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The Lisbon Treaty: A Brief Outline

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Abstract

The story of the Lisbon Treaty cannot be told—nor can a brief outline thereof be sketched—without going back to the Constitutional Treaty, which represents the background to the Lisbon Treaty and against which the Lisbon Treaty ought to be assessed. That is why the present outline will first refer to the Constitutional Treaty, before addressing the structure and the content of the Lisbon Treaty.

THE LISBON TREATY: A BRIEF OUTLINE

*Giorgio Maganza**

INTRODUCTION

The signing of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (“Lisbon Treaty”)¹ on 13th December 2007 put an end to a period of political and institutional crisis in the European Union which had opened in 2005, when the Treaty establishing a Constitution for Europe (“Constitutional Treaty”)² was rejected in two referenda by the French and Dutch voters. The new Treaty is due to enter into force on 1st January 2009, provided that the twenty-seven signatory Member States ratify it. Six already have.³

The story of the Lisbon Treaty cannot be told—nor can a brief outline thereof be sketched—without going back to the Constitutional Treaty, which represents the background to the Lisbon Treaty and against which the Lisbon Treaty ought to be assessed. That is why the present outline will first refer to the Constitutional Treaty, before addressing the structure and the content of the Lisbon Treaty.

I. *THE BACKGROUND TO THE LISBON TREATY: A FAIR ATTEMPT TO SIMPLIFY THINGS*

The Constitutional Treaty—which was signed in Rome on 29th October 2004 by all the (then) twenty-five Member States of the European Union, and which was ratified by eighteen Member States⁴ but rejected in two referenda held in France and the

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1. Draft Treaty of Lisbon (Reform Treaty) O.J. C 306/01 (2007) *opened for signature* Dec. 13, 2007, (not yet ratified) [hereinafter Lisbon Treaty].

2. Draft Treaty establishing a Constitution for Europe, O.J. C 310/1 (2004) [hereinafter Constitutional Treaty].

3. At the date of writing, Hungary, Slovenia, Malta, Romania, Bulgaria and France had ratified the Treaty.

4. Including Spain and Luxemburg, which held two successful referenda, as well as Bulgaria and Romania which joined the European Union in 2007. See *EU Constitution: Where Member States Stand*, BBC NEWS, Mar. 25, 2007, <http://news.bbc.co.uk/2/hi/europe/3954327.stm>.

Netherlands⁵—had broken a new path in Treaty-revision.⁶ Before being agreed upon under the usual procedure by an Intergovernmental Conference (“IGC”), the Constitutional Treaty had been debated and crafted by a large gathering of representatives, not only of the Member States, but also of the European Parliament, as well as of national Parliaments:⁷ it was the Convention model, already used to draft the Charter of Fundamental Rights of the European Union of 7th December 2000.

Albeit the product of a new Treaty-revision process, the Constitutional Treaty was not less a Treaty than any other basic treaty—from the Rome Treaties to the Single European Act, from the Maastricht Treaty to the Amsterdam and Nice Treaties—which had preceded it. However, its title referred to a constitution and it contained symbols of statehood—such as the anthem, the flag, and the motto—which certainly contributed to make the eurosceptic wind blow and to attract criticism from those who feared that the European integration process may lead to a State, or even to a federal State.

Would calling the Treaty “a Constitution for Europe” have made the European Union a State? Of course it would not. The European Court of Justice had done so almost twenty years earlier⁸ and nobody had protested. The Union is not a State—it still draws its authority from the sovereign States who are its founding and component members—and would not become one as a result of the Constitutional Treaty. The fact that the Union derives from the will of Member States would be spelled out in the Treaty and the relation between the Union and its Member States would be defined more clearly than ever before.

5. On 29 May, 2005, about 55% of the French voters pronounced against the ratification of the Treaty; three days later, the Dutch voters against the Treaty were about 62%. *See id.*

6. *See* JEAN-CLAUDE PIRIS, *THE CONSTITUTION FOR EUROPE: A LEGAL ANALYSIS* (2006). Documents relating to the Intergovernmental Conference (“IGC”) proceedings, which led to the signing of the Constitutional Treaty, can be found at http://www.consilium.europa.eu/cms3_applications/Applications/igc (last visited Mar. 28, 2008).

7. *See* The European Convention, Composition, <http://european-convention.eu.int/Static.asp?lang=EN&Content=Composition> (last visited May 7, 2008) (listing all participating members).

8. The Court called the Treaty “the basic constitutional charter.” *See* Parti écologiste “Les Verts” v. European Parliament, Case 294/83, [1986] E.C.R. 1339; *see also* Draft Agreement Relating to the Creation of the European Economic Area, Opinion 1/91, [1991] E.C.R. 6079.

Still, one cannot argue against the evocative power of names. And the name was apparently too much to bear: the name, probably more than the “thing,” contributed to the rejection of the Treaty. Thus, with the Lisbon Treaty, Member States reverted to the classical Treaty-revision approach.

Despite the fact that it never came into force, the Constitutional Treaty deserves to go on record as a true attempt to provide an enlarged European Union with a simplified structure and simpler procedures, as well as Institutions to make it function in a more efficient way, thus responding to the Nice Declaration and the Laeken European Council mandate.⁹

In particular, the Constitutional Treaty had managed to:

- concentrate the existing primary law—which represents about 3,000 pages from twenty different treaties—into one single document of 448 articles (coming up to 200 pages, or double, with protocols), repealing the existing basic treaties, as well as the treaties which had kept amending them over the years; that was a considerable simplification indeed; all the more so if one considers that the first sixty articles of the Constitutional Treaty already provided for an overall view of the Union’s objectives and means;¹⁰
- clearly define for the first time the system of competences (“who does what”) in the Union;¹¹

9. One year after the Nice “Declaration on the Future of the Union,” the declaration on the Future of European Union called for a better division and definition of competence in the European Union; simplification of the Union’s instruments; more democracy, transparency and efficiency in the European Union; and reorganization of the Treaties possibly leading to a constitutional text in the Union. See EUROPEAN COUNCIL MEETING IN LAEKEN, PRESIDENCY CONCLUSIONS 24-25 December 2001, SN 300/1/01 REV 1, available at http://ec.europa.eu/governance/impact/docs/key_docs/laeken_concl_en.pdf. The Nice Declaration of 2000 also referred to the status to be given to the newly adopted Charter and to the role of national parliaments. See Justice and Home Affairs: The Charter of Fundamental Rights, Treaty of Nice: Declaration 23 on the Future of the Union, http://ec.europa.eu/justice_home/unit/charte/en/declarations-nice.html (last visited May 7, 2008). To pave the way for the IGC to come, while encouraging a public debate on the future of the European Union, the European Council had decided to convene a Convention composed of the main parties involved in the debate on the future of the Union.

10. See Constitutional Treaty, *supra* note 2, arts. I-1–I-60, O.J. C 310/1, at 11-40 (2004).

11. See *id.* arts. I-11–I-18, O.J. C 310/1, at 14-18 (listing the categories of competences and defining the areas where the Union has exclusive competence, where it shares competence with the Member States, and where it has competence to carry out supporting, coordinating or complementary action).

- revise the Union institutional framework to make it more democratic and more efficient; and simplify the typology of legal instruments and the different types of decision-making procedures presently available;
- give treaty value to the Charter of Fundamental Rights of the European Union of 7th December 2000;¹²
- suppress the pillar structure, giving rise to a single entity, the European Union.

Many of the above achievements of the Constitutional Treaty can now be found in the Lisbon Treaty; however, that does not apply to the simplification, given the Treaty-revision approach that Member States had reverted to.

The Constitutional Treaty was indeed a readable text, compared to the traditional amending treaties that had preceded it, and a fair answer to the criticism often expressed in the post-Maastricht debates about the difficulty of grasping the intricacies of a multi-layered Treaty structure. The Constitutional Treaty's fair and straight answer was to do away with the thousands of pages of treaty texts which had been piling up for years, and start anew with a single, comprehensive text of a far lesser volume.

The Constitutional Treaty embodied a fair attempt at making things simpler and clearer; and yet, it was often criticized in the same terms as the previous treaties had been and it ultimately turned out making things more difficult. Thus, Member States reverted to the classical Treaty-revision method: to make a treaty amending the existing treaties.

II. *THE STRUCTURE OF THE AMENDING TREATY: BACK TO THE OLD CLASSICS*

The IGC which drafted the Lisbon Treaty was carefully prepared throughout the first semester of 2007, leading to the adoption of the IGC mandate by the European Council in June 2007.¹³ The German Presidency made a decisive contribution to its success; it was helped in this by the political circumstances that appeared in 2006, after the "reflection period" which followed the negative referenda, and notably by the commonly

12. *See id.* pt. II, O.J. C 310/1, at 41-54.

13. *See* Council of the European Union, Intergovernmental Conference 2007 Mandate, 11218/07, POLGEN 74 [hereinafter IGC Mandate], available at <http://register.consilium.europa.eu/pdf/en/07/st11/st11218.en07.pdf>.

shared objective of having a new treaty in force by the next elections of the European Parliament, scheduled for June 2009.¹⁴ This was reflected in the Berlin “Declaration on the occasion of the fiftieth anniversary of the signature of the Treaties of Rome” of 25th March 2007.¹⁵

It was felt in particular that having a new treaty in force by the next elections of the European Parliament might revive the citizens’ interest in the European Union and increase their participation in the European Parliament’s elections, a participation which had kept declining since the first election by direct universal suffrage was held in 1979. Furthermore, having the negotiations on a new treaty closed before the European Parliament election in 2009 would avoid any risk of overlapping between the “constitutional” discussions and the politically sensitive debate on the “mid-term review” of the financial perspectives due to take place in 2008/2009.¹⁶ It was clear however that time was extremely short: having a new treaty *in force* by 2009 could only be achieved, given the need to allow time for Member State ratifications, by having a new treaty *signed* by the end of 2007.

Since the early weeks of 2007, the preparation, and then the adoption, of the Berlin Declaration had shown the German Presidency’s determination, and Chancellor Angela Merkel’s per-

14. See Council of the European Union, Brussels European Council 21/22 June 2007, Presidency Conclusions, Council Document 11177/1/07 REV 1 CONCL 2, at 2 (2007), available at http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/94932.pdf.

15. The Declaration adopted on the occasion of the informal meeting of the Heads of State and Government in Berlin on 24-25 March 2007 notably reads, “[W]e are united in our aim of placing the European Union on a renewed common basis before the European Parliament elections in 2009.” Presidency of the European Union, Declaration on the Occasion of the Fiftieth Anniversary of the Signature of the Treaties of Rome, pt. III (2007), http://www.eu2007.de/de/News/download_docs/Maerz/0324-RAA/English.pdf.

16. In the framework of the overall agreement on the Financial Perspective 2007-2013, the European Council had agreed at its meeting on 15-16 December 2005 that “the EU should carry out a comprehensive reassessment of the financial framework, covering both revenue and expenditure, to sustain modernisation and to enhance it, on an ongoing basis.” It had accordingly invited the Commission “to undertake a full, wide ranging review covering all aspects of EU spending, including the CAP, and of resources, including the UK debate, to report in 2008/9.” Council of the European Union, Financial Perspective 2007-2013, at 32, Council Document 15915/05 CADREFIN 268 (2005), available at http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressdata/en/misc/87677.pdf.

sonal commitment, towards attaining concrete results. The Presidency pursued a dual objective: not only reaching an agreement on the launching of an IGC to draft a new treaty, but also reaching as detailed an agreement as possible, i.e., a sufficiently precise mandate for the IGC so as to minimize the risk of re-opening discussions and have the new treaty signed as quickly as possible.

The outcome of this effort was the mandate, agreed by the European Council during the early hours of 23rd June 2007,¹⁷ which led to the formal opening of the IGC a month later, on 23rd July 2007, and to the drafting of the amending Treaty by an IGC group of legal experts between the end of July and the early days of October 2007. It could then be left to the Heads of State and government, meeting in Lisbon on 18th and 19th October, to settle the outstanding issues and pave the way for the signing of the Lisbon Treaty on 13th December 2007.¹⁸

The IGC which led to the signing of the Lisbon Treaty was thus one of the shortest in the history of the European integration process. It had to be short, given the sensitive context in which it took place and given the need to exploit the political “window of opportunity” which had opened. But it could be short only thanks to the extraordinarily thorough preparation which had been previously carried out by the German presidency, with the assistance of the General Secretariat and, in particular, of the Council Legal Adviser, Jean-Claude Piris. Never before had an IGC mandate gone into such a level of detail, running to sixteen pages and including fully drafted legal texts. Never before had IGC negotiations for Treaty revision been conducted and successfully closed in such a short period of time.

As the previous amending treaties, the Lisbon Treaty purports to amend the existing treaties, which remain in force and are to be adapted according to the new one. The Lisbon Treaty contains two articles, plus the usual final clauses. Article 1 amends in 61 points the Treaty on European Union,¹⁹ while Article 2 amends in 295 points the Treaty establishing the Euro-

17. See Council of the European Union, *supra* note 14, at Annex I.

18. See Council of the European Union, http://www.consilium.europa.eu/cms3_.../showPage.asp?id=1314&lang=en&mode=g (last visited May 7, 2008) (presenting documents relating to the IGC proceedings which led to the signing of the Lisbon Treaty).

19. See Lisbon Treaty, *supra* note 1, art. 1, O.J. C 306/01, at 10-41 (2007).

pean Community, which it renames “Treaty on the Functioning of the European Union.”²⁰ Both treaties will have the same legal value. The European Union will succeed to, and replace, the European Community, thus giving rise to a single legal entity.

Hardly more readable than the previous amending treaties, the Lisbon Treaty needs to be considered in conjunction with the EU and EC Treaties and with the Constitutional Treaty, of which it largely takes the substance, as well as with the June 2007 European Council mandate. The reading is easier with a consolidated version of the treaties, as they result from the Lisbon Treaty, published, for documentary purposes, in the Official Journal of the European Union.²¹

III. *THE CONTENT OF THE LISBON TREATY: PRESERVING THE CORE OF THE CONSTITUTIONAL TREATY*

In substance, the main changes which the Lisbon Treaty would introduce, once ratified, into the EU Treaty and the EC Treaty, renamed “Treaty on the Functioning of the European Union,” relate to the structure and the institutions of the EU; they correspond to a very large extent to the changes which had been agreed upon in 2004. Indeed, if the constitutional symbols are left aside, the core of the Constitutional Treaty is preserved. Thus, the Lisbon Treaty represents the new point of balance between the Member States which, having ratified the Constitutional Treaty, wished to keep most, if not all, of its substance and those which, having their public opinions in mind, could not accept a text which looked too ambitious and preferred one stripped of any possible constitutional flavor.

Great caution was taken, both in the drafting of the IGC mandate and of the Treaty text, to suit the latter concerns, while agreeing that the main innovations of 2004 would be preserved.

Accordingly, the IGC mandate:

- on the one hand, announced, from the very first lines, that “[t]he constitutional concept . . . is abandoned;” and it specified, a few lines later, probably in order to dispel any possible misunderstanding, that “[t]he TEU and the Treaty on the Functioning of the Union will not have a

20. *See id.* art. 2, O.J. C 306/01, at 42-133.

21. *See* Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, O.J. C 115/01 (2008).

constitutional character;"²²

- on the other hand, it clearly indicated that the innovations resulting from the 2004 IGC would be introduced in the existing Treaties, which remain in force, in accordance with the usual amending technique.²³

The same goes for the outcome of the IGC proceedings. While preserving the substance of the Constitutional Treaty, the Lisbon Treaty left all the constitutional symbols aside. Therefore, the Treaties, as amended by the Lisbon Treaty:

- would not contain any terminology referring to a "Constitution:" neither the term itself nor the denominations "law" and "framework law" will be used, nor even the term "Union Minister for Foreign Affairs" (replaced by "High Representative of the Union for Foreign Affairs and Security Policy");²⁴
- would not mention the symbols of the Union—the flag, the anthem, the motto, the currency and the Europe day—as they were referred to in Article I-8 of the Constitutional Treaty; it goes without saying, however, that the symbols will continue to be used in the future, as they are used now and they were used in the past;
- would not include any provision affirming—as did Article I-6 of the Constitutional Treaty—that Union law shall have primacy over the law of the Member States; however, in a declaration attached to its Final Act,²⁵ the IGC recalls the principle of primacy; furthermore and for the first time in Treaty-revision practice, reference is made to a Council Legal Service opinion affirming that the fact that primacy is not mentioned in the Treaties shall not in any way change the existence of the principle and the existing case-law of the Court of Justice;
- would not reproduce the Charter of Fundamental Rights

22. See IGC Mandate, *supra* note 13, at 2-3.

23. See *id.* at 4.

24. See *id.* at 3.

25. See Lisbon Treaty, *supra* note 1, O.J. C 306/01, at 256 ("The Conference recalls that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of the Member States, under the conditions laid down by the said case law."). The Declaration goes on to reproduce the opinion of the Council Legal Service on the primacy of EC law. See European Council, Opinion of the Legal Service, 11197/07, JUR 260, available at <http://register.consilium.europa.eu/pdf/en/07/st11/st11197.en07.pdf>.

of the European Union of 7th December 2000;²⁶ however, Article 6(1) of the Treaty on European Union as amended by the Lisbon Treaty would contain a cross reference to the Charter, as adapted at Strasbourg on 12th December 2007, the day before the signing of the Lisbon Treaty, and would give it “the same legal value as the Treaties.”

As for the substance, the Treaties as amended by the Lisbon Treaty would largely reproduce the main changes agreed within the Constitutional Treaty in 2004. This is as true for the provisions on Institutions as for those on policies, with a few exceptions.

Concerning the institutional system, the Lisbon Treaty would provide for:

- a new composition (the number of MEPs not to exceed 751, including the President) and larger powers for the European Parliament, resulting both from the extension of the scope of the codecision procedure (in future, ordinary legislative procedure) and from the introduction of a new budgetary procedure, where the Parliament would “co-decide” with the Council on the budget;²⁷
- the transformation of the European Council into an Institution and the creation of the office of President, to be elected for a two and a half years term;²⁸
- a new “double majority” (States and population) voting system for the Council, subject to qualifications which were discussed until the late hours of the IGC negotiations;²⁹ and more majority voting (which would become

26. See IGC Mandate, *supra* note 13, at 9.

27. See *id.* at 12.

28. See *id.*

29. “As from 1st November 2014, a qualified majority shall be defined as at least 55% of the members of the Council, comprising at least fifteen of them and representing Member States comprising at least 65% of the population of the Union,” with the requirement of at least four Council members to form a blocking minority. See Lisbon Treaty, *supra* note 1, art. 1, point 17, O.J. C 306/01, at 18. Until then, the present qualified majority system (255 out of 345 votes cast by more than fourteen members of the Council, with the possibility to check that this comprise more than 62% of the population of the Union) will continue to apply. See *id.* Protocol on transitional provisions, O.J. C 306/01, at 161. Between 1st November 2014 and 31st March 2017: a) any member of the Council will still be able to request that a decision be taken in accordance with the present qualified majority voting system; b) a “Ioannina”-like system will be revived to allow a number of Council members smaller than the blocking minority to request, under certain conditions, that the Council continues discussions with a view to reaching, if possible, a satisfactory solution which also addresses their concerns. See *generally* Council Decision of 29 March 1994, O.J. C 105, at 1 (1994).

- the voting rule by default);³⁰
- a lighter Commission which, as of 1st November 2014, would consist of a number of members corresponding to two thirds of the number of Member States;³¹ and a strengthened role for its President;³²
 - the creation of the office of the High Representative of the Union for Foreign Affairs and Security Policy, who would have the “double hat” of Chair of the Foreign Affairs Council and Vice-President of the Commission, and who would be supported by a European External Action Service;³³
 - the Presidency of the Council, with the exception of the Foreign Affairs configuration, to be held by pre-established groups of three Member States, made up on a basis of equal rotation, for a period of eighteen months.³⁴

Finally, the role of national Parliaments—already acknowledged by the Constitutional Treaty—has been further stressed and enhanced by the Lisbon Treaty.³⁵ In particular, national Parliaments would be given the right to carry out a “subsidiarity test” of draft legislation, which might, in certain cases, eventually lead to block the legislation in question.

Also, concerning policies, the Lisbon Treaty largely confirms the innovations which were to be introduced by the Constitutional Treaty. These are no major innovations, even if they were sometimes presented as such in national ratification debates: the Constitutional Treaty, for instance, did not intend—nor does the Lisbon Treaty—to make the European Union more liberistic an area than it presently is, or to lower the level of social protection. On the contrary, both treaties contain strengthened social provisions, as well as they both provide for new pow-

30. *See id.* art. 1, O.J. C 306/01, at 18.

31. *See id.* art. 1, O.J. C 306/01, at 20. Today, for instance, the Commission would have eighteen rather than twenty-seven members.

32. *See id.*

33. *See id.* art. 1, O.J. C 306/01, at 21, 27.

34. *See id.* art. 1, O.J. C 306/01, at 19.

35. A general provision would be inserted in the Treaty on European Union to illustrate the different ways in which national parliaments are expected to contribute—and already do—to the good functioning of the Union, be it through the information they receive on draft Union legislation and the possibility to check that it complies with the principle of subsidiarity or through their participation in the revision procedures (with the possibility to oppose, in certain cases, the adoption of the envisaged decision) and being notified of applications for accession to the Union. *See id.* art. 1, O.J. C 306/01, at 15.

ers to make the Union's actions more effective in the fields of environment, climate change, and energy.³⁶

The most significant innovation is represented by the suppression of the pillar structure. This could only be done, however, subject to "ring-fencing" the provisions on common foreign and security policy and to allowing specific exceptions in the fields of police cooperation and judicial cooperation in criminal matters. Overall, the Lisbon Treaty consolidates—as did the Constitutional Treaty—the existing policy provisions rather than innovating on them.

CONCLUSION

The European Parliament recently endorsed the Lisbon Treaty.³⁷ Six Member States, including France, have already ratified, thus responding to the European Council call "for a swift completion of national ratification processes with a view to allowing entry into force of the Treaty on 1st January 2009."³⁸ In the meantime, work has begun to prepare Treaty implementation.

Hopefully, when the Lisbon Treaty enters into force, the European Union will at last be out of the tunnel of political instability it had entered all of a sudden one spring evening of 2005. It will then be able to concentrate again on concrete things to do and political choices to make in order to face the challenges it is confronted with. The European Union might also start thinking of new ways of having 260 million people—living in a Union three times as large as the one in which the European Parliament was first elected by direct universal suffrage, thirty years ago—still have the same dream. But that will probably involve speaking in a new language to European citizens.

When the European Union is out of the tunnel it entered on that spring evening of 2005, it will, in any case, have taken a new step along the way to European integration.

36. See *id.* arts. 1, 2, O.J. C 306/01, at 11, 87, 88; see also Constitutional Treaty, *supra* note 2, art. II, O.J. C 310/01, at 48-49, 60, 93-99, 103-05, 112.

37. See European Parliament Resolution of 20 February 2008 on the Treaty of Lisbon, PE 398.367. (2008) (not reported), available at http://www.europadecentraal.nl/documents/dossiers/Europaalgemeen/Lissabon/Resolutie_EP.pdf.

38. Council of the European Union, Brussels European Council, 14 December 2007, Presidency Conclusions, Council Document 16616/1/07 REV 1 CONCL 3 (2007), available at <http://register.consilium.europa.eu/pdf/en/07/st16/st16616-re01.en07.pdf>.