

## The Entering Into Force of the Lisbon Treaty – A European Odyssey

By Dr. Nikolaos Lavranos



On December 1, 2009, after a struggle of almost a decade, the Lisbon Treaty, aimed at improving the functioning of the European Union (EU), has entered into force.

### The European Odyssey

This European “odyssey” started with the 2001 Laeken Declaration,<sup>[1]</sup> when the European Council, composed of EU heads of states and governments, convened a European Convention<sup>[2]</sup> to draft a European Constitution to replace the various European Communities’ (EC) and EU treaties. The first European Constitution contained all the elements of a national constitution, including a catalog of fundamental rights, a list of exclusive and shared competences, a President of the European Council as well as a European Minister of Foreign Affairs, an official anthem, and a flag. While the European Constitution was signed by all Member States in 2004, it still needed to be ratified by each of them.<sup>[3]</sup> It seemed as if nothing stood in the way of the EU constitutionalization process.

However, the unexpected rejection of the European Constitution by the Dutch and French voters in 2005 suddenly brought the process to a halt. During the “reflection pause” of almost two years, European leaders analyzed the various reasons for the rejection and concluded that the word “Constitution” and its connotation of creating a “Federal United States of Europe,” much like the United States, was perceived by many as a step too far. As a result, the Member States decided that all references to the word “Constitution” be redacted, and all other symbols, such as the European flag and anthem, be removed. At the same time, the parties decided to leave the substance of the European Constitution in place.<sup>[4]</sup> Finally, on December 13, 2007, the Lisbon Treaty<sup>[5]</sup> was signed by all Member States.

The Lisbon Treaty, like the European Constitution, had to be ratified by all Member States before entering into force. However, the entering into force of the Treaty was far from certain, even though France, the Netherlands, and most other Member States decided against holding of referenda. But since the political context radically changed since 2001, the hurdles for the Lisbon

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Treaty were manifold, including the enlargement of the European Union;<sup>[6]</sup> the steadily decreasing enthusiasm and support for the European integration process;<sup>[7]</sup> the emergence over the past decade of more “eurosceptic” nationalistic minded governments; and the growing public ambivalence about the European Constitution caused by increasing anxieties about security, immigration, religion, and, most recently, the economy.

In short, it was far from certain if and when the Lisbon Treaty would be ratified by all Member States. While Parliament approval was sufficient in some Member States, others required referenda and/or approval by their constitutional courts.

### **The Federal German Constitutional Court’s Conditional Approval**

One of the most critical hurdles for the Lisbon Treaty was the Federal German Constitutional Court. As with the Maastricht Treaty in 1993, it was called upon to translate the above-mentioned anxieties into a judgment, which delivered a very critical message to the pro-European integration movement. As in 1993, the German Constitutional Court did not disappoint the “eurosceptics” when it gave only a conditional approval to the Maastricht Treaty.<sup>[8]</sup> Indeed, its judgment on the Lisbon Treaty delivered on June 30, 2009<sup>[9]</sup> contains clearly formulated limits and “no go” areas for the future European integration process. The Court made clear that it will not accept any transfer of competences in areas like education, taxes, and culture. More generally, the Court was particularly critical about the “fiction” created in the past decades that the European decision-making process is essentially comparable to the one of the Member States in terms of democratic representation. In short, for the German Constitutional Court, the Lisbon Treaty is a treaty that improves, where necessary, the functioning of the European Union without changing its fundamental nature—that is, a cooperation forum between sovereign states in a limited number of clearly identified areas—nothing less but certainly nothing more.

### **The Irish Referendum and the Czech President’s Opt-out**

Although the importance of the German Constitutional Court’s conditional approval of the Lisbon Treaty cannot be overstated, the ratification of the Lisbon Treaty was still uncertain. As with previous treaty revisions, the Irish needed a second referendum to say “yes” to Europe, after rejecting the Treaty the first time around. But this time, due to the economic crisis, the Irish voters realized that without the safety net offered by Brussels, Ireland could find itself in a similar position as almost bankrupt Iceland, which for the very same reason has applied for EU membership.<sup>[10]</sup> Consequently, the Irish approved the Lisbon Treaty with a clear sixty-seven percent majority.<sup>[11]</sup>

Finally, the Czech President Václav Klaus threatened to refuse to ratify the Lisbon Treaty unless the Czech Republic would obtain an opt-out regarding the application of the EU Charter of Fundamental Rights. Klaus claimed that the Charter, which would become legally binding with the entering into force of the Lisbon Treaty, would expose his country to property claims by the 2.5 million ethnic Germans and their descendants expelled from the then-Czechoslovakia after World War II under the so-called Benes Decrees. After intense discussions, the Czechs received an opt-out similar to one

already obtained by Poland and the United Kingdom. However, according to the opt-out, no mention is to be made of the Benes Decrees or anything related to the past. After the Czech opt-out was approved, the Czech Constitutional Court approved the Lisbon Treaty.<sup>[12]</sup>

## **Main Changes of the Lisbon Treaty**

The following section provides a very limited overview of some main changes introduced by the Lisbon Treaty.

First, the creation of the new position of President of the European Council must be mentioned. The relatively unknown former Belgian Prime Minister Herman Van Rompuy, in office for only a year, was appointed by the heads of states and governments as the first President of the European Council. His main task will be to chair, coordinate, and implement the work of the European Council, as well as facilitate cooperation between the various European institutions. Moreover, he must ensure the external representation of the EU concerning issues of common foreign and security policy, without prejudice to the powers of the High Representative of the EU for Foreign Affairs and Security Policy. His mandate is for two and a half years and renewable only once.

This development brings us to the other new appointment, namely Catherine Ashton. Ashton, the current external trade Commissioner of the EU, was appointed as the new High Representative for Foreign Affairs. This position merges the existing two external relations positions of High Representative for Common Foreign and Security Policy (held by Javier Solana) and the Commissioner for External Relations (held by Benita Ferrero-Waldner). In addition to chairing the Foreign Affairs Council, Ashton's main task will be to conduct the Union's common foreign and security policy. Clearly, an overlap of tasks exists between the President and the High Representative, so it remains to be seen how both appointees, who have little experience on the international plane, will coordinate their respective tasks and how effectively they will represent the EU externally.

Second, the Lisbon Treaty provides for the EU to have explicit legal personality. Previously, only the EC had been granted legal personality by Article 281 of the EC treaty, while the legal personality of the EU was not regulated and thus remained disputed. This issue, which has cast a doubt regarding the EU's capacity to conclude treaties, has split the European law community into two camps. The first camp has argued that the EU possessed implicit treaty-making authority derived from the EC since the creation of the EU in 1993. This argument is based on the Advisory Opinion of the International Court of Justice (ICJ) in the *Reparations for Injuries* case,<sup>[13]</sup> in which the ICJ stated that an International Organization (IO), such as the United Nations, must have legal personality (albeit limited) to exercise its task – even if the legal personality is not explicitly mentioned in the founding instrument of the IO. Indeed, the EU has concluded several treaties in the past without this explicit treaty-making power.<sup>[14]</sup> This first camp sees the Lisbon Treaty as an embodiment of the status quo. In other words, nothing changes with the ratification of the Lisbon Treaty in this respect.<sup>[15]</sup> The other camp, however, has claimed that only with the ratification of the Lisbon Treaty has the EU actually obtained full treaty-making powers.

Arguably, this claim is contradicted by the practice of states that have concluded treaties with the EU in the past. Either way, the granting of explicit legal personality simply clarifies that the EU as a whole has the capacity to conclude treaties. Beyond this, the Lisbon Treaty extends the areas of exclusive competence of the EU, which means that it will from hereon conclude more treaties acting alone rather than as a co-party with the Member States.<sup>[16]</sup> In particular, in the context of common commercial policy, the Lisbon Treaty gave the European Parliament much greater say in the negotiation and conclusion of international treaties.<sup>[17]</sup>

Another change that should be noted is the merger of the so-called third pillar – governing Police and Judicial cooperation – into the first pillar. This merger will allow the Commission and the European Parliament to partake in the decision-making process for all future police and criminal law legislation. In addition, decisions of the Council of Ministers in this area will now be taken by a qualified majority vote rather than by consensus. This change will facilitate the legislative process. Also, the European Court of Justice (ECJ) will play a greater role in this area as it will obtain full judicial review of all police and criminal law legislations which before the Lisbon Treaty was very limited.

Fourth, besides strengthening of the European Parliament's position by making it a co-legislator with the Council in additional policy areas, the national parliaments of the Member States will be more closely involved in the European decision-making process.<sup>[18]</sup> Notably, national parliaments will be informed about all legislative proposals at the same time they are sent to the European Parliament. In addition, national parliaments will be allowed to complain to the Commission if they consider that the subsidiarity principle is infringed. If the national parliaments muster sufficient support amongst them, they can—albeit indirectly—bring a case before the ECJ to review a potentially infringing act.<sup>[19]</sup>

Fifth, the Lisbon Treaty contains for the first time a catalog of competences governing distribution between Brussels and the Member States.<sup>[20]</sup> Such catalogs are common in many federal states' constitutions. The main purpose of the catalog of competences is to reduce the tendency of centralization, which in the past has led to a consistent transfer of competences from Member States to Brussels without a clear legal basis. Practice will tell whether this catalog will contribute to more clarity or rather lead to more disputes between the European institutions and the Member States regarding their respective competences.

Sixth, the European Council has been converted into a European institution with explicitly defined powers. Indeed, these powers have been significantly extended, returning to the Member States, unified in the European Council, powers they had lost over time to the Commission and European Parliament.

Finally, the EU Charter of Fundamental Rights will become legally binding.<sup>[21]</sup> This Charter, which to a large extent mirrors the European Convention of Human Rights (ECHR), is the first legally binding fundamental rights instrument that binds all EU institutions. Consequently, all EU measures must be in accordance with the Charter. Moreover, the Lisbon Treaty introduces an explicit legal basis for the EU to accede to the

ECHR.<sup>[22]</sup> Thus, Europe is “blessed” with two distinct but closely related fundamental rights treaties supervised by two independent European courts – the European Court of Human Rights and the ECJ. It remains to be seen how these two fundamental rights systems will interact with each other and how they will accommodate possibly divergent or conflicting jurisprudence.

## Outlook

The Lisbon Treaty and the appointment of two relatively unknown figures to represent the EU arguably send opposing signals. On the one hand, the strengthening of the European institutions is clearly a shift towards a more supranational decision-making process under increased parliamentary and judicial scrutiny. On the other hand, Member States have retained and even increased their influence in the European decision-making process through the European Council. However, one could argue that the appointment of a rather unknown individual as the first President of the European Council, instead of a flamboyant pro-European leader, underlines the desire of the Member States to renationalize competences they have lost in the past decades to ever-expanding European centralism. While this approach goes well with the current anti-European climate in most, if not all, Member States, it cannot disguise the lack of a European vision. Indeed, with this hesitant and skeptical approach towards the future European integration process, the hearts and minds of the European peoples for this unique project will never be won.

## About the Author

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## Endnotes

[1] Laeken Declaration on the Future of the European Union, Dec. 15, 2001, available at <http://www.ena.lu/>.

[2] The European Convention was chaired by former French President Valéry Giscard d'Estaing, while Giuliano Amato and Jean-Luc Dehaene acted as vice chairmen. In addition, the Convention was composed of fifteen representatives of the heads of state or government of the Member States (one from each Member State), thirty national parliament members (two from each Member State), sixteen members of the European Parliament, and two Commission representatives.

[3] Treaty Establishing a Constitution for Europe, Dec. 10, 2004, 2004 O.J. (C 310), available at <http://eur-lex.europa.eu/JOHtm1.do?uri=OJ:C:2004:310:SOM:EN:HTML>.

[4] Notably, the European voters were informed that the “new” Constitution had nothing to do with the former European Constitution.

[5] Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (as amended by the Lisbon



Treaty), May 9, 2008, 2008 O.J. (C 115), available at <http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2008:115:SOM:en:HTML> [hereinafter Treaty on EU and Treaty on the Functioning of EU].

[6] The European Union, which grew from fifteen to twenty-seven Member States, has converted from a relatively lean and compact economically orientated organization into a huge, slow and much more inconsistent multi-purpose organization. In 2004, ten former Central and Eastern European states joined the EU, while Bulgaria and Romania followed in 2007. Currently, several states (Croatia, FRY Macedonia and Turkey are “candidate countries,” while Serbia, Albania, Kosovo, Bosnia and Herzegovina, and Montenegro are “potential candidates”) are negotiating their accession to the EU. So, a further enlargement of the EU is to be expected, although it is still unclear when it will take place. For further information, see European Commission, Enlargement Strategy and Progress Reports 2009, available at [http://ec.europa.eu/enlargement/press\\_corner/key-documents/reports\\_oct\\_2009\\_en.htm](http://ec.europa.eu/enlargement/press_corner/key-documents/reports_oct_2009_en.htm).

[7] For example, the last European Parliament elections held in June 2009 had the lowest ever voter turnout (forty-three percent). See European Parliament Election Results, available at [http://www.europarl.europa.eu/parliament/archive/elections2009/en/index\\_en.html](http://www.europarl.europa.eu/parliament/archive/elections2009/en/index_en.html).

[8] Entscheidungen des Bundesverfassungsgerichts [BVerfGE] [Federal Constitutional Court] Oct. 12, 1993, Docket Nos. 2 BvR 2134/92, 2 BvR 2159/92, available at <http://www.servat.unibe.ch/dfr/bv089155.html>.

[9] Entscheidungen des Bundesverfassungsgerichts [BVerfGE] [Federal Constitutional Court] June 30, 2009, Docket Nos. 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/0, available at [http://www.bundesverfassungsgericht.de/entscheidungen/es20090630\\_2bve000208en.html](http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html).

[10] Iceland submitted its EU membership application on July 23, 2009. See Press Release, Swedish Presidency of the European Union, Iceland and EU Set Out Together (July 23, 2009), available at [http://www.se2009.eu/en/meetings\\_news/2009/7/23/iceland\\_and\\_the\\_eu\\_set\\_out\\_together](http://www.se2009.eu/en/meetings_news/2009/7/23/iceland_and_the_eu_set_out_together).

[11] See *Ireland backs EU's Lisbon Treaty*, BBC NEWS, Dec. 8, 2009, available at <http://news.bbc.co.uk/2/hi/8288181.stm>.

[12] nález Ústavního soudu čj[Czech Constitutional Court] 19/08 Sbírka nálezu a usnesení Ústavního soudu, available at [http://angl.concourt.cz/angl\\_verze/doc/pl-19-08.php](http://angl.concourt.cz/angl_verze/doc/pl-19-08.php).

[13] *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. 174 (Apr. 11), available at <http://www.icj-cij.org/docket/files/4/1835.pdf?PHPSESSID=61b9928d15b162a30ed9aea39b656570>.

[14] See, e.g., *Agreement between the European Union and the Federal Republic of Yugoslavia on the Activities of the European Union Monitoring*

Mission (EUMM) in the Federal Republic of Yugoslavia, 2001 O.J. (L 125) 2, 4, available at [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:22001A0505\(01\):EN:NOT](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:22001A0505(01):EN:NOT); See also Agreement between the European Union and the Republic of Croatia on the Participation of the Republic of Croatia in the European Union Military Operation to Contribute to the Deterrence, Prevention and Repression of Acts of Piracy and Armed Robbery off the Somali Coast (Operation Atlanta) 2009 O.J. (L 202) 84, 89, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:202:0084:0089:EN:PDF>.

[15] In fact, just hours before the Lisbon Treaty would enter into force, the EU signed a treaty with the U.S. on the access of U.S. law enforcement agencies to the SWIFT database, thus excluding the European Parliament from participation. See Valentina Pop, *Bank Data Transfer Deal with US Reached*, EUROSERVER.COM, Nov. 30, 2009, available at <http://euobserver.com/22/29072>.

[16] In this context, see a recent ECJ opinion on the distribution of powers between the EC and the Member States regarding the modification of General Agreement on Trade in Services (GATS) commitments, Case 1/08, Request for an Opinion Submitted by the Comm'n Pursuant to art. 300(6) EC (July 19, 2008), available at <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en>.

[17] See Andrew Willis, *EU Treaty Implications for Trade Unclear*, EU OBSERVER, Dec. 8, 2009, available at <http://euobserver.com/9/29119> (the author argues that the role of the European Parliament has been stepped up considerably in many areas, including trade policy, since the Lisbon rules came into force on December 1, 2009).

[18] Protocol No. 1 on the Role of National Parliaments in the European Union, and Protocol No. 2 on the Application of the Principles of Subsidiarity and Proportionality, 2008 O.J. (C 115/203), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:306:0148:0150:EN:PDF>.

[19] Protocol No. 2 art. 8.

[20] Treaty on the Functioning of the EU, *supra* note 5, art. 3, enumerating the exclusive competence as follows:

1. The Union shall have exclusive competence in the following areas:
  - a. customs union;
  - b. the establishing of the competition rules necessary for the functioning of the internal market;
  - c. monetary policy for the Member States whose currency is the euro;
  - d. the conservation of marine biological resources under the common fisheries policy;
  - e. common commercial policy.
2. The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to

exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.

Article 4 of the Treaty on the Functioning of the EU enumerates the shared competence:

1. The Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6.
2. Shared competence between the Union and the Member States applies in the following principal areas:
  - a. internal market;
  - b. social policy, for the aspects defined in this Treaty;
  - c. economic, social and territorial cohesion;
  - d. agriculture and fisheries, excluding the conservation of marine biological resources;
  - e. environment;
  - f. consumer protection;
  - g. transport;
  - h. trans-European networks;
  - i. energy;
  - j. area of freedom, security and justice;
  - k. common safety concerns in public health matters, for the aspects defined in this Treaty.
3. In the areas of research, technological development and space, the Union shall have competence to carry out activities, in particular to define and implement programmes; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.
4. In the areas of development cooperation and humanitarian aid, the Union shall have competence to carry out activities and conduct a common policy; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.

[21] Treaty on EU, *supra* note 5, art. 6. The EU Charter of Fundamental Rights is not an integral part of the Treaty, however, it is made binding by referring to the text as adopted as a non-binding declaration in 2000 during the Nice Treaty negotiations. The text of the Charter is *available at* [http://www.europarl.europa.eu/charter/pdf/text\\_en.pdf](http://www.europarl.europa.eu/charter/pdf/text_en.pdf).

[22] See Treaty on EU, *supra* note 5, art. 6(2).