

## The Treaty of Lisbon – How much ‘Constitution’ is left?

### An Overview of the Main Changes

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On 13 December European Leaders will sign the “Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community”. Some commentators already take its long title to mean that it may not be quite the ‘mini-treaty’ Nicolas Sarkozy had promised, and much of the public debate on the text has focussed on the question of ‘how much constitution’ it still contains. This paper intends to provide a concise overview of the most important innovations introduced by the Treaty of Lisbon (ToL), comparing it at the same time to the abandoned Constitutional Treaty (CT).<sup>1</sup>

#### I. General Points

Before addressing the treaty’s substance, there needs to be some comment on how agreement was reached on this text. Looking back, the road to the new treaty has been a long and bumpy one (see box on page 2). After eight years of continuous reform debate, a convention, difficult intergovernmental negotiations and two failed referenda, most governments now just want to close the institutional dossier and concentrate on policy issues. However, in contrast to the numerous self-congratulatory

remarks on this agreement, it is clear that when the ToL is signed on 13 December, it will only have reached the same stage as the CT did back in October 2004. Despite the fact that French and Dutch electorates will most likely not be consulted this time, the forthcoming ratification phase may still hold surprises that provide for a high degree of unpredictability.

The main lesson that leaders seem to have drawn from the ratification of the CT appears to be “No more referenda!”, as they are making every effort to pass the treaty through national parliaments. At present, Ireland is the only member state set to hold a referendum and even the Irish vote is not the result of a deliberate political choice, but rather constitutional obligations. The fact that Dutch and French citizens are not consulted again will certainly not play in favour of the Treaty in the Irish campaign. Also, political developments in some member states (especially the UK) remain hard to predict, which could then have a knock-on effect in other countries.

#### 1. Another Amending Treaty (unlike CT)

Maybe the most significant change in substance from the CT is the return to the instrument of ‘amending treaties’. This implicitly means giving up on one of the core aims of the CT: making the EU’s legal framework more coherent and transparent. According to its article IV-437, the CT would have

<sup>1</sup> For a further analysis see the CEPS-EPC-Egmont-study, “The Treaty of Lisbon: Implementing the Institutional Innovations”, November 2007 ([http://shop.ceps.eu/BookDetail.php?item\\_id=1554](http://shop.ceps.eu/BookDetail.php?item_id=1554)).

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repealed and replaced the existing treaties. In contrast, the ToL changes them, just like the Treaty of Amsterdam or the Treaty of Nice did in the past. In this respect, the ToL is thus a step ‘back to the future’. Using an architectural metaphor, the ToL continues to add new attachments to the existing ‘main building’ and thus contributes further to the Union’s Byzantine legal structure.

## 2. Demolition of the pillar structure (like CT, but specificity of CFSP stressed)

Just like the CT, the ToL will formally abolish the current ‘three-pillar-structure’ of the EU. This means that (at least formally) the special instruments applied in Common Foreign and Security Policy (‘second pillar’) and in police and judicial cooperation on criminal matters (‘third pillar’) will be abandoned. The move towards one common framework is also reflected in article 1 TEU (“*The Union shall replace and succeed the European Community.*”)

However, the ToL also clearly states that “the adoption of legislative acts shall be excluded” from CFSP (art. 11 (1) TEU). There will thus be ‘decisions’ in the area of CFSP, but the term will still not *mean* the same as in other policy areas. Unlike the CT, the ToL also states explicitly that “the common foreign and security is subject to specific rules and procedures” (art. 11 (1) TEU).

The specificity of CFSP is further underlined by two new Declarations, one of which clarifies that the provisions on CFSP “do not give new powers to the Commission to initiate decisions nor do they increase the role of the European Parliament.”

The second pillar is also maintained in view of the so-called ‘flexibility clause’. Article 308 TEC will in principle apply beyond the current first pillar in the future, but the ToL now explicitly excludes its application for CFSP matters.

If one accepts that the word ‘pillar’ signifies a distinct set of decision-making rules, the second pillar will thus de facto largely be maintained. Compared to the CT, the ToL has increased the safeguards against possible ‘spill-overs’ from ‘communitarised’ decision-making.

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The following two sections give an overview of the changes introduced to the two main texts by the ToL:

- the Treaty on European Union (TEU) and
- the Treaty establishing the European Community (TEC).

### Chronological Overview: The long road to Lisbon

- **26 February 2001:** Signing of the Treaty of Nice (generally perceived as a ‘lowest common denominator’ that would require further treaty reform); ratification starts immediately, but rejected in a first Irish referendum (7 June 2001); approved in a second referendum (19 October 2002); entry into force on 17 February 2003
- **14/15 December 2001:** European Council (EC) at Laeken decides to refer the preparation of the next treaty reform to a ‘Convention on the Future of Europe’ presided by Valéry Giscard d’Estaing
- **28 February 2002:** Convention starts work
- **20/21 June 2003:** “Draft Treaty on a Constitution for Europe” (CT) presented to the EC in Thessaloniki; EC considers it as a “good basis for initiating the Intergovernmental Conference” (IGC)
- **4 October 2003:** IGC begins officially
- **13 December 2004:** IGC fails to find agreement at Brussels summit, mainly due to opposition from Poland and Spain to the proposed system of voting weights in the Council
- **18 June 2004:** Political agreement reached under the Irish EU presidency
- **29 October 2004:** Heads of State sign CT in Rome; ratification begins
- **20 February 2005:** Yes-vote in referendum in Spain
- **29 May and 1 June 2005:** No-votes in France & the Netherlands
- **10 June:** Yes-vote in Luxembourg
- **16/17 June 2005:** EC calls for ‘Period of Reflection’; several MS put ratification on hold (CT never ratified by CZ, DK, FR, IRL, NL, PL, PT, SE,UK) while others continue
- **15/16 June 2006:** EC asks German EU-presidency (1st half of 2007) to present a report “that should contain an assessment of the state of discussion with regard to the [CT] and explore possible future developments”
- **21/22 June 2007:** EC agrees mandate for IGC on a ‘Reform Treaty’ and decides to open IGC
- **5 October 2007:** First full draft of new treaty presented
- **18/19 October 2007:** Informal Summit in Lisbon agrees on remaining points
- **13 December 2007:** Signing ceremony in Lisbon
- Ratification in all MS; entry into force foreseen for **1 January 2009** (before next EP-elections)

## II. The Treaty on European Union

As amended by the ToL, the future TEU will be divided into the following six ‘Titles’:

- I. General Provisions (mostly amendments to the old TEU)
- **II. Democratic Principles (new title, mostly from CT)**

- **III. Institutions (new title from CT; modified ‘double majority’ voting rules)**
- IV. Enhanced cooperation (mostly amendments to old TEU; formerly Title VII TEU)
- V. External Action & CFSP (mostly amendments to old TEU)
- VI. Final Provisions (mostly amendments to old TEU, formerly Title VIII TEU)

While four titles are in fact amended versions of existing titles of the TEU, Title II and III are taken almost entirely from the CT. As a consequence of the abolition of the current ‘third pillar’, the former Title VI TEU on ‘police and judicial cooperation in criminal matters’ is integrated into Title IV of the Treaty on the Functioning of the European Union (TFEU),<sup>2</sup> where the provisions of the already ‘communitarised’ parts on justice and home affairs (e.g. visa, asylum, immigration) are located. The ToL will thus lead to one common title on Justice and Home Affairs.

## 1. General Provisions (Title I TEU)

### 1.1 Provisions on values and objectives of the EU (mostly like CT)

The current Title I of the TEU is substantially amended with provisions that have already been included in the CT. For example, the reference to the “cultural, religious and humanist inheritance of Europe” is taken from the CT’s preamble. The articles on the EU’s values and objectives are also taken on board. Contrary to the CT, the ToL does not introduce ‘undistorted competition’ as a new objective of the EU. One should bear in mind however, that the current treaties do not include this objective either. ‘Undistorted competition’ is currently mentioned in article 3g TEC as an ‘activity’ of the Union, which will in the future only be included in a protocol (thus also legally binding). This has triggered concern about future Court rulings giving less weight to undistorted competition,<sup>3</sup> while the author of this paper is of the view that this is an unlikely ‘worst case scenario’.

### 1.2 Symbols of the EU not mentioned (unlike CT)

A more significant impact on the Union’s future could result from the fact that the ToL no longer contains articles on the symbols of the EU. This

move to make the treaty look as technical and unemotional as possible is clearly motivated by the fact that leaders want to play down the significance of the treaty and to avoid referenda. It is far from clear however whether citizens will buy into that argument.

The omission of European symbols in the treaty text does not make a difference from a legal point of view and will certainly not lead to the abolition of the European flag or anthem in practice. However, it demonstrates that European leaders have given up on the attempt to provide the EU with any kind of ‘social legitimacy’ or emotional attachment – something already sorely lacking at present. In this respect, those who see the Union as another tool in the box of the nation state have clearly won the case, which is unlikely to be without consequence for the prospects of future integration.<sup>4</sup> (In this context it should be mentioned that at least the outcome of the French referendum was not primarily motivated by fear of a European ‘super state’, as surveys show that most French people actually voted ‘no’ for a lack of EU legislative action in the field of social protection.<sup>5</sup>)

### 1.3 Reference to the Charter of Fundamental Rights (functionally like CT)

Article 6 of the TEU makes a clear reference to the Charter of Fundamental Rights and states that it “shall have the same legal value as the treaties”. As such it becomes legally binding, just as it would have when it still was Part II of the CT. The fact that the Charter of Fundamental Rights is not directly incorporated into the treaty text anymore is motivated by the same concerns for which the symbols have been abandoned. Britain and Poland have negotiated opt-outs from the Charter that exclude its application by national and European Courts when this would contradict national laws or practices.

### 1.4 Explicit primacy of EU law not mentioned (unlike CT)

The fact that the ToL will not introduce an explicit reference to the primacy of EU law over national law is likely to be of minor importance. Instead a “Declaration concerning primacy” has been annexed to the treaty that clearly confirms the status quo, i.e. the well-established case-law of the European Court

<sup>2</sup> Note that the current Treaty establishing the European Community (TEC) is renamed by the ToL as the Treaty on the Functioning of the European Union (TFEU).

<sup>3</sup> See for example Alan Riley, *The EU Reform Treaty and the Competition Protocol: Undermining EC Competition Law*, CEPS Policy Brief No. 142, September 2007.

<sup>4</sup> See also Sebastian Kurpas and Justus Schönlaue, *Deadlock avoided, but sense of mission lost? The Enlarged EU and its Uncertain Constitution*, CEPS Policy Brief No. 92, February 2006.

<sup>5</sup> See Flash Eurobaromètre 171, *La Constitution européenne – Sondage post-référendum en France*, juin 2005, p. 17/18 ([http://ec.europa.eu/public\\_opinion/flash/f171\\_fr.pdf](http://ec.europa.eu/public_opinion/flash/f171_fr.pdf)).

of Justice that has never been contested by member states.<sup>6</sup> If, for whatever reason, member states should start to contest this principle, the EU would find itself in deep crisis.

### *1.5 Relations between the Union and Member States (mostly like CT)*

Article 3a of the TEU is mostly taken from the CT. It contains one sentence stating that “[The Union] shall respect [Member States’] essential State functions...” As this sentence does not conclusively define what “essential State functions” are, it leaves room for further interpretation. Unlike the CT, the ToL will introduce an additional phrase that further stresses national sovereignty (“In particular, national security remains the sole responsibility of each Member State.”).

### *1.6 Relations between the Union and neighbouring countries (like CT)*

Art. 7a of the TEU is an exact ‘copy-paste’ of art. I-57 CT, calling for a “special relationship with neighbouring countries” and outlining the possibility of the Union to conclude specific agreements with the countries concerned.

## **2. Democratic Principles (Title II TEU)**

This new title is essentially taken from the CT (article I-45 to I-47 CT).

### *2.1 Citizens’ initiative (like CT)*

According to this provision of participatory democracy “one million citizens who are nationals of a significant number of member states” can call upon the European Commission to submit a proposal on a matter that falls within its area of competence. The Commission would not have to follow this request, but considerable public pressure could be expected in such a case.

### *2.2 National Parliaments (stronger than CT)*

A second innovation is included in a new article on national parliaments (article 8c TEU). It highlights the role of national parliaments in the EU policy process and makes reference to the ‘Protocol on the Application of the Principles of Subsidiarity and Proportionality’, which was already annexed to the CT. This annex includes provisions that grant national parliaments the power to kick off a procedure for a subsidiarity check. This procedure has been strengthened in the ToL in comparison to the CT (so called ‘orange card procedure’): If 1/3 of national parliaments claim that a particular legislative initiative of the Commission breaches the principle of subsidiarity, they can demand that the

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<sup>6</sup> See for example Costa/ENEL, 15 July 1964, Case 6/641.

Commission abandon the project. If the Commission still proceeds, the initiative can be stopped either by 55% of member states in the Council *or* 50% of the votes cast in the European Parliament.<sup>7</sup> This instrument is a potentially powerful tool, but its effectiveness will largely depend on the capacity of national parliaments to coordinate their actions within the foreseen deadline of eight weeks. There are also concerns that national parliaments will focus too strongly on the role of a defensive ‘emergency brake’ for EU-legislation, instead of becoming more pro-active contributors in the European decision-making process. In many member states, parliaments still fail to efficiently control their respective government in the Council and do not sufficiently stimulate public debate on policy options at the national level.

## **3. Institutions (Title III TEU)**

Title III clearly contains the greatest number of significant innovations. With very few exceptions they had already been included in the CT. Elements from Title III are therefore also most often cited when it is claimed that the ToL was a ‘Constitution by the back door’.

### *3.1 Permanent European Council President (like CT)*

The provision on the European Council President is directly taken from the CT. Art. 9 b TEU establishes a permanent President of the European Council who will be nominated for 2 ½ years, renewable once. He/she will be nominated by a qualified majority of the members of the European Council and the position cannot be combined with any national one. On paper the European Council President only has limited powers of a mostly procedural nature (e.g. chairing European Council meetings), but much will depend on the personality that fills the position. There are some concerns about potential ‘turf fights’ with the Commission President or the new ‘double-hat’ High Representative for Foreign Affairs. There is no clear delimitation of competences on the external representation of the Union especially with the latter (see art. 9 b (6) TEU). One should also note that while the European Council and the Foreign Affairs Council receive a permanent chair, all other council formations will remain subject to a rotating presidency (art. 9c (9) TEU).

### *3.2 European Council and ECB receive institutional status (like CT)*

Like the CT, the new treaty will grant the European Council and the European Central Bank (ECB) the status of a European Institution. Article 9 TEU lays

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<sup>7</sup> See article 7 of the Protocol on the Application of the Principles of Subsidiarity and Proportionality.



out what this status implies in terms of competences and obligations. There were some concerns in the ECB about its independence in view of the sentence “The institutions shall practise mutual sincere cooperation.” (art. 9 (2) TEU).

### *3.3 Commission President elected by majority of European Parliament (like CT)*

As foreseen in the CT, the European Council will nominate a candidate by qualified majority “taking into account the elections to the European Parliament”. In a second step this candidate will then be *elected* by the majority of the component members of the European Parliament (article 9 d (7) TEU). In many ways this procedure only makes the current procedure more visible: already under the present treaty provisions, the candidate is ‘approved’ by the European Parliament. The change in wording might raise awareness of the importance of European elections, but it must be stressed that already after the 2004 elections, the strongest group successfully demanded that the Commission President had to come from their ranks. In the longer term the election of the Commission President might give an incentive for a European political party to agree on a common candidate. This would certainly strengthen the ‘personality factor’ in the European election campaign that is currently missing. It would make the campaign more interesting, which (in view of the traditionally low turnout) would certainly be a welcome change.

### *3.4 College of Commissioners reduced to 2/3 of the number of MS (like CT)*

As of 2014 the Commission will be reduced to 2/3 of the number of member states. The reduction must be based on a system of “strictly equal rotation” (article 9d (5) TEU). This means that every third term there will not be a Maltese or Luxembourg Commissioner just as there will not be a French or German one, i.e. regardless of the size of the member state. One could argue that this does not matter, since Commissioners are not meant to be representative of their home country anyway, and should rather define (and defend) the common European interest. However, the French President Nicolas Sarkozy in particular has already voiced concern and suggested that the elected Commission President should be free to choose his/her team in the future. Certainly this suggestion was also motivated by the (probably realistic) belief that a Commission President would not dare to ignore a French candidate for his/her team. The system of equal rotation still needs to be implemented through a *unanimous* Council decision before 2014. With the rest of the treaty already in force by then, the requirement for unanimity will still give large member states an opportunity to

block the implementation and demand a treaty change on this point.

### *3.5 ‘Double-hat’ High Representative/Vice-President of the Commission (like CT, except the title)*

In the CT this position was called ‘Foreign Minister’. Besides its ‘new old’ name (“High Representative of the Union for Foreign Affairs and Security Policy”, article 9e TEU), it remains exactly the same construct in the ToL: Like the Foreign Minister, it essentially entails a ‘merger’ between the current High Representative (Solana) and the Commissioner for External Relations (Ferrero-Waldner). Additionally the new ‘double-hat’ HR will also chair the Foreign Affairs Council and become the Vice-President of the Commission. He/she will however not be the Secretary-General of the Council anymore. The ‘double-hat’ structure is intended to bring together the visibility and political clout of the current HR with the resources of the Commission. Many issues still need to be clarified and there remains some nervousness that the new structure might lead to an ‘intergovernmentalisation’ of the Commission’s external competences, or – on the contrary – to the ‘communitarisation’ of the CFSP (despite the safeguards mentioned above). In the end much will depend on the personality of the person holding this office. There are also some unclear legal aspects. (For example, what happens to the HR, if the Commission has to step down and then a new one comes to office? Will he/she then also have to give up his/her office in the Council?)

### *3.6 Double-majority voting system (based on CT, but amendments)*

The double majority system is the only institutional element that has undergone substantial changes in comparison to the arrangement of the CT. Once meant to make the voting system in the Council clearer and more transparent, one could hardly claim progress on this aspect anymore. The complicated amendments to the initial provision in the CT are due to strong opposition from the former Polish government under the then Prime Minister Jarosław Kaczyński. The Polish would have preferred to keep the rather arbitrary Nice voting rules of the current treaties and then put forward a so-called ‘square-root’-system as a possible compromise. In the end numerous transitional and safeguard clauses have been introduced, but the essential concept of the double-majority system from the CT has been preserved. It means that the weight of each national vote is based on two elements that weigh in equally: (1) each country counts as one – regardless of its population; (2) each country counts according to the size of its population. A majority is reached if 55% of member states that represent 65% of the EU’s

population vote in favour (article 9c (4) TEU).<sup>8</sup> The Polish government has negotiated, however, that this system will now only come into force in 2014 and until 2017 any member state can still demand to apply the current Nice rules, if that country believes a proposal could have been blocked. In addition the so-called Ioannina-formula is maintained in a revised version in a declaration. It stipulates that if there are *not* sufficient votes to constitute a blocking minority, but 75% of the number of countries *or* 75% of the population necessary to constitute a blocking minority, the issue is to be referred back to the Council for further discussion (from 2007 even 55% will be sufficient). An agreement should then be reached within a “reasonable time”. Here again the Polish government argued that a “reasonable time” could be up to two years, while the other governments insisted that it should be three months maximum. In the end the Polish government abandoned its opposition.

### *3.7 Size of European Parliament limited to 750 members (almost like CT)*

The size of the parliament will be limited to 750 members, as foreseen by the CT. However, due to demands from the Italian government, there will be one additional Italian MEP, thus bringing Italy on a par with the UK. To get to this result, the President of the European Parliament will be counted in addition to the 750 other deputies.

## *4. Enhanced cooperation (Title IV TEU)*

As regards this title, several minor changes can be detected.<sup>9</sup> While the CT stipulated that 1/3 of member states would have to participate in an enhanced cooperation, the ToL demands “at least nine Member States” (article 10 (2) TEU), which is one more than under the current provisions. In view of future enlargements, the ToL thus makes it (slightly) easier than the CT to start an ‘avantgarde’ movement within the treaty framework. This mechanism has so far never been used, however, and it remains unclear whether it will become an attractive alternative to initiatives outside the treaties in the future.

## *5. External action (Title V TEU)*

The general clarification that CFSP remains subject to specific rules and the double-hat High

Representative have already been mentioned above. In the context of CFSP two other aspects should however be included in this overview. Both have already featured in the CT.

### *5.1 External action service (like CT)*

According to article 13a (3) TEU, the External Action Service (EEAS) shall assist the HR in fulfilling his mandate. It is supposed to work in cooperation with the diplomatic services of the member states and shall comprise officials from the General Secretariat of the Council, from the Commission and seconded staff from national diplomatic services. Its organisation and functioning still needs to be established by a Council decision agreed upon a proposal by the HR. As for the HR many issues still remain open concerning the EEAS, particularly its legal status and its institutional affiliation, which could be in the Council, in the Commission or somewhere outside the two (‘*sui generis*’).

### *5.2 Permanent structured cooperation on defence matters (like CT)*

Permanent structured cooperation is a mechanism that was already included in the CT providing for cooperation on defence matters among a smaller group of member states (art. 28a (6) TEU, 28e TEU). Participation does not only depend on the political willingness of a member state, but also on *objective* criteria concerning military capabilities (i.e. “targeted combat units”, see article 1 of the ‘Protocol on Permanent Structured Cooperation’). Permanent Structured Cooperation can be established by a qualified majority in the Council (article 28e (2) TEU).

## *6. Final provisions (Title VI TEU)*

### *6.1 Legal personality of the EU (like CT)*

Just like the CT, the ToL will introduce a single legal personality for the European Union (article 46a TEU) covering both the current European Community and the European Union. In a declaration to the ToL it is stated that the legal personality may not “in any way authorise the Union to legislate or to act beyond the competences conferred upon it by the Member States in the Treaties.”

### *6.2 Voluntary withdrawal clause (like CT)*

This clause is also directly taken from the CT. It only regulates what would already have been possible in the past, since no member state would have been obliged to stay in the European Union against its will. The new provision (article 49a TEU) only makes this option visible and provides a procedure for an ‘orderly retreat’. It foresees

<sup>8</sup> Where the Council does not act on a proposal from the Commission or from the High Representative, the qualified majority is defined as at least 72% of member states, representing at least 65% of the population, according to article 205 (2) TFEU.

<sup>9</sup> For a detailed overview see the Joint Study by CEPS, EPC and Egmont, pp. 99-119.

negotiations, but in case these fail, the member state can leave the Union two years after notifying the European Council of its intention. The voluntary withdrawal clause can thus be seen as a safeguard against unconsidered moves by national governments (e.g. in case a government comes to power after promising to leave the Union in the election campaign, it would at least have to wait for two years, if negotiations fail).

### *6.3 Ordinary and simplified revision procedure (like CT)*

As in the CT, the ordinary revision procedure for the treaties introduced by the ToL foresees a Convention and an IGC (article 48 (2-5) TEU). A Convention does not have to be convened, if a simple majority in the European Council is reached and if the European Parliament gives its consent. As governments might want to avoid a Convention in the future, the European Parliament will be given a powerful tool: in order to grant its consent, it is likely to make demands on the content of future treaty revisions.

A simplified revision procedure is foreseen for Part III of the TFEU, but still demanding a unanimous decision in the European Council. The decision “shall not increase the competences conferred on the Union in the Treaties” (article 48 (6) TEU).

There are also two so-called ‘passarelle clauses’ that allow the move from unanimous decision-making to qualified majority voting and from a consultation procedure to co-decision (i.e. full involvement of the EP). Such a decision must be taken by unanimity in the European Council, by majority in the EP and it may not be taken on matters with military implications. More importantly, however, it can be stopped if any one national parliament voices its opposition within six months of the date of its notification. The two ‘passarelle clauses’ are thus very unlikely to play a significant role in the future.

The ToL has introduced one – rather symbolic – clarification to article 48 TEU that was not already in the CT, stating that proposals for Treaty amendments may also serve to *reduce* the competences conferred on the Union.

### *6.4 Accession criteria (like CT)*

Article 49 TEU is amended with a reference demanding that applicant countries have to respect and *promote* the values of the Union.

## **III. Treaty on the Functioning of the Union**

As a result of the fact that the European Union “shall replace and succeed the European Community” (article 1 TEU), the treaty name will

also change: the Treaty establishing the European Community will be renamed ‘Treaty on the Functioning of the European Union’ (TFEU).

From a functional point of view, one could argue that the TEU contains more general provisions, while the TFEU – as its name suggests – covers more detailed articles, which would have justified a certain hierarchy. However, like article 1 TEU, article 1 TFEU also states that both treaties have the same legal value. Consequently, there is no legal hierarchy between the two texts. Most governments rejected the idea that the TFEU could be interpreted in the light of the provisions of the TEU.

As a detailed description of the changes in all policy areas would go beyond the scope of this paper, the following part will provide a general overview of the most important changes to the treaty.

### *1. Qualified majority voting and co-decision become the “ordinary legislative procedure” (like CT)*

The most important change to the TFEU is undoubtedly a further extension of co-decision and qualified majority voting. This goes together with the fact that co-decision and qualified majority become the so-called “ordinary legislative procedure” (article 251 TFEU). The policy area that will be most broadly affected by this change is justice and home affairs, but there will also be many other policies shifted fully or partially under the ordinary legislative procedure, e.g. energy (art. 176 a TFEU), tourism (art. 176 b TFEU), civil protection (art. 176 c TFEU), sport (art. 149 TFEU), structural funds (art. 161 (1) TFEU), incentive measures to protect human health (art. 152 TFEU) or space policy (art. 172a TFEU).

### *2. Extension of the ordinary legislative procedure to the whole annual budget (like CT)*

With this innovation the distinction between compulsory and non-compulsory expenditure will be abandoned, which means that the EP will have the final word for all categories of expenditure. In return, however, the multi-annual financial framework will determine the amounts of the annual ceilings as well as the appropriations for the various categories of expenditure and payment.

### *3. New title on energy (like CT)*

A new title on energy (Title XX) is added to the treaty, which had already been included in the CT. What the exact impact of this article will be in practice, however, remains to be seen. According to article 176a TFEU, it will give the EU a legal basis to “(a) ensure the functioning of the energy market;

(b) ensure security of supply in the Union; (c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and (d) promote the interconnection of energy networks.” However, the provision also contains important safeguards that ensure member states’ rights to determine the conditions for exploiting their energy resources, their choice between different energy sources and the general structure of their energy supply (so-called ‘energy-mix’). Unanimity and mere consultation of the EP apply when measures are “primarily of fiscal nature.”

In addition to the provision taken from the CT, the ToL has added a reference to the “spirit of solidarity between Member States”. The same reference has also been included in article 100 TFEU (“Difficulties in the Supply of Certain Products”).

#### **4. Categories and areas of competences (like CT)**

The provisions on “categories and areas of competences” (article 2a to 2e TFEU) have been taken from the CT. They specify the different categories (exclusive competence, shared competence, competence to coordinate, support or supplement actions of member states) and list the policy areas falling into the respective categories. It is certainly not a rigid “Kompetenzkatalog” as initially demanded by Germany, but it does make clearer what the EU may (and may not) do.

#### **5. Abolition of current third pillar and integration into Title IV (like CT)**

The formal abolition of the EU’s pillar-structure has already been mentioned above. Contrary to the second pillar (CFSP), the third pillar (police and judicial cooperation on criminal matters) will not only be ‘demolished’ *pro forma*, but also in substance.<sup>10</sup> Two main differences between the ToL and the CT should be mentioned however:

(1) The UK and Ireland have negotiated a comprehensive opt-out for which the conditions are laid out in great detail in article 4a of the revised ‘Protocol on the Position of the United Kingdom and Ireland in Respect of the Area of Freedom, Security and Justice’.

(2) A veto for each national parliament has been introduced that allows it to stop a unanimous

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<sup>10</sup> Although some exceptions remain here as well; for greater detail see Sergio Carrera and Florian Geyer, *The Reform Treaty & Justice and Home Affairs – Implications for the common Area of Freedom, Security and Justice*, CEPS Policy Brief No. 141, August 2007 ([http://shop.ceps.eu/BookDetail.php?item\\_id=1535](http://shop.ceps.eu/BookDetail.php?item_id=1535)).

decision of the Council that would introduce qualified majority voting to the area of family law. The use of this ‘passarelle’ has therefore become even less likely than under the provisions of the CT.

#### **6. Provisions on Services of General Interest (mostly like CT)**

The provision on services of general economic interest will be amended. Article 16 TFEU will make reference to article 3a TEU that mentions the respect of the Union for the “essential State functions” of member states. Article 16 TFEU will also provide a legal basis for EU regulations (by ‘ordinary procedure’) that establish principles and set conditions “to provide, to commission and to fund such services”.

A ‘Protocol on Services of General Interest’ has been added by the ToL that was not part of the CT. As regards the content of this protocol, however, it seems to be only of a clarifying character.

#### **Conclusion: More democratic, more efficient, more transparent?**

This overview has shown that the innovations of the Constitutional Treaty have to a very large extent been preserved in the ToL. The main differences can be summarised as follows:

- The symbolic elements of the CT have been abandoned. As explained, this appears as a minor detail from a legal perspective, but may have major implications for the future of the integration process. The stronger emphasis on national sovereignty and on the limits of EU competences also hints in this direction.
- The Treaty of Lisbon is again an amending treaty that will add another ‘layer’ of provisions to the ‘acquis’. The legal foundations of the EU will thus become even more complex and the treaty itself is unreadable for the average citizen.
- Several member states negotiated substantial opt-outs (UK and Ireland on JHA; UK and Poland on the application of the Charter), thus adding to the already existing ‘variable geometry’ among member states.
- Certain control mechanisms for national parliaments have been strengthened (subsidiarity check, vetoes on ‘passarelle clauses’). This holds the potential for a better implication of the national level in the EU-policy making process, but also carries the risk of national parliaments focussing on a defensive role as an ‘emergency break’ for European integration.

At the beginning of the Constitutional Convention European leaders pleaded for a more democratic,



more efficient and more transparent EU. Judging the Treaty of Lisbon by these three criteria, the question remains whether it will make the EU...

*1. ....more democratic? Yes.*

Concerning this aspect the content stands in some contrast to the procedure. While the failed referenda on the Constitutional Treaty have led to more secretive negotiations than ever before, the content of the text does mean progress for EU democracy. It gives greater control to national parliaments, strengthens the power of the European Parliament as an equal co-legislator in many policy areas and might even make the European elections more attractive, as political parties now have an additional incentive to nominate candidates for the office of the Commission president *before* the elections. The treaty also introduces an element of direct democracy through the citizens' initiative.

*2. .... more efficient? Maybe.*

It is impossible to pass definitive judgment on whether the EU will become more efficient as yet. Certainly the move towards more qualified majority voting will make agreement easier in a number of policy fields, especially in justice and home affairs. The impact of the new voting system in the Council ('double majority') is less likely to have a major impact as long as the 'consensus style' of Council negotiations is preserved. In any case, first results will only be visible in 2014. Future treaty revisions will hardly become easier either. Initial ideas in the Convention aimed at bringing certain parts of the treaties under a revision procedure by 'super-qualified majority (e.g. 80%)', but they had already been discarded in the CT. The simplified revision procedure still maintains unanimity for all changes to the treaties and the 'passerelle clauses' are unlikely to be used. There is also some justified concern that the treaty reform may have concentrated too much on making each institution more efficient, but neglecting the impact of these reforms on the overall institutional balance. For example, it is certainly more efficient for the European Council to have a permanent president, to grant the Commission President more clout through an official election and to 'merge' the post of the current High Representative with that of the Commissioner for External Relations (and Vice-President of the European Commission). However, it is difficult to predict how these three posts will interact, especially as regards the external representation of the EU and the provision of political leadership. It is difficult to deny a certain potential for 'turf fights' and much will depend on the personalities involved.

*3. ....more transparent? No.*

If the ToL has failed in one respect, then it is clearly in making the current treaties more understandable and transparent. On the contrary, the ToL will make the EU even more difficult to grasp due to a further increase in opt-outs, protocols and declarations. In a Union of 27 member states this might be unavoidable and a poor omen for future integration.

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Finally, as regards general tendencies for the future, one can easily predict an increased use of 'flexible integration' mechanisms, be it inside or outside the treaties. The Treaty of Lisbon actively contributes to this development through the difficult treaty revision procedure, the opt-outs for the UK, Ireland and Poland, (slightly) more attractive provisions for 'enhanced cooperation' and the introduction of the 'permanent structure cooperation' on defence. This does not have to be negative, as long as on the one hand the door remains open for other member states that want to join later and no exclusive clubs are constituted outside the EU. On the other hand, opt-outs should not become so broad or numerous that the character of the EU as a 'community of values' is undermined.

The probable move towards more flexible integration also makes it more likely that the present IGC has been the last one for a long time. The heavy revision procedure combined with the experience of recent years will curb the appetite among decision-makers for further comprehensive treaty reforms considerably.

And what does the treaty mean for citizens' support? Here again, the problem has certainly not been solved. The Constitutional Treaty, once envisaged as a remedy to the public's disenchantment with the Union, turned into a problem itself and led to the most secretive treaty negotiations in a long time, when leaders tried to save the substance of the text. Today, little seems to be left of the ambitions "to bring European institutions closer to the citizens."<sup>11</sup> As has been shown in this paper, the Treaty of Lisbon does contain certain elements to increase citizens' interest in EU decision-making. Let's hope that leaders will also be wise enough to use and promote them.

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<sup>11</sup> See Laeken Declaration on the Future of the European Union, p. 2 (<http://european-convention.eu.int/pdf/LKNEN.pdf>).