

TRUE GUIDE TO THE TREATY OF LISBON

Andrew Duff¹

The Treaty of Lisbon was signed on 13 December 2007. It is intended to enter into force on 1 January 2009.²

The new Treaty will much enhance the Union's capacity to act by increasing the efficiency and effectiveness of the institutions and decision-making mechanisms. Armed with the Treaty, the EU will be able to face its new global challenges and address the issues which matter most to citizens - such as climate change, energy security, international terrorism, cross-border crime, asylum and immigration.

The Treaty of Lisbon will greatly improve the democratic character of the Union by increasing Parliament's powers, by entrenching the Charter of Fundamental Rights and by strengthening the rule of law. It clarifies the values and reaffirms the objectives of the Union.

The Treaty of Lisbon amends the *Treaty on European Union (TEU)* (essentially the Treaty of Maastricht) and the *Treaty establishing the European Community (TEC)* (essentially the Treaty of Rome), which is renamed the *Treaty on the Functioning of the European Union (TFEU)*. Both treaties have the same legal rank.³ Even if the new Treaty is no longer overtly a constitutional treaty, it manages to preserve most of the important achievements of the *Treaty establishing a Constitution of Europe* which was signed in 2004 but never ratified.

The Charter of Fundamental Rights becomes binding and has the same legal value as the Treaties, although its text will not be in the Treaties.⁴ The Charter was solemnly proclaimed at a plenary session of the Parliament by the Presidents of the Parliament, the Council and the Commission on 12 December and published in the *Official Journal*. A Protocol introduces specific measures for the United Kingdom and Poland seeking to establish national exceptions to the justiciability of the Charter.⁵ The Treaty provides a new legal basis for the accession of the Union to the European Convention on Human Rights.⁶ The Council will decide this by unanimity, with the consent of European Parliament and the approval of member states.

The concept of EU citizenship is affirmed and developed.⁷ The right of citizens to approach the Court of Justice is broadened.⁸ Participatory democracy is enhanced notably

¹ Andrew Duff MEP (ALDE/UK) was one of three representatives of the European Parliament in the 2007 Intergovernmental Conference, with Elmar Brok (PPE/D) and Enriqu e Baron Crespo (PSE/ES).

² Article 6(2) Reform Treaty.

³ Article 1 TEU.

⁴ Article 6(1) TEU; Declaration 1.

⁵ Protocol on the application of the Charter of Fundamental Rights to Poland and to the United Kingdom; Declarations 61 & 62.

⁶ Article 6(2) TEU and Protocol on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms; Declaration 2.

⁷ Articles 8 TEU & 17 TFEU.

through the right of citizens' initiative which allows at least one million signatures from a significant number of member states to ask the Commission to take a specific initiative.⁹

A clearer and more precise delimitation of competences conferred on the Union by member states is introduced.¹⁰ The Union enjoys three categories of competence: exclusive, shared or complementary, and supporting or supplementary. EU competences are in any case limited to those expressly conferred by the Treaties, and, in non-exclusive areas, their use is governed by the principles of subsidiarity and proportionality.¹¹ The regional and local dimension of subsidiarity is also recognised.

There is also a flexibility clause to allow the Union to acquire powers to attain its objectives where the Treaties do not already provide them.¹² Competences can either be increased or reduced.¹³ Member states gain the right to secede from the Union.¹⁴

Co-decision between the Council and Parliament is substantially extended (as foreseen by the constitutional treaty) and becomes the ordinary legislative procedure.¹⁵ Particularly important is the extension of co-decision into agriculture, fisheries, transport and structural funds - in addition to the whole of the current 'third pillar' of justice and interior affairs. The European Parliament now becomes the co-equal legislator for almost all European laws. The new budgetary procedure ensures full parity between Parliament and Council for approval of the whole annual budget (the distinction between compulsory and non-compulsory CAP expenditure is abolished). The multi-annual financial framework, which becomes legally binding, also has to be agreed by Parliament.¹⁶

Qualified majority voting becomes the general rule in the Council – defined as a double majority of 55% of states representing 65% of the population (while a minimum number of four states is needed to constitute a blocking minority).¹⁷ 40 significant items move from unanimity to QMV, including the whole of justice and interior affairs. Only the most sensitive areas remain subject to unanimity: tax, social security, citizens' rights, languages, seats of the institutions and the main lines of common foreign, security and defence policies. In some of these areas, such as anti-discrimination measures, Parliament gains the right of consent.¹⁸ And in others, such as ecological taxation, specific *passerelles* to the ordinary legislative procedure are inserted.¹⁹

However, the new system will not come into force until 2014 – and will still be subject, until 2017, to being blocked by recourse to the voting rules of the Treaty of Nice.²⁰ On

⁸ Article 230(4) TFEU.

⁹ Articles 8b TEU & 21 TFEU.

¹⁰ Articles 2a-2e TFEU and Protocol on the exercise of shared competence.

¹¹ Article 3b TEU.

¹² Article 308 TFEU.

¹³ Article 48(2) TEU; Declaration 18.

¹⁴ Article 49a TEU.

¹⁵ Article 251 TFEU.

¹⁶ Articles 9a(1), 9c(1) TEU & 268-279b TFEU.

¹⁷ Articles 9c(4) TEU & 205 TFEU.

¹⁸ Article 16e TFEU.

¹⁹ Article 175 TFEU.

²⁰ Article 9c(5) TEU and Articles 3 & 4 of Protocol on transitional provisions.

top of that, a new mechanism based on the 'Ioannina compromise' will allow 55% of states forming a blocking minority to ask for a delay and reconsideration of a draft law before its adoption.²¹ A Protocol negotiated in the last hours of the IGC, at the request of Poland, states that the Council can only amend or repeal the Ioannina clause by consensus.²²

Enhanced cooperation²³ among nine or more states becomes both easier and more purposeful, due to the fact that a core group is enabled to introduce QMV where unanimity will still apply in the Council of 27.²⁴ The militarily capable and politically willing are enabled to go forward to (permanent) structured cooperation in defence.²⁵ A solidarity clause means that member states will assist each other in the event of armed aggression.²⁶

A new 'permanent' President of the European Council (elected for 2.5 years) will chair and drive forward its work. He or she will prepare meetings of the European Council and report to Parliament afterwards.²⁷ The European Council becomes a fully fledged institution of the Union, subject to supervision by the Court of Justice.²⁸

With the exception of the Council of foreign ministers, which is to be chaired by the High Representative, the other sectoral Councils are to be chaired by ministers from a team of three member states for a period of eighteen months.²⁹ The Council will have to legislate in public.³⁰

The new Treaty introduces the principle of degressive proportionality for the apportionment of seats in the European Parliament. Paradoxically, this principle was immediately breached by the IGC, which gave one more seat to Italy for the term 2009-14, asserting that the Parliament will now be composed of 750 members plus its President.³¹ The largest state (Germany) will have 96 MEPs; the smallest (Malta and Luxembourg) six. MEPs will henceforward represent 'the Union's citizens' rather than 'the peoples of the States'.³²

The President of the Commission will be elected by Parliament. The candidate will be proposed to MEPs by the European Council, nominated by QMV, taking into account the results of the parliamentary elections.³³ Parliament will also invest the whole

²¹ Declaration 7.

²² Protocol on the Decision of the Council relating to the implementation of Article 9c(4) TEU and Article 205(2) TFEU between 1 November 2014 and 31 March 2017 on the one hand, and as from 1 April 2017 on the other.

²³ Articles 10 TEU & 280a-280i TFEU.

²⁴ Article 280h TFEU.

²⁵ Articles 28a (6) & 28e TEU and Protocol on permanent structured cooperation established by Article 28a TEU.

²⁶ Articles 28a (7) TEU & 188r TFEU.

²⁷ Article 9b TEU; Declaration 6.

²⁸ Article 230 TFEU.

²⁹ Articles 9c(9) TEU, 201b TFEU; Declaration 9.

³⁰ Article 9c(8) TEU.

³¹ Article 9a(2) TEU; Declaration 4.

³² Article 189 TEC.

³³ Article 9d(7) TEU; Declaration 6 & 11.

Commission³⁴, including the High Representative for Foreign Affairs, who will also be Vice-President of the Commission.³⁵ The size of the European Commission will be reduced after 2014, corresponding to two thirds of the number of member states, unless the European Council decides (unanimously) otherwise. To ensure equality between states, a rotation system will assure each state representation in two colleges out of three.³⁶

The double-hatted High Representative for Foreign Affairs will chair the Council of Foreign Affairs. He or she will be appointed by the European Council with the agreement of the President of the Commission.³⁷ Parliament will be consulted about the appointment of the first (interim) High Representative, foreseen for January 2009.³⁸ The High Representative will manage a new European External Action Service, formed by a combination of national civil servants, the Council secretariat and the Commission. The External Action Service will be established by the Council during 2008 with the consent of the Commission after consulting Parliament.³⁹ As the External Action Service will be funded from the EU budget, MEPs will obtain significant control.

The jurisdiction of the European Court of Justice is expanded to all the activities of the Union with the express exception of common foreign and security policy.⁴⁰ However, the Court has oversight in the case of a breach of procedure or a conflict over competence (in effect, patrolling the frontier between the first and second pillar). It can hear appeals against restrictive measures and give an opinion about an international treaty.⁴¹ Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised.⁴² The number of advocates-general is increased from eight to eleven.⁴³ Specialised courts can be set up, with the agreement of Parliament, for example, in patent law.

The primacy of EU law is affirmed, if rather clumsily.⁴⁴ Member states must ensure adequate remedies, and the powers of the Court and the Commission to impose penalties in case of infringement are increased.⁴⁵ Expansion of the Court's powers into the field of intellectual property rights has to be agreed unanimously.⁴⁶

The Union gains a single legal personality in international law across its whole competence.⁴⁷ Member states may only sign international agreements that are compatible with EU law. Parliament has to approve all agreements in fields covered by the ordinary

³⁴ Article 9d TEU.

³⁵ Article 9e TEU.

³⁶ Article 9d(5) TEU; Declaration 10.

³⁷ Article 9e TEU; Declaration 6.

³⁸ Declaration 12.

³⁹ Article 13a TEU; Declaration 15.

⁴⁰ Articles 9f & 11(1) TEU.

⁴¹ Article 240a TFEU.

⁴² Article 188n(11) TFEU.

⁴³ Declaration 38.

⁴⁴ Declaration 17.

⁴⁵ Article 228(2-3) TFEU.

⁴⁶ Article 229a TFEU.

⁴⁷ Article 46a TEU.

legislative procedure, association agreements, and those with budgetary or institutional implications.

The single legal personality means that the 'third pillar' in the field of justice and home affairs will disappear entirely after a five year transition, with common policies in the area of freedom, security and justice, including Schengen, assimilated within the 'first pillar' or Community method.⁴⁸ The Commission's right of initiative in justice and interior affairs, however, is shared with one quarter of member states.⁴⁹

Only the common foreign, security and defence policies, provided for in the TEU, continue, in the main, to have specifically intergovernmental procedures.⁵⁰ The mandate of the European Defence Agency, however, is broadened.⁵¹

Accordingly, while the powers of the Commission, Parliament and Court are extended to the Union's policies on interior affairs, initiatives by member states remain possible in certain cases. There are also some 'emergency brakes' which allow states to refer issues to the European Council if they feel that their vital national interests are at stake. In all those cases, other states are propelled forward into enhanced cooperation.

The UK and, reluctantly, Ireland have specific protocols which allow them to either opt into or opt out of EU common policies concerning Schengen and the area of freedom security and justice. But they may exercise this privilege only according to terms, conditions and timetables to be established in each case by the Council and Commission (who will try to maximise both participation and coherence).⁵² The UK may not opt in at the beginning of a legislative procedure and, then, at the end, opt out. Nor may it stick with an existing policy if the others wish to revise it. Nor may it continue to participate in existing common policies if, after a transitional period of five years, it refuses to accept the new powers of the Commission, Parliament or Court.⁵³

The UK has obliged its partners to raise the barrier with respect to the free movement of workers. Any member state may now veto a law on labour mobility by claiming that it affects 'important' (rather than 'fundamental') aspects of its national social security.⁵⁴ The European Council may suspend the legislative process.

The time allowed for national parliaments to scrutinise draft law is raised from six to eight weeks. One third of national parliaments may object to a draft legislative proposal on the grounds of a breach of subsidiarity – the 'yellow card'. The Commission will then reconsider it. In addition, if a simple majority of national parliaments continue to object, the Commission refers the reasoned objection to the Council and Parliament, which will

⁴⁸ Article 10 Protocol on transitional provisions.

⁴⁹ Article 61i TFEU.

⁵⁰ Articles 10a-28e TEU.

⁵¹ Article 28a TEU.

⁵² Article 5 of the Schengen Protocol; Protocol on position of the UK and Ireland in respect of the area of freedom, security and justice.

⁵³ Article 10 Protocol on transitional provisions.

⁵⁴ Article 42 TFEU.

decide the matter – the ‘orange card’.⁵⁵ A new clause usefully describes all the formal functions of national parliaments in relation to EU affairs.⁵⁶

The Committee of the Regions gains the right to approach the Court of Justice.⁵⁷ Dialogue between the institutions and civil society, including the churches, is enhanced.⁵⁸ The tripartite summits, with the social partners, are enshrined in the treaty.⁵⁹

New legal bases have been introduced for intellectual property rights, sport, space, tourism, civil protection and administrative cooperation.⁶⁰ Environment policy has been supplemented by a reference to combating climate change.⁶¹ Common energy policy has been strengthened with respect to security and interconnectivity of supply and solidarity.⁶² Enlargement policy will now need to take into account the Copenhagen criteria.⁶³ The Commission's role in the excessive deficit procedure is enhanced.⁶⁴ Whereas competition is no longer one of the official objectives of the Union, the status of competition policy is (probably) undiminished.⁶⁵

Otherwise, the economic governance of the Union is adjusted modestly to give more autonomy of action to the eurogroup, including in international financial institutions.⁶⁶ A specific legal basis is introduced for services of general economic interest.⁶⁷

New horizontal clauses ensure that, in the definition and implementation of its policies, the Union will take into account the social dimension of the single market, sustainable development and combating discrimination.⁶⁸

A new hierarchy of norms is established which distinguishes between legislative acts, delegated acts and implementing acts⁶⁹ - although, confusingly, the terms ‘law’ and ‘framework law’ postulated in the 2004 constitutional treaty have been abandoned in favour of keeping the present terminology (directives, regulations and decisions). Parliament and Council have co-equal powers to decide how to control delegated and implementing acts (comitology).⁷⁰

⁵⁵ Article 7(2) & 7(3) of the Protocol on the application of the principles of subsidiarity and proportionality as well as Protocol on the role of national Parliaments in the European Union. For the role of national parliaments see also in particular Articles 3b, 8a(2), 8c & 48 (2-3) & (7) TEU & 61b, 65 & 308(2) TFEU.

⁵⁶ Article 8c TEU.

⁵⁷ Protocol on the Application of the Principles of Subsidiarity and Proportionality; Article 230(3) TFEU.

⁵⁸ Articles 8b TEU; 16c TFEU.

⁵⁹ Article 136a TFEU.

⁶⁰ Respectively, Articles 97a, 149, 172a, 176b, 176c, 176d TFEU.

⁶¹ Article 174 TFEU.

⁶² Article 176a TFEU.

⁶³ Article 49 TEU.

⁶⁴ Article 104 TFEU.

⁶⁵ Protocol on the Internal Market and Competition.

⁶⁶ Articles 115a - 115c TFEU.

⁶⁷ Article 16 TFEU; Protocol on services of general interest.

⁶⁸ Articles 2 TEU & 2a-6b TFEU.

⁶⁹ Articles 249-249d TFEU.

⁷⁰ Articles 249b & 249c TFEU.

Parliament has an enhanced role in the procedure for future Treaty revision: vitally, it gets the right of initiative, it is part of the Convention which will be the norm for major treaty change (and its consent is necessary if there is not to be a Convention). There are simplified revision procedures for minor amendments: common internal policies can be modified by unanimous decision of the European Council with the approval of national parliaments (with the European Parliament consulted); decision making can be switched from unanimity to QMV, or from abnormal to the normal legislative procedure, by a unanimous decision of the Council (and the consent of both European and national parliaments) – the ‘*passerelle*’.⁷¹

*

*

*

If successfully ratified, the Treaty of Lisbon will be a decisive step forward in the constitutional evolution of the European Union. In historic terms it is at least as significant as the Treaty of Maastricht (1991) which introduced the single currency and established early provisions for foreign and security policy and for cooperation in police and judicial affairs.

Agreement on the new Treaty will mark the end of the phase of controversial political integration which began with the Convention on the Charter of Fundamental Rights in 1999, and later developed by the Treaty of Nice (2000), the Declaration of Laeken (2001), the Convention on the Future of Europe (2002-03), the Treaty establishing a Constitution for Europe (2004), the referendums in France and the Netherlands (2005), and the subsequent ‘period of reflection’.

With the new Treaty in force, the Union will not need and will not seek the transfer of new competences from member states. Although some further rationalisation and simplification will continue to be both possible and desirable, the system of government achieved by Lisbon should, in all essentials, be strong and durable.

⁷¹ Except in defence policy. Article 48 TEU.