

Introduction: After the Treaty is before the Treaty

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On 1st December 2009, after a second Irish referendum and the signature of the Czech and Polish presidents, the Treaty of Lisbon finally entered into force. The journey to this new version of the Treaty on European Union and the new Treaty on the Functioning of the European Union had been a long one. Following the ground-breaking Treaty of Maastricht 1992 and the reforming Treaties of Amsterdam 1997 and Nice 2000, the European Union had embarked on an ambitious process towards a ‘constitution’. However, the Constitutional Treaty, carefully prepared by the Constitutional Convention from 2001 to 2003, and signed by the Member States in 2004, was rejected in referenda in France and the Netherlands in 2005. This prompted the formal abandonment of the Constitutional Treaty, a ‘period of reflection’, and finally, in 2007, the Treaty of Lisbon, which successfully completed its ratification process in all 27 Member States in November 2009. In early 2012 the impacts of the changes involved in the new Treaty are only beginning to be felt.

While abandoning its ‘constitutional decorum’,¹ the new Treaty on European Union and the Treaty on the Functioning of the European Union contain most of the substantial changes envisaged in the Constitutional Treaty. The European Community ceases to exist and is replaced by the European Union, which has international legal personality. The three pillar structure of the Union is formally abolished, affecting especially the former Third Pillar on Cooperation in Justice and Criminal Matters. The Charter of Fundamental Rights becomes legally binding, although not as an integral part of the Treaty itself. The new permanent President of the European Council is the new figurehead of the Union, although without, it appears, at the same time really abolishing its rotating presidencies. A new External Action Service of the EU is to take responsibility for all external relations, even when its head has to accept the title of ‘High Representative’

¹ Flag, anthem, and motto.

rather than that of 'EU Foreign Minister'. The Common Security and Defence Policy introduced a collective defence commitment of the Member States. Qualified majority voting in the Council and co-decision with the European Parliament have become the default ordinary law-making procedure of the Union. There are amendments concerning the powers of the European Court of Justice, the internal market regime, competition law, and other core areas. Many of these changes are to be subjected to a thorough legal analysis in the 23 chapters of this book.

Most substantial changes to what will now have to be called 'European Union law' require and will receive analysis with respect to both their content and likely impact. However, the possible shortcomings of these changes will also be highlighted. Even though the Treaty of Lisbon is likely to stay in force for a long time to come, the academic and political discussion about the 'next Treaty' already began shortly after 1 December 2009. This book also aims to make a contribution to this discussion. Both with respect to the changes introduced by the Treaty of Lisbon and the emerging discussion on its contents, shortcomings, and impact on the one hand, and the beginning discussion on the 'next Treaty', on the other, this is a timely book on the current and the next chapter of European law and integration.

The book will be subdivided into six parts on: (1) Law and governance in the European Union; (2) The powers and nature of the European Union; (3) The Charter of Fundamental Rights; (4) External action and policy; (5) Justice and criminal policy; and (6) Economic governance. There will be three to five chapters on specific topics related to these six areas grouped under each heading. Each chapter is written by a different author who is an expert in the field he or she covers. Most chapters have been the subject of a paper presentation at the academic conference 'After Lisbon: The future of European Law and Policy II' organised by the Institute of European Law at the University of Birmingham in June 2010 with the assistance of the Jean Monnet Fund and the Graduate School of the College of Arts and Law of the University of Birmingham. A discussant and the learned audiences of the respective workshops in which the papers were delivered provided feedback on each paper. Chapters 14 and 22 were written by authors who did not participate in the conference. Feedback was also provided by the editors on all chapters. The research assistant of Birmingham Law School, Dominic de Cogan, has also contributed to the editing of the final manuscript.

In Part I, 'Law and governance in the European Union', five chapters investigate the extent of changes brought by the Treaty of Lisbon to the EU institutions and how they relate to each other and to the Member States. Chapter 1, 'Who leads the EU?' by Michael Mirschberger, elucidates the

competences and possible competence quarrels of the four most prominent positions in the architecture of the EU's post-Lisbon era – the President of the European Council, the High Representative of the Union for Foreign Affairs and Security Policy, the Presidency of the Council, and the President of the European Commission. Furthermore, it provides an assessment pertaining to the question of whether one leading position of the European Union, based on the provisions of primary EU law, can be detected.

Chapter 2, 'The European Court of Justice after Lisbon' by Tony Arnall, looks at the Lisbon provisions on the nomenclature of the three components of the European Union judicature. It examines the apparently anodyne changes introduced at Lisbon to the procedure for appointing new members of the European Court of Justice (ECJ). The chapter then considers the effect of the Lisbon Treaty on the powers of the ECJ and the scope of its jurisdiction and the implications, particularly for the ECJ, of the enhanced status accorded to the Charter of Fundamental Rights and future accession by the European Union to the European Convention on Human Rights. The chapter concludes by reflecting on the general approach likely to be taken by the ECJ in the post-Lisbon era.

Chapter 3 by Adam Cygan is entitled "'Collective" subsidiarity monitoring by national parliaments after Lisbon: the operation of the early warning mechanism'. The Treaty of Lisbon includes several amendments designed to improve participation by national parliaments in EU decision-making, the most important of which is subsidiarity monitoring. Subsidiarity monitoring enhances the position of national parliaments by enabling them to use the pre-legislative constitutional intervention device commonly known as the Early Warning Mechanism. This encourages horizontal cooperation between parliaments to arrive at a collective position with regard to the compatibility of a legislative proposal with subsidiarity. The chapter argues that while this improves the opportunities for national parliaments it does not, per se, improve either accountability or the quality of EU legislation.

Chapter 4 by Laura Puccio is entitled 'The pressures inflicted by the financial crisis on the euro area: de facto creating an EU "economic government" despite the status quo maintained in the Lisbon Treaty?' During the financial crisis, the necessity to bailout banks and support the economy has substantially increased public deficit. Some Euro Area countries had less room to manoeuvre, and low growth rates and competitiveness levels made the path of public debt unsustainable. The increase in bond yields created difficulties for these countries to access the debt market and endangered the stability of the currency union. The reaction to this crisis called for a major rethinking of the main rules (in particular the no-bailout clauses and the Stability and Growth Pact) on which the

Economic and Monetary Union (EMU) was founded. This article considers the main changes proposed in 2010 to the EMU and their impacts on the institutional framework and the competences at the EU level.

Chapter 5 by Melanie Smith, the final chapter in this section, is entitled 'Tracing the development of administrative principles in the EU: a possible new approach to legitimacy?' The development of the administrative law-type mechanisms within the European Union is almost exclusively focused on the activities of the Member States as the main implementers of Union law. This has left an administrative gap at the level of the EU institutions, with little evidence of determinative horizontal administrative principles to be found in either the Treaties or the case law of two European courts. Where the courts have acted, they have adopted a sectoral and highly circumscribed approach to the development of administrative norms. Post Lisbon, can evidence be found within the Treaties that the administrative route to legitimacy has not been entirely foreclosed? This chapter proposes a model of administrative legitimacy for the EU level of administration that provides a foundation for the interconnected concepts of good governance and political legitimacy.

Part II explores the effect of the Treaty of Lisbon on the powers and nature of the European Union, in particular the principles of conferral and subsidiarity and flexibility, in four chapters. Chapter 6 by Barbara Guastaferrero is entitled 'The European Union as a Staatenverbund? The endorsement of the principle of conferral in the Treaty of Lisbon'. It argues that the Treaty of Lisbon, while providing the EU with new competencies, has strengthened the principle of conferral. Many of the provisions of the Treaty of Lisbon, indeed, seem to accommodate the claim of some of the Member States of the EU to retain the *Kompetenz-Kompetenz* within the European legal order. Among them, particular attention is dedicated to the revisited vertical division of competences, to the reform of the 'flexibility clause', and to the dynamics of Union pre-emption. Against this backdrop, the analysis provides significant insights reflecting on the nature of the EU legal order. While refraining from broadening the scope of EU competences vis-à-vis Member States' ones, does the Treaty of Lisbon conceive of the EU as a mere 'Staatenverbund', to use the German Constitutional Court's wording in the recent *Lissabon-Urteil*?

Chapter 7 by Elaine Fahey is entitled 'A jagged-edged jigsaw: the boundaries of constitutional differentiation and Irish-British-Euro relations after the Treaty of Lisbon'. While key objectives of the Stockholm Programme are judicial cooperation and the unity of EU law, the Treaty of Lisbon appears to deepen and widen the nature of multi-speed integration in the EU. Multi-speed integration in the EU is a phenomenon that appears to be constantly evolving through the Treaties. Yet from the inception of the

Treaty of Amsterdam to the present day, Ireland and the United Kingdom, together with Denmark, appear ostensibly to be the principal beneficiaries of multi-speed integration, obtaining constitutional positions that new accession States are unable to achieve. Legal provisions obtained by Ireland and the United Kingdom in the Treaty of Lisbon now indicate an outward constitutional stance of isolation and negativity towards further and deeper integration. The limited case law of the European Court of Justice on the provisions for the two Member States appears hostile to the objective of multi-speed integration and confirms the failure of its policy objective.

Chapter 8 was written by Ester Herlin-Karnell and is entitled 'Enhanced cooperation and conflicting values: are new forms of governance the same as "good governance"?' The chapter aims to explore the concept of enhanced cooperation and its possible renaissance within the Lisbon Treaty. After all, the former EC Treaty regulation of enhanced cooperation has never been used, as the restrictions regulating the establishment of such a regime have been so many that almost nothing met the criteria in question. Nevertheless, it is sometimes pointed out that regional forms of enhanced cooperation may provide tailor-made responses to particular problems instead of the 'one size fits all' template provided by a programme of harmonisation. Therefore, the purpose of this chapter is to examine the impact of the establishment of enhanced cooperation in the context of the principle of subsidiarity and hence explore conflicting rationalities between 'moving forward' – in terms of closer cooperation – within the framework of the Treaty and restricting EU action in line with the principle of subsidiarity. Criminal law will be used as an example where this tension is particularly significant.

Chapter 9 was written by Ton van den Brink and is entitled 'The substance of subsidiarity: the interpretation and meaning of the principle after Lisbon'. The Treaty of Lisbon has firmly strengthened the subsidiarity principle by empowering national parliaments to scrutinise legislative proposals on compliance with the principle. But how do they apply subsidiarity, how do they interpret the principle and what criteria do they derive from it? First experiences indicate that national parliaments do not apply the new subsidiarity mechanism simply to block EU legislation. They further demonstrate the need for developing and applying objective criteria. As such, the principle may grow into a principle with a legal meaning and significance.

The three chapters of Part III concentrate on the European Union Charter of Fundamental Rights after Lisbon. Chapter 10 by Helena Raulus is entitled 'The Charter of Fundamental Rights as a set of constitutional principles'. It argues that despite the fact that the Charter of

Fundamental Rights has application only within the scope of the autonomous EU legal system; its impact in this area is to develop the Union's constitutional principles in fundamental rights protection. First, the Charter identifies clearly for the first time Union fundamental rights. Second, it provides for a binding set of rights against which the Union integration can be tested. Consequently, the European Court of Justice should develop its approach to fundamental rights protection, not only promoting the pro-integration goals of the Union, but providing for a rigorous review of Union action on the basis of fundamental rights.

Chapter 11 written by Martin Borowski is entitled 'The Charter of Fundamental Rights in the Treaty on European Union'. The Treaty of Lisbon established a new system for the protection of fundamental rights of the Union, a system in which the Charter of Fundamental Rights with legally binding force is front and centre. Although Charter rights and fundamental rights as general principles of Union law are formally on a par, Charter rights enjoy a pragmatic preference. The tendency towards the convergence of the two layers is being reinforced by the Union's accession to the European Convention on Human Rights (ECHR).

Chapter 12, 'EU human rights protection after Lisbon', is by Wolfgang Weiß. The new EU law mentions the European Convention on Human Rights in different contexts which induces the need for reassessing its legal significance for the EU. As Article 52 of the EU Charter on Fundamental Rights partially incorporates the Convention, the EU human rights standards are challenged, with consequences for the interpretation, application and relevance of human rights within EU law. The partial incorporation of the European Convention also affects the autonomy of the EU's legal order.

Part IV, with its four chapters, is devoted to the external action and policy of the Union after the Treaty of Lisbon. Chapter 13, written by Urfan Khaliq, is entitled 'The external action of the European Union under the Treaty of Lisbon'. It examines the post-Lisbon external relations architecture of the European Union and how the High Representative, the President of the Council and the new European External Action Service relate to one another in seeking to create a more effective and consistent foreign policy for the Union.

Chapter 14 by Rafael Leal-Arcas, 'The European Union's new common commercial policy after the Treaty of Lisbon', explores the three main changes introduced by the Treaty of Lisbon to the EU's external trade and investment policy decision-making: first, the extension of exclusive EU competence to cover more trade, trade-related issues and, importantly, foreign direct investment (FDI); second, the enhancement of the role of the European Parliament by granting it joint powers with the Council when it

comes to shaping the legislative framework for trade, and by facilitating a more active role for the Parliament in the negotiation and ratification of international trade agreements; and third, bringing external trade into European external action along with foreign policy, development, humanitarian aid, and international environment policy. All these changes could have implications for the EU's role as an actor in international trade. The chapter argues that there will be little immediate change due to the inclusion of external trade in the EU's common external action.

In Chapter 15, 'EU external energy policy: the legal and policy impact of the new competence', Bart van Vooren explores what, if any, impact the new legal basis of the Lisbon Treaty has had on the formulation and execution of EU external energy policy. To that end it first sets out the state of play on EU energy policy before the Lisbon Treaty. This then forms the basis for the second section which provides the post-Lisbon perspective on EU energy policy. On the one hand, this chapter argues that the overall direction of EU energy policy has simply been codified in the Lisbon Treaty. On the other hand, in legal terms, the new competence has created a novel problem. Notably, it is unclear how the objective of ensuring secure energy supplies in Article 194 TFEU relates to the Union's Common Foreign and Security Policy.

In Chapter 16, 'Towards a common defence? Legal foundations after the Lisbon Treaty', Erkki Aalto argues that the Lisbon Treaty offers several new elements, such as from the provisions on permanent structured cooperation and on mutual assistance, to the discussion on the European Union's role in defence matters. The Lisbon Treaty also recognises more clearly than before that a common defence is a possible outcome of European defence integration. The thesis of the chapter is that EU defence cooperation is based on two pillars: on the development of an intergovernmental Common Security and Defence Policy and on the creation of a supranational European Defence Technological and Industrial Base. The combination of intergovernmental and supranational elements is a unique feature of the EU in comparison with other defence organisations, for example NATO.

Part V, consisting of three chapters, discusses another area of law affected by the Treaty of Lisbon: justice and criminal policy. Chapter 17, entitled 'Delegation and accountability of criminal agencies after Lisbon: an examination of Europol', was written by Bleddyn Davies. The Treaty of Lisbon has absorbed the Third Pillar into the constitutional architecture of the old Community, abolishing the unique Third Pillar legislative measures. This chapter argues that this may not be uniformly positive, particularly in the context of delegation to executive agencies, where the role of national

parliaments in ratifying Third Pillar conventions may have been instrumental in legitimising agencies with a criminal law remit.

In Chapter 18, 'Options for the development of European criminal law under the Treaty of Lisbon', Flora Goudappel explores the options and limitations for the development of European criminal law after the entering into force of the Treaty of Lisbon. The Treaty and the Stockholm Programme give both fixed elements and options for development. The position of the individual and the principle of sovereignty play an important part in this. The developments to be foreseen focus on mutual trust and mutual recognition, as well as on elements which do not contain a cross-border element.

Chapter 19, entitled 'The EU immigration and asylum policy in the post-Lisbon institutional context', was written by Marie-Laure Basilien-Gainche. An analysis of the European immigration and asylum policy in the post Lisbon context seems of utmost importance, as the Treaty promises to open the door to a new phase in European integration. In the Area of Freedom, Security and Justice (AFSJ) in general, in immigration and asylum fields in particular, the powers of the European Parliament have been increased and those of the European Court of Justice have been improved. Nevertheless, it must not be forgotten that the Lisbon Treaty provisions let the intergovernmental approach encroach upon the supra-national ambitions, and that the objectives of the European Pact on immigration and asylum let the Member States' security purposes take priority over respect for migrants. The common ambition of a truly European immigration and asylum policy is contradicted by nationalist trends; the fundamental rights of all are afflicted by the irrational fear of some.

The four chapters of Part VI discuss the economic governance of the European Union after Lisbon. Chapter 20, written by Francesco Costamagna, is entitled 'The internal market and the welfare state: anything new after Lisbon?' For a long time, it has been assumed that social welfare policies were immune from the reach of EU law. However, the situation has markedly changed over the years, with the progressive 'infiltration' of EU internal market norms into Member States' social sphere. This chapter seeks to determine if, and to what extent, the Lisbon Treaty can contribute to finding a new balance between the competing interests at stake. First of all, the analysis focuses on the new Article 3 TEU that excludes undistorted competition from the catalogue of EU aims, while, at the same time, making express reference to the establishment of a 'social market economy' and the promotion of social solidarity. Secondly, it looks at the Charter of Fundamental Rights, and to the welfare rights contained therein, to which the Lisbon Treaty affords the same legal value as the Treaties. The aim of

the chapter is to assess the legal impact of these innovations, that is if they can steer a new course in the relationship between the economic and the social dimension in the European integration process. The analysis seeks to establish whether they represent just cosmetic changes or if they can actually help the Court in finding a more virtuous balance between the protection of the welfare state and the completion of the internal market.

Chapter 21, 'Changing the competition regime without altering the Treaty's chapter on competition' by Julian Nowag, examines whether the changes in the objectives of the EU mean a change in the competition *acquis*. A three-step analysis leads to the conclusion that this is not to be expected. First the status of competition in the constitutional hierarchy under the old EC Treaty is examined. After setting out the detailed changes under the Lisbon Treaty, the chapter, finally, investigates whether these alter the relationship between competition and other EU goals and whether the case law that relied on the deleted and transposed initial 'common provisions' needs to be changed.

In Chapter 22, 'Services of General (Economic) Interest post-Lisbon', Johan van de Gronden and Catalin Stefan Rusu explore the changes brought upon by the Treaty of Lisbon with regard to services of general (economic) interest, by analysing three of the relevant legislative innovations put forward by this Treaty: the Protocol on Services of General Interests; Article 14 TFEU; and Article 36 of the Charter of Fundamental Rights of the EU. The chapter examines whether the novelties relating to these services have introduced a transparent and coherent approach towards them. The authors' findings reveal that although the Treaty of Lisbon has clarified some of the issues relating to these services, many questions remain open. Nevertheless, the value of these latest developments relates to the introduction of an overarching Treaty approach towards services of general interest and services of general economic interest, which the authors believe will inevitably lead to these concepts becoming of paramount importance in the context of EU (market) law.

In Chapter 23, the final chapter of Part VI and of the book as a whole, with the title of 'The future of employment law and policy after Lisbon: the rise of solidarity rights?', Lisa Rodgers considers the impact of the Lisbon Treaty on EU employment law and policy. Firstly, she discusses the procedural changes brought in by the Treaty, in particular the increase in the role of the European Parliament and 'civil society' in the determination of European affairs, and the importance of these changes for employment law and policy. Secondly, the chapter analyses the potential impact in the employment field of some of the substantive changes introduced by the Treaty of Lisbon. The focus here is on the effect of the incorporation (by

annexe) of the Charter of Fundamental Rights and Freedoms on employment rights at EU level, particularly in the light of recent legal decisions in this area.

Not all the important changes of the Treaty of Lisbon could be discussed in this book. This is first of all due to a lack of space. The editors wanted the collection to stay within certain manageable and readable limits. Moreover, a comprehensive coverage of Lisbon can only be conducted some years in the future. That said, the various chapters do cover many of the changes produced by Lisbon and the issues currently facing the EU. The list of possible additional topics would have been endless. What is offered here is a selection of issues, certainly personal and limited, but which, in the editors' view, illustrate the changes faced by the EU after the Treaty of Lisbon.

'After the game is before the game', Germany's football legend Franz Beckenbauer² once remarked. What he meant by this is that, rather than resting on his laurels, he wanted to immediately prepare for the next challenge; that he did not want to look back at a glorious past but look forward to the future. Could a similar wisdom be applied to the European Union, is 'after the Treaty before the Treaty', 'after Lisbon' before the next major Treaty revision?

It has been argued that, after the difficulties of the Treaty of Lisbon, the rejection in the first Irish referendum, the reservations of the Polish and Czech presidents, not to mention the failure of the Constitutional Treaty due to its rejection in the French and Dutch referenda, the EU will not have a Treaty revision for a long time, that there will be no 'Treaty of Athens', 'Treaty of London', or 'Treaty of Zagreb' for a while. In other words, the 'after Lisbon' period might be a very long chapter in the history of the Union.

However, while perhaps the quick succession of the Single European Act 1986, Maastricht 1992, Amsterdam 1997, Nice 2000, and the Constitutional Treaty 2005 may be slowed down, the process of Treaty revision cannot stop for good. First, the Treaty of Lisbon is not perfect – a fact many aspects of which are discussed in the chapters of this book. The simplified revision procedure introduced by the Treaty of Lisbon will not be sufficient to address all these shortcomings. Second, the Treaty of Lisbon was conceived in a particular historical, political, and economic situation and the Treaty responded to that particular situation. This situation is constantly changing: the financial crisis and the rescue packages, the

² Twice FIFA World Cup winner for Germany: 1974 as captain and 1990 as manager.

economic and political crisis of the Eurozone and the future of the Euro, with the need to rethink the monetary and economic architecture of the system itself, the ‘Arab Spring’, mass migration from outside the EU, the challenge of climate change and the interlinked need to ensure sustainable and secure energy sources, future enlargement, the ageing population, and, more generally, the role of the EU and its Member States in the fast changing geopolitics and economics of this globalized world, are only some examples of this constant change. Indeed, if the situation is changing, the constitutional order of the EU needs to change with it. A fast and effective adaptation from the largest regional block in the world, the ‘Community’, now simply ‘Union’, has always been in the making, both through the apparent (more or less grand Treaty revisions) and the less apparent (day-to-day EU practice and most importantly judicial process – at both supranational and national levels). Quite soon the Treaty of Lisbon might no longer be an adequate instrument to govern the EU, if it is adequate today. Third, European integration is a process, towards ‘an ever closer union’. In the current debate on the Euro crisis, two broad alternatives are presented: the dismantling of the single monetary project, which would probably be disastrous, or indeed its strengthening, by upgrading the powers of coordination of economic and fiscal domestic policies at EU level, which is certainly ambitious but to a large extent logical. The ‘millenarists’ even suggest that the hard-earned process of European integration is doomed. ‘Disintegration’³ would be the inevitable outcome of the crisis. However, the EU and its predecessors the European Communities have contributed much to what has been achieved since 1945: the longest period of peace in European history, unprecedented wealth, freedom of movement, stable democracy, and making Europe’s voice count on the world stage. The Union’s critics have so far failed to present a credible alternative, other than returning to strong nation states, which did anything but make Europe peaceful, wealthy and influential. Ultimately, the next Treaty will come and it is unlikely that it will reverse the current acquis, quite the opposite.

Whatever the next years will bring, what should not be lost is the deep and entrenched sense of ‘community’ which has accompanied European integration since its beginnings and in most of its key moments of development. The main *raison d’être* of the EU is that, with all its increasingly diverse richness, its Member States, peoples and citizens share common

³ ‘Integration or Disintegration?’ is the topic of the follow-up conference (Birmingham Law School 28–29 June 2012) to the conference this book was based on.

values and interests, and that a cooperating enterprise has greater advantages than antagonism, autarky and individual runaways. Every action and change to the EU should take this ‘community’ dimension into due account: it is in a sense a pity that with the Treaty of Lisbon the word ‘community’ has disappeared from EU jargon. The fact of participating in a community was evident in the simpler 1950s’ EEC but is of essential importance to both the meaning and working of European integration even now, after Lisbon.

*Birmingham and Florence,
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