

## “THE EU CONSTITUTION IS DEAD — LONG LIVE THE REFORM TREATY” — BUT WILL IT MAKE THE EU MORE DEMOCRATIC, EFFICIENT AND TRANSPARENT?

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Résumé de l'article

Cet article traite d'un sujet éminemment particulier au droit européen et à la politique européenne : le projet de réforme du traité sur l'Union européenne. Il établit les grandes lignes des changements introduits par le traité et les soumet ensuite à une analyse critique. En particulier, cet article examine si les amendements effectués rendront l'Union européenne plus *démocratique*, plus *efficace* et plus *transparente*. Les enjeux spécifiques adressés par cet article incluent la nouvelle procédure de vote au Conseil, le rôle accru des parlements nationaux et du Parlement européen, le nouveau poste de Président du Conseil de l'Europe, la personnalité juridique de l'Union ainsi que la nouvelle initiative des citoyens.

**“THE EU CONSTITUTION IS DEAD — LONG LIVE THE REFORM  
TREATY”<sup>\*</sup> — BUT WILL IT MAKE THE EU MORE DEMOCRATIC,  
EFFICIENT AND TRANSPARENT?**

*Hannes H. Hofmeister*<sup>\*\*</sup>

This article deals with a highly topical issue in European Law and Politics: the European Union Reform Treaty. It outlines the key changes introduced by the Treaty, then subjects them to a critical analysis. In particular, it examines whether the amendments made will render the European Union more *democratic*, more *efficient* and more *transparent*. The specific issues addressed include the new voting procedure in the Council, the enhanced role of national parliaments and the European Parliament, the new post of President of the European Council, the legal personality of the Union as well as the new citizens’ initiative.

Cet article traite d’un sujet éminemment particulier au droit européen et à la politique européenne: le projet de réforme du traité sur l’Union européenne. Il établit les grandes lignes des changements introduits par le traité et les soumet ensuite à une analyse critique. En particulier, cet article examine si les amendements effectués rendront l’Union européenne plus *démocratique*, plus *efficace* et plus *transparente*. Les enjeux spécifiques adressés par cet article incluent la nouvelle procédure de vote au Conseil, le rôle accru des parlements nationaux et du Parlement européen, le nouveau poste de Président du Conseil de l’Europe, la personnalité juridique de l’Union ainsi que la nouvelle initiative des citoyens.

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<sup>\*</sup> Now also referred to as “Treaty of Lisbon,” after the city where it was signed in December 2007.

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Three years after the adoption of the *Constitution for Europe* and two years after its rejection by Dutch and French voters,<sup>1</sup> the continent's leaders managed the impossible: they saved "large parts of the old text and stitched them together into a new 'Reform Treaty.' Europe's [prime ministers and presidents] talked of an urgent need to strike a deal."<sup>2</sup> An enlarged union of 27 heterogeneous states with uneven levels of economic development "could not hope to function on rules designed for a 15-nation block. There were warnings of paralysis, [even] of deadlock,"<sup>3</sup> if Europe's leaders failed to reach an agreement.

Afraid of any further referenda, most European Union ("EU," "the Union") states thus rushed for the traditional safety method: cramming the innovations into an almost illegible text, designed for swift ratification by national parliaments.<sup>4</sup> This strategy, however, almost failed as Ireland – the only state compelled by its constitution to hold a referendum<sup>5</sup> – promptly voted against the *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community* ("Reform Treaty")<sup>6</sup>. Many Irish complained that they did not understand the highly technical text. Hence, they decided to play it safe and vote "no." Only a year later, however, they reversed course in a second referendum,<sup>7</sup> paving the way for further integration.

Does the old dictum "all's well that ends well" therefore apply to the *Reform Treaty*? Not really. Ireland's eventual ratification must not conceal the instrument's enduring fundamental problem: its illegible and highly technical text.

In order to shed some light on this complex text, this article first outlines the key changes introduced by the *Reform Treaty*, then subjects them to critical analysis. In particular, it examines whether the amendments made are likely to contribute to the achievement of the EU's declared objectives, namely the achievement of a more *democratic, efficient and transparent* Union.<sup>8</sup> Lastly, a short conclusion summarizes the main findings.

<sup>1</sup> On the popular referenda held in May/June 2005, see Giuliano Amato & Jacques Ziller, *The European Constitution: Case and Materials in EU and Member States's Law* (Cheltenham: Edward Elgar, 2007) at 56-60.

<sup>2</sup> "Tailoring a Compromise: A 'Reform Treaty' Is Agreed Upon" *The Economist* (24 June 2007), online: Economist.com <<http://www.economist.com>> ["Tailoring Compromise"].

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

<sup>5</sup> See *Crotty v. An Taoiseach*, [1987] IESC 4, [1987] IR 713.

<sup>6</sup> *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community*, 13 December 2007, 2007 O.J. C 306/01 [*Reform Treaty*]. In a referendum held on 12 June 2008, 53.4 % of Irish voters rejected the *Reform Treaty*. Turnout was higher than expected, with 53.1 % of the electorate participating in the vote.

<sup>7</sup> In a second referendum held on 2 October 2009, the *Reform Treaty* was finally approved by 67 % of Irish voters. Turnout was again higher than expected, with 58 % of the electorate participating in the vote. See "Ireland backs EU's Lisbon Treaty" *BBC News* (3 October 2009), online: BBC News <<http://usproxy.bbc.com/2/hi/europe/8288181.stm>>.

<sup>8</sup> European Council, *Presidency Conclusions, European Council Meeting in Laeken 14 and 15 December 2001*, online: EC <[http://ec.europa.eu/governance/impact/background/docs/laeken\\_concl\\_en.pdf](http://ec.europa.eu/governance/impact/background/docs/laeken_concl_en.pdf)> at 22.

## I. A Critical Analysis – Will the *Reform Treaty* Render the EU More Democratic, Efficient and Transparent?

### A Brief Overview

Following the negative referenda in France and the Netherlands, the European Council has agreed to abandon the concept of a single constitutional treaty. Hence, the *Reform Treaty* only amends—but does not replace—the previous conventions: the *Treaty on the European Union*<sup>9</sup> (*TEU*) and the *Treaty establishing the European Community*<sup>10</sup> (now referred to as the *Treaty on the Functioning of the European Union*,<sup>11</sup> *TFEU*). Both amended treaties possess the same legal status and entered into force simultaneously.

The *TEU* and the *TFEU* do not have a constitutional character.<sup>12</sup> Their terminology reflects this significant change<sup>13</sup>: the term “constitution” is abandoned and the position of “Union Minister for Foreign Affairs” is given the “catchy” title of “High Representative of the Union for Foreign Affairs and Security Policy.” Likewise, the *Reform Treaty* drops all references to the symbols of the EU, such as the flag, the motto or the anthem.<sup>14</sup>

On the other hand, the *Reform Treaty* introduces significant institutional and procedural changes, such as a new voting system in the Council, a permanent post of President of the European Council as well as an enhanced role for national parliaments—to compensate for their perceived loss of influence on matters now legislated at the EU level. Whether these modifications will render the EU more efficient, democratic and transparent will be analyzed in the next section.

### A. Making the EU More Efficient?

#### 1. THE NEW VOTING SYSTEM IN THE COUNCIL

One of the most problematic issues during the treaty negotiations was the future system for qualified majority voting (QMV) in the Council of Ministers, the

<sup>9</sup> *Treaty on European Union*, 7 February 1992, [1992] O.J. C 191/01, 31 I.L.M. 247 [*Pre-Lisbon TEU*], as amended by the *Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts*, 2 October 1997, [1997] O.J. C 340/1, 37 I.L.M. 56 (entered into force: 1 May 1999) [*Treaty of Amsterdam*] and by the *Treaty of Nice Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts*, Feb.26, 2001, [2001] O.J. C80/1 [*Treaty of Nice*].

<sup>10</sup> *Treaty establishing the European Community*, 7 February 1992, [1992] O.J. C 224/01, 37 I.L.M. 56 [*EC Treaty*], as amended by the *Treaty of Amsterdam*, *ibid.*, and by the *Treaty of Nice*, *ibid.*

<sup>11</sup> As the Community will be replaced by the Union.

<sup>12</sup> EC, Council of the European Union, *Presidency Conclusions* (Brussels: 21-22 June 2007), Doc. 11177/1/07 Rev. 1, Annex I at para. 16 [*Presidency Conclusions 2007*]. See also Christine Reh, “The Lisbon Treaty: De-Constitutionalizing the European Union?” (2009) 47 *Journal of Common Market Studies* 625.

<sup>13</sup> *Presidency Conclusions 2007*, *ibid.*

<sup>14</sup> These will continue to exist, but without a legal basis in European Union primary law.

Union's main decision-making body. Under the previous system, a measure requiring a qualified majority is adopted if two requirements are met: first, it must be backed by a majority of Member States<sup>15</sup>; second, the proposal must receive a minimum of 255 votes out of a total of 345 weighted roughly in proportion to the size of the population.<sup>16</sup>

This system of weighted votes suffers from a number of weaknesses.<sup>17</sup> First, the complex numerical distribution of votes is rightly criticized as being too complicated for the understanding of the general public. It thus reinforces the widespread perception of the EU as an elitist, technocratic institution. Another major difficulty with weighted voting is the determination of the respective strength of each Member State's votes, an issue which resurfaces whenever a new country joins the existing group: each Member tries to retain as much power as possible to protect its own national interest. This often leads to a deadlock, as in the example of the resistance of Spain<sup>18</sup> to a new method of QMV which resulted in the failure of the Intergovernmental Conference in December 2003. Last but not least, the current voting system also lacks the efficiency needed in an enlarged Union of 27 States.<sup>19</sup> The inclusion of twelve new Members with different economies, young party systems and uneven levels of development potentially undermines the EU's ability to pass legislation under the current QMV rules.

The *Reform Treaty* therefore favours a move away from the complex numerical distribution of votes. It redefines a qualified majority as at least 55 % of the members of the Council, representing at least 65 % of the EU population (the so-called *double majority* approach).<sup>20</sup> Moreover, a blocking minority must include at least four member states, to prevent a small number of large states blocking a proposal.<sup>21</sup> This new system is supposed to enhance not only transparency, but also the dual legitimacy of the EU as a union of States and peoples.

*Prima facie*, the double majority approach appears to achieve the set objective, namely to shape a more transparent and efficient voting system. Yet, the devil is in the details.<sup>22</sup> In order to placate Poland's fears that it is the main loser in the new voting procedure, it has been agreed to keep the current system in force until

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<sup>15</sup> Even then, however, a Member State may request confirmation that the votes in favour represent at least 62 % of the total population of the Union; where this is not the case, the vote will still fail. See *EC Treaty*, *supra* note 10, s. 205(4).

<sup>16</sup> Of each Member State; *ibid.*, s. 205 (2).

<sup>17</sup> See also Sebastian Kurpas et al., *The Treaty of Lisbon: Implementing the Institutional Innovations* (Center for European Policy Studies, 2007) at 57-81, online: Center for European Policy Studies <<http://www.ceps.eu/node/1385>> [Kurpas].

<sup>18</sup> As well as Poland.

<sup>19</sup> For example, by setting a fairly high threshold (74 % of all votes) and thereby cutting down on the number of proposals likely to pass.

<sup>20</sup> See *Consolidated Version of the Treaty on European Union*, 13 December 2007, [2008] O.J. C 115/15, s. 16(4) [*TEU*].

<sup>21</sup> *Ibid.* Finally, even where there are insufficient votes or States to constitute a blocking minority, the Council should enter into a conciliation phase—which must not, however, prejudice time limits for enacting legislation.

<sup>22</sup> See also Kurpas, *supra* note 17 at 60-65.

March 2014, with a further three year transition period after that.<sup>23</sup> Moreover, the Council has already adopted a decision relating to the implementation of the new Article 16 of the *TEU*,<sup>24</sup> inspired by the Ioannina compromise.<sup>25</sup> It provides that even when a qualified majority is reached, a Member State may ask for the matter to be discussed further if the minority on that issue is close to the blocking minority provided in the Treaty, i.e. when the minority represents at least 75 % of the population or 75 % of the States necessary to constitute a blocking minority.<sup>26</sup> Whether this mechanism actually makes the new voting system easier to understand and more transparent is questionable. Moreover, it could even be argued that this approach will effectively raise the two thresholds of the double-majority method,<sup>27</sup> thus rendering the decision making process even more difficult.<sup>28</sup>

On a final note, it has been argued that the changes in QMV are unlikely to matter much anyway, since Member States rarely hold votes in the Council, preferring instead to proceed by means of *informal* consensus. True, the Council only holds formal votes in 10-20 % of cases.<sup>29</sup> Nonetheless, the “mere possibility of a formal vote means that the voting system can determine a state’s bargaining power”<sup>30</sup> and may therefore strongly influence the search for consensus. In this respect the changes made do indeed matter and should not be underestimated.

## 2. “MR EUROPE” — THE PRESIDENT OF THE EUROPEAN COUNCIL

Another innovation introduced by the *Reform Treaty* to improve the efficiency of the EU is the full-time office of President of the European Council.<sup>31</sup> Before, the EU Council had been chaired by the Head of State of the Member which

<sup>23</sup> See *TEU*, *supra* note 20, s. 16(5); *Protocol (No 36) on Transitional Provisions*, 13 December 2007, [2008] O.J. C 115/322, s. 3 [*Protocol No 36*]. See also “Tailoring Compromise,” *supra* note 2.

<sup>24</sup> This decision will become effective once the *Treaty of Lisbon* enters into effect; see *Declaration on Article 16(4) of the Treaty on European Union and Article 238(2) of the Treaty on the Functioning of the European Union*, 13 December 2007, [2008] O.J. C 115/338 [*Declaration on Article 16(4)*].

<sup>25</sup> See also Kurpas, *supra* note 17 at 61.

<sup>26</sup> Jean Claude Piris, *The Constitution for Europe: A Legal Analysis* (Cambridge: Cambridge University Press, 2005) at 103. This rule will apply from November 1, 2014 until March 31, 2017; see *Declaration on Article 16(4)*, *supra* note 24 at s. 1. As of April 1, 2017, the same mechanism will apply, the relevant percentages being, respectively, at least 55 % of the population or 55 % of the number of Member States necessary to constitute a blocking minority; see *Declaration on Article 16(4)*, *supra* note 24, s. 4.

<sup>27</sup> To 66 % of States and 74 % of the population until March 31, 2017. As of April 1, 2017 the threshold would be raised even further.

<sup>28</sup> It must be said, however, that this is unlikely to be the case: the decision makes clear that the Council’s rules of procedure must be respected. Since these rules provide that a simple majority of the Council may ask for a vote to take place, it is unlikely that this “Ioannina style” mechanism will be invoked frequently. This mechanism thus only contains a delaying veto; see Piris, *supra* note 26 at 105.

<sup>29</sup> See Wolfgang Wessels, “Die institutionelle Architektur der EU nach der Europäischen Verfassung: Höhere Entscheidungsdynamik – neue Koalitionen?” (2004) 3 *Integration* 168.

<sup>30</sup> Hugo Brady & Katinka Barysch, “The CER Guide to the Reform Treaty” (17 October 2007) at 2, online: Center for European Reform <[http://www.aueb.gr/deos/MASTER-GR/CER\\_reform\\_treaty.pdf](http://www.aueb.gr/deos/MASTER-GR/CER_reform_treaty.pdf)> [Brady & Barysch].

<sup>31</sup> *TEU*, *supra* note 20, s. 15.

held the six-monthly rotating presidency of the Council. In an enlarged Union of 27 Member States, however, the six-month rotation system had become unworkable for a number of reasons.<sup>32</sup> For instance, rotation translated to constantly changing priorities, as successive presidencies pushed issues of national interest towards the top of the agenda during their time in office.<sup>33</sup> This, in turn, resulted in a lack of consistency and continuity in the work of the Council. Moreover, given that the task of “President” came on top of the respective politician’s normal duties as a national Head of State, he or she often lacked the time necessary to properly prepare the sessions of the European Council. Last but not least, rotation often resulted in too little follow up on Summit decisions.<sup>34</sup>

Providing for a more stable and permanent presidency of the European Council thus became one of the main objectives of the *Reform Treaty*. Under the new system, EU Heads of State<sup>35</sup> will therefore choose a full-time president who will chair their meetings for a term of two and a half years, renewable only once.<sup>36</sup> The President will drive forward the work of the European Council, ensure its preparation and continuity on the basis of the work of the General Affairs Council, and facilitate cohesion and consensus.<sup>37</sup> The President will also have a role in the most high-level aspects of the EU’s external relations.<sup>38</sup>

This is where the problems start. There are no clear demarcation lines as to the external competences of the President, the High Representative<sup>39</sup> and the Commission. Although Article 15(6) of the *TEU* provides that the role of the President in ensuring “the external representation of the Union [at his level] [...] [will be] without prejudice to the powers of the High Representative,”<sup>40</sup> in practice it will be difficult to delimit their respective powers in external affairs. For instance, how is one to interpret “at his level” and “without prejudice to the powers of the High Representative”? On a strictly literal reading, this would leave the President with representative functions only, since the High Representative is responsible for Common Foreign and Security Policy issues.<sup>41</sup>

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<sup>32</sup> Brady & Barysch, *supra* note 30.

<sup>33</sup> Helen Wallace & Fiona Hayes-Renshaw, “Reforming the Council: A Work in Progress” (2003) 9 *Swedish Institute for European Policy Studies* at 9.

<sup>34</sup> Brady & Barysch, *supra* note 30.

<sup>35</sup> As well as the President of the Commission; see *TEU*, *supra* note 20, ss. 15(2)-(5).

<sup>36</sup> *Ibid.* s. 15 (5).

<sup>37</sup> *Ibid.* s. 15 (6).

<sup>38</sup> See “EU reforms wait on Ireland” (2009) 15:2 *Strategic Comments* 1 at 2.

<sup>39</sup> Stephan Griller & Jacques Ziller, *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty?* (New York: Springer, 2008) at 205-235 [Griller & Ziller].

<sup>40</sup> *TEU*, *supra* note 20, s. 15 (6).

<sup>41</sup> For a detailed analysis of the European Union’s Common Foreign and Strategy Policy after Lisbon, see Wolfgang Wessels & Franziska Bopp, “The Institutional Architecture of CFSP after the Lisbon Treaty: Constitutional breakthrough or challenges ahead?” (2008), produced within the “CHALLENGE - Changing Landscape of European Liberty and Security” Research Project, Research Paper No. 10 at 1-36, online: Centre for European Policy Studies <<http://www.ceps.eu/book/institutional-architecture-cfsp-after-lisbon-treaty-constitutional-breakthrough-or-challenges-a>>.

According to Article 15(6)(c) of the *TEU*, moreover, the President “shall endeavour to facilitate cohesion and consensus within the European Council.” Since the facilitation of consensus is one of the intrinsic functions of a chairman, elevating it to an explicit task betrays a desperate search to identify tasks for the President which are not in conflict with the competences of other organs and which do not grant him a power base of his own.<sup>42</sup>

In short, the creation of a permanent office of President of the European Council will provide a greater degree of continuity and consistency, thereby making the Union more efficient. Still, the functions of the President remain largely of a representative nature and need to be more clearly defined.<sup>43</sup>

### 3. INTERNATIONAL LEGAL PERSONALITY

Until recently, only the European Community<sup>44</sup> had express legal personality, as contemplated in Article 281 of the *European Community Treaty (ECT)*. This enabled the *Community* to act at an international level – for example, to conclude treaties. There was controversy, however, as to whether the *European Union*, when acting within some areas of Justice and Home Affairs<sup>45</sup> had such personality. While some scholars rejected this thesis on the basis that the *TEU* lacked an equivalent provision to Article 281 of the *ECT*, the better view seemed to be to accept that the EU already had a degree of “functional” legal personality. This view was supported by Article 24 of the *TEU*, which allowed the Council to conclude international agreements *on behalf of the Union*. The Union itself was therefore the participating party bound by the agreement, which implied that the Union has legal personality under international law.

The *Reform Treaty* sought to clarify this situation,<sup>46</sup> formally giving the EU a single legal personality.<sup>47</sup> This translates into a simpler, more transparent state of affairs, allowing the EU to act on the world stage in a more coherent manner.<sup>48</sup> Moreover, the creation of a single legal personality enabled the merger of the three

<sup>42</sup> This is confirmed by Article 15(6)(d) of the *TEU*, according to which the President “shall present a report to the European Parliament after each of the meetings of the European Council.” This task has long been considered an intrinsic task of the President and has been fulfilled by him accordingly.

<sup>43</sup> Last but not least, the six-month rotation system for the Presidency of the Council of Ministers will remain, and the daily work of this organ will therefore continue to suffer from a lack of continuity. In order mitigate the effects of rotation, the *Reform Treaty* provides for a new “Troika Team Presidency” system.

<sup>44</sup> And the European Atomic Energy Community; see *Treaty Establishing the European Atomic Energy Community*, 25 March 1957, 298 U.N.T.S. 167, s. 184, 5 Eur. Y.B. 454.

<sup>45</sup> And on Common Foreign and Security Policy (CFSP) issues.

<sup>46</sup> *TEU*, *supra* note 20, s. 47.

<sup>47</sup> It also abolishes the European Community, which will be replaced – across the board – by the European Union.

<sup>48</sup> U.K., Foreign and Commonwealth Affairs, White Paper, *The Reform Treaty: The British Approach to the European Union Intergovernmental Conference*, House of Lords Sessional Papers, No. 17 (2007), Cm 7174 at 12 [“British Approach to IGC”].



pillars into one single – albeit complex – legal order, thus eliminating the problems of “inter-pillar mixity.”<sup>49</sup> Last but not least, establishing a single legal personality of the Union will strengthen the EU’s negotiating power, making it both a more effective player on the world stage and a more visible partner for third countries.

#### 4. CONCLUSION

In terms of making the Union more efficient, the *Reform Treaty* presents a mixed picture. For instance, the Council’s new voting method does not achieve the set objective, i.e. creating a more transparent and efficient voting system—at least, not for the foreseeable future. The creation of a permanent office of President of European Council and the establishment of a single legal personality of the Union, however, significantly strengthen the EU’s negotiating power, enabling it to become a more visible and effective player on the world stage.

### B. Making the EU more democratic?

#### 1. AN ENHANCED ROLE FOR NATIONAL PARLIAMENTS

Further reforms contained in the *Reform Treaty* aimed to render the EU more *democratic* by strengthening the role of national parliaments.<sup>50</sup> EU institutions used to have no legal obligation to consult national parliaments about EU legislation. Under the new mechanism, however, EU institutions must directly inform national parliaments of proposed legislation<sup>51</sup> and give them eight weeks in which to make a reasoned objection to a draft legislative act on the grounds of a breach of the *principle of subsidiarity*.<sup>52</sup> If at least one third of all national parliaments object,<sup>53</sup> the Commission reviews the draft (“yellow card mechanism”) and, while the document can be maintained, amended or withdrawn, it must give reasons for the ultimate decision.<sup>54</sup>

This early warning mechanism is supplemented by a new procedure, the so-called “orange card.”<sup>55</sup> If a majority of national parliaments objects to a draft law, but

<sup>49</sup> At least to a certain extent. See Giuliano Amato, Hervé Bribosia & Bruno De Witte, eds., *Genèse et destinée de la Constitution européenne: commentaire du Traité établissant une Constitution pour l'Europe à la lumière des travaux préparatoires et perspectives d'avenir* (Bruxelles: Bruylant, 2007) at 1174.

<sup>50</sup> Especially when monitoring compliance with the principle of *subsidiarity*.

<sup>51</sup> See Michael Dougan, “The Treaty of Lisbon 2007: Winning Minds, Not Hearts” (2008) 45:3 *Common Market Law Review* 617 at 647-649.

<sup>52</sup> See the *Protocol on the Application of the Principles of Subsidiarity and Proportionality*, 17 December 2007, [2007] O.J. C 306/150, s. 6 [*Protocol on Subsidiarity & Proportionality*]. See also “British Approach to IGC,” *supra* note 48.

<sup>53</sup> *Protocol No. 30, ibid.*, s. 7(2).

<sup>54</sup> This procedure applies only to *subsidiarity*.

<sup>55</sup> See also Kurpas, *supra* note 17 at 84-85.

the Commission nonetheless decides to sustain it,<sup>56</sup> the final decision on how to proceed would be made by the European Parliament and the Council.<sup>57</sup>

Whether this new mechanism will prove effective is questionable for a number of reasons.<sup>58</sup> First, eight weeks is a very short time for national parliaments “to undertake the intensive research necessary [to provide] them with the arguments required to formulate a convincing, critical, reasoned opinion on a new legislative proposal.”<sup>59</sup> For instance, it is almost impossible to consult external advisors within this short period.

To make matters more complicated, national parliaments not only need to achieve internal cohesion within eight weeks, but must also seek and find consensus with at least eight other national parliaments.<sup>60</sup> With inter-parliamentary cooperation still far from perfect, reaching the required quorum may prove difficult; hence, the practical effectiveness of this new early warning mechanism seems rather doubtful.

Moreover, it should not be forgotten that this new procedure applies to subsidiarity alone; it does not cover proportionality, or any other rights. The scope of this new mechanism is therefore actually rather limited. It is doubtful whether the role of national parliaments has been truly enhanced.

From a procedural point of view, the introduction of an additional control mechanism in the form of the “orange card” is also questionable, given that rejection by one third of national parliaments (“yellow card”) would in any event spell the political death for a draft law. The “orange card” mechanism will likely never be employed.

Perhaps the real significance of the early warning mechanism lies not in the frequency of its use,<sup>61</sup> but in the stimulus it should give to the development of good governance in the EU.<sup>62</sup> For instance, it might lead to “improved and informed parliamentary scrutiny of EU affairs. The true objective, after all, is to improve the quality of public policy stemming from Brussels.”<sup>63</sup> Last but not least, this new mechanism should also have the positive side effect of improving inter-parliamentary cooperation.

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<sup>56</sup> See *Protocol on Subsidiarity & Proportionality*, *supra* note 52, s. 7(3).

<sup>57</sup> This reinforced control mechanism (“orange card”) is the result of compromise between those who would have preferred to only keep the “yellow card” mechanism and those who advocated the introduction of a “red card,” i.e. giving national parliaments the right to veto any European Union legislation.

<sup>58</sup> See also Kurpas, *supra* note 17 at 85-88.

<sup>59</sup> Andrew Duff, *The Struggle for Europe's Constitution* (London: Federal Trust, 2005) at 109.

<sup>60</sup> *Ibid.*

<sup>61</sup> Or its practicability, *ibid.* at 112.

<sup>62</sup> *Ibid.*

<sup>63</sup> *Ibid.*

## 2. INCREASED POWERS FOR THE EUROPEAN PARLIAMENT

Another key element of the *Reform Treaty* designed to make the Union more democratic is the stronger position accorded to the European Parliament.<sup>64</sup> For instance, it now has the right to elect the President of the Commission,<sup>65</sup> as well as a crucial role in the new budgetary procedure: it decides with the Council on all expenditures. Most importantly, however, its legislative role<sup>66</sup> is significantly strengthened, as the co-decision procedure is now the ordinary legislative procedure.<sup>67</sup>

## 3. THE RIGHT TO WITHDRAW FROM THE EU

For the first time in its history, EU law provides for an express, unilateral right to withdraw from the Union. EU membership is thus no longer a “marriage for life,” but rather a so-called “*Lebensabschnittspartnerschaft*.”<sup>68</sup> This new right to withdraw strengthens the EU’s *democratic* credentials because no State will be forced to remain a Member of the EU if its population decides otherwise.

The right to withdraw is codified in Article 50 of the revised *TEU*.<sup>69</sup> According to the first paragraph of this Article, any Member State may decide to withdraw from the Union in accordance with its *own constitutional provisions*. EU law itself does not impose any specific substantive conditions on a State’s right to withdraw.<sup>70</sup> The underlying rationale of this rule is to reassure potential Members that they will remain the “masters of the treaties.”<sup>71</sup>

<sup>64</sup> For a good overview, see Griller & Ziller, *supra* note 39 at 109-135.

<sup>65</sup> *TEU*, *supra* note 20, s. 14(1).

<sup>66</sup> See *ibid.*

<sup>67</sup> More generally on institutional innovations introduced by the *Reform Treaty*, see also Griller & Ziller, *supra* note 39 at 57-79.

<sup>68</sup> “A partnership for a certain phase in one’s life” [translated from German by the author].

<sup>69</sup> Article 50 *TEU* now reads as follows: “ (1). Any Member State may decide to withdraw from the European Union in accordance with its own constitutional provisions. (2). A Member State which decides to withdraw shall notify the European Council of its intentions; the European Council shall examine that notification. In light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State setting out the arrangements of withdrawal taking account of the framework of its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council of Ministers, acting by a qualified majority, after obtaining the consent of the European Parliament. (3). The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement, or failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, decides to extend this period. (4). For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the European Council or the Council discussions or decisions concerning it. A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union. (5). If a State which has withdrawn from the Union asks to re-join, its request shall be subject to the procedure referred to in Article 49”.

<sup>70</sup> See EU, Conference of the Representatives of the Governments of the Member States, Intergovernmental Conference Secretariat, *Editorial and Legal Comments on the Draft Treaty Establishing A Constitution for Europe—Basic Document* (2003) Document CIG 4/2003 at 126.

<sup>71</sup> See e.g. Christoph Vedder & Wolff Heintschel von Heinegg, *Europäischer Verfassungsvertrag: Handkommentar* (Baden-Baden: Nomos Verlag, 2007) at 256.

A Member State that decides to withdraw must first formally notify the European Council of its intentions.<sup>72</sup> On the basis of the guidelines provided by the European Council, the Union will then negotiate an agreement, specifying the *details* of withdrawal and setting out the *contours* of the future relationship between the Union and the withdrawing State. The agreement thus only comprises the details of the withdrawal, whereas the future relationship between the Union and the withdrawing State is only cursorily addressed in the agreement. Practically speaking, this will necessitate the conclusion of a further agreement at a later stage which also regulates in detail the future relationship between the two parties.

The agreement will be concluded on behalf of the Union by the Council of Ministers, acting by a qualified majority, after obtaining the consent of the European Parliament. Interestingly, the withdrawal agreement is not designed as an “*actus contrarius*”<sup>73</sup> to the accession agreement. As such, it would have to be concluded by the Member States according to Article 49 of the *TEU*. Parties to the withdrawal agreement are, however, the withdrawing state and the Union itself according to Article 50(2). This makes sense insofar as the withdrawal agreement only concerns the relationship between the Union and the withdrawing State.<sup>74</sup>

According to Article 50(3), EU Law shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification of the EU Council. A close analysis of Article 50(3) thus reveals that the withdrawal agreement referred to above is *not* an essential condition for withdrawal from the EU. Even if the EU and the withdrawing Member State fail to reach an agreement, withdrawal nevertheless becomes effective two years after notification. In short, Article 50 represents a compromise solution: although Member States have a “*unilateral* right to withdraw, [they do] not have an *immediate* right [to do so]. A Member State that wishes to withdraw must spend two years attempting to negotiate the terms of that withdrawal.”<sup>75</sup> Only after this period has expired will the provisions of the Treaties cease to apply to the withdrawing State.<sup>76</sup>

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<sup>72</sup> See *Consolidated TEU and TFEU*, *supra* note 20, s. 50 (2).

<sup>73</sup> “Contrary act.”

<sup>74</sup> See e.g. *supra* note 71 at 256-257.

<sup>75</sup> Raymond Friel, “Providing a Constitutional Framework for Withdrawal from the EU: Article 59 of the draft European Constitution” (2004) 53 *I.C.L.Q.* 407 at 425 [Friel].

<sup>76</sup> *Ibid.* at 425.

Article 50 also suffers from a number of deficiencies.<sup>77</sup> The procedural provisions in particular are incomplete and unclear. For instance, they do not define the new status of the withdrawing Member State during the negotiation period,<sup>78</sup> nor do they address the question of whether the withdrawal notification itself can be withdrawn during the two year period. “During the difficult period that would surround any putative withdrawal, one would expect a rule that would provide clear and unambiguous answers.”<sup>79</sup> Regrettably, this is not the case. Article 50 is conspicuously deficient in this regard.

Moreover, Article 50 also tends to favour larger States in a number of ways. For example, the mere threat of withdrawal carries more weight coming from a large State than from a smaller one.<sup>80</sup> No one would seriously doubt that a French threat to withdraw would cause more turmoil than a similar threat by Malta. The larger States might thus be tempted to use the threat to withdraw as a bargaining tactic to gain concessions.

In short, an *unfettered* right to withdrawal – as envisaged by Article 50 – might strengthen the EU’s democratic credentials but is also open to abuse, in particular by large and economically powerful states.

#### 4. THE CITIZENS’ INITIATIVE

In order to further strengthen the democratic element, EU citizens will be given the right to directly influence EU politics by bringing a citizens’ initiative, signed by at least one million citizens who are nationals of a significant number of Member States.<sup>81</sup> “Through such an initiative, they will be able to invite the Commission, within the framework of its powers, to submit appropriate proposals on matters for which they consider that a legal act of the EU is required.”<sup>82</sup> While the Commission will be under no legal obligation to follow up on any such initiative, the

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<sup>77</sup> Some even claim that Article 50 would render the European Court of Justice (ECJ) the final arbiter over national constitutional law. Their argumentation is as follows: according to this Article, a State’s right to withdraw is subject to the requirement that it be in accordance with its own constitutional provisions. Since Article 50 would be justiciable by the ECJ, this insertion – it is claimed – has catapulted that court into the role of final arbiter of a significant issue of national constitutional law—something not previously attempted within Treaty provisions. Hence, if a dispute arises regarding the validity of the national decision to withdraw, the question as to whether or not that decision was constitutionally made would fall ultimately to the ECJ, see e.g. Friel, *supra* note 75 at 425. This criticism is unconvincing. There is no risk of the ECJ becoming a final arbiter over national constitutional law. Article 50 only requires the Court to verify whether the appropriate national institution has acted, i.e. made the decision to withdraw. Any further substantive legal examination would not be undertaken by the ECJ, as it would be exclusively a matter of national constitutional law, see e.g. Christian Calliess & Matthias Ruffert, eds., *Verfassung der Europäischen Union* (Munich: Beck, 2006) at 637.

<sup>78</sup> Nor do they define the status of its representatives in all European Union institutions during the negotiation period.

<sup>79</sup> Friel, *supra* note 75 at 426.

<sup>80</sup> *Ibid.* at 427.

<sup>81</sup> See *TEU*, *supra* note 20, s. 11.

<sup>82</sup> Piris, *supra* note 26 at 119; see also *ibid.*

political weight of it will, in practice, force the Commission to seriously consider them.<sup>83</sup> This new provision will thus not only play a symbolic role; also it is likely to have a real practical impact.

## 5. REMOVING THE SYMBOLS

Democracy crucially depends on the active participation of the people. Hence, the introduction of the citizens' initiative is surely a step in the right direction. Unfortunately, however, the *metamorphosis* from the *Draft Constitution* to the *Reform Treaty* has also produced changes that might alienate EU citizens. For instance, the *Reform Treaty* drops all references to symbols of the EU such as the flag, the motto or the anthem.<sup>84</sup> *Prima facie*, deleting all references to EU symbols may seem a marginal issue. One might be tempted to affirm that if it is only the symbols that are dropped and not the "core substance," the omission will not matter much anyway. Yet, the importance of symbols should not be underestimated. A transatlantic perspective might be instructive in this regard: imagine the Fourth of July celebrations in the United States without men and women waving flags, or singing the American national anthem. By dropping all references to the symbols, the *Reform Treaty* fails to create the essential emotional link that would bridge the various nations and gradually foster a European identity.<sup>85</sup> In short, marginal though it may appear, their absence will significantly delay the creation of a European identity.

## 6. CONCLUSION

The EU has long been criticized for its democratic deficit. As discussed here, the *Reform Treaty* significantly minimizes this deficit by strengthening the role played by the European Parliament, national parliaments (though more needs to be done in this respect) and EU citizens.

### C. Making the EU more transparent?

As outlined in the *Laeken Declaration*, the European project derives its legitimacy not only from efficient democratic institutions, but also from *transparent* ones. The *Reform Treaty* contributes to the achievement of this objective in various ways.

For instance, the transparency of the EU legislative process is increased by opening to the public all Council meetings, during which it deliberates and votes on draft legislative acts. Moreover, the *Reform Treaty* also clarifies the distribution of competences between the Member States and the Union, thereby enhancing the

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<sup>83</sup> Piris, *ibid.*

<sup>84</sup> These will, of course, continue to exist, but without a legal basis in European Union primary law.

<sup>85</sup> See e.g. Albrecht Weber, "Vom Verfassungsvertrag zum Vertrag von Lissabon" (2008) 19 *Europäische Zeitschrift für Wirtschaftsrecht* 7 at 14.

transparency of the decision making process. Last but not least, the *Reform Treaty* formally endows the EU with a single legal personality. This will make the Union a more transparent, visible and effective player on the world stage.<sup>86</sup>

It has also been argued that the *European Charter of Fundamental Rights* – which will become binding under the *Lisbon Treaty* – would enhance both the transparency and clarity of fundamental rights protection in the EU.

So far, the protection of fundamental rights in the EU was based on opaque “unwritten rights,” whose content the court derived (a) from the constitutional traditions common to the Member States and (b) from the *European Convention for the Protection of Human Rights (ECHR)*.<sup>87</sup> A single written document in which all fundamental rights protected in the EU are transparently codified has so far been missing. Many important questions were thus left unanswered: for instance, which rights exactly are protected and what is their precise scope?<sup>88</sup>

The *European Charter of Fundamental Rights* – it is claimed – would put an end to this unsatisfactory (and obscure) status quo. It would list all fundamental rights in a single document and would give them sharper contours, thus making their substance clearer.<sup>89</sup>

On closer examination, however, this turns out to be wishful thinking. The *Charter* is not an autonomous, self-contained document.<sup>90</sup> It continues to interact with other human rights documents, such as the *ECHR* and national constitutions.<sup>91</sup> Article 6(3) of the revised *TEU* is quite straightforward in this regard: “[f]undamental rights, as guaranteed by the *European Convention for the Protection of Human Rights and Fundamental Freedoms* and as they result from the constitutional traditions common to the Member States, shall [continue to] constitute general principles of the Union’s law.”<sup>92</sup> These “general principles” derived from traditional sources will thus continue to apply alongside the new *Charter*. Together these various sources form “a patchwork, the work of an amateur bricoleur, the by-product of Ikea-like constitutional design: [...] cheap and ephemeral, full of redundancies and of cross references to other legal texts.”<sup>93</sup>

In short, instead of clarifying things, the *Charter* would thus “add another layer of complexity to the current situation”<sup>94</sup>; so much for transparency.

<sup>86</sup> *Reform Treaty*, *supra* note 6, s. 2 (2)(c).

<sup>87</sup> *Pre-Lisbon TEU*, *supra* note 9, s. 6 (2).

<sup>88</sup> Julio Baquero Cruz, “What’s Left of the Charter?: Reflections on Law and Political Mythology” (2008) 15:1 M.J.E.C.L. 65 at 66 (Jurisquare) [Cruz].

<sup>89</sup> *Ibid.*

<sup>90</sup> *Ibid.*

<sup>91</sup> *Ibid.* at 67.

<sup>92</sup> *TEU*, *supra* note 20, s. 6 (3).

<sup>93</sup> Cruz, *supra* note 88 at 67.

<sup>94</sup> *Ibid.* Needless to say, the interested citizen will not find the text of the *Charter* in the main Treaties. At the insistence of the United Kingdom and Poland, it will only be published as an annex to these instruments. Article 6(1) of the revised *TEU* specifically provides: “the Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal

The problem just described is symptomatic of the general malaise which afflicts the “Portuguese patient.”<sup>95</sup> While the *Draft Constitution* would have consolidated the existing European Union and European Community Treaties into one document, neatly divided into four parts, the *Reform Treaty* is – in terms of accessibility – a nightmare. At its heart lies a highly complex web of compromises which gives even legal experts sleepless nights.<sup>96</sup> This complexity, combined with an element of opacity, is no coincidence. Having failed to convince EU citizens with grand phrasing and unusual openness during the campaign for the *Constitution*,<sup>97</sup> EU politicians reverted to their traditional strategy, based on the principle of “form follows function”: they simply crammed an extensive list of innovations into an illegible text.<sup>98</sup>

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value as the Treaties. The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions”.

<sup>95</sup> I.e. the “Lisbon Treaty”.

<sup>96</sup> “Tailoring Compromise,” *supra* note 2.

<sup>97</sup> “Give Europe A Say: Sneaking a Constitution Through on the Sly is a Bad Idea for all Europeans” *The Economist* (25 October 2007), online: Economist.com <<http://www.economist.com>> [“Give Europe A Say”].

<sup>98</sup> *Ibid.* This text would then – as was claimed by Europe’s leaders – be suitable for rapid approval by national parliaments without the need for potentially disastrous referenda. This strategy eventually proved successful, as Ireland – the only State compelled by its constitution to hold a referendum – also voted for the Treaty (albeit only in a second referendum). It must be said, however, that this strategy was risky. After the first referendum (held on June 12, 2008), Ireland abruptly ended the European Union’s hopes for a swift ratification process: seemingly irritated by the highly technical and complex text, 53 % of Irish voters decided to play safe by voting “No” (for a detailed analysis of the Irish referendum, see John O’ Brennan, “Ireland says No (again): the 12 June 2008 Referendum on the Lisbon Treaty” (2009) 62 *Parliamentary Affairs* 258). The Irish “No” was not, as some feared, the nail in the coffin of the *Reform Treaty*. Only a year later, on October 2, 2009 the Irish were again called to the ballot box to decide its fate and, as they did in 2002 (when they voted for a second time on the *Treaty of Nice*), they reversed their decision, thus paving the way for further integration. What had happened in the meantime? Or, to put it differently: how could the Irish be persuaded to change their mind in such a short time span? Following the initial shock of the Irish rejection, EU leaders continued the ratification process and decided to hold a second referendum. Once all the other 26 Member States had ratified the Treaty – so the argument went – the external pressure on Ireland to ratify as well would increase significantly. The country would otherwise come to be seen as permanently obstructive, preventing not only institutional reform but also the accession of new Member States, such as Croatia. Moreover, as an incentive to vote for the *Reform Treaty* certain legally-binding guarantees were conceded in areas of concern to the Irish electorate, such as neutrality, taxation and family law. External circumstances, in particular the financial crisis, also created a favorable environment for the “yes” campaign. Given these circumstances, it is hardly surprising that 67 % of the electorate eventually voted for the *Reform Treaty* on October 2, 2009. See generally Desmond Dinan, “Institutions and Governance: Saving the Lisbon Treaty – An Irish Solution to a European Problem” (2009) 47 *Journal of Common Market Studies* 113; John O’ Brennan, “Ireland and the Lisbon Treaty: Quo vadis?” (2008) 176 *Center for European Policy Studies Policy Brief* 1 at 8; John O’ Brennan, “Ireland’s Plan to Resurrect the Lisbon Treaty to be Unveiled at the Brussels Summit” (4 December 2008) *Center for European Policy Studies Commentary* 1 at 2-3.



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The *Reform Treaty* is not the *monstrum horribile* that many eurosceptics described. On the contrary, it brought about many useful improvements. For instance, it strengthened the *democratic* element in the EU by enhancing the role of national parliaments and of the European Parliament. It scrapped a pre-existing system that saw the EU States taking six-month turns as chairmen of the European Council,<sup>99</sup> thereby providing a degree of continuity and efficiency to the work of the Union. Last but not least, the *Reform Treaty* also formally gives the EU a single legal personality. This will strengthen the EU's negotiating power, making it both a more effective player on the world stage and a more visible partner for third countries.

Not all amendments represent a significant advance: the new voting system in the Council will not be more transparent or more efficient than its predecessor – at least not for the foreseeable future. In order to placate Poland's fears that it is the main loser in the new voting procedure, it has been agreed to keep the current system in force until March 2014, with a subsequent three year transition period.<sup>100</sup> Hence an apparently urgent crisis has been resolved by putting it off for almost a decade. The EU will regret this lengthy delay and obfuscation in the introduction of the Council's new voting system. While the *Reform Treaty* will generally render the Union more efficient and democratic, it largely failed to achieve another main objective: to improve its level of transparency. In contrast to the *Draft Constitution*, the *Reform Treaty* is less structured and more opaque, overall not a particularly "user-friendly" document.

Despite these evident weaknesses, the *Reform Treaty* is undoubtedly a step in the right direction. It is, however, not a legal *revolution*, but rather a mere *evolution*. It thus marks a return to the successful integration method of small, but solid steps advocated by the Community's founding fathers, in particular Jean Monnet, who famously remarked: "*L'Europe se fait par des petits pas.*"<sup>101</sup>

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<sup>99</sup> "Give Europe A Say," *supra* note 97.

<sup>100</sup> See *TEU*, *supra* note 20, s.16(5); *Protocol No 36*, *supra* note 23, s.3. See also "Tailoring Compromise," *supra* note 2.

<sup>101</sup> Jean Monnet in U.K., H.L., *Parliamentary Debates*, series 6, vol. 492 col. 1120 (3 February 1988), online: Hansard <<http://hansard.millbanksystems.com/sittings/1988/feb/03>>.