



# eipascope

Bulletin  
Special Issue  
No. 2008/1

In this issue >>

From Rome to Lisbon: Really the End of the Road?  
*Dr Edward Best*

The Lisbon Treaty: A Qualified Advance for EU  
Decision-Making and Governance  
*Dr Edward Best*

The Lisbon Treaty and External Relations  
*Dr Simon Duke*

Justice and Home Affairs in the Lisbon Treaty:  
A Constitutionalising Clarification?  
*Brendan Donnelly*

Flexibility within the Lisbon Treaty: Trademark or Empty Promise?  
*Funda Tekin and Prof. Dr Wolfgang Wessels*

The Treaty of Lisbon: New Signals for Future Enlargements?  
*Sonia Piedrafita*

The EU Treaty Reform Process since 2000: The Highs and  
Lows of Constitutionalising the European Union  
*Dr Thomas Christiansen*



[www.eipa.eu](http://www.eipa.eu)



EIPA's Headquarters  
Maastricht (NL)



European Documentation  
Centre



# About EIPASCOPE

---

EIPASCOPE is the Bulletin of the European Institute of Public Administration and is published three times a year. The articles in EIPASCOPE are written by EIPA faculty members and associate members and are directly related to the Institute's fields of work. Through its Bulletin, the Institute aims to increase public awareness of current European issues and to provide information about the work carried out at the Institute. Most of the contributions are of a general character and are intended to make issues of common interest accessible to the general public. Their objective is to present, discuss and analyse policy and institutional developments, legal issues and administrative questions that shape the process of European integration.

In addition to articles, EIPASCOPE keeps its audience informed about the activities EIPA organizes and in particular about its open seminars and conferences, for which any interested person can register. Information about EIPA's activities carried out under contract (usually with EU institutions or the public administrations of the Member States) is also provided in order to give an overview of the subject areas in which EIPA is working and indicate the possibilities on offer for tailor-made programmes.

Institutional information is given on members of the Board of Governors as well as on changes, including those relating to staff members, at EIPA Maastricht, Luxembourg, Barcelona, Milan and Warsaw.

The full text of current and back issues of EIPASCOPE is also available on line. It can be found at:  
<http://www.eipa.eu>

## EIPASCOPE dans les grandes lignes

---

EIPASCOPE est le Bulletin de l'Institut européen d'administration publique et est publié trois fois par an. Les articles publiés dans EIPASCOPE sont rédigés par les membres de la faculté de l'IEAP ou des membres associés et portent directement sur les domaines de travail de l'IEAP. A travers son Bulletin, l'Institut entend sensibiliser le public aux questions européennes d'actualité et lui fournir des informations sur les activités réalisées à l'Institut. La plupart des articles sont de nature générale et visent à rendre des questions d'intérêt commun accessibles pour le grand public. Leur objectif est de présenter, discuter et analyser des développements politiques et institutionnels, ainsi que des questions juridiques et administratives qui façonnent le processus d'intégration européenne.

En dehors des articles, EIPASCOPE contient également des informations sur les activités organisées par l'IEAP et, plus particulièrement, ses séminaires et conférences ouverts qui sont accessibles à toute personne intéressée. Notre bulletin fournit aussi des renseignements sur les activités de l'IEAP qui sont réalisées dans le cadre d'un contrat (généralement avec les institutions de l'UE ou les administrations publiques des Etats membres) afin de donner un aperçu des domaines d'activité de l'IEAP et des possibilités qu'il offre pour la réalisation de programmes sur mesure adaptés aux besoins spécifiques de la partie contractuelle.

Il fournit également des informations institutionnelles sur les membres du Conseil d'administration ainsi que sur les mouvements de personnel à l'IEAP Maastricht, Luxembourg, Barcelone, Milan et Varsovie.

EIPASCOPE est aussi accessible en ligne et en texte intégral sur le site suivant: <http://www.eipa.eu>



# From Rome to Lisbon: Really the End of the Road?



By **Dr Edward Best\***

The signature of a "reform" treaty to replace the ill-fated Constitutional Treaty promises to conclude the problematic process of rewriting the formal bases of the Union. Assuming ratification, this will be greeted with relief both by those who have presented the last few years as a "crisis" and by those who simply want to put these institutional questions behind them and move on. Of so many elaborate plans, perhaps, this is the end.

Following its signature on 13 December 2007, the European Council pronounced that "The Lisbon Treaty provides the Union with a stable and lasting institutional framework. We expect no change in the foreseeable

future". This new framework, moreover, despite the exceptions which had to be accepted and the inevitable textual mysteries of a reform treaty, was seen to represent an important improvement in terms of democratic accountability, clarity and effectiveness.<sup>2</sup>

It may be the case that the basic construction of a European edifice (including some recent extension jobs to accommodate new residents) has been completed, to enter a period, so to speak, of institutional home improvement. A shift of just this kind is suggested in the successive drafts of the preamble. In the July 2007 version, the Treaty was said "to complete the process started by the Treaty of



*Signed Treaty of Lisbon.*

© The Council of the European Union, 2008

future..."<sup>1</sup> This was echoed by the European Parliament (EP) when adopting a favourable resolution in February 2008: "the Treaty of Lisbon will provide a stable framework which will allow further development of the Union in

Amsterdam and by the Treaty of Nice of adapting the institutions of the European Union to function in an enlarged Union." In the final text, the Treaty is said "to complete the process started by the Treaty of Amsterdam and by the

\*All references in these contributions refer to the renumbered articles of the Treaty on European Union and the Treaty on the Functioning of the European Union as agreed at Lisbon.

Treaty of Nice with a view to enhancing the efficiency and democratic legitimacy of the Union and to improving the coherence of its action”.

Yet this obviously does not suggest a sort of “end of history” for the European system. Even if major treaty reform is not going to take place in the foreseeable future, no-one would argue that the process of “improvement” should be discontinued and, independently of actors’ preferences, there seems no reason to believe that the dynamics of institutional change will now suddenly cease to operate.

This special issue of *EIPASCOPE* offers a preliminary reflection on the implications of the Lisbon Treaty for the evolution of EU governance and the constitutionalisation of the Union. The contributions draw on work carried out by members of the working group on “constitutional and institutional change” which has been created within the **EU-CONSENT** Network of Excellence, which is supported by the EU’s 6<sup>th</sup> Framework Programme and led by Professor Wolfgang Wessels at the University of Cologne. EIPA’s Unit I coordinates the Work Package on Institutions.

The first contribution focuses on the new system of binding EU acts, with its important extension of codecision as the “ordinary legislative procedure”, and a differentiation between “delegated acts” and “implementing acts” at non-legislative level. It is argued that overall the changes represent a qualified advance in decision-making and governance. Apart from the extension of majority voting, they do not promise any increase in efficiency beyond what was achieved through adaptation to enlargement. There should be an improvement in comprehensibility but there remain many variants and exceptions. And the formal changes do not in themselves, however, guarantee an increase in legitimacy, which will also require movement on other fronts.

*Simon Duke* then assesses the perspectives for the Common Foreign and Security Policy (CFSP) and the Common Security and Defence Policy (CSDP) after Lisbon. These areas of cooperation will continue to be intergovernmental. Nonetheless, some important innovations are introduced, notably the strengthened position of High Representative and the new European External Action Service, which could contribute to greater consistency and effectiveness of the Union’s role in the world. This will depend, however, on how the provisions are put into practice and, above all, on the political will of the Member States.

*Brendan Donnelly* considers the changes proposed concerning Justice and Home Affairs. In contrast to CFSP/CSDP, where the impact of EU measures is mainly felt outside the Union, this area constitutes the obverse side of the coin which is the internal market at the heart of the Union. It is therefore objectively understandable that the Member States should have come to accept the need to apply the same kinds of rules and practices in this areas as well. The transformation is nonetheless remarkable and, despite some continued exceptions and specificities, the result is a clarification which may be considered to be of a constitutionalising nature.

Some of the specific elements surrounding the former “Third Pillar” concern the possibility for “enhanced cooperation” within groups of Member States. This is addressed by *Funda Tekin* and *Wolfgang Wessels* in their contribution on flexibility. After reviewing the different concepts of flexibility which have emerged, and their respective implications for the European integration process, they discuss the specific changes introduced by the new Treaty, concluding that enhanced cooperation, as a form of flexibility which can have an “upward” effect is in fact unlikely to materialise to any significant extent.

The implications for further enlargement are dealt with by *Sonia Piedrafita*. The Lisbon Treaty was negotiated against the background of a new strategy on enlargement based on consolidation of existing commitments, better communication to citizens, stricter conditionality and the consideration of the EU’s capacity to integrate new members. Although the provisions reflect a less favourable atmosphere for enlargement and are intended to reinforce conditionality, they may not constitute significant changes in practice. Nevertheless, future accession processes are likely to be long and strict – which will also have implications for the EU’s policy with neighbouring countries.

Finally, *Thomas Christiansen* considers the Lisbon Treaty in the broader perspective of the recent evolution of debates over the EU system. He reviews the different episodes of treaty reform over the last decade, seeing them as part of a continuous process and looking at both the formal and informal dimensions of change. He concludes that, even if consideration of a formal “Constitutional Treaty” as such may prove to have been only a brief interlude in European integration, a process of constitutionalisation has been taking place – and is going to continue.

## NOTES

\* Dr Edward Best, Professor, Head of Unit “European Decision-Making”, EIPA.

<sup>1</sup> Presidency conclusions, Brussels, 14 December 2007, 16616/07.

<sup>2</sup> European Parliament Resolution of 20 February 2008 on the Treaty of Lisbon, 2007/2286 (INI).

# The Lisbon Treaty: A Qualified Advance for EU Decision-Making and Governance



By Dr Edward Best\*<sup>1</sup>

The Lisbon Treaty represents a significant shift in EU decision-making, although important changes have already taken place as the institutions have adapted to enlargement. The extension of majority voting promises some further increase in efficiency, and the extension of codecision as the “ordinary legislative procedure” strengthens the formal democratic aspects of the process. The new system of instruments and procedures, including the new distinction between delegated acts and implementing acts within non-legislative acts, may also prove easier for people to understand, despite the existence of multiple exceptions and special cases. However, it remains to be seen how several important aspects of the new system will be implemented in practice; it is not clear that this will in itself increase legitimacy; and the dynamics of change will continue to be felt. Even if there is no major treaty reform in the near future, this is not the end of history when it comes to the EU institutional system.

## Introduction

This contribution discusses the impact of the Lisbon Treaty on EU decision-making procedures from two perspectives. First, it discusses whether the resulting system of binding EU acts is likely to be simpler and more efficient in terms of producing decisions.

Second, it asks how far the Treaty promises to strengthen the foundations of the Union by addressing the basic challenges for decision-making in terms of (good) European governance? That is, does it seem likely also to increase the transparency of procedures and the quality of the results, as well as the overall legitimacy of the system?

It therefore starts by summarising the main issues which have been at stake, then reviews the changes introduced by the new Treaty, and finally offers some tentative assessments of the likely impact of Lisbon on the EU’s decision-making processes.

## Simplification and problem-solving

Member States have largely agreed on two basic drivers for reform of the Union’s constitutional structure and decision-making procedures. On the one hand, there has been

universal support for *simplification* of the complicated system which has grown up bit by bit over the last decades. On the other hand, and with less consensus as to the solutions, there has been pressure for substantive *problem-solving*. That is, there has been broad political agreement, with considerable public support, that in certain spheres the existing arrangements of the Union are dysfunctional for

the achievement of shared objectives, and are so to an extent that outweighs the sovereignty costs of joint action. Consequently a formal change in powers and procedures has been accepted which strengthens European decision-making at the expense of national discretion. In both respects, it has also been hoped that reforms would boost legiti-

**There has been universal support for simplification of the complicated system which has grown up bit by bit over the last decades.**

macy, both on the “input” side, by permitting a clearer understanding among citizens as to how decisions are taken (and perhaps also a feeling of greater influence on decision-making), and on the “output” side, by producing tangible benefits in areas of popular concern.

The process of simplification was to begin with the basic treaty structure. The Treaty of Maastricht, the “Treaty on European Union” (TEU), modified the content of the three Community Treaties, which continued to exist within the TEU.<sup>3</sup> In its Titles V and VI, it also established the bases for intergovernmental cooperation between the Member States

in the form of a Common Foreign and Security policy (CFSP – the “second pillar”) and Cooperation in Justice and Home Affairs (the “third pillar” – since 1999, Police and Judicial Cooperation in Criminal Matters).

The EU since Maastricht has thus often been presented in the form of a Greek “temple”, with the Union as the roof, the Communities as the *naos* at the heart, and inter-governmentalism as the surrounding *peristasis*. This model rather accurately reflects the way in which European integration has historically worked. Stability in the complex and contested process has been assured by a combination of a range of commitments based on law, and the acceptance of more flexible arrangements around that indispensable “hard core”. Yet these arrangements have resulted in a degree of complexity which is incomprehensible to most people, as well as working against efficiency and effectiveness even in policy areas in which there is a general consensus. Only the Communities have explicit legal personality. Each pillar gives the institutions different powers and uses different instruments and procedures.

## We will go from a situation in which we have three Treaties to one in which we will have ... the same three Treaties, one with a different name.

different name. The TEU remains as such, continues to include CFSP, and gives legal personality to the Union. The Community Treaty becomes the Treaty on the Functioning of the European Union (TFEU) and notably includes the former third pillar. The two treaties are said to have “the same legal value”, and the Union replaces and succeeds the Community (the term “Community” is systematically replaced throughout). Euratom remains a separate Treaty, modified by a Protocol annexed to the Treaty of Lisbon.

The resulting structure can no longer be captured by the old architectural imagery (although it is tempting to say that, given the continued specificities of procedures in both CFSP and, albeit within the TFEU, of police and judicial cooperation in criminal matters, the change has been from a Greek temple, with pillars on the outside, to a Roman villa, with pillars on the inside). It is more complicated than it could have been, which is a disappointment in terms of making the constitutional structure of the Union more comprehensible to people. Nonetheless, as far as the practical consequences for decision-making are concerned,



Celebrating 50 years of the Treaty of Rome.  
© The Council of the European Union, 2008

The Constitutional Treaty proposed to merge the Treaty of Maastricht and the Treaty of Rome (the Community Treaty, that is: given the sensitivities over nuclear energy, Euratom was never going to be merged, but simply attached to the Union – hopefully out of public sight). The Lisbon Treaty does not go so far. Indeed, the result of the retreat from the Constitutional near-unification is that we will go from a situation in which we have three Treaties to one in which we will have ... the same three Treaties, one with a

this does represent an advance in terms of both simplification and problem-solving because the same instruments and largely the same procedures will be applied in police cooperation and judicial cooperation in criminal matters.

The simplification exercise was equally directed at the Union’s multiple legal instruments and decision-making procedures. The Community started with three binding legal instruments (Regulation, Directive, Decision) and one main procedure: decision by the Council on the basis of a

Commission proposal, generally after consulting the Parliament. In theory, qualified-majority voting (QMV) would come to apply in numerous sectors in contrast to unanimity, thus creating two main alternatives within this "consultation" procedure,<sup>4</sup> but in practice this was not used until the 1980s. Over the decades, decision-making procedures proliferated. The role of the EP in decision-making was strengthened, however, by successively adding on new procedures in specified areas. By the early 1990s the EP variously had the right of consultation, cooperation and codecision in legislative procedures, as well as its budgetary powers and the right of assent. At the same time, a second level of Community law was consolidated as the system of Community implementing acts was formalised: that is, the delegation of powers in secondary legislation by the

Council (or later, the Parliament and Council) to the Commission for the application or adaptation of certain non-essential elements of the rules. Numerous different procedures were defined governing the way in which the Commission should consult these "comitology" committees.

As already noted, the new "pillars" had their own instruments and procedures. Together with the lack of a clear hierarchical differentiation between binding Community instruments, the result was complex and hard to understand. There were regulations, directives and decisions adopted on the basis of the Treaty (by different forms of inter-institutional interaction); regulations, directives and decisions adopted on the basis of secondary legislation (with different forms of consultation with committees); common strategies, joint actions, common positions and decisions in CFSP; and framework decisions, decisions and common positions in the third pillar. One of the core mandates given to the European Convention by the Laeken European Council was thus to reduce the number of instruments and procedures.

### Instruments

The Constitutional Treaty had proposed two legislative acts: "European laws" and "European framework laws", which would respectively replace, with the same legal characteristics, the regulations and directives currently adopted by the Community legislator on the basis of the treaty. Everything else would be squeezed into two non-legislative categories of regulations and decisions

The introduction of the word "law", however, was among those symbolic elements which were dropped in order to demonstrate that the new treaty did not have a constitutional character. The Lisbon Treaty therefore retains regulations, directives and decisions as the legally-binding instruments of the Union for legislative acts and for all kinds of non-legislative acts.<sup>5</sup> The loss of the terminological distinction between these two kinds of act may well be regretted on the grounds of transparency, although the system proposed in the Constitutional Treaty would have introduced other forms of complexity as well being a

practical nightmare to introduce (Best 2003).

Only one instrument, the decision, is changed. It will henceforth be defined as follows: "A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them."<sup>6</sup> This covers both decisions as defined in Article 249 of the TEC, which are individual instruments addressed to specified

parties (ranging from all the Member States to an individual company); and "sui generis" decisions adopted in the framework of the Community which have no addressees (for example, in trade policy, for the adoption of action programmes or to change organic rules). Whereas the instruments of the third pillar will genuinely disappear, the changes in CFSP are largely cosmetic. A "common strategy" becomes a "European Council decision on the strategic interests

and objectives of the Union"; a "joint action" a "decision defining a Union action"; and a "common position" a "decision defining a Union position".

### Legislative acts

Like the Constitutional Treaty the Lisbon Treaty explicitly establishes a category of "legislative" acts, divided according to the procedure by which they are adopted.

Codecision, by which the Parliament has equal rights with the Council, becomes the "ordinary legislative procedure" and is extended to over 40 new cases. The new areas notably include agriculture and most of the former third pillar. In this latter respect, however, the extension has come at a price. The Commission will share the right of initiative with one-quarter of the Member States.<sup>7</sup> An "emergency brake" is foreseen in different ways for decisions on criminal procedure, the definition of offences and sanctions, the establishment of a European Public Prosecutor's Office, and operational cooperation between police, customs and other specialised law enforcement services. In these cases the procedure may be suspended for four months and referred to the European Council, possibly resulting in the proposed measure going ahead in the form of enhanced cooperation among at least nine Member States.

A category of "special legislative procedures" covers several other forms of interaction between Council and Parliament. These include the annual budget negotiations, in which the Parliament has gained in power notably by virtue of the abolition of the distinction between "compulsory" and "non-compulsory" expenditure, and the formal introduction of the Conciliation Committee procedure. The Parliament adopts "regulations on its own initiative" concerning exercise of the right of inquiry and conditions governing the performance of MEPs and the Ombudsman's duties. There are five cases of "consent" by the European Parliament (a renaming of the present "assent"), concerning procedures for European elections, combating discrimination, citizens' rights, implementing measures for the system of own resources and the multi-annual financial framework.

## Codecision, by which the Parliament has equal rights with the Council, becomes the "ordinary legislative procedure" and is extended to over 40 new cases.

Finally, there are 22 cases in which Parliament is only consulted – of which, in 20 cases, the Council acts unanimously. These apply in a number of cases in justice and home affairs, as well as in the usual sensitive areas for Member States such as taxation or social security.

### Non-legislative acts

The Lisbon Treaty introduces two categories of non-legislative acts which will have to start replacing the present system of “comitology” – just as the ongoing reform of that system reaches its full implementation. In order to assess the impact, one needs to look briefly back at the previous stages in this process. There have been four basic issues.

The first, the pursuit of a clearer hierarchy of norms – meaning a terminological distinction between those binding acts adopted on the basis of primary law and those binding acts adopted on the basis of the secondary acts – has already been mentioned.

The second issue has concerned rationalisation and standardisation of the procedures governing the Commission’s consultation of committees. By the mid-1980s, a proliferation of different procedures had grown up. The first “comitology decision” in 1987 provided for a menu of seven different procedures. The second comitology decision of June 1999 reduced this to three procedures<sup>8</sup> – advisory, management and regulatory – which provided standard options between which the legislator could choose. This was accompanied by standard rules of procedure and improvements in transparency.

The third issue has been the basic question as to whether the Commission *should* be subject to control in the exercise of its delegated powers of execution. The Commission has always stressed the importance of expert advice, but would have liked to remove the control involved in management and regulatory committees. The Commission’s 2001 White Paper on Governance thus proposed “a simple legal mechanism [which] allows Council and European Parliament as the legislature to monitor and control the actions of the Commission against the principles and political guidelines adopted in the legislation” (EC 2001 p.31). In the Convention, some Member States did support this position. The majority, however, insisted on retaining a reference to “control by the Member States”.

The fourth concerns the European Parliament’s rights with regard to supervision of implementing measures when it comes to base acts adopted by codecision, since comitology committees only include representatives of the Member States. This has been the source of inter-institutional debate since the early 1990s. The 1999 decision only partly satisfied the Parliament, by giving it the rights of information and of scrutiny, meaning the right to receive the drafts of proposed measures implementing elements of acts adopted under codecision, and to adopt non-binding resolutions, within one month, indicating that the Commission had exceeded its powers.

The Constitutional Treaty proposed a major reform. Amid the uncertainty following the French and Dutch referendums, however, a 2002 Commission proposal to modify the comitology decision was revived, leading to a major reform in 2006. A new procedure known as “regulatory with scrutiny” was introduced. This applies to measures of general scope for which powers are delegated to the Commission in secondary legislation adopted by codecision, and which modify non-essential elements of

the base act. Its impact may be summarised as giving the Parliament the right of veto where a committee has given a positive opinion, and certain powers to influence the final outcome where a committee has not. Following a set of urgent cases to which the new procedure was applied in 2007, a massive process of “general alignment” was under way by early 2008.

Against this background, the Lisbon Treaty foresees a future division of all acts adopted on the basis of secondary legislation into two categories. *Delegated acts* (to be termed “delegated regulations” etc.) will be “non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act”. They will be adopted by the Commission on the basis of powers delegated to it by the legislator in the legislative act, subject to supervision and possible revocation of the delegation by either the Parliament or the Council. *Implementing acts* (to be termed “implementing regulation” etc.) will be adopted “[w]here uniform conditions for implementing legally binding Union acts are needed” on the basis of implementing powers conferred in such acts on the Commission or, in some cases, the Council. The Council and the Parliament will, by codecision, adopt “the rules and general principles concerning mechanisms for control by Member States of the Commission’s exercise of implementing powers”.

It seems probable that the concept of delegated acts will cover the same areas now being placed under the regulatory procedure with scrutiny plus all those of similar nature arising in the new areas to which the ordinary legislative procedure will be applied. However the modalities for implementation of this concept will have to be defined. What kind of body will carry out the task of reviewing the Commission’s work on behalf of the Council? Implementing acts will presumably be considered to be those now being left under the advisory, management and regulatory procedures, but it remains to be clarified whether the same procedures will be retained, and with what rights for the Parliament. A successor to the current comitology decision will have to be agreed, which will, in contrast to last time, be done by codecision between Council and Parliament.

### Majority voting

The new Treaty provides for a significant extension of qualified-majority voting (which also becomes the “default setting” of the Treaty). A new system of majority voting is also foreseen to replace the Nice arrangements, with a threshold for a qualified-majority requiring 55% of Member States and 65% of total population, with a minimum of four countries required for a blocking minority. This new system would in principle make decision-making in the Council more efficient (although one should not exaggerate the importance in day-to-day reality of the details of the voting system; the basic question is simply whether or not a majority vote is possible). However, it will not come into effect at all until 1 November 2014, and even then, until 31 March 2017 a Member State may request that the Nice system is applied in particular cases. In other words, in the medium term there will be no change in this respect.

### National parliaments

A new Article 12 in the TFEU lists the ways in which national parliaments “contribute actively to the good functioning of the Union”. These include the role of “seeing to it” that the

principle of subsidiarity is respected in decision-making. This is developed in detail in the Protocol on the Role of National Parliaments in the European Union, and the modified Protocol on the Application of the Principles of Subsidiarity and Proportionality.

National parliaments are to receive directly all "draft legislative acts" (i.e. proposals from the Commission, initiatives from a group of Member States, initiatives from the European Parliament, requests from the Court of Justice, recommendations from the European Central Bank and requests from the European Investment Bank for the adoption of a legislative act) as well as amended drafts, legislative resolutions of the European Parliament and positions of the Council.

Each national parliament will have two votes, which may be shared between chambers in the case of bicameral parliaments. Within eight weeks of receipt of the draft acts (in all the official languages) they may issue reasoned opinions on a draft act's non-compliance with the principle of subsidiarity. If such opinions represent one-third of the votes (one-quarter in the case of police and judicial cooperation in criminal matters), the draft will have to be "reviewed" by its author. In the case of proposals under the ordinary legislative procedure, if such opinions represent a simple majority of the votes, the draft will have to be reviewed. If the Commission maintains its proposal it will have to issue a reasoned opinion stating why the proposal is justified in terms of subsidiarity. Either the Council or the Parliament may then decide to terminate the legislative procedure.

These two general provisions have been dubbed, following the sporting practice, "yellow" and "orange" cards. There is in fact also one, rarely-commented, provision which is equivalent to a "red card" which can be used by any single national parliament, namely decisions determining those aspects of family law with cross-border implications which may be the subject of acts adopted by the ordinary legislative procedure.<sup>9</sup>

It remains to be seen what practical impact these provisions will actually have. Eight weeks is not a long time for a parliament to act. In all events, however, they may help to increase the quantity and quality of national debates over European initiatives involving opposition parties and civil society, a need which is more important and relevant than to allow national governments to be stopped by the parliamentary majorities on which they in most cases rest.

### Concluding remarks

What can one say at this stage with respect to the likely consequences of all this for the efficiency, quality and transparency of EU decision-making, and for the overall legitimacy of the EU system?

It obviously remains to be seen what will happen in practice, but the new provisions do not in themselves promise any major change in the efficiency of decision-making. On the one hand, the Treaty comes on top of the procedural adaptations which have already been introduced

to deal with enlargement as well as an important reform to the system of comitology. On the other hand, it is not self-evident that the additional treaty changes will lead to greater efficiency. Despite majority voting (and, as noted above, the treaty changes will not actually come into effect for a long time), codecision does not mean quicker procedures or simpler laws. This is all the more so in the enlarged Union; evidence from recent years indicates that codecision procedures have been taking longer than before, and that the texts adopted are longer (Best and Settembri 2008). It can also be expected that the new arrangements

which will be implemented to replace the current comitology system will not make decision-making any quicker. At the time of writing, the practical implications of the 2006 reform remain unclear (Christiansen and Vaccari 2006). Comitology decisions under the new regulatory procedure with scrutiny only began to be adopted in 2008. We have no experi-

ence of how Parliament will "play" the arrangements, nor of the impact of the new language conditions: the periods for Parliamentary action will henceforth only start to operate once the measure has been transmitted in all official languages, while it is also possible that there may be pressures to implement a new language regime in comitology committees (Alfé et al 2008).

It is also unclear what all this will mean for the quality of decisions. In addition to questions as to how the Parliament will manage to process the great mass of measures involved – and the extension of codecision to agriculture and other areas will entail a further leap in the demands on Parliament – there is also some concern as to the content of Parliament's input. The Parliament has very few "technical" resources of its own to support the positions of its Members. The risk is already present that Parliament's positions may rely on the kind offer of expertise from interested parties. What can be done to prevent this from having even wider consequences? In addition, the kinds of procedural devices which have been adopted in order to facilitate decision-making under the codecision procedure – notably the practice of reaching agreements at first reading on the basis of informal negotiations between the institutions – continue to raise some questions as to their consequences for the transparency and quality of parliamentary practice.

Will the Treaty at least make decision-making more transparent – notably easier for people to understand? The answer is probably "yes" on balance, so long as they only look at the consolidated versions and concentrate on the main issues rather than all the details. Even if the terminological distinction is not as great as hoped, the new system does provide for a formal hierarchy of acts. The differentiation between the categories of non-legislative acts is also a positive step in principle with regard to the clarification of powers. Yet the new system in fact increases the number of basic procedures involved even when it comes to acts adopted on the basis of secondary legislation. In addition, there are numerous non-legislative acts which are adopted directly on the basis of the Treaties. Looking only at the main variables (Council decision-making rule, power of the EP, source of the proposal/role of the

## Will the Treaty at least make decision-making easier for people to understand? The answer is probably "yes" on balance.

Commission) there are 19 different procedures of this nature. Together with four variants of the ordinary legislative procedure and seven kinds of special legislative procedure, one can therefore identify as many as 30 different procedures by which binding acts can be adopted on the basis of the TFEU, quite apart from the specific procedures applicable to CFSP/CSDP under the TEU (Best 2008).

In terms of legitimacy and public support, finally, the Treaty is likely to have a limited impact. Hopes that the reform process might itself help achieve political consensus and public consent have been subordinated to efforts to ensure ratification with as little debate as possible. Moreover, while the further strengthening of the powers of the European Parliament may rightly be held to increase the formal democratic quality of the Union, the fact remains that greater formal powers for the EP do not in themselves translate automatically or universally into greater popular acceptance of the EU system. It remains to be seen whether people will be reassured by the kind of role foreseen for national parliaments in controlling subsidiarity, or whether at least some will rather be confirmed in their scepticism by the negative imagery of national parliaments' having to save people from some of the mad or bad things that might otherwise come at them from Brussels.

Although it is indeed unlikely that further developments will take the form of major treaty reform in the near future, this is not the end of the road in the evolution of EU decision-making. Some important steps still have formally to be taken to define how things will work, most notably concerning the future of comitology, and the new structures and procedures in CFSP. In the coming years, at least some of the complications and exceptions introduced as a result of the recent political negotiations may be reviewed.

Beyond this, there is no reason to believe that the dynamics of institutional change will cease to operate: the new provisions do not guarantee complete political consensus or perfect practical performance; the institutional actors in European integration will not stop pursuing their interests; and the evolution of the EU's decision-making procedures will inevitably be influenced by, perhaps even more than they influence, the broader challenges of consolidating a stable system of multi-level European governance.

## References

- Alfé, M., Christiansen, T. and Piedrafita, S. (2008), "Implementing Committees in the Enlarged European Union: Business as Usual for Comitology?" in E. Best, T. Christiansen and P. Settembri (eds.) *The Institutions of the Enlarged European Union. Continuity and Change*, Cheltenham: Edward Elgar, 315-341.
- Best, E. (2003) "Decision-Making and the Draft Constitution: Have We Really Cleaned Up Our Legal Acts?" *Intereconomics*, 38, 170-176.
- Best, E. (2008) "Legislative Procedures after Lisbon: Fewer, Simpler, Clearer?" *Maastricht Journal of Comparative and International Law*, 15, 59-70.
- Best, E. and Settembri, P. (2008), "Legislative Output after Enlargement: Similar Number, Shifting Nature" in Best et al. (eds.) *The Institutions of the Enlarged European Union*, 284-314.
- Christiansen, T. and Vaccari, B. (2006), "The 2006 Reform of Comitology: Problem Solved or Dispute Postponed", *Eipascope* 2006/3, 9-17.
- European Commission (EC) (2001) *European Governance. A White Paper* COM(2001) 428 final.

## NOTES

- \* Dr Edward Best, Professor, Head of Unit "European Decision-Making", EIPA.
- <sup>1</sup> The author would like to thank Michael Kaeding and Pierpaolo Settembri for helpful comments received.
- <sup>2</sup> Presidency conclusions, Brussels, 14 December 2007, 16616/07.
- <sup>3</sup> The Treaty of Paris established the European Coal and Steel Community (1951, entering into force in 1952). The two Treaties of Rome (1957, entering into force in 1958) established the European Economic Community (EEC) and the European Atomic Energy Community (known as "Euratom"). These three were for most purposes merged as the "European Communities", but there were significant differences in powers and procedures. The current system of European law-making is primarily derived from the EEC model.
- <sup>4</sup> Simple majority has been the "default setting" of the Treaty but applies to very few cases and not to the adoption of legislative acts.
- <sup>5</sup> Recommendations and Opinions are also retained as non-binding instruments.
- <sup>6</sup> Ex Art. 249 TEC, renumbered Art. 288 TFEU, fourth indent.
- <sup>7</sup> There are also minor exceptions giving the initiative to the European Central Bank and the Court of Justice in specific cases concerning those institutions' statutes.
- <sup>8</sup> The 1999 decision also foresaw a so-called safeguard procedure. This, however, provides for an appeal to the Council by an affected Member State, and not a committee procedure.
- <sup>9</sup> Article 81(3) TFEU.

# The Lisbon Treaty and External Relations



By Dr Simon Duke\*

Some of the most profound and potentially far-fetching changes introduced into the Treaty of Lisbon are to be found in the area of EU external relations. Although consensus for change was already established at the Convention on the Future of Europe, the national sensitivity of foreign and security policy has meant that the Treaty often does little more than sketch the broad outlines leaving the details to be filled in at a later date. This contribution argues that the principal challenges for EU external relations lie beyond ratification. It will be up to the Member States and the EU institutions to imbue the new positions and practices introduced by the Treaty with substance. Critically, this will mean defining the role of the (new) High Representative vis-à-vis the other external relations actors; shaping the European External Action Service and the Union delegations; and deciding how national diplomatic roles will complement those of the EU institutions and vice versa. The security and defence related provisions of the Treaty will also have to be implemented in a consensual manner. In short, the Lisbon Treaty holds enormous potential for a more coherent Union on the international stage, but whether this is realised or not will ultimately depend upon the Member States.

The citizens of France and the Netherlands did not vote against the Constitutional Treaty with external relations specifically in mind. Indeed, successive public opinion polls indicate the desire for more, not less, Europe in foreign and security policy. The Lisbon Treaty introduces a number of potentially far-reaching changes in EU external relations with the scope for the Union to become a more coherent actor on the international stage. The scope of the changes reflects the visions of those working groups in the Convention on the Future of Europe who were prescient enough to realise that the Union had yet to reach its full potential in these areas.

This contribution will briefly summarise the nature of the key changes introduced by the Treaty in external relations and will then focus upon some of the potential challenges that lie beyond ratification. Since space prohibits a detailed

examination of all of the changes introduced in the external relations area, the focus will be upon the High Representative of the Union for Foreign Affairs and Security Policy and the European External Action Service (EEAS), which shall assist the former, the Union delegations and the Common Security and Defence Policy (CSDP).

## Implications of the Lisbon Treaty for EU external relations

The conclusions of the Convention on the Future of Europe's Working Group on External Action recognised the need for the Union to "maximise its influence on the global stage" by using "all its instruments, political and economic alike,

in a coordinated and mutually reinforcing manner".<sup>1</sup> Of central importance to this effort was the creation of a position combining the existing functions of the High Representative for CFSP with that of a Vice-President of the Commission, responsible for coordination of external relations, as well as that of chair of the Foreign Affairs Council (FAC). It is thus not correct to say, as is all too common, that the new position is simply a dual-hatting of the current High Representative's role with that of the Commissioner for

**The Lisbon Treaty introduces a number of potentially far-reaching changes in EU external relations with the scope for the Union to become a more coherent actor on the international stage.**

External Relations – it is more. The Working Group contented itself with outlining a number of options regarding what they then termed the "European External Representative". Although the institutional location and role of the (new) High Representative became clearer in the subsequent treaty drafting processes, it still begged a number of

important questions such as how the High Representative will balance his or her role with the triple Presidencies – those of the European Council, the Council and the Commission. These will be briefly reviewed since they are essential to understanding the institutional context in which the High Representative will have to operate.

The Treaty states that the President of the European Council shall “at his or her level and in that capacity, ensure the external representation of the Union on issues concerning its common foreign and security policy, without prejudice to the powers of the High Representative of the Union for Foreign Affairs and Security Policy.<sup>2</sup> The first and most obvious problems are of “level” and “capacity” that may be largely determined by the perception and self-image of the first office holders. A declaration to the Final Act calls for the choice of the three positions (High Representative and the respective Presidents of the European Council and the Commission) to “respect the geographical and demographic diversity of the Union and its Member States” which, although understandable, could give rise to the familiar jockeying between the Member States. This, in turn, may then influence relations between the three key positions. At a more technical level, the absence of any specified secretariat for the President of the European Council raises the question of who, or what, will support this office? It also raises the question of whether those departments that do not fall under the European External Action Service (EEAS) (discussed in more detail below) are then under the President of the European Council? Might this also include the EU Military Staff?

The rotating national Presidency of the Council applies to all configurations of the Council with the exception of the

has, arguably, been the main focus of successive Presidencies. Under the Lisbon Treaty the delineation of duties and competences between the FAC and the General Affairs Council has yet to be specified, although the FAC is clearly not limited solely to CFSP matters since they shall also “elaborate the Union’s external action on the basis of strategic guidelines laid down by the European Council and ensure that the Union’s action is consistent”.<sup>4</sup> This has implications for the Political and Security Committee (PSC), which shall be chaired by a “representative of the High Representative of the Union for Foreign Affairs and Security Policy”, whereas the Committee of Permanent Representatives (Coreper) will be chaired “by a representative of the Member State chairing the General Affairs Council”. This gives rise to a number of questions such as who will represent the Commission in the PSC and how the working parties will be arranged and chaired. Presumably the working parties in the current Community areas of external relations (such as trade, development or enlargement) will continue to be chaired by the rotating Presidency, whereas the CFSP groups could be chaired by a member of the EEAS, with an *ad hoc* determination applying where mixed competences apply.

The new High Representative’s relations with the Commission, including the President thereof, are also likely to be challenging. The High Representative will be a Vice-President in Commission but, unlike the other Vice-Presidents, he is not appointed by the President of the Commission but by the European Council, acting by qualified-majority, with the agreement of the President of the Commission. The High Representative shall be “responsible within the Commission for responsibilities



Signing the Treaty of Lisbon  
© European Communities, 1995-2008

FAC, which shall fall under the new High Representative.<sup>3</sup> The question then arises of what role the Presidency plays in CFSP since under the current treaty arrangements this

incumbent upon it in external relations and for coordinating other aspects of the Union’s external action”.<sup>5</sup> This immediately raises the question of what are those

“responsibilities” incumbent upon the Commission and what are the “other aspects” that have to be coordinated. The scope of the former could be indicated by the current Group of Commissioners on External Relations, chaired by the President of the Commission and the Commissioner for External Relations as Vice-President (in other words, DG External Relations including the Service responsible for External Delegations; DG Trade; DG Development; DG Enlargement; the EuropeAid Cooperation Office; ECHO; and some external aspects of DG Economic and Financial Affairs). These tasks would then be distinct from other aspects of the Commission’s work with a bearing on external relations, such as agriculture or the environment, where the High Representative would have a coordination role rather than direct responsibility. This question is of more than passing interest to the European External Action Service (see below) where considerable confusion exists over which departments are “relevant” to the new Service – the remit of the High Representative in this context will therefore suggest the scope of relevance to the Service. Given the extensive nature of the High Representative’s responsibilities, the President of the Commission would presumably not chair any revised external relations group – although this remains to be seen.

The High Representative’s role in the Commission context may also be complicated by some more mundane considerations, such as whether it is possible to balance his or her responsibilities and coordination roles within the Commission, which demands a presence in Brussels, with the demands of foreign representation in political dialogue and at international conferences. This may not be an easy balance, especially if the current High Representative’s punishing travel schedule is any indication. The considerable physical demands of the job makes the question of effective support a critical issue and it is to this we now turn.

### The European External Action Service

The EEAS is in many ways pivotal to the coherence and effectiveness of future EU external relations. The degree to which any High Representative will be able to function and meet the demands made upon him or her will depend primarily upon the Service. The Treaty specifies that the EEAS will assist the High Representative and “shall work in cooperation with the diplomatic services of the Member States and shall comprise officials from the relevant departments of the General Secretariat of Council and of the Commission as well as staff from national diplomatic services of the Member States”.<sup>6</sup> The key issues behind which a multitude of turf sensitivities lie, are what are the “relevant departments” and how seconded national diplomats will be integrated?

Preparatory work on the Service has progressed in fits and starts, commencing with the signature of the Constitutional Treaty in October 2004, halting after the respective French and Dutch referenda in May and June 2005, and recommencing more recently with the signing of the Lisbon Treaty. Until this point progress had been made in discussions between the parties on the legal status of the

EEAS, personnel issues, budgetary questions, administrative aspects and the management of the Union delegations. The Member States were consulted between 27-29 April 2005 (including Bulgaria and Romania) and a stocktaking of these meetings took place in Coreper on 12 May. The European Parliament also held a debate on the EEAS in plenary session on 11 May and adopted a resolution on the Service on 26 May. The resolution included the firm desire to see the Service “incorporated, in organisations and budgetary terms, in the Commission’s staff structure, while the directorial powers of the Foreign Minister, who will also be a Commission Vice-Presidency, should ensure that the Service is bound in the “traditional” foreign policy sphere (the CFSP and CSDP) by the decisions of the Council ... and subject in the Community external relations sphere to the decisions of the college of Commissioners”.<sup>7</sup>

Javier Solana, the High Representative for CFSP, and José Manuel Barroso, President of the European Commission, were less emphatic than the European Parliament in terms of the institutional locale of the Service, preferring to describe the EEAS as *sui generis* in nature, in their 2005 Joint Progress Report. Hence, the Service “would not be a new ‘institution’, but a service under the authority of the Foreign Minister, with close links to both the Council and the Commission”.<sup>8</sup> The logic underpinning the *sui generis* formulation was in part to minimise duplication and to

save costs, but also to provide the High Representative with a framework in which he or she could rely on the assistance of the EEAS as well as the support services of the Commission and the Council. Less charitably, this formulation was merely a reflection of earlier unresolved differences over the composition and affiliation of the Service that emerged from the Convention. The preference of the European Parliament to incorporate the EEAS into the Commission’s staff structures, the predictable opposition to this from a number of Member States, alongside the lack of any specific institutional reference in the Constitutional Treaty, made the *sui generis* moniker preferable – but it solved few of the underlying tensions.

The difference, albeit undefined, between *responsibilities* within the Commission and the *coordination* of other aspects of the Union’s external action, suggests two logical options. The first, a minimalist model, would put the emphasis on coordination and less on the direct responsibilities of the High Representative, while the maximalist version stresses responsibilities rather than coordination.

Given the High Representative’s specific responsibilities in the CFSP and CSDP areas, the minimalist model would emphasise the ability to assist him or her in this domain. Since the High Representative’s role does not preclude him from drawing on other services within the Council Secretariat and the Commission, the arguments could be made in favour of a fairly small Service, complemented by seconded national diplomats. The minimalist model would restrict the EEAS to most of DG-E and the Policy Unit from the Council Secretariat side and DG External Relations on the Commission side, most notably Directorate A, or the “Crisis Platform”, with responsibility for policy coordination in

## The EEAS is in many ways pivotal to the coherence and effectiveness of future EU external relations.

CFSP. In this case, the self-exemption of trade from the EEAS discussions on the grounds of exclusive competence could reasonably be extended to other areas of exclusive or mixed competence in external relations, such as development policy, humanitarian assistance, management of external financial programmes and enlargement negotiations; in these areas the High Representative would play an important coordination role.<sup>9</sup> The advantage of this approach is that it would be easier to manage and, given its relatively small size, less likely to evoke turf tussles amongst the institutions, or concern from some Member States regarding the potential effects upon their national diplomatic services and practices. It would, however, be insufficient to staff the full range of geographic and thematic desks, quite aside from the basic staffing of the Union delegations. The preferences of the Member States were torn between those who wanted the EEAS restricted to CFSP issues, while others preferred an even broader remit than that described above, to include areas such as enlargement, neighbourhood (ENP) and development policy.<sup>10</sup>

As has already been suggested, the maximalist model would include a far wider representation from the Commission side to include all or most of the DGs mentioned above (except trade). The Joint Progress Report by Solana and Barroso, referred to above, argued that the roles attributed to the High Representative (including, notably, responsibility for consistency of the external relations of the Union) mean that the EEAS should be in a position to “provide unified policy advice and briefing not only to the [High Representative], but also to the other Commissioners and the President of the European Council”.<sup>11</sup> The same report suggested that the Service should include “services currently dealing with CFSP (including CSDP), together with geographical desks covering *all* regions of the world and thematic desks dealing with issues such as human rights, counter-terrorism, non-proliferation and relations with the UN”.<sup>12</sup> The report is careful to note that desks should not be duplicated, but this dodges the question of whether existing desks should be relocated to the EEAS or not?

On the Council Secretariat side involvement could extend to all crisis management-related aspects, including the Military Staff, as well as the Sitcen. It is worth noting in passing that the minimalist model would have the effect of bifurcating the civilian and military aspects of crisis management, if the Military Staff were excluded from the Service. The maximalist perspective would therefore incorporate the military dimensions of crisis management into the EEAS which, it could be argued, is logical given the High Representative’s responsibilities in the CSDP domain. The model could give rise to questions of manageability for the High Representative and the type

of management structures and style that would be required to deal with the Service and coordination with the Commission, Council Secretariat and the Member States. Finally, the maximalist model may bring up the question of how to improve relations between the European Parliament

and the EEAS and whether there is need to expand upon Michael Matthiessen’s current role as Personal Representative of the High Representative for Parliamentary Affairs in the CFSP area, into a fully-fledged section responsible for relations with the Parliament.

No matter which model prevails (the former seems more likely) there will still be a number of vexatious issues. Four deserve brief mention. First, the question of staffing ratios may prove challenging. Commission officials in the *famille Relex* outnumber their Council Secretariat counterparts by a ratio of almost 5:1.<sup>13</sup> The presence of national diplomats may alter the ratio slightly but, in both the minimalist (as service providers) or the maximalist (as the predominant staff component) cases, the Commission’s role in shaping and staffing the Service will be significant. This may also have implications for the financing of the Service.

Second, the question of whether the Situation Centre (SitCen) will be within the EEAS remains highly sensitive. The current reservations that apply to the sharing of intelligence analysis beyond the Member States may be an *a priori* argument for excluding the SitCen, but this could then harm the ability of the Service to respond in an optimal manner, especially since crisis prevention remains a fixed priority under the treaty.

Third, the budgetary arrangements for the Service remain unclear. If the EEAS is financed from the general budget this will give the European Parliament considerable leverage (a point noted in the Convention), whereas if it is financed through a separate intergovernmental arrangement the question of who should pay for what, at a time when nearly every national foreign ministry faces budget strictures, will come to the fore. In the event of the latter, this could tip the balance in favour of the minimalist option.

The final sensitive question is how the Member States fit into the EEAS. Two declarations on CFSP inserted into the Final Act strike a potentially defensive note on the part of the Member States vis-à-vis the putative Service.<sup>14</sup> The first notes that the provisions on CFSP, including the creation of the office of High Representative and the establishment of the External Service, will 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 organizations”. In a similar vein the second declaration notes that the same developments will “not affect the existing legal basis, responsibilities, and powers of each Member State in relation to the formulation and conduct of its foreign policy, its national diplomatic service, relations with third countries and

participation in international organisations, including a Member State’s membership of the Security Council of the United Nations”.

The manner in which personnel from the Member States are supplied to the Service is open for discussion (temporary

## Perception of the EEAS from the Member States and the decisions that are made regarding the quantity and level of secondment to the EEAS, will have a strong influence on the shaping of the Service.

agents or seconded?), as is the question of how all staff in the EEAS can be accorded the same status and conditions of employment. The selection procedure for national staff working in the Service and who has the final right of approval also remains up in the air. The perception of the EEAS from the Member States, and the decisions that are made regarding the quantity and level of secondment to the EEAS, will have a strong influence on the shaping of the Service. The quality of existing national staff in the Council Secretariat leaves room for optimism, but if the EEAS is perceived to be Commission-oriented or dominated (see the above point on potential staffing ratios), it may evoke more caution on the part of the Member States.

If the Member States were to choose to see the EEAS as an opportunity, rather than a potential threat to the conduct of foreign policy or representation, their role could be substantial, especially if senior national figures serve in the Service (as was the idea behind the appointment of the former Irish Prime Minister, John Bruton, to the Head of Delegation in Washington DC). The EEAS offers an opportunity for closer coordination between the Member States and the EU, compared to the vagaries of coordination in the current Commission and rotating Presidency contexts. The EEAS could also be usefully promoted as a platform for horizontal coordination in the growing number of issues that go beyond the ambit of any one Member State. The presence of national embassies (especially those of the larger Member States) in many overseas locations, as well as EU delegations, raises the question of whether such representation is duplicative or whether the EEAS might usefully concentrate on regional perspectives and issues, in the same manner that a number of Special Representatives are doing.

### Union delegations

The Lisbon Treaty, due to the attribution of legal personality to the EU, refers to Union delegations.<sup>15</sup> There was originally no defined position on whether the delegations should form part of the EEAS or not but, logically, it is assumed that they should. This does not imply, however, that the EEAS should entirely staff the delegations. The treaty states that, "With the exception of the common foreign and security policy, and other cases provided for in the Treaties, [the Commission] shall ensure the Union's external representation".<sup>16</sup> The Union delegations will presumably build upon the current External Service and will include staff from other DGs, such as trade, agriculture or transport, to provide seconded expertise; this is similar to many national models where professional diplomats are complemented by the line ministries. For the CFSP-specific aspects, Council Secretariat or seconded national staff will have to be included. The Treaty instructs national diplomatic and consular missions to work in "close cooperation" with the delegations.<sup>17</sup>

The composition of the delegations raises a number of issues, starting with the question of authority. Presumably, the staff of a given delegation will fall under the Head of delegation which implies that all staff, regardless of origin, should be part of a single structure. The integration of national staff into the delegations raises questions regarding

the exchange of information and liaison arrangements between the delegations and the missions of the Member States in third countries. A broader question, broached by Michel Barnier, former French Foreign Minister and former Commissioner, concerns the ill-defined links between consular and diplomatic protection and areas such as civil protection, crisis intervention and humanitarian assistance.<sup>18</sup> The Charter of Fundamental Rights also defines the right to consular and diplomatic protection as a "fundamental right" of the EU citizen. This may suggest a greater EU role in this area but for less noble reasons, such as the financial restrictions confronting many national diplomatic services, there may be national interests in moving some consular and visa duties towards the EEAS.

The Treaty is clear that "The diplomatic missions of the Member States and the Union delegations in third countries and at inter-

national organisations shall cooperate and shall contribute to formulating and implementing the common approach [defined by the European Council or the Council]"<sup>19</sup> and that the Union delegations "shall act in close cooperation with the Member States' diplomatic and consular missions".<sup>20</sup> The spirit of mutual cooperation that will be required is not evident if read in conjunction with the two declarations on CFSP attached to the Final Act (see above). The evident danger of not striking the right cooperative balance is that the national diplomatic staff will view temporary assignment or secondment to the EU as a burden, with the consequence that the game becomes one of shifting burdens (notably consular) in the direction of the delegations and downgrading the prestige of service in the EEAS amongst national diplomats. Finally, the pressure from the Member States to replicate national diplomatic models at the European level should be resisted since the EEAS offers the chance to design from scratch far more integrated horizontal structures that can address complex interlinked challenges – ranging from terrorism, health issues, security sector reform to migration – in ways that many national diplomatic services find difficult to do.

### The Common Security and Defence Policy

The renamed ESDP – CSDP in the Treaty – reflects a number of changes that, for the most part, codify existing practice. For instance, the idea of "coalitions of the willing" and lead framework nations is already fairly well established, but is codified in the form of permanent structured cooperation. The expanded Petersberg tasks also codify what the EU has been doing anyway and the 2004 Solidarity Clause, adopted by the European Council in the aftermath of the Madrid bombings, are now in the Treaty. Two things are worthy of note, however.

First, the appearance of the mutual defence clause<sup>21</sup> appears to open up the possibility for an "Article 5" type NATO (or WEU) obligation. The relevant section states that, "If a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter". The clause is however circumscribed by reference to the "specific character of the security and defence policy

## The real challenges lie ahead, beyond the ratification of the treaty.

of certain Member States". It is therefore clear that, while some may welcome the presence of a mutual defence clause, its practical impact is limited by the neutrality or non-alignment of some EU members on the one hand, and by a preference to see such obligations fulfilled through NATO on the other.

The second notable aspect of the stipulations on CSDP is the considerable emphasis placed on the role of the European Defence Agency (EDA). The multiple mentions of the EDA is remarkable given that only two other agencies (the European Space Agency and Euratom's Supply Agency) are actually mentioned by name (see Article 45 in particular). Large parts of the 2004 Joint Action founding the EDA are reproduced in the treaty. The purpose is, presumably, to accord particular importance to the role of the Agency as a vehicle for helping to address the underlying rhetoric-resources gap at the centre of CSDP. This is clearly a high-stakes move when considering the relative newness of the agency and its limited powers to influence European

defence procurement, budgeting and innovation. The agency has enjoyed some early successes, but the longer-term challenges are formidable.

## Conclusion

The test for the future coherence and credibility of EU external relations depends upon the political will of the Member States to breathe life into the new institutions and practices created by the Treaty of Lisbon. The Treaty does not put national diplomatic practice up against European-level diplomacy but offers potential synergy through mutual involvement and enrichment. The question of whether the treaty is allowed to live up to its potential will depend critically upon the EEAS since it is difficult to conceive of an effective High Representative, streamlined geographical or thematic desks, let alone fully-fledged Union delegations, if the Service is deprived of oxygen upon delivery. The real challenges lie ahead, beyond the ratification of the Treaty.

## NOTES

\* Dr Simon Duke, Professor, Unit "European Policies".

<sup>1</sup> Final report of Working Group VII on External Action, The European Convention, The Secretariat, CONV 459/02, Brussels, 16 December 2002, Para. 20.

<sup>2</sup> Art. 15(6) TEU.

<sup>3</sup> Art. 16(9) TEU.

<sup>4</sup> Art. 16(6) TEU.

<sup>5</sup> Art. 18(4) TEU.

<sup>6</sup> Art. 27(3) TEU.

<sup>7</sup> *Official Journal of the European Union* C 117 E/233, 18 May 2006, P6\_TA(2005)0205, European External Action Service, European Parliament resolution on the institutional aspects of the European External Action Service, 26 May 2005, Para. 2.

<sup>8</sup> European External Action Service, *Joint Progress Report to the European Council by the Secretary-General/High Representative and the Commission*, Council of the European Union, 9956/05, Brussels, 9 June 2005, Para. 6.

<sup>9</sup> In the case of enlargement it could be excluded altogether on the grounds that it is not really external relations, although the current practice is to treat it as such.

<sup>10</sup> *Ibid.* Para. 7.

<sup>11</sup> *Ibid.* *Issues Paper on the European External Action Service*, Annex II, Para. 12.

<sup>12</sup> *Joint Progress Report to the European Council by the Secretary-General/High Representative and the Commission*. Para. 8 (emphasis added).

<sup>13</sup> Calculated on the basis of AD officials and temporary agents on the Commission side and staff in Directorate-General E of the Council Secretariat, and staff detached to the High Representative. If all staff are included (i.e. contract staff, seconded national experts, technical and administrative) the ratio changes to around 11:1

<sup>14</sup> *Final Act*, Conference of the Representatives of the Member States, CIG 15/07, 3 December 2007, Declarations concerning provisions of the treaties, Declarations 13 and 14 concerning the Common Foreign and Security Policy.

<sup>15</sup> Art. 32 TEU.

<sup>16</sup> Art. 17 TEU.

<sup>17</sup> Art. 221(2) TEU.

<sup>18</sup> Michel Barnier, "For a European civil protection force: europe aid", May 2006, at [http://ec.europa.eu/commission\\_barroso/president/pdf/rapport\\_barnier\\_en.pdf](http://ec.europa.eu/commission_barroso/president/pdf/rapport_barnier_en.pdf).

<sup>19</sup> Art. 35 TEU, emphasis added.

<sup>20</sup> Art. 221 TEU, emphasis added.

<sup>21</sup> Art. 42(7) TEU.

# Justice and Home Affairs in the Lisbon Treaty: A Constitutionalising Clarification?



By **Brendan Donnelly\***

The Lisbon Treaty represents a major milestone in the evolution of the European Union's legal order. Even if the Common Foreign and Security Policy (CFSP) will remain largely intergovernmental in nature, almost all policy areas of Justice and Home Affairs (JHA) will come under the "Community method", forming a single Area of Freedom, Security and Justice in which qualified-majority voting and codecision, as 'the ordinary legislative procedure', will be the general rule. This contrast in the respective developments of the two "pillars" erected at Maastricht reflects their different relationship with the bulk of the Union's policies. JHA is the obverse side of the coin which is the internal market: the disappearance of national barriers between the Member States constitutes an inexorable drive to adopt measures under JHA on the same legal foundations. Such considerations do not apply, in the case of CFSP, the impact of which is mainly felt outside the European Union.

## Introduction

The use of the term "constitution" in connection with the document adopted by the Convention on the Future of Europe in 2003 was from the beginning a controversial one. Critics argued that the sprawling and heterogeneous text of the "European Constitutional Treaty" lacked the coherence and concision normally associated with national constitutional documents. Above all, the Treaty failed in the traditional central ambition of constitutional texts, that of placing beyond day-to-day controversy the major goals, institutions and working methods of the political entity being described. Deep-rooted differences of analysis and aspiration between the members of the Convention and the Member States themselves had inevitably led, in the view of these critics, to a document of systematic vagueness and ambiguity, which advanced the "constitutionalisation" of the European Union not at all.

If there is some general validity to this criticism, it is not a reproach which can properly be levelled at one important aspect of the Constitutional Treaty and the Treaty of Lisbon which succeeds it. Whatever its other ambiguities and evasions, the Treaty of Lisbon has achieved a very substantial

new measure of clarity on the future decision-making procedures of one central area of the Union's decision-making, namely Justice and Home Affairs (JHA).

This significant new clarity can properly be described as "constitutional" or at least "constitutionalising" in nature. JHA matters are currently divided between the Community (mainly asylum, immigration, visas, and judicial cooperation

in civil matters) and the so-called "Third Pillar" (Police and Judicial Cooperation in Criminal Matters), in which decisions are taken on a more intergovernmental basis. If and when the Treaty of Lisbon is ratified, all JHA matters will fall under the institutional decision-making procedures familiar to scholars and commentators under the rubric of the

"Community method", which will be the general rule in a single Area of Freedom, Security and Justice. All but a limited number of JHA policy areas will be subject to qualified-majority voting in the Council. The European Parliament will play a full, parallel legislative role through the codecision procedure (to be known as the "ordinary legislative procedure") in almost all cases. The European Court of Justice (ECJ) will in time have jurisdiction to enforce all JHA decisions: those provisions adopted under the previous, intergovernmental framework of the "third pillar"

**This significant new clarity  
can properly be described  
as "constitutional" or at  
least "constitutionalising"  
in nature.**

will be subject to a limited jurisdiction of the ECJ for a transitional period of five years, after which the ECJ's normal jurisdiction will be extended to cover all prior legislation in policing and criminal matters. Moreover,, with the exception of police and judicial cooperation in criminal matters and administrative cooperation in JHA, where it will share this right with one-quarter of the Member States, the Commission will enjoy the exclusive right of legislative initiative.

These changes mark a major milestone in the evolution of the European Union's legal order. More precisely, they are the culmination of an institutional journey which has lasted fifteen years, the decade and a half since the signing of the Treaty of Maastricht.

### Some recent history

The Maastricht Treaty of 1992 systematised and extended the scope of the then European Community's activities to two major new policy areas, Justice and Home Affairs (essentially questions of internal security and civil liberties) and the Common Foreign and Security Policy (CFSP), including the "eventual framing of a common defence policy." Because a number of European governments were at the time hesitant to share their national and executive sovereignty in these sensitive areas with the central European institutions, a specific decision-making procedure was adopted for these two new areas of European activity. This procedure involved unanimous decision-making in the Council of Ministers; a limited role in the procedure for the European Commission and the European Parliament; and no role for the European Court of Justice. This arrangement was not far removed from the interaction of independent national governments, and hence widely and accurately described as "intergovernmentalism." Although this system of decision-making applied originally equally to both the Common Foreign and Security Policy and to Justice and Home Affairs, the years since the signing of the Maastricht Treaty have witnessed its progressive dismantlement in the field of Justice and Home Affairs, but its substantial maintenance in the field of the Common Foreign and Security Policy. Whether or not the Lisbon Treaty comes into force, CFSP will continue to be an area of policy dominated by "intergovernmentalism." Even before the Lisbon Treaty on the other hand, substantial inroads had already been made into the intergovernmental nature of decision-making in the field of JHA.

It should not be forgotten that at the time of the Maastricht Treaty's signature there were already governments which saw the new decision-making procedures as simply temporary expedients, which could be expected to wither away with the passage of time. This view was in sharp contrast to that of the British Government, which saw in the arrangements of the Maastricht Treaty for JHA and CFSP (known as the JHA and CFSP "pillars" respectively) a long-term "bulwark against federalism". In

the sphere of JHA at least, this British analysis rapidly came to need revision, when the Amsterdam Treaty of 1997 partially transferred the policy areas of "visas, asylum and immigration" to the traditional "Community method" of decision-making, thereby pruning back the area of intergovernmental decision-making to only the most sensitive areas of JHA – "Police and Judicial Cooperation in Criminal Matters". Future decisions in the policy areas transferred by the Amsterdam Treaty to the "Community method" were in some cases still to be decided by unanimity rather than qualified-majority voting, but the enhanced involvement in the newly transferred policy areas of the European Commission and the European Court of Justice marked an important break with the intergovernmentalist philosophy of JHA contained in the Maastricht Treaty. The British Prime Minister who signed the Maastricht Treaty, John Major, had set himself and his government against any such dilution of "intergovernmentalism" in the field of JHA. One of the first actions of his successor as Prime Minister, Tony Blair, was to accept this envisaged change and sign the Amsterdam Treaty, although he demanded and obtained a specific British provision in the Treaty, allowing the United Kingdom to opt in, or to opt out of new JHA legislation adopted by the "Community method."

The Amsterdam Treaty not only limited the policy areas to which the intergovernmentalism of the Third Pillar would in future apply. It also provided for a process of regular review of those JHA elements newly transferred to the "Community method" but retaining to various degrees aspects of intergovernmental decision-making, notably the unanimity principle. In 2004 this process of review saw Member States agreeing to extend the scope of codecision with the European Parliament and qualified-majority voting in the Council of Ministers to all areas of "visas, asylum and immigration", with the exception of legal migration and family law. 2004 in addition saw the end of Member States' right of initiative for the JHA measures subject to the "Community method" of decision-making.

### Some more recent history

The year 2004 also, and even more importantly, saw the agreement among Member States of the European Constitutional Treaty, which proposed the wholesale transfer of all remaining JHA matters to the "Community method" of decision-making. Codecision and qualified-majority voting would apply to most of these newly-communitarised JHA areas, as they had come by 2004 to apply to nearly all JHA areas previously communitarised by the Treaty of Amsterdam. The right of initiative on JHA matters, until recently shared with the Council, would be exclusively the Commission's. The ECJ would eventually enjoy normal jurisdiction over what had come by now to be described as the European "Area of Freedom, Security and Justice".

Commentators on the European Constitutional Treaty were unanimous in regarding its provisions on JHA as

## Circumstances and events combined in June 2007 to allow the implementation of an almost universal consensus that "intergovernmentalism" in JHA had had its day.

being among the most significant provisions of the Treaty. The “no” votes of France and the Netherlands in the referendums of 2005 appeared however to forestall for the foreseeable future further movement towards the complete communitarisation of JHA. Indeed, efforts made during the Finnish Presidency in 2006 to implement some of the Constitutional Treaty’s JHA-communitarising provisions were not supported by even a bare majority of Member States. It came as a surprise to many that under the German Presidency of 2007, such rapid progress could be made towards agreeing a successor document to the Constitutional Treaty, and that this successor document should contain all the major provisions on JHA which figured in the Constitutional Treaty. Indeed, EU Member States voted in

the German Presidency of the European Union an expert and conciliatory leader of negotiations. Circumstances and events thus combined in June 2007 to manifest and allow the implementation of an almost universal consensus within the governments of the European Union that “inter-governmentalism” in JHA had had its day.

### Why JHA has worked out the way it has

Although a number of conjunctural influences came together in 2007 to allow for the important agreement on JHA contained in the Lisbon Treaty, it is clear that, within the 15 years since the coming into force of the Maastricht Treaty, the overwhelming majority of EU Member States have



© European Community, 2008

June 2007 to go in an important respect further than the Constitutional Treaty, incorporating into the acquis of the European Union the Prüm data-sharing initiative, which facilitates cooperation between national police services.

If it seems puzzling in retrospect that the European Council of June 2007 was able to take wide-ranging decisions on JHA matters, while only a year before it had seemed that the further communitarisation of JHA had reached an impasse, two factors can be mentioned as contributing to this volte-face. First, it is a well-established feature of European negotiations that it is often easier to agree a raft of measures in a Treaty affecting a whole spectrum of sectors – where the disbenefit to certain Member States of some changes will be compensated for by more agreeable changes in other areas – than to agree to specific changes in isolation. Second, political and personal factors were structured very differently in 2007 to their conjunction in 2006. By the time of the European Council in June, 2007, Tony Blair had announced his forthcoming resignation from government and probably therefore had more freedom of political manoeuvre to take decisions whose political consequences would primarily be felt by his successor. Mr Sarkozy offered in the first days of his presidency a new approach to European questions after Mr Chirac’s departure, and Mrs Merkel proved herself in

come to believe that their interests in the field of JHA will be best served by the use of the “Community method” in this sphere. A number of interlocking considerations seem to have led them to this conclusion, primarily considerations of efficiency, of democratic transparency and of administrative simplicity.

Even before the terrorist attacks of 11 September 2001 in the United States of America, European states were becoming uneasily aware that the decision-making structures they had given themselves in the co-operative fight against major crime and terrorism were cumbersome and ill-adapted to the gravity of the threats posed. The attacks on the World Trade Center and other targets in 2001 encouraged European governments to seek a more flexible system of decision-making in this field, one which could not indefinitely be restrained by national vetoes, and which more fully involved the democratic and judicial elements of the Union’s institutional system, namely the European Parliament and the European Court of Justice. Moreover, although the original decision-making system of the Maastricht Treaty had been a relatively simple and straightforward one, the Amsterdam Treaty of 1997 had led over time to a bewildering variety of legal and political instruments in the field of JHA. It was an undoubted attraction for many European governments of the European

Constitutional Treaty that it brought into the complicated area of JHA an accessible and familiar simplicity of legal structure. They were understandably eager to preserve this simplicity in the Lisbon Treaty.

But there is perhaps another, yet more fundamental reason why the fates of intergovernmental decision-making in the areas of JHA and of CFSP have been so disparate since the Maastricht Treaty. This reason lies deeper than the subjective analyses of individual national governments and arises from the nature of the issues involved in the two areas. It is possible to construct in retrospect an entirely plausible account of why JHA should relatively rapidly have come to be subsumed under the "Community method" of decision-making and why it will probably be a long time before such a fate overtakes CFSP, if indeed it ever does.

The plain fact is that JHA matters stand in an altogether different relationship to the great bulk of the European Union's policies and legislation compared to that which exists between these and the CFSP. Logically and analytically, the area of policy and legislation known as JHA can appropriately be regarded as the observe side of the coin which is the European Union's well-established internal market. The pressing need for the European Union's governments to work ever more closely together to protect physical security and civil liberties derives precisely from the ceaseless deepening of the Union's internal market. The ease with which national frontiers can be crossed by individuals, goods or money is a boon to citizens, but also creates greater opportunities for trans-European crime. European citizens born in one country, educated in another, working in a third and then retiring to yet another may well, through the circumstances of their lives, create challenges and claims which purely national legal systems are ill-equipped to address in a coherent and non-discriminatory manner. Those affected, either negatively or positively, by decisions taken in the sphere of JHA will normally be citizens of the EU's Member States, or at least persons residing, temporarily or permanently, in the territory of the EU. The relentless disappearance of national barriers between the Member States of the EU sets the material stage and creates the legal imperative for most decisions taken under JHA. The EU's internal market is itself pre-eminently a product of the "Community method". It is hardly surprising that its pendant, the European "Area of Freedom, Security and Justice" should come to rest upon the same legal foundations. The aspiration of some to regard the "JHA pillar" as institutionally isolated for ever from the Union's central achievement until now, the single internal market, can be seen today as a highly implausible one.

On the other hand, little, if any, of the above analysis can be applied to decisions taken under the CFSP. The impact of these decisions is largely external to the European Union, with individuals and entities outside the Union's territory being the beneficiaries or victims of these decisions.

## The relentless disappearance of national barriers between the Member States of the EU sets the material stage and creates the legal imperative for most decisions taken under JHA.

Inevitably, much decision-making involving the Union's bilateral relations with third countries will be opportunistic, urgent, discretionary or confidential. All these are conditions making less apt for law-making under the "Community method" the decisions which constitute the CFSP. Consciously or otherwise, national governments in the European Union recognise this distinction, which allows

them to exert, both individually and corporately, an infinitely greater degree of executive sovereignty in external policy than they enjoy in the rules-bound legal system which will in future constitute the underlying structure of the Union's internal policies, both for the internal market and for JHA. In the negotiations which preceded the European Constitutional Treaty and the Lisbon Treaty, there was little appetite from any European governmental quarter for the substantial modification of the CFSP intergovernmental

"pillar". There seems equally little reason to believe that this political reality is like to change in any immediately foreseeable future.

### The British exception

In the British political debate, institutional changes which facilitate the taking of action at the European level are frequently viewed in negative rather than positive terms. The Lisbon Treaty's extension of qualified-majority voting in the area of JHA and other changes introduced by the Treaty to voting weights and voting procedures in the Council have been widely criticised in the United Kingdom as an unacceptable infringement of British national sovereignty. Such criticism sits oddly with the fact that the UK is among the Member States that are most enthusiastic to see common action in JHA, in the security sphere in particular. It does however reflect the political predicament of the British Government in the negotiations over the Constitutional and Lisbon Treaties. This political predicament has been a key factor in the British Government's pressing for and securing a number of special arrangements in the Lisbon Treaty, particularly in regard to JHA.

While the Lisbon Treaty, for the vast majority of Member States, has the effect of "homogenising" a communitarised Area of Freedom, Security and Justice, the position of the UK (and Ireland and Denmark to varying degrees) relative to other Member States, is made only *more* anomalous. In the Lisbon Treaty, the British Government has secured for itself a generalised opt-in/opt-out from all newly-communitarised areas of JHA. This change constitutes a striking and objective difference between the Constitutional and Lisbon Treaties, a difference British governmental spokesmen have been eager to underline in the domestic debate over the need or otherwise for a referendum on the Lisbon Treaty.

It is, however, extremely difficult to see what objective British interests will be better protected by the new, generalised system of JHA opt-ins/opt-outs. At the time of

the European Constitutional Treaty, the British Government had believed that its interests in the sphere of JHA were adequately protected by the “emergency brake” system contained in that document, a system which allowed Member States to “revoke” their willingness to be outvoted on JHA matters which seemed to them of exceptional national importance. The impression cannot be avoided that the change in British governmental attitudes on this subject between 2004 and 2007 was largely driven by the need to find political arguments in the Lisbon Treaty which would legitimise the Labour Government’s unwillingness to hold a referendum on the new treaty. It is in any case wholly unclear what real use the British Government will make of its

JHA opt-ins/opt-outs. It is entirely possible that the United Kingdom will see its interests as lying for the great majority of cases in associating itself with new JHA legislation rather than standing aside. It is instructive, and ironic, that the British Government today finds itself pleading two cases before the ECJ where it would like to participate in JHA measures, but is currently prevented from doing so.

### Conclusion

It would be an unbalanced analysis of the provisions of the Lisbon Treaty bearing on Justice and Home Affairs if

**It must seriously be asked whether the imagery of “pillars” for the European Union any longer has relevance or validity.**

excessive attention were directed to the undoubted ambiguities and uncertainties surrounding the British, Danish and Irish positions in this field. The real effect of these ambiguities will probably be limited, and for the other 24 members of the Union the Lisbon Treaty represents an undoubted clarification and systematisation of a central area of the European Union’s decision-making. A fashionable description of the European Union at the time of the Maastricht Treaty was to describe it as a pediment resting on three pillars, the internal market, CFSP and JHA. One of these pillars has now not only disappeared, but has been incorporated into another “pillar”. It must seriously be asked whether the imagery of “pillars” for the European

Union any longer has relevance or validity. A more accurate depiction of the Union would be of a political association that normally applies a standardised decision-making procedure, to which there are only two exceptions, the Common Foreign and Security Policy and the governance of the Eurozone, the latter of which is as yet an evolving and incomplete system. If this radically simplified analysis of the European Union comes to be generally accepted by scholars and commentators, it will be a substantial “constitutionalising” legacy from the Convention, the European Constitutional Treaty and the Treaty signed in Lisbon on 13 December 2007.

### NOTE

- \* Brendan Donnelly is Director of the Federal Trust, London. He is a team leader in the Work Package on Institutions which EIPA coordinates within the EU-CONSENT Network of Excellence.

# Managing Structural Funds: A Step-by-Step Practical Handbook

more details at: <http://www.eipa.eu>

*Robin Smail, Luc Broos and Els Kuijpers*

EIPA 2008/1, 262 pages

ISBN: 978-90-6779-207-3, €70.00 (including postage and packing in Europe)

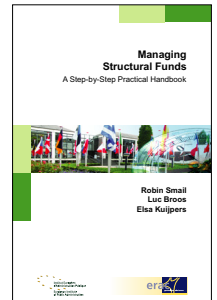
This handbook describes and explains the series of programming and management tasks involved in implementing Structural Funds and Cohesion Fund programmes and projects for the programming period 2007-2013.

Many of the tasks described relate specifically to the new regulations which govern the use of the Structural Funds. These regulations are designed to reflect the most recent reform of EU cohesion policy, which aims to simplify the policy, further decentralise administration, increase financial accountability and enhance the effectiveness of the Funds.

However, the tasks, tools and procedures described in this handbook go beyond the new regulations. They cover, for example, project development activities, programme and project evaluation techniques and the fundamentals of monitoring procedures.

The handbook attempts to provide a step-by-step guide to the tasks to be performed, as far as possible in a chronological order. The descriptions provided here should be complementary to the information provided in official documentation which already exists.

The handbook is split into three parts. Part I deals describes the reformed cohesion policy and the new programming context, and explains how National Strategic Reference Frameworks have been put together. Part II covers the vast array of programme preparation and management tasks. It includes descriptions of how operations get started, what the financial management and control tasks are, and how to monitor, evaluate and close programmes. Part III looks at project development, project management and all stages of project monitoring and evaluation.



# Flexibility within the Lisbon Treaty: Trademark or Empty Promise?



By **Funda Tekin** and **Prof. Dr Wolfgang Wessels**<sup>1</sup>

The concept of flexibility in the European integration process has been discussed in different ways since the 1970s. Some forms may be “upwardly oriented”, representing a driving force rather than a brake on the integration process. Others may weaken integration and have a “downsizing” effect. “Enhanced cooperation”, which was first introduced by the Amsterdam Treaty, aims to provide an attractive alternative to intergovernmental cooperation outside the treaty, and to allow a group of Member States to deepen integration in particular areas without affecting either the interests of others or the overall construction of European integration. The Lisbon Treaty introduces changes at all stages of the cycle: preparatory stage, initiation, authorisation, implementation, accession and termination. The conditions for enhanced cooperation remain restrictive and other forms of flexibility may seem more attractive. Consequently the prospect is for flexibility to be an empty promise rather than a trademark of the new Treaty.

## Introduction

The idea of flexibility in the integration process has long been the subject of European debate. The best-known terms have been “Core Europe” (Schäuble and Lamers 1994), “avant-garde” (Chirac 2000), “centre of gravity” (Fischer 2000) and “directoire” (Hill 2006), but these represent only an excerpt from a broad catalogue of such concepts.<sup>2</sup> The debate dates back to the 1970s (Tindemans 1975) and has put forward different interpretations of flexibility, depending on the approach and on the analyst.

In this contribution, we start from the general definition that it refers to forms of integration in which one group of EU Member States is not subject to the same Union rules as the rest.<sup>3</sup> The basic concern is why countries which are objectively able and actually willing to proceed with further integration in a particular area should be prevented from doing so by others which are unable and/or unwilling. Treaty-based flexibility can be identified whenever a group of Member States proceeds in some such way within the treaty framework. This does not necessarily have to be a long-term condition but should ideally provide an incentive for other Member States to join the “avant-garde” in due time. In this sense, flexibility represents a driving force or motor, rather than a brake on European integration.

This article will analyse more specifically whether the provisions for enhanced cooperation in the Lisbon Treaty constitute efficient procedures for flexibility. To this end, the framework of different concepts and forms of differentiated integration is outlined, and the Treaty’s provisions on

flexibility are analysed in the light of the decision-making dilemma in which procedures are revised between a sovereignty-led veto reflex and a functional drive for efficiency (Hofmann and Wessels 2008). Given the restricted length of this article, we will focus on the general procedure of enhanced cooperation, referring to special provisions within Common Foreign and Security Policy (CFSP) and Justice and Home Affairs (JHA) whenever this adds to the line of argument. Our essential point is that the Lisbon provisions for enhanced cooperation are hardly offering an opportunity for an upward flexibility. It will therefore remain an empty promise, rather than turning out to be a “trademark” of the Lisbon Treaty.

## Concepts of flexibility

There are various approaches aimed at structuring the broad catalogue of concepts of flexibility. The “deepening and widening” graph presented by Faber and Wessels (2006) lays out a framework for visualising different scenarios and strategies for future EU developments. Despite its schematic nature, mirroring the heterogeneity of the inputs to the debate on deepening and widening, it can – in a slightly adapted version – provide a clear framework for defining basic concepts of flexibility, both from a static and dynamic perspective (see Figure 1). The impact on European integration of these different concepts of flexibility depends on whether the overall aims of integration are commonly defined. Thus, concepts of “Core Europe” (concept (a)) and “variable geometries” (concept (b)) can

be defined as upwardly-oriented flexibility. A “Core Europe” merely represents a group of Member States that are already able to attain the commonly-defined aims of integration. Due to its inherent integration-driven dynamic of a “re-invented Union” (Faber and Wessels 2006, pp. 14-15), the remaining Member States will eventually join the core in due time. Even though the concept of “variable geometries” accepts that only some Member States will form a fully-integrated core group, while others may decide to permanently choose lesser integration, flexibility is still upwardly oriented.

However, flexibility can develop disintegration or “spill-back” effects whenever “matter” – that is, the very substance of the policy area concerned as compared to the timing or scope of participation – becomes the predominant variable of integration (Stubb 1996), at the expense of commonly-defined overall objectives of integration, resulting in highly differentiated forms of functional cooperation emerging from the EU 27. Hence an intergovernmental cooperation of only a few large Member States (EU3; EU6) forming a “Directoire” (concept (c)) may extend the scope and level of cooperation substantially in specific policy areas, while neglecting other matters and members. The concept of “Europe à la carte” (concept (d)) offers a broad range of subject areas from which each Member State can choose the preferred menu, which suits its ability and willingness.<sup>4</sup>

Without the definition of a common integration framework, “Europe à la carte” neglects deepening, per se, and hence is also referred to as “downsizing flexibility” (Wessels and Jantz 1997, p. 348).

The basic dilemma resulting from flexibility is that modes of differentiated integration need to take account of objectives defined by a smaller group of able and willing Member States (“ins”) while ensuring that the overall construction of European integration and the interests of the Member States not included (“outs”) remain unaffected. The desired effect of flexibility can thus be defined as tackling the threat of dissolution of the current state of European integration and preventing a “downsizing flexibility”.

To that end, three forms of flexibility<sup>5</sup> have been introduced in the EU’s legal framework (concepts (a) and (e)):

- 1) Predefined flexibility, which makes possible partial integration within a specific subject area by precisely defining the objective and scope, as well as the participating Member States. While the European Monetary Union can be perceived as one of the prime examples, there are various other examples of predefined flexibility established in protocols and declarations, mainly in relation to JHA (e.g. Schengen).
- 2) Case-by-case flexibility, which enables Member States to abstain from a decision without vetoing it, thereby

accepting that the decision is legally binding for the other EU Member States. This constructive abstention is only applicable within the intergovernmental CFSP.<sup>6</sup>

- 3) Enabling clauses, which provide a procedure for a smaller group of interested Member States to proceed within a clearly defined framework of given structures, as in the case of enhanced cooperation complemented by permanent structured cooperation.<sup>7</sup>

### Enhanced cooperation – a treaty-based flexibility arrangement

With EMU and Schengen representing cases in which some Member States decided to withdraw from deeper collective action, based on their cost-benefit ratio, flexibility is already a reality within European integration. The latest example of an opt-out is the Charter of Fundamental Rights, which will be introduced into the EU’s legal framework by the Lisbon Treaty, but which will not be fully applicable to Poland and the UK (Protocol No.30). Thus, treaty-based arrangements for predefined flexibility have already been used, and have effectively contributed to preventing stagnation in the integration process in specific EU policies. Other treaty-based arrangements such as case-by-case flexibility and enabling clauses have not yet been used. Moreover, they have been challenged by options for further integration

outside the EU’s legal framework. In May 2005, seven EU Member States signed the Treaty of Prüm on extended data exchange and intensified cooperation against terrorism. Even though the scope and objective of this agreement would have complied with the requirement of the Nice Treaty that “[enhanced cooperation] must remain within the limits of the powers of the Union or of the Community and does not concern the areas which fall within the exclusive competence of the Community”, this procedure did not represent an option, because the threshold of eight interested Member States was not reached.<sup>8</sup> Thus, the Treaty of Prüm can be

regarded as an enhanced cooperation outside the EU Treaty, with the clearly defined aim to be eventually transferred into the EU’s legal framework (Kietz and Maurer 2006).

Whenever EU Member States have the choice between perfect and no communitarisation within the treaty framework, rather than between perfect and imperfect communitarisation, they are tempted to opt for models of intergovernmental cooperation outside the EU. While these forms of flexibility permit further integration within a policy area where otherwise stagnation might have prevailed, compliance with provisions of the EU Treaties has to be ensured. Moreover, the lack of democratic control outside the EU’s legal framework represents a problem, especially

**Concepts of “Core Europe” and “variable geometries” can be defined as upwardly-oriented flexibility... The desired effect of flexibility can be defined as tackling the threat of dissolution of the current state of European integration and preventing a “downsizing flexibility”.**

with regards to a policy area as sensitive as internal security. Thus, even though intergovernmental cooperation structures outside the EU have so far been designed in terms of an upwardly-directed flexibility, as preparatory stages to further integration within the Union's legal framework (e.g. Schengen, Prüm), the possibility of a downsizing flexibility effect cannot be completely ruled out, due to the double structures and lack of control.

Enhanced cooperation, which was established by the Amsterdam Treaty and reformed by the Nice Treaty, is supposed to represent a treaty-based flexibility arrangement which is sufficiently attractive to provide an alternative within the EU's

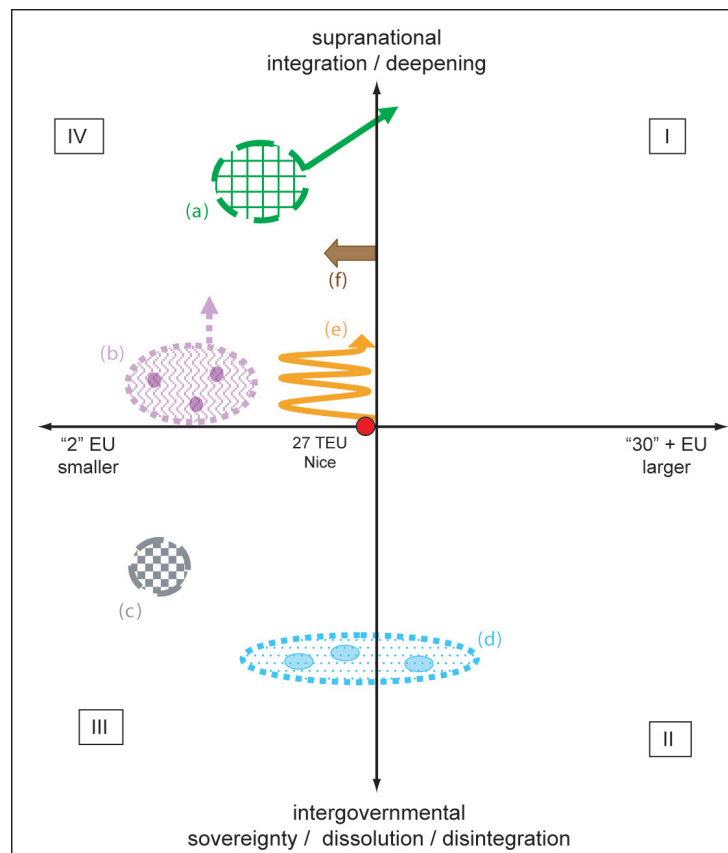
legal framework. Thereby, it is to be perceived as a tool for effective policy-making, rather than a tool for building a "Core Europe" (see Figure 1 concepts (a) and (e)). The basic aim of enhanced cooperation is to enable a group of

interested Member States to proceed within integrated institutional structures, under rather strict conditions, resulting in a temporary state of imperfect communitarisation with the inherent option for eventually achieving the state of perfect communitarisation, due to its openness to other Member States.

Various reasons for the non-use of enhanced cooperation have been discussed. On the one hand it is argued that the mere existence of this procedure serves its own purpose, because in sensitive policy areas especially (where unanimity prevails) the "threat" of moving forward within a smaller group of Member States might lead to consensus and hence develop an upwardly directed flexibility effect. On the other hand, conditions for triggering enhanced cooperation and provisions regarding the procedure are perceived to be too strict to be applicable. Thus, the respective treaty provisions

## Enhanced cooperation supposed to represent a treaty-based flexibility arrangement which is sufficiently attractive to provide an alternative within the EU's legal framework.

Figure 1: Concepts of Flexibility<sup>9</sup>



- Core Europe ("Avantgarde"):** functional and/or constitutional deepening by a group of „willing“ and „able“ Member States to attract others to follow
- Variable geometry:** sectoral integration of different groups of Member States with opt-outs accepting that not all Member States might join the fully integrated group
- Directoire:** intergovernmental cooperation between a few large Member States (EU3, EU5) excluding smaller states by definition
- L'Europe à la carte:** ad hoc groups of interested states (including more or less than the actual number of EU members) engaged in limited functional or sectoral cooperation outside the TEU framework
- Treaty-based flexibility:** pre-defined flexibility; case-by-case flexibility; enabling clauses; thus enhanced cooperation(!!!)
- Withdrawal by single Member States:** complete opt out of one or more Member States.

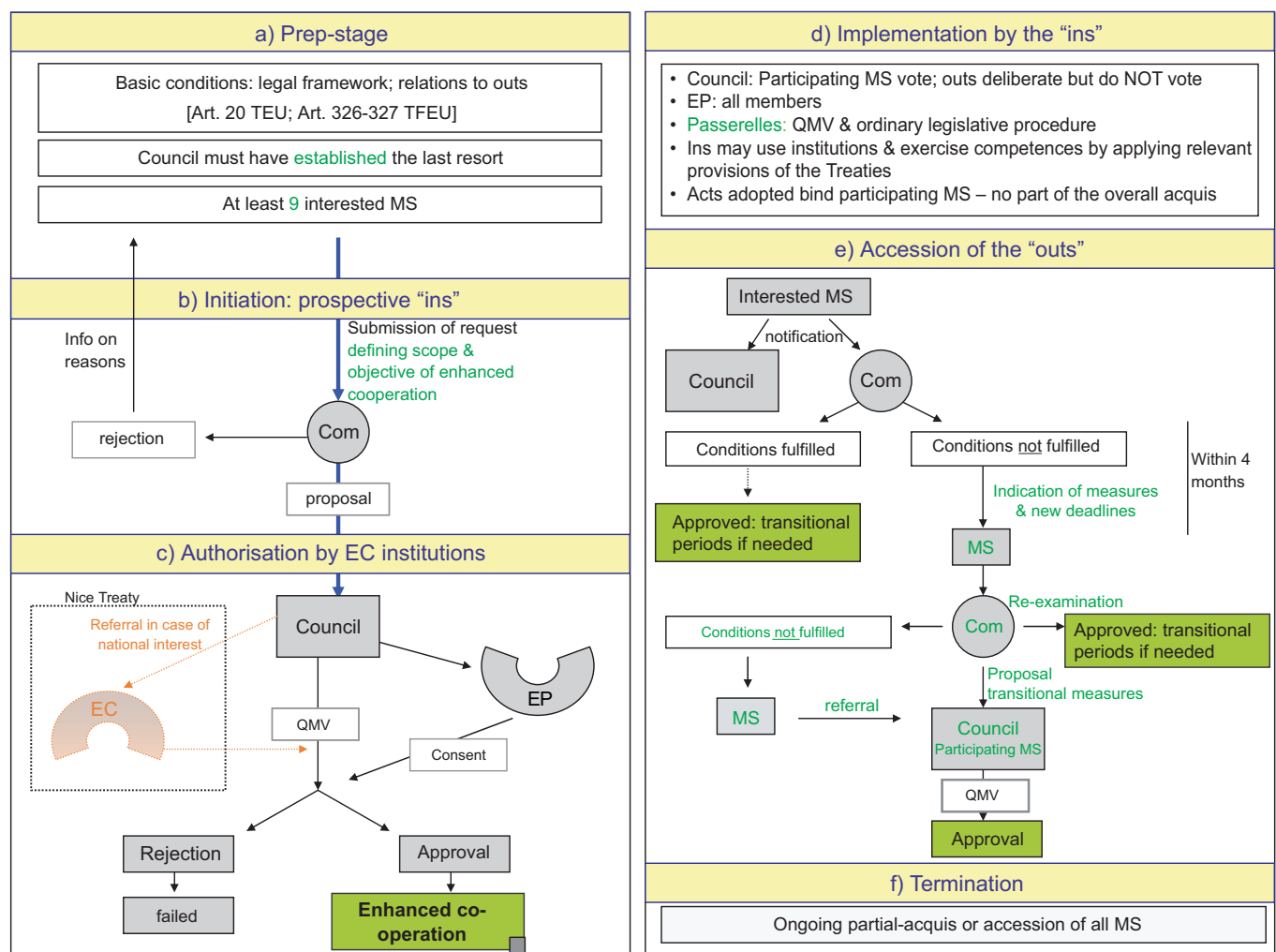
Source: own adaptation of Wessels, 2008.

have been reformed with every treaty revision ever since its introduction into the legal framework by the Amsterdam Treaty. These revisions can only be subject to speculative consideration, since the procedure has yet to be triggered. This also applies to the latest treaty revision in 2007.

### The flexibility check for the differentiated policy cycle after Lisbon

In the following, the provisions of the Lisbon Treaty are analysed within the framework of the differentiated policy-making cycle of preparatory stage, initiation, authorisation, implementation, accession and termination (see Figure 2 below).

Figure 2: Enhanced cooperation in the Lisbon Treaty



#### a) Preparatory stage: merely slightly revised conditions

Conditions for triggering enhanced cooperation remain restrictive, according to the provisions of the Lisbon Treaty.<sup>10</sup> Building enhanced cooperation is only possible "within the framework of the Union's non-exclusive competences"<sup>11</sup> and it has to "comply with the treaties and the law of the Union".<sup>12</sup> Moreover, the aim shall be to "further the objectives of the Union, protect its interests and reinforce its integration process".<sup>13</sup> In this way, undermining the internal market or economic, social and territorial cohesion, discrimination in trade and distortion of competition between Member States are to be prevented.<sup>14</sup> While enhanced cooperation can make use of common institutions and exercise competences, by applying the relevant provisions

of the treaties,<sup>15</sup> the competences, rights and obligations of the "outs" are to be respected.<sup>16</sup> Enhanced cooperation shall not become an exclusive club, and hence the provisions of the Lisbon Treaty continue to demand that cooperation remains "open at any time to all Member States".<sup>17</sup> Furthermore, the Commission and the "ins" are asked to promote participation.<sup>18</sup>

Only the "last resort" condition and the threshold for the minimum of participating Member States have been reformed by the Lisbon Treaty. Provisions of the Nice Treaty stipulated its use only when the objectives of such cooperation could not be achieved within a reasonable period by applying the relevant provisions of the treaties, without specifying by whom and how this should be measured. This

"last resort" principle has been watered down by the Lisbon Treaty by stating that the "last resort" can be established by the Council<sup>19</sup> (CEPS/Egmont/EPC 2007). Moreover, the minimum number of Member States wishing to engage in enhanced cooperation is set at nine Member States<sup>20</sup> instead of eight. In terms of efficiency, there are various interpretations of the most appropriate threshold for building an enhanced cooperation. Nine Member States might currently be considered reasonable, because within an EU-27 this represents one-third of the Member States. Since an enhanced cooperation is authorised to make use of common institutions, the cost-benefit ratio will improve if as many Member States as possible are involved (CEPS/Egmont/EPC 2007, p.101). Thus, in view of an ever-growing Union

it might have been preferable to define the threshold in relation to the overall number of EU Member States, keeping the ratio of Member States necessary for building enhanced cooperation stable. For this reason, even though there is currently no difference between the threshold of nine Member States (Lisbon Treaty) and one-third of the overall number of Member States (Constitutional Treaty), the latter might have been more efficient in the longer-term perspective.

#### b) Initiation: self-defined scope and objectives via a supranational mediator

According to Article 329(1) TFEU, "Member States wishing to establish enhanced cooperation between themselves [...] shall address a request to the Commission, specifying the scope and objectives of the enhanced cooperation proposed." This means that the request is not submitted directly to the Council, but to the European Commission, "which submits the proposal to the Council to that effect"<sup>21</sup> – preserving supranational review. If the Commission does not submit a proposal to the Council, it is requested to inform the respective Member States of the reasons. Thus, even though interested Member States are able to define the scope and objectives of an enhanced cooperation, the Commission remains the only gateway for launching a concrete legal text.

#### c) Authorisation: emergency brake and accelerator

Revisions of the procedure to authorise enhanced cooperation have been remarkable. The Nice Treaty established an "emergency brake" in case enhanced cooperation is vetoed in the Council and special national interest exists, providing Member States the possibility of referring the matter to the European Council for consensus-driven deliberations. The Lisbon Treaty communitarised the procedure to authorise enhanced cooperation by abolishing this opportunity and introducing qualified-majority voting (QMV) to all areas except CFSP, where decisions are now to be taken by unanimity.<sup>22</sup>

Within specific policy areas of the Lisbon Treaty, special options are provided. If one Member State vetoes a decision on police and judicial cooperation in criminal matters, and at least nine Member States wish to proceed, "enhanced cooperation [...] shall be deemed to be granted and the provisions on enhanced cooperation shall apply".<sup>23</sup> In this case, the functional drive for efficiency transforms an emergency-brake veto by one or more Member States into an accelerator for smaller groups of "ins".

Moreover, the Lisbon Treaty increased the European Parliament's (EP) rights of participation in the authorisation procedure. While according to the provisions of the Nice Treaty the EP was asked for consent only in areas where "co-decision" applied, its consent with simple majority will

additionally be required under the Lisbon provisions in areas where special legislative procedures apply.<sup>24</sup> Thus in general, the procedure to authorise enhanced cooperation has been communitarised in terms of an increase in participation rights of the EP, closely linking the emergency brake to an accelerator and the application of QMV. Nevertheless, the efficiency of the latter remains subject to the suspensive sovereignty-led veto reflex provided by the so-called "Ioannina" clause. That is, a group representing at least three-quarters of the share of population necessary for building a blocking minority can ask the Council to do everything in its power, within a reasonable period of time, to reach a satisfactory solution. This opens up the possibility of pulling a "hidden emergency brake" at least for a limited period.

#### d) Implementation: enhanced cooperation a moving target?

Decisions taken in the Council within enhanced cooperation are to be taken only by the "ins", while the "outs" are granted the right to participate in deliberation on the decisions but not to vote. This implies that some sort of "mini-acquis" – legally binding only for the Member States engaged in enhanced cooperation<sup>25</sup> – is being created within the overall *acquis communautaire*. This is especially interesting with regard to Art. 333 TFEU which offers two *passerelle* clauses: Member States engaged in enhanced cooperation are enabled to transform unanimity into QMV and to introduce the ordinary legislative procedure in cases where special legislative procedures are foreseen. This

might render enhanced cooperation a moving target for those Member States wishing to accede to it at a later stage – having to apply the mini-acquis in its entirety, without any direct influence on its scope. Indirect influence is possible via the European Parliament, where all members are entitled to vote in cases in which the ordinary legislative procedure is applied or consent is requested. However, the EP's influence is rather limited with regards to the *passerelle* clauses, being only consulted when the ordinary legislative procedure is to be introduced. Nevertheless, in view of the Commission's right to propose legal acts,

the EP's (limited) right to participate and the judicial control by the European Court of Justice, Community control is granted to a certain extent.

#### e) Accession: Commission and Council of the "ins" as door openers

In general, the procedure for accession of former "outs" to enhanced cooperation in the Lisbon Treaty has remained unchanged. The Commission is responsible for evaluating and deciding on any accession request "within four months of the date of receipt of the notification".<sup>26</sup> This supranational control ensures that the interests of the EU as a whole are

**In general, the procedure to authorise enhanced cooperation has been communitarised in terms of an increase in participation rights of the EP, closely linking the emergency brake to an accelerator and the application of qualified-majority voting.**

preserved and that coherence with the legal framework is provided. However, “outs” are explicitly requested to comply “with any conditions of participation laid down by the authorising decision”.<sup>27</sup> The provisions lack specification as to whether these conditions were initially defined by the Member States submitting the request for establishing an enhanced cooperation or by the Council deciding on its authorisation. Thus, if the former applied, the “ins” would have an influence on the accession of the “outs” by predefining the conditions. Furthermore, the procedure for accession in the Lisbon Treaty is extended in the event that a request for accession is rejected twice by the Commission: Member States then have the right to refer the request to the Council comprising only the “ins”.<sup>28</sup> Therefore, the decision of the Commission can be overruled by the small group of participating Member States by QMV<sup>29</sup> and the “ins” become a second door-opener.

#### f) Termination: enduring “mini acquis” or *acquis communautaire*?

Even though the accession of all EU Member States is not the explicit objective of enhanced cooperation, it is not excluded in a long-term perspective. In the meantime, the mini-acquis can provide an efficient tool for differentiated policy-making in the respective policy area in terms of a “multi-speed Europe”. Once it has been triggered, it represents a state of imperfect communitarisation, preventing a stagnation of integration. In line with the argument that flexibility represents a motor rather than a brake to European integration, this state will only be of temporary nature. However, even if the “mini-acquis” was of an enduring nature, in terms of “variable geometries”, this form of flexibility would not develop a disintegration impact, because the general *acquis communautaire* persisted.

#### Conclusions

The reforms put forward by the Lisbon Treaty will not necessarily make enhanced cooperation less complex, and the sovereignty-led veto reflex has not been outweighed by the functional efficiency drive. In particular the remaining strict conditions for triggering enhanced cooperation will not make the procedure more applicable. Thus, it will continue to be challenged by other treaty-based arrangements for flexibility, such as opting-out or predefined forms of cooperation. Furthermore, the choice between imperfect and no communitarisation will remain prominent, thus maintaining the attractiveness of intergovernmental cooperation outside the treaty framework. For reasons of complexity, and given the existence of other, more attractive, flexibility options, it will be difficult for this kind of treaty-based flexibility arrangement to develop an upward flexibility effect, despite the revisions of the treaty provisions on enhanced cooperation at all stages of the differentiated policy-making cycle. It is more likely to remain an empty promise than to become a trademark of the Lisbon Treaty.

#### References

- CEPS, Egmont, EPC (2007), *The Treaty of Lisbon: Implementing the Institutional Innovations*, Joint Study, November 2007, [http://shop.ceps.eu/BookDetail.php?item\\_id=1554](http://shop.ceps.eu/BookDetail.php?item_id=1554) (07.03.2008).
- Chirac, J. (2000), “Unser Europa”, Rede am 27.6.2000 vor dem deutschen Bundestag in Berlin, <http://www.bundestag.de/geschichte/gastredner/chirac/chirac1.html>, (07.03.2008).
- Deubner, C. (2000), “Harnessing differentiation in the EU – Flexibility after Amsterdam. A Report on Hearing with Parliamentarians and Government Officials in Seven European Capitals”, *Working Paper 2000*, Stiftung für Wissenschaft und Politik, [http://www.ec.europa.eu/comm/cdp/working-paper/enhanced\\_flexibility.pdf](http://www.ec.europa.eu/comm/cdp/working-paper/enhanced_flexibility.pdf) (07.03.2008).
- Faber, A. and Wessels, W. (2006), “Theories and Sets of Expectations. Background paper on the project’s theoretical framework and expectations including yardsticks with indicators”, *EU-CONSENT Paper*, <http://www.eu-consent.net/content.asp?contentid=740> (07.03.2008).
- Fischer, J. (2000), *Vom Staatenverbund zur Föderation – Gedanken über die Finalität der europäischen Integration*, Rede vom 12. Mai 2000 an der Humboldt Universität, Berlin, <http://www.hu-berlin.de/pr/veranstaltungen/reden> (07.03.2008).
- Hill, C. (2006), “The Directoire and the Problem of a Coherent EU Foreign Policy”, *CFSP Forum*, 4 (6), pp. 1-4.
- Hofmann, A. and Wessels, W. (2008), “Der Vertrag von Lissabon – eine tragfähige und abschließende Antwort auf konstitutionelle Grundfragen?” *Integration* 31 (1), 3-20.
- Kietz, D. and Maurer, A. (2006), “Von Schengen nach Prüm. Sogwirkungen verstärkter Kooperation und Anzeichen der Fragmentierung in der EU”, *SWP-Aktuell*, May 2006, [http://www.swp-berlin.org/common/get\\_document.php?asset\\_id=2988](http://www.swp-berlin.org/common/get_document.php?asset_id=2988) (07.03.2008).
- Missiroli, A. (2000), “CFSP, defence and flexibility”, *Challiot Paper 38*, Paris: WEU Institute for Security Studies.
- Schäuble, W. and Lamers, C. (1994), *CDU/CSU-Fraktion des Deutschen Bundestages, Überlegungen zur europäischen Politik*, Bonn.
- Stubb, A. C-G. (1996), “A categorisation of differentiated integration”, *Journal of Common Market Studies*, 34 (2), pp. 283-295.
- Tindemans, L. (1975), *European Union: Report to the European Council*, in: *Bulletin of the European Communities*, Supplement 1/76, Luxembourg.
- Wessels, W. (2008), *Das politische System der EU*, Baden-Baden: Nomos.
- Wessels, W. and Jantz, B. (1997), *Flexibilisierung: Die Europäische Union vor einer neuen Grundsatzdebatte? Grundmodelle unter der Lupe*, in: Hrbek, R. (Hrsg.): *Die Reform der Europäischen Union. Positionen und Perspektiven anlässlich der Regierungskonferenz*, Baden-Baden: Nomos, pp. 345-368.

## NOTES

- <sup>1</sup> The University of Cologne leads the EU-CONSENT Network of Excellence. Funda Tekin is Project Manager, and Professor Wolfgang Wessels is the Coordinator.
- <sup>2</sup> For an overview on the complexity of terminology see Stubb 1996.
- <sup>3</sup> In line with this general definition, the terms “flexibility” and “differentiated integration” will be used synonymously.
- <sup>4</sup> This definition of the pick-and-choose character of “Europe à la carte” is based on Dahrendorf 1979.
- <sup>5</sup> For a more detailed description of these three modes see Deubner 2000, Missiroli 2000.
- <sup>6</sup> Art. 31 TEU.
- <sup>7</sup> Arts. 20 and 46 TEU; Arts. 326-333 TFEU.
- <sup>8</sup> Former Art. 43(d) and (g) TEU.
- <sup>9</sup> While the horizontal x-axis denotes the number of Member States, the vertical y-axis indicates the dichotomy between sovereignty of Member States and the autonomy/supremacy of the EU-level. What can be seen as ‘integrationist’ should be seen as an upward movement along the y-axis and vice versa.
- <sup>10</sup> Conditions in the Lisbon Treaty for building enhanced cooperation within CFSP have been simplified by abolishing the definition of specific aims and the restriction to specific actions. Thus, enhanced cooperation is extended to the entire field of CFSP and CSDP – permanent structured cooperation being introduced to the latter (Art. 20 TEU; Art. 326-334 TFEU; Art. 46 TEU).
- <sup>11</sup> Art. 20(1) TEU.
- <sup>12</sup> Art. 326 TFEU.
- <sup>13</sup> Art. 20(1) TEU.
- <sup>14</sup> Art. 326 TFEU.
- <sup>15</sup> Art. 20(1) TEU.
- <sup>16</sup> Art. 327 TFEU.
- <sup>17</sup> Art. 20(1) TEU.
- <sup>18</sup> Art. 328(2) TFEU.
- <sup>19</sup> Art. 20(2) TEU.
- <sup>20</sup> Art. 20(2) TEU.
- <sup>21</sup> Art. 329(1) TFEU.
- <sup>22</sup> Art. 329(2) TFEU.
- <sup>23</sup> Arts. 82, 83, 86 and 87 TEU.
- <sup>24</sup> Art. 329(1) TFEU.
- <sup>25</sup> Art. 330 TFEU.
- <sup>26</sup> Art. 332(1) TFEU.
- <sup>27</sup> Art. 328(1) TFEU.
- <sup>28</sup> Art. 331(1) TFEU.
- <sup>29</sup> Art. 330 TFEU.

# Measuring Individual and Organisational Performance in the Public Services of EU Member States

Christoph Demmke, Gerhard Hammerschmid and Renate Meyer

EIPA 2008/2, approx. 140 pages

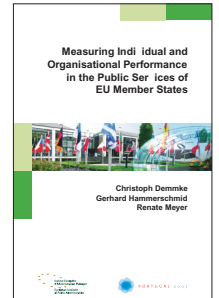
ISBN: 978-90-6779-208-0 € 45.00 (including postage and packing in Europe)

This study compares and analyses the different individual and organisational performance assessment systems used by the public administrations of the Member States of the European Union (and Norway).

This publication presents an analysis and comparison of the various performance assessment systems in place, their objectives, working procedures, challenges and effects. The focus, therefore, is less on concepts and more on the actual practices of managers doing performance assessments.

The overall goal is to explore the main management challenges and success factors of implementing individual appraisal systems in public services in Europe. Based on deepening insights and practical experiences, the study intends to:

- make available up-to-date information on experiences across European public administrations;
- identify the main leadership challenges in successfully conducting individual assessments and linking them to organisational performance;
- present and discuss good practices in the field;
- provide practical guidance, by identifying the factors that will assist organisations in the design, implementation and reevaluation of their systems in order to make performance assessments run more smoothly and contribute to improved organisational performance.



Another purpose of this comparative study is to present more empirical evidence on the relationship between the assessment of individual and organisational performance. What are the criteria used? What is the relationship between organisational performance and individual performance? How can organisational and individual performance be measured? What are the main challenges in measuring organisational performance and individual performance? Are recent reforms in the field of individual performance assessment enhancing organisational performance?

# The Treaty of Lisbon: New Signals for Future Enlargements?



By **Sonia Piedrafita**\*<sup>1</sup>

The Lisbon Treaty was negotiated against the background of a new strategy on enlargement based on consolidation of existing commitments, better communication to citizens, stricter conditionality and the consideration of the EU's capacity to integrate new members. It has introduced some changes to Article 49 of the Treaty on European Union, which specifies the basic procedures for accession of new members. These relate to the promotion of the EU values, better information to both the national and the European parliaments and the explicit reference to conditions for entry laid down by the European Council. This contribution, on the one hand, reviews this new strategy on enlargement. On the other, it examines to which extent the new treaty provisions reflect the less favourable climate and whether they may represent any major change in practice.

Enlargement of the EU has figured prominently in recent public debates over the future of Europe. It was regarded as an important factor behind the negative result in the referendums on the Constitutional Treaty in France and the Netherlands, even though the reasons given by citizens for a negative vote were usually related to economic considerations, the lack of information or the threat to the national government.<sup>2</sup> Indeed, support for enlargement has been decreasing in the recent years in many old Member States,<sup>3</sup> and only 29% of their citizens think that enlargement has a positive impact on the EU.<sup>4</sup>

At the EU level, decision-makers seem to prefer a pause in order to digest completely the last accessions and consolidate existing commitments. Caution about further enlargements is also fed by uncertainty about how enlargement is going to affect the future of the EU in terms of the manageability of its decision-making process, deeper integration or a single voice in the world. Inevitably, enlargement-related issues have been present in both the European Convention's debates and the intergovernmental negotiations leading to the Treaty of Lisbon.

This contribution will first review the policy background against which the recent Treaty reform has taken place, focusing on the new strategy on enlargement, and on the evolution from "absorption capacity" to "integration

capacity". It will then examine whether the new provisions introduced by the Treaty of Lisbon reflect this less favourable climate for enlargement and to which extent they are going to make a difference to common practice so far.

## **From absorption capacity to integration capacity**

The climate for enlargement has become less favourable in the last decade, triggering a new strategy for enlargement based on stricter conditionality and on the capacity of the Union to integrate new members without hindering its goals and policies. Traditional concerns about the impact

of new members on the functioning of the Community institutions and policies turned into the notion of "absorption capacity" on the occasion of last enlargement, and "integration capacity" more recently.

Even though it was not until June 1993 that the Copenhagen European Council first formally stated that "the Union's capacity to absorb new members, while maintaining the momentum of European Integration" was an important consideration to take into account when considering a membership application, these

were already concerns in previous rounds of enlargement. One fear about the accession of Denmark, Ireland and the United Kingdom was that it could affect the capacity of the

**The climate for enlargement has become less favourable in the last decade, triggering a new strategy for enlargement based on stricter conditionality and on the capacity of the Union to integrate new members.**

Community to work efficiently and further complicate progress in Community policies (Deighton and Milward 1999). And when the Community was still digesting with some difficulties the absorption of these new members, the application of Greece again prompted voices of alarm about both the institutional capacity of the EC to work with more members and the consequences for the integration process (Verney 2007). The subsequent applications by Portugal and Spain further increased these concerns (Tsoukalis 1981).

The first response to the membership applications from the EFTA countries (Austria, Finland, Norway, Sweden), and to increasing pressure from the Central and Eastern European Countries (CEECs) for a clear “European perspective”, was the Commission’s report “Europe and the challenge of enlargement”, submitted to the Lisbon European Council in June 1992. The report outlined the challenges that the accession of the EFTA countries, and to a still greater extent the accession of the CEECs, could pose for the effectiveness of the Community, its institutions, and the development of the common policies (EC 1992).

Indeed, one of the main reasons for excluding from the Association Agreements with the CEECs a “membership clause”, such as had been included in similar agreements with Greece and Turkey in the past, had been the risk that their accession could pose for the “deepening” process taking place in 1991, when the terms of political and economic union were agreed.

The capacity to absorb new members was traditionally assessed through the Commission’s opinions on the applications for membership, examining on the one hand the candidates’ ability to assume the obligations of membership including their acceptance of EU policies and, on the other, the impact of accession on the Union, in areas such as the functioning of the rotating Council Presidency, estimates of net financial transfers based on existing common policies, or the addition of official EU languages. Given the special difficulties and challenges involved in the eastern enlargement, the possible consequences were the subject of a special Commission Communication in 1997: “Agenda 2000: For a stronger and wider Union”. In this case, the Commission not only delivered an opinion on the candidates’ applications but also examined the likely impact of the enlargement more generally, proposing EU budgetary and policy reforms (EC 1997). In the same vein, in parallel to the Regular Report on Turkey and its recommendation to open negotiations in October 2004, the Commission also presented a detailed Impact Study on “Issues raised by Turkey’s possible membership in the European Union”.<sup>5</sup>

A thorough preparation process by both the EU and the CEECs has helped ensure – so far – a smooth functioning of the EU institutions and a similar delivery of results after enlargement (Best *et al* 2008). However, the accession of ten new Member States in May 2004 and Bulgaria and Romania in January 2007 has also posed important

challenges for the manageability of the decision-making process, especially in view of the increased size and heterogeneity and the specific features of the newcomers. The accommodation or “absorption” of the new members may be regarded as a successful but still ongoing process, with neither they nor the Union having fully finalised the necessary adjustments. On the one hand, the EU institutional and treaty reform process has not been completed yet, and pressure for further change may still emerge in the future as the result of enlargement and other factors. On the other, the new Member States are still in the process of developing efficient mechanisms to participate in and

influence EU decision-making, improve their administrative capacity to implement the *acquis* and EU policies, and prepare their economies for full membership of the Economic and Monetary Union and the challenges of the Lisbon strategy.

The need to allocate time and resources to the goal of completing the process successfully, the increasing pressure for accession from candidate and potential candidate countries, the treaty-reform *fatigue* resulting from two decades of

intense widening and deepening, and the blame laid on enlargement for the failure of the ratification of the European Constitution, all triggered the development of a new strategy by the European Commission in 2005. “Consolidation, Conditionality, Communication: The strategy of the enlargement policy” was based on three lines of action: consolidation of existing commitments, better communication to citizens in order to improve the legitimacy of the process, and application of fair and rigorous conditionality to the candidate countries so that they are ready to fulfil their obligations as members and implement Community policies (EC 2005). The Commission stressed that future enlargement should depend on the candidate’s performance in meeting the standards in order to ensure the smooth absorption of the new members, and should also guarantee the capacity of the Union to act and decide according to a fair balance within its institutions.

Rigorous and fair conditionality implies first that the “Union has ‘to demand fulfilment of the accession criteria and duly reward countries that make progress’ and, second, that “accession negotiations at any stage in the accession process may be suspended if these criteria are not met.” Whereas the fulfilment of the enlargement criteria implied a single judgement as to whether an applicant met the minimal requirements for membership, the principle of conditionality involves continuous scrutiny by the EU of all spheres of the legal, political and economic reforms in the candidate countries (Kochenov 2005). Conditionality gives the Union guarantees that obligations are assumed by the applicants, and allows differentiation between complying and non-complying candidates. Conditionality indeed became a new principle of enlargement throughout the accession process of the CEECs. Membership was conditioned first to fulfilment of the Copenhagen criteria.

## The accommodation or “absorption” of the new members may be regarded as a successful but still ongoing process, with neither they nor the Union having fully finalised the necessary adjustments.

The Luxembourg European Council of December 1997 agreed that, even though negotiations could be opened with those candidates that satisfied the political criteria, conclusion of the negotiations would be conditional on their fulfilment of the economic criteria and satisfactory adoption of the *acquis*. The Accession Partnerships went a step further and conditioned the reception of accession aid to the fulfilment of the criteria.

This new strategy was followed by discussions in the Council on whether to include the EU's capacity to integrate new members as a new criterion when considering an application, with the June 2006 European Council requesting the Commission to present a special report in this regard.<sup>6</sup> In its report, the Commission stated that the EU's "integration capacity" (rather than "absorption capacity") depended on the development of the EU's policies and institutions, as well as on the transformation of applicants into well-prepared Member States (EC 2006). The capacity of would-be members to accede to the Union should be "rigorously assessed by the Commission on the basis of strict conditionality". "Integration capacity" also means assessing "whether the EU can take in new members at a given moment or in a given period, without jeopardizing the political and policy objectives established by the Treaties." In order to maintain the momentum of European integration "as it enlarges the Union needs to ensure that its institutions continue to act effectively, that its policies meet their goals, and that its budget is commensurate with its objectives and with its financial resources." The EU's integration capacity will be reviewed at all key stages of the accession process. In its opinions on applications for membership and in the course of accession negotiations, the Commission will provide impact assessments of accession on key policy areas.

In November 2006 the European Parliament adopted a Report drafted by Alexander Stubb on the institutional aspects of the Union's capacity to integrate new members. This acknowledged the EU's "difficulties to honour its commitments towards South-East European countries", and called for a series of institutional changes to improve the EU's "integration capacity". These changes included adoption of a new system of qualified-majority voting in the Council; a clear definition of the EU's values, objectives and competences; more transparency in Council's operations or increased powers of scrutiny for national parliaments, most of them already envisaged on the Constitutional Treaty. The Parliament welcomed the abandonment of the term "absorption capacity" since the "EU does not in any way absorb its members", but stressed that "integration capacity" should not be "a new criterion applicable to the candidate countries" and that responsibility for improving "integration capacity" lay within the Union itself.<sup>7</sup> Although the December 2006 European Council did not include "integration capacity" as an additional criterion for the candidate countries, it did agree on a "renewed consensus on enlargement" based on the new enlargement strategy (consolidation, conditionality and communication) and the EU's capacity to integrate new members as proposed by the Commission.

### Implications of the new Treaty

Against the background of this new strategy and increasing concerns about future accessions, the current treaty reform has introduced some changes regarding enlargement.

This section will examine to which extent the new provisions are reflecting the less favourable climate on the issue and what changes they might involve in practice.

The European Council in June 2007, in its Draft Mandate for the 2007 Intergovernmental Conference, tried to combine the consensus reached during the deliberations before signature of the Constitutional Treaty (which was more positive with regard to enlargement) with this new, less favourable climate. The resulting changes to Article 49 of the Treaty on European Union, which specifies the basic procedures for accession of new members, include the promotion of EU values as a condition to apply and the notification of the new applications to both the national and the European parliaments, as envisaged in the Constitutional Treaty. The Draft Mandate added the consideration of the conditions of eligibility decided by the European Council to the list, and dropped the article stating the open nature of the EU in the Constitutional Treaty.

The text as modified by the Treaty of Lisbon thus reads as follows:

Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union. The European Parliament and national Parliaments shall be notified of this application. The applicant State shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the consent of the European Parliament, which shall act by a majority of its component members. The conditions of eligibility agreed upon by the European Council shall be taken into account.

### The respect and promotion of EU values

Before 1999, the only requirement for a state to apply for membership was to be European. The term "European" was considered to be a non-fixed, ever-changing concept that combined geographical, historical and cultural elements that constituted the "European identity" (EC 1992:11). After the entry into force of the Amsterdam Treaty, an applicant country also had to respect the principles of freedom, democracy, respect for human rights and fundamental freedoms and the rule of law.<sup>8</sup> The Amsterdam Treaty also introduced a procedure to allow the provisional suspension of certain membership rights in case of the breach of these principles by a Member State, which was further reinforced by the Treaty of Nice. Since then, the role of these principles as guidelines for EU decision-making has increased across many policy areas.

The European Convention added human dignity and equality to the list, dropping the fundamental freedoms, and stated that "these values are common to the Member States in a society of pluralism, tolerance, justice, solidarity and non-discrimination." The 2003 IGC added that in this society "the principle of equality between women and men prevail" and emphasised "the rights of the persons belonging to minority groups" in the list of principles.

The Lisbon Treaty has maintained Article 2 of the Constitutional Treaty:

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

However, the article of the Constitutional Treaty stating that the Union shall be open to all European states which respect the collective values and are committed to promote them (Article I-58), clearly stressing the “open” nature of the European project, has been dropped. The European Council’s Draft Mandate for the 2007 IGC decided to return to the old wording and to make clear that, even though only states that respect and promote these values may apply, the acceptance of the application still lies with the EU, which still can reject any future application on these grounds.

### The role of the European and national parliaments

A second change introduced by the Lisbon Treaty is the obligation to inform the European Parliament and the national parliaments about any new membership application. So far, the role of the EP has been limited to

group to examine the role of the national parliaments (O’ Brennan and Raunio 2007). It was the Constitutional Treaty that established that both the EP and national parliaments should be notified of any membership application (Art. I-58) and the Draft Mandate for the 2007 IGC maintained the clause in the revised article on enlargement.

This new provision could have a twofold effect. The decision to give a country the candidate status lies in the European Council, usually in accordance with the recommendation made by the Commission, which has traditionally played the role of securing the support of the most reluctant member governments for the accession of some candidates. Widening the public debate and bringing the decision-making closer to the national constituencies may contribute to increase the legitimacy of the process and improve the understanding by the citizens, but it could



*Taking Europe into the 21<sup>st</sup> century*  
© European Communities, 1995-2008

giving the “assent” required for enlargement decisions. The role of the national parliaments has been limited to ratification of the accession treaties once they had been signed, according to the procedures established by the national law. The new change in the enlargement procedure echoes broader trends to increase the role of the EP in the EU decision-making process, and to improve the information and interaction with national legislative assemblies as a means to reduce the democratic deficit of the Union.

Two Declarations on national parliaments in the Treaty of Maastricht, further developed and included as Protocols in the Treaty of Amsterdam, already regulated better communication procedures with national parliaments and fostered inter-parliamentary cooperation.<sup>9</sup> Declaration No. 23 of the Final Act of Nice listed the role of national parliaments in the European architecture as one of the four key questions which the next IGC should address. Indeed 56 (out of 102) members of the Convention represented national parliaments and there was a specific working

also make this consensus-searching task much more difficult. However, this new provision may not involve big changes compared to the past. In practice, the EP and national parliaments were already informed about membership applications, either through formal mechanisms such as hearings and reports from the executives, or informal mechanisms like intra-parties relationships.

### The explicit reference to conditions laid down by the European Council

The Treaty of Lisbon has included the requirement to consider conditions of eligibility defined by the European Council when accepting or rejecting an application, which was not explicitly foreseen in the Constitutional Treaty. This has largely been intended as a reassuring response to public concerns about enlargement. However, it may not in fact represent any major change in practice.

It was the then European Assembly – subsequently the European Parliament – the first to set any membership

criteria. Only six years after its foundation, the 1962 Birkelbach Report stated the necessity to be a democratic state in order to become a member of the European Communities.<sup>10</sup> This interpretation of Article 237 TEC was soon implemented when Franco's Minister of Foreign Affairs Castiella filed the Spanish application for membership on 9 February 1962. The request was merely acknowledged but the EC did not accept Spain as a candidate because it was not a democratic state. A similar approach was adopted in a declaration by the Council at its meeting in Copenhagen in 1978, again in close relation with the changes taking place in Southern Europe. In its Declaration on Democracy, the Council stated that "the

respect and maintenance of representative democracy and human rights in each member States are essential elements of membership in the European Communities."

The enumeration of specific criteria that candidates should meet in order to become members was first developed in the Commission's report "Europe and the Challenge of Enlargement", submitted in June 1992 to the Lisbon European Council. The Commission admitted that the Community had never been "a closed club and could not now refuse the historic challenge to assume its continental responsibilities and contribute to the development of a political and economic order for the whole of Europe", but also listed the conditions the candidate countries should meet in order to become a member, namely share the European values, be a democracy and respect the human rights, adopt the objectives of the EC, including the CFSP and all the *acquis*, and assume all the membership obligations. The latter was meant to avoid new opt-outs for newcomers. The Lisbon Council agreed then to open accession negotiations with the EFTA candidate countries – after approval of the financial perspectives and ratification of the Maastricht Treaty – and to further examine the enlargement Eastwards.

In October 1992 John Major and Jacques Delors met the Governments of Poland, Hungary, Czech Republic and Slovakia and agreed to prepare a list of admission criteria for the Edinburgh European Council in December. The Commission submitted its first draft of "Towards a Closer Association with the Countries of Central and Eastern Europe" to the European Council in December 1992 and again in June 1993, when the decision to give a clear membership perspective to the CEECs was taken.<sup>11</sup> Following the Commission's report, the Council specified the so-called Copenhagen criteria, namely: the stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities; the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union; and the ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union. In order to react to the specific challenges emerging from the

preparation of the CEECs for future accession, the European Council added to the list the administrative capacity to implement the *acquis* in its meeting in December 1995 in Madrid, and the actual application of the *acquis* beyond its mere adoption, in its meeting in December 1997 in Luxembourg.

However, fulfilment of the criteria which have been laid down since the early 1990s has not so far been a condition *sine qua non* to accept a candidate. Decisions have sometimes been taken for political reasons rather than as the result of a painstaking assessment of the candidates. Some candidate countries did not fully fulfil the criteria when the Commission proposed, and the European Council accepted, to open negotiations with 5+1 candidate countries in December 1997; neither did the other 5+1 when the Helsinki 1999 European Council decided to open up the negotiation process to them.<sup>12</sup> Bulgaria and Romania did not fulfil the criteria when the accession treaties were signed, and did not do so even when they became fully members of the Union, being granted some extra time to meet their commitments.

Although this new provision in the Treaty of Lisbon, together with the stricter conditionality envisaged in the new strategy for enlargement, is meant to avoid similar circumstances in the future, the final word will still lie with the European Council, and nothing prevents future decisions on enlargement from being taken according to the political preferences of the day.

### Concluding remarks

Against the background of a new strategy on enlargement based on consolidation of existing commitments, better communication to citizens, stricter conditionality and the consideration of the EU's capacity to integrate new members, the current treaty reform has introduced some changes to Article 49 of the Treaty on European Union, which specifies the basic procedures for accession of new members. These relate to the promotion of the EU values, better information to both the national and the European parliaments and the explicit reference to conditions for entry laid down by the European Council. While the first two were already envisaged in the Constitutional Treaty, the last was added during the 2007 intergovernmental negotiations, which also dropped the article of the Constitutional Treaty which stated that the Union shall be open to all European states which respect the collective values and are committed to promote them. Only states that respect and promote these values may apply but the treaty makes it clear that the decision to accept any application lies in the EU.

The new provisions, as compared with the constitutional text, reflect to some extent the less favourable climate on enlargement. However, they may not represent any major change in practice. The provisions on the European and national parliaments and on the conditions set by the European Council can be regarded as a mere codification

**The new provisions, as compared with the constitutional text, reflect to some extent the less favourable climate on enlargement. However, they may not represent any major change in practice.**

of existing practice. Even if the addition of some values and the requirement not only to respect but also promote them in order to be eligible to apply may provide substantive grounds to discourage some applications, and even though the application of stricter conditionality may make future accession processes more difficult, EU enlargement will probably remain dependent on the politics of the day and the will of the European Council, as has always been the case.

Beyond this, we can venture that, even for those countries that have already acquired candidate status or the “European perspective”, the accession process is very likely to be long and strict. The main challenge for the EU, on the other hand, will now be to develop new ways to manage its relations with these countries, as well as with those that have not yet even been granted the European perspective, on the basis of the new article in the Treaty on European Union which provides for a special relationship with “neighbouring countries” – but without being able to offer so convincingly the perspective of accession which has so far been such an effective tool for the EU to wield “soft power” around its edges.

## References

- Best, E., Christiansen, T. and Settembri, P. (eds.) (2008), *The Institutions of the Enlarged European Union: Continuity and Change*, Cheltenham: Edward Elgar.
- Deighton, A. and Milward, A. S. (eds) (1999), *Widening, Deepening and Acceleration: The European Economic Community 1957-1963*, Baden: Nomos Vlg.
- European Commission (EC) (1992), *Europe and the challenge of enlargement*, Bulletin of the European Communities, Supplement 3/92, Luxembourg: Office for Official Publications of the European Communities.
- European Commission (EC) (1997), *Agenda 2000 – For a stronger and wider Union*, Bulletin of the European Union, Supplement 5/97, COM(97) 2000 final, 13 July 1997 Luxembourg: Office for Official Publications of the European Communities.
- European Commission (EC) (2005), *Consolidation, Conditionality, Communication – The strategy of the enlargement policy*, Brussels, 9.11.2005, IP/051392.
- European Commission (EC) (2006), *Communication from the European Commission to the European Parliament and the Council “Enlargement Strategy and Main Challenges 2006 – 2007” Including annexed special report on the EU’s capacity to integrate new members*, Brussels, 8.11.2006, COM(2006) 649 final.
- Kochenov, D. (2005), “EU Enlargement Law: History and Recent Developments: Treaty-Custom Concubinage?” *European Integration Online Papers*, 9/6: <http://eiop.or.at/eiop/text/2005-006a.htm>.
- O’Brennan, J. and Raunio, T. (2007) “Deparliamentarization and European Integration”, in *National Parliaments within the Enlarged European Union*, Abingdon: Routledge, 1-27.
- Tsoukalis, L. (1981), “Negotiations and Community Attitudes”, in *The European Community and its Mediterranean Enlargement*, London: George Allen & Unwin Ltd, 132-165.
- Verney, S. (2007), “The dynamics of EU accession: Turkish travails in comparative perspective” *Journal of Southern Europe and the Balkans*, 9/3: 307-322.

## NOTES

- \* Sonia Piedrafita, Researcher, Unit “European Decision-Making, EIPA.
- <sup>1</sup> The author would like to thank Prof. Edward Best, Prof. Phedon Nicolaides and Dr. Thomas Christiansen for their valuable comments on this article.
- <sup>2</sup> See [http://ec.europa.eu/public\\_opinion/constitution\\_en.htm](http://ec.europa.eu/public_opinion/constitution_en.htm)
- <sup>3</sup> See last Standard Eurobarometers [http://ec.europa.eu/public\\_opinion/standard\\_en.htm](http://ec.europa.eu/public_opinion/standard_en.htm)
- <sup>4</sup> See Eurobarometer April-May 2007 [http://ec.europa.eu/public\\_opinion/archives/eb/eb67/eb67\\_en.htm](http://ec.europa.eu/public_opinion/archives/eb/eb67/eb67_en.htm). For specific attitudes, see *Attitudes towards European Union Enlargement* July 2006 [http://ec.europa.eu/public\\_opinion/archives/eb\\_special\\_en.htm](http://ec.europa.eu/public_opinion/archives/eb_special_en.htm)
- <sup>5</sup> European Commission, *Issues Arising from Turkey’s Membership Perspective*, Commission Staff Document, Brussels 06.10.2004, SEC(2004) 1202, COM(2004) 656 final.
- <sup>6</sup> Other critical papers would follow suit, e.g. CEPS Policy brief “Just what is this absorption capacity of the European Union?” [http://shop.ceps.eu/downfree.php?item\\_id=1381](http://shop.ceps.eu/downfree.php?item_id=1381); EPC Policy brief “Absorption capacity: old wines in new bottles?” <http://www.epc.eu/en/pub.asp?TYP=TEWN&LV=187&see=y&t=&PG=TEWN/EN/detailpub&l=12&AI=542>
- <sup>7</sup> *The Report on the institutional aspects of the European Union’s capacity to integrate new Member States*, European Parliament, Final A6-0393/2006, was approved by the Parliament’s Committee on Constitutional Affairs on 13 Nov 2006, was adopted by the EP by 398 votes in favour, 99 against with 36 abstentions.
- <sup>8</sup> Article 49 and article 6(1) TEU.
- <sup>9</sup> On the contrary to Declarations, Protocols are legally binding for the relevant individual and institutions.
- <sup>10</sup> Assemblée Parlementaire Européenne (1962) “Rapport de la Commission politique de l’Assemblée Parlementaire Européenne sur les aspects politiques et institutionnels”, Document 122, Janvier 1962. Archives of the European Communities, 07.515:32;X3.075.15.
- <sup>11</sup> “Towards a Closer Association with the Countries of Central and Eastern Europe”, SEC (92) 2301 f. 2 de diciembre de 1992; “Towards a Closer Association with the Countries of Central and Eastern Europe”, SEC (93) 648 f. 18 de mayo de 1993.
- <sup>12</sup> The first group of 5+ 1 consisted of Poland, Hungary, Czech Republic, Slovenia, Estonia + Cyprus. Slovakia, Romania, Bulgaria, Latvia, Lithuania + Malta constituted the second group.

# The EU Treaty Reform Process since 2000: The Highs and Lows of Constitutionalising the European Union



By **Dr Thomas Christiansen**\*<sup>1</sup>

The period from 2000 to 2008 has seen an extraordinary attempt to formally constitutionalise the European Union. Building on long-standing traditions within the European project, a constitutional discourse initiated in the final stages of the Intergovernmental Conference negotiating the Nice Treaty led to the so-called “Laeken Process”: the launch of a formalised, but open debate about the “Future of Europe”, the setting-up of a “Constitutional Convention” and the negotiation of a “Treaty establishing a Constitution for Europe”. However, the failure to ratify this “European Constitution” then threw the entire reform project into doubt. After a period of “reflection” and subsequent re-negotiation governments agreed a new treaty that maintained much of the substance of the “constitution”, but avoided the symbolic language that this had contained. This article charts the highs and lows of this period of treaty reform, arguing that the constitutionalisation of the EU is best viewed as a long-lasting and gradual process that is set to continue even if the formal project to adopt a European Constitution will not be re-visited for some time to come.

## Introduction

An initial observation, when starting to examine recent developments regarding the constitutional reform process in the EU, is the recognition that the debate about a “European Constitution” was deeply embedded in an existing integration process. The talk about, and the work on, a constitutional document was indeed a radical departure from the previous practice of avoiding, at all cost, the language, symbols and other trappings of statehood. In spite of this discursive break with the past, there was never any serious idea to compose such a constitutional document from scratch. Instead, the debate about the “European Constitution” that began among the European political elites in 2000, took account of the previously established patterns and foundations of European integration. It linked to previous aspirations of the European movement, in particular constitutional federalism; it build on the advances of European constitutional law; and it was situated within the reform

debate of the European Union in preparation of Eastern enlargement. In fact, the launch of the debate occurred during the final stages of the Nice Intergovernmental Conference (IGC) and was initially seen as an attempt to achieve a more federalist outcome of that particular IGC.

### **The nightmare of Nice: The traditional treaty reform method reaches its limits**

The impact of the emerging constitutional discourse on the actual negotiations in the 2000 IGC was in fact minimal, because the IGC was too advanced in order to be able to accommodate a return to broad and far-reaching questions about the EU’s foundations. The initial assessment was, therefore, that the Nice Treaty was a defeat for pro-integrationist forces and served to preserve the status quo. However, the “defeat” of these high aspirations was only temporary, and in fact the momentum right after the Nice European Council was gathering for a deeper revision of the treaties. This was

**The period from 2000 to 2008 has seen an extraordinary attempt to formally constitutionalise the European Union.**

partly due because the outcome of the Nice European Council was questionable, both with regard to the content of the revised Treaty and with regard to the way in which it had been negotiated. The treaty reform, while having been launched at a major review of the institutional provisions of the Union in preparation for enlargement, failed to achieve this aim, and while there were modest extensions of co-decision, most other important decisions were postponed to a future round of reform. The extension of qualified-majority voting was linked to a new way of calculating the qualified-majority – a triple majority that actually made decision-making more cumbersome than the previous system.

Equally damaging was the actual experience of the final summit, where negotiators spent three days bargaining over the final issues, and were seen to be more concerned about parochial interests rather than the search for workable solutions for the “new Europe”. France, holding the Presidency, spent significant diplomatic resources on the defence of its voting parity with Germany; Belgium did the same, though with less success, vis-à-vis the Netherlands; and the then candidate states were seen to be excluded from the negotiations about arrangements that would equally apply to them as to the old Member States.

The Nice summit therefore ended not only with an imperfect treaty, but also with a number of important “leftovers” requiring further treaty change, with a desire by many involved in the negotiations to reform the format of

### New beginning? The launch of a formal process of constitutionalisation

It was Belgium – one of the more federal-minded Member States – that held the EU Presidency in the second half of 2001, when the details of this “post-Nice process” were being worked out. At the Laeken European Council in December 2001, a rather maximalist interpretation of the aims of the “post-Nice process” was worked out. This included the reference to a possible “constitutional document” in the mandate of the European Convention that was being agreed on in Laeken. This was then taken a step further by the Convention itself, which, under the leadership of Giscard d’Estaing, set itself the aim of drafting a Constitutional Treaty rather than merely providing the subsequent IGC with a report or a number of scenarios – outcomes that would also have been possible under the Laeken mandate.

At the Laeken Summit, another important decision was taken, namely the nomination of Valéry Giscard d’Estaing as the Chairman of the Convention, with Jean-Luc Dehaene and Giuliano Amato, former prime ministers of Belgium and Italy, respectively, as Vice-Chairs. Giscard d’Estaing had previously been a French President, but had also served many years as a member of the European Parliament and thus combined the roles of representing both Member State and EU institutional interests. A further important appointment in the Convention was that of John Kerr, the



(from left to right) Mr Giuliano Amato, Vice-Chairman; Mr Valéry Giscard d’Estaing, Chairman; and Mr Jean-Luc Dehaene, Vice-Chairman, before the official opening of the inaugural session of the European Convention, 28 February 2002.

© European Communities, 1995-2008

negotiations as well; and with an explicit mandate, contained in Declaration 23 attached to the Nice Treaty, to launch a process to engender a wider debate about the “Future of Europe”. In different circumstances this might not have had the consequences that it did, but given the contingencies at the time, these developments set a course for a period of formal constitutionalisation.

former UK Permanent Representative, as Secretary-General. He brought with him not only close connections to the British establishment, but also experience and familiarity of COREPER/Council procedures.

The European Convention thus had a strong leadership, both in political and administrative terms. Giscard had a clear vision of the direction he wanted the Convention to

go, and even though he suffered certain setbacks in the closing stages of the Convention, his agenda of formally constitutionalising the European Union did resonate with the membership of the Convention.<sup>2</sup> The Convention was made up of representatives of national governments, members of the European Commission, members of national parliaments and of the European Parliament, and even though there were differences among its members about the substance of any draft Constitutional Treaty, Giscard's approach of seeking "consensus" (rather than the more formal unanimity or majority-voting) proved to be effective in achieving a final agreement.

The members of the Convention organised themselves in a number of working groups on specific, mainly sectoral issues, but due to the parliamentary majority of the membership there was also a strong party-political dimension to the Convention's work. In the final analysis, though, the Convention was very much a top-down affair, with a "Praesidium" bringing together 12 key members of the Convention steering the drafting of the new Treaty (Kleine 2007). This Praesidium, which – unlike the plenary sessions or the working groups who met in private – was supported by a very effective secretariat composed of officials from the Commission, the EP Secretariat and, above all, the Council Secretariat (Deloche-Gaudez 2007).

Giscard's handling of the Convention was controversial, partly because his constitutional ambitions so explicitly went beyond the kind of treaty reform that had been initially expected. While the draft treaty ultimately did include a lot of the language of statehood (flags, symbols, a European President and Foreign Minister, European laws, a supremacy of EU law clause), he did not succeed with proposals for a renaming of the Union to the "United States of Europe". He was also heavy-handed in the use of his procedural resources, frequently ignoring opposition from the floor in favour of his own preferences with regards to specific aspects of the treaty, the preamble being a case in point. Finally, he was criticised towards the end of the Convention, when he was seen to consult extensively with national governments, anticipating their views in advance of the subsequent IGC, at the expense of listening to opinion within the Convention.

The European Convention was not the "deliberative forum" that many constitutionalists had hoped to see (Eriksen et al 2004; Panke 2006). There was a certain degree of deliberation, but negotiations about the final draft treaty were neither fully transparent nor did they necessarily reflect the substantive work that had taken place in the working groups. Even so, when the Convention had completed its work in the summer of 2003, it did achieve two significant objectives: first, to have been able to agree on a single, comprehensive draft treaty, and, second, to have set the agenda for the Constitutional IGC that followed the Convention, and that had the formal power to agree on changes to the treaty (Milton and Keller-Noëllet 2005; Church and Phinnemore 2006).

Treaty reform always implies an agenda-setting phase, and it is possible to see the Convention as simply a forum

## The European Convention was not the "deliberative forum" that many constitutionalists had hoped to see.

for more systematic setting of an agenda. Earlier IGCs had been preceded by reflection groups, and one perspective on the Convention is to see it as a "super reflection group". However, given the strength of opinion, the detailed work and the high degree of consensus that had been achieved in the Convention, the approach of the Italian Presidency to minimise any changes to the draft Treaty in the IGC appeared as an obvious choice. The Convention Draft did indeed constitute the basis of negotiations in the IGC, and even though the Italian strategy of seeking to avoid the "re-opening" of individual articles appeared to fail when the December 2003 summit ended without agreement, the subsequent Irish Presidency succeeded in getting agreement on a revised version of the draft treaty, approved at the final summit in June 2004. Heads of State or Government then met in Rome in October 2004 for a formal signing ceremony of

the "Treaty Establishing a Constitution for Europe" – a document that thereafter was widely referred to as the "European Constitution".

While a lot of work, energy, diplomatic skill and other resources had gone into drafting this treaty, the process was still not complete without ratification. Given the constitutional aspirations of the Treaty, it generated significant public interest and in a large number of Member States a popular referendum was seen as the ratification method of choice. This not only included countries that had regularly held referendums in the past, but also several others which had not previously submitted EU matters to such a test, and indeed some where referendums had never been held before. The Netherlands was one such case in point. France and the UK had both called referendums for reasons that were regarded as more politically than legally motivated, and in both cases doubts were raised about the likelihood of achieving a positive result of such a vote.<sup>3</sup>

### The "failure" of the Constitutional Treaty: The limits of politicisation

In the end, it was first in the Netherlands, at the end of May 2005, and a few days later in France, that the electorates of two of the original Member States voted against the Constitutional Treaty. Analysis of the voting intentions and of the public debate in these countries has sought to show that the result was less a verdict on the actual text of the treaty, but was best explained by a variety of factors which included both European and domestic issues. While the "no" votes in these two countries were a severe shock to the "system", there was nevertheless an immediate reflex by the EU institutions to persist with the ratification process, and indeed several countries did ratify the Constitutional Treaty in subsequent months, including Luxembourg by referendum. After all, there were precedents when initial "no" votes had been subsequently overturned, after domestic politics had had a chance to react and make arrangements for a second vote that would assure a more favourable reception.<sup>4</sup>

There was also, however, a sense that the opposition to the Constitutional Treaty had been so strong in these two

countries, and that these countries were so central to the European project, that it would be difficult, if not impossible, to overcome this double “no”. In addition, a number of Member States decided to put their referendums on hold after the rejection of the treaty in France and the Netherlands. A more concerted effort was therefore perceived to be necessary in order to keep the constitutional project going. Both the European Commission and the Member States acted in response to the “constitutional crisis”. The Commission identified a gap in the communication between the EU and the citizens, and launched a programme aimed at enhancing the opportunity for dialogue between citizens

### Agreement on the Lisbon Treaty: Constitutionalisation in all but its name

The Lisbon Treaty was signed by the Heads of State or Governments in December 2007. A number of factors facilitated this process: there had indeed been the anticipated change in domestic politics in key countries, namely in France with the election of Nicolas Sarkozy as President. EU enlargement, which had been one of the main reasons that were given for the need of a fundamental, constitutional overhaul of the Union, and which had been one reason for the opposition towards the Constitutional Treaty, had



Versions of the Treaty establishing a Constitution for Europe in the English language, published by the European Union for the general public.

and elites, the so-called “Plan D” (Wallström 2007). Coming together in the European Council in 2005, governments agreed that what was needed was a “reflection period”, which would last until 2007 and enable a possible re-negotiation of the treaty in time for the next EP elections in 2009. This period of “reflection” about the future of the constitutional project would also, and conveniently, include the national elections that were due in both France and the Netherlands, thus allowing the new governments to present the European issue differently to their electorates.

The reflection period, which lasted from mid-2005 to mid-2007, served the actors to buy time. During this period, the Union celebrated its 50<sup>th</sup> anniversary, which included the adoption of a “solemn declaration” in Berlin about the Union’s values and aims, and thus provided a text with some constitutional principles (Presidency of the European Union 2007). In terms of treaty change, the realisation by early 2007 was clearly that, despite previous statements to the contrary, a re-negotiation of the treaty was both necessary and possible. The German and the Portuguese Presidencies collaborated closely in order to launch a new IGC in the summer of 2007 – Berlin managing to get agreement on an extremely detailed mandate for the IGC, and Lisbon then following up on this with a conference that was concluded in the second half of the year.

happened *without* the Union suffering any immediate or obvious negative effects as a result,<sup>5</sup> and Turkish accession to the EU, while still on the agenda, had clearly moved into the background of public deliberation. Above all there had been a growing acceptance among the EU’s political elite that, while a reform of the treaty was still seen to be necessary, that this should preferably not be presented as a constitutional project. Ratification of “ordinary” treaty change would be more easily achieved if referendums could be avoided, and for this to be the case, the language of constitutionalism had to be replaced.

This reversal from the high degree of politicisation that treaty reform had “enjoyed” during and after the European Convention, to the active de-politicisation of negotiations towards a “Reform Treaty” is remarkable,<sup>6</sup> as is the fact that substantively the vast majority of provisions that had been contained in the Constitutional Treaty were included in the Lisbon Treaty.<sup>7</sup> The Treaty contains key elements of the original Treaty that would need to be regarded as constitutional:

- The *President of the European Council* will be chosen by the Heads of State or Government for a term of 30 months. This office does not empower the elected top politician to take any executive decisions. Furthermore, the Presidency system will be revised, with representatives from three Member States jointly running sectoral Council

- meetings over period of 18 months.
- The *High Representative of the Union for Foreign Affairs and Security Policy/Vice-President of the Commission* will combine the functions of the current High Representative and the External Relations Commissioner. The powers of the High Representative are limited to implement policies, but he or she will play an important role in representing the EU globally.
  - The *President of the European Commission* will be elected by the European Parliament, based on a proposal from the European Council. The size of the College will be reduced from 2014 onwards. Only two-thirds of Member States will have a Commissioner at any one time, rotating every 5 years.
  - The Commission's delegations will form part of a "European External Action Service" of the Union and will come under the joint responsibility of the Council and the Commission.
  - The *European Parliament*, comprising 750 members and a President, will gain further powers as the co-decision procedure becomes the "ordinary legislative procedure" and is expanded to further areas. Additionally, the new budgetary procedure requires approval by both the Council of Ministers and the Parliament.
  - *National parliaments* also get more involved in the legislative process. They are to be notified of proposed legislation and have eight weeks to deliver their comments.<sup>8</sup>
  - *Qualified-majority voting* was extended to new policy areas. As from 2014, a new voting system shall be introduced: a vote is passed if 55% of Member States are in favour and if these countries represent 65% of the EU's population – an element that makes the size of the country's population much more important.
  - The *European Court of Justice* is granted enhanced powers to rule on cases dealing with EU Justice and Home Affairs legislation.<sup>9</sup> The Charter of Fundamental Rights, agreed in 2000 as a "solemn proclamation", will become legally binding with the Lisbon Treaty.<sup>10</sup>

Ratification of this Treaty remains, of course, an important issue, but the changes that national governments have made to the domestic arrangements make an ultimate adoption of the treaty by all Member States more likely. All Member States except Ireland have decided to rely on parliamentary ratification alone – something that is especially remarkable in countries like Poland, Denmark and the UK, which had been previously committed to referendums on the Constitutional Treaty.

Beyond the Irish referendum, there is also the possibility for judicial review of the Treaty by national supreme courts, a scenario that might be likely in both Germany and the Czech Republic. Overall, the chances of ratification are uncertain, but appear to be significantly higher than they were for the Constitutional Treaty.<sup>11</sup>

## Conclusions

While the outcome of ratification, at the time of writing in early 2008, cannot be predicted, we can say that the Union appears to have found a way out of the constitutional impasse. The three elements that formalised constitutionalisation after the Nice Treaty – the use of the convention method for deliberation of treaty changes, the adoption of a language of constitutionalism, and – at least in many Member States, the search for legitimisation of treaty change through public referendums – have not been present in the (negotiation of) the new treaty. Instead, the Lisbon Treaty has reverted back to the pre-Laeken practice with regards to language, negotiation method and ratification format, even though in substance it maintains the constitutional elements that the formal "constitution" contained.

This observation demonstrates that the Lisbon Treaty is, indeed, "constitutionalisation without the name" – the continuation of a process that began decades ago and is being carried forward despite the "failure" of the formal project to design a "European Constitution". Our analysis, on the basis of a conceptualisation developed elsewhere,<sup>12</sup> has demonstrated that neither was the Constitutional Treaty a radical break with the past, nor was the Lisbon Treaty a radical break with the constitutional project. In both cases there was a huge shift in the degree of formalisation of the constitutional process – a shift that, as the politics in the ratification phase have shown, has been hugely significant – but it did not change the underlying trend towards greater constitutionalisation. The thesis of a continuous process of constitutionalisation in the European Union, taking different forms at different times, is therefore confirmed rather than disproved by the experience of treaty reform since the turn of the century.

In terms of the future outlook, we can say that the signs are that constitutionalisation will continue further, but no formal constitutional project and probably no "ordinary" treaty reforms either, are likely to occur in the near future, for a number of reasons. Given the tortuous process by which the Union managed to arrive at the Lisbon Treaty, there is a certain degree of treaty reform fatigue detectable, both among governments and electorates. Even if the Lisbon Treaty is unlikely to last the "50 years" which Giscard d'Estaing had predicted the Constitutional Treaty would

last without revision, governments will seek to avoid another, major treaty reform in the foreseeable future. The Lisbon Treaty is, in many ways, a much more fundamental overhaul of institutions and procedures than either the Amsterdam Treaty or the Nice Treaty were. The Lisbon Treaty also includes a new article concerning the changes to the treaty revision

procedure. This article (Art.33) provides for both an ordinary and a simplified procedure for changing the treaties. This means that a major reform project would – again – require the convening of a European Convention, but it would also allow minor reform steps to be taken using a simplified procedure, the so-called *passarelle* clause, which allows the European Council, acting unanimously, to make changes to parts of the treaty, for example with regard to the

**Treaty reform is best viewed in terms of a continuous process of constitutionalisation that has both formal and informal dimensions.**

extension of the ordinary legislative procedure into new areas.

If and when the Lisbon Treaty is ratified, there is then an expectation that constitutionalisation will continue further, even if the formal method of Constitutional Convention and Intergovernmental Conference is not applied. Thus, having moved from a fairly informal process of constitutionalisation to become highly formal and politicised in the context of the Constitutional Treaty, constitutionalisation is again reverting to a less formal process in the wake of the ratification failure of that treaty.

This analysis of EU treaty reform from Nice to Lisbon, via Laeken, demonstrates that there is a very close linkage between treaty reform and constitutionalisation. Treaty reform itself is best viewed in terms of a continuous process of constitutionalisation has both formal and informal dimensions. Looking at the period from the mid 1980s until today, it is evident that treaty reform has been a constant feature of the political life of the Union during this time. The project to draft and adopt a "European Constitution" must be seen in this context: it built on the previous rounds of treaty reform, and fuelled further treaty reform after the "constitution" itself failed (Christiansen and Reh forthcoming). The "Constitutional Treaty" may have turned out to be a brief episode in the integration process, but constitutionalisation, albeit under a different name, is very much alive and present.

## References

- Best, E. et al. (forthcoming), *The Institutions of the Enlarged European Union – Continuity and Change*, Cheltenham: Edward Elgar.
- Christiansen, T. and Reh, C. (forthcoming), *Constitutionalizing the European Union*, London: Palgrave Macmillan.
- Church, C.H. and Phinnemore, D. (2006), *Understanding the European Constitution. An Introduction to the EU Constitutional Treaty*, London and New York: Routledge.
- Closa, C. (2007) "Why convene referendums? Explaining choices in EU constitutional politics", *Journal of European Public Policy*, 14, 1311-1332.
- Deloche-Gaudez, F. (2007) *Traité réformateur: le veto, les peuples et les mots*. Retrieved October 26, 2007, from [http://www.portedeurope.org/IMG/pdf/euros\\_du\\_villagefinal1810.pdf](http://www.portedeurope.org/IMG/pdf/euros_du_villagefinal1810.pdf).
- Eriksen, E.O., Fossum, J.E. and Menéndez, A.J. (eds.) (2004), *Developing a Constitution for Europe*, London and New York: Routledge.
- Hagemann, S. (2007), EPC Commentary: Ratifying the Lisbon Treaty: what happens now? EPC: Brussels.
- Kleine, M. (2007) "Leadership in the European Convention", *Journal of European Public Policy*, 14, 1227-1248.
- Milton, G. and Keller-Noëllet, J. with Bartol-Saurel, A. (2005), *The European Constitution – its origins, negotiation and meaning*, London: John Harper Publishing.
- Norman, P. (2005) *The Accidental Constitution: The Making of Europe's Constitutional Treaty*, Brussels: Euro-Comment.
- Panke, D. (2006) "More Arguing Than Bargaining? The Institutional Designs of the European Convention and Intergovernmental Conferences Compared", *Journal of European Integration*, 28, 357-379.
- Presidency of the European Union (2007), *Declaration on the occasion of the fiftieth anniversary of the signature of the Treaties of Rome*, Berlin.
- Wallström, M. (2007), *Debate on the preparation of the European Council and the situation with regard to the revision of the Treaty*. Speech held at the European Parliament, Brussels, 7 June 2007.

## NOTES

\* Dr Thomas Christiansen, Senior Lecturer, Unit "European Decision-Making", EIPA.

<sup>1</sup> The argument of this article is based on a book publication (Christiansen and Reh, forthcoming) where these themes are elaborated in detail. The author gratefully acknowledges the research assistance provided by Johanna Oettel.

<sup>2</sup> For a detailed examination of the proceedings of the Convention, see Norman (2005); for an analysis of Giscard's leadership, see Kleine (2007).

<sup>3</sup> For a detailed discussion of the motivations behind individual countries' choices in favour of holding referendums, see Closa (2007).

<sup>4</sup> Denmark initially voted 'no' on the Maastricht Treaty, and then ratified the Treaty after a second, favourable referendum, and the Irish government lost a referendum on the Nice Treaty, which was then overturned in a second referendum.

<sup>5</sup> See Best et al. (forthcoming) for a discussion of the impact that EU enlargement has had on the workings of the key institutions in the European Union. The contributors conclude that there is no significant detrimental effect on the efficient function of the EU institutions.

<sup>6</sup> In the Lisbon Treaty IGC, the political level was almost entirely absent and detailed negotiations on the basis of the June

2007 mandate were conducted by a group of legal experts that was chaired, not by the Presidency, but by a senior official of the Council Secretariat.

<sup>7</sup> Most observers agree that the Lisbon Treaty is essentially the Constitutional Treaty, minus the name, the flag/symbols clause, the title of the Foreign Minister and the terminology for EU legislative acts. Ways of "measuring" the degree of congruence between the two treaties differ, but according to some analysts the Lisbon Treaty is more than 90 per cent identical with the Constitutional Treaty.

<sup>8</sup> When one-third of national parliaments object to a proposal, the Commission has to consider whether to maintain, amend or withdraw the legislative proposal; when the majority of the national parliaments object, and the Commission still wants to press ahead with its proposal, the European Parliament, and the Council consider both sides of the argument and come up with a decision.

<sup>9</sup> Special provisions were given to Denmark and the United Kingdom.

<sup>10</sup> Special provisions were given to Poland and the United Kingdom.

<sup>11</sup> See Hagemann (2007).

<sup>12</sup> See Christiansen and Reh (forthcoming).

# Visitors at EIPA

## Informal talk by Mr Norman Jardine (DG ADMIN, European Commission)

On 12 March 2008, **Mr Norman Jardine**, Head of Unit for "Learning and Development" in the European Commission's Directorate-General for Personnel and Administration, gave an informal talk to EIPA staff on the Commission's Learning and Development Policy.



*Mr Norman Jardine, holding his presentation.*

## Visit of the Secretary-General and Directors of the European Economic and Social Committee (EESC)

On 10 April 2008, a **delegation of the EESC** visited EIPA. On that occasion a framework contract was signed between the EESC and EIPA in the context of the second multi-annual framework contract ("Lot 8"), which EIPA was awarded to provide training and consultancy services to EU Institutions, bodies and agencies in the field of "EU Governance".



*From left to right: Mr Patrick Venturini (Secretary-General, EESC); Mr Cornelius Bentvelsen (Director, Human and Financial Resources, EESC); Prof. Dr. Marga Pröhl (Director-General, EIPA) and Dr Edward Best (Head of Unit, "European Decision-Making", EIPA).*

# Staff News

---

## Luxembourg



**William Bull** (UK/IT) joined the Luxembourg Antenna of EIPA, the European Centre for Judges and Lawyers, as a Researcher on 1 February 2008.

Having obtained his LLB with a specialisation in European and Italian law from University College London (in conjunction with the Università degli Studi di Genova), he attained a Masters degree in European Legal Studies at Maastricht University in the Netherlands. His Master Thesis was on Flexicurity in European Labour and Social Security law, while his undergraduate dissertation was in the field of Legal Philosophy and has since been published in *Ethic@* (online journal).

His working experience includes legal editing for METRO, the Institute for Transnational Legal Research, where he revised various upcoming publications in the Maastricht Journal of European and Comparative Law and the *Ius Commune Europaeum* Book Series, and English language training in various private sector institutions in the UK, Germany and the Far East (International House, Linguarama and Inlingua respectively), where he focused especially on the planning and delivery of training programmes for professional employees.

His fields of specialisation include: fundamental EU law and constitutional issues; EU institutional and procedural law; the internal market and the four freedoms (free movement of goods); EC intellectual property and competition law; certain aspects of labour law and legal aspects of Flexicurity.

# Recent Publications

more details at: <http://www.eipa.eu>

## Measuring Individual and Organisational Performance in the Public Services of EU Member States

Christoph Demmke, Gerhard Hammerschmid and Renate Meyer  
EIPA 2008/2, approx. 140 pages, Only available in English  
ISBN: 978-90-6779-208-0, €45.00

## Managing Structural Funds: A Step-by-Step Practical Handbook

Robin Smail, Luc Broos and Elsa Kuijpers  
EIPA 2008/01, 262 pages, Only available in English  
ISBN 978-90-6779-207-3, €70.00

## Performance Assessment in the Public Services of the EU Member States: Procedure for Performance Appraisal, for Employee Interviews and Target Agreements

Christoph Demmke  
EIPA 2007/03, 131 pages, €45.00, Also available in German  
ISBN: 978-90-6779-205-9

## Leistungsbewertung im öffentlichen Dienst in den Mitgliedstaaten der EU: Verfahren zur Leistungsbewertung, für Mitarbeitergespräche und Zielvereinbarungen

Christoph Demmke  
EIPA 2007/04, 139 Seiten, €45.00, Auch in Englisch erhältlich  
ISBN: 978-90-6779-206-6

## Public-Private Partnerships (PPP) – A Decision Maker's Guide

Michael Burnett  
EIPA 2007/02, 186 pages, €60.00, Only available in English  
ISBN: 978-90-6779-204-2

## Decentralisation and Accountability As a Focus of Public Administration Modernisation: Challenges and Consequences for Human Resource Management

Christoph Demmke, Gerhard Hammerschmid and Renate Meyer  
EIPA 2006/01, 138 pages, €40.00, Also available in German  
ISBN-10: 90-6779-201-2/ISBN-13: 978-90-6779-201-1

## Dezentralisierung und Verantwortlichkeit als Schwerpunkte der Modernisierung der öffentlichen Verwaltung: Herausforderungen und Folgen für das Personal-Management

Christoph Demmke, Gerhard Hammerschmid und Renate Meyer  
EIPA 2007/01, 160 Seiten, €45.00, Auch in Englisch erhältlich  
ISBN: 978-90-6779-203-5

## Tripartite Arrangements.

### An Effective Tool vor Multilevel Governance?

Gracia Vara Arribas and Daphine Bourdin, eds.  
EIPA 2006/02, 113 pages, €30.00  
ISBN-10: 90-6779-202-0/ISBN-13: 978-90-6779-202-8

## Are Civil Servants Different Because They Are Civil Servants? Who Are the Civil Servants – And How?

Christoph Demmke  
EIPA 2005/07, 160 pages, €37.00  
ISBN-10: 90-6779-200-4/ISBN-13: 978-90-6779-200-4

## Administrations publiques et services d'intérêt général: quelle européanisation?

Sous la direction de Michel Mangenot  
Avant-propos de Gérard Druésne, Directeur général de l'IEAP  
Préface de Claude Wiseler, Ministre luxembourgeois de la Fonction publique et de la Réforme administrative  
IEAP 2005/04, 200 pages, €41.00, Disponible également en anglais et en allemand  
ISBN-10: 90-6779-197-0/ISBN-13: 978-90-6779-197-7

## Public Administrations and Services of General Interest: What Kind of Europeanisation?

Under the direction of Michel Mangenot  
Preliminary Remarks by Gérard Druésne, Director-General of EIPA  
Foreword by Claude Wiseler, Luxembourg Minister for the Civil Service and Administrative Reform  
EIPA 2005/05, 186 pages, €41.00, Also available in French and German  
ISBN-10: 90-6779-198-9/ISBN-13: 978-90-6779-198-4

## Öffentliche Verwaltungen und Dienstleistungen von allgemeinem Interesse: welche Europäisierung?

Herausgegeben von Michel Mangenot  
Vorwort von Gérard Druésne, Generaldirektor des EIPA  
Geleitwort von Claude Wiseler, Luxemburgischer Minister für den öffentlichen Dienst und die Verwaltungsreform  
EIPA 2005/06, 210 Seiten, €41.00, Auch in Englisch und Französisch erhältlich  
ISBN-10: 90-6779-199-7/ISBN-13: 978-90-6779-199-1

## State Aid Policy in the European Community: A Guide for Practitioners

Phedon Nicolaidis, Mihalis Kekeleakis and Philip Buyskes  
EIPA/Kluwer Law International  
June 2005, €65.00\*  
ISBN 90-411-2394-6

## Die europäischen öffentlichen Dienste zwischen Tradition und Reform

Christoph Demmke  
EIPA 2005/02, 234 Seiten, €40.00, Auch in Englisch erhältlich  
ISBN-10: 90-6779-186-5/ISBN-13: 978-90-6779-186-1

## Main Challenges in the Field of Ethics and Integrity in the EU Member States

Danielle Bossaert and Christoph Demmke  
EIPA 2005/01, 270 pages, €42.00  
ISBN-10: 90-6779-196-2/ISBN-13: 978-90-6779-196-0

## European Social Dialogue and Civil Services. Europeanisation by the back door?

Michel Mangenot and Robert Polet  
EIPA 2004/09, 161 pages, €35.00, Also available in French  
ISBN-10: 90-6779-195-4/ISBN-13: 978-90-6779-195-3

## Dialogue social européen et fonction publique. Une européanisation sans les Etats?

Michel Mangenot et Robert Polet  
IEAP 2004/8, 161 pages, €35.00, Disponible également en anglais  
ISBN-10: 90-6779-194-6/ISBN-13: 978-90-6779-194-6

## eGovernment in Europe's Regions: Approaches and Progress in IST Strategy, Organisation and Services, and the Role of Regional Actors

Alexander Heichlinger  
EIPA 2004/03, 118 pages, €21.00  
ISBN-10: 90-6779-187-3/ISBN-13: 978-90-6779-187-8

## European Civil Services between Tradition and Reform

Christoph Demmke  
EIPA 2004/01, 202 pages, €40.00  
ISBN-10: 90-6779-185-7/ISBN-13: 978-90-6779-185-4

## Enlarging the Area of Freedom, Security and Justice

Conference Proceedings  
Cláudia Faria (ed.)  
EIPA 2004/C/01, 77 pages, €28.00, Mixed texts in English and French  
ISBN-10: 90-6779-189-X/ISBN-13: 978-90-6779-198-2

# Editorial Team



## Dr Edward Best (UK)

Professor; Head of Unit "European Decision-Making"  
European institutions and decision-making processes;  
comparative regional cooperation and integration



## Dr Christoph Demmke (DE)

Professor  
Implementation of European environmental policy and law;  
comparative studies on public service reform (including HRM reforms)



## Cosimo Monda (IT)

Senior Lecturer; Head of Information, Documentation, Publications and Marketing Services  
European information; eLearning; consumer protection;  
information society



## Dr Phedon Nicolaides (CY)

Professor of Economics  
Economic integration; trade policy; competition policy; industrial policy; EU enlargement process



## Denise Grew (UK)

Publications Department  
Coordinator



## Willem Huwaë (NL)

Publications Department  
Design and layout



The European Commission supports EIPA through the European Union budget.



Printed:  
Sapnu Sala Printing House,  
Lithuania

The views expressed in this publication are those of the authors and not necessarily those of EIPA.  
No articles in this bulletin may be reproduced in any form without the prior permission of the Editors.

European Institute of Public Administration  
P.O. Box 1229,  
6201 BE MAASTRICHT,  
THE NETHERLANDS

Tel.: +31 43 3296 222  
Fax: +31 43 3296 296  
Website: <http://www.eipa.eu>

© 2008 EIPA, Maastricht

# REQUEST for INFORMATION

## Seminars & Training Courses

Please complete in black and capital letters

Project No.	Date

Mr/Mrs/Ms:

Surname: ..... First name(s): .....

Organisation: .....

Department: .....

Current Position: .....

Address: .....

Postal code: ..... Town: ..... Country: .....

Tel.: ..... Fax: ..... E-mail: .....

For general information on seminars and training courses, please contact:

**Ms Wytske Veenman**

Head of Programme Organisation and Linguistic Services

European Institute of Public Administration

P.O. Box 1229

6201 BE MAASTRICHT

THE NETHERLANDS

Tel.: +31 43 3296 247

Fax: +31 43 3296 296

E-mail: [w.veenman@eipa-nl.com](mailto:w.veenman@eipa-nl.com)

Website: <http://www.eipa.eu>

Signature: ..... Date: .....

# PUBLICATIONS ORDER FORM

Please return order form to:  
 Ms Marita Simons, Publications Department,  
 European Institute of Public Administration  
 P.O. Box 1229,  
 6201 BE MAASTRICHT  
 THE NETHERLANDS  
 Tel.: +31 43 3296 274  
 Fax: +31 43 3296 296  
 E-mail: m.simons@eipa-nl.com  
 Website: <http://www.eipa.eu>

Please send me the following books:

..... No. ....  
 ..... No. ....  
 ..... No. ....  
 ..... No. ....

Name: .....

Organisation: .....

Address: .....

Postal code and town: ..... Country: .....

Office tel. No.: ..... Telefax: .....

Signature: ..... Date: .....

*All prices are subject to change without notice*

**Postage and packing is included, except for addresses outside Europe where an extra charge, depending on the weight of the parcel, will be added.**

## Method of Payment

**Bank/Giro Account:**

Upon receipt of the invoice the full amount to be transferred to EIPA's **Giro Account No. 34.333.99** (IBAN: NL67PSTBN0003433399; BIC code: INGBNL2A), or **Bank Account No. 41.35.20.358** (IBAN: NL07ABNA0413520358; BIC: ABNANL2A) at the ABN/AMRO Bank in Maastricht, clearly stating invoice number and date.

**CREDITCARD (the following must be completed)**

American Express     Eurocard/Mastercard     Access     Visa

Card No. .... Card Validation Code ..... Expiry date .....

Name Card Holder ..... House Number ..... Postal Code ..... Country .....

### For administrative use only

Transaction Date ..... Authorisation Code ..... Amount (EUR) .....

(Exempt from VAT by virtue of Article 11, paragraph 1, letter O, subparagraph 2 of the 1968 Law on VAT).