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The Treaty of Lisbon: A story in History or the Making of a Treaty

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Abstract

And like all stories there are of course the main characters, the public heroes, and, around them, those who help them find a happy ending. The story in this Essay is written in honor of one of the characters who played a key role in achieving the Treaty of Lisbon: Jean-Claude Piris, who was for more than twenty two years, Director General of the Legal Service of the Council of the EU. But to understand this story, to understand the reasons behind it, one should know its roots.

THE TREATY OF LISBON: A STORY IN HISTORY OR THE MAKING OF A TREATY

Thérèse Blanchet *

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INTRODUCTION

This is a story that began in early summer 2005 with a violent shock and two big slaps in the face: the first, on May 29, with 54.8% voting no in France, and the second, two days later, on June 1, with 61.6% voting no in the Netherlands. And even the brave people of Luxembourg who, a month later, on July 10, produced a vote of 56.5% for yes could not change it: the European Constitution was rejected, and with it, ten years of work. Under its shiny outfit, which covered what was mostly a consolidation of existing treaties, the European Constitution was in reality, at its heart, a piece of institutional engineering, the culmination of ten years of trial and unsuccessful attempts to adapt the institutional structures of the European Union to the largest expansion ever of its membership.

It is a story that ends on December 1, 2009, with the entry into force of the Treaty of Lisbon. This treaty will probably be, in the history of the European Union (“EU” or “Union”), the last, if not greatest, and certainly the most voluminous treaty of this type, the last of a generation of treaties that succeeded in amending core provisions of the Union’s set-up. It took more than fifteen years to get there, to adapting EU institutions, the

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EU's engine, to this major enlargement. This is partly why the Treaty of Lisbon may seem already overtaken by events: it contains solutions devised long ago and, in the meantime, the world did not wait.

And like all stories there are of course the main characters, the public heroes, and, around them, those who help them find a happy ending. The story in this Essay is written in honor of one of the characters who played a key role in achieving the Treaty of Lisbon: Jean-Claude Piris, who was for more than twenty two years, Director General of the Legal Service of the Council of the EU. But to understand this story, to understand the reasons behind it, one should know its roots.

I. *THE GENESIS OF THE STORY*

In 1993, the Heads of State or Government of the then twelve European Union Member States decided to open the door of the EU to its recently freed neighbors in Central and Eastern Europe.¹ They also decided that before bringing in new members, they should adapt the Union's engine—its structure and the functioning of its institutions—to bear its new charge if the Union was to keep going forward: “deepening” and “widening,” hand in hand.² They were, however, careful not to dig deeper into underlying issues—such as the ultimate purpose of the European Union, its borders, and its future—on which everyone had an opinion, but for which there was no answer acceptable to everyone.

As foreseen by the Treaty of Maastricht of 1992, an Intergovernmental Conference (“IGC”) was convened in 1996 (known as the Amsterdam IGC) for the purpose of, among other things, examining the possible extension of the co-decision procedure to new sectors.³ To this commitment was added, in

1. See Copenhagen European Council, Conclusions of the Presidency, E.U. BULL., no. 6, at 13 (1993) (“The European Council today agreed that the associated countries in Central and Eastern Europe that so desire shall become members of the European Union.”); see also *id.* (listing the criteria, known as the “Copenhagen criteria,” that should govern the enlargement of the European Union (“EU”)).

2. *Id.* (“The Union's capacity to absorb new members, while maintaining the momentum of European integration, is also an important consideration in the general interest of both the Union and the candidate countries.”).

3. See Treaty on European Union (Maastricht text) art. N(2), July 29, 1992, 1992 O.J. C 191/1 [hereinafter Maastricht TEU]. It was also anticipated that the

December 1993 when concluding the institutional issues of the accession negotiations with Austria, Finland, and Sweden, the promise of adapting the institutions of the EU to accommodate its forthcoming enlargement:

In adopting the institutional provisions of the Accession Treaty, the Member States and the applicant countries agree that, as well as examining the legislative role of the European Parliament and the other matters envisaged in the Treaty on European Union, the Intergovernmental Conference to be convened in 1996 will consider the questions relating to the number of members of the Commission and the weighting of the votes of the Member States in the Council. It will also consider any measures deemed necessary to facilitate the work of the Institutions and guarantee their effective operation.⁴

Indeed the core issues in view of this next enlargement were, on the one hand, the question of the number of Commissioners—would the Union ultimately have a Commission of thirty, thirty-five, or forty members?—and, on the other hand, the question of the weighting of votes in the Council of the European Union (“Council”). The challenge would be to keep a democratic balance in the voting system given the significant increase in the number of less populated Member States relative to the number of more populated states, and how to “compensate” the large states’ likely loss of their second Commissioner. One should remember that in the original setup of the Union, the most populous Member States each had two

Intergovernmental Conference (“ICG”) would review the provision on defense and possibly add provisions on civil protection, energy, and tourism, deal with the composition of the Commission and of the European Parliament, or introduce a hierarchy of norms. See Maastricht TEU, Declaration on Civil Protection, Energy and Tourism, 1992 O.J. C 191, at 97; Maastricht TEU, Declaration on the Number of Members of the Commission and of the European Parliament, 1992 O.J. C 191, at 101; Maastricht TEU, Declaration on the Hierarchy of Community Acts, 1992 O.J. C 191, at 101. The Treaty of Maastricht came into force in November 1993 after an initial negative referendum in Denmark in June 1992 (50.7% voting no), followed by a positive referendum in May 1993 (56.7% voting yes). See Finn Laursen, *Denmark and the Ratification of the Maastricht Treaty*, in THE RATIFICATION OF THE MAASTRICHT TREATY: ISSUES, DEBATES AND FUTURE IMPLICATIONS 69, 78 (Finn Laursen & Sophie Vanhoonaeker eds., 1994).

4. See Brussels European Council, Conclusions of the Presidency, E.U. BULL., no. 12, at 18 (1993).

Commissioners⁵ while other states had one. Likewise, the number of weighted votes allocated to each Member State by the original Rome Treaty and successive amending treaties was roughly based on the size of its population. But enlargement after enlargement decreased the relative weight of large states compared to that of the less populous, but more numerous, states.⁶

Since 1993, every six months at each meeting of the European Council, the Heads of State or Government of the twelve, and later, fifteen Member States had, in the same breath, welcomed the progressive steps on the path toward the Central European enlargement, (the negotiations for which actually only began after the 1996 IGC), and had drummed their commitment to prepare the EU institutions for this enlargement.⁷ Yet, although all elements of the debate on the adaptation of the EU institutions had been amply exposed and discussed, and despite a final appeal from the European Council in December 1996,⁸ the Amsterdam IGC failed to cut the Gordian knot.

5. *See id.* at 16 (Spain, with a population of about 40 million, also had two Commissioners, i.e., the same as the four largest Member States, which have (or had) populations of about 60 million; Germany's population, after its reunification in 1990, was 80 million).

6. *See* JEAN-CLAUDE PIRIS, *THE CONSTITUTION FOR EUROPE: A LEGAL ANALYSIS* 96–105 (2006); *see also*, JEAN-CLAUDE PIRIS, *THE LISBON TREATY: A LEGAL AND POLITICAL ANALYSIS* 213–21, 225–29 (2010). The proportion of votes in the Council allocated to each of the four most populous states decreased between 1958 and 2005 from 23.5% of the total votes to 8.4%. Taken together, these four states' representation in the Council decreased from 70.5% of the total votes to 33.6% even though they represent 53.64% of the EU population. *See* Council Decision No. 2010/795/EU, 2010 O.J. L 338/47 (listing EU Member State populations for 2011).

7. *See* Corfu European Council, Conclusions of the Presidency, E.U. BULL. no. 6, at 8 (1994); *see also* Turin European Council, Conclusions of the Presidency, E.U. BULL. no. 3, at 9 (1996) (“[F]uture enlargement, which represents a historic mission and a great opportunity for Europe, is also a challenge for the Union in all its dimensions. In this perspective, institutions and their functioning, and procedures must be improved in order to preserve the capacity for action”); Cannes European Council, Conclusions of the Presidency, E.U. BULL. no. 6, at 23–24 (1995); Madrid European Council, Conclusions of the Presidency, E.U. BULL. no. 12, at 23–24 (1995); Essen European Council, Conclusions of the Presidency, E.U. BULL. no. 12, at 20–26 (1994).

8. *See* Dublin European Council, Conclusions of the Presidency, E.U. BULL., no. 12, at 13 (1996) (“The Union needs to improve its ability to take decisions and to act. This is already true today and it will be even more necessary as the Union moves to enlarge its membership further. . . . The European Council notes that the Presidency document . . . does not include texts in Treaty form on the issue of flexibility and on certain sensitive institutional questions, although it offers an analysis of the issues and identifies options. In the next phase of the Conference solutions must be found on all institutional issues,

The Treaty of Amsterdam of 1997 did improve the functioning of the EU, for instance, in the field of foreign policy, by establishing a new office of the high representative for common foreign and security policy (“CFSP”),⁹ and in the field of justice and home affairs (“JHA”), by the “communitarisation” of three sectors, namely asylum, immigration, and judicial cooperation in civil matters.¹⁰ It also integrated the Schengen *acquis*,¹¹ upgraded and expanded the co-decision procedure, and added the provisions on enhanced cooperation.¹² But the “High Contracting Parties” left intact the original institutional engine, limiting themselves to record their failure in a “Protocol on the institutions with the prospect of enlargement of the European Union.” This protocol, popularly called the “Amsterdam leftovers,” postponed the deadline by which one would have had to fix the engine: it would no longer have to be before the start of the Central European accession negotiations, but before the entry into force of the Accession Treaty.

The European Council in June 1997 declared that “with the successful conclusion of the Intergovernmental Conference, the way is now open for launching the enlargement process.”¹³ This is what the European Council did in December 1997 when, while meeting in Luxembourg, it decided that “the enlargement process” would be launched at the end of March 1998.¹⁴ The

including in particular on the size of the Commission, the role of the European Parliament, the collective association of national parliaments, [and] the voting mechanisms in the Council . . . The European Council emphasizes strongly that the future of the Union and the success of the further enlargement to which it has committed itself will depend on a satisfactory resolution of all of these questions.”)

9. See Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts art. 1(10), 1997 O.J. C 340/1, at 13 [hereinafter Treaty of Amsterdam]. The holder of this new function between 1999 and 2009 was Javier Solana, former Secretary General of NATO and former Minister for Foreign Affairs of Spain.

10. See *id.* art. 2(15), at 28.

11. See Treaty of Amsterdam, Protocol Integrating the Schengen *Acquis* into the Framework of the European Union, 1997 O.J. C 340/93.

12. See *id.* arts. 1(12), 2(5), at 22, 25.

13. See Amsterdam European Council, Conclusions of the Presidency, E.U. BULL., no. 6, at 9 (1997).

14. See Luxembourg European Council, Conclusions of the Presidency, E.U. BULL., no. 12, at 9 (1997) [hereinafter Luxembourg European Council 1997]. The first series of negotiations began with six states on March 31, 1998 (Cyprus, the Czech Republic, Estonia, Hungary, Poland, and Slovenia), see *id.* at 5, followed two years later, on February 15, 2000, by the second series of negotiations with six other states (Bulgaria,

European Council did, however, recall that “[a]s a prerequisite for enlargement of the Union, the operation of the institutions must be strengthened and improved in keeping with the institutional provisions of the Amsterdam Treaty.”¹⁵

The Nice IGC of 2000 was to focus on the unresolved institutional issues.¹⁶ Its mandate was strictly institutional: “size and composition of the Commission; weighting of votes in the Council (re-weighting, introduction of a dual majority and threshold for qualified-majority decision making); [and] possible extension of qualified-majority voting in the Council.”¹⁷

The IGC ended on December 9, 2000, after three days and two nights of tough negotiations, without having actually solved the core problems: the principle that the number of Commissioners should be reduced was agreed upon, but without setting out the number;¹⁸ and the reweighting of votes in the Council was more of a last-minute tinkering than a lasting and balanced solution (too many votes for some Member States compared to their size, not enough for others, and an increase of

Latvia, Lithuania, Malta, Romania, and Slovakia), *see* Helsinki European Council, Conclusions of the Presidency, E.U. BULL., no. 12, at 8 (1999).

15. *See* Luxembourg European Council 1997, *supra* note 14, at 9.

16. *See* Cologne European Council, Conclusions of the Presidency, E.U. BULL., no. 6, at 13–14 (1999) (“In order to ensure that the European Union’s institutions can continue to work efficiently after enlargement, the European Council confirms its intention of convening [an IGC] early in 2000 to resolve the institutional issues left open in Amsterdam that need to be settled before enlargement.”). The same European Council decided for the first time that, in parallel to the IGC, a new body called “Convention” with a wider composition than an IGC would draft a Charter of Fundamental Rights intended to be solemnly proclaimed by the three institutions (European Parliament, Council, and Commission), and “[i]t will then have to be considered whether and, if so, how the Charter should be integrated into the treaties.” *Id.* at 35–36. On this new type of body, *see* FLORENCE DELOCHE-GAUDEZ, *NOTRE EUROPE, THE CONVENTION ON A CHARTER OF FUNDAMENTAL RIGHTS: A METHOD FOR THE FUTURE?* (Nov. 2001).

17. *Id.* at 14.

18. The Protocol on the Enlargement of the European Union, which repealed the “Amsterdam Leftovers” protocol, provided that the number of commissioners who would be appointed after the accession of the twenty-seventh Member State (the one that would take office on November 1, 2009) would be “less than the number of Member States.” Consolidated Version of the Treaty of European Union, Protocol (No. 10) on the Enlargement of the European Union, art. 4, 2006 O.J. C 321 E/5, at 231. It would be up to the Council to determine unanimously the number of Commissioners and the arrangements for an equal rotation between Member States “as regards determination of the sequence of, and the time spent by, their nationals as Members of the Commission,” in a way that “reflect[s] satisfactorily the demographic and geographical range of all the Member States of the Union.” *Id.* at 232.

the threshold for qualified-majority voting). As for the extension of qualified-majority voting to the other fields, this was abandoned in the middle of the battle.

However, in a “declaration on the future of the Union,” the heads of states or government congratulated each other on the results and declared that the treaty “opens the way for enlargement of the European Union and . . . with ratification of the Treaty of Nice, the European Union will have completed the institutional changes necessary for the accession of new Member States.”¹⁹ At the same time, they pledged to open a “a deeper and wider debate about the future of the European Union,” which would include discussions on a more precise delimitation of powers, the status of the Charter of Fundamental Rights (proclaimed at Nice on December 7, 2000), the simplification of the treaties, and an enhanced role for national parliaments.²⁰ After this preparatory work, a new IGC was to be convened in 2004, with the understanding that it “shall not constitute any form of obstacle or pre-condition to the enlargement process.”²¹

Then events quickly unfolded: the adoption of the so-called “Laeken Declaration” under the Belgian Presidency in December 2001 gave a (wide) mandate to a “Convention on the Future of Europe,” which was composed of over 200 people (representatives of governments, the European Parliament, national parliaments, and the Commission), to prepare the work of the 2004 IGC.²² The convention began its work on February 28, 2002 and submitted a draft treaty to the European Council in July 2003. The IGC was convened in September 2003 and concluded its work in June 2004. The signature of the Treaty

19. Treaty of Nice Amending the Treaty on the European Union, the Treaties Establishing the European Communities and Certain Related Acts, Declaration on the Future of the Union, 2001 O.J. C 80/1, at 85 [hereinafter Treaty of Nice, Declaration on the Future of the Union].

20. *Id.*

21. *Id.* Signed in February 2001, the Treaty of Nice did not enter into force until February 2003, after a first negative referendum in Ireland in June 2001 (54% voting no), followed by a second referendum in October 2002 (62.8% voting yes). See Finn Laursen, *Introduction*, in THE TREATY OF NICE: ACTOR PREFERENCES, BARGAINING AND INSTITUTIONAL CHOICE 11 (Finn Laursen ed., 2006).

22. See Laeken European Council, Conclusions of the Presidency, E.U. BULL., no. 12, at 2 (2001). For an account of the 2004 IGC, in which Jean-Claude Piris played an important role, particularly as chairman of the group of legal experts of the IGC, see PIRIS, THE CONSTITUTION FOR EUROPE, *supra* note 6, at 49–55.

Establishing a Constitution for Europe²³ took place on October 29, 2004, by the twenty-five Member States (following the accession of ten Member States on January 1, 2004).

The shape of this treaty, its title, its glitter, and the delusion and misunderstandings it caused proved to be mistakes that were probably fatal to it. But, in substance, the treaty did attain the institutional response that the Union had sought in vain for ten years and had pretended to have found in Nice: (1) a reduction in the number of Commissioners to two-thirds of the number of Member States from November 1, 2009, with a possible further reduction; (2) a double majority system for the weighting of votes in the Council as from November 1, 2009, providing for a requirement that a successful vote must comprise at least 55% of the number of Member States, representing at least 65% of the population of the Union, a blocking minority having to include at least four Member States; and (3) a significant extension of the scope of qualified majority voting (and co-decision) especially in the field of justice and home affairs.

The treaty also provided answers on topics that had long been discussed: the role of the national parliaments in monitoring the respect of the principle of subsidiarity, the incorporation of the Charter of Fundamental Rights into the treaty, a better delimitation of competences, a semblance of a hierarchy of norms, the simplification of enhanced cooperation, and the streamlining of legal instruments. In addition, the dynamics inherent in the convention system had allowed other innovations, including a single legal personality (the Union) and the merger of pillars; the formalization of the European Council into an institution; a modification to the system of six-monthly presidency of the Council through the establishment of two new stable functions: a President of the European Council and a Union Minister for Foreign Affairs²⁴; the creation of a European diplomatic service incorporating the 130 Commission delegations in the world; the insertion of simplified treaty revision procedures and so-called “*passerelles*” (French for

23. Draft Treaty Establishing a Constitution for Europe, 2004 O.J. C 310/1 (never ratified) [hereinafter Draft Constitutional Treaty].

24. This new function of Minister combined three existing functions into one: President of the Foreign Affairs Council (which so far belonged to the six-monthly Presidency of the Council), the High Representative for Common Security and Defense Policy (“CFSP”), and the Commissioner for External Relations.

“footbridges”) injecting internal flexibility in the system; the insertion of a horizontal social clause, and the insertion of specific legal bases on economic discipline in the euro area, public services, energy, civil protection, humanitarian assistance, and space. Then came the slap in the face during the summer of 2005.

II. THE STORY IN HISTORY

The blow was hard, everyone was a little groggy, and the atmosphere became unreal. The then European Council President, Luxembourg Prime Minister Jean-Claude Juncker, declared bravely that “[t]he European construction does not stop today.”²⁵ The Heads of State or Government at the European Council of June 16 and 17, 2005, took note of the two negative referenda, but, noting that ten Member States had already ratified the treaty,²⁶ said the ratification process should continue. They also decided to launch a “period of reflection” to consider the concerns and worries expressed by citizens. A rendezvous was set for the following year, in the first half of 2006, for an overall assessment.²⁷

The “period of reflection” soon turned into a period of lethargy. In October 2005, the Commission launched a “Plan D for Democracy, Dialogue and Debate,” and a slogan appeared: “Europe of results.”²⁸ The idea was to make the best of the existing treaties, in their post-Nice versions, to create conditions conducive to an “institutional settlement,” as the Commission described the problem to be solved. There was obviously no

25. Jean-Claude Juncker, Luxembourg Prime Minister and then President of the European Council, Statement Following the Results of the French Referendum (May 30, 2005), available at <http://www.eu2005.lu/en/actualites/communiqués/2005/05/29jclj-ref/index.html>.

26. The Draft Constitutional Treaty was ratified by Spain by referendum held on February 20, 2005 (76% voting yes), and Germany, by parliamentary vote, on May 27, as well as Austria, Greece, Hungary, Italy, Latvia, Lithuania, Slovakia, and Slovenia. See *The Constitution—Ratification*, UNIV. DE ZARAGOZA, http://www.unizar.es/euroconstitucion/Treaties/Treaty_Const_Rat.htm (last visited Mar. 12, 2011).

27. Brussels European Council, Declaration by the Heads of State or Government of the Member States of the European Union on the Ratification of the Treaty Establishing a Constitution for Europe, E.U. BULL., no. 6 (2005).

28. See Commission of the European Communities, A Citizens’ Agenda: Delivering Results for Europe, COM (2006) 211 Final, at 3 (May 2006). This communication followed several statements by politicians in this direction.

“plan B,” and it all began to look like a first-class burial of the Constitutional Treaty and its innovations. It is likely that some people were not particularly sad about this, either because they never liked the idea of losing “their” commissioner or a piece of the fame brought by the six-month Council presidency, or because the failure reinforced their cynical outlook that the project would end in ruins.

What to do? How to get out of this swamp that could become noxious to the European Union? One could not let the institutional solutions go awry, as they were the real advances at the heart of this long negotiation between fifteen, and later twenty-five, Member States: there had finally been an agreement, they had all signed, and many of them were still ratifying.²⁹

In addition, the central elements of this long negotiation, made invisible because they had been melted into the mass of the long Constitutional Treaty that codified existing texts, had not caused particular trouble or raised frontal opposition during the referendum debates. One does not recall that the introduction of the double majority in the Council, the reduction of the number of commissioners, the extension of qualified majority voting, the creation of the two new positions of President of the European Council or Minister of Foreign Affairs of the Union, or the creation of a European diplomatic service played a decisive role in the debates.

It was rather Part III of the Constitutional Treaty that had been scrutinized and had raised the most questions and opposition. Part III was, in essence, the recasting or codification of the technical provisions (i.e., the collection of “legal bases,” or enabling clauses, that list the powers entrusted by the Member States to the EU institutions) contained in the original Treaty Establishing the European Community (the Treaty of Rome of 1957, as amended four times, most recently in Nice). In fact, some of the most virulent critics focused more on the policy options chosen when legislating on the basis of these provisions

29. By early 2007, after the accession of Bulgaria and Romania on January 1, two-thirds of Member States (eighteen out of twenty-seven states) had ratified the Draft Constitutional Treaty. Apart from Luxembourg, all those who had planned a referendum that should have taken place after the two negative referenda (Denmark, Ireland, Poland, Portugal, and the United Kingdom) had frozen the procedure. The Czech Republic and Sweden had frozen their parliamentary procedure.

rather than on the treaty's legal bases themselves, which had existed for ten, twenty, or fifty years.³⁰

Studies conducted after the referenda revealed that the French no vote was primarily because of economic and social reasons, accompanied by a malaise vis-à-vis enlargement, and that the Dutch no was much more about sovereignty (the impression that the Netherlands were paying too much for the Union, and that they could lose control of their sovereignty and identity).³¹

In his capacity as legal counsel to all the IGCs since Maastricht, Jean-Claude Piris had been at the heart of all these debates. He had helped draft the text of the most delicate compromises and the most acrobatic devices. He knew the ins and outs of the discussions that had taken place over all these years.³² And Jean-Claude Piris was not one to give up.

The solution lay between two quite obvious limits. On the one hand, it would be impossible to renegotiate everything from scratch. One cannot redo a negotiation of this magnitude among twenty-seven states. On the other hand, doing nothing and allowing the wind of division and failure to blow upon the Union was dangerous for the European project itself.

30. In France, for example, the draft directive on free movement of services (Directive 2006/123/EC of the European Parliament and of the Council on Services in the Internal Market, 2006 O.J. L 376/36) had been very hotly debated. During the referendum debate in France, ludicrous issues appeared, such as debates on the "Polish plumber" supposedly taking French jobs, how easy it would be to negotiate a "social treaty" with the other twenty-six Member States, the supposed existence of a necessarily true, if hidden, "plan B" in case of a no vote, the principle of "free and undistorted competition" that would be written "in stone," the contention that Article 2 of the Charter of Fundamental Rights ("Charter"), which enshrines the right to life (and the prohibition of the death penalty) would prevent abortion in France, or that Article 10 of the Charter on freedom of thought, conscience, and religion would prevent France from adopting a law banning the wearing of headscarves in public schools (although these two provisions simply copied the corresponding provisions of the European Convention of Human Rights of 1950, respectively Articles 2 and 9, which had been applicable in France since 1974).

31. For an analysis of the reasons of the negative referendums, see PIRIS, *THE CONSTITUTION FOR EUROPE*, *supra* note 6, at 9–24.

32. He had also contributed to the discussion in several publications, notably in 1995, using the pseudonym "Justus Lipsius." He authored *The 1996 Intergovernmental Conference*, 20 EUR. L. REV., 235, 235, 262 n.38 (1995), where he suggested merging the four legal personalities (EU, EC, Euratom and ECSC) of the time into one (the European Union), in a single treaty, a short and readable Treaty Charter, with protocols incorporating the technical provisions.

The heart of the solution would necessarily be the political package of innovations that was contained in the Constitutional Treaty. The more one moved away from the subtle, delicate balances and mutual concessions that had enabled the negotiation to succeed, the more one moved away from a solution. To reopen part of that package might lead to the reopening of another element that had been negotiated in exchange, and so on until the dismantling of the whole.

In the autumn of 2005, Jean-Claude Piris began to write an updated and expanded French version of his book on the Constitutional Treaty that he had published in English.³³ In a final section devoted to different imaginable scenarios, he described eleven of them; the fifth concerned placing the innovations of the Constitutional Treaty in a shorter text.³⁴ To see if such a scenario was feasible, and to see how many pages a treaty that limited itself to these innovations would have to contain, without recopying the existing provisions,³⁵ it was necessary to prepare projects and to try it.

By late autumn 2005 and into 2006, efforts were made to do just that. The general idea was to make something different and shorter, while including what had been the heart of the negotiation. The drafting method would be the reverse of that of the Constitutional Treaty. One would proceed, as in all previous IGCs, through an amending treaty, which limited itself by inserting the new elements into the existing structure, and not by way of a codifying treaty that replaces and repeals by modifying hundreds of existing provisions. So the structure would still be based on the two treaties inherited from Maastricht: the Treaty on European Union ("TEU") and the Treaty Establishing the

33. See PIRIS, *THE CONSTITUTION FOR EUROPE*, *supra* note 6. The manuscript of that book had been delivered to publisher in late September 2005.

34. See JEAN-CLAUDE PIRIS, *LE TRAITÉ CONSTITUTIONNEL POUR L'EUROPE: UNE ANALYSE JURIDIQUE* [THE CONSTITUTIONAL TREATY FOR EUROPE: A LEGAL ANALYSIS] 248–73 (2006). The idea of placing most of the innovations of the Constitutional Treaty in a shorter text was in the air, as shown in footnotes 360 and 361 of the book (excerpts from statements of the yes camp in France (Nicolas Sarkozy) as well as from the no camp (Laurent Fabius) and from other politicians like Romano Prodi, then president of the Council in Italy).

35. Length would be an important criteria because the length of the Constitutional Treaty (about 700 pages) had been widely criticized (an unfair criticism because those 700 pages were in effect replacing almost 3000 pages of primary law spread across seventeen treaties, including the various accession treaties).

European Community (“EC Treaty”),³⁶ which would be renamed, in order to realize the merger into one (the Union) of the two legal personalities (the Union and the European Community).³⁷ All this was, of course, only about the drafting method. It would then be up to politicians to choose which of the innovations of the Constitutional Treaty they wished to retain, modify, or abandon.

One option, a bit maximalist, could have been a kind of Constitutional Treaty without its Part III. This would have replaced, as a block, the Treaty on European Union by the provisions of Parts I and IV (Final Provisions) of the Constitutional Treaty. This would have kept the reader-friendly character of Part I of the Constitutional Treaty, which had been conceived as a sort of “reader’s digest” in which one could find the “fundamentals” of the Union (e.g., its values and objectives, the rights of its citizens, its competences, its institutions), collected in about thirty pages. To this would have been added the full text of the Charter of Fundamental Rights (Part II of the Constitutional Treaty) and the insertion of the innovations contained in Part III in the form of amendments to the technical provisions of the EC Treaty (in an amending protocol). The EC Treaty would have become a sort of “toolbox,” the receptacle of the detailed provisions (legal bases and institutional arrangements) of the Union, while the TEU would have become a kind of general treaty, the two treaties constituting an inseparable whole.³⁸

36. In addition, of course, to the Treaty Establishing the European Atomic Energy Community, Mar. 25, 1957, 298 U.N.T.S. 167.

37. Several names were possible: the Treaty on European Union could have been renamed, for example, the Basic Treaty on European Union; the EC Treaty could become, for example, the Treaty on the Competences of the European Union or the Treaty on the Functioning and Competences of the European Union. In order to merge two legal personalities, “Community” would have to be replaced by “Union.”

38. In this regard, a drafting question arose: how to translate this unity of the two treaties when the articles of the TEU and the EC Treaty used the words “this Treaty.” One could have inserted a provision stating that when the text referred to “this Treaty,” it also meant the other treaty, or else the words “this Treaty,” could have been replaced by “the founding Treaties” or “the Treaties.” The latter solution was finally chosen, together with an explicit statement under which this formula means the two treaties would “have the same legal value.” See Consolidated Version of the Treaty on European Union art. 1, 2010 O.J. C 83/13, at 16 [hereinafter TEU post-Lisbon]; Consolidated Version of the Treaty on the Functioning of the European Union art. 1(2), 2010 O.J. C 83/47, at 50 [hereinafter TFEU].

Other options incrementally departed from the style and appearance of the Constitutional Treaty and increasingly resembled a conventional amending treaty, with the undesirable result of being less reader friendly. This increased the risk of criticism upon ratification due to the difficulty in reading and understanding it.³⁹

There were several conceivable alternatives, depending on the sensitivities. On structure, one could either try to introduce into the TEU the structure of Part I of the Constitutional Treaty and that of Part III of the Constitutional Treaty into the EC Treaty,⁴⁰ or one could maintain existing structures and limit oneself to inserting the innovations inside these structures. On length, one could either faithfully introduce in the TEU and the EC Treaty all the innovations brought by the Constitutional Treaty, including the new vocabulary, or one could try to find ways to keep the essence of these innovations while limiting the number of changes, and hence the length of the amending treaty. On symbols, one could either keep as much of the “constitutional” character of the vocabulary as possible, or one could eliminate as much as possible this character, which could be considered as having played a role in the rejection of the Constitutional Treaty. On readability, one could either try to

39. The usual method of drafting amendments, which could be described as a “lace method,” consists of a series of paragraphs specifying that “In Article XX, paragraph YY shall be replaced by the following,” that “In Article XX, the phrase ‘YYY’ shall be deleted,” and that “In Article XX, first paragraph, third indent, the words ‘YYY’ shall be replaced by ‘ZZZ.’” This certainly allows the reader to identify precisely the differences from the existing text, but it is very indigestible. A less-detailed drafting method consists of replacing a whole article or chapter “in block.” The text is more readable, but the reader who wishes to identify the innovations is constrained to a tedious exercise of comparative reading of old and new texts to discover the differences. The Constitutional Treaty had been criticized for its length and for the fact that it was difficult to understand, but it was written in prose, so to that extent, it was legible.

40. The structure of Part III of the Constitutional Treaty reshuffled the EC Treaty, first for consistency. For instance, it regrouped the provisions dealing with the same subject, such as provisions on external action, which had been scattered in the EC Treaty: trade (Consolidated Version of the Treaty Establishing the European Community arts. 131–34, 2006 O.J. C 321 E/37, at 103 [hereinafter EC Treaty]) was located between employment and customs cooperation, separately from development cooperation (*id.* art. 177) and from the procedure for negotiating international agreements (*id.* art. 300). The other reason was political and presentational: for instance, it was more appropriate, in Part III of the Constitutional Treaty, to place the provisions on free movement of persons before those on the free movement of goods, while in the EC Treaty the provisions on goods and agriculture came before those on persons.

adopt a drafting method which, although “amending” rather than “codifying,” remained as much as possible a prose text, or one could choose the “lace” drafting technique, with many detailed amendments, and thus would be almost unreadable.

These options and alternatives could be combined, with varying degrees of similarity or distance from the text of the Constitutional Treaty and in varying length. The goal was to find a balance between readability, brevity, and fidelity to the innovations of the Constitutional Treaty.

For example, drafting a text that contained a mere reference to the Charter of Fundamental Rights (“Charter”), conferring on it the quality of primary law, allowed the drafters to save some fifty articles (twenty pages). But doing so required a political decision, given the symbolic nature of reproducing—or not—the Charter in full within the treaty.⁴¹ Not reproducing it in the treaty diminished its resemblance to the Constitutional Treaty (which could be an advantage for some and a drawback for others).

Another example was the choice of whether to use the terms “European laws” and “European framework laws” introduced by the Constitutional Treaty.⁴² Not to incorporate these new names would have shortened the text by a dozen pages by having fewer technical amendments.⁴³ But these new terms allowed readers to

41. The integration of the Charter into the treaties had been an important goal for several Member States, notably Germany. See E.U. BULL., *supra* note 16, at 13, 35–36; see also Treaty of Nice, Declaration on the Future of the Union, *supra* note 19, 2001 O.J. C 80, at 85 (stating that the European Council, in charting the enlargement process, should address the “status of the Charter of Fundamental Rights of the European Union”).

42. Not only for the sake of bringing some semblance of hierarchy between norms and streamlining them, but also for symbolic reasons (e.g., the noble and constitutional character of the word “law”), the Constitutional Treaty provided for a new typology of acts of the Union. While the existing treaties provided for fifteen different instruments, the Constitutional Treaty had limited their number to six (European laws, European framework laws, European regulations, European decisions, recommendations, and opinions). See PIRIS, *THE CONSTITUTION FOR EUROPE*, *supra* note 6, at 70–73.

43. In the Constitutional Treaty, the introduction of these new names led to a redrafting of almost all the legal bases to change the subject of the verb. Previously the subject of the verb was the institution that adopted the act; for example, “the Council, acting in accordance with the procedure referred to in Article 251 [i.e., co-decision], [shall establish measures] [shall adopt directives].” In the Constitutional Treaty, however, the subject of the verb had become the law or framework law (“European laws shall establish measures . . .”). Therefore, introducing the new vocabulary “law” and “framework law” into the EC Treaty would have required the replacement of the subject

distinguish what was legislative (the acts called “laws,” or “framework laws”) from what was nonlegislative. Defining an act as legislative occasioned a series of automatic consequences: the proceedings in the Council for its adoption had to be public,⁴⁴ the obligation that such an act had to be adopted on a proposal from the Commission,⁴⁵ the hierarchical relationship between the laws and “delegated acts,”⁴⁶ the obligation to inform national parliaments, and the subsequent control by them of the respect of the principle of subsidiarity.⁴⁷ It was therefore necessary to keep the substance of this innovation (the distinction between legislative and nonlegislative acts), without necessarily keeping the method for achieving it. This could be achieved through identifying what is legislative by the type of procedure followed to adopt the act (i.e., by specifying that the procedure is of a legislative character) rather than by the name of the act.⁴⁸ But

of the verbs in almost all the legal bases of the EC Treaty and thus numerous (and lengthy) technical “lace-like” adjustments (on this drafting method, *see supra* note 39).

44. Compare TEU post-Lisbon, *supra* note 38, art. 16(8), 2010 O.J. C 83, at 24 (“The Council shall meet in public when it deliberates and votes on a draft legislative act.”) and TFEU, *supra* note 38, art. 15(2), 2010 O.J. C 83, at 54 (“The European Parliament shall meet in public, as shall the Council when considering and voting on a draft legislative act.”), with Draft Constitutional Treaty, *supra* note 23, arts. I-24(6), I-50(2), 2004 O.J. C 310, at 21, 35.

45. Compare TEU post-Lisbon, *supra* note 38, art. 17(2), 2010 O.J. C 83, at 25 (“Union legislative acts may only be adopted on the basis of a Commission proposal, except where the Treaties provide otherwise.”), with Draft Constitutional Treaty, *supra* note 23, art. I-26(2), 2004 O.J. C 310, at 22.

46. Only legislative acts may delegate to the Commission the power to adopt delegated acts, while implementing powers may be conferred (on the Commission or on the Council) by any legally binding act of the Union, and therefore not only by a legislative act. Compare TFEU, *supra* note 38, arts. 290, 291, 2010 O.J. C 83, at 172–73, with Draft Constitutional Treaty, *supra* note 23, arts. I-36, I-37, 2004 O.J. C 310, at 28.

47. See 2010 Consolidated TEU & TFEU, Protocol (No. 1) on the Role of National Parliaments in the European Union art. 2, 2010 O.J. C 83/201, at 204; 2010 Consolidated TEU & TFEU, Protocol (No. 2) on the Application of the Principles of Subsidiarity and Proportionality art. 4, 2010 O.J. C 83/206, at 206 [hereinafter Protocol (No. 2)] (“Draft legislative acts . . . shall be forwarded to national Parliaments.”).

48. One would specify, in the legal bases, that the act was adopted “in accordance with the ordinary legislative procedure” (co-decision) or “in accordance with a special legislative procedure.” The proximity of this wording with that previously used allowed for cases of co-decision to use a horizontal adaptation to replace, in all the legal bases, the words “the Council, acting in accordance with the procedure referred to in Article 251” with “the European Parliament and the Council, acting in accordance with the ordinary legislative procedure.” This method of horizontal adaptation was very much used in the Treaty of Lisbon for amending the EC Treaty and the protocols, which required many mechanical and technical modifications. See Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community

again, like the Charter, this would require a political decision, given the symbolic nature of the decision to use the word “law” and “framework law.”

Similarly, the wish to keep the text that would remain in the TEU readable and concise could lead to the transfer to the EC Treaty—the “toolbox”—of a number of provisions contained in Part I of the Constitutional Treaty, notably the more technical ones (e.g., some legal bases, the too-detailed provisions).⁴⁹ But such a transfer could also be symbolic. For example, Title III of Part I of the Constitutional Treaty contained provisions on the definition and delimitation of Union competence. A transfer of these provisions from the “general treaty,” which the TEU would become, to the “toolbox” could be viewed as a diminution of their importance.⁵⁰

The same concern of readability could also bring about a breakdown between, on the one hand, the most “noble” amendments made to the EC Treaty, which could be grouped together in Article 2 of the amending treaty—for example, blocks of changes to the CFSP, JHA, horizontal provisions inserted at the beginning of the EC Treaty, the governance of the euro, some new legal bases (e.g., energy, civil protection, public services)—and, on the other hand, technical and mechanical changes, which, when mixed with the “noble” ones, would have affected the readability of the whole, and could therefore be located in an amending protocol.⁵¹ The above examples illustrate

art. 2, 2007 O.J. C 306/1, at 42–45 [hereinafter Treaty of Lisbon]. To streamline the number of legal instruments of the Union, it was enough to keep the five types of instruments used in the EC Treaty from the origin (regulations, directives, decisions, recommendations, and opinions) and to extend their application to all areas of action of the EU (except the area of CFSP where only decisions can be adopted). See TFEU, *supra* note 38, art. 288, 2010 O.J. C 83, at 171–72.

49. A side effect of the “reader’s digest” character of Part I of the Constitutional Treaty was that it contained in many respects repetitive provisions, details of which were in Part III. To shorten and simplify Part I, one could simply transfer some of its provisions into the EC Treaty, from where they had been partially copied.

50. Other transfers in the “toolbox” were more obvious, such as the provisions relating to legal acts (arts. I-33 to I-39), those on the finances of the Union (arts. I-53 to I-56), or those describing the CFSP and JHA (arts. I-40 to I-42). The list of provisions that would eventually be transferred to the EC Treaty is contained in Annex 2 of the mandate of the Lisbon IGC. See Brussels European Council, Presidency Conclusions, E.U. BULL., no. 6, at 23–25 (2007).

51. This kind of division between the “noble” and “technical” had already been used in the Treaty of Amsterdam. The first part contained the “substantive changes” and the second part, entitled “simplification,” contained provisions cleaning up lapsed

the policy choices that were considered by different drafting methods, which aimed at making the text shorter or more readable. Meanwhile, time passed.

In June 2006, under the Austrian presidency, the European Council noted in a remarkable understatement that “the reflection period has overall been useful,”⁵² that fifteen Member States had ratified the Constitutional Treaty,⁵³ and that, in the spirit of a “Europe of results,” one should make the “best use . . . of the possibilities offered by the existing treaties in order to deliver the concrete results that citizens expect.”⁵⁴ These conclusions also invited the incoming German presidency in the following year (first semester 2007), first, to adopt a declaration on March 25 commemorating the fifty years of the Treaty of Rome and, second, to present a report to the European Council “based on extensive consultations with Member States [that] should contain an assessment of the state of discussion with regard to the Constitutional Treaty and explore possible future developments.”⁵⁵ The outcome of this examination was to “serve as the basis for further decisions on how to continue the reform process, it being understood that the necessary steps to that effect will have been taken during the second semester of 2008 at the latest.”⁵⁶

Then the German presidency, led by Angela Merkel, arrived. As requested by the European Council in June 2006, the

provisions and renumbering articles. This method was used in the Treaty of Lisbon only for the amendments to the protocols to the EC Treaty and amendments to the Euratom Treaty, *see* Treaty of Lisbon, Protocol No. 1 Amending the Protocols Annexed to the Treaty on European Union, to the Treaty Establishing the European Community and/or to the Treaty Establishing the European Atomic Energy Community, 2007 O.J. C 306/165; Treaty of Lisbon, Protocol No. 2 Amending the Treaty Establishing the European Atomic Energy Community, 2007 O.J. C 306/199, but not for amendments made to the EC Treaty itself, which are all contained in Article 2 of the Lisbon Treaty.

52. Brussels European Council, Conclusions of the Presidency, E.U. BULL., no. 6, at 15 (2006) [hereinafter Brussels European Council 2006].

53. After the two negative referendums of June and July 2005, five more Member States had ratified the Constitutional Treaty by June 2006: Belgium, Cyprus, Estonia, Luxemburg, and Malta.

54. Brussels European Council 2006, *supra* note 52, at 15.

55. *Id.*

56. *Id.* This tight schedule was due to the wish to ensure that any new treaty would be in force before the European elections of June 2009 and the appointment of the new Commission in November 2009. It was therefore necessary that the treaty be signed in late 2007 or early 2008 and that the ratifying procedure take place during 2008. *See* PIRIS, *supra* note 34, at 244–48 (2006).

presidency engaged in “extensive consultations with Member States.”⁵⁷ By January 2, 2007, Angela Merkel already informed her colleagues by letter that she would organize confidential consultations between the Heads of State or Government and their close advisers to prepare the political declaration of March 25 and, at the same time, hold consultations on a possible continuation of the constitutional process to develop a viable proposal for the June European Council on the basis of extensive consultations with all partners. She asked her colleagues to appoint “contact points.”

The various projects that had been tried previously, the real-life tests, helped provide a description in brief notes for the German presidency, as soon as it started, of the possible drafting methods, with their advantages and disadvantages and the approximate length of the texts that would result from this or that option. These notes would be accompanied by various drafts of an amending treaty, of varying lengths and degrees of readability, illustrating different options (with or without the Charter, with or without “law,” with or without a distinction between the “noble” provisions and the more technical ones, etc.).

In the Berlin Declaration of March 25, 2007 celebrating the fiftieth anniversary of the signing of the Treaty of Rome, recalling the dream of European unification that had become reality, a good which should be protected for future generations, the last paragraph stated that “we are united in our aim of placing the European Union on a renewed common basis before the European Parliament elections in 2009.”⁵⁸

Gradually, the extensive consultations were being transformed into a kind of pre-IGC. The main elements of the “constitutional process,” as Chancellor Merkel had called it in her letter, appeared quickly as follows⁵⁹:

57. Brussels European Council 2006, *supra* note 52, at 15.

58. Presidency of the European Union, Declaration on the Occasion of the Fiftieth Anniversary of the Signature of the Treaties of Rome, pt. III (2007), available at http://www.eu2007.de/de/News/download_docs/Maerz/0324-RAA/English.pdf.

59. Letter dated January 2, 2007 from Angela Merkel, Chancellor of Germany, to her counterparts (on file with author).

—abandonment of both the “constitutional” concept of a single text that recopied, and hence obliged to re-ratify, past texts, and the title “Constitution”;

—development of a shorter treaty⁶⁰ inserting, by amendment, into the TEU (which retained its name) and the EC Treaty (renamed “Treaty on the Functioning of the European Union”) the substantive innovations contained in the Constitutional Treaty, particularly the “institutional package” and the establishment of a single legal personality for the Union;

—adaptation of some of these innovations to meet the concerns of some Member States, including, of course, France and the Netherlands, but also the Czech Republic, Denmark, Poland, the United Kingdom, and others.

About forty points were raised and discussed during the months before the European Council of June 2007, points that led to the deletion, modification, or addition of various provisions or declarations. These points can be divided into nine groups:

1. Abolition of the Pillars: To highlight the specific character of the former second pillar (CFSP) in relation to other provisions of the treaties, some Member State representatives insisted that the CFSP chapter should remain located in the TEU and not be transferred to the “toolbox” of the EC Treaty. They also obtained (a) the addition of a paragraph on the specificity of the CFSP in the first article of the CFSP chapter,⁶¹ (b) the exclusion of the CFSP from the scope of the flexibility clause,⁶² (c) a declaration

60. Approximately 200 pages in length (similar to that of the Treaty of Amsterdam), compared with 700 pages for the Constitutional Treaty.

61. Compare TEU post-Lisbon, *supra* note 38, art. 24(1), 2010 O.J. C 83, at 30, with Draft Constitutional Treaty, *supra* note 23, art. I-16(1), 2004 O.J. C 310, at 17. However, as in the Constitutional Treaty, the CFSP chapter was placed under a common umbrella of principles and objectives, together with the provisions on the Union’s external action, which were in the TFEU. See TEU post-Lisbon, *supra* note 38, arts. 21–23, 2010 O.J. C 83, at 28–30; TFEU, *supra* note 38, art. 205, 2010 O.J. C 83, at 139.

62. Compare TFEU, *supra* note 38, art. 352(4), 2010 O.J. C 83, at 196, with Draft Constitutional Treaty, *supra* note 23, art. I-18, 2004 O.J. C 310, at 15.

concerning this subject (No. 41),⁶³ and (d) a specific article on data protection by Member States in this field.⁶⁴

2. Delimitation of Competences: For some, the purpose was to better frame the system of Union competences and to make it clear, in particular, that the competences conferred on the Union or exercised by it could also be given back to Member States or that competences not yet exercised remained with Member States. Consequently, several such reminders were added in the provisions on relations between the Union and Member States,⁶⁵ in the provisions on competences,⁶⁶ and in the legal basis for the ordinary revision procedure of the treaties,⁶⁷ complemented by two declarations (Nos. 18 and 42).⁶⁸

3. Charter of Fundamental Rights: Some Member States did not want the Charter in the treaties, but the overwhelming majority of Member States did want it incorporated. The solution was to insert a reference to the Charter that would give it the quality of primary law, but this had to be accompanied with an express reminder that the Charter did not add to the competences of the Union.⁶⁹

4. Role of National Parliaments: Some Member States wanted to strengthen the role of national parliaments in

63. Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, Declaration 41 on Article 352 of the Treaty on the Functioning of the European Union, 2010 O.J. C 83/01, at 350 [2010 Consolidated TEU & TFEU].

64. Compare TEU post-Lisbon, *supra* note 38, art. 39, 2010 O.J. C 83, at 36, with Draft Constitutional Treaty, *supra* note 23, art. I-51, 2004 O.J. C 310, at 36. There was also agreement to add an article in Protocol 22 on the Position of Denmark (annexed to the TEU and TFEU), specifying that the Danish opt-out would also apply to the processing of personal data by Member States regarding activities in the JHA. Protocol (No. 22) on the Position of Denmark, art. 2a, 2010 O.J. C 83, at 300.

65. Compare TEU post-Lisbon, *supra* note 38, art. 4(1), 2010 O.J. C 83, at 18, with Draft Constitutional Treaty, *supra* note 23, art. I-5, 2004 O.J. C 310, at 12.

66. Compare TEU post-Lisbon, *supra* note 38, art. 5(2), 2010 O.J. C 83, at 18 and TFEU, *supra* note 38, arts. 2(2), 6, 2010 O.J. C 83, at 50, 52, with Draft Constitutional Treaty, *supra* note 23, arts. I-11(2), I-12(2), I-17, 2004 O.J. C 310, at 14, 15, 17.

67. Compare TEU post-Lisbon, *supra* note 38, art. 48(2), 2010 O.J. C 83, at 42, with Draft Constitutional Treaty, *supra* note 23, art. IV-443(1), 2004 O.J. C 310, at 189.

68. See 2010 Consolidated TEU & TFEU, Declaration 18 in Relation to the Delimitation of Competences, 2010 O.J. C 83/344, and Declaration 42 on Article 352 of the Treaty on the Functioning of the European Union, *id.* at 351 (on limits of the flexibility clause).

69. Compare TEU post-Lisbon, *supra* note 38, art. 6(1), 2010 O.J. C 83, at 19, with Draft Constitutional Treaty, *supra* note 23, art. I-9, 2004 O.J. C 310, at 13.

monitoring compliance with the principle of subsidiarity by introducing the possibility of a “red card” (right to block the legislative process of the Union) in addition to the “yellow card” system already foreseen. They obtained the extension from six to eight weeks for the period during which national parliaments may send the EU legislator a reasoned opinion on subsidiarity (Protocol Nos. 1 and 2)⁷⁰ and the addition of an article highlighting the rights and role of national parliaments (Article 12 TEU).

5. Enlargement: Some wanted to include the so-called “Copenhagen criteria” in the article on the enlargement procedure. A declaration was envisaged, but not agreed at that stage.

6. Primacy of Union Law: Some requested the deletion of Article I-6 of the Constitutional Treaty, which codified the jurisprudential principle of primacy, but others opposed it. It was therefore decided to delete the article but to insert a declaration (No. 17) recalling the case law on this principle.⁷¹

7. Terminology: Those who opposed using any constitutional terminology (e.g., “law,” “Minister”) in the treaty succeeded in having it removed, as well as the article on the symbols of the Union.⁷²

8. Special Procedures: In certain sensitive sectors, the transition to qualified majority had been accompanied by a mechanism called a “brake” or “emergency brake” by which the European Council acted as a sort of appeals chamber. Some called for the strengthening of one or the other of these mechanisms. In compensation, they proposed to make it easier to move toward enhanced cooperation in case of deadlock. The

70. Compare 2010 Consolidated TEU & TFEU, Protocol (No. 1) on the Role of National Parliaments in the European Union, art. 4, 2010 O.J. C 83/203, at 204, and Protocol (No. 2), *supra* note 47, art. 6, 2010 O.J. C 83, at 206, with Draft Constitutional Treaty, Protocol 1 on the Role of National Parliaments in the European Union, art. 4, 2004 O.J. C 310, at 205 and Draft Constitutional Treaty, Protocol 2 on the Application of the Principles of Subsidiarity and Proportionality, art. 6, 2004 O.J. C 310, at 208. At a point, it was envisaged to give national parliaments a right similar to the citizens’ initiative by which they could invite the Commission to submit proposals in an area of EU competence, but this idea was not pursued.

71. 2010 Consolidated TEU & TFEU, Declaration 17 Concerning Primacy, 2010 O.J. C 83/344.

72. See Draft Constitutional Treaty, *supra* note 23, art. I-8, 2004 O.J. C 310, at 13 (on the flag, anthem, motto, currency, and Europe day).

“brake” mechanism was reinforced in the field of social security,⁷³ but the “accelerator” mechanism was made easier to use, and even extended in the field of JHA.⁷⁴

9. Clarifications and Additions in Some Areas: Some asked for clarifications and additions in the areas of public services, environment, and energy, but without effect at that stage, apart from a draft declaration on public services.

The wish to clarify the division of powers also led to a series of “surgical” adjustments and transfers of certain provisions from one chapter to another, which made them fall within a different legal regime. Such adaptations related to the definition of the objectives of the Union,⁷⁵ the procedure for acceding to the European Convention on Human Rights, the granting of jurisdiction to the Court of Justice over European intellectual property rights,⁷⁶ and the provisions on diplomatic protection, space and health.⁷⁷ Articles giving the EU powers concerning

73. Compare TFEU, *supra* note 38, art. 48, 2010 O.J. C 83, at 67, with Draft Constitutional Treaty, *supra* note 23, arts. III-136(2), 2004 O.J. C 310, at 60.

74. Compare TFEU, *supra* note 38, arts. 82(3), 83(3), 86(1), 87(3), 2010 O.J. C 83, at 80, 81, 82, 83–84, with Draft Constitutional Treaty, *supra* note 23, arts. III-270, III-271, III-274, III-275, 2004 O.J. C 310, at 118–19, 119–20, 121, 121–22.

75. An example of such a change included clarifying in TEU post-Lisbon Article 3 on the objectives of the EU, on the one hand, the objectives of the area of freedom, security, and justice and, on the other hand, those of the internal market, with deletion from these objectives of the words “where competition is free and undistorted,” which had caused emotion in the referendum debate in France. Compare TEU post-Lisbon, *supra* note 38, art. 3(2–3), 2010 O.J. C 83, at 17, with Draft Constitutional Treaty, *supra* note 23, art. I-3(2–3), 2004 O.J. C 310, at 11. This formula did not exist as such in the EC Treaty; it was invented by the convention that had merged two existing formulas: “[A] system ensuring that competition in the internal market is not distorted,” which had been taken from Article 3(1)(g) of the EC Treaty and which listed the means to achieve the objectives of the EC, and “an open market economy with free competition,” which had been taken from Articles 4, 98, and 105 of the EC Treaty and related to economic and monetary union. A reference to the “protection of its citizens” was also added in paragraph 5 (of Article 3 TFEU) on international relations. Compare TEU post-Lisbon, *supra* note 38, art. 3(5), 2010 O.J. C 83, at 17, with Draft Constitutional Treaty, *supra* note 23, art. I-3(4), 2004 O.J. C 310, at 12.

76. In both cases, unanimity and ratification by Member States was provided for while the Draft Constitutional Treaty provided for qualified majority and did not require ratification by Member States. Compare TFEU, *supra* note 38, arts. 218(8), 262, 2010 O.J. C 83, at 146, 162, with Draft Constitutional Treaty, *supra* note 23, arts. III-325(8), III-364, 2004 O.J. C 310, at 148, 159.

77. It was expressly specified in the legal bases in question that the measures the EU can adopt on these matters are of a support character and do not allow harmonization of national legislation. Compare TFEU, *supra* note 38, arts. 23, 168(5),

passports and identity documents and on the freezing of assets in the field of JHA were transferred to the title on the area of freedom, security and justice.⁷⁸

This period of extensive consultations helped the European Council in June 2007 not only to prepare a report assessing “the state of discussion with regard to the Constitutional Treaty and [exploring] possible future developments,”⁷⁹ as requested by the European Council in June 2006, but also to present a very detailed mandate for an IGC.

The draft IGC mandate will probably remain unique. It was a kind of map, a game of orienteering inside the treaties. It consisted of precise indications of where and how the Constitutional Treaty’s innovations (which were named “innovations agreed in the 2004 IGC” in the mandate) should be incorporated into the existing treaties. It also contained, mostly in the form of articles or declarations already written, the forty additions or modifications that had been agreed upon during the extensive consultations. This somewhat revolutionary method was made possible thanks to the drafting work that had already taken place, i.e., the drafting of both a complete amending treaty and the resulting consolidated versions of the treaties. One could foresee in the mandate the future amending treaty and how the future TEU and EC Treaty (TFEU) would look after consolidation.

During the three days (and two nights) of the European Council from June 21 to 23, the original draft mandate was amended on several points. With respect to the nine areas listed above, the following amendments were made⁸⁰:

189(2), 2010 O.J. C 83, at 58, 123, 132, *with* Draft Constitutional Treaty, *supra* note 23, arts. III-127, III-254(2), III-278(5), 2004 O.J. C 310, at 57, 112, 124.

78. Articles 75 and 77(3) of the TFEU were located in the title on the area of freedom, security, and justice, thereby making them fall under the opt-out provided by Protocols Nos. 21 and 22. *Compare* TFEU, *supra* note 38, arts. 75, 77(3), 2010 O.J. C 83, at 75, 76, *with* Draft Constitutional Treaty, *supra* note 23, arts. III-125, III-160, 2004 O.J. C 310, 56–57, 68.

79. *See supra* note 55 and accompanying text.

80. *See* the IGC mandate that was agreed upon in the morning of June 23, 2007, E.U. BULL., *supra* note 50. For a detailed overview of changes the mandate brought to the innovations of the Constitutional Treaty, see PIRIS, THE TREATY OF LISBON, *supra* note 6, at 33–40.

1. Abolition of the Pillars: addition of two (repetitive) declarations (Nos. 13 and 14) on the limits of CFSP⁸¹ and a declaration (No. 24) stating that the grant of a single legal personality to the Union did not change the allocation of competences;⁸²

2. Delimitation of Competences: addition of a reference to national security as remaining within the sole responsibility of Member States;⁸³ an article on cooperation between Member States in this area;⁸⁴ three new protocols—on the exercise of shared competence (No. 25),⁸⁵ on services of general interest (No. 26),⁸⁶ and on the internal market and competition (No. 27)⁸⁷—and text concerning the repeal of EU legislative acts in Declaration (No. 18) on the delimitation of competences;⁸⁸

3. Charter of Fundamental Rights: addition of a paragraph on the interpretation of the Charter,⁸⁹ a declaration (No. 1),⁹⁰ and a protocol (No. 30) on the application of the Charter to Poland and the United Kingdom;⁹¹

81. 2010 Consolidated TEU & TFEU, Declaration 13 Concerning the Common Foreign and Security Policy, 2010 O.J. C 83/343, and Declaration 14 Concerning the Common Foreign and Security Policy, *id.*

82. 2010 Consolidated TEU & TFEU, Declaration 24 Concerning the Legal Personality of the European Union, 2010 O.J. C 83/346.

83. TEU post-Lisbon, *supra* note 38, art. 4(2), 2010 O.J. C 83, at 18 (“In particular, national security remains the sole responsibility of each Member State.”).

84. TFEU, *supra* note 38, art. 73, 2010 O.J. C 83, at 74.

85. 2010 Consolidated TEU & TFEU, Protocol (No. 25) on the Exercise of Shared Competence, 2010 O.J. C 83/307.

86. 2010 Consolidated TEU & TFEU, Protocol (No. 26) on Services of General Interest, 2010 O.J. C 83/308.

87. 2010 Consolidated TEU & TFEU, Protocol (No. 27) on the Internal Market and Competition, 2010 O.J. C 83/309. This protocol was linked to the deletion of the words “free and undistorted competition” in Article 3 of the TEU, a deletion which, some feared, would make it more difficult to adopt legal acts in the field of mergers since, under the EC Treaty, such acts had been adopted by using Article 308 (now Article 352 TFEU) in association with the mention of a “system ensuring that competition in the internal market is not distorted” in Article 33(1)(g) of the EC Treaty. See Council Regulation 139/04/EC on the Control of Concentrations between Undertakings, 2004 O.J. L 24/1.

88. 2010 Consolidated TEU & TFEU, Declaration 18 in Relation to the Delimitation of Competences, 2010 O.J. C 83/344.

89. TEU post-Lisbon, *supra* note 38, art. 6(1), 2010 O.J. C 83, at 19.

90. 2010 Consolidated TEU & TFEU, Declaration 1 Concerning the Charter of Fundamental Rights of the European Union, 2010 O.J. C 83/337.

91. 2010 Consolidated TEU & TFEU, Protocol (No. 30) on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom, 2010 O.J. C 83/313.

4. Role of National Parliaments: addition of a strengthened procedure by which national parliaments can seek to enforce the principle of subsidiarity with regard to legislative acts adopted by co-decision (the so-called “orange card”)⁹² and a right of objection by national parliaments on decisions to use the *passerelle* in the area of family law;⁹³

5. Enlargement: addition of a reference to the eligibility criteria agreed upon by the European Council;⁹⁴

6. Primacy of Union Law: addition of a reference to the Court of Justice’s doctrine in a declaration (No. 17);⁹⁵

7. Terminology: replacing the name “Union Minister for Foreign Affairs” with “High Representative of the Union for Foreign Affairs and Security Policy”;

8. Special Procedures: addition of a provision on facilitating the use of enhanced cooperation through limiting the minimum number of Member States required to launch such cooperation to nine (instead of two-thirds)⁹⁶ and extension of the scope of the UK’s opt-out protocol to also cover judicial cooperation in criminal matters and police cooperation;⁹⁷ and,

9. Clarification and Additions in Some Areas: addition of a reference, in the statement of the Union’s objectives, to the economic and monetary union and the euro,⁹⁸ and addition of a

92. 2010 Consolidated TEU & TFEU, Protocol (No. 2), *supra* note 47, art. 7(3), 2010 O.J. C 83/206, at 208.

93. TFEU, *supra* note 38, art. 81(3), 2010 O.J. C 83, at 79.

94. *Compare* TEU post-Lisbon, *supra* note 23, art. 49, 2010 O.J. C 83, at 43, *with* Draft Constitutional Treaty, *supra* note 23, art. I-58, 2004 O.J. C 310, at 38.

95. It was agreed to insert a legal opinion from the Legal Service of the Council. This had never been done before. 2010 Consolidated TEU & TFEU, Declaration 17 Concerning Primacy, 2010 O.J. C 83/344; *see also* European Council, Opinion of the Legal Service, 11197/07, JUR 260 (June 22, 2007).

96. *See* TEU post-Lisbon, *supra* note 38, art. 20(2), 2010 O.J. C 83, at 28.

97. *See* 2010 Consolidated TEU & TFEU, Protocol (No. 21) on the Position of the United Kingdom and Ireland in Respect of the Area of Freedom, Security and Justice, 2010 O.J. C 83/295. A cryptic sentence in the mandate left it to the IGC to consider the issue of amendments made to existing measures and measures based on the Schengen *acquis*. The resolution of this issue, under the expert leadership of Jean-Claude Piris, occupied half of the time of the working group of legal experts of the IGC in September 2007.

98. *Compare* TEU post-Lisbon, *supra* note 38, art. 3(4), 2010 O.J. C 83, at 17, *with* Draft Constitutional Treaty, *supra* note 23, art. I-3, 2004 O.J. C 310, at 11–12.

reference to the fight against climate change in the article on the environment⁹⁹ and to solidarity in the field of energy.¹⁰⁰

It was also agreed to postpone the entry into force of the new double-majority system of Council voting to November 1, 2014, and allow a possibility, until March 31, 2017, for any member of the Council to request the application of the old rule of qualified-majority when a vote took place.¹⁰¹

This negotiation was conducted masterfully by Chancellor Merkel. At one point, after a meeting of high officials, many thought all was lost because of a serious blockage by one delegation. Some began to wander the corridors in a state of loss, or “schadenfreuding” around, to the tune of “I told you so.” However, the atmosphere among the Heads of State or Government, who were having a separate meeting under the leadership of Chancellor Merkel, was calm, consistent, and serious.

It is obvious that any renegotiation could only result, despite the resistance of the eighteen Member States that had ratified the Constitutional Treaty, in a retreat from or reframing of certain advances of the Constitutional Treaty, which would not necessarily correspond to what some proponents of the French no vote, and of any (necessarily better) plan B, had in mind. But when one decides to reshuffle the cards, one can never know in advance what game will be on hand and how other players will play.

In general, the European Council confirmed the approach adopted during the preparatory work, namely that “the constitutional concept . . . is abandoned.”¹⁰² The option chosen in the end was that of a text that bore the least possible

99. Compare TFEU, *supra* note 38, art. 191(1), 2010 O.J. C 83, at 132, with Draft Constitutional Treaty, *supra* note 23, art. III-233(1), 2004 O.J. C 310, at 103.

100. Compare TFEU, *supra* note 38, arts. 122(1), 194(1), 2010 O.J. C 83, at 98, 134, with Draft Constitutional Treaty, *supra* note 23, arts. III-180(1), III-256(1), 2004 O.J. C 310, at 77, 112.

101. See 2010 Consolidated TEU & TFEU, Protocol (No. 36) on Transitional Provisions, art. 3(2), 2010 O.J. C 83/322, at 322. This was accompanied by an extension of the so-called “Ioannina” mechanism, which had been approved under the Constitutional Treaty. Compare Declaration 7 on Article 16(4) of the Treaty on European Union and Article 238(2) of the Treaty on the Functioning of the European Union, 2010 O.J. C 83, at 338, with Draft Constitutional Treaty, *supra* note 23, Declaration 7 on Article I-27, 2004 O.J. C 310, at 423.

102. E.U. BULL., *supra* note 50, at 16.

resemblance to the Constitutional Treaty, while taking over most of its substantial innovations. The institutional package had been preserved.

In order to avoid letting things rest too long, the European Council agreed to quickly convene an IGC, which was to be immediately opened by the end of July and be completed by the end of 2007, so that the treaty could be ratified before the European elections of June 2009. The IGC was “to carry out its work in accordance with the mandate.”¹⁰³

The Council Legal Service prepared a draft treaty, the text of which was already well advanced thanks to the earlier work, and the draft was put on the table on July 23, the day of the official launch of the IGC under the Portuguese presidency. The main work of the IGC was carried out by a group of legal experts, soon named the “Piris II Group” because it was chaired by Jean-Claude Piris, as had been the group of legal experts of the IGC in 2004.¹⁰⁴ This work was endorsed by the IGC at the level of Foreign Ministers on October 5, and then transmitted to the Heads of State or Government for their final meeting of October 18, 2007 in Lisbon. They agreed on some final amendments,¹⁰⁵ and the treaty was signed on December 17, 2007. Ratification could now begin, the idea being that it would take place during

103. *Id.* at 9.

104. For a detailed overview of the work of this “Piris II” Group, and the corrections it brought to the draft treaty, see PIRIS, *THE TREATY OF LISBON*, *supra* note 6, at 40–44.

105. They reached an agreement on the future composition of the European Parliament (on the basis of the suggestions made by the European Parliament), deciding to increase the total membership to 751 instead of 750, *see* TEU post-Lisbon, *supra* note 38, art. 14(2), O.J. C 83, at 22; 2010 Consolidated TEU & TFEU, Declaration 4 on the Composition of the European Parliament, 2010 O.J. C 83/337; Declaration 5 on the Political Agreement by the European Council Concerning the Draft Decision on the Composition of the European Parliament, 2010 O.J. C 83, at 337; on a protocol relating to the “Ioannina” Decision, *see* Protocol (No. 9) on the Decision of the Council Relating to the Implementation of Article 16(4) of the Treaty on European Union and Article 238(2) of the Treaty on the Functioning of the European Union between 1 November 2014 and 31 March 2017 on the One Hand, and as from 1 April 2017 on the Other, 2010 O.J. C 83, at 274; on the number of Advocates-General in the Court of Justice of the European Union, *see* Declaration 38 on Article 252 of the Treaty on the Functioning of the European Union Regarding the Number of Advocates-General in the Court of Justice, 2010 O.J. C 83, at 350; and on the European Parliament’s role in appointing the High Representative, *see* Declaration 12 on Article 18 of the Treaty on European Union, 2010 O.J. C 83, at 342. For a general discussion, *see* PIRIS, *THE TREATY OF LISBON*, *supra* note 6 at 44–46.

2008 in order to enable the treaty to enter into force on January 1, 2009.¹⁰⁶ But the nerves would still be put to the test.

III. HISTORY PROLONGS THE STORY

Six months after the signing of the treaty, on June 12, 2008, 53% of the Irish people, in a referendum, said no to the Treaty of Lisbon. A week later, the European Council, taking note of this result, also noted “that the parliaments in 19 Member States have ratified the Treaty and that the ratification process continues in other countries.”¹⁰⁷

In September, the subprime mortgage crisis erupted, Lehman Brothers went bankrupt, and the financial system was on the verge of apoplexy.

In December 2008, under the French presidency, the European Council endorsed the components of a solution (which would be formalized in June 2009) to enable Ireland to hold a second referendum. This solution included a major stab in the back to the institutional package that had been hitherto untouchable. The European Council promised to abandon the portion of the draft Lisbon Treaty that would have reduced number of commissioners: “[T]he European Council agrees that provided the Treaty of Lisbon enters into force, a decision will be taken, in accordance with the necessary legal procedures, to the effect that the Commission shall continue to include one national of each Member State.”¹⁰⁸

106. This was the objective set out in the Treaty of Lisbon. Treaty of Lisbon, *supra* note 48, art. 6(2), 2007 O.J. C 306, at 135 (“This Treaty shall enter into force on 1 January 2009, . . . or, failing that, on the first day of the month following the deposit of the instrument of ratification by the last signatory State to take this step.”).

107. Brussels European Council, Conclusions of the Presidency, E.U. BULL., no. 6, at 8 (2008).

108. Brussels European Council, Presidency Conclusions, E.U. BULL., no. 12, at 8 (2008). The other part was, thanks to the expert assistance of Jean-Claude Piris, a legal guarantee given to Ireland that the Treaty of Lisbon did not change or affect some sensitive areas for Ireland (taxation policy, family, social, and ethical issues, and defense provisions with regard to Ireland’s traditional policy of neutrality). *See id.* at 8–9. This agreement was formalized in June 2009 in the form of a “Decision of the Heads of State or Government,” with the promise of turning it into a protocol “at the time of the conclusion of the next accession Treaty,” which meant a political link on the timing (to be adopted at the same time as a separate act), but not that the protocol would be made part of the accession treaty. Such a protocol could only be annexed to the treaties through the ordinary revision procedure. *See* TEU post-Lisbon, *supra* note 38, art. 48(2)–(5), 2010 O.J. C 83, at 42; Brussels European Council, Presidency Conclusions, E.U.

Meanwhile, Ireland had been hit very hard by the financial crisis, and the housing market had collapsed. The second referendum was held on October 2, 2009, and 67% voted yes. Ireland ratified the treaty on October 23, 2009.

But that would not be the end of the problems. Czech President Václav Klaus decided not to sign the ratification of the Treaty of Lisbon adopted in the spring of 2009 by the Czech parliament, despite the fact that the Czech Constitutional Court had held, on November 26, 2008, that the Charter of Fundamental Rights and the provisions of the Treaty of Lisbon were consistent with the Czech Constitution.¹⁰⁹ On September 29, 2009, three days before the second referendum in Ireland, Mr. Klaus encouraged the filing of a further appeal to the Czech Constitutional Court and demanded of the other EU Member States that the Czech Republic also be covered by Protocol (No. 30) on the Application of the Charter to Poland and the United Kingdom.

Cornered, the other Member States agreed in late October to satisfy this request in the form of a promise similar to the one made to Ireland, namely the adoption “at the time of the conclusion of the next Accession Treaty” of a protocol amending Protocol (No. 30) to add the Czech Republic.¹¹⁰ On November 3, 2009, the Czech Constitutional Court ruled that the additional provisions of the Treaty of Lisbon that it had examined were

BULL., no. 6, at 8–9, 14–16 (2009). For a detailed overview, see PIRIS, *THE TREATY OF LISBON*, *supra* note 6, at 51–60.

109. *Nález Ústavního soudu ze dne 26.11.2008* [Decision of the Constitutional Court of Nov. 26, 2008], ÚS 19/08, *available at* <http://www.concourt.cz/clanek/pl-19-08>.

110. *See* Brussels European Council, Presidency Conclusions, October 2009 Annex I to Doc. 15265/1/09, at 14, *available at* http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/110889.pdf. The process of ratification of the Treaty of Lisbon was not easy in Germany and Poland either. In Germany, the Constitutional Court had been requested to review the Treaty of Lisbon’s compatibility with the German Basic Law. In a strongly worded decision of June 30, 2009, the Constitutional Court held the Treaty of Lisbon to be compatible with the German Basic Law, but concluded that the German law should be changed to give more power to the German parliament in some European procedures. The law was amended in September and the ratification was deposited on September 25, 2009. In Poland, the Polish President Lech Kaczyński had conditioned his signing of the ratification law (adopted by the Polish Parliament in April 2008) to the ratification of the treaty by Ireland. He signed the law on October 10, 2008 after the second referendum in Ireland, and the Polish ratification was deposited on October 12, 2009. *See generally* PIRIS, *THE TREATY OF LISBON*, *supra* note 6, at 60–63.

consistent with the Czech Constitution,¹¹¹ and on the same day, Mr. Klaus agreed to sign the Czech ratification law of the Treaty of Lisbon. This allowed the treaty to enter into force on December 1, 2009.

EPILOGUE

Since then, the Treaty of Lisbon has commenced its life and history continues to be made. The Heads of State or Government chose and appointed the two personalities whom they wanted to embody the two new functions created by the treaty: former Prime Minister of Belgium Herman van Rompuy as the European Council president, and former European Union Trade Commissioner Catherine Ashton, from the United Kingdom, as the High Representative for Foreign Affairs and Security Policy. The European diplomatic service was established by a sort of merger-acquisition of relevant departments of the Council Secretariat and the Commission, including the latter's network of some 130 delegations to various countries and international organizations.¹¹² The European Parliament is now spreading the wings of its new powers, though the trajectory is not always very obvious. The European Council—to which, to their amazement and disappointment, the Foreign Ministers are no longer standing invitees, a fact that does not displease the Heads of State or Government who can hold more frank discussions among themselves—had to affront the storm of the sovereign debt crisis in the euro area.

Like all its predecessors, the Treaty of Lisbon is commented on, criticized, and even considered catastrophic; as in a poorly organized banquet where the guests have waited too long for the food, which arrived cold, and the party was a bit spoiled.

The fact is that some of the “internal flexibility” clauses,¹¹³ which the treaty contains in order to offset the introduction of a more burdensome ordinary revision procedure (which requests the automatic convening of a convention, unless the European

111. *Nález Ústavního soudu ze dne 03.11.2009* [Decision of the Constitutional Court of Nov. 3, 2009], ÚS 29/09, available at <http://www.concourt.cz/clanek/pl-29-09>.

112. See Council Decision No. 2010/427/EU (European External Action Service), 2010 O.J. L 201/30.

113. See, e.g., PIRIS, THE TREATY OF LISBON, *supra* note 6, at 361–64 (listing simplified revision procedures and *passerelles*).

Parliament agrees not to do so), have been rendered much more difficult to use,¹¹⁴ and even, for some of them, are about to be made meaningless because of the unilateral action of one Member State.

This is particularly true with regard to the few so-called *passerelles* provisions, which enable the European Council to decide to shift the voting requirement of most legal bases (except for defense matters) in the treaty from unanimity to qualified majority voting, without the need to amend the treaty through the ordinary revision procedure and without the need for national ratification. To use the general *passerelle*, the treaty only provides for a procedure under which, in the absence of objection by a national parliament within six months, the European Council can adopt the decision to use the *passerelle*.¹¹⁵ Other specific *passerelles* may be used without any reference to national parliaments.¹¹⁶

However, the United Kingdom has introduced a bill whose adoption would require the government to submit to a referendum on not just any treaty amendment that would result in transferring new competences or powers from the United Kingdom to the Union, but almost all uses of a *passerelle* (whether

114. This is notably due to the German law adopted in September 2009 on the occasion of the ratification of the Treaty of Lisbon, which provides in many cases, for the use of the general *passerelle*, a national ratification procedure identical to that for an amendment of the treaties. See PIRIS, *THE TREATY OF LISBON*, *supra* note 6, at 341–58.

115. See TEU post-Lisbon, *supra* note 38, art. 48(7), 2010 O.J. C 83, at 43 (conferring this power on the European Council, acting unanimously, after approval by the European Parliament by a majority of its members). The instrument of the *passerelle* is not new; it already existed in certain provisions of the EC Treaty. See EC Treaty, *supra* note 40, art. 67(2), 2006 O.J. C 321, at 69 (*passerelle* in the field of immigration, asylum, and judicial cooperation in civil matters); *id.* art. 137(2), at 108 (*passerelle* in the field of social policy); *id.* art. 175(2)(c), at 125 (*passerelle* in the environmental field); see also Council Decision No. 04/927/EC, 2004 O.J. L 396/45, which is an example of the use in late 2004 of the *passerelle* in Article 67(2) of the EC Treaty. The novelty of the Treaty of Lisbon is the insertion of a *passerelle* that can be used generally for all the legal bases of the TFEU or for CFSP (except defense and the provisions listed in TFEU Article 353).

116. See TEU post-Lisbon, *supra* note 38, art. 31(3), (4), 2010 O.J. C 83, at 34 (*passerelle* in the field of CFSP); see also TFEU, *supra* note 38, art. 153(2), 2010 O.J. C 83, at 83 (*passerelle* in the field of social policy); *id.* art. 192(2), at 133 (*passerelle* in the field of environment); *id.* art. 312(2), at 182 (*passerelle* in the field of the multiannual financial framework); *id.* art. 333, at 191 (general *passerelle* within an enhanced cooperation).

general or specific).¹¹⁷ The likely consequence of this law is that, except in an area in which the United Kingdom does not participate, either because of an opt-out or because there is an established closer cooperation without the United Kingdom, *passerelles* will in effect be made impossible to use.

Besides the EU bill in the United Kingdom, the extreme difficulty of negotiating and ratifying the institutional package that was wanted for fifteen years to help the Union face the biggest enlargement in its history demonstrates that it has become progressively impossible to change the treaties, except in minor ways or in amendments unlikely to provoke a referendum.¹¹⁸ One has already observed this trend in the decision to modify the TFEU to include a provision that will concern only euro area Member States and does not increase the competences conferred on the EU.¹¹⁹

117. See European Union Bill, 2010-11, H.C. Bill [106] (Gr. Brit.) (aiming to strengthen the UK procedures for ratifying certain EU decisions and treaty changes). The bill was presented to the UK parliament by the government on November 11, 2010.

118. Ratification by referendum has been used in Ireland and Denmark (where the conditions provided by Article 20 of the Danish Constitution are met), and was promised in the UK (EU draft bill) and Austria (statement by Chancellor Gusenbauer in June 2008). Since the entry into force of the Treaty of Lisbon (at the time of writing, June 2011), three minor amendments to the treaties have been decided. The first is to help increase the number of members of the European Parliament until the end of the present 2009–2014 parliamentary term. See Protocol Amending the Protocol (No. 36) on Transitional Provisions Annexed to the Treaty on European Union, to the Treaty on the Functioning of the European Union and to the Treaty Establishing the European Atomic Energy Community, 2010 O.J. C 263/01 (this amending Protocol was adopted by an IGC on June 23, 2010, without convening a convention; at the time of writing (June 2011), it had been ratified by twenty-one Member States). The second amendment changes the status of the French island of Saint-Barthélemy from that of outermost region to that of overseas country or territory. See European Council Decision No. 2010/718/EU (*Saint-Barthélemy*), 2010 O.J. L 325/04/4 (based on the simplified revision provided for in Article 355(6) of the TFEU). The third in the European Council Decision which amended Article 136 TFEU. See *infra* note 119.

119. See European Council Decision No. 2011/199/EU, 2011 O.J. L 91/01. This decision was adopted on March 25, 2011 and must be approved by Member States “in accordance with their respective constitutional requirements.” *Id.* It is based on the simplified revision procedure provided for in TEU Article 48(6), which requires a unanimous decision of the European Council, without the convening of a convention or an IGC. The use of this procedure was possible because the Decision does not increase the competences conferred on the Union. The Decision inserts into TEU Article 136 a declaratory provision stating that Member States of the euro area may establish a stability mechanism to preserve the stability of the euro area as a whole and that “the granting of any required financial assistance under the mechanism will be made subject to strict conditionality.” *Id.*

It is likely that in the future, those Member States who wish to deepen their integration in a given area will have no choice but to act either within the framework of enhanced cooperation—in which the United Kingdom would not participate if the participants want to be able to use the *passerelle* within that area of enhanced cooperation—or through intergovernmental cooperation or international agreements outside the EU, but without the benefit of the tools available in the Union's legal order (e.g., enforcement mechanisms, judicial system). But that is another story.