



## EU Constitutional Issues

**On** October 18, 2007 the heads of state and governments of the EU member states agreed on a final text of the Lisbon Treaty (the “Reform Treaty”), which amended the Treaty of Rome (1957) and the Treaty on the European Union (1992). The official signing ceremony was held on December 13, 2007 and ratification will take place in individual countries throughout 2008. Assuming nothing goes wrong in this process, the treaty will enter into force in 2009. The final text is the outcome of the painful “EU reflection period” that was invoked after French and Dutch voters rejected the ambitious “Treaty Establishing a Constitution for Europe” in a popular referendum in June 2005. As the new Treaty is “just a Treaty” and not a “Constitution”, most European governments concluded that they can proceed by ratifying through parliament, thus bypassing the risk of another referendum. Whether this conclusion is democratically justifiable is debatable. In the view of Valéry Giscard d’Estaing, the former French President and architect of the rejected Constitutional Treaty, the Lisbon Treaty contains the same institutional modifications as did the Constitution, but are merely put in a different order or have been inserted in former treaties. The last word on the ratification process has not yet been spilled. Ireland – obliged so by its own constitution – will hold a referendum and in some other countries, for example Denmark, the debate has not yet crystallized out. If the result is in favor of a referendum, this could pressurize other governments into doing the same.

This brief explains the developments that led to the drafting of the Constitution and the Lisbon Treaty, and outlines the most important institutional and policy-oriented innovations proposed in it, as well as their consequences.

### **Background – the Laeken Declaration and the Convention on the Future of Europe**

The EU Constitution had its origin in the EU's existing Treaties, that is, the Treaty of Rome (1957) and the Treaty on European Union (1992), as well as Treaties that have amended these, most recently the Treaty of Nice (2000). The main objective of the Nice Treaty was to prepare the Union for enlargement into Central and Eastern Europe, a decision resulting from the break-up of the Soviet Union. Although the Nice Treaty did take such steps, there was broad consensus in the European Council that further streamlining of institutions and decision-making procedures was needed. Because agreement upon the details of such changes could not be reached at the time, a declaration on the future of Europe was included as a component of the Nice Treaty. At the subsequent Laeken European Council summit in 2001, the European Council adopted this declaration, thereby posing sixty targeted questions on the future of the EU, clustered around four areas of attention: the division of powers between the Union and its member

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states, more rigorous definition of the tasks of the Union's institutions, coherence of the Union's external actions and a strengthening of the EU's legitimacy. The declaration also committed the Union to becoming more democratic and transparent and admitted itself to "bring citizens, and primarily the young, closer to the European design and the European institutions." To proceed, a "Convention for the Future of Europe" made up of European and national Parliamentarians was established to draft the constitutional document. Former French President Valéry Giscard D'Estaing served as chair of this Convention, and meetings started in February 2002. A draft constitutional treaty was delivered by the Convention in June 2003. This document was a point of departure for discussions on reform during the Intergovernmental Conference that opened in October 2003, but these were marred by disagreements. Nevertheless, the European Council approved the Constitution on June 18, 2004 with relatively few changes. After being signed by heads of state and government, the Constitution was endorsed by the European Parliament on January 15, 2005 by 500 votes to 137 with 40 abstentions. Despite the large majority in favor, it should be noted that amongst British, Czech and Polish MEPs a majority of votes were cast against the Constitution.

Ratification in the member states was an even bumpier process. In France a popular referendum was held on May 29, 2005. The polls showed that the levels of support for the Constitution declined sharply in the months leading up to the referendum, with the No-camp eventually securing a clear 55 percent majority. The Dutch went to the polls four days after this French rejection, in what was the first nation-wide poll in the history of the Netherlands. Although the poll was not constitutionally binding, the government promised to respect the outcome, which was a resounding 62-38% rejection of the Constitution. As a reaction to these unforeseen events, the British and Portuguese governments postponed their referendums. No coherent scenarios had been developed to deal with rejection, causing the EU to plunge into a state of paralysis, later renamed somewhat optimistically as the "reflection period". This period of internal meditation lasted until June 2007, when, under the German EU Presidency, this sensitive but inevitable issue was reopened for debate at the highest level. At the European summit of June 22 and 23, 2007 it was agreed that both the Treaty on European Union and the Treaty establishing the European Community were to be amended by a new Reform Treaty, and therefore an Intergovernmental Conference (IGC) was launched. The path leading to agreement on a "slimmed" version of the Constitutional Treaty has been wobbly and sometimes characterized by harsh and even hostile national attitudes – a case in point was the Polish-German row which referred to World War Two. But on October 18, 2007 agreement was reached and the process of ratification is now in train.

The key agreements were all made before the Lisbon Summit, so that at the meeting itself only relatively minor issues remained unsolved. These last issues grouped mainly around Poland, Italy and Britain. Poland, at the time of negotiations was still governed by the Kaczynski twins, and was clearly playing its "national" card, as Polish parliamentary elections took place only several days after the Lisbon Summit (their Law and Justice Party lost). The Polish gained an equal footing with other big EU countries in the European Court of Justice by the right to appoint an Advocate-General. In order to show

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its discontent with the Charter of Fundamental Rights, Poland vetoed a proposal to establish a “European day against the death penalty”. Another Polish last minute catch was the reappearance of the Ioannina compromise; however, it has not been incorporated in the main text. This compromise allows a minority of member states to delay decisions voted by qualified majority voting (QMV) “within a reasonable time”. “Reasonable” remains undefined and of course may cause problems for the smooth running of the Union in the future.

Italy faced a dilemma because a system based on population counts led to the conclusion that it should have fewer seats in the European Parliament than the UK and France, which Italy perceives as demonstrating a political hierarchy led by these big member states. In the end, Italy was granted an extra seat in the European Parliament (2009-2014), settling at 73 seats, equal to the UK, and just one less than France. To come to this compromise without having to change the total number of 750 MEPs, the Portuguese Presidency smartly decided not to count the President of the Parliament, who does not have a vote in any case.

An interesting point is that the no-voters (France and the Netherlands) did not come to the negotiation table with proposals for fundamental changes. The Dutch mainly advocated changes in decorative aspects, for example regarding the nation-building elements of the preamble and in not naming the “EU Foreign Minister” the “EU Foreign Minister”, but the “High Representative of the Union for Foreign Affairs and Security Policy”. President Sarkozy’s most notable concern was an economic policy; on his request a reference to “free and undistorted competition” as a goal of the Union was taken out of the final text. However, even more interesting, the French and Dutch electorates who derailed the Constitution did not fervently object to the decision not to hold a referendum on this treaty, even though the perception is that fundamentally not much has been changed between the two documents. In France, this is less surprising, because Sarkozy explicitly told the electorate in his Presidential campaign that he would ratify it in parliament. The constitutional no-vote was less a rejection of European cooperation than a reaction to domestic problems, and possibly to the idea of Turkey joining the EU imminently – a large factor in the French no-vote.

### **Changes Made by the Lisbon Treaty**

Opinions differ on how different the Lisbon Treaty really is from the rejected European Constitution. The changes made through amendments of former treaties (Rome, Maastricht) make it more difficult to make this assessment without references to constitutional lawyers. One thing that is very clear, however, is that substantially less has been modified than high level politicians tend to argue. The main modifications made in the Lisbon Treaty are:

- The system of rotation for the European Council President (whereby the President of the Union changed every six consecutive months) will be abolished. Instead the Union will have a permanent European Council President to be elected by the

members of the European Council using Qualified Majority Voting (QMV). The President will be elected for a 2 ½ year period, renewable once. Regarding the EU Presidency, each Member State will continue to hold the rotating Presidency for six-month periods.

- A position of “High Representative of the EU for Foreign Affairs and Security Policy” will be created. This position merges the position of Javier Solana and the external relations commissioner. He or she will be appointed by the European Council using QMV.
- From 2014 the size of the Commission will be reduced to fifteen, or two-thirds of the number of member states, using a system of equal rotation. At the moment every member state can appoint one commissioner.
- There will be a maximum of 750 members of the European Parliament (MEPs), plus the president, due to the extra seat granted to Italy. There will be a minimum of 6 and a maximum of 96 MEPs per member state.
- QMV on proposed EU legislation is to be defined as at least 55% of the members of the Council, comprising a minimum of 15 of them and representing member states comprising at least 65% of the Union’s population. Due to the Polish opposition, the new QMV-voting system will start in 2014, with the Ioannina compromise making it easier to block a decision until 2017.
- The effectiveness of the EU’s decision making mechanism will be enhanced, as QMV will be extended to 40 extra policy areas, mainly concerned with asylum, immigration, and police and judicial cooperation.
- The EU will have a single legal personality and thus the possibility to accede, for example, to international conventions.
- Member states are allowed to leave the Union. Procedures for voluntary withdrawal from the Union have been included whereby any state wishing to withdraw must notify the European Council, who will then provide guidelines for the negotiation and conclusion of practical arrangements.
- The Charter of Fundamental Rights becomes a legally binding document.
- The division of competences between the EU and the national governments will be clarified. The principles that guide the division of responsibility between member states and the EU by emphasizing the principle of conferral, i.e. that the EU has no competencies by right. To ensure compliance with the subsidiarity principle – decisions must be made at the right level and as close to the citizen as

- possible – national parliaments are given the right to raise objections with an “orange card”.
- Some new opt-out policy provisions are created for Britain regarding judicial and police co-operation, asylum and immigration. These opt-outs can easily be converted to opt-ins.
  - A citizens’ initiative will be introduced, by which at least one million citizens from different member states can invite the Commission to propose legislation within its areas of competence.

In the end, the Lisbon Treaty provides for most of what was originally imagined by the Laeken Declaration. With the new treaty coming into force, EU institutions and mechanisms are likely to be more in line with the substance of the organization itself. In comparison to the defeated Constitution, it can be concluded that elements bearing a nation-building connotation, such as the word “Constitution”, the symbols and the European anthem (Beethoven’s Ode to Joy, Ninth Symphony) perished in the Lisbon Treaty. During the reflection period, it became clear that policymakers had by far overestimated the identification of citizens with the entity “Europe” in comparison to their national loyalties. With its own citizens, references to the EU bureaucracy often have negative connotations, based around the democratic deficit and nanny-state meddling.

The Charter of Fundamental Rights, which was an important part of the Constitutional Treaty, has not been incorporated in the new treaty. Nevertheless, it has been replaced by a short cross-reference which will put it on the same legal level. Britain and Poland have, in keeping with their awkward partner status, obtained an opt-out for the Charter. As the legal status of the cross-reference is equal to the incorporation of the Charter, its interpretation now lies with the European Court of Justice. Many of the rights included are already granted to Europeans by the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) signed in 1950. However, this document mainly focuses on negative rights, whilst the EU’s Charter includes a range of positive rights such as the right to good administration, the social rights of workers, the protection of personal data and bioethics, next to some disputable rights such as the right for children to self determination, dignity, respect, integrity, non-interference and the right to make informed personal decisions.

### **Ratification**

In order to come into force the Lisbon Treaty must be ratified in accordance with national procedures. Such procedures depend on the internal constitutional conditions in each state. In a large number of countries the national parliament can ratify treaties without the direct involvement of the public. A referendum can be held either for constitutional reasons or at the discretion of the individual government (mostly due to political

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pressure). After the signing ceremony on December 13, 2007 all 27 member states have started the ratification process, which is expected to conclude at the end of 2008, ahead of the European elections in 2009. Surveys point out that 70% of the EU citizens would like to see a referendum on the Lisbon Treaty.

Only Ireland is bound by its own constitution to hold a referendum. Decisions whether or not to put the Treaty to a referendum in some other member states have become even more political due to a “referendum anxiety” that spread after the French and Dutch rejection of the EU Constitution in 2005. At the state level, the emphasis has been that the Lisbon Treaty is “just a Treaty” and thus the general consensus has been that no referendums are needed, and parliamentary ratification is sufficient. In Denmark and the UK, for example, debates are still going on whether – as for discretion of the government – to consult the citizens. France will ratify only in parliament, a decision clearly spelled out in Sarkozy’s electoral campaign. The Dutch government, traumatized by its first experience with the 2005 referendum, will skirt its citizens’ opinion as well, although there, one of the coalition parties had actually been pro-referendum in its electoral campaign. If Denmark is to decide to put the Lisbon Treaty to a referendum, this will enhance the pressure on governments that have not yet taken a decision or on those countries in which a decision is based on weak constitutional and political foundations.

## Summary

Whilst the EU Constitution was designed to replace all earlier EU treaties and start from a *tabula rasa*, the Lisbon Treaty is a treaty on top of, and amending, the Treaty of Rome and the Treaty on the European Union. The opinions on the impact of the Lisbon Treaty, which is in substance close to the defeated EU Constitution, are divided. Some commentators hold that the Treaty is merely a tidying-up exercise aimed at increasing the clarity of the legal foundations of the Union. Others, however, see the new arrangements as a move towards further political integration.

The truth lies somewhere in between. The division of responsibilities, particularly between the EU and member state level have been clarified. Although the large majority of the clauses and provisions are unchanged, there are a number of innovations. These include methods of appointment of key figures such as the President of the Council, and the addition of a High Representative of the EU for Foreign Affairs and Security Policy. The EU seems to get its long awaited face for the outside world and external policies are likely to become more coherent as a result. The expansion of qualified majority voting into additional policy areas, mainly concerning judiciary cooperation, immigration and asylum will enhance the EU’s effectiveness in these areas. In many areas, the Lisbon Treaty seems to live up to the aims set in the Laeken declaration. The statement in the Laeken declaration that “simplification is essential” should however be considered an exception and the outcome of the debate on the ratification process will be a first sign on whether the Union will commit itself to – not only in word, but also in practice – becoming more democratic and transparent.