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## Special Issue the Lisbon Reform Treaty

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## Foreword: From the Constitutional Treaty to the Reform Treaty

Gil Carlos Rodríguez Iglesias\*

The Lisbon Treaty can only be understood with regard to the Treaty Establishing a Constitution for Europe, which was intended to provide the European Union with a formal Constitution. After the failure of its ratification as a consequence of the negative results of the referenda in France and the Netherlands, the Lisbon Treaty was the solution chosen to overcome the constitutional crisis of the European Union, by keeping most of the important reforms envisaged in the Constitutional Treaty while abandoning the formal constitutional dimension which was its most significant innovation.

However, the constitutional dimension of the European Union existed long before the process leading to the Constitutional Treaty was embarked upon. It is well known that the Treaty establishing the European Community (formerly the European Economic Community) – which remains, according to the treaties currently in force, the basic pillar of the European Union – has been characterized by the European Court of Justice as the constitutional charter of a Community based on the rule of law. This characterization sums up the result of a jurisprudential process which began in the early sixties with the judgments in *van Gend en Loos* and *Costa v. ENEL*, which identified the basic principles of direct effect and the supremacy of Community Law. The relevance of this process for the European Union is comparable to the impact on the constitutional history of the United States of America of *Marbury v. Madison* (1803), by which the Supreme Court recognized the supremacy of the Constitution and the power of the Judiciary to ensure this supremacy with regard to all public authorities.

In my opinion, the characterisation of the basic treaties of the European legal order as a constitution is best understood as a characterisation by analogy. It is useful and legitimate insofar as it underlines the fact that the treaties play a constitutional role in the European system: they are the supreme norm, in that they provide the legal basis for the powers of the common institutions and establish their limits. In short, they contain the basic principles of a legal system which ensures the rule of law, just as a national constitution seeks to do.

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I should like to thank the Editors of this Special Issue of the European Journal of Law Reform for their kind invitation to write this brief foreword. This gives me an opportunity to make up for my involuntary absence from the Conference on *The Lisbon Treaty (and its rejection?): Internal and External Implications*, organised by the Davis Institute for International Relations and the Israeli Association for the Study of European Integration, in Jerusalem, on 12-14 July 2008.

However, from a strictly formal legal point of view, the treaties remain international Treaties and their modification requires the consent of all member states, a requirement which implies that any substantive change must be compatible with each and every national constitutional system. Moreover, whereas the treaties provide a clear legal legitimacy for the European institutions, the political legitimacy of these institutions and of the European *Constitution* itself is basically an indirect legitimacy, which can only be channelled through the member states.

The Constitutional Treaty was, of course, also an international Treaty. However, it introduced modifications of a constitutional nature which went far beyond a mere confirmation of the constitutional analogy enshrined in the jurisprudence of the Court. It was intended to establish a normative text which would be perceived as a Constitution by all citizens, and not just by experts in European Union law.

In my opinion, three aspects of the Constitutional Treaty are decisive in this respect: the name chosen, the method followed for its adoption, and the incorporation of the Charter of Fundamental Rights.

The use of the term *Constitution* was a clear expression of the intention to implement a qualitative change in the nature of European integration by giving the Union a political dimension. Moreover, in my view the use of that term would have had a normative value if the Treaty establishing a Constitution for Europe had finally entered into force.

Secondly, and for the first time ever, the Convention method introduced elements of non-governmental representation – already present in the institutional makeup of the Community – with regard to its Treaty making (or constituent) power, which had traditionally been monopolised by the member states, the true ‘Masters of the Treaties’ (*Herren der Verträge*).

Finally, the inclusion of the Charter of Fundamental Rights as part of the Constitution was particularly relevant not only from a legal, but also from a political point of view. It was intended to become a privileged instrument with which to proclaim shared fundamental values, to ensure the visibility of our fundamental rights, and as a way of encouraging citizens to identify with their constitutional rights and with their constitution as a whole.

The Lisbon Treaty, conceived and characterised as a Reform Treaty, has been carefully drafted in order to eliminate not only the term ‘Constitution’, but also the symbols of the Union and any other elements which could evoke its constitutional dimension.

As we know, the Convention method was not followed during the drafting of the Lisbon Treaty (rightly, in my view, given the very special circumstances in which it was adopted). The negotiation was basically intergovernmental, and it was conducted with a high degree of opacity and even secrecy. However, the new Treaty includes the requirement to convene a Convention in the ordinary revision procedure and in the same terms as the Constitutional Treaty had done. In other words, the new method for treaty reform inaugurated with the Constitutional Treaty will thus be incorporated into the *acquis communautaire*.

As to the Charter of Fundamental Rights, although it was not included in the text of the Lisbon Treaty, Article 6.1 makes it clear that it will have the same legal value as the Treaties. From a legal point of view, therefore, the result is the same

as in the Constitutional Treaty. Unfortunately, a Protocol on the Application of the Charter to Poland and the United Kingdom limits its legal effects in these two member states quite drastically. From a political point of view, the relevance of the Charter has undoubtedly been undermined, both because of its overall lack of visibility and due to the inequality of rights resulting from the aforementioned Protocol on the Application to Poland and the United Kingdom.

The comparison of these three elements in the Constitutional Treaty and in the Lisbon Treaty is not sufficient to draw far-reaching conclusions, but it is certainly symptomatic. It shows that, in spite of the manifest purpose of those who drafted the Lisbon Treaty to depart from the constitutional model, there is considerable continuity between the two, even in areas which were at the core of the constitutional project. Needless to say, there is also significant continuity in other areas as well.

As far as the constitutional dimension of the European Union is concerned, the new Treaty represents a return to the Community tradition. This may be regrettable, but it seemed inescapable after the failure of the Constitutional Treaty's ratification process. In my view, the Lisbon Treaty offers a reasonable and pragmatic solution to the constitutional crisis this had led to. Admittedly, it does not have the same potential to strengthen the direct democratic legitimacy of the European Union as the Constitutional Treaty had, but it has retained many of the most important reforms introduced by the latter, including a number of provisions intended to improve the observance of democratic principles and methods in the functioning of the Union.

Unfortunately, the ratification process of the Lisbon Treaty has also clashed with a national referendum, this time in Ireland. At the time of writing, it is not yet clear whether or how this obstacle can be overcome. Nevertheless, I am reasonably confident that, sooner or later, we will find a solution that will allow us to move forward, thereby enabling the European Union to meet the increasingly complex demands it will have to face in the future.



## **The Lisbon Reform Treaty (and the Irish No): Internal and External Implications**

Guy Harpaz\* and Lior Herman\*\*

The European integration project is in the midst of conducting a soul-searching exercise, seeking its own *raison d'être*, vision, inspiration, constitutional apparatus, cohesive European identity, institutional efficiency and social legitimacy. Immigration and economic pressures which the EU is facing distance the European masses from Europe's economic, political and bureaucratic elite and render the exercise even more challenging. To make matters more complicated, measures that were once effectively employed to attain these objectives, such as the doctrines of supremacy and direct effect, as well as the Internal Market freedoms, are nowadays taken for granted and to a large extent are exhausted for such purposes.<sup>1</sup> Other instruments might prove to be unhelpful: The enlargement policy suffers from an 'enlargement fatigue', while the Common Foreign and Security Policy is inhibited by its intergovernmental nature.

Would the adoption of a formal constitutional order assist the EU in that regard? The participants of the EU Convention on the Future of Europe (2002-2003) certainly thought that it could. Their efforts culminated in the adoption of the Constitutional Treaty (2004). Following the rejection of the Constitutional Treaty by the French and Dutch electorate, the leaders of the EU and its Member States adopted the Lisbon Reform Treaty, a watered-down version of the Constitutional Treaty.<sup>2</sup>

The Lisbon Reform Treaty purported to provide the EU with a comprehensive and advanced constitutional, institutional, socio-economic regime, a regime which would enhance the EU's legitimacy, cohesiveness, effectiveness and actorness, thereby enabling it to meet its internal and external challenges.<sup>3</sup>

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<sup>1</sup> See S. Douglas-Scott, *A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis*, 43/3 *Common Market Law Review*, 629, at 630 & 651 (2006); A. Von Bogdandy, *The European Union as a Human Rights Organisation? Human Rights and the Core of the European Union*, 37 *Common Market Law Review* 1307, at 1337 (2000).

<sup>2</sup> OJ 2007 C 306.

<sup>3</sup> For analysis of the Lisbon Reform Treaty see M. Dougan, *The Treaty of Lisbon 2007: Winning Minds not Hearts*, 45 *Common Market Law Review* 617 (2008); D. Dinan, *Governance and Institutional Developments: Ending the Constitutional Impasse*, 46 *Journal of Common Market Studies (Annual Report)*, 71 (2008); S. Kurpas *et al.*, *The Treaty of Lisbon: Implementing the Institutional Innovations* (2007); T. Risse & M. Kleine, *Assessing the Legitimacy of the EU's Treaty Revision Methods*, 45/1 *Journal of Common Market Studies*, 69 (2007); U. Sedelmeier &

The Leonard Davis Institute for International Relations and the Israeli Association for the Study of European Integration (IASI), with the assistance of the Czech Association of European Studies, the Friedrich Naumann Foundation for Liberty and Eleven International Publishing, invited renowned scholars from Austria, Belgium, Croatia, Czech Republic, Germany, Italy, Poland, Spain, United Kingdom, United States and Israel to an international conference entitled 'The Lisbon Reform Treaty (and its rejection?): Internal and External Implications'. The conference examined this theme from interdisciplinary, theoretical, and thematic perspectives, critically exploring the normative, institutional, constitutional, legal, economic, and socio-political dimensions of the Lisbon Reform Treaty. The European Journal of Law Reform, for its part, agreed to provide the academic platform for the publication of the conference proceedings and nine of the conference contributions were selected for this Volume.

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The European Coal and Steel Community (1951) and the European Economic Community (1957) were formed as economic entities and as such they offered individuals and corporations economic rights, without providing for a comprehensive constitutional-institutional regime. Into that vacuum entered the European Court of Justice, which refused to treat the European original legal order as a mere international treaty operating solely under traditional public international law. Rather the ECJ regarded itself as serving a "constitutional role,"<sup>4</sup> transforming the constituting treaties into the EC's "Constitutional Charter."<sup>5</sup>

Since then, European integration has been undergoing a continuous and unprecedented process of constitutionalisation, whereby its legal order has been elevated from a set of traditional, horizontal legal arrangements binding sovereign states into a vertically integrated, quasi-Federal, *sui generis* legal regime, conferring enforceable rights on legal entities.<sup>6</sup>

The EU attempted to formalize and concretize this judicial-led constitutional process and the ratification of the Constitutional Treaty was meant to serve as the

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A. R. Young, *Editorial: The EU in 2007: Development without Drama, Progress without Passion*, 46 *Journal of Common Market Studies* (Annual Review), 1 (2008); T. König, S. Daimer & D. Finke, *The Treaty Reform of the EU: Constitutional Agenda-Setting, Intergovernmental Bargains and the Presidency's Crisis Management of Ratification Failure*, 46/3 *Journal of Common Market Studies*, 337 (2008).

<sup>4</sup> Report of the Court of Justice on Certain Aspects of the Application of the Treaty on European Union, submitted to the European Council in preparation for the IGC (May 1995), at 4; B. de Witte, *The Past and Future Role of the European Court of Justice in the Protection of Human Rights*, in P. Alston (Ed.), *The EU and Human Rights* 878, at 869 (1999).

<sup>5</sup> Opinion 1/91, Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area, [1991] ECR I-06079, as analyzed by L. R. Helfer & A-M. Slaughter, *Towards a Theory of Effective Supranational Adjudication*, 107 *Yale Law Journal* 273, at 293 (1997-1998).

<sup>6</sup> U. Haltern, *Pathos and Patina: The Failure and Promise of Constitutionalism in the European Imagination*, 9 *European Law Journal* 14 (2003).

culmination of that attempt.<sup>7</sup> Yet, the Constitutional Treaty (which was ratified by eighteen Member States) was rejected by the French and Dutch electorate, sparking a constitutional crisis and creating an impasse.<sup>8</sup> Following a ‘period of reflection’, the Lisbon Reform Treaty was adopted instead.

The Lisbon Reform Treaty stripped the Constitutional Treaty of its symbols, shedding the form, language and symbols of the “European Constitution.”<sup>9</sup> Yet it reincarnated to a large extent most of its institutional-constitutional reforms, possibly affording the EU improved institutional-constitutional architecture.<sup>10</sup>

As such it should be seen as an ambitious albeit disguised constitutional document, designed to simplify and re-organize the prevailing legal order, to increase the EU’s competencies, to enhance the efficiency, transparency, democratic accountability and popular legitimacy of the EU’s institutional apparatus and its decision-making process and to buttress the EU’s external actorness.<sup>11</sup>

For these purposes the Lisbon Reform Treaty accorded international legal personality to the EU, abolished the EU’s three-pillar structure, enhanced the role of national parliaments and the EU citizens in the decision-making and legislative processes, broadened the EU’s competencies in general and in the fields of Freedom, Security and Justice, in particular.<sup>12</sup> In addition, it reorganized and enhanced the Foreign, Defence and Security Policy, provided the EU with a President of the European Council and a Foreign Minister (the latter titled High Representative for Foreign Affairs), accorded the Charter on Human Rights a binding legal force and the EU a mandate to accede the ECHR,<sup>13</sup> reformed the decision-making instruments, powers and procedures,<sup>14</sup> including in particular the scope of the co-decision legislative process and Qualified Majority Voting, reduced the size of the Commission, further empowered the European Parliament in the legislative, budgetary and supervisory spheres and extended the competencies of the EU’s judiciary.<sup>15</sup>

Can one therefore conclude that the Lisbon Reform Treaty succeeded in providing the EU with a modern quasi-constitutional formal basis, striking the right delicate equilibrium between institutional-procedural efficiency and democratic accountability and social legitimacy, between supranationalism and intergovernmentalism, between competitiveness and social cohesion? Would it

<sup>7</sup> See Treaty establishing a Constitution for Europe, OJ 2004 C 310/01, at <http://europa.eu.int/eur-lex/lex/JOhtml.do?uri=OJ:C:2004:310:SOM:EN:HTML>. For analysis of the constitutional process and its various stages, see Dougan, *supra* note 3, at 618-620.

<sup>8</sup> S. Hug & T. Schulz, *Referendums in the EU’s Constitution Building Process*, 2/2 *The Review of International Organizations*, 177 (2007).

<sup>9</sup> Dougan, *supra* note 3, at 620.

<sup>10</sup> For analysis, see Dougan, *supra* note 3, at 620-637.

<sup>11</sup> See König, Daimer & Finke, *supra* note 3, at 352.

<sup>12</sup> For analysis, see Dougan, *supra* note 3, at 672-687.

<sup>13</sup> *Id.*, at 671-682.

<sup>14</sup> For analysis, see *id.*, at 637-651.

<sup>15</sup> See König, Daimer & Finke, *supra* note 3, at 352; Dougan, *supra* note 3, at 672-680.

bring the European integration project closer to the EU citizens, as envisaged in the Laeken Declaration? Would it obtain their widespread acceptance? Not necessarily.

It was Michael Dougan who warned us in his extensive survey of the Lisbon Reform Treaty that despite the overall impressive achievements of the Lisbon Reform Treaty one must not conclude in the words of Shakespeare that “all’s well that ends well.”<sup>16</sup> Indeed the leaders of the Member States were not convinced that they should bring the Lisbon Reform Treaty to the approval of their citizens. Instead they reverted to their own parliaments for ratification and the Lisbon Reform Treaty was already approved by twenty four national parliaments. Only Ireland, which was bound under domestic legislation to obtain popular approval, called for a referendum, which ended up to the dismay of EU leaders with a clear-cut no-vote. The fate of the Lisbon Reform Treaty thus remains unclear.

This Volume attempts to analyse the Lisbon Reform Treaty as well as the various implications and ramifications of its ratification or its rejection, focusing on three central themes: (i) the procedure of ratification; (ii) the EU’s own nature and its interface with the constitutional process; and (iii) the impact of the Lisbon Reform Treaty on the EU Regional Policy, the Foreign, Security and Defence Policy (CFSP/ CSDP) and on the Area of Freedom, Security and Justice (AFSJ).

Addressing the process of Treaty adoption, Sarah Seeger analyzes the shift that took place in numerous Member States from referendum euphoria, in respect to the Constitutional Treaty, to referendum phobia, in respect to the Lisbon Reform Treaty. Seeger explores how Member States decided whether to ratify the Lisbon Treaty, either in Parliament or through a referendum. Applying a comparative analysis across five Member States, Seeger analyses governments’ framing patterns of the Lisbon Treaty and their positive and negative impact on the decision-making process.

Three articles examine the formation of the EU’s gist and constitutional identity by taking different approaches: the article by Sergio Fabbrini focuses on the level of understanding between Member States of what is and desired to be the constitutional identity of the European polity; the article of Luk Van Langenhove and Daniele Marchesi provides a three-generation typology of the evolution of regional integration and attempts to situate the EU in that analysis in light of the reforms proposed by the Lisbon Reform Treaty; while Maya Sion-Tzidkiyahu’s contribution emphasises how Member States’ opt-out actions shape the formation of the EU.

Fabbrini analyses the dynamics of EU constitutionalisation, arguing that these dynamics are underlined by constant tensions between competing views and between different understanding of the desired constitutional nature of the European Union. In the absence of common constitutional language, any attempt to create a stable and fixed European constitutional identity is likely to be contested. Luk Van Langenhove and Daniele Marchesi explore the implications of the Lisbon Reform Treaty pertaining to the EU’s attempt to move beyond first generation regionalism (extensive economic integration) and second generation

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<sup>16</sup> For analysis, see Dougan, *supra* note 3, at 617.

regionalism (a developed political and institutional entity with a spectrum of internal policies) into third generation regionalism, under which the EU would serve as a fully-fledged actor in international relations, engaging proactively and in a unitary manner with other regions and at the multilateral level. Sion-Tzidkiyahy unravels the issue of opt-outs, taking a historical perspective from the first introduction of opt-outs in the Maastricht Treaty to the Lisbon Treaty. Focusing on the areas of Justice and Home Affairs (JHA) and AFSJ, she examines the United Kingdom, Denmark and Ireland and how their opt-outs influenced the development of a Europe *à la carte*.

The final theme of this Volume analyse the effects of the Lisbon Reform Treaty on the EU's regional policy, the human rights regime, the AFSJ, as well CFSP/CSDP. The impact of the Treaty on regional policy is addressed at different layers of governance.

Claudio Mandrino investigates whether the Lisbon Treaty improved the position of the regions in terms of governance in the EU and whether the regions' legal role has advanced compared with the roles played by governments and EU supranational institutions. His investigation looks at five key areas: recognition, consultation, representation, justiciability and subsidiarity. Through these lenses, Mandrino argues that changes in the Lisbon Reform Treaty were more a matter of formality than any substantial redistribution of powers and competencies. Reaching similar conclusions, Anna-Lena Hogenauer observes multi-level governance at the EU employing the logic of two-level games. She explains that while the Lisbon Reform Treaty empowers the regions with several new participatory rights, these remain limited in scope, and that overall the Lisbon Treaty is not likely to lead to substantial changes in regions' ability to influence EU decision-making processes and legislation.

Eve C. Landau argues that the attempt by the Lisbon Reform Treaty to accord binding legal force to the EU Charter of Fundamental Rights is to be welcomed because it would provide the EU with an advanced and comprehensive human rights regime. In such a scenario, the accession of the Union to the ECHR, as prescribed by the Lisbon Reform Treaty, would, however, be redundant, if not harmful.

Juan Santos Vara examines the implications of the Lisbon Treaty for the external dimension of the AFSJ. He shows that external challenges related to AFSJ can be met by the EU through various legal instruments and actions, grounded in the legal basis provided by the new Treaty. Nevertheless, EU's ability to significantly act as international actor in AFSJ is undermined by Member States who completely retain competences in AFSJ matters or opt out of certain areas.

Concluding this Volume, Edith Drieskens addresses the CFSP/CSDP. She uses a principal-agent theory to examine whether the Treaty of Lisbon will lead to an increased EU actorness – the capacity to act – at the United Nations' Security Council. Addressing conceptual issues such as representation, specialisation, autonomy and authority, Drieskens shows that the Treaty proposes little improvement for greater EU actorness, particularly since the latter depends on the willingness of the Member States and their capacity to act as agents of the EU.

It is to be hoped that when combined, the nine contributions will broaden the analytical breadth of existing scholarship on the EU constitutional, institutional, socio-political, legal and economic persona, as affected by the Lisbon Reform Treaty (and its possible rejection).

# From Referendum Euphoria to Referendum Phobia – Framing the Ratification Question

Sarah Seeger\*

## Abstract

When the Treaty Establishing a Constitution for Europe (TEC) was signed on 29 October 2004, many member states of the European Union (EU) announced a referendum in addition to the national parliamentary ratification procedure. Against the background of the rejection of the Constitutional Treaty in the referendums in France and the Netherlands in spring 2005, the referendum euphoria changed into a referendum phobia. All member states (except for Ireland, where a referendum is required by the national constitution) decided to ratify the Treaty of Lisbon by parliamentary procedure only – even if it is widely asserted that the new treaty contains crucial elements of the TEC. Based on an analysis of the debate about direct democracy and referendums in the EU, this article explores how member states' governments framed their decision on the ratification procedure of the Constitutional Treaty in comparison with the Treaty of Lisbon.

## A. Introduction

When the Treaty Establishing a Constitution for Europe (TEC) was signed on 29 October 2004, many member states of the European Union (EU) announced a referendum in addition to the national parliamentary ratification procedure. Against the background of the rejection of the Constitutional Treaty in the referendums in France and the Netherlands in spring 2005, the referendum euphoria changed into a referendum phobia. All member states (except for Ireland, where a referendum is required by the national constitution) decided to ratify the Treaty of Lisbon by parliamentary procedure only – even if it is widely asserted that the new treaty contains crucial elements of the TEC.

Based on an analysis of the debate about direct democracy and referendums in the EU, this article aims at identifying how member states' governments publicly framed their decision on the ratification procedure of the Constitutional Treaty in comparison with the Treaty of Lisbon. This is based on the premise that it is the governments which have a specific responsibility in communicating their decisions to the public. Frames put forward by other players (such as the opposition, the media or civil society) as well as the repercussions of the different

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\* Sarah Seeger is a researcher at the Center for Applied Policy Research (CAP) at the LMU Munich. This article is based on a paper presented at the international conference "The Lisbon Reform Treaty: Internal and External Implications" at The Hebrew University of Jerusalem, 13-14 July 2008. I am grateful to Dr. Guy Harpaz, an anonymous referee, Dr. Carlos Closa and the participants of the conference for their helpful comments.

frames on each other are not in the framework of the analysis even if these might influence the governments' frame(s) to a great extent. Furthermore, the article does not seek to elaborate on the question which frames succeed in framing the public discourse and why they do, as there might be many diffuse and multifaceted factors influencing the effect of the respective frames. This makes it difficult to attribute a particular outcome to a particular factor. Thus, the article has a rather categorizing objective which can serve as a starting point for further research on the interactions between the different frames and on their effect on public discourse.

The article aims at contributing to a wider range of academic literature on referendums in the EU.<sup>1</sup> The existing studies touch upon issues such as the contribution of referendums to enhancing democracy, voting behaviour in referendums, referendum campaigns, referendums as strategic instruments etc. By elaborating on the question how the decision on the respective methods of ratification of EU treaties is framed, the article aims to shed light on a hitherto hardly conceptualized field of research and thus to complement the existing findings on the use of referendums in the EU.

As regards the empirical test cases, the article takes a closer look at those member states where the question of holding a referendum was, for different reasons, of particular importance: First, it explores the situation in France and the Netherlands where the decision on the ratification procedure has to be taken against the background of the no-votes of 2005. Additionally, the focus is put on Spain and Luxembourg where the electorate approved the TEC by popular vote but where, the second time, only parliamentary ratification took place. Finally, the debate in the United Kingdom is analyzed, where a referendum was announced on the TEC but which, due to its rejection in France and the Netherlands, did not take place and where, in the case of the Treaty of Lisbon, the question of the ratification process was heatedly debated.

<sup>1</sup> E.g. G. Biagini, *Direktdemokratische Legitimation der EU-Verfassung?*, in F. Cheneval (Ed.), *Legitimationsgrundlagen der Europäischen Union*, 349 (2005); C. Closa, *Why convene referendums? Explaining choices in EU constitutional politics*, 14 JEPP, 1311 (2007); B. Crum, *Confusing Cues: Competition and Collusion of Party Strategies in Referendums on the EU Constitution*, Paper for the Conference on Euroscepticism – Causes and Consequences, 1-2 July 2005; S. Hug, *Voices of Europe – Citizens, Referendums and European Integration* (2002); S. Hug & T. Schulz, *Referendums and Ratification of the EU Constitution*, in Z. T. Pállinger et al. (Eds.), *Direct Democracy in Europe – Developments and Prospects*, 174 (2007); D. Jahn & A.-S. Storsved, *Legitimacy through referendum? The nearly successful domino-strategy of the EU-referendums in Austria, Finland, Sweden and Norway*, 18 *West European Politics*, 18 (1995); S. Kadelbach (Ed.), *Europäische Verfassung und direkte Demokratie* (2006); T. König, S. Daimer & D. Finke (Eds.), *Plebiszit und Ratifikation. Eine vergleichende Untersuchung von Referenden zur Europäischen Verfassung* (2006); L. LeDuc, *Opinion Formation and Change in Referendum Campaigns*, in C. H. de Vreese (Ed.), *The Dynamics of Referendum Campaigns. An International Perspective*, 21 (2007); Z. T. Pállinger et al. (Eds.), *Direct Democracy in Europe – Developments and Prospects* (2007); C. H. de Vreese, *Context, Elites, Media and Public Opinion in Referendums: When Campaigns Really Matter*, in C. H. de Vreese (Ed.), *The Dynamics of Referendum Campaigns: An International Perspective*, 1 (2007); C. H. de Vreese, & H. A. Semetko, *Political Campaigning in Referendums: Framing the Referendum Issue* (2004).

Applying a comparative approach is advantageous for two reasons: First, one can compare the variation of arguments when the same issue (TEC or Treaty of Lisbon respectively) is framed in different national arenas. This allows conclusions to be drawn on factors influencing how the same issue is framed in different arenas (same issue/different arenas/same time). Second, as it is assumed that the TEC and the Treaty of Lisbon are strongly inter-connected and contain, in large measure, similar elements, this allows conclusions to be drawn as to how different settings influence the manner in which a slightly changed issue is re-framed in the same arena (similar issue/same arena/different time).

The article draws its empirical evidence not only from Eurobarometer results and academic literature, but also from public expressions made by government officials, such as speeches, articles or interviews, as these are considered to be the relevant instruments for framing a political issue in the public discourse. Yet, it is important to note that *how* the ratification issue is framed does not have to correspond to *why* a particular manner of ratification is chosen.<sup>2</sup> Different actors may advocate or reject the idea of holding a referendum for different reasons, depending on which (normative and/or strategic) goal is aspired to. Particularly in the case of strategic reasons (e.g. aiming at strengthening the government's position), it is unlikely that the government will frame its decision in a strategic way, as this might damage its political reputation. Therefore, the data source chosen might not provide insights into the *reasons* for deciding on the ratification procedure. However, for the purpose of identifying the *frames* used to justify the ratification procedure, these data resources provide appropriate evidence.

## **B. The Debate on Direct Democracy and Referendums in the EU**

Decisions on EU matters have increasingly become the subject of popular votes. The topics submitted to a referendum concern both specific policies such as the adoption of the Euro and more systemic issues such as EU accession or treaty reform. But it was not until the ratification process of the TEC that referendums became a widely used instrument for involving citizens in EU affairs: Ten member states (Czech Republic, Denmark, France, Ireland, Luxembourg, Netherlands, Poland, Portugal, Spain, United Kingdom) announced a popular vote, with further states such as Belgium, Germany and Italy having lively national debates on holding a referendum, but, for different reasons, deciding to submit the TEC to parliamentary ratification only.

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<sup>2</sup> For the possible reasons for announcing a referendum see, e.g. Closa, *supra* note 1; Jahn & Storsved, *supra* note 1.

Table 1: Referendums on European Integration

<i>Year</i>	<i>Country</i>	<i>Issue</i>	<i>Result</i>
1972	France	Enlargement of EC	Yes
1972	Ireland	EC membership	Yes
1972	Norway	EC membership	No
1972	Denmark	EC membership	Yes
1972	Switzerland	EC-EFTA Treaty	Yes
1975	Great Britain	Continuation of EC membership	Yes
1986	Denmark	Single European Act	Yes
1987	Ireland	Single European Act	Yes
1989	Italy	Mandate for MEPs	Yes
1992	Denmark	Maastricht Treaty	No
1992	Ireland	Maastricht Treaty	Yes
1992	France	Maastricht Treaty	Yes
1992	Switzerland	European Economic Area Treaty	No
1992	Liechtenstein	European Economic Area Treaty	Yes
1993	Denmark	Maastricht Treaty	Yes
1994	Austria	EU membership	Yes
1994	Sweden	EU membership	Yes
1994	Finland	EU membership	Yes
1994	Norway	EU membership	No
1997	Switzerland	Withdrawal of EU membership bid	No
1998	Ireland	Amsterdam Treaty	Yes
1998	Denmark	Amsterdam Treaty	Yes
2000	Switzerland	Free movement of persons	Yes
2000	Denmark	European Monetary Union	No
2001	Switzerland	Resume accession talks with EU	No
2001	Ireland	Nice Treaty	No
2002	Ireland	Nice Treaty	Yes
2003	Sweden	European Monetary Union	No
2003	Lithuania	EU membership	Yes
2003	Latvia	EU membership	Yes
2003	Estonia	EU membership	Yes
2003	Poland	EU membership	Yes
2003	Czech Republic	EU membership	Yes
2003	Slovakia	EU membership	Yes
2003	Slovenia	EU membership	Yes
2003	Malta	EU membership	Yes
2003	Hungary	EU membership	Yes
2003	Romania	Adjusting national law to EU acquis	Yes
2005	Spain	TEC	Yes
2005	France	TEC	No

2005	Netherlands	TEC	No
2005	Luxembourg	TEC	Yes
2005	Switzerland	Free movement of persons	Yes
2005	Switzerland	Schengen	Yes
2008	Ireland	Treaty of Lisbon	No

Source: Hug, *supra* note 1, at 27; Vreese & Semetko, *supra* note 1, at 5; own additions.

According to Article 48 of the Treaty on European Union, treaty reforms cannot come into force unless they are ratified by all member states “in accordance with their respective constitutional requirements.” No member state except for Ireland is legally obliged to hold a popular vote on treaty revisions.<sup>3</sup> In some states, a facultative-binding (e.g. Czech Republic, Denmark or France) or a facultative-consultative (e.g. Luxembourg or Spain) referendum can be held. In other words, even if the decision to hold a referendum is dependent on the requirements of the national constitution, it also depends on a political decision of the government. In these cases, the question how the ratification issue is framed in the public discourse is of special importance in terms of legitimacy and credibility.

From a normative point of view, the different ways of ratification reflect diverging attitudes towards the way in which decisions in a democracy should be taken. Under analysis are the implications and differences between direct democracy and representative democracy. Advocates of direct democracy highlight the advantages participatory elements can bring to the EU’s decision-making process. Since the negative vote of the Danish citizens in the referendum on the Maastricht Treaty 1992, much has been said about the Union’s democratic deficit.<sup>4</sup> At the heart of the debates is the increasing transfer of competences and sovereignty towards the European level, the related decreasing influence of member states’ parliaments, the deficient responsivity of the European Parliament, weak European intermediary actors such as parties, media and civil society organisations, the only indirectly legitimized executive (Council and Commission) as well as the lack of transparency of the EU’s decision-making process. As one way of remedying these problems, voices are raised which call for a stronger involvement of citizens by fostering a culture of lively participation. Against the background of the constantly decreasing turnout at European elections, referendums are seen as a chance to enhance civic mobilization and participation, and thus to strengthen democracy and legitimacy in EU politics.<sup>5</sup>

<sup>3</sup> For an overview on the different national ratification procedures see, e.g. R. Bieber, *Zur Ko-Existenz von Referenden und parlamentarischer Demokratie – Das Beispiel der Ratifizierungsverfahren zur Europäischen Verfassung*, in S. Kadelbach (Ed.), *Europäische Verfassung und direkte Demokratie*, 57 (2006); N. Hussain, *Referendums on the EU Constitutional Treaty: The State of Play*, Chatham House European Programme EP/BP 05/02 (2005).

<sup>4</sup> E.g. A. Føllesdal & S. Hix, *Why there is a Democratic Deficit in the EU: A Response to Majone and Moravcsik*, 44 *JCMS*, 533 (2006); V. Schmidt, *Democracy in Europe: The EU and National Politics* (2006).

<sup>5</sup> E.g. Vreese & Semetko, *supra* note 2 at 180.

As concerns the case of the Constitutional Treaty, it was argued that the notion of a 'Constitution' required the direct approval of the citizens as *pouvoir constituant*. This was already part of the deliberations going on in the Convention on the Future of Europe: "If the Constitution is to have real democratic legitimacy, then it ought to be put to the people of Europe in a Europe-wide referendum."<sup>6</sup>

For the first time, the direct link between the Union and its citizens should be written down in the EU primary law. Article 1 of the TEC states that the Union is built on "the will of the citizens and States of Europe." Therefore, besides the parliamentary assent, the TEC should also be approved by the European citizenry which would enhance the legitimacy of 'the Constitution'. Furthermore, it was argued that a EU based on a 'Constitution' would require the assent of a 'European demos' based on a common European self-conception which could be triggered by a Europe-wide referendum.

The opponents of direct democracy also bring forward striking arguments. From a representative democracy perspective, it is the directly elected representatives in the parliaments who should have the final say on political issues, in particular on complex ones such as EU treaty revisions. Through elections, they have received a mandate which legitimizes their political decisions. As regards the TEC, it was argued that this document was elaborated in the Convention in an open, democratic and inclusive process with strong parliamentary participation which was seen as sufficient to ensure democratic legitimacy.<sup>7</sup>

Moreover, it is argued that referendums are rather 'second-order votes', which means that citizens take their decision not on the issue in question but also on other factors such as the popularity of the incumbent government and national politics. As studies reveal this is especially the case regarding highly complex matters such as EU treaty revisions where voters do not exclusively take their decisions on the referendum subject but rather on domestic issues.<sup>8</sup> This provides a challenge as the nationally influenced decision of one national electorate affects all 26 other member states, which means that a minority is able to create a political stalemate due to rather national issues and not due to the contents submitted to the vote.

Referendums on EU treaty reforms are also criticized from another perspective: It is argued that the more referendums are held, the more package deals have to be made between the governments during the treaty negotiation process. According to Putnam's two-level game, each government which can credibly claim to hold a referendum can put pressure on its negotiating partners in order to pursue its own interests and to have them respected in the treaties.<sup>9</sup> The increasing use

<sup>6</sup> European Convention, Referendum on the European Constitution, CONV 658/03, at 3 (2003). As it does not directly touch upon the topics discussed in this article, the debate about a Europe-wide referendum is not reflected here. For more details see e.g., J. Habermas, *Europa: Vision und Votum*, 5 Blätter für deutsche und internationale Politik, 517 (2007).

<sup>7</sup> E.g. Biaggini, *supra* note 2, at 353.

<sup>8</sup> J. Garry, M. Marsh & R. Sinnott, 'Second-order' versus 'Issue-voting' Effects in EU Referendums, 6 *European Union Politics*, 201 (2005).

<sup>9</sup> Hug & Schulz, *supra* note 1.

of referendums on EU treaty reforms can thus lead to a highly complex treaty structure. As a result, deficiencies can easily be highlighted and be exploited for Eurosceptic campaigns.

### **C. Framing the Ratification Question**

As is widely asserted, framing is an influential and determinant instrument of power and can be applied “as a tactic used by political entrepreneurs to coordinate individuals around particular interpretations of their problems.”<sup>10</sup> Communicating actors can offer ‘short cuts’ and influence the decision-making of citizens. Some aspects of the issue at stake are emphasized while others are rather not touched upon. Key words and metaphors play an important role in order to reduce complexity and to transmit the message which is seen as most likely to produce a certain outcome. As Vreese and Semetko point out, referendums are characterized by volatile electorates, uncertainty in elite cues and a high issue complexity.<sup>11</sup> Regarding EU affairs in general and the TEC and the Treaty of Lisbon in particular, citizens lack a deeper understanding.<sup>12</sup> Therefore, the information available and the frames put forward play a role that is crucial to the perception of the ratification question.

Based upon the arguments put forward in the debate about direct democracy and referendums in the EU, I propose to distinguish five different frames which can be used in order to frame the decision on how ratification of EU treaties should occur:<sup>13</sup> the direct democracy frame, the European frame, the legal frame, the national frame and the technical frame. Even if some of the frames might include similar elements, they can conceptually be distinguished according to specific key words and characteristics. In other words, the emphasis which is put on different elements of the frames allows five different ideal types of framing concepts to be created.

As will be elaborated below, the hypothesis is that the first two frames are used to justify a positive decision in favour of a referendum. The third frame is assumed to be used both in a positive and a negative way, whereas the fourth and fifth frames might be used to justify a negative decision against the use of a referendum.

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<sup>10</sup> D. Chong, & J. N. Druckman, *Framing Theory*, 10 Annual Review of Political Science 103, at 118 (2007).

<sup>11</sup> Vreese & Semetko, *supra* note 1.

<sup>12</sup> For Eurobarometer data *see* [http://ec.europa.eu/public\\_opinion/index\\_en.htm](http://ec.europa.eu/public_opinion/index_en.htm). Specific findings on the TEC and the Treaty of Lisbon can be found in Flash Eurobarometer 168, 171, 172, 173, 245 and Special Eurobarometer 214.

<sup>13</sup> As this article proceeds in a rather exploratory manner, the list of frames might not be complete and might be complemented by findings of further research.

Table 2: Framing the Ratification Question

<i>Frame</i>	<i>Way of framing a referendum</i>
Direct democracy frame	Positive
European frame	Positive
Technical frame	Positive/Negative
Legal frame	Negative
National frame	Negative

The *direct democracy frame* implies a normative notion. It is expected that governments referring to this frame will use the arguments put forward by the advocates of direct democracy. Key words might be legitimacy, democracy, participation, and mobilization. It can be assumed that governments are likely to use the direct democracy frame (in a positive way) in the case of the TEC much more than (in a negative way) in the case of the Treaty of Lisbon, because governments might stress the constitutional elements which, from a normative point of view, enhance the role of the citizens in contrast to 'normal' EU treaties and which might, from a normative point of view, require a referendum – even if the national constitution does not oblige the government to hold one.

The *European frame* implies that governments frame their argumentation according to a European logic. One would expect key words relating to the transnational dimension in order to justify the decision for a referendum. This frame also is assumed to have a normative notion in the sense that it touches upon questions related to a general 'European interest', a European public sphere and a shared European sense of belonging. Cross-national references to debates in other EU member states are expected. Similar to the above-mentioned frame, it is assumed to be used in a positive way, i.e. in order to speak in favour of a referendum rather than against it. Therefore, it is expected that the European frame is used more often in the case of the TEC than in the case of the Treaty of Lisbon, because references to a common European self-conception were put forward much more frequently in the case of the TEC (pointing to the fact that 'the Constitution' ought to be ratified by a 'European demos') than in the case of the Treaty of Lisbon.

When using a *technical frame*, governments are expected to refer to technical details and specific regulations of the treaty in question compared to the *status quo* as well as to other EU treaties rather than to wider normative implications of the treaty regarding democracy and legitimacy (as is assumed in the case of the direct democracy frame). It is expected that this frame will be used both in a positive and a negative way to frame the ratification decision. Regarding the TEC, this frame might be used to explain the need for a referendum by highlighting the main innovations compared to the *status quo*. In the case of the Treaty of Lisbon, the opposite might be the case: By emphasizing the treaty's details, opponents of a referendum might want to emphasize the technical nature of the document and thus avoid a constitutional notion which, in turn, would be linked to direct approval by the citizens.

The *legal frame* refers to legal/constitutional provisions to justify a decision for/against holding a referendum. As concerns the examples chosen in this article,

I argue that this kind of frame only plays a minor role in justifying a decision for a referendum as all countries analyzed do not necessarily require the direct approval of the citizens. In other words, it is assumed that the legal frame did not play a greater role in the decision on the manner in which the TEC should be ratified. However, the frame might acquire a greater influence in the second case under analysis: As all countries lack an imperative demand to hold a referendum, the decision not to hold one might be framed according to the legal frame – yet in a negative sense.

The *national frame* contains references to the national dimension. As was argued above, governments can exert significant influence during treaty negotiations by playing the referendum card.<sup>14</sup> In turn, having succeeded in securing their own interests by choosing that negotiation strategy, governments can omit holding a referendum by pointing to their negotiation success. Therefore, it is assumed that this frame is used in a negative way in cases where the government expects a negative vote and where the negotiation successes can be framed as compensation for not holding a popular vote. Key words used to frame the ratification issue might be national sovereignty, national influence or national interest.

## **D. Adjusting the Frames – The Cases of France, the Netherlands, Spain, Luxembourg and the United Kingdom**

### **I. France**

According to Article 89 of the French Constitution, constitutional amendments have to be submitted to a popular vote. The president, however, can decide against a (binding) referendum and submit for ratification the law aimed at amending the constitution to the *Congrès*, which comprises the first and second chamber of the parliament, and thus avoid a popular vote. In this case, the *Congrès* has to approve the bill with a three-fifth majority. Other bills that do not affect the French constitution can also be put to a referendum (Article 11 of the constitution). Thus, even if there is no imperative obligation to hold referendums, instruments of direct democracy are not unfamiliar to French politics.<sup>15</sup>

In the case of the 2005 referendum, President Jacques Chirac had ruled out the referendum option at the beginning, but domestic pressure to hold one increased. Thus, the President finally conceded and announced a popular vote. In his speech on 14 July 2004, Chirac mainly framed his decision according to the direct democracy frame. As he said, a referendum was needed as people would

<sup>14</sup> Hug & Schulz, *supra* note 1.

<sup>15</sup> A. Mayer, *Frankreich: Der Präsident entscheidet – und ist entscheidend*, in T. König, S. Daimer & D. Finke (Eds.), *Plebizit und Ratifikation. Eine vergleichende Untersuchung von Referenden zur Europäischen Verfassung*, 47 (2006); M. Qvortrup, *The Three Referendums on the European Constitution Treaty in 2005*, 77 *The Political Quarterly* 89, at 89 (2006).

be affected directly by the Constitutional Treaty and thus had to be consulted directly (“les Français sont directement concernés et ils seront donc directement consultés.”<sup>16</sup>)

As concerns the ratification procedure of the Treaty of Lisbon, it was clear that the no vote of the French citizens of 2005 had to be taken into account. In the referendum, 69.3 per cent of the population went to the ballot boxes, much more than on the occasion of the European elections in 2004 (42.8 per cent). Thus, the vote could be seen as significant and every new initiative to reform the EU had to be linked to it. The reasons for the no were mainly related to economic and social issues: 76 per cent of the no-voters stated that the TEC either would have negative effects on the employment in France, that the economic situation in the country already was too weak or that the document was too liberal in economic terms.<sup>17</sup>

It was not until 6 May 2007, when the French presidential elections took place and Nicolas Sarkozy succeeded Chirac as president, that the ratification procedure of the Treaty of Lisbon (then named the Reform Treaty) became clear, as the two main candidates, Nicolas Sarkozy and Ségolène Royal, had favoured different options during their campaigns. Whereas Sarkozy pleaded for ratification without a referendum, Royal advocated a popular vote. Sarkozy put forward his line of argumentation according to the technical frame: In order to overcome the EU's reform crisis after the failure of the TEC, he suggested elaborating a ‘mini traité’ or a ‘traité simplifié’ which would contain the crucial technical and institutional provisions of the TEC, but where all constitutional aspects would be removed.<sup>18</sup> Furthermore, Sarkozy's framing strategy picked up the most prominent arguments put forward in the 2005 no-campaign: He succeeded in scrapping any mention in the EU treaty of the aim of ‘free and undistorted’ competition which the TEC had mentioned in Article 1 and thus reacted to the fears of a neo-liberal European economic policy. The frame chosen did not remain uncontested by other parties and the wider public. For example, the Socialists called the decision not to hold a referendum a “denial of democracy.”<sup>19</sup> Yet, the Treaty of Lisbon was finally ratified by a large majority in both chambers of parliament on 7-8 February 2008.

<sup>16</sup> J. Chirac, Television interview approved by M. Jacques Chirac, President of France, on the occasion of the national holiday, 14 July 2004 ([http://www.elysee.fr/elysee/elysee.fr/francais\\_archives/interventions/interviews\\_articles\\_de\\_presse\\_et\\_interventions\\_televisees/2004/juillet/interview\\_televisee\\_du\\_president\\_de\\_la\\_republique\\_a\\_l\\_occasion\\_de\\_la\\_fete\\_nationale.359.html](http://www.elysee.fr/elysee/elysee.fr/francais_archives/interventions/interviews_articles_de_presse_et_interventions_televisees/2004/juillet/interview_televisee_du_president_de_la_republique_a_l_occasion_de_la_fete_nationale.359.html)).

<sup>17</sup> Flash Eurobarometer 171.

<sup>18</sup> N. Sarkozy, *L'Europe de demain – Une nouvelle vision française*, speech given towards Friends of Europe and Fondation Robert Schuman, 8 September 2006.

<sup>19</sup> E. Vucheva, *French Socialists to Back New EU treaty*, EUobserver, 7 November 2007. For further details on the French campaign see, e.g. S. Seeger, *Die EU im Spannungsfeld von Demokratiedefizit, Politisierung und Vertragsratifikation*, in W. Weidenfeld (Ed.), *Lissabon in der Analyse – Der Reformvertrag der Europäischen Union*, 233 (2008).

## II. The Netherlands

The Dutch Constitution does not explicitly contain provisions for holding a popular vote.<sup>20</sup> The 2005 referendum was the first nation-wide referendum since 1815, even if there had been a debate on introducing instruments of direct democracy for some time. However, the leading political figures had for a long time prevented a constitutional revision which would have introduced regulations on referendums. The referendum on the TEC was triggered by a parliamentary bill initiated by the Social Democrats, the Greens and the liberal D66. The bill became law – against the will of Prime Minister Jan Peter Balkenende and his party, the Christian Democrats. However, due to the political pressure that the initiative put on the government, the Christian Democrats changed their mind and finally backed the referendum initiative. The government framed its decision along the arguments put forward by the advocates of the referendum. Atzo Nicolai, Dutch Minister for European Affairs, applied the direct democracy frame and emphasized the legitimizing role of citizens in European politics.<sup>21</sup>

Regarding the ratification procedure of the Treaty of Lisbon, Balkenende was in the same position as French President Sarkozy: The results of the 2005 referendum had to be taken into account (turnout: 62.8 per cent), yet the treaty would be ratified by parliamentary procedure only. As a survey conducted in the aftermath of the referendum revealed, the three weightiest reasons for opposing the TEC were lack of information (32 per cent), fear of loss of sovereignty (19 per cent) and a general opposition with the government and certain political parties (14 per cent).<sup>22</sup> Furthermore, a general scepticism towards deeper integration and further enlargement determined the decision of the no-voters.

Like Sarkozy, Balkenende used the technical frame and pointed to the fact that due to the influence of the Dutch government the constitutional concept had been given up during the EU's June summit 2007 when the mandate for the Intergovernmental Conference (IGC) aimed at elaborating the EU's Reform Treaty was drafted.<sup>23</sup> As the Prime Minister stated,

the new EU treaty is a regular reform treaty, [therefore] the normal approval procedure will be followed. The government does not feel that a referendum is an appropriate instrument. The government sees the new treaty as similar to those of

<sup>20</sup> E.g. J. Bellmann, *Niederlande – die Verfassung als Sündenbock?*, in T. König, S. Daimer & D. Finke (Eds.), *Plebiszit und Ratifikation. Eine vergleichende Untersuchung von Referenden zur Europäischen Verfassung*, 81 (2006); Hussain, *supra* note 4, at 7; Qvortrup, *supra* note 15; M. Weiner, *Nach Punktsiegen im neuen Vertrag kein Referendum*, in J. Lieb, A. Maurer & N. von Ondarza (Eds.), *In 27+X Schritten zur Reform – Die Ratifikation und Umsetzung des Lissabonner Vertrags*, 72 (2008).

<sup>21</sup> A. Nicolai, *De politiek terug in de politiek*, 4 *Internationale Spectator* 179 (2005).

<sup>22</sup> Flash Eurobarometer 172.

<sup>23</sup> For details on the process of drafting the Treaty of Lisbon see, e.g. S. Seeger, *Die Institutionen- und Machtarchitektur der Europäischen Union mit dem Vertrag von Lissabon*, in W. Weidenfeld (Ed.), *Lissabon in der Analyse – Der Reformvertrag der Europäischen Union*, 63 (2008).

Maastricht, Amsterdam and Nice, and like those earlier treaties, it can be approved via the normal procedure. The reform treaty will thus be debated and voted on by parliament.<sup>24</sup>

The decision was backed by a judgement of the State Court (*Raad van Staate*) which came to the conclusion that the new EU treaty did not contain constitutional elements and thus would not affect Dutch sovereignty, and by Queen Beatrix, who confirmed in her *Speech from the Throne* on 18 September 2007 that the Treaty of Lisbon would be submitted to parliament for ratification.<sup>25</sup>

Besides, a national frame can be observed, which is not surprising when looking at the reasons why the Dutch voters rejected the TEC. Fears of losing sovereignty were already articulated during the referendum campaign on the TEC and were emphasized in the process of drafting the Treaty of Lisbon again.<sup>26</sup> Balkenende repeatedly pointed to the fact that he had successfully striven for ensuring national parliaments a greater say in European politics.<sup>27</sup>

Even if the debates on the manner of ratification of the new treaty were still contentious and some opposition parties again called for a referendum, “the referendum issue could effectively be buried.”<sup>28</sup> The first part of the ratification in the Dutch Lower House successfully took place on 5 June 2008, the Senate took its decision in favour of the Treaty of Lisbon on 9 July 2008.

### III. Spain

On 11 January 2005, the *Cortes Generales*, the Spanish parliament, unanimously decided to hold a referendum on the Constitutional Treaty according to Article 92 of the Spanish constitution. It was the country’s first referendum on EU affairs. Apart from decisions amending the constitution which can be put to a referendum according to Article 187 of the Spanish constitution, Article 92 states that decisions with far-reaching impact can be submitted to a (consultative) popular vote. It is the prime minister who takes the decision of putting a certain issue to a referendum. Therefore, the decision to hold a referendum implied one important aspect: The TEC was implicitly framed to be of far-reaching impact which, from a legal point of view, required the direct approval of the citizens – in contrast to the other EU treaties which had not been ratified by referendum. Thus, the Spanish government – at least implicitly – applied the legal frame (otherwise it would have made no sense to apply Article 92). It is important to note, however, that the decision to apply Article 92 of the constitution is rather surprising as the

<sup>24</sup> Government of the Netherlands, *Normal procedure for new EU treaty*, 21 September 2007, press release, ([http://www.government.nl/News/Press\\_releases\\_and\\_news\\_items/2007/September/Normal\\_procedure\\_for\\_new\\_EU\\_treaty](http://www.government.nl/News/Press_releases_and_news_items/2007/September/Normal_procedure_for_new_EU_treaty)).

<sup>25</sup> The speech can be downloaded at [http://www.government.nl/Government/Speech\\_from\\_the\\_Throne\\_2007](http://www.government.nl/Government/Speech_from_the_Throne_2007).

<sup>26</sup> S. Kurpas *et al.*, *Updates on the Ratification Debates. What Prospects for the European Constitutional Treaty? Results of an EPIN Survey of National Experts 10* (2005).

<sup>27</sup> D. Hierlemann & S. Seeger, *Who Wants What and Why? FAQs About the EU Constitutional Summit*, *Spotlight Europe* 3 (2007); Weiner, *supra* note 20, at 73.

<sup>28</sup> Institute for European Politics (Ed.), *EU-27 Watch*, at 51 (2008).

Spanish constitutional court had explicitly ruled out already in October 2004 that the TEC had a major impact on the Spanish constitution<sup>29</sup> which challenges the legal frame used by the government.

The legal frame was complemented by the direct democracy frame. The party manifesto of Prime Minister José Luis Rodríguez Zapatero's party PSOE contained references to the need to involve citizens more closely in European politics. Zapatero repeatedly stated that citizens should have a say and legitimize 'the Constitution' ('La construcción Europea no puede proseguir sin los ciudadanos.'<sup>30</sup>)

Additionally, a third frame can be detected. After Zapatero had spoken out in favour of a referendum on the TEC shortly after the Spanish elections in 2004,<sup>31</sup> he reiterated that this would give Spain the opportunity to show its strong commitment to European integration.<sup>32</sup> The vote of the citizens ought to contribute to a European spirit and be a strong signal against any Eurosceptic tendencies.<sup>33</sup> It is worth noting that Zapatero might not only have had normative, but also strategic reasons for applying the European frame. After the parliamentary elections in March 2004 which ended with a defeat of the conservative Aznar government, Zapatero aimed at strengthening Spain's reputation as a European actor. Since the negotiations on the Treaty of Nice, Spain had lost significant influence in European politics due to José Maria Aznar's uncompromising claims for a stronger voting position in the Council. Furthermore, the position of the Aznar government on the war against Iraq isolated the country from the Franco-German tandem. Against this background, a positive outcome of the referendum on the TEC was also intended to bring Spain back into the centre of European decision-making.

As concerns the Treaty of Lisbon, there was a broad consensus among Spanish political elites that no referendum was needed. In a press conference after the EU's June summit 2007, Zapatero stated that the new treaty would be put to parliamentary ratification only. The decision was not really contested by the opposition or the wider public, which might come as a surprise as the government stressed the fact that the new treaty had provided a safeguard to as many provisions of the TEC as possible.<sup>34</sup> This raises the question how the government framed its decision not to hold a referendum on the new treaty.

Two different frames can be identified: On the one side, the government argued that precisely because both documents resembled each other, *no* referendum

<sup>29</sup> Bieber, *supra* note 3, at 65.

<sup>30</sup> El País, *El Gobierno someterá a referendo la aprobación de la Constitución europea*, 23 June 2004.

<sup>31</sup> K. Bernhardt, *Die Volkabstimmung in Spanien: Stärkung nach Innen und Außen*, in T. König, S. Daimer & D. Finke (Eds.), *Plebiszit und Ratifikation. Eine vergleichende Untersuchung von Referenden zur Europäischen Verfassung* 101, at 101 (2006).

<sup>32</sup> Interestingly, it was not Zapatero's government which first called for a referendum but the Aznar government. Therefore, the reason for Zapatero's decision to hold a referendum on the TEC can also be explained by the fact that he was already bound by the expressions made by Aznar before. I am grateful to Dr. Carlos Closa for this comment.

<sup>33</sup> El País, *supra* note 32.

<sup>34</sup> El País, *La Generalitat 'da por bueno' el tratado de la UE patado en Lisboa*, 27 October 2007.

was needed, as the text had already been agreed upon and legitimized by the Spanish citizens with a large majority of 76.7 per cent in the 2005 referendum.<sup>35</sup> Furthermore, the fact that former Prime Minister Felipe González was elected president of the committee of wise men was seen as a guarantee to have democracy and legitimacy in the EU respected and as a compensation for the lack of a citizens' involvement in the process of ratifying the Treaty of Lisbon.<sup>36</sup> Thus, contrary to the expectations pointed out in the previous chapter, the direct democracy frame was used in a negative way to rule out a second referendum.

On the other side, Alberto Navarro, Secretary of State of European Affairs, stated that the Treaty of Lisbon was nothing more than an amending treaty, just as the Treaty of Amsterdam or the Treaty of Nice, neither of which had been ratified by referendum. Therefore, he stated that a popular vote was not needed.<sup>37</sup> Thus, the two frames used sent rather contradictory signals, which, however, could not damage the government's political reputation.

#### IV. Luxembourg

Similar to that of the Netherlands, the direct democratic tradition of Luxembourg is weak. However, against the background of the country's general debates on opening politics to more direct democracy, Luxembourg's Prime Minister Jean-Claude Juncker had been campaigning for a popular vote on the TEC since 2003.<sup>38</sup> Succeeding in having the TEC passed by popular vote, the referendum on the Constitutional Treaty was the first one in the country since 1937. As could be expected, the frames used by the government focused on the added value of direct democracy. In an interview in the run-up to the referendum on the TEC in Luxembourg, Juncker emphasized the importance of enhancing civic participation.<sup>39</sup>

In the case of the Treaty of Lisbon, Juncker ruled out holding a referendum, but the decision was hardly contested by other political actors or by the wider public.<sup>40</sup> In contrast to the run-up to the 2005 referendum, no major debates took place on the new treaty which made it easy for the government to frame its decision.<sup>41</sup> Like the Spanish government, the Prime Minister put emphasis on the fact that the Treaty of Lisbon resembled the TEC in large parts. It was argued that, as the TEC had been adopted by the citizens in a referendum, no second vote was needed on the new treaty.<sup>42</sup> The parliamentary ratification procedure of the Treaty of Lisbon

<sup>35</sup> Zapatero in a press conference after the European Council on 21/22 June 2007.

<sup>36</sup> Secretary of State for European Affairs Alberto Navarro on 17 January 2008.

<sup>37</sup> *Id.*

<sup>38</sup> Qvortrup, *supra* note 15, at 91.

<sup>39</sup> J.-C. Juncker, *Europa steckt in einer tiefen Krise*, interview in d'Wort, 20 June 2005 ([http://www.gouvernement.lu/salle\\_presse/interviews/2005/06juin/20050620juncker\\_wort/index.html](http://www.gouvernement.lu/salle_presse/interviews/2005/06juin/20050620juncker_wort/index.html)).

<sup>40</sup> S. Reichel, *Luxemburg – Eine kleine Geschichte der Ernüchterung*, in J. Lieb, A. Maurer & N. von Ondarza (Eds.), *In 27+X Schritten zur Reform – Die Ratifikation und Umsetzung des Lissaboner Vertrags* 65, at 66 (2008).

<sup>41</sup> Institute for European Politics, *supra* note 28, at 48.

<sup>42</sup> Government of Luxembourg, *Traité de Lisbonne: heure d'actualité à la Chambre des députés*,

could be completed on 29 May 2008 with 47 members of parliament backing the treaty and one opposing it. Again, the hypothesis that the direct democracy frame only would be applied in a positive way is not confirmed.

## V. United Kingdom

According to the constitutional tradition of the UK, there is no written obligation to hold a referendum on the reform of EU treaties. However, elements of direct democracy can be applied by a referendum bill<sup>43</sup> which has to be endorsed by a majority of the parliament. In the case of the TEC, the *European Union Bill* contained the provisions which would have allowed submitting the document to a popular vote.

For a long time, Prime Minister Tony Blair had been reluctant to announce a referendum, but he changed his mind after coming under pressure because of the upcoming national elections.<sup>44</sup> In a speech before the House of Commons on 20 April 2004, Blair demanded: “Let the people have the final say. The electorate should be asked for their opinion.”<sup>45</sup> As he argued,

[it] is time to resolve once and for all whether this country, Britain, wants to be at the centre and heart of European decision-making or not [...]. Let the Eurosceptics whose true agenda we will expose, make their case. Let those of us who believe in Britain in Europe not because we believe in Europe alone but because, above all we believe in Britain, make ours.<sup>46</sup>

Thus, Blair used the European frame to justify the choice for a referendum, although not in a normative sense as described in the previous chapter but implicitly according to the national frame by emphasizing the importance of the referendum for Britain’s national interest.

When the Treaty of Lisbon started to gain shape under the German presidency, Blair made clear that no referendum would be held on the document. Gordon Brown, who succeeded Blair as prime minister in June 2007, followed this line of argumentation, even if he had spoken out for a referendum on the TEC.<sup>47</sup> As could be expected, this was challenged by a broad coalition including supporters of Brown’s own Labour Party, the Conservatives, the Liberals, the mass media, members of trade unions and civil society organisations.<sup>48</sup> Even if the arguments put forward differed widely, the campaigns resembled each other in one aspect:

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23 October 2007, press release ([http://www.gouvernement.lu/salle\\_presse/actualite/2007/10/23-pm-chd/index.html](http://www.gouvernement.lu/salle_presse/actualite/2007/10/23-pm-chd/index.html)).

<sup>43</sup> N. L. Potzeldt, *Vereinigtes Königreich: Referenden als Mittel der Wahl*, in T. König, S. Daimer & D. Finke (Eds.), *Plebiszit und Ratifikation. Eine vergleichende Untersuchung von Referenden zur Europäischen Verfassung* 111, at 115-116 (2006).

<sup>44</sup> Kurpas *et al.*, *supra* note 26, at 13.

<sup>45</sup> T. Blair, ‘*Let the People Have the Final Say*’ on *New European Treaty*, Statement to the House of Commons, 21 April 2004 (<http://www.fco.gov.uk/en/newsroom/latest-news/?view=Speech&id=1897432>).

<sup>46</sup> *Id.*

<sup>47</sup> E.g. G. Stuart, *If Brown Won’t Listen, How Can We Trust Him?*, *The Telegraph*, 29 July 2007.

<sup>48</sup> E.g. Seeger, *supra* note 19.

It was stated that the new treaty contained the crucial provisions of the TEC. This was backed by a report of the European Scrutiny Committee of the House of Commons which mentioned that “the Reform Treaty produces a general framework which is substantially equivalent to the Constitutional Treaty.”<sup>49</sup>

Against this background, the government focused on a three-dimensional way of framing its decision against holding a popular vote. On the one side and according to the assumptions of the previous chapter, a technical frame was used in order to point out both the differences between the TEC and the Treaty of Lisbon and the continuity between the new treaty and previous EU treaties.<sup>50</sup> Furthermore, the strong parliamentary tradition of the United Kingdom was highlighted, i.e. the ratification decision was additionally framed in a legal way. As the government repeatedly stated, a referendum would not be necessary, as no referendum had taken place on any previous EU treaties.

However, as probably the most dominant approach, the national frame was used. The government pointed to the fact that during the process of drafting the IGC mandate and during the IGC itself, Britain’s national interest had been satisfactorily respected. The four British ‘red lines’ – maintaining special provisions in the areas of justice and home affairs, in foreign and security policy, in social policy and with regard to the Charter of Fundamental Rights – were respected in various treaty provisions, protocols and declarations. Hence, a referendum was not needed as “we have defended the British national interest.”<sup>51</sup> Even if the government faced strong criticism for its decision not to hold a referendum, the parliamentary ratification procedure could be concluded on 18 June 2008, shortly after the Irish voters had rejected the Treaty of Lisbon.

Table 3: Frames Used by the Selected Governments

	<i>Framing the decision in favour of a referendum on the TEC</i>	<i>Framing the decision against a referendum on the Treaty of Lisbon</i>
<i>France</i>	Direct democracy frame	Technical frame
<i>The Netherlands</i>	Direct democracy frame	Technical frame National frame
<i>Spain</i>	Legal frame Direct democracy frame European frame	Direct democracy frame Legal frame
<i>Luxembourg</i>	Direct democracy frame	Direct democracy frame
<i>United Kingdom</i>	European frame/National frame	Technical frame Legal frame National frame

<sup>49</sup> House of Commons European Scrutiny Committee, European Union Intergovernmental Conference. Thirty-fifth report of Session 2006-07, at 16 (2007).

<sup>50</sup> House of Commons European Scrutiny Committee, European Union Intergovernmental Conference: Government Responses to the Committee’s Thirty-fifth report of Session 2006-07 and the Committee’s Third report of Session 2007-08 (2007).

<sup>51</sup> G. Brown, Press Conference in Lisbon, 19 October 2007 (<http://www.number-10.gov.uk/output/Page13571.asp>).

## E. Framing the Same but Differently – Determining Factors

Once the different frames have been identified, one has to ask why governments choose a particular way of framing their message. Of course, the development of European politics has to be kept in mind when analysing the various frames.

After it had become clear that the TEC was partly rejected because people were afraid of an emerging European super-state which the notion of a ‘Constitution’ might have implied, political elites tried to avoid the impression that a new constitutional document was drafted. Rather, the instruments of ‘normal’ treaty revision were given special importance, i.e. a ‘classic’ IGC took place without any similarity to the Convention process of 2002/2003 and referendums should be avoided.<sup>52</sup> Shortly after the EU member states had agreed on the Treaty of Lisbon, Valérie Giscard d’Éstaing stated that the document was made as complex as possible in order to omit popular votes, even if both documents resembled each other strongly.<sup>53</sup> A second ratification failure ought to be avoided in any case. As member states have bound themselves to take the necessary steps to get the treaty ratified, announcing a referendum without being legally obliged might have put the state in question in political isolation. Therefore, the arguments used to justify not holding a referendum on the Treaty of Lisbon have to be seen, first of all, in relation to the failure of the Constitutional Treaty. Against this background, the fact that France, the Netherlands, and the United Kingdom used a technical frame to justify their decision to submit the new treaty only to parliamentary ratification is not surprising. However, Luxemburg and Spain did not apply the technical frame, and other governments did not exclusively focus their framing strategy on the technical frame either. This raises the question what other factors might determine the choice of the frames.

To answer this question, the comparative approach pursued in this article can enable valuable insights. First, the same issue is framed at the same time in different national arenas, which allows conclusions to be drawn on influencing factors between different domestic settings. Second, as it is assumed that the TEC and the Treaty of Lisbon are strongly connected to each other and contain, in wide parts, similar elements, it allows conclusions to be drawn on factors which determine how a (similar) issue is re-framed in the same arena at a different time.

When identifying factors with an impact on the frames chosen, I will proceed in a rather exploratory manner, i.e. the list of factors might not be complete. However they might generate first interesting findings which can be elaborated on in further research.

<sup>52</sup> E.g. W. Wessels & A. Faber, *Vom Verfassungsvertrag zurück zur Methode Monnet? Die Entstehung der ‘Road Map’ zum EU-Reformvertrag unter deutscher Ratspräsidentschaft*, 4 *Integration* 370 (2007).

<sup>53</sup> H. Spongenberg, *Lisbon Treaty made to avoid referendum, says Giscard*, *EUobserver*, 29 October 2007.

First, I assume that a government of a country where the ratification of EU treaties by a referendum is not envisaged by constitutional provisions has to frame the decision to hold a referendum differently from a government of a country where the constitution obliges the political actors to do so. The hypotheses would be that the more a decision to hold a referendum or not differs from the legal requirements or the tradition of direct democracy, the less it is framed in a *positive* way with legal arguments. Consequently, the more a decision to hold a referendum or not differs from the legal requirements, the more it is framed in a *negative* way with legal arguments. When looking at the selected countries, the Netherlands, Spain and Luxembourg are those countries with the weakest European referendum tradition. In contrast, France and the UK have already had experience in submitting European issues to a popular vote. Therefore, one would expect that the application of the legal frame in a positive manner is more likely in the case of the TEC in France and the UK than in the other three countries. In turn, one would assume that the frame has a greater impact in the Netherlands, Spain and Luxembourg in the case of the Treaty of Lisbon. However, in the case of the TEC the frame only played a major role in Spain when the prime minister applied Article 92 of the Spanish constitution. Thus, the findings do not exactly match the expectations as Spain is not among those countries with stronger legal requirements or a stronger tradition of direct democracy. Furthermore, in the case of the Treaty of Lisbon the frame was not applied in the Netherlands and Luxembourg as was assumed. Generally speaking, the legal requirements and the direct democracy tradition may have some influence but are not determining factors for the way how the ratification issue is framed.

Second, analysing the party system and the political scenery might also tell a lot about how the ratification issue is framed. A government which is faced with several strong competitors, e.g. a strong opposition party, is likely to be constrained in the process of choosing a frame. As has been the case in the past, it is usually the opposition calling for a referendum which tries to use it as a strategic instrument to enhance the own position. The arguments put forward are often framed in a normative, but populist way in the sense that not holding a referendum is alleged to be a way of depriving citizens of their right to participate in politics. I assume that if the government is in favour of a referendum and faces a strong opposition, it is likely to highlight the added value of direct democracy in order to avoid a populist defeat by its opponents. In contrast, if the government refuses to hold a referendum, I assume that it might focus on technical details of the treaties and thus might try to avoid a general debate about direct democracy and legitimacy. This assumption is well reflected, in particular in the case of the Treaty of Lisbon. Only Spain and Luxembourg chose this frame. Neither of the two countries was confronted with major opposition to their decision not to hold a referendum. In contrast, in those countries where, in the case of the Treaty of Lisbon, the calls for a referendum from the opposition were significant, such as France, the Netherlands, and the UK,<sup>54</sup> the government avoided references to the direct democracy frame as this would have given the opposition a major

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<sup>54</sup> E.g. Seeger, *supra* note 19.

point for criticism. They rather applied a technical frame in order to point out the differences between the TEC and the new treaty and to underline the technical nature of the document and the continuity to previous amending treaties.

Third, another important constraining factor is public opinion on European integration in general and on the issue in question (the TEC and the Treaty of Lisbon respectively) in particular as it can be assumed that the government is eager to take into account public opinion in order to increase support for the decision on the ratification procedure. If the respective citizenry is rather Eurosceptic, governments might be reluctant to announce a referendum as it can be used to express a general antipathy towards the EU instead of judging the issue in question. If the government announces a referendum under such rather risky conditions (risky in the sense that the government has committed itself to ensure proper ratification by signing the respective treaty), the way the ratification question is framed is expected to differ strongly from the same decision under rather 'favourable' conditions in a more Europhile environment. It is assumed that a government with a rather Eurosceptic citizenry chooses the national frame and puts emphasis on key words such as national interest and sovereignty in order to create a favourable atmosphere and convince citizens that a referendum is not necessary as other concessions can be offered. In contrast, one might argue that the more Europhile the electorate is, the less the arguments are focused on the national but rather on the European interest. At a first glance, it seems that the findings only partly confirm the hypothesis. Whereas the fact that the Spanish government chose the European frame in the case of the TEC can partly be explained by the strong public support for European integration, this is not the case in the UK, where the European frame was also used in the case of the TEC. However, as Blair did not use the European frame in a normative sense but rather as a means to highlight the national interest, the findings match the assumption much better. In the case of the Treaty of Lisbon, the expectation is also confirmed both in the UK and in the Netherlands. Fears of losing sovereignty and a general sceptical attitude towards deeper integration and further enlargement could be observed in both countries; in the Netherlands these issues led many voters to reject the TEC. Against this background, both governments framed their decision not to hold a referendum on the Treaty of Lisbon in a national way by pointing to the provisions which ensured national sovereignty, such as the newly introduced provisions on the role of national parliaments or the British 'red lines'.

Interestingly, only the UK and Spain applied the European frame whereas all other countries avoided references to the European dimension. Especially in the case of the TEC this might be rather surprising as normative aspects were emphasized both during the work of the Convention and the ratification process. This indicates that debates about the EU in general and about treaty reforms in particular are still perceived in a national way and that creating a common European sense of belonging by enhancing trans-national awareness does not have a strong priority for governments. The hopes that the Constitutional process would contribute to strengthen a European public sphere with cross-border debates were rather dashed by the findings of this article. Instead, great differences in how the ratification issue is perceived are revealed, strongly depending on the domestic setting.

## F. Conclusion

Against the background of an analysis of the debate on direct democracy and referendums in the EU, this article analyzed how governments of five EU member states (France, the Netherlands, Spain, Luxembourg, UK) framed their decision on the ratification procedure of the Constitutional Treaty in comparison with the Treaty of Lisbon. While all these countries decided to ratify the TEC by referendum, the Treaty of Lisbon was ratified by parliamentary procedure only, which indicates that the referendum euphoria changed into a referendum phobia. As it is widely asserted that the Treaty of Lisbon contains many of the reforms of the TEC, it is interesting to ask how governments framed their decision to not submit the new treaty to a popular vote.

The article proposed distinguishing five different frames: The direct democracy frame, the European frame, the technical frame, the legal frame and the national frame. As could be shown, all governments except for the UK related to the direct democracy frame in the case of the TEC. The Spanish government additionally applied the legal frame and the European frame. The British government also used the European frame. In the case of the Treaty of Lisbon, three countries referred to the technical frame: France, the Netherlands and the UK. Regarding the fact that the process of drafting the Treaty of Lisbon was generally framed as rather technical in comparison with the TEC, this does not come as a surprise. However, what is important to note is that both countries where the TEC was approved by a referendum in 2005 did not use the technical frame. Rather, they related to the direct democracy frame by stressing the fact that the TEC and the new treaty *did* resemble each other strongly. Interestingly, and against the expectations, the legal frame did not play a greater role in the cases of France, the Netherlands and Luxembourg, even if in particular in the case of the latter two, direct democracy had not played a greater role in political decision-making before. Matching the expectations, it was the two governments with rather Eurosceptic populations in the Netherlands and the UK where the national frame was applied in the case of the Treaty of Lisbon.

These rather mixed findings suggest that, apart from the general European context, domestic factors, such as constitutional provisions/direct democracy tradition, the party system or public opinion determine the framing strategy. However, whereas the findings on the influence of the party system and public opinion match the expectations, the role of constitutional provisions/direct democracy tradition is not absolutely clear. This underlines the great relevance of the political/strategic dimension of the respective ratification procedure.

In the light of the debate on the democratic deficit of the EU and the search for ways to enhance legitimacy and citizens' acceptance of the Union, it is challenging when the same issue is framed differently in different national arenas at the same time or when one (slightly different) issue is framed differently in the same arena at different times. As the contentious debates in France, the Netherlands and the UK on the way of ratification of the Treaty of Lisbon show, credibility of EU politics is at stake. This might backfire at a later stage with people withholding their support for further deepening and widening the European Union.

# Contesting the Lisbon Treaty: Structure and Implications of the Constitutional Divisions Within the European Union

Sergio Fabbrini\*

## Abstract

The article argues that the constitutionalization of the European Union is necessarily a contested process. The 'No' to the Lisbon Treaty, expressed in June 2008 by the Irish voters, is the last example of this contestation. The argument is based on an interpretation of the EU as a compound democracy. The compound democracy is of the model organizing unions of states of different demographic size and different political history. Inevitably they have different views on the constitutional nature of the polity. They share the need of staying together, but not the view on how to stay together. The article traces the rationale and implications of the divisions on the constitutional identity of the European Union.

## A. The Argument

The 'No' to the Lisbon Treaty, expressed by the Irish voters in the referendum of 12 June 2008, is the last, but probably it will not be the least, expression of the contested nature of the process of constitutionalization of the European Union (EU). Certainly, the Irish 'No' represents a serious blow to the agreement reached in Lisbon by the European Council. The so called Lisbon Treaty, signed on 13 December 2007,<sup>1</sup> effectively transformed a large part of the previous Treaty establishing a constitution for Europe (hereafter Constitutional Treaty or CT) into a set of amendments to the two existing treaties and recognized the Charter of

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<sup>1</sup> The Lisbon Treaty (also known as the Reform Treaty) consists of a series of amendments to the *Treaty on European Union* (TEU, Maastricht 1992) and the *Treaty Establishing the European Community* (TEC, Rome 1957), the latter renamed *Treaty on the Functioning of the European Union* (TFEU) in the process. The two consolidated treaties would form the legal basis of the Union, and include most of the content of the abandoned *Treaty establishing a Constitution for Europe*. Prominent changes in the Treaty of Lisbon include the scrapping of the pillar system, reduced chances of stalemate in the EU Council through more qualified majority voting, a more powerful European Parliament through extended co-decision with the EU Council, as well as new tools for greater coherence and continuity in policies, such as a long-term President of the European Council and a High Representative for Foreign Affairs. The Lisbon Treaty is scheduled to be ratified in all twenty-seven member states by the end of 2008, in time for the 2009 European elections. As of 1 July 2008, nineteen countries have ratified the Treaty, with the only refusal of Ireland.

Rights as a *de facto* third treaty. Such an agreement was, in turn, the answer to the rejection of the CT in the referendums held in France and the Netherlands, on 29 May and 1 June 2005 respectively.<sup>2</sup> Although it is always puzzling to interpret the popular 'No' to a treaty (in the Irish and Dutch cases it might have been motivated by the fear that the EU has gone too far in its process of federalization, whereas in the French case the criticism came also from the disillusionment on a too timid federalization's process), each time a 'No' comes to be expressed against a treaty, an interpretation is advanced concerning the failure of the European integration process, but each time a new agreement is reached this is interpreted in terms of the inevitable success of the process of European integration.

Which interpretation is more appropriate? My argument is that both views are misplaced. Indeed, the EU's constitutional odyssey of the 2000s confirms its structural difficulty in finding a definitive solution to the issue of its constitutional identity. The contested nature of the constitutionalization process is due to structural and not only contingent factors.<sup>3</sup> Although it has been argued that failure is inevitable when complex constitutional treaties must be approved by popular referendum, one also has to consider cases, such as Spain, Romania and Luxembourg, where popular referendum brought approval, and not rejection, of constitutional treaties. Thus, the contestation is not due necessarily to the instrument (the referendum) utilized for waging the dispute on the constitutional nature of the EU (although the approval of a complex document through a popular referendum might lead more easily to the venting of a populist criticism than its approval through a parliamentary vote), but it is due to the very nature of the EU. Or rather to what the EU has become after the Single European Act (1986) and the Maastricht Treaty (1992) and should become with the new treaties of the 2000s.

I shall base my argument that the constitutionalization of the EU is a contradictory process on the interpretation of the latter as a compound democracy. I define as compound democracy the form which democracy takes when applied to a union of states that are demographically asymmetrical and historically differentiated, as has been the case with the United States (US) and Switzerland. The equilibrium between asymmetrical and differentiated states is preserved through the creation of a highly complex structure of multiple separations of

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<sup>2</sup> The *Treaty establishing a Constitution for Europe* was signed in 2004, in Rome, by representatives of the member states of the Union but was subject to ratification. Most member states did so, by parliamentary ratification or by referenda, but France and the Netherlands rejected it. Its main aims were to replace the overlapping set of existing treaties that compose the EU, to codify human rights throughout the EU and to streamline decision-making in what is now an organization with 27-member states. The failure of the treaty to win popular support in these two countries caused some other countries to postpone or halt their ratification procedures, and the European Council (of heads of government of the member states) to call for a period of reflection. Had it been ratified by all member states, the treaty would have come into force on 1 November 2006. 18 member states ratified the text (three by referendum: Spain, Luxembourg and Romania) while 7 postponed the ratification process after the 2 rejections.

<sup>3</sup> See F. Snyder, *The Unfinished Constitution of the European Union: Principles, Processes and Culture*, in J. H. H. Weiler & M. Wind (Eds.), *European Constitutionalism Beyond the State* 55 (2001).

powers and a rigid procedure for changing it.<sup>4</sup> These structural and procedural features make the preservation of the Union possible, but at the same time render uncertain any revision of its institutional relations or any re-distribution of its policy's competences. The difficulty with the EU is that, contrary to the US and Switzerland, it has become a compound democracy by necessity and not by design, with the consequence that the EU has come to face the choice of defining its nature later in its development, whereas the other two polities have tried to define the issue since their inception (although without success in both cases, and dramatically so in the American case).

Here I will proceed as follows: first, I will argue that EU is a constitutionalized compound democracy organizing a union of states created for closing a long era of European civil wars. Second, I will discuss the cleavages that the constitutionalization of the EU has brought to the surface. Third, I will discuss some problematic implications of those divisions on the future of the EU with particular regard to the Lisbon Treaty.

## **B. The EU as a Constitutional Regime**

In order to argue about the contested nature of the constitutionalization of the EU, the first step is to show that the EU has become indeed a constitutionalized regime. The concept of 'constitution' is not univocal in its meaning.<sup>5</sup> At least, one can distinguish between a formal and material constitution. A *formal* constitution summarizes in a single written document the set of fundamental rights, institutional arrangements and functional procedures that shall regulate the workings of a given political community (which becomes such through this document). A *material* constitution consists of the social practices (derived from political conventions, historical traditions or specific judiciary regulations) recognized as the basic norms of a given society. Although it is evident that the EU does not have a formal constitution, it is also indisputable that it has a material constitution. However, the EU's material constitution does not consist of generic established social practices. Rather it is the juridical expression of higher-order principles (such as supremacy of Community law or direct effect of Community law on individual citizens) established by the European Court of Justice (ECJ) since the 1960s and recognized as such by the member states and their citizens. One might argue that the material constitution of the EU has come to be based on the founding treaties which have been interpreted by the rulings of the ECJ as quasi-constitutions, and which thus have gradually been integrated in the constitutional orders of the member states.<sup>6</sup> After all, more than a few

<sup>4</sup> See S. Fabbrini, *Madison in Brussels: The EU and the US as Compound Democracies*, 4 *European Political Science* 188 (2005).

<sup>5</sup> See A. J. Menéndez, *Three Conceptions of the European Constitution*, in E. O. Eriksen, J. E. Fossum & A. J. Menéndez (Eds.), *Developing a Constitution for Europe* 109 (2004).

<sup>6</sup> See M. Everson & J. Eisner, *The Making of a European Constitution. Judges and Law Beyond Constitutive Power* (2007); see also P. Craig, & G. De Burca (Eds), *The Evolution of the EU Law* (1999); also G. F. Mancini, *Europe: The Case for Statehood*, 4 *European Law Journal* 29 (1998).

established national democracies are based on a material, rather than a formal, constitution. This is so in the case of the United Kingdom whose constitution is the sedimentation of legislative and judicial acts. But it is also the case for countries like Israel or Germany, that are based on fundamental laws, rather than on formal constitutions, that organize those democracies.<sup>7</sup>

Accordingly, one may argue that the EU material constitution has supported a process of constitutionalization,<sup>8</sup> if by *constitutionalization* is meant the process by which an integrated legal order is formed in a given political territory.<sup>9</sup> This constitutionalization has gradually transformed the European nation states (with few exceptions among the established democracies, e.g. Norway and Switzerland) into *member states* of the EU.<sup>10</sup> The traditional European nation-states have had to redefine their sovereignty by sharing it with other states within a supra-states aggregate.<sup>11</sup> In this sense, the EU is a constitutionalized regime, because the ECJ has used the treaties to promote an integrated legal order among the EU member states.<sup>12</sup> The constitutionalization of the EU has ensued from increasing levels of trans-national activity (exchange and cross-border cooperation) in that their regulation has required increasing intervention by the EU institutions.<sup>13</sup> The increase in trans-national economic activity has exacerbated legal disputes among economic actors operating in different national legal systems, and this in turn has required the Community system's judicial organ, the ECJ, to play a more active

<sup>7</sup> The *Wende* or German unity of 1990 was not accompanied by a new constitution. Indeed, the five reestablished federal states (*Bundesländer*) of East Germany – Brandenburg, Mecklenburg-Vorpommern, Saxony, Saxony-Anhalt, Thuringia – formally joined the Federal Republic of Germany, along with the city-state Berlin which formally came into being at the same time, created out of the still formally occupied West Berlin and East Berlin, and admitted to the federation. In practice however, West Berlin had already acted as an 11<sup>th</sup> state for most purposes, so Berlin is generally not included in the list of '*Neue Länder*'. The 'Basic Law' or *Grundgesetz* of West Germany was thus extended to include them. To facilitate this process, some changes were made to the 'Basic Law'. After the five '*Neue Länder*' of East Germany had joined, the *Grundgesetz* was amended again to indicate that all parts of Germany are now unified. However, this change still permits the adoption of another constitution by the German people at some time in the future.

<sup>8</sup> See B. Rittberger & F. Schimmelfennig (Eds.), *The Constitutionalization of the European Union* (2007); see also M. Longo, *Constitutionalizing Europe: Processes and Practices* (2006).

<sup>9</sup> See M.P. Maduro, *Europe and the Constitution: What if This is as Good as it Gets?*, in M. Wind & J. H. H. Weiler (Eds.), *Constitutionalism Beyond the State* 74 (2003); see also A. Stone Sweet & J. Caporaso, *From Free Trade to Supranational Polity: The European Court and Integration*, in W. Sandholtz & A. Stone Sweet (Eds.), *European Integration and Supranational Governance* 92 (1998).

<sup>10</sup> See A. Sbragia, *From "Nation-State" to "Member State". The Evolution of the European Community*, in P. M. Lutzeler (Ed.), *Europe After Maastricht. American and European Perspectives* 69 (1994).

<sup>11</sup> See N. Walker (Ed.), *Sovereignty in Transition* (2003).

<sup>12</sup> See B. De Witte, *Direct Effect, Supremacy and the Nature of Legal Order*, in P. Craig & G. De Burca (Eds.), *The Evolution of EU Law* 177 (1999).

<sup>13</sup> See A. Stone Sweet, *The Constitutionalization of the EU: Steps Towards a Supranational Polity*, in S. Fabbrini (Ed.), *Democracy and Federalism in the European Union and the United States. Exploring Post-National Governance* 44 (2005); see also A. Stone Sweet, W. Sandholtz & N. Fligstein (Eds.), *The Institutionalization of Europe* (2001).

role. The ECJ has used the opportunities afforded by the treaties to construct a new legal order for a supranational market, transforming those treaties into sources of law superior to those of the EU member states.

The EU treaties, contrary to other international treaties, have thus given rise to a legal order which is binding on the citizens of its member states and not only on the governments which signed them (as is typical of international treaties). A legal order has thus arisen that confers judicially enforceable rights and obligations on all legal persons and parties, public and private, within the territory of the member states of the EU.<sup>14</sup> Certainly, constitutionalization based on inter-state treaties is different from constitutionalization based on a formal constitution deliberately chosen by the founding members.<sup>15</sup> In fact, although the treaties are part of a larger constitutional order supported by the member states' constitutions, the EU constitutional order continues to be too ambiguous to settle the different views on what the EU should be.

It is possible to have a democratic regime without a formal constitution in culturally homogeneous and institutionally simple polities, as is the case in the UK, Israel and Germany. All of them are parliamentary democracies governed by the political majority of the day.<sup>16</sup> A union of asymmetrical states cannot be organized along the vertical lines of a parliamentary model, even in its federal form. Parliamentary federalism is possible only where the territorial units are relatively comparable, in terms of demographic size, economic capability and political history. As is the case in post World War II Germany, whose *Länder* were designed by the Allied authorities keeping in mind those criteria.<sup>17</sup> The self-sufficiency of each *Länder* was considered a necessary condition for precluding the emergence of an imposing territorial power, such as Prussia after the formation of the German confederation in the 1870s.<sup>18</sup> However, in compound polities, such as the US or Switzerland, the very existence of a formal constitutional document is the condition for taming the tension between its constitutive units through apolitical means.

<sup>14</sup> See J. H. H. Weiler, *Federalism Without Constitutionalism: Europe's Sonderweg*, in K. Nicolaidis & R. Howse (Eds.), *The Federal Vision. Legitimacy and Levels of Government in the United States and the European Union* 54 (2001); see also J. H. H. Weiler, *The Constitution of Europe* (1999).

<sup>15</sup> See J. H. H. Weiler & U. R. Haltern, *Constitutional or International? The Foundations of the Community Legal Order and the Question of Judicial Kompetenz-Kompetenz*, in A. M. Slaughter, A. Stone Sweet & J. Weiler (Eds.), *The European Courts and National Courts: Doctrine and Jurisprudence* 331 (1998).

<sup>16</sup> It might be of interest to note that in UK after the devolution process initiated by the first Blair government of 1997-2001, many quarters have solicited a move to a formal constitution so as to order the relations between the various units of the Union, in particular the relations between England and Scotland.

<sup>17</sup> See C. Jefferey & P. Savigner (Eds.), *German Federalism Today* (1991).

<sup>18</sup> See D. Ziblatt, *Structuring the State. The Formation of Italy and Germany and the Puzzle of Federalism* (2006).

### C. The EU as a Compound Democracy

If the EU is a constitutionalized polity, what kind of polity is it? It seems plausible to argue that the EU is the object of contestation because it has become much more than a “regulatory system,”<sup>19</sup> a “governance system,”<sup>20</sup> an “economic regional organization”<sup>21</sup> or a “political system.”<sup>22</sup> The EU has become the object of contestation because it came to take more and more decisions that affect deeply the institutions, policies and identities of its member states. Indeed, the EU meets all the criteria for being considered a democratic system.

Interpreting the EU as compounding both member states and Community institutions, it is improper to deny that those who take decisions in the EU have been elected either by citizens in national elections (members of Council of Ministers) or European elections (members of the European Parliament) or selected by politicians elected in national and European elections (members of the European Commission). European decision-makers are compelled to act within a complex system of separation and balancing of powers, as it was gradually defined by the various treaties; and they are subject to the control of both national and European courts (constitutional courts, in the first case, and the ECJ, in the second case). The compound nature of the EU is due not only to the fact that it has aggregated distinct state units *and their* individual citizens, but also to the fact that those state units are demographically *asymmetrical* and historically *differentiated*. Compoundness refers to the structural integration of the member states and the Community’s institutions. The EU is constituted not only by the Brussels’ institutions, but also by those of the member states. One should not consider the former separately from the latter.

Thus, the EU is a democracy, although it is a democracy *of a new kind* when compared to the democracy of the EU member states. It is a compound democracy<sup>23</sup> in which decision-making power is diffused among a plurality of actors within a multiplicity of institutions. Each decision inevitably is the outcome of a drawn-out process of negotiation between those actors and institutions. This diffused decision-making structure is protected by a diffusion of veto positions. Each member state or institutional actor may hinder or postpone an undesired decision, unless it is partially changed in accordance with the request of that member state or institutional actor. Certainly, in many policy fields, the Council of Ministers (which first and foremost represents the member states’ governments) may use (qualified) majority voting in order to decide between rival interests, although the decision finally reached will subsequently have to be re-negotiated with the European Parliament. However, even a (qualified) majority system leaves

<sup>19</sup> See G. Majone, *Dilemmas of European Integration. The Ambiguities and Pitfalls of Integration by Stealth* (2005).

<sup>20</sup> See F. Scharpf, *Governing in Europe. Effective and Democratic?* (1999).

<sup>21</sup> See P. Katzenstein & T. Shiraiishi (Eds.), *A World of Regions: Asia and Europe in the American Imperium* (2005).

<sup>22</sup> See S. Hix, *The Political System of the European Union* (2005).

<sup>23</sup> See S. Fabbrini, *Compound Democracies: Why the United States and Europe Are Becoming Similar* (2007).

many opportunities to a minority coalition of member states or trans-national interests to mobilize its veto resources unless its preferences are somehow taken into consideration by the majority coalition. A system for reaching a decision which implies the involvement of reciprocally separated institutions (such as the Commission, the Council of Ministers, the Parliament and even the Court) is an incentive to the taking into consideration of the interests of each member state (small and medium sized ones included).

Certainly, in the early decades of the undertaking that has produced the EU in its present form, the Council of Ministers functioned as the institution able to ultimately monopolize decision-making power.<sup>24</sup> However, since the 1986 Single European Act (SEA), and the Maastricht Treaty of 1992, which organized the EU into three pillars, the EU has progressively structured itself as a system in which several institutions separately but jointly contribute to numerous public policy decisions. To be sure, such a structure concerns the first pillar more than the other two, which have tried to preserve the nature of an inter-governmental agreement. However, the growing interaction between the various policy fields has called into question the clear distinction of policies and institutions designed in Maastricht. Indeed, a process of cross-pillarization has led also the two 'inter-governmental' pillars to be affected by the logic of the first Community pillar.<sup>25</sup> One only has to think of the interaction between trade policy, which formally falls within the first pillar with the Commission playing a prominent role, and security policy, which formally falls within the second pillar with the Commission that should play a secondary role. Indeed, this interaction has led also security policy to adopt a supra-national more than inter-governmental logic. Or think of the third pillar of justice and home affairs pressured to deal, especially after 11 September 2001, with the challenge of the immigration of terrorist groups into EU member states; a challenge that only closer cooperation between governments under the supervision of the Commission could face effectively.

Consequently, the originally pre-eminent institution in the system (the Council of Ministers) has been forced to acknowledge the considerable influence acquired by the Commission, also in the field of foreign, security and justice policies. It has then been obliged to recognize the co-determination and co-decisional power acquired by the European Parliament since its direct election in 1979, and especially since the SEA and the two fundamental treaties of the 1990s (Maastricht 1992 and Amsterdam 1997). However, the growing influence of these Community institutions (representative of supranational interests) has not reduced the influence of the Council of Ministers and therefore of the European Council (representative of the member states, and therefore of the intergovernmental side of the EU).

The complexity of the compound democracy of the EU is not easy to change. A stringent procedural rule for defining or changing the treaties, i.e. the rule of

<sup>24</sup> See D. Dinan, *Ever Closer Union. An Introduction to European Integration* (2005).

<sup>25</sup> See S. Stetter, *EU Foreign and Interior Policies. Cross-pillar Pillar Politics and the Social Construction of Sovereignty* (2007); See also A. Von Bogdandy, *The European Union as a Supranational Federation: A Conceptual Attempt in the Light of the Amsterdam Treaty*, 6 *Columbia Journal of European Law* 27 (2000).

unanimity, protects the structure of the multiple separation of powers, vertically (between Brussels and the member states) and horizontally (within the latter), whereas this is not the case in the non-compound democracies of the EU member states. In simple democracies, in fact, it is possible to change the rules of the game through a parliamentary majority, although in some countries it needs to be confirmed by a subsequent electoral majority expressed through a popular referendum. In compound democracies instead, any such change has to enjoy a broad basis of consensus. Hence: in the EU *all* the member states' parliaments or electors have to agree on the change; in the US super-majorities need to be reached in order to approve a constitutional amendment (it has to gain the support of 2/3 of the members of the House of Representative and the Senate and, thus, of the legislatures or special conventions of 3/4 of the states), although some important constitutional changes were introduced through rulings of the Supreme Court.<sup>26</sup> In Switzerland any constitutional amendment, whether introduced by popular initiative or in Parliament, in order to be approved needs the double majority of both the national popular vote and a majority of cantonal popular vote.<sup>27</sup> Thus, what distinguishes the EU from both the US and Switzerland is the unanimity rule which pays lip service to the sovereignty of the member states, although that sovereignty has been largely reduced and substantially reconfigured in a supra-national direction. One should observe, however, that the unanimity rule was introduced in the founding treaties of Rome (1957) when the then European Economic Community (EEC) consisted of only six countries. Probably due to the logic of path-dependency, that rule has survived in a EU of 27 member states, making it much more troublesome to periodically adjust the rule of the games to the new realities the polity has to face.

#### D. The EU as a Peace Pact

If one considers that the EU is a *pact* for promoting peace through prosperity among traditionally warring states jealous of their own national identity, then it becomes possible to understand why it came to be organized in such a complex way. All compound democracies, such as the US<sup>28</sup> and Switzerland,<sup>29</sup> are based on a peace pact among previously independent neighbouring states. They are unions of states that sought to domesticate the international relations of their constitutive units, although not all unions of states have become compound democracies.<sup>30</sup> The EU is the outcome of inter-state treaties intended to create a supra-states polity, able to close the long era of European civil wars<sup>31</sup> by fostering

<sup>26</sup> See B. Ackerman, *We the People: Transformations* (1998).

<sup>27</sup> See H. Kriesi & A. H. Trechsel, *The Politics of Switzerland. Continuity and Change in a Consensus-Democracy* (2008).

<sup>28</sup> See D. C. Hendrickson, *Peace Pact. The Lost World of the American Founding* (2003).

<sup>29</sup> See J. Blondel, *Il modello svizzero: un futuro per l'Europa*, 28 *Rivista italiana di scienza politica* 203 (1998).

<sup>30</sup> See M. Forsyth, *Unions of States. The Theory and Practice of Confederation* (1981).

<sup>31</sup> See T. Judt, *Postwar. A History of Europe Since 1945* (2005).

the growth of a common market on a continental scale. Of course, those treaties were imposed not only by dramatic historical events, but also by wise politicians and public officials.<sup>32</sup> Compound democracies are generally the outcome of elite-driven processes of institution-building. Although their purpose was to create the conditions for a new pact among traditional enemies, it is interesting to note that the security side of the pact was controlled by the US (a non-European power acting as the external enforcer) through its leadership in NATO.

Thus, the European (initially, continental) states had to recognize that they had no chance to avoid wars generated by the rivalries their own nationalism produced, but by building a *novus ordo seclorum*. However in Rome 1957, contrary to Philadelphia in 1787,<sup>33</sup> the features and rationale of that new 'international' order were not discussed. Certainly, the founding fathers of the then EEC were aware that the traditional Westphalian system of states, with its balance-of-power logics, was the source of the permanent inter-states insecurity, thus triggering periodical attempts by one or other state to super-impose an imperial order. What we now call the EU is thus the outcome of an attempt to go, *de facto*, beyond the Westphalian solution to inter-states rivalries. In fact, if the inter-governmental side of the EU has stressed the role of the states as the 'masters' of the treaties, the supra-national side has recognized that the 'masters' need to be embedded in a larger institutional context which they cannot control unilaterally. For the first time in European history, the European nation states have tried to build an institutional order with supra-state and not only inter-state features, institutional order through peaceful means (basically through negotiation over common economic issues).

In this sense, the EU constitutes an attempt to transform the international relations of the European nation states into the internal features of a supranational polity. In fact, the peace pact could have not been guaranteed solely by an inter-states (or intergovernmental) agreement (as historical experience had amply shown). The inter-states (or intergovernmental) agreement needed to be protected by supra-states (or Community) features. Without supra-states (or Community) authorities (that is, authorities institutionally separated from the states that had created them in the first place), there was no guarantee that the partners of the inter-states (or intergovernmental) agreement would abide by their own rules. In the EU, Community features were, and are, thus necessary in order to protect the *pact* from the inter-states rivalries and instability. The premise of the peace pact consisted of trans-national cooperation on a growing number of common economic matters.<sup>34</sup> This cooperation has led to the progressive institutionalization of the close network of European Community institutions envisaged by the original treaties – the Council of Ministers, the European Commission, and the European Parliament – but also institutions not originally envisaged, like the European Council. In sum, in order to preclude the possibility of another internecine European war, the EU has come to organize itself in a way which could guarantee,

<sup>32</sup> See C. Parsons, *A Certain Idea of Europe* (2003).

<sup>33</sup> See D. H. Deudney, *The Philadelphia System: Sovereignty, Arms Control, and Balance of Power in the American States-Union, Circa 1787-1861*, 49 *International Organization* 191 (1995).

<sup>34</sup> See L. N. Lindberg, *The Political Dynamics of European Economic Integration* (1963).

at the same time, the recognition of the nation states which constituted it in the first place and their transformation into member states of a larger polity as a consequence of EU institutional development.

### E. The Logic of a Compound Democracy

In order to function properly, a compound democracy has to be an anti-hierarchical institutional order in which separated institutions share decision-making power (or *co-decide*, to use the EU lingo). In an anti-hierarchical order the formation of a coherent political or territorial majority across all the separated institutions is difficult, unless the polity has to deal with life-or-death-issues which always tend to render political divisions simple and homogeneous. Compound democracies tend to discourage the growth of hegemonic majorities,<sup>35</sup> although they allow for the nesting of powerful minorities within specific institutions. Of course, reality has often differed from theory, showing that in specific areas (i.e., foreign policy in the US) one institution (the presidency) has come to be pre-eminent *vis-à-vis* other institutions (Congress). However, it has been political pre-eminence and not institutional predominance. Indeed, the unilateral decision-making style typical of two-parties parliamentary systems with strong Cabinets and *primus super pares* prime ministers is structurally impracticable in these democracies. Neither the president of the Commission, nor the six-months rotating president of the European Council could impose their will on the other actors participating in the decision-making process.

It has been the institutionalization of the structure of multiple separations of powers (between the Brussels' institutions and between them and the institutions of the member states) which has strengthened the compound nature of the EU. It is interesting to note that in separation-of-power systems, the relation between the separated institutions has a positive-sum game character. In the case of the EU, it has been possible to increase the power of one institution (such as the Parliament) without decreasing the power of the other institutions (such as the Council or the Commission). Exactly the opposite has happened in fusion-of-power systems, where the increasing power of the government/cabinet has brought about a dramatic reduction of the power of the parliament, following a zero-sum logic. In Brussels decisions are taken and values are authoritatively allocated, but they are the outcome of a process of negotiation and deliberation taking place within the loose borders of a system of separated institutions. The EU is functioning *without a government acting as a single institution*; yet it is able to take authoritative decisions. The institutionalization of a structure of multiple separations of powers has gradually nested a powerful anti-majoritarian logic within the EU. If that was not sufficient, the unanimity procedure required for the change of the basic rules of the polity (for adopting or amending the treaties) precludes the formation of a constitutional majority able to impose its views on the minority.

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<sup>35</sup> See V. Ostrom, *The Political Theory of a Compound Republic. Designing the American Experiment* (1987).

Thus, the inevitable contrast of interests and views among its member states and citizens cannot be resolved through the will of the incumbent parliamentary majority (as happens in the EU member states), i.e. through political means. The anti-hierarchical nature of the institutional system is a necessary condition for aggregating asymmetrical states, but is also an invitation to struggle for decision-making pre-eminence. The compound democracy of the EU is structured mainly around cleavages between member states or clusters of member states (territorial sections),<sup>36</sup> rather than among economic classes (as are the majoritarian democracies) or ethnic-linguistic-religious communities (as are the consensual democracies).<sup>37</sup> Likewise the political development of the US has been based on sectional cleavages more than on ideological (or left-vs-right) cleavages.<sup>38</sup> The same economic cleavages have been recomposed within the competition between regions.<sup>39</sup>

With the progressive deepening of European integration (i.e. the proliferation of public policies decided in Brussels), the constitutionalization of the EU has grown increasingly more political, and increasingly less economic,<sup>40</sup> and thus more contentious. The institutionalization of the EU has ended up bringing in through the window the very issue which was not allowed to enter through the door in Rome in 1957 and in Paris in 1952, namely the issue of what the EU should be. In fact, since the 1990s, with the end of the Cold War and the prospect of the political reunification of the continent, the dispute on the constitutional identity of the EU came to the fore. The reference to a Charter of Rights (though not its binding recognition) in the 2000 Treaty of Nice has further stoked the debate on the constitutional nature of the EU. The dispute on the constitutional nature of the EU thus made it necessary to hold a Convention in Brussels.<sup>41</sup> The outcome of the Brussels Convention (2002-2003) has opened a formal constitutional process within the EU.<sup>42</sup> Such a constitutional process has manifested deep divisions concerning the organization that the EU should assume, the strategies that should be pursued to organize the power of the Community actors participating in

<sup>36</sup> See S. Bartolini, *Restructuring Europe: Centre Formation, System Building, and Political Structuring Between the Nation State and the European Union* (2005).

<sup>37</sup> See A. Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries* (1999).

<sup>38</sup> See R. F. Benschel, *Sectionalism and American Political Development: 1880-1980* (1987).

<sup>39</sup> See A. M. Sbragia, *Debt Wish. Entrepreneurial Cities, U.S. Federalism and Economic Development* (1996).

<sup>40</sup> See M. P. Maduro, *Contrapunctual Law: Europe's Constitutional Pluralism in Action?*, in N. Walker (Ed.), *Sovereignty in Transition* 502 (2003); see also N. Walker, *The Idea of Constitutional Pluralism* (2002).

<sup>41</sup> See P. Norman, *The Accidental Constitution. The Story of the European Convention* (2003); see also B. De Witte (Ed.), *Ten Reflections on the Constitutional Treaty for Europe* (2003).

<sup>42</sup> See N. Walker, *The EU as a Constitutional Project*, 19 *The Federal Trust*, online paper (2004). See also E. O. Eriksen, J. E. Fossum & A. J. Menéndez (Eds.), *Developing a Constitution for Europe* (2004); see also B. De Witte, *The Closest Thing to a Constitutional Conversation in Europe: The Semi-Permanent Treaty Revision Process*, in P. Beaumont, C. Lyons & N. Walker (Eds.), *Convergence and Divergence in European Public Law* 39 (2002).

authoritative decisions, and the guarantees that should be introduced to promote individual rights and to protect social ones.<sup>43</sup>

The structural cleavages which were dormant during the 'passive consensus' of the long period of the material constitutionalization of the EU have emerged especially since the debate on the CT (which, in some way, was the closest approximation to a 'formal' constitution ever elaborated), and thus have accompanied the tortuous journey which has seen the transformation of the CT into a new treaty, the Lisbon Treaty, in its turn contested by the Irish voters.

## **F. Asymmetrically-Based Cleavage: Size Matters**

Certainly, few of the cleavages or divisions that emerged during the constitutional debate of the 2000s were of a temporary nature. The position of some member states on specific issues has changed in relation to the government of the day. However, at least three types of cleavages have proven to be of a permanent character, reflecting stable differences of views and interests among member states, due to their different sizes, histories and political values. Each of these cleavages seem to have both centripetal and centrifugal effects, that is their development might be either compatible or incompatible with the logic of a compound democracy.

The first cleavage is the structural one between large and medium/small member states. This conflict is an effect of the asymmetry between member states within the EU. It has emerged regularly during the development of the EU, which started as a pact between two large countries (France and Germany) mediated by a medium size country (Italy) and three small countries (the so called group of Benelux). However, since the 1990s, as an effect of various enlargements, this division has gained relevance. One has only to think of the Nice Treaty of 2000, when medium/sized member states (such as Spain) were able to obtain very favourable conditions in the weighing of the votes within the Council of Ministers (thus benefiting also the then future candidate state of equivalent size, such as Poland). This advantage provoked a negative reaction in large states such as France and (especially) Germany, that indeed (also on the basis of other considerations) pushed immediately for a revision of the Nice Treaty in the European Council meeting held in Laeken on 15 December 2001. The Laeken Declaration called for a convention on the constitutional future of Europe, a convention subsequently held in Brussels in 2002-2003. Inevitably, this division re-emerged during the works of that convention, with the small/medium member states asking for an over-representation in the voting within the Council of Ministers and the larger member states asking for a representation in the European Parliament proportional to the population.

The compromise found in the Rome European Council of October 2004, and introduced in the Lisbon Treaty, that a decision of the Council of Ministers will be effective if supported by a majority of 55 per cent of the member states representing at least 65 per cent of the population, was subsequently challenged

<sup>43</sup> See A. M. Sbragia *et al.*, *Symposium: The EU and Its 'Constitution*, 39 PS: Political Science and Politics 237 (2006).

by the Polish government at the Berlin European Council of June 2007. In the Lisbon European Council, which formally agreed on the new or reform treaty, the Polish government successfully imposed the deferral of the introduction of this rule to November 2014 (with an extra transition period until March 2017, during which a member state can ask for a qualified majority on a specific issue if considered of national importance). This division also emerged on the issue of the Commission's composition during and after the Brussels Convention.<sup>44</sup> The small/medium member states requested and obtained a number of commissioners equivalent to the number of the member states (that is one commissioner for each member state), whereas the large member states supported the project of a down sizing of the Commission (setting the number of the commissioners to 2/3 of the member states). The compromise reached has settled that the number of Commissioners would be reduced, in the sense that only two out of three member-states would have the right to representation (on a rotating basis). Again, however, the introduction of this reform has been postponed to 2014.

This cleavage is inevitable in a union of (asymmetrical) states. It represents a clash between the legitimate interests of both small/medium and large member states. If properly represented, and adopting the necessary and pragmatic compromises, it may produce a centripetal pressure within the EU. Indeed, in order to favour such centripetal pressure, the US constitution makers meeting at Philadelphia were prone to introduce those institutional devices which, although they were (and are) at odds with democratic criteria,<sup>45</sup> could keep such division of interests under control. One only has to think of the compromise of assigning two senators to each state regardless of its demographic size and of electing the President through electoral colleges of states which over-represent the small ones.<sup>46</sup> Certainly, in the case of the EU, the contrast between small/medium and large member states has been made more complex by its economic implications. In general the large states (such as Germany, France and the UK) have been more developed and richer than the small ones. However, through the structural fund policy, introduced for compensating the economically weak states for the costs they have to pay for operating within a single market, this contrast has been tamed by a significant redistribution of resources from the large and rich member states to the small and poor ones. Indeed, this policy was also important for attracting the small/medium size states of Eastern and Southern Europe to the EU.

However, this division has also spawned centrifugal forces. Some of the large states have pursued clearly hegemonic strategies. For example, in France, important sections of the political elites have interpreted the EU as a sort of

<sup>44</sup> See P. Magnette & K. Nicolaidis, *Coping with the Lilliput Syndrom: Large vs. Small Member States in the European Convention*, 14 *Politique Européenne* 1 (2004).

<sup>45</sup> See R. A. Dahl, *How Democratic Is the American Constitution?* (2001).

<sup>46</sup> The American President is indirectly elected by the so called presidential electors who constitute the Electoral College of each state. The Electoral College of each state is composed of a number of ad hoc presidential electors equal to the number of representatives of that state in the House of Representatives plus the two senators each state has in the Senate. In this way, thanks to the Senate clause, the small states have a number of presidential electors superior to what they would have according to the criteria of representation proportional to the population.

Greater France. To them, the process of integration could present an opportunity for promoting the French role on a larger scale. At the same time, some of the small states have manifested an opposition to the integration process that was so persistent that it could not only be explained by the fear of being overwhelmed by the large states in specific decisions. For example, Denmark, the Czech Republic and thus Ireland in the 2008 referendum have advanced reiterated claims for preserving the national sovereignty of the 'small native land' which is at odds with the requirements of a supranational union of states.

### G. Historically-Based Cleavage: Identity Matters

This brings us to the second structural division, which has its origin in the traditional one between the countries of western continental Europe and the countries of northern insular Europe. This cleavage has for years accompanied the process of European integration, in particular since 1973 when the UK, Denmark and Ireland entered the EU.<sup>47</sup> It is a division which reflects the different historical experiences of the 'islands' and the 'continent' in the formation of the nation state and its international extensions. Indeed, since its entrance into the EU, the UK has come to head a coalition of EU member states that view integration primarily as a process of building a common market. At issue for these member states is the formation of a market regime, not of a political regime. Indeed, these countries have regarded the deepening of the integration process as a threat to their national sovereignty to be countered by pressing for further enlargement.<sup>48</sup> In any case, not only is the EU, since the 1960s, more than an economic regional organization (such as the ASEAN, the APEC, the MERCOSUR or the NAFTA), but it is interesting to note that the UK has also been one of the member states more respectful of EU regulations and directives.

Nevertheless, in these countries, the defence of sovereignty springs from the distinct historical phenomenon of democratic nationalism: it is nationalism which has enabled them (especially the UK) to preserve democracy.<sup>49</sup> The UK, Ireland, Denmark and Sweden have obtained regular opt-outs from parts of the treaties or from recognizing the jurisdiction of the EU concerning specific social and economic rights. In particular, in exchange for signing the Lisbon Treaty, the UK government has obtained the possibility to opt-out from adopting even the Charter of Fundamental Rights and together with the Irish government it has also opted out from adopting the article on qualified majority voting in the sector of Police and Judicial Co-operation in criminal matters. That notwithstanding, it is evident that these concessions have not reduced these countries' fears of seeing their national prerogatives challenged by Brussels' institutions and officials.

<sup>47</sup> See M. Gilbert, *Surpassing Realism: The Politics of European Integration Since 1945* (2003).

<sup>48</sup> See A. Geddes, *The European Union and British Politics* (2004).

<sup>49</sup> See N. D. MacCormick, *Liberalism, Nationalism and Post-Sovereign State*, in R. Bellamy & D. Castiglione (Eds.), *Constitutionalism in Transformation: European and Theoretical Perspective* 141 (1996).

This group of so-called traditional Euro-skeptics was joined by some new East European member states, even before the enlargements of the 2000s. In particular, the nationalistic governments of some new member states of the EU (such as the Polish government of the period 2005-2007 and the Czech government that emerged from the parliamentary elections of 2007) have been engaged in defending their regained national sovereignty after almost half a century of enforced Soviet domination. Also for these member states, the EU has to be (or it has to return to being) mainly a common market regime, through which they can remedy their economic backwardness without constraints on their regained political sovereignty. However, significant differences have emerged within this group of member states. Some of them, in fact, like the UK, accept a European regulatory framework, while others, such as the Czech Republic, seem to distrust even this. One might argue that the UK holds a confederal position which recognizes the importance, of course in the first pillar of the common market, of the Community institutions and rules (and especially of the *acquis communautaire*) for promoting a single market. In the case of the Czech Republic, one might argue that the position held by the incumbent President of the Republic seems more coherent with a customs union view of the EU. Indeed, in some of the new East European states, the spread of Community rules is sometimes perceived as an imperial policy pursued by the West.<sup>50</sup>

The other side of the division has been represented by the large majority of European continental member states. Indeed, their historical experience was very different from that of the 'islands'. In the case of many continental states, nationalism was historically the force which erased democracy, owing to a set of cultural and ecological factors. The development of the democratic state has encountered much more unfavourable conditions in the land-bound European countries than it has in the sea-bound ones.<sup>51</sup> In the former, nationalism has been frequently anti-democratic,<sup>52</sup> bending to (or sustaining) the centralist ambitions of dominant authoritarian groups. Inevitably, for the EU member states that have inherited this historical experience and memory, integration has represented the antidote to the virus of authoritarian nationalism, while those that have inherited the "island" experience view integration as a threat to their democratic identity. For this reason, many Western and Eastern countries of continental Europe have tended to interpret integration as a political rather than economic process.<sup>53</sup> After all, this is the core of countries which needed to sign the peace pact for closing the long era of European hot and cold wars.

However, also in these countries differences have thrived. For example, France has displayed rather ambivalent sentiments towards a politically integrated Europe.<sup>54</sup> It was the formidable drive of French politicians and officials (from Robert Schuman and Jean Monnet in the 1950s to Francois Mitterand and Jacques Delors in the 1980s) which has made the initiation and the progress of the

<sup>50</sup> See J. Zielonka, *Europe as Empire. The Nature of the Enlarged European Union* (2006).

<sup>51</sup> See C. Tilly (Ed.), *The Formation of National States in Western Europe* (1975).

<sup>52</sup> See A. D. Smith, *National Identity* (1991).

<sup>53</sup> See G. Hendricks & A. Morgan, *The Franco-German Axis in European Integration* (2001).

<sup>54</sup> See A. Guyomarch, H. Machin & E. Ritchie, *France in the European Union* (1998).

integration of the continent possible. But it was also the formidable opposition of French leaders and public opinion that has regularly jeopardized the very same project of political integration (from the parliamentary rejection of the European Defence Community in 1954 to the 'empty chair' of Charles De Gaulle in the 1960s and the 'difficult referendum' which barely approved the Maastricht Treaty in 1992, to the fatal blow to the CT in the referendum of 2005). Such ambivalence probably reflects the peculiar development of nationalism in France, which was the condition for promoting 'the rights of the man and the citizen', but also a constraint on the liberal evolution of the country.

The division between sea-bound and land-bound Europe is also an effect of the competition between two traditional European powers, the UK and France. After all, they are the only two European countries with strong democratic credentials, with a proper military strength, with a tradition of international power (which for a long time assumed the form of colonialism and imperialism), with a permanent seat in the United Nations Security Council and with a ruling elite aware of the game to be played in global affairs. Their competition has also been based on two different interpretations of Europe's role in the Atlantic alliance. Since the end of the World War II, the UK has traditionally been in favour of a Churchillian perspective, i.e. of a Europe firmly allied with the US, with the UK playing the crucial role of bridging the two shores of the Atlantic, whereas France has rather pursued a Gaullist perspective, based on the idea that Europe should be independent from, if not competitive with, the US.<sup>55</sup>

It is plausible to argue that nationalism in Europe has played (and continues to play) a dividing role similar to the issue of slavery in the US. As with slavery, the defence of national sovereignty is incompatible with a supra-national compound democracy. The contrast between different national identities might be channelled in a centripetal direction if the elites of the member states, and their public, agree on the need to operate in a larger institutional framework compatible with multiple identities. However, if national sentiments are allowed to roam unleashed, it is the very project of European integration which could be called into question. If national elites use supranational institutions and officials as scapegoats, then it is inevitable that national sentiments against Brussels will tend to emerge. In sum, such a cleavage might develop in a very centrifugal direction, unless national and supranational elites will be able to construct a convincing discourse on the necessity and features of a new European democracy.<sup>56</sup>

## **H. Politically-Based Cleavage: Democracy Matters**

These structural cleavages have been overlapped by a cross-cutting territorial division of a political kind. In particular, there has arisen a contrast between those who advocate a more federal Europe and those who maintain instead that the

<sup>55</sup> See T. Garton Ash, *Free World. America, Europe, and the Surprising Future of the West* (2004).

<sup>56</sup> See V. A. Schmidt, *Democracy in Europe. The EU and National Politics* (2006).

EU has gone too far in its federalization process.<sup>57</sup> The latter position emerged dramatically in the Irish ‘No’ against the Lisbon Treaty, which was criticized by many in the name of homeland democracy and its cultural and religious identity. But even in the French and Dutch ‘No’ against the CT there was the fear that the process of federalization was challenging the social cohesion of the two countries through the opening of the borders and the arrival of waves of immigrants from Eastern and Southern new member states. Nonetheless, there is no serious elaboration of this position comparable to the Anti-Federalist papers of the post-Philadelphia convention’s debate. The political criticism of a EU too advanced in its supranational development has been raised by fringe groups in European politics, such as the National Front in France or the Northern League in Italy. The criticism against the so-called ‘F’-word (or Federal Europe) continues to be very common in the British press. Certainly, behind this position there is a popular uneasiness with some of the crudest side effects of integration, such as illegal immigration. However, unless one thinks to create a fortress Europe or to go back to the before World War II national barriers, it seems very unlikely to deal effectively with such side effects without stronger cooperation among EU member states. In any case, here reside, probably, the more centrifugal forces of the European debate.

The other side of the cleavage is represented by those groups advocating a closer union in order to deal with the challenges of globalization and democratization. Only a fully ‘Federal Europe’ can play an important role in the global system, effectively negotiating better economic and political conditions with the other global powers, on behalf of its member states. In particular, only an integrated Europe may protect the social model which characterizes many of its member states. On its own, each of the EU member states, including the larger ones, has no chance of protecting its own way of life. It is from within this rank of ‘Federal Europe’ supporters that traditionally the criticism on the democratic deficit of the EU has been voiced. Indeed, this criticism has been levelled for a long time against the EU by the more radical sections of public opinion.<sup>58</sup> The core of the criticism is unequivocal: “The fact is that Europeans cannot hold their politicians accountable for what the EU does.”<sup>59</sup> The transformation of the EU in a parliamentary federation is thus seen as the magic formula for solving its democratic deficit.

Of course, it is true that a compound democracy has two important negative side-effects. It makes the decision-making process extremely cumbersome and it obfuscates responsibility. At the end of the day, it is impossible to answer the question of who is responsible for what in the EU. Why so? Because the diffusion of responsibility and the slowness of the decision-making process are conditions for keeping together states of different size and histories and with (often) conflicting expectations and interests. However, because many critics of the EU democratic deficit do not seem to be aware of the systemic imperatives

<sup>57</sup> See P. Taggart, *The Domestic Politics of the 2005 French and Dutch Referendums and Their Challenge for the Study of European Integration*, 44 *Journal of Common Market Studies* 7 (2006).

<sup>58</sup> See D. Marquand, *A Parliament for Europe* (1979).

<sup>59</sup> See K. Nicolaidis, *We the Peoples of Europe ...*, 83 *Foreign Affairs* 97, at 98 (2004).

of a compound democracy, they have tended to see the EU through the eyes of national (parliamentary and federal) democracies. But the EU cannot become a parliamentary-federal democracy, unless both its member states are 're-designed' in order to make them of comparable size and their histories are obliterated within a single narrative framework. Whereas in the EU member states the parliament is the only one institution expressing popular sovereignty, in the EU sovereignty is fragmented, pooled and shared by several separated institutions. Indeed, it is this structural difference between the EU and the parliamentary systems of its member states which has brought many to talk of an EU democratic deficit.

The EU does not have a political decision-making body (like the cabinet in parliamentary systems) which voters can judge politically,<sup>60</sup> because it cannot have one. Unions of states cannot support centralization of power, but only separation of powers, both vertically and horizontally, as is shown by the experience of both the US and Switzerland. Moreover, in a union of states the predominant line of division is between states rather than between parties (i.e. between left-vs-right as in the EU member states). Indeed, in the EU, there are convergences among national parties belonging to different European political groupings and divergences within these various political groupings which cannot be related to the divisions within national party systems. The left-vs-right division may be working within the European Parliament but it cannot regulate the divisions also within the Council of Ministers or the Commission. In particular in the Council, inter-states cleavages have been more relevant than the traditional political division proper of EU member states. However, also this political division has manifested a singular incongruence. For instance, in the French referendum on the CT of 2005, supporters of a 'Federal Europe' voted 'No' because the treaty was not sufficiently democratic, thus joining hands with the opposite critics of the CT who considered it to be too much advanced in the federal direction.

In conclusion, these various divisions are only indicators of the constitutional divisions existing within the EU. In fact, in the Northern 'islands' as well in the Eastern member states there are positions in favour of greater political integration, just as in the member states of Western continental Europe there are influential groups pushing only for economic integration. Nevertheless, these cleavages express relatively stable divisions within the EU on its constitutional future and each of them might generate either centripetal or centrifugal effects.

## I. Conclusion

The institutionalization of the EU as a compound democracy where more and more decisions are taken at the supranational level has triggered, since the 1990s, a debate on the constitutional nature of the polity. What was swept under the carpet in Rome in 1957, has come to the surface after decades of passive consensus on the integration process. As a result, divisions on what the EU should be and how it should be organized have finally emerged. Here three kinds of divisions were

<sup>60</sup> See B. Kohler-Koch, "Framing". *The Bottleneck of Constructing Legitimate Institutions*, 7 *Journal of European Public Policy* 513 (2000).

discussed, the first motivated by the different size of the EU member states, the second by their different historical relation with nationalism, and the third by different expectations concerning the EU. Each of them may have both centripetal and centrifugal implications, in the sense that each of them might turn out to be compatible or incompatible with the logic of a compound democracy. Other compound democracies have experienced a similar ambivalence. In the case of the US it was a bloody Civil War which resolved that ambivalence. In particular, after that war, the constitution came to be recognized as the basis for managing the subsequent conflicts. Once settled the question of the preservation of an indivisible union, the US constitution has provided the normative (and semantic) basis for representing the different interests and views of its member states and citizens. Of course, the ambivalence on the nature of the EU cannot be resolved through force. However, in particular the Irish 'No' seems to indicate that the ambiguities surrounding the EU have to be faced, unless the EU is to remain in a permanent condition of stalemate. A stalemate motivated by the fact that it is impossible to return to the pre-1960s EEC and it is difficult to move in the direction of a formally constitutionalized supranational democracy.

In order to resolve the stalemate, two options seem available. The first one concerns the possibility that if the 'No' to the Lisbon Treaty will remain confined to Ireland, the rigid rule of unanimity might be substituted *de facto* with the more pragmatic one of the quasi-unanimity for approving it (thus waiting for Ireland to find a way for going back on board). In this case, the EU will remain the only organization in town, although the pragmatism used for the implementation of the Lisbon Treaty would be checked by an extension of the principle of opting-out for those member states unwilling to participate in specific policies. One might argue that this option would make the EU more a *compound polity* than a compound democracy. The second option, on the contrary, would move in the direction of recognizing the existence of 'two Europes'. If the 'No' to the Lisbon Treaty will be shared by other countries, and considering that some of the 'Yes' were delivered *oborto collo* by the national legislature, then the EU would have to face the structural nature of its internal cleavages. A group of member states might use the Nice Treaty clause on reinforced cooperation to moving in the direction of a political integration, to the point of creating a formal constitutional entity. In this case, the EU will be the name of the economic organization of the common market of an entire continent (the EU as compound polity), whereas (just as an example) a Union of European States might be created as the political organization of those EU member states willing to build a formally constitutionalized regime (the EU as a *compound democracy*). The two options are not incompatible, given that the first has a short-term and the second a long-term perspective. However, both would encounter serious difficulties in their implementation. The short-term project because it runs against the dictate of the Lisbon Treaty, which still requires the respect of the unanimity rule for being implemented. The long-term project because of the formidable technical and political constraints it would face in the process of extracting a new organization from the old EU.

In conclusion, after the Irish 'No' to the Lisbon Treaty and the French and Dutch 'No' to the CT, the discussion on the *finalité* of the project of European

integration can no longer be evaded.<sup>61</sup> However, that discussion might be more fruitful if based on the recognition of what the EU is and the implications of the constitutional divisions on what the EU should be.

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<sup>61</sup> See N. Walker, *After Finalité? The Future of the European Constitutional Idea* (2007).

# The Lisbon Treaty and the Emergence of Third Generation Regional Integration

Luk Van Langenhove and Daniele Marchesi\*

## Abstract

The purpose of this article is to assess the development of the EU as an international actor in foreign and security policy and to analyze the possible impact of the innovations introduced by the 2007 Lisbon Treaty. The article adopts the conceptual framework of 'three-generational' regionalism, which distinguishes regional organizations according to the area of governance that they cover. While it becomes increasingly active towards the outside world, the EU is conceptualized as a 'third generation' regional organisation, engaging in relationships with other states, regions and international organizations. The question is then, whether and to what extent, the Lisbon Treaty is likely to strengthen the EU as a global actor. In the first part, the study looks at the typology of three-generational regionalism and at how the EU fits into this scheme. The second part focuses on the challenges for the EU's foreign and security policy and looks at the implications of the Lisbon Treaty in this field. In particular, the paper assesses the case of the EU's role in the United Nations. It is argued that the Lisbon Treaty could constitute an institutional opportunity for the EU to become more coherent and visible player on the international stage. This opportunity, however, is limited by the ambiguities in the EU member states' visions on the EU and by the persisting divide between intergovernmental and supranational strategies. These ambiguities, in turn, preserve the originality of the EU as a new type of global actor, different from a state.

## A. Introduction

European integration can be regarded as the most advanced and successful regional integration experience accomplished so far.<sup>1</sup> Among the numerous integration schemes that have mushroomed in Europe since the end of World War II, the European Union (EU) has emerged as a unique process and as a prototype of what can be defined as a 'third-generation' of regionalism.<sup>2</sup> In this view, the EU has developed beyond a mainly economic integration process (first generation regionalism), to a deeply institutionalized and politicized union

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<sup>1</sup> R. Baldwin & P. Thornton, *Multilateralising Regionalism* (2008).

<sup>2</sup> L. Van Langenhove & A. C. Costea, *The EU as a Global Actor and the Emergence of 'Third Generation' Regionalism*, in P. Foradori, P. Rosa & R. Scartezzini (Eds), *Managing a Multilevel Foreign Policy – the EU in International Affairs* (2007).

with many competences in an all-encompassing spectrum of internal policies (second generation or 'new regionalism'). In this process of widening/deepening of policies, structures and membership, the EU has become a global actor present in the international forums where once only states operated (third generation).

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

The article tackles this issue in two parts. The first part will look at the typology of three-generational regionalism and at how the EU fits into this scheme. The second part focuses on the challenges for the EU's foreign policy and looks at the implications of the Lisbon Treaty for the Common Foreign and Security Policy (CFSP). In particular, the paper assesses the case of the EU's role in the United Nations. As a regional actor the presence of the EU in the temple of national sovereignty should reveal the extent to which it is developing as a 'third-generation' regional organization.

By doing so, the article hopes also to shed further light on the interrelation and possible synergies between regionalism studies and European studies in order to understand the EU as an international actor. It will be argued that the Lisbon Treaty could provide an institutional opportunity for the EU to develop into a more coherent and visible player on the international stage. This opportunity, however, is limited by the UN structure itself – which is still impervious to regional organizations – and by the ambiguities in the EU member states' strategies and motivations. These ambiguities, in turn, preserve the originality of the EU as a new type of global actor, different from a state.

## **B. Three-generation Regionalism and the European Union**

The study of the phenomenon of regionalism has been intrinsically linked to the study of the process of European integration following World War II. As a regional scheme, the European Communities and then the European Union have provided an advanced example of institutionalized regionalism. At the same time,

European integration as a project has been perceived as a clear political success in terms of achieving prosperity and stability in a given territory where war and violence had once been the rule. This led to the partial identification of the process of regionalism with the European experience in two ways. On the one hand, it was implied that the global process of regionalism had to take Europe as a model. On the other hand, regionalism in itself came to be considered a political project, and regional integration around the world was viewed as a desirable outcome to complement and support global governance.<sup>3</sup>

This view has now been widely criticized both academically and politically. Academically, as Hurrell puts it, “the most important ‘lesson’ of Europe is that there are so few good grounds for believing that Europe is the future of other regions.”<sup>4</sup> In other words, the specific circumstances and factors that characterized the emergence of the European integration experience can hardly be found in other parts of the world.<sup>5</sup> And in fact every regionalism is somewhat different from another, ranging from highly institutionalized schemes such as the EU, to instances of soft regionalism, as seen, for example in South East Asia with ASEAN. Politically, regionalism has been criticized as a Eurocentric project, which risks undermining the wider multilateral system, in particular concerning trade liberalization and the WTO. What is clear is that regionalism is becoming more and more a new and additional layer in the governance of globalization both at the micro, intra-state level, and at the macro, inter-state level.<sup>6</sup>

## I. Generations of Regionalism

In an attempt to clarify the problem of comparing the different existing forms of regional integration, the typology of the three-generations of regional integration can serve as a useful tool to go beyond the traditional chronological and qualitative dichotomy between old and new regionalism.<sup>7</sup>

The argument typifies regional schemes in three main ideal-typical cohorts or generations, according to the following aspects of state governance around which they are primarily built: (i) the operation of a state territory as a ‘single’ market with a related economic policy; (ii) the governance of public goods and the control over resources and power and (iii) the external sovereignty that allows them to be an ‘actor’ in international relations. Each cohort is driven by

<sup>3</sup> For a discussion see L. Fawcett, *Regionalism from an Historical Perspective*, in M. Farrell, B. Hettne & L. Van Langenhove (Eds.), *Global Politics of Regionalism: Theory and Practice* (2005).

<sup>4</sup> A. Hurrell, *The Regional Dimension in International Relations Theory*, in M. Farrell, B. Hettne & L. Van Langenhove (Eds.), *Global Politics of Regionalism: Theory and Practice* 40 (2005). See also K. E. Smith *European Union Foreign Policy in a Changing World* 72 (2003).

<sup>5</sup> Smith lists among these circumstances: the functionalist (economy first) strategy, the democratic political systems of the participating states, the strong security concerns (Germany, USSR), the benevolence of the US and the security umbrella offered by NATO, *id.*, at 71.

<sup>6</sup> L. Van Langenhove, *Globalization and the Rise of Neo-Westphalian World Order of States and Regions*, in *Proceedings International Conference ‘Globalization Challenges and New Trends of Governance’*, Centre of European Studies, University of Economics, Prague, 20 November 2007.

<sup>7</sup> Van Langenhove & Costea, *supra* note 2, at 64.

a specific objective or *telos* – the ideal end-point of integration in that aspect of governance – and materializes into a concrete development process that will not necessarily reach its culmination. Importantly, the three generations coexist and influence each other, often within the same organization. Each regional scheme and organization follows its own integration trajectory and can remain insulated within one dimension of governance or, alternatively, spill-over and cumulate the characteristics from the other generations/cohorts of regional integration.

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

More specifically, the first generation of regional integration is characterized by mainly economic integration leading to free trade agreements, custom unions, or common markets. These schemes are characterized mainly by ‘negative integration’ – a process of removing the barriers to the free flow of economic factors – and by the widening of the membership included in the process. Actual transfer or pooling of sovereignty, though, can occur, as in the case of custom unions, where a common external tariff is put in place, as well as in the case of monetary unions. The *telos* of first generation integration is thus the creation of a new single market that comprises the old national markets of each of the participating states.<sup>8</sup>

Second-generation regionalism describes regional schemes where the focus of cooperation is not purely economic but concerns mainly the political sphere, including regulation in non-economic areas, redistribution of resources or providing of security. Regional schemes of this second generation proliferated, particularly following the end of the Cold War, in a complex process to which the all-encompassing notion of ‘new regionalism’ was then attributed.

The *telos* of ‘second-generation’ schemes is to establish a common approach towards what is usually referred to as ‘internal affairs’: this includes infrastructure, energy and environment policy, as well as security policy, social policy, health, employment, research, etc. Here also the level of integration can vary from superficial political dialogue and coordination to actual binding regulation and common policies. Further, the process of policy expansion can be accompanied by considerable institutionalization and a process of democratization of the supranational level, through the creation of parliamentary assemblies, the concentration of interest representation and other instances of input legitimacy and participation.

In the specific EU case, political (second-generation) cooperation and ‘positive integration’ emerged as a consequence – for instance through functional ‘spill over’ – of the previous negative integration (first-generation), which was failing to achieve a functioning common market. As a broader concept, however,

<sup>8</sup> B. Balassa The Theory of Economic Integration (1961).

second-generation regionalism can also be an original project not stemming from an economic integration dynamic or anticipating economic integration. Finally, second-generation regionalism is conceptually introspective, focussing on managing problems that are internal to the regional area. This is not to say that this regionalism is cut off from the outside world. On the contrary, both first and second-generation regionalisms are in many ways responses to the wider globalization process and to the problems and challenges that derive from it. Furthermore, these types of regionalisms have a presence and impact on the wider international context.<sup>9</sup> On the one hand, they can be seen as favouring or hindering global multilateralism; on the other hand, by their mere existence they contribute, to a general process of ‘contagion’<sup>10</sup> of regionalism around the world. Finally, their full accomplishment as internal dynamics creates pressure for external action (e.g. where a custom union calls for a common trade policy or where a strong common policy on environment has to be promoted globally).

As the first two cohorts of regional schemes does not exist in a geopolitical vacuum, external action towards the outside world is the most specific characteristic of ‘Third-generation’ regionalism. In this case, the *tèlos* is a single, unified, foreign policy, together with the ambition to operate as one actor on the international scene and thus also outside its own territory. This implies the willingness and capacity to deal at the regional level of governance with ‘out of area’ challenges.<sup>11</sup> Regional organizations, then, develop a strong sense of identity (cohesiveness) and assume an ever more confident external profile (actorness) in interacting with third states, with other regions, and within multilateral institutions. A strong institutionalization distinguishes ‘third-generation’ regional integration from a mere alliance of countries or a ‘coalition of the willing’, which are both schemes that can be rather active externally. The organization tends to become autonomous or at least distinguishable from its members and develops its own identity, interests and institutions across a wide range of issues, not circumscribed within a single policy area (comprehensiveness).

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

<sup>9</sup> For an influential characterization of EU actorness see C. Bretherton & J. Vogler, *The European Union as a Global Actor* (2006).

<sup>10</sup> Fawcett, *supra* note 3, at 21.

<sup>11</sup> Van Langenhove & Costea, *supra* note 2, at 78.

in the political and security domain). The next pages will focus specifically on the third generation dimension and on how the conceptual approach can be applied to the study of the EU and of the potential impact of the Lisbon Treaty.

## II. Third-generation Regionalism as a Political Objective

As compared with the first two cohorts/generations of regionalism, the concept is more normatively political than a mere description of reality.<sup>12</sup> The European Union is a developed prototype in this sense: no other regional scheme has the same degree of comprehensiveness, cohesiveness, capacity and autonomy. No other organization, with the exclusion of NATO, has the same ambition to deploy 'out of area' operations. However, the EU is by no means unique in this trend towards an enhanced role of regional groups in global governance.<sup>13</sup> Van Langenhove and Costea specify three key features that are specific to the third-generation organization: first, the institutional environment providing the capacity to have an external action; second, the political willingness to be proactive in engaging in bilateral relations with states and, especially, in inter-regionalism with other regions, and; third, the engagement within the multilateral system, particularly the UN. The first characteristic is related to the structure of a third-generation organization and will be analysed further below. The second two features, by contrast, relate to the goals of such organizations, which tend to pursue inter-regionalism, on the one hand, and multilateralism on the other.

### 1. Promoting Inter-regionalism

Among the objectives of the EU as a foreign policy actor, that of promoting regional cooperation in its relations with third countries is the one most EU-specific, as it is an integral part of its very nature.<sup>14</sup> The EC started dealing with third countries by grouping them in regions in the 1960s when it launched its preferential policy towards the African countries, then ACP.<sup>15</sup> Since then the EU has promoted regionalism both in its economic and political relations, in Africa, Asia, Latin America, North Africa and the Gulf, in the Balkans and more recently in the Black Sea region.<sup>16</sup> Smith identified various reasons for this predilection for regionalism, as an objective and as an approach: the independent external

<sup>12</sup> B. Hettne, *Regionalism and World Order*, in M. Farrell, B. Hettne & L. Van Langenhove (Eds.), *Global Politics of Regionalism: Theory and Practice* 277 (2005); L. Van Langenhove, *Towards a Multiregionalism World Order*, XLI(3) UN Chronicle 12 (2004); and L. Van Langenhove, *From a World of States to a World of Regions*, in E. Cihelková et al. (Eds.) *Nový Regionalismus, Teorie a Případová Studie*, at ix-xi (2007).

<sup>13</sup> Regional organizations that have expressed the ambition to become active internationally are proliferating also at the UN. *See, for instance*, the high-level meetings with regional organizations held regularly by the UN Secretary General and by the UN Security Council.

<sup>14</sup> Smith, *supra* note 5, at 69-96 and F. Söderbaum & L. Van Langenhove (Eds.), *The Politics of Interregionalism* (2005).

<sup>15</sup> Smith, *supra* note 5, at 69

<sup>16</sup> *See* for all the Commission's, Communication on EC support for regional economic integration in developing countries, COM (95)219, 16 June 1995. At the time of writing the Commission

demand coming from new regional groupings to have a relationship with the EU; the belief, coming from experience, that regional integration can bring stability and growth; the recognition that neighbouring countries are interdependent; the pragmatic simplification of external strategies (the sheer number of states now in the multilateral system makes it impossible for each one to have separate relationships with everyone else); finally, the competition for economic influence with other actors, e.g. the US in Latin America and Asia.<sup>17</sup> One can also identify a pro-integration agenda promoted opportunistically by some member states and EU institutions, particularly the Commission. Overall, though, much of this tendency has been purely instinctive and, as a consequence, not always completely rational. Smith defines it as a form of narcissism, while others see it as a search for affinity, and ultimately for identity and legitimacy in constructing a new post-Westphalian order based on inter-regionalism.<sup>18</sup>

The 'value' of regional integration would seem to be an instance of Europe's 'normative power.'<sup>19</sup> However, there are three important pitfalls with this regionalist inclination. First, 'mechanical iso-morphism': the EU's tendency to impose regional integration, just by establishing copycat institutions and routines and losing sight of the functional policy need.<sup>20</sup> This can undermine the legitimacy of and the general support for regionalism. Second, 'strategic schizophrenia': the tendency, which is now increasingly noticeable, of somewhat inconsistently juxtaposing region-to-region dialogue with bilateral relations between so-called 'strategic partners', such as Brazil, that are also deeply involved in regional groupings. Third, 'disguised Eurocentrism': is third-generation regionalism an exclusively Europe-driven endeavour? If so, is the EU really serious about creating a 'European world order' made up of interacting regions?<sup>21</sup> This last question is linked to a second objective, which is crucial to third-generation regionalism: the relationship with the multilateral system. In the EU this relationship is subsumed in the concept of 'effective multilateralism'.

## 2. Promoting Multilateralism

The term 'effective multilateralism' was introduced as a strategic objective of the Union in the European Security Strategy.<sup>22</sup> Simply put, it refers to the alleged propensity of the EU to work through and for multilateral institutions (including the WTO, the UN, NATO and other regional organizations) and, at

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was holding an online open consultation with development stakeholders with a view to a new Communication on regional integration in the ACP region, closed on 9 May 2008.

<sup>17</sup> Smith, *supra* note 5, at 83.

<sup>18</sup> F. Söderbaum, P. Stålgren & L. Van Langenhove, *The EU as a Global Actor and the Dynamics of Interregionalism: a Comparative Analysis*, 27 *European Integration* 365 (2005).

<sup>19</sup> I. Manners, *Normative Power Europe: A Contradiction in Terms?*, 40/2 *JCMS* 234 (2002).

<sup>20</sup> For the specific case of the Mediterranean see, F. Bicchì, 'Our Size Fits All': *Normative Power Europe and the Mediterranean*, 13 *Journal of European Public Policy* 286 (2006).

<sup>21</sup> Hettne, *supra* note 12.

<sup>22</sup> Council of the European Union, *European Security Strategy* 9-10 (2003). Importantly, promoting relations with regional organizations is considered part of the effort to strengthen global governance under the heading of "effective multilateralism."

the same time, its commitment to contribute to the reform of the multilateral structure with a view to making it more effective and more legitimate. There is no doubt that the concept principally served the identity objective of reasserting unity of purpose, following the 'unilateralist turn' of the United States and the subsequent crisis of CFSP over the war in Iraq.<sup>23</sup> Beyond the rhetoric, two aspects have to be taken into account. On the one hand, the EU has indeed increased its substantial cooperation with the UN, both strategically and operationally on all issues, and particularly in the field of security.<sup>24</sup> Militarily, for instance, the EU has equipped itself with the Battle Groups, designed specifically for operations under UN mandate. The UN has also welcomed this process, as it needs regional organizations, and particularly the EU to share the burden of global governance.<sup>25</sup> However a generally positive assessment is nuanced by two considerations. Firstly, the EU does not fit perfectly into the vision of the UN Charter of Regional Arrangements as 'Chapter VIII' organizations, as it has a global ambition that goes beyond Europe (typical of third-generation regionalism).<sup>26</sup> This can produce an overt clash in the long run within the current set-up and calls for an active participation and a coherent strategy in the reform of the multilateral system. Yet, secondly, the EU has maintained a visible division over the central issue of the reform of the multilateral system, and particularly of the UN Security Council (UNSC). The African Union, for instance, has been much more open in promoting a new regional approach to the reform. This internal EU division reveals the still uncertain stance of some member states towards the meaning of effective multilateralism, and towards the role of the EU and the states within it. Thus although there is a certain tendency towards promoting a 'world of regions', an authentic political commitment is still lacking to translate it in the multilateral structure.

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

<sup>23</sup> S. Keukeleire & J. MacNaughtan, *The Foreign Policy of the European Union* (2008) and D. Marchesi, *The EU CFSP in the UN Security Council: Between Coordination and Representation*, BRIGG papers, College of Europe and UNU-CRIS, 3/2008.

<sup>24</sup> See in particular the 2003 UN-EU Joint Declaration on Crisis Management.

<sup>25</sup> For an interesting discussion: T. Tardy, *L'ONU et les Organisations Régionales: de la Compatibilité entre Multilatéralismes Global et Régional dans le Maintien de la Paix. Le cas de l'Union européenne*, 9ième Congrès AFSP, Toulouse, 5-7 September 2007.

<sup>26</sup> K. Graham & T. Felício, *Regional Security and Global Governance: A Study of Interaction Between Regional Agencies and the UN Security Council – With a proposal for a Regional-Global Security Mechanism* (2006). See also the statement on behalf of the European Union by H. E. Mr. Erkki Tuomioja, Minister for Foreign Affairs of Finland, Seventh High-Level Meeting between the United Nations and Regional and other Intergovernmental Organizations, New York 22/9/2006:

the EU supports the development of the co-operation between the United Nations and relevant regional organizations as a way to strengthen effective multilateralism. However, we strongly advocate a pragmatic and action-oriented approach, both for the EU-UN cooperation and for the broader context of cooperation between the UN and regional and other organizations.

## C. Reforming the EU as a Global Actor

### I. The Two Main Challenges for the CFSP

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

Academic discussion has focused on two main dilemmas: (1) the different models of the EU on the civilian/military power spectrum and (2) the opposing intergovernmental and supranational tendencies, between which the EU's foreign policy profile is torn.

This theoretical debate reflected, however, the very practical consciousness of the limitations of the EU foreign policy's capabilities and political clout, as well as that of the related failures in policy terms, particularly in the Balkans. This, in turn, has led to identifying two major shortcomings to be addressed in order to transform the EU from an affluent payer into an influential player. These were the lack of military power and the insufficient institutional coherence, which makes it difficult to concentrate political authority towards common policies. Before focusing on how the Lisbon Treaty tackles the institutional problems, a first brief look at the problem of military power is called for.

Since the 1998 Franco-British agreement in Saint-Malo, important and relatively quick steps were taken to set up a European Security and Defence Policy (ESDP), designed to grant more autonomy to the EU from the US in the use of force and the capacity to carry out even robust missions in the field of peace and security.<sup>27</sup> These efforts were not seriously undercut by the 2003 crisis over the second US intervention in Iraq.<sup>28</sup> In fact, by deploying its first autonomous mission in Congo in 2003, the EU immediately made it clear that it was committed to engaging in 'out of area' interventions, in order to burnish its image as a global actor. Since the end of the nineties, therefore, the EU has transformed itself from an authentically 'civilian power' into what has been defined a 'civilising power' or as a 'military power in the making.'<sup>29</sup> This build-up has been tangible in terms of capabilities, institutional structures in Brussels and operations. All this, nevertheless, has been done while attempting not to sacrifice the positive image and the soft power of attraction of the EU as a new type of 'post-modern' global actor.<sup>30</sup> Therefore, the EU has tried to combine traditional foreign policy goals and tools with more far-sighted and comprehensive 'structural' foreign

<sup>27</sup> J. Howorth, *Security and Defence Policy in the European Union* (2007).

<sup>28</sup> A. Menon, *From Crisis to Catharsis: ESDP After Iraq*, 80 *International Affairs* 631 (2004).

<sup>29</sup> For a discussion: K. E. Smith, *Beyond the Civilian Power EU Debate*, 17 *Politique Européenne* 63 (2005).

<sup>30</sup> R. Cooper, *The New Liberal Imperialism*, *The Observer*, 7 April 2003.

policies,<sup>31</sup> designed not only to benefit states but also to have a deeper influence on the structure of the societies of the recipient countries and on the very nature of international relations. In this sense, the first pillar of external relations, including development policy, humanitarian aid, trade, enlargement and the neighbourhood policy (ENP), play a crucial role.

The quite impressive development of ESDP, however, has been undermined by the much less fructiferous attempts to tackle the second, institutional, shortcoming of EU foreign policy. This has led some commentators to speak about a defence policy, without a truly 'common' foreign policy, although there has been considerable progress since the late nineties.<sup>32</sup> The main institutional problems can be summarized in the multilevel and multi-pillar structure of the EU, leading to incoherence and lack of leadership; as well as in the resilience of the unanimity rule in the Council of Ministers on CFSP matters, leading to lack of strategy and paralysis. Unlike for the problem of the deficit of military force, these two institutional shortcomings were accentuated by enlargement. This promised to increase the complexity of the EU system, the diversity between member states and the time needed to take decisions. As a consequence, since the beginning of the Convention on the future of Europe in 2002, it was widely accepted among academics as well as policy-makers that some far-reaching reforms had to be agreed, particularly in the domain of foreign policy. What, however, remained highly disputed was whether the reforms had to enhance supranationalism and 'communitarize' CFSP, or whether its intergovernmental character should be maintained.

This debate reflected the deeply rooted visions on the future of the EU as a political system, including its further development as a 'second-generation' regional scheme. Interestingly however, this division did not dent the actual pragmatic perception of the need to increase the overall efficiency of the foreign policy mechanisms. In fact, even following the rejection of the referenda on the Constitutional Treaty in 2005 in France and the Netherlands, some of the agreed changes were experimented in practice, e.g. the double-hatting of some heads of delegations. Furthermore, the EU undoubtedly increased its external activity in the period of crisis or 'reflection' in an effort to "act itself into being."<sup>33</sup> All this shows the broad support for reform in external relations present in the member states, including in the public opinion.<sup>34</sup>

<sup>31</sup> S. Keukeleire, *The European Union as a Diplomatic Actor: Internal, Traditional and Structural Diplomacy*, 14/3 *Diplomacy and Statecraft* 31 (2003).

<sup>32</sup> Keukeleire & MacNaughtan, *supra* note 23.

<sup>33</sup> This term is borrowed from Gilson, in Söderbaum, Stålgren & Van Langenhove, *supra* note 18, at 373.

<sup>34</sup> European Commission, *Standard Eurobarometer 68 / autumn 2007 – TNS Opinion & Social*, December 2007. 67 percent of EU citizens think that defence and foreign policy should be made jointly within the EU, at 28.

## II. The Implications of the Lisbon Treaty

The EU cumulates features of all three generations/cohorts of regionalism, in terms of economic, political and external sovereignty. The Lisbon Treaty<sup>35</sup> touches on all three dimensions especially, the second and third, pertaining to internal political integration and external actorness. Overall, most of the institutional reforms contained in the 2005 Constitutional Treaty were substantially preserved. Analyses done on that compromise showed a limited but tangible deepening of integration in terms of second-generation regionalism. Some important innovations were agreed, such as: the new mechanism for qualified majority voting (QMV); the general expansion of QMV and co-decision to most policy areas; a clearer distinction in the division of competencies; an increased role for the European Parliament and the Court of Justice; the end of the formal pillar structure as well as an enhanced role for national parliaments, especially in safeguarding the principle of subsidiarity.<sup>36</sup> What went lost in the 2005-2007 period, were mainly symbols and state-like labels such as the words 'Constitution' and 'Minister of Foreign Affairs'. A major change was adopted in the process of choosing the text, where the participative and inclusive approach of the 2002-2003 Convention on the Future of Europe and of the referenda, was sacrificed to the more traditional closed-door diplomatic style of the IGC and of parliamentary ratification.<sup>37</sup>

This article, however, focuses on the third-generation perspective and consequently on the contribution that the reform could bring to the EU's external actorness. The major changes introduced in external relations are the following. A new High Representative for Foreign Affairs and Security Policy (art. 18 and 27 TEU), who will also be the Vice President of the Commission for external relations (HR/VP); the end of the rotating presidency (and 'troika') in external representation, with a permanent and full-time President of the European Council, representing the EU abroad at the level of heads of states (art. 15 TEU); the end of the pillar structure and of the EC/EU distinction, although CFSP will maintain its specific procedures, e.g. unanimity (art.31 TEU); the legal personality conferred to the EU (art. 47 TEU); a European External Action Service (EEAS) supporting the HR/VP (art. 27 TEU); the possibility for 'Permanent Structured Cooperation' in the field of defence policy, which would allow states willing and able to meet certain standards to move forward in military cooperation and integration (art. 42.6 and 46 TEU); a mutual assistance clause for defence (art. 42.7 TEU) and a solidarity clause for the reaction to terrorist attacks and disasters (art.188R TFEU); a new legal basis for the ENP (art. 8 TEU). To these one should add

<sup>35</sup> Formally signed on 13 December 2007, the Treaty Amending the Treaty on European Union (TEU) and the Treaty Establishing the European Community (TEC) Lisbon Treaty: Henceforth known as the Lisbon Treaty. Most of the TEC would now be renamed into the Treaty on the Functioning of the European Union (TFEU).

<sup>36</sup> D. Phinnemore, *The Treaty Establishing Constitution for Europe: An Overview*, Chatham House Briefing Note, June 2004. See also W. Wessels, *Keynote Article: The Constitutional Treaty – Three Readings From a Fusion Perspective*, 43 JCMS 11 (2005).

<sup>37</sup> For a discussion see C. Skach, *We the People? Constitutionalising the European Union*, 43 JCMS 149 (2005).

a considerable expansion in the internal policies and competencies (second-generation dimension) that have an impact on external relations, such as energy policy (Title XXI TFEU), environment/climate change (Title XX TFEU).

These innovations attempt to tackle some of the problems outlined above. The new double-hatted HR/VP linking first and second pillar competences should partially improve the problem of institutional incoherence (between the Council and the Commission) and of horizontal incoherence (between policies).<sup>38</sup> Further, he or she would contribute to the easing of the leadership deficit, and together with the president of the European Council, the provision on legal personality, and the end of the troika structure should simplify EU external representation. Although the policy processes and structures between second and first pillar remain distinct, overall, the innovation is considerable and there are some expectations of the possible impact, particularly in terms of visibility.<sup>39</sup> As the Convention had already noted, a unified figure dealing with CFSP would definitely “improve the visibility, clarity and continuity of the Union on the global stage.”<sup>40</sup>

On the other hand, vertical incoherence (between the member state and EU level) is likely to remain a fatal characteristic of EU foreign policy making, due to the unanimity in the Council and to the intergovernmental approach in CFSP. This is true particularly for big member states, who want to maintain an independent foreign policy and an international role and to resist the convergence of foreign policy preferences. In this sense, the EU will remain a polity very different from a state. This ambiguity reflects the eternal overarching division between intergovernmental and federal strategies. The result is an indisputably incremental process of integration, where the equilibrium lies somewhat in the middle between the call for effectiveness on the one hand, and the maintenance of a strong member state participation on the other.<sup>41</sup>

### III. The EU Reform and the UN

As was shown above, inter-regionalism and enhanced presence and actorness in the multilateral system are crucial aspects in identifying the EU as a third-generation regional organization. In engaging with international organizations and institutions and in promoting a rule-based international system, regional schemes translate their own internal procedures globally, seek common solutions to global problems and receive external recognition. The EU and its member states engage with a vast variety of international organizations and arrangements at different levels and with different intensity and impact. Research shows that the level of actorness of the EU, within international organizations, varies considerably depending on the institutional structures, the interests and the issues

<sup>38</sup> For the typology of EU coherence used here (institutional, horizontal and vertical), S. Nuttal, *Coherence*, in C. Hill & M. Smith (Eds.), *International Relations and the European Union* (2005).

<sup>39</sup> Interviews in the Council and Commission. 2005, 2007 and 2008.

<sup>40</sup> European Convention. Final report of Working Group VII on External Action CONV 459/02, Brussels, 16 December 2002, para. 67.

<sup>41</sup> This is the fusion argument. See Wessels, *supra* note 35, at 14.

involved.<sup>42</sup> Generally, for instance, the role of the EU will be related to its internal competence in the particular policy area, varying across trade and agriculture, regulatory standards, development aid, security. This article focuses specifically on the impact of the Lisbon reform on the EU's role in the UN system. As stated in Article 21 of the TEU, following the Lisbon Treaty:

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

The broad scope of activities, the universality and the relevance of the UN, make it a crucial challenge for an accomplished third-generation regional organization. The UN, in fact, is at once the realm of traditional nation states – with their sovereign prerogatives and relationships – and the centre of a reforming multilateral system – opening to regional organizations as well as civil society. The presence of regional organizations here carries, therefore, also a symbolic meaning. The following sections will pick some key issues in the foreign and security sphere where Lisbon is likely to have an impact.

### 1. EU Seat in the Security Council

The UN, therefore, represents an important stage on which to assess the credibility of the EU as a foreign policy actor. And within this context, it is relevant to discuss the issue of the 'EU seat' in the UNSC. This 'EU seat' problem has been at the centre of CFSP development, as it constitutes one of the most noticeable points of friction between intergovernmental and supranational thinking on the future of the EU integration.<sup>43</sup> Considerations on the opportunity of establishing an EU seat were already part of the IGC on a Political Union that prepared the Maastricht Treaty.<sup>44</sup> Subsequently, during the 2002-2003 Convention on the Future of Europe, the issue of the representation of the EU at the UN was debated extensively in the working group VIII on external action and III on legal personality.<sup>45</sup> The concept of a European seat was finally turned down both for legal (only states can be members of the UNSC) and political considerations (including the firm opposition of the UK and France). The discussion was further complicated by the bid of Germany to obtain a national permanent seat, which

<sup>42</sup> S. Gstöhl, 'Patchwork Europe'? *The EU's Representation in International Institutions*, BRIGG papers College of Europe and UNU-CRIS, 2/2008.

<sup>43</sup> The European Parliament supports this solution, at least in the long term. See European Parliament Resolution of 9 June 2005 on the Reform of the United Nations (P6\_TA(2005)0237), OJ 2006 C 124/549, at 552. But also the Commissioner for External Relations Benita Ferrero-Waldner and the High Representative for the CFSP Javier Solana have expressed similar opinions, though less vocally.

<sup>44</sup> P. Tsakaloyannis & D. Bourantonis, *The EU's CFSP and the Reform of the Security Council*, 2 *European Foreign Affairs Review* 197 (1996).

<sup>45</sup> European Convention, Working group VII 10, CONV 385/02, 5 November 2002, para.7 <http://register.consilium.eu.int/pdf/en/02/cv00/00385en2.pdf>, and the Revised draft final report, Working document 21 REV 1, Working Group VII, Brussels, 22 November 2002, para. 68. <http://european-convention.eu.int/docs/wd7/5573.pdf>.

divided the EU.<sup>46</sup> It was agreed that it was more realistic in the short-term to only moderately enhance the capability of the EU to speak with a single voice in the UNSC, without reforming drastically the provisions of article 19 TEU, which regulate this delicate issue. This course was kept also with the Lisbon Treaty.

Yet, from a third-generation regionalism perspective, a common seat in the UNSC would certainly increase the visibility, the recognition and ultimately the identity of the EU. It would pave the way for other regions to seek representation in that forum and would enhance the standing of the EU as a frontrunner in both multilateralism and inter-regionalism. In the UNSC, a strong single voice, coupled with the willingness to act, would be an improvement as compared to the current broad but fragmented presence. Finally, beyond the cosmetics of the single voice, the seat would also induce further coordination and integration upstream in foreign policy-making, as the EU would need to produce flexible and meaningful common positions and negotiate them with other actors. On the contrary, in the absence of structural transformation and 'communitarization' of EU foreign policy (e.g. for instance through the introduction of some limited majority voting), the single seat would be detrimental. It would reduce the sheer number of votes and bargaining power of the EU without increasing its capacity to propose solutions and assume responsibilities. It would conduce to lame positions presented in the UNSC or constant abstention. In addition, the coexistence in the UNSC of regional actors and states would increase fragmentation, internal diversity and tensions and could eventually persuade some key member states to avoid it and focus elsewhere.

## 2. Legal Personality

Certainly, a (small) part of the arguments used against the EU seat was undercut by the legal personality that the Lisbon Treaty finally conferred on the EU.<sup>47</sup> Resisted for years by France and the UK, this provision could in the long term have had a beneficial effect for the EU in the UN and not only in the UNSC. The EU, in fact, can now assume obligations and sign treaties with the UN and other international organizations. The innovation will not have all its effects until the UN reforms itself to accept the full membership of regional organizations. Yet, there is no question that, at least in principle, this is a major step forward from a legal and institutional point of view.<sup>48</sup> In turn, the EU personality could lead to major developments in various UN bodies, and notably in the General Assembly. Here, the EU will have to apply for an enhanced observer status, as the simple succession to the EC would relegate it to speaking at the end of every debate, after all the member states.<sup>49</sup> The Lisbon Treaty in fact, also eliminates the rotating presidency, which has until now constituted an easy way for the EU

<sup>46</sup> Marchesi, *supra* note 23.

<sup>47</sup> New article 47 TEU.

<sup>48</sup> I. Govaere, J. Capiiau & A. Vermeersch, *In-Between Seats: The Participation of the European Union in International Organizations*, 9 *European Foreign Affairs Review* 155 (2004).

<sup>49</sup> Politically, however applying for enhanced status could have a domino effect on other regional organizations with observer status in the General Assembly.

to present common positions through the mouthpiece of an actual UN member. Interestingly, at the UNGA level the discussion on the single seat has been less intensive than for the UNSC. On the one hand the structure and the procedures of the UNGA clearly give an advantage to large groups of states (rather than to single actors, such as the US) in creating large coalitions and promoting resolutions. On the other hand, the EU has been rather successful in coordinating its positions in this (mainly declaratory) forum and voicing them through the rotating presidency, with considerable visibility gains. This raises questions on whether the General Assembly as such is the ideal venue of third-generation regional organizations.

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

### 3. Coordination on the Security Council

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

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

The previous distinction between non-permanent and permanent members has disappeared. Although in the European context this change of formulation is supposed to re-establish the equality among the EU member states serving in the UNSC, it does not have any effect on the prerogatives of France and UK as veto holders in the UN framework. Fassbender minimizes both the *raison d'être* and the implications of this amendment. This view is supported by the preservation of art. 19's last sentence that prioritizes the UN responsibilities over EU membership.<sup>50</sup> Nevertheless, even this minor change in the formulation is a further acknowledgement of a gradual evolution from the initial national perspective and testifies to the great pressure to enhance the European dimension of art. 19, both during the Convention and the IGCs.

<sup>50</sup> B. Fassbender, *The Better Peoples of the United Nations? Europe's Practice and the United Nations*, 15 *European Journal of International Law* 881 (2004).

#### 4. The High Representative

The most important change for EU foreign policy comes clearly from the establishment of the double-hatted HR/VP.<sup>51</sup> At the UN, this innovation was long awaited so as to tackle the problem of the dispersive representation of the EU. This is currently voiced by the troika (e.g. meetings with third countries or the UN Secretariat), by the Commission for EC exclusive competences, by the Presidency for mixed competences, and by the member states, who often reiterate a common position. The HR/VP could give the EU a single voice in New York and in the UNSC, especially in combination with the new provision of article 34.3 third paragraph that states:

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

The insertion of this provision should not create too much excitement. It is the codification of an already established practice of inviting the High Representative Javier Solana to the UNSC open meetings to express CFSP common positions. In short, the presence of the HR/VP or of his/her representative in the Security Council will continue to be dependent on the goodwill and invitation of the member states. Obviously, when such a common position has been agreed in unanimity among the capitals and in Brussels, the EU members in the UNSC are by definition bound to it. In order to change the quality of EU coordination in the UNSC, the role of the HR/VP should be also enhanced in the ascending phase of the decision-making process, in the closed-door meetings, at least to allow him/her to be well informed of the situation.

#### 5. Personalities and Practice and the External Action Service

In sum, there is some evidence that the provisions of the Lisbon Treaty, if ratified, would establish some incremental improvements in the institutional context of the EU presence at the UN. Some innovations do open institutional opportunities that could be taken if the political will emerges. The HR/VP would be equipped with the necessary status and tools to play a role in the current configuration, if the member states support (or at least avoid boycotting!) him or her. If we may indulge in some speculation, the HR/VP could also play a role in case the idea of an EU seat or other more conservative proposals, such as that to include a representative of the EU institutions in one of the national delegation in the Security Council, see the light.<sup>52</sup> So far, however, this innovation has been vetoed by the two EU permanent members, who have an interest in limiting the EU presence in order to retain their autonomy in the UNSC.<sup>53</sup>

<sup>51</sup> In particular *see* new art. 18 and 27 TEU

<sup>52</sup> For a discussion of the proposal *see* F. P. Fulci, *L'Unione Europea alle Nazioni Unite*, 269 *Rivista di studi politici internazionali* 32 (2001) and E. Drieskens, D. Marchesi & B. Kerremans, *In Search of a European Dimension in the UN Security Council*, 42 *International Spectator* 421 (2007).

<sup>53</sup> In this context, the position of the UK is also informed by the public opinion's scepticism

Yet, if the member states' grip is still firm on the single provisions contained in the treaty, less strong is their control on the day-to-day implementation. In this sense, personalities and practice will play a crucial role in determining the actual impact of the structural reforms agreed in Lisbon.<sup>54</sup>

Concerning the first factor, the choice of the person who will serve in the position of HR/VP will be extremely important in determining, from the start, the ambition, the independence and the scope of action of this new institution. In fact, the Treaty has not relieved the tensions between the intergovernmental and supranational poles, which are so typical of the EU. In a way, it has just transferred them onto the shoulders of one person. As an institutional agent, the HR/VP will have to be loyal both to the Commission and to the member states, via the Council. He/she will have huge responsibilities and duties and will have to prioritize his or her resources and time, leading to potential clashes between its two principals. In this sense, the prestige, background and authority of the HR/VP and the manner in which he or she will get along with the President of the Commission and the President of the European Council will be critical. This is particularly true for the first period of the mandate, which will constitute the political precedent for the following years.

The institutional struggle over the configuration of the External Action Service (EAS) provides an example of the current uncertainty and of the importance of the first years of implementation and practice. This will be a first test of the equilibrium struck by the text.<sup>55</sup> The service is to include elements of the Commission staff, of the Council Secretariat and seconded staff from the member states. However, the final dimension of the service, its overall autonomy and the actual proportion of the various component parts, are under negotiation. According to the Treaty, the final deal will have to be rubberstamped by all the member states, the Council Secretariat and the European Commission. The European Parliament also wants to have a strong word. The conflict between effectiveness and member states' participation is particularly prominent here and consequently even after the formal agreement, the tension on day-to-day practice will persist.

Overall, however, the EAS has the potential to 'lubricate' the EU external relations machinery, including in New York. Having single EU delegations around the world, with coherent political guidance from unified desks in Brussels and incorporating member states' preferences and expertise will rationalize and streamline the external and diplomatic action of the EU. Eventually, this could

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towards the EU and towards the Lisbon Treaty in particular. The Foreign and Commonwealth Office, for instance, included in its website the idea that the Lisbon Treaty would lead it to eventually relinquish its permanent seat in the UNSC as one of the "myths" on the new Treaty. See FCO website <http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1184758750520>.

<sup>54</sup> Aware of this risk, the UK pushed for the inclusion of declarations 13 and 14 annexed to the final act of the intergovernmental conference adopting the Treaty of Lisbon, that try to limit the potential of the new provisions, particularly in the UNSC. Drieskens, Marchesi & Kerremans, *supra* note 52, at 425.

<sup>55</sup> For discussion see The European Policy Centre, *The EU Foreign Service: How to Build a More Effective Common Policy*, EPC report (2007).

increase its capacity to concentrate authority strategically (and perhaps financially) and could improve coherence at all levels, including vertically, between member states and the EU.

## **D. Conclusions**

The case study of CFSP in the United Nations offers a crucial but limited view of the impact of the Lisbon Treaty on the development of the EU as a 'third-generation' regional organization. Offering a summary of the main arguments and findings presented above, the aim of this final section is to elaborate on the possibility to generalize this study to the wider problem of the EU as an international actor.

The concept of three-generation regionalism provides some interesting insights on the European Union's reform process, by bridging regional integration studies with EU studies. While recognising the uniqueness of the EU, the three-generation typology will offer a useful conceptual framework to compare and assess its development as one regional integration scheme among others. First (economic sovereignty), second (internal sovereignty) and third (external sovereignty) generation features all coexist and cumulate within the EU as in other organizations, but are not equally developed. While a review of the whole scope of European external relations was outside the reach of this article, further research could use the third-generation concept to assess external economic policies such as development and trade, which stand at the crossroads of various generations of regional integration. Within this conceptual framework, it is also possible to locate the EU in the context of the global trend towards third-generation regionalism witnessed around the world, in Asia, Africa and Latin America.

We have specifically focused on the third, external dimension of regional integration and looked at the foreign policy goals of the EU and at the development of its institutional structure in this domain. From this distinction between goals and structure stems another consideration that could be explored further through international relations theory. It appears that the two key European foreign policy agendas of 'multilateralism' and 'interregionalism' are a function of the nature of the EU as a third-generation regional project. First, they can be ascribed to the ideas and vision that Europe has of the future of global governance as a multipolar world of coexisting states and regions. Second, they respond to the specific interest of the EU to promote its experience and to foster a rule-based international system where it can benefit from its comparative advantages in terms of soft power, diplomatic network, development aid, trade and economics. Finally, institutionally, the EU has a tendency towards pursuing these goals by default.

Special focus was given to this last, institutional dimension, as the study tackled the implications of the Lisbon Treaty. The crucial question here was whether the Lisbon Treaty would improve the EU institutional structure for external action. Without a doubt, this Treaty is particularly important from a third-

generation perspective. From the point of view of the process, the sheer number of amendments related to external relations as a fraction of the whole Treaty, proves that the EU member states wanted a clear acceleration in this domain. The willingness to experiment on some innovations pending the entry into force of the Treaty reinforces this impression. The establishment of the European Defence Agency or the appointment of an EU/EC double-hatted head of delegation to the African Union are clear cases in point. On the other hand, from the point of view of the substance, there is a general, albeit largely cosmetic,<sup>56</sup> attempt to address the traditional problems of EU foreign policy (unanimity rule, lack of leadership and authority). This is done by increasing the visibility, the capabilities, the coherence and the comprehensiveness of the EU's external relations machinery.

However, these efforts are marked by ambiguity: the EU addresses some of the problems with the High Representative, the President of the Council and the External Action Service; but much is left open for interpretation and day-to-day practice. This feeling emerges clearly when analysing the stand of the EU in the UN. Some very limited institutional opportunities could provide for a more unified EU foreign policy here, but there is no decisive break-through towards a communitarized approach. Not only do the member states maintain full control of EU foreign policy but, in some cases, they also continue to carry out their own parallel policies. A similar picture would probably surface from the analysis of other international forums as well, whether they are impervious or not to third-generation regionalism. In short, the EU has raised further the standing of external relations in the spectrum of its competences, without embarking on a qualitative transformation towards a state-like foreign policy. The EU has done much to shift away from exclusively civilian power status, becoming increasingly willing and able to use force. However, most of the key tensions between federal and intergovernmental strategies and between effectiveness and member states' control, linger. This division among member states' visions about the future of the EU will continue to hamper the capacity of Europe to concentrate authority and power in its foreign policy. As a fully-fledged 'third-generation' regional organization, the EU remains incomplete.

Rather, the EU continues to muddle through towards a new type of global actor: different from a state and in equilibrium between intergovernmental and supranational/federal pressures. It will, therefore, remain misleading to "measure its success" against mythical images of world super-power.<sup>57</sup> Although military force continues to be a major factor in a world still inhabited by modern Westphalian logics and even pre-modern (non-state or failed states) actors,<sup>58</sup> the EU is largely preserving its post-modern character. This is not a bad thing. Comprehensive and structural foreign policy seems a more suitable strategy to tackle today's global challenges, which are largely non-military: global warming,

<sup>56</sup> R. G. Whitman, *Foreign, Security and Defence Policy and the Lisbon Treaty: Significant or Cosmetic Reforms?*, 2008 EUSA Review Forum: Europe's Evolving Framework for External Action.

<sup>57</sup> K. E. Jorgensen, *The European Union's Performance in World Politics: How Should We Measure Success?*, in J. Zielonka (Ed.), *Paradoxes of European Foreign Policy*, Ch. VI (1998).

<sup>58</sup> Cooper, *supra* note 30.

sustainable development, energy security, migration, terrorism. The Lisbon Treaty has recognized these challenges as new objectives to be dealt with both at the regional and multilateral level. Thus, as it fosters regional cooperation and integration around the world, the EU promotes a new 'European world order',<sup>59</sup> in which regional actors contribute to sharing the burden of the UN in global governance.

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<sup>59</sup> Hettne, *supra* note 12.

## Opt-Outs in the Lisbon Treaty: What Direction for Europe *à la Carte*?

Maya Sion-Tzidkiyahu\*

### A. Europe *à la Carte* in the Area of Freedom Security and Justice – State of Affairs

The debate on the merits of flexibility in the European Union (EU) has been going on intensely since the Amsterdam Treaty introduced the Enhance Cooperation mechanism in 1997. Opt-outs – exemptions from policy fields – are considered one of the most harmful forms of flexibility in the EU, as they breach the unity and coherence of a main principle in the EU – preserving the *acquis communautaire* as common community law.<sup>1</sup> Indeed, opt-outs harm the EU's unity and sense of community. But opt-outs also allow the integration process to advance and deepen, as they prevent the Member State receiving an opt-out from vetoing new EU treaties. Despite the fact that opt-outs were already introduced in the Maastricht Treaty, 1991, they did not produce the same literature and did not capture much academic attention. So far eight opt-outs have been obtained in the European integration process by four Member States from four policy areas.<sup>2</sup> Among the least researched opt-outs are the ones from Justice and Home Affairs (JHA)/Area of Freedom, Security and Justice (AFSJ).<sup>3</sup> The first JHA opt-out was granted to

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<sup>1</sup> See A. Stubb, *Negotiating Flexibility in the European Union: Amsterdam, Nice and Beyond* 52 (2002). Stubb classified the various flexibility mechanisms in the EU along three categories: multi speed, variable geometry and Europe *à la carte*. In the first category the *acquis* is preserved, in the second category the *acquis* is not harmed as flexibility takes place outside the legal and institutional structure of the EU, whereas in the third category the *acquis* is undermined. The EU's flexibility mechanisms in this latter category are opt-outs and constructive abstention (introduced in the Amsterdam Treaty in the field of Common Foreign and Security Policy). *Id.*, 32-33.

<sup>2</sup> The UK obtained opt-outs from the Economic and Monetary Union (EMU), social policy and the removal of border control. Denmark obtained an opt-out from the EMU, EU citizenship (merely declaratory opt-out, hence not part of the eight opt-outs considered), defence, and supranational JHA. Ireland, due to the Common Travel Area with the UK, had to join its opt-out of removal of borders control, and Sweden has a *de-facto* opt-out from EMU third phase.

<sup>3</sup> The terms JHA and AFSJ are used interchangeably. The term JHA was created in the Maastricht Treaty for the third pillar. The term AFSJ was coined in the Amsterdam Treaty, which transferred

Denmark in the Maastricht Treaty. Soon after, the UK and Ireland obtained opt-outs (presented as opt-ins, see below) from the AFSJ in the Amsterdam Treaty. Despite much criticism they receive, opt-outs have not been terminated. On the contrary, the Lisbon Treaty will, for the first time, bring to the expansion of those opt-outs/opt-ins to additional AFSJ policy fields.

This article will analyze the trends in the Lisbon Treaty regarding Europe *à la carte* as reflected in the JHA/AFSJ opt-out/opt-in. Several questions arise: Is the flexible opt-in which allows Member States to 'pick & choose', and hence to enjoy 'the best of both worlds',<sup>4</sup> becoming the preferable form of Europe *à la carte*? What was the response of other EU Member States to this expansion of opt-ins? How did they succeed to narrow the ability of the three opt-out Member States to 'pick & choose'? At first glance the UK, Ireland and Denmark got 'more of the same' – the UK and Ireland obtained an extension of their flexible opt-in, while Denmark faces an extension of its rigid opt-out. But on closer inspection the Lisbon Treaty will change the opt-outs 'rules of the game'. The UK and Ireland will face the threat of being shoved out of measures they already adopted under the opt-in, whereas Denmark has the opportunity to remove its rigid opt-out and adopt the more flexible opt-in model. Such a move is expected to considerably shrink its opt-out. On the one hand, the flexible opt-in which allows Member States to 'pick & choose', and therefore to enjoy 'the best of both worlds', becomes the preferable form of Europe *à la carte*. On the other hand, the response of the other EU Member States to this extension of the opt-ins was to narrow the ability of those three Member States to 'pick & choose'. The novelty in the Lisbon Treaty is the introduction of the EU as a veto-player in the opt-in management 'game', which change its rules.

The AFSJ is one of the main policy areas in which the EU has most developed the integration process in the last years, intruding deeper and deeper into the sovereignty of Member States. Once the Single Market and the Economic and Monetary Union projects have been nearly completed, the next fundamental objective of the EU is to offer its citizens "an AFSJ without internal borders." One of the means to achieve this aim in the Lisbon Treaty is to cancel the pillars structure of the EU, moving the remaining third pillar from intergovernmental cooperation to the supranational Community method (legally speaking, Title VI Treaty on European Union [TEU], containing the third pillar, would become part of Title IV Treaty establishing the European Community [TEC], comprising first pillar AFSJ. The latter would be renumbered as Title V in the Lisbon Treaty). Such a move is part of the EU's long identified desire to strengthen and advance cooperation in the fight against illegal immigration, cross-border crime and terrorism. As the pillars structure of the EU is about to be abolished, this bears consequences on the opt-outs from AFSJ, since the JHA policy fields in the third pillar (police and judicial cooperation in criminal matters) will be added to the

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asylum, immigration and judicial cooperation in civil matters from the third to the first pillar. With the due cancellation of the third pillar the term AFSJ would prevail.

<sup>4</sup> The phrase "the best of both worlds" is taken from Geddes, quoting Prime Minister Tony Blair. A. Geddes, *Getting the Best of Both Worlds? Britain, the EU, and Migration Policy*, 81 International Affairs 723 (2005).

AFSJ opt-out/opt-in regimes of Denmark, the UK and Ireland, expanding them. This move for more Europe *à la carte* is partially balanced by changing the opt-outs provisions and restricting their use so that the 'in' Member States will have a 'weapon' against too much 'pick & choose' by an opt-out Member State.

Denmark, the UK and Ireland are under two very different opt-out regimes. They have dissimilar roots and paths and have been managed in different ways. The UK and Ireland's opt-outs stem from the Schengen Agreement, which brought about the removal of borders control, while Denmark is part of the Schengen Agreement. The Danish opt-out is very rigid and self-constraining, whereas the British one is much more flexible and pragmatic, leaving room to manoeuvre. The UK and Ireland's arrangement allows them to 'pick & choose' which legislation in Title IV TEC they will enter and which they will stay out of, while Denmark's opt-out leaves no choice but to stay out of all measures in that Title. The British call their opt-out an 'opt-in', which best articulates the difference between their opt-out and the Danish one (see Table 1 below for summary of the comparison between the JHA/AFSJ opt-outs/ins). It comes as no surprise that for the last few years there is a wish by the Danish government to move to the British opt-in model. If the Lisbon Treaty is ratified, and Denmark will vote 'Yes' in a referendum to change its AFSJ opt-out to an opt-in, both brands of opt-out are likely to become more similar.

To analyze the trends in the Lisbon Treaty regarding Europe *à la carte* as reflected in the JHA opt-out/opt-in, we first need to understand the opt-outs roots and their path. Such an understanding is vital to the analysis of opt-outs in the Lisbon Treaty and especially to analyze the expected trend. Due to the academic lacuna in this field, the first part of this article will depict how the opt-outs were obtained and managed since the Maastricht and Amsterdam Treaties and will examine their path. It will then analyze the changes introduced in the Lisbon Treaty in the opt-outs regimes, and will conclude by inquiring what direction the EU is taking – more Europe *à la carte* which allows 'the best of both worlds', or Europe *à la carte* that is a double edge sword to the opt-in Member State.

The article is based on 90 interviews with politicians in government and in parliament, senior government officials and legal specialists and with some non-governmental organisations from each of the four opt-out countries and Brussels (EU institutions and Permanent Representatives) dealing with the eight opt-outs (see footnote 2). Twenty four interviews dealt specifically with the JHA/AFSJ opt-outs. Additional twenty interviews had general relevance to all opt-outs, including JHA/AFSJ. The interviewees were selected based on their close involvement in handling the opt-outs and the period of time they have been dealing with them, so as to cover the whole time-span of each opt-out. Most interviews were conducted during September-October 2007 and February 2008. Those were open interviews structured according to both similar questions and case-relevant questions, lasting an hour on average. All of the interviews were conducted under the promise of confidentiality, and are therefore not attributable.

## I. Denmark – Losing Both Ways

The Danish opt-out from Title IV TEC is a result of the ‘No’ in the June 1992 referendum on the Maastricht Treaty. The centre-right minority government in Denmark supported the Maastricht Treaty, but was unable to resolve this crisis by itself. The solution came from three opposition parties: the Social Democrats and the Radical Left Party, which also supported the ratification of the treaty, and the Socialist People’s Party (SPP) which moved from a ‘no’ to a ‘yes’ position on condition of obtaining opt-outs for Denmark. The resolution of this domestic and European crisis was brought to an end by the Edinburgh Summit of the European Council, December 1992, in which four opt-outs were granted to Denmark (see footnote 2). Regarding JHA, the opt-out protocol text actually seemed to be a full opt-in, as JHA was intergovernmental while the opt-out was only from supranational policy. Annex no. 1 in the Edinburgh Presidency conclusion stated that “Denmark will participate *fully* in cooperation on Justice and Home Affairs on the basis of provisions of Title VI of the Treaty on European Union” (emphasis added). The opt-out obtained was forward-looking. It dealt with the possible future application of Article K9 TEU, known as the *passarelle* article. This article provided the possibility to transfer six policy fields from the third intergovernmental pillar to the first community pillar. Annex no. 3 stressed and clarified that in Denmark such transfer of sovereignty will require either majority of 5/6 of Members of the Folketing or both majority of the Members of the Folketing and majority of voters in a referendum.<sup>5</sup> Until the Amsterdam Treaty the JHA opt-out was merely declaratory. As the *passarelle* article was not employed, Denmark did not have to face the above procedure. The 1996-1997 Intergovernmental Conference (IGC) agreed on the transfer of visa, asylum and immigration, together with judicial cooperation in civil matters, to the first supranational pillar under Title IV TEC. This made Denmark activate its opt-out. When the Amsterdam Treaty took effect in May 1999, Denmark got out of all first pillar measures in asylum, immigration and judicial cooperation in civil matters, but continued to fully participate in what was left in the intergovernmental third pillar – police cooperation and judicial cooperation in civil matters.<sup>6</sup> To conclude, Denmark is fully included in intergovernmental JHA (under Title VI TEU), but is fully excluded from supranational JHA (under Title IV TEC).

This opt-out, stemming from the electorate’s veto and imposed by opposition parties, was designed and construed very rigidly. The Danes have excluded themselves entirely from the JHA first pillar policies. In legal terms, whatever legislation based on Title IV TEC falls under the opt-out terms, therefore the measure will not be binding on Denmark. Denmark does not have a voice around the Council’s table and does not vote. Thus, the only argument it can raise is whether the legal basis is indeed the right one.<sup>7</sup> The interpretation and management

<sup>5</sup> Ann. 3, Unilateral Declarations of Denmark on Cooperation in the Fields of Justice and Home Affairs, Conclusion of the Presidency, European Council of 11-12 December 1992, OJ 1992 C 348.

<sup>6</sup> Denmark also has to adopt all measures regarding visa policy, as those pertain to the Schengen Agreement. *See below.*

<sup>7</sup> The measure against smuggling illegal immigrants is one example where the legal basis was

of this opt-out is very strict. It does not matter what legislation and new measures are being introduced by the EU, Denmark cannot be bound by them as such. Even if it is in the 'national interest' to cooperate with the rest of the Member States in measures coping with illegal immigration and multiple asylum seekers, the Danish government has no independent judgment whether to exercise its opt-out or not. It is automatically out.

The only way Denmark can be bound by those measures in a manner that would legally fit the opt-out is under international law. Therefore, the Danish government asked for six 'parallel agreements', which are meant to introduce EU community measures to Danish law under international law. Two of the parallel agreements were in the field of asylum<sup>8</sup> and four in the field of judicial cooperation in civil matters. At first the European Commission did not favour Denmark's request. It was not enthusiastic to allow Denmark to minimize the opt-out indirectly, reducing its costs of non-participation in EU cooperation and decision-making, which would, in turn, decrease the political inclination in Denmark to terminate it. Hence, Denmark is at the mercy of the Commission when asking for parallel agreements.<sup>9</sup> In terms of content, these parallel agreements bypass the opt-out, but legally speaking they respect the terms of the opt-out, since those parallel agreements are not EU law, but are covered by international law. Unlike EU law, they can be unilaterally terminated by Denmark.<sup>10</sup> However, as long as those parallel agreements are in place, Denmark agrees to be under the European Court of Justice (ECJ) ruling. Thus, this Danish opt-out is a question of form and method, and not of content. The form is Title IV TEC and the method is supranational.

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divided between first and third pillar into two complementing measures. Denmark was able to vote and participate only in the measure which was under the third pillar, but not in the measure under the first pillar. *See* Initiative of the French Republic with a view to the adoption of a Council Directive defining the facilitation of unauthorized entry, movement and residence, 4 September 2000, OJ 2000 C 253/1; Initiative of the French Republic with a view to the adoption of a Council Framework Decision on the strengthening of the penal framework to prevent the facilitation of unauthorized entry and residence, 4 September 2000, OJ 2000 C 253/6.

<sup>8</sup> Denmark signed the 1990 Dublin Convention on Asylum. When the EU inserted that convention into its *acquis*, Denmark was left in an awkward position. It was obliged by the convention but not by the measures the EU adopted to advance and change that convention.

<sup>9</sup> It took the Prime Minister himself, Anders Fogh Rasmussen, to persuade Romano Prodi, the President of the Commission, to agree to open negotiations on four such agreements. Still, it took about six years to conclude them. The Commission consented to negotiate those agreements due to the rationale that Denmark was already party to former agreements between EU Member States before they became EU law (*e.g.*, the 1990 Dublin Convention on Asylum and the 1968 Brussels Convention). *See* footnote 8. Moreover, the Commission has stressed the parallel agreement solution is "exceptional and transitional" in nature. *See* Commission Press Release of 30 April 2002, IP/02/643, <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/02/643>.

<sup>10</sup> *See for example* Art. 3-7(c) in Agreement between the European Community and the Kingdom of Denmark on the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in Denmark or any other Member State of the European Union and Eurodac for the comparison of fingerprints for the effective application of the Dublin Convention, 8 March 2006, OJ 2006 L 66 at 38-43.

Joining the Schengen Agreement at a time of negotiations over introducing it into the EU *acquis*, and in parallel of negotiating a renewed opt-out protocol from Title IV TEC, can be seen as another bypass of the opt-out content, while keeping its form intact. In December 1996, Denmark joined the Schengen Agreement together with the other Scandinavian countries while the Amsterdam IGC was being held. Among other things, the IGC was negotiating the incorporation of the Schengen Agreement into the EU legal and institutional system. This resulted in a special kind of opt-out, as Denmark is in Schengen but out of Title IV TEC (to which the major part of the Schengen *acquis* was about to enter). Thus, Denmark is not only in Schengen; it is also in EU 'Schengen building measures', but here as well it is under international law and not under EU law. When it comes to 'Schengen building measures' concluded by the Council under Title IV TEC, Denmark does not vote but has a (rather weak) voice around the Council's table, as the new measure will affect it. Once a measure has been adopted, Denmark has six months to notify the Council if it accepts the new measure under international law or not. If it does not, the Schengen Member States can take steps against it. Until now (August 2008), Denmark fully adopted all the Schengen building measures, and is expected to continue this docile, compliant path. On some issues Denmark even wants to go further than the majority of the Member States would.<sup>11</sup> Thus, the Danish agreement to join Schengen is a kind of parallel agreement with an updating mechanism.

In other AFSJ policies, where the opt-out is full both in content and form, Denmark's voice is the weakest – if heard at all – as the EU measures will not affect it. Therefore, its rhetoric is different.<sup>12</sup> In the field of immigration the Danish centre-right government can actually benefit from the opt-out and the ability to have a more strict policy than the EU (see below). In contrast, in the field of asylum there is hardly any difference between Denmark and the EU's policies. The Danish government actually wants to be fully in the EU regime, and the opt-out is conceived as a cost. This cost was lowered by the parallel agreement Denmark signed in March 2005 with the EU Council, agreeing to participate in the Dublin II Regulation and Eurodac.<sup>13</sup> It seems that despite its rigid opt-out, Denmark had some room to manoeuvre and narrow its content, though not its form. The next section will reveal the extent to which, unlike Denmark, the UK has much more choice whether to be in or out.

<sup>11</sup> For example, on harmonizing the kind of information inserted into the Schengen Information System (SIS).

<sup>12</sup> See also R. Adler-Nissen, *The Diplomacy of Opting Out: A Bourdieudian Approach to National Integration Strategies*, 46 *JCMS* 663 (2008).

<sup>13</sup> Dublin II Regulation determines asylum application procedures. It is designed to prevent 'asylum shopping' and to ensure that each asylum applicant's case is processed by only one Member State. Eurodac is a system for the comparison of asylum seekers and illegal immigrants' fingerprints for the effective application of the 1990 Dublin Convention.

## II. The UK – Enjoying the ‘Best of Both Worlds’

Removing border controls between the EU Member States and creating common EU external border control has been a contentious issue between the UK – wanting to maintain its natural geographical advantage as an island – and the Continental Member States since the Single European Act in mid 1980s. The UK refused to relinquish its border control *vis-à-vis* the other Member States and allow freedom of movement of third country nationals. This was one of the reasons why the Schengen system evolved outside the legal and institutional framework of the EU. Unlike the political situation in Denmark, where the veto stemmed from the electorate and the opt-outs were imposed by opposition parties, in the UK both big political parties – the Conservative and Labour – were united against this EU policy, and were in line with the voters. But unlike Denmark, the UK did not negotiate an opt-out from JHA in the Maastricht Treaty. Despite the sensitivity of the issue, as long as JHA was intergovernmental (meaning the UK maintained its veto-power), the government did not feel the political need to secure such a formal – though merely declaratory – opt-out. However, when parts of the JHA were to be transferred to the supranational first pillar, and the Schengen Member States wanted to bring in the Schengen Agreement as part of the *acquis communautaire* in the Amsterdam Treaty, it was an opportunity for the UK to secure its non-participation. The government could use its veto power over the new treaty as a bargaining chip and obtain an opt-out as the price for its consent. This ‘blackmail’ was used to obtain a flexible opt-out/in. The protocol the UK negotiated in AFSJ is very different from the Danish one, and is different from the former two opt-outs it obtained in the Maastricht Treaty (see footnote 2). The fact that the government and administration chose to call it an opt-*in* rather than opt-out, is an indication of this difference.

There are three protocols pertaining this opt-out/opt-in. One relates to Schengen and the others to Title IV TEC. The first is the Schengen Protocol, which introduced the Schengen Agreement and implementing measures into the EU’s *acquis*. This Protocol allows the UK to participate in part or all of the Schengen *acquis*, subject to the unanimous approval of the Schengen Member States in the council. A second protocol sets the UK’s opt-out of common EU border control, allowing it to keep her border checks for persons coming from EU Member States. This protocol sets the opt-out, and does not give an opt-in option. A third ‘Title IV’ protocol entitles the UK to adopt the opt-in option, this time for first pillar JHA measures (under Title IV TEC) – asylum, immigration and judicial cooperation in civil matters. This opt-in protocol gives the UK three months from the time a legislative proposal is laid on the Council’s table to announce if it would like to opt in. If the UK announces that it wishes to opt in, it can participate in the decision-making, i.e., have a voice and a vote on the new measure. However, if it participates in the vote, and is the deciding factor in blocking the measure from being adopted, the other Member States can proceed without her. Hence, ostensibly, the UK cannot veto a proposal once it opted in.<sup>14</sup>

<sup>14</sup> There has been no case where after the UK or Ireland opted in to a proposal, they blocked

If the UK does not opt in at the decision-making phase, it can still join after the measure has been concluded and adopted. Obviously, this latter track does not give the UK a voice nor a vote. Until now (August 2008), the UK has not made use of this option.

While the Title IV protocol allows for ‘cherry picking’ on a case-by-case basis, it is understood that if the UK wants to opt in to Schengen measures, it has to join clusters of the *acquis* which are internally coherent. In March 1999 the UK made a partial application to Schengen. Jack Straw, the Home Secretary, made a statement to parliament in which he said the government is “keen to engage in co-operation in all areas of present and future JHA co-operation which do not conflict with our frontiers control.”<sup>15</sup> That has broadly remained the UK’s approach, though there are some exceptions.<sup>16</sup> The UK is out of most measures relating to abolishing EU internal borders control, including the common visa policy. So far, the UK participates in all asylum measures, and most illegal immigration measures, but has remained out of legal immigration instruments. In judicial cooperation in civil matters it exercises its opt-in on a case-by-case basis, picking and choosing which measures to opt in to and from which to opt out. Since the ratification of the Treaty of Amsterdam in mid 1999 until mid 2004, the UK opted into 18 out of 39 measures in Title IV TEC.<sup>17</sup> As mentioned, Tony Blair has called this opt-out/opt-in ‘the best of both worlds’.<sup>18</sup> The UK has the option to ‘pick & choose’ in which fields or measures it would like to participate and have influence on the decision-making, and in which measures it prefers to stay out, preserve its sovereignty, and not be bound. Still, this flexible opt-in has limits. First, the UK needs unanimity in the Council for joining parts of Schengen. Second, the right of the UK to opt in can be denied in ‘Schengen building measures’ if the UK did not adopt the measures upon which the new legislation builds on. This was the ECJ judgment in the *Frontex* case (see below). The Irish opt-out is identical to the British one in form, but is completely different in its reasons.

### III. Ireland – Out of Strong Came Force Some Sweetness

Ireland is a party to the same AFSJ opt-out protocols as the UK, and is under exactly the same flexible opt-in arrangement. But behind the similar legal terms lies a different story, which makes Ireland’s opt-out quite extraordinary. The Irish

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agreement on that proposal, resulting in the other Member States going ahead without them. It is understood that the UK Home Office is particularly keen to avoid this ever happening, and so far it has succeeded. S. Peers, *Statewatch Analysis EU Reform Treaty Analysis No. 4: British and Irish Opt-outs from EU Justice and Home Affairs (JHA) Law*, 4 (2007), <http://www.statewatch.org/news/2007/aug/eu-reform-treaty-uk-ireland-opt-outs.pdf>.

<sup>15</sup> House of Commons Hansard, *Written Answers*, 12 March 1999, Column: 382, <http://www.parliament.the-stationery-office.co.uk/pa/cm199899/cmhansrd/vo990312/text/90312w02.htm>.

<sup>16</sup> For example, the UK has not participated in family reunion, long-term residence, and extension of long term residence to those with international protection status.

<sup>17</sup> 21 out of the 39 measures were on border control and visas, to which the UK joined 6. So in fact, the UK opted in to most other measures on legal and illegal immigration and asylum, See Geddes, *supra* note 4, at 734.

<sup>18</sup> See *supra* note 4.

government did not want this opt-out. On the contrary, in the Amsterdam summit it explicitly stated its desire to be a full participant in those policy fields. Ireland declared that “it intends to exercise its right ... to take part in the adoption of [Title IV TEC] measures ... to the maximum extent compatible with the maintenance of its Common Travel Area with the United Kingdom.”<sup>19</sup> This is still the formal position of the government.<sup>20</sup> The decision to obtain an opt-out from Title IV TEC and Schengen did not stem from the government as in the UK, nor from opposition parties or the median voter as in Denmark. The Irish opt-out stems from the British one. Ireland had to agree to the opt-out because of its Common Travel Area (CTA) with the UK. Keeping the CTA is far more important to Ireland than joining Schengen, both for practical and political reasons.<sup>21</sup> To preserve it, Ireland had to have the same external border control, visa, immigration and asylum policy as the UK. In other words, to keep the uniformity and consistency of the CTA, it had to adopt the UK’s opt-out/opt-in arrangement in measures pertaining to border control. This is a unique case where the ‘veto-player’ making the opt-out call is not located domestically, but in another country – the UK.

Ireland normally follows the UK in the management of the opt-out/opt-in. It does so completely in the field of border control, but is not obliged to do so in judicial cooperation in civil matters. Here Ireland has an opportunity to use the opt-in as it sees fit. Out of strong came forth some sweetness. Despite its declared intention to opt in and take part in non CTA related measures ‘to the maximum extent’, Ireland takes advantage of the opt-out in the field of judicial cooperation in civil matters, especially regarding family law. For example, it has taken advantage of the opt-in arrangement to get out of Rome III on matrimonial matters, as it pertains to the sensitive issue of divorce.<sup>22</sup> Why judicial cooperation in civil matters was put in Title IV TEC together with visa, asylum and immigration is not quite clear. However, the flexible opt-in arrangement serves both Ireland and the UK, as their common law systems are different than the Continental ones.

Each of the three opt-outs has different roots and a different path. Revealing the specific veto-players who caused the obtainment of each opt-out also explains the manner they have been managed later on (see Table 1 below). In Denmark, the opt-out came from voters and was ‘translated’ by opposition parties, who have been ‘guarding’ ever since the way in which the government manages the opt-out. This results in quite a strict and rigid interpretation of the opt-out, leaving

<sup>19</sup> *Declaration by Ireland on Article 3 of the Protocol on the position of the United Kingdom and Ireland*, Declaration No. 4, 1999 Treaty of Amsterdam, at 143 (OJ 1999 C340).

<sup>20</sup> The different governments repeated this declaration ever since. *See, for example, Declaration by Ireland on Article 3 of the Protocol on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice*, Declaration No. 56, The Lisbon Treaty, at 450.

<sup>21</sup> The CTA is comprised of the two islands of Great Britain and Ireland, giving their citizens the same rights of free movement, the right to work and even vote. It solves the delicate political sensitivity of carrying passports when crossing from Ireland to Northern Ireland.

<sup>22</sup> Rome III is proposed Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters. This is a regulation proposed by the Commission to create a set of harmonized choice of law rules applicable in matrimonial matters, and thus improve legal certainty in cross-border divorce proceedings.

the government with hardly any room to manoeuvre. In the UK's case the opt-out stems from the government, which took advantage of a window of opportunity that allowed it to 'blackmail' the other Member States to grant it a flexible opt-in/opt-out. This allows her to 'pick & choose' to a large extent to which measures it will opt in and from which it would stay out. Ireland did not even want this opt-out. On the contrary, it wanted to be in, but was forced to follow the UK. In terms of Europe *à la carte* the three opt-outs are under two very different regimes, and are not managed in a similar manner. Moreover, Ireland does not always manage its opt-in in an identical manner to that in which the British do, which makes the Europe *à la carte* state of affairs even more complex and complicated. What has the Lisbon Treaty changed in that regard?

Table 1: Comparing the Three JHA/AFSJ Opt-Outs/Opt-Ins Roots and Paths

	<i>Opt-out</i>	<i>Opt-in</i>	
<i>Who</i>	Denmark	UK	Ireland
<i>Veto-player</i>	Median voter, opposition parties	Government	UK
<i>When – obtained</i>	Edinburgh European Council 1992	Amsterdam IGC 1997	
<i>When – activated</i>	Amsterdam Treaty ratification	Amsterdam Treaty ratification	
<i>Out of what</i>	All JHA measures moving to 1 <sup>st</sup> pillar (Title IV TEC) – no voice, no vote	Measures in 1 <sup>st</sup> pillar (Title IV TEC) on a case-by-case basis – voice and vote if opting in, but no blocking ability	
	Schengen Member under international law – have some voice, no vote	Not Schengen member – no voice, no vote	
<i>Result</i>	Rigid	Flexible	Rigid in CTA; otherwise quite flexible
<i>Interpretation and management</i>	Self-constraining	Pragmatic	
<i>Bypass mechanism</i>	Parallel agreements under international law	Opt-in protocol allows 'pick & choose'	
<i>Room to manoeuvre</i>	Little	Considerable	None in CTA; some in other fields
<i>State of affairs</i>	Opt-out as question of form, not content	Opt-out as question of content, not form	

## B. Negotiating More Europe *à la Carte*: From the Constitutional Treaty to the Lisbon Treaty

The development of the JHA/AFSJ field is a story of stops and starts. The Maastricht Treaty first established JHA in the EU intergovernmental sphere. The Amsterdam Treaty transferred the policy fields of visa, asylum, immigration and judicial

cooperation in civil matters from the third to the first pillar, but this supranational step forward was postponed as it was agreed its commencement will be only five years after the treaty ratification. The Nice Treaty, coming so shortly after the Amsterdam Treaty ratification, did not deepen or widen the AFSJ. But soon after the Constitutional Treaty agreed to abolish the third pillar altogether and transfer it to the first one.<sup>23</sup> This is a fundamental change, as the communitarisation of the third pillar is much more than just changing the legal basis. EU competences and decision-making procedures will be revised. Moving from unanimity to QMV in the fields of legal migration, police cooperation and most areas of judicial cooperation in criminal law, accompanied by co-decision with the European Parliament (EP), along with increased powers of the Commission in those areas, and the ECJ jurisdiction, will increase the EU's powers *vis-à-vis* the Member States. For Denmark the move to a one pillar structure means expanding its rigid opt-out, while for the UK and Ireland it meant expanding their flexible opt-in. This explains their different responses.

Since each Member State has veto-power over new EU Treaties, it can use its veto to either obtain new opt-outs or expand existing ones if a reform in the EU is to be unanimously approved. On the one hand, as mentioned, opt-outs breach the unity, uniformity and coherence of the EU *acquis*. On the other hand, they allow new treaties and new measures to be adopted, and hence allow the integration process to advance. In the Constitutional Treaty Denmark expanded its opt-out to the widened Title IV TEC (to become Title V in the Constitutional/Lisbon Treaty). The UK and Ireland expanded their opt-ins only in the Lisbon Treaty.<sup>24</sup> On the one hand, opt-outs were expanded in the Lisbon Treaty. On the other hand, this move to more Europe *à la carte* was matched by the rest of the Member States and the EU institutions, who have become less patient with opt-outs, and especially with opt-ins. Thus, they have made a counter-move to reduce the opt-outs/ins harm to the integrity of the integration process by transforming the opt-out/in mechanism into a 'double edge sword', so that they can fight back some of the 'pick & choose' trend. The following sections will analyze those trends.

## **I. Denmark – Getting Some of the Best of Both Worlds?**

In the Edinburgh Council, 1992, Denmark has undertaken the obligation not to stand in the EU's way to deepening the integration.<sup>25</sup> Therefore, it could not (nor did it want to) veto the abolishment of the pillar structure, and consequently

<sup>23</sup> See J. Monar, *Justice and Home Affairs*, 43 JCMS 131 (2005); A. Niemann, *Dynamics and Countervailing Pressures of Visa, Asylum and Immigration Policy Treaty Revision: Explaining Change and Stagnation from the Amsterdam IGC to the IGC of 2003–04*, 46 JCMS, 559 (2008).

<sup>24</sup> S. Peers, *Statewatch Analysis: Transferring the Third Pillar* 10 (2006). See also S. Peers, *Statewatch Analysis: EU Reform Treaty Analysis No. 3.2: Revised text of Part Two of the Treaty establishing the European Community (TEC)*, 23 October 2007.

<sup>25</sup> "... Denmark does not intend to make use of the following [opt-out] provisions in such a way as to prevent closer cooperation and action among Member States compatible with the Treaty and within the framework of the Union and its objectives." *Ann. 1: Decision of the Heads of State and Government, Meeting Within the European Council, Concerning Certain Problems Raised by*

was about to see its rigid opt-out expand also to policy areas where it has been actively participating in. For example, Denmark might have to leave third pillar agencies like EUROPOL and EUROJUST and anti-terror activities once they become supranational.<sup>26</sup> As the political and policy costs of this expanded opt-out are expected to be high, the government wanted to negotiate a solution. By the end of 2003 the new Danish opt-out protocol was agreed upon domestically and intergovernmentally. Denmark was granted the right to adopt the same opt-in conditions as the UK and Ireland. This was a second-best solution to cancelling the opt-out altogether. Unlike the former opt-out protocols, which came into force when the treaties were ratified, here Denmark did not ask to move immediately to an opt-in position, but first to ratify the new treaty with the expanded AFSJ opt-out, and only later to hold a referendum on changing this opt-out to an opt-in. Therefore, Denmark is expected to have a two-step process, separating the ratification of the Lisbon Treaty from the referendum on cancelling the AFSJ opt-out. This way a Danish 'no' to cancelling the opt-out would not have a negative impact on the rest of the EU, but on Denmark alone.

The main policy field presenting a domestic political problem for cancelling the Danish opt-out in JHA is immigration. The centre-right government, and particularly the Danish People's Party (DPP) supporting it from outside, want to maintain a relatively strict national immigration policy and for that purpose they would like to keep the opt-out.<sup>27</sup> The dilemma is that if Denmark does not change its rigid opt-out into a flexible opt-in, it will also find itself excluded from EU cooperation on the fight against terrorism, in which the government (and the DPP) very much wishes to continue its participation and cooperation. This desire was strengthened after the cartoon episode, in October 2005, which amplified Denmark as a target for terrorists. The change from opt-out to an opt-in will solve this dilemma and grant Denmark the ability to enjoy 'the best of both worlds'. Denmark would be able to opt in to most AFSJ cooperation, but stay out of legal immigration policy. The difficulty is to ratify this change in a referendum. It is unclear whether even this lower threshold (moving to opt-in instead of cancelling the opt-out altogether) will be crossed. Some in Denmark have expressed fears that in fact the government will adopt most of the EU's measures.

A way to reduce those fears would be to reach an agreement among a wide majority of the political parties and to formulate policy guidelines for managing the opt-in, clarifying in which fields Denmark would seek to opt in and in which it would maintain its opt-out. Such policy guidelines were formulated by the British Government in 1999 and by Ireland in its opt-out protocol. It is probable that the Danish government would have to make concessions to some opposition parties regarding the management of the opt-out, so as to enhance its chance to win the referendum. The left-wing Socialist People's Party, that once opposed

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*Denmark on the Treaty on European Union*, Conclusion of the Presidency, European Council of 11-12 December 1992, OJ 1992 C 348.

<sup>26</sup> F. Laursen, *Denmark and the Intergovernmental Conference: a Two-Level Game*, Danish Foreign Policy Yearbook 91, at 109 (2004).

<sup>27</sup> The most known example is family reunification. Denmark passed a rule such unification can take place only after a person is 24 years old, where in the rest of the EU the age barrier is 21 at most.

the Maastricht Treaty and asked for the JHA opt-out, has changed its position in recent years and supports its cancellation. The right-wing DPP, supporting the government from outside, is against such move. However, on EU matters the government usually does not seek its support, but rather reaches to the left-wing parties. Once Denmark will move to the opt-in position, the parliament would be the veto-player determining where the government can opt in or not. This is very different than the situation in the UK.

## II. The UK – Is the ‘Best of Both Worlds’ Coming to an End?

As mentioned, the Constitutional Treaty did not expand the UK’s opt-in to the widened AFSJ, whereas the Lisbon Treaty did. The political price of blocking the EU from moving the third pillar to the Community method would have been high for the UK. Furthermore, it has actually been in the UK’s interest to move at least some fields in the third pillar to QMV, so as to allow the EU to act more quickly, dynamically and resolutely on relevant issues such as the fight against terrorism and cross-border crime. But in other areas, such as criminal procedural law, the UK had objected to moving to QMV. When the Constitutional Treaty was opened for renegotiation, the UK took this opportunity to expand its opt-in to those fields, and was no longer satisfied with the reassurance of the Emergency Brake.<sup>28</sup> The UK’s widened opt-in protocol was concluded in the last weeks before the conclusion of the new treaty in Lisbon, October 2007. Some movement to opt in has already begun in parallel to expanding the opt-out. At the Lisbon summit, the UK announced it will exercise its opt-in in Article 75 of the Lisbon Treaty, which added the grounds of “preventing and combating terrorism and related activities” to the current provisions on sanctions against a third state.<sup>29</sup>

The Lisbon Treaty has clarified the UK’s rules of the opt-in. The question in dispute was whether the UK has to opt in to future amendments of measures it has formerly opted in to. The new opt-in protocol in the Lisbon Treaty concluded it should. If not, the UK can be excluded from the measure it already takes part in. The new procedure in Article 4a (which applies also to Ireland and Denmark under opt-in regime) is that:

[I]n cases where the Council, acting on a proposal from the Commission, determines [by QMV] that the non-participation of the United Kingdom or Ireland [or Denmark] in the amended version of an existing measure makes the application of that measure inoperable for other Member States or the Union, it may urge them to [opt in to the decision-making phase]... or... [opt in after a measure was adopted]. *If... [after] two months... the United Kingdom or Ireland [or Denmark] has not [notified of opting in], the existing measure shall no longer be binding upon or applicable to it.*<sup>30</sup>

<sup>28</sup> According to the Emergency Brake procedure if a Member State considers a draft directive would affect its fundamental aspects, it may request that the draft be referred to the European Council, which would have to make a unanimous decision.

<sup>29</sup> The new article 75 specify “the freezing of funds, financial assets or economic gains belonging to, or owned or held by, natural or legal persons, groups or non-State entities.”

<sup>30</sup> Art. 4a Protocol No. 21 in regards to the UK and Ireland; Art. 5 Protocol No. 22 in regards to Denmark in the Lisbon Treaty.

Moreover, if the UK (or Ireland and Denmark) will not adapt its opt-in, it “shall bear the direct financial consequences.”<sup>31</sup> This is the major change in the opt-in protocol. Some have called it ‘the bullying tactic’ which aims to pressurise the UK into opting in to the adapting measures.<sup>32</sup> This procedure puts some limit on Europe *à la carte* and the ability of an opt-out Member State to ‘pick & choose’.

Another limitation on the opt-in was the ECJ’s judgment in the *Frontex* case given two months after the conclusion of the Lisbon Treaty. Frontex is the European Agency established in 2005 to manage cooperation between the Member States at the external borders, and is considered a ‘Schengen building measure’ integral to the Schengen *acquis* on borders. The UK notified the Council it would like to opt in within the three months period set by the opt-in protocol, but was denied the right to take part in the adoption of the Regulation establishing Frontex. As the UK is out of the common borders policy, the Council decided it could not join a legislation building on it. It was all or nothing; to join Frontex, the UK had to join the whole cluster of border checks and control *acquis*. This was the first limit the Council set on the UK’s ability to use its Schengen opt-in to ‘pick & choose’. The UK has challenged the Council in the ECJ and lost.<sup>33</sup> The ECJ ruled that if an EU measure is deemed a ‘Schengen building measure’, but the UK does not participate in the underlined *acquis*, it will not be granted the right to participate in the *acquis* building on this measure. While the UK thought there could be a ‘win-win’ solution, in which it could have its cake and eat it, the Council Legal Service considered it a zero sum game of ‘either – or’. Is the ‘best of both worlds’ coming to an end for the UK? Perhaps to some extent, but as many Member States want the UK to be in, so that they will be able to enjoy the UK’s data, experience and cooperation in the AFSJ, the UK is still likely to be able to play its cards and push some opt-in limits, especially in its areas of interest: cross-border crime, terrorism and illegal immigration.

These two developments – Article 4a procedure and the *Frontex* case – have put some limit on the ‘pick & choose’ by the UK and increase the opt-out cost. Due to the opt-out, the UK finds itself outside of an expanding area of legislation, where the Schengen Member States act under Enhanced Cooperation in an exclusive manner, expanding it to gradually include more policy fields, like migration. This can gradually squeeze the UK out. Fears were expressed that the changes in the opt-in regime weaken the UK’s position by making decisions not to opt in to a measure the subject of unpredictable consequences and risk.<sup>34</sup> The way the

<sup>31</sup> Art. 4a(3) Protocol No. 21 in regards to the UK and Ireland.

<sup>32</sup> Open Europe, Guide to the Constitutional Treaty 15 (2008), quoting the Labour Chairman of the European Scrutiny Committee, Michael Connarty, European Scrutiny Committee Hearing, 16 October 2007.

<sup>33</sup> The UK also lost the biometric passport case on similar grounds. Judgement of 18 December 2007 in *Case C-77/05, United Kingdom of Great Britain and Northern Ireland v. Council of the European Union (Frontex)*, [2007] and *Case C-137/05, United Kingdom of Great Britain and Northern Ireland v. Council of the European Union*, [2007] 45 CMLR 835 (not yet published in ECR).

<sup>34</sup> House of Commons, European Scrutiny Committee 3<sup>rd</sup> Report 2006-07, European Union Intergovernmental Conference: Follow-Up Report, 14 November 2007, Para. 56.

British will exploit the expansion of their opt-out depends mostly on the party in government and the ministers in place. It is yet to be seen how the Commission and Council will employ Article 4a.

### III. The Irish 'No' to the Reform Treaty

The first Irish 'no' in 2002 to the Treaty of Nice was resolved by the EU making the Seville Declaration on Ireland's policy of military neutrality. This was not another opt-out, but clarification. Following the defeat of the Lisbon Treaty in the Irish referendum on 12 June 2008, EU officials have said that the country will probably be offered additional guarantees of its sovereignty, most likely in areas such as taxation, military policy and family law.<sup>35</sup> The latter is relevant to the opt-in arrangement. As in the Treaty of Amsterdam, the extension of the UK's opt-in protocol in the Lisbon Treaty had to be matched by Ireland, so as to preserve the CTA. As indicated, the time that has passed since the Amsterdam Treaty was ratified proved to Ireland there are also benefits to this forced opt-out, such as in family law and judicial cooperation in civil matters. Here Ireland can have a different opt-in picture than the UK, allowing it to preserve its different legal/religious tradition and values. Although it shares the common law system with the UK, it has different family law, such as strict divorce law, therefore its decisions where to opt in and where not to in those fields do not necessarily resemble those of the UK. Even though the Irish opt-out started due to the British one, Ireland may have become accustomed and even fond of the opt-in possibility. Nevertheless, Ireland has inserted to the Lisbon Treaty a (non-binding) declaration in which it states:

Ireland declares its firm intention to exercise its right ... to take part in the adoption of measures pursuant to Title V of Part Three of the Treaty on the Functioning of the European Union [current Title IV TEC and Title VI TEU] to the maximum extent it deems possible.

Ireland will, in particular, participate to the maximum possible extent in measures in the field of police cooperation.

Furthermore, Ireland recalls that ... it may notify the Council in writing that it no longer wishes to be covered by the terms of the Protocol. Ireland intends to review the operation of these arrangements within three years of the entry into force of the Treaty of Lisbon.<sup>36</sup>

Due to the failure of ratification of the Lisbon Treaty in Ireland, the optimistic note of the government is somewhat less promising, and may be either lip service given by Ireland to the EU and/or an expression of an internal split on the matter. If at all, Ireland may be given more opt-outs/opt-ins and special declarations to resolve the EU ratification block of the Lisbon Treaty.

<sup>35</sup> L. Phillips, *Irish No Side Rejects Additional Protocols as 'Trinkets'*, EUObserver, 17 June 2008, at <http://euobserver.com/18/26343?print=1>. See also P. Runner, *Ireland to Work With EU Lawyers on Lisbon Opt-outs*, EUObserver, 17 October 2008, at <http://euobserver.com/18/26953>.

<sup>36</sup> *Supra* note 20, at 450-451.

### C. The Lisbon Treaty – What Direction for Europe *à la Carte*?

Each of the three JHA/AFSJ opt-outs has different roots and a different path. Revealing the specific veto-players who caused the obtaining of each opt-out also explains the manner they have been managed later on and is the key factor for predicting their future management. In Denmark the veto stemmed from the electorate and the opt-out was imposed on the minority government by opposition parties. Thus, the parliament is the guardian of the opt-out. In the UK there has been consensus among both big political parties and the ‘median voter’. Therefore, the UK government had much more room to manoeuvre both in the opt-out obtaining and in the management phase of its opt-out. The Irish opt-out is a unique case where the veto-player making the opt-out call is not located domestically, but in another country – the UK. Still, the Irish government has learned to make the most of it. The novelty in the Lisbon Treaty is the introduction of the EU as a veto-player in the opt-in management ‘game’, which change its rules.

Analysing the trend of Europe *à la carte* as manifested through opt-outs in the Lisbon Treaty demonstrates that the direction the EU is proceeding in is both more Europe *à la carte* which allows ‘the best of both worlds’, and at the same time Europe *à la carte* that is a ‘double edge sword’ to the opt-out Member State. Despite the EU’s general desire to terminate the opt-outs or at least narrow them, the direction in the treaty is to expand their scope to additional policy fields. On the one hand, the flexible opt-in, which allows a Member State to ‘pick & choose’, and hence to enjoy ‘the best of both worlds’, becomes the preferable form of Europe *à la carte* in one of the most dynamic and expanding policy fields of the integration process – the AFSJ. On the other hand, the ‘in’ Member States have inserted themselves as a veto-player in the opt-in ‘pick & choose’ ‘game’. Thus, *vis-à-vis* the expansion of the opt-ins, the EU has taken a defensive/offensive move to restrict the ‘pick & choose’ trend. An opt-out state that opts in to a measure will need also to opt in to its amendments. The Lisbon Treaty does not change the veto-players in each of the opt-out Member States. What it does do is adding the ‘in’ Member States as a veto-player regarding the ability of the above three to exercise their opt-out once they have opted in. This new Article 4a procedure can limit to a certain extent the trend of Europe *à la carte* and resist its becoming a complete ‘pick & choose’ state of affairs.

Will this expansion of the JHA/AFSJ opt-outs on paper necessarily bring about more Europe *à la carte* on the ground? Once a referendum in Denmark results in ‘yes’ to the opt-in, it will have the ability to ‘pick & choose’ from new JHA/AFSJ measures. The expected trend by Denmark is less opt-out and more opt-in, meaning that despite the right to stay out, once Denmark moves to the opt-in position, it will opt in to almost all EU measures in this field, narrowing the opt-out to the minimum (probably except family unification). However, the extent to which Denmark will use its opt-in depends not only on the government (usually a minority government), but on the parliament. It is somewhat paradoxical that

the expansion of the Danish opt-out is expected to narrow it substantially if it changes into an opt-in. What on paper looks like more differentiation would probably bring about less. The UK's direction once the Lisbon Treaty is ratified is not clear, as its opt-in management is pragmatic and is done on a case-by-case basis. Among other things, it depends on the road the EU will choose to follow in those fields under the Community method. Since many Member States want the UK to opt in, so they will be able to enjoy its data, experience and cooperation, the UK may still be able to play its cards and push some of the new opt-in limits in its areas of interest: crime, terrorism and illegal immigration. Once the UK expands the opt-in limits, Ireland and Denmark should be able to enjoy the same benefits (at lower political cost).

With the integration process intruding deeper into the heart of Member State's sovereignty, opt-outs on the one hand serve to preserve national sovereignty of reluctant Member States, while on the other hand remove their veto on new EU treaties and later on new measures. Hence, despite their negative image, opt-outs have a positive side, as they allow for the integration process to advance. As such, they have policy, political, institutional and normative implications, which should be closely examined if opt-outs are to be terminated or managed in a way that would disturb the *acquis communautaire* less.



# The Lisbon Treaty and the New Powers of Regions

Claudio Mandrino\*

## A. Introduction

The Treaty signed in Lisbon on 13 December 2007 represents the last step of the reform process of the European Union Treaties which began six months earlier, after the negative results of the referenda in France and in the Netherlands and the demise of the Treaty Establishing a Constitution for Europe (Constitutional Treaty). Therefore, the new Treaty has marked the end of the 'period of reflection' launched by the European Council in June 2005, following the failure to complete the ratification of the European Constitution. The aim was to "enable a broad debate to take place in each of our countries, involving citizens, civil society, social partners, national parliaments and political parties."<sup>1</sup>

It is too early to judge the formal and substantive architecture of the new Treaty. Moreover, the negative result of the Irish referendum will probably cause a delay in the ratification process and, therefore, in the entry into force of the Treaty itself.<sup>2</sup> Anyway, it is possible, from now, to propose some evaluations *de jure condendo* about its most significant provisions and amendments to the current EU institutional structure.

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<sup>1</sup> Brussels European Council, 16-17 June 2005, Presidency conclusions, available at [http://www.consilium.europa.eu/ueDocs/cms\\_Data/docs/pressData/en/ec/85349.pdf](http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/85349.pdf). On the Lisbon Treaty, see G. Barrett, "The king is dead, Long live the king": the Recasting by the Treaty of Lisbon of the Provisions of the Constitutional Treaty Concerning National Parliaments, 2008 ELR 66; P. Craig, *The Treaty of Lisbon: Process, Architecture and Substance*, 2008 ELR 137; L. Daniele, *Trattato di Lisbona: Addio all'Idea Federalista per Superare gli Ostacoli Degli Euroscettici*, 2007 Guida al diritto. Diritto comunitario e internazionale 2; P. Kiiver, *Lisbon and the Lawyers-Reflections on What the EU Reform Treaty Means to Jurists*, 14 MJ 337 (2007); B. Nascimbene & A. Lang, *Il Trattato di Lisbona: l'Unione Europea a una Svolta?*, 2008 Il Corriere Giuridico 237; F. Pocar, *Gli Obiettivi dell'Europa nel Nuovo Trattato: un Compromesso tra Luci e Ombre*, 2007 Guida al diritto. Diritto comunitario e internazionale 2; P. Ponzano, *Le Trait  de Lisbonne: l'Europe Sort de sa Crise Institutionnelle*, 3 RDUE 569 (2007); J. Ziller, *Il Nuovo Trattato Europeo* (2007).

<sup>2</sup> The consequences of the Irish referendum on the ratification process are still not clear. The Brussels European Council, 19-20 June 2008, stated only that "more time was needed to analyse the situation" and that the Heads of State and of Government will "come back to this issue at its meeting of 15 October 2008 in order to consider the way forward." The Conclusions are available at [http://www.consilium.europa.eu/ueDocs/cms\\_Data/docs/pressData/en/ec/101346.pdf](http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/101346.pdf).

The specific aim of this article is to investigate the provisions of the new Treaty related to the functions of Regions in the context of European Union Law. In this respect, in the last twenty years Regions have progressively claimed a greater role in preparing and implementing EU policies, and they have obtained some important results, though there has never been a real agreement on what this effective role for Regions might actually be. That is because, after the fading of enthusiasm for a possible establishment of a 'Europe of the Regions' stemming from the Maastricht Treaty innovations, it is time to reflect on this subject in a deeper and more comprehensive way.

To this end, the analysis will be developed by means of five key-words: recognition; consultation; representation; justiciability; subsidiarity. As it will be further explained, these concepts summarize the main issues linked to the role of the Regions within the EU. For each of these issues the article will focus on the demands submitted by regional authorities during the last years and it will try to clarify if they have been granted, or not, by the new Treaty. In particular, the new powers gained by the Committee of the Regions will be studied in depth, namely its right to refer directly to the Court of Justice of the European Communities to defend its own prerogatives or in case of a breach of the principle of subsidiarity. Finally, some comments will be developed in order to evaluate if, after decades of *lobbying* at the EU level, after the experience of the European Convention and the results temporarily obtained with the signature of the Constitutional Treaty, the European Regions can be satisfied with the reforms introduced by the Treaty of Lisbon concerning their role within the European Union system.

## **B. The 'Regional Mobilization' from the Nice Treaty to the Lisbon Treaty**

To better understand the main innovations introduced by the Lisbon Treaty linked to the functions of Regions in the European Union institutional architecture, it is useful to go back to the involvement of the Regions in the EU Treaties reform process of the last six years.

In recent years several Member States have devolved functions to Regions which have taken over a lot of competencies originally performed by the organs of the central state. At the same time, though, the functions of the EU have significantly increased, particularly after the Single European Act and the Maastricht Treaty. This has allowed national governments, as representatives of their states in the Council, to negotiate and adopt legal acts on matters which, in some countries, had constitutionally been devolved to Regions, such as agriculture, regional development and environment. Consequently, Regions argue that their autonomy is progressively being eroded by European legislation that has infringed upon their functions. The EU is increasingly perceived as affecting the constitutional powers of Regions, without increasing their role in the EU decision-making process in return. These considerations have led to a 'regional mobilization': Regions request the introduction of mechanisms to enhance their

ability to participate and have an influence on EU policymaking. They have also claimed the enforcement and the formal acknowledgment of their role in the EU decision-making process.

The first, concrete result of this mobilization has been the White Paper on European Governance published by the European Commission in July 2001. In this document the Commission expressly brought forward the issue of regional functions in the EU into the more general debate about the reform of the EU governance, suggesting that the European Union would be closer to its citizens only if regional institutions were involved more actively. The White Paper proposed three instruments in order to make Regions able to participate in EU policymaking. First, the Commission stated that more consideration should be given to regional interests in the development of its proposals, by means of a “systematic dialogue with European and national associations of regional government,” including greater cooperation between these associations and the Committee of the Regions. Then, the White Paper proposed a greater flexibility in the implementation of EU acts characterised by a “strong territorial impact.” Finally, the European Commission noted that a greater recognition of the territorial impact of EU policies like transport, energy and environment was essential, and argued that only by acknowledging the demands of the Regions in the management of these policies, the EU decision-making process would become more democratic and clear.

The Laeken Declaration of 2001 partially responded to the proposals of the Commission: it stated that a “renewed Union” needed to “clarify, simplify and adjust the division of competence between the Union and the Member States.”<sup>3</sup> Then, the Declaration called for a year-long Convention on the future of Europe to be convened in particular to decide how the division of competencies could be more transparent and how the principle of subsidiarity should be applied, including the question of allowing Regions to undertake day-to-day administration and implementation of EU policies where appropriate. The sub-national authorities have taken advantage of the open and public method of the Convention to submit many proposals to gain powers within the EU. This has probably been the ever strongest moment of regional mobilization at EU level, which had not been as active during the Intergovernmental Conferences leading to the Amsterdam and Nice Treaties.

Two comments can be made about this strong regional activism during the European Convention. Firstly, the interests of Regions have been represented not only by the Committee of the Regions, but also by other associations, so that this representation has been fragmented among all these subjects. This is a novel element if compared with the previous Intergovernmental Conferences, when regional actors were represented exclusively by members of the Committee of the Regions. Such a fragmentation brought as a consequence the production of an excessive number of documents. Often, the same considerations were developed in various documents. This situation created also a sort of rivalry among the

<sup>3</sup> The Declaration is annexed to the Presidency Conclusions, European Council Meeting in Laeken, 14-15 December 2001 and it is available at [http://www.consilium.europa.eu/ueDocs/cms\\_Data/docs/pressData/en/ec/68827.pdf](http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/68827.pdf).

different associations and between them and the Committee of the Regions<sup>4</sup> with a weakening of the unitary position and interests of the European Regions. Secondly, the participation of Regions was limited to the observer status granted to the Committee of the Regions. The Regions thus entered the Convention in a weak and marginal position and they were not equal to the representative of the European Parliament, of the Commission, of the Member States and even of the candidate countries. Instead, the Committee remained at the same level of the less active (at least from the point of view of mobilization and debate) Economic and Social Committee and Ombudsman. A formal session concerning the role of Regions in EU governance was convened too late, after the first sixteen articles of the future Constitution draft, dealing with the division of competences between EU and Member States, had already been issued.

Apart from these negative aspects, the regional mobilization within the European Convention has been fundamental in order to increase the functions of Regions in the EU legal system. In fact, as we will see, the Lisbon Treaty has substantially confirmed several innovations introduced by the European Convention and by the IGC which approved the Constitutional Treaty.

## C. The Innovations of the Lisbon Treaty

### I. Recognition

Since the beginning of the European Convention, Regions have requested that the new Treaty contains an explicit reference to the existence and the role of regional authorities within the EU. The very first draft of the Constitutional Treaty published in February 2003 by the *Praesidium* of the Convention, satisfied only partially this request. In fact, it expressly mentioned Regions in article 9, which read that

The Union shall respect the national identities of its Member States, inherent in their fundamental structures and essential State functions, especially their political and constitutional structure, including the organisation of public administration at national, regional and local level.<sup>5</sup>

This meant that the regional level of government was not considered from a perspective of enhancing its value in the EU institutional framework, but as an expression of the freedom of every Member State to decide freely its own political and territorial organisation. Furthermore, there was no reference to Regions in the articles related to the principle of subsidiarity and to the division

<sup>4</sup> See the Contribution submitted by the Observers of the Committee of the Regions and members of the Convention, CONV 195/02, of 17 July 2002:

The CoR would like to reiterate its exclusive legitimacy as institutional discussion partner for the local and regional authorities of the Union and it rejects any attempt to replace it with various structures which do not represent all local and regional authorities.

<sup>5</sup> Praesidium (CONV), 528/03 of 6 February 2003.

of competences between the EU and its Member States. Then, following some specific demands, the European Convention reached a general agreement on the necessity of considering in the first articles of the new Treaty the regional dimension and powers at EU level. The result was a limited amendment of article 5, first paragraph, where it was affirmed that the Union shall “respect the equality of Member States before the constitution as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.”

Now, this text has been reproduced in article 4, paragraph 2 of the Lisbon Treaty. It completes the current text of article 6, paragraph 3 of the the EU Treaty – introduced by the Maastricht Treaty – which simply affirms that the European Union “shall respect the national identity of its Member States.” So, the Lisbon Treaty gives a more precise definition of the national identity in order to consider also the regional and local communities. Moreover, the Preamble of the Charter of Fundamental Rights of the European Union<sup>6</sup> – which according to article 6 of the new Treaty has the same juridical value as the Treaty itself – states that the Union contributes to the “preservation and development of these common values while respecting [...] the national identities of the Member States and the organisation of their public authorities at national, regional and local levels.”

Through these two combined provisions the EU primary law would not only recognize Regions in an indirect way as a consequence of the right of every Member State to its national self-organization, but it would directly acknowledge the existence and dignity of regional communities at EU level as well as the values of autonomy and self-governance. Thus, the new Treaty considers the regional and local dimension as an integral part of the complex institutional building of the EU.<sup>7</sup> This does not mean that the new article would constitute an interference of the EU law in the internal affairs of Member States. The general principle that the former cannot influence either the constitutional and political organizations of the latter, or their territorial articulation, would continue to have full application. Nevertheless, the explicit reference to the regional and local autonomies represents clear recognition given by the EU of the importance of decentralized legislative and administrative structures in order to enhance democracy and participation in the EU.

In this respect, we have also to consider article 5, paragraph 3 of the Lisbon Treaty which gives a new content to the subsidiarity principle, authorizing the EU to act in the matters which do not fall under its exclusive competence only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level.<sup>8</sup> Also this article is an heritage of the Constitutional Treaty; if the Lisbon Treaty enters into force, the involvement of the regional level will be explicit, alongside the central organs of each Member State, in the application of this principle.

<sup>6</sup> The Charter of Fundamental Rights of the European Union was solemnly proclaimed by the European Parliament, the Council of the European Union and the European Commission on 7 December 2000, but it is not legally binding.

<sup>7</sup> J. Ziller, *La Nuova Costituzione Europea* 28 (2004).

<sup>8</sup> The main innovations linked to the principle of subsidiarity will be analysed in section B.V.

## II. Consultation

Like the Constitutional Treaty, also the Lisbon Treaty has taken into consideration the proposals linked to the debate about the European governance started by the European Commission with its White Paper of 2001. To this end, the new Treaty has introduced in the primary law some of the innovations in the decision-making procedures proposed by the Commission in previous years.

Before analyzing the innovations introduced by the Lisbon Treaty it must be said that in the last years the debates on the reform of the Treaties and on the European governance have been carried out separately. The object of the former, from the establishment of the European Convention to the signature of the new Treaty, has fundamentally been the institutional structure of the European Union and the separation of competencies between the EU and its members. By contrast, the debate on governance has been centred more on factual, almost political, aspects and in particular on the instruments enabling the subjects involved in EU policy making (not necessarily belonging to governmental networks) to contribute to the elaboration and the application of the EU policies. The discussions on the EU governance, therefore, are centred on the functioning of the various networks connecting all different subjects, like Regions, which act and cooperate at the supranational level.

Nevertheless, the EU institutional structure and the EU governance can be viewed as complementary. In fact, the first one clarifies the juridical structure in which the supranational institutions, the national governments and the other actors participate in the EU decision-making process, whereas the second one develops the practical methods of this cooperation. The fact that with the Lisbon Treaty the primary law has included some principles established in the context of the EU governance is a further proof that the two aspects are linked.

The Lisbon Treaty acknowledges the juridical value of the new “culture of consultation and dialogue” promoted by the European Commission in its White Paper of 2001 and in its following communications. In these documents the Commission recognizes that the efficiency of a policy depends in large part upon the participation of its addressees. According to this culture of consultation European institutions, in particular the Commission, committed themselves to take more into account the interests and the demands by the various subjects applying EU policies. From this perspective, it was necessary to “enhance the culture of consultation and of dialogue by all the European institutions”<sup>9</sup> through a code of conduct setting minimum standards, focusing on what to consult on, when, whom and how to consult in order to reduce the risk of the policy-makers considering only some partial aspects of an argument or of particular groups getting privileged access. Finally, in the communication of December 2002: “*Towards a reinforced culture of consultation and dialogue*”, the European Commission defined the concept of consultation as “those processes through which the Commission wishes to trigger input from outside interested parties

<sup>9</sup> Commission White Paper COM(2001) 428 of 25 July 2001.

for the shaping of policy prior to a decision by the Commission.”<sup>10</sup> It is worth observing that among the subjects considered by the Communication there were also the regional authorities: “consultation is intended to provide opportunities for input from representatives of regional and local authorities, civil society organisations” (p. 4).

The principle of cooperation and consultation is recognized in several parts of the new Treaty. First of all, article 11, paragraph 3 of the Treaty on European Union states that the European Commission “shall carry out broad consultations with parties concerned in order to ensure that the Union’s actions are coherent and transparent.” Then, according to the second paragraph of the same article, “The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society.” These provisions develop the principle – introduced in the Protocol on the application of the principles of subsidiarity and proportionality attached to the Treaty of Amsterdam – of dialogue between EU institutions, civil society and associations representing the various interests involved with the EU policies.<sup>11</sup>

It is true, though, that in article 11 we do not find any explicit mention of regional autonomy, so that it seems that the contents of the Communications by the European Commission on the structured dialogue and the reinforced consultation have not been fully received by the reform Treaty. Furthermore, the Committee of the Regions is not given any new, strengthened role in the context of the ‘pre-legislative procedures’. On the subject, between 2001 and 2005 two Protocols of cooperation – which from a juridical point of view are not binding – were signed by the European Commission and the Committee of the Regions in order to enhance the role of the Committee both in the adoption of the EU acts, and in the development of the principles of good governance exposed in the White Paper. Particularly relevant is point number eight of the Protocol of 2005 which tries to promote a more active role of the Committee in the preparation of EU policies. For example, the Commission can ask the Committee to adopt studies on the impact of its proposals on the regional and local autonomies; these opinions will be examined and discussed by the Commission. The aim of such methods of cooperation is to give the Commission a broader vision about the effects of its proposals.

The inclusion of some of these measures in the new Treaty would have undoubtedly conferred a stronger role to the Committee of the Regions in the ‘pre-legislative’ stages in the EU decision making process. On the contrary, the provisions of the Protocols have not been transferred in the text of the Treaty, so that they will continue to be not binding for both the Commission and the Committee. Some authors have proposed treating associations of regional authorities at European level like the “representative associations” of article 11.

<sup>10</sup> Commission Communication COM(2002) 704 of 11 December 2002.

<sup>11</sup> Article 9 of the Protocol states that

Without prejudice to its right of initiative, the Commission should, except in cases of particular urgency or confidentiality, consult widely before proposing legislation and, wherever appropriate, publish consultation documents.

In other terms, this concept should make reference to those organizations which do not represent civil society, like those representing territorial communities.<sup>12</sup> Therefore, only through this broad interpretation of article 11 it would be possible to consider the principles of consultation and of participative democracy guaranteed by the Treaty. A more explicit acknowledgement of the regional dimension in the procedures of consultation is made by the new article 2 of the Protocol on the application of principles of subsidiarity and proportionality. The text of this article is the following:

Before proposing legislative acts, the Commission shall consult widely. Such consultations shall, where appropriate, take into account the regional and local dimension of the action envisaged. In cases of exceptional urgency, the Commission shall not conduct such consultations. It shall give reasons for its decision in its proposal.

In the Protocol attached to the Amsterdam Treaty the same concept was expressed using the conditional tense: it was written that the Commission “should consult”. This meant that the Commission was not obliged to actually put into practice the consultations with the parties involved; this was subject to its discretionality. Instead, the use of the verb ‘consults’ has given the consultations a binding value. So, the Commission will have to consider the opinions expressed by the organisations representing civil society and by regional institutions about a EU act proposal. According to article 2 of the Protocol as modified by the Lisbon Treaty, the European Commission will be obliged to consult regional authorities.

The reference to regional dimension in the new version of the Protocol is an important example of the enhancement of the role of Regions in the Lisbon Treaty. Nevertheless, two limitations risk annulling the principle of cooperation. First of all, according to article 2 of the Protocol, the consultations must be developed only for the proposals of legislative acts. It is true that article 11, paragraph 3 of the Treaty reads that the territorial communities can be consulted also in cases other than legislative procedures. This is only facultative, though, and this norm does not impose any obligation in this sense on the EU institutions. Secondly, article 2 contains an ambiguous expression: the Commission makes the consultations “where appropriate”. This means that it has a considerable discretion on deciding whether to consult regional authorities. One could even conclude that these limitations reduce the principle of consultation to a mere formal obligation.

Nevertheless, this risk is unlikely. The discretionality of the Commission will be limited because of the right, recognized to the Committee of the Regions by the new Treaty, to resort to the European Court of Justice in order to protect its own prerogatives. The Committee could ask the Court to annul an act not only if the regional authorities have not been previously consulted, but also if the Commission has not given a reason in case of lack of consultations. In fact, the duty to give such a reason is explicitly stated by article 2 of the Protocol. For this purpose, it will be necessary to clarify if the Commission’s duty of motivation recurs only when consultations are not held for reasons of extraordinary urgency, or also if the Commission simply deems unnecessary the involvement of Regions.

<sup>12</sup> See F. Priollaud & D. Siritzky, *La Constitution européenne. Texte et commentaires* 136 (2005).

In conclusion, this right awarded to the Committee of the Regions can be viewed as a useful measure to guarantee the European Commission's strict respect of the provisions on the consultation of Regions.

### **III. Representation: The Committee of the Regions**

The Committee of the Regions,<sup>13</sup> established by the Maastricht Treaty, is composed of regional and local representatives in order to “enable regional and local bodies to participate [...] in the decision-making process of the European Union.”<sup>14</sup> The Nice Treaty has amended article 263 of the Treaty establishing a European Community in the sense that it requires the members of the Committee to “hold a regional or local authority electoral mandate” or to be “politically accountable to an elected assembly.” According to article 265 of the EC Treaty, the Committee must be consulted by the Council or the Commission if the Treaty so provides, that is in relation to education, culture, public health, cohesion and guidelines for trans-European networks. The Committee can also issue an opinion on its own initiatives when appropriate. In any case, it always has only a consulting function.

The Committee has acknowledged the inadequacy of its own role. During the previous intergovernmental conferences for the revision of the Treaties, it strongly demanded an upgrading of its functions within the institutional system in order to gain a more relevant role in the EU decision-making process. As a premise, we can observe that the internal organisation of the Committee of the Regions is not homogeneous, but it is mixed, with representatives of both regional and local institutions.

It is true that the functions and the competencies of the several regional and local institutions differ among Member States and that multiformity is a characteristic of the territorial autonomies, so that the heterogeneous membership of this organ can be considered inevitable. Nevertheless, this composition introduces an excessive fragmentation in the works of the Committee where it is difficult to find a common position which takes into account the interests of both regional and local actors. The demands of the former, which in their country have relevant normative functions, are different from the demands of the latter, which operate in more restricted areas and have only some limited administrative powers. Due to this uneven composition of the Committee a compromise must always be found, and the adoption of opinions and recommendations is often long and

<sup>13</sup> On the Committee of the Regions, see J. Bourrinet (Ed.), *Le Comité des Régions de l'Union européenne* (1999); A. M. Cecere, *La Dimensione Regionale Della Comunità Europea. Il Comitato Delle Regioni*, in L. Chieffi (Ed.), *Regioni e dinamiche di integrazione europea*, 175 (2003); T. Cole, *The Committee of the Regions and Subnational Representation to the European Union*, 12 *Maastricht Journal of European and Comparative Law* 49 (2005); P. A. Féral, *Le Comité des Régions de l'Union Européenne, du Traité de Maastricht au Traité d'Amsterdam* (2004); A. W. Pankiewicz, *Realtà Regionali ed Unione Europea: il Comitato delle Regioni* (2001); L. H. Rancho, *El Comité de las Regiones: su Función en el Proceso de Integración Europea* (2003); A. Warleigh, *Committee of the Regions: Institutionalizing Multi-Level Governance* (1999).

<sup>14</sup> Committee of the Regions, Opinion of 17 May 1994, paragraph 4.

complex.<sup>15</sup> Strangely enough, though, this matter has never been challenged by the Committee itself. It has never considered in its demands the problem related to its composition.

Instead, the main demands proposed by the Committee at the European Convention have been the following: the acknowledgement of its status of institution and not only of organ, as is stated in the current text of the Treaty; the right to submit written and oral questions to the European Commission; the faculty to participate in the meetings of the Council if the latter discussed items for which the Committee's opinion must be obtained in accordance with the Treaty.<sup>16</sup> All these demands were inspired by the will of the Committee to perform more relevant functions in the future. Nevertheless, it has also asked for a more effective consulting power.<sup>17</sup> In order to reach this goal it has proposed to increase the number of domains where it must be consulted with an inclusion of all the issues where the regional administrations usually exert some competencies within the Member States, such as agriculture, research and technological development; introduce the duty, for the EU institutions which adopt an act without having accepted the previous Committee's opinion, to justify the reasons for this discrepancy.

None of these demands has found place in the Constitutional Treaty. In the new Treaty there will not be any fundamental modifications for what concerns the composition and the functions of the Committee, but only some limited amendments to the current text of the Treaty. Article 300, after having clarified the consulting functions of the Committee and the rules for its composition, states that

The rules [...] governing the nature of the composition of the Committee shall be reviewed at regular intervals by the Council to take account of economic, social and demographic developments within the Union. The Council, on a proposal from the Commission, shall adopt decisions to that end.

It is worth noting that this article does not require the consultation of the Committee of the Regions before the Council adopts a decision. This is another element of weakness of the Committee if compared to the institutions of the EU.

Article 305 introduces three amendments to the current formulation of the Treaty:

- the number of representatives per country will no longer be fixed in the Treaty. It is the Council of Ministers, unanimously deciding on a Commission proposal, which will adopt a decision regarding its composition. This disposition too, is not completed by the provision of a necessary opinion by the Committee before the adoption of the act. Moreover, it reserves to the Governments of the Member States the final decision about the composition of the Committee

<sup>15</sup> A. Warleigh, *supra* note 13, at 39.

<sup>16</sup> See, *inter alia*, the Contribution from the six observers to the Convention: *The Committee of the Regions and the future of the European Union*, Brussels CONV 494/03 of 17 January 2003.

<sup>17</sup> See Committee of the Regions Opinion, *The participation of the Committee of the Regions to the structured debate on the EU reform*, 3 October 2001.

and this is not a progress towards the enhancement of the institutional role of the Committee;

- the term in office of the members of the Committee increases from four to five years, to be in line with those of the Parliament and the European Commission. In this way the institutional balance within the EU is increased, because the office of all the institutions and organs will have the same length;
- the European Parliament receives the power to summon the Committee of the Regions and moves into the ranks of the institutions which must consult it. For the Parliament, consultation of the Committee has been until now only a possibility, even if widely used. This innovation effectively strengthens the inclusion of the Committee in the institutional structure of the EU.

By contrast the Lisbon Treaty, as well as the Constitutional Treaty, have not increased the number of domains where an opinion of the Committee is necessary.

It is, therefore, evident that neither the Constitutional Treaty, nor the Lisbon Treaty have introduced any significant amendment in the composition and functions of the Committee within the decision-making process.

#### **IV. Justiciability – The right of Access to the European Court of Justice**

The ability of Regions to challenge the legality of an EC act before the Court of Justice has been one of the fundamental demands proposed during the recent IGCs by the Committee of the Regions and other associations representing Regions. Until now, nevertheless, neither the Committee, nor the regional authorities have been accorded a right of privileged access to the Court of Justice for the annulment of a Community act *ex* article 230 of the EC Treaty. This issue must be analyzed taking into consideration two aspects: the concept of Regions as legal persons and the possibility for a Region to be considered as a privileged applicant.

On the first point, the jurisprudence of the EC Judges is clear in the sense of according the Regions the quality of legal person once this personality has been previously acknowledged by their national laws.<sup>18</sup>

<sup>18</sup> Advocate General Lenz in *Joined Cases 62 and 72/87, Exécutif Régional Wallon and Glaverbel v. Commission*, [1988] ECR 1573, at 459

In principle, the admissibility of the application of the Exécutif régional wallon cannot be called in question either. It, too, must be regarded as a legal person within the meaning of the second paragraph of Article 173 of the EEC Treaty.

*See also* the Court of First Instance, judgement of 30 April 1998 in *Case T-214/95, Het Vlaamse Gewest v. Commission*, [1998] ECR 1717, at 328:

The Flemish Region is therefore not entitled to bring proceedings pursuant to the second paragraph of Article 173 of the Treaty. By contrast, since it has legal personality under Belgian national law it must, on that basis, be treated as a legal person within the meaning of the fourth paragraph of Article 173 of the Treaty.

By contrast, the ability of Regions to be considered as privileged applicants in the *locus standi* before the EC Judges is a more problematic issue. In its jurisprudence the Court of Justice denies the inclusion of territorial authorities in this category. According to the Court, the concept of 'Member State' must be identified with the central government of the State itself, to the exclusion of any extensive interpretation comprehensive of the regional governments. In an Order of 1997 the Court clarifies the notion of 'Member State' as follows:

It should be noted that it is apparent from the general scheme of the Treaties that the term Member State, for the purposes of the institutional provisions and, in particular, those relating to proceedings before the courts, refers only to government authorities of the Member States of the European Communities and cannot include the governments of Regions or autonomous communities, irrespective of the powers they may have.<sup>19</sup>

This means that, according to the European Court, Regions cannot be viewed as privileged applicants and can only bring an action for annulment as legal persons within the meaning of the fourth paragraph of Article 230 TEC. So, these public authorities, which express a collective interest and in certain cases have even a legislative power, are considered at the same level as a legal person of private law.<sup>20</sup> If they want to ask the Court to annul a decision addressed to another person, they have to prove that this decision concerns them directly and individually.<sup>21</sup> This situation could change only by the means of a modification of article 230 of the

<sup>19</sup> Order of 21 March 1997 in *Case C-95/97, Région Wallonne v. Commission*, [1997] ECR 787. The position of the Court is inspired by the concern about not undermining the institutional balance provided for by the Treaties and to avoid situations in which different authorities from the same Member State directly oppose each other in direct actions before the Court. On this issue see O. Porchia, *La Legittimazione Attiva Degli Enti Pubblici Territoriali nei Ricorsi per Annulamento Degli Atti Comunitari*, 2000 *Diritto dell'Unione Europea* 337; P. Van Nuffel, *Région Wallonne v. Commission*, 1998 *Col JEL* 675; J. Scott, *Case 95/97. Region Wallonne v. Commission of the European Communities*, 1999 *CMLRev* 231.

<sup>20</sup> Most cases initiated by Regions involve decisions addressed to another person, so that they can challenge these acts only if they are of direct and individual concern to the regions and this is not easy to prove. In the Order of 16 June 1998 in *Case T-238/97, Comunidad Autonoma de Cantabria v. Council*, [1998] ECR 2273, centered on the challenge by a regional authority of a Regulation adopted by the Council, the Tribunal of First Instance recalls the previous case law according to which an association able to promote collective interests cannot be considered individually wronged by an act if this does not concern specifically the association itself. The Tribunal stated that this was not the case: the Region was considered having only a generic interest based on the socio-economic consequences of the regulation on its own territory. See also the Judgement of the Court of Justice of 2 May 2006 in *Case C-417/04, Regione Sicilia v. European Commission*, [2006] ECR 654, where the Court rejected as inadmissible the Regione Sicilia's action for annulment of a Commission Decision relating to the cancellation of the aid granted to the Italian Republic by previous Commission Decision concerning the provision of assistance by the European Regional Development Fund as infrastructure investment in Italy (region: Sicily), and for the recovery of the advance on that assistance made by the Commission.

<sup>21</sup> Some authors have underlined that regions suffer of a "véritable captis deminutio, dans la mesure où elles ne peuvent attaquer que les actes les concernant directement et individuellement." R. Mehdi, *Chronique de Jurisprudence du Tribunal et de la Cour de Justice des Communautés Européennes*, 2000 *JDI* 455.

EC Treaty. In this view, since the Convention in 2002, both the Committee of the Regions and some associations representing regional authorities have demanded some amendments to the Treaty.

These demands were expressed on several occasions. The Regions with legislative powers asked for extensive reforms in the way they participate in EU institutions, demanding, *inter alia*, the right to initiate proceedings in the European Court of Justice to protect their constitutional prerogatives. Similarly, the Assembly of European Regions (AER) together with the Conference of the Regional Legislative Assemblies of Europe (CRLAE), proposed qualifying Regions as “privileged applicants” in respect of the rights that the constitutions of their states recognize them. Then, the Committee of the Regions asked to be given the right of appeal to the Court of Justice to defend its own prerogatives. It proposed an amendment to article 230 of the Treaty through the addition of a paragraph stating: “The Court of Justice can also decide over the actions proposed by the Committee of the Regions to annul the acts for the purpose of protecting its prerogatives.” So, from an analysis of the various documents proposed, a substantial convergence among the regional representative at the Convention appears.

These demands have only partially been accepted by Governments. The Group “*Subsidiarity*” within the European Convention, like the European Court of Justice, had already refused to recognize the right of a Region to bring an action for annulment so as not to “*affect the equilibrium established between the Member States at European level.*”<sup>22</sup> This choice has been confirmed by the Lisbon Treaty, whose approach is conservative from this point of view. In fact, to grant Regions a right to bring suit against EC acts autonomously from their national governments would mean to upgrade them to the status of a subject of European law, like the Member States. Nevertheless, the European Union still has the nature of an international organisation composed of states, where the Regional authorities, according to the general principles of international law, are not considered as subjects of law. Instead, the Constitutional Treaty (article III-365) stated that

The Court shall have jurisdiction under the same conditions in actions brought by the Court of Auditors, by the European Central Bank and by the Committee of the Regions for the purpose of protecting their prerogatives.

<sup>22</sup> Speech by the President of the Group Subsidiarity to the members of the Group itself, Conv. 286/02, 8:

the degree of and arrangements for the involvement of regional and local authorities in the drafting of Community legislation should be determined solely in the national framework. ... the mechanism proposed in this document does not, where appropriate, prevent consultation in a national framework with regional or local assemblies. Any other approach would, moreover, risk affecting the equilibrium established between the Member States at European level. For these reasons, the Group did not accept the proposal to grant a right of appeal to the Court of Justice for violation of the principle of subsidiarity to regions which, within the framework of national institutional organisation, have legislative capacities.

This provision has been confirmed by the Treaty of Lisbon (article 263 TFUE). In this way, at least for the ability to bring proceedings before the Court of Justice, the Committee would be similar to those institutions – Court of Auditors and European Central Bank – which already have been accorded jurisdictional protection if their prerogatives are infringed. So, it would acquire the *status* of semi-privileged applicant. Two considerations stem from this innovation.

First of all, one can reasonably imagine that the case law of the Court of Justice related to the violation of the European Parliament prerogatives developed after the *Chernobyl* case<sup>23</sup> would be applied. The Committee of the Regions could bring an action before the Court if the EU institutions took a decision without having previously consulted the Committee, when such a consultation is considered compulsory by the Treaty. According to this jurisprudence, in fact, the compulsory consultation cannot be reduced to a simple formality because, where it is imposed by the Treaty, it represents an essential requisite of validity of an EC act. Therefore, it must be asked in due time, in order to allow the consulted organ to exert efficiently its function and to have the faculty to be involved in the adoption of the final decision.<sup>24</sup> As stated by the Court of Justice, the “due consultation of the Parliament in the cases provided for by the Treaty is one of the means enabling the Parliament to participate effectively in the Community’s legislative procedure.”<sup>25</sup>

Secondly, it can be argued that the status of the Committee of the Regions will be even more complicated: it will not be formally qualified as an institution, but it will exert the same judiciary rights of the Court of Auditors, which is fully considered an institution *ex current* article 7 of the EC Treaty.<sup>26</sup>

## V. Subsidiarity

The Lisbon Treaty includes two important innovations for the role of Regions in the EU referring to the application of the principle of subsidiarity: (A) the explicit reference to Regions and (B) the new functions of the Committee of the Regions in monitoring respect for the principle.

(A) New article 5 of the Treaty states that

in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level.

So, the Lisbon Treaty has incorporated into the definition of the principle also the territorial units, along with the Member States, exactly as it was in the Constitutional Treaty. Consequently, the “sufficient” character of the action carried out by the Member States must be evaluated also taking into due consideration the regional and local government. According to the current version of the

<sup>23</sup> See the Judgement of 7 July 1992 in *Case C-295/1990, European Parliament v. Council*, [1992] ECR 644.

<sup>24</sup> Ziller, *supra* note 7, at 64.

<sup>25</sup> *Case C-295/1990, European Parliament v. Council*, Rec. 12 of the judgment.

<sup>26</sup> Ziller, *supra* note 7, at 66.

Protocol on the application of the principle of subsidiarity, attached to the Treaty, instead, this evaluation must be done only regarding the national constitutional systems.<sup>27</sup> The text of the new Treaty, therefore, seems more adequate in the sense of an acknowledgement of the role of the regional authorities within the Member States. Anyway, this amendment neither broadens nor restricts the powers of the EU institutions, which will be able to adopt an act only if the action by the Member States is not sufficient. In fact, for the EU it is not important whether the competence to adopt an act within a State pertains to the central organs or the regional ones.

(B) According to the Lisbon Treaty, the Committee of the Regions can exert new functions in the procedure of control over the application of the principle of subsidiarity, but only in the so-called *ex post* stage, which has a judicial character.

The Committee has often stressed that the role of regional authorities in the EU could be enhanced only by means of a clarification of the distribution of competences. The main demands advanced by the Regions in order to obtain more powers in the ascendent and descendent phases are linked to policies shared between the EU and its Member States. So, the setting of clear rules for the adoption of acts at EU level regarding these shared competences and the application of the principle of subsidiarity have been considered by the Committee of the Regions to be particularly important, even more than the inclusion of an explicit list of EU and State competences in the Treaty. In this context, the Committee has requested for itself a new role in referring infringements of the principle of subsidiarity to the European Court of Justice.

In order to meet these demands, the Constitutional Treaty granted the Committee of the Regions supervision powers on the application of the cited principle. The articles governing the functions of the Committee were included in a Protocol on the application of the principles of subsidiarity and proportionality attached to the Constitutional Treaty. Also in this case, the Lisbon Treaty has confirmed, apart from small changes, the innovations brought by the latter. Article 8, paragraph 2, of the Protocol empowers the Committee of the Regions to institute actions before the European Court of Justice regarding the infringement of the principle of subsidiarity by EU legislation. This is carried out by means of “legislative acts for the adoption of which the Treaty on the Functioning of the European Union provides that it be consulted.”

In this way, the Committee obtained the right to turn to the Court in case of a violation of the principle of subsidiarity.<sup>28</sup> The acknowledgement of this new role for the Committee of the Regions is linked to the new text of article 5, paragraph 3 which, as we have seen, now makes reference to the application of the principle of subsidiarity also to sub-national level. The Treaty states that the action must

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<sup>27</sup> Paragraph 5 of the Protocol.

<sup>28</sup> Article 8 of the new protocol affirms that the Member States, on behalf of their national Parliament or a chamber thereof, can have recourse to the Court of Justice, ex article 263 TFUE, in case of a violation by a EU act of the principle of subsidiarity. Nevertheless, this option does not make the national parliaments privileged applicants on the same level of the Member States, because the action is formally brought forward by the Member States.

be proposed by the Committee within two months from the publication of the act; it seems that this term is sufficiently adequate, given that the Committee has, probably, already analyzed the contents of the act in the exercise of its consultative function.

These dispositions allow the preservation of the effectiveness of the Committee's function, and to verify if subsidiarity is respected by the EC institutions in the various steps of the decision-making process. It is also possible to contemplate that the Regions with legislative powers will use this jurisdictional function of the Committee as an institutional channel through which they could make requests which have not been previously considered by the national governments or by the European Commission. Nevertheless, the action for annulment of an EU act for the violation of subsidiarity has two limits. Firstly, this action can be proposed only when the Treaty imposes consultation of the Committee. This means that the action is excluded when the institutions have requested a facultative opinion (article 307, par. 1, final part) or when the Committee has delivered an opinion on its own initiative (article 307, comma 4).

The second limit derives from the interpretation of article 8, paragraph 2 which makes explicit reference to the "rules laid down in Article 263." This article mentions the requisite of violation of the prerogatives of the Committee for the exercise of the action. So, the effective violation of these prerogatives must be considered as an essential element in order to allow the Committee to report an infringement of the principle of subsidiarity to the European Court of Justice.

The Lisbon Treaty, like the Constitutional Treaty, has rejected the more radical demand advanced by Regions with legislative powers: the introduction of the choice for these Regions to bring an action for annulment in the context of the procedure of control over the application of the principle of subsidiarity.<sup>29</sup> Indeed, the issue was faced during the plenary sessions of the European Convention, but it raised several doubts. In particular, the Convention did not want to introduce another differentiation among the several regional authorities of the Member States.<sup>30</sup>

Even if the new provisions analyzed above represent a progress towards a more influential role of the Committee of the Regions, some questions can be raised: the new discipline is not fully convincing for two reasons. First of all, the efficiency of the jurisdictional, *ex post*, control is doubtful, if we consider the case law of the Court of Justice. To present day, in fact, it has clarified that the principle of subsidiarity has an eminently political nature, so that it has always

<sup>29</sup> The regions with legislative powers have often asked for a greater say within the EU system, recalling that: they account for some 56% of the total EU population; they have their own Governments and Parliaments; they often have similar legislative and executive responsibilities within their respective Member States; in areas falling within their legislative competence, they are also responsible for implementing directives in accordance with Article 249 of the EC Treaty. Their demands were essentially finalised to be involved in the control over the respect of subsidiarity, to participate in the Council of Ministers where European action affects regional competences, to bring actions directly to the European Court of Justice, to be consulted by the European Commission when it develops proposals concerning matters for which regions are responsible. See *Florence Declaration of the Regions with Legislative Power on the Future of Europe* of 30 January 2003.

<sup>30</sup> See the *Conclusions* of the Group Subsidiarity, CONV 286/02 of 23 September 2002.

been prudent in declaring its violation by the EC institutions. Consequently, the new right granted to the Committee of the Regions could remain essentially theoretical, with no significant impact over the EU decision-making process, as it will not substantially modify the current institutional role and functions of the Committee. Moreover, according to some authors, not only the *ex-post* procedure would be useless if we consider the few cases in which the Court has decided on the application of subsidiarity, but it would even be harmful. The reason is that the Court should decide on cases involving mainly constitutional issues internal to the Member States, thus interfering with the supreme national jurisdictions.<sup>31</sup>

Secondly, the Committee of the Regions shall not exert any function in the *ex ante* stage of the procedure of verifying the application of the principle of subsidiarity. This stage will focus on the activities of the national parliaments. Article 5 allows them to start the *ex ante* mechanism delivering a reasoned opinion within eight weeks after having received a proposal for a legislative act by the European Commission. Regions can be involved only in those Member States with a federal constitutional structure, where one of the chambers of the national parliament represents the interests of regional authorities. Nevertheless, such a chamber is to be found but only in a few Member States. Therefore, the reaction of sub-statal authorities through their national parliaments to an act violating the principle of subsidiarity could be seen as a single initiative involving Regions of few Member States and not the majority of them.

Also the paragraph in article 6 of the Protocol, according to which “It will be for each national Parliament or each chamber of a national Parliament to consult, where appropriate, regional parliaments with legislative powers” does not seem sufficient to guarantee a significant involvement of Regions to the *ex ante* stage. The possibility of consulting regional parliaments is left to the National ones. Moreover, this provision risks creating a fracture among Regions in Europe. In fact, only some of them – namely, the Regions with legislative functions – will have the right to participate to the procedure and to influence the adoption of EU acts, and not those without elected assemblies with legislative powers. Moreover, if the sub-state dimension to the subsidiarity debate is to be engaged in a meaningful manner, then some questions must be considered. For example: are there adequate channels for regional parliaments to receive legislative proposals of the Commission, in time to enable scrutiny to be undertaken? Does the regional parliament have adequate resources to challenge an impact assessment – or other kinds of qualitative and quantitative data – provided by the Commission? In summary, the real efficiency of these procedural mechanisms for regional authorities will depend on the roles national authorities envisage for them.

## D. Conclusions

The debate on the role of the Regions in the European Union has emerged largely as a result of five factors: the deepening of the discussions about the institutional

<sup>31</sup> A. Tizzano, *La Costituzione Europea e il Sistema Giurisdizionale Comunitario*, 2003 *Il Diritto dell'Unione Europea* 475.

reform of the EU; the challenge of reducing the democratic deficit of the EU; the publication by the Commission of several documents where it promotes a stronger dialogue between the supranational institutions and the regional authorities; the rise of Regions with strong legislative powers within several Member States and, finally, the demand for greater autonomy or for self-determination by Regions within some Member States.

The stronger functions devolved upon Regions by their national governments and the contextual, progressive up-grading of the regional level in the European policy process have led some authors to suggest that the European Union has become the signal example of multi-level governance. This concept emphasizes power-sharing among levels of government, with no centre of accumulated authority. Instead, variable combinations of governments on multiple layers of authority – European, national, and subnational – form policy networks for collaboration. The relations are characterized by mutual interdependence on each others' resources.<sup>32</sup>

As regards Regions, the logical consequence is that both their mobilization at the EU institutions and the transferral of powers to Regions within many Member States have favoured the creation of a third level of government in Europe. This would be the regional level, whose institutional actors – the Committee of the Regions, the various associations representing regional interests and Regions with legislative powers – would have gained essentially the same powers and dignity of the traditional subjects of the European Union law, that is the EU institutions and the Member States.<sup>33</sup> The conclusion is that the ascent of the Regions as “new actors in European policy-making” and the consequential pressures for regional participation would be responsible for “novel elements of interlacing and interlocking politics” where Regions would play a primary role.<sup>34</sup>

Are the results of the process of reforming the institutional structure of the EU sufficient to justify the above mentioned conclusions of the theory of Multi-level Governance? We argue that the answer cannot be other than negative.

<sup>32</sup> L. Hooghe, *Introduction: Reconciling EU-Wide Policy and National Diversity*, in L. Hooghe (Ed.), *Cohesion Policy and European Governance. Building Multilevel Governance*, 18 (1996). About the role of regions in Multilevel Governance, see also B. Kohler-Koch, *The Strength of Weakness: the Transformation of Governance in the EU*, in S. Gustavsson & L. Lewin (Eds.), *The Future of the Nation State*, 169 (1996); G. Marks, *Structural Policy and Multilevel Governance in the EC*, in A. Cafruny & G. Rosenthal, (Eds), *The State of the European Community. Vol. 2: The Maastricht Debates and Beyond*, 403 (1993); F. W. Scharpf, *Community and Autonomy: Multi-Level Policy Making in the European Union*, 1994 JEPP 219.

<sup>33</sup> See, as an example, A. Benz & B. Eberlein, *The Europeanization of Regional Policies: Patterns of Multi-Level Governance*, 1999 JEPP 342:

The process of the regionalization of EU policies and the rise of the regions as new actors in European policy-making produced novel elements of interlacing and interlocking politics. They raise the challenge of including the regional level in the EU multi-level fabric without impairing effective decision-making [...] European multi-level governance can successfully cope with this challenge.

<sup>34</sup> A. Benz & B. Eberlein, *Regions in European Governance: The Logic of Multi-Level Interaction*, EUI Working Papers RSC. 98/31, at 18 (1998).

It is true that some progress towards a more significant recognition of the regional functions has been made. Firstly, the new Treaty has introduced the principle of autonomy, imposing on the EU the respect of the national identity of the Member States, comprising the system of regional autonomies. Secondly, the Committee of the Regions has gained the right of appeal to the Court of Justice in case of violations of its prerogatives. Finally, the Lisbon Treaty ensures Regions stronger instruments to verify the correct application of the principle of subsidiarity.

Nevertheless, it seems that most of these innovations are more formal than substantial. In particular, the Committee of the Regions' expectations were greater than what achieved with the new Treaty. It will not be consulted by the Council in relation to the decision about its composition. It has not acquired any role in the pre-legislative procedures. Then, it is not likely that the Court of Justice will modify its jurisprudence which generally stresses the political value of the principle of subsidiarity, so that the right of appeal granted to the Committee risks being only theoretical. Finally, the Treaty has not intervened on the composition of the Committee which is one of the causes of its institutional weakness and has not recognized Regions with legislative functions the power of *locus standi* before the European Court of Justice.

Another comment must be made about the control on the application of subsidiarity. Under the Lisbon Treaty, national parliaments are to receive information directly from the EU institutions. An early warning system would allow a national parliament or a chamber of a Parliament to contest a legislative proposal with regard to its compliance with the subsidiarity principle. The system empowers national parliaments to demand that the Commission review a proposal if at least 1/3 of the parliaments submit a reasoned opinion to the Commission. None of these privileges is granted to regional Parliaments. It is not clear why Regions have not been involved in this *ex ante* procedure. As it has been stressed in the literature, "Why should regional and sub-national Parliaments not also enjoy a carefully and narrowly defined right of participation on the model crafted by the Convention for the national parliaments?"<sup>35</sup>

In this sense, the Lisbon Treaty has confirmed the modest results of the Treaty Establishing a European Constitution.

In conclusion, the EU integration process has, in recent years, upgraded the role and the functions of Regions and it has produced new interactions between the latter, the national governments and the EU institutions. It does not seem true, however, that a third level of regional government exists, even if the new Treaty entered into force. We cannot assume that, at the current stage of the integration process, Regions constitute a hypothetical third level of government in which they act as subjects of EU law, along with States and supranational institutions. Not surprisingly, an important author has emphasized that "mobilization and influence are not synonymous."<sup>36</sup>

<sup>35</sup> S. Weatherill, *Finding a Role for the Regions in Checking the EU's Competence*, in S. Weatherill & U. Bernitz (Eds.), *The Role of Regions and Sub-national Actors in Europe* 130, at 149 (2005).

<sup>36</sup> C. Jeffery, *Sub-national Mobilization and European Integration: Does It Make Any Difference?*, 2000 JCMS 3.



# The Impact of the Lisbon Reform Treaty on Regional Engagement in EU Policy-Making – Continuity or Change?

Anna-Lena Högenauer\*

## A. Introduction

From the mid-1980s, European policy-making became increasingly subject to intense regional lobbying, in particular from strong legislative regions such as the German *Länder*. The growing regional interest in European Union (EU) affairs, the creation of institutions for regional representation such as the Committee of Regions and the reform of domestic provisions for regional involvement in EU policy-making led Marks to depict EU governance as multi-level, with regional, national and European actors interacting in various arenas.<sup>1</sup> However, while European integration is often seen as empowering constitutionally ‘weak’ regions, strong legislative regions are sometimes seen to lose competences to European and national actors. Jeffery claims that the increase in regional participation rights of the 1980s and 1990s has failed to counterbalance that loss and that strong regions have become increasingly frustrated with the process of European integration. He argues that, in the German case, the *Länder* have moved away from demands for more participation at the European level and for greater involvement in the definition of national positions towards a strategy of minimising the overlap between regional and European competences.<sup>2</sup> This strategy of separating rather than sharing may be seen as an attempt to disentangle the competences of the various levels – and hence as an attempt to limit the need for multi-level interaction. However, at the same time, demands for a greater role of the Committee of Regions were presented during the constitutional debate,

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<sup>1</sup> G. Marks, *Structural Policy and Multilevel Governance in the EU*, in A. Cafruny & G. Rosenthal (Eds.), *The State of the European Community*, 391 (1993).

<sup>2</sup> C. Jeffery, *A Regional Rescue of the Nation-State: Changing Regional Perspectives on Europe*, EUSA Tenth Biennial International Conference, Montreal (2007). C. Jeffery, *Regions and the Constitution for Europe: German and British Impacts*, 13 *German Politics*, 605 (2004). C. Jeffery, *Towards a New Understanding of Multi-Level Governance in Germany? The Federalism Reform Debate and European Integration*, 48 *Politische Vierteljahresschrift* 17 (2007).

pointing towards a complementing strategy of increasing regional participation in areas where competences have already been transferred to the European level. The question is thus whether the Lisbon Reform Treaty has led to a greater disentanglement and/or to what extent greater participation rights have been achieved in the areas of European competence.

Focusing on the regions of federal states, i.e. those regions with the greatest chances of influencing EU policies, we will adapt Putnam's model of two-level international negotiations to the context of EU policy-making.<sup>3</sup> We will then analyse to what extent the Lisbon Reform Treaty increases/reduces the scope for regional participation and whether it leads to a clearer division of powers amongst different territorial levels. It will be argued that the changes were mostly symbolic, resulting in limited new opportunities for regional participation. Overall, they are expected to have little impact on the nature of EU policy-making with regard to the multi-level governance (MLG) debate.

## B. Multi-Level Governance in the EU: A Frustrating Experience for Strong Regions?

Gary Marks developed the concept of multi-level governance in 1992 and 1993 from the study of EU structural policy. He defines MLG as

a system of continuous negotiation among nested governments at several territorial tiers – supranational, national, regional and local – as the result of a broad process of institutional creation and decisional reallocation that has pulled some previously centralised functions of the state up to the supranational level and some down to the local/regional level.<sup>4</sup>

Thus, different levels of government negotiate on several levels in a process that goes beyond formal relationships to include informal interaction.

While MLG shares with intergovernmentalist integration theory the acknowledgement that Member States remain for the foreseeable future “the *most* important pieces of the European puzzle,”<sup>5</sup> it shares with supranationalists the view that supranational bodies, and in particular the Commission, are capable of exerting independent influence by forming alliances with actors other than central governments. However, contrary to intergovernmentalist and neo-functionalist approaches that explain the process of European integration, MLG has started

<sup>3</sup> R. D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-level Games*, 42 IO 427 (1988).

<sup>4</sup> Marks, *supra* note 1, at 392. See also G. Marks, *Structural Policy in the European Community*, in A. Sbragia (Ed.), *The Political Consequences of 1992 for the European Community*, 191 (1992).

<sup>5</sup> G. Marks, L. Hooghe & K. Blank, *European Integration from the 1980s: State Centric v. Multi-level Governance*, 34 JCMS 341, at 346 (1996). See also C. Jeffery, *Regional Information Offices in Brussels and Multi-level Governance in the EU: A UK-German Comparison*, in C. Jeffery (Ed.), *The Regional Dimension of the European Union – Towards a Third Level in Europe?* 183, at 184 (1997).

as a theory of policy-making in the EU as a political system and was only subsequently developed into a theory that addresses both European integration and the functioning of the EU.<sup>6</sup>

As a theory of European integration, MLG relies on an actor-centred approach to explain why central governments may agree to disperse authority within the process of European integration. It argues that government leaders may wish to disperse authority in order to avoid responsibility for unpopular decisions, to attempt to tie their successors' hands, or to tie their own hands in such a way as to reduce the scope of concessions that regional or supranational actors may ask of them in subsequent negotiations. Finally, government leaders may agree to transfer competences away from the central government if they regard it as necessary in order to achieve a highly desirable policy outcome or they may be unable to prevent the transfer of authority due to ambiguities in treaties exploited by supranational agents.<sup>7</sup>

As a result of the transfer of powers to the supranational level, sub-national actors will feel the need to adapt to the changing circumstances through contact with the new actors and modified national procedures. The supranational actors, and, in particular, the Commission, may engage in alliances with sub-national actors that allow both to circumvent central governments.<sup>8</sup> On this basis, scholars of MLG usually work with two hypotheses: (1) there will be direct interaction between sub-national and the supranational actors unmediated by central governments; and (2) this interaction will undermine the authority of central governments.

Over time, a more precise set of hypotheses has been developed, especially in relation to the question of regional influence on EU policy-making. Thus, a study of sub-national offices in Brussels by Marks, Haesly and Mbaye shows that an office's lobbying activity increases with the funds available. These funds tend to increase with the competences of a region.<sup>9</sup> Jeffery identifies four variables that have an impact on the level of influence of sub-national authorities (SNAs). Firstly, a strong constitutional position allows for more regional influence. Secondly, formal structures of intergovernmental relations are seen as resulting in greater regional influence than informal structures. Thirdly, administrative adaptation, leadership and coalition-building have an impact on the level of influence and, finally, legitimacy and social capital (historic background of a SNA, sense of identity, a well developed civil society, etc.) give greater credibility to sub-national demands.<sup>10</sup>

While these studies suggest that strong legislative regions invest more into lobbying at the European level and have greater influence than constitutionally

<sup>6</sup> S. George, *Multi-level Governance and the European Union*, in I. Bache & M. Flinders (Eds.), *Multi-level Governance* 107, at 113 (2004).

<sup>7</sup> Marks, Hooghe & Blank, *supra* note 5.

<sup>8</sup> *Id.*

<sup>9</sup> G. Marks, R. Haesly & H. A. D. Mbaye, *What Do Subnational Offices Think They Are Doing in Brussels?*, 12 *Regional and Federal Studies* 1 (2002).

<sup>10</sup> C. Jeffery, *Subnational Mobilization and European Integration: Does it Make any Difference?*, 38 *JCMS* 1, at 14-17 (2000).

weak regions, Jeffery argues with regard to the German *Länder* that European MLG may nevertheless be a frustrating experience for constitutionally strong regions.<sup>11</sup> His argument is in line with the view that regional mobilisation may not just be due to the virtuous attempts of the European Commission to involve sub-national actors in its policies, but that it may be a bottom-up attempt by the regions to regain control over policies that have been moved to the European level,<sup>12</sup> and with the assumption that European integration – at least initially – entails a disempowerment of constitutionally strong regions.<sup>13</sup> However, Jeffery's work goes beyond this, suggesting that strong regions have come to see European integration as a threat that cannot be reigned in by participation rights and have therefore moved to a strategy of disentanglement of competences. Jeffery argues that “while regional governments set out 20 years ago with a transformative project designed to challenge the centrality of the member state in the EU, legislative regions have in the last few years come to endorse, even buttress the centrality of the member state.”<sup>14</sup> In particular, while much of the MLG literature focuses on *implementation*, he regards legislative regions as having a distinctive interest in the preservation of “the meaning of regional *law-making* powers in the context of European integration.”<sup>15</sup> According to Jeffery, from the mid-1990s, the German *Länder* realised that the enhanced domestic and European participation rights could not offset the transfer of competences to the European level and they embarked on a defensive strategy, supported by the Belgian and Austrian regions during the European constitutional debate. The core demands were the introduction of the ‘new early warning system’ for national parliaments, a clearly defined catalogue of EU competences, the restriction of the use of Arts. 94, 95 and 308<sup>16</sup> and the strengthening of the subsidiarity and proportionality principles with the goal of preventing further Europeanization of regional legislative competences.<sup>17</sup> Based on the analysis of the preferences of the German *Länder* in the European constitutional debate, Bauer concludes that “[a] sub-national government is expected to favour a more autonomy-orientated relationship with the European

<sup>11</sup> See Jeffery, *Regional Rescue of the Nation-State; Regions and the Constitution for Europe and Towards a New Understanding of Multi-Level Governance in Germany?*, *supra* note 2.

<sup>12</sup> A. Bourne, *The Domestic Politics of Regionalism and European Integration: Introduction*, in A. Bourne (Ed.), *The EU and Territorial Politics Within Member States: Conflict or Cooperation?* 1, at 5 (2004).

<sup>13</sup> S. Weatherill, *The Challenge of the Regional Dimension in the European Union*, in S. Weatherill & U. Bernitz (Eds.), *The Role of Regions and Sub-National Actors in Europe*, 1 (2005).

<sup>14</sup> Jeffery, *Regional Rescue of the Nation-State*, *supra* note 2, at 1.

<sup>15</sup> *Id.*

<sup>16</sup> These three articles currently allow the EU to act in the absence of explicit competences where such action is required for the fulfilment of the internal market (Arts. 94 and 95 EC Treaty) or for the fulfilment of the objectives set out in the Treaties (Art. 308 EC Treaty). The regions see in them the danger of ‘creeping’ European competences, i.e. a transfer of competences that they cannot prevent in the absence of a formal modification of the Treaties.

<sup>17</sup> C. Jeffery, *Regions and the European Union: Letting them In, and Leaving them Alone*, in S. Weatherill & U. Bernitz (Eds.), *The Role of Regions and Sub-National Actors in Europe* (2005). M. Große Hüttemann & M. Knodt, ‘Diplomatie mit Lokalkolorit’: *Die Vertretungen der deutschen Länder in Brüssel und ihre Aufgaben im EU-Entscheidungsprozess*, 7 Jahrbuch des Föderalismus 595, at 596-597 (2006).

Union, the more its actual political room for manoeuvre is affected by further European integration.”<sup>18</sup> The ‘actual’ political room for manoeuvre is determined by both the constitutional competences and the economic resources of a region. These preferences would be in stark contrast to the European Commission’s vision as set out in the *White Paper on European Governance*, where one of its concluding statements is that “[I]n a multilevel system, the real challenge is establishing clear rules for how competence is *shared – not separated*; only that non-exclusive vision can secure the best interest of all the Member States and all the Union’s citizens” (emphasis added).<sup>19</sup>

The aim of the third strategy would thus be to disentangle regional policy-making from national and European policy-making, or at least to prevent further entanglement. Legislative regions seem to want less MLG rather than more. Thus, in the face of these demands, the question is whether and to what extent the Lisbon Reform Treaty reduces regional-EU entanglement and hence MLG or strengthens MLG through further regional participation rights. In the following two sections, the existing channels of regional interest representation in the European Union and the resulting regional position in the decision-making game will be reviewed. We will then analyse the potential impact of the Lisbon Reform Treaty on this system before concluding with reflections on the implications of the Irish ‘no’ to the Treaty.

### **C. Channels of Regional Representation in the European Union**

There are three main channels for regional engagement at the European level: the Committee of Regions, the regional information offices and (depending on domestic arrangements) the Council of Ministers. In addition, one could identify a number of regional networks as a means of cross-border coordination of regional positions. While some of the regional alliances are *ad hoc*, others have been institutionalised in networks such as RegLeg. However, in everyday policy-making regional participation in these networks will largely depend on and be coordinated by the regional offices in Brussels. As their role may vary widely depending on the policy sector and interests affected by EU legislation, they will not be reviewed separately here except to mention that they offer additional opportunities for collective regional lobbying.

The most *approachable* ‘institutionalised’ channel for sub-national authorities is the Committee of Regions (CoR).<sup>20</sup> Established by the Treaty of Maastricht, this advisory organ consists of representatives of the regional and local levels. Over

<sup>18</sup> M. W. Bauer, *The German Länder and the European Constitutional Treaty: Heading for a Differentiated Theory of Regional Elite Preferences for European Integration*, 16 *Regional and Federal Studies* 21, at 35 (2006).

<sup>19</sup> Commission White Paper of 25 July 2001, *European Governance – A White Paper*, OJ 2001 C 287/1 at 35.

<sup>20</sup> A. Sloat, *Scotland in Europe – A Study of Multi-Level Governance* 46 (2002).

the years, the CoR has gained greater control over its own operation, obtaining its own resources and the right to establish its own rules of procedure in the Treaty of Amsterdam. The Commission and Council of Ministers are obliged to consult it on issues concerning employment, social policy, environment, transport, public health, structural funds, education and training (Art. 265 EC Treaty). It may also be consulted by the European Parliament and has the right to issue opinions of its own motion. The main merits of the CoR lie in its great symbolic value as the only supranational institution representing the sub-national level,<sup>21</sup> and in its capacity to provide a setting for coalition-building and the debate on sub-national issues at the European level.<sup>22</sup>

While Schausberger argues that the CoR has received growing recognition as a result of its constructive work during and after the European Convention,<sup>23</sup> most academics are sceptical about the influence of the CoR. Its diverse membership is seen as leading to a lack of cohesion. In particular, the mix of representatives of strong legislative regions, weak regions and cities reduces its usefulness as a political forum for strong regions.<sup>24</sup> As a result, legislative regions have occasionally demanded special treatment in the past – a tactic that undermines the credibility of the CoR.

Regional information offices are the main non-institutionalised channel of regional representation at the European level.<sup>25</sup> In the past, the regions of federal states have been eager to establish their own base in Brussels, and the German *Länder* in particular were among the first to do so in the 1980s.<sup>26</sup> In terms of structure and function, the regional offices vary widely across Member States. The functions of these offices include information gathering for the regional government at home, networking, assisting other, private actors at home (e.g. in applications for funding), active attempts at influencing policies and the general improvement of relations with other tiers of government.<sup>27</sup> While information gathering and networking, the ‘bread-and-butter’ activities of sub-national offices, are conducted by all offices, different types of regions attach varying degrees of importance to assisting private local and regional actors and, in particular, to

<sup>21</sup> J. Loughlin, *Representing Regions in Europe: The Committee of the Regions*, in C. Jeffery (Ed.), *The Regional Dimension of the European Union – Towards a Third Level in Europe?* 147, at 163-164 (1997).

<sup>22</sup> P. C. Müller-Graff, *The German Länder: Involvement in EC/EU Law and Policy-Making*, in S. Weatherill & U. Bernitz (Eds.), *The Role of Regions and Sub-National Actors in Europe* 103, at 109 (2005).

<sup>23</sup> F. Schausberger, *Der Ausschuss der Regionen im Jahr 2005 – gefragter Partner in einer kritischen Phase der EU*, 7 *Jahrbuch des Föderalismus* 576, at 592-594 (2006).

<sup>24</sup> Müller-Graff, *supra* note 22, at 110. J. Nergelius, *The Committee of the Regions Today and the Future – A Critical Overview*, in S. Weatherill & U. Bernitz (Eds.), *The Role of Regions and Sub-National Actors in Europe* 119, at 126 (2005).

<sup>25</sup> C. Jeffery, *Conclusions: Sub-National Authorities and ‘European Domestic Policy’*, in C. Jeffery (Ed.), *The Regional Dimension of the European Union – Towards a Third Level in Europe?* 204 (1997).

<sup>26</sup> Große Hüttemann & Knodt, *supra* note 17, at 595.

<sup>27</sup> A. Benz & B. Eberlein, *The Europeanization of Regional Policies: Patterns of Multi-level Governance*, 6 *Journal of European Public Policy* 329, at 331 (1999).

influencing policies.<sup>28</sup> Marks, Haesly and Mbaye find a weak negative association that suggests that offices “that emphasise political influence as a goal are *less* likely to report that finding funding opportunities is important to them, *less* likely to report that building ties with other regional or local representations is important for them, and *less* likely to report that responding to requests from people in their region is important to them.”<sup>29</sup> Whether or not a regional office seeks political influence and how much it is willing to invest in this activity depends on the constitutional strength of the region.<sup>30</sup> The level of funding is important in that it translates into more staff and thus increased specialisation of officers in certain policy areas and the coverage of a broader spectrum of policy areas.<sup>31</sup> The work of regional offices is also designed to serve policy-shaping through domestic channels, by providing the necessary information for the effective use of existing Member State structures.<sup>32</sup>

The actual influence of regional offices is difficult to measure. Especially with regard to the relationship between the regional offices and the Commission – a central actor at the European level due to its agenda-setting ability – there are open questions with regard to the Commission’s role and intentions. Some authors argue that the Commission champions the regional cause, contributes to regional mobilisation when looking for support for policies and “is eager for political allies to moderate state executive domination in the EU.”<sup>33</sup> While it is true that regions can provide important grass-root information about the feasibility and implementation of policies, these assessments rely too much on the idea that regional and Commission preferences are similar. This also implies that regions are relatively powerless in cases where European policy does not coincide with regional preferences and where the Commission is going its own way.

The third possibility for regional engagement at the EU level is the involvement of regional representatives in the Council of Ministers. According to Art. 203 EC the Council of Ministers consists of one representative at the ministerial level from each Member State. It thus allows for representation at either the federal or the regional ministerial level. At first glance, this opportunity may seem to greatly empower regions, and Bullmann argued that strong regions may come to regard this channel as more important than a full-blown regional Third Chamber at the European level.<sup>34</sup> However, whether regional ministers are actually allowed to sit on the Council depends on domestic constitutional arrangements, with the result

<sup>28</sup> A. Heichlinger, *A Regional Representation in Brussels: The Right Idea for Influencing EU Policy Making?* 9-10 (1999).

<sup>29</sup> Marks, Haesly & Mbaye, *supra* note 9, at 8.

<sup>30</sup> *Id.*, at 15.

<sup>31</sup> Heichlinger, *supra* note 28, at 13.

<sup>32</sup> *Id.*, at 1.

<sup>33</sup> G. Marks & D. McAdam, *Social Movements and the Changing Structure of Political Opportunity in the European Union*, 19 *West European Politics* 249, at 267 (1996). See also I. Tömmel, *Transformation of Governance: The European Commission’s Strategy for Creating a ‘Europe of the Regions’*, 8 *Regional and Federal Studies* 52, at 72 (1998). Benz & Eberlein, *supra* note 27, at 331.

<sup>34</sup> U. Bullmann, *Introductory Perspectives – The Politics of the Third Level*, in C. Jeffery (Ed.), *The Regional Dimension of the European Union – Towards a Third Level in Europe?* 3, at 16 (1997).

that most regions do not have any access to the Council. Moreover, whichever minister sits in the Council has to be able “to commit the government of that member state” (Art. 203 EC). As only the national position may be represented and as the national vote cannot be split into regional elements, the regional representative in the Council has only a limited margin of manoeuvre. Due to the need to coordinate the national position internally before presenting it externally, participation in the Council is *de facto* an intra-state mechanism.<sup>35</sup>

As the opportunities for regional input at the European level are mainly advisory and rely on persuasion, the channels for influencing national positions on EU policies have to be considered. Below, the domestic provisions of Belgium and Germany will be analysed in turn, as the regions of these states are arguably the most powerful domestically and have therefore the greatest chances of influencing European policies.

In Belgium, the central coordinating role for Belgium’s official position in the European Union is played by the Directorate for European Affairs (DEA) of the Federal Foreign Ministry. It is an administrative body composed of representatives of the federal, regional and community ministries and headed by a federal representative. Unlike in Germany, the Senate is not incorporated into the institutional settings of coordination.<sup>36</sup> In the DEA, decisions are taken by consensus, which confers an equal status on the regions, communities and the central government as neither entity can act without the consent of the others.<sup>37</sup> The federal level can only achieve a slight degree of primacy through the use of its monitoring and coordinating role.<sup>38</sup> In the absence of consensus, ministers from the different levels will discuss an issue at the Interministerial Conference for Foreign Policy. If no common position can be found, the Prime Minister and regional and community minister-presidents will meet in the Consultation Committee. However, failure to reach an agreement at the level of the DEA often leads to abstention in the Council. Yet, the vast majority of decisions are taken in the DEA and abstentions are rare.<sup>39</sup> The role of the DEA varies, however, across policy sectors. With regard to exclusive federated competences, decisions are often taken through non-formalized interaction between federated units and are subsequently formalized the DEA.

The involvement of federated entities in the Council of Ministers was regulated by the Cooperation Agreement Act of 8 March 1994 and then modified by the Lambermont Agreements of July 2001.<sup>40</sup> There are essentially four

<sup>35</sup> M. Morass, *Austria: The Case of a Federal Newcomer in European Union Politics*, in C. Jeffery (Ed.), *The Regional Dimension of the European Union – Towards a Third Level in Europe?* 76, at 84 (1997). T. Kovziridze, *Europeanization of Federal Institutional Relationships: Hierarchical and Interdependent Institutional Relationship Structures in Belgium, Germany and Austria*, 12 *Regional and Federal Studies* 128, at 136 (2002).

<sup>36</sup> Kovziridze, *supra* note 35, at 137.

<sup>37</sup> B. Kerremans & J. Beyers, *The Belgian Sub-National Entities in the European Union: Second or Third Level Players?*, in C. Jeffery (Ed.), *The Regional Dimension of the European Union – Towards a Third Level in Europe?* 41, at 50 (1997).

<sup>38</sup> Kovziridze, *supra* note 35, at 138.

<sup>39</sup> *Id.*, at 137-138.

<sup>40</sup> Cooperation Agreement of 8 March 1994, OJ of 17 November 1994. In Belgium, most

possible cases for representation and two exceptions: when an issue falls under the sole federal responsibility, the federal ministers sit on the Council. In case of exclusive regional competences, the regional ministers sit on the Council. When predominantly central competences are concerned, a national minister is assisted by a regional representative and lastly, for predominantly regional matters, a regional minister is assisted by a representative of the national level.<sup>41</sup> Equality between regions is ensured through a rotation system, where regional representatives replace each other every six months. In practice, though, there are often several regional representatives present at Council meetings to facilitate coordination.<sup>42</sup> The Lambermont Agreements created two exceptions to this rule. The federal minister leads negotiations on agricultural issues assisted by the Flemish and Walloon regional ministers. The Flemish government represents Belgium on fishery.

Overall, even though Belgium originally adopted a system of dual federalism, European integration has led to a greater prevalence of cooperation and joint decision-making in Belgium. The downside is that the reinforced interdependencies prevent regions from acting as fully-fledged EU level players.<sup>43</sup>

In Germany, the mechanisms of coordination in European matters are laid down in Art. 23 of the Basic Law (BL) and the *Law on Cooperation (LC) between the Bund and the Länder Concerning European Matters* of 12 March 1993. The coordination takes place between the federal government and the collective position of the *Länder* as expressed in the *Bundesrat* through a majority vote. Thus, unlike in Belgium, in Germany individual *Länder* do not enjoy equal status to that of the federal government.<sup>44</sup> If the European measure predominantly concerns a field of legislative and administrative power of the *Länder*, the statement of the *Bundesrat* has to be decisively taken into account (“*massgeblich zu berücksichtigen*”) without compromising the federal responsibility for the entire Republic. In case of disagreement between federal government and *Bundesrat*, an arbitration procedure takes place. In the absence of a compromise, a two-thirds majority is required for the *Bundesrat* to confirm its original opinion. For concurring legislative powers, the *Bundesrat*'s statement has the same moderate weight as in the case of exclusive federal powers - it merely has to be taken into account – if the federal government has already legislated in the field or if there is a need for uniform regulation. Otherwise, the opinion of the *Bundesrat*

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competences belong exclusively to either the regions or communities or the federal level. In order to allow for a coherent Belgian foreign policy, the regions, communities and the central government have entered into a number of cooperation agreements to lay down how these internal powers are to be exercised in the European Union and the international arena. In particular, these agreements usually specify who has the right to represent Belgium and how the national position is to be negotiated. The Belgian Constitution confers upon the agreements the status of ‘special laws’, which means that they can only be amended with special majorities. The Lambermont Agreements are the fifth Belgian state reform transferring also new powers to the regions.

<sup>41</sup> Kerremans & Beyers, *supra* note 37.

<sup>42</sup> Kovziridze, *supra* note 35, at 149.

<sup>43</sup> J. Beyers & P. Bursens, *The European Rescue of the Federal State: How Europeanisation Shapes the Belgian State*, 29 *West European Politics* 1057, at 1057-1059 (2006).

<sup>44</sup> Kovziridze, *supra* note 35 at 140.

has to be decisively taken into account (Art. 23 BL and §5(2) LC).<sup>45</sup> Thus, the federal government can disregard the opinion of the *Bundesrat* in fields of federal competence, and even in fields where regional competences are concerned, the federal government has some say in the formulation of the German position.<sup>46</sup> However, there is also an array of non-formalized mechanisms, such as the Conference of Minister Presidents or the conferences of specialized ministers that often coordinate *Länder* positions prior to the meetings of the *Bundesrat*, and the *Bund-Länder* working groups that try to reach subject-orientated consensus.<sup>47</sup> In case of disagreement, solutions are sought in non-formalized settings and before the official procedure starts. Both non-formalized coordination amongst *Länder* and between the *Bund* and *Länder* strengthen the *Länder*, but in the case of conflict, the formal structures prevail.<sup>48</sup>

When it comes to representing the German position in the Council, the federal government is in an even stronger position. A regional minister represents Germany's position in three areas: school education, culture and broadcasting (Art. 23(6) BL). In all other areas, federal ministers will represent Germany on the Council.

Thus, Germany has developed a version of co-operative federalism for European policy formulation that takes internal competences into account. This is in line with the definition of European policies as 'European domestic policies' instead of classical foreign policies and with the demands of the *Länder* that their domestic competences be reflected in German EU policy-making.<sup>49</sup> However, while the *Länder* have the means of influencing the German position in areas where their competences are affected, they have to exercise these powers collectively. The input of each individual region is diluted at three stages: during the negotiations among regions, during the negotiations with the central government and then at the European level in negotiations with other Member States and European institutions. Thus, if a region wants to avoid the erosion of its impact on the final outcome, it has to enter into alliances with other actors with similar preferences to strengthen its bargaining power at each of these stages.

## D. Towards a Model of Regional Engagement in EU Policy-Making: The Multi-Level Game

In his 1988 article on the logic of two-level games, Putnam describes domestic politics and international relations as "often somewhat entangled." According to

<sup>45</sup> *Id.* See also Müller-Graff, *supra* note 22.

<sup>46</sup> Kovziridze, *supra* note 35, at 141.

<sup>47</sup> R. Palmer, *European Integration and Intra-State Relations in Germany and the United Kingdom*, in A. K. Bourne (Ed.), *The EU and Territorial Politics Within Member States: Conflict or Cooperation?* 51, at 57 (2004). C. Jeffery, *Farewell the Third Level? The German Länder and the European Policy Process*, in C. Jeffery (Ed.), *The Regional Dimension of the European Union – Towards a Third Level in Europe?* 56, at 72 (1997).

<sup>48</sup> Kovziridze, *supra* note 35, at 142-143.

<sup>49</sup> Jeffery, *supra* note 47, at 216.

him, dynamics in the domestic arena and dynamics in the international arena influence each other in a way that outcomes of international negotiations can only be explained by reference to both. Thus, “the politics of many international negotiations can usefully be conceived as a two-level game,” with domestic groups pressuring the government at the national level, where politicians have to construct coalitions among those groups, and with “national governments seeking to maximize their own ability to satisfy domestic pressures, while minimizing the adverse consequences of foreign developments” at the international level.<sup>50</sup>

In his work on international negotiations, Putnam identifies a certain number of concepts as crucial for analysing two-level games such as the role of win-win sets for ratification of an agreement and for the direction of international negotiations themselves, the risk of defection of players, the effect of package deals, the option of non-agreement, reverberation of the international game on the domestic game and *vice-versa*.<sup>51</sup> Below, Putnam’s two-level game metaphor will be adapted to illustrate the options of regions in European decision-making. In the modelling of the European ‘game’ two elements have to be taken into account. First of all, decision-making in the EU is subject to a specific set of rules that differ in important ways from international negotiations as analysed by Putnam. The EU has become a complex political system that is in between an international organisation and a state.<sup>52</sup> Everyday EU decision-making more closely resembles decision-making in federal states than traditional international negotiations. Secondly, as the metaphor is applied to EU decision-making in general rather than used to analyse a particular instance of policy-making, the focus necessarily lies more on the rules of the game and opportunities than on specific win-sets or trade-offs. Further research is needed to determine how the various players play the game. In the short term, the model can help us understand why certain regions may come to feel disempowered by EU policy-making.

Putnam breaks his model of negotiations down into two stages: At Level 1, bargaining between the national negotiators takes place. At Level 2, discussions on the ratification of the agreement take place within each group of constituents, i.e. within each domestic setting. While it is possible that the negotiating position is agreed at Level 2 prior to the start of negotiations, and while it is likely that both Level 2 attitudes and Level 1 attitudes may evolve during the negotiations due to a mutual impact, Putnam assumes that the most important part of Level 2 negotiations – ratification – follows chronologically Level 1 negotiations.<sup>53</sup>

As mentioned previously, everyday decision-making in EU politics – as opposed to constitutional decision-making - follows somewhat different rules that impose different opportunities and constraints on players. In fact, when analysing the role of regions, it is useful to distinguish two types of game. Both types are two level games, involving negotiations on the domestic and European levels, but one conforms more to an intergovernmental idea of policy-making while the other comes closer to MLG.

<sup>50</sup> Putnam, *supra* note 3, at 434.

<sup>51</sup> *Id.*

<sup>52</sup> N. Nugent, *The Government and Politics of the European Union* 512 (2003).

<sup>53</sup> Putnam, *supra* note 3, at 435-436.

Contrary to the idea of multi-level governance, *decision-making* in the narrow sense takes place mainly in a two-step process with regional involvement depending on domestic structures.<sup>54</sup> This game resembles Putnam's use of the metaphor in that there is a domestic level with negotiations between domestic actors and a supranational level with negotiations between the central governments and the supranational institutions. At the European level, the Commission formulates the policy proposal and the Council of Ministers and the European Parliament amend and adopt it (the exact modalities depending on the policy-area). As described above, certain regions may have the right to represent their Member State in the Council of Ministers, but they may only represent the state as a whole, not the region or regional position. Regions have therefore no 'hard' decision-making powers at this level. Before the Council of Ministers adopts a position, the national positions will be formulated according to the national sets of rules. Thus, regional influence at this level (Level 2), can range from virtually no involvement to co-determination. The strongest regions in this respect are the Belgian regions, followed by the German *Länder*. However, while each Belgian region could veto the national position, in the case of Germany even the majority position of the Bundesrat has only to be taken into account or taken into account to a large extent. Thus, even in the case of the relatively strong German regions, the central government acts as a gatekeeper. As there is no need to ratify European legislation, the bulk of Level 2 negotiations are thus conducted prior to Level 1 negotiations. At best, European framework legislation needs to be transposed into national law, but as a case can be brought before the ECJ for non-implementation and infringement, contrary to international negotiations, voluntary defection can be limited.<sup>55</sup>

Further differences between EU decision-making and international negotiations lie in the majority requirements. While international negotiations generally require unanimity, EU decision-making now mostly relies on qualified-majority voting. As a result national players can be outvoted and are less powerful than in international negotiations, where unanimity is the rule. In addition, the position of the European Parliament will often have to be taken into account. Consequently, national win-sets become less important. While Member States tend to still adopt policies by consensus as often as possible, if only one or two Member States are seen as blocking a decision, they risk being outvoted.<sup>56</sup> On the other hand, a government can justify adopting a more conciliatory stance than hoped for by the national parliament, regions or public opinion on the basis that this allows it to achieve at least some compromise, while it would simply be outvoted if it tried to adopt a more radical stance. Thus, EU decision-making rules seem to strengthen the government more in the face of domestic (and regional) demands than in the face of European pressure.

<sup>54</sup> By 'decision-making' the process of actually taking a decision (i.e. voting, vetoing etc.) is meant. It is thus about 'hard' decision-making powers as opposed to 'soft' powers (consultation, advice, lobbying) involved in 'decision-shaping'.

<sup>55</sup> Cf. Putnam, *supra* note 3, at 438.

<sup>56</sup> B. De Witte, *Anticipating the Institutional Consequences of Expanded Membership of the European Union*, 23 *International Political Science Review* 235, at 242 (2002).

Beyond this narrowly-defined formal game of decision-making, we can identify a partly formal and partly informal game of *decision-shaping*, i.e. influencing decisions in the broad sense. It is this game that is multi-level, with the interaction of several actors from different levels. Below, we will concentrate on regional and national governments and the EU institutions, as we are interested in the regional perspective. Of course, a variety of private actors are also promoting their interests through action on the national and European levels.

This decision-shaping game takes place in the context of the rules set by national constitutions, the European treaties and the grey areas left by them, which actors may be able to exploit as opportunities.<sup>57</sup> It takes place parallel to the decision-making game but relies on ‘soft’ powers, i.e. the capacity of an actor to persuade other players of the ‘rightness’ of its position or to convince them of the benefits of a particular course of action.<sup>58</sup> It is multi-level in the MLG sense – i.e. with interaction between the regional and European levels – with players being engaged in multiple relationships with other players. At the centre is a triangular relationship between Member States and EU institutions, Member States and their respective regions, and regions and the European institutions. From each of the corners, a variety of other relationships branch out in the form of alliance-building amongst Member States, amongst regions of the same state and/or regions of different states or alliances between regions and private actors.

At the domestic level, in addition to the above-mentioned formal mechanisms for influencing the national position, regions can of course submit their observations to the national government or officials on a less formal basis or try to increase their influence on the national position by entering into interregional alliances. In Germany, for example, this is facilitated by informal working-level meetings between national and regional civil servants and higher level Interministerial Conferences.<sup>59</sup>

As to the relationship between regions and European institutions, the Committee of Regions serves as a formal channel of regional consultation. Apart from this, regions can submit their observations to the Commission during consultations, invite European policy-makers to events or meetings at the regional offices in Brussels or establish regular informal contact with European officials through these offices. They can also enter into cross-national alliances and try to maximise the impact of their position through collective lobbying.

Overall, despite variations in regional competences and involvement across Member States, regions have ‘hard’ decision-making powers at best at the national level. This has led Jeffery to argue that “any significant difference made by sub-national engagement is likely to arise primarily from what SNAs [sub-national authorities] do in the field of European policy in the intra-state arena in their respective Member States.”<sup>60</sup> Kerremans and Beyers agree with this assessment

<sup>57</sup> For example, in the case of Germany, the right to establish regional information offices in Brussels, which was used to build up regional quasi-embassies.

<sup>58</sup> Cf. Putnam’s concept of the ‘restructuring’ of other players’ perception: Putnam, *supra* note 3, at 438.

<sup>59</sup> Kovziridze, *supra* note 35.

<sup>60</sup> Jeffery, *supra* note 25, at 205 and Jeffery, *supra* note 10.

in the case of Belgium. They find that Belgian regions have only limited contact with other Member States, regions or supranational interest groups at the European level and point out that Belgian regions can only extend their domestic power to the European level if they act jointly.<sup>61</sup> However, Belgium is special in the sense that it has only three regions. The more regions have to come to an agreement – be it through voting or consensus – the less impact the individual regions will have. In addition, whatever impact a region manages to have on the collective regional position is likely to be eroded during the multiple negotiations with the national government, in the Council of Ministers, between the national government and the Commission and in the European Parliament. Finally, Jeffery himself admits in one of his articles the possibility that diverging regional interests might cancel each other out in collective policy-making and thus increase the importance of individual strategies.<sup>62</sup> Thus, if an individual region wants to make sure that its position is heard at the European level as well as at the national level, it has to use the ‘soft’ European channels in addition to national channels.

To conclude, when competences are transferred to the European level, legislative regions see their formal and substantial policy-making powers being replaced by an array of mostly advisory and often collectively exercised powers. In addition, they can use a number of informal and hence intrinsically advisory channels. As a result, from a policy-making perspective, it is in a region’s interest to keep its own and European competences disentangled as far as possible. However, to date, a variety of regional competences have already been Europeanised. In these areas, regions will have to use a wide variety of channels if they want to make a difference, as none of the channels guarantees them an impact on European decision-making.

The Lisbon Reform Treaty offered regions an opportunity to push for change. In the following section, we will analyse whether the Lisbon Reform Treaty offers regions better participation rights in EU policy-making thereby strengthening the multi-level character of the European Union and/or if it provides a clearer delimitation of competences between the regional, national and European levels that would prevent European encroachment upon regional competences.

## **E. EU Policy-Making Post Lisbon: Continuity or Change?**

The European constitutional debate saw the emergence of an array of regional demands, some aiming at a clearer separation of competences, others at enhanced participation rights. As this paper is less concerned with the process of negotiating the Constitutional Treaty and the Lisbon Reform Treaty than with the final outcome of the debate, we will only briefly review the key demands presented by the Committee of Regions and legislative regions – in particular the German

<sup>61</sup> Kerremans & Beyers, *supra* note 37, at 53.

<sup>62</sup> C. Jeffery, *Les Länder allemands et l’Europe: intérêts, stratégies et influence dans les politiques communautaires*, in E. Négrier & B. Jouve (Eds.), *Que gouvernement les régions d’Europe?* 55, at 59 (1998).

regions – and then compare this with the actual changes introduced in the Lisbon Reform Treaty and their expected impact.<sup>63</sup>

The demands of the Committee of Regions are – unsurprisingly – about the improvement of the status and role of this body. The most ambitious demands included a right of veto over issues on which it has currently to be consulted and an extension of the areas of mandatory consultation as well as the right to bring cases before the European Court of Justice to review the legality of a European act.<sup>64</sup> The right to review the legality of legally binding acts adopted by the European institutions “on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers” was hitherto reserved to the Member States, the Commission, the Council and the European Parliament (Art. 230 EC Treaty). In addition, the European Central Bank and the Court of Auditors could invoke it to protect their prerogatives. All other natural or legal persons could only bring an action before the ECJ to review the legality of an act if that act directly and individually affected them (Art. 230 EC Treaty). In the absence of this right for either the Committee of Regions or the regions themselves, it was difficult for the CoR to defend its right to be consulted or for regional actors to challenge an act as breaching the principles of subsidiarity and proportionality. In addition, the CoR demanded a special role in overseeing the principle of subsidiarity and the right to ask written and oral questions of the Commission.<sup>65</sup> While the fulfilment of the first of these demands would result in the emergence of a genuine ‘third chamber’ at the European level, the three following demands would give the CoR a stronger standing amongst the supranational institutions and bodies. More modest demands included, for example, a clearer definition of the subsidiarity principle and the obligation on the part of the supranational institutions to give an explicit reason if the opinion of the CoR is ignored.<sup>66</sup>

In the case of the German *Länder*, Bauer identifies 16 key demands.<sup>67</sup> Some of these are about autonomy, such as the respect for the principle of local and regional self-government, the clearer definition of the subsidiarity and proportionality principles and the abolition or restriction of use of Articles 94, 95 and 308 EC Treaty.<sup>68</sup> By contrast, the demands for a stronger CoR, the introduction of an early warning system for non-respect of subsidiarity involving national parliaments (i.e. also the *Bundesrat*) and the clarification of regional representation rights in the Council of Ministers are about the defence or extension of participatory powers.

<sup>63</sup> The German *Länder* are chosen as an example of the scope of regional demands, as – thanks to Bauer – a comprehensive summary of these regions’ demands is available at the time of writing (see Bauer, *supra* note 18).

<sup>64</sup> Committee of Regions Resolution of 21 November 2002, *In preparation for the Copenhagen European Council*, OJ 2003 C 73/12. Committee of Regions Opinion of 21 November 2002, *More democracy, transparency and efficiency in the European Union*, OJ 2003 C 73/17.

<sup>65</sup> *Id.*

<sup>66</sup> See *supra* note 64 and Committee of Regions Opinion of 9 October 2003, *CoR proposals for the Intergovernmental Conference*, OJ 2004 C 23/01. Committee of Regions Opinion of 17 November 2004, *On the Treaty establishing a Constitution for Europe*, OJ 2005 C 71/01.

<sup>67</sup> Bauer, *supra* note 18, at 25-28.

<sup>68</sup> See *supra* note 16 on Arts. 94, 95 and 308 EC Treaty.

Finally, a certain number of demands would result neither in disentanglement nor in greater participation but would prevent further entanglement by maintaining the *status quo* of European competencies. These include the exclusion of the Open Method of Coordination from the Treaty, the rejection of ‘*passerelle*’ clauses that would allow the Council of Ministers to agree unanimously on the use of qualified majority voting in certain areas and opposing further European competences in the areas of tourism and services of general interest.<sup>69</sup> Several of these demands were shared by other legislative regions and defended collectively through the Committee of Regions or the Conference of Regional Legislative Assemblies in Europe (CALRE).<sup>70</sup> CALRE represented all of the German, Belgian, Austrian, Italian and Spanish regions and also Scotland, Northern Ireland and Wales. It demanded a special status for constitutional regions in the EU treaties, a clearer division of legislative powers between the European, national and regional level and a right of appeal for the Committee of Regions.<sup>71</sup>

In terms of outcomes in the Lisbon Reform Treaty, the Committee of Regions has obtained the right to bring action before the European Court of Justice to have the legality of an act reviewed, if it is deemed to be in breach of the principle on subsidiarity and if it falls under an area where the consultation of the CoR is mandatory. In addition, the principles of subsidiarity and proportionality have been reformulated, the respect for regional and local self-government has been included in the Treaty and the definition of the division of competences between the European Union and the Member States has been reworded (Arts. 3-5 of the new TEU; Arts. 1-6 of the new TFEU). The *Protocol on the application of the principles of subsidiarity and proportionality* explicitly requires that the impact of measures on the regional level be addressed in impact assessments:

This statement should contain some assessment of the proposal’s financial impact and, in the case of a directive, of its implications for the rules to be put in place by member states, including, where necessary, the regional legislation. [...] Draft legislative acts shall take account of the need for any burden, whether financial or administrative, falling upon the Union, national governments, regional or local authorities, economic operators and citizens, to be minimised and commensurate with the objective to be achieved. (Art. 5)

In addition, both the *Protocol on the application of the principles of subsidiarity and proportionality* and the *Protocol on the role of national parliaments in the European Union* give a greater role to national parliaments. In the case of bicameral systems, this may include a chamber representing regional governments, such as the German *Bundesrat*. Under the Lisbon Reform Treaty, national legislatures would obtain all documents of legislative planning and draft legislation. In addition, the *Protocol on the application of the principles of subsidiarity and proportionality* introduces an ‘early warning system’ for breaches of the principle of subsidiarity. After draft legislation has been made available to national parliaments, eight weeks have to elapse before the draft

<sup>69</sup> Bauer, *supra* note 18, at 25-28.

<sup>70</sup> P. Lynch, *Regions and the Convention on the Future of Europe: A Dialogue with the Deaf?*, 11 *European Urban and Regional Studies* 170 (2004).

<sup>71</sup> *Id.*, at 173.

can be put on the Council's provisional agenda for the adoption of a position. During this time, each national parliament or chamber of a national parliament can submit a reasoned opinion to the Presidents of the European Parliament, the Commission and the Council of Ministers if it finds the draft to be in breach of the principle of subsidiarity. According to Art. 7 of the Protocol, each national legislature receives two votes or, in the case of bicameral parliaments, each chamber one vote. If reasoned opinions from national parliaments amounting to at least one third of the total number of votes find the legislation in breach of the principle of subsidiarity, the draft must be reviewed (at least a quarter of votes in the case of issues in the area of freedom, security and justice). The institution or group of Member States from which the draft originated may then decide to confirm, amend or withdraw the draft.

However, there have also been changes that went against the preferences of the regions. Thus, the definition of the competences of the European Union and the legal instruments includes the Open Method of Coordination (Arts. 1-6 TFEU). More importantly, Art. 31 of the new TEU allows the Council to decide with unanimity to move to qualified majority voting in all areas that do not have military or defence implications. Finally, there has been a minor extension of the EU's competences in the areas of health and tourism (Titles XIV and XXII TFEU).

Overall, there have thus been amendments both to the advantage and to the disadvantage of the regions. A closer look reveals that these changes are unlikely to have a drastic impact on the position of regions in EU policy-making in the short-term.

With regard to the opportunities for regional involvement in European policy-making – and hence the potential strengthening of multi-level interaction in the European Union – the most promising change is the CoR's right to challenge the legality of European acts before the ECJ. Through the right of appeal of the Committee of Regions, regions and local authorities can now formally challenge European legislation through collective action. As such an action may lead to the annulment of EU legislation, regions have now, for the first time, gained 'hard' powers at the European level. In addition, they can use the threat of an appeal as a means to force the Commission and Council to take subsidiarity seriously and to prevent them from defining the principle too narrowly. If the Committee of Regions uses this new power (or the threat of it) effectively, it may raise its prestige in the eyes of the Commission and Council and give weight to its opinions. Finally, it could try to use the threat of an appeal as a means to increase its bargaining power on points of substance. However, the effectiveness of this tool is limited in scope by the fact that it can only be used for the principle of subsidiarity and only in those areas where the CoR has to be consulted. Its credibility will also greatly depend on how broadly or narrowly the ECJ is willing to define subsidiarity.<sup>72</sup>

<sup>72</sup> At first sight, one might compare the CoR's right to appeal to the ECJ with important role that litigation has played in the development of the powers of the European Parliament (EP) (Cf. Judgment of 29 October 1980 in Judgment of 22 May 1990 in *Case 138/79, Roquette Frères SA v. Council* [1980] ECR 3333 and *Case 70/88, Parliament v. Council, 'Chernobyl'* [1990] ECR 4529 on the establishment of the EP's right to be consulted prior to a Council Decision and on its right to

As to the second improvement in regional participation, while Cooper sees the early warning system as potentially leading to a “virtual third chamber” of national legislatures,<sup>73</sup> the impact on regional influence in EU policy-making is likely to be very limited. Only those few regional governments that are represented in a national parliament can make use of this system. This also increases the risk that specifically regional concerns will be in a minority within the procedure itself. In addition, it is a purely advisory system. Even if enough national parliaments submit reasoned opinions to reach a simple majority of total votes allocated, the draft will only be discarded if its authors agree to withdraw it or if 55 percent of Council members or a majority of votes cast in the European Parliament decide that it is not in line with the principle of subsidiarity. Thus, the national parliaments have obtained at best an ‘advisory veto’ concerning only subsidiarity, not proportionality. Furthermore, there is a risk that the mechanism will be inefficient if some national parliaments decide not to invest time and resources into the procedure, as this would reduce the chances of the remaining parliaments to succeed with a challenge.<sup>74</sup> On the positive side, while the parliaments can only challenge a draft for breaching the principle of subsidiarity, legislative regions could use subsidiarity as a pretext to voice concerns over the substance of the text. In the long term, the procedure may also have a socialisation effect through a regular dialogue and debate between the Commission and the national parliaments on the ‘proper’ scope of European legislation.<sup>75</sup>

One of the potentially negative changes with regard to regional participation in EU policy-making is the possibility to move to qualified-majority voting without a formal renegotiation of the Treaty. While a move to qualified-majority voting would have no effect on regional participation at the European level, it would have an indirect effect on regional participation in domestic European policy-making. As mentioned above, central governments can use the threat of being outvoted in the Council as a means to pressure other domestic actors into accepting a more

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bring actions before the ECJ). After the Court confirmed its right to be consulted prior to a Council Decision, the EP used its right to be consulted as a means to delay decision-making when it wanted to exert pressure on the Council to incorporate some of its demands into the final outcome. The right to appeal allowed it to bring its case before the ECJ when it felt that a decision had been taken on a legal basis that allowed for less participation than a potential alternative legal basis (M. McCown, *The European Parliament Before the Bench: ECJ Precedent and EP Litigation Strategies*, 10 JEPP 974, at 977 (2003)). It is, however, questionable whether the CoR will be able to create the same dynamic of empowerment. The European Parliament was trying to strengthen the principle of representative democracy when the political systems of all Member States rested on representative democracy. The CoR has the disadvantage of demanding more powers when the powers that regions hold domestically vary substantially between member states. The more centralized states are likely to oppose any move beyond consultative powers, as such a development might lead to a situation where the European powers of their regions and local authorities would exceed their domestic powers. Such a situation might in turn fuel domestic pressures for decentralization.

<sup>73</sup> I. Cooper, *The Watchdogs of Subsidiarity: National Parliaments and the Logic of Arguing in the EU*, 44 *Journal of Common Market Studies* 281, at 283 (2006).

<sup>74</sup> T. Raunio, *Much Ado About Nothing? National Legislatures in the EU Constitutional Treaty*, 9 *European Integration Online Papers*, at 6 (2005).

<sup>75</sup> *Id.*, at 7. Cooper, *supra* note 73, at 282.

compromising stance. The scope of the effect will, of course, depend on whether moves to qualified-majority voting take place and on the number of policy areas concerned.

Overall, regions have gained a minor increase in participation rights, with the precise impact of the changes depending on the interpretations of the Court of Justice. As a result, in those areas where competences have been moved to the European level, the multi-level character of the European Union has been strengthened. In particular, drawing on the adaptation of Putnam's model of two-level games to the European Union, regions have now gained 'hard' decision-making rights in EU policy-making. As a result, even the narrow definition of the process of 'policy-making' concentrating on 'hard' powers now includes a small element of multi-level governance. Depending on how effectively the right to appeal is used, it may also strengthen the regions' soft 'policy-shaping' powers in the medium term by increasing the importance of the CoR and its opinions in the eyes of the other actors. In addition, the early warning system will provide some regions with a new channel for policy-shaping through persuasion. Overall, the regions' ability to shape the final outcome of the decision-making procedure is nonetheless likely to remain small.

The changes introduced in the Lisbon Reform Treaty with regard to the German regions' defensive aim to achieve a clearer separation of powers, to prevent a further transfer of competences to the European level and to roll back some of its existing powers are even more balanced and moderate. Most of the accepted regional demands were 'soft' demands that Bauer describes as "vague legal self-commitments" to limit the scope of EU legislation in the future.<sup>76</sup> Thus, the impact of the rewording of the principles of subsidiarity and proportionality and the reference to the respect for regional and local self-government will depend on the willingness of the Commission, the Council and the European Parliament to apply these principles, especially since the Committee of Regions can only invoke the principle of subsidiarity before the ECJ. It is possible, however, that the stricter definition of the principles of subsidiarity and proportionality in combination with the commitment to respect regional and local self-government, the CoR's right to appeal to the ECJ and the early warning system may lead to a continuous and intensive dialogue between regional and European actors. In the medium term, such a dialogue might induce the European institutions to voluntarily limit the scope of EU legislation.

Furthermore, a new definition of the allocation of competences between the Member States and the European Union has been inserted into the Lisbon Reform Treaty (Arts. 1-6 TFEU). But at the same time, this definition allows recourse to the Open Method of Coordination in several areas (Art. 5 TFEU). As a result, European coordination can take place even in areas that are in principle a national prerogative. In addition, it is questionable whether this definition of European competences will prevent a further creeping transfer of competences to the European level, as those articles that have hitherto allowed for such a transfer of competences (Arts. 94, 95 and 308 EC Treaty) have been retained in the Lisbon

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<sup>76</sup> Bauer, *supra* note 18, at 25.

Reform Treaty (now Arts. 114, 115 and 352 TFEU). Finally, as mentioned above there have been some minor transfers of competences in the areas of tourism and health, where strong legislative regions tend to have legislative powers in the domestic arena. Overall, the Lisbon Reform Treaty seems to result in a limited transfer of competences to the European level and it leaves open the possibility for future ‘creeping’ transfers. The continued existence of the Open Method of Coordination as well as Arts 114, 115 and 352 still blurs the division of competences between the Member States and the European level. The strong legislative regions have thus failed to disentangle regional decision-making and competences from European decision-making and competences.

## **F. Conclusion and Outlook**

Under the current regime, European decision-making consists of two different types of two-level games. On the one hand, a focus on ‘hard’ decision-making powers shows a state-centric, two-level game in which national governments can still act as gate-keepers, even in the most federalised Member States. On the other hand, a focus on ‘soft’ powers (i.e. advisory powers and lobbying) reveals multi-level interaction between regions, central governments and European institutions. However, for legislative regions, the lack of ‘hard’ powers in EU policy-making, especially at the European level, may result in disempowerment when traditionally regional powers are transferred to the European level. As a result, these regions pursue the double aim of improving their participation rights in EU policy-making and of obtaining a clearer delimitation of competences between the Member State and the European levels. A review of the Lisbon Reform Treaty has shown, however, that the defensive strategy of these regions has failed. The increased protection of regional competences through the improved subsidiarity provisions is offset by minor losses through the transfer of new competences and the continued existence of those articles that have so far allowed a creeping extension of EU competences.

While the defensive regional strategy has failed, the regions have gained some new participation rights. In the case of the early warning system they are limited to certain legislative regions and are still advisory. By contrast, the Committee of Region’s right to challenge legislative acts before the European Court of Justice finally allows regions to collectively exercise ‘hard’ influence at the European level. Thus, even the first, narrow definition of European ‘policy-making’ focusing on ‘hard’ powers now includes a small element of multi-level governance. The full impact of the right to appeal will, however, only become apparent in the medium and long term, as it depends both on the use the Committee makes of its right and ECJ’s definition of the principle of subsidiarity.

The overall impact of the Lisbon Reform Treaty on regional involvement in EU policy-making consists thus of a small increase in the participation rights of the regions. The rejection of the Lisbon Reform Treaty in the Irish referendum raises the question of whether these changes would have to be abandoned if the ratification process failed. In fact, as many of the changes that increase regional

influence or protect regional competences either result in advisory powers or depend to a large extent on the goodwill and self-commitment of the European institutions for their success, most could be adopted on an informal basis. Thus, the Commission could incorporate the new definitions of subsidiarity and proportionality, as well as the requirements for the impact assessment of draft legislation in its own guiding principles of good governance. Even the early warning system can be put in place if the Commission is willing to regularly consult the national parliaments and take their opinions into account.<sup>77</sup> As it is difficult to take back concessions that have already been made in principle, it is likely that the early warning system would find its way into future Treaties should the Lisbon Reform Treaty fail. The only regional gain that would be hard to adopt in the absence of ratification is the right of the Committee of Regions to appeal to the European Court of Justice. Unfortunately, this is indeed the greatest change with regard to the involvement of regions in EU policy-making. However, as in the case of the early warning system, the regions should be able to defend this concession in the next round of Treaty negotiations.

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<sup>77</sup> Cooper, *supra* note 73, at 283.



# A New Regime of Human Rights in the EU?

Eve Chava Landau \*

## A. The European Community (EC) Regime of Human Rights

In the three first decades of its existence the EC recognized human rights only as part of the general principles of law that the Community was bound to respect. There was no written legal text dealing with human rights. The Treaty of Rome, 1957, creating the European Economic Community (EEC) contained only a few scattered provisions relating to social and economic rights. For instance, express reference was made to equal pay for equal work of men and women. This equality principle was enshrined in Article 119, which later on became Article 141. Freedom of movement of Community workers was recognized in Article 48 and a few more rights were given legal force, but there is no systematic recognition of human rights in this basic Treaty.

It was the European Court of Justice (ECJ or the Luxembourg Court) in *a jurisprudence constante* that protected human rights inspired by international treaties ratified by the Member States and rights enshrined in their constitutions. The Court developed a common law human rights. Some of the leading precedents may be recalled here:

In 1970 the Court had to deal with the complex case of *Internationale Handelsgesellschaft*, in which the principle of '*Verhältnismässigkeit*', borrowed from German Constitutional Law, re-baptised as the Principle of Proportionality, was debated in the context of Community Law. The Court ruled as follows:

... respect for fundamental rights forms an integral part of the general principles of law of which the Court of Justice ensures respect<sup>1</sup>

The Court repeated its recognition of fundamental rights in a line of cases involving the protection of economic and social rights, such as the right to property and the

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<sup>1</sup> Judgment of 17 December 1970 in *Case 11-70, Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*. [1970] ECR 1125.

freedom to conduct a business. In the case of *Nold v. Commission* (1974),<sup>2</sup> the Court stated that besides the constitutions of the Member States international conventions for the protection of human rights can supply guidelines which would be followed within the framework of Community law. These two sources of general principles of law – constitutions and international conventions, in particular the European Convention of Human Rights, 1950 (ECHR), have been reconfirmed in the case of *Hauer v. Land Rheinland Pfalz* (1979) in which the Court consolidated the concept of the inherent limitations of fundamental rights and found that there was in fact no violation of fundamental rights.<sup>3</sup>

In the domain of freedom of movement of persons, one of the leading cases is that of *Rutili* (1975). In this case, which was decided a few months after France had ratified the ECHR, one finds express reference to certain provisions of Protocol No. 4 to the Convention on freedom of movement.<sup>4</sup>

In 1976 the Court was asked to safeguard the fundamental right of freedom of religion in a staff case of *Prais v. Council*.<sup>5</sup> Although the ECJ found that there was no discrimination on grounds of religion in this case, the Court considered itself bound by freedom of religion even in the absence of written community law protecting civil and political rights.

These precedents show that the creativity of the Court helps fill gaps in the written law. Fundamental rights became part of the general principles of Community law that the Court respects and applies. The Treaty of Rome creating an Economic Community was not intended to introduce human rights in its basic text. It was some thirty years later in the Single European Act, 1986, that reference to human rights is to be found in its Preamble. As of 1986 all basic treaties, the Treaty of Maastricht (1992), the Treaty of Amsterdam (1997) as well as the Treaty of Nice (2000) contain a commitment to protect human rights. The Treaty of Nice contained for the first time a catalogue of rights in the EU Charter of Fundamental Rights, annexed in a Protocol. Although the Nice Treaty entered into force, the Protocol did not.

The original Article F(2) of the Treaty of Maastricht, reproducing the idea of the Preamble of the Single European Act, provided that :

The Union Shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and of Fundamental Freedoms, signed in Rome on 4 November 1950 and as they result from the Constitutional traditions common to the Member States as general principles of Community Law.

This brief review shows that the ECJ coped well even without a written text of a Bill of Rights. The cases that came up before the Court as from the 1970s were

<sup>2</sup> Judgment of 14 May 1974 in *Case 4/73, J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities*, [1974] ECR 491.

<sup>3</sup> Judgment of 13 December 1979 in *Case 44/79, Liselotte Hauer v Land Rheinland-Pfalz*, [1979] ECR 3727.

<sup>4</sup> Judgment of 28 October 1975 in *Case 36-75, Roland Rutili v Ministre de l'intérieur*, [1975] ECR 1219. See C. Shachor-Landau, *The Protection of Fundamental Rights and Sources of Law in the European Community Jurisprudence*, 10 *Journal of World Trade Law* 289 (1976).

<sup>5</sup> Judgment of 27 October 1976 in *Case 130/75, Vivien Prais v Council of the European Communities*, [1976] ECR 1589.

satisfactorily solved. Nevertheless as of the mid 1970s the desire for a written Bill of Rights for the Community was expressed and two options were considered. The first was to create a Community Charter containing a catalogue of fundamental rights. The second option advocated the accession of the Community as such to the European Convention of Human Rights, 1950 (The ECHR).<sup>6</sup>

## **B. The European Court of Human Rights (The Strasbourg Court)**

The Strasbourg Court was created by the Council of Europe under the European Convention of Human Rights of 1950. This Convention and its Protocols contain a substantive part, namely a catalogue of civil and political rights, inspired by the UN Universal Declaration of Human Rights, 1948. The effectiveness of this Convention is in that it set up, in addition, a machinery of control and implementation, a European supervision and collective guarantee of Human Rights. In addition to rights, a procedure of enforcement is also provided by the Convention. Any individual could bring a claim against any of the States that accepted the optional individual petition to the European Commission of Human Rights. The case would be heard by the Court only if the State concerned accepted the compulsory jurisdiction of the Strasbourg Court. At a later stage all States signatories of the ECHR had to accept the compulsory jurisdiction of the Strasbourg Court. Only States can become parties to the Convention. All 27 Member States of the EU have gradually ratified the Convention. With the entry into force of Protocol No. 11 to the ECHR in 1998 the hitherto cumbersome procedure (through a Commission of Human Rights before which the individual had standing, but not before the Court) was abolished<sup>7</sup>. The individual can now apply directly to the Strasbourg Court, which has become a permanent Court with compulsory jurisdiction. Any person victim of a violation, not only the 800 million citizens of Europe, may rely on one of the rights included in the catalogue as against one of the ratifying states. Some 47 Member States of the Council of Europe, including the 27 EU Member States have ratified the ECHR.

## **C. The Opinion of the ECJ Re Accession of the EC/EU to the ECHR**

Up to the end of the 20<sup>th</sup> century the two alternative projects of creating a binding EU Bill of Rights or of accession by the EU as such, as a party, to the ECHR have not been realised. The adoption of a Charter of Fundamental Rights was in

<sup>6</sup> See P. Pescatore, *The Context and Significance of Fundamental Rights in the Law of the European Communities*, 2 *Human Rights Law Journal* 295 (1981).

<sup>7</sup> As to the situation before the entry into force of Protocol No. 11 see C. Shachor-Landau, *Reflections on the Two European Courts of Justice*, in Y. Dinstein (Ed.), *International Law at a Time of Perplexity, Essays in Honour of Shabtai Rosenne* 771 (1989).

preparation, whilst the option of accession of the EU to the ECHR was blocked by the Opinion of the ECJ rendered in 1996 in accordance with Article 300 (ex Article 228) (Opinion 2/94).<sup>8</sup>

The Court was of the opinion that accession at that time was incompatible with the EC Treaty. The Court's view was that under Community Law as it then stood, accession would require an amendment of the Treaty. In particular, no Treaty provision conferred on the Community Institutions "any general power to enact rules on Human Rights or to conclude international conventions in this field." There was no express or implied power for such purpose and Article 308 (ex Article 235), though empowering to fill gaps, did not permit the adoption of provisions that would amount to a Treaty amendment. Furthermore, accession would consist of the entry of the Community "into a distinct international institutional system as well as integration of all provisions of the Convention into the Community legal order" and as such, would be of "constitutional significance." The Court was simply of the opinion that accession to the ECHR was inappropriate. One may recall that the ECHR is open to ratification only to States and an amendment to the Convention would be required to allow access to the Community. From the Union's point of view certain amendments would also be required, such as to endow the EU (as distinct from the European Community) with legal personality and legal capacity to conclude agreements. Indeed Article 47 of the subsequently amended Treaty provides "The Union shall have legal personality." This amendment still requires ratification.

We shall return to the assessment of the validity of the Court's opinion to day at a later stage.

#### **D. The Amsterdam Treaty, 1997**

Since the Court's Opinion was delivered the basic texts of the Community have opened new avenues to the protection of human rights. The substantive law of the Community has been enriched by concepts, principles and new fundamental rights.

The turning point was the Amsterdam Treaty 1997 that provides that: "the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States." The Treaty enshrined the principles of equality (Articles 13 and 141) and gave human rights a new profile. The Treaty of Amsterdam also gave legal backing and enabled Community legislation. It was but a prelude to the drafting of the EU Charter of Fundamental Rights that was subsequently adopted in Nice in 2000. The place of human rights became at the center of the aims and tasks of the Union. The landscape of human rights has totally changed and has been updated and modernized, so much so that one may wonder whether accession to the old ECHR is still necessary or desirable? As we shall see, the

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<sup>8</sup> Opinion of 28 March 1996, *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, Opinion 2/94 [1996] ECR I-1759.

Charter is a much more comprehensive Bill of Rights than the ECHR and the latter's catalogue of rights is much more modest.

## **E. From Amsterdam to Lisbon**

In spite of the development of human rights within the Union and the growth of a *corpus juris* in this field through the precedents of the ECJ, the two options of adopting a Charter and accession to the ECHR are still on the Agenda. They are not alternative options today, but rather complementary. After the non-ratification of the Charter as a Protocol to the Nice Treaty and the failure of the Constitutional Treaty in 2005, in which the Charter of Fundamental Rights, occupied Part II, the Lisbon Reform Treaty (LRT), 2008,<sup>9</sup> has revived the focus on human rights and has amended Article 6(1) of the Treaty of European Union to give legal force to the EU Charter of Fundamental Rights (adopted already in 2000). In addition Article 6(2) of the Treaty of the European Union now prescribes the accession of the Union to the ECHR. This dual development heralds a new regime of Human Rights although one might say that the new era started already with the Treaty of Amsterdam, 1977 and the adoption in Nice of the Charter of Fundamental Rights in 2000.

As we know, the Treaty of Lisbon has not yet been ratified by all the EU Member States and its rejection by the Irish referendum in 2008 cannot be ignored. Nevertheless, the 2000 EU Charter of Fundamental Rights has opened the door for a new regime of Human Rights, regardless of whether the EU Charter becomes positive written law and regardless of whether the Lisbon Treaty enters into force. The new *soft law* of human Rights already impacts the landscape of fundamental rights in the EU. This development calls for an examination of the new regime of human rights, one that includes substantive positive rights as well as new potential procedures.

## **F. Why a Charter?**

The Charter comes to enhance legal certainty and visibility in particular after the adoption of the second and third pillars of the Union, by the Maastricht Treaty. These new competences are likely to create new potential infringements of human of human rights. The passage from an Economic Community to a Political Union that extends its competences into areas of justice and criminal judicial cooperation that are sensitive to the violations of human rights renders a Charter indispensable.

In addition it was felt that the level of the existing protection of human rights conferred on the individual was not sufficient. An extension of the rights as well as better visibility would be both beneficial to the EU institutions and to the citizens. The view was expressed that at the beginning of the 21<sup>st</sup> century the

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<sup>9</sup> Treaty of Lisbon, OJ 2007 C 306.

citizen is “entitled to see his fundamental rights set out in black and white terms that he can enforce in a Court of law.”<sup>10</sup>

The EU Charter targets human rights with obligations imposed mainly on the EU institutions and not on the Member States. Article 51(1) of the Charter expressly provides that it applies to the EU institutions and to the States only when they apply Union law.<sup>11</sup> The EU institutions aspired to be bound by a Bill of Rights and have declared their commitment to uphold the Charter.

Some see the Charter as a benchmark for compliance with the common values upon which the Union was founded as well as a benchmark for determining eligibility of new States. The Charter gives a concrete form to the four values that Community Law claims to follow: Dignity, freedom, equality and solidarity.

The new regime has begun already let us examine its nature and scope:

## G. Is the Charter Just a Showcase of Existing Rights?

Whilst opinions diverge as to its innovative nature *ratione materiae*, there is consensus as to its future application *ratione personae*, to the institutions of the EC, and here is where the novelty lies. Lord Goldsmith, one of the architects of the Charter, stated that its “purpose is to constrain the actions of the EU institutions, rather than any other, perhaps misunderstood purpose, such as controlling the Member States that are already bound by other instruments.” He further states that the Charter “is not a mine of new human rights.”<sup>12</sup>

However, the Charter embraces in one instrument civil, political, economic, social, cultural and other rights, as well as principles, that the Union is to recognize, respect and protect. It is composed of seven Chapters: Dignity (Chapter I), Freedoms (Chapter II), Equality (Chapter III), Solidarity (Chapter IV), Citizen’s Rights (Chapter V), Justice (Chapter VI) and General Provisions (Chapter VII).

The Charter is a consolidation of fundamental rights enshrined in a variety of Conventions, such as ILO Conventions, European Social Charters, the UN Convention on the Rights of the Child and the Convention on the Status of Refugees and last, but not least, the ECHR. Upon close inspection, this ‘consolidation’ in 54 articles comprises not only declarative provisions but also constitutive ones. Likewise, it is not just a restatement of existing EU written law or of EU common law created by the ECJ.

As the preamble of the Charter proclaims, “it is necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter.”

<sup>10</sup> Professor Toth before the House of Lords Select Committee on EU, 2002-3, 6<sup>th</sup> Report. *The Future Status of the EU Charter of Fundamental Rights*, 3 February 2003 <http://publications.parliament.uk/pa/Id200203/Idselect/Ideucom/48/4803>.

<sup>11</sup> Charter of Fundamental Rights of the European Union, OJ 2007 C 303.

<sup>12</sup> L. Goldsmith, *The Charter of Human Rights – A Brake Not an Accelerator*, 5 European Human Rights Law Review 473 (2004).

An example of such visibility is afforded by Article 3 entitled the Right to the Integrity of the Person. Whereas the right to dignity and integrity is recognized its impact in the fields of medicine and biology is an innovation which answers the need of protection in view of scientific development of research in our times.

1. Everyone has the right to respect for his or her physical and mental integrity.
2. In the fields of medicine and biology, the following must be respected in particular:
  - the free and informed consent of the person concerned, according to the procedures laid down by law,
  - the prohibition of eugenic practices, in particular those aiming at the selection of persons,
  - the prohibition on making the human body and its parts as such a source of financial gain,
  - the prohibition of the reproductive cloning of human beings.

This up-to-date provision is a legal novelty drafted in a more visible manner.

It is true that Kantian philosophy already stipulated that a human person should never be treated as a means but always as an end. The Universal Declaration of Human Rights has also enshrined the right to dignity. But Article 3 (2) addresses more specific rights that were not the object of protection before.

Although some of these rights are included in the Convention on Human Rights and Biomedicine, adopted by the Council of Europe in 1997,<sup>13</sup> they were not recognized and could not be included in the 58 years old ECHR, simply because science and medicine were not as yet advanced. Furthermore, the 1997 Convention has been ratified to-date by a mere nineteen out of the forty-seven Member States of the Council of Europe and only by eleven EU Member States, that is, in both cases less than half.

Bearing this data in mind it is not quite accurate to say that the right to the integrity of the person and especially Article 3 Paragraph (2) of the Charter do not mint new rights *de lege feranda*. Searching for precedents of the ECJ recognizing this right, we find the case of *Netherlands v. Council*, 2001,<sup>14</sup> where the issue of the legal validity of patenting of biomedical inventions arose. The Netherlands applied to the Court to annul Directive 98/44/EC that determines which inventions involving the human body may or may not be patented. The Dutch government was of the opinion that the Directive violated i.a. the human right of dignity. In his Opinion (para. 197) Advocate General F. Jacobs refers to Article 3 of the EU Charter which enshrines the right to the integrity of the person, although the Charter is not yet adopted as positive law. The Netherlands, which had not ratified the 1997 Convention on Human Rights and Biomedicine, did not invoke that Convention. The Opinion and the Judgment of the ECJ in *Netherlands v. Council* do not refer to that instrument at all, although it protects human dignity and is considered as the inspiration for the inclusion of this right in the Charter.<sup>15</sup>

<sup>13</sup> European Treaty Series (ETS) 164 and additional Protocol ETS 168.

<sup>14</sup> Judgment of 9 October 2001 in *Case C-377/98, Kingdom of the Netherlands v European Parliament and Council of the European Union*, [2001] ECR I-7079.

<sup>15</sup> See legal explanation to Art. 3 in <http://eucharter.org/home>.

This would support the view that the right to integrity of the person in the field of medical research is firstly recognized as a fundamental right in the EU Charter.

Space does not allow to individually examine each of the fundamental rights that have become a positive obligation on the EU, such as the right to asylum enshrined in Article 18, the rights of the elderly by virtue of Article 25, the rights of persons with disabilities to integration in society, enshrined in Article 26 and the controversial unlimited right to strike, introduced as part of the right of collective bargaining in Article 28. These rights are constitutive and not merely declarative of existing rights.

The very fact of elevating certain rights to the status of a fundamental right may also be considered as an innovation. Examples of such rights are afforded by i.a. the right to protection of personal data enshrined in Article 8 and the freedom of the arts and scientific research and academic freedom consecrated in Article 13, as well as, the right to good administration in Article 41 and others.

## H. 'Rights' and 'Principles'

At this point it may be opportune to distinguish rights from principles. Unlike rights, principles are subject to judicial review only when the Union has legislated in these matters. Environmental protection and the principle of sustainable development provided for in Article 37 and consumer protection as ensured in Article 38 are examples where the rights are as yet inchoate until further Union legislation takes place and until judicial remedies accompany these rights. As the House of Lords Select Committee on the EU Charter commented: "Many of the Articles are of an aspirational character and lack precision and definition that would be expected of Articles in a Bill of Rights."<sup>16</sup> The Select Committee recommended a revision of the Charter in paragraph 11 of its Report and added in paragraph 17: "We doubt whether a citizen will be much impressed if access to a remedy is not available to him when he believes that his rights ... have been infringed." Rights without remedies are indeed no rights. The Charter should have been clearer and transparent on this point.

## I. The Scope of the Charter and the Scope of the ECHR

If one compares the EU Charter to the ECHR one realizes immediately that the Charter provides a greater spectrum of rights. Even in the field of civil and political rights, covered by the ECHR, the Charter expands the protection. One can classify the rights into two groups: those that overlap with the ECHR and those that do not.

The rights, mainly civil and political, which overlap, include the following: the right to life, freedom from torture or degrading treatment or punishment, freedom from slavery and forced labour, the right to liberty and security of the person, the

<sup>16</sup> See para. 8 of the House of Lords Select Committee on the EU, Sixth Report, *supra* note 9.

right to marry and the right to found a family, freedom of thought, conscience and religion, freedom of expression and information, freedom of assembly and of association, the right to education, the right to property, right to an effective remedy and to a fair trial, respect for the rights of the defence and the presumption of innocence, the fundamental right to non-retroactive laws, the right not to be tried or punished twice in criminal proceedings for the same criminal offence. Some jurists attribute to these rights the qualification of “first generation human rights” or classical human rights.

These rights, which draw their inspiration from the ECHR, will be interpreted and have the same meaning and scope as those enjoyed under the ECHR by virtue of Article 52(3) of the EU Charter which provides that:

In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

The text of the Charter itself indeed allows for more extensive protection of several rights enshrined in the ECHR and its Protocols. Some examples will illustrate this point:

1. Article 5 of the Charter, echoing Article 4 of the ECHR by prohibiting slavery and forced labour, adds in paragraph 3 that trafficking in human beings is prohibited. Trafficking in human beings has become a real problem in the last three decades, which could not be foreseen by the old ECHR.
2. Article 10 regarding freedom of thought, conscience and religion is based on Article 9 of the ECHR, however, it spells out for the first time the right to conscientious objection, which is as yet not recognized by all Member States.
3. Article 14 of the Charter extends the right to education found in Protocol No.1 to the ECHR Article (2). The vague provision in the Protocol does not refer to the possibility to receive free compulsory education nor a right to vocational and continuing training. These provisions are now to be found in the Charter.<sup>17</sup>
4. Article 17 (1) of the Charter on the right to property echoes the provision of Protocol 1 to the ECHR Article (1), but Article 17(2) adds that intellectual property shall be protected, which was not explicit under the ECHR.
5. One cannot deny that the Chapter on Equality (Chapter III) is innovative. Article 20 declares that “Everyone is equal before the law.” Up to now only citizens of the Union were equal before the law and no discrimination was allowed on the basis of nationality between citizens concerning the provisions of the basic Treaties. Equality before the law of non-citizens in matters outside citizenship of the Union is a novelty. With respect, the proviso that is included in Article 21 (2) should have appeared here as well. To be quite clear “Within

<sup>17</sup> See E. C. Landau, *The Right to Education – The European Perspective*, in M. G. Kohen (Ed.), *Liber Amicorum in Honour of Judge Lucius Caffisch* (2007).

the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.”

Furthermore, Article 21 of the Charter extends the grounds and scope of the right to equality much beyond the scope of Article 14 ECHR. Article 21 enumerates the following grounds: “Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.” Article 14 of the ECHR enumerates just over half of those grounds. It does not mention genetic features, disability, age or sexual orientation. Since the entry into force of Protocol No.12 to the ECHR in 2005 one can invoke now discrimination independently and not only in conjunction with a claim of a violation of one or more rights under the Convention.<sup>18</sup>

Article 21 of the Charter provides for an independent, self-standing right to non-discrimination. Regarding the newly prohibited grounds of discrimination, they were extended to cover national minorities, disability, age and sexual orientation in line with the *acquis communautaire* and the 2000, 2002 Directives on non-discrimination.<sup>19</sup>

The use of the words “such as” in Article 21 of the Charter makes it clear that the list of the prohibited grounds of discrimination is not exhaustive but merely illustrative. New categories of persons protected against discrimination may therefore be added to reflect social changes.

6. Article 23 on equality between men and women is declarative of the legal position as far as “employment, work and pay” are concerned in the Union. But it is constitutive and innovative as far as it dictates that “Equality between men and women must be ensured *in all areas*” (emphasis added). Up to now Community legislation and the initial provision of the Treaty of Rome, Article 119 (amended by the Treaty of Amsterdam and replaced by Article 141) addressed uniquely the principle of equality of men and women at work.<sup>20</sup>

Up until the Treaty of Amsterdam, the Union has not promoted human rights or equality in a substantial measure. Now, equality is to be ensured in all areas, such as education, vocational training, representation in public life and in decision-making forums. Equality has become a core fundamental right as it now figures as an ‘aim’ and a ‘task’ of the Union.

The reluctance of the ECJ to deal with the issue of ‘affirmative action’ and quotas when it results in reverse discrimination, was mitigated by its approach to positive action for the promotion of women, now formulated in

<sup>18</sup> The legal position was modified by Protocol No 12 of the ECHR, 2000, which entered into force in 2005.

<sup>19</sup> E.g. Council Directive 2000/78/EC of 27 December 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation. OJ 2000 L 303/16.; Council Directive 2000/43/EC of 29 June 2000 implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin, OJ 2000 L 180/22.

<sup>20</sup> See E. C. Landau, *The Rights of Working Women in the European Community* (1985).

Article 141(4). The provision is in the spirit of the second paragraph of Article 23 of the Charter: “The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.”

The case-law of the ECJ has not tolerated, however, rigid advantages for women or quotas resulting in “reverse discrimination” for men, as the cases of *Kalanke* (1995),<sup>21</sup> *Marschall* (1997),<sup>22</sup> *Badeck* (1999)<sup>23</sup> and *Abrahamsson* (2000)<sup>24</sup> show. It is hard to predict how these issues would be dealt with by the European Court of Human Rights (the Strasbourg Court) under the recent Protocol No. 12 on Discrimination, now ratified by the Member States of the Council of Europe. The Strasbourg Court may perhaps find inspiration in the decisions of the Luxembourg Court.

7. Article 49 of the Charter, restating the principle of non-retroactivity of laws enshrined in Article 7 of the ECHR, adds in its first paragraph that if subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable. No such exception to the principle of non-retroactivity is to be found in the ECHR.

Judging by these examples, the Charter is an up-to-date Bill of Rights that has enlarged and modernised the scope of the ECHR in the spirit of Article 52(3) of the Charter and its Preamble. The charter opens with the right to dignity which is not expressly mentioned in the ECHR. It is for the Strasbourg Court to draw inspiration from the EU Charter of Fundamental Rights. The Charter not only introduced new rights but widened the scope of existing rights to cover new situations and needs of protection.

## J. Is the Charter an Exhaustive Bill of Rights?

Should the Charter be considered as an exhaustive Bill of Rights? The answer is in the negative for more than one reason. First, the Preamble of the Charter formulates its purpose “to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments.” Changes and progress are a continuing development and, to quote the famous German legal philosopher Rudolf von Jhering, “Law is perpetually in the process of becoming.”<sup>25</sup> He pronounced this phrase in the nineteenth century, but it is even more true of our century.

<sup>21</sup> Judgment of 17 October 1995 in *Case C-450/93, Eckhard Kalanke v Freie Hansestadt Bremen*, [1995] ECR I-3051.

<sup>22</sup> Judgment of 11 November 1997 in *Case C-409/95, Hellmut Marschall v Land Nordrhein-Westfalen*, [1997] ECR I-6363.

<sup>23</sup> Judgment of 28 March 2000 in *Case C-158/97, Georg Badeck and Others, interveners: Hessische Ministerpräsident and Landesanwalt beim Staatsgerichtshof des Landes Hessen*, [1999] ECR I-3633.

<sup>24</sup> Judgment of 6 July 2000 in *Case C-407/98, Katarina Abrahamsson and Leif Anderson v Elisabet Fogelqvist*, [2000] ECR I-5539.

<sup>25</sup> Free translation by the author. Cf. R. von Jhering, *Der Kampf um's Recht* 69 (1992).

Secondly, the Charter provides that fundamental rights as they result, i.a., from the constitutional traditions common to the Member States shall constitute general principles of the Union's law. Consequently, the catalogue of fundamental rights enumerated in the Charter may not be considered as exhaustive or necessarily preventing the development through case law of new rights inspired by national constitutional law and traditions.<sup>26</sup>

## **K. The Charter and Derogations**

Another question may arise as to the application, limitation, or suspension of fundamental civil and political rights as well as other rights in times of emergency. Should the application of the Charter follow the model of the ECHR?

We recall that the ECHR distinguishes in Article 15 between 'sacrosanct' rights that cannot be suspended in times of emergency, such as the right to life, freedom from torture, freedom from slavery and forced labour and freedom from retroactive legislation, and those fundamental rights that may be derogated from in times of emergency. There is no parallel provision to that effect in the EU Charter.

What interpretation should be given to the silence of the Charter on this point? The answer is perhaps to be found in part in Article 52(1) of the Charter, which stipulates that "Any limitation on the exercise of the rights and freedoms recognized by the Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others." Yet this provision does not provide for derogation on account of an emergency as does Article 15 ECHR. Naturally, the Member States can resort to Article 15 ECHR, but the fact remains that there is no similar provision for the EU institutions.

## **L. The Role of the ECJ**

The rule that any matter concerning EU Law should be adjudicated exclusively by the ECJ is sound. It is enshrined in Article 219 of the Treaty of Rome, 1957 (now Article 292 EC). Why should human rights be resourced elsewhere? Is the EU Charter of Fundamental Rights not an integral part of Union Law? It would seem that the ECJ's competence over the application of the Charter is implicit. But the exclusive or otherwise jurisdiction should have been clearly and expressly stated in the Charter itself or in the Lisbon Treaty.

By virtue of Article III-375 of the failed Constitution, that has been rejected in 2005,<sup>27</sup> Member States could not submit a dispute concerning the Constitution to any method of settlement other than before the ECJ. In accordance with

<sup>26</sup> See E. Regan, *What the Constitutional Treaty Means: Fundamental Rights in the EU 5* (2005).

<sup>27</sup> By the French and Dutch Referendums.

Article I-5(2) the Union was likewise bound to submit any dispute with Member States to the Court. As the EU Charter of Fundamental Rights figured as Part II of the Constitution the above-mentioned provisions equally applied also to the Charter as being part of the Constitution. Now that the Charter is not part of the Lisbon Reform Treaty, a similar express provision should have been included in the Charter, giving jurisdiction or exclusive jurisdiction to the ECJ in claims by individuals against the Union's institutions for violation of their fundamental rights.

As to the justiciability of the Charter opinions vary regarding which European Court is best suited for its control and enforceability. Judge Tulkens of the Strasbourg Court maintains that an external judicial body exercising external supervision is to be preferred to the ECJ<sup>28</sup> She writes:

In the interests of ensuring its credibility, the protection of fundamental rights must be achieved under the control of an international institution acting as a third party. The ECJ can not exercise this control when Community acts are concerned, as it belongs to the Community. The external control is part of the requirements of International Law.

Indeed the principle *nemo iudex in sua causa* demands that the institutions of the EU, including its Court, should be controlled by a separate Court. It has been proposed to create a neutral Court for the purpose of supervision. If this solution is eventually adopted, is accession to the ECHR and to its judicial machinery still necessary?

The suitability of the Strasbourg Court is also questioned by Professor Jacqueline Dutheil de la Rochere<sup>29</sup> She supports the continuation of the role of the ECJ as a custodian of the Charter and maintains that the ECJ should continue to have jurisdiction. She writes:

It should not be forgotten in this context that the European Court of Human Rights is ultimately only competent in human rights cases dealt with by ECHR; for the protection of other fundamental rights, namely those which appear in the Charter, the ECJ would continue to have jurisdiction within the limits of the treaties. The inclusion of the catalogue of fundamental rights in the EU Treaty, either through a reference in article 6.2 or in any other way, would give the Charter its full effect, allow it to bear on EU's institutions and provide citizens with an effective means of enforcing their rights either in national courts or the ECJ.

In other words, accession to the ECHR for the purpose of benefitting from its judicial machinery is not recommended. The 1996 Opinion of the ECJ implicitly rejected a judicial control outside the institutional set up of the Union. Accession to the ECHR meant entry into "a distinct international institutional system" that was not approved by the ECJ. Whilst the first part of the opinion does not reflect anymore the development of human rights today in the legislation and written

<sup>28</sup> F. Tulkens, *Towards a Greater Normative Coherence in Europe*, 21 Human Rights Law Journal 329, at 331 (2000).

<sup>29</sup> She is professor at the University of Paris II and Director of the Centre of European Law. <http://www.ecln.net/elements/Conferences/book-Athens/dutheil.pdf>.

norms of the Union, the second part of the Opinion may still be pertinent and accession to the ECHR should be re-considered with great caution.

The Community Court has fifty years experience of reviewing actions of Community institutions via the procedures enshrined in Articles 173 and 175, now Articles 230 and 232. When dealing with human rights, it is hoped that the Court would be more generous and liberal in its interpretation of the notion of 'individual concern', required in order to establish a *locus standi* for the individual in a direct action for annulment (according to the fourth paragraph of Article 230 EC).<sup>30</sup> The Treaty of Lisbon now removes this requirement of 'individual concern' and allows a wider access for individual applicants.

The Community Court also has competence in infringement actions brought by the Commission against Member States to control the national implementation of EU Law, in accordance with Articles 226 and 228 EC. Moreover, the Court is empowered to impose fines on Member States for non-fulfilment of their obligations or for their disregard of the Court's judgments.

Furthermore, the ECJ is unique in that it is a supranational court competent to give preliminary rulings under Article 234 EC. It is mainly via this procedure that the ECJ developed the Community common law of Human Rights, whenever national courts referred questions to the Luxembourg Court for an authoritative interpretation.

Admittedly, the Strasbourg mechanism has been streamlined in 1998 with the entry into force of Protocol No. 11.<sup>31</sup> Actions by individuals are now heard by the European Court of Human Rights directly, and the two-tier cumbersome procedure through the European Committee on Human Rights was abolished. However the Strasbourg Court is overburdened by actions brought against the 47 Member States of the Council of Europe, especially against some of the new Member States, like Russia and Turkey, and justice is delayed with a backlog of some 90.000 cases pending.<sup>32</sup> It is said that the Strasbourg Court is asphyxiated by the massive influx of applications. This situation is more than grave even without the additional jurisdiction of review of actions against EU institutions.

Furthermore, access to the ECJ presents potential advantages to litigants over actions before the Strasbourg Court, as litigants in Luxembourg do not need to exhaust all domestic remedies, as do applicants to the Strasbourg Court.<sup>33</sup>

As Sir Francis Jacobs stated in his keynote address at the British Institute of International and Comparative Law Annual Conference in June 2006, the idea behind EU accession to the ECHR is to fill a gap, by allowing an individual

<sup>30</sup> An alternative is "to change the case-law on individual concern" as advocated by A-G Jacobs in his Opinion in *UPA v. Council* Case, C-50/00, (2002) ECR I-6677, at para. 4. The ECJ has unfortunately not followed his Opinion in this case. The Lisbon Treaty has now removed the requirement.

<sup>31</sup> ETS No. 155.

<sup>32</sup> See Speech of President J-P Costa on the occasion of the Opening of the Judicial Year at the Strasbourg Court, 19 January 2007.

<sup>33</sup> For a detailed comparison, see S. Douglas-Scott, *A Tale of Two Courts; Luxembourg, Strasbourg and the Growing European Human Rights Acquis*, 43 *Common Market Law Review* 629, at 661 (2006).

to bring a case against the EU, as well as against Member States. A problem however exists where the ECJ has no jurisdiction in respect of matters under the Second and Third Pillars (introduced by the Maastricht Treaty) that impinge on the basic human rights of individuals.

Sir Francis Jacobs adds, however, that extending the jurisdiction of the ECJ is preferable to EU accession to the ECHR. The ECJ needs to be given a greater role so as to be able to ensure respect for the rule of law in important areas requiring effective judicial review.<sup>34</sup> Besides can one pretend that the control mechanism of the implementation of the Charter is better served by the Strasbourg Court than by the ECJ?

Once the EU Charter of Fundamental Rights becomes positive law it is questionable whether accession to the ECHR is still necessary. At the same time so long as the Charter's ratification is in suspense, the ECJ, the master of creativity in filling gaps in the absence of written law, will find a way to apply the provisions of the Charter as *a soft law* and by resorting to the interpretation of the *effet utile*, as it did in the past. Just as the principle of supremacy of EU law over conflicting national laws was coined by the Court, as early as 1964, in the *Costa v. ENEL Case*<sup>35</sup> in the absence of any written norm as to the supremacy of Community Law over national law. Until the Charter becomes ratified and enters into force, it will continue to serve as a source of inspiration in the field of Human Rights. In those domains where the rights are considered as 'declarative' and a mere consolidation of existing law, the Community Court would not hesitate to apply the Charter as evidence of general principles of Community Law, which it is bound to protect. Indeed all the Advocates General, in a growing number of cases, as well as the Court of First Instance, have already cited the provisions of the Charter,<sup>36</sup> including Francis Jacobs, AG in *Netherlands v. Council*, discussed above. AG Mischo in his Opinion in *Booker Acquaculture Ltd Case* (2001) sums up the impact of the Charter as from its initial proclamation as follows:

I know that the Charter is not legally binding, but it is worthwhile referring to it given that it constitutes the expression, at the highest level, of a democratically established consensus on what must today be considered as the catalogue of fundamental rights guaranteed by the Community legal order.<sup>37</sup>

Human Rights will continue to bind the Court, and *ibi jus ubi remedium*. The granting of remedies by the Court will reinforce the rights: *ibi remedium ubi jus*. Gradually, therefore, the Charter will become part of the Union's legal order by judicial incorporation.

<sup>34</sup> Sir Francis Jacobs, *The Future of the Constitutional Treaty for Europe and the ECJ* (2006), available at: [http://biicl.org/files/633\\_report\\_annual\\_conference\\_speech\\_sir\\_francis\\_jacobs.pdf](http://biicl.org/files/633_report_annual_conference_speech_sir_francis_jacobs.pdf).

<sup>35</sup> Judgment of 15 July 1964 in *Case 6/64, Flaminio Costa v E.N.E.L.*, [1964] ECR 585.

<sup>36</sup> A. Arnulf, *From Charter to Constitution and Beyond: Fundamental Rights in the New European Union*, 2003 Public Law 774.

<sup>37</sup> Opinion of Mr Advocate General Mischo of 20 September 2001 in *Joint Cases C-20/00 and C-64/00, Booker Aquacultur Ltd and Hydro Seafood GSP Ltd v The Scottish Ministers*, [2003] ECR I-7411, at para. 126.

### M. Is Accession by the EU to the ECHR Desirable?

As we have seen, the new European Union Reform Treaty, adopted on 18-19 October 2007 in Lisbon, establishes in Article 6(2) the legal basis for the EU's accession to the ECHR. At the same time Protocol No. 14 to the ECHR provides for the possibility of EU accession from the point of view of the Council of Europe. The exact accession modalities, some of which will require a further protocol to the ECHR or an accession treaty, will have to be agreed upon by all Council of Europe Member States, as well as the EU. The Lisbon Treaty also contains a Protocol on Accession of the EU to the ECHR, the Protocol relating to Article 6(2) of the Treaty of European Union.

The issue of the accession of the EU to the ECHR is indeed complex. Modifications of legal texts on the part of both the EU, the Council of Europe and the parties to the ECHR are required. Judge Egbert Myjer, the Dutch Judge on the European Court of Human Rights, looked at some of the difficulties involved and questioned "Can the EU join the ECHR?" He believed that the legal and political difficulties as well as the technical ones could be overcome.<sup>38</sup>

However, some issues of substance have not been fully addressed. The vital issue of the competence of the Strasbourg Court *ratione materiae*, to review the implementation of the EU Charter on Fundamental Rights has not been examined. Will the catalogue of rights of the ECHR be extended and updated once the Charter becomes positive law? Are the twenty non-EU Member States of the Council of Europe ready for such a revolutionary development in their human rights agenda? They are struggling enough to adapt and to assume their commitments under the old ECHR. It does not seem a realistic project at the moment to update the ECHR and enlarge the catalogue of rights in line with the EU Charter. Europe will have to remain for the time being as it is, Europe of the EU of the 27, with a pilot development and model in the form of the EU Charter, and Europe of the 47.

To advocate accession, without extension of jurisdiction of the Strasbourg Court, would create a difficult situation in which the institutions of Europe of the 27 will have to accept to be controlled by a Court with partial jurisdiction over violations of human rights. The Strasbourg Court will have no jurisdiction to review violations, for instance, of the rights dictated by bio-ethics or claims by a victim of unfair dismissal and of other rights enshrined in the EU Charter and not in the ECHR. Accession would create an artificial situation, where practically most of the new rights under the Charter will remain outside the competence of the ECHR and only civil and political rights and a few social and economic rights would be coming within its jurisdiction. An unintended consequence may entail an ambiguous and confusing divided jurisdiction between the ECJ and the Strasbourg Court over human rights in the European Community. It is thus preferable to leave Community human rights to the control of the ECJ, as already mentioned above, when dealing with the role of the ECJ.

<sup>38</sup> [http://www.ecln.net/elements/conferences,book\\_Berlin/Myjer.pdf](http://www.ecln.net/elements/conferences,book_Berlin/Myjer.pdf).

A somewhat over-simplified approach to this issue is to be found in the concluding observations of the otherwise remarkable and cogent comments on the accession of the EU/EC to the ECHR by Pieter van Dijk, Member of the Venice Commission in 2007:<sup>39</sup>

27. The text of the EU Charter of Fundamental Rights should preferably be formulated identically to the ECHR, in so far as the same rights are concerned. If the present formulation of the EU Charter of Fundamental Rights remains unchanged and the Charter becomes binding law, either by incorporation in the amending Treaty or by a provision in the Treaty to that effect, its Article 52, paragraph 3, has to be interpreted and applied by the ECtHR (the Strasbourg Court) and the ECJ in such a way that it is guaranteed that, to the extent that this formulation deviates from that of the ECHR, the latter prevails, *unless the Charter provides for a more extensive protection of the right concerned or provides for additional rights.* (emphasis added)

As two-thirds of the Charter do provide additional rights, what role can the European Court of Human Rights play, in the absence of competence *ratione materiae*? Thus the Strasbourg Court, as was already mentioned, has no power to review violations of the right relating to personal data or certain grounds of violations of equality. As far as social rights are concerned, the European Court of Human Rights may not have a say over a violation of a right to collective bargaining (Article 28) or a claim of unjustified dismissal (Article 30) and others.

The accession of the EU to the ECHR may be considered as progress from a federalist point of view. The EU is likened to a quasi federal supra-national entity subject to international control, where its Charter of Fundamental Rights is compared to the constitutions and internal law of the Member States. A Council of Europe Document in the form of Questions and Answers queries:

After accession, what will be the relationship between the ECHR and the EU Charter of Fundamental Rights? The relationship between the ECHR and the EU Charter of Fundamental Rights (which is itself based on the ECHR and the Council of Europe Social Charter) will be similar to the one which exists between the ECHR and the constitutional provisions on human rights in countries parties to the ECHR which may, and often do, go beyond the minimal standards set by the ECHR.<sup>40</sup>

It would appear from the above that the EU Charter will be adjudicated for the most part by the ECJ, while the Strasbourg Court will be the final arbiter for the civil and political rights common to the EU Charter and the ECHR. Accession to the ECHR will mean that the EU and its institutions will be accountable to the European Court of Human Rights for issues concerning the ECHR and not for violations of human rights under the EU Charter. This legal dichotomy can but produce conflict and confusion.

Leaving aside the question of competence of the Strasbourg Court over violations of the EU Charter, an additional question arises as to the subjection of the ECJ to review by the Strasbourg Court for claims of violation of the rights

<sup>39</sup> The Venice Commission created by the Council of Europe is a Commission for Democracy through Law, [http://www.venice.coe.int/docs/2003/DCL\(2003\)069-e.asp](http://www.venice.coe.int/docs/2003/DCL(2003)069-e.asp).

<sup>40</sup> <http://www.coe.int/t/DC/Files/Source/SF,EUAccessiontoECHR.doc>.

enshrined in the ECHR. Can one envisage the ECJ as a respondent in a claim, for instance, of a violation of Article 6 of the ECHR on grounds of an unfair trial by the Community Court? Yet President Gil Carlos Rodriguez Iglesias of the ECJ and President Luzius Wildhaber of the Strasbourg Court have both expressed support for the idea of accession of the EU to the ECHR.<sup>41</sup>

A more profound study is called for before the Council of Europe and the Lisbon Treaty Protocols on Accession are ratified. The Council of Europe has realised the necessity of further discussion on the matter and the Third Council of the Europe Summit in Warsaw on May 2005 called for an in – depth study by a group of eminent and experienced national and international judges and other experts as well as a Group of Wise Persons, chaired by Gil Carlos Rodriguez Iglesias, the former President of the ECJ.<sup>42</sup>

The question of accession to the ECHR for the purpose of adopting a Bill of Rights will be finally solved when the EU Charter of Fundamental Rights becomes binding. The EU does not need two catalogues of human rights – one old and one modern. The Charter alone should fulfill the purpose.

Accession to the ECHR in order to benefit from its machinery of enforcement seems to create more problems than it solves. The justiciability of human rights within the EU is better served by the ECJ or by an independent Court.

The 1996 Opinion of the ECJ implicitly rejected a judicial control outside the institutional set up of the Union. Accession to the ECHR meant entry into “a distinct international institutional system” that was not approved by the ECJ. Whilst the first part of the opinion does not reflect anymore the development of human rights today in the legislation and written norms of the Union, the second part of the Opinion may still be pertinent and accession to the ECHR should be re-considered with great caution.

## N. Reflections *de Lege Feranda*

The adoption of the Charter as an independent binding legal instrument would be beneficial for the Institutions of the Union as well as for individuals. It would strengthen integration and enhance democratic values, especially in a decade of enlargement. It would become a Bill of Rights for individuals and serve a benchmark for the new Member States.

Even without a legally binding Charter, the European Community regime of human rights during its first decades is incomparable to the Union regime of human rights today. As we have seen, the landscape has changed since the Treaty

<sup>41</sup> See L. Wildhaber & G. C. Rodriguez Iglesias, *Speeches Given on the Occasion of the Opening of the Judicial Year*, Strasbourg, 31 January 2002; See also D. Spielmann, *Un autre regard: la Cour de Strasbourg et le droit de la communauté européenne*, in [Editor?] *Libertés, Justice, Tolérance (Liber Amicorum Cohen-Jonathan) 1447* (2004); F. Jacobs, *Interaction of the Case-law of the European Court of Human Rights and the European Court of Justice: Recent Developments* and L. Wildhaber, *The Coordination of the Protection of Fundamental Rights in Europe*, both in European Court of Human Rights, *Dialogue Between Judges* (2005).

<sup>42</sup> [www.coe.int/summit](http://www.coe.int/summit).

of Amsterdam. Our Millennium started with a new regime *de facto*, with adoption of the Charter of Fundamental Rights in 2000. This regime will gain once the Charter is given a status *de jure*. It is unfortunate that twice before, the Charter has been linked to international instruments that encumbered its legal status.

The linkage of the Charter, first as, an unratified Protocol to the Treaty of Nice, and subsequently as Part II of the failed Constitution, where both the Charter and the Constitution have not been ratified, is a warning against the linkage of the Charter to the ratification of the LRT. The Charter's destiny should be guaranteed in an independent legal instrument in the internal law of the Union. As the institutions of the Union declared their commitment to the Charter its legitimacy is recognized. Surely the citizens of Europe will acclaim the Charter as a champion of their rights, but not if it is linked to a political document like a constitution or mini-constitution or a reform treaty.

Regardless of whether the Lisbon Treaty enters into force or not, the Charter should become positive law in one form or another.<sup>43</sup> The example of the U.K. is useful to show that no written Constitution was required in order to implement the ECHR in its internal law. The UK has adopted a Human Rights Act, 1998, without having a written Constitution. Ways should be found to adopt the Charter as a legally binding instrument in the EU even in the absence of a European Constitution or a Lisbon Reform Treaty.

In the last resort the model of a 'Single European Act for Human Rights', following the homonymous precedent, could successfully be adopted. This would close the circle of recognition of fundamental rights. As the Single European Act was the first legal Community instrument to refer to human rights in 1986, it is opportune that over twenty years later, a new Single European Act, to enshrine a Bill of Rights for the EU, is adopted. Little objection by the Members States is to be feared, as the Charter does not impose any new obligations on them, but rather on the EU institutions. The citizens of Europe would likewise welcome the Charter as a champion of their fundamental rights.

Failing the adoption of the Charter as a legally binding instrument, the Charter serves a subsidiary source of general principles of law. As we have seen, it is already a Union *soft law*. Gradually, the fundamental rights enshrined in it would be introduced into the EU legal system by the Luxembourg Courts, as has traditionally been done. There is no reason why European Judges should not use the Charter as a source of inspiration in the same way as they have used the ECHR.<sup>44</sup>

Indeed, the EU Charter has a future, either as a legally binding instrument or as a model Bill of Rights to inspire the institutions of the Union and its Courts of Justice. As we have seen, a new era and regime of human rights has already started at the beginning of our Millennium regardless of whether or not the EU accedes to the ECHR.

<sup>43</sup> See E. C. Landau, *The Future of the EU Charter of Fundamental Rights*, in N. Neuwahl & S. Haack (Eds.), *Unresolved Issues of the Constitution for Europe; Rethinking the Crisis* 354 (2007).

<sup>44</sup> Editorial Comment, *The EU Charter of Fundamental Rights Still Under Discussion*, 38 *Common Market Law Review* 1, at 6 (2001).



# **The External Dimension of the Area of Freedom, Security and Justice in the Lisbon Treaty**

Juan Santos Vara\*

## **A. Introduction**

Today, the internal and external aspects of the Area of Freedom, Security and Justice (AFSJ) are directly related. Even though the internal dimension constitutes the foremost manifestation of the AFSJ, it is sometimes overlooked that this area has also a significant external component. Indeed, most of the measures adopted within this sphere have implications for the nationals of other States. The ten priorities contained in the Hague Programme, adopted by the European Council on 4 & 5 December 2004, refer to the need to complement the internal dimension with external action.<sup>1</sup>

Furthermore, in recent years the EU has concluded a series of international treaties with third countries that have a direct bearing on the AFSJ, and has taken an active part in international conferences and organisations which have a significant impact on this matter. Given the ever greater importance of what we might refer as the external dimension of the AFSJ, it should come as no surprise that the EU institutions have recently set themselves the goal of defining a coherent strategy in this field. In October 2005, the Commission proposed an initiative to organize the different instruments of the external dimension of justice and home affairs around clearly defined principles.<sup>2</sup> In December 2005, the Council of Ministers adopted this proposal, confirming the underlying principles

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<sup>1</sup> In the Hague Programme, the European Council reaffirms the priority attached to the development of an AFSJ, identifying ten areas for priority action within the next five years (European Council, Hague Programme on *Strengthening Freedom, Security and Justice in the European Union*, 4-5 December 2004).

<sup>2</sup> Communication from the Commission: a strategy on the external dimension of the area of

of the Commission's strategy, which involves partnership with third countries, albeit with a differentiated approach to individual third countries and regions.<sup>3</sup> This strategy affects such wide-ranging fields as human rights, strengthening institutions and good governance, migration, asylum and border management, and the fight against terrorism and organized crime.

Given the growing importance that the external dimension of the AFSJ is acquiring, it should perhaps have received greater attention in the Lisbon Treaty. Only two express references to the external dimension of the AFSJ can be found in the Treaty on the Functioning of the Union (TFEU). Within the context of the common European asylum system, Article 78(2)(g) TFEU declares that special attention should be paid to cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection. Also, Article 70(3) TFEU clearly states that the EU may conclude agreements with third countries for the readmission of illegal immigrants into their country of origin or provenance. It seems that the Member States do not consider it necessary to explicitly regulate the external dimension of the AFSJ.<sup>4</sup> Nonetheless, one should not underestimate the impact the significant changes introduced by the Lisbon Treaty may have on the external dimension of the AFSJ. In the light of these considerations, it would be interesting to conduct an analysis of those amendments introduced by the Lisbon Treaty which may have a bearing on the external dimension of the AFSJ, as this is a sphere in which the EU and its Member States will clearly intensify their activities over the coming years.

In this article it will be shown that the Treaty of Lisbon creates a legal framework in which the European institutions can adopt legal instruments and operative actions that respond efficiently to the challenges that affect the external dimension of the AFSJ, without infringing upon the protection of human rights and the respect for democratic values. However, the sum of exceptions and derogations to the new regime of the AFSJ may hinder the chances of progress provided by the EU's new structure as regards the external projection of the AFSJ.

This article is organized in three parts. The first part provides a brief overview of some of the EU's main actions in the external dimension of the AFSJ and the second part will examine the most relevant amendments introduced in the AFSJ by the Lisbon Treaty. There will be an analysis of the extent to which the new

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freedom, security and justice, COM (2005) 491 final, 12.10.2005. The mandate to develop this strategy was included in the Hague Programme.

<sup>3</sup> Council doc. 14366/05, 6.12.2005.

<sup>4</sup> In a Document submitted to the Feira European Council, it is stated that:

developing the JHA external dimension is not an objective in itself. Its primary purpose is to contribute to the establishment of an area of freedom, security and justice. The aim is certainly not to develop a "foreign policy" specific to JHA. Quite the contrary. The JHA dimension should form part of the Union's overall strategy. It should be incorporated into the Union's external policy on the basis of a "cross-pillar" approach and "cross-pillar" measures

Priorities and objectives of the European Union for external relations in the field of Justice and Home Affairs, Conclusions of European Council, 19 and 20 June 2000.

institutional and legal framework introduced by the Lisbon Treaty might help to improve the EU's external dimension of the AFSJ. Finally, the last part will focus on the impact of the considerable number of exceptions and derogations to the general rules on the future development of the external action of the AFSJ.

## **B. An Overview of the AFSJ External Projection**

A brief overview of the EU's actions in the external dimension of AFSJ reveals that in the ever present dialectic of *freedom vs. security*, the latter has clearly prevailed over the former in recent years. Given the limited extent of this article, it is not possible to examine all the instruments covering the external aspects of the EU's policies on freedom, justice and security that are in place. However, it seems appropriate to highlight the key features of the external dimension of EU immigration policy, cooperation on criminal matters with third countries and the implementation of the Security Council's anti-terrorism resolutions in the EU. The increasing importance of EU activity within these fields justifies this selection. In no way does this article intend to present a detailed examination of each one of these highly complex issues, but this brief introduction will highlight some of the main themes involving the external dimension of the AFSJ.

### **I. The External Dimension of the Immigration Policy**

A European immigration policy worthy of that name requires the supplementation of the internal regulatory action with a suitable deployment of legal instruments in the relations with third countries. Although as yet still modest, the Union's involvement in this field will be crucial in the future, given its greater capacity for negotiation and mobilization of resources to seek the cooperation of the countries of origin or transit of those migrants who attempt to gain illegal entry into the territory of Member States.<sup>5</sup> However, the adoption and subsequent application of this policy is proving to be highly complex, as is revealed by the negotiation of agreements with third countries for the readmission agreements of illegal migrants. Since the entry into force of the Treaty of Amsterdam on 1 May 1999, the Council of Ministers authorized the Commission to negotiate Community readmission agreements with sixteen countries. By the middle of 2007, only five of these sixteen mandates have resulted in signed readmission agreements.<sup>6</sup> The third countries in question have sought to delay as long as possible the start of negotiations, as well as the signing and entry into force of these agreements. Although readmission agreements are not considered separately in the management of migratory flows by the EU, but rather form part of a broader approach that

<sup>5</sup> See Communication of the Commission on priorities in the matter of the fight against illegal immigration, of 19 July 2006, COM (2006) 402 final.

<sup>6</sup> The readmission agreement with the Hong Kong Special Administrative region and with Macao entered into force on 1 May 2004, with Sri Lanka on 1 May 2005, with Albania on 1 May 2006 and with Russia on 1 July 2007. As will be shown later, other readmission agreements have also been signed in recent months.

includes cooperation for development with third countries and tackling the root causes of migration, third countries do not appear to be particularly interested in concluding agreements of this kind.<sup>7</sup> This is due mainly to the fact that the EU requires not only the readmission of nationals of the third country, but also those non-nationals who transited through the territory of one of the parties en route to the other.

Despite the fact they are concluded on the basis of reciprocity, the readmission agreements are designed to stop the massive influx of illegal immigrants into the EU.<sup>8</sup> Third countries look upon these agreements as a measure imposed by the EU, as the burden of their implementation will fall upon their shoulders. Practice tells us that the success of negotiations on agreements of this kind will depend on the incentives that the EU is able to offer to third countries, with some of the more salient ones being visa facilitation regimes and the perspective of joining the EU in the future.<sup>9</sup> In view of this, in 2007 the EU has managed to sign readmission agreements with Serbia, Bosnia and Herzegovina, Montenegro, the Former Yugoslav Republic of Macedonia, Moldova and the Ukraine.<sup>10</sup>

These agreements join the five mentioned above, but as the EU is not in a position to offer these incentives to the majority of third countries, negotiations often either become bogged down or even fail to start in the first place.<sup>11</sup> Furthermore, one cannot ignore the fact that if the readmission agreements are not accompanied by the necessary guarantees in terms of human rights and the principle of *non-refoulement*, they may turn the EU into an accomplice in forced returns and human rights violations. Unfortunately, this is not the only sphere in which the attempt to make third countries act as a kind of *cordon sanitaire*, protecting the Union from massive migratory flows, poses a serious risk for the safeguarding of human rights. A good example of this can be seen in the Regional Protection Programmes, proposed by the Commission in 2005 with the aim to enhance the protection capacity of the countries of origin and transit of refugees and asylum seekers.<sup>12</sup>

<sup>7</sup> A. Roig & T. Huddlestone, *EC Readmission Agreements: A Re-evaluation of the Political Impasse*, 9 *European Journal of Migration and Law* 363, at 373, 378 (2007).

<sup>8</sup> See M. Schieffer, *Community Readmission Agreements with Third Countries-Objectives, Substance and Current State of Negotiations*, 5 *European Journal of Migration and Law* 343 (2003).

<sup>9</sup> In the context of formal national readmission negotiations, some Member States are sometimes prepared to offer incentives to third countries when they agree to readmit both own and third country nationals (Communication from the Commission, Study on the links between legal and illegal migration, COM (2004) 412, 4.6.2004, at 14).

<sup>10</sup> Whereas only the Former Yugoslav Republic of Macedonia is a candidate to join the EU, the others are potential EU candidate countries.

<sup>11</sup> See Schieffer, *supra* note 8.

<sup>12</sup> Commission Communication to the Council and the European Parliament of 1 September 2005 on regional protection programmes, COM (2005) 388 final, 1.9.2005. See A. Baldaccini, *The External Dimension of the EU's Asylum and Immigration Policies: Old Concerns and New Approaches*, in A. Baldaccini, E. Guild & H. Toner (Eds.), *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy* 277 (2007).

## II. The External Cooperation in Criminal Matters

The need for a comprehensive approach to combat international crime, and especially the terrorist threat, which exploits the discrepancies existing between sovereign states, has been the driving force behind international cooperation in the area of justice and home affairs. Among the international agreements signed by the EU in this field are the Agreements on extradition and mutual legal assistance between the European Union and the United States of America,<sup>13</sup> which seek to fine-tune existing bilateral relations between the EU Member States and the US in terms of judicial cooperation.<sup>14</sup> The negotiations preceding these agreements were shrouded in secrecy, with a lack of transparency and the cold-shouldering of the European Parliament and of national parliaments regarding the content of the agreements.<sup>15</sup> The absence of the European Parliament from the process of drafting these international agreements is due to the fact that Articles 24 and 38 of the Treaty of the European Union (TEU) do not contemplate its involvement in the negotiation of agreements concerning the CFSP and police and judicial cooperation in criminal matters. Nonetheless, the European Parliament exploited the possibilities for political control bestowed upon it by Articles 39.1 and 2 of the TEU to try to influence the content of the agreements.<sup>16</sup>

The debate which arose during the negotiation process regarding the guarantees that needed to be introduced into the wording of the agreements in order to protect human rights and basic freedoms shows us that the drafting of agreements of this nature is not without its difficulties. One of the more controversial areas during the negotiation process of the Agreement on extradition has been the issue of extradition to the USA of individuals who face the death penalty. The final text of the Agreement allows extradition on condition that the death penalty, if imposed, will not be carried out,<sup>17</sup> but it does not include any provision that allows for extradition to be refused due to human rights concerns.<sup>18</sup>

<sup>13</sup> OJ 2006 L 181, at 27 and OJ 2006 L 181, at 34. See also the Council Decision concerning the signature of the agreements on the basis of Arts 24 and 38 TEU, OJ 2006 L 181, at 25.

<sup>14</sup> See *inter alia*, R. Genson, *Les accords d'extradition et d'entraide signés le 25 juin 2003 à Washington entre l'Union européenne et les Etats-Unis d'Amérique*, 470 RMC et UE 427 (2003); G. Stessens, *The EU-US Cooperation on Extradition and on Mutual Legal Assistance: How to Bridge Different Approaches*, in G. Kerchove & A. Weyembergh (Eds.), *Sécurité et justice: enjeu de la politique extérieure de l'Union européenne* 263 (2007); J. Wouters & F. Naert, *Of Arrest Warrants, Terrorist Offences and Extradition after '11 September'*, 41 CML Rev. 909 (2004).

<sup>15</sup> V. Mitsilegas, *The External Dimension of EU Action in Criminal Matters*, 12 EFA Rev. 457, at 472 (2007).

<sup>16</sup> See, the European Parliament Recommendation B5-0540/2002, requesting the Council to inform it as well as national parliaments on the progress of the negotiations and Resolution B4-0813/2001, where the Parliament insisted on safeguards such as not allowing extradition if the defendant could be sentenced to death in the USA.

<sup>17</sup> In the negotiation mandate adopted by the Justice and Home Affairs Council of 26 April 2002, it is declared that "the Union will make any agreement on extradition conditional on the provision of guarantees on the non-imposition of capital punishment sentences, and the securing of existing levels of constitutional guarantees with regard to life sentences" (Council document 7991/02, at 13).

<sup>18</sup> Art. 17.2 of the extradition Agreement provides for consultations between the parties "where

Another significant challenge to the protection of fundamental rights is related to the inadequacy of data protection in the Agreement on mutual legal assistance. The Agreement requires the parties to provide mutual legal assistance involving the exchange of a wide range of data with the purpose of identifying information regarding natural or legal persons convicted “or otherwise involved in a criminal offence,” but does not include an adequate level of personal data protection.<sup>19</sup> Accordingly, the necessary cooperation between European bodies, such as Europol and Eurojust, and third countries and, in particular the United States, has not ceased to be problematic as regards personal data protection.<sup>20</sup> The Agreement between Europol and the USA allows for the exchange of data on a wide range of crimes and the delivery of data by Europol to numerous US authorities, including those at local level.<sup>21</sup> Thus, EU external cooperation on criminal matters is being undertaken without paying sufficient attention to the values and principles that underpin the EU, amongst which the protection of basic freedoms occupies a highly prominent position.<sup>22</sup> At the same time, there is a certain contradiction between the active role the EU plays in the promotion of human rights in its external action and the content of these agreements.

### III. The Implementation of the Security Council’s Anti-terrorism Resolutions in the EU

The EU’s external action in the fight against terrorism involves a wide range of instruments, and therefore there is a need to safeguard their coherent use within the framework of a multilateral strategy defined by the United Nations. Strict application is to be made of the counterterrorism clause that has recently been included in the agreements concluded with third countries, and care must be taken

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the constitutional principles of, or final judicial decisions binding upon, the requested State may pose an impediment to fulfillment of its obligation to extradite.”

<sup>19</sup> See Art. 4(1)(b) of the Agreement on mutual legal assistance. It is even stated in Art. 9(2)(b) of this Agreement that “generic restrictions with respect to the legal standards of the requesting State for processing personal data may not be imposed by the requested State as a condition (...) to providing evidence or information.” For a detailed examination of this issue see V. Mitsilegas, *The New EU-USA Cooperation on Extradition, Mutual Legal Assistance and the Exchange of Police Data*, 8 EFA Rev. 515 (2003).

<sup>20</sup> The majority of the agreements concluded by Europol involve former or current candidate countries and Schengen associates. Article 18 of the Europol Convention allows Europol to communicate personal data to third countries and bodies if this is necessary for preventing and combating criminal offences falling within Europol’s jurisdiction and if the third countries offer an adequate level of data protection. In 1999 the Council passed an Act setting out the rules governing the transmission of personal data to third countries and bodies, and this was amended in 2002 (OJ 2002 C 76, at 1).

<sup>21</sup> The agreement can be consulted at <http://www.europol.europa.eu/legal/agreements/Agreements/16268-2.pdf> (last consulted 6 September 2008).

<sup>22</sup> The Agreement between the EU and the USA on the transfer of PNR provides another good example of the EU’s weakness in promoting and protecting in its external action the core values upon which European integration is based.

not to contradict the spirit of the same.<sup>23</sup> The efficiency of the EU's antiterrorist policy within the context of relations with third countries must necessarily be accompanied by the strengthening of cooperation with universal and regional organizations that have a crucial role to play in maintaining international peace and security.

The implementation of the sanctions adopted by the Security Council (SC) to combat the terrorist scourge has posed numerous problems for the EU's constitutional framework in recent years. The individuals and entities blacklisted by the 1276 Sanctions Committee have not been given the opportunity to dispute the grounds for their inclusion on the list, nor do they have access to an independent tribunal to assess the fairness of the decisions, which restrict their fundamental rights.<sup>24</sup> The present situation of the victims of such sanctions is unacceptable from the perspective of the international protection of human rights,<sup>25</sup> and some of the listed individuals and entities have initiated legal proceedings before the EC Courts.<sup>26</sup> On 21 September 2005, the Court of First Instance (CFI) of the European Communities delivered its judgments on the *Yusuf* and *Kadi* cases,<sup>27</sup> ruling that it did not have the authority to review whether the regulations implementing UN Security Council resolutions were consistent with fundamental rights as protected by the Community legal order.<sup>28</sup> The CFI

<sup>23</sup> Counterterrorism clauses are inserted in Community agreements, such as the Cotonou Agreement.

<sup>24</sup> In 1999 the Security Council adopted Resolution 1267 to sanction the Taliban for sheltering and training terrorists within the territory of Afghanistan as well as for their refusal to surrender Osama bin Laden. Resolution 1267 imposed a ban on travel, an arms embargo and the freezing of the Taliban's assets and established a Sanctions Committee to draw up a list of individuals and entities against which the sanctions were to be applied. In 2000, Resolution 1333 expanded the reach of the freezing measures to include Osama bin Laden, Al Qaeda and its affiliates. These measures were renewed for the most recently by Resolution 1822 (2008).

<sup>25</sup> See B. Fassbender, *Targeted Sanctions and Due Process*, 20 March 2006 (final), [http://www.coe.int/t/e/legal\\_affairs/legal\\_co-operation/Public\\_international\\_law](http://www.coe.int/t/e/legal_affairs/legal_co-operation/Public_international_law) (last consulted 3 July 2008); I. Cameron, *The European Convention on Human Rights, Due Process and United Nations Security Council-Terrorism Sanctions*, Committee of Legal Advisers on Public International Law (CAHDI), Doc. CAHDI (2006) 22, <http://www.coe.int/cahdi> (last consulted 3 July 2008).

<sup>26</sup> Thereby obliging the CFI to conduct for the first time a detailed examination of the relationship between the legal order created by the UN Charter and the internal or Community order.

<sup>27</sup> *Case T-306/01, Yusuf and Al Barakaat International Foundation v. Council and Commission (Yusuf)*, [2005] ECR II-3533 and *Case T-315/01, Kadi v. Council and Commission* [2005] ECR II-3649.

<sup>28</sup> The reasoning followed by the CFI has been widely criticized by the doctrine. See *inter alia* G. Della Cananea, *Return to the Due Process of Law: the European Union and the Fight Against Terrorism*, 32 E. L. Rev. 896 (2007); P. Eeckhout, *Community Terrorism Listings, Fundamental Rights, and UN Security Council Resolutions. In Search of the Right Fit*, 33 EuConst. 183 (2007); N. Lavranos, *Judicial Review of UN Sanctions by the Court of First Instance*, 11 EFA Rev. 471 (2006); J. Santos Vara, *La indefensión de los particulares frente a las sanciones del Consejo de Seguridad: el reconocimiento de la competencia de los tribunales internos para controlar las resoluciones del Consejo de Seguridad en relación con el ius cogens*, 11 Revista General de Derecho Europeo (2006), available at <http://www.iustel.com> (last consulted 3 September 2008); P. Stangos & G. Gryllos, *Le droit communautaire à l'épreuve des réalités du droit international: leçons tirées de la jurisprudence communautaire récente relevant de la lutte contre le terrorisme*

made a restrictive interpretation of human rights in which it prioritizes the fight against terrorism over the interest in safeguarding fundamental rights, and shies away from controlling the compliance of the contested EU legislation with the fundamental rights protected by the EU's legal order.<sup>29</sup> By so doing, the CFI is in fact disregarding the constitutional nature of the EC Treaty and, in particular, the protection of fundamental rights in EU legal order, which is the result of a praetorian creation of the European Court of Justice. In the Court's view, the primacy of the resolutions of the SC determines that EU institutions do not have an independent discretionary margin when implementing targeted sanctions of this nature, whereby the annulment of EU rules would imply that SC resolutions are also in breach of fundamental rights.<sup>30</sup>

Yusuf, Kadi and Al-Barakaat lodged an appeal against the judgments of the CFI before the European Court of Justice,<sup>31</sup> and on 3 September 2008, the Court delivered its judgment on the *Kadi* and *Al-Barakaat* cases.<sup>32</sup> The Court of EU stated that the CFI had erred in law when it held that the Community courts had no jurisdiction to review the internal lawfulness of the contested regulation save with regard to its compatibility with the norms of *jus cogens*.<sup>33</sup> The Court affirmed that the Community courts must ensure the review of the lawfulness of all Community acts in the light of fundamental rights protected by the EU legal order as general principles of Community law, "including the review of Community measures which, (...), are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Chapter of the United Nations."<sup>34</sup> The Court concluded that, in the light of the actual circumstances surrounding the inclusion of persons and entities whose funds are to be frozen, the appellants' claims that the contested regulation infringes the right to be heard, the right to judicial review and the right to property are well founded, and consequently the Court annulled the Council regulation in so far as it concerns the appellants. However, in order to prevent the negative effects arising from the annulment of the regulation with immediate effect, the Court maintained the effects of the regulation for a period of

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*international*, 42 Cahiers de droit européen 429 (2006); L. Van den Herik & N. Schrijver, *Human Rights Concerns in Current Targeted Sanctions Regimes from the Perspective of International and European Law*, in T. J. Biersteker & S. E. Eckert (Eds.), *Strengthening Targeted Sanctions Through Fair and Clear Procedures* 18 (2006), available at [http://www.watsoninstitute.org/pub/Strengthening\\_Targeted\\_Sanctions.pdf](http://www.watsoninstitute.org/pub/Strengthening_Targeted_Sanctions.pdf) (last consulted 3 September 2008).

<sup>29</sup> Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban, OJ 2002 L 139, at 9.

<sup>30</sup> The CFI affirms that "any review of the internal lawfulness of the contested regulation, especially having regard to the provisions or general principles of Community law relating to the protection of fundamental rights, would therefore imply that the Court is to consider, indirectly, the lawfulness of those resolutions" (*Yusuf*, para. 266).

<sup>31</sup> The appeal against the CFI decision on *Yusuf* was later removed from the ECJ register.

<sup>32</sup> *Joined Cases C-402/05P and C-415/05P, Kadi and Al Barakaat International Foundation v. Council* (not yet published in the ECR).

<sup>33</sup> The Court followed the Opinions of Advocate General Poiares Maduro delivered on 16 January 2008, *Case C-402/05 P, Kadi v. Council and Commission*, and on 23 January 2008, *C-415/05 P, Al Barakaat International Foundation v. Council and Commission*.

<sup>34</sup> *Joined Cases C-402/05P and C-415/05P, Kadi and Al Barakaat*, para. 326.

no more than three months. Although the annulment of the contested regulation, in so far as it concerns Kadi and Al-Barakaat, poses a serious legal and political problem, it might help to encourage the Security Council to introduce a review mechanism available to listed individuals and entities.

Secondly, the current pillar division does not sit well with the need to fight terrorism through the implementation of efficient measures that at the same time respect fundamental rights. Accordingly, the judicial control of counterterrorist measures by EU courts has clearly highlighted the weaknesses that characterize effective judicial protection within the sphere of CFSC and Police and Judicial Cooperation in Criminal Matters. Thus, in the *Segi* and *Gestoras Pro-Amnistía* cases, the applicants lodged a compensation action before the CFI for the damages allegedly sustained as a result of their inclusion on the terrorist list drawn up by the Common Position 2001/931 and contested the legality of certain provisions included in this act. The CFI declared that it has no jurisdiction over the application, as the EU Treaty does not consider the possibility of filing an action for damages against acts adopted by EU institutions within the framework of the CFSP and the third pillar.<sup>35</sup> The appeals lodged before the European Court of Justice have been used by the Court to mitigate the more negative consequences of the CFI's orders. The Court accepted that a national court may raise the issue of validity or interpretation of a common position adopted on the basis of Article 34 EU when it has serious doubts "whether that common position is really intended to produce legal effects in relation to third parties."<sup>36</sup> As it is well known, it is not expressly laid down in the Treaties the possibility to give preliminary rulings as regards common positions. Even though the European Courts have made great efforts of interpretation, they have not proved sufficient to fill the gaps in effective judicial protection against third pillar acts as the judges cannot replace the Member States in the reform of the Treaties.

### **C. The Implications of the Lisbon Treaty for the External Dimension of the AFSJ**

One of the key new features introduced by the Lisbon Treaty is the abolition of the complex pillar structure that at the same time entails the 'communitarisation' of police and judicial cooperation in criminal matters. The aim of this part of the article is to examine the extent to which the Lisbon Treaty effectively creates a legal framework in which European institutions can adopt legal instruments and operative actions that respond effectively to the challenges that affect the external dimension of the AFSJ, without infringing upon the protection of human rights

<sup>35</sup> Orders of 7 June 2004, *Case T-338/02, Segi and others v. Council*, [2004] ECR II-1647 and *Case T-332/02, Gestoras Pro-Amnistía and others v. Council* (unpublished).

<sup>36</sup> Judgments of 27 February 2007 in *Case C-355/04P, Segi v. Council*, [2007] ECR I-1657 and *Case 354/04P, Gestoras Pro-Amnistía*, [2007] ECR I-1579, para. 54. By the same token, the Court of Justice declared that it has also jurisdiction to review the lawfulness of common positions "when an action has been brought by a Member State or the Commission under the conditions fixed by Article 35(6) EU." (para. 55).

and the respect for democratic values. It goes without saying that many of the improvements introduced by the new Treaty affect both the internal and external dimensions of the AFSJ, but this article will focus mainly on the implications of the Lisbon Treaty for the external dimension.

## I. The Abolition of the Complex Pillar Structure

The EU's current structure of pillars is ill-suited to the challenges that the EU and its Member States will in all probability have to face in the future, as regards both the internal and the external dimensions of freedom, security and justice. The application of different legal regimens to the matters included in the Treaty of the European Community (visas, asylum, migration and other policies related to the free movement of persons) and to the third pillar of the EU (police and judicial cooperation in criminal matters) is an endless source of complications.<sup>37</sup> A good example of this is provided by the mixed inter-pillar agreements. Member States appear to have understood this reality by fully 'communitarising' police and judicial cooperation in criminal matters. In contrast to the situation of the CFSP, which continues to maintain its inter-governmental character despite the formal abolition of the pillars, the AFSJ is fully integrated within the Community pillar.<sup>38</sup> The TFEU creates a new Title V that integrates all the provisions of the AFSJ (Arts. 67-89), and the EU's aim of offering its citizens "an area of freedom, security and justice without internal frontiers" occupies a very prominent position among its goals, standing in second place on the list (Art. 2 of the new TEU). The integration of police and judicial cooperation in criminal matters within the Community sphere implies the suppression of the specific legal acts currently available under the third pillar, the application of the "ordinary legislative procedure" that involves the enhancement of the powers of the European Parliament and the use of a qualified majority in the decision-making process, and the extension of the jurisdiction of the Court of Justice to all the spheres of the AFSJ. Among other highly significant innovations introduced by the Lisbon Treaty will be the abolition of the specific peculiarities of enhanced cooperation under existing Title VI of the TEU, whereby the same rules will be applied to enhanced cooperation throughout the entire AFSJ. These changes would undoubtedly help furnishing Europe with a coherent strategy that responds to the challenges that the EU and its Member States will in all probability have to face in the future as regards both the internal and the external dimensions of the AFSJ.

<sup>37</sup> On the negative effects of the pillar division on the area of freedom, security and justice *see* the contribution of H. Labayle to the works of the European Convention on this issue and T. Balzacq & S. Carrera, *Migration, Borders and Asylum: Trends and Vulnerabilities in EU Policy*, Centre for European Policy Studies (2005).

<sup>38</sup> Bruno de White uses the term 'partial depillarization' to describe the merger of the Treaties (*The Constitutional Law of External Relations*, in I. Pernice & M. Poiares Maduro (Eds.), *A Constitution for the European Union: First Comments on the 2003 Draft of the European Convention* (2004).

## II. The Creation of a Single Legal Personality

One of the changes with the potential to have a more positive impact on the external projection of the AFSJ is the explicit recognition of the EU's international personality in Article 47 of the new Treaty of the European Union.<sup>39</sup> This provision contains one of the main innovations introduced by the Constitutional Treaty.<sup>40</sup> The Lisbon Treaty creates a new international organization, the European Union, which will replace and succeed the current European Community and European Union in all their international rights and obligations.<sup>41</sup> In the discussions maintained by the Working Group on Legal Personality of the European Convention, it was quite clear from the beginning that maintaining separate legal personalities for the EU and the European Communities would have a negative bearing on the coherence and visibility of the EU's external action.<sup>42</sup>

Nevertheless, conferring the EU with a single legal personality does not imply unifying the competences of the institutions, and a good example of this can be seen in the survival of the specific characteristics of the CFSP. However, all matters regarding police and judicial cooperation in criminal matters become shared competences between the EU and its Member States.<sup>43</sup> The consequence of this transfer of competences will have far-reaching implications in the external dimension of the AFSJ. Following the entry into force of the Lisbon Treaty, the procedure for concluding international treaties will be the same for all those matters included in the new Title V of the TFEU, doing away with the complex inter-pillar mixed agreements in the AFSJ.<sup>44</sup> The EU's international representation before other organizations and third countries will not vary depending on whether it is an issue involving police and judicial-criminal cooperation or visas, asylum and immigration. In short, the express recognition of its legal personality will undoubtedly help to improve the visibility of the European Union on the international stage and to enhance the coherence of its external action as a whole, including the external dimension of the AFSJ. It is important to consider that the external action of the AFSJ is affected not only by the EU's internal and external activities aimed at creating an AFSJ, but also by the Development policies of the EU and the CFSP. Accordingly, the establishment of the new European External Action Service, which will assist the High Representative of the Union for Foreign Affairs and Security Policy, may help to improve the efficiency and coherence of the Union's external action.

<sup>39</sup> On the debate of the legal personality of the EU, *see inter alia*, N. Fernández Sola, *La subjetividad internacional de la Unión Europea*, 11 *Revista de Derecho Comunitario Europeo* 85 (2002); J. C. Gautron, *Article I-7*, in L. Burgorgue-Larsen (Ed.), *Traité établissant une Constitution pour l'Europe. Parties I et IV. Architecture constitutionnelle* (2007); N. Wessels, *Revisiting the International Legal Status of the EU*, 5 *EFA Rev.* 5 (2000).

<sup>40</sup> Art. I-7 of the Constitution.

<sup>41</sup> *See* Art. 1 of the new TEU. The EURATOM will maintain a separate international personality in the future.

<sup>42</sup> CONV 305/02.

<sup>43</sup> Art. 4 of the TFEU.

<sup>44</sup> Article 218 provides a common procedure for negotiating and concluding agreements between the EU and third countries or international organizations.

### III. The Clarification of the EU External Competences

The entry into force of the Lisbon Treaty will entail a clarification and simplification of the Union's external competences. There is no doubt that the disappearance of the so-called 'inter-pillar agreements' will help to improve the exterior projection of the AFSJ.<sup>45</sup> Agreements of this nature require constant coordination between the EU and the EC throughout the negotiation process, and the consent to be bound on the part of the EU has to be expressed in two separate legal instruments.<sup>46</sup> All this may give rise to considerable confusion in third countries. Once the Lisbon Treaty comes into force, EU competence and procedure for concluding international agreements regarding police and judicial cooperation in criminal matters will undergo major changes.

According to the Lisbon Treaty, the EU may not only conclude an international agreement where the Treaties expressly confer such powers, but the EU's external competence may also flow implicitly from its provisions. Article 216 is intended to reflect the Court of Justice case law on external competence,<sup>47</sup> and this constitutes a major innovation as regards agreements on police and judicial cooperation in criminal matters. As the entire AFSJ will become a shared competence between the new EU and its Member States, the application of the 'AERT doctrine' to matters currently included within the third pillar is the obvious consequence. However, within the framework of the European Convention that drafted the European Constitution, some members of the Convention supported the right of Member States to conclude international agreements in the area of judicial co-operation, even if the Union had already adopted internal rules on the

<sup>45</sup> For an overview of the third pillar agreements see G. De Kerchove & S. Marquardt, *Les accords internationaux conclus par l'Union européenne*, 2004 AFDI, 803; C. Martínez Capdevilla, *Los acuerdos internacionales del tercer pilar de la U.E.*, in A. Remiro Brotóns (Ed.), *El futuro de la acción exterior de la Unión Europea* 201 (2006).

<sup>46</sup> The conclusion of the agreement between the European Union, the European Community and Switzerland on the Schengen acquis required two separate Decisions by the EU and EC respectively. On behalf of the EU, Council Decision 2008/149/JHA, OJ 2008 L 53, at 50, and on behalf of the EC, Council Decision 2008/149/JHA, at 50. See G. De Kerchove, *Relations extérieures et élargissement*, in G. De Kerchove & A. Weyembergh (Dirs.), *L'espace pénal européenne: enjeux et perspectives* 257, at 272 (2002).

<sup>47</sup> Article 216 of the TFEU provides that

the Union may conclude an agreement with one or more third countries or international organizations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.

Even though the doctrine accepts that the Constitutional Treaty clarifies the EU's external competence, it does not hold the same opinion as regards the attempt to codify the Court's case law on competence. Dashwood stated that "any attempt to fabricate constitutional provisions giving effect to a complex and subtle case law is liable to result in distortion and impoverishment of the *acquis*" (*The Relationship Between the Member States and the European Union/European Community*, 41 CML Rev. 355, at 373 (2004)). This view is shared by M. Cremona, *The Union's External Action: Constitutional Perspective*, in G. Amato, H. Bribosia & B. De White (Eds.), *Genesis and Destiny of the European Constitution* 1173, at 1183 (2007).

same matter.<sup>48</sup> As a result of this discussion, the Intergovernmental Conference of 2004 adopted a Declaration on Article III-325 of the European Constitution, stating that Member States may negotiate and conclude agreements with third countries or international organisations in the areas of judicial cooperation in civil and criminal matters and police cooperation “in so far as such agreements comply with Union law.” This precedent has led to an identical Declaration on Article 218 of the TFEU.<sup>49</sup> Even though the international agreements concluded by the EU in these areas tend not to exclude the participation of Member States,<sup>50</sup> this Declaration indicates that they are not willing to transfer completely their external competences to the EU on these important issues.

On the other hand, the conclusion of international agreements on police and judicial cooperation in criminal matters will follow the common procedural treaty-making provision. Article 218 of the TFEU provides a common procedure to negotiate and conclude agreements between the EU and third countries or international organizations, that is based on the current Article 300 TEC. The Lisbon Treaty will introduce the innovations that were already included in the Constitutional Treaty.<sup>51</sup> Firstly, the changes to the procedure for the conclusion of international agreements will substantially enhance the role of the European Parliament, putting an end to the democratic shortfall that characterizes the procedure of Article 24 TEU. Whereas at present the Parliament is merely informed of the third pillar agreements, the consent of the European Parliament will be required in a wide range of international agreements, including those concerning domains subject to the ordinary legislative procedure in the internal sphere of the Union.<sup>52</sup> Secondly, the qualified majority vote is generally applied in the decision-making process regarding agreements on criminal and police cooperation. Thirdly, the competence of the ECJ is extended to control the legality of those agreements concerning matters already included in the third pillar. Finally, the current provision that allows the Member States’ representatives in the Council to state that they have to comply with the requirements of their own constitutional procedure is not included in the new procedure laid down in Article 218 TFEU.<sup>53</sup> Even though there is not a unanimous interpretation of this clause, most of the

<sup>48</sup> See Final report of the Working group X *Freedom, Security and Justice*, CONV 426/02, 2.12.2002.

<sup>49</sup> Declaration on Article 218 of the Treaty on the Functioning of the European Union concerning the negotiation and conclusion of international agreements by Member States relating to the area of freedom, security and justice.

<sup>50</sup> The EU-US Agreements on Extradition and Mutual Legal Assistance do not exclude the conclusion of bilateral agreements between Member States and the USA if they are consistent with the Union agreements (Art. 18 of the Extradition agreement and Art. 14 on the Mutual Legal Assistance).

<sup>51</sup> See A. Cebada Romero, *Análisis de la reciente práctica convencional de la Unión Europea. Cambios introducidos en el procedimiento convencional por el Tratado constitucional de la UE*, 233 *Gazeta Jurídica* 3 (2004); R. Passos & S. Marquardt, *International agreements-competences, procedures and judicial control*, in G. Amato, H. Bribosia & B. De White (Eds.), *Genesis and Destiny of the European Constitution* 875 (2007).

<sup>52</sup> Art. 218 TFEU.

<sup>53</sup> See Arts. 24 and 38 TEU.

doctrine considers that it amounts to delaying the vote on the conclusion of the agreements by the EU.<sup>54</sup> Consequently, this change will undoubtedly contribute to facilitate the conclusion of international agreements.

#### IV. The Jurisdiction of the European Court of Justice

The application of what is called ‘the Community method’ to police and judicial cooperation in criminal matters is accompanied by the extension of the jurisdiction of the Court of Justice to the entire AFSJ, repealing those specific mechanisms provided for in Articles 35 TEU and 68 TCE.<sup>55</sup> This change is very important, as the measures adopted in this field may have many implications on fundamental rights. The Court shall be competent to review the validity of and interpret the acts adopted within the sphere of the AFSJ and, furthermore, citizens will be provided with all the means foreseen in the Community legal order for seeking the protection of their rights. However, the Lisbon Treaty does not grant the EJC jurisdiction to review the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.<sup>56</sup> This therefore amounts to maintaining the exception to the jurisdiction of the European Court of Justice, as laid down in current Articles 68(2) EC and 35(5) TEU, albeit with more precise regulation, whereby the sole exclusion is the competence of the Court over police and public order actions governed by each country’s legislation. The Court will, however, be fully competent to rule on the application of EU Law.

Pursuant to the provisions of the Reform Treaty, and as laid down in the Constitutional Treaty, when the Lisbon Treaty comes into force private individuals may lodge a compensation action before the EC Courts within a factual context similar to the *Segi* and *Gestoras pro-Amnistía* cases. This action may be filed against all the measures adopted in the entire AFSJ.<sup>57</sup> This change provides a positive response to the suggestions put forward in recent times by both the Court of Justice and the Court of First Instance, in the sense that it devolves upon the Member States the reform of the system of legal protection.<sup>58</sup>

<sup>54</sup> See *inter alia*, S. Marquardt, *La capacité de l’Union européenne de conclure des accords internationaux dans le domaine de la coopération policière et judiciaire*, in G. De Kerchove & A. Weyembergh (Eds.), *Securité et justice: enjeu de la politique extérieure de l’Union européenne* 179, at 180, 192 (2003); A. Mignolli, *Sul treaty-making power nel secondo e nel terzo pilastro dell’Unione europea*, 4 *Riv. Diritto Internazionale* 978, at 989 (2001). In the interim the other members of the Council may agree to apply the agreement provisionally, without binding the Member State that has made the declaration.

<sup>55</sup> At present, the European Court of Justice has no full jurisdiction over AFSJ legal acts. See A. Weyembergh, *La coopération européenne en matière de justice et d’affaires intérieures: vers un rééquilibrage du couple liberté sécurité?*, 35 *Revue Belge de Droit International* 612 (2002).

<sup>56</sup> Art. 276 TFEU. This restriction was also included in Article III-377 of the Constitutional Treaty.

<sup>57</sup> Art. 368 TFEU.

<sup>58</sup> See J. Santos Vara, *El control judicial de la ejecución de las sanciones antiterroristas del Consejo de Seguridad en la Unión Europea*, 15 *Revista Electrónica de Estudios Internacionales* (2008), available at <http://www.reei.org> (last consulted 23 August 2008).

The new Treaties likewise introduce amendments that help to solve the problems recently posed by the judicial control of Community acts implementing the sanctions adopted by the 1267 Sanctions Committee against individuals and entities associated with or linked to Al-Qaida and the Taliban. Firstly, Article 215 of the TFEU explicitly empowers the EU to adopt sanctions against non-state actors, and this provision will replace the present Article 301 TEC. Likewise, as regards preventing and combating terrorism, Article 75 TFEU will allow the Parliament and the Council to define a framework for administrative measures with regard to capital movements and payments, such as the freezing of funds belonging to natural or legal persons.<sup>59</sup> In both Articles 215 and 75 TFEU, an explicit request is made for the adoption of the necessary legal safeguards.<sup>60</sup> This issue is also addressed by the Intergovernmental Conference in the Declaration annexed to the Treaties, in which it noted that proper attention should be paid to the protection and observance of the due process rights of the individuals and entities concerned. In order to guarantee a thorough judicial review of decisions subjecting an individual or entity to restrictive measures, “such decisions must be based on clear and distinct criteria.”<sup>61</sup>

Secondly, although the competences of the Court of Justice for controlling CFSP acts will continue to be very restricted, plans are afoot to enable explicitly natural or legal persons, non-state entities and groups to lodge an action for annulment regarding the restrictive measures adopted by the Council of Ministers within the sphere of the CFSP.<sup>62</sup> The TFEU follows the precedent established by Article III-376 of the Constitution. Accordingly, the aim has been to make it clear that the legal acts implementing the sanctions against individuals or entities are subject to the legal control of EU courts. There is no doubt that the difficulties arising in the jurisprudence examined are behind this new constitutional provision.

Nonetheless, the extension of the Court of Justice’s jurisdiction to the whole AFSJ is going to be delayed by a maximum of five years after the date upon which the Treaty of Lisbon comes into force. Indeed, the Protocol on Transitional Provisions upholds the current restriction on the jurisdiction of the European Court of Justice with respect to the acts of the Union in the field of police and judicial cooperation in criminal matters, which have been adopted before the entry into force of the Treaty of Lisbon.<sup>63</sup> This exception may well prolong the

<sup>59</sup> The text of Article 75 TFEU is based on Article III-260 of the Constitutional Treaty. However, the fact that the Reform Treaty moves it from the provisions concerning free movement of capital to the general provisions on the AFSJ gives rise to suspicion. S. Peers says that the British and Danish opt-outs might also affect this clause (*EU Reform Treaty: Analysis 1: JHA provisions*, Statewatch analysis, 22 October 2007, at 6, available at <http://www.statewatch.org/news/2007/oct/eu-reform-treaty-jha-anal-1-ver-3.pdf> (last consulted 23 August 2008)).

<sup>60</sup> It is not clear what is meant by “necessary legal safeguards.” It is likely that the Court of Justice will be asked to clarify this notion in the future.

<sup>61</sup> Declaration on Articles 75 and 215 of the Treaty on the Functioning of the European Union.

<sup>62</sup> See Arts. 215 and 275 TFEU.

<sup>63</sup> Art. 10 of the Protocol on Transitional Provisions. The legal effects of the acts adopted in the field of police cooperation and judicial cooperation in criminal matters before the date of the entry into force of the Treaty of Lisbon “shall be preserved until those acts are repealed, annulled or amended” (Art. 9 of the Protocol on Transitional Provisions).

intergovernmental nature of police and judicial cooperation for some considerable time. It is a transitory measure that may postpone the full ‘communitarisation’ of the third pillar, in the sense of delaying the transformation of existing acts into EU Law and providing an incentive for the adoption of those draft acts that are pending at the moment before the Lisbon Treaty comes into force, and thereby prolonging its intergovernmental character.<sup>64</sup>

## V. An Enhanced Role for the European Parliament and National Parliaments

As is well known, the role that the Treaty of the EU currently attributes to the European Parliament in the third pillar is wholly marginal within both the internal and the external dimensions of the AFSJ. There is no doubt that the Parliament has managed to make intelligent use of the mechanisms of political and judicial control provided for in the TEU in order to try to influence the content of third-pillar acts.<sup>65</sup> However, there is a clear democratic shortfall, as those policies the institutions may adopt within the sphere of police and judicial cooperation in criminal matters have an increasingly greater bearing on individual rights and freedoms.

The entry into force of the Lisbon Treaty will lead to major progress that will contribute to alleviating the deficiencies that characterize European cooperation in this field from a democratic perspective.<sup>66</sup> As noted earlier, extending the co-decision procedure, the so-called “ordinary legislative procedure”, will strengthen the EU’s democratic accountability, and this democratic enhancement will obviously have repercussions on the external dimension of all policies included in the AFSJ. It is to be expected that the new powers vested in the European Parliament by the Lisbon Treaty will enable it to influence the implementation of new actions undertaken by the EU both in policies on border checks, asylum, and immigration and in police and judicial cooperation in criminal matters.

Besides the European Parliament’s general control competences, the involvement of national Parliaments in the control over draft legislation will also have repercussions on the external dimension of the AFSJ.<sup>67</sup> The Protocol on the Application of the Principles of Subsidiarity and Proportionality stipulates that any national Parliament or any chamber of a national Parliament will have eight weeks to check whether a draft legislative act complies with the principle of

<sup>64</sup> I. Lirola Delgado, *La cooperación judicial en material penal en el Tratado de Lisboa: ¿Un doble proceso de comunitarización y consolidación a costa de posibles frenos y fragmentaciones?*, 16 *Revista General de Derecho Europeo*, at 6 (2007), available at <http://www.iustel.com> (last consulted 3 September 2008).

<sup>65</sup> See J. Martín y Pérez de Nanclares, *La posición del Parlamento Europeo en el espacio de libertad, seguridad y justicia*, in E. Barbé Izuel & A. Herranz Surrallés (Eds.) *Política Exterior y Parlamento Europeo: hacia el equilibrio entre eficacia y democracia* 67 (2007).

<sup>66</sup> See European Parliament, Report on the Treaty of Lisbon (2007/2286(INI)), 29.1.2008 and Resolution of 20 February 2008 on the Treaty of Lisbon, Doc. A6-0013/2008.

<sup>67</sup> On the role of National Parliaments in the AFSJ, see Article 12 of the Title II of the new TEU (Provisions on Democratic Principles).

subsidiarity. Article 7 of the Protocol provides that “where reasoned opinions on a draft legislative act’s non-compliance with the principle of subsidiarity represent at least one third of all votes allocated to national Parliaments, (...) the draft must be reviewed. This threshold shall be a quarter in the case of a draft legislative act submitted on the basis of Article 76 of the Treaty on the Functioning of the European Union on the area of freedom, security and justice.” Although this reduction undoubtedly increases the competences of national Parliaments within this sphere, it may also be interpreted as the acknowledgement of greater leeway to block initiatives according to national interest.<sup>68</sup>

## **VI. The Reference to the Union’s Values in the TEU**

Article 2 TEU expresses the values upon which the Union is founded. The Treaty of Lisbon includes respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights.<sup>69</sup> These values are not new, in fact they are based on the founding ideas of European integration,<sup>70</sup> but the Lisbon Treaty, following the path laid down by the Constitutional Treaty, proceeds to develop them in a clearer and more precise manner throughout the Treaty. Within the context of this article, it is very important to refer to the values inherent in the provisions devoted to the external action.<sup>71</sup> Article 21 TEU states that the Union’s external action will be guided “by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world,” including among others, the indivisibility of human rights and fundamental freedoms, and respect for the principles of the United Nations Charter and International law. Although this specific reference to values in external action is made in the Title devoted to the “General provisions on the Union’s external action,” the EU must also respect these principles in the implementation of the external aspects of the AFSJ.<sup>72</sup>

Elsewhere, the Charter of Fundamental Rights also develops and defines the Union’s values, and the new Article 6 TEU includes a direct reference to the Charter that will enable its binding nature to be preserved. The rights, freedoms

<sup>68</sup> See Lirola Delgado, *supra* note 64, at 14. The Treaty of Lisbon provides an even stronger role for National Parliaments than that foreseen in the Constitutional Treaty, as regards not only control over the principles of subsidiarity and proportionality, but also the political mechanisms of control. For details see S. Carrera & G. Florian, *The Reform Treaty & Justice and Home Affairs. Implications for the Common Area of Freedom, Security & Justice*, 141 CEPS Policy Brief, at 2 (2007).

<sup>69</sup> The Reform Treaty reproduces literally Article I-2 of the Constitutional Treaty.

<sup>70</sup> A. Mangas Martín, *Nuevos y viejos valores de la identidad europea al hilo del Tratado Constitucional*, 12 *Revista General de Derecho Europeo*, at 5 (2007), available at <http://www.iustel.com> (last consulted 3 September 2008), and *Reflexiones en torno al “proceso de constitucionalización” de la integración europea*, in F. M. Mariño Menéndez (Ed.), *El Derecho Internacional en los albores del siglo XXI, Homenaje al profesor Juan Manuel Castro-Rial Garrone* 423 (2002).

<sup>71</sup> See Arts. 3 and 21 TEU.

<sup>72</sup> See Art. 21(3) TEU.

and principles set out in the Charter will have the same legal value as the Treaties,<sup>73</sup> and the provisions of the Charter are legally binding for the European institutions, bodies, offices and agencies of the Union, as well as for Member States when they implement Union law.<sup>74</sup> Consequently, the development of the policies included in the AFSJ is to uphold fundamental rights, in both internal and external actions. The incorporation of the Charter into the TEU means that the external action in police and cooperation in criminal matters will from now on shift from merely being developed within a intergovernmental framework to being fully subject to fundamental rights. If we consider that most of the measures adopted in the AFSJ have ramifications for the nationals of other States, the emphasis on the Union's values and the incorporation of the Charter into the Treaty may have a positive bearing on the external dimension of these policies.<sup>75</sup>

#### **D. The Impact of Exceptions and Derogations on the External Action of the AFSJ**

Although the modification of the institutional and legal structures brought about by the Lisbon Treaty will, once it comes into force, create a legal framework that will strengthen the efficiency, democracy and protection of human rights in the external action of the AFSJ, note should also be taken of the limitations introduced by the new Treaty. As has already been mentioned throughout this paper, the Lisbon Treaty provides for a series of exceptions and derogations to the AFSJ that run the risk of fragmenting the AFSJ.<sup>76</sup>

Firstly, the United Kingdom, Ireland and Denmark have expressed their intention to opt out of the AFSJ. According to the Protocol on the Position of the United Kingdom and Ireland in respect of the AFSJ, these countries will not take part in the adoption of measures pursuant to Title V of Part Three of the TFEU. Article 3 of the Protocol accepts that these countries may notify the Council, within three months after a proposal or initiative has been presented to the Council that they wish to take part in the adoption and application of the proposed measures (opting-in). This exclusion is not a new phenomenon. The United Kingdom and

<sup>73</sup> See Charter of the Fundamental Rights of the European Union, OJ 2007 C 303/01, and Explanations Relating to the Charter of Fundamental Rights, OJ 2007 C 303/17.

<sup>74</sup> Art. 51 of the Charter. Unfortunately, the exception of Poland and the United Kingdom to the application of the Charter may have a negative impact on the development of the AFSJ. According to Article 1 of this Protocol

the Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.

<sup>75</sup> For a similar opinion, see Mitsilegas, *supra* note 15, at 497.

<sup>76</sup> See S. Carrera & F. Geyer, *El Tratado de Lisboa y un Espacio de Libertad, Seguridad y Justicia: excepcionalismo y fragmentación en la Unión Europea*, 29 *Revista de Derecho Comunitario Europeo* 133 (2008).

Ireland do not take part in the measures adopted within the framework of Title IV of the TCE on visas, asylum, migration and other policies related to the free movement of persons. However, the Treaty of Lisbon complicates this situation by extending the exclusion of these two countries to police and judicial cooperation in criminal matters.<sup>77</sup> At the same time, according to the Protocol on the Position of Denmark, this country will remain completely removed from the measures regarding the AFSJ, with no possibility of opting in.<sup>78</sup> The situation of the United Kingdom, Ireland and Denmark introduces great complexity and diversity into the development of these policies.<sup>79</sup> This is the price that has had to be paid in order to achieve the ‘communitarisation’ of the third pillar. The stance adopted by these three countries has a direct bearing on the external dimension of the AFSJ, as the international agreements concluded by the EU on these issues are not binding upon the three countries. When either the United Kingdom or Ireland notifies the Council of their willingness to take part in any proposed internal measure, they are also accepting the external competence to conclude international agreements on the same issue. Otherwise, the effects of the Protocol will extend beyond the framework of the AFSJ, also including opting out of Article 216 TFEU, which reflects Court case law on external competences. While third pillar agreements are currently binding upon all Member States, including the United Kingdom, Ireland and Denmark, the position of these countries may give rise to a wide range of different situations in the future.

Secondly, the Protocol on the application of the Chapter of Fundamental Rights to Poland and the United Kingdom is also likely to have negative consequences for the future development of the AFSJ. According to Article 1 of the Protocol, “the Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.” In paragraph 2 of the same provision, it is stated that nothing in the Charter creates justifiable rights applicable to Poland or the United Kingdom “except in so far as Poland or the United Kingdom has provided for such rights in its national law.” This exception will inevitably have the effect of relativizing the progress implied in the incorporation of the Charter of Fundamental Rights into the TEU and the extension of the European Court’s jurisdiction.

<sup>77</sup> According to Article 9 of the Protocol, the opting-out of Ireland would not apply to the freezing of financial assets or funds of entities or individuals suspected of having links with terrorism (*see* Art. 75 TFEU).

<sup>78</sup> The Protocol on the Position of Denmark applies the current opting-out of Denmark as regards Title IV of the TCE on “Visas, asylum, migration and other policies related to the free movement of persons” to the whole AFSJ. The application to Denmark of any measure adopted pursuant to the new Title V of the TFEU will depend on the conclusion of an international agreement between this country and the EU.

<sup>79</sup> At any time Ireland may notify the Council that it no longer wishes to be covered by the Protocol on the Position of the United Kingdom and Ireland in respect of the AFSJ (Art. 9 of the Protocol) and Denmark may decide to adopt an opting-out position similar to that of the United Kingdom and Ireland (Art. 8 of the Protocol of Denmark).

Thirdly, the establishment of minimum rules in criminal law will be subject to the so-called mechanisms of ‘emergency brake’ and ‘enhanced cooperation’. If one member of the Council considers that a draft directive may affect fundamental aspects of its criminal justice system, it may request that the draft directive be referred to the European Council and the ordinary legislative procedure would be suspended.<sup>80</sup> In the event of disagreement, the same provision facilitates the establishment of enhanced cooperation. In addition to these exceptions, the adoption of measures concerning operational cooperation between the police, customs and other specialized law enforcement services “in relation to the prevention, detection, and investigation of criminal offences” will be subject to the special legislative procedure (unanimity in the Council and mere consultation of the European Parliament).<sup>81</sup> Similar exceptions to the ordinary legislative procedure are provided for the adoption of measures concerning family law with cross-border implications, provisions concerning passports, identity cards, residence permits or any other such document and the establishment of the European Public Prosecutor’s Office.<sup>82</sup>

## E. Conclusions

The EU’s external projection, according to diverse rules, depending on whether it is an issue involving visas, asylum and immigration or police and judicial cooperation in criminal matters, has proven inadequate for achieving a true AFSJ. The Lisbon Treaty upholds the main contributions of the Constitutional Treaty regarding the AFSJ, including the formal abolition of the EU pillar structure and the ‘*communitarisation*’ of the third pillar. Even though the Lisbon Treaty does not include a systematic regulation of external action in relation to the AFSJ, the new Title V of the TFEU introduces substantial institutional and procedural changes to the current regulation of these issues. As mentioned above, the explicit recognition of the EU’s international personality is one of the changes with the potential to exert a more positive effect on the external projection of the AFSJ. The procedure for concluding international agreements and the international representation of the EU will not depend on whether it is an issue involving police and judicial cooperation on criminal matters or visas, asylum and immigration. This will put an end to the specificities that characterizes the procedure of Article 24 TEU. Another major change introduced by the Lisbon Treaty is the extension of the jurisdiction of the Court of Justice, granting it the jurisdiction to review the validity and interpret the acts adopted within the sphere of the AFSJ. As a result of this, the new Treaties introduce amendments that help solve the problems posed by the judicial control over Community acts in the third pillar. Furthermore, the entry into force of the Reform Treaty will contribute to alleviate the deficiencies which

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<sup>80</sup> Art. 82(3) TFEU.

<sup>81</sup> Art. 87(1) and (2) TFEU.

<sup>82</sup> Arts. 81 (3), 77(3) and 86(1) TFEU.

characterize European cooperation in this field from a democratic perspective, and the external action in police cooperation and criminal matters will be fully subject to fundamental rights.

Nevertheless, the sum of exceptions and derogations to the new regime of the AFSJ may hinder the chances of progress provided by the EU's new structure. The existence of a wide range of situations amongst the commitments of Member States may have a negative bearing on the achievement of a true AFSJ. As Carrera and Geyer have stated, "allowing the possibility of too many 'speeds' going in too many different directions might have helped to end the pillarisation but may create an Area of Freedom, Security and Justice prone to 'differentiation' and 'exceptionalism'."<sup>83</sup> Accordingly, the new Title V of the TFEU continues to reflect the tension between Community and intergovernmental approaches which has been a feature of the third pillar since it was introduced and throughout the successive reforms of the Treaties.

This situation may turn out to have a negative bearing on the external projection of the AFSJ. Without diminishing the contributions made by the Lisbon Treaty to the creation of an external projection of the AFSJ that is both efficient and upholds the most basic democratic requirements, the Treaty also presents certain grey areas. The existence of Member States that fully retain their competences in those matters included in the AFSJ, or which are involved solely in terms of the adoption and application of certain acts, considerably undermines the EU's ability to act as a significant international player in these matters and to speak out with a single voice on highly sensitive issues of international security. The limitations on the competence of the Court of Justice, the secondary role played by the Parliament in the adoption of extremely important decisions, and the British, Irish and Danish opting-out clauses, together with the exceptions of the United Kingdom and Poland to the Charter of Fundamental Rights, considerably weaken the possibilities provided by the Lisbon Treaty to develop the external dimension of the AFSJ. It should be added, moreover, that the involvement of a broad array of actors in the external action of the EU (President of the European Council, High Representative of the Union for Foreign Affairs and Security Policy, Presidency of the Council of Ministers and Commission) may also hinder the development of a coherent external dimension of the AFSJ.

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<sup>83</sup> Carrera & Florian, *supra* note 68, at 8.



# EU Actorness at the UN Security Council: A Principal-Agent Comparison of the Legal Situation Before and After Lisbon

Edith Drieskens\*

## Abstract

This article focuses on the external implications of the Lisbon Treaty and explores the opportunities for an increased EU actorness at the UN Security Council. The Lisbon Treaty is expected to increase the international profile of the EU, by improving the coherence and visibility of its external representation. However, a Principal-Agent theory inspired analysis of the modifications brought to Article 19 of the EU Treaty demonstrates that this conclusion does not apply to the UNSC: the opportunities for an increased EU actorness remain here dependent upon the representation behaviour of the EU Member States and their willingness to act as agents of the EU.

## A. Introduction

This article focuses on the external implications of the Lisbon Treaty (TOL). It seeks to explore the opportunities for an increased EU *actorness* at the UN Security Council (UNSC). The TOL is said to increase the international profile of the EU, by improving the coherence and visibility of its external representation. However, a Principal-Agent (PA) theory inspired analysis of the modifications brought to Article 19 of the EU Treaty (TEU) demonstrates that this conclusion does not apply to the UNSC. The opportunities for an increased EU actorness remain here dependent upon the representation behaviour of the EU Member States (EUMS) and their willingness to act as agents of the EU. In what follows, we develop our explanation by drawing on the language provided by Nicolaidis and the notions of *flexibility*, *autonomy* and *authority* in particular.<sup>1</sup> We demonstrate

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that the entry into force of the TOL will homogenize the EU mandate of the EUMS serving here on permanent and non-permanent basis. However, it will not end the structural difference between them, because the decisive factor here is not their mandate or authority, but the different degree of *autonomy* they enjoy when acting as EU agents. As this variable degree follows directly from the UNSC's membership and working methods, New York rather than Brussels is the starting point for fundamental change. We start our analysis with operationalizing the notion of actorness in terms of PA theory.

## B. Theorizing EU Actorness

It is a widespread assumption, both in academic literature and policy circles, that a uniform EU representation will increase the (bargaining) power of the EU(MS) in international settings. Also advocates of a single seat for the EU in the UNSC argue that such form of representation will increase the EU's international *presence*, or its 'ability to exert influence, to shape the perceptions and expectations of others'.<sup>2</sup> In recent years, scholars have often enclosed this notion in a broader framework, applying the concept of *actorness* to describe and evaluate the EU as an international actor. In accordance with Sjöstedt's definition of 'actor capacity', most of them have operationalized this concept in terms of 'the capacity to behave actively and deliberately in relation to others in the international system'.<sup>3</sup> Conceptualizing actorness as *the capacity to act* implies that EU actorness varies not only across time, but also across policy sectors.<sup>4</sup> However, while recognizing this variation, most authors relying on this concept seem to argue that direct and single representation – meaning: representation through one of the institutions of the EU – is a necessary precondition for EU actorness. Going against the grain, in this article, we argue that such form of representation is not a *conditio sine qua non*: in international fora in which the EU is not directly represented, this actorness may also be the indirect result of the representation behaviour of the EUMS. In what follows, we build our argument upon the work of Jupille and Caporaso, which can be seen as one of the first attempts to transfer the often-used concept of actorness into a workable research instrument.<sup>5</sup>

<sup>1</sup> K. Nicolaïdis, *Minimizing Agency Costs in Two-Level Games. Lessons From the Trade Authority Controversies in the United States and the European Union*, in R. Mnookin & L. Susskind (Eds.), *Negotiating on Behalf of Others*, 87 (1999).

<sup>2</sup> D. Allen & M. Smith, *Western Europe's Presence in the Contemporary International Arena*, 16 *Review of International Studies* 19 (1990).

<sup>3</sup> G. Sjöstedt, *The External Role of the European Community* 16 (1977).

<sup>4</sup> See, *inter alia*, J. Reiter, *The European Union as Actor in International Relations: The Role of the External Environment for EU Institutional Design*, in O. Elgström & C. Jönsson (Eds.), *European Union Negotiations. Processes, Networks and Institutions* 148 (2005); C. Bretherton & J. Vogler, *The European Union as a Global Actor* 23-33 (2003); K. E. Jørgensen, *A Multilateralist Role for the EU?*, in O. Elgström & M. Smith (Eds.), *European Union's Roles in International Politics. Concepts and Analysis* 30 (2006).

<sup>5</sup> J. Jupille & J. A. Caporaso, *States, Agency, and Rules: The European Union in Global Environmental Politics*, in C. Rhodes (Ed.), *The European Union in the World Community* 213 (1998).

Building upon the notion of presence and studying the participation of the EC in the 1992 Rio Earth Summit, Jupille and Caporaso unpack the EU as an international actor by introducing four actor capacity criteria. In their view, the EU's capacity to act is a function of its recognition (meaning acceptance of and interaction with the EU by others), authority (understood as the legal competence to act externally), autonomy (defined as institutional distinctiveness and independence from others, meaning the EUMS) and cohesion (conceived as the degree to which the EU is able to formulate internally consistent policy preferences). In our opinion, these criteria are helpful for conceptualizing the EU as an international actor, including within the framework of the UNSC.<sup>6</sup> However, as they are strongly interrelated – Jupille and Caporaso write that they form a 'coherent ensemble' depending on one another for full meaning – we consider them to be less suited for guiding empirical research and theory building.<sup>7</sup>

### C. On Principals and Agents

In terms of Hill, students of EU foreign policy have argued that there is a gap between what the EU has been talked up to do and what it is able to deliver, i.e. between the expectations of EU foreign policy and the capabilities of the EU to meet these expectations.<sup>8</sup> Some of them have argued that there is a similar problem with the outcomes of EU foreign policy and their explanations.<sup>9</sup> Like the operational capability-expectations gap, the theoretical gap has begun to narrow in the 1990s, with scholars moving from establishing the existence of the EU as an important international presence to testing its effectiveness as an important international actor. According to Ginsberg, scholars have developed more sophisticated explanatory concepts and have transcended the debate over the appropriateness of realist and liberal approaches, bridging different levels of analysis and achieving a more rounded understanding of foreign policy cooperation within the context of the EU. However, to close the gap, an 'inductive approach' is required, inducing middle range theories from explanatory concepts.<sup>10</sup> As a first attempt hereto, in what follows, we build on the notion of actorness and the actor capacity criteria developed by Jupille and Caporaso and link them to the overall theoretical model that PA theory offers, conceptualizing the EUMS serving on the UNSC as *EU agents*.<sup>11</sup>

<sup>6</sup> S. Biscop & E. Drieskens, *Effective Multilateralism and Collective Security: Empowering the UN*, in K. Verlin Laatikainen & K. E. Smith (Eds.), *Intersecting Multilateralisms: The European Union and the United Nations* 115 (2006).

<sup>7</sup> J. Jupille & J. A. Caporaso, *supra* note 5, at 220.

<sup>8</sup> C. Hill, *The Capability-Expectations Gap, or Conceptualizing Europe's International Role*, 31 *Journal of Common Market Studies* 305, at 315 (1993); A. Toje, *The Consensus-Expectations Gap: Explaining Europe's Ineffective Foreign Policy*, 39 *Security Dialogue* 121, at 121 (1998).

<sup>9</sup> R. Ginsberg, *Conceptualizing the European Union as an International Actor: Narrowing the Theoretical Capability-Expectations Gap*, 37 *Journal of Common Market Studies* 429, at 433 (1999).

<sup>10</sup> R. Ginsberg, *supra* note 9, at 450.

<sup>11</sup> Jupille & Caporaso hint vaguely to the use of PA theory, but limit their analysis to

To put it simply, in a PA relationship one actor (the agent) acts on behalf of another (the principal), following an act of delegation. The relationship between them is governed by a contract, even if this is implicit or informal. It is a misunderstanding that the PA theory would assume that agents represent their principals in a loyal way. Even quite the contrary: it recognizes that the agents can be opportunistic and pursue their own interests, as a result of which there is a potential gap between what the principals want and the agents do. For this reason, this relationship between the holders and servants of constituent power is usually seen as a problematic one.<sup>12</sup> Political scientists, and rational choice institutionalist in particular, have applied, extended and adapted the generic PA model, which originated in the new economics literature in the early 1970s to describe business relations, to explore the delegation of power in political settings. They did so by relaxing its core assumptions, including e.g. the assumption of a solitary principal and agent by introducing multiple ones.<sup>13</sup> Whereas the contours of the agency paradigm in political science are thus similar to those in the new economics version, namely that principals delegate to agents the authority to carry out their policy preferences, the details are rather different.<sup>14</sup>

Within the framework of political science, PA insights were first applied to explain the delegation of powers from US Congress to executive agencies and committees and the delegation of monetary policy to the Central Bank.<sup>15</sup> More recently, PA insights have been used to explain the delegation of powers to (financial) international organizations, as well as to conceptualize and explain the delegation of negotiating authority from the EUMS to the supranational institutions, with most scholars focusing on the dynamics of the EU's external trade policy and the Commission's role herein as EU negotiator.<sup>16</sup> In this article,

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conceptualization. When discussing the criterion of 'authority', they refer to PA pioneer Terry M. Moe, stating that

(...) to speak of the EU's authority is to think of authority delegated to EU institutions by nation states. Legal authority or competence to act in such situations is given by a contract under which principals empower agents to act in their interests. Such contract at one limit the actions of principals and constrain the scope of agents' competence to that which principals will accept.

See Jupille & Caporaso, *supra* note 5, at 216.

<sup>12</sup> A. Stone Sweet & J. A. Caporaso, *From Free Trade to Supranational Polity: The European Court and Integration*, in W. Sandholtz & A. Stone Sweet (Eds.), *European Integration and Supranational Governance* 92, at 92-94 (1998).

<sup>13</sup> S. Shapiro, *Agency Theory*, 31 *Annual Review of Sociology* 263, at 266-267 (2005); J. Tallberg, *European Governance and Supranational Institutions. Making States Comply* 24-25 (2003); R. W. Waterman & K. J. Meier, *Principal-Agent Models: An Expansion?*, 8 *Journal of Public Administration Research and Theory* 173, at 178-183 (1998).

<sup>14</sup> Shapiro, *supra* note 13, at 271.

<sup>15</sup> M. A. Pollack, *International Relations Theory and European Integration*, 39 *Journal of Common Market Studies* 221, at 227-231 (2001); M. A. Pollack, *The New Institutionalisms and European Integration*, in A. Wiener & T. Diez (Eds.), *European Integration Theory* 137, at 138-139 (2004).

<sup>16</sup> See, *inter alia*, A. Ballmann, D. Epstein & S. O'Halloran, *Delegation, Comitology, and the Separation of Powers in the European Union*, 56 *International Organization* 551 (2002); H. Kassim

we take PA theory *beyond* the first pillar so to say. As noted, we start exploring the possibility of building up an analytical model, inspired by PA theory, to explain the representation behaviour of the EUMS at the UNSC and the potential impact of the TOL in particular. While recognizing that the PA model originated and flourished within the rational choice tradition of neo-institutionalism, we approach it in a more *abstract* and *heuristic* way, using it as a *theoretical template* to structure the relations between the EUMS at the level of the EU and those serving on the UNSC.

More specifically, we conceptualize the relationship between the EUMS at the level of the Council of Ministers and the EUMS who are members of the UNSC in terms of principals and agents, with their relationship being governed by the representation rules included in article 19 TEU. Unlike most scholars, we explore the agent side of the PA relationship. Browsing through the literature reveals that a general feeling of uneasiness seems to shadow any attempt to give CFSP a theoretical underpinning.<sup>17</sup> Scepticism about the extent to which insights from the study of the first pillar can be applied to the EU at large also seems to be widespread.<sup>18</sup> However, PA theory, and Nicolaïdis' operationalization in particular, proves to be a powerful tool for operationalizing the notion of EU actorness, in particular for presenting theoretical evidence to the structural difference that most authors observe between the EUMS serving on a permanent and non-permanent basis at the UNSC and for nuancing the changes that the TOL will make in this regard.

Point of reference are the provisions on the UNSC that were included in the Maastricht Treaty, which established that the EUMS that are also members of the UNSC should concert and keep the others fully informed (*ex* article J.5.(4) TEU). EUMS serving on a permanent basis should ensure the defence of the positions and interests of the EU, though without prejudice to their responsibilities flowing from the UN Charter (UNCH). Most authors see these references as a clear confirmation of the UNSC lying in the *domaine réservé* of France and the UK. However, the negotiating history reveals that they were only included at the eleventh hour. On 12 April 1991, the Luxembourg Presidency submitted a non-paper, including also a number of provisions on cooperation in international

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& A. Menon, *The Principal-Agent Approach and the Study of the European Union: Promise Unfulfilled?*, 10 *Journal of European Public Policy* 121 (2003); S. Meunier, *What Single Voice? European Institutions and EU-US Trade Negotiations*, 54 *International Organization* 103 (2000); Nicolaïdis, *supra* note 1; M. A. Pollack, *The Engines of European Integration. Delegation, Agency and Agenda-Setting in the EU* (2003).

<sup>17</sup> See, *inter alia*, B. Tonra & T. Christiansen, *The Study of EU Foreign Policy: Between International Relations and European studies*, in B. Tonra & T. Christiansen (Eds.), *Rethinking European Foreign Policy* 1 (2004); F. Andreatta, *Theory and the European Union's International Relations*, in C. Hill & M. Smith (Eds.), *International Relations and the European Union* 18 (2005); K. E. Jorgensen, *Theorising the European Union's Foreign Policy*, in B. Tonra & T. Christiansen (Eds.), *Rethinking European Foreign Policy* 10 (2004); K. E. Jorgensen, *European Foreign Policy: Conceptualising the Domain*, in W. Carlsnaes, H. Sjursen & B. White (Eds.), *Contemporary European Foreign Policy* 32 (2004).

<sup>18</sup> S. Stetter, *EU Foreign and Interior Policies. Cross-pillar Politics and the Social Construction of Sovereignty* 25 (2007).

Table 1: Towards Article J.5(4) TEU

<i>SEA (1986/1987)</i>	<i>Luxembourg Presidency (Spring 1991)</i>
<p>Title III Article 30(7):</p> <p>(a) In international institutions and at international conferences which they attend, the High Contracting Parties shall endeavour to adopt common positions on the subjects covered by this Title.</p> <p>(b) In international institutions and at international conferences in which not all the High Contracting Parties participate, those who do participate shall take full account of the positions agreed in European Political Co-operation.</p>	<p>Article I:</p> <p>1. Member States shall coordinate their action and, when necessary, define common positions in international organisations and at international conferences.</p> <p>2. In international organisations and at international conferences where not all the Member States participate, those who do take part shall comply with the common positions agreed on and ...</p>
	<p>... shall keep the other Member States informed of any matter of general interest.</p>

organizations and at international conferences.<sup>19</sup> As Table 1 shows (see above), the drafters decided to have recourse to the Single European Act (SEA) and updated the existing provisions by inserting an information requirement reflecting the developing policy practice. The *Draft Treaty on the Union* reproduced these amendments on 18 June 1991.<sup>20</sup> As known, the Dutch Presidency decided to ignore this compromise and put forward its own draft. When the vast majority of the EUMS rejected this text on 30 September 1991, the Luxembourg draft became again the basis for the negotiations.

As for the future Article 19 TEU, the *Dutch Presidency Draft Union Treaty* of 8 November 1991 removed the amendment on information sharing and added a footnote about the IGC adopting a declaration in the *Final Act* saying that “(t)he term ‘international organizations’ would cover all the bodies of such organizations.”<sup>21</sup> In our view, this footnote might also explain the inclusion of an

<sup>19</sup> Luxembourg Presidency, Non-paper, Draft Treaty articles with a view to achieving political union, 12 April 1991, Articles G, H, I.

<sup>20</sup> Luxembourg Presidency, Draft Treaty on the Union, 18 June 1991, Articles G, H, I.

<sup>21</sup> Dutch Presidency Draft Union Treaty, Working Document, 8 November 1991; Brückner writes

<i>Dutch Presidency (Autumn 1991)</i>	<i>Maastricht (1991/1992)</i>
<p>Article B(3): Member States shall coordinate their action in international organisations* and at international conferences. They shall uphold the common positions in such for a.</p> <p>In international organisations* and at international conferences where not all the Member States participate, those who do take part shall uphold the common positions.</p>	<p>Article J.2(3) TEU: Member States shall coordinate their action in international organisations and at international conferences. They shall uphold the common positions in such forums.</p> <p>In international organisations and at international conferences where not all the Member States participate, those which do take part shall uphold the common positions.</p>
<p>[* Declaration in the Final Act: “The term ‘in international organisations’ covers all the bodies of such organisations.”]</p>	<p>Article J.5(4) TEU: Without prejudice to paragraph 1 and Article 14(3), Member States represented in international organisations or international conferences where not all the Member States participate shall keep the latter informed of any matter of common interest.</p> <p>Member States which are also members of the United Nations Security Council will concert and keep the other Member States fully informed. Member States which are permanent members of the Security Council will, in the execution of their functions, ensure the defence of the positions and the interests of the Union, without prejudice to their responsibilities under the provisions of the United Nation Charter.</p>

explicit reference to the UNSC. As it would have allowed the EU to enter what they considered to be their private field, we assume that France and the UK decided to ink the bounds of EU foreign policy cooperation, consolidating policy practice by way of Article J.5(4) TEU and giving their global mandate a regional interpretation. This was done at the final preparatory meeting of the foreign ministers in Brussels on 2 and 3 December 1991, following a tour of the capitals by a small negotiating team headed by then Dutch Prime Minister Lubbers.<sup>22</sup> In other words, it seems to be the case that a misjudgement of the Dutch Presidency team has resulted in the inclusion of a direct reference to the UNSC in the European

in this regard that France and the UK have stated categorically during the negotiations leading to the SEA that the provision on the coordination in international organizations would not apply to the UNSC. See P. Brückner, *The European Community and the United Nations*, 1 *European Journal of International Law* 174 (1990).

<sup>22</sup> The drafters may have found inspiration in article 103 UNCH, which reads as follows:

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

Table 2: Reforming Article 19 TEU

<i>SEA (1986/1987)</i>	<i>Maastricht (1991/1992)</i>
<p>Title III Article 30(7):</p> <p>(a) In international institutions and at international conferences which they attend, the High Contracting Parties shall endeavour to adopt common positions on the subjects covered by this Title.</p> <p>(b) In international institutions and at international conferences in which not all the High Contracting Parties participate, those who do participate shall take full account of the positions agreed in European Political Co-operation.</p>	<p>Article J.2(3) TEU:</p> <p>Member States shall coordinate their action in international organisations and at international conferences. They shall uphold the common positions in such forums.</p> <p>In international organisations and at international conferences where not all the Member States participate, those which do take part shall uphold the common positions.</p>
	<p>Article j.5(4) TEU:</p> <p>Without prejudice to paragraph 1 and Article 14(3), Member States represented in international organisations or international conferences where not all the Member States participate shall keep the latter informed of any matter of common interest.</p> <p>Member States which are also members of the United Nations Security Council will concert and keep the other Member States fully informed. Member States which are permanent members of the Security Council will, in the execution of their functions, ensure the defence of the positions and the interests of the Union, without prejudice to their responsibilities under the provisions of the United Nations Charter.</p>

Treaties. The provisions in question were reproduced by the Amsterdam Treaty and replaced by Article 19 TEU. While the Nice Treaty did not change their content or the wording, the TOL will do so, as we explain in what follows.

#### **D. Article 19 TEU After Lisbon**

Table 2 (see below) shows that while the text of the first paragraph of the new Article 19 TEU corresponds largely to its predecessor, the same cannot be said for the second one. A detailed reading of these provisions shows that the TOL introduces two novelties that are directly relevant for the way the EU is represented at the UNSC. First, in the event that the EU has defined a position on an agenda

<p><i>Lisbon (2007/...)</i></p> <p>Article 19(1) TEU: Member States shall coordinate their action in international organisations and at international conferences. They shall uphold the Union's positions in such forums. The High Representative of the Union for Foreign Affairs and Security Policy shall organize this coordination.</p> <p>In international organisations and at international conferences where not all the Member States participate, those which do take part shall uphold the Union's positions.</p>
<p>Article 19(2) TEU: In accordance with <i>Article 11(3)</i>, the Member States represented in international organisations or international conferences where not all the Member States participate shall keep the other Member States and the High Representative informed of any matter of common interest.</p> <p>Member States which are also members of the United Nations Security Council will concert and keep the other Member States <i>and the High Representative</i> fully informed. Member States which are members of the Security Council will, in the execution of their functions, <i>defend</i> the positions and the interests of the Union, without prejudice to their responsibilities under the provisions of the United Nations Charter.</p> <p>When the Union has defined a position on a subject which is on the United Nations Security Council agenda, those Member States which sit on the Security Council shall request that the High Representative be invited to present the Union's position.</p>

item of the UNSC, the EUMS serving have to ask that the new foreign policy representative is invited to present it. Secondly, when the TOL enters into force, also the EUMS with a non-permanent seat will have to defend the EU positions proceedings in New York should not be overestimated. Like we do not expect the EU's actorness in the UNSC to improve substantially as a result of the reform proposals that are at the table of the UN General Assembly (UNGA), we neither expect the TOL to bring the necessary changes, especially not the modified Article 19 TEU.<sup>23</sup>

<sup>23</sup> We refer here to the numbering of the text that was signed on 13 December 2007 and published in the *Official Journal of the European Union* on 17 December 2007. The new Article 19 TEU will probably be renumbered Article 34 TEU. See E. Drieskens, D. Marchesi & B. Kerremans, *In Search of a European Dimension in the UN Security Council*, XLII *The International Spectator* 421 (2007).

It is nevertheless a general expectation that the new *High Representative of the Union for Foreign Affairs* will improve the EU's external impact, and the consistency and visibility of its external representation in particular. He/she will bring together the current functions of the CFSP High Representative and the External Relations Commissioner. Being a Vice-President of the Commission, in addition, he/she will chair the meetings of the EU's External Relations Council and take over the external representation role from the EU Presidency, including in international organizations. In this context, he/she will also be responsible for the coordination between the EUMS. This task was not defined before, but *de facto* performed by the country holding the Presidency. However, the EUMS will continue to run the show, not only when such a position does not exist, but also when it does because a common position has to be adopted by unanimity and therefore approved by all. Moreover, for the actual invitation of the new representative, UN rules apply. So far, Javier Solana has addressed the UNSC four times; the Commission only once. And as they are invited under different Rules of Procedure (Rules 37 and 39 of the UNSC's Provisional Rules of Procedure respectively), the double-hatting of this person raises questions from a UN perspective as well.

The TOL will not change the difference in league between the EUMS serving on a permanent and elected basis either. Caution is thus also needed with the second novelty, and more specifically with the extension of the obligations included in the second paragraph of Article 19(2) TEU to the countries with a non-permanent seat.<sup>24</sup> As noted, once the TOL enters into force, not only the EUMS serving on a permanent basis, but also those who are serving for a two-year term will have to defend the EU positions and interests in the execution of their functions, albeit without prejudice to their responsibilities under the provisions of the UNCH.<sup>25</sup> A handful of scholars have discussed this amendment so far, though only in passing. Wessel writes that this 'minor difference' opens the possibility of a larger group of countries deviating from earlier EU positions once related issues are on the UNSC agenda during their mandate as non-permanent members.<sup>26</sup> Whereas Fassbender writes that the special status of France and the United Kingdom was not meant to be changed by this amendment, Verbeke argues that it will end an 'anomaly', considering it 'somewhat surprising' that the obligations imposed upon the permanent members went further than those upon the elected ones, as no distinction was made between these categories in the UN

<sup>24</sup> This amendment was included in the *Treaty establishing a Constitution for Europe* (article III-305(2) TCE; October 2004), but not confirmed by the *Draft Reform Treaty* (July 2007), in which the second sub-paragraph of the new article 19 referred to the permanent members only (OD22: para. 37). Since the draft Reform Treaty had not properly reflected the wording of the TCE, this discrepancy was raised in an expert group of legal revisers in the summer of 2007. As the TCE was to be taken as a blueprint for the ToL unless the IGC had decided expressly otherwise, the adjective 'permanent' was deleted again upon the request of the Hungarian delegation.

<sup>25</sup> The new formulation is thus stronger, as the serving EUMS will have to defend the positions and interests of the EU, rather than merely ensuring their defence.

<sup>26</sup> R. Wessel, *Differentiation in EU Foreign, Security and Defence Policy: Between Coherence and Flexibility*, in M. Trybus & N.D. White (Eds.), *European Security Law 225*, at 243 (2007).

Charter (UNCH).<sup>27</sup> By relying on PA theory and Nicolaïdis' work in particular, in what follows, we demonstrate that the dropping of the word 'permanent' might end the structural difference between the EUMS serving on an elected and permanent basis on paper, but not in practice. Moreover, the explanatory notes of the Convention demonstrate that the drafters never intended so. Indeed, while also this amendment was to increase the EU's profile, it would not entail any consequences for the 'status' or 'position' of the EUMS serving.<sup>28</sup>

## E. The Convention Proceedings

While thinking about the practical implications of the new provisions on CFSP and external action has only started in Brussels and New York, it was clear right from the start that some EUMS want to limit their impact. The fact that, upon the urging of the UK, the Intergovernmental Conference (IGC) was mandated to adopt a declaration stating that the new provisions on CFSP will not 'affect' the participation of the EUMS in international organizations, including their membership of the UNSC is here probably the most visible illustration.<sup>29</sup> It also confirms Thym's belief that, while the UK has been especially active in searching for a new external representation model within the Convention framework – mainly because it was convinced that the inefficiency of the Council's working methods and especially the problems linked to the rotating Presidency – could undermine the influence of intergovernmental cooperation *vis-à-vis* the supranational institutions, it was probably not 'its original intention'

<sup>27</sup> B. Fassbender, *The Better Peoples of the United Nations? Europe's Practice and the United Nations*, 15 *European Journal of International Law* 857, at 881 (2004); J. Verbeke, *EU-Coordination on UN Security Council Matters*, in J. Wouters, H. Hoffmeister & T. Ruys (Eds.), *The United Nations and the European Union: An Ever Stronger Partnership* 49, at 50-51 (2006).

<sup>28</sup> CONV 685/03, Draft Articles on external action in the Constitutional Treaty, 23 April 2003.

<sup>29</sup> In addition to the specific rules and procedures referred to in paragraph 1 of Article 11 of the Treaty on European Union, the Conference underlines that the provisions covering the Common Foreign and Security Policy including in relation to the High Representative of the Union for Foreign Affairs and Security Policy and the External Action Service 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 organizations, including a Member State's membership of the Security Council of the UN. The Conference also notes that the provisions covering the Common Foreign and Security Policy do not give new powers to the Commission to initiate decisions nor do they increase the role of the European Parliament. The Conference also recalls that the provisions governing the Common Security and Defence Policy do not prejudice the specific character of the security and defence policy of the Member States.

See Annex I to the Presidency Conclusions, European Council Brussels, 21-22 June 2007, note 22.

that the UNSC would be handed over to the new foreign policy representative under certain circumstances.<sup>30</sup>

Interestingly, the *Working Group on External Action* did not exclude diversity in EU representation, even though its members concluded that the arrangements regarding the external representation of the EU in multilateral fora lacked clarity and that a single representation would improve the EU's capacity to act effectively and convincingly on the global stage.<sup>31</sup> They agreed that in case there is an agreed EU position, the EU should have, 'when appropriate', a single spokesperson. They also agreed that EUMS should enhance the coordination of their positions in international organizations and conferences with a view to agreeing on EU positions and a strategy to promote them. Also for the representation of the EU at the UNSC, they touched the spot again, by stating that coordination could be improved. Within the Convention, also the *Working Group on Legal Personality* concluded that the EU's external political action would be 'effective' and 'credible' only if the EU would speak with a single voice.<sup>32</sup> According to the members of this group, it would be advisable to establish mechanisms to ensure that the EU expresses a single position and is represented by a single delegation.<sup>33</sup>

In its report on the draft articles on external action of May 2003, the European Union Committee of the House of Lords argued that there were 'serious questions' about the new Article 19 TEU. Who appears for the UNSC was first of all 'a matter for them to decide', not for the EU. Also, the requirement that the EUMS serving on the UNSC had to defend the positions of the EU seemed to ignore the fact that the discussions within this setting are 'organic', meaning that the positions of the EUMS within this framework develop during the course of discussion and debate, making it "inconceivable that one player would be expected to do no more than defend the pre-agreed position which they had no mechanism to adapt."<sup>34</sup> In their opinion, especially the EUMS with a permanent status should remain free to act independently in the UNSC. They also indicated that EUMS who dissent from decisions taken within the EU context couldn't be under an obligation to support and defend this position here.<sup>35</sup>

The Committee also considered the proposal to give a special status to the foreign minister – referring to his/her "automatic right to speak"<sup>36</sup> – "impracticable." Then Minister for Europe, Peter Hain, who represented the British government in the Convention, requested the deletion of the new third sub-paragraph, arguing, as the amendment form reveals, that the UK could not accept "any language" which

<sup>30</sup> D. Thym, *Reforming Europe's Common Foreign and Security Policy*, 10 *European Law Journal* 5, at 20 (2004).

<sup>31</sup> CONV 459/02, Final Report of Working Group VII on External Action, 16 December 2002, para. 15.

<sup>32</sup> WG III – WD 15, Final Report Working Group III on Legal Personality, 17 September 2002, para. 17.

<sup>33</sup> *Supra* note 32, para 21.

<sup>34</sup> CONV 741/03 (Annex), *The Future of Europe: Constitutional Treaty – Draft Articles on External Action*, House of Lords, Select Committee on the European Union, Session 2002-03, 23<sup>rd</sup> report, 15 May 2003, para. 20.

<sup>35</sup> *Supra* note 34, para. 21.

<sup>36</sup> *Open Europe, A Guide to the Constitutional Treaty* 10 (2007).

implies that it would not retain the right to speak in its national capacity in the UNSC.<sup>37</sup> As he was forced to back down, a new amendment was tabled, bringing the provision, as was argued by the government, into line with the UNSC's Provisional Rules of Procedure, supporting the "continuation of the current practice whereby the Presidency speaks at open meetings of the Council."<sup>38</sup> This amendment was reading as follows: "When the Security Council holds a meeting at which non-members of the Council are permitted to speak, and when the Union has defined a common position on the subject of the meeting, the Minister of Foreign Affairs may request an opportunity to present the Union's position."

As indicated above, a reading of the last sentence of the second paragraph of the new Article 19 TEU shows that the UK had to eat the dust a second time, as the mandatory character of the foreign minister's right to speak in the UNSC was maintained ultimately. But the issue remains sensitive, especially because of the public opinion. This also appears from the fact that 'The UK will lose or have to vacate its seat on the UN Security Council' and 'An 'EU Foreign Minister' will control Britain's foreign policy' were listed at the top – first and second, respectively – on the list of myths that the UK government published on the website of its Foreign and Commonwealth Office.<sup>39</sup> Internet users can find a hyperlink to a similar statement at the website of the UK Mission to the UN, including the following quote of Hain's predecessor, i.e. Jim Murphy: "The UK is proud of its seat in the Security Council, and voice in the UN. We will continue to make our voice heard and exercise our influence in the UN. Nothing would make us relinquish that voice, or our seat at the table. The new EU Treaty does not make us give up our seat or defer to the EU in UN meetings."<sup>40</sup> An analysis of the other 14 amendments formulated to the changes suggested by the Convention Presidium in relation to Article 19 TEU (i.e. first in relation to Article 14 of Part II, Title B, and later Article III-201) indicates that the British government was not completely isolated.

Indeed, some of Hain's fellow Convention members supported his call for deleting the references to the Foreign Minister (Bonde, Gormley, Svensson).<sup>41</sup> Others suggested toning down the language on the promotion of the common positions (Lequiller, Heathcoat-Amory, Svensson), even to delete this provision entirely (Kirkhope). But the majority held a different opinion and suggested strengthening the language proposed (Duff and nine others, Fini/Speroni, Voggenhuber/Lichtenberger/Wagener, de Vries/de Bruijn, and Farnleiter), deleting the disclaimer clause (Fini, Farnleiter, de Vries/de Bruijn), allowing the foreign minister to participate in the meetings of UNSC instead of just addressing them (Michel et al.), making him/her responsible for the channelling of information (Brok et al.), even including a provision stipulating that the EU "shall aim and act to obtain a seat on the UNSC" (Voggenhuber/Lichtenberger/Wagener). Also a provision on what to do in case it was not possible or practical for the foreign

<sup>37</sup> Suggestion for amendment of Article: Part II, Title B, Art. 14, by Mr Hain.

<sup>38</sup> Suggestion for amendment of Article: Part III, Title V, Article 201 (ex. Art.14), by Mr Hain.

<sup>39</sup> The EU Reform Treaty: 10 Myths, Foreign and Commonwealth Office.

<sup>40</sup> This list is available at <http://www.ukun.org>.

<sup>41</sup> The various amendments are available at <http://www.european-convention.eu.int>.

minister to present the EU position was suggested (Roch). Remarkably, a large group of Convention members also advocated the inclusion of a reference to the Commission in the new Article 19 TEU, considering it the only EU interlocutor at the international level, except for CFSP (Brok et al.).

Finally, while nobody questioned the removal of the distinction between the permanent and non-permanent members in the second sub-paragraph of Article 19(2) TEU, one member suggested replacing the reference to the UNSC here by a reference to the UN as such (Heatcoat-Amory). Heat-Amory argues that this way the cooperation could be opened up to all UN ‘components’, while keeping it voluntary. Like some of his colleagues, he also suggested not to include the new third paragraph, as this would grant the EU “equivalence to statehood” and “further remove independent action and silence national voices.” However, a PA inspired comparison between the old and new Article 19 TEU demonstrates that the possible impact of the new provisions on the room for manoeuvre of the EUMS at the UNSC is rather limited.

## F. Delegation is an Option, Representation Not

PA insights have been used most often in cases of Treaty-based delegation, though this is not a *conditio sine qua non*. Like Tallberg, we are convinced that the rationalist perspective on delegation may also generate important insights when delegation does *not* take place or only gradually.<sup>42</sup> In the previous section, we argued that when defining the relationship between the EU membership at large and the EUMS serving on the UNSC, as embodied by Article 19 TEU, in terms of principals and agents, one has to take into account that the delegation between principals and agents is an *option*. This act of delegation is thus fundamentally different from the one in which the European Commission represents the EUMS – acting as their agent – on the basis of Article 300 TEC in e.g. external trade negotiations. Here, Article 300 TEC appoints the Commission as EU negotiator for international negotiations dealing with issues falling exclusively under the EC’s competence or for the EC part of so-called mixed negotiations.<sup>43</sup> It specifies that the Council shall authorize the Commission to negotiate on behalf of the EC (“to open the necessary negotiations”). By comparison, the authorization stage for international agreements dealing with CFSP (i.e. agreements with one or more States or international organizations) is rather different, both in its obligatory character and the actors involved.

Indeed, Article 24 TEU specifies that the Council may authorize the Presidency, assisted by the Commission as appropriate, to open such negotiations. In the opening weeks of the IGC that resulted in the Maastricht Treaty, the Commission had put forward a draft text on the development of a common external policy,

<sup>42</sup> J. Tallberg, *Delegation to Supranational Institutions: Why, How and with What Consequences?*, 25 *West European Politics* 23, at 41-42 (2002).

<sup>43</sup> T. Delreux, *The European Union in International Environmental Negotiations: A Legal Perspective on the Internal Decision-making Process*, 6 *International Environmental Agreements* 231, at 237-248 (2006).

taking an approach very similar to what the Dutch Presidency would do in the second semester of 1991. This draft stipulated not only that in CFSP matters the EU would be represented by the Presidency and the Commission in relations with non-member countries, international organizations and international conferences, but also that the Council may entrust one or more Member States with the task of presenting the EU's position in specific instances, including before the UNSC.<sup>44</sup> Here, the Council would act on a proposal from the Commission or one of the EUMS. Both Article 18 TEU and Article 19 TEU indicate that the Commission had to back down. Under the current Treaties, the EUMS cannot be forced to represent the EU in international fora, including the UNSC, in CFSP matters or have to be authorized by the Council to do so. In what follows, we demonstrate that notwithstanding the fundamental differences in the authorization mechanisms embodied by Articles 300 TEC and 19 TEU, insights from the way the Council uses mandates to guide the Commission's behaviour in external negotiations on first pillar issues are also useful for understanding the relationship between the EUMS with a seat on the UNSC and those without.

## I. Representation Guidelines as Mandate

When defining the notion of 'delegation', Hawkins, Hake, Nielson and Tierney write that principals and agents are mutually constitutive, defined by their relationship to each other only: without principals there are no agents and without agents there are no principals, it is that clear.<sup>45</sup> However, while the relationship between a principal and agent is always governed by a contract, their narrow definition does not require that this contract is *explicit* or *formal*. It may also be *implicit* – i.e. never formally acknowledged – or *informal* – i.e. based on an unwritten agreement. Such contracts usually specify the scope of the authority delegated, the instruments by which the agent is permitted to carry out its task and the procedures to be followed.<sup>46</sup> Scholars relying on PA theory describe these agreements as varying between *rule-based* and *discretion-based* delegation.<sup>47</sup>

Under the first form of delegation, principals instruct their agents on precisely how they have to do their job. By contrast, under the second form of delegation, the principal specifies its goals, but leaves it to the agent how best to reach this. As discretion-based delegation enhances the policy-making role of the agent, it enhances also the opportunities for opportunistic behaviour by the latter. This form of delegation also brings us again to the relationship between the EU Membership at large and the EUMS serving on the UNSC and the scope of the Council's mandate for these countries as defined by Article 19 TEU. In our reading of Article 19 TEU, delegation is an option. However, when looking from the perspective of the agents, the default condition is not one of non-representation. A careful reading

<sup>44</sup> *Common External Policy*, 17 March 1991, Article Y7.

<sup>45</sup> D. G. Hawkins *et al.*, *Delegation Under Anarchy: States, International Organizations, and Principal-agent Theory*, in Hawkins *et al.* (Eds.), *Delegation and Agency in International Organizations* 3, at 7 (2005).

<sup>46</sup> Hawkins *et al.*, *supra* note 45, at 27.

<sup>47</sup> Hawkins *et al.*, *supra* note 45, at 27-28.

of Article 19 TEU reveals a number of rules on the (representation) behaviour of the EUMS serving on the UNSC on a permanent basis in case there is no common position. In other words: delegation is an option, representation not.

Article 19 TEU does not stipulate that the EUMS should formulate common positions on the dossiers on the agenda of the UNSC. It only requires that if such positions exist, the EUMS serving should uphold them within this forum. Being permanent members, France and the UK have to ensure the defence of the positions and interests of the EU, though without prejudice to their responsibilities flowing from the UNCH, which are not spelled out in detail. We already explained how France and the UK have given their global mandate a regional interpretation in Maastricht, by way of Article 19 TEU. Moreover, being part of the CFSP framework, this provision is not legally enforceable. Accordingly, we argue that their EU mandate boils down to a *legally non-binding advice on desirable representation behaviour*.<sup>48</sup> Their mandate given by the Council is vague, reflecting a situation of *doing the best you can*, though, if you wish so. While they merely have to ‘ensure the defence’ of the positions and interests of the Union, their non-permanent colleagues have to ‘uphold’ the common positions. While the contours of the mandate of the non-permanent agents are formulated in more affirmative terms, the scope of the mandate of the permanent members is broader, as it includes ensuring the interests of the EU as well. But these interests are only vaguely defined, especially in comparison to the national *domains réservés*.

As the very notion of delegate illustrates, the policy officials of both countries operate in the UNSC under instructions, acting thus as agents. But they seem to act here first of all as national agents, since their instructions come from London and Paris, even though they may run parallel with the wishes in and from Brussels. The difference in mandate of the EUMS serving on a permanent and non-permanent basis will disappear in writing once the TOL enters into force. What will, in our opinion, not change soon is their different presence in the UNSC system, and more specifically the omnipresence of the EUMS serving on a permanent basis within this framework. As a result of the UNSC’s ‘corporate culture’, and more specifically of the pivotal role played by the P5 and P3 and the voting arrangements applied – their difference in league will remain, a difference that can be explained by the different levels of autonomy between the EUMS serving on a permanent and elected basis.<sup>49</sup>

## II. Similar Levels of Authority, Different Levels of Autonomy

In her seminal work on the external representation of the EU in international trade negotiations, Nicolaïdis established a useful distinction between ‘flexibility’,

<sup>48</sup> Winkelmann has formulated it as follows: “In total, the legal framework of the CFSP at the United Nations provides for a somewhat intergovernmental and ‘soft’ style of cooperation, leaving a large degree of flexibility and margin of manoeuvre to EU partners.” See I. Winkelmann, *Europäische und mitgliedstaatliche Interessenvertretung in den Vereinten Nationen*, 2000 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 413, at 443.

<sup>49</sup> K. Mahbubani, *The Permanent and Elected Council Members*, in D. M. Malone (Ed.), *The UN Security Council: From the Cold War to the 21<sup>st</sup> Century* 253, at 253 (2004).

‘autonomy’ and ‘authority’ as attributes of what she refers to as the “delegation of competence.”<sup>50</sup> Each of them is linked to a different *negotiation* stage. First, in the *authorization stage*, principals can give their agents a flexible or restricted mandate. They can give them a flexible, vague or broad mandate by instructing them to do ‘the best they can’. But they can also give them more restricted or narrow instructions and specify the concessions that are acceptable. Secondly, principals can grant their representatives a high or low degree of autonomy as regards the *representation stage*, depending on their actual involvement in the negotiation process. At one extreme, principals can sit at the negotiation table alongside their agents and share in their activities. At the other extreme, they can leave their delegate completely free, at least until the ratification stage. This also influences the degree to which an agent can monopolize the external contacts. Thirdly, principals can give their agents little or much authority in order to make promises and concessions on their behalf, depending on the procedures used in the final stage of the negotiations, i.e. the *ratification stage*. In what follows, we demonstrate that Nicolaïdis’ attributes are also powerful instruments for explaining the different room for manoeuvre that the permanent and non-permanent agents in this research enjoy and for evaluating the modifications that the TOL bring, as Tables 3 and 4 show.

On the basis of the representation guidelines that are included in Article 19 TEU, one could argue that the EUMS serving on the UNSC are only guided by a weak EU mandate, with those serving on a permanent basis facing somewhat stronger rules, even though, as indicated above, they are allowed to ignore them in case this would conflict with their global mandate. As noted, the entry into force of the TOL will end this difference by dropping the word ‘permanent’ in the second paragraph of Article 19(2) TEU. As it will homogenize the EU mandate of the EUMS at the UNSC, it seems logical to conclude that Brussels is the starting point for those who want to increase the EU’s actorness at the UNSC. To anticipate the UNSC’s proceedings, one could think about giving substantial input through the definition of common positions and interests about the issues under discussion so as to guide the EUMS serving here. However, one should not forget that such positions are adopted by unanimity. Moreover, PA theory shows that while such input is crucial, it is only one side of the story. In what follows, we argue that the opportunities for an increased EU actorness at the UNSC remain dependent upon actual representation behaviour of the EUMS serving, because the TOL does not influence the autonomy or authority they enjoy as EU agents.

Although the entry into force of the TOL will end this difference in mandate on paper, it will not end the fundamental difference between the permanent and non-permanent agents, as the decisive factor is here not their EU mandate or authority, but the different degree of *autonomy* they enjoy during the *representation* stage, which follows directly from the UNSC’s membership and working methods. Analyzing the more realistic options that circulate in New York from a PA perspective, one could argue that neither the authority, nor the autonomy of these agents will change soon. Indeed, it is not very likely that the binding character

<sup>50</sup> K. Nicolaïdis, *supra* note 1, at 94-98; S. Meunier, *supra* note 16, at 111.

Table 3: A PA-inspired comparison between the permanent and elected EU agents before Lisbon

	<i>Permanent EU agents</i>	<i>Elected EU agents</i>
<i>Mandate</i> (authorization stage)	Article 19(2) TEU (ensure the defence of the positions and interests of the Union)	Article 19(1) TEU (uphold the common positions)
<i>Autonomy</i> (representation stage)	Membership P3/P5	Membership UNSC
<i>Authority</i> (ratification stage)	Articles 24, 103 UNCH <sup>1</sup>	

<sup>1</sup> Article 24 UNCH reads as follows: "In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf."

Table 4: A PA-inspired comparison between the permanent and elected EU agents after Lisbon

	<i>Permanent EU agents</i>	<i>Elected EU agents</i>
<i>Mandate</i> (authorization stage)	Article 19 TEU (defend the positions and interests of the Union)	
<i>Autonomy</i> (representation stage)	Membership P3/P5	Membership UNSC
<i>Authority</i> (ratification stage)	Articles 24, 103 UNCH	

of the decisions of the UNSC (*authority*; see Articles 24 and 103 UNCH) or its staged decision-making practice (*autonomy*) will be touched upon, even if only because of the reform procedures that have to be followed and the approval of the permanent members such reform entails.<sup>51</sup>

Being permanent members, it is very unlikely that France and the UK would be excluded from the negotiation process in the UNSC, even in the very early stages of discussion. Even if they would, for one reason or another, have been excluded these stages, they will join their colleagues around the horseshoe table, both in the formal and informal meetings. Moreover, their final approval remains necessary, as decisions in the UNSC (with the exception of procedural ones) are taken by the affirmative vote of nine votes, including the concurrent ones of the five permanent members. This gives them a right to veto decisions taken in their absence, both in formal meetings and closed consultations. Indeed, while a veto occurs only rarely in open settings, the reality is that none of the permanent

<sup>51</sup> Even though Russia and China have been emerging as global (economic) powers on the international scene, the reality is that also today, representatives of France, the UK and the US (the so-called 'Western' permanent members; P3) usually sit together to talk things over before consultations are organized between the five permanent members (P5). Generally speaking, the non-permanent members only come into the picture in a later stage.

members hesitates to take a firm stand, also for drawing up the UNSC's agenda, which they consider to be a substantive and not a procedural issue.<sup>52</sup>

While we argue that they enjoy the same degree of authority as their elected colleagues, and this because of the binding character of the decisions of the UNSC, the same cannot be said for their levels of autonomy, quite the contrary. The policy and decision-making practice in the UNSC shows that the room for manoeuvre of the EUMS serving on a non-permanent basis is limited, also because of the omnipresence of France and the UK. France and the UK can thus not only be seen as EU agents with (1) weak mandates, (2) a high degree of authority and (3) a high degree of autonomy, but also with (4) a high degree of control over the autonomy and action of their colleagues who do not have the privilege of serving on a permanent basis. As Table 4 illustrated, once the TOL enters into force, the representation guidelines that apply now only to France and the UK as permanent members, will also apply for them. Given the secondary position of the elected members in the UNSC system and the lower degree of autonomy this entails, they will nevertheless not be able to exploit their agent role to the same extent as France and the UK can. Indeed, not only the optional character of delegation and a lack of sanctions mechanisms, but also a high degree of information asymmetry make that these two countries can exploit their EU agent role to a maximum, while remaining, as explained in the following section, the most attractive agents for the EU(MS).

### III. Specialized Agents

PA theorists would argue here that delegation is premised upon the division of labour and gains from specialization.<sup>53</sup> In comparison to their principals, *specialized agents* have the expertise, time, political ability and resources to perform a certain task. These criteria, in combination with the knowledge that gains from specialization are likely to be the greatest when the task to be performed is frequent, repetitive, and requires specific expertise or knowledge, as is the case with the UNSC, make France and the UK specialized agents *par excellence*. In comparison to their elected colleagues, they not only have (permanent) access to the UNSC's inner circle, but also more resources, expertise and knowledge to perform their tasks. This expertise and knowledge is also a result of their permanent membership and the fact that their membership of this body has been an inherent part of their foreign policies for more than six decades, even before their memberships of the European constructions were, especially for the UK, which only joined in 1973. While countries like Germany and Italy have been present on a regular basis, for most small EUMS, a seat on the UNSC is a rare occurrence.<sup>54</sup>

<sup>52</sup> S. Bailey & S. Daws, *The Procedures of the UN Security Council* 240-249 (1998).

<sup>53</sup> D. G. Hawkins & W. Jacoby, *How Agents Matter*, in D. G. Hawkins *et al.* (Eds.), *Delegation and Agency in International Organizations* 199 (2006).

<sup>54</sup> E. M. Loj, *Denmark's Membership of the UN Security Council: What Came out of it?*, 2007 Danish Foreign Policy Yearbook 31, at 33-34 (2007).

As their terms are often more than 20 years apart, their delegations have little institutional memory to rely on, also because, as Loj explains, both the agenda and working atmosphere change significantly over such period of time. In comparison to their permanent colleagues, this makes them less attractive as agents, even though, as is known, ‘longstanding agents’ are more likely to openly interpret their mandate and other rules in ways that are inconsistent with the preferences of the principals. PA theorists would argue there that specialization allows agents to provide services that principals are unable or unwilling to provide.<sup>55</sup> Simplifying considerably: the greater the needs, the larger the gain from specialization and the more likely delegation is. And as Hill has observed correctly, while few EUMS are happy with the special status of France and the UK, most of them are happy that these countries contribute their bit – both in financial and personal terms – to the maintenance of international peace and security, so that they can stay out of the spotlight.<sup>56</sup>

The non-permanent members of the UNSC are traditionally seen as second-class members who play a supporting role at best; the leading roles are reserved for their colleagues with a permanent seat. Mahbubani summarizes this dual reality in this way: the permanent members have been given “power without responsibility”; their elected colleagues “responsibility without power.”<sup>57</sup> While there might be a ‘warm sense of camaraderie’ between the various permanent representatives, so he writes, non-permanent members experience an “extreme advantage” from a structural point of view. In the literature, this difference is usually explained in realist terms, i.e. the presence and absence of decision-making powers and veto powers in particular. Going against the grain, in this article we did not look at the representation behaviour of the EU Member States serving on the UNSC through the theoretical lens of realism, but suggested a PA perspective for doing so. More specifically, we started exploring the possibility of building up an analytical model, inspired by PA theory so as to explain their representation behaviour within this setting.

## G. Concluding Remarks

Building on the work of Nicolaidis, we have theorized the fundamental difference that most authors observe between the permanent and non-permanent members of the UNSC, focusing on the EU Member States serving here. By looking at their mandate, autonomy and authority, we pointed out what makes the EU Member States serving here on a permanent and non-permanent basis so fundamentally different: not their mandate or authority, but the different degree of autonomy they enjoy when acting here as EU agents. The fact that this variable degree results directly from the membership and working methods of the UNSC makes us

<sup>55</sup> Hawkins *et al.*, *supra* note 45, at 12-20.

<sup>56</sup> C. Hill, *The European Powers in the Security Council: Differing Interests, Differing Arenas*, in K. Verlin Laatikainen & K. E. Smith (Eds.), *Intersecting Multilateralisms: The European Union and the United Nations* 49, at 59 (2006).

<sup>57</sup> Mahbubani, *supra* note 49, at 256-261.

conclude that New York is the starting point for fundamental reform, not Brussels. The discussions that we had last Summer with policy officials in Brussels and New York on this reform revealed that even if everything goes according to plan and the TOL enters into force on 1 January 2009, there is only a small chance that the new provisions on external representation will be operational in New York on day one. As the implementation of these provisions requires a number of issues to be cleared, both at the level of the EU and UN, a transition period seems to be more likely. In anticipation, for instance, Slovenia decided to organise during its EU Presidency an informal exchange of views in New York, to provide input for the decision-makers in Brussels about the issues to be considered. That the main focus of these discussions was the implementation of the TOL in the context of the UNGA illustrates our point that the manifestation of EU actorness at the UNSC will not improve soon. As it remains dependent upon the willingness of the EUMS to act as agents of the EU, we argue that the TOL will only have little impact on the way Article 19 TEU is operationalized in New York in relation to the UNSC. *Mutatis mutandis*, the impact of the 'Irish no' should not be overestimated either.

