EU policy communities such as Schengen and ESDP but don’t have a vote. It is complicated by initiatives like the Bologna process for higher education harmonization, which was set up outside the EU by the member-states and including most of them (but again not the UK), and was aided financially and administratively by the Commission. Such differentiated integration will be further extended by the Eastern Partnerships proposed by the Commission, to be launched in spring 2009, which involve deep and comprehensive free trade agreements, gradual integration into the EU economy, democracy and good governance promotion, ‘mobility and security pacts’ to allow for easier legitimate travel while fighting corruption, organized crime, and illegal immigration (European Commission). Moreover, for prospective members in the EU’s periphery, membership need no longer be a question of ‘in’ or ‘out’ but rather of ‘in which areas’ or ‘out of which areas.’ Accession would therefore become a gradual process for bordering countries, policy area by policy area, once certain initial conditions related to democratic practices, respect for human rights, and internal market reforms were met. It would help avoid the ‘big bang’ of accession (or rejection) after long years of hard-bargaining, provide on-going socialization into the EU’s consensual policymaking, ensure implementation of EU rules, and promote continued democratization.

Some might respond that setting up this kind of partial membership would not be very attractive. For countries in the EU’s periphery, why try to meet the criteria demanding significant democracy and market opening when neighborhood policy allows entry into the European market with criteria that are more exhortatory than real with regard to democratization? Similarly, for countries like Norway, Iceland, or Switzerland which are already part of the European Free Trade Association (EFTA) or the European Economic Association (EEA) and already participate in the Single Market in myriad ways, where is the value-added?

The value-added is in a further, and necessary, privilege of membership: institutional participation. Institutional voice and vote is necessary not only to make certain that the policy decisions are accepted as the right ones—because all participants would have a place at the table to air their concerns and vote their

preferences—but also to ensure the ‘democratic’ legitimacy of the decision-making process and the continued democratizing power of attraction of the EU. How this would function institutionally would naturally have to be worked out—and the Treaties would have to be amended to allow this. Doing so would help reduce the existing democratic deficit for those European countries which have chosen for different reasons not to join the EU. Norway, for example, contributes large amounts of funds to the EU in exchange for being part of the internal market, and has to implement all regulations without having any vote (although it does attend meetings).

### **Toward a ‘menu’ Europe?**

Once the principles of unanimity and uniformity are abandoned, membership in the EU will no longer be an all or nothing proposition. Beyond certain basic membership requirements—being a democracy which respects human rights and participates in the Single Market—member-states will increasingly come to pick and choose the policy ‘communities’ of which they wish to be a part. The result is differentiated membership in the EU. If we were to imagine what the EU as a regional state would look like on a map, we would likely find over time a rather large core of deeply but not uniformly integrated members, mainly in Continental and Mediterranean Europe, including some of the CEECs, with somewhat less integration for the UK and Nordic countries, and even less as we move eastward.

This is not to suggest, however, that the EU is now to be ‘*Europe à la carte*,’ as the free marketeers might wish. Nor is it to encourage the communitarians to retreat to a ‘*core Europe*,’ with one dish for all. Rather, this is an elaborate ‘*menu Europe*,’ with a shared main dish (the Single Market), everyone sitting around the table, and only some choosing to sit out one course or another.

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## Ireland Votes 'No'

Chris J. Bickerton

On June 13, 2008, the Irish voted on the Treaty of Lisbon. Agreed upon by member states in late 2007, this “mini-treaty” was what the EU leaders had managed to salvage from the draft Constitution after the ‘No’ votes in France and the Netherlands in 2005.<sup>1</sup>

Although France and the Netherlands both said ‘No’ to the Constitution Treaty, Ireland is the only country so far to have had a referendum on the Lisbon Treaty. Fifty three point four percent of the votes were against the treaty and 46.6% were in favour. Of the 27 member states, 23 have now ratified the Treaty. The victory of the ‘No’ vote leaves the Treaty null and void since it needed the ratification of *all* member states, if it were to come into effect in January 2009 as planned.

As a result, it was decided at the European Council summit in December 2008 that Ireland should be asked to vote again on the Treaty. It is important to be clear on the details of the December Council decision. In order to avoid having all member states ratify once again a modified Lisbon Treaty, it was agreed that Ireland would be offered a *political* promise from the European Union that future *legal* guarantees against a number of issues (neutrality, abortion, tax) would be inserted into the accession Treaty with Croatia, expected to come into effect in 2011 or thereabouts.<sup>2</sup> In the meantime, in the autumn of 2009, the Irish will be asked to vote on a text that is the same as the one they voted on 18 months earlier. The only substantive change – which can occur without the need to modify the Lisbon Treaty – is that of the number of Commissioners. Instead of reducing the size of the Commission, the body will continue to include one national from each member state (Quatremer 2008).

Since then, support in other countries has wavered. On November 26, 2008, the Czech Constitutional Court gave its judgement on the Lisbon Treaty. It gave a unanimous decision in favour of the constitutionality of the Lisbon Treaty, a decision which the Czech president, Vaclav Klaus, denounced as politically motivated. The Czech parliament remains the only parliament among the EU

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<sup>1</sup> For the argument that the Lisbon Treaty is in substance identical to the Constitutional Treaty, see Bonde 2007.

<sup>2</sup> As Open Europe puts it in a report on the EU in 2009, EU member states are “treading a delicate balance between trying to convince the Irish people that the Treaty has been altered to reflect their concerns, while avoiding any actual changes which would require the Treaty to be re-ratified across the EU”. Open Europe (2008: 8).

member states through which the Lisbon Treaty has not passed yet. The lower house (Chamber of Deputies) has delayed the vote and there are many senators in the upper house voicing concern over the Treaty. President Klaus has said that he will not sign the Treaty until it has been agreed to by Ireland. Most recently, the German Constitutional Court in Karlsruhe has been asked to judge on the constitutionality of the Treaty. The two-day hearing has been animated, though many expect the court to approve Germany's treaty ratification bill (Scally 2009).<sup>3</sup>

EU leaders have argued that ratification should continue regardless, and that a compromise can be made with Ireland to ensure a favourable outcome in a second vote. An alternative would have been to abandon the Treaty altogether and to implement some aspects of it without tying everything together into a single treaty. It is conceivable that if the Irish vote 'No' a second time, they will be asked to leave the EU, though this is not a position any member state will defend publicly. A second Irish 'No' would probably bring down Brian Cowen's government. It would certainly raise more questions about the EU's strained relations with its own citizens.

One of the leading architects of the "mini-treaty" was French president Nicolas Sarkozy. The 'No' vote disrupted the beginning of a much-hyped French presidency of the EU, which ran from July to December 2008. However, since then, it has elevated President Sarkozy to the position of "crisis manager-in-chief." Sarkozy travelled to Ireland on July 21, promising to listen to the Irish. His visit provoked angry reactions after he had reportedly said that Ireland would have to vote a second time, pre-empting what should be a decision for the Irish government.

### **The 'No' Campaigners**

The 'No' campaign in Ireland was similar in some ways to the French 'No' campaign in 2005: it was made up of disparate groups and interests, which spanned the political right and left. The vast majority of the Irish establishment was on the side of the 'Yes' campaign, as in France in 2005 (Halimi 2005). However, in the three years since France rejected the Constitutional Treaty, the politics of opposition to the EU has evolved (Marks and Steenbergen 2004).

One of the main groups leading the 'No' vote was *Libertas*, a campaign group founded by Declan Ganley, an Irish millionaire businessman. The group was originally set-up in opposition to the regulation and red-tape coming from Brussels and turned against the Lisbon Treaty in recent months. Its campaign focus was on the loss of Irish influence in the EU decision-making, the undemocratic nature of the EU and the threat of tax harmonisation. Ireland has a

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<sup>3</sup> For a very useful briefing on the state of the pending ratification procedures on the Lisbon Treaty, see the report produced by Gayle Kinkead for the European Referendum Campaign. The report can be accessed at: [http://erc2.org/fileadmin/user\\_upload/docs/Report\\_on\\_Countries.pdf](http://erc2.org/fileadmin/user_upload/docs/Report_on_Countries.pdf)

12.5% corporation tax, one of the lowest in Europe, which many view as essential for Irish economic growth.

*Libertas* combined free market and pro-business rhetoric with a nationalist defence of Irish interests against the encroachments of the EU bureaucracy. Given the extent of Ireland's economic ties with the rest of the EU, Ganley cut a lonely figure, as much of the business establishment was on the 'Yes' side.

Many other groups in the 'No' campaign shared *Libertas*' nationalist rhetoric. Sinn Fein combined a welfarist economic agenda—at odds with Ganley's anti-regulatory zeal—with the same nationalist sentiment. On the economy, the EU was viewed as a malign force for *deregulation*, particularly in the area of workers' rights. With the slogan "Ireland deserves better," Sinn Fein highlighted Ireland's waning influence in the EU decision-making. Sinn Fein also played up the dangers the Treaty posed for Irish neutrality, suggesting that the Lisbon Treaty would draw Ireland into the EU's common security and defence structures.

Alongside these groups, many other issues and interests were raised. Irish farmers raised concerns about the EU's position on trade issues at the World Trade Organization, issuing warnings to the EU's trade commissioner, Peter Mandelson. Devout Irish Catholics argued that the EU represented a threat to Ireland's anti-abortion laws.

### **A New Disenchantment**

If the 'No' campaign was so full of contradictions, how can we explain its success? One important factor lies outside of the 'No' camp itself. What secured the result was more than simply the mobilization of anti-abortion Catholics, free market zealots, anti-war leftists and old school Republican nationalists. In fact, according to polls, only 6 % of the 'No' vote was made up those who wanted to protect the Irish tax system; and only 2 % voted 'No' because a fear of what the EU legislation might mean for issues like abortion and gay marriage (Flash Eurobarometer 2008).

Crucial to understanding the 2008 vote was the mobilization of a new anti-EU constituency: the hitherto politically apathetic, who this time felt that their lack of understanding of the Treaty was a sufficient reason to vote 'No'. The message of the 'Yes' camp had effectively been, "trust us, the Treaty is complicated but we know it is in your best interest." It was this claim to expertise which was rejected by 22 % of those who voted 'No' due to a lack of information, by far the most popular reason given for voting against the Treaty. It is also significant that 65% of 18-24 year olds voted 'No'. The referendum seems to have expressed a new disenchantment with the kind of politics that tells voters that mere acquiescence with whatever the political elites say is the best way forward (Bickerton 2008).

### **Ireland Against the Rest**

Another element explains the success of the 'No' campaign: diverse themes were united under the common banner of defending Ireland's interests against those of more powerful EU member states and of the Brussels bureaucracy itself. A David-versus-Goliath theme emerged, evident in the popular 'No' slogan of "Don't Be Bullied." Twelve percent of the No voters said they voted 'No' in order to protect Irish identity within Europe; 6 % were concerned about Ireland's neutrality; 6% were afraid of losing an Irish European Commissioner; and 3% were afraid that small states would be left worse off with the new Treaty. This nationalist concern gave the 'No' campaign a coherence and resonance which it would otherwise have lacked.

### **Which No?**

These two forces behind the 'No' vote need to be distinguished from one another. The lack of trust evident in many people's decision to vote 'No' reflected the state of the relationship between Irish citizens and their own political establishment. Above all, it represented a challenge to the expertise-driven rhetoric of European integration and to the legitimacy of the Irish government.

The nationalist impulse, on the contrary, was not a challenge to Cowen's government; it united Ireland in the struggle against other powerful EU member states and the Brussels-based institutions. An internal political battle was transformed into a battle between states and between Ireland and the EU.

Which 'No' prevails over time will have important consequences for European politics. Underlying the attack on the politics of expertise is a strong democratic sentiment which rejects elitism in the name of popular self-determination. Promoting Irish interests against those of other EU member states will only blur the lines of political conflict, pitting European peoples up against each other instead of uniting them in opposition to their own elites. European integration, after all, is not something that is "out there" in Brussels; it has become a continuation of domestic politics and should be understood as such. It is interesting that *Libertas*, the recently constituted pan-European political party that has grown out of the campaign group that played a central role in the 2008 referendum, contains within itself both tendencies. It seeks to unite people across Europe in opposition to the Lisbon Treaty by fielding candidates in all EU member states in the June elections to the European Parliament. Yet at the same time it argues strongly for a return of political powers to the nation-state in the name of democratizing the EU. Pan-European politicization thus sits alongside fervent

nationalism as two contrary tendencies within the heart of the new political opposition in Europe.<sup>4</sup>

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<sup>4</sup> For three accounts of European integration as a constitutive feature of domestic politics, see Heartfield 2006, Bartolini 2005, and Schmidt 2006.



### **III. In Depth Analysis**



# How to Reform the European Union: Is the Treaty of Lisbon Part of the Solution or Part of the Problem?\*

Luis Silva Morais

## Introduction

At a June 2007 international conference, dedicated to an analysis of 50 years after the Treaty of Rome, Joseph Weiler offered a funeral prayer for the European Constitutional Treaty. It meant breaking two common rules for funeral prayers: brevity and avoiding negative comments about the deceased.<sup>1</sup>

Addressing the Treaty of Lisbon is quite a different task. To a certain extent, we will be offering a prayer for a newborn: the Treaty of Lisbon. Its life, unlike the events of June 2007 surrounding the Constitutional Treaty, is (still) a probability, not counting the uncertainties associated with the result of the Irish referendum (which was held, in fact, as the result of an internal constitutional imposition). One must also bear in mind that any ‘surprises’ within the context of the United Kingdom would now be relatively remote.<sup>2</sup>

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\* This analysis is based on a presentation given at a conference held in Lisbon on April 17, 2008, sponsored by the European Institute of the School of Law of the University of Lisbon, of which the author was co-organizer with Prof. Paulo de Pitta e Cunha. This conference had as its general theme the Treaty of Lisbon. Among the presenters were Pitta e Cunha, Lopes Porto (at the time President of ECSA World), and Vlad Constantinesco, Neill Nugent and António Vitorino (former European Commissioner of Justice and Internal Affairs). Proceedings of the June 2007 conference were published in Portuguese, English and French under the general title of *A Europa e os desafios do século XXI [Europe and the Challenges of the Twenty First Century]* (Paulo de Pitta e Cunha and Luis Silva Morais, editors, Coimbra: Almedina). This conference also had as panellists several leading European and North-American academics (e.g., Joseph Weiler, Simon Hix, J. Bourrinet, Vito Tanzi, Douglas Rosenthal, Joaquín Roy, W. Molle, J.C. Gautron, Philippe Moreau Defarges, Martin Seidel, among others).

<sup>1</sup>Cfr. Joseph Weiler (Ibid., 179) “The Constitution of Europe: Resquiecat in Pacem”, in *Europe*, Pitta e Cunha/Morais (editors).

<sup>2</sup> The option for a parliamentary ratification of the Treaty of Lisbon by the government of Gordon Brown seemed to pave the way to its ratification. However, the negative result of the Irish referendum brought serious uncertainty about the future of the Treaty, which still persists at the date of the final review of the text of this paper (December 2008). Notwithstanding such uncertainties, the Treaty of Lisbon still embodies a political process in which all options remain open, especially with the decision taken at the end of 2008 to hold a new referendum in Ireland, contrarily to what happened in the summer of 2007 with the Constitutional Treaty (at that time, precisely at the last European Council of the German Presidency, the Member States approved a

The Treaty is, however, a newborn with a certain life expectancy which raises numerous questions about its consequences. Additionally, in continuing to use images, including those from literature, it may, to some extent, operate as a form of ‘*Dr. Jekyll and Mr. Hyde*’ (with the pendulum swinging back and forth, positive in some aspects and negative in others).

Some of the presentations at the 2008 conference already addressed some positive aspects of the Treaty of Lisbon. In contrast, other interventions reflected a highly critical view of this Treaty, displaying a healthy rejection of an *a priori* or *unanimous* view that should guide academic discussions. In this paper I will seek to list some of the potential positive aspects and some of the negative dimensions of the Reform Treaty.

### Mixed Reactions

Given this divided view set forth from the start, a prior clarification must be made with regard to our overall position in relation to the Treaty of Lisbon. On the one hand, we believe that, *given the situation of impasse and misgivings with regard to the direction of European integration that had been generated by the rejection of ratification of the Constitutional Treaty*, it could, indeed, lead to a negative spillover in terms of integration dynamics. On the other hand, (without evaluating here the reasons for this crisis and the problems behind this rejection of ratification),<sup>3</sup> *the Treaty of Lisbon appears, to a certain extent, as a positive development to remove this impasse.*

The quite negative consequences for the integration process are the reason that this impasse had to be removed. Hence, the solution of adopting the Treaty of Lisbon appears, in this light, to be an essentially positive development. Nevertheless, various aspects of the Lisbon text are open to criticism, as they will be delineated below. First, the new Treaty is based on the mandate established during the German Presidency of the Council during the first half of 2007, as well as on the subsequent negotiations. These were not painless, but very complex, and they were led with undeniable institutional merit subsequently by the Portuguese Presidency of the Council in late 2007.

Notwithstanding the above, the Reform Treaty does not yet represent—to use another expression that has become popular—the ‘*end of history*’ in terms of the European integration process, despite widespread support for a period of ten or fifteen years without new and successive revisions of the Treaties that support the European integration process. In reality, even in a scenario in which the Treaty of Lisbon would be ratified—something that is not guaranteed at the time of writ-

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roadmap to a new Reform Treaty and, in doing so, signalled the actual ‘death’ of the Constitutional Treaty).

<sup>3</sup>Reflecting this kind of analysis, see, *inter alia*, Philippe Moreau Defarges (Ibid., 151) “Les referenda dans le processus de ratification des traités européens”, in Pitta e Cunha/Morais, *Europe*,

ing—there will still be problems, or essential imbalances, in the functioning of the EU that have not been addressed. Consequently, they will have to be considered through the use of other solutions in the future. These problems will be further elaborated below.

Essentially, two levels of analysis of the content of the Treaty of Lisbon are proposed. On a first and primarily institutional level, I propose to identify and characterize the essential components of the structure of the Treaty of Lisbon and their overall impact on the legal structures of the EU. They follow highlights of some of the main changes in the institutional organization and its functioning, i.e., in the decision-making process of the EU. At this level, I will seek to determine possible gains in efficiency in the EU decision-making process, and simultaneously evaluate the consequences for the position of Member States in a hybrid legal structure that already involves many federal components.<sup>4</sup>

On a second and primarily legal and economic level (which, somehow surprisingly, has been seldom commented on or developed), this analysis proposes to selectively study some innovations of the Treaty with both positive implications (in our opinion), and potentially negative significance. We will thus select, for this purpose, two types of innovations, namely innovations in relation to the framework of the *Economic and Monetary Union*, and of the so-called *Stability and Growth Pact*, as well as changes in the field of *competition*, at the level of the *general legal principles applicable to the functioning of the EU*, and additionally, the *framework of services of general economic interest*.

### The Institutional Level

Concerning the first institutional level indicated above, it should be remarked from the start that, unlike the Constitutional Treaty, the Treaty of Lisbon (as its very name of “*Reform Treaty*” suggests) implies the return to the legal technique of reform of earlier treaties that had been adopted in the course of the European integration process. It is hence not conceived as an overall replacement of those earlier treaties. It merely modifies previous treaties, which have framed the process of European integration. This was recently the case with the Treaty of Amsterdam and the Treaty of Nice. Consequently, it thus extends and perhaps increases the complexity of existing legal structures: the European Union Treaty and the Treaty establishing the European Community (now referred to as the “*Treaty on the Functioning of the European Union*”), since legally the EU has taken over from the European Community.

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<sup>4</sup>Some authors, attempting a difficult global qualification of the EU, use for that purpose the idea of a confederation. This parallel was put forward by Vlad Constantinesco and other participants at the conference of April 2008. With all due respect for those scholarly views, there are serious reservations about such qualifications, and I prefer to qualify the EU as a hybrid legal construction which already bears some federal elements.

However, there is no legal hierarchy between the two treaties, which have now been changed in this legal structure (which remains complex), despite the apparent simplification or consolidation resulting from the EU-entity, which replaces the previous overall EC. Such treaties have the same legal value, as it is clearly shown in Article 1 of the EU Treaty, and Article 1 of the Treaty on the Functioning of the European Union.

In contrast, while it is true that the complexity of the legal structure of the two treaties is maintained, there has been an apparent consolidation of the so-called three-pillar-structure of the EU, created by the Treaty of Maastricht. This framework is composed of the so-called community pillar, while the second pillar is devoted to the common foreign and security policy, and the third pillar is devoted to police and judicial cooperation in criminal matters.

In fact, the Treaty of Lisbon, as was already the case with the Constitutional Treaty, formally abolishes the aforementioned three-pillar structure, but this consolidation or merger of the three pillars tends to appear as a mainly semantic issue. Indeed, while the consolidation substantively affects the third pillar, it affects to a much lesser extent the second pillar (foreign policy). This limitation lies in the fact that in the field of foreign policy the adoption of legislative acts has been excluded. In this domain decisions are admitted, but they will not have the same meaning as in the framework of other policies and other fields of action in the European Union. Certainly, the Treaty of Lisbon, unlike the Constitutional Treaty, expressly establishes that the Common Foreign and Security Policy is subject to specific rules and procedures.<sup>5</sup>

Furthermore, it is also specified that *the flexibility clause contained in the former Article 308 of the European Community Treaty* – permitting the adoption of provisions with a view to the development of the community actions necessary to pursue treaty objectives when the powers or means of action have not been established as such in the fields in question – *does not apply to common foreign and security policy*.

On the whole, one must consider that everything undoubtedly depends on the very concept of ‘pillar’ of integration in the framework of the EU that is adopted. Although the second pillar of the EU is formally abolished by the Treaty of Lisbon, if we take into account the existence of a different set of rules governing decision-making processes and legal acts that can be adopted in the field in question, it would appear undeniable that, substantively, the former second pillar is, to a large extent, maintained and its envisaged ‘extinction’ is a matter of legal semantics.

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<sup>5</sup> Also emphasizing the importance of the dissimilarity between the Constitutional Treaty and the Treaty of Lisbon, see, *inter alia*, Kurpas. 2007.

*On Institutions*

Leaving aside the particular aspects of foreign policy, and considering now, in general, the institutional aspects related to other areas of action and to other European Union policies, as well as the decision-making processes aimed at the adoption of binding legal instruments by the EU (which, in a somehow simplified way, '*brevitatis causae*' we can call the *European Union decision-making process*), it is necessary, on the one hand, to highlight some of the key adjustments emerging from the reforms established through the Treaty of Lisbon and, on the other hand, to try to assess the major repercussions arising from some of those changes.

From a general point of view, we can consider that these global repercussions are twofold. *Firstly*, there are changes that apparently reduce the power of the Member States, particularly the power of Member States to block the decision-making process, as well as changes that actually reduce the direct participation of States in the functioning of Community institutions. *Secondly*, this movement, limiting the scope and the actual sphere of intervention by Member States, in favor of a supposedly added efficiency in the decision-making process, is intended to be somehow balanced or compensated by another movement (also already briefly mentioned at this conference)<sup>6</sup> towards an increased intervention of national parliaments (an aspect that is definitely set out in the Treaty of Lisbon.)

Regarding this first line of institutional changes referred to above, a number of significant aspects need to be briefly considered. One of these aspects corresponds to the creation of a Permanent President for the European Council for a term of office of two and a half years with the possibility of renewal, appointed by a qualified majority of the European Council. This institutional figure, as well as its essential attributes, has been extensively discussed, therefore there is no need to proceed to its detailed characterization and assessment.

However, it should be stressed that this position does not imply in itself the end of the rotating presidency of the Member States, at least in absolute terms. It is true that Member States will no longer hold the presidency of the European Council and that they will no longer control the presidency of the Council of Ministers; but they will still hold the presidency of the Council in other specialized formations. This duality accentuates, to an extent, the complexity of the functioning of the EU and it undeniably reduces, in drastic terms, the political and

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<sup>6</sup> See Vlad Constantinesco, presentation at the Lisbon conference of 2008. The aforementioned aspect has also been largely underlined by several doctrinal general analysis of the Treaty of Lisbon and the impact of its institutional reforms. See, on that topic, *inter alia*, *The Treaty of Lisbon – Implementing the Institutional Innovations*, Joint Study – EPC, Eggmont, CEPS, November 2007, Sebastian Kurpas, Bem Crum, Philippe De Schoutheete, Jacques Keller, Franklin Dehousse, Sami Andoura, Antonio Missiroli, Sara Hagemann, and Hervé Bribosia (Rapporteurs).

institutional clout of the current figure of the rotating presidencies of the Council by the Member States.

In strictly literal terms, the new entity of the Permanent President of the European Council is bestowed with rather limited powers, which are essentially of procedural nature. However, in this regard we must acknowledge that the implementation of the Treaty inevitably involves uncertain factors. Much will actually depend, in terms of the institutional dynamics of the EU, on the personalities of the Presidents that initially hold this office.

This new position indisputably allows for relative gains in terms of coherence and temporal continuity in conducting the affairs of the European Council, but conversely—and this aspect should also be highlighted—the potential for risks, imbalances and institutional malfunctions is high. Actually, there is no clear delimitation of competencies between the Permanent President of the European Council and the new figure of the High Representative for Common Foreign and Security Policy, which may give rise to possible situations of tension in the exercise of functions in this field. Furthermore, situations of potential tension with the President of the European Commission should not be entirely ruled out, especially when there are two totally different institutional logics or dynamics, in which interaction may not be very straightforward.

On the one hand, we shall have an institutional dynamic associated with the action of the President of the European Council, essentially answerable in practice to Member States' governments. On the other hand, a second institutional dynamic will correspond to the action of the President of the European Commission, mainly answerable to the European Parliament. In this context, it should not be taken for granted that these two institutional dynamics, clearly different, will be harmoniously combined. Different positive or negative developments may '*in concreto*' occur. However, the potential that this might not happen is relatively high.

Additionally, within the first line of institutional changes mentioned above, reference should be made to the new system of qualified majority voting in the Council. It is associated with extending the qualified majority procedure to new issues, as well as to extending the co-decision procedure involving the European Parliament to new issues as well. Once again, these are aspects of institutional reform that have been repeatedly described in numerous analyses of the Treaty of Lisbon, and are not worth discussing in greater detail here.<sup>7</sup> Accordingly, due to the limited purposes of this analysis, only some more pressing points will be addressed.

Thus, in a system of sensitive balances of power between Member States and the EU on the one hand, and between the states themselves on the other hand, changing criteria for a qualified majority through the Treaty of Lisbon involves a

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<sup>7</sup> On these changes of the decision procedure of the EU, see again, *The Treaty of Lisbon – Implementing the Institutional Innovations*, Joint Study (Ibid., 57)

significant transition that reduces the weight of medium-sized Member States, such as Portugal, the Czech Republic or Greece, and others. At the same time, this adjustment of votes and of the criteria established for qualified majority voting within the Council actually favors some of the smaller states and indisputably favors the relative position of the larger Member States. At least, this modification appears relatively favorable for small states that always end up in a demographically overvalued position.<sup>8</sup>

The result of the replacement of the *triple* majority system, introduced by the Treaty of Nice<sup>9</sup>, by a *double* majority system, was compacted in the vote of 55% of the Member States, representing 65% of the EU population. This clause sets a system of qualified double majority, based on essentially demographic criteria that in fact led to a potential compression of the position of the average size Member States.

In fact, if we try to assess the voting scenarios from every angle with this new system (which in any case would only come into force in 2014, with a transition period until 2017), a clear fundamental consequence becomes rather obvious: a relative loss of influence on voting on the part of medium-sized Member States will occur.

This should be viewed as an objective fact, irrespective of any quantitative weighting that may be considered. How to assess this objective fact globally is an entirely different matter. It may certainly be construed that there are reasons of *efficiency* and of *speed of decision-making* that argue in favor of the planned changes. Incidentally, other papers presented at the above mentioned conference, which this paper follows, addressed the probability of increasing the chances for successful and possibly faster adoption of decisions, although this always involves a rather complicated probability calculation.<sup>10</sup> As a bottom line, it could

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<sup>8</sup> On these evaluations of the overall significance of the voting criteria and on the related variations of the relative influence of the several Member States in the functioning of the Council, considering both the Constitutional Treaty and the Treaty of Lisbon, see Simon Hix, "Will the Constitution Make EU Decision Making Easier", in *Europe*, Cunha and Morais, 169. On the same topic see, also by Simon Hix, *What's Wrong*, 2008.

<sup>9</sup> It should be taken into account here that in the triple majority system of the Treaty of Nice the voting criteria concerning each Member State translated into a global reinforcement of the number of votes of the major States, since the following was required: (i) an absolute minimum number of votes for the approval of any binding measures, (ii) the positive vote of the majority of Member States in case the measure at stake was proposed by the Commission and finally (iii) the fulfilment of the so called demographic condition on the basis of which it was necessary to verify that the Member States ensuring the qualified majority represented at least 62% of the total population of the EU. On the particular significance of this triple majority established by the Treaty of Nice in a sense quite different from the model previously established, see, *inter alia*, Vlad Constantinesco Yves Gautier, Denys Simon, *Le Traité de Nice*, 2001.

<sup>10</sup> That view was namely expressed in the presentation of António Vitorino at the International Conference. This line of reasoning can also be found in other analysis, as, *e.g.*, the ones included in *The Treaty of Lisbon – Implementing the Institutional Innovations*, Joint Study, pp. 57 ss.

even be considered that the very imperatives of integration and Community solidarity imply the transfer of more sovereignty elements by Member States to the supranational EU level.

In any case, these additional transfers of sovereignty appear uneven between Member States, although there are reasons (some of a strictly demographic nature) that support this inequality. As such, this adjustment may in the future raise a delicate problem of institutional and political balance in the hybrid and complex structure of the European Union. Irrespective of its atypical and hybrid nature, the EU structure involves an increasing number of federal components, which tend to even be progressively reinforced. Historically, the more stable federal organization models always implied at various levels institutional systems with mechanisms that ensure their overall balance and a level of fairness in the treatment of the different member states.

Here I refer in particular to mechanisms that permit equal or increasingly equal representation of the Member States. However, it is very clear that this institutional ‘safety valve’—typical of federal systems— does not exist in the institutional model of the European Union as redesigned by the Treaty of Lisbon. It is therefore a matter for further reflection whether this decisive aspect should not be rethought before 2014-2017 (in other words, before full implementation of the new voting system in the Council, in case the Treaty of Lisbon comes into force). On this point, in institutional terms—as in other aspects—the Treaty of Lisbon probably does not yet represent the ‘end of history’..

#### *On Representation*

Proceeding to the second line of institutional changes, it should be noted that some compensation has been sought for these potential tensions or malfunctions in the Treaty of Lisbon through the second movement considered above. This is the movement intended to strengthen the powers of national parliaments. It would be like a compensation for the relative loss of power by some of the Member States within the complex institutional model of the EU.

This aspect is undeniably important because the Treaty of Lisbon reinforces the role of national parliaments more than the Constitutional Treaty did.<sup>11</sup> In fact—if the Treaty of Lisbon enters into force—a new article shall be added to the Treaty on the Functioning of the European Union (former EC Treaty) on national parliaments, which should be coordinated with an Agreement on the application of principles of subsidiarity and proportionality. In short, these devices enable national parliaments to trigger a procedure to check compliance with the principle of subsidiarity whenever the Commission puts forward new legislative proposals.

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<sup>11</sup> On the role of national parliaments of the Member States in the context of the institutional model of the EU adjusted by the Constitutional Treaty, see Constantinesco, *Le Traité*, 2006.

Thus, if a group of national parliaments, representing one third of the total, considers a legislative proposal put forward by the Commission to exceed the limits of the principle of subsidiarity, those parliaments may ask the Commission to abandon the project in question. In such a context, if the Commission persists in its legislating initiative, this could be blocked by 55% of the Member States in the Council or by 50% of the votes in the European Parliament.

What is being envisaged here may well represent an important legal instrument with significant potential, but—as is the case on other levels with various legal solutions established in the Treaty of Lisbon—there are major uncertainties as to whether it can effectively function. Among other possible issues, there is doubt about the extent to which national parliaments will be able to coordinate themselves within a short deadline. Eight weeks is a rather rushed period to make a pronouncement in compliance with the principle of subsidiarity regarding the Commission's new legislative proposals.

Another question is how the dynamics of national control of governments by the parliaments in each State—control with undeniable limitations when there are absolute majorities in several Member States— could be efficiently coordinated with this idea of control of the application of the subsidiarity principle on a decision-making level by the Council, in which the States are essentially represented by their governments. It could be said in this case that there is no tradition of coordination between national parliaments, which may sustain *ab initio* an assumption of great effectiveness in instruments with these characteristics in the European Union.

Conversely, an additional element of complexity is introduced here, which further delays the legislative process and even may make room for other 'power games' (pursuing certain objectives by national governments through their parliaments) in addition to the power dynamics already at play within the framework of the Council. Accordingly, we reiterate here our initial leitmotif: The model of significant institutional complexity put in place by the Treaty of Lisbon may hypothetically function, but the potential for institutional *malfunctions* is high. Herein lies an essential uncertainty factor (or a possible dark side of 'Mr. Hyde') associated with the reformed institutional model of the new Treaty.

### **The Legal and Economic Level**

Leaving aside other institutional aspects, we should now address very briefly – even in rather schematic terms– some discussion topics related with *the second level of analysis, primarily legal and economic*, initially proposed. The first significant aspect at this level is the *institutionalization*, in formal terms, of the so-called *Eurogroup*, corresponding to the meeting of the Ministers for Finance and Economy of the Eurozone States. This *institutionalization* of the *Eurogroup* provided for in the Treaty of Lisbon—an aspect that has some how inexplicably been given very scarce attention—may contribute to the strengthening of the

coordination of suitable budgetary policies in the framework of an economic or budgetary pillar of the Economic and Monetary Union (EMU). This pillar is recognizably weak when compared with the monetary pillar. At the same time, some provisions of the Treaty of Lisbon imply a greater clarification of the connections between Eurozone States, in order to strengthen the coordination of their economic and budgetary policies (in other words, to strengthen the weakest pillar of the EMU, thus attenuating a limitation or structural deficiency that has persisted since the Treaty of Maastricht, although perhaps not yet as much as would be required<sup>12</sup>).

On this same level, the attribution of a new right to the Commission to issue Opinions addressed to Member States with excessive budget deficits should be mentioned, as well as the introduction of provisions for the Commission to issue proposals (and not merely recommendations) of penalties for States that do not comply with objectives set out on this level (clarifying at the same time that the Council may give a ruling in conflict with that proposed by the Commission). There is thus a clarification and readjustment of powers in terms of control of the application of the Stability and Growth Pact, which largely arises from the previous experience of the conflict between the Commission and the Council regarding excessive deficits in France and Germany (that gave rise to the judgment “*Commission v. Council*” of 13 July 2004 of the ECJ.<sup>13</sup>)

In another predominantly legal and economic field, the Treaty of Lisbon also introduced significant changes in terms of the framework of Services of General Economic Interest (SGEI). Thus, the previous provisions of Article 16 of the EC Treaty on SGEI are changed. Instead, the subject is now coordinated with the provisions of the EU Treaty that envisage respect of essential functions of the Member States in terms of the SGEI by this same EU. The fundamental basis for the recognition of SGEI and their financing is reinforced, and the previous Article 16 EC reviewed in order to become the normative basis for EU Regulations on the financing of SGEI (thus contributing to a new dynamic for the application of SGEI systems and the related systems of derogations arising from the previous Article 86:2 of the EC Treaty).<sup>14</sup>

Finally, on a legal and economic level, the most disputed aspect raises major uncertainties, showing the dark side of the Treaty of Lisbon and, continuing our use of literary images, the ‘Mr Hyde’ dimension of the text. This aspect corres-

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<sup>12</sup> On that limitation or structural omission which translates into a significant weakness of the economic pillar of the Monetary and Economic Union and on the unbalance that may arise from that factor in a historically original experience of introducing a common currency with no accompanying instruments at the level of budgetary policy, see our paper “Portugal e os Défices Excessivos”.

<sup>13</sup> On this decision of the ECJ “*Commission c. Council*”, of the 13th of July, 2004 (Case C-27/04) and on its significance see again our paper “*Portugal e os Défices Excessivos*”.

<sup>14</sup> That potential new dynamic associated with the SGEI also bears considerable uncertainties that we have no room to address here and certainly justifies an *ex professo* analysis.

ponds to the elimination of the objective provided for in the previous provisions in Article 3, 1 (g) of the EC Treaty, i.e. on the existence of a system ensuring that competition in the Internal Market is not distorted. If the Treaty of Lisbon enters into force, the enactment of this objective would be transferred in almost literal terms (given the wording of the previous Article 3, 1 (g) EC) to an Agreement on Competition, annexed to the Treaty on the Functioning of the European Union.

This alteration, if it occurs, would be highly negative for the safeguarding of the Community *acquis* in matters of competition, law, and policy. This is a matter which is even more sensitive and problematic if we are to consider that the so-called Lisbon Strategy for the economic and social development of the EU is based, to a large extent, on the functioning of systems and tools that presuppose effective antitrust enforcement in the internal market.

Undoubtedly, as advocated by those that defend this alteration introduced by the Treaty of Lisbon in the field of competition law, the Competition Agreement will have legally binding content. However, this legal *truism* does not mean that there may not be highly negative overall repercussions for this sensitive field of EC competition law. In fact, the way the ECJ and the CFI have consistently provided *teleological interpretations* of antitrust rules—which are mainly framework rules of highly generic content (and dependent on the proper practical application of general legal principles<sup>15</sup>)—means that the absence of the objective of guaranteeing undistorted competition in the internal market from the *catalogue* of core objectives of the EU can have material consequences in the long term.

This will result from the fact that for the purposes of a teleological interpretation related with the development of general legal principles in the field of competition law, the Agreement annexed to the Treaty on the Functioning of the European Union does not indisputably provide the same normative basis (compared with that provided by Article 3, 1 (g) EC). The question is whether in the long term antitrust rules—arising from the former Articles 81 and 82 EC—could continue to be considered fundamental rules and true pillars of an EC economic constitution (in substantive terms) in the new framework resulting from the Treaty of Lisbon (briefly referred to above).

This problem would be particularly great, as well as sensitive, in recurrent situations of tension between conflicting objectives. This would be the case of social protection and employment levels vs. the protection of competition (such as the ones that have occurred already in numerous cases decided by the ECJ and by the CFI).

In a legal scenario, in which the protection of competition is no longer at the core of the central objectives of the EU as provided for in the body of the Treaty on the Functioning of the European Union, the risks of disqualifying or down-

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<sup>15</sup> On the importance of the teleological interpretation of EC competition rules see our monograph, *Empresas Común*.

grading competition values will almost inevitably increase, which may have negative repercussions particularly in the fields of control of State aid and of merger control, which are more prone to considerations of industrial policy and assessments. These involve several contradictory objectives and tend, in the absence of a predominant unifying criterion, to favor ‘*ad hoc*’ positions sustained in these areas by larger Member States.

This will not be one of the least important uncertainties created by the Treaty of Lisbon, despite the fact that the Treaty results from a generally worthy aim of contributing to the progress of European integration.

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# **The EU's Treaty of Lisbon: Origin, Institutional Choice and Significance\***

Finn Laursen

## **Introduction**

The European Union is currently based on the treaty framework which emerged as the Treaty of Nice entered into force in 2003 (European Union 2003). The Constitutional Treaty elaborated during the Convention on the Future of Europe, 2002-2003, and finally negotiated during the Intergovernmental Conference (IGC), 2003-2004, proposed a number of changes in that framework, but the treaty was rejected in referenda in France and the Netherlands in May and June 2005 (Laursen 2008). After a reflection period it was decided to negotiate a so-called Reform Treaty. The German Presidency played an important role in securing agreement on a mandate for a new IGC in June 2007. During the Portuguese Presidency in the autumn of 2007 that IGC then produced a new treaty, the Lisbon Treaty (European Union 2007).

In this paper I shall explore the process of producing this latest EU treaty, outline the most important institutional changes of the treaty, and discuss its significance. Will the Lisbon Treaty improve the efficiency, democratic legitimacy “as well as the coherence of its external action,” as the mandate from June 2007 claimed it should? (Council of the European Union 2007a).

The Constitutional Treaty would have replaced all existing treaties of the EU by one new treaty. The Lisbon Treaty reverts to the classical method of treaty reform, amending the existing treaties. For that reason the treaty that was signed in Lisbon on December 13, 2007 is much more difficult to read than the Constitutional Treaty (Council of the European Union 2004). Luckily the consolidated version of the treaties incorporating the Lisbon Treaty, which was published in early 2008, is easier to read than the Lisbon Treaty itself (European Union, 2008). So when I look at the institutional choice I shall compare the 2003 and 2008 versions of the Union's Consolidated Treaties, I shall also be looking at the differences between the Constitutional Treaty and the Lisbon Treaty, which in many ways are minor, but some of them nonetheless controversial.

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I should of course add that at the moment we do not know whether the Lisbon Treaty will enter into force. It was rejected by the Irish voters in a referendum in June 2008. It now looks rather certain that there will be a second referendum in Ireland in the autumn of 2009, based on some opt-outs for Ireland. Given the fact that a large majority of the member states has ratified the treaty, there is a chance that the Irish may accept it in a second referendum and it will enter into force. The latest opinion polls in Ireland suggest that there is currently a majority in favour of the treaty. But nothing can be taken for granted when it comes to the use of referenda. Indeed, behind the strategy of the Reform/Lisbon Treaty was a deliberate effort to avoid referenda in France, the Netherlands, the UK and other countries.

### **The Process: A Rescuing Mission with German Leadership**

Strictly speaking, to explain the institutional choice of the Lisbon Treaty, we should study the institutional choice of the Constitutional Treaty. And if we were to fully explore the origin of the Lisbon Treaty we would have to go back to the post-Nice agenda established at the Nice meeting of the European Council in December 2000. This agenda included yet another reform, which first produced the ill-fated Constitutional Treaty. In this paper, however, I will focus on the decision by the European Council in June 2007 to abandon the Constitutional Treaty and go for a new treaty, initially referred to as a Reform Treaty. It was in the run-up to this decision, which included a detailed mandate for a new IGC that we saw the German Presidency, Chancellor Angela Merkel in particular, playing a role of leadership. The coming to power of Nicolas Sarkozy in France, in May 2007, proved to be an important factor in the process.

The June 2006 meeting of the European Council decided that “the Presidency will present a report to the European Council during the first semester of 2007, based on extensive consultations with the Member States. This report shall contain an assessment of the state of discussion with regard to the Constitutional Treaty and explore possible future developments.” This was a mandate to the future German Presidency to start consultations. It was also specified that the reform process should be completed “during the second semester of 2008, at the latest.” It was not mentioned explicitly at the time, but the idea was to finish the process before the elections to the European Parliament in June 2009. The Presidency Conclusions from the June 2006 meeting also mentioned that a political declaration should be adopted in Berlin on 25 March 2007, commemorating 50 years of the Treaties of Rome (Council of the European Union 2006).

Finding a solution to the constitutional impasse produced by the negative referenda in France and the Netherlands was the most important point on the agenda of the German Presidency in the first half of 2007. Seventeen of the now 27 member states had ratified the Constitutional Treaty and in Germany the parliamentary part of the ratification had been completed. The treaty had been rejected

by referenda in France and the Netherlands. The remaining states had put the ratification process on hold.

Those who had ratified the Constitutional Treaty wanted something as close as possible to that treaty. Presidential hopeful Sarkozy in France had suggested a mini-treaty which would only include the essential elements of the Constitutional Treaty. The Netherlands and the UK also wanted some kind of minimal reform that would allow them to avoid a referendum. Sweden and Denmark had sympathy for such an approach. Poland had big problems with the new double majority, 55% of the member states representing 65% of the population, which was included in the Constitutional Treaty (Kurpas and Riecke 2007). The Poles were happy with the voting rules adopted in Nice in 2000. They now suggested a square-root-of-population approach as the best solution to the weighting of votes.

The drafting of the Berlin Declaration commemorating the 50<sup>th</sup> birthday of the Treaties of Rome showed the divergence of views and interests among the 27 member states. In the end, the Declaration was only signed by representatives of the three main institutions, Chancellor Angela Merkel for the Presidency, EP President Hans-Gert Pötering and Commission President José Manuel Barroso. Afterwards, critical comments followed from the Czech President Vaclav Klaus and the Polish President Lech Kaczynski, even though the Declaration was rather weak in commitments (Ibid., 11). It was also pointed out by press comments that there were some differences in the various translations (Spongenberg 2007). In the German text we read “Wir Bürgerinnen und Bürger der Europäischen Union sind zu unserem Glück vereint.” In the English version it was: “We, the citizens of the European Union, have united for the better.” And the French version said: “Notre chance pour nous, citoyennes et citoyens de l’Union européenne, c’est d’être unis.”<sup>1</sup>

In April Chancellor Merkel sent a letter to the member governments with 12 questions which indicated a pragmatic approach. While wanting only to do what was absolutely necessary to satisfy the sceptical governments, especially the UK, Poland and the Czech Republic, but also France and the Netherlands, the questions suggested the possibility of reverting to the classical method of amending the existing treaties, doing away with the Foreign Minister title and various symbols of a constitution (flag, hymn and logo) (Mahony 2007a).

Just prior to the June summit, UK Prime Minister Tony Blair made a statement outlining four British ‘red-lines’:

First, we will not accept a treaty that allows the Charter of Fundamental Rights to change UK law in any way.  
Second, we will not agree to something that replaces the role of British foreign policy and our foreign minister.

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<sup>1</sup> The Danish version is similar to the English: “Vi, borgere i Den Europæiske Union, er forenet til det bedre.” Professor of law at Copenhagen University, Henning Kock, called it a political translation (Spongenberg, 2007).

Thirdly, we will not agree to give up our ability to control our common law and judicial and police system.

And fourthly, we will not agree to anything that moves to qualified majority voting something that can have a big say in our own tax and benefit system. We must have the right in those circumstances to determine it by unanimity (BBC News, 18 June 2007).

He added: "If we achieve those four objectives I defy people to say what it is supposed to be so fundamental that could require a referendum."

At the June 2007 summit, the UK government was therefore once again a difficult partner, and so was Poland. The latter opposed the new double majority rule from the Constitutional Treaty which would reduce its influence in the Council. The Nice Treaty negotiations had given 27 votes to Spain, compared with 29 for Germany, France, UK and Italy. Spain has about 40 million people (Laursen 2006). When Poland, with about 38 million people, joined the EU in 2004, it got the same number of votes as Spain (Wilga 2008). Since Germany has about 82 million people the double majority formula from the Constitutional Treaty would give Poland only about half of that influence. With the square-root-of-the-population formula Poland would retain about two-thirds the influence of Germany (Kurpas and Riecke 2007). Spain would of course also lose influence, but the Spanish Socialist Prime Minister Zapatero, who had won a referendum on the Constitutional Treaty, had reconciled himself with that reduction.

As the summit started the Polish position was deemed unpredictable. Just prior to the meeting, the Polish Prime Minister Jaroslaw Kaczynski said to the Polish national radio: "We are only demanding one thing, that we get back what was taken from us." And he explained: "If Poland had not had to live through the years of 1939 to 1945, Poland would be today looking at the demographics of a country of 66 million" (quoted from Mahony 2007b, and Parker, Cienski, and Benoit 2007).

The actual meeting of the European Council went into the morning of June 23. The Polish demand was the most difficult issue. As the participants thought that an agreement was near late in the evening the Polish Prime Minister Jaroslaw Kaczynski gave a press conference back in Warsaw saying that the compromise proposed to his brother, President Lech Kaczynski, who was in Brussels, was not acceptable. We learn from informed sources that Angela Merkel at this point threatened the Poles to seek an agreement among the remaining 26 member states, thus leaving Poland on the sidelines (Kurpas and Riecke 2007, Rettman 2007a). Two countries, Lithuania and the Czech Republic indicated that they would not favour such an approach. Through further negotiations where the German Presidency was assisted by Blair, Sarkozy and Luxembourg's Prime Minister Jean-Claude Juncker a compromise was found which was accepted by Poland (Ibid.).

What Poland got included a delay in the application of the double majority until 2014 and the so-called Ioannina compromise afterwards, which says that if 75% of a blocking minority is reached talks in the Council shall continue. The UK got an opt-out from the Charter of Fundamental Rights, as did Poland on police and judicial cooperation on criminal matters. The Netherlands succeeded in inserting a reference to the Union's values as a condition of membership and a strengthening of the national parliaments in their control of the application of the principle of subsidiarity, the so-called 'orange-card procedure' (Ibid.). Sweden's Prime Minister Fredrik Reinfeldt tried to resist the strengthening of membership conditions and Belgium's federalist Prime Minister Guy Verhofstadt was against a further strengthening of national parliaments (Björklund 2007, and *Financial Times*, June 24, 2007a). To the dismay of many France succeeded in eliminating the reference to "free and undistorted competition" from the Union's objectives. Some French voters in the 2005 referendum had voted 'no' because they saw the Union as too "Anglo-Saxon" (Parker, Buck, and Benoit 2007, and Buck et al. 2007).

In the end the summit adopted a 16-page mandate for an IGC which started early in the Portuguese Presidency on July 23, 2007. Final agreement on the Reform Treaty was reached at a meeting of the European Council in Lisbon, October 18-19, 2007. It was signed in Lisbon on December 13, 2007. During the IGC, Poland secured a stronger wording of the Ioannina compromise and a permanent Polish advocate general in the European Court of Justice (ECJ) by increasing the number of Advocates General from 8 to 11. And Italy secured an additional seat in the European Parliament (Hans 2007).

The mandate for the IGC was rather detailed. This made it possible to conclude the IGC rather quickly during the Portuguese Presidency. The German Presidency deserves credit for its handling of the negotiations that reached the agreement on the mandate. After the June summit the *Financial Times* (June 24, 2007b) wrote:

Angela Merkel, the German chancellor, emerged with her reputation enhanced, as a clear-sighted leader and a persuasive negotiator. She looked after the interests of big and small alike, essential in an enlarged EU. Against the odds, she produced a detailed road map for a "reform treaty" that manages to preserve most of the substance, but water it down enough to satisfy the "minimalists" in France, the Netherlands and the UK. Those governments were desperate to have a deal that would not require them to call referendums, and risk another No vote. Ms Merkel persuaded the "maximalists" to shelve their ambitions and accept a second best deal.

### **The Institutional Choice**

The Lisbon Treaty has retained most of the institutional changes of the Constitutional Treaty (de Poncins 2008; Griller and Ziller 2008; Sauron 2008; and Weidenfeld 2008). It amends the Treaty on European Union (TEU) and the Treaty Establishing the European Community (TEC), the latter being renamed The Treaty on the Functioning of the European Union (TFEU). All references to symbols of constitutionalism, including flag, anthem and motto, have been removed. Legislative acts will not be called laws and framework laws, but retain the old names of regulations and directives. The new post in the Constitutional Treaty of Union Minister for Foreign Affairs has been renamed High Representative of the Union for Foreign Affairs and Security Policy (HR). Nor does the new treaty explicitly say that the Union law has primacy, although it will have such primacy based on case law of the ECJ going back to the early years of European integration. The IGC confirmed this in Declaration No. 17 attached to the treaty: “The Conference recalls that in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law” (European Union 2008, 344, see also Wouters et al. 2008, p. 190).

The text of the Charter of Individual Rights is no longer a part of the treaty as such, but the Lisbon Treaty says that it “shall have the same legal value as the Treaties” (art. 6(1) TEU).

### **Institutional Changes**

The Treaty of Nice limited the number of Members of the European Parliament (MEPs) to 732. The Treaty of Lisbon increases the number to 751 (Art. 14 TEU). The exact distribution will be decided by the European Council. The number of seats will vary between six and 96. At the moment the EP has 785 members because of transitional measures in relation to the 2004 and 2007 enlargements (Sauron 2008, p. 43, de Poncins 2008, p. 145). If the Treaty of Lisbon does not enter into force before the next election to the EP in June 2009, then 732 MEPs will be elected instead of 751.

The Lisbon Treaty retains the provision proposed by the Constitutional Treaty for electing the President of the European Council “by a qualified majority, for a term of two and a half years, renewable once” (Art. 15(5) TEU). At the same time the European Council officially becomes an institution.

The European Council will, among other things, determine “the strategic interests and objectives of the Union” for all its external action (Art. 22(1) TEU) thus bringing external relations and the CFSP together. The President of the European Council will also be involved with external representation of the Un-

ion. The job description of the new post is not very detailed. The location and size of the staff is still to be determined.

The use of QMV in the Council of Ministers becomes the norm: “The Council shall act by a qualified majority except where the Treaties provide otherwise” (Art. 16(3) TEU). This should increase the efficiency of decision-making. According to one account, 33 new articles will be based on QMV. With 63 articles already stipulating QMV that brings the total to 96 articles where decisions can be made by QMV (de Poncins 2008, 201).

From 2014 the QMV will be defined as “at least 55% of the members of the Council, comprising at least fifteen of them and representing Member States comprising at least 65% of the population of the Union” (Art. 16(3) TEU). It is also stipulated that a blocking minority must include at least four members. This was the provision that Poland found difficult to accept.

The so-called co-decision procedure, whereby the Council and the EP act on par in the legislative process, each having a veto, becomes “the ordinary legislative procedure” (Art. 294 TFEU). This empowers the EP further and should increase the democratic legitimacy of the Union. Co-decision will be extended to more than 40 new decision areas. It has been suggested that co-decision will apply to 95% of decisions compared to 75% at the moment (de Poncins 2008, 148).

The procedure for designating the President of the Commission changes slightly. According to the Treaty of Nice the European Council nominates the President who is then approved by the EP. According to the Treaty of Lisbon the European Council shall propose a candidate, “taking into account the elections to the European Parliament.” This candidate shall then be elected by the European Parliament (Art. 17(7) TEU). This is a slight step towards a more parliamentary system. But even if the treaty uses the term ‘election’, the choice will be determined by the European Council, i.e. the governments of the member states.

Further, from 2014, “the Commission shall consist of a number of members, including its President and the High Representative of the Union for Foreign Affairs and Security Policy, corresponding to two thirds of the number of Member States, unless the European Council, acting unanimously, decides to alter this number.” In this future Commission reduced in size there will be strict equal rotation between the member states (Art. 17(5) TEU). But it should be pointed out that the possibility of retaining a Commissioner per member state is there. It will require a unanimous vote in the European Council. It may become part of a solution to the Irish problem, since the Irish did not want to lose an Irish Commissioner.

The jurisdiction of the ECJ will be enlarged because of the abolition of the pillar structure, with some limitations remaining especially for the CFSP. The Court of First Instance becomes the General Court and there will also be specialised courts (Art. 19 TEU).

The national parliaments will have an increased role in the future. According to article 12 TEU and Protocol no. 1 on the Role of National Parliaments and

Protocol no. 2 on the Application of the Principles of Subsidiarity and Proportionality they will supervise the application of the principle of subsidiarity. If a third of them so requests a draft legislative act must be reviewed. In case of proposed legislation concerning the Area of Freedom, Security and Justice a quarter of the national Parliaments will be sufficient. In countries having bicameral parliaments each chamber will have one vote. Unicameral parliaments will have two votes.

### **Division of Competences**

The call for a catalogue of competences, particularly from the German *Länder*, at the time of the Treaty of Nice negotiations led to the inclusion of the issue in the post-Nice agenda and the European Convention produced a list of different kinds of competences. The Lisbon Treaty includes such listing of different kinds of competences. Some competences are exclusive, including the customs union and common commercial policy (art 3 TFEU). But most common policies, including the internal market, the Common Agricultural Policy, social policy and environment policy are shared competences (art. 4 TFEU). Coordination of economic policies constitutes a separate category (art. 5 TFEU), and so do supporting actions for some policies which basically remain national, such as health, industry, culture and education (Art. 6 TFEU). All this may constitute a clarification, but it does not really change matters.

### **Area of Freedom, Security and Justice**

The Maastricht Treaty included a third pillar that dealt with Justice and Home Affairs (JHA) cooperation. Like the second pillar, the CFSP, it was intergovernmental cooperation. Decisions normally required unanimity. The role of the Commission was very limited and the ECJ was largely excluded. The Amsterdam Treaty started moving some of the JHA matters to the first pillar, thus introducing the Community method, with majority voting and increased roles for the Commission and the ECJ. The treaty introduced the concept of an Area of Freedom, Security and Justice (AFSJ). The Treaty of Nice reinforced this trend towards using the Community method for JHA, but Criminal Justice and Police cooperation stayed in the third pillar. The Lisbon Treaty formally abolishes the pillar structure and the Community method will to a large extent also be used for Criminal Justice and Police cooperation in the future. The Lisbon Treaty includes the following under AFSJ: border checks, asylum and migration (Art. 77-88 TFEU), judicial cooperation in civil matters (art. 81 TFEU), judicial cooperation in criminal matters (Art. 82-86 TFEU) and police cooperation (Art. 87-89 TFEU).

**External Action**

As mentioned earlier the Lisbon Treaty formally abolishes the pillar structure. The CFSP, the old second pillar, however will largely remain intergovernmental even after the formal abolishment of the pillar structure.

The existing pillar structure creates problems of coherence between external relations of the Community (1<sup>st</sup> pillar) and the CFSP (2<sup>nd</sup> pillar). In the past only the Community had legal personality. The Lisbon Treaty attributes legal personality to the Union as a whole (Art. 47 TEU). So in the future the Union will also be able to enter into international agreements under CFSP. The new High Representative will deal with both external economic relations of the Union, in his capacity of Vice-President of the Commission, as well as the CFSP, in his capacity of High Representative and as Chairman of the Foreign Affairs Council (Art. 27(1) TEU). This should be seen as an effort to increase coherence in external action in general.

The new TEU has a longer list of external action objectives than the existing treaties. They are listed in the section on external action so they include both external economic relations, including trade, development and humanitarian aid, as well as the CFSP. Including this list in the new external action section of the treaty for instance means that the EU will have to work to consolidate human rights in its commercial policy.

**Common Commercial Policy**

The Common Commercial Policy remains a central part of the Union's external action. It has been an exclusive competence since the Treaty of Rome (Art. 113). The Commission negotiates trade deals multilaterally within the GATT – and now WTO - as well as bilaterally with third countries. Decisions can be made in the Council by a QMV. The ECJ has jurisdiction. In other words, the Community method is applied for commercial policy. Interestingly enough, the original article 113 did not mention the European Parliament.

The original treaty basically covered trade in goods. But some international treaties included matters where the member states remained competent. They were so-called mixed agreements. For such agreements procedural rules are more complicated. Such agreements, for instance, also require national ratification.

The Uruguay Round extended the international trade agenda to include services and trade related aspects of intellectual property (TRIPS). The ECJ in 1994 decided that these new areas were partly national competence.

In the treaty reforms that followed there was an effort to extend the definition of trade to include services and intellectual property. They were included by the Treaty of Amsterdam, but decisions had to be by unanimity. The Treaty of Nice introduced QMV for services and intellectual property. But “cultural and audio-

visual services, educational services, and social and human health services” would still require unanimity (Art. 133 TEC).

The Treaty of Lisbon retains QMV for services and intellectual property, and extends it to the new category of foreign direct investment. However, it retains unanimity for cultural and audiovisual services (“where these agreements risk prejudicing the Union’s cultural and linguistic diversity”) as well as social, education and health services (“where these agreements risk seriously disturbing the national organisation of such services and prejudicing the responsibility of Member States to deliver them”). Finally the Lisbon Treaty introduces the ordinary legislative procedure for commercial policy, thus giving the EP a much stronger role in commercial policy (Art. 207 TFEU). Making the EP a co-legislator in commercial policy is one of the most important innovations of the Lisbon Treaty.

### **Common Foreign and Security Policy**

The Union’s CFSP competence remains limited in various ways in the Treaty of Lisbon. According to Article 24 TEU there are ‘specific rules and procedures’ for the CFSP. Unanimity will remain the normal decision rule. Adoption of legislative acts is excluded. And the ECJ normally has no jurisdiction. There are two exceptions: The reference to Article 40 means that the ECJ will “be empowered to referee disputes over the interface of the Union’s general authority and its specific authority relating to the CFSP” (Siebersson 2008,180). The other exception concerns restrictive measures involving individuals. The Maastricht Treaty had introduced procedures for adopting sanctions involving both the CFSP (the political decision) and the Community (the actual sanctions, often involving trade measures). These sanctions were aimed against states. This created a problem for sanctions against individuals, so-called ‘smart sanctions’ that the EU may want to use against terrorists (see Wouters et al. 2008, 193). The Lisbon Treaty has a new article that allows restrictive measures “against natural or legal persons and groups or non-State entities” (Art. 215(2) TFEU). Article 275 TFEU gives the ECJ jurisdiction to review the legality of such restrictive measures against natural or legal persons.

The CFSP is not listed in the treaty’s lists of either exclusive or shared competences, which for instance mention common commercial policy as an exclusive competence of the Union (Art. 3(1) TFEU). Development cooperation and humanitarian aid are mentioned among shared competences (Art. 4(4) TFEU). The CFSP is mentioned separately as a competence without giving this competence a specific name (Art. 2(4) TFEU).

These various provisions of the new treaty show that despite the formal abolishment of the pillar structure there is still an important difference between external (economic) relations, falling under the old 1<sup>st</sup> pillar, and the CFSP, the old 2<sup>nd</sup> pillar. The member states were not ready to extend the ‘Community method’ to the latter. So, *de facto*, a special CFSP pillar will remain.

Although the basic decision rule for the CFSP is unanimity, there is the possibility of some decisions being made by a QMV. Of the four possibilities for QMV mentioned three already exist. The new one is the third possibility mentioned, namely the one where the HR proposes a decision following a ‘specific request’ from the European Council (see Art 31 TEU).

The treaty also includes so-called ‘constructive abstention’, which goes back to the Amsterdam Treaty. Only those voting in favour of a decision are committed. Those abstaining, and explaining why, in a declaration, are not committed but accept that the decision commits the Union (Art. 31(1) TEU).

The idea that the Council can make implementing decisions by QMV is not new, but the member states have so far hesitated to use the possibility. In Article 31 TEU, the possibility is linked with a so-called ‘emergency brake’. A state that has ‘vital’ reasons for opposing a decision can request that the decision be moved from the Council to the European Council for decision by unanimity. There is a tightening here since it used to be ‘important’ reasons under the current treaty (UK, House of Commons 2008, 42). On the other hand, the article in question also includes a bridging clause – or *passerelle* – whereby it can be decided by unanimity in the European Council to move some area of decision making, beyond the four listed, from unanimity to QMV. This does not include defence matters, though. So all in all, a complex set of rules. Most likely unanimity will remain the norm.

Let’s add that the UK secured two Declarations during the IGC 2007, nos. 13 and 14, which stress the intergovernmental nature of the CFSP. Declaration 13 says that the creation of the office of the HR and the establishment of an External Action Service “do not affect the responsibilities of the Member States as they currently exist, for the formulation and conduct of their foreign policy nor of their national representation in third countries and international organisations.” Declaration 14 specifically mentions the Security Council of the United Nations and says that the CFSP provisions of the treaty “do not give new powers to the Commission to initiate decisions nor do they increase the role of the European Parliament.”

The new High Representative for Foreign Affairs and Security Policy (HR) shall conduct the CFSP and be a Vice-President of the Commission. This has been referred to as double-hatting. Since he or she will also chair the Foreign Affairs Council (Art. 18(3) TEU) the HR will actually have three hats. The position is a major innovation. The new HR should become a central figure in the external (economic) relations as well as foreign and security policy of the Union. Some turf battles with the new permanent President of the European Council as well as the President of the Commission can be expected. Further, there will also be a General Affairs Council to be chaired by the rotating Presidency. Much will depend on the personalities of those appointed, and whether some memorandum of understanding about the roles is worked out prior to the appointments being made.

The HR will be assisted by a new European External Action Service (EEAS) composed of officials from the Council Secretariat, the Commission and seconded from Member State Foreign Ministries. This is another important innovation. Details of the arrangement still have to be worked out, but some preparatory work has taken place in cooperation between the current HR and the Commission. The EEAS is expected to reduce duplication and facilitate the development of a more effective external policy of the EU (UK, House of Parliament 2008, 63-66).

It is worth mentioning that the existing Commission Delegations in third countries and at international organisations will become the EU Delegations. Many assume that they will become part of the EEAS. Diplomatic missions of member states are required to cooperate with Union Delegations (Art. 32 and 35 TEU).

The current instruments of the CFSP are joint actions and common positions, introduced by the Maastricht Treaty, and common strategies, introduced by the Amsterdam Treaty. The distinction between the three can sometimes be difficult in practice. The Lisbon Treaty instead talks about general guidelines and decisions. This at least is a simplification.

The basic budget provisions of the Lisbon Treaty for the CFSP remain the same as the current ones, where administrative expenses are charged to the Union budget, while operating expenses normally are charged to the Union budget, “except for such expenditure arising from operations having military or defence implications and cases where the Council acting unanimously decides otherwise” (art. 41(3) TEU). Financing military and defence operations can thus potentially be a problem. The Lisbon Treaty tries to help by adding provisions for urgent financing, including the setting up of a start-up fund.

### **Common Defence and Security Policy (CDSP)**

The Common Defence and Security Policy (CDSP), which used to be called the European Security and Defence Policy (ESDP), gets a more prominent place in the new treaty. The basic definition does not change much, but there is now a new emphasis on operational capacity including both civilian and military assets.

The so-called Petersberg tasks, defined at a meeting of the Western European Union (WEU) in 1992, and included in the EU treaties by the Amsterdam Treaty, are extended to include joint disarmament operations, post-conflict stabilisation as well as “fight against terrorism, including by supporting third countries in combating terrorism in their territories.” Both civilian and military means can be used.

The emphasis on operational capacity has led to the establishment of a European Defence Agency. In fact, this agency had already been established in 2004.

### **Flexibility Provisions in CFSP and CSDP**

The Lisbon Treaty will introduce more flexibility in the CFSP, including the CSDP. This is an important aspect of the treaty.

First, the Lisbon Treaty allows for ‘enhanced cooperation’ in all areas, including the CFSP and the CSDP (Art. 20 TEU). The current treaty does not allow for ‘enhanced cooperation’ in defence. Establishing enhanced cooperation will require a minimum of nine member states (Art. 20(2) TEU), against eight currently. Enhanced cooperation in the CFSP, including the CSDP, further requires unanimity in the Council (Art. 329(2) TFEU).

The Lisbon Treaty also introduces the new concept of ‘permanent structured cooperation’ in the defence area. This is considered an important innovation by many observers (e.g. Angelet and Vrailas 2008). Contrary to ‘enhanced cooperation’ it does not require unanimity to be established, but a QMV. The idea is that member states with greater willingness and capacity in the area of defence ‘shall go together in some kind of closer cooperation of a more permanent kind. This cooperation is geared towards increasing the military capabilities of the member states and thus the Union.

‘Constructive abstention’ mentioned above, which is not new, can also be seen as a kind of flexibility, but more of an *ad hoc* nature.

More importantly, for the expanded Petersberg tasks, the Lisbon Treaty mentions the possibility of entrusting “the implementation of a task to a group of Member States which are willing and have the necessary capability for such a task” (Art. 44 TEU). Such a group is often referred to as a ‘coalition of the able and willing.’

All in all there are now a number of flexibility provisions which can be applied in the areas of the CFSP and the CSDP.

### **Mutual Defence and Solidarity**

A somewhat controversial new mutual defence or mutual assistance clause has been added to the treaties by the Lisbon Treaty (Art. 42 TEU). The language can resemble the collective defence articles of the WEU and NATO treaties. Notice the provisos though. The obligation of assistance “shall not prejudice the specific character of the security and defence policy of certain Member States”, read non-aligned Member States. Further, commitments must be consistent with NATO commitments, a stipulation considered important by the more pro-Atlantic Member States, including the UK.

Finally, we should mention the new mutual solidarity clause, which is part of the TFEU. This deals with terrorist attacks against member states or natural or man-made disasters in member states. The article asks for solidarity and mobilisation of all instruments, including military resources. This is the Union’s

response to events like 9/11 in general and the terrorist bombings in Madrid and London in particular.

### **Significance of Changes**

If ‘institutions matter,’ as claimed by many social scientists, the Lisbon Treaty should be expected to produce more efficiency and legitimacy in general and more coherence and effectiveness in the Union’s external action.

The extended use of the so-called ordinary legislative procedure involving the EP more should in principle produce more ‘input’ or procedural legitimacy.

The increased use of QMV in the Council should increase efficiency, which in turn may also be good for legitimacy to the extent that grid-lock can be avoided or at least be reduced (‘output’ legitimacy).

The new permanent President of the European Council should be able to give the EU more continuity and direction.

The new triple-hatted HR should bring more coherence to external action. The EEAS and the EDA are important new agencies that should help increase the capacity for external action, by providing information, analysis and increased capabilities. If the member states are willing to use QMV the possibility is there in the treaty also for the CFSP, although still based on preceding unanimity in the European Council, where the Union’s strategic interests are defined. In the end much will depend on the political will of the member states. As long as unanimity dominates you have 27 veto points in the EU-27, and you will have more in the future as the Union will move on and take in more member states.

The EU is promising much in its treaties. The list of objectives, values and good intentions is long, but the member states have ring-fenced the CFSP in the Treaty since it remains intergovernmental. So the discrepancy between rhetoric and action will most likely remain considerable. Those who favour increased capacity for international action of the EU can hope that there will be a convergence of interests among the member states. Interaction, actor socialisation and learning processes may gradually produce collective European identities among foreign policy decision-makers in Europe, which in turn may affect interests. But the rationale of collective action will then still have to be communicated to the European publics in a convincing way.

The Lisbon Treaty has also increased the possibility of some member states going ahead without waiting for the laggards. Flexibility, multi-speed integration, in various forms, have contributed to the integration process in the past, so why not in other areas, including the CFSP? Schengen cooperation started among a small group of five states. Today it involves most of the member states. The Economic and Monetary Union (EMU) did not include all member states at the outset, but the number of participating states has increased since 1999, when the single currency was introduced, and more member states are expected to join in

the coming years. This is why the increased possibility of flexibility in the CFSP may also turn out to be a useful tool in the future.

In the area of defence in particular we know that things will only move once France and the UK have agreed and preferably Germany has joined. Then other member states may 'bandwagon.' The development of a common defence policy, made possible by the Treaty of Maastricht, only started after the historic meeting of minds at the Franco-British summit at Saint Malo in 1998 (see for instance Howorth 2007). Then things suddenly moved very fast. But it may be that a kind of plateau has been reached now and that further incentives and instruments are needed. The Lisbon Treaty has added to the toolbox, but it cannot change the constraints of domestic politics. National leadership is also required.

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## **Correcting Past Mistakes: The Failure of the European Constitution and Its Resurrection as the Lisbon Treaty**

Adam Kreidman

The failure of the EU Constitution was seen as a major blow to European integration, but European leaders are determined to ensure that it is only a minor setback. With the causes of the Constitution's rejection still fresh in memory, the EU has crafted the Lisbon Treaty, which is intended to fulfill most of the same objectives while avoiding those aspects which incited the greatest controversies. Both in terms of concept and in marketing, it appears that the EU has been successful in pinpointing the weaknesses of the Constitution, and the Lisbon Treaty should therefore achieve the success that the Constitution never had.

The original impetus for the drafting of the European Constitution remains, as the EU has undergone a profound transformation in the nearly 20 years since its advent. Through alterations in global affairs over time and especially the enlargement process, the EU has undergone radical changes that, first in 2004, drove EU leaders to conclude that the original EU treaties, the Treaties of Rome and Maastricht, needed to be expanded in order to meet the needs of the continuing EU integration process. It was from this conclusion that the concept of the Constitution was born.

During 2002 and 2003, representatives from all relevant parties met in Brussels to discuss the crafting of the European Constitution. This included government and national parliament representatives from each of the EU's member states, a representative from each applicant nation, and 16 representatives from the European Parliament (EP). Under the guise of the Convention on the Future of the European Union, these 105 representatives completed the first published draft of the European Constitution in July of 2003; it was finalized in June of the following year (Gathani 2003).

The document included many changes to the EU structure as well as codification of existing practices. It created a new position in the European Council, that of president, which would be elected by the members of the Council for a thirty-two month term; it implemented qualified majority voting in 40 additional areas, which would require a majority of EU member states representing a minimum of 65 % of the total population for legislation to be accepted; it increased the power of the EP by allowing it to, along with the Council of Ministers, reject legislation subject to qualified majority voting; it created a Common Foreign and

Security Policy (CFSP) for the EU; and it codified the notion that EU law supersedes state law in specific areas. These are only a few of the changes introduced by the Constitution. The Constitution's passage would have been a landmark event for the EU, but it rapidly became apparent that this was not to be.

In late 2004 the Constitution was signed by representatives of the EU member states. With Ireland the only country required by its national constitution to hold a referendum on the European Constitution, it was expected that most nations would leave passage of the document to national parliaments. Germany, for one, brought up the possibility of holding a national referendum, but national law prohibited it. German Conservative MP Peter Hintze said that the "problem with plebiscites is that people virtually never vote on the issue in question" (qtd. in "Germany"). Bowing to pressure from their citizenry, however, France and the Netherlands agreed to hold referenda, and the UK was also deliberating on the same course of action.

Opposition to the Constitution began to grow over time, as 'Euro-skeptics,' or opponents of European integration, claimed that it stripped national governments of too much of their power. The very fact that the document was called a Constitution disquieted many, and the CFSP as well as the president position in the European Council were enough to convince many EU citizens that the Constitution was not worthy of passage. The writings of columnist Jim Allister reflected the sentiment: "To oppose the European constitution is to stand up for the rights of our nation state instead of surrendering them to unelected bureaucrats in Brussels" (Allister 2004). There was a persistent fear that the EU was beginning to completely usurp the responsibilities of each member state's national government.

Opposition to the European Constitution did not necessarily mean that most EU citizens disagreed with reform, however. Some of its opponents believed the beneficial reforms of the treaty were coupled with aspects so problematic that the Constitution was essentially too comprehensive to be acceptable. As the European 'No' Campaign stated on its web site, passage of the Constitution would mean that "all its unwanted features, false compromises and the lack of democracy will be set in stone." (European 'No' Campaign 2006) Although national governments generally voiced support for the Constitution, the EU citizenry was highly skeptical of the document.

Ironically, some of the most vociferous opposition to the European Constitution came from France. Though much of it was for the same general reasons that many opposed the Constitution throughout Europe, this particularly intense French opposition may have been triggered in part by purely domestic factors. France's president during the Constitution ratification process was Jacques Chirac, who, like the president who came before him, was not well-liked by most of the French people. Chirac was a major supporter of the European Constitution; according to William Rees-Mogg, "The opportunity to pay off old scores against their presidents may have been too good to miss." (Rees-Mogg 2005) At the

time, the French economy was also underperforming, and the introduction of the euro was blamed for this plight. The French began to believe that the expanding EU was not the boon to their fortunes that they had expected it would be.

There existed harsh opposition to the Constitution in the Netherlands as well. Again, economic concerns were on the minds of the Dutch. Referring to the euro, Oda Selbos made her reason for discontent with the EU clear: "Everything has doubled in price," she said. (Browne 2005) Coupled with concerns over Turkey's possible entry to the EU, the Dutch were prepared to vote 'No' on the European Constitution in their referendum on June 1, 2005. According to Anthony Browne (2005), "the referendum on the constitution was likely to become a protest vote about the direction of the EU."

Whatever the reasoning of their peoples, both France and the Netherlands rejected the European Constitution in their referenda. As the Constitution required unanimous approval for passage, the two nations' 'No' votes immediately put the document's future in doubt. The EU did not initially admit defeat on the matter, claiming instead that there would be a "pause for reflection" until passage of the Constitution could be pursued once again (Browne 2005). Eventually, however, the EU admitted that the Constitution, in its proposed form, was dead. The "pause" became a "period of reflection" as EU leaders weighed their options and decided what to do next (Watt 2006).

The "period of reflection" ended in 2007. Supporters of the Constitution tried and failed to develop persuasive arguments with which to sway its opponents in France and the Netherlands, leaving observers to comment that the period "has been all pause and no reflection" (Peel 2007). Although the Constitution appeared to be a futile proposition, the desire for reform remained and was supported by opinion makers throughout the EU. A survey conducted in 2006 confirmed this: "There is widespread support for cherry-picking key elements of the EU constitution" (Corlin 2006). This is essentially what happened, as Germany, which held the presidency at the time, introduced the Reform Treaty in June of 2007.

The details of the Reform Treaty were devised by the European Council during a meeting in Brussels. The negotiations were nearly derailed by Poland's opposition to the qualified majority voting system that most nations wanted to include. Poland insisted on the adoption of a different voting system, citing the impact of World War II as support for their demand: "If Poland had not had to live through the years of 1939 to 1945, Poland would be today looking at the demographics of a country of 66 million," said Polish Prime Minister Jaroslaw Kaczynski (qtd. in Mahony 2007). Poland was eventually granted a reprieve from the qualified majority voting system until 2014, which ended the dispute and restarted the progress of the Reform Treaty.

As development of the Reform Treaty continued, it became obvious that it was not the European Constitution. In fact, some nations believed that too much of the Constitution had been removed from the Reform Treaty. Regardless, this

did not placate some national governments, which saw the Reform Treaty as a political liability. Wary of another failure, the writers of the Reform Treaty granted to the UK and Ireland the ability to opt-out of some of the terms, in addition to the slightly reduced scope of the new document.

Portugal subsequently assumed the EU presidency, and scheduled an inter-governmental conference (IGC) in October for the finalization of the Reform Treaty. A series of concessions in the final stages of the negotiations ensured the Reform Treaty's acceptance in the IGC. Many nations received specific benefits, some symbolic, and others more substantive: Poland ensured that small groups of nations can delay the passage of legislation; Italy was given an extra seat in the European Parliament; Austria was allowed to retain its quota on foreign students for five years; and Bulgaria was permitted to use the name "evro" for the euro currency in accordance with their Cyrillic alphabet (BBC 2007). The Reform Treaty was signed on December 13th in Lisbon, Portugal by 26 prime ministers and presidents from the EU member states; its official title was to be the Lisbon Treaty (Woodcock 2007). The British Prime Minister, Gordon Brown, was conspicuously absent from the official treaty signing, and later claimed that he had been obligated to attend a House of Commons committee meeting.

Instead of replacing the Treaties of Rome and Maastricht, as the Constitution would have done, the Lisbon Treaty amends them. It also contains many of the same provisions as the Constitution, such as the introduction of the presidency of the Council of the EU and the qualified majority voting system. Overall, the conclusion is that "the practical outcome of both treaties is pretty much the same" (Mulvey 2007). The discrepancies lie mostly with the language that could be construed as supporting the notion of a single European nation. In particular, the text referring to the EU flag and anthem has been eliminated along with most of the Constitution's preamble, in addition to the aforementioned opt-outs. The EU leaders believe that these changes, and the fact that the Lisbon Treaty no longer has the name "Constitution," though superficial, should help avert the contentiousness of the debate on the European Constitution.

But it is becoming obvious that this is not the case. Ruth Lea of the opposition group Global Vision says of the situation: "It is now clear that the Reform Treaty is in all but name the Constitutional Treaty" (Lea 2007). Therefore the debate on the Lisbon Treaty is very much the same debate that Europe has already had with the Constitution. However, now that the domestic and economic issues that hung over the French and Dutch referenda are no longer extant, the disagreements with the terms of the Lisbon Treaty appear to be more uniform.

Opponents continue to argue that the Lisbon Treaty perpetuates the EU's 'democratic deficit.' They believe that, as the EU takes on more powers at the expense of national parliaments, EU citizens are being increasingly separated from any semblance of a democratic process. As the EP is the sole directly elected EU institution, those who complain of a 'democratic deficit' are especially concerned with the qualified majority voting system and the Lisbon

Treaty's removal of individual member state veto power in many areas of policymaking. While these are legitimate concerns, they also contend that the Council of the EU presidency and the single foreign policy representative created by the Lisbon Treaty are part of an effort to create a single European state. However, examination of the text of the Lisbon Treaty reveals these particular charges to be baseless. Neither position has a significant amount of power without the backing of member state governments.

Supporters of the Lisbon Treaty claim that its passage is necessary for continued enlargement of the EU. Charles Grant of the European Center for Reform calls the enlargement process "a means of spreading democracy, security and prosperity across the continent," and thus supports the Lisbon Treaty (Lea 2007). They also have said that the Lisbon Treaty is needed because the current foreign policy apparatus of the EU is ineffective. Various officials can currently claim to speak for the EU in some capacity on foreign policy matters. The Lisbon Treaty would give such authority to a single person called the High Representative of the Union for Foreign Affairs and Security Policy, which, according to Lisbon Treaty supporters, would strengthen the voice of the EU in foreign policy matters while keeping the unanimity requirement, which would preserve national autonomy.

For many of its opponents, however, the Lisbon Treaty represents a continuing loss of national sovereignty. Ruth Lea (2007) claims that if the Lisbon Treaty passes, "there will quite simply be no more significant powers left... outside the orbit of the EU's formal institutions." Supporters of the Reform Treaty cannot really say that this is untrue. It would, indeed, give the EU some influence in nearly all matters of importance. But supporters of the Reform Treaty have stated that this loss of sovereignty is actually the way by which the 'democratic deficit' will be eliminated. In effect, the EU becomes more democratic at the supranational level because individual nations relinquish more of their intergovernmental powers. It may be a convincing argument for many, but the reactions to it appear to be contingent on an individual's view of the EU.

The differences between the European Constitution and the Lisbon Treaty have not convinced many Europeans that referenda are not needed. In the UK, which had planned a referendum on the Constitution but did not see a need after the votes in France and the Netherlands, support for a referendum on the Lisbon Treaty had been very strong since its introduction. Supporters of a referendum claimed that, as the British government had agreed to hold a referendum on the European Constitution, there should be a referendum on the Lisbon Treaty. The British government rejected this argument, maintaining that the sundry opt-outs and exceptions that were provided to the UK during negotiations were proof that the Lisbon Treaty was truly different from the Constitution and could not be legitimately argued to be a threat to national sovereignty. Yet there remained a great deal of skepticism and demands for a national referendum. "It was fascinating to sit here and listen to the debate about how removing the symbolism

changes “this” said Irish politician Bertie Ahern (Smyth “Political” 2007). Nevertheless, Prime Minister Gordon Brown was ultimately able to keep the vote on the Lisbon Treaty in the parliament. The Lisbon Treaty was passed in the UK on March 11th, 2008, by a vote of 346-206 (BBC 2008).

France was similarly able to avoid a referendum and pass the Lisbon Treaty in parliament. As one of the more socialist nations of Europe, France had originally been concerned with the Constitution’s stipulation that “free and undistorted competition” should be a priority of the EU (McNamara 2006). France’s President Nicolas Sarkozy pushed for the line’s removal and succeeded. Despite widespread support for a referendum, the French parliament voted on the Lisbon Treaty on February 8<sup>th</sup>, 2008; it passed both houses with an overwhelming majority.

The government of the Netherlands has also taken efforts to avoid a referendum. The Dutch people are not as hostile to the Lisbon Treaty as they were to the Constitution, but they nevertheless do not view it in a very favorable light. Like the UK, the primary concern of the Dutch is with the new powers given to the EU by the Lisbon Treaty and the loss of national jurisdiction over certain matters. The Dutch government appears to have been successful in keeping the Lisbon Treaty vote in the parliament, and the final vote should take place in mid-2008.

Ireland’s constitution, unlike those of all other EU member states, required a referendum on the Lisbon Treaty. This drew the attention of all EU nations, as the referendum in Ireland was to be the only one held. The Irish debate on the Lisbon Treaty was similar to what was seen when the European Constitution was being considered, with most of the same arguments being presented. Irish opinion polls were initially favorable for supporters of the Lisbon Treaty prior to the vote, but they become decidedly more unclear by the day of the referendum, which was June 13<sup>th</sup>.

Irish voters dealt the Lisbon Treaty a resounding blow when they voted against it by a margin of 53.4%-46.6%. The result of the Irish referendum means that the Lisbon Treaty has an uncertain future. The Commission President, Barroso, has said that he does not want the result to affect the continuation of the ratification process. He has indicated that he does intend to allow the Irish referendum to lead to the death of the Lisbon Treaty. However, Luxembourg’s Finance Minister Jean-Claude Juncker said that the EU is now in the midst of a “crisis” and that the Irish result is “not good for Europe” (The Irish Times 2008).

There are now several potential paths for the Lisbon Treaty. It could share the same fate as the European Constitution, which many European leaders insisted was not dead after its own referendum defeats; or it could be reworked specifically to address the concerns of the Irish, in a similar fashion to what was done with the Treaty of Nice, which in 2001 was also rejected in an Irish referendum, but was later passed after changes were made. What the situation confirms is that the EU is not easily understandable for many of its citizens. Until the leaders of the EU can find a way to simplify the content of the reform process, or

cogently convey its intricacies, they will likely face further defeats in their efforts.

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# **Comparing the Lisbon Treaty with the Constitutional Treaty: Transparency in Process vs. Transparency in Results\***

Jacques Ziller

## **Introduction**

This paper explores the issues that had to be solved in 2007 in order to arrive at a compromise between governments in favour of the Constitutional Treaty and governments that opposed it. It explains the alternatives that were available in order to draft a treaty that would be different from the Constitutional Treaty of 2004 while saving the entire substance of the innovations that had been agreed upon by all Governments with their signing of the Constitutional Treaty. It shows the technical logic that supports the choices made for drafting the Lisbon treaty in the political context of 2007.

Since the negative referenda in France on May 29th and in the Netherlands on June 1, 2005 quite a number of commentators have insisted that the main problem of the Constitutional Treaty of 2004 was its Part III, and that it needed to be suppressed or modified. These comments however did not get to the point: the question to be asked was not what to do with Part III of the Constitutional Treaty of 2004, but what to do with the presently applicable treaties, i.e. with the Treaty on the European Union (treaty of Maastricht - EU treaty) and the Treaty establishing the European Community (treaty of Rome – EC treaty), as last amended by the treaty of Nice of 2001. The response of the Convention and of the Intergovernmental Conference (IGC) in 2003-2004 was that these treaties would have to be replaced by one single new treaty, which would therefore take over the clauses which are needed for the further functioning of the existing EU institutions and policies, amending them to a certain degree. The option that was adopted by the European Council on June 21-22, 2007– i.e. to revert to the traditional method of treaty reform can only be understood in the light of this choice, which had not been properly explained during the referendum campaigns in France and the Netherlands.

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\* This essay is partly based on a previous paper, which was drafted before the European Council of June 2007, and which has been published in Spanish (Ziller 2007), with necessary updates and conclusions

### **Saving the Substance of the 2004 Agreement**

Since the end of 2006 a possibility of consensus had arisen between two groups of governments. The first group included the governments of countries which had already ratified the Constitutional treaty in the following chronological order: Lithuania, Hungary, Slovenia, Italy, Greece, Spain, Austria, Latvia, Cyprus, Malta, Luxembourg, Belgium, Estonia and Finland, as well as Bulgaria and Romania. The two latter countries had ratified their accession treaty, which was drafted as accession to the Constitutional Treaty, with a clause foreseeing accession to previous treaties if it were not in force at the moment of accession. Two other countries were part of the group, as the authorisation had been given by their Parliament, but ratification itself is suspended because of a pending appeal to the Constitutional court: Germany and Slovakia. This group also included the governments of countries who had not yet completed their internal ratification procedures but openly supported the Constitutional Treaty: Denmark, Ireland, Portugal, and Sweden,

On the other side there were governments claiming that ratification of the Constitutional Treaty of 2004 was not possible any more. This was obviously the case for France and the Netherlands because of the negative referendums. It was even more so with the government of the UK, who thought that it was bound to lose the referendum which it had promised to hold on the Constitutional Treaty. The government of Poland and the President of the Czech Republic, where the situation was particularly unclear, were the strongest in voicing their opposition to the Constitutional treaty.

The governments that did not want to pursue ratification specified that they did want to ratify the treaty, even though it was unanimously signed on October 29, 2004 in Rome. The official reason was that it had been rejected in the referenda of May 29th in France and on June 1, 2005 in the Netherlands. Yet they had not rejected the possibility of signing and ratifying another treaty, reforming the EU and EC treaty along the lines agreed to by the IGC that negotiated the constitutional treaty in 2003-2004 on the basis of the draft which had been adopted in July 2003. On the other hand, the governments who were in favour of the Constitutional Treaty claimed they want to keep its 'substance', but admitted that this could have the form of another treaty.

During the second part of 2006 a number of members of the European Parliament (EP) politicians of the countries who had already ratified played with the idea of a solution which would allow their country not to ratify again while a slightly different text would be submitted in those countries 'which had difficulties' with the Constitutional Treaty. This was probably due to confusion between 'ratification' in the technical sense, and the political debates held in the process leading to ratification, especially in the countries where a referendum had been held. Technically speaking, as soon as even a comma would be changed in the treaty establishing a Constitution for Europe on October 29, 2004, a new ratifica-

tion would have to occur. From a legal point of view, a referendum was however not obligatory in any of the countries which have already ratified. Furthermore, in the case of only formal changes, it would have been possible to argue in a number of countries that a new parliamentary ratification would not even be necessary, and that due to previous ratification, the new text could have the status of some kind of executive agreement.

In France and in the Netherlands no effort was made by the executive to try and define what exactly had been rejected by referendum, apart from a fully-fledged text called ‘Treaty establishing a Constitution for Europe’. It could certainly not be argued that the whole content of the Constitutional Treaty had been rejected, as this would have entailed a political obligation to renounce participating in those institutional mechanisms and policies that were taken over without changes from the presently applicable treaties: the treaty on the EU and the treaty establishing the EC. Only after the new Dutch government was formed in February 2007, an attempt to define what the Netherlands would want to see cancelled from the Constitutional Treaty was formulated, as an answer to the questions of the German presidency. The Dutch government even asked an opinion to the State Council, and was happy not to contradict the commentators which thought that this was asking some kind of green light to a constitutional court – which was not at all the case (Ziller 2008). No official government position was published by the governments of the other 26 member states, who preferred keeping their views for the Sherpa of Chancellor Merkel, who were trying to find a way out of the crisis with the help of the General secretariat of the Council (Ziller 2007-2008).

### **Sorting out the Bones of Contention**

On the basis of the official Dutch requests and of bilateral contacts with all governments, the German presidency sent a letter to the other members of the European Council in the last week of April 2007. This “questionnaire in view of the bilateral meetings with focal points to be held between 23 April and 4 May” was supposed to remain confidential, but was soon published on different internet sites. This letter raised twelve questions, the answers to which might condition decisions to be taken at the European Council of June 22-23.

1. How do you assess the proposal made by some Member States not to repeal the existing treaties but to return to the classical method of treaty changes while preserving the single legal personality and overcoming the pillar structure of the EU?
2. How do you assess in that case the proposal made by some Member States that the consolidated approach of part I of the Constitutional Treaty is preserved, with the necessary presentational changes resulting from the return to the classical method of treaty changes?

3. How do you assess the proposal made by some Member States using a different terminology without changing the legal substance, for example with regard to the title of the treaty, the denomination of EU legal acts and the Union's Minister for Foreign Affairs?
4. How do you assess the proposal made by some Member States not to include an article relating to the symbols of the EU?
5. How do you assess the proposal made by some Member States not to include an article that explicitly restates the primacy of EU law?
6. How do you assess the proposal made by some Member States that Member States will replace the full text of the Charter on Fundamental Rights by a short cross reference having the same legal value?
7. Do you agree that the institutional provisions of the Constitutional Treaty form a balanced package that should not be reopened?
8. Are there other elements which in your view constitute indispensable parts of the overall compromise reached at the time?
9. How do you assess the proposal made by some Member States concerning possible improvements/clarifications on issues related to new challenges facing the EU, for instance in the fields of energy/climate change or illegal immigration?
10. How do you assess the proposal made by some Member States to highlight the Copenhagen criteria in the article on enlargement?
11. How do you assess the proposal made by some Member States to address the social dimension of the EU in some way or the other?
12. How do you assess the proposal made by some Member States applying opt-in/out provisions to some of the new policy provisions set out in the Constitutional Treaty?

Different options were explored with this letter, in order to push those governments who had not made their views clear enough to take a stance. Questions 9 and 11 – and to a lesser degree question 10 – corresponded to an option which would have been that of the ‘treaty plus’, i.e. improving the content of the constitutional treaty, an option very clearly put forward by Spanish MEPs, amongst others (Mendez de Vigo 2007). The outcome did not match all the expectations of the promoters of such a solution, but are to a certain extent present in the mandate for the 2007 IGC and in the wording of the Treaty of Lisbon.

Question 12 was clearly reflecting demands of the Danish, Irish and British governments. They were accepted in principle, but remained a bone of contention during the whole process which led to the agreement on the text of the Lisbon Treaty at the informal European Council meeting of October 18, 2007.

Question 7 and 8 were designed in order to find out mainly what the different government of the first group understood as being “the substance” of the Constitutional Treaty. It resulted in the main feature of the treaty of Lisbon, which was drafted on the basis of the Constitutional Treaty, in order to incorporate all the substantive innovations of parts I, III and IV into the existing EU and EC treaties.

Questions 1 to 6 were clearly to address the question of ‘changing the form’ while keeping the substance,’ i.e. the option which was most favoured by the governments of the first group, and by a large part of the political class in France and in the Netherlands, although they did not all voice it in a clear way. The answers to questions 1 to 5 led to the abandonment of the title of the Constitutional Treaty, and of the clause on symbols, and to the replacement of the clause on primacy by a declaration reaffirming that the relevant case-law of the European Court of Justice (ECJ) was accepted by all governments. The answers to question 6 resulted in giving the Charter the same legal value as the treaties.

The wording of the questionnaire shows that work was well in progress at the German Chancery and at the General Secretariat of the Council in order to find a way to keep the substance of the 2004 treaty in a way that might be acceptable to all governments.

### **Changing the Form**

Without attempting any assessment of the tactical appropriateness of the questionnaire, it can be said that it was helpful in that it drew attention to the two dimensions of the ‘form’ of the Constitutional treaty that had to be taken into consideration.

*First*, the Constitutional Treaty of October 29, 2004 follows a very specific way of formulating amendments to the EU and EC treaty, which differs from all previous treaty amendments since the treaty on the fusion of executives of the three Communities of 1965.

All former treaty revisions followed the form used as well in community law as in the vast majority of member states when it comes to amend existing legislation or norms. The legislator or treaty makers adopt a series of articles which mention the words, sentences, paragraphs or articles that have to be replaced and indicate the words that have to replace them. The result of this technique is that it is impossible to understand how the amended text looks like until one has incorporated the changes in the existing text, i.e. the so-called ‘consolidation.’ On the other hand, it has the advantage of being transparent on what is being done, as only innovations appear in the amending treaty or law. In some cases, like in the Maastricht treaty, the entire text of a modified article was mentioned as replacing the previous one even if only one word has been indeed change. It is useful in order to avoid misunderstandings, but it creates the false impression that the entire article is being changed, which is not the case.

The Constitutional Treaty of 2004 followed another technique that is has been traditionally used in Germany for the amendment of laws, and is called ‘*Novellierung*.’ The author of the amendments adopts the new text incorporating all amendments to previously existing texts, achieving thus by the amendment itself what is being achieved elsewhere by ‘consolidation’ of the amendments in the existing texts. The main advantage is that it is possible to immediately under-

stand the meaning of the amended text as a whole. The negative referenda in France and in the Netherlands, and even more the referendum campaign in France has shed light on a major drawback of this technique: contrary to the classical technique, it does not clearly show what is new and what already existed in the law. Indeed the vast majority of critiques during the French referendum campaign were addressed to clauses which had not changed in their formulation since the Treaty of Rome of 1957 or – as far as the EMU is concerned – since the Treaty of Maastricht of 1992.

Furthermore, whereas some members of the Convention's Praesidium had pleaded in favour of splitting the draft in two documents, i.e. a Constitutional Treaty containing parts I, II and IV of the final draft, and a second treaty, of a more technical nature, containing part III, the British government as well as a number of other government representatives announced that they could not accept this splitting. They obviously feared that this would lead to a hierarchy between the two texts or even worse, that they would not be master of the limits which are usually being put in the EU/EC treaties by the formulation of legal bases.

As a consequence of the technique of '*Novellierung*,' a number of clauses which are contained both in the presently applicable EC and EU treaties and in the Constitutional Treaty of 2004 needed to be ratified again, and this was creating a quite new legal situation as compared with previous treaty amendments. This was a technical argument in favour of dropping the method of '*Novellierung*' in 2007: if by chance a second treaty that was taking over the clauses of the Rome and Maastricht treaty was not to be ratified, there was no doubt that euro-sceptics, would try and take advantage of this situation and plead that the present treaties had therefore lapsed. The choice of the Lisbon treaty for returning to the classical amending technique was primarily a response to this risk, and not merely a machiavellic attempt at hiding what was being done with the Lisbon treaty. This is confirmed by the – rather quick – publication by the Council of a consolidated version of the TEU and TFEU, whereas for previous treaty amendments, the consolidated versions had only been published after completion of ratification by all member states.

*Second*, the title of the treaty 'establishing a Constitution' was perceived by an important part of public opinion as giving a different nature to the treaty of 2004 as opposed to any other of the founding or amending treaties. The academics who have been passionately discussing whether this was 'a treaty or a constitution' are not the only ones to give an importance to the words chosen by the drafters of the Constitutional Treaty. Politicians and public opinion do even more so, as apparent in two countries which are reputed for their pragmatic culture, i.e. the Netherlands and the United Kingdom. This impression was being reinforced by elements like article I-8 on the 'symbols' of the Union – an article which was added to part IV after the Convention had finished its work –, by the incorporation of the Charter in the text of the treaty, by the use of the words

‘Law-Ley-Loi-Gesetz’ or “Minister.” and even by the ‘restatement’ of the jurisprudential principle of ‘primacy.’ The fact that most of these clauses were the result of the clarification or simplification and not of an attempt to constitutionalize the Union was being ignored by the application of a kind of ‘theory of appearance.’

In light of these considerations, changing the form entailed two kinds of possible changes:

1) Using the common technique of amendment of EU treaties; the difference with the treaty of 2004 was only in terms of transparency: What was being lost due to the complex amendment formulation was being gained by the clarity of what is new as opposed as to what is already applicable in treaty provisions; furthermore, clarity on the outcome would again be gained once a consolidated version would be published.

2) Using a wording which does not have the ‘appearance’ of a constitution; while those who favoured a European constitution might justly be disappointed – and the others reassured – it has to be pointed out that the constitutional nature of the treaty of 2004 has been and remains highly debatable from a ‘scientific’ point of view, as it is possible to claim as well that the presently applicable treaties already are the Union’s ‘material constitution’ or on the contrary that the Constitutional Treaty of 2004 is not a ‘true constitution.’

Along with the two questions of the formulation of amendments and the constitutional appearance, two issues had to be addressed in any attempt to change the form without changing the substance of the Constitutional Treaty: the technical options for amendment, and the question of the constitutional appearance.

### **Options for Changing the Form While Keeping the Substance**

At the time of Chancellor Merkel’s above mentioned letter, I was writing (Ziller 2007) that going back to the usual amendment technique of EU/EC treaties could have been done according to a minimum of four different options, which would enable to take over all the innovations contained in the Constitutional Treaty.

A *first option* would have consisted of one single treaty, which would only have contained amendments to the present treaties, i.e. a list of amendments to 60 out of the 63 articles of the treaty on TEU and a list of amendments to 217 out of 317 articles of the treaty establishing the EC. This number would have been reached by renouncing the amendments to 80 articles of the TEC, for which the wording of Part III of the Constitutional Treaty would not have changed their legal significance, but which were deemed to be written in a more appropriate manner by the drafters of the 2004 treaty. The entire treaty would have followed the technique of classical amendment and there would not be any ‘*Novellierung*.’ After consolidation, the suppression of the pillar structure would not have been visible for anyone other than experts in EU law: even though there would be a single legal personality of the Union, and a harmonisation of acts and to a certain

extent procedures, the provisions relating to external policies would be spread between the TEU and TEC, as well as some general and institutional provisions.

A *second option*, which I advocated in March 2006 (Ziller 2006) – at a time where there seemed to be still time to reopen a debate in France and the Netherlands, would have consisted in splitting the Constitutional Treaty of 2004 in two: parts I, II and IV on one side and part III on the other. This could have been done through a rather simple protocol which could have been considered as an executive agreement in the countries which already had ratified, as long as no other change besides the splitting would have been made. It would obviously have necessitated a careful rewording of the cross references to articles of other parts in Parts I, III and IV. This option however did not imply a change of amendment technique, as it would have remained a general ‘*Novellierung*.’ The EU would thus be governed by two treaties, instead of one, as would result from the entry into force of the constitutional treaty. Obviously, all protocols and the EURATOM treaty also have to be counted within primary law, as is already the case and as would be the case with the first option. A number of politicians continued advocating this option even later on, when it was obviously too late to implement it in France and in the Netherlands, due to the stiffening of positions where politicians of all parties were hammering that “the sovereign people had decided.”

A *third option* would have consisted in a new treaty to take over Part I of the Constitutional Treaty of 2004 as well as a modified version of Part IV, plus a clause giving binding force to the Charter. The technique of ‘*Novellierung*’ would thus have been followed as far as the content of Part I of the Constitutional Treaty of 2004 would be concerned. The innovations of Part III would have been transformed into amendments to the existing treaties according to the traditional amending technique, by means of two supplementary protocols. After consolidation of the amendments, the EU would be governed by two treaties and the Charter: the new treaty’s text (almost identical to the text of Part I) would replace the text of the TEU; the amended TEC would contain all the elements on policies of the Union and details of the functioning of the institutions (which corresponds to the content of Part III). Here again one would have to add the EURATOM treaties and protocols. This option was defended by the Action Committee for European Democracy, chaired by Giuliano Amato, former vice-president of the European Convention, and presented to the public in June 2007. This was indeed a somewhat complex operation, but an appropriate presentation of the amending protocols might have restored transparency in process and outcome. (ACED 2007)

A *fourth option*, to a certain extent similar to the third option, would have produced a longer new treaty, as it also would have included a number of clauses that are to be found in Part III of the Constitutional Treaty, which would have been considered as part of the substance. After consolidation of the amendments, the EU would have been governed by two treaties and the Charter, as in the third

option. The TEU would have been somewhat longer than with the third option, and there would have been a smaller number of clauses of institutional nature in the TEC (which would correspond to the rest of Part III). This option had been chosen by Pierre Lequiller (2007), Chairman of the EU Standing delegation of the French National Assembly on EU affairs and former member of the Convention.

With options three and four, there would have been a mix of amendment techniques – as suggested in the Questionnaire of Chancellor Merkel. The new treaty, corresponding to Part I or Part I and some clauses of Part III plus a rewritten Part IV, would have followed the technique of ‘*Novellierung*,’ whereas the protocol which would operate the work done by Part III would have followed the classical technique of treaty amendment. Here again it would have been possible to choose between at least two techniques. A first way of wording would have been to simply follow the order of the articles of the EU and EC treaties – as was done with the Single European Act, and the treaties of Maastricht, Amsterdam and Nice. It would have resulted in a technical protocol ‘for specialists’ which would not be intelligible to non-experts. Another technique might be tried out: that of one or more protocols which would be drafted in order to clearly illustrate what changes would be made to the existing treaties and why.

The choice of the European Council was that of the first option, probably for two reasons: technically it was easier to apply and more coherent than any other option; politically it helped to sustain the claim that the “constitutional concept” had been abandoned, as Part I of the Constitutional Treaty, which was most clearly incorporating this concept, was dismantled.

### **Splitting the Constitutional Treaty?**

As opposed to the third option – which followed the division of the Constitutional Treaty between Parts I and III –, this fourth option would have raised the question of the criteria to be used in order to choose which clauses from Part III would have been taken over in the new treaty, and which clauses would simply be treated as amendments to be inserted in the protocols.

The dilemmas linked to these choices are illustrated not only by the draft proposed by Pierre Lequiller (2007), but also by those proposed by MEPs Andrew Duff (2007) and Gérard Onesta (2006), who have explored the possibilities of splitting the Constitutional Treaty in two (a ‘Constitution’ and a ‘Treaty’), but taking over a number of clauses from part III into the ‘constitution’

A first possible criterion would have been that of the ‘constitutional character’ of the clauses which would have to be taken over. It was the criterion used by MEP Onesta. His draft shows clearly that there was ample room for discussion of what has a ‘constitutional character’ and what does not. This was opening the door for long negotiations. The same would have applied to the criterion of the ‘substance’ of the constitutional treaty, as it is not defined anywhere.

A second possible criterion would have been that of the ‘innovations.’ One would have taken over the clauses of Part III that represent an innovation to the present treaties, and which do not derive from the mechanical application of the innovations of Part I/the new treaty. This would have resulted in taking over not only institutional changes, but also some modifications in the formulation of legal bases of the EC Treaty (for instance article III-284 on civil protection, or the addition ‘effective access to justice’ in article 65 TEC). The new treaty would therefore have contained a series of minor changes on policies which would have made it very difficult to understand, and would have deprived it of its character as a framework treaty. Furthermore, as clauses on policies would have been split between the new treaty and the amended EC treaty, it would have created the impression – after consolidation – that there were two categories of policies, with a hierarchy between them. To a certain extent this might seem to be already the case with the Constitutional Treaty, because Part I contains ‘specific provisions’ applicable to the foreign and security policy, to the common security and defence policy and to the area of freedom, security and justice. But these ‘specific provisions’ may also be considered as more extended clauses on competences and hence their place in the new treaty was justified, as it was in Part I.

A third possible criterion would have been to limit the choice of clauses to take over from Part III to ‘innovations’ which have an ‘institutional character’ (not ‘constitutional’) and which do not automatically derive from the new treaty. It seems to have been the idea of Mr Lequiller’s draft (Lequiller 2007).

Looking back at the different options that had been explored in 2006-2007, the option chosen by the German Chancery and the General Secretariat of the Council to be presented at the European Council of June 2007 definitely appear to be the simplest one. It was only defensible in terms of transparency if a consolidated version was soon published. This was done on April 15 on the internet, and on May 9 in the Official Journal of the EU. It seems however that the Irish government did not make use of the consolidated version during the referendum campaign of 2008.

### **The ‘Constitutional Appearance’**

As already mentioned, the form of the Constitutional Treaty of 2004 was embedding two aspects: one was the amending technique, the other the ‘constitutional appearance.’ This latter aspect had two dimensions.

A *first* dimension was merely symbolic, without any clear legal consequences attached to changes.

It is the case of the name of the treaty “establishing a Constitution for Europe.” In the second half of 2006, proposals have flourished. The first to appear was to call it ‘fundamental law’ instead of ‘Constitution,’ referring to the distinction made in Germany between ‘*Grundgesetz*’ and ‘*Verfassung*.’ This

clearly would not have worked, as the Dutch and Danish versions already used the expression ‘fundamental law’: *grondwet*, *grundlov*. Any other attempt to play with the word ‘fundamental’ would probably have met the same objections in the Netherlands. The variety of possible names for a new treaty is probably quite long, but the question of its translation into 23 treaty languages should not be overlooked. If the classical amendment technique were being used rather than ‘*Novellierung*,’ another question would arise, i.e. if the TEU and TEC would keep their name, or if one or both would have to be amended, as already happened with the treaty of Maastricht which changed the name of the European ‘Economic’ Community into European Community. The choice of the German Chancery and of the General Secretariat of the Council was the most neutral one, and the most easy to justify: keeping the name of the Maastricht Treaty and calling the Rome Treaty “Treaty on the functioning of the Union.” In order to suppress any attempt at finding a hierarchy between both treaties, which could have been read in their title, the drafters opted for insisting on inserting several clauses reaffirming the equal value of both treaties. They also chose to insert the clauses on the fields of competences in the TFEU, rather than in the TEU, where they would also have found their place, transforming the latter into a fully fledged constitutional basis for the EU, as was Part I of the Constitutional Treaty (Ziller 2008).

The case of the ‘Minister’ of foreign affairs was even easier to solve. The British and Dutch government simply refused its use. The only issues to consider were that the word Commissioner should probably not be used, because the ‘Minister’ was submitted to a double accountability, different from that of other members of the Commission, and that the expression has to be easy to translate in all treaty versions. The final choice was to keep the name of High Commissioner that was already official since the Amsterdam treaty, slightly changing the adjectives.

The issue of the denomination of legal acts was a far more delicate one. Replacing the vocabulary of the Constitutional Treaty, i.e. European laws and framework laws by the presently used vocabulary of directives and regulations could involve a series of very serious drawbacks:

- In order to maintain the distinction between ‘legislative acts’ (usually involving the European Parliament) and ‘non legislative’ acts, a third category had to be used, which is called regulation in the Constitutional Treaty. Another expression like decree or ordinance was difficult to find with precise equivalent in the 23 official languages, and it furthermore had some strong implications in a series of member states where it would therefore probably create problems of acceptability;

- using the vocabulary of directives and regulations might lead to leave aside an extremely important aspect of simplification and delivery which had been acknowledged within Part III, namely establishing with clarity when ‘legislative acts’ have to be used, and when not. This could lead to a reduction of the cases

where the EU is involved in decision making, as compared to the Constitutional Treaty;

- a concept covering directives and regulations when they have this 'legislative' character was anyway needed, as this character triggers a number of consequences, like the procedures of the protocols on national parliaments and subsidiarity, etc.

The choice of the German Chancery and of the General Secretariat of the Council to refer to the legislative procedure for legislative acts was probably the only one that kept the advantages of the innovations of the Constitutional Treaty and those of the present distinction between directives, regulations and decisions.

The suppression of the restatement of the principle of primacy could not make a significant change from the legal point of view, but it could most probably raise some concerns for the governments who were attached to the Constitutional Treaty and with some specialists, as the mere fact that it would not appear in the treaties could be used as an argument against the persistence of this principle which was established for 42 years in the ECJ's case law. There were alternatives. One was referring to principles of the jurisprudence, with an appropriate declaration, and it was indeed chosen. Another alternative might have been to suppress not only the principle of primacy but also the principle of conferral, which is implied in the fact that from the point of view of international law the EU has the characteristics of an international organisation, and not of a state. This would have been coherent from a legal technical point of view. It was politically unacceptable to most member states, as demonstrated by the obsessive reaffirmation of the principle of conferral and all its consequences in the Lisbon Treaty and the annexed protocols and declarations (Ziller 2007-2008). At any rate, the translation of the relevant document had to be carefully checked: whereas in most language the word 'primacy' or an equivalent with the sense of 'priority' was being used in the Constitutional Treaty, some language versions use the word 'supremacy' which has never been used by the ECJ, and thus contribute even more to a Constitutional appearance in a clause that was not intended in this sense by its drafters (Amato and Ziller 2007).

### **Transforming the Constitutional Treaty in Amendments to the Treaties of Rome and Maastricht**

The final choice made by the drafters of the Lisbon Treaty is well known: transforming the Constitutional Treaty in amendments to the Treaties of Rome and Maastricht. Looking back at the alternative options, and keeping in mind the split between governments in favour of keeping the Constitutional Treaty and others trying to get rid of it, it seems that the German Chancery and the General Secretariat made the most feasible choice in order to guarantee a rapid conclusion of the coming IGC. The Portuguese government had made it a condition of its acceptance, as it wanted to have the best guarantees of success.

The result seemed incomprehensible when reading the mandate of the IGC which was annexed to the Conclusions of the June 2007 European Council (EU Council 2007). With some patience and a good knowledge of the Constitutional Treaty as well as the treaties of Rome and Maastricht, the outcome of the IGC was predictable. For this reason I spent the month of August 2007 writing a book on a treaty that did not yet exist, and which could be published in November 2007 in its Italian version (Ziller 2007-2008).

Tracking the migration from the clauses of the Constitutional Treaty to the TEU and TFEU is not too difficult: one has to use the tables of correspondence that were established between the Constitutional Treaty and the TEU and TFEU, on one side, and the tables of correspondence between the present TEU/ TEC and the future TEU/TFEU. Some slight amendments have been added to the innovations of the Constitutional Treaty: they are easy to find out as they all were explicitly spelled out in the mandate of June 2007. The only clauses which have not been taken over are those corresponding to the ‘constitutional appearance’ and a few words of article I-42 *Specific provisions relating to the area of freedom, security and justice*: for some strange reason, it escaped the drafters attention that the Lisbon treaty would not take over the promotion of “mutual confidence” between the competent authorities of member states. A Freudian lapsus...

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## Can European Institutions Still be Reformed?

Renaud Dehousse

The rejection of the Lisbon Treaty by the Irish people has confirmed the extent of the crisis triggered by the rejection of the European Constitution. Unable to agree on a response to the concerns which emerged at the time of the French and Dutch referenda, the heads of state and government had attempted to repackage the proposed reform in a more modest way – a new treaty modifying the institutional setting. Should the failure of this attempt be interpreted as signifying that the enlarged Union—which encompasses widely contrasting visions of the European project—can no longer be reformed?

The mechanism for reforming European Union (EU) treaties is remarkably conservative. It has not changed since the construction of Europe was initiated, whereas the number of member states has quadrupled and public demands for democratic control have increased dramatically. This conservatism is easily explained. By retaining control over this process, governments can make sure that European integration does take a direction incompatible with their wishes. During deliberations on the Convention, there was a looming concern that certain governments might decide to exercise their veto rights. From this perspective, the cautious approach taken by the draft Constitution with regard to revision is not surprising: governments could scarcely be expected to willingly relinquish their powers. It was foreseeable that they would insist on retaining unanimity for both the signing and ratification of any amendment of the new EU Charter of Fundamental Rights.<sup>1</sup> Such a status quo revealed much about the nature of the text: using the word “Constitution” to refer to a document of which the real masters remained the States had all the appearances of a slight of hand (Dehousse 2005).

The procedure’s conservative nature did not necessarily imply a paralysis of the political system. In less than 20 years, the treaties have undergone four reforms which had significantly transformed the European project, with the launch of major initiatives such as the completion of the internal market and the adoption of a single currency. Apparently, however, over the past few years, a clear consensus has emerged over the need for a “reform of the reform process.” As early as with the signing of the Treaty of Amsterdam in 1997, several voices were raised in criticism of the erratic nature of intergovernmental negotiations, in which crucial decisions are often made at the last minute by heads of state and government rushing to reach a conclusion (De Schoutheete 2000). The half-fail-

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<sup>1</sup> Article IV- 447 of the Constitution.

ures recorded in Amsterdam, and later on in Nice, on questions of institutional reform, led to the implementation of more open procedures, with the conventions which formulated the EU Charter of Fundamental Rights and the Constitution.

Moreover, even though the Convention proved to be extremely cautious in this respect, the Constitutional Treaty's fate highlighted what many feared: in a group consisting of twenty-five member states, within which the consent of each member is needed for even the most modest reform, there is a high risk of problems at the ratification stage. If one accepts that Europe has not yet come to the end of its institutional evolution, it would be wise to consider ways of circumventing the stumbling block of unanimity so that it might continue to evolve.

What possible lines of evolution might the mechanisms for treaty reform follow? The question merits consideration, inasmuch as the fate of the Lisbon Treaty still seems uncertain at the time of writing.

### **A Model Crisis**

As already mentioned, the general revision procedure set out in the EU treaties is typically very rigid: amendments must be adopted by common accord by the member states' government representatives in a diplomatic conference, and can only enter into force after being ratified by all states in accordance with their respective constitutional procedures (Article 48, Treaty of the European Union - TEU).

This procedure presents many difficulties. Its diplomatic nature does not make it a model of transparency, despite the leaks which may come from one of the participants. Its decentralized nature—with each member state allowed to present its own proposals—can sometimes lead to disjointed negotiations, particularly in the final phases of the conference. The lack of strong leadership is often sensed, especially since the number of participants has continued to rise (Mazzucelli 2006 and Smith 2002). Generally, the thorniest problems tend to be referred up to meetings between foreign affairs ministers, or even heads of state and government, which can create bottlenecks. During the last Intergovernmental Conferences (IGCs), it has become increasingly challenging to organize debates efficiently—inducing UK Prime Minister Tony Blair to exclaim in Nice: “We can't go on like this!”

The problem is exacerbated by the double unanimity required to conclude an IGC. Each delegation thus has the right to veto the final outcome, or, more subtly, they can imply that, due to a lack of concessions on a particular point, the final document might not be ratified by its parliament or, as the case may be, in the ensuing referendum. We thus fall into what has been described as a “joint decision trap”: self-interested bargaining yielding sub-optimal results, with each State striving to maximize its own advantage, regardless of the general interest (Scharpf 1988).

The establishment of the European Convention brought about several significant changes to this basic system. It allowed a greater variety of actors to participate in the reform process, as it included members of national parliaments and of the European Parliament (EP), and greater transparency in the debates. This led to a partial change in the rules of the game, since a deliberation-oriented approach was, on occasion, substituted for one based on negotiation in the IGCs (Magnetite 2004). This enabled the Convention to reach a compromise on certain issues that had stymied the discussions in Nice, such as the dismantling of the “pillars” structure, the simplification of the Treaties, and the Union’s legal personality. However, it would be wrong to conclude that this innovation made a decisive difference to the balance of power within the content of the revision procedure. The constraint of “double unanimity” still existed. It was known that the Convention would be followed by an IGC in which the member states could voice any strong objections they had to the draft text in order to gain additional concessions. The most delicate phases of the debate were thus overshadowed by the threat of the final compromise being called into question, which often led the delegates to moderate their demands (Dehousse 2004). In other words, the states remained largely in control of the final compromise.

The failure to ratify the draft Constitution confirms that the structural weaknesses which have just been pointed out may well prevent any significant thought of reform in the future.<sup>2</sup> In a multi-level co-decision system bringing together 27 countries today, and possibly thirty-plus tomorrow, possibilities of deadlock are manifold. The number of bodies having veto power is higher than the number of member countries: a parliamentary assembly can refuse to ratify a treaty signed by “its” government, as the French National Assembly did at the time of the European Defence Community (EDC) Treaty. Moreover, dividing the process into two phases—preparation and negotiations on one hand and ratification on the other—creates a harmful break between debates held at the European level and those held at the national level, whose impact was cruelly felt in the referenda campaigns of the spring of 2005. This segmentation conferred a binary character on the national debates, occasionally exacerbated by resorting to a referendum, given that the sole item on the agenda was the ratification of an agreement reached at the European level. It is thus now necessary to consider what remedies might be used to solve these various problems. We will do so here by successively addressing three issues: the preparation of reforms, the problem of ratification, and how to promote genuine European debate on the reforms.

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<sup>2</sup> As has been observed, partial and more targeted reforms would probably be easier to carry out. See De Schoutheete 2006).

### **Preparation: the Need for an Open Debate**

Despite all the criticisms which may be made of the precedents constituted by the first two European Conventions, they clearly brought about a series of innovations which have improved the reform process. In terms of legitimacy, the assembly's mixed composition, which included representatives from a variety of categories, has unquestionably increased the debates' pluralism and transparency. The added value is just as great, though not as obvious to the uninitiated, in terms of efficiency: the existence of a rather long preparation phase, in the course of which most of the issues could be closely examined,<sup>3</sup> has made it possible to more carefully weigh the respective merits of the various options. These discussions constitute one of the variables which may explain how the Convention has managed to overcome some of the obstacles which had defied previous IGCs. It is unclear how they might be eliminated, in view of the number of actors who need to be involved in the reform process.

This does not mean that no changes need be made in the model. The organization of the Convention's work has been subject to various criticisms. The Chairman has often been accused of pursuing his own personal interests rather than striving to help the assembly reach a consensus. Perhaps the Presidium did not adequately represent the various opinions which co-existed within the Convention; the basis on which the proposals and amendments were accepted was not always very apparent. A more systematic use of working groups would undoubtedly have been a preferable option.

Nonetheless, the fundamental difficulties lay elsewhere and relate both to the Convention's composition and to the role it must necessarily play in the revision procedure. It is often said that the EU relies on two types of legitimacy: a democratic legitimacy notably embodied by the EP, and an inter-state legitimacy assured by the governments.<sup>4</sup> The key question is to determine how these two forms of legitimacy should interact in reform procedures.

As for the intergovernmental element, the initial road map reflected the extreme caution—if not to say distrust—with which certain capitals had viewed the establishment of the Convention. The latter included one representative of each government, while the Laeken Declaration provided that the conclusions it would reach would be reviewed by an intergovernmental conference, which was called upon to make the “definitive decisions.” The governments thus multiplied their opportunities to control the work done by the Convention. However, the experiment did show the limitations of this method. When it appeared that the Convention would set the stage for a new dynamic, several governments—in-

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<sup>3</sup> With the—notable!—exception of institutional issues.

<sup>4</sup> This reading, first proposed in the Club of the Florence Report 1996.

cluding those of France and Germany —felt the need to be more closely involved in its work, which induced them to send their minister of foreign affairs to the Convention. In addition, the Convention-IGC sequence led to several types of problems. States such as Spain and Poland, which had strong reservations about the final “consensus,” adopted a low profile at the end of the Convention’s debates, knowing perfectly well that they would have an opportunity to express their dissent on the occasion of the ensuing IGC. In other areas—particularly with respect to the entry-into-force and revision clauses—the Convention decided to limit its ambitions so as to avoid IGC censorship. In other words, the break between the Convention and the IGC has been the source of complex “two-level games” which altered the transparency of the reform process (Putnam 1988).

These shortcomings might be lessened if a dual amendment were to be accepted in place of the existing version: a closer involvement of the governments in the Convention’s work—undoubtedly through the agency of their minister of foreign affairs—as well as the elimination of the IGC. This latter proposal will probably seem counter-productive in this phase characterized by the harder line being taken by national governments in opposing anything which can be perceived as a threat to their autonomy. Closer examination of the proposal will, however, show that it is not motivated by a desire to reduce governments’ influence, but simply to channel it by encouraging them to get involved straightaway in an open discussion process from the moment it gets underway, rather than at the end of it. In any case, the governments will not lack means to make their voices heard, as the final decision will always be predicated on a very broad agreement<sup>5</sup> and will require ratification at the national level. There would still be many opportunities for a veto.

A similar reasoning could be applied to the subject of democratic legitimization: if it is as critical as people say, then it should intervene earlier in the process. The current system, in which the necessity of popular consent renders ratification by referendum necessary (politically if not legally) in many countries, has revealed its limitations. The referendum’s binary nature is singularly ill-suited to deal with the complexity of the issues addressed in large treaty reforms: replying “Yes” or “No” to the provisions of a long and dense text which has undergone complex compromises is anything but easy. As one poster in the French 2005 campaign proclaimed, “we all have a reason to say No,” and the brutal simplicity of the referendum gives people only a limited choice: to accept or reject the text as a whole. This is obviously not the best way to allow people to weigh the pros and cons of a basic choice: it would be better to give them an opportunity to express their opinions at a more advanced stage, when they could have a say in the formulation of the draft. Ideally, certain members of the Con-

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<sup>5</sup> This would be the case even if one were to accept doing away with unanimity as proposed below.

vention would be directly elected, which would conceivably allow a certain number of themes to emerge in the campaign that would then be addressed during the assembly's work—thus making the public aware of issues under discussion, contrary to what happened in the first two Conventions. Also, the election of at least some of its members would enable the Convention to better reflect the sensibility of public opinion. It is common knowledge that euro-sceptics were only weakly represented within the Convention on the Future of Europe. Is this acceptable when one knows the considerable extent of their influence in many countries?

### **How to Circumvent the Double Unanimity Constraint**

Even before the Convention began its work, several voices were heard pointing out that due to the increasing number of member states, it was necessary to review the double unanimity requirement set out by the treaties—unanimity in the IGC, ratification by all the member states—without which any reform would very likely be doomed to fail. The setbacks suffered by the draft Constitution have provided a striking confirmation of this view.

Of course, there is nothing new about this problem: the Maastricht Treaty had initially been rejected by the Danish people and the Nice Treaty by the Irish. Some therefore concluded that one could draw inspiration from these precedents and adopt a protocol or declaration which would address the concerns of those who voted 'No' before submitting the text to a new vote. As is known, this is the road chosen to rescue the Lisbon Treaty after the Irish referendum: a handful of declarations meant to allay the fears of the Irish will be inserted in a protocol to be added to the next treaty reform, due to take place at the time Croatia will join the Union. Aside from the cynical aspect of such an approach, which makes it difficult to defend, what is the point of holding a referendum if 'Yes' is the only possible option? This solution is also far too superficial. It lends too much credibility to the texts—however cleverly they may be drafted—drawn up with a view to second referenda. The decisive variables which explain the about-face in the two precedents mentioned above lie elsewhere; namely in the organization of energetic campaigns aimed at overcoming the indifference which the draft treaties had met, and in the Danish and Irish fears of being somehow left aside if they were to vote 'No' again.<sup>6</sup> No doubt, if the 'Yes' camp ultimately prevails in the forthcoming Irish referendum, this will largely be due to a similar fear of exclu-

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<sup>6</sup> On Ireland, see for example B. Laffan 2005. The conditions were radically different in the case of the draft Constitution: the motives behind the French and Dutch "No's" were so heterogeneous that it is hard to see what kind of formal declaration could satisfy them all. Besides, these two founding States were not likely to be overly concerned about the risk of being excluded, as both of them found it difficult—though to varying degrees—to imagine that Europe could be built without them. Hence the need for a new treaty.

sion, as well as to a severe economic storm, which has stressed that Ireland's well-being is closely linked to that of its partners.

Be that as it may, one cannot endlessly rely on *ad hoc* solutions. The EU must face the obvious: it has reached the limits of what can be achieved with the current reform mechanisms. If it intends to continue evolving, it will have to 'Cross the Rubicon' and shed the constraints of unanimity. It is not a question of putting in place a pure majority system but, more modestly, of allowing those states which wish to move forward to do so without being hampered by the objections of a recalcitrant few, as is the case when a vote is taken within the Council. After all, as a report from the European University Institute, commissioned by the European Commission, once pointed out, many international organizations, beginning with the United Nations (UN), already use qualified majority revision procedures (EUI 2000).

Unanimity made sense in a union of six states sharing the same vision of a more integrated Europe, but with 25 member states, it can only lead to paralysis. The question is how to bring about this turning point? In addition to the political obstacles that a qualitative leap of this magnitude would inevitably involve, there is also a legal hurdle, as the present treaties can only be amended by unanimity.

This issue occupied a central place in the draft Constitution prepared by the European Commission during the Convention—the "Penelope" project. In order to avoid a deadlock, the Commission proposed an innovative solution by offering each member state a choice between *continued participation in the Union*, based henceforth on a Constitution, or *withdrawal from the Union to assume a special status* under which it would not lose anything compared with the current situation because it would continue to benefit to a large extent from the existing arrangements.<sup>7</sup> The legal legitimacy of this solution was based on two elements: first, it offered every guarantee to the recalcitrant states by allowing them to retain their established rights and second, it was predicated upon the member states unanimously approving this treaty amendment procedure.<sup>8</sup>

There were several advantages to this inventive solution. Quite rightly, it suggested that the question of the conditions under which the new treaty would enter into force should be addressed at the start of negotiations, which seems logical given the importance of these conditions in any negotiation. The draft Constitution's fate confirmed the soundness of this advice. The Penelope document also dealt with the question of the legal status of the recalcitrant States—the "rearguard," in the words of the Penelope draft's chief architect (Lamoureux

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<sup>7</sup> European Commission, "Feasibility Study, Contribution to a Preliminary Draft Constitution of the European Union, working document, 4/12/2002," p. XI.

<sup>8</sup> To that end, the project envisaged all Member States entering into an agreement to amend existing Article 48 TEU in order for the Constitution to come into force once it has been ratified by three-quarters of the Member States. This agreement would enter into effect upon ratification by five-sixths of the Member States, the recalcitrant States being deemed to have decided to withdraw from the Union.

2004)—which were given the prospect of keeping their present status. In other words, it endeavoured to reconcile respect for the law and the need for reforms. However, this led it to make a rather optimistic assumption, since all member states were expected to (unanimously) agree to give up unanimity. What made the proposal worthwhile legally (upholding the requirements of international law) also made it weak politically.

The icy reception which it received showed that the time was not yet ripe for this kind of quantum leap. In truth, this is not at all surprising. Unanimity works in favour of those who favour the status quo and are presumably prepared to accept the failure of an attempt at reform. It is unlikely that they would be willing to relinquish their veto power. Even the states most in favour of the change would fear that the latter might evolve in a direction contrary to their best interests. Under such conditions, except in the case of a state of necessity brought about by a crisis, it is hard to imagine the governments calmly giving up the power that unanimity confers upon them.

For such a radical change to be conceivable, another path must be taken: instead of reforming the existing treaties, a new legal structure would be created alongside today's EU. In this hypothesis, there is no need for unanimous agreement: the signatories of the new text could easily agree to attach less costly conditions to its entry into force. Legally, this solution is perhaps less elegant than the previous one: it is bound to make things more complex, since it would lead to the creation of new structures alongside the existing ones. Moreover, the new agreement could not in principle affect the rules established by the existing treaties. But simplicity is not the dominant feature of multi-level structures, and the history of European integration has shown that this type of "roundabout" method might be necessary for the process to remain dynamic. Where would we be today if the six founding members of the European Coal and Steel Community (ECSC) had listened to those who argued in favour of reforming the Council of Europe to discourage them from making progress?

How should the new Union be organized and what should its ambitions be? Such questions lie far beyond the scope of this paper. Some proposals have already been advanced (Verhofstadt 2006). Let us simply state that the history of European construction suggests that bold reforms are more easily accepted when their ambitions are concrete enough to secure the support of governments and public opinion. How often was it said during the referendum campaigns that the average voter thought the Constitution too abstract? Secondly, if the new Union sets in motion smoothly, it will prove that a consensual evolution is possible, even without the formal guarantees attached to unanimity. Perhaps then it would be possible to envisage shifting some of the EU's activities towards the new structure, or even gradually reforming the revision procedure set out in Article 48 of the TEU.

**How Can the Debate be “Europeanized”?**

The third element which deserves more consideration is the organization of the ratification debates. The current procedure reflects the international origin of European construction. The debates on European reform are more or less taking the form of debates on international treaties, with occasional variants related to the magnitude of the powers transferred at the European level. German Basic Law, for example, provides strengthened powers for the Bundesrat, since the EU often addresses issues which concern the competences of the Länder.<sup>9</sup> It is questionable, however, whether this process is still suited to the specific character of European integration. The fact that national debates are fragmented in as many procedures as there are member states presents numerous disadvantages. In so-called “European” contests, EU-related issues are often obscured by the desire to punish established national governments. It is beyond dispute that the French, Dutch and Irish ‘No’ in the recent referendums was largely due to the unpopularity of the governments defending the projects at hand. This diversion of European issues to serve national ends is obviously problematic, since what is decided at the outcome of these debates ultimately affects the fate of other European peoples.

The dilemma now confronting us—what to do with a project approved by half of the states and rejected by a few of them—can be attributed in part to this gap between issues and procedures. The member states comprising Europe are, of course, entirely justified in expressing their opinion about the latter’s future. Yet is it not just as logical to expect them to do so in terms of European issues, rather than based on purely national considerations? Clearly, without venturing so far as to envisage a genuine European ratification procedure by which a hypothetical European population would assert its position, we need to determine how national procedures can be organized in such a way as to promote the emergence of the European elements of the debate.

When the Convention work was completed, several of its members had argued in favour of a public consultation which would be held simultaneously in all member states in which such a consultation is legally permitted. In this way, they claimed, European populations would have the opportunity to voice their opinions as a group about the way in which the Union should be run, and even to compare their respective views during the campaign. The governments did not see it this way, yet as noted above, the outcome of the events showed how real the danger of a “nationalization” of the debates actually was. It also revealed that, although it could produce some circumstantial majorities to destroy a compromise, the referendum procedure was quite incapable of generating alternative solutions. Other ‘Europeanization’ mechanisms therefore need to be envisaged. The calendar has its importance: if the ratification debates intervened at the same

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<sup>9</sup> German Basic Law Article 23.

time in all of the states, the common issues would undoubtedly be easier to perceive. More unexpectedly perhaps, one may also assume that the end of unanimity might have some beneficial effects at this level. A country having a right of veto is not necessarily inclined to question its partners' motivations, whereas a country aware that its objections will not necessarily be decisive will more likely take an interest in them and contemplate ways to communicate with others' views on topics of common interest.

Pursuing this same line of thought, we need to reconsider the role of ratification procedures in a multi-level reform process. Hypothetically, whatever the procedure (parliamentary or referendary), ratification is the moment when the principals examine the work done by their agents, and decide whether the agreement that was reached should be implemented. This exercise takes the form of a binary choice—especially when it concerns complex agreements covering a great number of areas. The very complexity of European issues and the difficulties surrounding negotiations, in which numerous partners participate, increases the risk that a problem which has not really been the focus of discussions at the European level may acquire considerable importance at the ratification stage. When that occurs, the current mechanisms are inadequate. The only alternative is to choose between two equally unsatisfactory solutions: give up asserting one's point of view or run the risk of frustrating the reform process. Even if an agreement were to be reached on relinquishing the constraint of unanimity, the break between the negotiation and ratification phases, together with the substantial number of parties involved, would likely increase the complications of which the repercussions in the wake of the last treaties have given us a preview: negative votes, followed by adjustment phases at the European level, and then by new 'accidents,' all of which will result in extremely complex situations.

If we want to keep these bumps in the road from creating a situation so complex that it cannot be managed, it is essential to promote a smoother dialogue between the national and European levels. To achieve this, one might draw inspiration from an illustrious precedent—that of the American Constitution's ratification. The Constitutional Convention in Philadelphia, regularly referred to by many members of European Convention, had failed to address the issue of the protection of human rights, its attention having been focused on the relations between the states and the new federal government. During the subsequent ratification debates, it soon became apparent that this omission would be used by the text's opponents as an argument against the draft Constitution. The Massachusetts Ratifying Convention thus chose to add a list of provisional amendments to the resolution approving the draft. Supporters of the Constitution agreed that, as soon as it entered into force, the revision procedure provided for in Article 5 would be launched in order to debate the amendments submitted by the Massachusetts delegates. The same procedure was successfully followed again by the Conventions of South Carolina, New Hampshire and New York. The promise was to be honoured at the very first session of Congress, in which James

Madison himself proposed “that certain clauses be incorporated in the Constitution in order to make it acceptable ... to all the people of the United States” (Lacorne 1991, 231). The first 10 amendments would later become the Bill of Rights, which entered into force in 1791.

It would probably be futile to hope that if a constitutional dialogue of this sort—both transnational and multi-level—were to develop at the European level, with the national parliaments expressing their views on the treaty changes that are contemplated, it would systematically lead to equally harmonious solutions. Nonetheless, the mere fact that such a dialogue could take place, and that citizens could—either directly or through the agency of their representatives—influence the reform process at an early stage, rather than merely in the ratification phase, would in itself be a positive factor, likely to establish the legitimacy of the entire system.

### **Conclusion**

What is true of so many other aspects of the European institutional framework is true of the reform process: the Union is going through an uncertain transition period. Although the diplomatic model of its early days, in which the states play a central role, is still embodied in the present Treaty, it has undoubtedly reached the limits of what it can achieve. The need for democracy—felt at this level just as it is at many others—has led to the ‘invention’ of a new body, the Convention, outside of the scheme provided for by the treaty and to multiple referenda, including in countries lacking a referendary tradition, such as the Netherlands. The growing number of potential veto-players increases the risk of deadlock and reinforces the need for carefully prepared reforms. On the other hand, the constitutional rhetoric of the past few years has outlined an alternative model in which a draft might be adopted by (a majority of?) representatives of a hypothetical European population. Obviously, we are still far away from that point. Nonetheless, the current model’s weaknesses are such that it has become necessary to reflect on the best way to adapt it in order to enhance its effectiveness and legitimacy.

Even if the intent is to preserve the current nature of the EU—which is still a union of states—reforms are indispensable. Some possible avenues have been outlined in this chapter. Veto players should be integrated into the preparation of reforms, just as the Convention has begun to do by involving parliamentary representatives in the process. Citizens must have a voice earlier on in the reform process. The dialogue between the state and European levels should be smoothed out and we need to develop a genuine transnational debate on the issues which are addressed. Lastly, and this will undoubtedly prove to be the most challenging task, the paralysing unanimity rule needs to be reviewed without undermining the consensual nature of the reforms. As has been pointed out, implementing such a

change would no doubt require a Herculean effort, but if that is not done, will the Union be able to meet its citizens' expectations?

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# The Treaty of Lisbon and the Irish Impasse

Francisco J. Lorca

*An idea that is developed and put into action is more important  
than an idea that exists only as an idea*

Siddhartha Gautama

## Introduction

The construction of an integrated Europe in the past centuries has become not only the most desirable but also the most difficult political goal to obtain. After years of bellicose conflicts, a handful of visionary political leaders, led by Jean Monnet and Robert Schuman, convinced a great number of Europeans of the benefits of a unified Europe, despite the difficulty in persuading Europeans used to a long history of countries constantly changing names, boundaries, and religions. The closest that Europe could be considered “integrated” was during the “Pax Romana,” under the Roman Empire. From its mythical beginnings, with founding of Rome by Romulus and Numa-Pompilio, it developed into an empire under the rule of Emperor Augustus. It achieved its greatest splendor under the rule of the emperor Hadrian from the Hispania Province, who expanded the Roman Empire to England, as evidenced by his construction of the now famous Hadrian’s Wall, delimiting the frontier of the Empire.

The vision to unite European territory has remained over the years. Charlemagne, Napoleon I, and Hitler, all tried to unify Europe following unique personal, political, economic, and social circumstances. However, the tyrannical view of constructing Europe, bringing about World War II, resulted in fracturing Europe into two parts after its conclusion. During the Postdam Agreements in 1945, U.S. Presidents Harry Truman—substituting for Franklin D. Roosevelt after his death—and U.K. President Winston Churchill, agreed to surrender the Eastern half of Europe to the Russians under Georgian politician Joseph Stalin. Months after this agreement, a remorseful Winston Churchill stated that “from Stettin in the Baltic, to Trieste in the Adriatic, an iron curtain has descended across the Continent ... The safety of the world requires a new unity in Europe, from which no nation should be permanently outcasts.” (Well 2007 3)

In response to this reality, the U.S. developed the Marshall Plan, which came to mark the transition between Western and Eastern Europe. The U.S. Marshall Plan represented not only economic aid, but was based on the conditionality of cooperation between beneficiary countries to reach agreement in the administra-

tion of the funds. This cooperation laid the groundwork for the Schuman Declaration, May 9, 1950, leading to the creation of the European Coal and Steel Community (ECSC). The Europe evolving in the West worked through the challenges of achieving economic, monetary, and political integration, with political set-backs as well as triumphs.

### **The Road to the Lisbon Treaty: A Brief Overview**

The actual path to political integration proved to be thornier than Jean Monnet and Robert Schuman could have imagined. The latter foresaw, however, that “Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a *de facto* solidarity.” (Schuman 1950, 2) It is in this solidarity that we accomplish and share the common good that some countries, most recently Ireland, have failed to understand, and hereby nearly jeopardized the entire EU-constitutional project a second time after the French and Dutch vetoes to its earlier version. Hence, achieving a full union of nations, enriched by a vast variety of cultural, linguistic, religious, social, and even economic backgrounds, continues to be difficult.

Despite the challenges, European leaders continue with the realization of Monnet and Schuman’s dreams, following in the footsteps of the EU’s founding fathers, deserving the accolades for the accomplishments of just 50 years: as Isaac Newton (Thinkexist) once stated, “if I have seen farther than others, it is because I was standing on the shoulders of giants;” that is, they followed the vision of Monnet and Schuman. In this realm, EU representatives had the task to draft the Treaty Establishing the Constitution of Europe, as agreed upon in the 2001 Laeken European Council, sometimes simply referred to as the European Constitution. It was not to replace national constitutions, but only to align the EU’s treaties into a coherent document. It was signed in 2004 by the representatives of the twenty-seven member states and was subject to ratification by each one. Fifteen<sup>1</sup> Member States ratified the Constitution by Parliamentary vote, three<sup>2</sup> ratified it by popular referendum, and two countries—France and the Netherlands— rejected it during a popular referendum that postponed the decision of the other seven<sup>3</sup> member states and has sent the entire process to an impasse also known as the *period of reflection*.

On June 2007, the Reform Treaty emerged as one solution to overcome the failed European Constitution, and on December 13, 2007, EU leaders continued down the path to the integration of Europe by signing the Treaty of Lisbon, bringing to an end two years of complex negotiations. Despite these efforts, one year later, on June 12, 2008, the Irish voted ‘No’ to the new Treaty of Lisbon.

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<sup>1</sup> Austria, Belgium, Bulgaria, Cyprus, Estonia, Finland, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Malta, Slovakia, and Slovenia.

<sup>2</sup> Luxemburg, Romania, Spain.

<sup>3</sup> C. Republic, Denmark, Ireland, Poland, Portugal, Sweden, U.K.

By the time the Irish rejection came, the majority of the member states had already ratified the new treaty but this time the ratification process has not been halted. However, as of January 2009, there a number of countries which are still pending final ratification. For instance, in Poland the Treaty was ratified by the Parliament on April 10, 2008 but it still pending President’s Kaczynski signature. In fact, Vuccheva (2009b, 1) reported that the Polish parliament passed a resolution that read: “The parliament requests the president to respect the will of both houses of parliament and to finish the process of ratification as quickly as possible.” However, President Kaczynski is not expected to sign the Treaty until Ireland has had its second referendum. In Germany, final ratification will come once Germany’s highest court confirms that there are not legal challenges. (Vuccheva 2008a) Finally, in the Czech Republic the ratification process is taking longer. Mr. Vondra—Prime Minister for European Affairs of the Czech Republic—has expressed that the Czech Republic is “a responsible country, but I think you should be aware that this is our domestic democratic process and any kind of pressure coming from outside is not helpful, I think. Give us a chance to go through that process.” (Vuccheva 2009a, 2) The Czech parliament is expected to finish working on the Treaty in February, and then the Treaty will have to be approved by both the House and the Senate.

The table below provides a snapshot view of the status of the ratification process as of January 31, 2008.

Countries where the Treaty has been approved	Austria, Bulgaria, Cyprus, Denmark, Estonia, France, Finland, Greece, Hungary, Latvia, Lithuania, Luxemburg, Malta, Portugal, Romania, Slovakia, Slovenia, UK, Spain, Netherlands, Belgium, Italy, Sweden
Countries where ratification is still in progress	Poland, Czech Republic, Germany
Countries which have rejected the Treaty	Ireland

The treaty of Lisbon only amends, but does not replace, the current Treaty of the EU, and the Treaty of Rome. The major reason behind this amendment is that the Treaty of Lisbon represents an enlarged EU composed of 27 members. The actual EU could not properly function under the Maastricht Treaty that provided an EU of 27 with tools designed to work for only 15 member states. Further, the EU is evolving in a constantly changing political environment that today depicts a reality that has little resemblance with the state of the world 50 years ago when the Treaty of Rome was signed by the six founding member states. It is for all these reasons that a new legal framework is needed. Unfortunately, some member states have openly expressed their discrepancies not only with the need of a new Treaty, resembling a European Constitution, but also with the essence of the document. Those who favor the new Treaty reason that it not only equips

the EU with the right tools to operate in an environment composed of 27 members states, but it also endows the right framework to institute the much sought after political integration process that was inaugurated by the speech made by Joschka Fischer (2000, 1) on May 12, 2000:

Fifty years on, the European integration process is probably the biggest political challenge, since its success or failure, even just the stalemate of this process of integration, will be of crucial importance not only to the future of each and every one of us, but to forthcoming generations. And it is this process of European integration that is now being called into question by many people; it is viewed as a bureaucratic affair run by a faceless, soulless Eurocracy in Brussels—at best boring, at worst dangerous.

For most, the Lisbon Treaty is viewed with the utmost importance for the EU as a political entity since it is perceived as the final step needed to achieve complete EU integration.<sup>4</sup> Regardless of the difficulties encountered with the political integration efforts, measured by the latest problems with the Treaty establishing the Constitution of Europe and the Lisbon Treaty, the EU should nonetheless be proud of its economic and monetary integration efforts which have propelled the EU to become a global player in economic and monetary affairs.

By 2004 the EU was facing a new political reality that called for a revised framework that would accommodate the accession of the latest EU candidate countries. After a two-year period of reflection following the fiasco of the rejected Constitutional Treaty, the Treaty of Lisbon became the new solution under the German Presidency of the Union. It had to be ratified by all member states before the Parliamentary elections in 2009. Nonetheless, 50 years of constructing the current EU framework, it seems that the idiosyncrasy of several member states is making this final step even harder to accomplish.

Perhaps it would help if today's leaders would pause and ponder if this new Treaty is really so crucial for the future of the EU. If this were to be the case, today's founding fathers of the European Constitution should look back and reflect at what history has taught all of us. During the time the U.S. Constitution was in the making, there were many instances of stalemates in negotiations. At one crucial point Benjamin Franklin used his well-known pragmatism to proclaim:

When a broad table is to be made, and the edges do not fit, the artist takes a little from both, and makes, a good joint. In like manner here, both sides must part with some of their demands in order that they may join in some accommodating proposition. (Phelan 1987, 49)

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<sup>4</sup> In this work, I will only refer to political, economic, and monetary integration.

Unfortunately, we are not witnessing this type of reasoning among certain European politicians, leading some scholars and commentators who feel disenchanting, to try to press forward to bring the matter to a speedy conclusion.

### **The Treaty of Lisbon: A Quick Overview**

The Treaty of Lisbon is intended to overcome the weaknesses found in the Treaty establishing the Constitution of Europe. Even though the focus of this work is not to provide a thorough analysis of the new Treaty, it is vital that we highlight three key aspects.

Advancing a solution to the critique of the EU as suffering from a 'democratic deficit' is not automatic. Europe cannot follow the U.S. constitution in this aspect: While the Founding Fathers of the U.S. Constitution faced 13 colonies proclaiming their independence in 1776 after abolishing British rule, they proclaimed that now that "we have swept away the King's rule, what will follow?" Without hesitation every member answered, 'The rule of the people!' (Phelan 1987, 9).

The much sought-after desire to build the EU from the bottom up has not been easy to achieve, especially in the aftermath of a war that tore apart countries, and if we consider the particular idiosyncrasy of the heritage of centuries of history, culture, and language of each individual country. Faced with this dilemma, the European leaders then opted for a top-down approach which is partly responsible for the well known 'democratic deficit' that is facing Europe today, and so they tried to lessen this effect through the introduction of the Lisbon Treaty.

The primary aim of the Treaty of Lisbon has been to make the EU more democratic and transparent. Take for instance the role of the European Parliament (EP) which has clearly been strengthened by increasing the opportunity of citizens to be heard. Also, the Treaty introduces the European Citizens' Initiative which will allow one million citizens to "call on the European Commission to propose a change to European law." (Balogh 2006, 1) Another important aspect that makes the new treaty more flexible and respectable is that for the first time in the history of the EU, one treaty recognizes and provides member states with the possibility to voluntarily withdraw from the Union. Further, in order to make the EU less abstract the treaty calls for the new post of the President of the European Council to be elected every two and a half years.

Additionally, the Treaty of Lisbon also simplifies the working methods and voting rules which will make the Union function more efficiently. For instance, the qualified majority voting (QMV) system in the Council of Ministers is simplified based on the principle of the double majority of member states. This double majority is achieved when a decision is taken by 55% of the member states representing at least 65% of the Union's population. The Treaty of Lisbon

is eager to promote democratic values, citizen's rights and the Charter of Fundamental Rights. It also reinforces the four freedoms for European Citizens, encourages the principle of solidarity between member states, and the importance of security in order to make everything function properly. According to the Treaty of Lisbon (2007, 160), members' vote shall be weighted as follows:

Belgium	12	Greece	12
Bulgaria	10	Spain	27
Czech Republic	12	France	29
Denmark	7	Italy	29
Germany	29	Cyprus	4
Estonia	4	Latvia	4
Ireland	7	Lithuania	7
Luxembourg	4	Romania	14
Hungary	12	Slovenia	4
Malta	3	Slovakia	7
Netherlands	13	Finland	7
Austria	10	Sweden	10
Poland	27	United Kingdom	29
Portugal	12		

When the representatives of the member states were drafting the 'Constitution' they were already aware that the EU needed to have the equivalent of a foreign minister and under the Constitution, the post of "Union Minister for Foreign Affairs" was created. However, it stirred a bitter debate between the UK and the rest of the member states. The Treaty of Lisbon, despite all the criticism, creates a new foreign minister which is named the *High Representative of the Union for Foreign Affairs and Security Policy*. The Treaty, hence, maintains as a major dogma that the EU should become an important world actor with a strong and coherent external voice embodied in the figure of the High Representative. This new post<sup>5</sup> will represent at the same time both the Common Foreign and Security Policy and the EU since it merges the existing posts of the *High Representative for the Common Foreign and Security Policy* (The Council of the EU) and the *European Commissioner for External Relations and European Neighbourhood*. (European Commission) In essence, this merger has created a "double-hat" institutional player. This post is not designed to weaken member state's foreign policy; on the contrary, it aims at complementing, not replacing, the foreign policy efforts of member states. However, the surrounding controversy regarding this post has come from the UK who feels it is in frontal

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<sup>5</sup> This merger was already contemplated in the Constitution; however, it is the title of the post that has been changed.

competition to its own Foreign Office post. Further, according to Leicester (2008, 1) the treaty “seeks to make the EU’s foreign policy more efficient with the creation of an EU President and single envoy to represent the bloc abroad.” This apparent duplicity has raised eyebrows and evokes strong emotions especially among those who recall Henry Kissinger’s doubts about the unity of Europe when he once stated: “If I want to call Europe, who do I call?” (Meek 2004, 1)

These are just some of the benefits of the Treaty of Lisbon, but there is one major criticism that should be addressed. *The Economist* (2008a, 46) has reported that some believe that after two years of impasses and political debate, “politicians hit on the cynical wheeze of writing the constitution main elements into the incomprehensible Lisbon Treaty, with the deliberate aim of avoiding the need to consult Europe’s voters directly again.” In fact, the Treaty per se is almost impossible to understand because it is an amalgam of footnotes that amends two treaties: the *Treaty of the European Union* (TEU) also known as the Maastricht Treaty and the *Treaty of Rome* which has been renamed Treaty on the Functioning of the European Union (TFEU). In fact, they are right; the Treaty of Lisbon has come about, as all previous Treaties through amendments to previous ones.

Despite this criticism, and given the format of the document, the real challenge is to believe in the concept of Europe and to be tolerant since this concept can be interpreted in a variety of ways. There are some who view Europe from an economic standpoint, while others from a bureaucratic one, and there are others who use an environmental framework. Others even see Europe from a regionalist perspective while others from a state oriented point of view, and even there are those who envision a two-speed Europe. But what they all seem to agree on is on the essence, and that is on the realization of the European Project. Metaphorically, it relates to the message of the well-known “Parable of the blind men and the elephant” where Buddha described that:

once upon a time a king gathered some blind men about an elephant and asked them to tell him what an elephant was like. The first man felt a tusk and said an elephant was like a giant carrot; another happened to touch an ear and said it was like a big fan; another touched its trunk and said it was like a pestle; still another, who happened to feel its leg, said it was like a mortar; and another, who grasped its tail said it was like a rope. Not one of them was able to tell the king the elephant's real form. (Kyokai 1966, 148)

Not a single man could describe how an elephant looked like but they all knew that elephants existed. The same idea could apply to the new Treaty. It is not the format but the essence of a project and the spirit and depth of its ideas that count; the essence of integrity is what truly inspired the founding fathers. Hence, a key aspect in this discussion is to avoid any ‘one size fits all’ approach. The future of the EU should not rely in a common Constitution which does not

recognize basic icons such as the common flag, the anthem, and the national day of Europe, among others. It must rest on the strength of the institutions established in Title III, Article 9, which are: the EP, the European Council, The Council, the European Commission, the European Court of Justice (ECJ), the European Central Bank (ECB), the Court of Auditors, as well as, on two new posts created which are the President of the European Council and the High Representative of the Union for Foreign Affairs and Security policy. In essence, it is the strength and credibility of these institutions that will really help integrate the European project as the founding fathers, Monnet and Schuman had envisioned.

### **The Truth Behind to the Irish ‘No Vote’ to the Lisbon Treaty**

On June 12, 2008, 53.1 % of the population in Ireland voted on the Lisbon Treaty. The result was more than demoralizing since 53.6 % of those that turnout rejected the Lisbon Treaty with just 46.6% voting in favor.

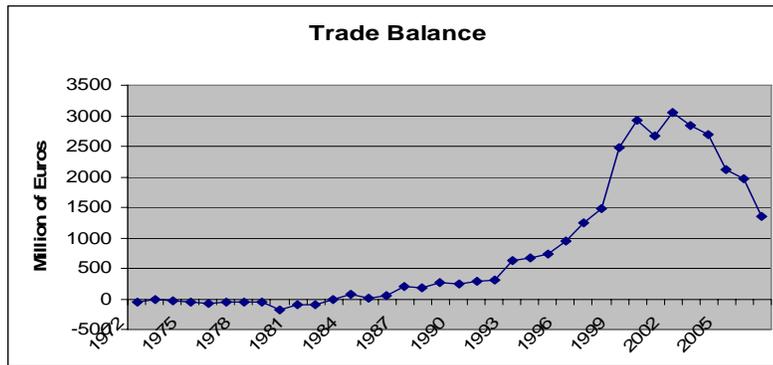
If all the other member states ratify the Treaty Ireland would be left isolated with the rejection that needless to say, made the rest of the European countries shiver. There are two simplistic reasons that have been used to justify the rejection. On the one hand, Michael Martin, Irish Minister for Foreign Affairs and director of the referendum campaign, excused his co-citizens by stating that “people were on doorsteps saying “I still don’t know enough about this treaty.” (*Irish Times Reporters* 2008, 1) Even, the Irish commissioner, Charlie McCreevy and the Prime Minister, Brian Cowen publically remarked that they had not read the Lisbon treaty "cover to cover," an honest and charming comment that certainly hindered the spirit of voter after voter. (Charlemagne 2008) On the other hand, according to the Irish European commissioner, the reason was that “the document is hard to sell because it does not bring a tangible benefit to the population.” (Mahony 2008a, 1) Still, it was the duty of the EU to have made sure that the Treaty was properly explained to the people of Ireland which shows that there is a clear disconnect between EU’s institutions and its citizens.

Accordingly, it is safe to proclaim that in case of Ireland the saying applies: eaten bread is soon forgotten. In fact, Hennigan (2008a, 3) has reported that President Stipe Mesic of Croatia denounced that "now that they (Irish) have used the accession and structural funds, when they have developed enormously, I'm a little surprised that the solidarity is at an end." Furthermore, history is hard to erase and many of today’s member states still remember when in the 1970's, when Germany was Europe's most supportive country and thus the one to which the rest of the countries would turn to for economic help, the Irish politicians claimed that it was the "obligation" of the rich countries of Europe such as Germany to help the poorer countries on the "western periphery" of Europe.

Michael Hennigan harshly explains that now Ireland is a rich country and not only does it not remember the solidarity mantra it claimed 30 years ago but neither does it recoil from any comparable "obligation" today. In fact, now Ireland

enjoys a privileged position because of the dominance of U.S. world class high-tech, pharmaceutical and financial service companies, all of which have been only possible due to the support for structural investment and agriculture from Europe.

The graph below shows the economic trend in the Irish Trade Balance. The trade balance is the difference between the monetary value of exports and imports over a certain period of time. If a country exports more than it imports, the country will experience a positive balance of trade or trade surplus. However, if the country imports more than it exports they will have a trade deficit or trade gap. For the last 40 years Ireland has been *breaking even* until 1990 when the efforts to adopt the euro forced the country to adopt certain policies that help improved Ireland productivity and competitiveness; as a consequence, the country experienced a trade surplus. This export led growth or trade surplus is behind the strength in its economy, or higher savings rate. However, ever since 2003 Ireland has been suffering a sharp reduction in its trade balance.



Source: Numerical data from Bloomberg.com. The author has imputed the data in excel to create this graph.

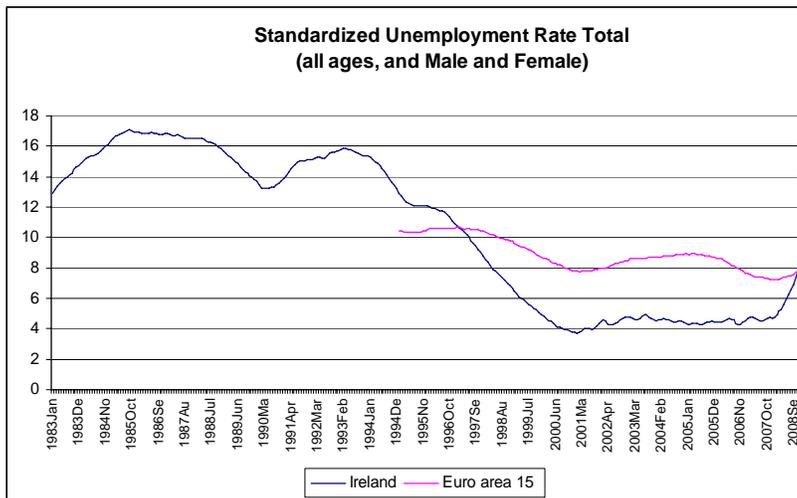
Anatole Kaletsky (2008, 1) puts it well, the ‘No’ vote, although “surely ‘astonishing’, is a fair adjective to describe this overwhelming democratic reaction to the political direction of Europe, led by three million people who have risen, in a single generation from penury to become the Continent's wealthiest nation, as a direct result of joining the EU.”

The economic data shows that Ireland and its citizens have benefited greatly from the EU. In fact, The Economist reports that, in the latest Eurobarometer poll, more people in Ireland (87%) than in any other EU country said their country had benefited from membership in the EU. (*The Economist* 2008a) Furthermore, the latest economic data demonstrate that Ireland has received €60 billion from the EU since joining in 1973 and has paid back €20 billion so far,

the biggest gain has been from the Common Agricultural Policy (CAP). The Department of Finance Secretary General David Doyle has stated that the contribution of the EU to the Irish economy had been "massive" and agreed "absolutely" with the suggestion that there were other non-cash benefits from Irish EU membership. (FinFacts Team) Interestingly enough, Hennigan explains that the Lisbon Treaty Referendum was opposed by a peculiar number of "bed patterns" which included socialist party Sinn Fein, the Irish Farmer Association— whose members have for years been the top per capita beneficiaries of the CAP— and by tycoon Declan Ganley, president of Libertas.

There is no doubt that Ireland has received help from the EU and it is also fair to say they have known how to take advantage of it in order to transform its society. In fact, the economic turnaround of Ireland is an example to follow for many countries that have joined the EU from the 1980s onward. For example, the latest economic facts reported that the population enumerated on census night April 23, 2006 was 4,239,848 persons, compared with 3,917,203 in April 2002, representing an increase of 8.2% in four years. (FinFacts Team) At the same time, from 1986 to 2006 the number of employed has increased from almost 1.1 million to over 2 million.

In yet another case that shows Irish economic prosperity, the graph below portrays the unemployment evolution since 1983. Needless to say that it shows an impressive downward trend especially, once again, around the time of the inception of the euro.



Source: Numerical data from European Central Bank, Statistic Data Warehouse. <http://sdw.ecb.europa.eu/>. The author has imputed the data in excel to create this graph.

Further, the pension coverage rate for all those employed in the fourth quarter of 2005 aged between 20 and 69 was 55%. Male workers (58.3%) continued to have a higher pension coverage rate than their female counterparts (50.6%). Good employment prospects are partly due to a solid educational system with high standards, which are the case in Ireland where in 2006 almost a quarter of those aged 15-64 had third level qualifications. Further, at age 19, 62% of females and 45% of males were in full time education in 2005/2006. In terms of economic performance, Ireland holds an impressive record.

While most of the EU countries are finding it increasingly hard to comply with the Stability and Growth Pact (SGP) and maintain the national debt as a percentage of GDP below 60%, Ireland has managed to lower it from 87.7% in 1990 to 20.4% in 2006. In addition, Ireland has had no problem meeting the balanced budget requirements and even made further improvements. The General Government balance grew a surplus of 5,031million Euros in 2006 compared with a surplus of only 1,627 million Euros in 2005. As a curious fact, there were 103 mobile phones for every 100 people in the country in the second quarter of 2006.

All these facts clearly demonstrate that Ireland has prospered due to the help of the EU economic measures and painful structural reforms that have transformed the nation. However, the Economic and Social Research Institute has declared in its latest Quarterly Economic Commentary that Ireland is likely to experience a recession for the first time since 1983 and that the slowdown will have a negative impact on the public finance deficit and on the overall economic performance of the country.

The rejection of the Lisbon Treaty seems like “bad timing” for Ireland, since in the aftermath of the ‘No’ vote, the Economic and Social Research Institute (ESRI) projected that Ireland was on the brink of a deep recession. This forecast constituted, according to Hennigan (2008.c., 2), a “deep psychological blow to Ireland on the world business stage.” The deteriorating economic conditions arise from the inevitable bursting of a housing property bubble in the midst of an international credit crisis and with global inflation risks that pose a threat to the economy and could well lead to future interest rate hikes. This so called “bad timing” could not have come at a worst time for Ireland, especially since its economy is highly dependent on exports by foreign-owned firms, in fact, in 2006 more than 90% of its exports were made by American firms. Munchau (2008, 1) has explained that the reaction by Brussels, Berlin and Paris has been swift: the ratification process must continue, “in fact, a ratification strike is what sank the constitutional treaty.”

### **The French Presidency and the Treaty of Lisbon**

Since France took over the Presidency of the European Union on July 1<sup>st</sup>, 2008, President Sarkozy has struggled to find a solution to the Irish dilemma. To him, the solution can only be found in a second referendum; however, the difficulty lies in the timing of such a referendum. President Sarkozy, at first said that it should take place in October or December 2008 since Parliamentary elections in the EU are to take place in June 2009 and it is necessary to know which of the two treaties, Lisbon or Nice, is to be enforced.

In order to try and find a solution, Sarkozy travelled to Ireland, and after his visit, he lowered his combatant tone. He declared that he did not want to push Irish voters into anything, however, he emphasized the importance of arriving at some solution before next year's European elections mainly because he wanted to make sure we move ahead as a family of 27 and nobody is left behind. The solution to the impasse that he proposed to the Irish Prime Minister, Brian Cowen, was that the Irish held a second referendum on the Lisbon Treaty "on the same day as the day of the elections to the European Parliament next June." (Leigh 2008, 1) The response to Sarkozy's visit and proposal was that the Irish would only be ready to offer a 'preliminary report' on the October's European Summit and "not a conclusive document detailing a way out of the impasse." (Leigh 2008, 1)

German foreign minister Frank-Walter Steinmeier suggested that one way to implement the treaty was for Ireland to withdraw temporarily from the process of European integration. The most important prerequisite for this outcome would be if all other EU members states, except Ireland, agreed to the Lisbon Treaty. If this were the case, because so far Ireland has been the only one to reject it, it would face two alternatives. On the one hand, the alternative would be a humiliating U-turn in the voting result consisting of a second referendum with a 'Yes' result to the same treaty without a material change of circumstances to make it more 'readable.' On the other hand, Ireland would lose its full EU membership if the second referendum produces another 'No' result. Munchau (2008, 1) states that the second option would mean that "Ireland's citizens would send the country back to the economic Dark Ages, from where it emerged only a few decades ago." Sinn Fein "which campaigned against the treaty, said that 'subtle threats' of Ireland's isolation within the union are 'nonsense' adding that a 'new treaty negotiation is the only way forward'." (Mahoney 2008b, 1)

The problem is that the Irish people have demonstrated to be the true guarantors of their sovereignty since they have not taken lightly any of the comments that the very combatant president Sarkozy has pronounced on the issue. As a matter of fact, Irish main newspaper's headline article on July 21, 2008 read, "Back off on vote: Cowen warns Sarkozy." Sarkozy was in fact travelling to Ireland to meet with many opponents' leaders to listen and understand their concerns and reasons behind the rejection. Sarkozy is meeting

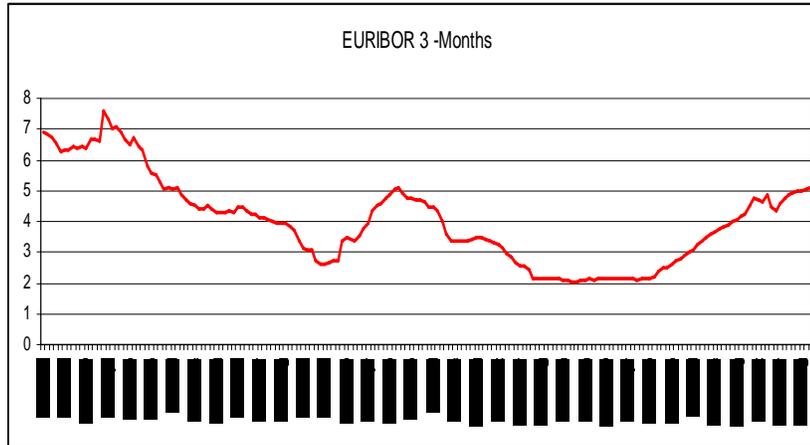
with Fine Gael, president of The United Ireland Party, but only because Irish Prime Minister Brian Cowen interceded for the meeting to take place, and with millionaire Declan Galey the leader of an influential anti-treaty group “Libertas.”

### **Final Word**

The European project has required since its inception leaders with two particular characteristics: imagination and patience. Imagination will always be a requirement, according to Albert Einstein, ‘imagination is more important than knowledge’ in order to envision a grand project and finding solutions to setbacks. Further, leaders are required to have great doses of patience in order to persevere in the completion of the European integration; in fact, Isaac Newton warned them on the importance of patience from his own experience since he once said that “if I have ever made any valuable discoveries, it has been owing more to patience.”

The example set by these two brilliant scientists demonstrates that achieving goals is not easy and that Europe and its leaders should be patient and imaginative in order to undergo a complete and successful integration process, due to the myriad of benefits it provides. Robert Schuman (1950, 2) explained that when “a united Europe was not achieved we had war.” Hence, economic, monetary and politically integrated area tends to avoid future wars. The larger market that comes with integration fosters competition and boosts incomes which increase the living standards and well-being of European citizens which should be the first priority in the agenda of European politics and political leaders. These should not be hesitant to go back to the origins of the European project and realize that Monnet and Schuman founded Europe during very difficult times, when hard feelings still existed between long time enemies such as France and Germany, and yet they were able to work those differences around to plant the seeds of this thrilling project called the European Union. Nonetheless, each success was achieved with small steps and through consolidating every single achievement. In fact, as Roy (2008, 3) explains, the founding fathers “rejected the invention of grandiose pseudo-federal schemes equipped with no political will that led nowhere in terms of providing economic and social stability.” Maybe, Europe now needs some time off to digest all the efforts made and goals accomplished during these years.

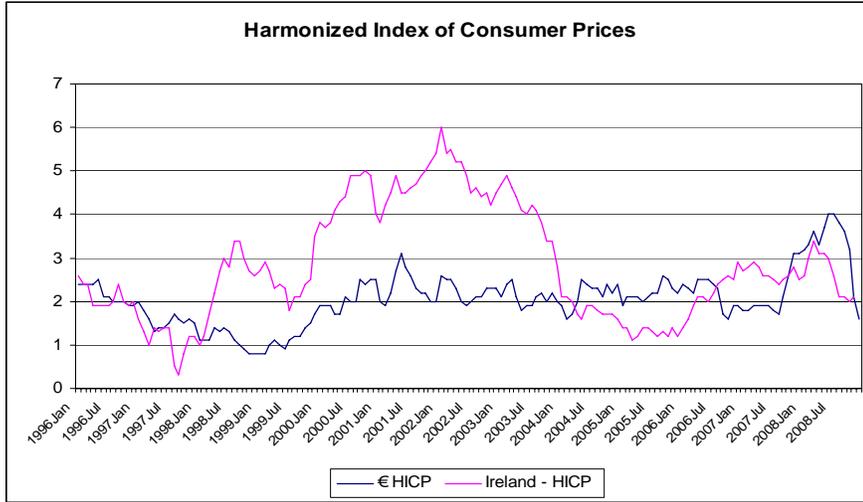
The current heated debate on the future of the Treaty is bound to lose momentum if the increasingly adverse economic climate were to deteriorate even further. One key economic statistic that many economists are watching closely is the medium term tendency of the Euribor (Euro Interbank Offered Rate), which is the rate at which euro interbank term deposits within the euro zone are offered by one prime bank to another. It is the benchmark most commonly used to price floating-rate mortgages in many EU member states such as Spain, Italy or Ireland.



Source: Numerical data from Bloomberg.com. The author has imputed the data in excel to create this graph.

According to the graph above, ever since the ECB started its hiking campaign by late 2005, the one-month Euribor has risen from a low of 2% in early 2004 to 4.482% as of July 23, 2008. Nonetheless, for well over a year the Euribor rates have deviated substantially upwards from the ECB policy rates, as financing conditions have tightened all over the world and there is substantial risk that events could spiral out of control. Evan-Pritchard (2007, 2) has stated that unless some pre-emptive action is taken by the authorities, “this could go beyond just a normal recession. With this credit crisis it could turn into a very uncomfortable situation, with a real economy-wide crunch that we cannot stop.” The concern by many political leaders and the general public, who have called on the ECB to cut rates, easing the upward pressures on the benchmark rate, reached its climax when in November 30, 2007 the one-month Euribor spiked violently by 60 basis points to 4.87%, the biggest one day increase ever recorded. On that day, the *Telegraph* newspaper’s front-page headline read that the Euribor had gone mad.

The reason for the Euribor to go mad is inflation. The graph below demonstrates that since January 2006 Harmonized Index of Consumer Prices (HICP) in the Eurozone (€HICP) and in Ireland have dramatically increased in both the Eurozone and in Ireland. This increase in the HICP means that inflation is rising. The graph shows that the HICP has been reaching levels of above 2% since January 2006. This is going against two important requirements. On the one hand, that the ECB must keep prices under control. On the other hand, that inflation must never break the 2% benchmark in the Eurozone. In order to meet these two requirements, the ECB had increased interest rates since January 2006 (see previous graph), which, in turn, have helped keep prices and inflation under control.



Source: numerical data from ECB Statistics Data Warehouse. <http://sdw.ecb.europa.eu/>. The author has imputed the data in excel to create this graph.

The last graph we are presenting is the U.S. Dollar Index which measures the performance of the U.S. dollar against a basket of currencies which includes the euro, the Japanese yen, the British pound, the Canadian dollar, the Swiss franc and the Swedish krona.



Source: Numerical data from Bloomberg.com. The author has imputed the data in Omega Research ProSuite to create this graph.

Whenever the index goes up, the U.S. dollar appreciates and vice versa. According to the graph, since 2003 the index has been on the decline recording a 30% fall ever since January 2003. Economic theory explains that the factors that influence the spot value of a currency vis-à-vis another currency are: the (differences in) market interest rates, the views of market participants about its future value and the perceived risks involved in holding that currency. The significant depreciation of the U.S. dollar currency has helped to alleviate the United States' current account deficit. The reality is that the current downward cycle could be coming to an end, at least that is what many think-tanks and supranational agencies have reiterated especially all along 2008.

According to the International Monetary Fund's (IMF) first deputy managing director, the decline in the dollar over the past six years, and in particular over the past year of the credit crisis, has more or less gone far enough.

The flipside to the bottoming out of the U.S. dollar is the inevitable topping out of the euro currency. The rapid appreciation of the euro vis-à-vis the U.S. dollar has been more painful for exporting countries to the United States than for Americans themselves. An appreciation of the euro reduces the profits of European companies, because their product becomes less affordable when expressed in dollars. Eijffinger (2003, 4) explains that "a positive effect is that the resources imported from abroad are cheaper for European companies. So, a strong euro leads to less import inflation and will mitigate consumer price inflation in the euro area." Back in 2003, *The Economist* (2003) stated that the euro was slightly overvalued against the dollar judged by its purchasing power parity (PPP), but it affirmed that it would rise even further. To defend its position, it used the example of the Deutsche mark that during the 1985-1987 period it climbed by 90% against the dollar. If history were to repeat itself, the euro could well reach 1.60, if it were to raise as much as the Deutsche mark back then. *The Economist* today, and always according to PPP, still maintains the thesis that the euro is highly overvalued. For the IMF the euro is now overvalued relative to medium term fundamentals.

Besides fundamentals, the statistical methodology, such as exponential smoothing studies and linear regressions, also point to a topping out of the euro against the U.S. dollar. Similar studies also conclude that the price of oil despite its recent retrenchment could very well continue its ascent. The reason for having introduced the oil into the equation is because a continued rise in the price of crude as well as a medium to long term weakening of the euro, these two pieces of economic data alone could have devastating economic implications for the EU. It could well be the moment of truth for the EU which could really suffer a "real" increase in the cost of energy.

The EU is currently facing its first brutal recession and further difficult economic times are expected in 2009. This work has just briefly outlined the economic difficulties that the EU will have to face and solve in the next couple of years. In the middle of it all lays the Treaty of Lisbon surrounded by an impor-

tant set of political tensions. However, the frightening economic scenario that is unfolding might serve to deflect the tension away from the institutional debate. It will be up to member states to demonstrate if their governments have the necessary political maturity to save the Treaty of Lisbon from sinking in deep waters.

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## **IV. External Reverberations**



# The Lisbon Treaty and the Emergence of Third Generation Regional Integration<sup>\*</sup>

Luk Van Langenhove  
Daniele Marchesi

## Introduction

European integration can be regarded as the most advanced and successful regional integration experience accomplished thus far (Baldwin 2008). Among the numerous integration schemes that have mushroomed in Europe since the end of World War II, the European Union (EU) has emerged as a unique process and as a prototype of what can be defined as a “third-generation” of regionalism (Van Langenhove 2007). In this view, the EU has developed beyond a mainly economic integration process (first generation regionalism), to a deeply institutionalised and politicised union, competent at various degrees in an all-encompassing spectrum of internal policies (second generation or “new regionalism”). In this process of widening/deepening of policies, structures and membership, the EU has become a global actor present in the international arena where once only states operated (third generation).

When ratified, the 2007 Lisbon Treaty promises to represent an additional episode of this incremental integrative process, through which the EU is progressively becoming a global actor. Following the 2004 and 2007 enlargements which have brought the membership to 27, the Treaty carries with it a considerable amount of structural reforms that are supposed to make the Union more efficient, and more democratic. Among these reforms is a new mechanism of qualified majority voting, a clearer distinction in regards to the division of competencies, an expansion of co-decision, which becomes the ordinary decision making procedure, and the end of the formal pillar structure, as well as an enhanced role for national parliaments, especially in safeguarding the principle of subsidiarity. Especially in external relations, some major innovations would be introduced such as the legal personality for the EU, the new President of the European Council and the High Representative and Vice President of the Commission, assisted by an External Action Service. This article explores the implications of these new institutional developments for the emergence of the EU as a “third generation regional organization,” i.e. becoming a fully-fledged actor

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<sup>\*</sup> This chapter is a revised version of an article entitled “The Lisbon Treaty and the Emergence of Third Generation Regional Integration”, published in the *European Journal of Law Reform (EJLR)*, volume 10, issue 4 (2008).

in international relations, engaging proactively and in a unitary way with other regions and at the multilateral level.

To tackle this key issue, this paper is divided into two parts. The first part will look at the typology of third-generational regionalism and at how the EU fits into this scheme. The second part, focuses on the challenges for the EU's foreign policy and looks at the external implications of the Lisbon treaty and, particularly, on its possible impact on the EU's role at the United Nations (UN). By doing so, the paper hopes also to shed some further light on the interrelation and possible synergies between regionalism studies and European studies in understanding the EU as an international actor. It will be argued that the Lisbon Treaty could constitute an institutional opportunity for the EU to develop into a more coherent and visible player on the international stage. This opportunity, however, is limited by the UN structure itself - which is still impervious to regional organisations - and by the ambiguities in the EU's member states strategies and motivations. These ambiguities in turn, preserve the originality of the EU a new type of global actor, different from a state.

### **Three-generation regionalism and the EU**

The study of the phenomenon of regionalism has been intrinsically linked to the study of the process of European integration following World War II. As a regional scheme, the European Communities and then the EU represent an advanced example of institutionalised regionalism. At the same time, European integration as a *project*, has been pictured as a clear political success in terms of achieving prosperity and stability in a given territory where war and violence was once the rule. This led to the partial identification of the process of regionalism with the European experience in two ways. On the one hand, it was implied that the global process of regionalism had to take Europe as a model and as an outcome. On the other hand, regionalism in itself came to be considered a political project, and regional integration around the world was viewed as a desirable and 'good' outcome to complement and support global governance (Fawcett 2005).

This view has now been widely criticised both academically and politically. Academically, as Hurrell puts it, "the most important 'lesson' of Europe is that there are so few good grounds for believing that Europe is the future of other regions" (Hurrell 2005 and Smith 2003). In other words, the specific circumstances and factors that characterised the emergence of the European integration experience can hardly be found in other parts of the world.<sup>1</sup> In fact, every regionalism is somewhat different from the other, ranging from highly institutionalised schemes such as the EU, to instances of soft regionalism as seen,

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<sup>1</sup> Smith, lists among these circumstances: the functionalist (economy first) strategy, the democratic political systems of the participating states, the strong security concerns (Germany, USSR), the benevolence of the US and the security umbrella offered by NATO, *ibid*, p. 71

for example in South East Asia with ASEAN. Politically, regionalism has been criticised as a euro-centric project, which risks undermining the wider multilateral system, in particular concerning trade liberalisation and the WTO. What is clear is that regionalism is becoming more and more a new and additional layer in the governance of globalisation both at the micro, intra-state level, and at the macro, inter-state level (Van Langenhove 2007).

### *Generations of Regionalism*

In an attempt to clarify the problem of comparing the different existing forms of regional integration, the typology of the three-generations of regional integration can serve as a useful tool to go beyond the traditional chronological and qualitative dichotomy between old and new regionalism (Van Langenhove 2007).

The argument typifies regionalism in three main ideal-typical cohorts or generations, through which we can distinguish the different schemes according to the aspect of state governance around which they are primarily built. (i) The operation of a state territory as a 'single' market with a related economic policy; (ii) the governance of public goods and the control over resources and power and (iii) the external sovereignty that allows to be an 'actor' in international relations. Each cohort is driven by a specific objective or *télos* - the ideal end-point of integration in that aspect of governance - and materialises in a concrete development process that will not necessarily reach its culmination. Importantly, the three generations coexist and influence each other, often within the same organisation. Each regional scheme and organisation follows its own integration trajectory and can remain insulated within one dimension of governance or, alternatively, spill-over and cumulate the characteristics from the other generations/cohorts of regional integration.

The development of each specific regional scheme can, thus, also be benchmarked in relation to the three *téloi* of complete integration. Per each cohort, the development will depend on the level of comprehensiveness (in terms of competencies), capacity (in terms of tools), cohesiveness (in terms of identity) and autonomy (from the national level). In theory, a complete and simultaneous integration in all three governance domain would result in the creation of a new supranational polity.

More specifically, the first generation of regional integration is characterised by mainly economic integration leading to experiences such as free trade agreements, custom unions, or common markets. These schemes are characterised mainly by "negative integration" - a process of removing the barriers to the free flow of economic factors - and by the widening of the membership included in the process. Actual transfer or pooling of sovereignty, though, can occur, as in the case of custom unions, where a common external tariff is put in place, as well as in monetary unions. The *télos* of first generation integration is thus the crea-

tion of a new single market that comprises the old national markets of each of the participating states (Balassa 1961).

Second-generation regionalism describes regional schemes where the focus of cooperation is not purely economic but concerns mainly the political sphere, including regulation, redistribution or security. Regional schemes of this second generation proliferated across all continents, particularly following the end of the Cold War in a complex process that was then labelled with the all-encompassing notion of “new regionalism.” As it is much narrower than “new regionalism”, the concept of “second-generation” is quite pregnant and more useful for comparison. The *télos* of “second-generation” schemes is to establish a common approach towards what is usually referred to as ‘internal affairs’: this includes infrastructure, energy and environment policy, but also security policy, social policy, health, employment, research, etc. Also here, the level of integration can vary from superficial political dialogue and coordination, to actual binding regulation and common policies. Further, the process of policy expansion can be accompanied by a process of democratisation of the supranational level, through the creation of parliamentary assemblies, the concentration of interest representation and other instances of input legitimacy and participation.

In the specific EU case, political (second-generation) cooperation and “positive integration” emerged as a consequence - for instance through functional “spill over” - of the previous negative integration (first-generation), which was failing to achieve a functioning common market. As a broader concept, however, “second-generation” regionalism can also be an original project not stemming from an economic integration dynamic or anticipating economic integration. Finally, “second-generation” regionalism is conceptually introspective, focussing at managing problems that are internal to the regional area. This is not to say that this regionalism is cut off from the outside world. On the contrary, both first and second-generation regionalisms are in many ways responses to the wider globalisation process and to the problems and challenges that derive from it. Furthermore, these types of regionalisms have a presence and impact on the wider international context.<sup>2</sup> On the one hand, they can be seen as favouring or hindering global multilateralism, on the other hand, by their mere existence they contribute, to a general process of “contagion” (Fawcett 2005, 21) of regionalism around the world. Finally, their full accomplishment as internal dynamics creates pressure for external action, e.g. a custom union calls for a common trade policy or a strong common policy on environment will have to be promoted globally.

As the first two cohorts of regional schemes don’t exist in a geopolitical vacuum, external action towards the outside world is the most specific characteristic of “third-generation” regionalism. In this case, the *télos* is a complete unified foreign policy together with the ambition to operate as one actor on the international scene and thus also outside its own territory. This implies the willingness

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<sup>2</sup> For an influential characterization of EU actorness see Bretherton 2006.

and capacity to deal at the regional level of governance with “out of area” challenges (Van Langenhove 2007, 78).

Regional organisations, then, develop a strong sense of identity (cohesiveness) and assume an ever more confident external profile (role) in interacting with third states, with other regions, and within multilateral institutions. A strong institutionalisation distinguishes “third-generation” regional integration from a mere alliance of countries or a “coalition of the willing,” which are both schemes that can be rather active externally. The organisation tends to become autonomous or at least distinguishable from its members and develops its own identity, interests and institutions across a wide range of issues, not circumscribed within a single policy area (comprehensiveness).

In sum, these three cohorts of regional integration typify different characteristics and different *téloi* of complete integration. In the real world, however, a clear distinction is much more difficult. Numerous dynamics such as functional and political spill-over across policies or between the internal and external dimensions of policies can facilitate the accumulation and overlap of the various generations of regionalism in one region or on one regional organization; beyond the initial project of the member states. The case of the EU is emblematic of this accumulation, which makes the EU a fully-fledged first-generation regional scheme (e.g. internal market and monetary union); a partly accomplished second-generation regional polity (e.g. shared or exclusive competences on almost all policy areas and a developing supranational democratic structure); and an emerging third-generation regional actor (almost autonomous in economic external relations, and increasingly active in the political and security domain). The next pages will focus specifically on the third generation dimension and on how the conceptual approach can be applied to the study of the European Union.

#### *Third-Generation Regionalism as a Political Objective*

As compared with the first two cohorts/generations of regionalism, the concept of “third-generation” is more a normative political project than a mere description of reality (Hettne 2005: 277-286; Van Langenhove 2004, 12-13 and Van Langenhove 2007). The EU is a developed prototype in this sense: no other regional scheme has the same degree of comprehensiveness, cohesiveness, capacity and autonomy. No other organisation, with the exclusion of NATO has the same ambition to deploy ‘out of area’ operations. However, the EU is by no means unique in this trend towards an enhanced role of regional groups in global governance.<sup>3</sup> Van Langenhove and Costea specify three key features that are specific to the third-generation organisation: first, the institutional environment providing the

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<sup>3</sup> Regional organisations that have expressed the ambition to become active internationally are proliferation, also at the UN. See, for instance, the high-level meetings with regional organisations held regularly by the UN Secretary General and by the UN Security Council.

capacity to have an external action; second, the political willingness to be proactive in engaging in bilateral relations with states and, especially, in inter-regionalism with other regions, and; third, the engagement within the multilateral system, particularly the UN. The first characteristic is related to the structure of a third-generation organisation and will be analysed further below. The second two features, instead, relate to the goals of such organisations, which tend to pursue inter-regionalism on the one hand, and multilateralism on the other.

### *Promoting Inter-Regionalism*

Among the objectives of the EU as a foreign policy actor, that of promoting regional cooperation in its relations with third countries is the one most EU-specific, as it is linked to its very nature (Smith 2003, 69-96 and Soderbaum 2005). The EC started dealing with third countries by grouping them in regions since the 1960's when it launched its preferential policy towards the African countries, then ACP (Smith 2003). Since then the EU has promoted regionalism both in its economic and political relations, in Africa, Asia, Latin America, North Africa and the Gulf, in the Balkans and more recently in the Black Sea region.<sup>4</sup> Smith identified various reasons for this predilection for regionalism, as an objective and as an approach: the independent external demand coming from new regional groupings to have a relationship with the EU; the belief, coming from experience, that regional integration can bring stability and growth; the recognition that neighbouring countries are interdependent; the pragmatic simplification of external strategies (the sheer number of states in the multilateral system now, makes it impossible for each one to have separate relationships with everyone else); finally, the competition for economic influence with other actors, e.g. the United States in Latin America and Asia (Smith 2003). One can also identify a pro-integration agenda promoted opportunistically by some member states and EU institutions, particularly the Commission. Overall, though, much of this tendency has been purely instinctive and, as a consequence, not always completely rational. Smith defines it as a form of narcissism, while others see it as a search for affinity, and ultimately for identity and legitimacy in constructing a new post-Westphalian order based on inter-regionalism (Soderbaum, Stalgren and Van Langenhove 2005).

The 'value' of regional integration would seem an instance of Europe's "normative power" (Manners 2002). However, there are three important pitfalls with this regionalist inclination. First, "mechanical iso-morphism": the EU's tendency to impose regional integration, just by establishing copycat institutions and

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<sup>4</sup> See for all the Commission's "Communication on EC support for regional economic integration in developing countries", COM (95)219, 16 June 1995. At the time of writing the Commission was holding an online open consultation with development stakeholders in view of a new Communication on regional integration in the ACP region, closed on 9 May 2008.

routines and losing sight of the functional policy need (Bicchi 2006). This can undermine the legitimacy and the general support for regionalism. Second, “strategic schizophrenia”: the tendency, which is increasingly perceivable now, of somewhat inconsistently juxtaposing region-to-region dialogue with bilateral relations with so-called “strategic partners”, such as Brazil, that are also deeply involved in regional groupings. Third, “disguised euro-centrism”: is third-generation regionalism an exclusively Europe-driven endeavour? If so, is the EU really serious about creating a ‘European world order’ made of interacting regions (Hettne 2005)? This last question is linked to a second objective, which is crucial to third-generation regionalism: the relationship with the multilateral system. In the EU this relationship is subsumed in the concept of “effective multilateralism”.

#### *Promoting Multilateralism*

The term “effective multilateralism” was introduced as a strategic objective of the Union in the European Security Strategy.<sup>5</sup> Simply put, it refers to the alleged propensity of the EU to work through and for multilateral institutions (including the WTO, the UN, NATO and other regional organisations) and, at the same time, its commitment to contribute to the reform of the multilateral structure in view of making it more effective and more legitimate. There is no doubt that the concept served mostly an identity objective of reasserting unity of purpose, following the “unilateralist turn” of the United States and the subsequent crisis of Common Foreign and Security Policy (CFSP) over the war in Iraq (Keukeleire and MacNaughtan 2008). Beyond the rhetoric, two aspects have to be taken into account. On the one hand, the EU has indeed increased its substantial cooperation with the UN, both strategically and operationally on all issues, and particularly in the field of security (2003 UN-EU Joint Declaration on Crisis). Militarily, for instance, the EU has equipped itself with the Battle Groups, designed specifically for operations under UN mandate. The UN has also welcomed this process, as it needs regional organisations, and particularly the EU to share the burden of global governance (Tardy 2007). However, a generally positive assessment is nuanced by two considerations. Firstly, the EU does not fit perfectly in the vision of the UN Charter of regional arrangements as “Chapter VIII” organisations, as it has a global ambition that goes beyond Europe (typical of third-generation regionalism). (Graham and Felicio 2006)<sup>6</sup> This can produce an overt clash in the long run within the current set up and calls for an active participation and a co-

<sup>5</sup> Council of the European Union (2003), “European Security Strategy”, pp 9-10. Importantly, promoting relations with regional organisations is considered part of the effort to strengthen global governance under the heading of “effective multilateralism”.

<sup>7</sup> European Commission, “Standard Eurobarometer 68 / Autumn 2007 - TNS Opinion & Social”, December 2007. 67 % of EU citizens think that defence and foreign policy should be made jointly within the EU

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herent strategy in the reform of the multilateral system. Yet, secondly, the EU has maintained a visible division over the central issue of the reform of the multilateral system, and particularly of the UN Security Council (UNSC). The African Union for instance, has been much more open in promoting a new regional approach to the reform. This internal EU division reveals the still uncertain stance of some member states towards the meaning of effective multilateralism, and towards the role of the EU and its states within it. Thus, although there is a certain tendency towards promoting a “world of regions,” an authentic political commitment is still lacking on how to translate it in the multilateral structure.

In what follows, the primary focus will be on the structural aspects of the EU as a third-generation organisation and, in particular, on the plausible impact of the Lisbon Treaty in making the EU increasingly comprehensive, capable, cohesive and active externally.

### **Reforming the EU as a global Actor**

#### *The Two Main challenges for the CFSP*

The idea of continuous reform has always been enshrined in the elusive project of a European CFSP and, before that, in European Political Cooperation. Integration in this field is so crucial to national sovereignty that it immediately raised questions such as: is the EU acquiring a state-like foreign policy? How can one conceptualise the EU as a foreign policy actor? What is the impact of the specificities and sui generis nature of the EU’s political system on the EU’s external relations?

Academic discussion focused on two main dilemmas: (1) the different models of the EU on the civilian/military power spectrum and (2) the torn EU’s foreign policy profile between intergovernmental and supranational tendencies. This theoretical debate reflected, however, the very practical consciousness of the limitations of the EU foreign policy’s capabilities and political clout, as well as of the related failures in policy terms, particularly in the Balkans. This, in turn, led to identifying two major shortcomings to be addressed in order to transform the EU from an affluent payer into an influent player. These were the lack of military power and the insufficient institutional coherence, which makes it difficult to concentrate political authority towards common policies. Before focusing on how the Lisbon Treaty tackles the institutional problems, first a brief look at the problem of military power.

Since the 1998 Franco-British agreement in Saint-Malo, important and relatively quick steps were taken to set up a European Security and Defence Policy (ESDP), designed to grant more autonomy to the EU from the U.S. in the use of force and the capacity to carry out even robust missions in the field of peace and security (Howorth 2007). These efforts were not seriously undercut by the 2003 crisis over the second U.S. intervention in Iraq (Menon 2004). In fact, by de-

ploying its first autonomous mission in Congo in 2003, the EU immediately made it clear that it was committed to engaging in 'out of area' interventions, in order to assert its image as a global actor. Since the end of the nineties, therefore, the EU transformed itself from an authentically "civilian power" into what has been defined a "civilising power" or as a "military power in the making" (Smith 2005, 63-82). This build-up has been tangible in terms of capabilities, institutional structures in Brussels and operations. All this though, has been done while attempting not to sacrifice the positive image and the soft power of attraction of the EU as a new type of "post-modern" global actor (Cooper 2003). Therefore, the EU has tried to combine traditional foreign policy goals and tools with more far-sighted and comprehensive 'structural' foreign policies (Keukeleire 2003) designed not only for states but also to have a deeper influence on the structure of the societies of the recipient countries and on the very nature of international relations. In this sense, the first pillar of external relations, including development policy, humanitarian aid, trade, enlargement and the neighbourhood policy (ENP) play a crucial role.

The quite impressive development of ESDP, however, has been undermined by the much less fructiferous attempts to tackle the second, institutional, shortcoming of EU foreign policy. This has led some commentators to speak about a defence policy, without a truly 'common' foreign policy, although there have been considerable steps forward since the late nineties (Keukeleire and MacNaughtan 2008). The main institutional problems can be summarised in the multi-level and multi-pillar structure of the EU, leading to incoherence and lack of leadership; as well as in the resilience of the unanimity rule in the Council of Ministers on CFSP matters, leading to lack of strategy and paralysis. Unlike for the problem of the deficit of military force, these two institutional shortcomings were accentuated by enlargement. This promised to increase the complexity of the EU system, the diversity between member states and the time needed to take decisions. As a consequence, since the beginning of the convention on the future of Europe in 2002, it was widely accepted among academics as well as policy-makers that some far-reaching reforms had to be agreed upon, particularly in the domain of foreign policy. What remained highly disputed was whether the reforms had to enhance supranationalism and "communitarise" CFSP, or whether its intergovernmental character should be maintained.

This debate reflected the deeply rooted visions on the future of the EU as a political system, including its further development as a second-generation regional scheme. Interestingly though, this division did not dent the actual pragmatic perception of the need to increase the overall efficiency of the foreign policy mechanisms. In fact, even following the rejection of the referenda on the Constitutional Treaty in 2005 in France and the Netherlands, some of the agreed changes were experimented with in practice, e.g. the double-hatting of some head of delegations. Furthermore, the EU undoubtedly increased its external activity in

the period of crisis or “reflection” in an effort to “act itself into being” (Gibson in Soderbaum, Stalgren and Van Langenhove 2005, 373).

All this shows the broad support for reform in external relations present in the member states, including in the public opinion (European Commission 2007).<sup>7</sup>

*The implications of the Lisbon Treaty*

The EU accumulates features of all three generations/cohorts of regionalism, in terms of economic, political and external sovereignty. The Lisbon Treaty<sup>8</sup> touches on all three dimensions, especially, the second and third, pertaining to internal political integration and external activities. Overall, most of the institutional reforms contained in the 2005 Constitutional Treaty were substantially preserved. Analyses done on that compromise showed a limited but tangible deepening of integration in terms of second-generation regionalism. Some important innovations were agreed, such as: the new mechanism for qualified majority voting (QMV); the general expansion of QMV and co-decision to most policy areas; a clearer distinction in the division of competencies; an increased role for the European Parliament (EP) and the European Court of Justice (ECJ); the end of the formal pillar structure as well as an enhanced role for national parliaments, especially in safeguarding the principle of subsidiarity (Phinnemore 2005). What went lost in the 2005-2007 period, were mainly symbols and state-like labels such as the words ‘Constitution’ and ‘Minister of Foreign Affairs.’ A major difference was in the process adopted for adopting the text, where the participative and inclusive approach of the 2002-2003 Convention on the Future of Europe and of the referenda, was sacrificed to the more traditional closed-door diplomatic style of the IGC and of parliamentary ratification (Skach 2005).

This paper, however, focuses on the third-generation perspective and so on the contribution that the reform could bring to the EU’s external role. The major changes introduced in external relations are the following. A new High Representative for Foreign Affairs and Security Policy (art. 18 and 27 TEU), who will also be the Vice President of the Commission for external relations (HR/VP); the end of the rotating presidency (and “troika”) in external representation, with a permanent and full-time President of the European Council, representing the EU abroad at the level of heads of states (art. 15 TEU); the end of the pillar structure and of the EC/EU distinction, although CFSP will maintain its specific procedures, e.g. unanimity (art.31 TEU); the legal personality conferred to the EU (art. 47 TEU); a European External Action Service (EEAS) supporting the HR/VP (art.27 TEU); the possibility for “Permanent Structured Cooperation” in the field

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<sup>8</sup> Formally signed on December 13, 2007, the Treaty Amending the Treaty on European Union and the Treaty Establishing the European Community Lisbon Treaty: Henceforth known as the Lisbon Treaty.

of defence policy, which would allow states willing and able to meet certain standards to move forward in military cooperation and integration (art.42 TEU); a mutual assistance clause for defence (art. 28.A.7) and a solidarity clause for the reaction against terrorist attacks and disasters (art.188R TFEU); A new legal basis for the ENP (art.8 TEU) was also introduced. To these one should add a considerable expansion in the internal policies and competencies (second-generation dimension) that have an impact on external relations, such as energy policy (Title XXI TFEU), environment/climate change (Title XX TFEU).

These innovations attempt to tackle some of the problems outlined above. The new double-hatted HR/VP linking first and second pillar competences should improve the problem of institutional (between the Council and the Commission) and of horizontal incoherence (between policies) (Nuttal 2005). Further, he or she would contribute to the easing of the leadership deficit, and together with the president of the European Council, the provision on legal personality, and the end of the troika structure, should simplify EU external representation. Overall, the innovation is considerable and there are some expectations towards the possible impact, particularly in terms of visibility.<sup>9</sup> As the Convention had already noted, a unified figure dealing with CFSP would definitely “improve the visibility, clarity and continuity of the Union on the global stage” (European Convention 2002, 67).

On the other hand, vertical incoherence (between the member state and EU level) is likely to remain a fatal characteristic of EU foreign policy making, due to the unanimity in the Council and to the intergovernmental approach. This is true particularly for big member states, who want to maintain an independent foreign policy and international role and resist the convergence of foreign policy preferences. In this sense, the EU will remain a polity very different from a state. This ambiguity reflects the eternal overarching division between intergovernmental incremental process of integration, where the equilibrium lies somewhat in the middle between the call and federal strategies. The result is an indisputably for effectiveness on the one hand, and the maintenance of a strong member state participation on the other (Wessels 2005).

#### *The EU Reform and the UN*

A place of its own in the analysis is the impact of the Lisbon Treaty on the EU profile in the UN. As was shown above, inter-regionalism and enhanced presence and role in the multilateral system are crucial aspects in locating the EU as a third-generation regional organisation. As stated by article 21 of the TEU, following the Lisbon Treaty:

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<sup>9</sup> Interviews in the Council and Commission. 2005 and 2007, 2008.

The Union shall seek to develop relations and build partnerships with third countries, and international, regional or global organisations [...]. It shall promote multilateral solutions to common problems, in particular in the framework of the United Nations.

*An EU Seat in the Security Council?*

The UN, therefore, represents an important stage to assess the credibility of the EU as a foreign policy actor. Within this context, it is relevant to discuss the issue of the ‘EU seat’ in the United Nations Security Council (UNSC). This ‘EU seat’ problem has been at the centre of CFSP development, as it constitutes one of the most noticeable points of friction between intergovernmental and supranational thinking on the future of the EU integration.<sup>10</sup> Considerations on the opportunity of establishing an EU seat were already part of the IGC on a Political Union that prepared the Maastricht Treaty (Tsakaloyannis and Bourantonis 1996). Subsequently, during the 2002-2003 Convention on the Future of Europe, the issue of the representation of the EU at the UN was debated extensively in the working group VIII on external action and III on legal personality (European Convention 2002, 68). The concept of a European seat was finally turned down both for legal (only states can be members of the UNSC) and political considerations (e.g. opposition of France and the UK, but also doubts on whether one seat in the UNSC would be better than the current many seats). The discussion was further complicated by the problem of the reform of the Security Council and by the bid of Germany to obtain a national permanent seat, which divided the EU (Marchesi 2008). It was agreed that it was more realistic in the short-term to only moderately enhance the capability of the EU to speak with a single voice in the UNSC, without reforming drastically the provisions of article 19 TEU, which regulate this delicate issue.

Of course, the most important institutional element to be agreed upon as a precondition for an EU seat (without taking into account here the complexities of the global arena of UN reform), is some kind of qualified majority voting (QMV) in CFSP. This was ruled out in the Lisbon treaty as in the Constitutional Treaty and is unlikely to re-present itself in the coming years. In general, the different type of ‘double majority’ QMV introduced by the Lisbon Treaty will not apply to CFSP, a part in limited and largely irrelevant occasions, such as when a detailed and unanimous political decision has already been taken at the European Council level. Without such a development and the substantial “communitarisation” of EU foreign policy, an EU seat would be damaging, as it would only be conducive

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<sup>10</sup> The European Parliament supports this solution, at least in the long term. See the Resolution of the European Parliament on the Reform of the United Nations, PE 357.491\ 1 6 June 2005 (Rapporteur Armin Laschet). But also the Commissioner for External Relations Benita Ferrero Waldner and High Representative for the CFSP Javier Solana have expressed similar opinion though less openly.

to lame positions presented in the UNSC or constant abstention. Although the achievement of common positions on matters of war and peace happens increasingly more often within the EU, a fracture such as that on Iraq in 2002-2003 could still occur in the present institutional setting.

#### *Legal Personality*

Certainly, a (small) part of the arguments used against the EU seat was undercut by the legal personality of the EU, finally granted by the Lisbon Treaty (TEU Article 47). Resisted for years by France and the UK, this provision could have in the long-term a beneficial effect for the EU in the UN and not only in the UNSC. The EU, in fact, can now as such assume obligations and sign treaties with the UN. The innovation will not have all its effects until the UN reforms itself to accept the full membership of regional organizations. Yet, there is no question that, at least in principle, this is a major step forward from a legal and institutional point of view (Govaere, Capiiau and An Vermeersch 2004). In turn, the EU personality could lead to major developments in various UN bodies, and notably in the General Assembly. Here the EU will have to apply for an enhanced observer status, as the simple succession to the EC would relegate it to speaking at the end of every debate, after all the member states.<sup>11</sup> The Lisbon treaty in fact, also eliminates the rotating presidency, which has constituted until now an easy way for the EU to present common positions through the mouthpiece of an actual UN member.

Concerning the UNSC, since neither the new permanent president of the European Council, nor the double-hatted HR/VP will be representing a member state, they will have to speak following article 39 of UNSC provisional rules procedure (observers and other parties), while until now the EU presidency was able to speak following article 37 (for member states). This should not constitute a big hurdle, as long as the HR/VP is supported or invited by the member states. Article 39 could even constitute an advantage in terms of visibility/identity, as the EU would speak behind its own nameplate instead than a member state's one.

#### *Coordination on the Security Council*

Looking at the innovations introduced with the reformulation of article 19 (now article 34), it is impossible not to recognise the very limited will amongst key member states, to improve EU coordination and representation in the UNSC. The article now states:

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<sup>11</sup> Politically, though, applying for enhanced status could have a domino effect on other regional organisations with observer status in the General Assembly.

Member States which are also members of the United Nations Security Council will concert and keep the other Member States and the High Representative fully informed. Member States which are members of the Security Council will, in the execution of their functions, defend the positions and the interests of the Union, without prejudice to their responsibilities under the provisions of the United Nations Charter.

The previous distinction between non-permanent and permanent members has disappeared. Though in the European context this change of formulation is supposed to re-establish the equality among the EU member states serving in the UNSC, it does not have any effect on the prerogatives of France and UK as veto holders in the UN framework. Fassbender (2004) minimizes both the *raison d'être* and the implications of this amendment. This view is supported by the preservation of article 19's last sentence that prioritizes the UN responsibilities over EU membership. Nevertheless, even this minor change in the formulation is a further acknowledgement of a gradual evolution from the initial national perspective and testifies of the great pressure to enhance the European dimension of this article both during the Convention and the IGCs.

#### *The High Representative*

The most important change for EU foreign policy comes clearly from the establishment of the double-hatted HR/VP.<sup>12</sup> At the UN, this innovation was long-awaited to tackle the problem of the dispersive representation of the EU. This is currently voiced, by the troika (e.g. meetings with third countries or the UN Secretariat), by the Commission for EC exclusive competences, by the Presidency for mixed competences, and by the member states, who often resonate or specify a common position. The HR/VP could give the EU a single voice in New York and in the UNSC, especially in combination with the new provision of article 34.3 third paragraph that states:

When the Union has defined a position on a subject which is on the United Nations Security Council agenda, those Member States which sit on the Security Council shall request that the High Representative be invited to present the Union's position.

In all likelihood, the insertion of this provision will not create too much enthusiasm. It is the codification of an already established practice of inviting the High Representative Javier Solana to the UNSC open meetings to express CFSP common positions. In short, the presence of the HR/VP or of his/her representative in the Security Council will continue to be dependent on the good will and

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<sup>12</sup> In particular see new art. 18 and 27 TEU.

invitation of the member states. Obviously, when such a common position has been agreed by unanimity among the capitals and in Brussels, the EU members in the UNSC are by definition bound to it. To change the quality of EU coordination in the UNSC the role of the HR/VP should also be enhanced in the ascending phase of the decision making process, in the closed-door meetings, at least to allow him/her to be well informed of the situation.

*Personalities and Practice and the External Action Service*

In sum, there is some evidence, that the provisions of the Lisbon treaty, if ratified, would establish some incremental improvements in the institutional context of the EU presence at the UN. Some innovations do open institutional opportunities that could be taken if the political will emerges. The HR/VP would be equipped with the necessary status and tools to play a role in the current configuration, if the member states support (or at least avoid boycotting!) him or her. To go into speculation, the HR/VP could also play a role in case the idea of an EU seat or other more conservative proposals, such as that to include a representative of the EU institutions in one of the national delegation in the Security Council, sees the light of day (Fulci 2001). So far though, this innovation has been vetoed by the two EU permanent members who have an interest in limiting the EU presence in order to retain their autonomy in the UNSC.<sup>13</sup>

Yet, if the member states grip is still firm on the single provisions contained in the Treaty, their control on the day-to-day implementation will remain weaker. In this sense, personalities and practice will play a crucial role in determining the actual impact of the structural reforms agreed in Lisbon (Drieskens 2007, 425).<sup>14</sup>

Concerning the first factor, the choice of the person who will serve in the position of HR/VP will be extremely important in determining from the start, the ambition, the independence and the scope of action of this new institution. In fact, the Treaty has not solved the tensions between the intergovernmental and supranational poles, which are so typical of the EU. In a way, it has just transferred them on the head of one person. As an institutional agent, the HR/VP will have to be loyal both to the Commission and to the member states, via the Council. He/she will have huge responsibilities and duties and will have to prioritise his or her resources and time, leading to potential clashes between its two princi-

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<sup>13</sup> In this context, the position of the UK is also informed by the public opinion's scepticism towards the EU and towards the Reform treaty in particular. The Foreign and Commonwealth Office, for instance, included in its website, the idea that the Lisbon treaty would lead it to eventually relinquish its permanent seat in the UNSC as one of the "myths" on the new treaty. See FCO website <http://www.fco.gov.uk/servlet/Servlet?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1184758750520>

<sup>14</sup> Aware of this risk, the UK pushed for the inclusion of declarations 13 and 14 annexed to the final act of the intergovernmental conference adopting the Treaty of Lisbon, that try to limit the potential of the new provisions, particularly in the UNSC.

pals. In this sense, the prestige, background and authority of the HR/VP and how he or she will get along with the President of the Commission and the President of the European Council will be critical. This is particularly true for the first period of the mandate, which will constitute the political precedent of the following years.

The institutional struggle over the configuration of the External Action Service (EAS) provides an example of the current uncertainty and of the importance of the first years of implementation and practice. This will be a first test to the equilibrium struck by the text (The European Policy Centre 2007). The service is to include elements of the Commission staff, of the Council Secretariat and seconded staff from the member states. However, the final dimension of the service, its overall autonomy and the actual proportion of the various component parts, are under negotiation. According to the Treaty, the final deal will have to be rubberstamped by all the member states, the council secretariat and the European commission. Also, the European Parliament wants to have a strong word. The conflict between effectiveness and member states participation is particularly prominent here, so, even after the formal agreement, the tension on day-to-day practice will persist.

Overall though, the EAS has the potential to 'lubricate' the EU external relations machinery, including in New York. Having single EU delegations around the world, with a coherent political guidance from unified desks in Brussels and incorporating Member States preferences and expertise will rationalize and streamline the external and diplomatic action of the EU. Eventually, this could increase its capacity to concentrate authority strategically (and perhaps financially) and could improve coherence at all levels, including vertically, between member states and the EU.

## **Conclusions**

While recognising the uniqueness of the EU, the three-generation typology offers a useful conceptual framework to compare and assess its development as a regional integration scheme among others. First (economic sovereignty), second (internal sovereignty) and third (external sovereignty) generation features all co-exist and accumulate within the EU as in other organisations, but are not equally developed. Economically, full integration in Europe is almost accomplished. In turn, from a more political perspective much remains to be done, both internally and externally, although the EU certainly represents the most advanced example of supranational polity. This paper has focused on the third, external dimension of regional integration, looking at the foreign policy goals of the EU (inter-regionalism and multilateralism), and at the development of its institutional structure in foreign policy, particularly with the Lisbon Treaty.

In conclusion, the EU continues to develop into a new type of global actor: different from a state and in equilibrium between intergovernmental and supra-

national/federal pressures. It is somewhat misleading to “measure its success” against mystified images of world super-power (Jorgensen 1998). Although, military force continues to be a major factor in a world still inhabited by modern Westphalian logics and even pre-modern (non-state or failed states) actors (Cooper 2003), the EU is largely preserving its post-modern character. This is not a bad thing. Comprehensive and structural foreign policy seems a more suitable strategy to tackle today’s global challenges, which are largely non-military: global warming, sustainable development, energy security, migration, terrorism.

The Lisbon Treaty has recognised these challenges as new objectives to be dealt with both at the regional and multilateral level. Thus, as it fosters regional cooperation and integration around the world, the EU promotes a new “European world order” (Hettne 2005), in which regional actors contribute to sharing the burden of the UN in global governance. In this sense, the EU is becoming a fully-fledged third-generation regional organisation: comprehensive in scope, capable in means, with a cohesive identity and the willingness to act externally.

Beyond the rhetoric however, a lot is still lacking in order to meet these high expectations. While the EU has done a lot to shift away from being an exclusively civilian power, becoming increasingly willing and able to use force, its internal structural contradictions are still preventing it from setting up a truly common foreign policy. The Lisbon Treaty will have some implications in terms of increased coherence and improved visibility, including within the United Nations. However, it will leave unsolved most of the key dilemmas between federal and intergovernmental strategies and between effectiveness and member states control. This ambiguity will continue to hamper the capacity of Europe to concentrate authority and power in its foreign policy. The lesson is that, although there is functional pressure towards regionalism around the world, the first condition for the formation of a “world of regions” is still the willingness of sovereign states to genuinely embark in integration.

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# The Role of National Parliaments in the EU after the Lisbon Treaty

Covadonga Ferrer

## Introduction

The question concerning the role of national Parliaments in the construction of Europe is not new but rather it has been discussed for a number of decades. The integration process has implied the transfer of a whole series of competences from the national level to the European one, due to which the role of national Parliaments in their respective political systems has diminished. They have seen their legislative function diminish, because in most cases the European legislation is directly applicable in all member states without any need for their intervention (Matía 1999, 25-32)<sup>1</sup> while, in others, this one is really limited (Molina 2004, 198).<sup>2</sup> The function of control has also been affected, as they cannot efficiently control the institutions that are really adopting the decisions: the Council and the European Council. (Martínez Sierra 2002a, 136)

Besides, this transfer of competences has not been accompanied by a proportional strengthening of the European Parliament's (EP) powers (Frank 2003, 176).<sup>3</sup> On the contrary, it has been essentially carried out to the benefit of the

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<sup>1</sup> In the case of Regulations, they have direct effect and, usually, exhaust the subject that is being regulated, requiring their implementation only administrative or judicial acts. They affect the future action by the national Parliaments, subtracting that subject from its sphere of competences. This would not be a problem if the transfer of competences was done to a body that represents all the peoples of the European Union and if its proceeding obeyed to a public and contradictory procedure. But this is not the case. The Council, composed by governmental representatives of the different Member States, is who enacts the Regulations. It only represents the parliamentary majorities, not the minorities, and its meetings are not public.

<sup>2</sup> That is the case of Directives, whose transposition is normally competence of the executive and whose content is also, usually, very detailed, leaving little margin of action to the national Parliaments. The participation of the national legislator is not excluded in this case, but it is limited as he is forced to pass a national law to transpose the Directive and, when this one is very detailed, he must copy literally what it provides and pass it without substantial changes. This technique and detailed Directives resembles the Rulings and it can be stated that they are, in most cases, self-sufficient acts.

<sup>3</sup> The Belgian MEP, Michel Toussaint, pointed it out in his report of 1<sup>st</sup> February 1988 concerning the democratic deficit of the European Communities, where he emphasizes that the transfer of competences from the national Parliaments to the Community's institutional system has not been compensated by a transfer of this competences to the parliamentary institution at the

Council (Molina and Degiorgis, 22-23, Martínez Sierra 2002a)<sup>4</sup> and it has not let the European Parliament develop the complete role of a Parliament in the community's political system (Report Vedel 1972).<sup>5</sup> The EP cannot control the institutions that are really making the decisions (Council and European Council), its power of control is limited to the Commission and the national Parliaments cannot make up for that lack of control (Martínez Sierra 2002a, 136).

The executives of the member states have been the leading actors of the integration process. Through the institutions in which they are represented, Council and European Council, they exercise the main competences transferred to the European level. Due to that transfer of competences, the Council is regulating subjects that in the national level fall under the principle of legal reservation and, consequently, cannot be regulated by the government (Matía 1999, 47-52).<sup>6</sup>

National Parliaments have seen themselves, in this way, reduced to a secondary role in the integration process; a role that does not agree with the importance that they have been recognized within their respective constitutional systems (Aragón 2005, 35).<sup>7</sup> The institutional position ascribed to them by their constitutions has been affected (Matía 1999, 38).

At first, the founding Treaties did not envisage any participation of national Parliaments in the decision-making process. Nevertheless, the European MPs were designed between the national ones which have, in this way, a direct way to participate in the community's affairs.<sup>8</sup> This dual mandate worked as a link between the EP and the national Parliaments, allowing a permanent contact between them.

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European level and that the mentioned deficit can only be corrected by a new distribution of powers between Council and European Parliament.

<sup>4</sup> At first, and with the Council voting governed by unanimity, each Member State had a veto power to block a decision, so national Parliaments could exert an important influence over it. But with the extension of the qualified majority voting their possibilities of influence in the Council's decisions were reduced.

<sup>5</sup> The Report Vedel of 1972 recognized, for the first time, that in the areas in which a transfer of competences to the European Community had occurred, the national Parliaments remained emptied out of powers while the European Parliament did not participate in the manage and control of that competences with the appropriate weight.

<sup>6</sup> The principle of legal reservation tries to guarantee that certain subjects are regulated by the Parliament so their adoption is accompanied by a debate in which the different representatives of the society participate. Debate between majorities and minorities that is essential in a democratic State and attached to which is the principle of publicity in the adoption of laws. But we do not have these elements in the community level, as is the Council who adopts the main legislative decisions in meetings that, in general, are not public. On the subject, see also Balaguer 2005: 127-128.

<sup>7</sup> In the parliamentary systems, predominant in the member states of the EU, national Parliaments have a central and outstanding position.

<sup>8</sup> Each founding Treaty envisaged the creation of its own Assembly, composed by delegates of the national Parliaments designed according to the rules and mechanisms established in each Member State, until it was not established a uniform procedure for the direct suffrage election. See articles 20 and 21 of the ECSC Treaty; articles 3.1 and 108 of the Euratom Treaty; and articles 138.1 and 138.3 of the EEC Treaty.

But after the first direct elections to the EP in 1979, with the entry into force of the Act of 20<sup>th</sup> September 1976,<sup>9</sup> that link was broken. As it has been provided in the founding Treaties, the Act established the election of the representatives of the Assembly by direct universal suffrage.<sup>10</sup> It allowed the compatibility of mandates<sup>11</sup> but left to the decision of the member states the possibility of establishing other incompatibilities with the European mandate, besides the ones envisaged in the Act.<sup>12</sup> According to this, certain Member States regulated the incompatibility of both mandates. After the amendment of the Act in 2002, the incompatibility was established between them, finally putting to an end the link that, until that first direct elections, national and EP had kept.<sup>13</sup>

It is not until the Maastricht Treaty in 1992 when it is recognized, for the first time, an active role of the national Parliaments. Since the origins of the European Communities, the integration process had been focused in an economic way, as the first attempt for building a political union in 1952 failed (Mangas and Liñán 2005, 41-43).<sup>14</sup> With time, economic objectives were achieved and the question of the political integration rose again. The problem was, then, how to give democratic legitimacy to it. The European Council held in Rome in October 1990, pointed out that

to increase the democratic legitimacy of the Union, the progress of the Community towards European Union must be accompanied by the development of the European Parliament's role in the legislative sphere (+) and with respect to the monitoring of the activities of the Union, which, together with the role of the national Parliaments, will underpin the democratic legitimacy of the Union.

It opened, this way, a debate about the role of national Parliaments and their participation in the community's affairs that lead to the inclusion of two Declarations annexed to the Treaty of the EU that tried to provide an answer to the question.

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<sup>9</sup> Act concerning the election of the representatives of the Assembly by direct universal suffrage. Official Journal L 278, 08/10/1976 P. 0005 – 0011.

<sup>10</sup> See article 1 of the Act. Although it established the election by direct universal suffrage it did not fix a uniform electoral procedure, leaving it to the national provisions of the Member States but subject to the provisions of the Act. See article 7.2 of the Act.

<sup>11</sup> “The office of representative in the Assembly shall be compatible with membership of the Parliament of a Member State” Article 5 of the Act.

<sup>12</sup> See Article 6 of the Act.

<sup>13</sup> See Council Decision of 25 June 2002 and 23 September 2002 amending the Act concerning the election of the representatives of the European Parliament by direct universal suffrage, annexed to Decision 76/787/ECSC, EEC, Euratom. Official Journal L 283, 21/10/2002 P. 0001 – 0004.

<sup>14</sup> The idea for the creation of a European Political Community (EPC) was proposed by the Italian minister Alcide de Gasperi but France rejected it.

Therefore, from the Maastricht Treaty of 1992 three important moments were opened in the acknowledgement of the role of national Parliaments in the European construction process: the mentioned Treaty of 1992, that recognized for the first time an active role through two Declarations annexed to the Treaty; the Treaty of Amsterdam, that went a step further incorporating a Protocol on the Role of national Parliaments (with legal binding character); and the Nice Summit of 2000, that included among the subjects that ought to be debated in the Intergovernmental Conference (IGC) to be held in 2003-2004 the question of the role of national Parliaments in the future European construction. IGC that would lead to the Treaty Establishing a Constitution for Europe, in which were incorporated new provisions for the participation of national Parliaments in the community's political system. A treaty that, as it is well known, never entered into force but which its' provisions have been incorporated into the new Treaty of Lisbon.

Following, we will analyze the different provisions contained in the Treaties of Maastricht, Amsterdam and in the "European Constitution"<sup>15</sup> to examine, in a second moment, the provisions included in the Treaty of Lisbon (Sierra 2001, 221-260).

### **Evolution of Treaty Provisions Regarding the Role of National Parliaments on the European Level**

It is possible to observe the evolution in the recognition of the role of national Parliaments at the European level: from the mere symbolic provisions of Declarations 13 and 14 annexed to the Maastricht Treaty, to the specific ones in the Lisbon Treaty.

#### *The Maastricht Treaty*

As we have just mentioned in the previous section, with the Maastricht Treaty begins the setting out of different proceedings regarding the role of national Parliaments in the European Union (Romo 2001, 265).<sup>16</sup> It is in Declarations 13 and 14 annexed to the Treaty that recognition of their role first appears (Laso 2005, 283). This recognition is the reflection of a whole series of studies and proposals made by different commissions and working groups during the 1980's. Among them, the Carvinho Report of September 24, 1991, was used as basis of the mentioned Declarations and it stressed the need of coordination between national Parliaments and European Parliament, as well as an increase in the contacts be-

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<sup>15</sup> It is not necessary to analyze the Treaty of Nice as it did not introduce any change with regard to the provisions established by Amsterdam, although Declaration 23 annexed to it opened again the debate about the role of national Parliaments and pointed it out as one of the main issues to be tackled during the 2004's IGC. For more information about the Treaty of Nice.

<sup>16</sup> Although already in 1991 the EP adopted, on its own initiative, some measures to reinforce the links with the national Parliaments, creating a special administrative unit in its departments.

tween them (Molina and Degiorgis 2004, 136-137). For the first time there was established in a rule of primary law certain provisions relative to the role of national Parliaments, but the two Declarations did not have legal binding force.

Declaration 13 stated, on the one hand, the convenience of encouraging a “greater involvement of national Parliaments in the activities of the European Union” and of stepping up the exchange of information between them and the EP. But it left in the hands of the governments of the member states the reference of Commission proposals for legislation to the national Parliaments, without establishing any deadline nor the penalties in case that they did not pass the information to them. So governments could decide if they passed or not the legislative proposal to the national Parliament and, in the case of doing so, as no deadline was established the Parliament saw its possibilities to give an opinion before the Council’s decision diminished (Aranda 2006, 275).

On the other hand, the Declaration also considered it important to step up the contacts between national Parliaments and EP, confirming this way a practice that was being carried out for a few years, as the meetings of the Conference of Community and European Affairs Committees (COSAC) started to be held from November 1989.<sup>17</sup>

As far as Declaration 14 is concerned, it invited “the European Parliament and the national Parliaments to meet as necessary as a Conference of the Parliaments (or ‘Assises’)” in order to debate the main features of the Union.<sup>18</sup> With this provision, it intended to facilitate that national Parliaments could control and exercise political influence on the members of their respective governments (as they are the ones that takes part in the meetings of the Council of Ministers or in the European Council, which adopts the main European decisions).

### *The Treaty of Amsterdam*

The Treaty of Amsterdam went a step further in the recognition of the role of national Parliaments by annexing a “Protocol on the role of national Parliaments in the European Union,” which provisions have binding force. As the Treaty of Nice did not make any modifications to this Protocol and the Lisbon Treaty is not yet in force, the Protocol agreed on in Amsterdam is, for the moment, the one in force.

The Protocol contains, on the one hand, rules to facilitate the indirect participation of national Parliaments in community affairs, articulating mechanisms of information for them. On the other hand, it confirms the COSAC as mechanism for their direct or collective participation.

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<sup>17</sup> After the adoption by the European Parliament of the “Resolution on relations between the national parliaments and the European Parliament” of 16 February 1989. OJ C 069, 20/03/1989, p. 0149.

<sup>18</sup> Declaration 14 annexed to the Maastricht Treaty “on the Conference of the Parliaments”. Treaty on European Union. Official Journal C 191, 29 July 1992.

Regarding the information that must be passed to the national Parliaments, the Protocol establishes the prompt forwarding to national Parliaments of all the Commission's consultation documents (white papers, green papers and communications)<sup>19</sup> and Commission proposals for legislation. It establishes also a six-week deadline "between a legislative proposal or a proposal for a measure to be adopted under Title VI of the Treaty on European Union [...] and the date when it is placed on a Council agenda for decision," so national Parliaments can have sufficient time to discuss the proposal, if necessary, with their respective governments.<sup>20</sup> Again, it does not fix a deadline for the transmission to the governments of the Commission's consultation documents and legislative proposals; neither does it say who must pass that information, which continues to depend on the national executives.

With regard to the COSAC, its participation in the community affairs is formalized, introducing it in the primary law and making it the ordinary way for the direct participation of national Parliaments in the European affairs. Apart from that institutionalization, its inclusion in the primary law does not imply a significant change in its functions and competences with regard to the ones that it was exercising since its first meeting in 1989 (Camisón 2007, 106).

The Protocol involves certain improvement of the precedent situation, as it has binding force and clarifies the documents that must be passed to the national Parliaments, establishing a binding obligation for the Commission and the national governments. But it still has some limitations, as it does not fix a deadline for the governments to transfer the information to their national Parliaments, so it is difficult for them to give an opinion in the mentioned period if they do not receive the information in a timely manner. Besides, COSAC is still a forum for the exchange of information and opinions but with a very limited activity (Delgado-Iribarren 2004, 777).

### *The Treaty Establishing a Constitution for Europe*

Before starting to analyze the provisions about the role of national Parliaments introduced in the unsuccessful "Constitutional" Treaty, we must do a brief analysis of the steps that led to its completion. As we have already seen, Maastricht and Amsterdam contained provisions in regard to the role of national Parliaments in the European construction. The following reform of the Treaties in Nice, did not introduce any novelty but in Declaration 23 annexed to the final Act of the Treaty, it raised again the question of their participation and included it among the subjects to be analyzed by the IGC that was going to be held in 2004.<sup>21</sup> Later,

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<sup>19</sup> See Point I.1 of the Protocol on the role of national parliaments in the European Union annexed to the Treaty of Amsterdam. Official Journal C 340, 10 November 1997.

<sup>20</sup> *Ibid* Point I.3.

<sup>21</sup> In Declaration No 23 the member states called for "a deeper and wider debate about the future of the European Union" focusing on four major areas (the delimitation of powers; the status

the Laeken Declaration deepened the issues addressed by Declaration 23, posing new questions about the role of national Parliaments in the EU<sup>22</sup> and asking a Convention the task of answering them. The Convention started its work the 1 May 2002 and created a working group to examine the question more deeply.<sup>23</sup> The group focused on solving two questions:<sup>24</sup> On the one hand, what should be the role of national Parliaments in the new architecture of the European Union? On the other hand, if it was necessary to create new bodies and proceedings to allow a better participation of them in the European's construction process?

As result of its work, the Convention adopted a "Draft Treaty establishing a Constitution for Europe" in which it was annexed a "Protocol on the role of national Parliaments in the European Union," with a first part regarding the information for the Member States' national Parliaments and a second one dedicated to the inter-parliamentary cooperation (Draft Treaty establishing a Constitution for Europe 2003). These provisions were included in the Treaty establishing a Constitution for Europe, which also included the mentioned Protocol and a Protocol on the application of the principles of subsidiarity and proportionality (Treaty establishing a Constitution for Europe 2004).

As in the Treaty of Amsterdam, the Protocol on the role of national Parliaments was also divided into two titles:

- the first one, regarding the information for national Parliaments and the institutions responsible for the transmission;
- the second, devoted to inter-parliamentary cooperation.

The information to be submitted to national Parliaments was widened and the obligations for the transmission passed from the national governments to the European institutions: Commission, European Parliament, Council, European Council and the Court of Auditors, depending on who was the author of the initiative.<sup>25</sup> It was also kept the six-week period established by the Treaty of Amsterdam for the examination of the information by the national Parliaments, although two novelties were introduced:<sup>26</sup>

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of the Charter of Fundamental Rights; the simplification of the Treaties; the role of the national Parliaments) and with the intention of improving and monitoring "the democratic legitimacy and transparency of the Union and its institutions, in order to bring them closer to the citizens of the Member States". Declaration No 23 annexed to the Final Act of the Treaty of Nice. *Official Journal C 80*, 10 March 2001.

<sup>22</sup> See Annex I "Laeken Declaration on the future of the European Union" of the Presidency conclusions of the European Council meeting in Laeken the 14<sup>th</sup> and 15<sup>th</sup> of December 2001.

<sup>23</sup> See Final report of Working Group IV on the role of national parliaments. The European Convention. The Secretariat. CONV 353/02.

<sup>24</sup> For more details of the work of the Working Group see its final report.

<sup>25</sup> See Title I of the Protocol on the role of national Parliaments in the European Union annexed to the "Constitutional" Treaty.

<sup>26</sup> *Ibid* article 4.

- during that period “no agreement may be reached on a draft European legislative act,” except “in urgent cases for which due reasons have been given;”
- a ten-day period should elapse “between the placing of a draft European legislative act on the provisional agenda for the Council and the adoption of a position,” again except in urgent cases.

The aim of these provisions was to enable national Parliaments to give an opinion before the European institutions adopted a decision.

As for the inter-parliamentary cooperation, it was regulated again in the second title of the Protocol. Firstly, it stated that the EP and the national Parliaments should together “determine the organisation and promotion of effective and regular inter-parliamentary cooperation within the Union.” Secondly, regarding the COSAC, it established that it could “submit any contribution it deems appropriate for the attention of the European Parliament, the Council and the Commission [...] promote the exchange of information and best practice between national Parliaments and the European Parliament, including their special committees [...] organise interparliamentary conferences on specific topics, in particular to debate matters of common foreign and security policy, including common security and defence policy.” The Protocol also stated that the contributions from the conference should not bind national Parliaments nor prejudice their positions.<sup>27</sup> It did not make any new contribution different to what was already established in the Treaty of Amsterdam.

With regard to the Protocol on the application of the principles of subsidiarity and proportionality, it introduced a new mechanism for the direct participation of national Parliaments: the early warning system (Delgado-Iribarren 2004, 780<sup>28</sup>). This mechanism was an improvement regarding the precedent situation, as with the provisions established in the previous Protocol they could only give their opinion, when they considered that a proposal violated subsidiarity, through COSAC. With the new mechanism, national Parliaments were given the control of the observation of the mentioned principle and the supervision of the compliance of the legislative proposals with it. The system could be activated if a number of reasoned opinions “on a draft European legislative act's non-compliance with the principle of subsidiarity” were received (Constitutional Treaty Article. I-11).

Another novelty was the provision established in article I-58 of the Treaty, according to which any application to become member of the Union should also

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<sup>27</sup> *Ibid* Title II, articles 9 and 10.

<sup>28</sup> This system was created by the Working Group I of the European Convention to avoid the creation of a new body and to establish a mechanism of direct participation that would not interfere nor block the legislative process.

be sent to national Parliaments.<sup>29</sup> Obviously, this does not mean that currently they do not have a role in these cases. They do because they participate in the ratifying process of the accession Treaty. These Treaties must be ratified by all the member states according to their respective constitutional provisions and this requires, generally, the intervention of the Parliament.<sup>30</sup>

Finally, the Constitutional Treaty also provided for the participation of national Parliaments in the revision procedures of the Treaty, specifically in articles IV-443 and IV-444, receiving a certain constituent role (Martínez Sierra 2002b).

Regarding their participation in the ordinary revision procedure, article IV-443 established that the Council should submit the proposals of amendment to the national Parliaments and that if a decision in favour of examining the proposed amendments was adopted, the President of the European Council should convene a Convention in which representatives of the national Parliaments would be integrated (Constitution Treaty Part III).

As for the simplified revision procedure, article IV-444 contemplated two cases in which it was not necessary to convene neither a Convention nor an IGC. The mechanism, known as “bridging clause,” allowed the revision of certain provisions of the Treaty (Constitution Treaty Part III) without having to turn to the ordinary procedure. Two general bridging clauses, therefore, enabled the European Council, by a unanimous decision, to apply qualified majority voting or the ordinary legislative procedure in a field for which the Constitution provided for unanimity<sup>31</sup> or a special legislative procedure (Constitutional Treaty Article IV-444.2). In both cases, any move by the European Council to make use of these bridging clauses should be national Parliaments should be notified. If in a six-month period they objected to the use of the clause, the European Council would not be able to adopt the decision (Constitutional Treaty Article IV-444.3).

To sum up, the Treaty continued with the tendency of not creating new bodies but just reforming an existing one: the COSAC. Few novelties, apart from the mentioned early warning system and the use of the Convention as new mechanism for the revision of the Treaties, could be observed.

As it is now, the Treaty establishing a Constitution for Europe could not enter into force as France<sup>32</sup> and The Netherlands<sup>33</sup> rejected it in referendum.

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<sup>29</sup> “Any European State which wishes to become a member of the Union shall address its application to the Council. The European Parliament and national Parliaments shall be notified of this application” Article I-58.2 “Constitutional” Treaty.

<sup>30</sup> *Ibid.*

<sup>31</sup> Except for decisions with military implications or those in the area of defence. Article IV - 444.1.

<sup>32</sup> The referendum was held the 29 May 2005, with a turn out rate of 69.74% and rejecting the text the 54.8% of the voters. See Flash Eurobarometer 171 “The European Constitution: Post-referendum France” European Commission, June 2005.

<sup>33</sup> The referendum was held the 1 June 2005, with a turn out rate of 62.8% and rejecting the text the 61.6% of the voters. See Flash Eurobarometer 172 “The European Constitution: Post-referendum Netherlands” European Commission, June 2005.

After a two-year reflexion period the European Council held in Brussels in June 2007 decided to convene a new IGC to prepare a new Treaty to modify the existing ones (Presidency Conclusions 2007). Next, we continue analyzing the provisions included in the new Lisbon Treaty regarding the question.

### **The Lisbon Treaty**

As we have just mentioned in the previous section, the rejection of the Treaty establishing a Constitution for Europe by both French and Dutch citizens was the beginning of the end of the “constitutional” text. Finally, during the German Presidency, the deadlock was broken and the European Council held in Brussels in June 2007 agreed to convene an IGC to finalize a new European Union Treaty (European Union Press Release 2007). This way, the intention of developing a “Constitution” for Europe was definitely abandoned and the leaders of the Members States returned to the option of modifying the existing Treaties, although the new Treaty introduces the innovations resulting from the Convention and the IGC concluded in June 2004 (Presidency Conclusions 2007).

#### *The IGC Mandate*

In its mandate to the IGC, the European Council asked it to draw up a Treaty amending the existing Treaties; a Reform Treaty that should introduce “into the existing Treaties, which remain in force, the innovations resulting from the 2004 IGC, as set out below [...]” (Presidency Conclusions 2007). In doing so, only the amendments introduced would need to be ratified, without needing to reopen issues already negotiated and closed. Besides, in this way the States that did not need to hold a referendum to ratify the Reform Treaty were able to justify before their public the parliamentary ratification (Ponzano 2007, 14).

With regard to the question that is being examined, the role of national Parliaments in the European Union, the mandate pointed out that “a new general article will reflect the role of the national parliaments” (Presidency Conclusions 2007) article in which have been incorporated issues as the obligation of the Institutions of the Union to keep them informed or their role as guardians of the principle of subsidiarity, among others.<sup>34</sup>

As for the Protocols on the role of national Parliaments in the EU and on the application of the principles of subsidiarity and proportionality, the mandate said that they would be “annexed to the existing Treaties”<sup>35</sup> and that any amendment to the Protocols agreed in 2004 would be made by a Protocol annexed to the

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<sup>34</sup> So national parliaments can “contribute actively to the good functioning of the Union” *Ibid*, Annex 1, Amendments to the EU Treaty, Title II: 26.

<sup>35</sup> *Ibid*, Point IV.21, Annex I: 23.

Reform Treaty.<sup>36</sup> According to the mandate given to the IGC, two are the novelties introduced in the mentioned Protocols:<sup>37</sup>

-On the one hand, the period given to national parliaments to examine draft legislative texts and to give a reasoned opinion on subsidiarity is extended from 6 to 8 weeks.

-On the other, a reinforced control mechanism of subsidiarity is added to what was agreed in 2004: when a draft legislative act is contested by a simple majority of the votes allocated to national parliaments, the Commission will re-examine the draft act, but it can decide to maintain, amend or withdraw it. If the Commission chooses to maintain the draft, it will have, in a reasoned opinion, to justify why it considers that the draft complies with the principle of subsidiarity. This reasoned opinion, as well as the reasoned opinions of the national parliaments, will have to be transmitted to the EU legislator (Council and European Parliament), for consideration in the legislative procedure. Here, the new specific procedure begins:

- a) Before the first reading concludes, under the ordinary legislative procedure, the legislator<sup>38</sup> shall consider the compatibility of the legislative proposal with the principle of subsidiarity.
- b) If, by a majority of 55 % of the members of the Council or a majority of the votes cast in the European Parliament, the legislator is of the opinion that the proposal is not compatible with the mentioned principle, the legislative proposal shall be dismissed.

#### *The 2007 IGC*

Following the mandate of the European Council held in Brussels in June 2007, the Presidency of the Council convened an IGC for the 23 July 2007.<sup>39</sup>

In accordance with article 48 of the EU Treaty, the German government submitted to the Council a proposal for the amendment of the Treaties on which the Union is founded<sup>40</sup> and, thereupon, the Council consulted the European

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<sup>36</sup> *Ibid*, Point I.2, Annex I: 15.

<sup>37</sup> *Ibid*, Point II.11, Annex I: 17.

<sup>38</sup> Council and Parliament.

<sup>39</sup> "Recalling the proposal submitted by the government of the Federal Republic of Germany on 27 June 2007 (see doc. 11222/07), which reproduces the mandate approved by the European Council of 21-23 June 2007, and following the favourable opinion delivered by the Council on 16 July 2007, the Presidency of the Council, in accordance with Article 48 of the Treaty on European Union, hereby convenes a conference of representatives of the governments of the Member States for the purpose of determining by common accord the amendments to be made to the Treaties on which the European Union is founded. The first meeting of the Conference will be held in Brussels on 23 July 2007". See Cover note from the Presidency of 17 July 2007. Doc. 12004/07.

<sup>40</sup> See Cover note from the General Secretariat of the Council of 26 June 2007. Doc. 11222/07.

Parliament, the Commission and the European Central Bank (ECB) for an opinion on the opening of an IGC for that purpose.

The ECB was the first one to give its opinion, the 5 July 2007, welcoming the opening of the IGC and showing its readiness to contribute to the Conference at any time during its work (Opinion of the European Central Bank 2007). On July 10<sup>th</sup> the Commission also gave its favourable opinion to the opening of the IGC and committed to contribute to its success.<sup>41</sup> As for the European Parliament's concern, it gave its favourable opinion on July 11<sup>th</sup>, although it regretted that the mandate implied:

the loss of some important elements that had been agreed during the 2004 IGC, such as the concept of a constitutional treaty, the symbols of the Union, comprehensible names for the legal acts of the Union, a clear statement of the primacy of the law of the Union and the definition of the Union as a Union of citizens and states, and also implies a long delay in the introduction of others<sup>42</sup>

additionally, it expressed its concern that:

at the fact that the mandate allows for an increasing number of derogations granted to certain Member States from the implementation of major provisions of the envisaged Treaties that could lead to a weakening of the cohesion of the Union.<sup>43</sup>

but it welcomed, nevertheless, the fact that the mandate safeguarded “much of the substance of the Constitutional Treaty.”<sup>44</sup>

In light of these opinions, the Council gave its favourable opinion on July 16<sup>th</sup> and the Presidency convened it for the 23<sup>rd</sup> of that month;<sup>45</sup> the 7<sup>th</sup> and 8<sup>th</sup> of September the Ministers of Foreign Affairs met to debate the progress of the works and in the Summit of the European Council held in Lisbon on October 18<sup>th</sup>

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<sup>41</sup> See Opinion of the European Commission, pursuant to Article 48 of the Treaty on European Union, on the Conference of representatives of the governments of the Member States convened to revise the Treaties. COM (2007) 412 final.

<sup>42</sup> See Point 3 of the European Parliament resolution of 11 July 2007 on the convening of the Intergovernmental Conference (IGC): the European Parliament's opinion (Article 48 of the EU Treaty), (11222/2007 – C6-0206/2007 – 2007/0808(CNS)): 4.

<sup>43</sup> *Ibid*, Point 4.

<sup>44</sup> *Ibid*, Point 8.

<sup>45</sup> See Cover note from the Presidency of 17 July 2007 to the Ministers of Foreign Affairs on the convening of an Intergovernmental Conference, Doc. 12004/07. The same 23<sup>rd</sup> of July, the Portuguese Presidency a Draft Treaty based on the mandate given by the European Council. See Draft Treaty amending the Treaty on European Union and the Treaty establishing the European Community. CIG 1/07. Brussels, 23 July 2007.

and 19<sup>th</sup>, the Heads of State and Government reached a consensus on the text of the Reform Treaty<sup>46</sup> (*Agencia EFE* 2007).

The new Treaty was signed in Lisbon the 13 December 2007 and, after the signature, began the ratification process. Hungary was the first Member State to sign the Treaty. The Treaty established the 1 January 2009 as date for its entry into force after “all the instruments of ratification have been deposited.”<sup>47</sup> The intention was to finish the ratification process in 2008 so that it could enter into force before the elections to the EP in June 2009. However, once again, problems arose: the referendum held in Ireland, the only member state who must do so,<sup>48</sup> had a negative outcome. But this time, the ratification process has not been paralyzed. The European Council, in its meeting held in Brussels in June 2008, held extensive discussions on the outcome of the Irish referendum and decided to pursue ratification in the countries where the Treaty has not yet been approved and to revisit the subject at its summit in October (Presidency Conclusions June 2008). In the mentioned meeting, the European Council heard the Irish prime minister's analysis of the referendum and agreed to review the issue in December (Presidency Conclusions October 2008), summit in which a new roadmap for the Treaty of Lisbon was discussed and where it was agreed that, once the Treaty enters into force, a decision will be taken to allow each EU country to nominate a

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<sup>46</sup> Again, Poland made new demands, as it had already done during the meeting of the European Council in June, achieving additional guarantees for the exercise of the veto power. Negotiations with Italy were also hard and finally it achieved another member in the European Parliament from 2009.

<sup>47</sup> See Article 6.2 of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007. OJEU C 306, Volume 50, 17 December 2007.

<sup>48</sup> In the EU's web site devoted to the Lisbon Treaty it can be found a survey that examines the Irish referendum, for a better understanding of the outcome and the reasons of the votes against and in favor: [http://ec.europa.eu/public\\_opinion/flash/fl\\_245\\_full\\_en.pdf](http://ec.europa.eu/public_opinion/flash/fl_245_full_en.pdf) Since the Decision of the Supreme Court of Ireland in the case *Crotty v. An Taoiseach*, that directly led to the Tenth Amendment of the Constitution of Ireland, any significant change made in the European Union Treaties has been ratified in Ireland by referendum, each in the form of an amendment of the Constitution. *Crotty v. An Taoiseach* was a legal action taken in 1987 by Raymond Crotty against the Irish Government. The case made by Crotty was an appeal for the Supreme Court to dismiss the Government's ratification of the Single European Act on the grounds that it was contradictory to the Irish constitution. The judgment made by the Court established that the provisions of Article 30, under Title III of the Single European Act, were inconsistent with the Constitution, by virtue of it requiring the Government to consult, and take into account the opinions of other member states, when formulating foreign policy. The power of the Government to decide foreign policy was deemed, by Article 6 of the Constitution, to be conferred, in whole, by the people of Ireland, and that any entitlement of foreign states to provide input into Irish foreign policy would require the assent of the Irish people. The Judgment of the Supreme Court can be consulted in <http://www.bailii.org/ie/cases/IESC/1987/4.html>. Later, the Eleventh, Eighteenth and Twenty-Sixth Amendments allowed the ratification of the Maastricht Treaty, the Treaty of Amsterdam and the Treaty of Nice, respectively. See Irish Constitution enacted by the people the 1<sup>st</sup> July 1937: [http://www.taoiseach.gov.ie/attached\\_files/html%20files/Constitution%20of%20Ireland%20\(Eng\).htm](http://www.taoiseach.gov.ie/attached_files/html%20files/Constitution%20of%20Ireland%20(Eng).htm)

member of the European Commission (Presidency Conclusions December 2008, Point I). Furthermore, the Irish government committed itself to organizing a new referendum before November 2009 in exchange for guarantees from its partners.<sup>49</sup>

The Lisbon Treaty introduces, into the existing Treaties, the innovations resulting from the 2004 IGC (Presidency Conclusions June 2007, Part I.1). As for the national Parliaments, their role will be bigger than what was then agreed upon.

*Provisions Regarding the Role of National Parliaments in the Lisbon Treaty*

In the new Treaty, the role of national Parliaments is reflected in a new general article, as the mandate of the European Council stated (Presidency Conclusions June 2007, Part II.11). Other provisions regarding their role can also be found in the Protocol on the role of national Parliaments in the EU and on the application of the principles of subsidiarity and proportionality. Following, we analyze all the provisions included in the Treaty.

(A) The role of National Parliaments

The role that national Parliaments will have at the EU level is established in the new article 12 of the EU Treaty, which states that they will contribute actively to the good functioning of the Union:<sup>50</sup>

- “Through being informed by the institutions of the Union and having draft legislative acts of the Union forwarded to them in accordance with the Protocol on the role of national Parliaments in the European Union.” This

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<sup>49</sup> The European Council also took note of the other concerns of the Irish people relating to taxation policy, family, social and ethical issues, and Common Security and Defence Policy (CSDP) with regard to Ireland's traditional policy of neutrality; and agreed that, provided that Ireland committed itself to seek the ratification “by the end of the term of the current Commission”, all of the concerns “shall be addressed to the mutual satisfaction of Ireland and the other Member States”. The European Council also agreed that “The necessary legal guarantees will be given on the following three points:

- nothing in the Treaty of Lisbon makes any change of any kind, for any Member State, to the extent or operation of the Union's competences in relation to taxation;
- the Treaty of Lisbon does not prejudice the security and defence policy of Member States, including Ireland's traditional policy of neutrality, and the obligations of most other Member States;
- a guarantee that the provisions of the Irish Constitution in relation to the right to life, education and the family are not in any way affected by the fact that the Treaty of Lisbon attributes legal status to the EU Charter of Fundamental Rights or by the justice and home affairs provisions of the said Treaty.” Ibid.

<sup>50</sup> See article 12 EU Treaty, Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union. Official Journal C 115 of 9 May 2008. Article 1 point 12 of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon 13 December 2007. Official Journal C 306 of 17 December 2007.

provision is already established in the Protocol on the role of national Parliaments currently in force and also in the same Protocol annexed to the European “Constitution” but now, for the first time, appears in the body of the Treaty and not only in a Protocol.

- “By seeing to it that the principle of subsidiarity is respected in accordance with the procedures provided for in the Protocol on the application of the principles of subsidiarity and proportionality.”<sup>51</sup> The current Protocol on the role of national Parliaments does not contain any provision to this respect, national Parliaments can only give their opinion about the observation of the mentioned principle through the COSAC and in a non-binding way for the community institutions.<sup>52</sup>
- “By taking part, within the framework of the area of freedom, security and justice, in the evaluation mechanisms for the implementation of the Union policies in that area, in accordance with Article 70 of the Treaty on the Functioning of the European Union, and through being involved in the political monitoring of Europol and the evaluation of Eurojust’s activities in accordance with Articles 88 and 85 of that Treaty”. This provision is new; it is not envisaged in the current Treaties. (Constitutional Treaty Articles III-260, III-273 and III-276).
- “By taking part in the revision procedures of the Treaties, in accordance with Article 48 of this Treaty”. The Treaties in force do not envisage their participation in the revision procedure, this one was introduced in the European “Constitution” and the Lisbon Treaty reflects it in this general article and in article 48 of the EU Treaty.<sup>53</sup>
- “By being notified of applications for accession to the Union, in accordance with Article 49 of this Treaty”. Again, provision introduced by the “Constitution” and not envisaged in the current Treaties.
- “By taking part in the inter-parliamentary cooperation between national Parliaments and with the European Parliament, in accordance with the

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<sup>51</sup> This provision is also established in the second paragraph of article 5.3 of EU Treaty, consolidated version of 2008. Article 1 point 6 of the Lisbon Treaty. The “Constitution” also included this role of national Parliaments in its article I-11.

<sup>52</sup> “6. COSAC may address to the European Parliament, the Council and the Commission any contribution which it deems appropriate on the legislative activities of the Union, notably in relation to the application of the principle of subsidiarity, the area of freedom, security and justice as well as questions regarding fundamental rights. 7. Contributions made by COSAC shall in no way bind national parliaments or prejudge their position.” See Point II.6 and 7 of the Protocol (No 9) on the role of national Parliaments in the European Union (1997) European Union: consolidated versions of the Treaty on European Union and of the Treaty establishing the European Community (consolidated text) *Official Journal C 321E of 29 December 2006*.

<sup>53</sup> See art. 48 EU Treaty, consolidated version 2008. Article 1 point 56 of the Lisbon Treaty.

Protocol on the role of national Parliaments in the European Union”, cooperation that they have been carrying out since some time ago.<sup>54</sup>

For the first time, in the body of the Treaty, we can find an express reference to the role that national Parliaments must have in the community’s political system, and not only in an annexed Protocol as it has been the case ‘til date<sup>55</sup>. In doing so, one of the recommendations of Working Group IV has been followed: introducing a general reference to the role of national Parliaments in the EU. Recommendation that they did for the “Constitutional” Treaty but that, finally, was not followed on that occasion.<sup>56</sup>

#### (B) Provisions of the Treaty that Expressly Refers to National Parliaments

Apart from what article 12 of EU Treaty establishes, the Lisbon Treaty introduces another *express references* to national Parliaments in the EU Treaty and in the Treaty on the Functioning of the European Union.<sup>57</sup>

In the Treaty on European Union, it is established that national Parliaments will ensure the compliance with the principle of subsidiarity;<sup>58</sup> that the members of the Council and of the European Council will be democratically accountable “either to their national Parliaments, or to their citizens;”<sup>59</sup> a new general article is introduced that reflects the role of national Parliaments in the EU;<sup>60</sup> it is envisaged that every proposal for the amendment of the Treaties shall be notified to them and that, if the proposal is accepted, the European Council shall convene

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<sup>54</sup> For the cooperation between European Parliaments and national Parliament, each Member State has established its own proceedings and we can find from joint commissions composed by members of the national parliament and members of the European Parliament, where the last ones have the same rights that the first ones, to other cases where the participation of the members of the European Parliament is not even envisaged. However, national Parliaments do participate periodically in the meetings of the European Parliament’s commissions, although without voting rights. With regard to the mechanisms of multilateral cooperation, between the different national Parliaments, the mechanism most used up to now is the COSAC. For a broad perspective of the different national mechanisms of control and participation see Matia 1999; Martínez Sierra 1998 – 1999; Maurer and Wessels 2001; Storini 2005.

<sup>55</sup> The Treaties currently in force do not make an express reference to the national Parliaments. They only envisage their participation in certain cases in an implicit way. For example, when they must ratify decisions already adopted by the community institutions, like the amendments of the Treaties, or develop them, as is the case of Directives.

<sup>56</sup> See Final report of Working Group IV on the role of national parliaments. The European Convention. The Secretariat. CONV 353/02.

<sup>57</sup> As we have already said, the current Treaties only make express references to their role in the annexed Protocols.

<sup>58</sup> Article 5.3 EU Treaty, consolidated version 2008. Article 1 point 6 of the Lisbon Treaty.

<sup>59</sup> Article 10.2 EU Treaty, consolidated version 2008. Article 1 point 12 of the Lisbon Treaty (that introduces an article 8A in the EU Treaty)

<sup>60</sup> Article 12 EU Treaty, consolidated version 2008. Article 1 point 12 of the Lisbon Treaty (that introduces an article 8C in the EU Treaty)

a Convention in which they will also participate;<sup>61</sup> that when the European Council wants to adopt a decision to allow the Council to apply qualified majority voting or the ordinary legislative procedure in a field for which unanimity or a special legislative procedure is provided in the Treaty, this initiative shall be notified to the national Parliaments that in a six-month period can object, in which case the decision shall not be adopted;<sup>62</sup> and that the applications of accession to the Union shall be notified to them.<sup>63</sup>

As for the Treaty on the Functioning of the European Union's concern, it envisages several provisions regarding the role of national Parliaments. As the EU Treaty, it establishes that national Parliaments will ensure the compliance with the principle of subsidiarity, in this case regarding the proposals submitted in the area of judicial cooperation in criminal matters and police cooperation.<sup>64</sup> Also, they shall be informed of the Member States' evaluations of the implementation of the Union policies in the area of freedom, security and justice,<sup>65</sup> as well as of the works carried out by the standing committee that "shall be set up within the Council in order to ensure that operational cooperation on internal security is promoted and strengthened within the Union."<sup>66</sup> The proposal of the Commission to the Council for the adoption of "a decision determining those aspects of family law with cross-border implications which may be the subject of acts adopted by the ordinary legislative procedure" shall be also notified to national Parliaments;<sup>67</sup> they shall also participate in the evaluation of Eurojust's activities and in the scrutiny of Europol's activities by the EP;<sup>68</sup> and the

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<sup>61</sup> Article 48.2 and 3 EU Treaty, consolidated version 2008. Article 1 point 56 of the Lisbon Treaty. They will be able to participate, consequently, in the ordinary revision procedure of the Treaties.

<sup>62</sup> Article 48.7 EU Treaty, consolidated version 2008. Article 1 point 56 of the Lisbon Treaty. It is a simplified revision procedure of the Treaties, also called "bridging clause", that allows to change the way in which certain provisions are applied without needing to amend the Treaties and, consequently, having to convene a Convention and an IGC.

<sup>63</sup> Article 49 EU Treaty, consolidated version 2008. Article 1 point 57 of the Lisbon Treaty.

<sup>64</sup> Article 69 of the Treaty on the Functioning of the European Union, consolidated version 2008. Article 2 point 64 of the Lisbon Treaty (that introduces an article 61B in the TFEU).

<sup>65</sup> Article 70 of the Treaty on the Functioning of the European Union, consolidated version 2008. Article 2 point 64 of the Lisbon Treaty (that introduces an article 61C in the TFEU).

<sup>66</sup> Article 71 of the Treaty on the Functioning of the European Union, consolidated version 2008. Article 2 point 64 of the Lisbon Treaty (that introduces an article 61D in the TFEU).

<sup>67</sup> "If a national Parliament makes known its opposition within six months of the date of such notification, the decision shall not be adopted. In the absence of opposition, the Council may adopt the decision" Article 81.3 of the Treaty on the Functioning of the European Union, consolidated version 2008. Article 2 point 66 of the Lisbon Treaty.

<sup>68</sup> The procedure according to which national Parliaments and European Parliaments will participate in the evaluation of Eurojust and Europol's activities will be established in the regulations that European Parliament and Council shall adopt to determine Eurojust's structure, operation, field of action and tasks. Articles 85 and 88 of the Treaty on the Functioning of the European Union (consolidated version 2008). Article 2 points 67 and 68 of the Lisbon Treaty.

Commission shall draw their attention to the proposals based on article 352 of the TFEU.<sup>69</sup>

National Parliaments only obtain a veto right in the case of “bridging clauses” that is, if they object to the adoption by the European Council of a decision that allows the Council to apply qualified majority voting or the ordinary legislative procedure in a field for which unanimity or a special legislative procedure is provided in the Treaty. If only a national Parliament object, the decision shall not be adopted. In the other cases, they are only “notified,”<sup>70</sup> even using the expression “draw the attention” in one case.<sup>71</sup>

### (C) The Protocol on the Role of National Parliaments in the European Union

In accordance with the mandate given by the European Council to the IGC, the new Protocols agreed in 2004 would be “annexed to the existing Treaties.”<sup>72</sup> Regarding this, the Protocol on the role of national Parliaments in the European Union has been annexed to the Lisbon Treaty, adding the appropriate amendments.<sup>73</sup>

The Protocol is divided in two titles: the first one, relating to the “Information for national Parliaments;”<sup>74</sup> the second one, to the “Interparliamentary cooperation.”<sup>75</sup>

Regarding the information that must be submitted to national Parliaments, the Protocol adds two new cases to the existing ones. As in the current Protocol, the Commission consultation documents and the draft legislative acts must be submitted to them. To this information, the new Protocol adds “the annual legislative programme as well as any other instrument of legislative planning or policy,”<sup>76</sup> “the agendas for and the outcome of meetings of the Council,

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<sup>69</sup> This article establishes that “If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament”. Article 352 of the Treaty on the Functioning of the European Union, consolidated version (ex article 308 TEC) Article 2 point 289 of the Treaty of Lisbon.

<sup>70</sup> See articles 48 and 49 EU Treaty (consolidated version 2008), for example.

<sup>71</sup> Is the case of article 352 TFEU (consolidated version 2008)

<sup>72</sup> See Presidency Conclusions. Brussels European Council 21/22 June 2007 (11177/1/07 REV 1), Point IV.21, Annex I: 23.

<sup>73</sup> For example, removing the Word “European”, where reference is made to draft legislative acts or the word “Constitution”, remaining the other provisions unchanged.

<sup>74</sup> Articles 1 to 8 of the Protocol (No 1) on the role of national Parliaments in the European Union.

<sup>75</sup> *Ibid*, articles 9 and 10.

<sup>76</sup> Article 1 of the Protocol.

including the minutes of meetings where the Council is deliberating on draft legislative acts,”<sup>77</sup> and the annual report of the Court of Auditors.<sup>78</sup> They shall also be informed when the European Council intends to adopt a decision to allow the Council to apply qualified majority voting in a field where unanimity is required, or the ordinary legislative procedure in a field for which a special legislative procedure is provided in the Treaty.<sup>79</sup>

The objective is to improve the information that national Parliaments receive so they can exercise much more effective control over their government’s activity at the community level. To achieve it, a deadline is established to enable them to examine the information and give their opinion to their respective governments.

The Protocol also provides that the institutions are the ones who must submit the information to the national Parliaments,<sup>80</sup> and not the governments like in the current Protocol, a situation which causes delays in the transfer of the information which subsequently prevent national Parliaments from studying it on time.<sup>81</sup>

The Commission shall forward to national Parliaments the annual legislative programme, any other instrument of legislative planning or policy, and the draft legislative acts originating from it at the same time as to the EP and the Council. The Commission consultation documents “shall be forwarded directly by the Commission to national Parliaments upon publication.”<sup>82</sup>

For the examination of the information by the national Parliaments, the Protocol establishes an eight-week period<sup>83</sup> that shall elapse between a draft

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<sup>77</sup> Article 5 of the Protocol.

<sup>78</sup> Article 7 of the Protocol.

<sup>79</sup> “national Parliaments shall be informed of the initiative of the European Council at least six months before any decision is adopted” Article 6 of the Protocol.

<sup>80</sup> Commission, European Parliament, Council, European Council and the Court of Auditors, depending on who is the author of the initiative. For example, if the draft legislative act originates from the European Parliament, it shall forward it directly to national Parliaments. Articles 2 and 3 of the Protocol.

<sup>81</sup> They depend on the diligence of their respective governments to receive the information with enough time for studying it and give their opinion, as the current Protocol only establishes that the information “shall be made available in good time so that the government of each Member State may ensure that its own national parliament receives them as appropriate” See Point I.2 of the Protocol (No 9) on the role of national Parliaments in the European Union (1997)

<sup>82</sup> Articles 1 and 2 of the Protocol.

<sup>83</sup> The current Protocol and the Protocol annexed to the European “Constitution” envisages a six-week period. See Point I.3 of the Protocol (No 9) on the role of national Parliaments in the European Union (1997) and article 4 of the same Protocol annexed to the Treaty establishing a Constitution for Europe. When the European Council intends to adopt a decision to allow the Council to apply qualified majority voting in a field where unanimity is required, or the ordinary legislative procedure in a field for which a special legislative procedure is provided in the Treaty, national Parliaments must be informed six months before any decision is adopted. The deadline to submit the information, in this case, rises. Article 6 of the Protocol.

legislative act made available to national Parliaments<sup>84</sup> and the date when it is placed on a provisional agenda of the Council for its adoption or for adoption of a position under a legislative procedure. Exceptions are envisaged in cases of urgency, but the Council shall state in its act or position the reasons for them. During the mentioned period, no agreement may be reached on a draft legislative act.<sup>85</sup> Between the placing of a draft legislative act on the provisional agenda for the Council and the adoption of a position a ten-day period shall elapse.<sup>86</sup> That means that, at least, ten days must pass as the current Council's Rules of Procedure raises it to 14 days, as the provisional agenda of its meetings must be sent to the members "at least 14 days before the meeting."<sup>87</sup>

However, as it happens in the Protocol currently in force, it is not envisaged what would happen if that period is not observed. Disrespect of the period will probably not be sanctioned, due to the fact that the national Parliaments cannot bring an annulment action before the ECJ as they do not have *locus standi* before it. Although the Council can neither debate the Commission's proposal nor include it in the provisional agenda during that period, this one can be discussed at COREPER's level, which can reach an agreement and include it in the A items of the agenda, items that can be approved by the Council without discussion. In doing so, they would be violating the deadline given to national Parliaments, which would not be able to take any legal action as the Protocol has not established the means (Smismans 1998, 72).

Through these mechanisms the Protocol seeks to permit national Parliaments the necessary time to examine the draft legislative acts and take a position on the issue. Nevertheless, each national Parliament will have to adopt the necessary procedures to process the information. What is guaranteed is that they received the information. After that, the parliamentary practice in each member state and the way in which they use that information will be the ones to determine if an effective control is achieved and if an influence in the European construction can be exercised (Martínez Sierra 1998-1999, 272).<sup>88</sup>

National Parliaments can also send to the Presidents of the EP, the Council and the Commission a reasoned opinion "on whether a draft legislative act complies with the principle of subsidiarity, in accordance with the procedure laid down in the Protocol on the application of the principles of subsidiarity and proportionality."<sup>89</sup> This provision constitutes a novelty as, up to now, national

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<sup>84</sup> In the official languages of the Union. Article 4 of the Protocol.

<sup>85</sup> "Save in urgent cases for which due reasons have been given" Ibid.

<sup>86</sup> Again, "save in urgent cases for which due reasons have been given" Ibid

<sup>87</sup> See article 3 of the Council's Rules of Procedure. Council Decision of 15 September 2006 adopting the Council's Rules of Procedure (2006/683/EC, Euratom) OJEU L 285, 16 October 2006.

<sup>88</sup> Some member states have adopted ambitious mechanisms of control, like Denmark or England.

<sup>89</sup> Article 3 of the Protocol.

Parliaments only were able to give their opinion through the COSAC<sup>90</sup> but in a non-binding way for the community institutions.<sup>91</sup>

As for the inter-parliamentary cooperation, it is addressed in the second part of the Protocol. Firstly, it establishes that the EP and national Parliaments “shall together determine the organization and promotion of effective and regular inter-parliamentary cooperation within the Union.”<sup>92</sup> With regard to the COSAC, the Protocol establishes that it “may submit any contribution it deems appropriate for the attention of the European Parliament, the Council and the Commission [...] promote the exchange of information and best practice between national Parliaments and the European Parliament, including their special committees [...] organize interparliamentary conferences on specific topics, in particular to debate matters of common foreign and security policy, including common security and defence policy.”<sup>93</sup> It scarcely introduces any novelty to what is already established in Amsterdam.<sup>94</sup> Besides, it stresses again that “contributions from the conference shall not bind national Parliaments and shall not prejudge their positions.”<sup>95</sup>

#### (D) The Protocol on the application of the Principles of subsidiarity and Proportionality

As the Protocol on the role of national Parliaments, the Protocol on the application of the principles of subsidiarity and proportionality has been annexed to the existing Treaties and the novelties agreed upon in the 2004 IGC, specifically introduced the new mechanism of early warning system that permits a direct participation of the national Parliaments in the community affairs (Delgado-Iribarren 2004, 780) and, with regard to which, two novelties have been introduced.

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<sup>90</sup> Although the Treaty of Amsterdam envisaged the possibility for the COSAC to submit contributions, the Conference did not use it until the meeting held in The Hague in November 2004. The COSAC agreed to conduct a “pilot project” which would allow national parliaments to test how their subsidiarity early warning mechanisms might work in practice, by examining a specific piece of draft EU legislation. It was agreed that the Commission’s 3rd Railway Package would be the subject for this pilot project. The results of this experience were analyzed in its meeting held at Luxembourg in May 2005. This first experience an agreement was reached that national parliaments would scrutinise EU legislation for subsidiarity and proportionality using the provisions of the Amsterdam Treaty. See the XXXII, XXXIII, XXXIV and XXXV meetings of the COSAC.

<sup>91</sup> See Point II.6 of the Protocol (No 9) on the role of national Parliaments on the European Union (1997)

<sup>92</sup> Article 8 of the Protocol.

<sup>93</sup> Article 10 of the Protocol.

<sup>94</sup> The provision established in the Protocol annexed to the Treaty of Amsterdam regarding which the Conference will make its contributions “in particular on the basis of draft legal texts which representatives of governments of the Member States may decide by common accord to forward to it, in view of the nature of their subject matter” disappears in the new Protocol. See Point II.4 of the Protocol (No 9) on the role of national Parliaments on the European Union (1997).

<sup>95</sup> Article 10 of the Protocol.

In general, the mechanism implies an improvement with regard to the participation of national Parliaments because, with the regulation in force, as already pointed out in the previous section, they can only give an opinion about the compliance of the subsidiarity principle through the COSAC.<sup>96</sup>

Through this mechanism, the Treaty expressly confers to national Parliaments the control of the compliance of every draft legislative act with the principle of subsidiarity. Every draft legislative act “shall be justified with regard to the principles of subsidiarity and proportionality”<sup>97</sup> and they should contain a detailed statement to permit national Parliaments to appraise the compliance with the mentioned principles.<sup>98</sup>

National Parliaments, once they receive the draft legislative act, have an eight-week period to analyze if it complies or not with the principle of subsidiarity. If a national Parliament considers that it does not comply, it can “send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion.”<sup>99</sup>

The mechanism activates if a number of reasoned opinions is received. Each reasoned opinion is allocated one or two votes: two if it comes from a unicameral Parliament and one if it comes from one of the Chambers of a bicameral Parliament.<sup>100</sup> If the reasoned opinions on a draft legislative act’s non-compliance with the principle of subsidiarity represent at least one third of all the votes allocated to the national Parliaments, the draft has to be reviewed. But, after that re-examination, the Commission<sup>101</sup> can decide to maintain, amend or withdraw it.<sup>102</sup>

In the case of a proposal for a legislative act, it must be also reviewed, under the ordinary legislative procedure, when the reasoned opinions on the non-compliance of the proposal with the principle of subsidiarity represent at least a simple majority of the votes allocated to the national Parliaments. Again, after the revision, the Commission can decide to “maintain, amend or withdraw the

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<sup>96</sup> And in a non-binding way. See Point II.6 of the Protocol (No 9) on the role of national Parliaments on the European Union (1997)

<sup>97</sup> Article 5 of the Protocol (No 2) on the application of the principles of subsidiarity and proportionality.

<sup>98</sup> *Ibid.*

<sup>99</sup> “stating why it considers that the draft in question does not comply with the principle of subsidiarity” Article 6 of the Protocol.

<sup>100</sup> “Each national Parliament shall have two votes, shared out on the basis of the national Parliamentary system. In the case of a bicameral Parliamentary system, each of the two chambers shall have one vote”. Article 7.1 of the Protocol. Obviously, in the case of bicameral Parliaments, the Chambers can deliver a joint reasoned opinion, in which case it will be assigned also two votes.

<sup>101</sup> “or, where appropriate, the group of Member States, the European Parliament, the Court of Justice, the European Central Bank or the European Investment Bank, if the draft legislative act originates from them” Article 7.2 of the Protocol.

<sup>102</sup> “This threshold shall be a quarter in the case of a draft legislative act submitted on the basis of Article 76 of the Treaty on the Functioning of the European Union on the area of freedom, security and justice” *Ibid.*

proposal.”<sup>103</sup> If the Commission chooses to maintain the proposal, it will have to (in a reasoned opinion) justify why it considers that it complies with the principle of subsidiarity. This reasoned opinion, as well as the reasoned opinions of the national Parliaments, will have to be transmitted to the EU legislator (Council and EP), for consideration in the legislative procedure.<sup>104</sup> Here, a “reinforced control mechanism of subsidiarity” begins.<sup>105</sup>

Before the first reading concludes the legislator (Council and Parliament) shall consider the compatibility of the legislative proposal with the principle of subsidiarity;

If, by a majority of 55 % of the members of the Council or a majority of the votes cast in the EP, the legislator is of the opinion that the proposal is not compatible with the mentioned principle, the legislative proposal shall be dismissed.

With this new “reinforced control mechanism of subsidiarity” a proposal can indeed be dismissed, unlike the mechanism established for the draft legislative acts in which, although the reasoned opinions required are received, the draft act can be maintained.<sup>106</sup>

The Protocol also establishes that “the Commission shall forward its draft legislative acts and its amended drafts.”<sup>107</sup> It is a previous control mechanism over the draft legislative acts that, obviously, can be modified afterwards during the legislative process. This limits the control by the national Parliaments, as they give their opinion in an early stage and not on the final text. However, in that case the national Parliament (or one of its Chambers) can demand its government to bring an annulment action before the Court of Justice (Laso 2005, 312-313).<sup>108</sup>

The second pillar, regarding the Common Foreign and Security Policy (CFSP), remains outside this mechanism (Delgado-Iribarren 2004, 784).

#### (E) Mechanisms of Direct Participation

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<sup>103</sup> Article 7.3 of the Protocol.

<sup>104</sup> Ibid.

<sup>105</sup> Ibid. The European Council, in the conclusions of its meeting of June 2007 talks about a “reinforced control mechanism of subsidiarity”. See Presidency Conclusions. Brussels European Council 21/22 June 2007 (11177/1/07 REV 1). Point II.11 of Annex I: 17.

<sup>106</sup> See Article 7.2 of the Protocol.

<sup>107</sup> Article 4.1 of the Protocol.

<sup>108</sup> See article 8 of the Protocol: “The Court of Justice of the European Union shall have jurisdiction in actions on grounds of infringement of the principle of subsidiarity by a legislative act, brought in accordance with the rules laid down in Article 263 of the Treaty on the Functioning of the European Union by Member States, or notified by them in accordance with their legal order on behalf of their national Parliament or a chamber thereof”. This provision was established by the 2004 IGC but, in neither of both cases, the Protocol establishes that the Government had an obligation to bring the action before the Court. Besides, although the government did it, practical problems would arise regarding the way in which the national Parliament could take part in the proceedings of the Court. The government would be the one in charge of defending the position of its national Parliament and informing it.

Again, the Lisbon Treaty has introduced all the novelties regarding national Parliament's direct participation agreed in the Treaty establishing a Constitution for Europe.<sup>109</sup> Scarcely one novelty is introduced. In both Treaties, the direct participation of national Parliaments is expressly recognized: in the control of the compliance of the principle of subsidiarity (through the early warning system) or in the revision procedures of the Treaties, for example.

Regarding the control of the principle of subsidiarity, as we have already mentioned, the Lisbon Treaty confers it expressly to national Parliaments in its article 12: "National Parliaments contribute actively to the good functioning of the Union: [...] (b) by seeing to it that the principle of subsidiarity is respected in accordance with the procedures provided for in the Protocol on the application of the principles of subsidiarity and proportionality."<sup>110</sup>

This principle intends to ensure that decisions are taken as closely as possible to the citizen and to constantly check whether the action at community level is justified in the light of the possibilities available at the national, regional or local level. It is the principle whereby the Union does not take action (except in the areas which fall within its exclusive competence) unless it is more effective than an action taken at national, regional or local level. It is closely bound up with the principles of proportionality and necessity, which require that any action by the Union should not go beyond what is necessary to achieve the objectives of the Treaty.<sup>111</sup>

Through the new mechanism of "early warning system" national Parliaments will be able to directly control the observation of the principle of subsidiarity. They will also have a "reinforced control mechanism of subsidiarity", under the ordinary legislative procedure, that can cause that the Commission's proposal is dismissed.<sup>112</sup>

As for their direct participation in the revision procedures of the Treaties, every proposal for the amendment of the Treaties shall be sent to them and, if the proposal is accepted, the European Council shall convene a Convention in which they will also participate.<sup>113</sup> But the European Council can decide "by a simple majority, after obtaining the consent of the EP, not to convene a Convention

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<sup>109</sup> As the mandate of the European Council stated: "the innovations resulting from the 2004 IGC will be integrated into the TEU and the Treaty on the Functioning of the Union, as specified in this mandate" See Presidency Conclusions. Brussels European Council 21/22 June 2007 (11177/1/07 REV 1). Point I.4 of Annex I: 16.

<sup>110</sup> Article 1 Point 12 of the Lisbon Treaty (that introduces an article 8C in the EU Treaty).

<sup>111</sup> See European Union's web site. Glossary:  
[http://europa.eu/scadplus/glossary/subsidiarity\\_en.htm](http://europa.eu/scadplus/glossary/subsidiarity_en.htm)

<sup>112</sup> See article 7.3 of the Protocol (No 2) on the application of the principles of subsidiarity and proportionality.

<sup>113</sup> Article 48.2 and 3 EU Treaty, consolidated version 2008. Article 1 point 56 of the Lisbon Treaty. They will be able to participate, consequently, in the ordinary revision procedure of the Treaties.

should this not be justified by the extent of the proposed amendments.”<sup>114</sup> Consequently, the decision about whether an amendment is important or not remains in the hands of the European Council.<sup>115</sup>

Finally, the Treaty also envisages their participation in the simplified revision procedures, amending all or part of the provisions of Part Three of the Treaty on the Functioning of the EU. This provision permits the European Council to adopt a decision to allow the Council to apply qualified majority voting or the ordinary legislative procedure in a field for which unanimity or a special legislative procedure is provided in the Treaty.<sup>116</sup> In these cases, the initiative shall be sent to the national Parliaments who can, within a six-month period, object to it, in which case the decision shall not be adopted.<sup>117</sup>

### Conclusions

The integration process and the transfer of competences that it has entailed, has affected the institutional position that the Constitutions ascribes to their national Parliaments, which have seen themselves reduced to a secondary role and limited its room to manoeuvre.

This is not the only problem which has arisen during the integration process. The mentioned transfer of competences has been done principally to the benefit of the Council and not of the EP. Besides, the EP cannot control the decisions adopted by the Council, as its control power is limited to the Commission, and the national Parliaments cannot make up for that lack of control.

This progressive transfer of competences to the community level and the extension of the integration process to areas that belonged, traditionally, to the realm of national sovereignty, have put in the foreground the debate about the democratic deficit of the Union,<sup>118</sup> although we should speak instead of a constitutional deficit (Balaguer 1997).

The Union neither escapes the criticism about its lack of legitimacy, due to the loss of competences of the national Parliaments, the lack of transparency in the decision-making procedure or the weak role of the EP, among others.

To confront these critics, at least partially, the participation of national Parliaments in the EU has been encouraged. For several decades, the debate about what must be their role is quite lively, pointing out the importance of their par-

<sup>114</sup> Article 48.3 EU Treaty, second paragraph.

<sup>115</sup> In this case, the European Council “shall define the terms of reference for a conference of representatives of the governments of the Member States”. Ibid.

<sup>116</sup> Article 48.6 and 7 of the EU Treaty, consolidated version 2008.

<sup>117</sup> Article 48.7 EU Treaty, consolidated version 2008. Article 1 point 56 of the Lisbon Treaty. It is a simplified revision procedure of the Treaties, also called “bridging clause”, that allows to change the way in which certain provisions are applied without needing to amend the Treaties and, consequently, having to convene a Convention and an IGC.

<sup>118</sup> References to the democratic deficit in Norton 1996; Sánchez 1997; Neunreither 1994; Rideau 1996; Gustavsson 1996; Frank 2003.

ticipation and the cooperation with the EP. All in order to achieve more democratic legitimacy to bring the Union closer to the citizens and to make it's functioning more transparent.

However, other necessary changes for the European system to have the same democratic guarantees that the national one's, have not been tackled. In the first place, the EP should be the centre of the institutional system and be able to control the decisions adopted by the community institutions.<sup>119</sup> Besides, an authentic European Constitution is needed, a Constitution that stems from the sovereignty of a European constituent power.

Regarding the role of national Parliaments in the European issues, different solutions have been adopted to enhance their participation and alleviate, at least partially, the loss of competences that they have suffered. The solutions can be classified into two groups: on the one hand, solutions at the European level aiming to strengthen the powers of the EP or the collective participation of national Parliaments at the European level. On the other hand, solutions at the national level, focused on the constitutional provisions of each Member State regarding the rules for the relations between government and Parliament. (Matía 1999, 55-56)

In this paper we have analyzed the "European" solutions and the evolution in the recognition of the role of national Parliaments in the EU: from the mere symbolic one, in Declarations 13 and 14 annexed to Maastricht Treaty, to the express provisions of the Lisbon Treaty.

At the European level, they have tried to strengthen their participation mainly through mechanism of information so they can receive this information on time and exercise effective control over the European activity of their governments. Mechanisms of cooperation have also been established, as the creation of a Conference of Parliaments or Assises<sup>120</sup> or the COSAC.<sup>121</sup>

The "Constitutional Treaty" envisaged some novelties, like the early warning system or the provisions for national Parliament's participation in the revisions procedures of the Treaties. All the provisions agreed upon in the 2004 IGC have been incorporated into the Lisbon Treaty, with some new novelty like the "reinforced control mechanism of subsidiarity" set out in the Protocol on the application of the principles of subsidiarity and proportionality.

Maybe one of the biggest novelties with regard to the current Treaties is the introduction of express provisions regarding the national Parliaments in the same body of the Treaty and not only in the annexed Protocols, like the new general article reflecting their role in the EU; the express conferment to them of the compliance of the principle of subsidiarity; or their participation in the revisions procedures of the Treaties.

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<sup>119</sup> And not trying to reside it in the national Parliaments.

<sup>120</sup> See Declaration 14 annexed to the Maastricht Treaty.

<sup>121</sup> Mechanism strengthened in Amsterdam, being abandoned definitely the Conference of Parliaments or Assises.

However, these new provisions do not allow it to overcome the critics mentioned before, as once more the option has been to leave the control of the community decisions in the national Parliaments and not confer it to the EP, which is the one that should do it.

In short, these provisions established at the European level will have more or less efficacy depending on the organization and constitutional practices of each member state. Each one has adopted its own practices to control the decisions adopted by its governments at the European level: some have adopted ambitious mechanisms, like Denmark or England; others have made mere formal changes; and all have created parliamentary commissions for the monitoring of the European issues.<sup>122</sup> (Alvarez 2003, 160-161) But models like the Danish or the British could not be extrapolated to other member states and it could neither be possible to establish the same model for everybody, as each member state has its own constitutional traditions and parliamentary practices. In the case of Denmark and England their models have much to see with their historic traditions and their political circumstances. Only the own Parliaments can establish control mechanisms and, up to now, comparable mechanisms to the existing ones have not been produced.

Every national Parliament will have to control the community activity of its government. But a greater control by them is not going to solve the problem of the constitutional deficit of the EU or to grant it more democratic legitimacy. At least, it will only contribute to the democratic functioning of the Union.

The constitutional deficit of the Union can only be resolved at the European level. It is necessary to reform the institutional framework of the Union so that its institutions and its legal system offer the same guarantees as their national homonyms. For that, we should have a EP that was the hard core of the institutional system and a European political system stem from the sovereignty of a European constituent power.

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<sup>122</sup> Usually, three models are distinguished depending on the measures that each Parliament establishes for the control of the European activity of the government: the Danish Folketing, the German-British model and the other Member States.

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## Ten Years with the Euro

María Lorca-Susino

### Introduction

After World War II, Europe was devastated and the economies of Germany, France, Great Britain, and the Soviet Union were destroyed. By the end of 1945, Europe was in a state of social and political collapse and, consequently, had disappeared as an economic power. As the economic situation worsened in 1946 and 1947, the United States (U.S.), under President Truman advised by U.S. Secretary of State George Marshall, put together the Marshall Plan that consisted of \$400 million in economic aid.<sup>1</sup> The U.S. Congress passed the Marshall Plan legislation, officially known as the Economic Cooperation Act, on March 30, 1948. The Marshall Plan required the cooperation of countries receiving economic aid, eventually leading to the need for greater integration. In fact, in April 1948, countries receiving economic aid, as designated by the Marshall Plan, created the Organization for European Economic Cooperation (OEEC), which would become the seed of the future European Union (EU).

The creation of the European Economic Community (EEC) in 1957 meant that European countries had to compete in the same market by exporting similar products to gain surplus at one another's expense. However, soon after the Common Market was created, not only was Germany's gross domestic product the biggest in Europe but also Germany was considered the "European Community's biggest market and most countries' largest European Trading partner." (Mitchener 1993, 1)

However, when European countries could not resist the German pressure, it became common practice to opt for a competitive devaluation. Competitive devaluations in France and Italy were the ammunition that really hurt the German manufacturing industry. A competitive devaluation in these two countries meant that German goods and products would become more expensive overnight in France and Italy; hence, German goods and services would suffer from a substitution effect. The loss of market share in France and Italy would do away with a large percentage of Germany's profits, "since France and Italy together absorbed more than 25% of total German exports." (Halevi 2005, 13) For instance, between September 1991 and March 1995, the Italian government devalued the Italian lira

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<sup>1</sup> Or \$4.4 billion in 2008 prices.

by more than 60% against the German mark in order to gain competitiveness. (Mitchener 1992)

This practice was such in the 1990's that countries with strong currencies asked the EU to "punish governments whose currencies [were] devalued." (Friedman 1995, 1) Some countries even considered employing "retaliatory measures against those governments that had made use of competitive devaluations." (Friedman 1995, 1) Hence, in order to end currency fluctuations and competitive devaluations, the European Monetary System (EMS) came into effect on March 13, 1979. The EMS had the blessing of the Federal Republic of Germany (FRG) which wanted to ensure its export grounds and surpluses by putting European currencies under the leash of the Exchange Rate Mechanism (ERM). The EMS became a successful mechanism and was operative until December 31, 1998 when member states fixed their currencies to the euro.

### **The Road to the Euro**

Germany's H. Schmidt and France's V. Giscard D'Estaing engineered the European Monetary System (EMS) to ensure currency stability. David Marsh (1994) explains that the European Monetary System (EMS), introduced on March 13, 1979, became the ultimate plan designed to obtain monetary cooperation among members of the EU in order to finally provide the currency stability necessary for the introduction of a common currency. Because European countries trade more with each other than with the rest of the world, it made sense for them to get rid of currency fluctuations and transaction costs in order to allow trade to flourish even more.

The EMS was designed around two key elements: the European Currency Unit (ECU) and the European Rate Mechanism (ERM). The ECU refers to a composed currency (or currency basket) formed by pre-determined percentages of each one of the participating currencies. This percentage is based on the contribution of each country to the gross national product of the Community. Table 1 shows how the German mark was the largest element of the basket due to its repeatedly proven stability.

The exchange rate mechanism was considered the most important pillar of the EMS. For each of the participating currencies, the EMS established a central type of exchange rate to the ECU, or central pivot, and some exchange rates for each currency with respect to the remainder (lateral pivots). The aim of this basket was to prevent currencies movements<sup>2</sup> around parity in bilateral exchange rates with other member countries

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<sup>2</sup> Currency oscillation of + and - 6% for Italy and of + or - 2.25% for the rest of the currencies participating in the EMS.

Table 1  
 ECU: Value and Percentage Weight of European Currencies during the  
 Different stages of the ERM

	13 March 1979 through 16 Sept. 1984		17 Sept. 1984 through 21 Sept. 1989		21 Sep 1989 through 31 Dec 1999	
	Value	Weight (%)	Value	Weight (%)	Value	Weight (%)
Belgian francs	3.8	9.64	3.85	8.57	3.301	8.183
German marks	0.828	32.98	0.719	32.08	0.6242	31.915
Danish kroner	0.217	3.06	0.219	2.69	0.1976	2.653
Spanish peseta					6.885	4.138
French francs	1.15	19.83	1.31	19.06	1.332	20.306
British pounds	0.0885	13.34	0.0878	14.98	0.08784	12.452
Greek drachmas			1.15	1.31	1.44	0.437
Irish punts	0.00759	1.15	0.00871	1.2	0.00855	1.086
Italian lira	109	9.49	140	9.98	151.8	7.84
Lux. francs	*	*	*	*	0.13	0.322
Dutch gilder	0.086	10.51	0.256	10.13	0.2198	9.87
Portuguese escudo					1.393	0.695

In April 1989, Jacques Delors outlined what became known as the Delors Report to introduce the EMU. The goal of the EMU was to help countries adopt the common currency, the euro. Granell (1989) explains that the final approval for Delors Report and the introduction of the euro took place at the informal ECOFIN meeting on May 19-20, 1989, at the Hotel La Gavina in S'Agaro on the Costa Brava (Spain). This ECOFIN meeting took place in Spain because from January to June 1989 Spain held the Presidency of the European Council. Consequently, the Delors Report was adopted as the roadmap to work on the creation of the EMU during the Madrid European Council that took place in June 1989.

The Delors Report was a thorough three-stage plan. Stage one of the Delors Report, also known as the preparatory phase, stated that the member states of the EU needed, from July 1990 to December 1993, to implement the first of the "four freedoms": the liberalization of capital movements. The 1992 Maastricht Treaty, which entered into force in November 1993, thoroughly spelled out specific targets concerning inflation rates, public finances, interest rates, and exchange rate stability. These requirements, which became to be known as the

Convergence criteria or Maastricht criteria,<sup>3</sup> established the economic requirements that had to be observed by those EU countries willing to adopt the euro. Table 2 summarizes these requirements.

Table 2  
Summary of the Maastricht Treaty Criteria

Target	Requirement
Inflation rate	No more than 1.5 percentage points higher than the 3 best-performing Member States of the EU.
Public finances	The ratio of the annual government deficit to gross domestic product must not exceed 3% at the end of the preceding fiscal year.
Interest rates	The nominal long-term interest rate must not be more than 2 percentage points higher than the 3 best-performing Member States.
Exchange rate stability	Applicant countries should have joined the exchange rate mechanism under the European Monetary System for 2 consecutive years and should not have devaluated its currency during the period.

Stage two of the Delors Report, also known as the transitional phase, covered the period from January 1994 to December 1998. During this phase, a new Exchange Rate Mechanism (ERM II) was set up in order to provide currency stability between the euro and the national currencies of those countries that were not yet part of the Eurozone. When the first eleven countries adopted the euro, the EMR was substituted by the ERM II. On March 16, 2006, the national central banks of member states outside the euro, but aspiring to adopt the common currency, agreed on operating procedures for an exchange rate mechanism in stage three of Economic Monetary Union (EMU).<sup>4</sup> The main purpose of the ERM II is to make sure that EU member states that want to adopt the euro succeed in implementing the adequate policies to maintain stable exchange rates between the euro and the participating national currencies. Table 3 indicates the

<sup>3</sup> The part of the Maastricht Treaty related to the EMU can be divided into two parts. One part addresses the provisions related to the transition to monetary union; that is, the convergence criteria. The second part relates to the macroeconomic policy of the completed union.

<sup>4</sup> Europa, "Exchange rate mechanism (ERM II) between the euro and participating national currencies," Institutional and Economic Framework of the Euro. <http://europa.eu/scadplus/leg/en/lvb/125082.htm> (accessed December 2, 2008).

exchange rates that some member states must maintain in order to comply with exchange rate stability.

Table 3  
National Exchange Rate to Euro and Fluctuation Bands

Member State (national currency)	Central rate (EUR 1)	Fluctuation band
Denmark (krone)	7.46038	+/- 2.25%
Estonia (kroon)	15.6466	+/- 15%
Lithuania (litas)	3.45280	+/- 15%
Latvia (lats)	0.702804	+/- 15%

Additionally, the report specified that by June 1, 1998, the ECB would become the ultimate monetary authority, and the European Council decided at the Amsterdam meeting to adopt the Stability and Growth Pact (SGP) to ensure budgetary and fiscal discipline after the creation of the euro. On December 31, 1998, the conversion rates between the eleven participating national currencies<sup>5</sup> and the euro were established. These conversion rates were put in place on January 1, 1999, with the irrevocable fixing of the exchange rates of those eleven national currencies participating in the Eurozone.

Enforcing of conversion rates on January 1, 1999, triggered the start of the final stage of the Delors Report. On that date, the euro currency became a reality, and a single monetary policy was introduced under the authority of the ECB. Although the conversion rates for the euro were put in place on January 1, 1999, actual euro notes and coins were not in circulation until January 2002; this delay was intentional to provide a transition period for those eleven countries adopting the euro. Hence, those eleven national currencies legally ceased to exist on December 31, 1998 and on January 1, 1999, the Eurozone was born.

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<sup>5</sup> Belgium, Germany, Spain, France, Ireland, Italy, Luxembourg, the Netherlands, Austria, Portugal, and Finland.

Table 4  
List of EU countries, National Currencies, and euro Actual and Expected Adoption Date

Country (Native Currency)	EMU Entry Date Actual	EMU Entry Date - Expected
Austria (Austrian schilling)	January 1, 1999	
Belgium (Belgian franc)	January 1, 1999	
The Netherlands (Dutch gilder)	January 1, 1999	
Finland (Finnish markka)	January 1, 1999	
France (French franc)	January 1, 1999	
Germany (German mark)	January 1, 1999	
Ireland (Irish pound)	January 1, 1999	
Italy (Italian lira)	January 1, 1999	
Luxembourg (Lux. franc)	January 1, 1999	
Portugal (Portuguese escudo)	January 1, 1999	
Spain (Spanish peseta)	January 1, 1999	
Greece (Greek drachma)	January 1, 2001	
Denmark (Danish krone)		Never joined
Sweden (Swedish krone)		Never joined
United Kingdom (Sterling pound)		Never joined
<hr/>		
2004 EU Enlargement		
Cyprus (Cypriot pound)	January 1, 2008	
Czech Repub. (C. korine)		2013
Estonia (Estonia kroon)		2011
Hungary (Hungaran forint)		2012
Latvia (Latvia lats)		2013
Lithuania (Lithuania lites)		2010
Maltan (Maltese lira)	January 1, 2008	
Poland (Polish zloty)		2012
Slovenia (Slovenian tolar)	January 1, 2007	
Slovakia (Slovak korune)	January 1, 2009	
<hr/>		
2006 EU enlargement		
Bulgaria (Bulgaria lev)		2012
Romania (Romania leu)		2014

Greece, which that was not able to meet the convergence criteria to join in 1999, finally qualified in 2000 and was admitted to the Eurozone on January 1, 2001.

Denmark<sup>6</sup>, Sweden<sup>7</sup>, and the United Kingdom<sup>8</sup> did not adopt the euro; these three countries are part of the EMU but still not part of the Eurozone. Of the ten new countries that joined the EU in 2004, Slovenia qualified in 2006 to adopt the euro on January 1, 2007, and Cyprus and Malta adopted the euro on January 1, 2008. Finally, Slovakia joined on January 1, 2009. Therefore, as of January 1, 2009 the Eurozone has sixteen Member States.

### **The Introduction of the Euro: Treaties that Shaped the Common Currency**

The introduction of the euro as common currency in sixteen Member States is the result of arduous negotiations and numerous compromises among governments and citizens of twenty-seven countries comprising the European Union.

The EU has been shaped by a number of treaties all of which have influenced the introduction of the common currency. The most significant Treaties are the Single European Act, the Maastricht Treaty, and the Lisbon Treaty once it gets ratified by all Member States.

#### *The Single European Act (SEA) and the Euro*

The Single European Act (SEA)<sup>9</sup> is the first major revision of the Treaty of Rome. It was signed in February 1986 and entered into force on July 1, 1987 with the main objective to introduce the steps necessary to help gradually reach a full single market in the EU by 1992. This single market has erased national borders, bringing national economies closer together, and forcing governments into economic integration. Scheller (2006, 20) believed that, in order for the single market to achieve its full potential, it needed a common currency to “ensure greater price transparency for consumers and investors, eliminate exchange rate risks within the single market, reduce transaction costs and, as a result, significantly increase economic welfare in the Community.”

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<sup>6</sup> Denmark has an “opt-out” clause from the Maastricht Treaty. The country held two referendums and both rejected the adoption of the euro, the latest public referendum took place in 2000.

<sup>7</sup> Sweden has to join the euro by the 1994 Act of Accession agreement. Although Sweden was not at the beginning, meeting the economic conditions to join the Eurozone, in 2003 the country was meeting the requirements; however, a public referendum rejected euro membership.

<sup>8</sup> The U.K. has an opt-out from eurozone membership under the Maastricht treaty. The U.K. meets the economic conditions to join the Eurozone; however, the Government has not yet put the question to public referendum.

<sup>9</sup> Euro-Lex, “Single European Act,” *Official Journal L 169 of 29 June 1987*. <http://eur-lex.europa.eu/en/treaties/index.htm> (accessed December 12, 2008).

Treaty	Contribution
<p><b>The Single European Act (SEA)</b></p> <ul style="list-style-type: none"> <li>• Signed on: February 17 in Luxembourg and on February 28, 1986 in the Hague</li> <li>• Entered into force on: July 1, 1987</li> </ul>	<p><b>Objective:</b> to improve the economic and social situation by extending common policies and pursuing new objectives: the Single Market</p> <p><b>Article 20:</b> Introduced a new Chapter 1 in Part three, Title II of the EEC Treaty reading: <i>Cooperation in Economic and Monetary Policy (Economic and Monetary Union)</i></p> <p><b>Article 23:</b> A title V shall be added to Part Three of the EEC Treaty: - <i>Title V: Economic and Social Cohesion</i></p>

Article 20 of the SEA introduces a new chapter – Chapter 1. This Chapter is titled Cooperation in Economic and Monetary Policy (Economic and Monetary Policy) and its Article 102.a declares that

In order to ensure the convergence of economic and monetary policies which is necessary for the further development of the Community, Member States shall co-operate in accordance with the objectives of Article 104. In so doing, they shall take account of the experience acquired in co-operation within the framework of the European Monetary System (EMS) and in developing the ECU, and shall respect existing powers in the field.

Article 23 of the SEA introduces a Title V on Economic and Social cohesion which Article 130a states that

In order to promote its overall harmonious development, the Community shall develop and pursue its actions leading to the strengthening of its economic and social cohesion. In particular, the Community shall aim at reducing disparities between the various regions and the backwardness of the least-favoured regions.

Further Article 130b states that

Member States shall conduct their economic policies, and shall co-ordinate them, in such a way as, in addition, to attain the objectives set out in Article 130a. The implementation of the common policies and of the internal market shall take into account the objectives set out in Article 130a and in article 130c and should contribute to their achievement. The Community shall support the achievement of these objectives by

the action it takes through the structural Funds (European Agricultural Guidance and Guarantee Fund, Guidance Section, European Social Fund, European Regional Development Fund), the European Investment Bank and the other existing financial instruments.

As the EU project was getting consolidated and the idea of a monetary and economic union was becoming more popular. The Treaty on the European Union, or Maastricht Treaty, signed on February 7, 1992, introduced Title VI on “Economic and Monetary Policy.” This Title sets the structure of the EMU by introducing the Convergence criteria which established the requirements that member states must achieve in order to adopt the euro.

The Lisbon Treaty, once it is ratified by all countries and entered into force, does not alter the requirements of the Maastricht Treaty but does, however, include for the first time the “exit clause” for those countries deciding to leave the EU.

*The Maastricht Treaty: The introduction of Economic and Monetary Policies*

The success of the Economic and Monetary Union (EMU) and the euro rests on three pillars: the credibility of monetary and economic policies achieved through the commitment of Eurozone member states to maintain price stability; the observance of the fiscal criteria; and, the implementation of structural policies, particularly in the labor market.

Meeting these three sets of requirements is the major guarantor of a long-lasting euro. *Price stability* is the result of a sound and indivisible monetary policy implemented by the European Central Bank (ECB) at a supranational level. *Fiscal criteria* are a set of fiscal requirements that must be achieved at the national level to maintain control of government debts and spending. *Structural policies* are policies implemented by national governments to achieve, for instance, the requirements established by the Lisbon Strategy to improve the labor market and strengthen social cohesion. The connection between monetary policy, economic policy, and the EMU is depicted in table 5.

Table 5  
Connection Between the EMU and the Monetary and Economic Policy

<b><u>Economic and Monetary Union (EMU)</u></b>	
<b>A. Monetary Policy</b>	<b>B. Economic Policy:</b>
-1. European Central Bank (ECB)	-2. Fiscal Policy: Stability and Growth Pact (SGP)
	-3. Structural Policies: Lisbon Agenda

The Maastricht Treaty, signed on February 7, 1992, introduced a chapter on the foundation of EMU as well as the *Convergence criteria or Maastricht criteria*, (Europa Glossary) that is, the economic and monetary requirements EU member states must fulfill in order to be eligible to adopt the euro and become part of the EMU.

The requirements for the Maastricht criteria are specified in the Protocol "On the Convergence criteria" which, in six articles, set the requirements that must be respected in order to adopt the euro.

Table 6  
Protocol on the Convergence Criteria

<p><b>PROTOCOL ON THE CONVERGENCE CRITERIA REFERRED TO IN ARTICLE 109j OF THE TREATY ESTABLISHING THE EUROPEAN COMMUNITY</b></p>
<p>THE HIGH CONTRACTING PARTIES,</p>
<p>DESIRING to lay down the details of the convergence criteria which shall guide the Community in taking decisions on the passage to the third stage of economic and monetary union, referred to in Article 109j(1) of this Treaty,</p>
<p>HAVE AGREED upon the following provisions, which shall be annexed to the Treaty establishing the European Community:</p>
<p><b>ARTICLE 1</b> The criterion on price stability referred to in the first indent of Article 109j(1) of this Treaty shall mean that a Member State has a price performance that is sustainable and an average rate of inflation, observed over a period of one year before the examination, that does not exceed by more than 1½ percentage points that of, at most, the three best performing Member States in terms of price stability. Inflation shall be measured by 30 means of the consumer price index on a comparable basis, taking into account differences in national definitions.</p>
<p><b>ARTICLE 2</b> The criterion on the government budgetary position referred to in the second indent of Article 109j(1) of this Treaty shall mean that at the time of the examination the Member State is not the subject of a Council decision under Article 104c(6) of this Treaty that an excessive deficit exists.</p>
<p><b>ARTICLE 3</b> The criterion on participation in the Exchange Rate Mechanism of the European Monetary System referred to in the third indent of Article 109j(1) of this Treaty shall mean that a Member State has respected the normal fluctuation margins</p>

provided for by the Exchange Rate Mechanism of the European Monetary System without severe tensions for at least the last two years before the examination. In particular, the Member State shall not have devalued its currency's bilateral central rate against any other Member State's currency on its own initiative for the same period.

#### ARTICLE 4

The criterion on the convergence of interest rates referred to in the fourth indent of Article 109j(1) of this Treaty shall mean that, observed over a period of one year before the examination, a Member State has had an average nominal long-term interest rate that does not exceed by more than 2 percentage points that of, at most, the three best performing Member States in terms of price stability. Interest rates shall be measured on the basis of long term government bonds or comparable securities, taking into account differences in national definitions.

#### ARTICLE 5

The statistical data to be used for the application of this Protocol shall be provided by the Commission.

#### ARTICLE 6

The Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, the EMI or the ECB as the case may be, and the Committee referred to in Article 109c, adopt appropriate provisions to lay down the details of the convergence criteria referred to in Article 109j of this Treaty, which shall then replace this Protocol.

All these requirements must be met and respected by those countries willing to adopt the euro as a common currency. Once the euro has been adopted, countries must comply with the economic and monetary requirements established in *Title VI of the Maastricht Treaty*. (Euro-Lex 1992) This title sets the rules to respect and the procedures to follow for the proper functioning of the Eurozone and the success of the euro.

### *Chapter 1: Economic Policy*

The Maastricht Treaty deals with the Economic Policy in Chapter 1, Title VI. Article 102.a explains that member states and the Community not only should respect the principle of an open market economy with free competition but also “conduct their economic policies with a view to contributing to the achievement of the objectives of the Community.” In order to guide this achievement, Article 103 highlights that the correct implementation of economic policies is a matter of common concern. It also sets the procedure to follow stating that “Member States shall regard their economic policies as a matter of common concern and shall coordinate them within the Council, in accordance with the provisions of Article 102a.”

Table 7  
Summary of the Maastricht Treaty

Treaty	Contribution
<b>Treaty on European Union</b>	
Signed on: February 7, 1992 in Maastricht	Sets its objectives in connection with the EMU to: Establish an <b>accurate calendar</b> to carry out EMU, split into three phases.
Entered into forced on: November 1, 1993	Introduces <b>Common Provision, Article 2</b> : <i>to promote economic and social progress</i> which is balanced and sustainable, in particular through the creation of an area without internal frontiers, through the strengthening of economic and social cohesion and through the <i>establishment of economic and monetary union, ultimately including a single currency in accordance with the provisions of this Treaty.</i>
<b>Title VI: Economic and Monetary Policy</b>	
<u>Chapter 1</u> : Economic policy – Article 104	
Art 102.a: - Free competition	
Art 103: - Guidelines of the economic policies	
Art 104C-1: - Excessive government deficits	
Art 104C-2a: - Government deficit to GDP	
Art 104C-2b: - Government debt to GDP	
- Protocol on excessive Deficit Procedures	
<u>Chapter 2</u> : Monetary policy – Article 105	
Art 105.1: objective: price stability by European System of Central Banks (ESCB)	
Art 105.2: explains tasks of ESCB	
Art 107: Independence of the ESCB	
<u>Chapter 3</u> : Institutional provisions	

Chapter 1, therefore, focuses on spelling the importance of avoiding excessive government deficits and points out that “the reference values are specified in the Protocol on the excessive deficit procedure annexed to this Treaty.” For that matter, Article 104.C.3 clearly explains that “if a member state does not fulfill the requirements under one or both of these criteria, the Commission shall prepare a report,” stressing the importance of these two requirements for the proper functioning of the common currency.

Moreover, the EU has in place the Stability and Growth Pact (SGP). The SGP, adopted by the European Council at the Dublin Summit in December 1996, consists of Council Regulations 1466/97 and 1467/97. The SGP requires adherence to the fiscal policies that Member States of the EU must comply with to help “contribute to the overall climate of stability and financial prudence underpinning the success of Economic and Monetary Union (EMU).” (EurActiv 2004) In particular, Council Regulation 14466/97 was signed on July 7, 1997 and is titled “on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies.” (Euro-Lex 1997) The purpose of this regulation is to set out

the rules covering the content, the submission, the examination and the monitoring of stability programmes and convergence programmes as part of multilateral surveillance by the Council so as to prevent, at an early stage, the occurrence of excessive general government deficits and to promote the surveillance and coordination of economic policies.

In addition, Council Regulation 1467/97 was signed on July 7, 1997 and it is titled “On speeding up and clarifying the implementation of the excessive deficit procedure.” The purpose of this regulation is to set out “the provisions to speed up and clarify the excessive deficit procedure, having as its objective to deter excessive general government deficits and, if they occur, to further their prompt correction.”

Opponents of the SGP believe that the SGP is pro-cyclical and anti-growth. Bini Smaghi (2007, 2) explains that “the 3% deficit ceiling set by the Maastricht treaty, which tends to be reached in cyclical downturns, is likely to push countries to adopt corrective measures in bad times and thus to implement pro-cyclical budgetary policies.” Evidence that the SGP had a pro-cyclical effect—particularly during an economic downturn—convinced heads of state and government to reform the SGP and during the March 2005 Summit, it was agreed to revise the SGP. The result was that rules were relaxed to make the SGP more enforceable.

Despite its dissenters, the SGP remains one of the most important policies of the Directorate General for Economic and Financial Affairs, led by Commissioner Joaquín Almunia. (Europa - Gateway to the EU 2005) The SGP is considered the answer to those with concerns on the continuation of budgetary discipline in Economic and Monetary Union (EMU) (EUB2 2006). The SGP forces Eurozone Member States to coordinate national government budget policies to avoid excessive government budget deficits.

*Chapter 2: Monetary Policy*

The Maastricht Treaty in its Title VI, Chapter 2, sets the basis for the monetary policy of the EU. Hence, the ECB has been responsible for implementing the adequate monetary policy and introducing a new monetary system for the Eurozone. Further, it is considered to be a supranational monetary organization because the Maastricht Treaty took monetary policy-making from the national level to the supranational level. Hence, the ECB became an independent body and its monetary policy-making has been shielded from possible political influences.

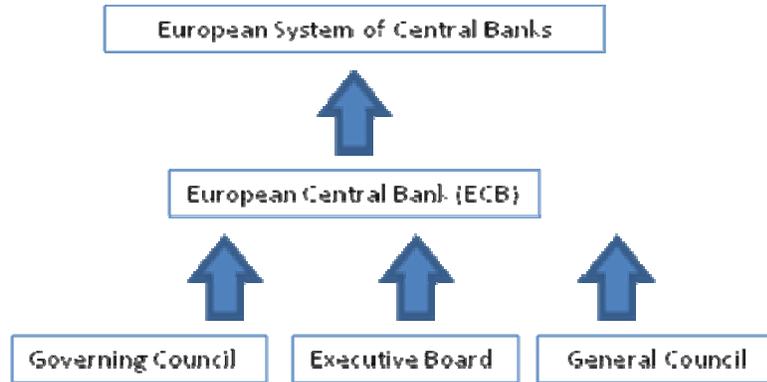
The predecessor of the ECB, the *European Monetary Institute* (EMI), was established during the second stage of the EMU as a transition vehicle to the ECB. The duties of the EMI are specified in Article 109f of the Maastricht Treaty. (EuroTreaties)

Table 8  
The European Monetary Institute and the ECB

<p>ARTICLE 109 f</p> <p>1. At the start of the second stage, a European Monetary Institute (hereinafter referred to as 'EMI') shall be established and take up its duties; it shall have legal personality and be directed and managed by a Council, consisting of a President and the Governors of the national central banks, one of whom shall be Vice-President. The President shall be appointed by common accord of the Governments of the Member States at the level of Heads of State or of Government, on a recommendation from, as the case may be, the Committee of Governors of the central banks of the Member States (hereinafter referred to as 'Committee of Governors') or the Council of the EMI, and after consulting the European Parliament and the Council. The President shall be selected from among persons of recognized standing and professional experience in monetary or banking matters. Only nationals of Member States may be President of the EMI. The Council of the EMI shall appoint the Vice-President.</p> <p>The Statute of the EMI is laid down in a Protocol annexed to this Treaty.</p> <p>The Committee of Governors shall be dissolved at the start of the second stage.</p>
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The ECB was founded on June 1, 1998, and began operations on January 1, 1999, when the euro was introduced. The Maastricht Treaty in its Title VI, Chapter 2, sets up the structure for and functions of the *European System of Central Banks* (ESCB) and the ECB. The ECB, together with the national central banks (NCBs) of Eurozone Member States, form the *Eurosystem*. Further, the ECB and the central banks of all the EU Member States form the ESCB. The relationship among these various banking entities and their governing bodies is depicted in Table 9.

Table 9  
Relationship among EU Banking Entities and their Governing Bodies



The ECB is comprised of the Governing Council, the Executive Board, and the General Council. *The Governing Council* is the most important decision making body in the ECB. It is responsible for establishing monetary policy and interest rates. It is comprised of the Executive Board of the ECB and the governors of the NCBs of the countries in the Eurozone that, when making decisions involving monetary policies, are not representing their countries' interests but rather acting as independent entities seeking the best position for the Eurozone. In essence, monetary policy decisions are made on the basis of *one person, one vote*. The *Executive Board* is formed by the ECB's president, vice president, and up to four other members in charge of implementing the monetary decisions made by the Board and informing the various EU Member States' NCBs of these decisions. Finally, the *General Council* is composed of the ECB's president, vice-president, and the governors of the NCBs of all EU Member States. Governors of those EU countries that have not yet adopted the euro cannot participate in decisions related to the euro, although they are invited to participate in discussions involving monetary policy issues.

In addition to its responsibility to set and maintain centralized monetary policy, the ECB is also responsible—as stated in Chapter 2, Article 105.2 of the Maastricht Treaty—for conducting *foreign exchange operations* as well as *maintaining the banking payment system* to ensure a stable financial system. Finally, Article 105 explains that the ECB (2) has the mandate to act “in accordance with the principle of an open market economy with free competition, favoring an efficient allocation of resources and in compliance with the principles set out in Article 3a.” (EuroTreaties – The Maastricht Treaty)

The ECB was designed to be independent (Article 107) from member states and EU institutions. In order to achieve this objective, the ECB followed the

structure of the German Bundesbank<sup>10</sup>, which outfitted the ECB with political independence and was assigned its own budget to arm it with financial independent. (ECB – Independence)

Such unprecedented expansive authority is the reason why the ECB has been considered the most powerful independent institution not only in the Eurozone, but also in the EU. According to Petr Doucek (2005, 4) the ECB is the “embodiment of modern central banking [...] It is independent within a clear and precise mandate; and it is fully accountable to the citizens and their elected representatives for the execution of this mandate.” (Doucek) Specifically, the second paragraph of Article 107 of the Maastricht Treaty proclaims the ECB’s independence from other European Union institutions and national governments, emphasizing that European official should “respect this principle and not seek to influence the members of the decision-making bodies of the ECB.” (EuroTreaties – The Maastricht Treaty) Nevertheless, its independence relies on its legitimacy, which is granted because the ECB is accountable in front of democratic institutions. Hence, the ECB

is required to publish quarterly reports on the activities of the Eurosystem as well as a consolidated Weekly Financial Statement. In addition, it has to produce an Annual Report on its activities and on the monetary policy of the previous and the current year. The Annual Report has to be addressed to the European Parliament, the EU Council, the European Commission and the European Council. (ECB – Accountability)

Nevertheless, the policy of independence has been repeatedly challenged by French President Nicolas Sarkozy. He has recently proposed to enforce publication of the ECB’s meeting minutes and to enforce greater political coordination between national governments and the ECB; two proposals in total confrontation with the idea of independence stated in Article 107. President Sarkozy has blamed the ECB for maintaining a monetary policy that was oriented to fight an inflation that, in his opinion, did not exist. Parker and Atkins (2007, 1) explained that this monetary policy was “forcing up interest rates and the value of the euro against the dollar and other currencies” which, in turn, Sarkozy blamed for the negative economic performance of most Eurozone Member States.

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<sup>10</sup> The Bundesbank governance structure: a president, a vice president, and two additional board members put forward by the German government. Four additional members of the executive board put forward by the Bundesbank.

### The Treaty of Lisbon: Its Future Influence in the Euro

The EU is currently on the verge of approving the “Treaty on the Functioning of the European Union” (TFEU) or Treaty of Lisbon. Title VIII of the consolidated version on the TFEU is titled “Economic and Monetary Policy” and has five important chapters relevant for the functioning of the Eurozone and the euro as a common currency.

Table 10  
Treaty of Lisbon: Title VIII

Chapter	Title	Articles
Chapter 1	Economic Policy	120-126
Chapter 2	Monetary Policy	127-133
Chapter 3	Institutional Provisions	134-135
Chapter 4	Provisions specific to Member States whose currency is the euro	136-138
Chapter 5	Transitional Provisions	139-144

In this Title VIII, Article 119 highlights that the EU is an open market economy which encourages free competition. Article 121.1 maintains that “Member States regard their economic policies as a matter of common concern and shall coordinate them within the Council.” Article 121.3 explains that in order to make sure that there is coordination of economic policies among member states, the Council “shall, on the basis of reports submitted by the Commission, monitor economic developments in each of the Member States and in the Union as well as the consistency of economic policies.” It is also reminded the necessity of economic coordination as well as the importance of stable prices, sound public finances, and a balanced balance of payments. It is extremely important Article 125 which explains that neither the EU nor individual member states are responsible for any other State debt liability. In this spirit the article reads that

The union shall not be liable for or assume the commitments of central governments, regional, local, or other public authorities, other bodies governed by public law, or public undertakings of any member State, without prejudice to mutual financial guarantees for the joint execution of a specific project. A Member State shall not be liable for or assume the commitments of central governments, regional, local, or other public authorities, other bodies governed by public law, or public undertakings of another Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project.

For this matter, Article 126 reminds that member states must keep on avoiding excessive government deficits by respecting government debt deficits and debt under the requirements specific in the Protocol.

Chapter 2, on Monetary Policy, reminds (Article 127) that the European System of Central Banks must maintain price stability, and, Article 128.1 explains that the European Central Bank has the “exclusive right to authorize the issue of euro banknotes within the union.” Furthermore, Article 128.2 points out that “Member States may issue euro coins subject to the approval by the European Central Bank of the volume of the issue.”

Chapter 4 specifies provisions that member states using the euro must respect “in order to ensure the proper functioning of the economic and monetary union.” Among them, the importance of maintaining coordination with respect to budgetary discipline and set out the economic guidelines that must be respected.

Finally, the Treaty of Lisbon includes for the first time an “exit clause” for those EU Member States that want to leave the EU. This “exit clause” was introduced in the failed “Treaty establishing the Constitution for Europe.” (Europa -Constitutional Treaty) The failed Constitution included Article 60 titled “Voluntary Withdrawal from the Union” which has been maintained in the Treaty of Lisbon setting the “exit clause.” In fact, point 40 of the “Explanatory Memorandum on the Treaty of Lisbon” published by the Foreign and Commonwealth Office of the U.K. explains that the Treaty “recognises a Member State’s right to withdraw from the European Union and sets out procedures providing for such an eventuality.” (Foreign and Commonwealth Office) However, this clause will become available once the Treaty of Lisbon is approved by all member states and entered into force.

## **Conclusion**

The introduction of the Economic and Monetary Union (EMU) and the adoption of the euro as common currency has been a long road guided by treaties that have shaped the EU.

The SEA established the common market and induced the necessity to have a common currency. The Treaty of Maastricht shaped the EMU and set the stages and requirements necessary to be part of the Eurozone. It further set the structure necessary to sustain the viability of the common currency. Despite the fact that certain measures recognized in the Treaty of Maastricht have been criticized as rigid and counterproductive, the Treaty of Lisbon will maintain them. These requirements have been proven vital to warrant the euro’s worldwide recognition as common and international currency.

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# **The Euro-Mediterranean Union and the Lisbon Treaty**

Astrid B. Boening

## **Introduction**

The EU's structure of "blended" inter-governmentalism and supranationalism left the EU's Common Foreign and Security Policy (CFSP) somewhat under-institutionalized, ad hoc and uneven in its development. (Brevin 2004, 13) This paper will examine the projection of the EU in its foreign policy, specifically in North Africa and the Middle East (MENA) through the dynamics of the Euro-Mediterranean Partnership (EMP) (also known as the Barcelona Process) from a security perspective. This includes briefly tracing the legal context of the CFSP and the European Security and Defense Policy (ESDP)/Common Foreign Security and Defense Policy (CSDP) up to the Treaty of Lisbon to identify some of the underlying multilateralism involved in this Partnership, concluding with the effect of the Lisbon Treaty's (aka Treaty on European Union) (TEU) on the CFSP and CSDP and the Euro-Mediterranean Region (Euro-Med).

## **EU Values and Identity and the Common Foreign and Security Policy**

The EU, as a unique socio-political "construct" ("*sui generis*"), the EU has been described in its international relations i.a. as a normative power (e.g. Nikolaidis 2002, Manners 2002), based on its social values to achieve its political end, and peaceful relations internally and internationally. The EU's Promotion of human rights and democracy are based on the principles of the UN's 1948 Universal Declaration on Human Rights, the 1950 European Convention on Human Rights, the UN's 1966 International Covenant on Civil and Political Rights, and the UN's 1976 International Covenant on Economic, Social and Cultural Rights. These were again enshrined in the EU's legal body in the 1999 Amsterdam Treaty, marking a deeper commitment to democratic principles, especially in the New Article 6, which states that the European Union "is founded on the principles of liberty, democracy, respect for human Rights and fundamental freedoms, and the rule of law, principles which are common to the Member States".

The Maastricht Treaty of 1992 expanded the EU's self-appointed mission to the propagation of human rights and democracy through the development and

consolidation of democracy and the rule of law, and to foster fundamental freedoms within the framework of cooperation policy. It later evolved into one of the explicit objectives of the emerging CFSP (Lannon, Inglis and Haehnebalcke 2001) as the Second Pillar in the EU. This would contradict some statements of certain Right-wing Europeans who attribute EU-values as a guiding Culture drawing on Judeo-Christian humanistic traditions, implying a “proprietary” quality for them, to the extent of challenging “the Islamic problem.” (Spiegel 2008)

The EU Commission represents the interests of EU as a whole. Their Actions are guided in the coherence of their internal and external approaches by the EU Charter on Fundamental Rights, proclaimed at the 2000 Nice Summit. This was enhanced by a series of Commission communications to the EU Council and the EU Parliament, such as the “Communication on the EU’s Role in Promoting Human Rights and Democratization in Third Countries” (May 8, 2001), which ensure that human rights and democracy issues are dominant themes in every External EU project or Action based

on the universality and indivisibility of civil, political, economic, social, and cultural human Rights and ... [Making] the protection of such Rights, together with the Promotion of pluralistic Democracy and effective guarantees for the rule of law and the fight against poverty, the EU’s fundamental goals. (quoted in, and interpreted by Scalambrieri 2004, 13)

The EU’s Charter of Fundamental Rights will also become legally binding in the Treaty of Lisbon. It obliges the EU to bear the international obligation to respect those principles in its relationships with other actors in the International Community, such as those receiving technical and political assistance or financial aid within the framework of their Cooperation. (Scalambrieri 2004, 13)

In 2003, the Commission (in: *Final Communication from the Commission to the Council and the European Parliament #294 “Reinvigorating EU Actions on Human Rights and democratization with Mediterranean Partners”*) set out working guidelines to achieve these goals of democratization and human rights promotion in cooperation with its partner countries in the Mediterranean by proposing ten concrete recommendations to improve the dialogue on, and the implementation of, democracy promotion and human rights implementation in those regions not complying with international norms. (Scalambrieri 2004, 24) By including a standard clause on democratic principles and fundamental human rights in agreements with third, countries the EU is now able to suspend or terminate agreements with these countries in case of non-compliance, as they are not establishing new standards but are simply referring to customary international law (Scalambrieri 2004, 25). These clauses are not transforming the basic nature of EU-agreements, but are simply re-affirming commonly shared values and principles, and positing them as a precondition for all cooperation – an “approach

... expressly confirmed by the European Court of Justice in Portugal v. Council (1996).” (Scalambrieri 2004, 25)

### **European Security and Defense Policy (ESDP)**

The original academic discussion of Europe as a civilian rather than Military power dates back to authors such as Duchene (1972) and Bull (1982) who viewed the EU as long on economic power, but short on military power. (Duchene 1972) By 1991, however, the Treaty on the European Union indicated the intent of the EU to also develop its defense dimension. (Manners 2002) Hence Manners (2002) suggests augmenting the civilian and military aspects of the EU by “the international role of the ... EU as a promoter of norms, which displace the state as the centre of concern”, such as through social solidarity, rule of law, human rights, and a “treaty base”, such as the Copenhagen criteria. (Manners 2002, 243)

Pertaining to EU values internally, Held (1999) states that Common European values underpin EU social models, and represent the foundations of the specific European approach to economic and social policies.

There can be no partial solutions. No single country can meet the challenges alone. Acting together at a European and national Level, we can give Europe a future. We can have a strong voice, projecting European vision and European values among our partners around the world ... the status quo is not an option ... growth and jobs is a truly European agenda. ... The EU’s Member States have developed their own approach reflecting their history and collective choices. (Held 1999, 3)

The following section presents a brief timeline to indicate the recent historical context for the (inter-) Regional and transatlantic inter-linkages and synergies reflected today in the ESDP as a background for its ideational evolution as it effects the ESDP and its Role in the Euro-Mediterranean Region (“Med”) today.

1948: Treaty of Brussels, as a defense pact purely against German rearmament, signed by France the United Kingdom, Belgium, the Netherlands and Luxembourg as a post-WWII Security Cooperation pact.

1949: North Atlantic Treaty, signed by the U.S. and ten Western European countries and Canada, gave rise to NATO, as a result of the recognition that Europe was unavoidably divided into East and West, with the USSR being a more serious threat to West European Security than Germany, and hence acknowledging that its defense would have to be Atlanticist. NATO’s Article 5 represents the essence of this organization, as it obliges all members to assist

the attacked party in the right to individual or collective self-defense by whatever means necessary to restore and maintain Security.

1954: Paris Agreement amends this Treaty with the accession of Germany, establishing the West European Union (WEU) as a European security and defense organization, setting out the principle of mutual assistance in the event of an armed attack against any of the High Contracting Parties in accordance with Article 51 of the Charter of the United Nations (the Right of self-defense) (*Europa.com* 2008), but without standing forces or command structures of its own. It featured additionally cultural and social clauses as concepts for the setting up of a 'Consultative Council' on the basis that cooperation between Western nations would help stop the spread of Communism.

1960: The cultural aspects of the WEU are transferred to the Council of Europe.

1970: As response to Davignon Report, introduces European Political Cooperation (EPC)

1987: Single European Act - formalizes consultations between EU Member States in foreign policy matters strive for Common Positions in IGOs. They are declared by the Presidency of the EU Council and implemented by the Council (even if they are not legally binding).

1992: Ministerial Council of the WEU set out the Petersberg Tasks, which became an integral part of the European Security and Defense Policy, and are specifically included in the Treaty on the European Union as Article 17, cover humanitarian and rescue tasks, peace-keeping as well as combat forces in crisis management, including peacemaking. On this occasion, WEU member states declared that they would make military units from the whole spectrum of their conventional armed forces available to NATO and the EU. Furthermore, establishment of the Satellite Centre in Torrejon/Spain, and a Situation Centre to monitor crisis areas, were decided upon.

1992: Maastricht Treaty/Treaty on the European Union: The WEU, maintaining its autonomy, is envisioned as the future military arm of the EU, and the Council of the WEU and of NATO began regular consultations between secretariats and military staffs, leading to deep Cooperation, such as WEU access to NATO's integrated communications system.

1992: Brussels NATO Summit – Agreement on closer cooperation between NATO and WEU, with NATO members giving their full support to the

development of the European Security and Defense Identity, to strengthen the European pillar of the Alliance and reinforced the transatlantic link. Hereby the European allies could take greater responsibility for their common security and defense. To avoid duplication of efforts, NATO agreed to make its collective assets available. Additionally, the Heads of State endorsed the Concept of Combined Joint Task Forces (CJTF) (NATO Handbook, Ch. 15).

1995: The Eurocorps, as a joint force drawn from the WEU, its associate members, partners and observers, who had over the years joined the WEU, becomes operational as a multi-national contribution to European forces. It includes Eurofor as the European Rapid Reaction Force, which Reports directly to the WEU, as well as Euromarfor a non-permanent, pre-structured European naval force consisting of Spanish, French, Italian and Portuguese ships.

1996: At their June Meetings, NATO Foreign and Defense Ministers decided that NATO's internal adaptation would involve building the European Security and Defense Identity within NATO, in order for the European Allies' shared responsibility to be expressed more effectively and coherently in their contribution to the missions and activities of the Alliance, and reinforce the transatlantic partnership. This "New-look" NATO has been described as a process of redefining the organisation's role and operation (*Europa.com* "New-look NATO" 2008), recognizing a European defense identity, strengthening the European component of the transatlantic security system, the new role of the WEU, as well as NATO's eastern enlargement and its establishment of a stable and sustainable Partnership with Russia and Ukraine, as well as NATO deepening its relations with third countries, e.g. through Partnership for Peace and Mediterranean Dialogue programs.

1998: St. Malo Declaration – laying the political foundation between France and Great Britain, which in turn facilitated the launch of the European Security and Defense Policy and the formulation of the Headline Goal.

1999: Treaty of Amsterdam — introduction of the Common Foreign and Security Policy (CFSP); as a *common strategy*<sup>1</sup> supersedes the informal, non-coercive intergovernmental arrangement, which its predecessor, the European Political Cooperation (EPC), represented. The CFSP now makes Common positions obligatory when adopted unanimously at the Council. Additionally, the WEU is absorbed into the EU to make it a defensive and

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<sup>1</sup> The EU Common Strategy as an instrument of the CFSP involves "operational" mechanisms: such as constructive (positive) abstention does not block "unanimous" votes under the CFSP, but this member must refrain from actions conflicting with actions based on this vote.

Peacekeeping Military organization in addition to its social and economic agenda, hereby gaining operational defense capability. As such it provides the framework for a future Common defense policy, which could lead to Common defense.

2000: "Helsinki Headline Catalogue" generated, leading to the formulation of the Petersberg task scenarios that specify which capabilities are required in each of 144 capability areas. In November 2000, the European Union held the first of several Capabilities Commitment Conference in Brussels, which elicited commitments for over 100,000 (existing) troops that were declared available for this Helsinki Force Catalogue.

2000: European Council "Common Strategy of the European Union on the Mediterranean Region": builds on the Euro-Mediterranean Partnership to pursue Cooperation between the EU, the Mediterranean Region and Libya (as observer) in a vast range of areas including Security, Democracy, justice and the economy. The objective is to promote Peace, stability and prosperity in the Region.

2001: Treaty of Nice – established closer Cooperation for the implementation of joint actions and common positions, but *without* applicability to Military or defense implications. It also introduced Qualified Majority Voting (QMV) to the selection of the High Representative as well as as special representatives for the CFSP (Alec de Flers 2008, 6).

2001: Laeken Summit - EU launches the European Capabilities Action Plan (ECAP) in order to remedy European capability shortfalls. It involved initially some twenty panels, composed of Military experts from the member states, which put forward plan and proposals in order to fill the identified shortfalls (e.g. by acquiring new equipment or optimizing existing capabilities, in particular through Cooperation at the *European* Level).

2003: Definition of Headline Goal 2003 during the Helsinki Summit - the European Union pledged itself during the Helsinki summit to be able to deploy rapidly, and then sustain forces capable of the full range of Petersberg tasks (as set out in the Amsterdam Treaty), including the most demanding, in operations up to a corps level of up to 15 brigades or 50,000-60,000 persons to have the capability to intervene in any crisis in areas affecting European interests. The aim is to make those forces self-reliant, deployable within 60 days and over 4,000 km, and sustainable in the field for a year. This might actually imply a force of 180,000 troops, including rotating replacements for the initial forces.

2003: European Security Strategy (ESS) formulated in a *post*-Cold War environment with increasingly open borders, links internal and External Security aspects indissolubly. Flows of trade and investment, the development of technology and the spread of Democracy have brought freedom and prosperity to many people. Others have perceived globalisation as a cause of frustration and injustice. These developments have also increased the space for non-state groups to play a part in international Affairs. And they have increased European dependence – and so vulnerability – on an interconnected infrastructure in transport, energy, information and other fields (European Security Strategy 2003, 2).

2004: As the Helsinki Headline Goal became fulfilled, the European Council approved further development of the EU's Military crisis management capability with a new target: "Headline Goal 2010", in which EU members committed that by the year 2010 they would be capable of responding "with swift and decisive action applying a fully coherent approach" to the whole spectrum of crisis management operations covered by the Treaty of the EU and the 2003 EU Security Strategy (i.e. humanitarian and rescue tasks, disarmament operations, support to third countries in combating terrorism, Peacekeeping tasks and tasks of combat forces in crisis management, and Peacemaking). The EU also aims to address the shortfalls from the previous headline goal (e.g. gaps related to strategic airlift and sealift).

2004: European Defense Agency (EDA), established by a Joint Action of the Council of Ministers "to support the Member States in their effort to improve European defence capabilities in the field of crisis management, and to sustain the ESDP as it stands now and develops in the future" via four functions: a. defense capabilities development, b. armaments cooperation, c. development of a European defense technological industrial base and a defense equipment market, and d. research and technology (European Security and Defense Assembly 2004). It is voluntary so far, but all EU member states except Denmark are participating.

#### *From European Security to Euro-Mediterranean Security*

NATO's Mediterranean Dialogue ("Dialogue") was formally launched in December 1994, reflecting the Alliance's recognition of the Mediterranean's unique Regional Security Challenges. The Mediterranean Dialogue, as a sub-program of the Partnership for Peace (PfP), specifically seeks to improve the understanding of Mediterranean Security perceptions and concerns of its Partners, e.g. enabling low level military cooperation, such as emergency planning, peacekeeping and peace supporting. (Said 2004) This Dialogue started initially with five countries (Tunisia, Morocco, Jordan, Israel and Egypt), with Algeria and Mauritania join-

ing later. Subsequently, it also involved talks with the Gulf Cooperation Council (Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the UAE). Initially, this initiative was limited to “dialogue”, as NATO had other pressing priorities, such as enlargement and developing the post-Cold War relationship with Russia. New members of the dialogue were weary of NATO’s image as a Cold War institution and preferred to concentrate on “soft” Security and economic Issues to develop mutual confidence and trust, rather than “hard” security issues of defense and military cooperation. In the first dozen years post-Cold War, NATO was much more actively engaged in Eastern Europe, and as a result of the hesitations by its Mediterranean Partners only sporadically engaged there. (Nachmani 1999, 97)

The Dialogue was also intended to reach out to non-NATO member countries who might be interested in collaborating with NATO’s Mediterranean Security and stability projects, as its mandate also shifted post-Cold War from defending a clearly delimited territory to a new strategy of committing member states to defend unbounded interests beyond Europe’s theater of operations: NATO’s New mandate is as global as the Western interests it has pledged to defend ... [implying] that the Arab World will receive its fair share of NATO attention ... [such as] crisis operations ... to keep risks at a distance by dealing with potential crises (which could affect Euro-Atlantic stability) at an early stage. (El-Gawhary 1999, 16/7)

The Dialogue was also intended to reach out to non-NATO member countries who might be interested in collaborating with NATO’s Mediterranean Security and stability projects. These “Partners” would not be allies at the beginning but would be involved in confidence building programs, to become members when some major qualifications were met, e.g. irreversible commitments to democracy, civilian control of the military and development of a nation’s military capability to a level of interoperability with those of NATO members.” (Kaplan 1999, 195)

At the meeting in June 2004 in Istanbul, NATO leaders decided to elevate the Alliance's Mediterranean Dialogue to a genuine partnership, and to launch the Istanbul Cooperation Initiative with select countries in the broader Region of the Middle East. Its goal is to promote practical bilateral Cooperation with interested countries of the Region, starting with countries of the Gulf Cooperation Council (GCC). This initiative aims at enhancing Security and stability through a New transatlantic engagement, offering tailored advice on defense reform, budgeting, and planning as well as civil-military Relations, promoting Military-to-Military Cooperation to contribute to interoperability, fighting terrorism through information sharing and maritime Cooperation, proliferation of weapons of mass destruction and their delivery means and fighting illegal trafficking. It is understood that the words "country" and "countries" in the document do not exclude participation, subject to the North Atlantic Council's approval, of the Palestinian Authority in Cooperation under this initiative. The enhancement of NATO's Mediterranean Dialogue and the launching of the Istanbul Cooperation

Initiative resulted from high-Level consultations conducted by NATO's Deputy Secretary General with the countries of the Mediterranean and the broader region, according to the principle of 'joint ownership'. These are two complementary, progressive, yet individualized initiatives.

### **European Neighborhood Policy (ENP) and the EuroMed Partnership (EMP)**

#### *Basic Governmental Structure from the EU Perspective*

Following the end of the Cold War and the socio-political consequences of this geopolitical challenge to the EU in terms of “big bang” enlargements, its policy makers sought a convergence of EU values and political principles in neighboring countries, even if the incentive of EU-membership could not be offered. (Scalambrieri 2004, 11) Against this background, the EuroMed Partnership (EMP) was founded 1995 in Barcelona for the purpose of fostering political, economic, and social-cultural Cooperation and harmonization among the countries bordering the Mediterranean for the purpose of stabilizing the Euro-Mediterranean Region. When the European Council of Copenhagen approved in December 2002 the concept of a “Wider Europe”, and as its policy tool the European Neighborhood Policy, the EMP became a part of it.

In May 2004, the Commission “published its Strategy Paper on the ENP, laying out the principles and objectives that would govern all future ENP Partnerships.” (Gaenzle 2008, 10) Each country Strategy Paper identifies the bilateral relationship between the EU and a Neighborhood country, its EU Cooperation goals and policy responses, and maps out areas for cooperation, key priorities, as well as assessing the Partner country’s policy agendas, and political and socio-economic status. By taking political and legislative measures to enhance economic integration and liberalization, as well as measures to promote human rights, cultural Cooperation and mutual understanding, countries neighboring the EU “are explicitly invited to make steps towards regional security co-management and participate in initiatives aimed at improving conflict prevention and crisis management,” as well as to strengthen cooperation in the prevention and fight against common security threats. (Attina 2005, 17)

In June 2004 the *Council* confirmed that the ENP is a strategy based on partnership and joint ownership to promote Modernization and reform in a single, inclusive, balanced and coherent policy framework. Action Plans with each country should clearly identify a limited number of key priorities with performance-driven, tailor-made assistance and incentives for reform (Council Conclusions 2007) in addition to contributing to *Regional Cooperation* (Council of the EU 2004) (italics added) .

A further review of the EMP upon its ten-year anniversary in 2005 brought a modified agreement, the “Barcelona Plus Declaration”, still “nestled” within the ENP, to address some of the short-comings of the initial EMP programs. These

were formulated in the Tenth Anniversary Declaration (2005), as well as the new five-year Work Programme, and the Anti-Terrorism Behaviour Code. (Attina 2007, 197) The Declaration tied peace in the Mediterranean to the non-proliferation of ABC-weapons within the framework of all *UN* initiatives, and the “two states solution” of a sovereign Palestinian State and Israel in the Middle East.

*From Values to Security*

positing EU values in the Mediterranean Ulla Holm (2004, 1), however, views the dialectic Faced by the EU in this Region in terms of the tension in the Conceptualization of the Mediterranean as a cultural cradle of great civilizations versus as a conflict laden zone, interlinked with the discourses of the EU as an exporter of Democracy through a model to copy, rather than an empire-builder, through respect for cultural diversity and Arab sovereignty while exporting political shared European values (which in turn reflect the U.N.’s “universal values”). The relationship between security and regional stability for the greater Europe is well known – and proven in the post-World War II developments, was it not the basis of the Truman Doctrine for Europe. (Coufudakis 2004, 235)

This philosophy was likewise also reflected also in the preamble of the Barcelona Declaration of 1995:

... turning the Mediterranean basin into an area of dialogue, exchange and Cooperation guaranteeing Peace, stability and prosperity requires a strengthening of Democracy and respect for Human Rights, sustainable and balanced economic and social development, measures to combat poverty and Promotion of greater understanding between Cultures...

Despite religious and civil (EU and international) Actors in favor of these values, a number of governments in the Middle East and North Africa (MENA) “have been reluctant to adopt substantive reforms on the way to democratization, ... appearing content on maintaining authoritarian rule.” (Scalambrieri 2004, 26) However, one must keep in mind the dangers inherent during periods of transition from authoritarian to democratic rule, as the case of Central-and Eastern Europe has amply demonstrated, such as a resurgence of extreme nationalism, often leading to increased domestic ethnic conflicts, and an exaggerated aggressive foreign policy. In MENA, this could in combination with radical “Islam exacerbate the already existing threats to peace and stability.” (Scalambrieri 2004, 27. Compare also Gillespie and Youngs 2002, 9 and Chourou 2002, 28) Senyuçel et al. (2006) writes that following the anti-terrorism measures post-9/11, the start of the Iraq War in 2003 and following the 2007 Israeli invasion of Lebanon, debates of religious and/or cultural identity increased in many MENA states. On the other hand of the spectrum, “organizations and groups representing

‘anti-Western’ positions and Concepts of state and society have been attracting greater attention” (though variable in extent from country to country), and the impact of “normative” Europe is being questioned. (Senyucel et al. 2006)

By comparison, after several years in existence of the EMP, in 2006 Democracy Watch Reported a significant increase in the pervasiveness of Democracy, respect of human Rights and civil liberties in the Arab World along several parameters. Yet, a stage of consistent Peaceful, substantive democratization is not yet been reached in the Maghreb and Mashrig, as the continued Middle Eastern unrest shows, in addition to other unsolved “conflicts”, such as the former western Mauritanian Region, Western Sahara’s border conflict with Morocco and the Turkish occupation of Cyprus.

The significance of an ascendance of liberal democratic values following the end of the Cold War suggests (Schweller 1991) that despite the ongoing power shifts, *i.a.* in the larger Euro-Mediterranean Region currently, that “the instability often associated with uneven rates of growth is neutralized by the increase in the number of democratic states” (Ibid.).

#### *The EMP and the ESDP*

Evaluating the EMP and the ESDP against this historical background, we find now that while the Valencia EMP foreign ministers’ summit 2002 (following the events of 9/11) only addressed the fight against terrorism in general terms, it nevertheless emphasized a deepening of the EMP’s

dialogue to accommodate the recent development of the European Union’s Common Foreign and Security Policy (CFSP) through the launching of the European Security and Defense Policy... [t]he European purpose behind the deeper dialogue is to reassure MPCs (Mediterranean Partner countries) about the Role of the European Rapid Reaction Force and possibly to open the way, in the longer terms, to Modest Defence co-operation in areas such as maritime distress relief operations (Gillespie 2002, 98).

Regardless of the ratification of an EU “Constitution” (i.e. the Lisbon Treaty), some of its foreign policy objectives, such as the European Security Strategy (ESS) proposed in 2003, are planned to be implemented separately. (Senyucel et al. 2006, 6) The ESS (2003) “identifies the Union’s Role in the World and its geo-strategic interests” and states, whereby

Europe should share responsibility for global Security and building a better World [as] the EU has the potential to make major contribution, both in dealing with the threats and in helping realize the opportunities. An active and capable EU would make an impact on a global scale.

Robert Kagan (2007) writes that in the years following the Cold War a glimpse at a new world seemed within reach, with nations growing closer and national boundaries becoming less important. However, he points out that this vision has not been realized completely, with international competition between great powers such as the US, Russia, China, Europe, Japan, India and Iran vying for Regional predominance. In this context of Regionalization, multilateralism and the international Security dilemma, let us Examine the context of the EMP within the (pre-Lisbon) Third Pillar of the EU:

The Justice and Home Affairs dimension of the EU, as its Third Pillar, was reciprocally firmly implanted in all chapters of the Barcelona Process (Gillespie 2002, 99) during the 2002 EMP foreign minister conference in Valencia in “anticipating a ‘Regional Cooperation programme in the field of Justice, in combating drugs, organized crime and terrorism as well as Cooperation in the treatment of Issues relating to the social integration of migrants, migration and movements of persons’.” (Euromed Report 44 2002) As the lack of a common language on defense and Security Issues became clear<sup>2</sup>, the Valencia Conference’s final Action Plan tended to delegate responsibilities for terrorism to the *UN* without a Regional initiative (Gillespie 2002), and only noted the need for a Common strategic language. As a point of reference, (im)migration, however, falls from the side of the EU into the “Justice and Home Affairs”- (third) (i.e. interregional) Pillar of the EU, and is handled by the countries on the southern border of the Mediterranean individually. The Third Chapter of the EMP, by comparison, is “social-cultural” – and the intent of the Valencia Conference in 2002 (i.e. post 9/11) was possibly to minimize any appearance of “hard” Security in the EMP.

#### *Good Governance, Development and Security*

The Eastern Mediterranean in particular is poised today more than ever before to become the epicenter of global strategic concern (Papacosma 2004) due to the much greater number of variables involved than existed during the Cold War. This leads to much greater difficulty in determining Common policy among traditional allies and neighbors. The continuing security dilemmas facing the states in this Region validate in my opinion Adler’s (1998 quoted in Attina 2000) belief that multilateral institutions and the community-building Practices, and the “institutions they activate, produce the necessary conditions for peaceful change, i.e. cognitive and material structures, transactions between states and societies and collective identity or ‘we-feeling’”.

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<sup>2</sup> The understanding of terrorism among EMP members varied, such as one country’s terrorist being another’s freedom fighter,

The complex interplay in the Euro-Med of international values and security significantly involves the political aspect of “Good Governance.” It is an area which is greatly dependent on the political will of a country’s leaders to not only legislate laws but also apply them in line with UN criteria of equitable, inclusive, participatory rule of law. The term Good Governance is used not only in the political arena, it is grouped in this paper under this section of “Justice and Home Affairs”, as the UN views it in its Role in terms of development (UNESCAP 2008, What is Good Governance?). Attention has focused on parliaments and the judiciary in Mediterranean countries, and the subjugation of the law and its institutions for the ruler’s interests, both upstream (i.e. the legislative Processes) and “downstream (prosecution, pleas, adjudication etc.)” ((Dupret and Boutaleb 2008, 1) As they take place in a cultural context, the applicability of code actually in practice, and the practices of the courts (including the plethora of actors such as the Court, clerks and Court interpreters) need to be evaluated to determine the quality of governance. ((Dupret and Boutaleb 2008, 2)

“Bad governance is being increasingly regarded as one of the root causes of all evil within our societies.” (UNESCAP) Governance, as the Process of decision-making and the process by government or civil society (such as (corrupt) influential land lords, peasant farmer associations, cooperatives, NGOs, research institutes, religious leaders, finance institutions, political parties, the military and on occasion organized crime syndicates) by which decisions are implemented (or not implemented) through formal or informal decision structures (e.g. kitchen cabinets or mafias). (UNESCAP) In light of this, following the rule of law does not automatically guarantee “good governance”, as the laws themselves may not have been legislated involving accountability, transparency, responsiveness, equitability and inclusivity, effectiveness and efficiency, participatory or consensus oriented. (UNESCAP) As a UN-Concept, “good governance” has been accepted (in theory) by all UN member states – an ideal, which is difficult to achieve in its totality. However, development programs in the “third chapter” of the EMP, the “social-cultural” basket, are well positioned to address some historical cultural obstacles to good governance in some Mediterranean countries.

Helle Malmvig (2004) echoes the dialectic in the EMP’s security discourse, one as being a liberal reform discourse, and the other as a cooperative Security discourse. He furthermore argues that the simultaneous intermingling of these two discourses has meant “that the EU has wavered uneasily between different priorities and logics in its Mediterranean policy.” (Malmvig 2004 , 3) Not only does this make EU policies somewhat schizophrenic, but they also “cause suspicions in Arab states about the real intentions and goals of the EU in the Region.” (Malmvig 2004, 3)

*From Security Community to Security Complex?*

Security in the Euro-Mediterranean has been described as asymmetrical between the Northern and the Southern shores (Schumacher 2003, 223): While Security in (EU-) Europe has traditionally had a multi-lateral character, largely due to Cold War constellations, with EU member states also NATO- and OSCE-members, Security policies in MENA states are generally more unilateral (Ibid.). This has been historically linked to distrust of new European involvement in MENA, and resulted in a more limited polarization during the Cold War between the shores of the Mediterranean (Schumacher 2003), whereby Israel would represent the exception to this North-South as well as “South-South” dynamics.

NATO had solved the self-help game of Europe’s Security dilemma that had governed Europe up to World War II, until the post-Cold War paradigm of the “major power consensus Model” (E. Haas 1964) of the U.S. vis-à-vis European collective Security changed: The Regional Mediterranean Security debate centered on the question of whether it was now a European (Weaver 2000) or a NATO responsibility. (Brevin 2004) NATO (“the Alliance”) recognized that Security and stability in the Mediterranean are significant actors in Europe’s Security structures. (NATO Handbook 2002, Ch. 3)

Beyond the debate of European identity and cultural definitions are also, implicit in the context of regional security community and –Cooperation, Javier Solana’s (1997 quoted in Spencer 2001) pronouncements as then NATO Secretary General of the “Common space, Common concerns and Common heritage” linking Europe to its southern Partners. Nevertheless, beyond NATO’s Mediterranean Dialogue, EMP members had in the past insufficiently developed a dedicated vision or commitment to the indivisibility of Security in their shared space, especially regarding Issues which have risen to the top of many member states’ Security agendas, such as environmental pollution, trafficking (whether human, drugs, weapons or cash), or societal security (e.g. pertaining to certain gender segments of a population), and civil liberties (such as journalistic freedom of expression).

Sarkozy, as president of the 2<sup>nd</sup> semester 2008 EU-presidency, confirmed that EU defense would not undermine NATO (EurActiv.com September 2008), despite the EU’s focus on immigration, development and security, especially vis-à-vis the Mediterranean in light of the recent re-launch of the EMP as the Union for the Mediterranean. Positing the above observation in an International Relations theoretical framework, one can compare the EU’s Mediterranean Relations in a number of paradigms. Traditional neorealist theory holds that the preconditions of the international system enable states to take certain foreign policy actions but not others. (Waltz 1979) Waltz (1959) also suggested that to understand state action in terms of war (as a foreign policy behavior), one needs to understand the dynamics of the international system as well as its internal characteristics, such as leadership, as they may explain the immediate reasons why a war is undertaken. However, the multilateralism described above does not call to mind the realist realm of international relations, one characterized by a

constant struggle to maintain sovereignty from other states in anarchy. Rather, I propose here that the “international system” of the Mediterranean Region and the institutional structures of the Dialogue and the EMP are neither the “finite” system of a zero-sum game, nor (due to the supra-national aspects of the EU at least), are the dynamics of the “Med” exclusively state-centric (with states as the only Actors of note, privilege, or Agency). (Neak 2003, 19) Rather, the Social-Constructivist dynamic of agent-ideas-interests-structure con-construction would be a particularly appropriate approach to understanding the Euro-Mediterranean Regional Security community, as was delineated in the preceding passages.

### **Foreign Policy and Security Implications of the Lisbon Treaty on the EU’s Southern Neighborhood**

This paper has sketched the EU’s CFSP as traditionally rooted in multilateral values as well as approaches to create Conditions supportive of the wellbeing and stability especially in its neighborhood. In the EU’s southern neighborhood especially, these are addressed predominantly through the EMP’s political, economic and socio-cultural soft power approaches, which are now enhanced in the EMP’s “upgrade”-program, the Union for the Mediterranean (UMed), inaugurated on July 13, 2008. Gonzalo Escribano (2005) points out that the ENP’s (in contrast to the EMP’s Region-specific) economic prescriptions had been perceived as merely cosmetic in the past. However, security perceptions in particular

are a decisive component of Mediterranean Security in North-South and South-North Relations alike. In the minds of a number of European publics, political Islamism – identified with terrorism and, at its worst, confusingly identified with Islam itself – tends to replace the defunct Soviet threat as the number one enemy, potentially at its best. (Vasconcelos 1999, 31)

Hence security in MENA is based partially socio-economically, and partially politically (e.g. through the radicalization of Islam). While the United States, especially through NATO, contributes substantially to the Security perception in the Mediterranean (at least until the start of the current Iraq war), the EMP’s Role in Mediterranean Security had been through deepening institutionalization (and its Role in increasing trust among its Partners through iteration and predictability) and political spill-over in terms of Ernst Haas’ (1964) neo-functional theory, as well as social-cultural rapprochement. These occurred largely through the efforts of NGOs; and within the UMed also specifically through the first Euro-Mediterranean University in Piran, Slovenia, and the expansion of the EU’s Erasmus student exchange program to include the Southern Mediterranean MSs of the UMed.

Procedurally, the CFSP and CSDP would be affected by the implementation of the Lisbon Treaty in a few aspects, intended to streamline the Processes of the EU's foreign policies, and present a more effective joint position. To this end, a ratification of the Lisbon Treaty would result in the Heads of State in the EU forming an independent institution (i.e. independent from the Council of Europe), the new "European Council", whose Vice President will also be the High Representative to represent the EU in its foreign relations. (S)he would be assisted by a formal European External Action Service, representing a significant staff increase over the current Policy Planning and Early Warning Unit (Alecu de Flers 2008, 8). Another change affecting the EU's foreign policy upon implementation of the Treaty of Lisbon would be the extension of revised QMV to further policy areas, such as justice and home affairs, asylum, immigration, tourism and civil protection to avoid the smooth functioning of the EU's External Relations to be ham-strung by single country's individual political agenda. The Presidency of the Council (other than Foreign Affairs) will rotate equally among member states (EU Commission 2008) on a two and a half year (one time renewable) basis, instead of the current six months, to increase the EU's stability, especially in its external presentation.

Interestingly, the Lisbon Treaty "acknowledges the importance of dialogue between citizens, civil society associations and the Union's institutions... to take part in European Actions." (Robert Schuman Foundation December 2007) This not only increases the democratic potential of the EU internally, but would enhance potentially the voice of the non-EU member states perhaps via the EU-Med in ever closer Euro-Mediterranean Region.

The CSDP would involve some flexibility to accommodate not only the differing capabilities, but also varying willingness of the EU's member states to participate in civilian and military crisis management. The European Defence Agency had already been established in 2004, but the Lisbon Treaty specifically involves an "Article 5'-type NATO ... obligation" (Alecu de Flers 2008, 10) – Mutual assistance and mutual solidarity clauses. (e.g. to prevent a terrorist threat, and protect democratic institutions or natural or man-made disasters. (Laursen 2009, 20) Under the Lisbon Treaty "permanent structured cooperation" (Robert Schuman Foundation 2007, 24) is introduced for all member states "who commit to taking part in the European military equipment programs and to providing combat units that are available for immediate Action to the European Union", indicating their readiness "to fulfill the most demanding military missions of behalf of the European Union particularly in response to requests made by the United Nations." (Robert Schuman Foundation 2007, 24) Laursen (2009, 19) states that in contrast "to 'enhanced cooperation', the 'permanent structured cooperation' in the defense area does not require unanimity but QMV to facilitate "the implementation of a task to a group of member states which are willing and have the necessary capability for such a task," which would enhance flexibility as

well as multi-speed integration. (Lisbon Treaty Art. 44, quoted in Laursen 2009, 19) This has already been the case with the EDA, as indicated above.

Additionally, in terms of *non*-traditional security, such as energy security, “the Lisbon Treaty would open the way for a truly European energy policy, [e.g.] by enabling” the legislation of a harmonized functioning of EU energy markets, potentially involving a trans-Mediterranean grid. (Robert Schuman Foundation 2007, 15)

### Conclusions

This chapter delineated some of the multiple parameters into which the EU’s foreign policy is embedded in overall, and especially pertaining to the Euro-Mediterranean Region.

The threats identified in the ESDP’s Security Strategy, such as terrorism, failed states, organized crime, proliferation and regional conflicts, all manifest in Africa. (Chaillot Paper No. 87 2005, 31) It is argued in this paper that widespread insecurity in the EU’s (southern) “neighborhood” is reduced with increasing success of the EU’s traditional development policy, in addition to the political approaches. This chapter posits the EU’s Relations with its southern neighborhood within the EMP and its successor program, the UMed, to address security in the Euro-Mediterranean Region from the soft-power institutional values of the EU, the universal values promoted by the UN, and overlapping with NATO’s programs in the region. Regional integration programs are viewed as a force for progress, and are natural allies in the quest for effective multilateralism as a way to ensure a sense of international order, of building trust and of combining effectiveness with Legitimacy, in particular to support those parts of the EMP which are over-armed but under-institutionalized. (Chaillot Paper No. 87 2005, 31/2) This is particularly significant also with respect to subregions, as Hazem Saghieh (Kumaraswamy 2006, 1) writes: “we are brothers but others are dividing us,” e.g. due to state creation without regard to ethnic lines in the post-colonial period. Hence socio-political and economic harmonization and integration between the Northern and southern Mediterranean are not the only concerns of the EMP and now the UMed, but stability and security on the sub-regional level (e.g. Palestinian Authority and Israel) were also affected by the agenda of the EMP at the time.

Cooperative Security in the EMP proved in its early years challenging. Beyond the disagreements among EMP-members over an approach to the Israeli-Palestinian peace process, long-term proactive policies “aimed at fundamental political and economic reform in the Southern countries with a view to imposing systemic changes on their polities” (Aliboni 2002, 7) in terms of democracy, human rights and globalization. These were viewed by the EU “as building blocks on the road to stability, but by the Arab (and to some extent the Turkish) governments as a recipe for interference and certain destabilization.” (Aliboni

2002) MENA countries initially disagreed with the EU's view of linking political and economic reform to address the root causes of instability and conflict, and would have preferred the EU to assist in reducing structural economic and social imbalances, and leave it up to them to address political stability and reform. (Aliboni 2002) Hence, as the South faced this "pro-active" Northern approach, they responded defensively to avoid domestic destabilization. Consequently, the 1998 Palermo declaration underlined the essentially *civilian* character of EMP Cooperation, while in the Stuttgart "guidelines" of 1999 the *Military* component of Security was delayed indefinitely.

In light of the relatively short existence of the ESDP, no extensive and comprehensive Studies have been undertaken to Examine the Relationship between the ESDP and the EMP specifically yet. Vasconcelos (2004, 6/7), however, lists the following key areas of translating principles into Action, especially those cooperative Actions which are feasible and likely to produce results, such as those building on the EU-UN cooperative crisis management experience gained in Bosnia and Kosovo, which might be applicable in sub-Saharan Africa, Civil Protection could be an ESDP task, such as in the mitigation of natural or man-made disasters, civil-Military training and exchange programs under the heading of possibly "transition, Democracy and Security", transparency in EuroMed defense cooperative agreements, as well as a WEU dialogue regarding Cooperation on land mines as a further joint Action area.

The ESDP, and now CSDP, exist as the bridge to the EU's hard power options, ranging from previously only national militaries and NATO on the one hand, and the EU's soft power approach on the other. While the EMP's approach has been basically one of soft-power, focusing on economic and social assistance through the EU's MEDA, NATO per se overall also boasts U.S. Military hard power capabilities. In contrast, NATO's Mediterranean Dialogue aims to build confidence and Cooperation.

While the EMP, as a North-South integration project with the aim of security through the EU's democratic principles of inclusion, and rejecting explicit power politics among the member states (Vasconcelos 2004, 8), the Euro-Med as a Region has been the stage to continuing hard-power confrontations during the existence of the EMP, such as the Israeli-Palestinian conflict, the Lebanese civil war, Algerian internal "turmoil", and other "incidents". One major difference between soft and hard power is the former's long "lead-time" vs. the greater potential for "immediacy" of hard power. Chourou (Spencer 2001, 24) had postulated that "Europe wanted a secure access to oil and gas and protection against waves of migrants". However Spencer (2001) points out that the first chapter of the Barcelona Declaration focuses on the standard agenda for Cooperation over hard Security objectives of arms control, Peaceful settlement of conflicts, conflict prevention and confidence building. In contrast to this, the

southern Mediterranean definitions of Security are almost entirely drawn in economic terms, the principle aim being to secure European financial and technical assistance to restructure markets to meet the demands of increased international competition if not directly the needs of the citizens and subject of each state. (Spencer 2001)

The Lisbon Treaty would converge the determination of the EU's strategic interests and objectives and all its External Action in the European Council, hereby effectively merging its External Relations and CFSP. (Laursen 2009, 4) In conclusion then, the ideological aspect of the Security Culture of the EU rejects nationalism as a legitimate basis for security (in light of the detrimental historical European experiences), but views security as indivisible, and as a supranational aspect. It aspires to resolve differences in Security Cultures of the member states by rule-of-law, and seeks Peace through greater Democracy in terms of the Democratic Peace theory. The practical application of this Security Culture of civilian power Europe in the EMP is approached through comprehensive/integrated policies, i.e. "economic integration, political convergence and Security Cooperation," in order to make conflict a loose-loose proposition in this vision of a Common destiny. (Vasconcelos 2004, 8)

The soft power of the EU, in contrast to Heisbourg's view (2001, 8) is value *rather than interest* oriented, and relates to the reciprocal co-constitution among all EMP-members of structures, values and interests within the dynamics of the EMP. I concur with Heisbourg (2001), stating that the "Process *itself* becomes as important as the specific policy objectives" (italics added). Over the course of the EMP and the changing international Security context, the EU has now recognized that it needs a consolidated hard approach to supplement its soft power, based on a Common vision for this strategy of capability coordination.

The internal dynamics have often been ignored in the Regional Security Analysis of the Euro-Mediterranean, not only in terms of the guarantees of fundamental Rights and freedoms of citizens, but also in terms of the Role of the Military and justice in internal Security. This must be considered post-9/11 in connection with the international War on Terrorism, and the effect this has had on domestic policies, which now increasingly exclude Islamic political parties, and justify repressive strategies or "reinforce authoritarian practices," as well as an "increasing habituation to the use of violence and terror... against civilians." (Vasconcelos 2004, 9)

Since then, the EU's CFSP and CDSP have evolved, though the Lisbon Treaty's name (from its previous reference to "Constitution") de-emphasizes an evolution of the EU Towards a super-state (Alec de Flers 2008, 12) with a foreign and defense policy independent of its member states' policies. Nevertheless, Article 42 of the Lisbon Treaty (quoted in Laursen 2009, 17) provides for

the progressive framing of a Common Union Defence policy. This will lead to a Common Defence, when the European Council, acting unanimously, so decides... The policy of the Union in accordance with this Section shall not prejudice the specific character of the Security and Defence policy of certain Member States and shall respect the obligations of certain Member States, which see their Common Defence realized in the North Atlantic Treaty Organization (NATO), under the North Atlantic Treaty and be compatible with the Common Security and Defence policy established within that framework.

As Laursen (2009, 17) states: the new “Common Defense and Security Policy” ... gets a more prominent place in the new Treaty. The basic definition does not change much, but there is now a new emphasis on operational capacity including both civilian and Military assets.”

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## **Challenges and Opportunities: European Union and Latin American Relation after Lima and Lisbon**

Aimee Kanner Arias

Spanish colonization in the western hemisphere in the sixteenth century began a long history of economic, political and cultural ties between Europe and Latin America. The beginning of European integration in the 1950s would allow these relations to slowly develop to a new dimension, one that is currently based on economic cooperation, political dialogue and trade.

Three key events in the 1980s and 1990s facilitated the institutionalization of European Union (EU)-Latin American relations. On January 1, 1986, Portugal and Spain, arguably the two European countries with the deepest ties to Latin America given their colonial history in the region, joined the EU. Following this Iberian EU enlargement, there was a significant increase in trade and diplomatic relations between the two regions. The second event was the Treaty of Amsterdam entering into force in 1999. This treaty included the creation of the position of High Representative of the Common Foreign and Security Policy, which improved the organization of the EU's external relations, including those with Latin America. Finally, in Latin America in the 1990s there was a transformation of regional organizations based on open regionalism and what many thought were the seeds of supranationalism based on the EU model. These changes were evident in the Andean Community of Nations (CAN), the Southern Cone Common Market (MERCOSUR) and the Central American Common Market, with their transitions to open market economies and their inclusion of potentially supranational institutions, including dispute resolution mechanisms. The EU has embraced relations on the sub-regional level as effective and reinforcing for regional integration on both sides of the Atlantic, but particularly for Latin America.

Given the long history of relations between the two regions and their commitment to strengthening them, however, there is a general consensus that EU-Latin American relations have not progressed as expected, especially compared to the institutionalized framework of relations between the EU and the African, Caribbean and Pacific (ACP) countries (Holland 2002, 59). The difficulties associated with improving EU-Latin American relations stem from several sources. First, in the individual member states composing the regional organizations in Latin America, there is a perpetual and painful lack of good

governance. This malady has translated to the regional level in the inability to consolidate integration. Second, in the 1990s with the reorganization of regional integration in Latin America, there was a general expectation that Latin American attempts at regional integration would more resemble that of the EU and that relations between the EU and Latin America would be developed inter-institutionally between comparable institutions. This hope quickly became a disappointment as evolution of regional integration in the Americas has hardly been so ambitious. Third, although there is a commitment to EU-Latin American relations, they are not a priority agenda item in either region. Latin American governments need to deal with long-term issues such as income distribution inequalities, poverty, drug trafficking, and guerrilla movements. The European Union also has a plethora of issues to address including the devastating financial crisis that began in 2008, the at least temporary inability to complete a treaty reform process that began in 2002, and foreign relations issues having a more direct effect on the economy and security of the EU.

All hope is not lost, however, as both regions have a vested interest in revitalizing interregional relations, a process to which all relevant actors (domestic and regional government representatives) are at least theoretically committed. The European Commission has addressed the situation by commissioning a “Study on Relations between the European Union and Latin America: New Strategies and Perspectives”, and by proposing in December 2005 a renewed strategy for “A Stronger Partnership between the European Union and Latin America”.

In this context of challenges and opportunities for EU-Latin American relations, this paper explores the development of this relationship over time with particular attention to its status in view of the EU’s Treaty of Lisbon and the fifth EU-Latin American/Caribbean Summit which took place in Lima, Peru, in May 2008. First, a framework of EU treaty change with regard to EU-Latin American relations, and EU-Latin American/Caribbean summitry will be provided. Next there will be a brief introduction to EU-Latin American relations and a more specific case study on EU-CAN relations. Finally there will be analysis and conclusions based on the argument that, despite possible attempts to the contrary, at any given time there are issues on the agendas of the EU and Latin American regional organizations that take precedence over building stronger relations between the two.

## **EU Treaties and EU-Latin American/Caribbean Summits**

### *EU Treaties*

The EU was primarily founded on four main documents, all of which are treaties. The 1951 Treaty of Paris established the European Coal and Steel Community (ECSC); the 1957 Treaties of Rome created the European Atomic Energy

Community (EURATOM) and the European Economic Community (EEC); and the 1992 Treaty of Maastricht reorganized European integration into a three-pillar system of European Union. There have been three successful attempts at treaty reform: the 1987 Single European Act (SEA) which provided the necessary tools to complete the single market; the 1997 Treaty of Amsterdam which fortified an EU Area of Freedom, Security and Justice; and the 2001 Treaty of Nice which incorporated the institutional reform necessary for the then imminent Central and Eastern European enlargement processes.

Not all endeavors to deepen, or add competences, to the EU have received the same level of acceptance, however. In 1954, the French National Assembly rejected the Treaty of Paris which would have established a European Defense Community. More recently, in national referendums in their respective member states in 2005, the French and Dutch citizens voted against the Treaty establishing a Constitution for Europe. Given this disappointment after more than three years of hard work by an army of EU officials and civil servants, the EU embarked on a period of reflection to ponder its future in the 21<sup>st</sup> century and how best to achieve its goals given this treaty reform failure. The result was the Treaty of Lisbon, or Reform Treaty, which was signed by the heads of state and government of the EU member states in December 2007. Another obstacle to treaty reform came six months later when the Irish rejected the Treaty of Lisbon in a national referendum. In early 2009, the Irish government agreed to hold a second referendum before the end of that year, the outcome of which will largely determine the options available to the EU.

While there are no direct references to EU-Latin American relations in these treaties, many of the treaties do contain mechanisms through which the EU has better organized and increased cooperation in the area of foreign and security policy, affecting its external relations with third countries throughout the world, including those with Latin America. As would be expected, in the early years of European integration, external relations with third countries were largely associated with commerce and trade. The Treaty of Paris established a commercial policy for the ECSC. At this time the institutions of the ECSC had limited authority that included setting customs duties, and granting import and export licenses (Treaty establishing the European Coal and Steel Community). The Treaty of Rome that created the EEC established a common external tariff for all third countries.

Over the years, there were many attempts to include more cooperation and integration in the area of foreign policy and political cooperation into the system of European integration but it was not until the SEA that these improvements became legally institutionalized. The SEA incorporated the goal of completing the single market for the EU, which was achieved on January 1, 1993. In this context, “by creating new Community competencies and reforming the institutions the SEA opened the way to political integration and economic and monetary union to be enshrined in the Treaty of Maastricht on the European

Union” (SCADPlus). The Treaty of Maastricht reorganized European integration into a three-pillar system, the second pillar of which is the Common Foreign and Security Policy (CFSP). CFSP basically provided an institutionalized forum for the EU member states to cooperate in foreign policy issues of mutual interest. In order to make CFSP more effective, the Treaty of Amsterdam introduced “constructive abstention” which is a procedure that allows certain CFSP decisions to be made with some member states abstaining from the decision and still allowing the initiative to pass. The Treaty of Amsterdam also creates the official position of High Representative of the CFSP, a way of augmenting the EU’s foreign policy profile in the rest of the world. Enhanced cooperation by which member states can pursue integration in certain fields, including foreign and security policy, even if all of the member states have not decided to participate, was facilitated in the Treaty of Nice.

The Treaty of Lisbon, should it enter into force upon all 27 member states ratifying it, includes mechanisms that would further streamline cooperation and integration in the area of foreign and security policy. This Reform Treaty provides for a new High Representative for the Union in Foreign Affairs and Security Policy who also occupies the position of Vice-President of the European Commission. It also includes provisions to establish a European External Action Service to act as a support service for the High Representative. Finally, this treaty facilitates reinforced cooperation amongst a smaller number of member states in the area of European Security and Defense Policy (Treaty of Lisbon).

In addition to the founding and reforming treaties, every time a new member state joins the EU, this enlargement process is legally undertaken through the provisions of an accession treaty. Though many of these treaties are legal and technical in nature, the one that arguably has the most relevance for EU-Latin American relations is the Treaty of Accession of Spain and Portugal. During the Iberian countries’ accession negotiations, their special relations with their former colonies in the western hemisphere were recognized by the member states and institutions of the EU.

### **EU-Latin American/Caribbean Summits**

Since 1999, Summits of the Heads of State and Government of the EU, Latin American and Caribbean countries have convened every few years to strengthen and to provide direction to the bi-regional relations. The first Summit took place in 1999 in Rio de Janeiro, Brazil, with the general objectives of cultivating a greater understanding between the two regions on political, economic, and cultural issues, and developing a strategic partnership in these three areas of mutual interest. The 2002 Summit in Madrid, Spain, specified plans for cooperation in these areas and reinforced the bi-regional relations between the EU and Latin America. The third EU-Latin American/Caribbean Summit was in Guadalajara, Mexico, in 2004 and reiterated the commitment to develop a

strategic partnership, and included a joint dedication to multilateralism as well as a determination to increase social cohesion. The Summit that took place in 2006 in Vienna, Austria, was perhaps the most ambitious. In the final declaration of this Summit, the leaders from both sides of the Atlantic agreed to condemn all acts of terrorism and to try to prevent them through whatever means possible; to strengthen cooperation to prevent and combat drug trafficking and organized crime; to protect the environment; to cooperate more closely in the area of energy; to promote economic growth and employment; to fight against poverty, inequality and exclusion; to cooperate in the area of development; and to cooperate in the area of migration (Declaration of Vienna). The Declaration that concluded the last Summit in Lima, Peru, in 2008, provides additional details and plans for the issues outlined in the Vienna Declaration. The next EU-Latin American/Caribbean Summit will take place in Spain in 2010.

### **EU-Latin American Relations and Case Study on EU-CAN Relations**

#### *EU-Latin American Relations*

EU-Latin American relations are developed on three different levels: regional, sub-regional, and bilateral. The three pillars of these relations are economic cooperation, political dialogue and trade. On the regional level, the EU has institutionalized relations with the Rio Group, which includes all of the Latin American countries, and is the basis of the bi-regional political dialogue between the EU and Latin America. Since 1999, Summits of the Heads of State and Government of the EU, Latin American and Caribbean countries have convened every few years to strengthen and to provide direction to the bi-regional relations. The EU has supported sub-regional integration in Latin America through economic cooperation and dialogue with the Central American Common Market, MERCOSUR, and the CAN. In addition to these regional and sub-regional frameworks the EU has developed bilateral relations with each individual Latin American country.

#### *EU-CAN Relations*

The CAN, since 1997 the successor to the Andean Pact (which was created through the Cartagena Agreement of 1969) is a regional organization that encompasses a free trade area and a customs union. The current member states of the CAN are Bolivia, Colombia, Ecuador, and Peru. The Andean Integration System is a network of institutions, including a Commission, Parliament, Council of Foreign Ministers, and Court of Justice among others that provide the administrative and organizational basis for all aspects of the objectives and work of the CAN.

While European-Andean relations have been developing for centuries, European Community-Andean Pact relations began in the 1970s. During the first few decades until the middle of the 1990s these relations were predominantly economic in nature. After the members of the Andean Pact made a conscious and political effort to deepen integration, and the Andean Pact was reorganized into the CAN, relations between the EU and the CAN also assumed a new meaning and dimension.

After nearly a decade of institutionalized relations consisting of a high-level political dialogue established through the June 30, 1996 Declaration of Rome, a high-level specialized dialogue on drugs, financial, technical and economic cooperation, and the establishment of most favored nation status, and the CAN member countries' inclusion in the EU's Generalized System of Preferences, the EU and the CAN decided to work towards negotiating a fourth-generation association agreement, such as exists already between the EU and Mexico and Chile, respectively, and as the EU is also in the process of negotiating with MERCOSUR. On January 21, 2005, the European Commission and the CAN launched a joint assessment of regional economic integration in the Andean Community as an intermediate stage prior to the beginning of negotiations for an association agreement. This was agreed upon during the May 2004 Guadalajara Summit.

Interregional flows and networks between the EU and the CAN have been deepening over the past decade. While they are not representative of the strongest flows and networks of the EU, they are not negligible. In fact they represent just one element in a web of global interregional flows and networks which are in the aggregate considerable. Physical flows between the EU and the CAN have both positive and negative characteristics. The negative aspects tend to be related with the effects of illegal activities such as drug trafficking and money laundering in both regions. Due to their nature, precise numbers are not available for these interregional flows. For flows having to do with for example (legal) trade, investment, and immigration, however, there are data available.

The total value of trade between the EU and the CAN in 2004 was \$15 billion. EU exports to the CAN in 2004 equaled \$6 billion, and CAN exports to the EU equaled \$8.8 billion that same year. For the CAN, the EU represents its second largest trading partner, representing 14.5% of the CAN's total trade. For the EU, the CAN is its 29<sup>th</sup> "smallest" trading partner, representing just 0.7% of the EU's total trade (European Commission, "Trade Issues"). While there are clearly skewed trade relations between these two regions in terms of importance, the value of trade between the two regions is fairly comparable. Nevertheless, trade between the EU and the CAN still accounts for \$15 billion in world trades. Furthermore, the CAN benefits from the EU's General System of Preferences, giving CAN member countries duty free access to the EU-market, a system which gives the CAN member countries even greater special preferences for so-called sensitive products due to its role in the fight against drug production and

drug trafficking. In 2003 EUR 1.6 billion of CAN's exports to the EU entered the EU market under the duty free advantages of this system (European Commission, "Trade Issues").

With regard to foreign direct investment (FDI) in the Andean region, the EU is one of the most important sources of FDI for the CAN. In fact, the EU accounts for more than one quarter of total FDI in the CAN (European Commission, "Trade Issues").

In terms of immigration, up until several decades ago migration flows were predominantly from the EU to the CAN, while today the opposite is true. In 2000 CAN immigration to the EU totaled 166,316 immigrants, with the great majority coming from Ecuador and arriving in Spain (European Communities 2003, 32-34). While 166,316 may not seem like a significant number, it is a physical interregional flow that in some way nevertheless has to be regulated. In addition, secondary flows result from this primary one, such as money remittances from the EU back to the CAN. The EU's single market, allowing for the free movement of people within the internal borders of the EU member states, makes the impact of these flows indeed regional, even though it is only a single EU member state, Spain, which receives the majority of the CAN immigrants.

The three pillars of the EU-CAN relations: political dialogue, economic cooperation and trade, are supported by legal international agreements. The legal documents of the political dialogue are the Declaration of Rome and the Political Dialogue and Cooperation Agreement, signed in Rome, Italy, on December 15, 2003, and currently in the ratification process. The legal bases of cooperation are Council Regulation (EEC) No. 443/92 of 25 February 1992 on Financial and Technical Assistance to, and Economic Cooperation with, the Developing Countries in Asia and Latin America; the 1993 EU-CAN Framework Agreement on Cooperation; Council Regulation (EC) no. 807/2003 of 14 April 2003, adapting to Decision 1999/4681EC the Provisions Relating to Committees which Assist the Commission in the Exercise of its Implementing Powers, laid down in Council Instruments and adopted in accordance with the Consultation Procedure (Unanimity); and the 2003 EU-CAN Political Dialogue and Cooperation Agreement (still undergoing the ratification process). Trade between the EU and CAN is regulated under the legal framework of Council Regulation (EC) No. 2211/2003 of 15 December 2003, amending Regulation (EC) No. 2501/2001 "Applying a Scheme of Generalized Tariff Preferences" for the Period from 1 January 2002 to 31 December 2004 and Extending it to 31 December 2005 (European Commission, "The EU's Relations").

## **Conclusions**

EU-Latin American relations are passing through a historic moment that poses challenges as well as opportunities. Interactions in the form of flows and networks continue to slowly but steadily increase between these two regions.

Furthermore, there has been a serious commitment from actors in both the EU and Latin America to rejuvenate and strengthen their relationship. In October 2005, Benito Ferrero-Waldner, European Commissioner for External Relations and European Neighbourhood Policy, in a speech at the 40<sup>th</sup> Anniversary of the Austrian Latin America Institute in Vienna, Austria, stated:

Today, our [EU-Latin America] friendship is strong, both politically and economically. Together, we represent nearly a billion people. Our relations are based on long-standing historical and cultural ties and shared values. Europe is Latin America's second largest trade and investment partner, with rapidly expanding business ties. Finally, our broad consensus around the international agenda is an important axis of today's multilateral world order. In short, Europe and Latin America are natural partners (2005).

Clearly, while experiencing certain difficulties, the EU-Latin American, and in turn, EU-CAN relations will continue.

In view of the latest EU-Latin American/Caribbean Summit and EU treaty reforms, and the fact that there are no pending radical changes specifically with respect to EU-Latin American relations, it can be expected that this interregional relationship will remain on a relatively similar path. Most of the declarations of the EU-Latin American/Caribbean Summits have addressed the importance of developing a vibrant strategic partnership between the EU and Latin America yet have been vague in nature. Furthermore, compliance with their action plans has been limited albeit not necessarily purposefully, especially on the part of the Latin American countries. In terms of the EU treaty reforms, the passage into force of the Treaty of Lisbon would be associated with implementation of mechanisms to make EU foreign policymaking more effective and efficient which would have an indirect (likely positive) effect on its relations with Latin America. If this latest attempt at treaty reform should be permanently obstructed, the EU will continue to operate in the area of foreign policy according to the latest treaty reform to enter into force, the Treaty of Nice.

EU-Latin American relations are also the result of simple facts. Latin America is not one of the EU's top trading partners. It is located across the Atlantic Ocean and, therefore, poses no immediate security threat to the EU. Latin America has not progressed as expected in the area of regional integration. It can be argued that in the absence of crisis or extreme change, at any given time there are issues on the agendas of the EU and Latin American regional organizations that take precedence over building stronger relations between the two.

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## **Conclusions: The New Europe after Lisbon Treaty**

Roberto Domínguez

The present book has inquired on several angles surrounding the uncertainties of the Treaty of Lisbon. Regardless of the result of the second referendum in Ireland and the pending ratifications in Poland, Czech Republic and Germany, the European Union (EU) will not be the same after the Lisbon Treaty. If it comes into effect, Europeans will face a new stage in the deepening of the integration process; if it is rejected, the first decade of the 21st Century will represent a period of institutional stagnation in the integration in Europe.

The preceding chapters have dealt with various aspects of the Lisbon process. All of them share a consensus that the Lisbon Treaty will make the EU decision making process more efficient, enhance the regional democracy and strengthen its international voice. After analyzing the first section of this book, the reader can conclude about the complexity of reaching a regional consensus on the common destiny revealed in the Treaty of Lisbon, which is the result of a collective negotiation. Both, José Sócrates and José Manuel Durão Barroso emphasize in the opening prefaces the contributions of Community institutions and states to make possible the prospects of a EU closer to the citizens and more credible in its performance. Sócrates reminds us that Europe is founded on the equality among the states, mutual respect, close cooperation and tolerance, while Durão Barroso stresses that the Treaty of Lisbon will strengthen the European Parliament and the community method.

The four articles included in the second section of the book put in perspective the historical and institutional contributions of the Lisbon Treaty. After reminding us about the sui generis nature of the EU and the challenges to study a dynamic process where stepping stones and seemingly insurmountable obstacles are intrinsic components of the integration process, Joaquín Roy asserts that despite the critical view about the Treaty of Lisbon, all the political actors have a vested interest in seeing the EU move ahead. In historical perspective, this hesitation is a kind of 'accident' that is a recurring phenomenon in the EU's recent history.

The recurring "historical accidents" are the result of a dynamic process that is far from perfect. Paulo de Pitta e Cunha enriches the debate on the post-Lisbon Treaty, regardless of its own fate, when argues that the Treaty of Lisbon reveals two negative characteristics. The first is the prevalence of big countries over the rest of the countries in the qualified voting system, and the second is the absence of any significant mechanism to revise the regime of the Economic and

Monetary Union. Additionally, he questions the opacity of the treaty, which makes it hard to understand by the European citizens. De Pitta e Cunha says that the Lisbon Treaty has failed to produce an alternative vision of the EU as an entity different from the state performing the role of regulator; instead, it remains the dichotomy view of states versus supranational institutions. The treaty is, in his view, progressing by stealth.

Likewise, Vivien A. Schmidt argues that unanimity and uniformity are things of the past. The EU is now too diverse to expect all member-states of the EU to ratify any given treaty or to participate in all areas of EU activity. In a nutshell, the problem is that member-states have competing visions of the EU, and are increasingly divided over what they would be willing to sign up to. Thus, Schmidt asserts that policies, not institutions, must be the focus of the day if the EU is to move forward. But whatever happens with regard to the Lisbon Treaty, it will not solve the underlying problem, which is how to accommodate member-states' differing visions of the EU? The solution, in her view, is to give up unanimity and uniformity.

The closing article of the second section is written by Chris J. Bickerton, who describes how the states negotiated their preferences in order to conclude the negotiation and make possible the second attempt to ratify the Treaty in Ireland. He argues that it was decided at the European Council summit in December 2008 that Ireland should be asked to vote again on the Treaty and it was agreed that Ireland would be offered a political promise from the European Union that future legal guarantees against a number of issues (neutrality, abortion, tax) would be inserted into the accession Treaty with Croatia, expected to come into effect in 2011. In the meantime, Bickerton states that the only substantive change – which can occur without the need to modify the Lisbon Treaty – is that of the number of Commissioners. Instead of reducing the size of the Commission, the body will continue to include one national from each member state

The third part of the book aims to present an in depth analysis of the Lisbon Treaty. The six articles in this section explain in detail the advantages and the limitations of the Lisbon Treaty. Thus, the EU under the Lisbon Treaty will make the following modifications:

- The European Council officially becomes an institution.
- The Union will have legal personality and will also be able to enter into international agreements under CFSP.
- New post of High Representative of the Union for Foreign Affairs and Security Policy will be also Vice-President of the Commission.
- New European External Action Service.
- Reduction of the number of situations, in which unanimity voting is required.
- Use of qualified majority voting (QMV) in the Council of Ministers becomes the norm.

- Strengthening of both the political and legislative role of the European Parliament.
- National parliaments will have an increased role in the future.
- Listing of the exclusive competences of the Union along the shared competences.
- The jurisdiction of the ECJ will be enlarged because of the abolition of the pillar structure, with some limitations remaining especially for CFSP.
- Enhanced cooperation in all areas, including CFSP and CSDP.
- New concept of “permanent structured cooperation” in the defense area (contrary to “enhanced cooperation,” it does not require unanimity to be established, but a QMV).

Notwithstanding the above, Luis Silva Morais correctly points out that the Lisbon Treaty does not yet represent the *end of history* in terms of the European integration process. In reality, even if the Treaty of Lisbon is ratified, there will still be problems in the functioning of the EU that have not been addressed. In this regard, understanding the EU as a process is of the utmost relevance to put in perspective the Lisbon Treaty. Thus, Finn Laursen indicates that there will be an increasing convergence of interests among the member states, in which interaction, actor socialization and learning processes may gradually produce collective European identities and consequently strengthen the EU policy making. However, new treaties are not enough. Adam Kreidman concurs with Finn Laursen as to the argument that the rationale of collective action will have to be communicated to the European publics in a convincing way. In fact, what the rejections of the Constitutional Treaty and the Lisbon Treaty confirm is that the EU is not easily understandable for many of its citizens. Until the leaders of the EU can find a way to simplify the content of the reform process, or cogently convey its intricacies, they will likely face further defeats in their efforts.

Thus far, the transformations above mentioned have led the EU to an uncertain transition period. Renaud Dehousse argues that although the diplomatic model of its early days, in which the states play a central role, is still embodied in the Lisbon Treaty and has undoubtedly reached the limits of what it can achieve. The growing number of potential veto-players increases the risk of deadlock and reinforces the need for carefully prepared reforms. In his view, veto players should be integrated into the preparation of reforms, just as the Convention had begun to do by involving parliamentary representatives in the process. Citizens must have a voice earlier on in the reform process. The dialogue between the state and European levels should be smoothed out and there is a need to develop a genuine transnational debate on the issues which are addressed. Although this new more encompassing model is embryonic and modestly emerging, it is important, as Francisco Lorca reminds us, to keep in mind that the European project has required since its inception leaders with two particular characteristics: imagination and patience.

The fourth and final section analyzes the external reverberations of the Lisbon Treaty. Luk Van Langenhove and Daniele Marchesi use the three-generation typology to explain the foreign policy of the EU. The authors state that the first (economic sovereignty), second (internal sovereignty) and third (external sovereignty) generation features all coexist and accumulate within the EU as in other organisations, but are not equally developed. Thus, the Lisbon Treaty will contribute to address a strategy to tackle today's global challenges, which are largely non-military: global warming, sustainable development, energy security, migration, terrorism. However, it will leave unsolved most of the key dilemmas between federal and intergovernmental strategies and between effectiveness and member states control. This ambiguity will continue to hamper the capacity of Europe to concentrate authority and power in its foreign policy.

As to the role of the transformations of the Lisbon Treaty on the European and national parliament, Covadonga Ferrer states that these provisions will have more or less efficacy depending on the organization and constitutional practices of each member state. Each one has adopted its own practices to control the decisions adopted by its governments at the European level: some have adopted ambitious mechanisms, like Denmark or England; others have made mere formal changes; and all have created parliamentary commissions for the monitoring of the European issues. Along the same lines, María Lorca puts in perspective the relative impact of the Lisbon Treaty on the Euro y arguing that despite the fact that certain measures recognized in the Treaty of Maastricht have been criticized as rigid and counterproductive, the Treaty of Lisbon will maintain them.

The last two articles in the book tackle the regional external relations of the EU toward the Euro-Mediterranean region and Latin America. From their distinct angles, Astrid Boening and Aimee Kanner concur with the argument that the implementation of the Treaty of Lisbon would be associated with execution of mechanisms to make EU foreign policy making more effective and efficient and would have an indirect (likely positive) effect on its relations with the Euro-Mediterranean region and Latin America. However, if this latest attempt at treaty reform is obstructed, the EU will continue to operate in the area of foreign policy according to the latest treaty reform to enter into force, the Treaty of Nice.

Fifty years ago, Europe decided to replace the battlefield by the battle of ideas. European new generations have taken as given the common good of peace. Fortunately, the EU is not about suppressing destructive instincts today. Instead, the current debate is about constructing the deepening and the widening of a new political entity. Regardless of its final destiny, Europe will not be the same after the Lisbon Treaty.

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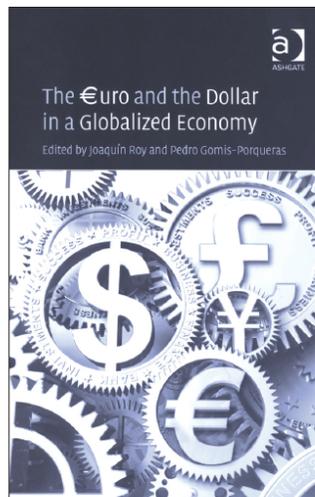
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# Regional Integration Fifty Years after the Treaty of Rome

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