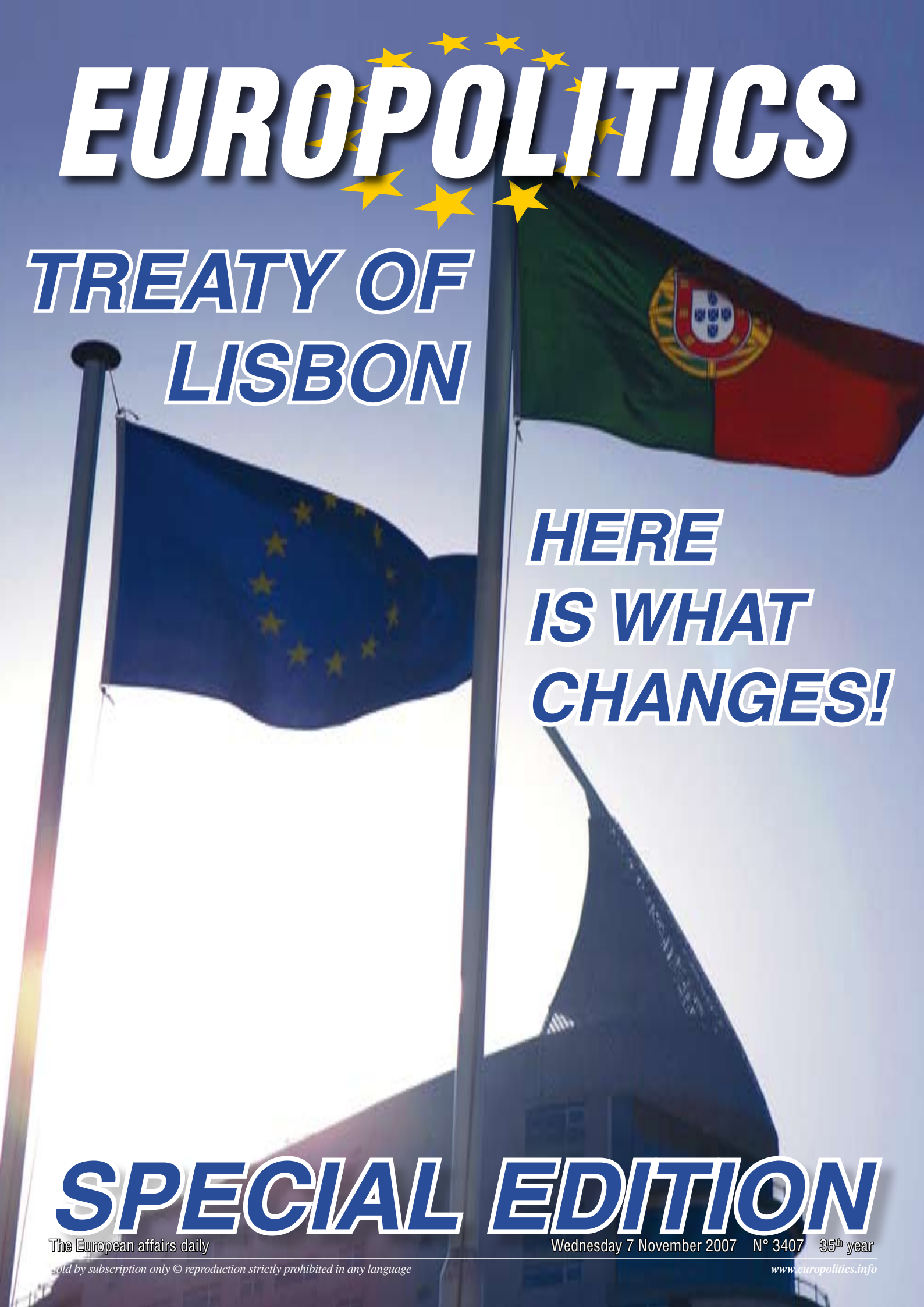
EUROPOLITICS

TREATY OF LISBON



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Editorial

Preparing for the next decade

By Pierre Lemoine

In this Special Dossier by *Europolitics*, the draft reform Treaty of Lisbon is explained chapter by chapter, sector by sector.

Europolitics takes pride in the on-the-spot analyses contained in this special feature, most of which have been published in our daily bulletin, since 19 October 2007, when the EU heads of state and government, meeting in Lisbon, adopted complex but essential reform texts.

This Treaty of Lisbon is presented as the sine qua non for the proper functioning of a Union of 27 member states, enabling it to adopt policies that will give it greater control over its own destiny and make it more influential on the rapidly evolving global stage.

FIRST ANALYSIS

This special issue of *Europolitics* constitutes an initial deciphering of the treaty.

- The most important innovations are identified and commented upon, with their legal references: our expert journalists have not approached the text as legal practitioners, but have carried out their usual job of clarification and explanation, in total independence.
- The texts adopted on 19 October are virtually final, but only the version to be signed on 13 December in Lisbon will be deemed authoritative.

FIRST PITFALLS

The entry into force of the Treaty of Lisbon on 1 January 2009 cannot be taken for granted.

The treaty, given the complexity of its construction – which Valéry Giscard d'Estaing has compared to a "tool box you have to rummage through to find what you're looking for" – represents a challenge to the member state governments and parliaments, which will have to approve and explain it.

The signature of the text on 13 December opens up a period of uncertainty in 2008, namely the 27 national ratification processes. Problems may arise in countries where a referendum is planned, like Ireland, or in countries subject to special provisions, like the Czech Republic, where a majority of three fifths of MPs is required. A way will also have to be found to prevent any isolated negative votes from blocking Europe again.

FIRST TESTS

Other obstacles still lie ahead.

Obviously, the new 'tools' imagined by the 2003 Convention are still in place: the stable European Council Presidency, smaller Commission, enhanced Parliament, minister for foreign affairs (in spite of the difference of title), double majority (states and citizens) for Council decisions, and so on. Yet, the establishment of the first Troika – Council and Commission presidents and high representative – from 2009 promises to be a test of credibility if, as British MEP Andrew Duff put it, the choice of representative figures for this European triumvirate is to "respect a balance of left and right, Eastern and Western Europe, North and South, and big and small countries".

- The cards are likely to be reshuffled in terms of the outcome of the June 2009 European elections and renewal of the Commission the following autumn. Time is of the essence from now until then, to wipe out the causes of the French and Dutch rejection of the Constitution (29 months ago), causes that are closely akin to Europeans' dominant scepticism: the feeling that the EU is not responding to economic and social insecurity, the growing gap between the EU institutions and citizens, the absence of interest in Europe for want of a grand common project.

EUROPE OF 2010 AND BEYOND

After Rome (1957), Maastricht (1992), Amsterdam (1996), Nice (2000) and Lisbon (2007), there will not be another new treaty for a long time to come. The new 'toolbox' is supposed to help the Union to tackle the renovation of its common policies and to begin the next decade renewed and stronger. To help it cross that hurdle, the Slovenian and French EU Presidencies will have a heavy responsibility in 2008.

The European leaders will have support from the 'group of wise men' that will be set up at the December 2007 summit, at the invitation of the French head of state. Ten to 12 eminent figures ("historians, geographers, philosophers and business leaders," according to President Sarkozy) will have until 2009 to study the Union's longer-term future (2020-2030) in the globalised world and, at the same time, Turkey's place therein.

TOWARDS A NEW SINGLE ACT?

An idea launched by Philippe Herzog seems to be gaining followers. This French former MEP and president of the association 'Confrontations Europe' proposes a new single act, like the 1987 original inspired by Jacques Delors, which paved the way to major reforms, the Single Market and the euro. Roughly, it would be an action plan based on pivotal projects to enable the Union to move forward progressively and pragmatically.

Whatever initiatives and methods may be agreed, if the EU succeeds, in spite of the inevitable roadblocks, in drawing up a roadmap for 2010 and beyond, then we will be able to say that the Treaty of Lisbon will have given birth to a new European Union. ■

* Formal change ** Partial change *** Fundamental change

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Dossier coordinated by Nicolas Gros-Verheyde

*** Formal change ** Partial change *** Fundamental change**

The Treaty of Lisbon brings one cycle to a close and opens another

By Nicolas Gros-Verheyde

The Intergovernmental Conference that culminated on 19 October with a new treaty - to be known as the Treaty of Lisbon - is historic in more than one sense.

THE END OF THE COMMUNITIES

If ratified by the 27 member states, the new text will bring to a close more than 15 years of talks on political Europe and institutional reform. Launched with the drafting of the Treaty of Maastricht, the debate kept coming back on the table (the famous "leftover"). Symbolically, the "European Communities" will no longer exist. With the renamed "Treaty on the Functioning of the European Union," the term "European Communities" will be replaced by "European Union".

The IGC also marks the end of the latest phase of enlargement to the countries "on the other side of the Wall" that split Europe in two for nearly 40 years, with the accession of the last two, Romania and Bulgaria, at the start of last January. The Balkan countries, mostly carved out of former Yugoslavia, will still have to be integrated, which is first and foremost a question of political will and pacification of the continent.

Of course, the mandate given to the intergovernmental conference may have seemed obscure and complex. Make no mistake about it: that was its main objective. Without a smoke screen, how could Eurosceptics and federalists, proponents of and opponents to the Constitution, ever have been reconciled? The talent of the political leaders and legal experts who worked on the text consisted in making extremely discreet the fact that the new treaty and the draft Constitution are like two peas in a pod, though the Treaty of Lisbon is perhaps better.

THE END OF AN ILLUSION

What is better is the new balance in terms of objectives, the protocol on services of general interest – which cannot be ignored and whose importance will be borne out over the years – and the new legal basis for solidarity on energy.

It is also – let's be frank - the shelving of all the symbols of a 'super-state'. Obviously, the original will of Europe was to unite Europeans. That has been reiterated. But was the idea really to live in a single mould? Is the concept of "united states" the best framework for Europe, the best model we can imagine? And most importantly, can it even be put into practice?

This IGC therefore served the useful purpose of putting an end to certain illusions born with the draft European Constitution. The work carried out by the team led by Valéry Giscard d'Estaing was worthwhile but a bit self-indulgent. Its main flaw was the failure to take account of the reality of the member states. The concept of European state that was viable for five or six countries, in 1950 or 1980, is no longer a model today. Meanwhile, the Berlin Wall has disappeared. And Europe has been both "reunified" – and not "enlarged" as often said - and diversified. This reunification and diversification (ideological, economic and philosophical) are tremendous assets but they come with a price: the revision of certain of our overly narrow political concepts.

The new member states have a concept of the Union that is not necessarily the same as that of the founding states, of an ever-closer Union that obliges them to abandon their sovereignty. That is the new syncretism that Europe must achieve: allowing each country to keep its sovereignty, its own flavour and colour, while taking part in more and a wider variety of common policies or policies under the competence of the Union.

In this context, the original philosophy of Europe retains all its vitality: building up policies one after another, moving forward one step at a time, progressing while staying together. The new challenge is to allow for synergy without imposing uniformity.

Policies on agriculture, transport, territorial cohesion, the single market and the single currency thus keep their rightful place, even though some would prefer to see them ditched. The area of freedom, security and justice is taking shape, slowly but surely. It will gain new impetus from the Treaty of Lisbon. Research, energy and civil protection policies will also be put in place. And, above all, the foreign, defence and security policies are raised in this treaty to the rank they should have had for years, and particularly since 1990, when the Twelve envisaged the creation of a political Europe alongside Economic and Monetary Union. ■

LEGAL PERSONALITY

EU assumes single legal personality **

By Nicolas Gros-Verheyde

The European Union now has legal personality (Article 32 TEU). Until now, only the European Community and Euratom enjoyed that status (along with the ECB and the EIB). The EU may thus conclude international agreements in all its areas of competence in four cases: 1. where the treaties so provide; 2. where the conclusion of an agreement is necessary to achieve one of the objectives referred to in the treaties; 3. where provided for in a legally binding Union act; 4.or where conclusion of an agreement is likely to "affect common rules or alter their scope" (Article 188L TFEU).

Legal personality may not have the effect of calling into question the division of powers between member states and the EU. The states remain free to conclude international agreements provided they are compatible with the agreements signed by the EU or with the EU's competence.

The new legal personality is matched with a single procedure for the conclusion of international agreements. The Council authorises the opening of negotiations on the basis of recommendations from the Commission or the high representative for the CFSP. It appoints the negotiator or head of the Union's negotiating team. The Council may also address directives and designate a special committee charged with monitoring the negotiations. It is also the Council that adopts a decision authorising the signature and conclusion of agreements. The European Parliament must approve agreements in fields to which the legislative procedure applies, having budgetary implications or creating a specific institutional framework, as well as association agreements or those on accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). In other cases it is simply consulted, save on the CFSP (Article 188 N TFEU). ■

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ANALYSIS

A 'modifying treaty' intended to disappear and be simplified

By Nicolas Gros-Verheyde

The text of the Treaty of Lisbon brings changes to three documents: the Treaty establishing the European Community (Rome 1957), the Maastricht Treaty (1992) and the Treaty establishing the European Atomic Energy Community (Euratom, Rome 1957).

Once it has been signed and ratified, the idea is that as a text in itself, it will disappear and its clauses will be integrated into the other three texts. Some notions can still develop before signing: in the margin during the review by lawyer-linguists; or more fundamentally if some countries reject certain dispensations in extremis.

COMPLICATED TEXT TO BE SIMPLIFIED

Though officially the Lisbon Treaty contains "only seven articles," as many political officials boasted, in reality, the text is made up of 152 pages containing more than 350 primary legislation provisions, to which 13 protocols and 59 declarations are added.

However, this real complexity could fade over the years. On the one hand, this is because the text cleans up all the obsolete notions, replacing 'ECU' with 'euro', or 'common market' with 'single market' etc (Article 2, Point 3 of the amending treaty). On the other hand, it is because once it has been ratified in every member state, the Official Journal should publish an unofficial 'consolidated' version, which could be accompanied by a renumbering of articles (some were deleted, others added). With this new version, we can see that this treaty brings real added value in terms of reading logic that previous treaties did not have. It still does not deserve to be dubbed 'simple', but it will nonetheless be more readable.

DIFFERENT LEGAL VALUES

The text of the treaty and its protocols have exactly the same legal value. Both have to be ratified by member states and under normal circumstances they can both only be modified by an Intergovernmental Conference (IGC), except where there is a clause to the contrary (Article 36 TEU).

Declarations are political acts, joined to the conclusions of the IGC. The content and legal value of these declarations vary considerably. They may originate in one or several member states or even the IGC. They can refer to an article in the treaty or one of its protocols or may contain a more general disposition. Often, they make it possible to increase the visibility of a point of view that is generally accepted by all: sometimes they are used to clarify a point which is not clear or to announce a future commitment. But this does not mean they are any less important.

It is in a declaration annexed to the Treaty of Nice that it was agreed that a new IGC should be convened (later to become the Constitutional IGC). By the same token, the clause specifying that a meeting of "the European Council should be held in Brussels during each Presidency" was contained in a declaration. And now again in Lisbon, the problems of the high representative (European Parliament), competencies (Czech Republic) and the composition of the Parliament (Italy) were all resolved in declarations.

PRIMARY OR SECONDARY LEGISLATION

Treaties and protocols, together with the EU Accession Treaties, form what is known as 'primary legislation'. In these treaties a distinction is made between the 'founding' acts, meaning original texts (Rome, Paris, Maastricht), and 'modifying' acts which, as their name suggests, are amendments to the original texts.

The term 'secondary legislation' refers to all those measures – regulations, directives, decisions – which are based on articles from the EC Treaty. It is the 'legal basis' which determines the scope of the Union's powers, the measures it is allowed to take and of course the voting practices. To give a complete overview of the legal setup, we must mention the conventional acts or international agreements signed by the Community or the European Union with third countries (association agreements).

LEGISLATIVE ACTS

The new treaty keeps the classic distinction from preceding treaties (regulation, directive, decision - see box), but simplifies and reorganises the decision-making instruments into four categories, reused from the IGC 2004. Only the name changes:

- **Legislative acts** are regulations, directives or decisions, adopted by a legislative procedure. The legislative procedure can be ordinary (decision through co-decision on a Commission proposal) or special (adoption by the EP with the participation of the Council or by the Council with the participation of the EP) (Article 249a TFEU).

- **Delegated acts:** This is a principal new addition in relation to today. A legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend "certain non-essential elements of the legislative act." The 'delegated' legislative act explicitly defines "the objectives, content, scope and duration of the delegation of power." Legislative acts set the conditions to which the delegation is subject: the possibility for the European Parliament or the Council to revoke the delegation or to set a waiting period – the delegated act may enter into force only if no objection has been expressed by the European Parliament or the Council within a period set by the legislative act (Article 249b TFEU).

- **Implementing acts:** Though it is the responsibility of member states to ensure the implementation of Union acts, the Commission can also be delegated to for certain implementing powers and in matters of the Common Foreign and Security Policy. This provision is quite similar to the existing one in comitology, with a fundamental difference: the European Parliament acts in codecision with the Council (Article 249c TFEU).

Council recommendations, which follow the same voting rules as legislative acts (qualified majority or unanimity). The Commission, as well as the European Central Bank, can adopt recommendations in specific cases (Article 249d TFEU).

The **regulation** has a general scope. It is compulsory in all its elements and it is directly applicable in all member states.

The **directive** links all recipient member states on the result to be achieved, while leaving it for the national authorities to decide on the form and the methods.

The **decision** is compulsory in all its elements. When it specifies its recipients, it is only applicable for those named.

Recommendations and **opinions** are not related. ■

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LISBON TREATY

Two routes for future revisions ***

By Nicolas Gros-Verheyde

The new treaty uses the provisions from the IGC of 2004 which set revision procedures more developed than the current treaty (right of initiative for the EP, the role of national parliaments, convening of a convention, simplified procedure, etc). Two revision methods are distinguished: ordinary and simplified (article 33 TEU).

Ordinary review: The revision initiative rests on a member state, the European Parliament or the European Commission, which presents a draft to the Council of Ministers. The draft revision can "inter alia, serve either to increase or to reduce the competences conferred on the Union in the treaties." The national parliaments are informed. But it falls on the European Council to decide how to follow it up – it deliberates it by simple majority after consultation in the Parliament and the Commission. Either it convenes a 'convention' made up of representatives of the national parliaments, heads of state and government of the member states, from the Parliament and the Commission, responsible for adopting – by consensus – a recommendation for a conference of representatives from member states (IGC), or it directly convenes an intergovernmental conference. In this case, the European Council establishes the mandate. The IGC deliberates by 'common accord'. The member states must ratify this text in accordance with their own constitutional rules.

Simplified revision. This procedure only applied to the third part of the Treaty on the Functioning of the Union (internal affairs). The procedure is identical, except on one point – there is no IGC or convention; it is the European Council which decides by unanimity – and with a limit – and its objective cannot be expanding the Union's competencies. The text must then be ratified by each member state.

General bridging clause. The European Council can also decide, by unanimity, to have a field pass from unanimity decision to qualified majority, from the special legislative procedure to the ordinary legislative procedure. No revision of the treaty is necessary. All fields are covered, except for defence and decisions having military implications. ■

Clause for an appeal

If, in the two years of the signing of the revised treaty, four-fifths of the member states have ratified the treaty but one or several member states encounter difficulties in ratifying the text, "the matter shall be referred to the European Council". But contrary to what is often said, this provision has only a very relative value. The clause does not allow the non-ratification in a member state to be disregarded. The ratification of treaties continues to obey international law: any subsequent amending treaty must be ratified by all member states, without which it cannot come into force.

PRINCIPLES

The fight for values: a reversal of principles **

By Nicolas Gros-Verheyde

From its first articles, the new treaty conceals an important aspect: it overturns Europe's values and objectives (Articles 2 and 3 TEU).

First, the mandate breaks up the unity of the Constitutional Treaty, which enumerated a long list of objectives. It thus brings the principle of 'free and undistorted' competition – which gave rise to violent criticisms during the referendums in France and the Netherlands – down to the ranks of a (mere) objective of European policies. Contrary to what some claim, however, it does not totally abolish it. Undistorted competition in the internal market remains, for example, one of the Union's exclusive competences together with the use of other policies : trade, anti-dumping, etc (article 3 TFEU).

Next, by renaming the Treaty Establishing the European Communities the "Treaty on the Functioning of the European Union", the Lisbon Treaty implicitly subordinates it to the Treaty on the European Union, and consequently to the objectives that treaty sets for Europe. As a result, principles previously considered declarative – protecting its citizens worldwide, economic, social and territorial cohesion, cultural and artistic diversity, etc – as well as social objectives, become fundamental principles guiding European policies and, by a simple mechanical effect, they are raised to a higher level.

This reversal of values may at first sight appear cosmetic in nature. Placing social, environmental and sustainable development values on the same level as liberal economic values, or even slightly above them, is a very strong political move. The term "social market economy" – dear to the Germans in particular – is placed beside the words "highly competitive". "Balanced economic growth" is set next to "price stability". The internal market is only mentioned in passing – "the Union shall establish an internal market" – whilst a whole set of socio-economic and environmental objectives are enumerated precisely: full employment, social progress, high level of protection and improvement of the quality of the environment, fight against social exclusion and discrimination, social justice and protection, rights of the child, etc. The consequences could also be legal, believe several analysts. It could give the judges at the EU Court of Justice the opportunity to operate based on a hierarchy of the fundamental social values and the fundamental principles of free movement. ■

Humanist values

Putting an end to the quarrel over the Christian inspiration of Europe, the Treaty reuses, in the preamble, the wording from the IGC 2004: "Drawing inspiration from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law."

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INSTITUTIONS

Institutional changes in the new treaty ***

By Célia Sampol

The EU's reform treaty (to be known as the Treaty of Lisbon), which has just been adopted by the EU27, incorporates into its 'Treaty on the European Union' section, in Article 9, the bulk of the innovations on the EU institutions which would have figured in the now-defunct Constitution.

EUROPEAN PARLIAMENT

The text states straight away that the "European Parliament exercises legislative and budgetary functions jointly with the Council". Indeed, with the extension of co-decision, Parliament obtains more powers because it is placed in a position as a true co-legislator with the Council. On the budget, it is now on the same footing with the Council on all budget headings since the difference between 'compulsory' and 'non-compulsory' expenditure disappears. The European Parliament will elect the president of the European Commission, whereas until now it simply had to approve the candidate chosen by the governments. From now on, the Parliament is composed of "citizens of the Union" and not "peoples of the states," which emphasises the role and the place of Europeans. The new distribution of seats from 2009 has been defined: the number of MEPs will be limited to 750+1 (the president of the Parliament), the seats will be allocated according to the principle of 'degressive proportionality', with a minimum of six MEPs per state and a maximum of 96. This distribution system will, however, have to be revised for 2014, in order to reach a sustainable and automatic method of calculation (Article 9a TEU + declaration).

EUROPEAN COUNCIL

The European Council becomes a full-fledged institution. It will still be composed of the heads of state or government of the member states, its president and the Commission president. The new 'high representative of the Union for foreign affairs and security policy' will participate in its work.

The Presidency will no longer be rotated every six months: the European Council will elect its president by qualified majority for a term of two and a half years, renewable once. The European Council president will represent the Union externally, at his level and in his capacity, for matters related to the Common Foreign and Security Policy, which will not prejudice the remit of the EUs high representative (Article 9b TEU).

COUNCIL

The additions concern the provisions on the new system of qualified voting. Starting from 1 November 2014, the qualified majority is defined as being equal to at least 55% of Council members, counting at least 15 and representing member states uniting at least 65% of the Union's population. A blocking minority must include at least four members of the Council, without which the qualified majority stands.

Other arrangements governing qualified majority voting are set in the Treaty on the Functioning of the Union and the provisions which are transitional till 31 October 2014, as well as those applicable between 1 November 2014 and 31 March 2017, are set in the protocol (see other article). A transparency criterion has been added: "The Council shall meet in public when it deliberates and votes on a draft legislative act".

Finally, the Council's Presidency, with the exception of foreign affairs issues, will be managed by predetermined groups from three member states for a period of 18 months. These groups are composed by equal rotation, taking account of their diversity and geographic balances within the EU. In turn, every member assumes the Presidency for six months (Article 9c TEU).

EUROPEAN COMMISSION

The Commission in office between 2009 and 2014 will be composed of one national per member state, among them the president of the institution and the new high representative for foreign affairs and security policy, who is one of the vice-presidents.

But from 1 November 2014, the Commission will be composed of a number of members corresponding to two-thirds of the number of member states, "unless the European Council, acting unanimously, decides to alter this number". If that does not happen, the EU27 will have 18 commissioners and the EU28 (with Croatia) 18 or 19, depending on how the decimals are counted. The Commission members will then be chosen based on a system of equal rotation between member states, based on the principle of strict equality of treatment between countries for the order of rotation and time of presence. The Commission president is now elected by a majority of members of the European Parliament, on a proposal from the European Council, acting by qualified majority. The Council, by agreement with the elected president, will then adopt the list of the other Commission members. The members shall be selected on the basis of the governments' suggestions. The Commission is subjected, as a College, to an approval vote in the European Parliament. On the basis of this approval, it is appointed by qualified majority by the European Council (Article 9d TEU).

NEW HIGH REPRESENTATIVE

The European Council, acting by qualified majority and in agreement with the Commission president, will appoint the high representative of the Union for foreign affairs and security policy (Article 9e TEU).

The high representative will conduct the Union's Common Foreign and Security Policy. He will contribute to the development of such policy by submitting proposals and will implement the policy as the Council's agent, doing likewise for security and defence policy. The main innovation is that this high representative will preside over the Foreign Affairs Council. The high representative is also one of the Commission vice-presidents, in charge of external affairs.

COURT OF JUSTICE

The new treaty states that the EU Court of Justice is comprised of the Court of Justice, the Court of First Instance and specialised courts. It will still have one judge per member state and 11 advocates-general (eight originally). The Court of First Instance must have at least one judge per member state. The judges and advocates-general are chosen from among distinguished figures offering every guarantee of independence and are appointed by common accord by the governments of the member states for six years, after consultation of a special panel (Article 9f TEU).

The provisions on the European Central Bank and the Court of Auditors are relegated in the Treaty on the Functioning of the Union. Both retain their institutional status, although it is given less emphasis. ■

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SUBSIDIARITY

Half a victory for national parliaments **

By Célia Sampol

The role of national parliaments in the architecture of the EU is a subject which has been debated for some time. The Treaty of Lisbon takes up the advances planned by the draft Constitution on the topic, while further reinforcing them. This new role does not, however, allow national assemblies to hold a blocking power on the European Commission's legislative proposals. These new provisions are contained in two additional protocols, one on the 'role of national parliaments' and the other on the 'application of the principles of subsidiarity and proportionality'. They already exist, and have existed since the Amsterdam Treaty, but today they have been amended in two ways.

Firstly, the period to examine draft Community legislative acts and to give a report on respecting the subsidiarity principle has been extended. It passes from six to eight weeks. Secondly, the new treaty provides for a reinforced control mechanism for the subsidiarity principle, allowing national parliaments to foil any Commission proposals that would not respect it. It would be necessary for a majority of parliaments to present a reasoned opinion to the EU legislator (Council or Parliament) and to obtain the support of 55% of member states and/or a majority of MEPs (Article 8c TEU + Protocols No 1 and 2).

THE RIGHT TO SHOW THE YELLOW CARD

These provisions constitute progress since Amsterdam. The working group on the role of national parliaments, established during the Convention on the Future of the European Union, had already given quite ambitious recommendations to the 2004 Intergovernmental Conference. An 'early warning mechanism' to monitor the application of the subsidiarity principle, for the first time directly involving the national assemblies, had notably been created. Today, that goes further. The Netherlands was the first to confront the role of national parliaments and respect of the subsidiary principle. Their main argument was the fear of seeing their sovereignty further escape them, to the profit of an increase in Community powers. Mindful that this founding country was one of the two that said 'no' to the Constitution, the German EU Presidency accepted, in June 2007, during negotiations on the treaty, to concede a little and give national parliaments the right to brandish this 'yellow card' faced with measures from the Commission.

The Netherlands would have preferred the 'red card', that is to say the power for parliaments to block the decisional process themselves. But member states refused to go so far, as well as the Commission, warning the member states against undermining its precious right of initiative. The idea of a right of initiative for the parliaments, allowing them to ask the EU executive to make a proposal in a particular field if a majority of them demand it, was also quickly abandoned. ■

COMMITTEE OF THE REGIONS

CoR gains political rights **

By Isabelle Smets

The Committee of the Regions (CoR - Articles 256-263 and 265 of the Treaty on the Functioning of the Union) can be satisfied with the new treaty. Since its creation in 1994, every review of the treaties has reinforced it powers and refined its political role. This time has not been an exception to the rule. Certainly, the committee remains... a committee; it is not becoming an EU institution, in the legal sense of the term, as it has asked again and again since its creation. But it obtains new rights: the right to be able to directly refer to the EU Court of Justice in case of a violation in the subsidiarity principle, at least concerning the texts for which it is necessarily involved in (it is the new protocol on subsidiarity which grants it this right) and the right to revert to the Court to defend its own prerogative (new Article 230, Paragraph 3).

In concrete terms, can we accept a deluge of pleas against acts which would violate the subsidiarity principle? This would not be in the interest of the CoR. For Jordi Harrison, the head of the cabinet of President Michel Delebarre, pleas should even be "extremely rare". But in the CoR, they are not refusing to show their pleasure and they believe that this new power makes its opinions more credible. Thanks to work which, according to Harrison, should be organised in advance, at the moment that legislation is being prepared. "If we succeed in organising ourselves at that moment, we could put forward an opinion which could be better understood, because there is this sword of Damocles. I think that we will gain in influence."

As the Nice Treaty already states, the number of members of the CoR cannot exceed 350, plus an equal number of substitutes. Conversely, the number of representatives per country will no longer be fixed in the treaty. It is the Council of Ministers, unanimously deciding on a Commission proposal, which will adopt a decision regarding its composition. A new provision (Article 256a, Paragraph 5) also gives the possibility of reviewing "the nature of the composition" of the Committee "at regular intervals, to take account of the economic, social and demographic changes in the Union". It will act, then, on a proposal from the Commission.

Like today, the members of the CoR will be named by the Council, deciding by qualified majority. But their term in office increases from four to five years, to come into line with those of the Parliament and the European Commission. The president and his office will be appointed for two and a half years (currently two years). Symbolically, the CoR – which asserts loud and clear its role as a political entity – welcomes office terms being made equal. Just like the reinforcing of relations with the European Parliament which, as was already the case for the Commission and the Council, receives the power to summon the CoR and moves into the ranks of the institutions which must consult it. For the Parliament, consultation of the CoR was until now only a possibility (though widely used). ■

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QUALIFIED MAJORITY VOTING

Double majority voting will have to wait till 2014 **

By Célia Sampol

The new qualified majority voting system in the Council should only be applied from 1 November 2014. This is what the heads of state and government of the EU27 unanimously agreed in the early hours of June 23, to satisfy Poland's persistent requests. This so-called "double majority" system holds that a decision is adopted if it unites at least 55% of the members of the Council, including at least fifteen of them, and representing at least 65% of the Union's population. Furthermore, a blocking minority will have to include at least four countries from the Council members. The Council will rule on the qualified majority except in instances where the treaties specify otherwise.

Until 31 October 2014, the current system provided for in the Nice Treaty will be used. It sets out three criteria to obtain the qualified majority: the threshold of weighted votes (at least 255 votes out of 345, i.e. 73.9%) expressing the favourable vote of the majority of members (14 out of 27) and representing 62% of the EU's population. The new Lisbon Treaty reuses the weighting from the Nice Treaty for the Council's deliberations which require a qualified majority (see table).

Countries (weighting - population in million)

- Germany 29 – 82.438
- Austria 10 – 8.266
- Belgium 12 – 10.511
- Bulgaria 10 – 7.719
- Cyprus 4 – 0.766
- Denmark 7 – 5.428
- Spain 27 – 43.758
- Estonia 4 – 1.344
- Finland 7 – 5.256
- France 29 – 62.886
- Greece 12 – 11.125
- Hungary 12 – 10.077
- Ireland 7 – 4.209
- Italy 29 – 58.752
- Latvia 4 – 2.295
- Lithuania 7 – 3.403
- Luxembourg 4 – 0.46
- Malta 3 – 0.404
- The Netherlands 13 – 16.334
- Poland 27 – 38.157
- Portugal 12 – 10.57
- Czech Republic 12 – 10.251
- Romania 14 – 21.61
- UK 29 – 60.422
- Slovakia 7 – 5.389
- Slovenia 4 – 2.003

THE 'IOANNINA COMPROMISE'

In addition, it has also been decided that there will be a transition period running from 1 November 2014 to 31 March 2017. During this period it will be possible members of the Council to ask that decisions that need to be adopted by qualified majority be adopted according to the qualified majority terms as stipulated in the Treaty of Nice. It will also be possible to suspend decisions using the "Ioannina mechanism". To do so will require an opposition comprising 75% of the threshold that would normally be required to form a blocking minority (at least four countries representing more than 35% of the population of member states, plus one member state). After 2017 the threshold required to apply the Ioannina mechanism will drop even further to 55% of the 35%, thereby increasing the possibility of forming minority blocking groups. The Ioannina compromise, developed during the 1994 European Council in Greece (hence the name), allows a small group of countries which after a majority vote, form a minority without having sufficient votes to reach the blocking minority threshold, to suspend a decision for long enough to find a solution that is acceptable to everyone. The exact duration of the suspension has not been specified. The text simply mentions a "reasonable delay". The articles referring to qualified majority voting in the Council are spread over four places in the Treaty. Firstly, article 9C of the Treaty on the EU reuses the definition of the double majority system.

Then the other arrangements governing this voting are set out in article 205 of the Treaty on the Functioning of the EU. It is a question of cases where the Council do not give a decision on a proposal from the Commission or the high representative of the Union for foreign affairs and security policy.

The transitory provisions from the Nice Treaty till 31 October 2014, as well as those applicable between 1 November 2014 and 31 March 2017, appear in protocol 10 "on transitional provisions." Finally, Declaration 4 explains the Ioannina compromise without quoting it. Since the European Council on 18-19 October in Lisbon, which saw the adoption of the new Treaty, an additional protocol has figured alongside this declaration (no. 9 bis). This additional protocol specifies that the Ioannina decision can only be suppressed or modified by unanimity ("the European Council shall hold a preliminary deliberation on the said draft, acting by consensus"). This inclusion allows Poland to be satisfied, as it had been worried to retain this mechanism which allows it, it believes, to compensate for the loss of power resulting from the double majority system. To begin with, Poland called for the compromise to be included in the Treaty itself. Ultimately, the solution of a declaration, reinforced by a protocol, was planned.

HISTORICAL REMINDER

The Convention on the Future of Europe, in the early days of the aborted draft Constitution, proposed the, to begin with, the following double majority: 50% of member states, representing at least 60% of the EU population. But the definition of qualified majority for a decision to be taken in the Council was the most difficult question to resolve during the intergovernmental conference in 2003-2004. During negotiations, some countries were opposed to the solution proposed by the Convention, in particular Poland and Spain. These two countries were much more in favour of the weighting of votes by country, as defined in Nice in 2000. In effect, this system gives them greater influence than their true demographic size (27 votes each, in comparison to 29 for the more populated countries).

Alongside this, the arguments put forward to defend the double majority were as follows: simpler decision making (a larger number of combinations of member states can constitute a qualified majority compared to the provisions in the Nice Treaty), more flexibility (the system will allow, at the time of future enlargements, lengthy negotiations concerning in attribution of votes to member states and the definition of the majority threshold to be avoided), taking account of the double nature of the Union (states and peoples). Persistent, Poland continued to think that the double majority was going to favour the large countries like Germany. Ultimately, an agreement was found in 2004, in the basis of the principle of the double majority with 55% of member states and 65% of the population. ■

*** Formal change ** Partial change *** Fundamental change**

VOTING IN THE COUNCIL

Areas moved to qualified majority **

By Célia Sampol and Nicolas Gros-Verheyde

One of the major institutional innovations of the draft Constitution – the extension of qualified majority voting in the Council – is taken up by the new treaty. This extension goes hand in hand with the application of the so-called ordinary legislative procedure (co-decision with the European Parliament).

Sensitive areas (tax, social security, foreign policy, common defence, operational police cooperation, language rules, seats of the institutions) remain decided by unanimity.

The following anre the main areas which move to qualified majority voting

- Order of Presidencies of the Council – decision of European Council, without a Commission proposal (Art. 201b TFEU).

- Mechanisms for control by member states of the Commission's exercise of implementing powers (current comitology decision) – ordinary legislative procedure (Art. 249c Paragraph 3 TFEU).

- Free movement of workers, social benefits – ordinary legislative procedure (Art. 42 TFEU).

- Amendment of certain provisions of the Statute of the ESCB – ordinary legislative procedure (Commission proposal with consultation of the ECB or ECB recommendation with consultation of the Commission) (Art. 107 Para. 3 TFEU).

- Common transport policy (deletion of the special arrangements for measures "which might seriously affect the standard of living and level of employment in certain regions and the operation of transport facilities") – ordinary legislative procedure (Art. 71, Paragraph 2 TFEU).

- Administrative cooperation in the area of freedom, security and justice – Council regulation, consultation of EP (Art. 66 TFEU).

- Border checks – ordinary legislative procedure, except for passports, identity cards and residence permits, decided unanimously after consulting the Parliament (Art. 69 TFEU).

- Asylum and protection of refugees and displaced persons – ordinary legislative procedure (Art. 69A TFEU).

- Immigration – ordinary legislative procedure (Art. 69B TFEU).

- Judicial cooperation in criminal matters – ordinary legislative procedure (Art. 69E TFEU).

- Approximation of criminal laws, offences and sanctions – with appeal procedure to the European Council (Art. 69F TFEU).

- Eurojust - ordinary legislative procedure (Art. 69H TFEU).

- Police cooperation limited to certain sectors (exchange of information, staff training, shared investigation teams - ordinary legislative procedure), operations cooperation for the police remains decided by unanimity with appeal procedure to the European Council (Article 69J Paragraph 2 TFEU).

Europol - ordinary legislative procedure (Art. 69K TFEU).

- Culture (incentives) – ordinary legislative procedure (Art.151, paragraph 5 TFEU).

- CEB: nomination of the president and members of the CEB board – decision of the European Council, on recommendation from the Council, consultation of the EP or the council of governors of the CEB (Art. 245b TFEU).

- Foreign policy: decisions based on a decision of the European Council or on a proposal from the high representative following a decision from the European Council, implementation of a preceding decision, nomination of a special representative (Art. 17 TEU).

New legal bases subject to qualified majority voting

- List of configurations of Council – European Council decision without proposal from Commission (Art. 201b TFEU).

- Review of rules governing the nature and composition of the Committee of Regions and Eeconomic and Social Committee – Council decision on a proposal from the Commission (Art. 256a TFEU). But the composition of the consulting bodies remains decided unanimously (Art. 258 and 263 TFEU).

- Citizens' initiative for a European law – ordinary legislative procedure (Articles 8B TEU and 21 TFEU).

- Measures implementing the own resources system – Council act, approval of the EP (Art. 269 TFEU). But arrangements for the own resources system (ceiling, categories) remains decided unanimously after consultation with the EP.

- Agreement on withdrawal of a member state – Council decision on a proposal from the negotiator of the agreement (in principle the Commission), after consent of EP (Art. 35 TEU).

- Principles and conditions for the operation of services of general economic interest – ordinary legislative procedure (Art. 14 TFEU).

- Intellectual property – ordinary legislative procedure for the creation of European intellectual property rights and the implementation of an authorisation and monitoring scheme on an EU level; language rules are still decided unanimously after consultation with the EP (Art. 97b TFEU).

- Common positions and unified representation in international scene of the Eurozone – Council decision, consultation of European Central Bank (ECB) (Art. 115a TFEU).

- Space policy – ordinary legislative procedure (Art. 172a TFEU).

- Energy (functioning of the market, renewable energies, interconnection) – ordinary legislative procedure (Art. 176a TFEU).

- Measures to support crime prevention – ordinary legislative procedure (Art. 69G TFEU)

- High safety norms for medicines and medical apparatuses (Art. 152 TFEU).

- Incentive measures to protect human health and in particular to combat the major cross-border health threats and tackle tobacco and alcohol abuse (Art. 152 TFEU).

- Tourism – ordinary legislative procedure (Art. 176B TFEU).

- Sport – ordinary legislative procedure (Art. 149 TFEU).

- Civil protection (Art. 176C TFEU).

- Administrative cooperation – ordinary legislative procedure (Art. 176D TFEU).

Appointment of the High Representative for foreign affairs and security policies (Art. 9E TEU).

- Statute and seat of European Defence Agency – Council decision without Commission proposal (Art. 30 TEU).

- Establishing permanent structured cooperation in the area of defence, admission or suspension of a member state – Council decision without Commission proposal, consultation of minister for foreign affairs (Art. 27 Paragraph 6 and Art. 31 TEU).

Establishing a 'start-up fund' for the financing of defence policy missions (Article 26 Paragraph 3 TEU).

- Humanitarian aid and creation of European Voluntary Humanitarian Aid Corps (Art. 188J TFEU).

- European Union administration (Art. 254a TFEU). ■

*** Formal change ** Partial change *** Fundamental change**

COMPETENCES

New treaty clearly establishes division of competences **

By Célia Sampol

The new draft treaty clearly defines the division of competences between the European Union and the member states. One article has been reinforced and contains all the most important clauses from the draft Constitution. In addition, a protocol and a declaration have been added.

The current treaty defines the limits of the Union's competences. In three paragraphs, it explains that the Community acts within the limits of the competences that have been conferred on it and the objectives which the treaty has assigned to it. This article is reused in the new treaty (Article 5 TEU).

In areas where it does not have "exclusive" competence, "the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the member states, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level".

In addition, EU action should "not exceed that which is necessary to achieve the objectives of the treaties" (proportionality principle).

RENEWED CONSTITUTION

The new treaty goes further and is more insistent on the need for a clear separation of competences between the EU and member states. To a large extent, it repeats the articles from the draft Constitution, notably the difference between exclusive and shared competences.

This means that when the EU is granted exclusive competence in a given domain, then the EU alone can legislate and adopt legally binding acts in that domain.

Furthermore, "member states can exercise their competences to the extent that the Union has not exercised its competence" or "has decided to cease exercising its competence".

Specific characteristics have also been kept. This means that member states will "coordinate their economic and employment policies within arrangements as determined by this treaty, which the Union shall have competence to provide". The EU shall also have "competence […] to define and implement a Common Foreign and Security Policy, including the progressive framing of a Common Defence Policy".

Furthermore, in certain areas the EU has been granted the competence to carry out actions "to support, coordinate or supplement the actions of the member states, without thereby superseding their competence in these areas" (Article 2 TFEU).

The new treaty, in the same way as the Constitution, then lists the domains in which it has exclusive competence, those with shared competence and those with carry out actions (Articles 3 to 6 TFEU, see box).

Logically, the EU's competence with regard to the CFSP is defined according to specific provisions of the EU Treaty.

CZECH REQUESTS

And things do not stop there. At the request of the Czech Republic, a protocol (No 8) has been introduced to strengthen the question of exercising shared competences.

It serves to define the scope of these competences: "When the EU carries out an action in a certain area, the scope of its competence covers only the elements governed by the act in question and does not therefore cover the whole domain".

A political declaration (No 28) has also been added to the treaty, again at the request of the Czechs.

The text specifies that all competences not specifically attributed to the EU in the treaties automatically become the competence of member states. Further details are also given on the cancellation of an EU legislation.

This implies that, at the initiative of one or more member states, the Council "can ask the Commission to submit a proposal to repeal a legislative act".

Initially, this request caused the European Commission to balk, believing it to be an attack on its right of initiative (which implicitly includes a right to repeal).

SYMBOLIC COMPROMISE

But in the end, in order to reach a general compromise, this declaration - mainly symbolic and with very little legal value - was accepted.

In fact, a sentence was added at the last minute: "The Commission states that it will pay particular attention to this type of request". Very politely put.

The declaration also stresses that during an Intergovernmental Conference, representatives from member states can decide to modify the treaties so as to increase or reduce the competences attributed to the EU. ■

Different categories of competences

- **Areas of exclusive competence:** the Customs Union, the establishing of the competition rules necessary for the functioning of the internal market; monetary policy for the member states whose currency is the euro; the conservation of marine biological resources under the Common Fisheries Policy; the Common Commercial Policy and concluding international agreements in certain cases.
- **Areas of shared competence**: internal market; social policy, for the aspects defined in this treaty; economic, social and territorial cohesion; agriculture and fisheries, excluding the conservation of marine biological resources; environment; consumer protection; transport; Trans-European Networks; energy; area of freedom, security and justice; common safety concerns in public health matters. Also, more detail in the areas of research, technological development, space, development cooperation and humanitarian aid, economic policies and the coordination of employment and social policies in member states.
- **Areas of supporting competence:** protection and improvement of human health; industry; culture; tourism; education, vocational training, youth and sport; civil protection and administrative cooperation.

*** Formal change ** Partial change *** Fundamental change**

FUNDAMENTAL RIGHTS

A charter of variable legal value ***

By Nicolas Gros-Verheyde

"The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights". So it is clear: the new treaty expressly mentions that the Charter of Fundamental Rights, announced on 7 December 2000 and corrected in the margin in the IGC 2004, will have "the same legal value as the Treaties." (Article 6 TEU). But the charter is more an announcement of principles than the expression of rights and this legal value is specifically defined.

Four provisions therefore specify that:

- the charter confirms "the fundamental rights guaranteed by the European Convention on Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the member states";

- the charter does not extend the scope of application of the Union's law beyond the powers of the Union; it establishes no new powers or tasks for the Union and it does not amend its powers or its tasks such as they are defined in the treaties (Declaration 29);

- the charter applies to institutions and member states only when they are implementing the Union's law;

- the explanations of member states present in the charter are stated in the entirety and the rights and liberties of the charter must be interpreted in accordance with these provisions.

The whole protection device for the rights set out in the charter (Articles 52 to 54 of the 2000 version) is reused: the frame of limitations to the rights and principles of the charter (compulsory respect for the principle of proportionality and responding to the objectives of the Union or the protection of others), interpretation at least identical to the articles of the European Convention of Human Rights (when the similar provisions, with the possibility of granting wider protection), no possible limit for rights already recognised in other instruments (the Union's law, international conventions, ECHR, constitutions of member states, etc), ban of abuse of a right.

In form, the charter no longer figures in the text of the treaty itself, which has an optical effect – reduce the length of the text by about fifty pages – and obey a philosophical willingness. "It would have reduced this text's worth if it had been annexed to the Treaty," explains a European jurist.

Before the final signing of the Treaty, the Charter of Fundamental Rights will have to be announced again, in a formal session of the European Parliament, and republished in the Official Journal of the European Union. A procedure necessary as, since its first announcement in December 2000 in Nice, amendments (text explanations and footnotes) have been added.

THE BRITISH EXCEPTION

Cautious, the UK has taken care (in Protocol 7) to explicitly state that:

1. "The charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms." (It is the specific aspect of the British judicial system and the laws on justice and home affairs which are targeted here).

2. "In particular, and for the avoidance of doubt, nothing in Title IV of the charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law." The following aspects of social and solidarity rights are targeted here: information of workers, collective negotiation and the right to strike, employment services, individual dismissal, working conditions, child labour, family life, social security and social assistance, health, access to services of general economic interest, protection of the environment and consumers.

3. "To the extent that a provision of the charter refers to national laws and practices, it shall only apply to Poland or the United Kingdom to the extent that the rights or principles that it contains are recognised in the law or practices of Poland or of the United Kingdom."

This protocol, however, does not challenge the respect of other obligations incumbent on the UK in virtue of the European treaties or the Union's law in general, nor the application of the charter in other member states.

THE POLISH EXCEPTION

Poland had decided to join the British opt-out, at least in the general part. In a declaration annexed to the treaty, it had, in effect, acknowledged submitting to the employment and social laws, as recognised by community law and the charter (Declaration 53). Similarly, it had specified, in another unilateral declaration, that "the charter does not affect in any way the right of member states to legislate in the sphere of public morality, family law, as well as the protection of human dignity and respect for human physical and moral integrity." (Declaration 51). It is in this format that the Treaty was approved at the Lisbon summit on 18 and 19 October. But the new government resulting from the ballot on 21 October has promised to reconsider this position, which can be done, with a new IGC, before the final signing of the treaty (planned for 13 December in Lisbon).

Also note that Ireland, who, in June, had reserved a possible opt-out, did not follow up on the matter.

GENERAL PRINCIPLES

The treaty reaffirms that the "Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the member states, shall constitute general principles of the Union's law." This is, then, the general principles of community law from the case-law of the Court of Justice, written in stone. ■

ADHERENCE TO THE ECHR

The treaty allows the Union to adhere to the European Convention for the Protection of Human Rights and Fundamental Freedoms. This must be ratified by the Council, deciding unanimously, and subjected to the ratification of member states. There too, it specifies that this adherence "shall not affect the Union's competences as defined in the Treaties." (Article 6.2 TEU + Protocol 5)

*** Formal change ** Partial change *** Fundamental change**

DEMOCRACY/CITIZENSHIP

Citizens' right of initiative is born ***

By Nicolas Gros-Verheyde

For citizenship, the major change is the insertion of the possibility of citizen initiative, formalising the principle of equality, the creation of a chapter titled "Democratic principles" in the TEU, a new legal basis for diplomatic protection, as well as the slight reinforcement of antidiscrimination measures. All the *acquis* of the Constitution has therefore been reused.

CITIZENSHIP

European citizenship. As in the current treaty, a citizen of the Union is clearly defined as "every national of a member state". It is also specified that this citizenship of the Union "shall be additional" to national citizenship and does not replace it (Article 8 TEU). The phrase "shall be additional" was preferred to the previous term "complement".

Citizens' rights. Even though the article has been re-written, it does not introduce anything new in the different citizen rights which is encapsulates into a single article: right to free movement, right of residence, right to vote and to stand as candidates in elections to the European Parliament and in municipal elections, diplomatic protection, right to petition, and to address the institutions and advisory bodies of the Union in any of the treaty languages. This list is not exhaustive (Article 17b TFEU, formerly Article 18 TEC). The Council, by unanimity, after approval from the European Parliament – and no longer just its consultation – can decide to add rights; rights subject to ratification by member states, in accordance with their respective constitutional rules (Article 22 TFEU).

Right to free movement. The rules on a free movement of people overall remains identical. Measures on social security and social protection can now be adopted on this basis, by unanimity after consultation in Parliament. The ban against adopting "passport and identity card" measures on this basis has been lifted, but placed into the chapter on "area of freedom, security and justice" (Article 18 modified TFEU).

Diplomatic protection. The protection of citizens abroad remains the main field of member states which must cooperate among themselves. But the treaty establishes a new legal basis. The Council can now establish directives "establishing the coordination and cooperation measures necessary", decision taken unanimously after consultation in Parliament (Article 20 modified TFEU).

DEMOCRATIC LIFE

Citizen initiative. Citizens acquire – like the European Parliament and the Council – the right to "take the initiative of inviting" the European Commission to submit an "appropriate proposal". It is necessary to gather the approval of a million citizens of the Union, who are natives of a significant number of member states. It is also necessary that the requested legal act is "required for the purpose of implementing the treaties." A decision (in accordance with the ordinary legislative procedure) will have to establish the procedures and conditions required for a citizens' initiative, particularly including the minimum number of member states from which such citizens must come (Articles 8b TEU and 21 TFEU). The Commission retains, the monopoly on the initiative and can, at any opportunity, decide on the follow-up to this reguest.

Dialogue with civil society. The principle of dialogue with civil society has been put into the treaty. Therefore, the institutions are duty bound to "give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action" and "maintain an open, transparent and regular dialogue with representative associations and civil society." The Commission is also duty bound to carry out "broad consultations with parties concerned" (Article 8b TEU).

Status of churches. The declaration adopted by the Amsterdam IGC is reused and complemented. The text therefore officially recognises "identity and their specific contribution" of churches, religious, philosophical and non-confessional associations and proposes an "open, transparent and regular dialogue". It affirms that the Union "respects and does not prejudice the status under national law of churches and religious associations or communities", along with the philosophical and non-confessional associations (Article 15b TFEU).

The ban on all discrimination and the principle of equality are reiterated in the fundamental principles (Articles 20 and 21 of the Charter of Fundamental Rights), the objectives of the Union (Articles 2 and 3 TEU), the principles which transcend all policies and instruments of the European Union (Article 10 TFEU) and a means of action (Articles 17 and 17a TFEU).

It is nonetheless necessary to notice that the list of discriminations to be fought (nationality, sex, race or ethnic origin, religion or convictions, handicap, age and sexual orientation) remains limited and still does not include, for example, discrimination for political or trade union opinions.

Principle of equality. The Treaty places the principle of equality in the rights of its citizens, which must receive "equal attention" of the institutions, bodies, offices and agencies (Article 8 TEU). A principle not written until now but regularly applied by the Court of Justice under the "general principles".

Anti-discrimination actions. Without changes, a legislative act can be taken in view of banning all discrimination carried out on grounds of nationality, measures taken according to the ordinary legislative procedure (Article 17 TFEU, formerly Article 12 TEC). Measures aiming to combat the other types of discrimination (sex, race or ethnic origin, religion or convictions, handicap, age and sexual orientation) are still taken by unanimity. But the European Parliament now has input, having to approve the decision and no longer only giving its opinion (Article 17a TFEU, formerly Article 13 TEC).

Horizontal clause. The treaty introduces a clause specifying that "in defining and implementing its policies", the Union "aims to combat" all these types of discrimination defined.

Unlike the horizontal social clause (see separate article), this clause seems less an imperative through the use of the term "aim to combat" rather than "takes into account"; it therefore constitutes more a guideline than an imperative. It is nevertheless a clear step forward in relation to the current text. ■

*** Formal change ** Partial change *** Fundamental change**

COURT OF JUSTICE

New treaty strengthens EU's judicial system **

By Nicolas Gros-Verheyde

The progress achieved by the 2004 Intergovernmental Conference has been taken up in its entirety by the new draft reform Treaty of Lisbon. The jurisdictional system includes: the EU Court of Justice itself, the Court of First Instance and the specialised courts.

ORGANISATION OF THE COURT

Name changes. The Court's original name - The Court of Justice of the European Communities - has been changed to The Court of Justice of the European Union (CJEU), a name which follows the changes of names of the Treaties and corresponds to the increase in jurisdictional powers. The name covers three entities: the Court of Justice, the [General] Court - which looses its 'First Instance' qualifier - and the specialised courts (Article 9F TEU).

Specialised courts. The creation of specialised courts can be decided by the Council by qualified majority (and no longer by unanimity), as a co-decision with the European Parliament (Article 225A TFEU). There is currently one specialised court, the EU Civil Service Tribunal. Another could be established for trademark law.

Appointment of judges: defined. A consultative committee - made up of seven 'wise men' chosen from among former members of the Court, national supreme administrative jurisdictions or well-renowned jurists - now gives its opinion on the 'suitability' of candidates, judges and advocates-general (Article 224B TFEU). But the proposal of candidates and their final approval remains the power of the member states alone. It is necessary to point out that the Council can, by simple majority, authorise a judge to carry out another professional activity, paid or not; the principle remains, however, the ban on any accumulation of workload (Point 7 of Protocol 11).

References

Articles 9f TUE, 221 to 245 TFUE, Protocol 11, Protocol on the status of the Court of Justice.

Three more advocates-general. Without changing the rules of the Treaty - which sets a minimum of eight advocates-general - the EU27 have agreed, in response to a request from Poland and other new member states, to increase the number of advocates-general from eight to 11. A permanent seat for an advocate-general is assigned to Poland, which puts it equal with other large countries (Germany, France, the UK, Italy and Spain). Two other posts are added to the three pre-existing posts which are filled, by rotation, by the other 21 member states. This increase allows the rotation to be a little quicker: about every 24 years rather than every 56 years as it currently stands (Declaration on Article 222 TFEU).

Assistant rapporteurs. The recourse to those people charged with assisting the judge-rapporteur and to participate in the trial of a case is facilitated. The general decision can be taken by the Council on the Court's request, based on qualified majority in co-decision with the EP; the appointment of assistant rapporteurs is made by the Council by simple majority (Point 7 of Protocol 11, Article 13 TFEU).

Statute of the Court: modifiable. The statute of the CJEU is now modifiable by qualified majority in co-decision. On two conditions: the statute of judges and advocates-general continues to obey the same revision logic as the Treaty, and the linguistic regime remains unanimous (Article 245 TFEU). As the Court's language of deliberation is French, that allows the French-speaking countries to block any changes. The language of the cases can be chosen by the parties.

JURISDICTIONAL PROCEEDINGS

Primacy of law: confirmed. Although the primacy of Community law over national law is no longer officially mentioned in the Treaty, as the 2004 IGC had planned, the Court's decisions are reiterated via a declaration: "In accordance with well settled case law of the EU Court of Justice, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of member states". An annexed opinion from the legal service specifies that "the fact that the principle of primacy will not be included in the future treaty shall not in any way change the existence of the principle and the existing case law of the Court of Justice" (Declaration 27).

Controls on legality and failure to act. The European Council, the European Central Bank and other bodies (the Economic and Social Committee or the Committee of the Regions) and organs of the EU can now be the subject of proceedings for failure to act if they refrain from taking or deciding on action in line with their missions; similarly, they can bring a suit for failing to act against the other EU institutions, bodies or organs. Only the institutions in the strictest sense were concerned until now (Article 232 modified TFEU). The European Council, the other bodies and organs of the EU are also added to the list of institutions whose legality of acts is monitored by the Court (Article 230 modified TFEU). The bodies and organs of the EU are added to the list of bodies for which the Court can interpret acts, through preliminary rulings (Article 234 TFEU), or legality, through cross-appeals (Article 241 TFEU).

Defence of authority. The Committee of the Regions gains the right, as the Court of Auditors and the ECB already had, to stand before the Court "for the purpose of protecting their prerogatives" (Article 230 Paragraph 3 TFEU).

The right of individuals to refer cases to the Court a little more flexible. The condition placed on appeals by individuals and businesses (or non-EU countries) to be individually affected by a Community decision to be able to contest its legality only disappears for regulatory acts exempted from implementation measures. An individual, a business or another organisation will therefore be able to contest a regulatory act of 'direct concern' to him or her and does not include implementation measures. For other acts, the double condition of 'direct and individual concern' to him or her remains applicable (Article 230 Paragraph 4 modified TFEU). This modification is not cosmetic. Numerous appeals have been refused in the past as the Court believed that the petitioners (civil servant unions, for example) were not individually concerned.

When a body or organ of the Union is created, "specific conditions and arrange-

*** Formal change ** Partial change *** Fundamental change**

ments" for legal entitlement can be anticipated for the acts of these bodies and organs "intended to produce legal effects in relation to them".

The Treaty specifies that the member states must establish "remedies sufficient to ensure effective legal protection in the fields covered by Union law" (Article 9F TEU). This provision fills a legal lacuna – the access of individuals to the Court of Justice remains very limited and national courts sometimes reject appeals against Community measures – and confirms case law (25 July 2002, Case C-50/00).

Infringement proceedings: new tools. The lax attitude of member states in transposing Community law is also affected. In infringement proceedings, the European Commission will in future be able to refer a case directly to the Court of Justice to impose a fine on member states which have not transposed a given directive within the specified time limit, and only in such cases.

The Court acquires the possibility to set the application date on which the fine or flat-rate amount must be paid (Article 228 Paragraph 3 modified TFEU). The European Commission may also, when a ruling has already been given and continues to be carried out, refer the case directly to the Court of Justice after issuing a formal notice (second stage), ie without a written warning in the form of a reasoned opinion (Article 228 Paragraph 2 modified TFEU).

Preliminary ruling: in case of emergency. The Court is obliged to give a verdict "with the minimum of delay" when a case involves a detained person, which gives a de facto legal basis to the new 'fast track' procedure proposed by the Court in July 2007 (Article 232 Paragraph 1 modified TFEU).

POWERS

Justice and Home Affairs: additional powers. The Court of Justice has been given the power of general control over all matters of JHA. Two exceptions are made: the Court cannot evaluate the validity and proportionality of police operations and other operations carried out in order to maintain the peace in a given member state (Article 240b TFEU). In terms of cooperation on criminal matters, the power to control of breaches of their trust in member states will not come into force until 2014. After this date the UK will be able to benefit from a special scheme.

External policies: slight restriction. The Court has also been granted additional powers in terms of all restrictive measures for moral and physical persons (anti-terrorist measures). This is in fact the only authorised incursion into the Common Foreign and Security Policy (Article 240a TFEU).

Violation of obligations of a member state: limited power. The Court cannot reach a verdict on the sanctions imposed by the Council or the European Council in regards of a member state that has violated the EU Treaty (Article 7 TEU). It can only reach a verdict on procedural questions (Article 235a TFEU).

Intellectual property: formal change. The extension of the Court of Justice's power in relation to European intellectual property rights will be decided by unanimity, after approval by member states, in compliance with the respective constitutional rules, and not by qualified majority as the 2004 IGC had planned (Article 229a TFEU). ■

In Brief

Beware of article numbers

The French version of the Lisbon Treaty usually mentions additional articles by using 'bis' and 'ter' (for example 17 bis), while the English version uses 'a', 'b', 'c' (for example, 17a). But this does not prevent some articles in French from sometimes using letters for additional articles, in this case a capital letter (for example, article 249 B). Contrary to the Maastricht Treaty, there is no way to distinguish an article belonging to one treaty from another, other than that all numbers starting with Article 41 regarding the TFEU (the modified TEU being limited to 40 articles). It is also necessary to pay attention because the Lisbon Treaty directly renumbers certain articles without changing them (for example, Article 51 TEU becomes Article 38 TEU).

Treaty in 23 languages, or more **

The treaty has been translated into the official EU languages. They now number 23: German, English, Bulgarian, Danish, Spanish, Estonian, Finnish, French, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Dutch, Polish, Portuguese, Romania, Slovakian, Slovenia, Swedish and Czech. All texts are equally valid; a version in one language is therefore not superior to any other version.

The treaty can also be translated into any other language chosen freely by the member state "among those which, in accordance with their constitutional order, enjoy official status in all or part of their territory" (for example, Catalan, Basque, Corsican, Russian). The member state concerned provides a certified copy of these translations, which will be deposited in the Council's archives (article 41 TEU). Conversely, the legal value of these "autonomous" translations is not mentioned, which infers that they are only for information purposes.

Nine for reinforced cooperation **

The minimum number of member states required to initiate a reinforced cooperation agreement has gone up from eight to nine, although the cooperations are still open to other members. Final authorisation to launch reinforced cooperation is granted by the Council (following a unanimous decision) in response to a proposal by the Commission (where the initial request is made) and after being approved by the European Parliament. Only those member states participating in the cooperation will vote on decisions meaning that unanimity will be made up of participating countries only. Qualified majority will follow the rules of the treaty. The procedure of "emergency brake" (appeal to European Council) is removed. The Member states participating in the cooperation could decide, by unanimity, that certain topics should be decided by qualified majority (Articles 10 TEU and 280 TFEU).

*** Formal change ** Partial change *** Fundamental change**

COMPETITION

Controversy over "free and undistorted" wording *

By Ruth Milligan

In the general excitement over the agreement on a new reform treaty reached by EU heads of state in Lisbon on 18-19 October, the row over competition which dogged the early days of the treaty seems to have been forgotten. The first draft of this treaty, hammered out in Brussels in June, provoked much consternation over the so-called demotion of 'free competition' as an objective of the treaty, a change pushed through by President Nicolas Sarkozy of France. But this time round, the issue has passed with relatively little comment.

THE OUTCOME

There is no change regarding competition in the treaty as agreed in Lisbon this month from the draft agreed in Brussels in June. What Sarkozy then engineered was the removal of a reference to 'free and undistorted competition' as an 'objective' of the Union. What must be got clear is that the argument was not about the current Treaty: free competition is not at present a primary 'objective' of the Union.

True, 'fair competition' is mentioned in the preamble – as it will continue to be. But the reference to 'free and undistorted competition' under dispute in June was contained in Article 2 of the 2004 draft Constitutional Treaty – the Treaty which was never ratified after 'no' votes in French and Dutch referenda. It read:

"The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, and a single market where competition is free and undistorted."

But Sarkozy proposed the deletion of the last phrase referring to free and undistorted competition. After some argy-bargy and many condemnatory newspaper headlines, EU ministers in June agreed the change. The wording now contained in Art 3 of Treaty on European Union as amended by the Lisbon reform Treaty is: "The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime."

THE PROTOCOL

However, lawyers noticed a snag to this new wording in June. The current Article 308 gives a general power to take action. This will now read: "If action by the Union should prove necessary… to attain one of the objectives set out in the Treaties and the Treaties have not provided the necessary powers, the Council. shall adopt the appropriate measures."

So, if free competition were to no longer be 'one of the objectives' of the Community, Article 308 would not apply for competition issues. This would not do. So it was agreed that a footnote would be added, essentially replacing what Sarkozy had taken out. The resulting Protocol 6 reads:

"The High Contracting Parties, considering that the internal market as set out in Article 3 of the Treaty on European Union includes a system ensuring that competition is not distorted, have agreed that, to this end, the Union shall, if necessary, take action under the provisions of the Treaties, including under Article 308 of the Treaty on the Functioning of the Union."

THE LEGAL RESULT

Commission lawyers take the view that the change makes no substantive difference as it takes no powers away from the Commission on enforcement of the competition provisions (Arts 81, 82 – mergers and cartels; Arts 86-88 – state aid). For Commissioner Neelie Kroes, the difference is semantic. "The protocol," she said, "clearly repeats that competition policy is fundamental to the internal market." For her, removing competition from the internal market, as some had suggested the alteration would do, was inconceivable. For Trade Commissioner, Peter Mandelson, "Competition should not be some sort of dogma or religion. But nor is it a dirty word. Without it, our economies would stagnate." However, others are worried about the rewrite, fearing that it will prevent the Commission from stepping in to prevent national governments from blocking foreign takeovers (something that is seen as a particular problem in France) Former EU Competition Commissioner, Mario Monti said, "It is the first step towards disintegration." EU competition lawyer, Alec Burnside commented, "What may be affected is the political debate over the balance of the priorities". The most likely areas to feel the fall-out, he continued, are state aid to failing companies and the progress of liberalisation of the energy market.

Whatever commentators say, the European courts are the final arbiter of EU law and it may be years before there is any ruling showing whether the change has had any significant impact. The court has in the past referred to Art 3 of the treaty. Whether the removal of the reference to 'distorted' in this Article has any impact on the substance of rulings, only time will tell. ■

The differences in detail

Treaty on Eu: Art 43(f) has been deleted. It now becomes Art 280(a) of the Treaty on the Functioning of the European Union.

Treaty establishing the Eu: The Lisbon Treaty gives this a new name: 'Treaty on the Functioning of the European Union'. There are 19 specific mentions of the word 'competition': Articles 81 & 82 deal specifically with the competition rules, while Articles 86 & 87 lay down the rules on state aid. In addition, 'competition' is mentioned in Articles 3; Art 27(b) and (c); Art 34(a); Art 36; Arts 76(2) & (3), Art 93; Art 96; Art 98 Art 105; Art 157; Art 296 and art 298. There are also some specific points to note:

ArticleS 3 & 4: The wording and organisation of these articles has been somewhat changed. In the old Treaty, Article 3 listed the 'activities of the Community', including at 3(g), 'to ensure competition in the internal market is not distorted'. In the new Treaty, Art 3 sets out exclusive competences of the Union as covering 'the establishing of the competition rules necessary for the functioning of the internal market.' The old Art 4 listed 'activities of the member states and the Community' as including 'an economic policy […] conducted in accordance with the principle of an open market economy with free competition.' The new Art 4 gives shared competences, a heading which does not include competition

Art 93, which gives the EU institutions powers to legislate for the harmonisation of indirect taxation, has been altered to add a power also to legislate to avoid distortion of competition.

*** Formal change ** Partial change *** Fundamental change**

INTERNAL MARKET

Furniture changed, house the same *

By Dafydd ab Iago

The centrepiece of EU action for the internal market is given in the revised Article 3, Paragraph 3 of the Treaty on the Functioning of the EU. "The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance."

Nonetheless, a range of other Union goals are also given in the same Article 3, Paragraph 3, alongside that of establishing an internal market. Certain goals, such as promoting economic, social and territorial cohesion, and solidarity among member states, have an obvious link with the "internal market", albeit one that is less fiercely competitive.

Other more social goals, such as fighting exclusion or discrimination, clearly conflict with any free-market interpretation of an internal market. In many ways this mixes, in the same article, the objective of establishing an internal market with those, notably, of combating social exclusion, discrimination, promoting social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child[1].

The EU's competence for the internal market is shared with member states as set out in Article 4, Paragraph 2a TFEU. The Union shall "adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties" as spelled out under a new Article 22a TFEU, concerning Community policies and internal actions. The ever growing number of cross-border legal problems between operators in the internal market is also tackled , in the Chapter 3 on judicial cooperation in civil matters. Paragraph 1 of Article 69d TFEU notes that the Union shall develop judicial cooperation in civil matters having cross-border implications. Necessary measures to increase justice and legal certainty in cross-border cases are also mentioned in paragraph 2 "particularly when necessary for the proper functioning of the internal market". New Article 97a TFEU also adds to this legal certainty "in the context of the establishment and functioning of the internal market" with the EU taking measures to provide uniform intellectual property rights protection throughout the Union.

CONSEQUENCES

Given the difficult history of the TFEU, including the removal of "free and fair competition" from the objectives of the Treaty, the Commission had some initial difficulty in summarising the consequences of the Lisbon Treaty as merely shifting furniture around, whilst leaving the house intact. Competition Commissioner Neelie Kroes spoke of "integrating" competition into the concept of the 'internal market' [2] and thus clarifying that one cannot exist without the other.

The Internal Market and Competition Protocol, as a legally binding confirmation ensures, stressed Kroes, undistorted competition as an integral part of the internal market. Initial reactions from business see benefits in an acceleration of procedures and better functioning under the Lisbon Treaty (Protocol No 6).

One glaring failing under the Treaty of the EU was the 25 years needed to finally adopt a proposal for the European company statute. Business should also benefit from stronger framework conditions surrounding the internal market, such as greater institutionalisation of the Eurogroup, an increased role for the Commission with respect to the Stability and Growth Pact and greater cross-border legal certainty. ■

(1) Interestingly, one also wonders to what extent the goal of respecting the EU's "rich cultural and linguistic diversity" and of ensuring that "... Europe's cultural heritage is safeguarded and enhanced", also given in Article 3, Paragraph 3, could come to conflict with the goal of establishing an internal market.
(2) The words 'common market' are remplaced by 'internal market' (Article 2, Paragraph 3g Lisbon Treaty).

CUSTOMS UNION

New treaty seeks to facilitate administrative cooperation *

By Christophe Garach

A historic pillar of the single market, the customs union will only be marginally affected by the new draft Treaty of Lisbon, as it was by the rejected Constitutional Treaty.

At a symbolic level, the customs union is not mentioned under Article 3 of the new Treaty on the European Union (TEU), containing the Union's objectives. However, the text does refer directly to the single market. The current treaty is equally vague: it mentions a "no-borders zone".

Article 3 of the new Treaty on the Functioning of the Union (TFEU) provides an answer: it clearly confers on the EU exclusive competence in five policy areas, including the customs union.

In practical terms, the current treaty chapter on the free movement of goods is solidly anchored in the TFEU. The founding articles of the customs union (Articles 23 and 31) were copied in entirety. These include the prohibition between member states of customs duties; authorised exceptions; and the adoption of customs duties by the Council. There is one notable difference: the current Article 135 pertaining to customs cooperation was renamed Article 27(2). It stipulates that "the European Parliament and the Council, acting under the normal legislative procedure [co-decision] take measures in order to strengthen customs cooperation". Unlike in Article 135, however, the words "these measures shall not concern the application of national criminal law or the national administration of justice" were removed. The reason for this is that the standardisation of the norms of criminal law is provided for specifically in the new TFEU (see separate article). ■

*** Formal change ** Partial change *** Fundamental change**

EUROZONE

The eurozone gains recognition **

By Christophe Garach

Although by no means revolutionary, the eurozone's new place in the reform treaty (if it is indeed ratified) is an encouraging sign on the eve of the zone's tenth birthday. Recognition of the eurozone is essentially a reminder that all countries within the Economic and Monetary Union are called upon to join. The tmember states were cautious, however, choosing to adopt - virtually without discussion – most of the provisions contained in the discarded Constitutional Treaty.

The symbols. As far as symbols are concerned, the eurozone now appears in a good place in the Treaty on the European Union, under the new Article 3 (on the Union's objectives). Paragraph 4 indicates that the EU "shall establish an economic and monetary union whose currency is the euro". Article 9 of the Treaty of the Union recognises also the European Central Bank as one of the Union's full-fledged institutions even though the bank's rules and procedure questions are set out in the Treaty on the Functioning of the Union.

In this second treaty, "monetary policy for member states whose currency is the euro" also clearly appears under Article 3, which lists the exclusive competences of the EU. Regarding the coordination of economic policies (see separate article), Article 5 indicates that "provisions apply to member states whose currency is the euro". This was not mentioned in the Nice Treaty: therefore the Union is now competent to set the modalities for economic policy coordination.

Governance. The Treaty on the Functioning of the Union devotes an exclusive and entirely new chapter to "provisions specific to member states whose currency is the euro". Article 114 thus indicates that these provisions aim: 1. to strengthen the coordination and surveillance of their budgetary discipline; 2. to set out economic policy guidelines "in order to ensure the proper functioning of the Economic and Monetary Union". Naturally, only eurozone members take part in the establishment of these broad guidelines. Moreover, the informal status of the Eurogroup is confirmed (Article 115). The group's arrangements are detailed in a short annex protocol, the modalities of which are already applied (creation of a stable Presidency for two-and-a-half years, president elected by a majority vote).

External representation. Article 115a introduces a substantial change in comparison with the Nice Treaty: it refers to the role that the eurozone could play within international financial institutions. Not only will the Council be entitled to adopt, on a proposal from the Commission and upon consulting the ECB, a decision establishing common positions, it will also be able to adopt appropriate measures to ensure "unified representation" of the eurozone. In this case, only eurozone members will be allowed to take part in the voting process for which the qualified majority will receive a specific definition.

Enlargement of the eurozone. Few changes were incorporated. The new feature (introduced by the Constitution): hereafter, the end of a derogation (to non-participation in the eurozone) can only be decided by the Council following a recommendation that is issued by a qualified majority of countries belonging to the eurozone.

Warning. New provisions in the chapter devoted to economic and monetary policy will also affect the eurozone (see separate article). The new Paragraph 4 under Article 99, for instance, borrows elements from the conduct code, which regulates the application of the revised Stability and Growth Pact of 2005. The new provisions include the power conferred upon the Commission to address a " warning " without prior assent from the Council in the event that a state's economic policies are not consistent with the broad guidelines of economic policy. Unlike in the code of conduct, it is not mentioned that the Commission can make this specific warning public.

Excessive deficit. The terms of the deficit procedure (Article 104) were not altered fundamentally.

However, Paragraph 6 stipulates hereafter that the Council decides whether an excessive deficit exists on the basis of a Commission proposal (the Council, acting unanimously, can modify the proposal), whereas at present the Commission issues a recommendation that the Council can modify by a qualified majority vote. In order to do this, the paragraph recalls the specific calculations used to define a qualified majority when a country does not take part in the vote (see also the additional Declaration 15 on excessive deficits).

Monetary policy and ECB. All changes that appear in the new Treaty on the Functioning of the EU for this chapter are covered in a separate article. Once again there has been no fundamental change. The objectives of both the ESCB (European System of Central Banks) and the ECB remain etched in stone.

These cover the price stability objective (Article 105), the independence of the ECB (Article 108), the Council's role, ie defining 'broad guidelines' for the exchange rate policy (Article 188o) and the rules and procedures of the ECB as an institution (Articles 112 and 113 are renumbered 245b and 245c). A specific (amended) protocol on the statutes of the ESCB is annexed to the treaty. ■

References

-Treaty of the EU: Common provisions, Article 3; Provisions pertaining to democratic principles, Article 9.
-Treaty on the Functioning of the Union : Principes, Articles 3 and 5
Economic policy: Articles 97c to 104
Monetary policy: Articles 105 to 111
Institutional provisions: Articles 112- 113
Provisions specific to countries whose currency is the euro: Articles 114 to 115b
Transitional provisions: Articles 116 to 120
International Agreements: Article 188o
Institutions, the European Central Bank: Article 245b to 245d
Protocol 3 on the Eurogroup, Protocol on the statutes of the European System of Central Banks and the ECB, Protocol on certain provisions concerning the United Kingdom and Denmark
Declaration on excessive deficits

*** Formal change ** Partial change *** Fundamental change**

ECONOMIC AND MONETARY UNION

Economic and tax governance – one step at a time *

By Christophe Garach

The Achilles' heel of the eurozone and the Economic and Monetary Union, the coordination of economic policies, due to a lack of consensus, is only making slight progress in view of the existing treaties and contents itself to fall back on the meagre advances in the former Constitutional Treaty.

In the symbols chapter, the eurozone now has a good position in the new Article 3 dedicated to the Union's goals in the Treaty on the European Union (see separate article on the eurozone). In the Treaty on the Functioning of the Union, Article 5 specifies, in terms of coordination of economic policies, that "specific provisions shall apply to those member states whose currency is the euro," which will allow the Union to have particular power over defining the terms of this coordination.

"CLOSE COORDINATION"

However, three other articles open other perspectives. Article 97 re-sketches the general framework: the activities of member states and the Union include the introduction of an economic policy founded on the coordination of economic policies, the internal market and the definition of common goals. As this already figures in the current treaty, Article 99 reiterates that "member states regard their economic policies as a matter of common concern" and coordinate them within the Council. The article introduces three new provisions on multilateral surveillance:

1. The Commission can now send (without the Council's backing) a warning to a member state which is moving away from its budgetary adjustment trajectory in the face of its general lines of its economic policies. But this warning remains non-binding.

2. When the Council sends a recommendation to a member state or decides to make it public, the Council will now decide without taking account of the vote of the country concerned. For the eurozone, only countries in the zone participate in the qualified majority voting.

3. The European Parliament sees its (meagre) powers increased to establish the arrangements for the multilateral surveillance procedure. Paragraph 6 states that the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, may adopt detailed rules, for fear that the Council does not accept the idea...

PEER PRESSURE

It is also worth noting that the Treaty on the Functioning of the Union reserves an exclusive chapter for "provisions specific to member states whose currency is the euro". Article 114 specifies that these provisions are destined to: 1. strengthen the coordination and surveillance of their budgetary discipline; and 2. to set out economic policy guidelines in order to ensure the proper functioning of the Economic and Monetary Union. Naturally, only the countries in the eurozone participate in the drafting of these guidelines within a group which will remain informal: the Eurogroup. Also of note is that no binding element has been included again regarding the preventative section for the revised Stability and Growth Pact. The president of the Eurogroup, although his office term (two years) will now be fixed by an annex protocol, will therefore have to continue to count on the willingness of eurozone members and on 'peer pressure' to speed up reforms and intensify budgetary rehabilitation policies.

Declaration of intention: Although Article 104 on the excessive deficit procedure has barely been changed in content, the EU27 are obliged to annex the treaties with a declaration on this particular point, which in reality looks like an admission of powerlessness. In effect, it has been written that "improved economic policy coordination could support this objective [of improving growth potential in member states]," which implies that full coordination could definitely become a fact.

The declaration reiterates that "raising growth potential and securing sound budgetary positions are the two pillars of the economic and fiscal policy of the Union". For lack of anything better, the EU27 are therefore content to stress their "commitment" to the goals of the Lisbon Strategy. And also to formulate a panoply of good intentions.

"Economic and budgetary policies thus need to set the right priorities towards economic reforms, innovation [...] This should be reflected in the orientations of budgetary decisions at the national and Union level."

The last recommendation is largely inspired by the Stability and Growth Pact revised in 2005 and by the Berlin Agreement of April 2006 concerning the return to balanced budgets by 2010 at the latest for countries in the eurozone: "Member states should use periods of economic recovery actively to consolidate public finances and improve their budgetary positions. The objective is to gradually achieve a budgetary surplus in good times which creates the necessary room to accommodate economic downturns and thus contribute to the long-term sustainability of public finances." The declaration ends on a vague promise: "This declaration does not prejudge the future debate on the Stability and Growth Pact."

TAXATION: ALMOST STATUS QUO

The coordination of economic policies would not be successful without real convergence of tax policies. Now, on this matter, the new Treaty on the Functioning of the Union only brings small advances. Generally speaking, it is even the same as before. The tax provisions (Articles 90 to 93) establish the (paralysing) rule of unanimity in an endlessly enlarged Union. The only half-open door: on the environment, Article 175 stipulates that "the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions, may make the ordinary legislative procedure" to decide provisions which "are primarily of a fiscal nature".

In other words, while in the current treaty the Parliament does not have a say if the Council decides to pass to the qualified majority in the field of environmental tax, with the new treaty, the situation will be able to change.

Therefore, the Parliament (if the Council is unanimous) will be able to be associated with a legislation (co-decision), which would be a first in tax matters. ■

*** Formal change ** Partial change *** Fundamental change**

EUROZONE

European Central Bank elevated to the rank of an institution *

By Christophe Garach

The Frankfurt-based European Central Bank did not obtain everything it sought from the draft reform Treaty of Lisbon (now awaiting ratification), but one thing is certain: it has been elevated to the rank of the other EU institutions (Article 9 of the Treaty of the European Union, TEU), which include the European Parliament, the European Commission, the Council, the EU Court of Justice and the EU Court of Auditors. Although the bank's statutes still do not appear in the TEU but are relegated instead to the Treaty on the Functioning of the European Union (TFEU), it retains its prerogatives given that all other provisions pertaining to the ECB in the Constitutional Treaty were maintained. Among the horizontal modifications enshrined in the treaty, the word euro now replaces ECU.

Symbols. Aside from its institutional quality, the ECB will also derive satisfaction from the fact that "the Economic and Monetary Union whose currency is the euro" now appears in the list of the Union's objectives (Article 3 of the TEU). Equally, Article 3 of the TFEU also confirms that monetary policy is an "exclusive competence" of the EU, as are the customs union, competition, trade policy and the conservation of the biological resources of the sea.

Price stability above all. Practically speaking, the reform treaties do not fundamentally change monetary policy (see, however, our article on the new prerogatives of the EU Court of Justice). The objectives of both the European System of Central Banks (ESCB) and the European Central Bank remain etched in stone. The main objective (Articles 97c and 105 TFEU) is to "maintain price stability".

But the ESCB must also "lend support to the Union's general economic policies so as to contribute to the realisation of these objectives". These objectives are defined under Article 3 of the TEU. On the economic level, the Union "shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment".

Prudential supervision. The only notable change to Article 105 concerns specific tasks that the Council, acting unanimously, can assign to the ECB regarding prudential supervision over credit institutions and other financial institutions (with the exception of insurance companies): hereafter, the European Parliament will only be consulted whereas before it had to give its assent. However, the Parliament can now be involved (qualified majority in the Council and co-decision) in amending certain non-fundamental provisions of ECB and ESCB statutes (Article 107 TFEU).

Among the horizontal modifications enshrined in the treaty, the word euro now replaces ECU

ECB's independence confirmed. The TFEU makes no change to Article 108 on the independence of the ECB. This article states that "neither the ECB, nor a national central bank, nor any member of their decision-making bodies shall seek or take instructions from Community institutions or bodies, from any government of a member state or from any other body".

Status quo on exchange policy. Aside from the numbering change (Article 111 is broken up and part of it reverts to Article 188 O TFEU), the Council's powers in terms of formulating general orientations for the exchange policy remain quite unclear.

The current rule therefore still applies: "In the absence of an exchange rate system in relation to one or more non-Community currencies […], the Council, acting by a qualified majority either on a recommendation from the Commission and after consulting the ECB or on a recommendation from the ECB, may formulate general orientations for exchange rate in relation to these currencies. These general orientations shall be without prejudice to the primary objective of the ESCB to maintain price stability".

Appointments by qualified majority. The TFEU introduces an important change in the process of appointing the president, vice-president and other members of the board (Article 112 TFEU).

Hereafter, the European Council appoints to these posts (non-renewable term of eight years) by means of a qualified majority vote on a recommendation by the Council and upon consulting the European Parliament and the Governing Council of the ECB.

The Parliament's grievances, however, were not heard: it is not stated explicitly that the Council will propose several candidates for one office. Nor is it mentioned that the big states cannot reserve a seat on the board as it now happens.

Minor changes in the statutes. Due to treaty modifications, the statutes of both the ECB and the ESCB, which are listed in an annex protocol to the TFEU (Protocol No 11), had to be amended accordingly.

Approximately twenty modifications were introduced in "non-essential" areas. The revised protocol may perhaps benefit from a simplified procedure (Article 41 TFEU) between the Parliament and the Council with regards to statistical collection, the opening of accounts by central banks in credit institutions, minimum reserves, clearing and payment systems.

Modified or repealed protocols. From the moment the ECB was founded, the Protocol on the Statute of the European Monetary Institute (EMI) became obsolete: it has therefore been repealed. Furthermore, on 'opt-outs' from the eurozone by the UK and Denmark, two protocols have been modified.

For the UK, the protocols state that "the UK government notified the Council that it was not intending to adopt the euro".

As for Denmark, it is stated that the country "does not repeal its derogation" to join the eurozone.

Economic policy. The European Central Bank is also affected by new treaty provisions relating to the coordination of economic policies for the EMU and the eurozone (see separate articles). ■

*** Formal change ** Partial change *** Fundamental change**

ENERGY

EU's powers are boosted but "wording is to be explored" **

By Dafydd ab Iago

In the Treaty of Lisbon, a specific section on energy appears for the first time, giving the EU clearer and stronger competence to ensure objectives that include proper functioning of the energy market, energy supply and promotion of energy efficiency and renewables. The new treaty thus pushes energy policy even more firmly into the EU domain, granting – in Article 4 Paragraph 2 – shared competence with member states for 'energy', as it does for a number of other related areas, including environment, transport, the Trans-European Networks, cohesion and the internal market. Additionally – important for energy research – the Union will also have the competence to carry out activities, "in particular to define and implement programmes," for research and development, albeit without limiting member state competence in this field.

Also new in the reform treaty is the clarity given to the concept of 'solidarity', a particularly Baltic and Polish request after recent oil and gas tussles with Russia (most notably during the January 2006 Ukraine-Russia gas dispute, but also over ongoing issues such as Russia's turning off in July 2006, for 'environmental reasons', the Druzhba oil pipeline to Lithuania). According to the new Article 100, Paragraph 1, relating to difficulties in the supply of "certain products" [energy], "without prejudice to any other procedures provided for in the treaties, the Council, on a proposal from the Commission, may decide, in a spirit of solidarity between member states, upon the measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products, notably in the area of energy".

A new Article 176a, in Title XX, also strengthens the whole position of energy policy, placing it clearly within the context of the internal market and of protecting the environment. EU energy policy thus aims, "in a spirit of solidarity between member states, to: (a) ensure the functioning of the energy market; (b) ensure security of energy 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". The above energy policy is to be determined by the European Parliament and the Council in accordance with the ordinary legislative procedure and without prejudice to the application of other provisions of the treaties. The Committee of the Regions and the Economic and Social Committee will have a right to consultation.

More importantly, measures adopted under EU energy policy, and in this new "spirit of solidarity," "shall not affect a member state's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply, without prejudice to Article 175(2)(c)". In the declarations, notably Declaration 20, the new Article 176a is not seen as affecting "the right of the member states to take the necessary measures to ensure their energy supply".

Commission officials appear to see few changes in energy policy under the reform treaty. The simple fact of mentioning energy specifically is no radical new break. "This is nothing new. It just codifies. It will not radically change things," commented a top Commission legal expert. Additionally, the provision, under Article 100, that member states may determine the conditions for exploiting their energy resources is also not new. Still, the official admits that the wording "remains to be explored". "This is another wording of an existing provision and is nothing radically new," added the official. "No one has explained in detail what it means," explained a commentator from the energy sector. Even where the reform treaty goes into specifics, notably mentioning increased "interconnection," there appear to be woolly concepts. "As usual, there will be disputes over the compromise wording," he added. His federation has yet to reach a "definitive" legal opinion on the reform treaty's implications for the sector. ■

EURATOM

Fifty years old and no changes foreseen *

By Dafydd ab Iago

The Treaty on the Functioning of the European Union (TFEU) sees the light of day in the jubilee year of the Euratom Treaty. But since 1957, and far from the radical transformation in other policy areas, the civilian nuclear industry in the EU has kept the same governing framework. Fifty years on, the European Atomic Energy Community (EAEC) retains its separate legal personality. And even if it shares the same institutions and will now have its expenditure and revenues listed in the EU budget (aside from the Supply Agency and Joint Undertakings), Euratom will not 'merge' with the Union. The TFEU thus does not provide for any major changes, aside from those technical amendments contained in the annexed Protocol 12[1]. Additionally, a declaration by Germany, Ireland, Hungary, Austria and Sweden calls for the convening of an Intergovernmental Conference to revise the Euratom Treaty.

Despite this lack of radical constitutional change, the Euratom Treaty, as an 'ad hoc' instrument of primary law for civilian nuclear energy, will far outlive its slightly younger sibling, the now defunct European Coal and Steel Treaty. Both, though, show the extent to which the EU has its origins in tackling energy issues. Coping with these practical energy questions will mean further Euratom developments so as to provide an adequate framework for the nuclear industry. The Commission, thus, talks confidently of "technical changes" and of the Euratom Treaty continuing to regulate the use of nuclear energy for the coming years. ■

(1) Protocol 12 recalls "the necessity that the provisions of the Treaty establishing the European Atomic Energy Community should continue to have full legal effect".

*** Formal change ** Partial change *** Fundamental change**

RESEARCH AND DEVELOPMENT

Creation of a European Research Area to become the main goal *

By Jim Brunsden

The most noticeable change contained in the Treaty of Lisbon, as regards research and development policy, is the establishment of a direct legal base for the building of a European Research Area.

The new Treaty on the Functioning of the EU states that the EU should build a European Research Area (ERA) in which "researchers, scientific knowledge and technology circulate freely". This concept of the ERA, a term not mentioned in the existing EC Treaty, is a broader idea than the goals previously set out for the EU in R&D policy. The goals set out in the EC Treaty are focused more narrowly on the need to promote cross-border cooperation between businesses, research institutes and universities.

The new treaty also states that the European Parliament and Council can, using the ordinary legislative procedure, adopt the measures necessary for the implementation of the ERA. This is a new legal base, which is not contained in the title devoted to research and technological development in the EC Treaty (Title XVIII).

The EU already has the ability to act on ERA-related issues

POLITICAL IMPETUS

The nature of this change, however, is not as dramatic as might first appear. The establishment of a direct legal base for actions to build the ERA may well provide a political impetus. However, the EU already has the ability to act on ERA-related issues using legal bases found in other parts of the EC Treaty. Legislative measures relating to researchers' mobility, for example, could already be proposed on the basis of Articles 39 and 40 TEC, which concern the free movement of workers. Article 40 provides for the co-decision procedure to be used for the adoption of directives or regulations in this area.

CONTINUITY

Other legal bases for R&D policy will not significantly change under the new treaty. The EU will continue, once the treaty comes into force, to have a multi-annual framework programme to fund R&D activities. The various elements of this, such as the specific programmes and the rules of participation, will continue to be adopted using the same types of legislative procedures as before (eg co-decision, consultation).

Article 171 of the EC Treaty, which allows the EU to set up Joint Undertakings (such as the proposed Joint Technology Initiatives) will remain unchanged. The same applies to Article 169, which provides for the Commission and groups of member states to carry out joint research programmes. The voting procedures for these kinds of initiatives will also be the same as before. ■

SPACE

Commission gets clear mandate for space policy initiatives **

By Jim Brunsden

Space will be recognised, in the draft Treaty of Lisbon (reform treaty), as an area in which the EU has a shared competence with its member states.

Article 172a of the new Treaty on the Functioning of the EU gives the Union a clear mandate to take initiatives. The article states that the EU shall draw up a European Space Policy. To achieve the goals of this policy, it may "promote joint initiatives, support research and technological development and coordinate the efforts needed for the exploration and exploitation of space". Measures in this area will be adopted by the European Parliament and Council using the ordinary legislative procedure, but cannot involve any harmonisation of the laws and regulations of the member states.

No specific article on space exists in the current EC Treaty. As a result, under the reform treaty, the European Commission will have for the first time a clear mandate to propose initiatives in this policy area. The importance of this change, however, should not be overestimated. There is already a European Space Policy. It was drawn up by the Commission and the European Space Agency (an intergovernmental body with 17 member states: the old EU15 + Norway and Switzerland), and approved by the Space Council (a joint meeting of the EU Council of Ministers with relevant ministers from Norway and Switzerland) in May 2007. Equally, the EU already has legal bases it can use to take initiatives related to space policy, and has used them. Examples of legislative proposals from the Commission include the proposal for a regulation on the further implementation of the European satellite radio navigation programmes EGNOS and Galileo (COM(2007) 535), which takes its legal base from Article 156 of the EC Treaty (relating to Trans-European Networks), and which is being examined under the co-decision procedure.

The importance of this change, however, should not be overestimated. There is already a European Space Policy

The new treaty will state that the measures to be adopted by Parliament and Council, to implement the Space Policy, may take the form of a 'European space programme'. This is also nothing new. An early draft of this programme was presented by the Commission at the same time as the Communication setting out the Space Policy (SEC(2007)504). The programme will be a detailed implementation plan for the Space Policy, and the final version is set to be adopted by ministers in autumn 2008.

Taking this into account, the strongest change that one can anticipate is that, because of Article 172a, the Commission will have a clear authority to propose measures related to space policy, without first seeking a request to do so from Council. ■

*** Formal change ** Partial change *** Fundamental change**

TRANSPORT

New treaty removes derogation from co-decision procedure *

Par Isabelle Smets

Under transports (Articles 70-80 TFEU), the new treaty introduces essentially new wording. Already the bulk of the legislation in this sector is adopted under the co-decision procedure and by qualified majority voting in the Council of Ministers.

What changes? The current treaty provides a derogation from the co-decision procedure for measures that could, if applied, have an adverse effect on living conditions and employment in certain areas as well as on the use of transport equipment. The Council adopts these measures unanimously upon consulting the European Parliament (Article 72 Subparagraph 2).

The new treaty removes this derogation: the new Subparagraph 2 indicates that the impact of these measures on living conditions, employment and the use of transport equipment should be taken into account. However, unanimity is not required to adopt these measures. The ordinary legislative procedure applies.

Article 78 of the current treaty has also been adapted. Originally, it laid down a derogatory regime for Germany in view of economic disadvantages that stem from the country's division. It now takes on a temporary nature as under new treaty provisions, five years after the treaty enters into force, the Council can adopt a decision to abrogate the derogatory regime.

For the rest, provisions concerning state aid in transports, non-discrimination, taxes and duties, etc. (currently under Articles 70-80) remain unchanged.

The same goes for provisions about the Trans-European Networks (Articles 154-156 TFEU). ■

TOURISM

Competence recognised but subsidiarity remains the rule *

by Isabelle Smets

A new heading dedicated to tourism (Heading XXI - Article 176B) appears in the treaty. Till now, no article was specifically dedicated to this sector.

Today, the EC Treaty mentions tourism as an area in which the Community can take "measures" (Article 3, Point u). These measures are unanimously adopted by the Council of Ministers, after consultation by the European Parliament (Article 308).

Above all, it is here that the change will be situated: the new treaty now holds that it is the ordinary legislative procedure which will be applied, so qualified majority in the Council and co-decision with the Parliament (Article 176b, Paragraph 2 TFEU).

Can we now speak of a true common tourism policy? We are a far cry from that. The new treaty explicitly rules out any legislative or regulatory harmonisation in this sector (Article 176B, Paragraph 2).

The EU's actions will remain principally what they are today: support action for policies established in and by member states. It is, furthermore, what is planned for in Article 6: tourism is a sector in which the EU has to power to "support, coordinate, or complement" the activities of member states. Subsidiarity remains the rule.

Paragraph 1 of the new Article 176B is clearer: the EU's action must aim, in particular by promoting the competitiveness of the companies:

- to encourage the creation of a favourable environment for the development of businesses
- to favour cooperation between member states, particularly through the exchange of good practices. ■

CIVIL PROTECTION

A new Community competence ***

By Anne Eckstein

Civil protection, which until now has been covered by the catchall articles in the existing treaty (Article 308) and the Euratom Treaty (Article 203) and managed by the European Commission's "Environment" Directorate General, has now been made an EU competence. Article, 176C inserted at the beginning of Title XXII of the new Treaty thus stipulates that "the Union shall encourage cooperation between member states in order to improve the effectiveness of systems for preventing and protecting against natural or man-made disasters".

In contrast to the aforementioned Articles 308 and 203 and in particular the 'flexibility clause' which states that "if action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures", the new Article 176C specifies that the Council will adopt measures to support and complement member states' action at national, regional and local level in risk prevention, in preparing their civil-protection personnel and in responding to natural or man-made disasters within the Union "according to the original procedure" (ie co-decision). e

According to the new treaty the Union also aims "to promote consistency in international civil protection work" but taking into account the fact that this is an area in which the EU provides support and complements member states' action at national level, Article 176C does not allow for the harmonisation of national legislation. ■

*** Formal change ** Partial change *** Fundamental change**

ENVIRONMENT

Fight against climate change becomes a priority **

By Anne Eckstein

The fight against climate change acquires priority status in the new treaty, which makes "promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change" one of the objectives of the environmental policy (amended Article 174 TFEU).

The indispensable link with the energy policy, evoked by the European summit of June 2007, is confirmed: the Union's policy in the field of energy must be carried out "with regard for the need to preserve and improve the environment" (Article 176A – Title XX, dedicated to the energy policy).

Furthermore, note the deletion, in Article 174, of the reference to Article 300 on negotiation procedures for international agreements, this being done, de facto, according to the general rules planned to this effect.

For the rest, the new draft Lisbon Treaty confirms the environmental objectives expressed in the Nice Treaty, including working for the sustainable development of Europe, a high level of protection and improvement of the quality of the environment as well as promoting sustainable development in the context of international activities (Article 3 TEU).

PROCEDURES

The general application of the ordinary legislative procedure (co-decision) for the adoption of decisions pertaining to environmental policy, after consultation with the Committee of the Regions and the Economic and Social Committee, is retained (Paragraphs 1 to 5 of Article 175 reuse the provisions of Article 175 of the current treaty and Paragraph 6 reuses the provisions of Article 176).

However, unanimity – after consultation in the European Parliament – remains a requirement for the adoption of decisions in the fields of taxation, land management, quantitative management for water resources and land use (with the exception of waste management) and those affecting the choice of a member state between energy sources and the general structure of its energy supply (Article 175 Paragraph 2 TEU). But the Council can now decide on a European Commission proposal by unanimity and after consultation by the EP, the Economic and Social Committee and the Committee of the Regions, to apply ordinary legislative procedure in these matters, which is by co-decision, therefore strengthening the role of the European Parliament. To recall, under the current treaty, the Council can only decide by qualified majority, and in all cases the role of the Parliament remains consultative on these topics.

Finally, policy plans of a general nature setting priority objectives to be attained are decided by the Council either by unanimity or by co-decision with the EP, according to whether it concerns fields subject a unanimous decision or not.■

SOCIAL POLICY

Modest success for a social Europe **

By Nicolas Gros-Verheyde

Although the new treaty only brings small advances for social policy, it can be considered a modest success at least for a social Europe.

The document proves that Europe is not inherently hostile to social issues as the supporters of the 'yes' campaign for the draft EU Constitution had claimed. It also shows that supporters of the 'no' campaign, namely in the French and Dutch referendums, were correct to argue that the introduction of social provisions did not require a fundamental revision of the whole treaty.

There are six important provisions, which can be combined if need be.

1. The legal basis for public services (Article 14 TFEU);

2. A new protocol on services of general interest, thanks to the perseverance of the Dutch delegation (see separate article);

3. Social objectives, completed, and raised to the level of common objectives for the European Union in terms of its action and policy (thanks to the German Presidency in association with certain delegations, including the French one);

4. The horizontal social clause, which contains social requirements (high levels of employment, education and vocational training, social security guarantees, the fight against social exclusion, the protection of human health – Article 9 TFEU);

5. The Charter of Fundamental Rights is still binding despite the British opt-out (see separate article).

6. The possibility of adhering to the European Convention on Human Rights, although the decision must still be adopted unanimously.

The technical provisions modified in the margins of the new treaty should also be mentioned:

- The partial implementation of social security issues for workers who move within the EU.

- The possibility of action in the event of serious cross-border health threats – (eg epidemics) – by legislative means (Article 152 TFEU). However, the new treaty still does not allow harmonisation.

Of course, provisions about the interior market and competition still exist and are, in fact, reasserted in a protocol (see separate article).

It would be wrong to think that they were removed from the treaty. The Commission retains all power in this area so that it can usefully combat monopolistc practices and unfair dumping. But it will no longer have a free hand with regards to this policy.

It will have to work towards objectives. "Competition is not an objective per say," said several heads of state and government, particularly French President Nicolas Sarkozy. Overall, it is quite clear that the treaty strikes a new balance between social and free market objectives.

What is required now is to balance out the tools and policies. ■

*** Formal change ** Partial change *** Fundamental change**

SOCIAL EUROPE

A social policy in a minor key *

By Nicolas Gros-Verheyde

While the scope of social policy does not change, certain developments nonetheless occur with regard to the philosophy of the objectives, the introduction of a social horizontal clause, voting rules on social issues, the emphasis given to social dialogue and provisions for keeping the European Parliament better informed. The 'transitional clause' that allows the use of qualified majority rather than unanimity in three areas (collective representation of workers, termination of employment contracts and employment conditions for immigrants) remains unchanged (social security and social protection of workers are excluded from this measure).

Social objectives. A highly competitive social market economy aiming at full employment and social progress, the fight against "social exclusion and discrimination," "social justice and protection," "equality between women and men, solidarity between generations and protection of the rights of the child" become EU objectives.

Horizontal clause. In the same spirit, but more concretely, there now appears at the head of the TFEU a provision obliging the Union to take account, "in defining and implementing its policies and actions," a range of "requirements": promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health (Article 9 TFEU). Similarly, the Union must take into account the fight against certain types of discrimination – on grounds of sex, race or ethnic origin, religion or beliefs, disability, age or sexual orientation (Article 10 TFEU).

Social security. Matters related to social security rights for workers exercising freedom of movement in the EU (employees or otherwise, with self-employed persons explicitly targeted) may be debated by qualified majority rather than unanimity, as is currently the case (Article 42 TFEU). In exchange, a procedure for referral to the European Council is introduced where a member state considers that this would "affect important aspects of its social security system". The European Council will take action by consensus. This provision, requested by Germany, is accompanied by a suspension measure sought by the European Commission. After a period of four months, the proposal is deemed not to have been adopted. The country that sounds the alarm "will be fully aware that this is a veto," explained one legal expert.

The impact of the change of majority is difficult to assess. Two difficulties exist in terms of amending the main text resting on this legal basis, the regulation on social security for workers exercising free movement in the EU (883/04). The regulation is founded on two legal bases: one requiring qualified majority, and the other (Article 308) unanimity. It concerns the families of workers, students and retired persons, whereas the switchover to qualified majority theoretically concerns only workers.

Social dialogue. The "role of the social partners" at European level is spotlighted in a new article (136a TFEU) along with the necessity of "taking into account the diversity of national systems". The tripartite social summit – traditionally held at the spring summit – is also enshrined in the treaty. Lastly, the social partners may be given a mandate to transpose the directives deriving from a collective agreement (they already had this possibility for directives resulting from the traditional procedure, ie without a collective agreement).

European Parliament. The European Parliament must henceforth be kept informed on agreements concluded between the social partners, which was not the case until now although the Commission informally transmitted them to Parliament (Article 139 TFEU), and on actions taken by the Commission to facilitate cooperation between member states.

Those actions are now spelled out, though not exhaustively, and include: exchange of best practice, establishment of indicators, surveillance and periodic monitoring and evaluation (Article 140 TFEU). ■

*** Formal change ** Partial change *** Fundamental change**

PUBLIC SERVICES

Services of general interest get legal basis ***

By Nicolas Gros-Verheyde

In the new treaty, services of general economic interest (SGEI) benefit from a new legal basis but also from a series of principles contained in a protocol. The protocol was negotiated for the most part by the Dutch who face a persistent enquiry into their social housing system by the European Commission.

Legal basis. The document introduces more clarity from a legal point of view than the current Article 16 of the TEC. A regulation – adopted under the ordinary legislative procedure – can therefore establish "the principles and conditions [to] offer, implement and finance these services […] without prejudice to the competence of member states" (Article 14 TFU).

Principles. Furthermore, a protocol refers to the "shared values of the Union" in respect of services of general economic interest:

- The essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organising services of general economic interest as closely as possible to the needs of the users;

- The diversity between various services of general economic interest and the differences in the needs and preferences of users that may result from different geographical, social or cultural situations, and;

- A high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights.

The protocol also states that treaty provisions do not encroach upon the competences of member states in terms of "the offer, regulation and organisation of services of general economic interest". Hitherto this was implict, now it is stated explicitly (Protocol 9). ■

EDUCATION AND TRAINING

Education and culture to keep their limited scope for action *

By Jim Brunsden

Education, vocational training and youth policy will retain the same status under the reform treaty as they had before.

These policy areas are classed in the new treaty as examples of those in which the EU can carry out actions to support, coordinate or supplement the activities of the member states. As under the EC Treaty, they will be areas in which the EU can adopt so-called "incentive measures". Such measures can not involve any harmonisation of the laws and regulations of the member states. Existing examples include the 2004 Decision of the European Parliament and Council (2241/2004/EC) to create a single Community Framework for the transparency of qualifications and competences (Europass).

Under the new treaty, incentive measures will always be adopted using the ordinary legislative procedure (ie co-decision), which also marks a continuation of existing practice. The Council will continue to adopt non-binding recommendations, following a proposal from the Commission, by qualified majority (Article 149 TFEU).

Almost exactly the same situation applies for culture policy. There is, however, one slight difference. This is that, under the EC Treaty, although the co-decision procedure is used to adopt incentive measures, Council always acts by unanimity. Under the new treaty, the ordinary legislative procedure will apply, meaning Council will vote by qualified majority (Article 151 TFEU).

One further point to note is that a reference to education is made in a general provision (Article 9) included in the Treaty on the Functioning of the EU. This article states that the EU, in defining and implementing its policies and actions, shall take into account requirements linked to the promotion of a high level of education and training for its citizens. ■

SPORTS

EU sports policy on the horizon? ***

By Jim Brunsden

The inclusion of a specific article for sport in the EU's reform treaty marks a fundamental change, compared to previous arrangements. Under the new treaty, sport will become one of the activities where the EU will have the right to carry out "actions to support, coordinate or supplement the actions of the member states" (Article 6, Treaty on the Functioning of the EU).

The new treaty states that the Union can take action to develop "the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports". It can also take action to protect "the physical and moral integrity of sportsmen and sportswomen, especially the youngest" (Article 149 TFEU).

In practice this means that Parliament and Council will be able to adopt so-called "incentive measures" in the area of sport, using the co-decision procedure. Such measures will not, however, involve any harmonisation of the laws and regulations of the member states. The Council will also be able to adopt non-binding recommendations.

Reference is also made in Article 149 to the need for the EU to take into account the "specific nature of sport". This reference to the specificity of sport in the EU treaty is new, the concept however, is not. The December 2000 European Council adopted a declaration (the Nice Declaration), which stated that the EU must, in its actions, "take account of the social, education and cultural functions inherent in sport and making it special". Further interpretation on what this principle means in practice was provided by a recent Commission White Paper (COM(2007)391). This made it clear that specificity does not amount to a general exemption from EU competition law and internal market rules. ■

*** Formal change ** Partial change *** Fundamental change**

HEALTH

Subsidiarity, the cornerstone of EU health action *

By Nathalie Vandystadt

The EU's reform treaty has gone slightly further in addressing public health than the current legislation. However, member states have seized the opportunity to underline the subsidiarity principle, which characterises this field. That is to say that the 27 insist that they will only confer upon the EU the power to legislate where they feel they themselves would be less effective. *Europolitics* had provided much the same analysis based on the proposal submitted by the Portuguese EU Presidency at the Intergovernmental Conference, which replaces the rejected EU Constitution (see *Europolitics* 3358 and 3336). This remains true in the Lisbon Treaty. Under 'definition and implementation of policy and action', the EU has taken onboard the demands concerning the protection of human health.

The EU's objective is to reach "a high level of health care" for Europeans. The term 'human health' has been replaced by 'physical and mental health'. The EU now gives due attention to these issues, by way of two green papers, one on mental health, the other on healthy diets and physical activity.

The new treaty states that the EU "encourages cooperation between member states" in order to "improve the complementarity of health services in cross-border areas". The text encourages "in particular initiatives aiming at the establishment of guidelines and indicators, the organisation of exchange of best practice, and the preparation of the necessary elements for periodic monitoring and evaluation. The European Parliament shall be kept fully informed".

DANISH RESERVATIONS

However, unlike in other sectors, public health has lost ground when compared to the defunct Constitution. "To get Denmark onboard without a referendum, we had to recall the current dispositions in terms of public health in the EU," said an EU source following the European Council of 21 and 23 June, which paved the way for the new document.

The Danes blocked what they considered to be a 'transfer of sovereignty'. Thus the new treaty does not contain what was the main innovation in the Constitutional Treaty, under Article 152 (public health): measures pertaining to "monitoring, early warning of and combating serious cross-border threats to health" have been relegated to a paragraph that calls for "promoting measures". Above all, this paragraph rules out "any harmonisation of the laws and regulations of the member states".

The term 'human health' has been replaced by 'physical and mental health'

In the Constitutional Treaty, which was rejected just two years ago by France and the Netherlands, these provisions were included so that measures could be established, in the case of shared competences between the EU and member states, to face common safety concerns (quality and security standards for organs and substances of human origin, blood and blood derivatives, veterinary and phytosanitary measures aimed specifically at public health protection, etc)

Harmonisation would therefore have been possible with regards to monitoring serious cross-border threats to health. But, according to an EU source, for Copenhagen "the transfer of competences means 'no unanimity', hence 'harmonisation', which implies directly a transfer of sovereignty, and therefore a referendum".

This will dash certain hopes. "Since 2004, nobody is in a position to explain to me what type of law might hold the carrot – the incentives – but not the stick – the possibility of coercing member states," said a Brussels-based public health consultant.

He adds that during the Intergovernmental Conference negotiations over the Constitutional Treaty in 2004, the position of DG Health and Consumer Protection was very clear: it called for an extension of its legal mandate because the current Article 152 had become insufficient. "With laws on the safety of blood and human tissues already in place, it had no scope to propose health laws," says this source.

Still according to this source, the article 'public health' in the defunct Constitution was drafted with precaution, such that it might be interpreted to cover contagious diseases like AIDS, a flu pandemic, tuberculosis, but also non-contagious diseases, such as obesity or cancer.

It could have also addressed alcohol and tobacco, among others. "The cross-border aspect of these diseases is such that they affect all member states to some degree. Therefore effective measures cannot be taken strictly at the national level," says this expert. Public health protection with regards to tobacco and alcohol, however, was also included in the paragraph excluding any harmonisation in the Constitutional Treaty. This of course is unchanged in the reform treaty.

"CONTINUATION"

Nevertheless, according to the Commission, this is not a step back but rather a "continuation," allowing it to act in favour of public health. Although it would have welcomed, with some enthusiasm, the possibility of harmonisation in the face of cross-border threat, the Commission still believes that the new treaty brings improvement.

Measures setting high standards of quality and safety will be extended to cover medicinal products and devices for medical use under the co-decision procedure (Council plus European Parliament).

A declaration, however, clarifies that these measures must respect "common safety concerns". Furthermore, their objective is to set high standards of quality only if "national standards within the single market cannot afford a high level of protection for human health". This is but another manifestation of subsidiarity, a principle so crucial to member states when it comes to the health of their citizens. ■

*** Formal change ** Partial change *** Fundamental change**

REGIONAL POLICY

Parliament becomes fully associated ***

By Isabelle Smets

The next set of regulations regarding the European Structural Funds will be negotiated under the ordinary legislative procedure, ie under co-decision with the European Parliament.

This is the biggest change that the treaty has introduced with regards to the EU Cohesion Policy (Article 161, Subparagraph 1 TFEU), and it should not be underestimated: from now on the European Parliament shall weigh in on decisions to regulate the use of Structural Funds within the EU.

FIERCE BATTLES

The battles will be fierce between the two institutions.

Until now, the General Regulation on the Structural Funds, which lays down the general provisions for the European Regional Development Fund (ERDF), the European Social Fund (ESF) and the Cohesion Fund, was adopted according to the assent procedure in Parliament and by unanimity in the Council.

This procedure meant that MEPs could only approve or reject the proposal without amending it.

The same was true for the regulation on the Cohesion Fund.

The co-decision procedure, however, did already apply to specific regulations for the ERDF and the ESF. Therefore these treaty changes do not affect them.

TERRITORIAL COHESION

The new treaty provisions on Cohesion Policy can be found where they are today, under Title XVII (Articles 158 and 162 TFEU), which is now called 'economic, social and territorial cohesion'.

The principle of 'territorial cohesion' now appears for the first time under Article 3 of the TEU (which lists the EU objectives) as do economic and social cohesion.

The term 'territorial' was also added in the current 'Protocol on economic and social cohesion', which now reads 'Protocol on economic, social and territorial cohesion' (and remains practically unchanged barring some editorial adaptations).

Even though territorial cohesion is not defined clearly for reference, local and regional authorities felt strongly about including the notion in the new treaty.

It certainly refers to a better understanding of territorial specificities within the EU.

The principle of 'territorial cohesion' now appears for the first time under Article 3 of the TEU (which lists the EU objectives) as do economic and social cohesion

The new wording of Article 158 TFEU reflects this urge. As before, it indicates that the Union shall aim at reducing disparities between the levels of development of the various regions and the backwardness of the least favoured regions (Subparagraph 2).

But the paragraph's current reference to rural zones was omitted while a new and fleshed-out Subparagraph 3 describes the regions that will receive 'particular attention' under the EU Cohesion Policy. These are:

- rural areas
- areas affected by industrial transition
- regions that suffer from severe and permanent natural or demographic handicaps such as the northernmost regions with very low population density and island, cross-border and mountain regions.

In practice, the current EU Cohesion Policy already takes into account the specificities of these regions, but the fact that they are incorporated into the treaty confers upon them a timeless quality.

THE ISLANDS

Article 158 of the amended treaty addresses the 'islands question' to end a legal discussion of several years. Indeed, the current treaty treats the islands in the EU differently according to the language version.

The French version indicates that "the Union aims to reduce […] the backwardness of regions or islands that are least favoured".

The Italian version only mentions "the islands" and therefore only the regions qualify as "least favoured" ("il ritardo delle regioni meno favorite o insulari").

In the English version "the backwardness of the least favoured regions or islands" can be read both ways.

"PARTICULAR ATTENTION"

The new treaty solves this problem: all islands belonging to the EU will receive "particular attention" in view of their inherent weaknesses and therefore regardless of their level of economic development.

A declaration indicates that the term 'island regions', appearing under Article 158, can also refer to island states as a whole (Declaration 17). ■

Regions in the new treaty:

- Foundations of the EU Cohesion Policy: Articles 158-162 TFEU, Article 3(3) Subparagraph 3 TEU and Protocol on economic, social and territorial cohesion
- Regional state aid: Articles 87(3a) and 87(3c) TFEU (change for outermost regions – see other article)
- Outermost regions: Article 299 TFEU and Paragraph 6 of Article 311 TFEU (see other article)
- Committee of the Regions: Articles 256b TFEU and 263-265 TFEU (see other article)
- Subsidiarity: Article 5 Paragraph 3 TEU and Subsidiarity Protocol (see other article)
- Local and Regional Autonomy: Article 4 Paragraph 2 TEU
- Role of local and regional authorities in managing services of general interest: Article 1, Subparagraph 1 of Protocol on services of general interest

*** Formal change ** Partial change *** Fundamental change**

REGIONS

Subsidiarity: a new role for the regions **

By Isabelle Smets

The new definition of the principle of subsidiarity, under Article 5 of the Treaty of the EU, now refers to local and regional powers: the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the member states, "either at the central level or at the regional and local leve". The new Protocol 2 on the application of the principles of subsidiarity and proportionality also mentions these authorities. The references to them (in Articles 2, 5, 6 and 8 of the Protocol) will guarantee, on the one hand, that the effects of any proposed legislation at the regional and local levels will be taken into account and, furthermore, that these authorities will be involved in the subsidiarity control mechanisms.

According to the Protocol on subsidiarity, before it can propose new legislation, the European Commission will consult widely. Such consultations shall, where appropriate, "take into account the regional and local dimension of the action envisaged". Draft legislative acts should contain a detailed statement making it possible to assess the proposal's financial impact and the implications for the rules to be put in place by member states, "including, where necessary, the regional legislation". Any financial or administrative burden that should fall upon local and regional authorities in particular should be minimised.

As far as monitoring subsidiarity is concerned, two mechanisms exist to involve local authorities:

1. **For legislative proposals:** the protocol, under Article 6, indicates that the national parliaments should be involved in the monitoring process and should deliver a reasoned opinion stating why they consider that a draft proposal does not comply with the principle of subsidiarity. The article also indicates that "it will be for each national parliament or each chamber of a national parliament to consult, where appropriate, regional parliaments with legislative powers". Of course, in the event of a consultation, the opinions of regional parliaments would not be tallied in the vote count that could potentially lead to a draft review (Article 7). Only the votes of national parliaments are considered. In short, the actual scope of these control mechanisms for regional authorities will depend on the roles national authorities envision for them. For example, a declaration by Belgium pertaining to national parliaments indicates from the outset that both the chambers of the federal parliament and those of the regional parliaments "act […] as components of the national parliamentary system or as chambers of the national parliament" (Declaration No 49).

2. **For adopted legislation**: the Committee of the Regions of the EU may turn to the Court of Justice if it finds that a legislative act infringes upon the principle of subsidiarity (see separate article). ■

OUTERMOST REGIONS

Saint Martin and Saint Barthélemy get OMR status *

By Isabelle Smets

Article 299(2) of the EC Treaty, which recognises the EU's Outermost Regions (OMR) and the need to adapt Community policies for them, has been modified to include nominally Saint Martin and Saint Barthélemy. The list now contains the following regions: Guadeloupe, French Guyana, Martinique, Réunion, Saint Martin, Saint Barthélemy, the Canary Islands, Azores and Madeira. Nine regions versus seven previously. This evolution reflects internal institutional changes in France: the islands of Saint Martin and Saint Barthélemy, formerly part of Guadeloupe and therefore part of the OMRs, have officially become overseas territorial collectivities on 15 July 2007 after a popular vote in 2003. They remain within the Union's territory and have become Outermost Regions in their own right.

The new treaty introduces a mechanism so that the list can be adapted without a treaty modification. Under the new Article 311, which defines the territorial scope of the treaty, Paragraph 6 allows for the European Council to adopt, by unanimity and upon consultation with the European Commission, a decision to modify the status of a country or a Danish, French or Dutch territory. This provision could apply to Mayotte given the institutional evolution of this French overseas collectivity, currently outside EU territory. A declaration to this effect is annexed to the treaty. It states that the European Council "will take a decision leading to the modification of the status of Mayotte with regard to the Union in order to make this territory an Outermost Region, when the French authorities notify the European Council and the Commission that the evolution currently under way in the internal status of the island so allows" (Declaration 25). The Netherlands could also ask that certain islands be added to the list following the dissolution of the Dutch Andes.

The new treaty introduces a mechanism so that the list can be adapted without a treaty modification

STATE AID

Under the new treaty's state aid rules, OMRs qualify for exceptional arrangements in terms of regional state aid, whatever their level of economic development. Article 87(3a) on state aid, which allows state aid for the least developed regions, was modified to take into account OMRs. These regions can now benefit from the most favourable arrangements in terms of regional state aid, regardless of their GDP per capita, despite the fact that these arrangements normally only apply to regions with 75% or less of EU average GDP per capita. These special arrangements, which the Commission already applied in the regional aid guidelines for 2007-2013, are designed to offset the specific weaknesses of the OMRs. ■

*** Formal change ** Partial change *** Fundamental change**

AGRICULTURE

MEPs will have their say on future policies **

By Luc Vernet

The new Treaty confers upon the European Parliament powers that are to be shared with the Council of Ministers in many areas, including agriculture (Article 4 TEU).

As was foreseen in the discarded Constitutional Treaty of 2004, the new document extends the co-decision procedure (involving the Council of Ministers and the European Parliament) to agriculture, which means that, in this sector, the Council will have to negotiate the amendments that are voted by the assembly, whereas at present, the latter is only consulted for an opinion. The document indicates, however, that only "the Council, on a proposal from the Commission, shall adopt measures on fixing prices, levies, aid and quantitative limitations and on the fixing and allocation of fishing opportunities". Regarding these matters, the Parliament will simply be consulted (Article 37 TFEU).

If these rules had been in place during the debates on the last Common Agricultural Policy reform, for example, the implementation of decoupled aid would have been a matter for both the Council and the assembly to decide upon, whereas the Council alone would have decided on fixing aid and milk quotas. Furthermore, given that, according to the latest provisions, price and levy decisions, among others, must be made by the Council following a proposal by the Commission, the procedure becomes somewhat ambiguous with respect to the management committees that the Commission established to pass CAP measures.

Last June, the Committee of Agricultural Organisations and the General Committee for Agricultural Cooperation in the European Union (COPA-COGECA) applauded the "new launch" of the European process, emphasising the need for a "strong common policy". But the agricultural organisations also said that, "to reach this target, the objectives for European agriculture must be stated clearly, and the European Union must be able to rely on a political decision-making process that is both effective and democratic". They fear that vague wording in the new provisions may give rise to endless discussions about the respective prerogatives of MEPs and member states.

Furthermore, in an article borrowed from the 2004 document regarding animal welfare, it is indicated that "in formulating and implementing the Union's agriculture, fisheries, transport, internal market, research and technological development and space policies, the Union and member states shall, since animals are sentient beings, pay full regard to the requirements of animal welfare, while respecting the legislative or administrative provisions and customs of member states relating in particular to religious rites, cultural traditions and regional heritage". This element was particularly important in the eyes of European Commissioner for Health Markos Kyprianou, who addressed the issue as a matter of priority throughout his term. ■

FISHERIES

Co-decision, finally, for the EU's fisheries policy **

By Anne Eckstein

The new Treaty on the European Union (TEU) confers exclusive competence upon the EU in the area of the conservation of marine biological resources under the Common Fisheries Policy (Article 3) and a shared competence with member states in the area of agriculture and fisheries, excluding the conservation of marine biological resources (Article 4).

The agricultural and fisheries policies remain linked, established as they are under the same reference articles, beginning with Title II of the new Treaty on the Functioning of the Union (TFEU) in which the words "and fisheries" have been added. Similarly, Article 32 first indicates: "the Union shall formulate and implement a Common Agricultural and Fisheries Policy" (Paragraph 1.1). And, to clarify further, the second part of that same paragraph indicates that "references to the Common Agricultural Policy or to agriculture, and the use of the term 'agricultural', shall be understood as also referring to fisheries, having regard to the specific characteristics of this sector".

Articles 33 to 35 (market organisation) were not modified: their provisions therefore remain valid, unlike those that pertain to competition rules (Article 36). A reference to the European Parliament was included in the first subparagraph, whilst the reference to Paragraph 3 under Article 37 was omitted, which implies that, hereafter, co-decision applies to these decisions and that the Parliament will finally be given a say. However, the new treaty only grants limited oversight to the assembly with regards to aid. Indeed, it indicates in the second subparagraph that "the Council, on a proposal from the Commission, may authorise the granting of aid," and makes no reference to the Parliament. Article 37 confirms the switch to co-decision. The first paragraph (ex 2), which indicates that the Commission "shall submit proposals" to formulate and implement the CAP, is followed by two new paragraphs. According to the second subparagraph, "the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall establish the common organisation of agricultural markets provided for in Article [III-228(1)] and the other provisions necessary for the pursuit of the objectives of the Common Agricultural Policy and the Common Fisheries Policy". Subparagraph 2a, more specific to fisheries, is also more restrictive, indicating that "the Council, on a proposal from the Commission, shall adopt measures on fixing prices, levies, aid and quantitative limitations and on the fixing and allocation of fishing opportunities". There is no reference here to the Parliament. In short, the co-decision procedure does not apply to the total allowable catches (TACs) or to the quota system. ■

*** Formal change ** Partial change *** Fundamental change**

FREEDOM, SECURITY AND JUSTICE

Extension of majority voting heralds new era for JHA policy ***

By Jim Brunsden

The most fundamental change in the area of Justice and Home Affairs, under the new Treaty, will be the extension of qualified majority voting (QMV) in Council to areas where decisions previously had to be taken by unanimity (JHA renamed in the Treaty "Area of Freedom, Security and Justice").

Under the current treaty arrangements, all decisions in the areas of police cooperation, and judicial cooperation in criminal matters, are taken by unanimity (with one small exception relating to implementing measures for previously agreed decisions).

Similarly, unanimity remains the rule for decision making in several major topics contained within the other JHA themes. It still applies to measures relating to legal migration and integration of non-EU nationals, measures dealing with visa requirements for non-EU nationals, rules on a uniform format for visas and family law.

Under the Lisbon Treaty, however, decision making by QMV will be the norm, with only a limited number of exceptions. The most significant of these will be: measures taken by the EU concerning passports, identity cards, residence permits and other documents that go beyond the powers conferred by the EU treaties, but which are necessary to fulfil citizens' right to move and reside freely within the Union (Article 69 TFEU); measures concerning family law; the establishment of a European Public Prosecutor's Office (EPPO), as well as any subsequent decision to extend the EPPO's powers; measures concerning operational cooperation between member states law enforcement authorities, and legislation setting down the conditions and limits under which law enforcement and judicial authorities may operate in the territory of another member state.

CO-DECISION

Also impressive is the extension of the role of the European Parliament. Under the new treaty, the EP will have co-decision powers in the majority of JHA policy areas. In a limited number of other areas, despite lacking co-decision powers, it will still need to give its consent before an initiative can be taken. These include notably the procedure to create the EPPO, and subsequent initiatives to extend its powers.

The remaining areas where Parliament will only be consulted will be limited.

These will be measures taken by the EU concerning passports and other documents that go beyond the powers conferred by the Treaties (Article 69 TFEU); the adoption of temporary measures to help a member state facing an emergency situation, caused by a sudden influx of third-country nationals; the adoption of measures concerning family law (unless Council decides, by unanimity and after consulting the EP, to move elements of this area over to co-decision); measures concerning operational cooperation between law enforcement authorities, and legislation setting down the conditions and limits under which law enforcement and judicial authorities may operate in other member states.

This should be compared to the present situation, where consultation is the rule for all measures concerning police cooperation, and judicial cooperation in criminal matters, as well as measures relating to legal migration and family law.

EMERGENCY BRAKES

One consequence of these changes has been the inclusion, in the Lisbon Treaty, of 'emergency brake' clauses. There will be two of these, both in the area of judicial cooperation in criminal matters. One covers the establishment of minimum rules "to facilitate mutual recognition of judgements and judicial decisions" (Article 69e TFEU).

The other covers the establishment of minimum rules concerning "the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross border dimension" (Article 69f TFEU).

In each case, the emergency brake allows a member state to block the adoption of a legislative proposal, if it believes the proposal would "affect fundamental aspects of its criminal justice system".

The task of resolving the matter would then fall to the European Council.

RIGHT OF INITIATIVE

One element which has been retained from the current Treaty on the European Union is member states' right of legislative initiative. Under the current TEU, member states are able to present legislative proposals to Council in the areas of police cooperation and judicial cooperation in criminal matters.

The new Treaty on the Functioning of the EU will retain this principle, while both extending and modifying it. Under the new arrangements, legislative acts in these specific areas of JHA policy will be able to be proposed not only by the Commission, but also on the initiative of a quarter of the member states (Article 68 TFEU).

SCOPE

When it comes to the EU's scope of action in the JHA area, the main change is the inclusion of an article allowing the EU to set up a European Public Prosecutor's Office (Article 69i TFEU). The EPPO is envisaged as a body which would be established in order to combat crimes affecting the financial interests of the Union.

It would be responsible for investigating, prosecuting and bringing to justice the perpetrators of crimes against the EU's financial interests.

The office would also be able to send prosecutors to seek convictions in the competent courts of the member states. The treaty also leaves open the possibility of a future extension of the EPPO's power to include all "serious crime having a cross-border dimension".

Other notable changes include that, in the TFEU, it will be clearly stated that EU action will not affect the responsibility of member state governments for preserving national security (Article 66 TFEU). This point is not stated explicitly in the current treaties.

Another is that a standing committee will be created within the Council, in order to promote operational cooperation between member states' internal security authorities (Article 65 TFEU). ■

*** Formal change ** Partial change *** Fundamental change**

FREEDOM, SECURITY AND JUSTICE

Opt-outs extended to address concerns at loss of national vetoes***

By Jim Brunsden

New elements are to be added to the 'opt-out' arrangements for the UK and Ireland, under the EU's new reform treaty, aimed at addressing previously unexplored questions concerning Council decision making in Justice and Home Affairs (JHA renamed in the Treaty: "Area of Freedom, Security and Justice").

The first of these questions is what procedure should apply when the UK or Ireland already participates in a JHA measure at EU level, but does not wish to be involved in a legislative initiative to amend or update it.

The protocol dealing with the involvement of these two countries in JHA measures, once it is amended by the Lisbon Treaty, will make it clear that they have the right not to participate in these kinds of procedures. Choosing to do so, however, could have serious consequences. The other member states would be able to decide, through a qualified majority vote (QMV), that the non-participation of either the UK or Ireland would make the amended version of the measure 'inoperable'. If the other member states did decide that this was the case, they could force the non-participating country to withdraw from the whole measure, not just the planned amendments (Protocol No 11 Lisbon Treaty).

DNA EXAMPLE

A good, hypothetical, example of this could be the decision by Council (on which political agreement was reached in June 2007) to implement essential aspects of the 2005 Prüm Treaty into EU law. The agreement reached in June foresees that member states' national law enforcement authorities will network their DNA databases. If, in the future, it was decided to amend this initiative to establish a single central database, the UK could decide not to participate. If the other member states felt, however, that it would not be technically feasible to have one country participating in the information-sharing to a lesser extent than all the others, the British could be excluded entirely.

The Council would also be able to decide, on the basis of QMV, whether the member state which has to withdraw from the existing measure should also have to bear certain financial consequences. The protocol will note that the country in question could be made to cover costs which arise "necessarily and unavoidably" as a result of their withdrawal. In the DNA database example, such costs could arise from other member states having to make changes to their computer systems to take account of the fact that the UK is no longer involved in the data sharing.

SCHENGEN

A similar question will be addressed by the Lisbon Treaty regarding measures linked to the Schengen acquis, namely: what should happen in situations where the UK or Ireland do not wish to participate in the adoption of a piece of Schengen-related legislation, despite the fact that the measure would build on a section of the acquis in which the country already participates?

Choosing to opt out, however, could have serious consequences

To recall, the UK and Ireland currently only participate in certain aspects of the Schengen *acquis* (notably aspects related to police and judicial cooperation), as opposed to all other EU member states, which are full participants.

According to the version of the protocol on the Schengen *acquis* that will be attached to the new EU Treaties, although the two countries would have the right to opt out of Schengen building measures, they would then risk being forced to cease their participation in existing laws. The protocol will state that, if either country decides not to participate in a building measure, the Council will be able to vote by QMV to end its involvement in Schengen legislation, in order to ensure the "practical operability of the various parts of the Schengen *acquis*".

Neither of these types of situation, relating to amending measures or Schengen building measures, are fully addressed in the versions of the protocols attached to the current treaties.

EXTENSION

The need to address these issues arose due to the agreement, reached at the June 2007 European Council, that the UK's existing 'opt-in' for JHA measures could be extended under the new treaties to cover the areas of police cooperation, and judicial cooperation in criminal matters (so-called third pillar matters). At present this 'opt-in' covers only the other areas of JHA decision making at EU level- namely borders, asylum, immigration, and judicial cooperation in civil matters. The 'opt-in' works on the basis that the UK is not automatically expected to join in with the adoption and implementation of measures, but can do so whenever it wishes.

The Irish government confirmed its intention to benefit from the same deal as the British on 9 October. There is one minor, yet noteworthy, difference however between the UK and Irish positions. This is that the JHA protocol, once revised by the Lisbon Treaty, will make it clear that Ireland's power to choose when it wishes to 'opt-in' to measures will not extend to legislation proposed under Article 67a TFEU (ie measures to freeze terrorist assets). It will participate in the adoption and implementation of such measures on the same basis as other member states.

DENMARK

The existing protocol relating to the position of Denmark in justice and home affairs policy will also be altered by the adoption of the new treaty.

The existing Danish 'opt-out' will be extended to cover the areas of police cooperation and judicial cooperation in criminal matters. Also, the new treaty adds a whole new annex onto the protocol.

This annex provides that, in the future, Denmark can give up its full opt-out, and instead have the same power to opt-in as the UK and Ireland. The Danish government has the freedom to decide when, and if, this change should take place, in accordance with its constitutional requirements. ■

*** Formal change ** Partial change *** Fundamental change**

FOREIGN POLICY

A high representative with the appearance of a minister **

By Sébastien Falletti

The new EU head of diplomacy, who will take office in 2009, will not hold the ambitious title of European foreign affairs minister as planned in the draft Constitution, but he will keep the majority of the powers and should allow the EU27 to make their voice heard throughout the world. In order to reassure the UK, the term 'minister' was abandoned in favour of the more modest 'high representative of the Union for foreign affairs and security policy' in the reaty adopted during the informal Council in Lisbon on 19 October. "There is no change in the substance in relation to the Constitutional Treaty. It is simply a name change," affirmed German Chancellor Angela Merkel who was, at the time of the decisive EU Council in June 2007, in charge of the EU Presidency.

The three key improvements for common foreign policy planned by the Constitution can be found in the new treaty. As stipulated by the new article inserted into the TEU (Article 9E), he or she "[the high representative] is responsible for conducting the Union's Common Foreign and Security Policy. He or she shall contribute by his proposals to the development of that policy, which he or she shall carry out as mandated by the Council." In concrete terms, the high representative presides over the Foreign Affairs Council, a function that until now fell to the foreign affairs minister in charge of the EU Presidency. He is appointed by qualified majority by the European Council with the agreement of the president of the European Commission for a term set by the heads of state and government. But unanimity is required for all decisions on foreign policy (Article 11 TEU).

VICE-PRESIDENT OF THE COMMISSION

The new high representative becomes the vice-president of the European Commission and takes control of "responsibilities incumbent on it in external relations and for coordinating other aspects of the Union's external action". Put plainly, the posts of commissioner for external relations, and of the current high representative for foreign and security policy filled by Javier Solana, merge. A decisive change because it allows the high representative to have a foot in the two key EU institutions and above all to take control of the Community budget for external matters, an element that Javier Solana has cruelly lacked until now. The extent of control that the new high representative will have on all the Commission's external policies, particularly on trade and development, remains to be specified.

Finally, the amending treaty plans for the creation of a European external action service, providing for the sharing of the resources of the Commission's delegations and the embassies of members states throughout the world (Article 13a TEU). Here also, it is the process of putting it into practice which will tell how far this innovative provision will go in terms of integration. The text also equips the EU with a legal personality, "an essential element for action outside the Union," according to Jean-Claude Juncker, the prime minister of Luxembourg (Article 32 TEU, see separate article).

The treaty nevertheless responds to the concerns of London, which feared that too ambitious a formulation would unleash the furore of the British Eurosceptic press and opinion and fuel demands for a referendum. The then-Prime Minister Tony Blair had demanded at the June Council the guarantee that the future head of European diplomacy would not have precedence on British diplomacy and would not challenge its permanent seat on the UN Security Council.

The text therefore reaffirms, in black and white, in a footnote, that the provisions concerning common foreign policy "do not affect the responsibilities of the member states, as they currently exist, for the formulation and conduct of their foreign policy nor of their national representation in third countries and international organisations".

It also narrowly covers the role of the European Commission and the European Parliament by refusing to grant them more power, as well as the powers of the Court of Justice in terms of foreign policy. ■

TRADE POLICY

Intellectual property identified as new trade priority *

By Sébastien Falletti

The draft reform Treaty of Lisbon does not fundamentally change the framework for the EU's trade policy but complements and reinforces it by adopting new global economic conditions. The defence of intellectual property rights, trade in services and foreign direct investment are now explicitly included in the scope of the Common Trade Policy defined by Article 188C TFEU, which replaces Article 133 of the EC Treaty. An expanded definition, which aims to reflect the Union's new priorities in its trade negotiations, on both the multilateral and bilateral level, as the European economy relies more and more on the creation of immaterial resources.

The text retains the qualified majority voting in the Council on trade agreements, with resort to unanimity for those affecting the cultural and audiovisual sector. A hypothetical case, which also applies to social and health services, "where these agreements risk seriously disturbing the national organisation of such services".

More generally, the new text raises the role of trade policy, which is no longer only common but becomes an exclusive competence of the EU. It also specifies that the trade policy is "conducted in the context of the principles and objectives of the Union's external action," opening the door to a potential struggle for influence between the new high representative (see separate article) and the European trade commissioner. On a procedural level, there is no change, but the text nonetheless increases the role of the Council and the European Parliament by specifying that the trade policy follows the "ordinary legislative procedure". ■

*** Formal change ** Partial change *** Fundamental change**

ENLARGEMENT

New treaty gives member states an exit clause for first time **

By Joanna Boguslawska-Kania

Despite growing 'enlargement fatigue' among EU citizens following the 'big bang' enlargement in May 2004 and the smaller scale enlargement in 2007, EU leaders have decided not to toughen up accession criteria for potential newcomers. But for the first time in the history of European integration they have decided to give member states the right to withdraw from the Union. Although to date none of the current members has publicly stated its intention to leave the EU (and the queue to join the EU is still a long one), the Union is now equipped with a legal mechanism making it possible not only to join but also to exit the EU.

Following ten months of discussions on the new treaty, focusing, inter alia, on future EU enlargement, member states decided only to slightly change Article 49 of the Treaty on the EU (TEU), which defines the conditions of eligibility and the procedure of accession to the Union.

According to the new Article 34 of the TEU, accession countries will have to respect the EU's 'values' rather than its 'principles'. To date, under Article 49, would-be member states had to "respect the principles of the EU" such as liberty, democracy, respect of human rights and fundamental freedoms and the rule of law. They will need to respect the "values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law" and will be obliged to show "commitment to promoting such values together". Moreover, countries wanting to become members will have to notify not only the Council but also the European Parliament and national parliaments of their application for accession. The national parliaments will not, however, have any role in further stages of the accession procedure.

Experts say that these changes are only "cosmetic" and do not create any additional requirements towards potential newcomers. They do, however, point to the new sentence which has been added at the end of the article, which says that "the conditions of eligibility agreed upon by the European Council shall be taken into account", as something more than just a minor change. According to Piotr Kaczynski, a researcher at the Centre for European Policy Studies (CEPS) in Brussels, this new requirement enables the EU to expand the current so called 'Copenhagen criteria' by adding new enlargement conditions, namely integration capacity.

The wording of Article 34 falls short of the expectations of France or the Netherlands, which wanted the accession criteria to be much stricter. The Netherlands insisted on including the Copenhagen criteria in the main body of the new treaty to make them legally binding on countries seeking accession. This proposal was, however, rejected. Although the Copenhagen criteria are in fact enshrined in the treaties already in force, they do not directly refer to the accession process. Some countries feared that putting the Copenhagen criteria directly into the article governing enlargement procedure would mean that they would come under the EU Court of Justice's jurisdiction, allowing non-EU states to challenge the EU.

A MECHANISM FOR NEGOTIATION

New Article 35 of the TEU will confirm, for the first time, that any member state may decide to withdraw from the EU. This would be done in accordance with that country's own constitutional requirements. The new treaty sets out a mechanism for negotiation and conclusion of such a withdrawal agreement with the other member states.

No special political criteria have been attached to this procedure. The member state has to notify the European Council of its intention and then negotiate arrangements for its withdrawal.

The withdrawal agreement is then concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament. From the date of entry into force of the withdrawal agreement, the treaties cease to apply to the state in question. The state, which has withdrawn from the Union is, however, allowed to apply again for membership. Such request is subject to the accession procedure referred to in Article 34 of the TEU. ■

HUMANITARIAN AID AND DEVELOPMENT

Voluntary aid corps to help with crisis relief **

By Sébastien Falletti

The new draft reform Treaty of Lisbon gives birth to a European Voluntary Humanitarian Aid Corps, which will allow young people to come to the help of populations that are victims of catastrophes and crises worldwide.

Building on initial provisions made in the draft EU Constitution, the goal is to enhance EU capacity and visibility in the humanitarian sector and to set up a European project for young people. A new article (188J TFEU) institutes this new corps "in order to set up a framework for all common contributions of young Europeans to the Union's humanitarian aid efforts". The Council and the European Parliament will determine its statute and rules of procedure according to an ordinary legislative procedure.

Again, the Constitution's wording was borrowed for a new article (188D TFEU) on development aid, which puts forward the autonomy of EU policy in this area, whereas it used to simply "complement" the policies of member states. "The Union's development cooperation policy and that of the member states shall complement and reinforce each other," states the new document, which is another attempt to strengthen the Union's identity, that of the leading donor in the field.

The document also underlines that this policy "shall be conducted within the framework of the principles and objectives of the Union's external action". But it also states that the EU should remain coherent and take into account the objectives of development cooperation in the policies that it implements which are likely to affect developing countries. ■

*** Formal change ** Partial change *** Fundamental change**

DEFENCE

Defence policy is enshrined in new treaty ***

By Nicolas Gros-Verheyde

Along with the foreign policy of which it is an inherent part, defence policy has been given a prominent place in the reform treaty, a promotion from its virtual non-existence in previous treaties. It also has a new name: the European Security and Defence Policy (ESDP) has been renamed the Common Security and Defence Policy (CSDP). As established by the Intergovernmental Conference in 2004, 'Petersburg' military-civilian tasks are enlarged, certain financial means are put into place, relations between states are clarified (common defence clause and solidarity clause) and intervention mechanisms are refined (groups of states, permanent enhanced cooperation and European Defence Agency). Since some of these provisions (EDA and enlargement of Petersburg tasks) have been implemented in advance, the most noteworthy innovation is permanent structured cooperation, a sort of avant-garde or core group of countries wishing to take European defence policy forward.

A NOT YET COMMON POLICY

The framers of the new treaty went to great pains to provide limits for the defence policy to keep it from spilling over onto national powers. It is clearly stated that "the provisions governing the Common Security and Defence Policy do not prejudice the specific character of the security and defence policy of the member states. The EU and its member states will remain bound by the provisions of the Charter of the United Nations and, in particular, by the primary responsibility of the Security Council and of its members for the maintenance of international peace and security" (Declaration 30).

What is more, unanimity is the rule in decision-making on defence policy and the adoption of legislative acts is ruled out (Article 17 TEU). There is no possibility of a switchover to qualified majority (Article 280H TFEU). In the same spirit, the EU Court of Justice has no jurisdiction over defence matters (Article 240a TFEU).

Member states' different views and different military capacities explain these safeguards. The treaty mentions reservations, moreover, and the necessity of preserving the autonomy of NATO, in particular at the request of Britain.

But the repeated ambition is "the progressive framing of a common defence policy that might lead to a common defence" (Article 11 TEU). The transition to a common defence shall be decided by the European Council acting unanimously; it will recommend to the member states to adopt a decision in accordance with their own constitutional rules (Article 27(1) TEU)

ENLARGED TASKS

Definition. The mission assigned to the Union is to ensure "an operational capacity drawing on civil and military assets". The Union may use that capacity on missions outside its territory for peacekeeping, conflict prevention and strengthening international security in accordance with the principles of the United Nations Charter. The performance of these tasks resides on capabilities provided by the member states. The states agree, moreover, to make these capacities available and "progressively to improve" them.

Petersburg tasks. In addition to humanitarian and rescue tasks, and combat forces in crisis management, already found in the previous treaty, the reform treaty enlarges the scope of such missions – which were launched during the war in former Yugoslavia, in June 1992, at a meeting of WEU Foreign and Defence Ministers in Petersburg (near Bonn). These now encompass: joint disarmament operations, military advice and assistance tasks, conflict prevention and peacekeeping tasks, as well as post-conflict stabilisation. All these missions may contribute to the fight against terrorism (Article 28 TEU).

Common defence clause. Inspired by the WEU Treaty, the new EU treaty establishes an obligation of mutual defence. If a member state is the victim of an armed aggression on its territory, the other member states shall have an "obligation" of aid and assistance "by all the means in their power". This obligation does not affect the "specific character" of the security and defence policy of certain member states (neutral or bound by special agreements) or NATO agreements (Article 27(7) TEU).

Solidarity clause. "The Union and its member states shall act jointly in a spirit of solidarity if a member state is the object of a terrorist attack or the victim of a natural or man-made disaster. The Union shall mobilise all the instruments at its disposal, including the military resources made available by the member states." This clause may be used to prevent the terrorist threat, to protect democratic institutions and the civilian population and to assist a member state "at the request of its political authorities" (Article 188 R TFEU). It is implemented by a decision adopted by the Council, on a joint proposal from the Commission and the high representative. Where a decision has defence implications, the Council must act unanimously and the European Parliament must be informed. The European Council must carry out a regular assessment of the threats facing the Union.

This clause was implemented in advance following the terrorist attacks in March 2004 in Madrid. It has been supplemented with a provision on civil protection (see separate article).

OPERATIONAL MEANS

Permanent structured cooperation. This is the main innovation of the new treaty. The states wishing to take part must agree to provide combat troops that can be deployed outside the EU, with all the necessary support elements (transport, logistics, etc) and at brief notice (five to 30 days) for a period of four months. This cooperation may be implemented immediately upon the treaty's entry into force. Any state wishing to participate shall notify the high representative. The decision establishing the cooperation shall be taken within three months following notification. A member state may also decide to sign up at a later date. Decisions on the creation(...) of cooperation, and those on the admission or suspension

*** Formal change ** Partial change *** Fundamental change**

of member states, are taken by qualified majority. On the other hand, within the structured cooperation, decisions must be adopted by unanimity (Article 27(6) and 31 TEU plus Protocol 4).

Group of member states. The Council may "entrust the execution of a task, within the Union framework, to a group of member states in order to protect the Union's values and serve its interests". The states participating in the task must keep the Council informed regularly on its progress on their own initiative or at the request of another member state (Article 29 TEU).

(Simple) enhanced cooperation. Since the restrictions set out in the Treaty of Nice are abolished, this possibility may apply to the CSDP.

European Defence Agency. Created in anticipation in 2004, on a decision of the Thessaloniki European Council, the European Defence Agency is legally enshrined in the treaty and has guaranteed autonomy. Its remit is also broader: the agency is no longer limited to crisis or armament management, but now also has the task of promoting harmonisation of operational needs. It obviously keeps its other tasks as well: helping to evaluate observance of capability commitments, research and development, strengthening of the industrial and technological base of the defence sector. The statutes, seat and operating arrangements of the European Defence Agency shall be decided by qualified majority (Article 30 TEU)

FINANCIAL MEANS

The treaty maintains the prohibition on charging military or defence operational expenditure to the Union's general budget. Such expenditure must be borne by the member states on the basis of gross national product, "unless all members of the Council, acting unanimously after consulting the European Parliament, decide otherwise".

There are two exceptions, however:

1. The Council may adopt a decision guaranteeing rapid access to credits earmarked for the urgent financing of initiatives concerning preparatory activities of Petersburg tasks. The European Parliament must be consulted.

2. The Council may set up special funds made up of contributions from the member states to finance preparatory actions for Petersburg and CSDP tasks not covered by the EU general budget. The Council of Ministers must act by qualified majority on a proposal from the High Representative (Article 26(3)).

WHO IS IN CHARGE?

The high representative (see separate article) conducts the Union's CSDP, making proposals and executing the policy as the Council's representative (Article 9e TEU).

The European Parliament must be regularly consulted by the high representative on the main aspects and basic choices of the CSDP and on how the policy evolves. Parliament's views must be "duly taken into consideration". Special representatives may be involved in briefing the European Parliament. The national parliaments may be involved in debate on defence, since the Conference of Community and European Affairs Committees (COSAC) may convene an interparliamentary debate twice a year on the subject. ■

In Brief

Local and regional autonomy *

Article 4(2) of the new TEU gives recognition to the principle of local and regional autonomy by the European Union. It indicates that the European Union shall respect the national identity of member states "inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government".

Limited competence retained for industrial policy *

Industrial policy will be officially classed under the new treaty as an area in which the EU can take actions to "support, coordinate or supplement" the actions of the member states. In reality, this marks no real change from the present situation. The EU already has the power, under Title XVI of the EC Treaty, to adopt (through co-decision) measures to support member state action in areas such as speeding up the adjustment of industry to structural changes, and creating an innovation friendly environment. There will be two notable changes to the wording of this Title under the new treaty. The first makes it clear that EU measures may not include any harmonisation of the laws and regulations of the member states (in fact no change to the present situation). The other is a reference stating that, when taking initiatives to promote the development of an Open Method of Coordination between the member states, the Commission shall ensure that Parliament is "kept fully informed" (Article 157 TFEU).

Consumer protection

For consumer affairs matters, the new European Treaty does not change the current provisions (Article 153 TFEU). The Union therefore continues to contribute to the protections of the health, safety, and economic interests of consumers as well as the promotion of their right to information. It adopts the measures in application in Article 95 (Internal Market) as well as measures which support and complement national policies. The European Parliament and the Council decide in accordance to the codecision procedure. These decided measures cannot prevent a member state of maintaining or establishing stricter protection measures. The telecommunications, information technologies, and communication sector – whose European legislation is also based on Article 95 – is not specifically affected by the amending treaty.

*** Formal change ** Partial change *** Fundamental change**

NEGOTIATION OF THE TREATY

Tales from inside a blue submarine…

By Nicolas Gros-Verheyde

The negotiations that preceded the Lisbon Treaty were a masterpiece in submarine technology. In complete contrast to the relative transparency surrounding the drawing up of the Constitution in 2003-2004, member states and the EU institutions this time deliberately opted for opacity… and all in the name of efficiency! But on one condition… that it wouldn't be seen!

Two principles therefore served as a guide in drawing up the new text: complexity – "using the Treaty of Nice as a base, we include all the innovations from the Constitution and we must create separate texts. It's a bit like negotiating a maze" – and discretion – the preparatory work carried out away from the public eye, a negotiating mandate that is as precise as possible, the finalisation of the text by "a group of legal experts" and the promotion to political level at the last possible moment (ministers and heads of state) without being submitted to Coreper. Nevertheless, to say that the work was done purely by and for technicians would be incorrect. All the preparations were followed closely by the member states. Very closely!

"REFLECTION" STARTED VERY EARLY

The drafting of the new text started very early. Following the negative results in the French and Dutch referenda when politicians were in "reflection" mode, legal members of the Council under the supervision of Jean-Claude Piris, donned their thinking caps. Legal analyst for the Maastricht, Amsterdam and Nice IGCs and the Constitution, Piris is no novice and according to those who know him, he knows "the treaties like the back of his hand". In his book published in 2006, he gives details of the interesting 'changes of substance' and lists all possible scenarios – with No 5 an almost word for word imitation of the future Treaty of Lisbon and the Sarkozy or Prodi drafts with one small difference – he refers to the "condensed treaty". His co-workers also studied the Constitution in depth and know all its secrets and… drawbacks. Useful knowledge indeed! Their first task in fact was to study the 2004 IGC, article by article" and "to decide what could be kept, either 'as is' or with minor changes" and then see where it could be inserted in the two existing treaties: the EC Treaty (Rome) and the EU Treaty (Maastricht). "Typical legal work" including underlined notes, deletions and cross-reference tables. In addition to the "bilateral" meetings between certain countries (Germany and France, for example) an enormous number of "internal meetings were also held;

The testing phase began around the autumn of 2006 with the help of diplomats and the German Presidency: it consisted of presenting sections of the text to the Commission and the "problem" member state. Numerous bilateral meetings then made it possible to draw up and fine-tune a text "matrix" and establish a draft mandate to open the intergovernmental Conference.

The mandate is, however, so detailed and incomprehensible that it is almost impossible to unravel. "That was the aim" admitted one diplomat "to leave as small a margin as possible for the unexpected to happen". And in all honesty, there have been a relatively limited number of unexpected events. Long public squabbles – the Polish and their voting rights or the British and their "red lines" – were merely the tip of the iceberg. To get everybody on side during the two nights of the summit it would be necessary to bring out the trump cards and where necessary do some rewriting which meant adding numerous additional footnotes: a yellow card for national parliaments and a public service protocol (for the Netherlands); withdrawing the conflicting objectives (for the French), adding a protocol on the same subject (for the Commission) and of course the "famous" Ioannina compromise (for Poland) (For the specialists, the Ionnina system was not new since it had already been included in a draft Constitution declaration and Jean Claude Juncker, the prime minister of Luxembourg and the "walking history" of European summits, would explain how it works to his peers at the dinner of the European Constitution on 21 June. Lech Kaczynski, the Polish president, was absent from that dinner and would have it explained to him in brief at a later date).

Once the mandate had been approved, on the night of 22 to 23 June, the German presidency would make the request for the Treaty to be reviewed official on 27 June in a letter sent to its partners (a necessary formality). And on 16 June, EU agricultural ministers accepted under "point A" the IGC convocation to the Council of general affairs ministers on 23 July.

Meanwhile, the lawyers had nothing better to do than to get back to work – in reverse order: putting the text back together. This was completed relatively quickly and sent by mail to all delegations on 21 July. There was a minor diplomatic incident when certain delegation expressed their anger that the text was only available in French and then English. The Portuguese Presidency would learn a lesson from this and would block subsequent text releases until most of the translations had been completed.

EXPERTS UNDER CLOSE SURVEILLANCE

Then it was back to work, this time at the level of legal experts from member states in room 20.45 on the second floor of the Council. "It was better than in 2004 where we all packed into a small room with no window". There were two representatives from each member state, most often one would be from the permanent representation in Brussels and the other from the country itself (often from the Ministry of foreign affairs and less frequently from the prime minister's cabinet). Most of the work was done in French, the language of the institutions' lawyers. "It's more precise as well as being more practical. At the 2004 IGC, we also worked in French"

After the inaugural session on 24 and

REAL-TIME TRANSLATION

The translators also got to work very early on, translating first the proposal that was made in June. By mid-September, around ten versions were ready (German, Spanish, Dutch, Slovak). By the beginning of October, before the General Affairs Council, all the texts had been translated. And as all amendments were sent to the translators as and when they were needed, it meant that every leader at the summit in Lisbon had a copy of the text in his own language.

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24 July for the initial explanations, the method and how the work was to be organised, the experts left on holiday with their homework under their arms: to correct the 300 pages of the treaty and the protocol. Some were incredibly meticulous, those of note being the Hungarian who "had marked everything, including the missing commas" and the "remarkably virtuous" Cypriot. The Germans and French on the other hand were "very discreet".

The first reading which took place on 29 August was rushed through quickly "it was pretty boring and fastidious" admitted one of the participants, "we checked that nothing had been forgotten". Overall 200 amendments were made, many of them just the form. "I feared that there would be a debate about the more vague elements of the mandate" such as the clause saying that all innovations from the 2004 IGC would be kept. "But what is an innovation?" And in the end, there was no debate Everybody at the table agreed to keep the Constitution except for the "most visible" and symbolic elements.

The Polish requests which blew up in the media only caused a small stir in the room itself. "Our colleague was only too well aware of it. We all know that there are times when we have to pass on absurd messages", said one diplomat. "In such instances we show our solidarity, we listen politely, and we move on to the next item". The principle was that "any delegation which wanted to ask a question, first had to put it to the group of experts" explained a lawyer from the Commission. "Even if it was just to establish that the question did not fall under the mandate and was therefore rejected". "Altogether we must have spent four minutes on this question" explained a lawyer from one of the other delegations. "The problem was trying to understand what exactly the Polish wanted, they kept changing their minds"

THE MAIN PROBLEM WAS THE BRITISH

The second reading was cut short and meetings were cancelled. "It was important to make time for the main issues": the supplementary opt-out for Justice and Home Affairs requested by the British. Already in June, Britain had submitted a document to the Portuguese Presidency with a list of their requests, described by certain delegations as "totally unacceptable". A series of bilateral meetings were then organised between the Portuguese presidency and the Council and the British first and then the "Schengen lovers" (the 13 countries that defend the integrity of the Schengen system) – before the official plenary meetings in a bid to reach agreement on one really complicated instrument: an 'opt-over' also referred to in-house as 'The Monster'. Discretion throughout was absolute. The subject is extremely sensitive "We have to be discrete, avoid provoking any extra tension and prevent matters from rising to political or even media level so that they can be blown up with the risk that the situation will be blocked". "Number 10" - home of the British prime minister – which has been watching developments very closely (one of Gordon Brown's advisors was present in the room) gave its approval. The other countries did likewise. In fact these meetings under the guise of being technical were actually very political and were used to resolve as many questions as possible before the official meetings. And so it came to pass that at 11:45 on 2 October the text was finally concluded. All that remained was for it to be ratified which was done the next day in a more formal session in the presence of the Portuguese permanent representative.

Only the final adjustments were left to be completed. Before the meeting of General affairs Ministers on 15 October, solutions were found for the Polish question (unanimity included in the treaty and an advocate General), the Czechs (a protocol), the Parliament and the Commission (transposition for the high representative). The summit on the 18 and 19 October was therefore dominated by the final adjustments (an extra advocate-general for the other member states) and the Italian question (an extra MEP). Agreement was reached at 2:30 in the morning. "Never before has an ICG managed to finalise a text in five months".

The experts can breathe again. Their work is finished … for the time being. ■

(Note: this article has been compiled based on a series of interviews with lawyers and diplomats from different member states and EU institutions between June and October 2007)

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Chairman and Publisher:
René-Charles Millet

TELEPHONE
Central: +32 2 737 77 00
Fax: +32 2 732 66 51
Direct lines:
Instead of 00, dial the two digits after the person's name.

E-MAIL
Editorial staff:
editorial@europolitics.info
Subscriptions:
subscriptions@europolitics.info
Direct:
firstname.surname@europolitics.info

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Translation:
Christina Berta, Alda Boghossian, Betty Jackson, Michèle Morsa, Ryan Stephens

Agenda, layout and website:
Philippe De Clercq (57)
Geneviève Jourdain (13)
Grégoire Maus (15)
Christine Serville (14)

ACCOUNTING: Pascal Duvent
Tel: + 33 1 42 74 28 93
Fax: + 33 1 42 47 29 00
accounting@europolitics.info

MARKETING/SUBSCRIPTIONS
Director: Frédérique Carton
Head of marketing:
Stéphanie Pacchiano (41)
Aurélie Aromatario (09)

ADVERTISING
Commercial Director:
Jérôme Millan
Tel: + 33 1 42 74 29 04
Email: jmillan@siac.fr
Benelux: Eurintro - M. Deurinck
Tel: + 32 475 271 382
Email: mdeurinck@eurintro.be
France: Anne Rougé
Tel: + 33 6 72 43 70 79
or + 33 8 72 62 22 47
Other: advertising@europolitics.info

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Representation of the European Commission in Belgium
Rue Archimède 73 – 1000 Brussels
www.ec.europa.eu/belgium
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