

Zentrum für Europäische Integrationsforschung  
Center for European Integration Studies  
Rheinische Friedrich-Wilhelms-Universität Bonn



Marcus Höreth/Jared Sonnicksen

## **Making and Breaking Promises**

The European Union under  
the Treaty of Lisbon

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Zentrum für Europäische Integrationsforschung  
Center for European Integration Studies  
Rheinische Friedrich-Wilhelms-Universität Bonn

Walter-Flex-Straße 3  
D-53113 Bonn  
Germany

Tel.: +49-228-73-4960  
Fax: +49-228-73-4984  
<http://www.zei.de>

Marcus Höreth, born 1968, is a Research Associate at the Institute for Political Science and Sociology of the University of Bonn. After completing his PhD. thesis at the University of Freiburg on the problems of legitimacy in Post-Maastricht Europe in 1999, he worked as a Research Fellow at ZEI and has been teaching at the University of Bonn since 2001. He completed his habilitation in early 2008 and the subsequent monograph on the European Court of Justice and the U.S. Supreme Court in comparison (*Die Selbstautorisierung des Agenten. Der Europäische Gerichtshof im Vergleich zum U.S. Supreme Court*) is being published by Nomos.

Jared Sonnicksen, born 1978, is a Research and Teaching Assistant at the Institute for Political Science of the University of Bonn. After completing his Bachelor of Arts at Wabash College (Indiana, USA), he attended the University of Bonn as a Fulbright Scholar and completed his M.A. there in 2003. He has been teaching at the University of Bonn since 2004 and is working on his doctoral thesis on EU reform and the limits and possibilities of democratization.

*Marcus Höreth/Jared Sonnicksen*

## **Making and Breaking Promises**

### The European Union under the Treaty of Lisbon

#### **1. Introduction**

The most surprising aspect of Europe's newest treaty is not so much its content, but more the way it came into being. For the first time in the history of European integration, a treaty is not the result of a "night of the long knives" at an EU Summit, but rather a several-year process. This process, characterized by a series of advances and setbacks, began with the "Laeken Declaration"<sup>1</sup>, in which the Heads of State and Government of the EU Member States recognized that the usual modes of diplomacy no longer represented an appropriate means for setting the course of future European politics. Consequently in February 2002, a Convention presided by former French president Valéry Giscard d'Estaing was convened for the purpose of working on proposals on institutional and constitutional reforms of the European Union. Moreover, the Convention sought to find a "European Constitution" that would guarantee democratic principles in the enlarged EU while at the same time preserving its effectiveness both domestically and externally. In July 2003, a Draft Constitutional Treaty was submitted to the European Heads of State and Government<sup>2</sup> and, after approximately

1 European Council, "Presidency Conclusions. European Council of Laeken, December 14-15, 2001, Brussels.

2 "Draft Treaty Establishing a Constitution for Europe", adopted by consensus by the European Convention on 13 June and 10 July 2003, submitted to the President of the European Council on 18 July 2003 in Rome, Luxembourg 2003.

one year of further negotiations, was approved by the European Council. However, it did not take long for the ratification process to be derailed by the rejections of the Constitutional Treaty in the French and Dutch referenda of 2005. Once again, the *quo vadis Europa* question pervaded EU political discourse and the European Council subsequently called for a period of reflection.

Under the German Presidency of 2007, efforts were made to salvage the constitutional project by abandoning the “constitution”, “watering down” reform issues<sup>3</sup> and establishing a road map for adopting a new reform treaty. The Portuguese Presidency overtook this task during the second half of 2007, soon presenting a “Draft Treaty amending the Treaty on European Union and the Treaty establishing the European Community” – the title’s prolixity alone being a stark contrast to the previously ambitious “Constitution for Europe”. After a series of compromises, the European Council finally agreed on the reform treaty in October, and the EU Member States signed the Treaty of Lisbon in December 2007.<sup>4</sup> While the breakthrough triggered both relief and hope that the European impasse would soon be over, there is still reason for concern. First, the ratification process awaits and, though most Member States will abstain from holding referenda, at least one country, Ireland, will be asking its citizens to approve the new treaty in June this year. Thus, one cannot be certain that all 27 parliaments and at least one electorate will ratify the treaty.<sup>5</sup> Secondly, in the end the Member States seem to have returned to the “old way” of treaty reform with intergovernmental negotiations among Member-State governments. Ironically, they have tried to rescue the ‘constitution’ – which was conceived, among other things, to secure democracy in the EU – but without

3 König, Thomas / Daimer, Stephanie / Finke, Daniel. (2008) ‘The Treaty Reform of the EU: Constitutional Agenda-Setting, Intergovernmental Bargains and the Presidency’s Crisis Management of Ratification Failure’, in: *Journal of Common Market Studies* 46(2): 337-63, here pg. 337-41.

4 European Commission, “Commission welcomes signature of the Treaty of Lisbon and calls for its swift ratification”, December 13, 2007, Brussels.

5 ‘Treaty Weakens Ireland - McDonald’, in: *The Irish Times*, February 29, 2008. Available at: <http://www.ireland.com/newspaper/breaking/2008/0229/breaking65.htm>.

dubbing the treaty so and moreover without consulting the European citizens.<sup>6</sup>

Nonetheless, the Treaty of Lisbon stems by and large from the formally proposed Constitutional Treaty. Its drafting did present an innovative method of participation and reform in the European integration project. Already, Member State governments have declared the Treaty a reform that will make Europe “more transparent, efficient and democratic”, which is what “helps citizens in Europe”.<sup>7</sup> Yet, aside from the uncertainty surrounding the new treaty’s ratification, the *substance* of the reform treaty – like its predecessor – equally warrants more sobriety than euphoria. The new document offers both improvements and drawbacks. On the positive side, the reform treaty, if ratified, would simplify the EU legislative procedures, reduce the amount of legal instruments, shift the EU from the three-pillar system to a more uniform institutional framework, and endow the EU with a single legal personality. However, a major question remains of whether procedures within the EU will indeed become more transparent and whether the sizeable interest differences among the Member States in an enlarged union will prevent that. In the following, we attempt to examine what the next treaty *really* has to offer and to assess to what extent the Treaty of Lisbon can fulfil its promise of more transparency, efficiency and democracy.

## **2. More Transparency?**

### **2.1. A New “Open Door” Policy of the Council of Ministers**

Comprehending which EU institution is responsible for what has been anything but easy for EU citizens. Most decisions from the European level result from negotiations between the governments of the Member States and

6 Tsebelis, George. (2008) ‘Thinking about the Recent Past and the Future of the EU’, in: *Journal of Common Market Studies* 46(2): 265-92, here pg. 286-89.

7 Steinmeier, Franz-Walter, Minister of Foreign Affairs of Germany, during the signing of the Treaty of Lisbon, December 13, 2007. Available at: [http://www.magazine-deutschland.de/ereignis\\_meldung.php?id=736](http://www.magazine-deutschland.de/ereignis_meldung.php?id=736).

the Commission, consisting frequently of obscure package deals, reciprocal arrangements, and side-payments. Moreover, these decisions tend to be met in anonymous networks. Consequently, Title II Article 8a-c of the Reform Treaty avows that the EU institutions are to work transparently. In this spirit, the Council of the European Union for example shall in the future hold meetings publicly when debating or voting on legislative acts (Title II, Art. 9c (8)).<sup>8</sup> The treaty however divides Council meetings into two types. While sessions involving debates and votes on legislative acts will be open to the public, sessions that do not pertain to legislation will continue to take place behind closed doors. When controversial legislative proposals are at hand, one may assume that the package deals and side payments often necessary for overcoming a deadlock in decision making will not be negotiated openly and be deferred to the second type of meeting. Horse-trading surely tends to place the participants in a negative light, which may represent the ulterior motive for keeping certain Council meetings secret. Under these conditions, Council members will in all likelihood continue their efforts to reach unanimous decisions in practice, even in areas where a qualified majority is sufficient. In those cases where the Council fails to reach consensus, the public part of the Council sessions could provide an opportunity for divergent sides to “showcase” for their respective national publics. Alas, costs and benefits of open Council meetings cannot yet be predicted.

## *2.2. Who gets what, when and how – the Creation of a Vertical System of Competences*

On the other hand, the creation of a vertical system of competences could substantially increase the transparency of European politics. The pressure for reform on this issue was particularly high: Regions above all, but also municipalities have insisted on stronger recognition of the regional dimension of Europe and demanded stricter adherence to the principle of subsidiarity; the EU has also played a role in strengthening regionalism and

8 All references to articles in the Treaty of Lisbon have been taken from the version available on the European Union website: <http://europa.eu/>. The text can be found in various languages through the following link: [http://europa.eu/lisbon\\_treaty/full\\_text/index\\_en.htm](http://europa.eu/lisbon_treaty/full_text/index_en.htm).

encouraging “territorial positioning” in sub-national authorities.<sup>9</sup> Along these lines, regional units and federal sub-units such as the German *Länder* hoped to win or win back a greater scope of political power.<sup>10</sup> These demands were made in the light of growing concerns that the EU institutions would loosely interpret their responsibilities in order to expand their powers and intensify the Member States’ and their sub-units’ loss of sovereignty as a result.

The Treaty of Lisbon can only partially alleviate these fears. For example, the new treaty systematizes competences in the multi-level governance system of the EU according to three categories. This may provide enhanced clarity (Title I, Art. 2a): exclusive competence of the EU; shared competences with Member States; and competences to carry out actions to support, coordinate or supplement the actions of the Member States. A delimitation of competences and a list of the areas they apply to would surely increase the transparency of the decision-making process. However, the reforms are not drastic enough to guarantee that competence conflicts between the EU and the Member States are easily interpretable and hence resolvable, but rather quite the opposite.

### *2.3. Stronger Subsidiarity: Bringing the National Parliaments back in...*

Thus, a strengthening of the principle of subsidiarity may pose a more promising way to reach an effective delineation of competences. The emphasis placed on the principle of subsidiarity in the Lisbon Treaty – as in the former draft constitution treaty – expresses not only a rejection of a European super-state, but also the commitment to a democratic governance order: in essence, the higher level of governance should only be responsible for a task when the lower levels are not capable of handling it.<sup>11</sup> The newly

9 Sykes, Oliver / Shaw, David. (2008) ‘Investigating Territorial Positioning by Sub-state Territories in Europe’, in: *Regional and Federal Studies* 18(1): 55-76.

10 Höreth, Marcus. (2003) ‘When Dreams Come True: The Role of Powerful Regions in Future Europe’, ZEI Discussion Paper C 121, Bonn.

11 Vergés Bausili, Anna. (2002) ‘Rethinking the Methods of Dividing and Exercising Powers in the EU: Reforming Subsidiarity and National Parliaments’, in: Jean Monnet Working Paper 9/02.

formulated subsidiarity principle (General Provisions, Art. 3b) differs from the hitherto-existing rule by including the regional and local levels of the Member States. In the future, a two-step assessment procedure will be necessary in accordance with the strengthened principle of subsidiarity. The first step involves ascertaining whether the local, regional or national level has the capacity to resolve an imminent problem. If that is not the case, measures toward finding a solution may be taken at the EU level. But a second step requires the EU level to provide evidence that it can actually resolve the problem more effectively. For ensuring the adherence to subsidiarity, national parliaments have been assigned the role of a controlling body in this procedure. At first glance, national parliaments might be most satisfied with this empowerment, since they have been the biggest losers of the transfer of powers to the Union level in the last years<sup>12</sup>.

The “Protocol on the Application of the Principles of Subsidiarity and Proportionality”<sup>13</sup> of the Lisbon Treaty sets forth how the national parliaments are to be included. In addition to the assessments undertaken by the Community institutions, the treaty provides for an “early warning system”. Prior to the submission of a legislative act, the Commission is to “carry out broad consultations” (Title II, Art. 8b) with concerned parties. The Commission must provide reasons for its draft legislation in a detailed “subsidiarity statement” (Subsidiarity Protocol, Art. 5), which shall allow an assessment of whether the principle of subsidiarity would be upheld. The ‘burden of proof’ lies solely with the Commission and applies only to European legislative proposals where the Commission is the initiator and not to other measures taken at EU level.

Moreover, the political control mechanism obligates the Commission to forward its legislative proposal to each Member State national parliament at the same time it sends its proposal to the EU legislative institutions, i.e.

12 Mauer, Andreas / Wessels, Wolfgang (Eds.) (2001) *National Parliaments on their Ways to Europe. Losers or Latecomers*, Baden-Baden: Nomos; Raunio, Tapio / Hix, Simon. (2001) ‘Backbenchers Learn to Fight Back: European Integration and Parliamentary Government’, in: Goetz, Klaus / Hix, Simon (Eds.) *Europeanised Politics? European Integration and National Political Systems*, London: Frank Cass Publications, pg. 142-68.

13 Hereinafter referred to as “Subsidiarity Protocol”.



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the Council of the EU and the European Parliament. Each parliament has the opportunity to submit a statement within eight weeks. If a statement of non-compliance with subsidiarity is supported by at least one-third of the votes from the national parliaments, then the Commission must review its proposal (Subsidiarity Protocol, Art. 7). Following review, the Commission can maintain, amend or withdraw its proposal and must justify its decision accordingly. And should the Commission decide to keep the proposal, the procedure continues, as the Council of the EU and the European Parliament are also obliged to further scrutinize the proposal with regard to its conformity with the principle of subsidiarity. If they verify non-compliance, they can reject the Commission's proposal. The Lisbon Treaty also provides for the possibility for subsidiarity non-compliance cases to be brought before the Court of Justice of the European Union, not only by the Committee of the Regions but also by national parliaments – yet the former's right to sue is limited pursuant to Article 230, meaning a suit cannot be brought before the Court of Justice by national parliaments directly, but rather by their own government on behalf of the parliament and in accordance with their respective legal order.

Through the early warning system, the national parliaments will gain for the first time the possibility to directly influence EU legislation. On the one hand, this innovation can be viewed – and will most likely be “marketed” during the ratification process – as a participatory breakthrough that provides national parliaments with a voice in European law making. On the other hand, the reform seems, from a constitution-legal standpoint, fairly problematic: the mechanisms designated in the new treaty essentially create a *tricameral* system, but without establishing a true third chamber. The national parliaments would be integrated in the EU legislative process, without being an institution of the EU. Consequently, they would bypass the very institution established for representing Member State interests, the Council of Ministers. If Member States have objections, especially in reference to the principle of subsidiarity and the protection of Member State law-making powers, they can and should be articulated within the Council of Ministers. The early warning system via national parliaments could be practiced through institutional mechanisms that already exist. There are no,

at least institution-structural, hurdles that can stop parliaments from compelling their respective governments to adjust their voting behaviour in the Council of Ministers to their preferences. Such “checking and balancing” of the parliament vis-à-vis its cabinet would not contradict parliamentary democracy; on the contrary, it is absolutely compatible. Moreover, the new system poses the question of how the Member State governments should be accountable to their parliaments, if the latter themselves are directly involved in the EU legislative process. Not least of concern is an additional legitimacy issue: the national parliaments’ future role as “sentinels” itself violates the principle of subsidiarity. Instead of contributing to a clearer delineation of powers between the various levels of European governance, the early warning system blurs the lines of responsibility and competence in the EU even further. By awarding the national parliaments with this additional power, the treaty in effect intrudes into the individual national constitutional-legal orders.

### **3. More Efficiency and Effectiveness?**

#### **3.1. The Commission: Still the “Heart” of the Union**

As concerns the productivity and efficacy of the Commission, the monopoly of initiative for legislative acts is of fundamental importance. This represents not only a core element of the “Community Method”<sup>14</sup> and a means to ensure coherent European legislation, but also the Commission’s central instrument of power. It is first and foremost its monopolized right of initiative that makes the Commission the “heart of the Union”<sup>15</sup>. Particularly for the smaller Member States, a well-functioning Commission bound to the interests of the Community as a whole helps to prevent dominance by the bigger states in the EU system. For the most part however, the monopoly of initiative remains limited by Lisbon to the classic Community

14 Scharpf, Fritz. (2001) ‘European Governance: Common Concerns vs. The Challenge of Diversity’, in: MPIfG Working Paper 01/6.

15 Nugent, Neill (Ed.) (2002) *At the Heart of the Union*. Studies of the European Commission, 2nd Ed. Basingstoke: Palgrave.

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policy areas, until now under the so-called “first pillar” (e.g. internal market, agriculture, competition, consumer and environmental protection). The new treaty has altered little to Commission’s limited role in Common Foreign and Security Policy, and where the Treaty enhances the Commission in the area of Freedom, Security and Justice, it also provides “emergency brakes” for Member States (see Art. 61i and Art. 62)<sup>16</sup>.

A controversial issue among EU members for quite some time has been the size of the Commission.<sup>17</sup> In light of the recent enlargements of the EU, from 15 to currently 27 members, it no longer seemed possible to have a Commission that could work effectively while adhering to the traditional practice of allotting at least one commissioner for each Member State. But a departure from full national representation, i.e. at least one Commissioner per Member State, posed a highly difficult reform step for the EU members to take. In contrast to the draft constitutional treaty, the Treaty of Lisbon succeeded in reaching an agreement on the reduction of the number of Commissioners in the European Commission. As of November 2014, the Commission will consist of a number of members corresponding to two-thirds of the number of Member States, the President of the Commission and the “High Representative” included, while Commissioners will be chosen on a basis of “strictly equal rotation” between the Member States (Title III, Art. 9d). The selection of Commissioners should furthermore reflect the demographic and geographic composition of the EU members. At the same time, the Treaty, and in this point akin to the draft constitutional treaty, has upgraded the position of the Commission President, but without altering the collegial nature of the Commission. Hence, the Commission President, although stronger, is still far from equivalent to a “Head of Government” such as prime ministers common at the national level. But in sum, the new arrangement of the Commission could create a body that is easier to manage and coordinate.

16 See also: Duff, Andrew. ‘True Guide to the Treaty of Lisbon’, Alliance of Liberals and Democrats for Europe, Brussels, December 12, 2007. Available at: <http://www.alde.eu/fileadmin/files/Download/True-Guide-NEW.pdf>.

17 Höreth, Marcus. (2002) ‘Entscheidungsfindung nach Nizza – die Europäische Kommission’, in: Zervakis, Peter / Cullen, Peter (Eds.) *The Post-Nice Process: Towards a European Constitution?*, Baden-Baden: Nomos, pg. 85-102.

### 3.2. *The European Council President*

In contrast to the generally positive reforms illustrated above, the treaty's creation of a President of the European Council could soon curb the Commission's enthusiasm. As foreseen in the former draft constitutional treaty, the Treaty of Lisbon would establish a President elected by the European Council for a two-and-a-half year term, renewable once, replacing – or supplementing, to be more precise – the six-month rotating Council Presidency (Title III, Art. 9b). As to transparency and effectiveness after Lisbon, the new President could help make European leadership more identifiable, while also increasing effectiveness and continuity through a longer-term president, who can assist in coordinating and preparing the work and thus cohesion of the European Council. The new position also produces a further multiplication of executives at the EU level, and thus can hardly be seen as a positive development from the Commission's point of view and its position in the EU institutional framework.<sup>18</sup> The balance of power between the European Commission, the supranational executive of the Union, and its most important intergovernmental counterpart, the European Council, has provided for institutional and political stability within the Union. The power issue likewise represents the nucleus of the ongoing conflict between Intergovernmentalism and Supranationalism as well as between large and small Member States and differing expectations about what European integration is and should be.<sup>19</sup> Resolving this issue in favour of the Intergovernmentalists – institutionally embodied by the European Council, the Heads of State and Government of the EU Member States – could potentially place consensus in the integration project at risk. This concern becomes all the more salient when considering the Union's traditionally delicate balance between further integration, democratic participation and preservation of Member State interests and influence.<sup>20</sup>

18 Blavoukos, Spyros / Bourantonis, Dimitris / Pagoulatos, George. (2007) 'A President for the European Union: A New Actor in Town?', in: *Journal of Common Market Studies* 45(2): 231-52.

19 Rosamond, Ben. (2002) *Theories of European Integration*, NY: Palgrave, pg. 1-17, 130-156.

20 Olsen, Johan P. (2004) 'Unity, diversity and democratic institutions', in: ARENA Working Papers 04/13.

Then again, the Treaty of Lisbon plainly restricts the power of the President of the European Council, who, pursuant to the treaty, will chiefly carry out intermediary and steering functions. Moreover, the effect of possible institutional tensions that the dual executive could trigger should not be overestimated. The introduction of the President of the European Council can certainly be construed as a strengthening of the intergovernmental dimension, but also as a “trade-off” for upgrading the Commission President and other supranational enhancements<sup>21</sup>, and hence congruent with the long-established treaty-making practice of squaring Member State sovereignty with deepened integration. Nor does the dual executive in the Treaty of Lisbon pose an anomaly, considering the rationale of the EU system. In carrying over the dual-headed nature of the European Union<sup>22</sup>, the treaty’s institutional arrangement is consistent with the path of European integration thus far and, in this respect, an expression of constitutional continuity. Nevertheless, the introduction of another executive position at EU level – in addition to the Commission President, the rotating Council Presidency of the Council of the European Union (Council of Ministers)<sup>23</sup>, and the quadri-annual European Council meetings – raises the critical question once again of whether the Lisbon Treaty’s institutional innovation can improve transparency and the efficiency of leadership in the EU.

### *3.3. No Minister! The “High Representative of the Union for Foreign Affairs”*

Besides the European Council President, the Treaty of Lisbon introduces an additional institutional novelty. In the past few years, the European Union has not been able to do justice to its claim to a leading role in international

21 Closa, Carlos. (2004) ‘The Convention Method and the transformation of EU constitutional politics’, in: Eriksen, Erik Oddvar / Fossum, John Erik / Menéndez, Augustín José (Eds.) *Developing a Constitution for Europe*, London: Routledge, pg. 183-206, here pg. 198-202.

22 Hix, Simon. (2005) *The Political System of the European Union*, 2nd Ed., Houndmills, Basingstoke: Palgrave MacMillan, here pg. 31-70.

23 Moreover, the Council Presidency is already a de facto triple presidency shared by three successive Member States: the current Member State in cooperation with the previous Member State holding the Presidency and the next Member State to hold the Presidency.

politics. Although not as symbolically far-reaching as the draft constitutional treaty – which would have introduced a Union “Minister for Foreign Affairs” – the Lisbon Treaty establishes a “High Representative of the Union for Foreign Affairs and Security Policy”, merging the former High Representative created by the Treaty of Amsterdam with the Commissioner for External Relations into one position (Title III, Art. 9e and Art. 13a.). As an obvious advantage, the reform promises to bring increased visibility to the European Union’s external actions, and even bears potential for meeting Henry Kissinger’s notorious demand for someone to call when he wanted to “speak to Europe”.<sup>24</sup> Moreover, the Lisbon Treaty maintains the draft constitution’s creation of a “European External Action Service” to assist the High Representative and cooperate with Member State diplomatic services and will be composed of relevant officials from the Council’s General Secretariat and the Commission (Title III, Art. 13a (3)) and with officials seconded by Member State foreign and diplomatic services. The High Representative, who will simultaneously hold the office of Vice-President of the Commission, is to be appointed by the European Council by qualified majority and by approval of the Commission President. With the ultimate goal of ensuring coherence of the Union’s external actions and its Common Foreign and Security Policy, the High Representative will be responsible for implementation of pertinent decisions by the European Council and the Council of Ministers.

That the High Representative will be wearing a “double hat” as a member of the Commission and the Council could provoke serious institutional problems. Via the High Representative – who will chair the Council of Ministers’ Foreign Affairs Council (Art. 13a (1)) and participate in European Council meetings and is thus *intergovernmentally* bound – it is quite imaginable that the Council may attempt to encroach upon Commission competences, especially in the area of external trade and development policy. Conversely, it is just as possible that the Commission will try to influ-

24 Lamy, Pascal. (2004) ‘Thoughts on Governance from Europe: Making Sure We don’t forget the Cosmopolitics’, in: Ryten, Jacob (Ed.) *The Sterling Public Servant. A Global Tribute to Sylvia Ostry*, Montreal/Kingston: McGill-Queen’s University Press, 203-215, here pg. 210.

ence the Council through the High Representative, who will likewise be *supranationally* bound to the Commission and the Commission President's guideline competence (Title II, Art. 9d (6)). In short, with the position of the High Representative and how it has been designed, the Treaty of Lisbon has virtually programmed "turf wars"<sup>25</sup> between the Commission and the Council and it remains to be seen, whether these issues will or even can be addressed pre-emptively, i.e., before the Treaty takes effect. On the whole, the new EU High Representative epitomizes a typical endeavour in European integration, i.e. the reversion to complex institutional measures in order to avoid addressing the unresolved question of *finalité* – the question of whether the EU should develop toward a federation or a more confederal union of nation-states<sup>26</sup>. One can postulate three basic scenarios, namely that the High Representative will become an "extension" of the Commission into the Council, or vice-versa, or on the contrary, the High Representative may be able to prevent the position from being instrumentalised and instead play an important role as a mediator between supranational and intergovernmental elements of European governance.

Either way, the treaty leaves much room for speculation in this area. Where the treaty does provide clarity is on Common Foreign and Security Policy and its near future. In the "Declarations Concerning Provisions of the Treaties", both declaration 13 and 14 express unequivocally that, despite the increased coherency and cohesion of the Union's external actions envisaged in the treaty, foreign policy, its conduct and formulation will continue to rest within the domain of the national governments. In other words, EU external actions will by no means precede Member State policy; Lisbon in substance cannot alter the Member States' more *uncommon* than common foreign policy.<sup>27</sup> Given that, one can in turn safely conclude that, regardless

25 Kurpas, Sebastian / Crum, Ben / et. al. (2007) 'The Treaty of Lisbon: Implementing the Institutional Innovations', Joint Study of the European Policy Centre, Egmont, and the Centre for European Policy Studies, here pg. 138.

26 Weiler, Joseph H.H. (2002) 'A Constitution for Europe? Some Hard Choices', in: Journal of Common Market Studies 40(4): 563-80.

27 The strictly intergovernmental nature of foreign policy is also underlined in the Treaty by Articles 9f and 11(1) for example, which state that foreign and security

of how the position develops, the scope of the High Representative's authority is strictly limited from the outset.

### ***3.4. Council Decision-Making: Between More Efficiency and Strong Veto-Powers***

Decision-making procedures and above all voting weights in the Council of Ministers can be added to the list of chronic “apples of discord” in EU treaty negotiations. Precisely this issue had originally played a significant part in delaying the Intergovernmental Conference's adoption of the draft constitutional treaty by nearly a year. Indeed, the issue continuously evokes a great deal of contention, though this is hardly surprising as it encompasses several other traditional tensions in the EU, such as between large and small states and the dual character of a Union of States versus a Union of Citizens in Europe. Consequently, it is just as unsurprising that the Treaty of Lisbon's provisions on voting in the Council make up a complex set of rules, having reached a delicate balance between proportional and equal representation of the Member States in the Council. The Treaty of Lisbon adopts a “double majority” for areas where the Council decides by qualified majority – an efficient departure from the triple majority required under the Treaty of Nice – and is defined as 55 % of the Council members<sup>28</sup> and representing 65 % of the entire population of the Union (Title III, Art. 9c), rendering the long-established system of voting weights obsolete. What should not be overlooked is the Treaty's success in extending majority voting to more than thirty new areas.<sup>29</sup> At the same time, the treaty lays down a series of restrictions that may encumber Council decision procedures and leave room for a variety of exceptions.

policy are excluded from the jurisdiction of the Court of Justice of the European Union – and hence the supranational level – as well.

28 At present, this equates to a minimum of 15 of the 27 EU members.

29 Robert Schuman Foundation. (2008) ‘Annex 3: List of the articles coming under qualified majority voting’, in: *Understanding the Lisbon Treaty*. Available at: <http://www.robert-schuman.org/tout-comprendre-sur-le-traite-de-lisbonne.php>.



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In “sensitive” policy areas such as taxation, social security, and Common and Foreign Security Policy (see Art. 10 and 11), the unanimity rule still applies.

The double majority of 55 and 65 percent does not even apply to all cases in which the Council votes by qualified majority. Article 205 sets forth that qualified majority is defined as 72 % of the Council members, and representing 65 % of the population of the Union when the Council is not acting “on a proposal from the Commission or from the High Representative of the Union for Foreign Affairs and Security Policy”. Such would be the case when, for example, the Council acts upon its own initiative on certain issues in the Area of Freedom, Security and Justice.

The Treaty of Lisbon maintains the mechanism of the blocking minority, which must consist of at least four Council members and representing more than 35 % of the participating Member States (Art. 9c (4) and Art. 205). This rule corresponds with the imperative of EU integration to balance the interests of small and large Member States and serves to prevent three large states (e.g. France, Germany and U.K.), which alone fulfil the 35 % of the population requirement, from being able to form a blocking minority, and thus easily hinder issues of interest to smaller and medium sized states.

The controversial Ioannina Compromise,<sup>30</sup> reached informally in 1994 and abandoned under the Treaty of Nice, has been re-adopted and adapted for the Treaty of Lisbon. Under the attached “Declarations Concerning Provisions of the Treaty”, the Declaration on Article 9 C(4) and Article 205(2) lays down the terms for the Ioannina Compromise in the transitional period from 2014, when the new rules on qualified majority voting (cf. Art. 9 c (4)) in the Council take effect, to 2017. According to this provision, the Council must delay voting if members of the Council representing 75 % of the population *or* 75 % of the number of Member States required for a blocking minority – i.e. 26.25 % of the Union’s population or 26.25 % of the Council members – indicate opposition to voting by qualified majority.

30 Hosli, Madaleine. (1999) ‘Power, Connected Coalitions, and Efficiency: Challenges to the Council of the European Union’, in: *International Political Science Review* 20(4): 371-91.

In such instances, the Council must do “all in its power” and “within a reasonable time” to reach a more satisfactory solution and address the concerns raised by the Council members (Section 1, Art. 1-3 of the Declaration on Article 9 C(4) and Article 205(2)). As of 2017, the threshold drops to at least 55% of the Council members *or* representing at least 55% of the Union’s population – i.e. 19.25 % of the Union population or 19.25 % of the Council members – for the deferral process to be invoked (Section 2, Art. 4-6 of the Declaration on Art. 9 C(4) and Art. 205(2)). As of 2017, it will only take 5 Member States out of 27 to obstruct the legislative process. During the transitional period from 2014 to 2017, Article 3 of the “Provisions concerning the Qualified Majority” (Title II of the Protocol on Transitional Provisions) allows any Council member to request that a measure – to be adopted by the new qualified majority – be adopted in accordance with the qualified majority as defined in paragraph 3 of that article; hence, any Council member may request that voting on a legislative act that is particularly sensitive to that Member State revert to the modalities of qualified majority under the Treaty of Nice with weighted voting. A member of the European Council or the Council of Ministers may also request that a check be made on whether an act adopted by the European Council or the Council by qualified majority represents 62 % of the total population of the Union (paragraph 4 of Art. 3 of the “Provisions concerning the Qualified Majority”).

On the whole, the Treaty of Lisbon achieves a number of improvements for voting procedures in the Council, albeit with mixed results. From the perspective of efficient decision-making as well as more proportionality in representation, the introduction of the double majority offers a highly significant improvement<sup>31</sup> compared with decision procedures until now and reduces the degree of over- and under-representation of Member States. In light of the restrictions illustrated above, the designers of the Reform Treaty have nonetheless managed to build in a number of “imponderabilities”. Regarding the Ioannina Compromise, the overall potential for block-

31 Laruelle, Annick / Valenciano, Federico. (2002) ‘Inequality among EU citizens in the EU’s Council decision procedure’, in: *European Journal of Political Economy* 18(3): 475-98.

age in the Council on legislative matters is difficult to predict, not least because the Treaty fails to explicitly define, for example, “a reasonable time”. Although the Polish delegation argued that this could be up to two years, the consensus reached among the Member States governments appears to be a maximum period of three months.<sup>32</sup> Once again, it can be reasonably expected that sooner or later the European Court of Justice will have to step in to resolve these open questions.

In general, the Treaty hardly makes it easy to comprehend which voting rules apply when. At the same time, the numerous attached Protocols and Declarations reveal that the steps taken forward in the Treaty, while ostensibly bold, are in effect largely reluctant. At first glance, it would likewise seem peculiar that the threshold for deferring voting by qualified majority actually *decreases*, from three-fourths of the blocking minority to 55 % after the transitional period, i.e. after 2017, and not the opposite (cf. (4) above). Reading between the lines however, the motivation becomes clear, given that the provision allowing a reversion to the “Nice” rules on qualified majority voting – illustrated in (5) above – expires in 2017. The trade-off thus for Member States was to lower the percentage necessary for deferring the voting procedure in the Council, in order to basically maintain the potential for pressure individual Member States can exert in the EU legislative process. As it stands, the Treaty allows for considerable debate on the extent to which the new rules will affect voting in the Council. However, one can assume that decision making in the Council will not change significantly once the treaty takes effect, but rather after the transitional period at the earliest, if at all.

## **4. More Democracy?**

### *4.1. Still in Search of a Right Model of Democracy*

The process of European integration towards an *ever closer union* has led the EU into an increasingly complex dilemma. Parallel to the expansion of

32 Kurpas, Sebastian. (2007) ‘The Treaty of Lisbon – How much “Constitution” is Left?’, in: CEPS Policy Brief No. 147, here pg. 6.

its competences, – a continuous trend in the EC/EU since the European Single Act – the critical debate of the European Union and in particular its legitimacy and democracy deficit have intensified commensurately.<sup>33</sup> Essentially, the growing authority, scope of activity and overall importance of the European Union have made the question of to whom EU actors can be held accountable all the more urgent,<sup>34</sup> particularly since democratisation has not been able to keep up pace with the expansion of EU authority. As the Laeken Declaration of 2001 demonstrates, the goal of a more democratic union closer to its citizens represented one of, if not *the* most important starting points for initiating the Constitution debate. Accordingly, and similar to the draft constitutional treaty, the Lisbon Treaty makes clear reference to democracy as one of the fundamental principles upon which the Union is founded (General Provisions, Art. 1a). In Title II, Provisions on Democratic Principles, Article 8 declares that the functioning of the Union is grounded in representative democracy. In addition to the ‘internal’ commitment to democracy, Article 10 A sets the advancement of democracy and the rule of law as guiding principles in the external actions of the Union. But upon closer inspection, the provisions on EU democracy reflect a certain indecisiveness with regard to which model of democracy the Union shall embrace.

The Treaty of Lisbon has not settled the conflict between supporters of more traditional forms of parliamentary and representative democracy and those who favour post-parliamentary, civil-society driven participatory democracy. Instead, the treaty may invigorate the debate by pledging the EU to both models, though only partially. While this can be criticised, the contrary viewpoint seems just as, if not more convincing, i.e. that a “hotch-potch” of democratic models is necessary for the hybrid, *sui generis* polity

33 Dehousse, Renaud. (1995) ‘Constitutional Reform in the European Community: Are there Alternatives to the Majoritarian Avenue?’, in: West European Politics 18(3): 118-36; Føllesdal, Andreas / Koslowski, Peter (Eds). (1998) Democracy and the European Union, Heidelberg: Springer.

34 Olsen, Johan. (2002) ‘Reforming European Institutions of Governance’, in: Journal of Common Studies 40(4): 581-602.

of the EU.<sup>35</sup> In Article 8b (2), the Treaty obliges the EU for instance to maintain open dialogue with representative associations and “civil society”, while Article 8a (2) emphasises representation of EU citizens through the European Parliament and 8a (4) refers to the contribution political parties make in expressing the citizens’ will. Article 8b (4) introduces yet another form of democracy for the first time to European governance, namely direct democracy, by allowing citizens a quasi-right of initiative. Pursuant to that, a minimum of one million citizens can “invite”, with unbinding effect, the Commission to submit a proposal for a legislative act. Interestingly, the Treaty additionally places the enhanced role of national parliaments (Art. 8c) under the “Provisions on Democratic Principles”, implicitly equating the principle of subsidiarity – and the national parliaments’ oversight of its application – with a democratic good in and of itself. Though there may be grounds for such rationale, for example when viewing “checks and balances” and *vertical* separation of powers as an element of democracy, the question arises as to the legitimacy of national parliaments – who receive no such mandate from EU citizens – to take on this role and thus as to how this provision serves EU democracy.

### *4.2. The Hybrid Nature of the Commission: Between Independence and Accountability*

Looking at the European Commission, the democratic amalgamation upheld and boosted by the new treaty becomes even more apparent. The Commission demonstrates this indecisiveness, as the Treaty of Lisbon attempts to balance between the demands for linking the Commission unambiguously to parliamentary-democratic control, e.g. through European Parliament election of the Commission, and the pressure for preserving the rather technocratic, and thus independent role of this institution.<sup>36</sup> Article 9a for instance ascribes to the European Parliament the function to “elect

35 Wallace, Helen. (2003) ‘Contrasting Images of European Governance’, in: Kohler-Koch, Beate (Ed.) *Linking EU and National Governance*. Oxford: Oxford University Press, pg. 1-9.

36 Moravcsik, Andrew. (2002) ‘In Defence of the ‘Democratic Deficit’: Reassessing Legitimacy in the European Union’, in: *Journal of Common Market Studies* 40(4): 603-24.

the President of the Commission”. Article 9d (7) obliges the European Council, when nominating a candidate for President of the Commission, to “take into account” the results from the elections to the European Parliament, while the Commission President and the Commission as an entire body will remain subject to a vote of consent by the European Parliament, and the EP maintains its power to “censure” (Art. 9d (8)) the Commission, who shall also be “responsible” to the EP. These institutional features could suggest that the Treaty of Lisbon adopts – or at least approaches – the model of parliamentary governance for the EU institutions with a cabinet government responsible to the majority in parliament, a trend previously latent in the European Union<sup>37</sup> and strengthened by Lisbon. But “censure” and the modus for applying censure in the EU should be interpreted with caution. Equating censure with a “motion of no confidence” is misleading<sup>38</sup>, especially since a majority of two-thirds is required for the European Parliament to force the entire Commission to resign. This constitutes a fundamental departure from the functional logic of parliamentary systems, resembling more the voting requirements of impeachment in presidential systems.<sup>39</sup> Moreover, the oft hoped party-politicization of the Commission into an elected EU “government” responsible to a majority in the EP could even endanger, not strengthen, the institutional role of the Commission as a “supranational” actor advocating Community interests.<sup>40</sup>

Precisely the latter role of the Commission has also been reconfirmed by the Treaty of Lisbon. Article 9d (1) clearly defines the responsibility of the Commission to promote “the general interest of the Union”. In contrast, even contradiction to the provisions on taking into account the results of the EP elections, Article 9d (3) sets forth that Commission members are to

37 Magnette, Paul. (2001) ‘Appointing and Censuring the European Commission: The Adaptation of Parliamentary Institutions to the Community Context’, in: *European Law Journal* 7(3): 292-310.

38 As the German text of the Treaty, (Misstrauensantrag) does, and has done in previous treaty texts.

39 Decker, Frank. (2002) ‘Governance beyond the nation-state. Reflections on the democratic deficit of the European Union’, in: *Journal of European Public Policy* 9(2): 256-72.

40 Majone, Giandomenico. (2002) ‘The European Commission: The Limits of Centralization and the Perils of Parliamentarization’, in: *Governance* 15(3): 375-92.

be chosen based on their competence and commitment to Europe and from persons “whose independence is beyond doubt”; one can hardly interpret from this rule that the selection of a nominee for the Commission should be based on his or her political party membership. In yet starker contrast to Article 9d (8) – according to which the Commission is responsible to the EP – paragraph 3 goes on to underline that the Commission shall be “*completely independent*” in carrying out its responsibilities, nor shall it take instructions from “any Government or other institution, body, office or entity”. The contrasting Commission roles, between technocratic, output-oriented administrating “vanguard of the Treaties”<sup>41</sup> and incipient parliamentary governing Cabinet, have, when taken together, been remarkably ambiguous – and this situation represents an ambiguity that the Treaty of Lisbon will make nearly superlative.

### *4.3. And the Winner is: The European Parliament?*

For the European Parliament, the Treaty of Lisbon may bring more promising changes and could make the solely directly-elected EU institution the “winner of the treaty”<sup>42</sup> once again. In general, the new treaty, in this respect parallel to the draft constitutional treaty, advances co-decision to the “ordinary” legislative procedure in European governance (see Art. 251). As a result, the areas where the European Parliament has legislative power on par with the Council – when the Council adopts acts by qualified majority – will increase significantly. At a nearly “equal footing” with the Council,<sup>43</sup> the European Parliament will be able to vote on more questions

41 Börzel, Tanja. (2003) ‘Guarding the Treaty: The Compliance Strategies of the European Commission’, in: *ibid./Cichowski, Rachel. (Eds.) The State of the European Union. Law Politics and Society, (Vol. 6) Oxford: Oxford University Press* pg. 197-220.

42 Pollack, Mark. (2000) ‘A Blairite Treaty: Neo-Liberalism and Regulated Capitalism in the Treaty of Amsterdam’, in: Neunreither, Karlheinz (Ed.) *European Integration After Amsterdam. Institutional Dynamics and Prospects for Democracy*, Oxford: Oxford University Press, pg. 266-289, here pg. 281.

43 See e.g. European Parliament, Committee on Constitutional Affairs. “Reasons to Ratify the Lisbon Treaty this Year”, January 23, 2008. Available at: [http://www.europarl.europa.eu/news/expert/infopress\\_page/002-19268-023-01-04-901-20080121IPR19249-23-01-2008-2008-false/default\\_en.htm](http://www.europarl.europa.eu/news/expert/infopress_page/002-19268-023-01-04-901-20080121IPR19249-23-01-2008-2008-false/default_en.htm).

on justice and home affairs in the area of Freedom, Security and Justice (e.g. Art. 63c, Art. 69b and f), and enjoy higher budgetary control (Art. 279b), even regarding agricultural policy (Art. 37c, under Title II), from which the EP has long been excluded. Given its democratic legitimacy singularity among EU institutions on account of its election directly by EU citizens, the strengthening of the EP's position as a legislative body can, and surely will be, viewed as one of the most significant achievements of the Lisbon Treaty as far as enhancing democracy in the Union is concerned.

In contrast to most legislatures, however, the European Parliament does not have the right of legislative initiative, a situation left unchanged under the new treaty. In other words, the right of initiative for legislative proposals will rest with the Commission (Art. 9d). In relation to the Commission though, the treaty does expand the EP's competence of control in the investiture procedure. And yet dubbing the parliament's function here an "election", as the treaty does, is euphemistic at best. The European Council proposes a candidate to the EP, who then has the power to *confirm* or *reject*; but the selection itself remains within the domain of the Member State governments, who through the Council and in cooperation with the EP-approved Commission President subsequently nominate the other Commissioners. Regardless of the extent to which the European Council will take "into account" future EP election results for the Commission investiture, the Treaty of Lisbon does not "parliamentarize" the EU institutions of governance and instead, similar to the continued ambiguity of the Commission's role, reaches a difficult balance between more democratic input and Member State control.

The lack of full parliamentarization does not necessarily mean the Treaty forfeits its goal of improving democracy in the Union. While the EP is directly elected – and thus, on the surface, a logical target to have the non-elected EU institutions anchored to – one may doubt the comparability of the democratic legitimization derived from EP elections with the legitimacy



of national Member State parliaments.<sup>44</sup> A primary source of criticism on European elections derives from the lack of a uniform European electoral law and moreover, a lack of “European” campaigns. Due to EP elections being conducted separately by national party organizations and under national election rules, the EP elections have become notorious for their “second order”<sup>45</sup> status with campaigns held more on national issues and with competition between the national parties, not on EU policy. At the same time European elections are used as a forum of protest by citizens against their own national governments<sup>46</sup>, an unsurprising result given the way the EP elections are conducted. Under these conditions, the democratic, European-political mandate gained from an EP election is severely limited – not least because the principle of equality is not fulfilled given the EP’s composition based on degressive proportionality (upheld in the Lisbon Treaty, Art. 9a (2)). Thus, although the EP will be stronger than ever, the EU will not become a parliamentary democracy any time soon, and for good reason when considering the EP’s problematic democratic-legitimatization.

## 5. Conclusion

*“With a view to enhancing the efficiency and democratic legitimacy of the Union...”* (Preamble, Treaty of Lisbon)

Even assuming that the Treaty of Lisbon will be ratified, the constitutional debate in Europe will undoubtedly continue in the future. As our analysis of the Reform Treaty indicates, there are a number of reasons for this. The drafters of the Treaty faced a great deal of ‘tricky’ questions and have responded with a number of complex answers. Unfortunately, the answers

44 Scully, Roger. (1999) ‘Between Nation, Party and Identity: A Study of European Parliamentarians’, in: European Parliament Working Group (EPRG), Working Paper 5.

45 The phrase was coined as early as 1980. See: Reif, Karlheinz/Schmitt, Hermann. (1980) ‘Nine Second-order National Elections. A Conceptual Framework for the Analysis of European Election Results’, in: European Journal of Political Research 8 (1): 3-44.

46 Marsh, Michael. (1998) ‘Testing the Second Order Election Model after Four European Elections’, in: British Journal of Political Science 28(4): 591-607.

fail to provide convincing solutions for the long-term, especially since regarding the promises of more transparency, efficiency and democracy, the Treaty leaves much to be desired and fulfilled.

As far as transparency is concerned, the Treaty strives to create more visibility of key European political actors and enhance the coherency of the Union's actions, both internally and externally. But, what has long counted as the major source of the transparency deficit is the EU's multiplicity of legislative procedures differentiated by policy area. In this context, the legislative and decision-making processes, as designed by Lisbon, have been simplified on the surface. But the series of opt-outs, blocking minorities, emergency breaks, exceptions to the new and improved rules on qualified majority, and transitional provisions make it safe to assume that EU citizens – and specialists – will face even larger difficulties in trying to comprehend which voting rules apply, when and why.

On the other hand, it is safe to say that the Treaty of Lisbon has the potential to make the EU more efficient and effective. On the positive side, the EU gains a European Council President and a single High Representative for Foreign Affairs as well as a smaller-sized and therefore manageable Commission. These reforms should improve the performance and coordination of the Union's internal and external actions. And yet, the attempt to enhance visibility of European leadership by introducing the permanent Council President may have overshot the mark. The European Union does not suffer from a lack of a president, but has on the contrary *too many* presidents already and the Reform Treaty diffuses the Union's executive branch even further. Given the new President's duties, the Treaty offers a good recipe for institutional and authority conflicts between European leaders.

Unsurprisingly, one of the most critical products of the new treaty derives from Member State bargaining on Council voting procedures. The Ioannina Compromise, essentially a 'dead horse' in the EU under the Nice Treaty, will be resurrected, reducing the threshold for Member States to throttle the Council decision-making process that the new Treaty aspired to accelerate. On the whole, the negative implications of Ioannina could bear costs affect-

## Making and Breaking Promises

ing all three dimensions of Lisbon's grand promises – transparency, efficiency and democracy. In a similar fashion, the Treaty also allows Member States to invoke “Nice” voting rules, diminishing the transparency and efficiency of Council decisions further. What is more, the institutional arrangements such as the enhanced role of national parliaments, the numerous exceptions to the Council voting rules, or the multiplication of European executives without sufficient democratic anchorage, could in effect render it more difficult to localize responsibility for actions and non-actions at the EU level.

Viewing the European Union as a house in the making, the Treaty of Lisbon presents a new blue print that has not corrected all construction defects, and the final result shows that none of the “architects” expected that it could. The former patchwork of three pillars with varying procedures and rules has been renovated toward a more uniform construct, making the façade more attractive. However, when looking past the exterior, it becomes more and more obvious that the Treaty drafters have brought a number of deficiencies in through the back door, yet again. With a view to the political circumstances and the malaise following the Constitutional Treaty's rejection, one can conclude that the new treaty has achieved far more than expected, but – with a view to ensuring more democracy, transparency and effectiveness – far less than necessary.

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