## DISCUSSION

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# THE LISBON TREATY – FROM A LEGAL AND THEREFORE POLITICALLY INCORRECT PERSPECTIVE

The Treaty establishing a Constitution for Europe (hereinafter „the Constitutional Treaty“) was meant to be a single (although voluminous) consolidated document that would lay down decision-making mechanisms for the European Union of the 21st century, enable it to speak with one voice to the rest of the world, bring it closer to the ordinary citizen, but most importantly create an institutional environment that would allow it to tackle the real challenges – global water shortage, energy dependence, immigration and climate change.

After the failure of this project, it was replaced by the Lisbon Treaty, which came into being after many an embroilment. We shall not discuss the different issues it raises on the political level; the future will reveal. Here refereg to the importance of the President of the European Council as opposed to the real power of the German Chancellor or the French President. The four-headed hydra responsible for external relations, who should speak with one single voice[2]), also gives rise to many concerns. Yet another question is whether the whole idea of setting up a European diplomacy is not misconceived, given the failure of the project to create a mere common consular service. Or, if the future

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[2]) One of the objectives of the Lisbon Treaty (and previously of the Constitutional Treaty) is to enable the EU to „speak with one voice“ externally. It came as a surprise for many that in spite of that, the powers in the area of external relations continue to be divided between the four top representatives of the EU, most of them coming from different institutions.
- the President of the Council *"shall, at his level and in this capacity, ensure the external representation of the Union on issues concerning its common foreign and security policy, without prejudice to the powers of the High Representative*“ (Article 15 TEU);
- the High Representative of the Union for Foreign Affairs and Security Policy *"shall conduct the Union's common foreign and security policy"* (Article 18(2) TEU);
- the President of the Commission *„shall lay down guidelines within which the Commission is to work"* ( Article 17(6) TEU), which means that on the one hand the High Representative is responsible for the tasks in the area of external relations (Article 18(4) TEU), on the other hand, as vice-president of the Commission, he/she is subject to the President and his/her ”guidelines“ (including those concerning external relations) and to the Commissioners, especially the one responsible for enlargement and for the European Neighbourhood Policy, who is sometimes called „the little foreign secretary of the EU“, but also to the Commissioner responsible for trade, development cooperation etc…

solidarity within the EU is proportionate to the number of references to it in the Lisbon Treaty, we shall soon enjoy an earthly paradise.

Let us examine the Lisbon Treaty from a technical-legal standpoint, systematically and without any concerns about political correctness.

It is beyond any doubt that the main objective, i.e. to lay down decision-making mechanisms for the EU in the 21st century and thus enable it to address jointly the above mentioned challenges existing in the real world, has been attained almost to the extent envisaged in the Constitutional Treaty. I admit in advance that all the issues discussed hereinafter are an acceptable price for the progress the Lisbon Treaty brings about.

However, what about the getting closer to the citizen?[3]) I have in front of me a consolidated version of the fundamental European legislative documents – same form, same publisher. The pre-Lisbon version had 240 pages, the Lisbon one contains 304 pages. It leaves me wondering how come. One cannot blame the EU Charter of Fundamental Rights – it has not given us so many new rights; in this version it has no more than 5 pages.

The European (previously Economic) Community and the European Union have merged, but the fact that the quite unimportant European Atomic Energy Community, which shares the main institutions with the EU, was left aside in this unification is discreetly ignored. There has been no clean sweep in the European law after all.

With a slight overstatement, I reckon that the way in which the innovations contained in the original Constitutional Treaty were incorporated in both the Treaty on European Union (TEU) and the Treaty on the functioning of the European Union (TFEU) is a revenge for the failure to adopt the Constitutional Treaty. Consider the following:

If you wish to find the general decision-making principle ("save where otherwise provided") stipulating that the European Parliament acts by simple majority, you need to sink into the TFEU (Article 231 TFEU). To find the analogous rule according to which the Council shall decide by qualified majority, grab the TEU (Article 16(3) TEU). Why?

This is not an isolated example: we learn about the legal personality of the EU in the TEU (Article 47); however the extent to which this personality is exercised in the Member States is laid down in the TFEU (Article 335). Following the same logic, the basis of the territorial scope of application is provided for in Article 52 of the TEU, the rest in Article 355 of the TFEU. The fundamentals of the European judicial system are set out in the TEU (Article 19), the rest in the TFEU. The same goes for the definition of qualified majority in the

[3]) Lawyers and especially law teachers are apparently not considered the type of citizens European law should get closer to. The author of this article has been dealing with European law since 1991. This is the third renumbering of the provisions in the founding treaties. However, one cannot forget the former versions, since they continue to be used in the applicable case-law of the European Court of Justice.

Council: if you want to know what it means when the Council acts on the initiative of the Commission then dig into the TEU (Article 16(4) TEU), while if the Council acts on the initiative of any other entity then you need to refer to the TFEU (Article 238(2) TFEU). A new institution – the European External Action Service – has its legal basis in Article 27(3) of the TEU, but its organizational units – Union delegations – are governed by Article 221 of the TFEU.

The list of overlaps would also be quite long, especially when comparing the TFEU and the Charter of Fundamental Rights of the EU. Have a look at just one example, that of (non) discrimination. Also, for instance the right to good administration is laid down – though in different wording – both in Article 298 of the TFEU and in Article 41 of the Charter! The chaos and duplications concerning the objectives of the EU, failure to make a difference between objectives and principles (a question of paramount importance for a law theoretician) are yet other examples of what happens when a legal document is drafted by diplomats rather than lawyers.

The overall systematic conception of the Treaties also has its shortcomings. Thus, the relation between the Neighbourhood Policy and the CFSP is not always clear, since the Neighbourhood Policy is laid down separately from the CFSP and, what is more, separately from the external action (Article 8(1) TEU).

It seems that the Member States wished to equal the authors of the Lisbon Treaty. Adopting different tactics to show off, they repeated in their declarations what had been agreed upon elsewhere in the binding text. Have a look at Declaration no. 57 (Italy):

*57. Declaration by the Italian Republic on the composition of the European Parliament*

*"Italy notes that, pursuant to Articles 10 and 14 of the Treaty on European Union, the European Parliament is to be composed of representatives of the Union's citizens; this representation is to be degressively proportional.*

*Italy likewise notes that on the basis of Article 9 of the Treaty on European Union and Article 20 of the Treaty on the Functioning of the European Union, every national of a Member State is a citizen of the Union.*

*Italy therefore considers that, without prejudice to the decision on the 2009-2014 legislative period, any decision adopted by the European Council, at the initiative of the European Parliament and with its consent, establishing the composition of the European Parliament, must abide by the principles laid down out in the first subparagraph of Article 14."*

Have you learnt anything new from the above declaration? The author of this article has not. Italy declares that the Treaties need to be respected. What a surprise!

To be impartial I concede that the Czech invention of the so called two-way flexibility (Article 48 TEU*): „The amendments of the Treaties may serve either*

*to increase or* **to reduce** the competences conferred on the Union“ is nothing extraordinary either. The possibility to strengthen or weaken the content of an international treaty is clearly provided for in the Vienna Convention on the Law of Treaties (1969); it is not necessary to repeat the same principle (see Articles 39 to 41 of the VCLT) in every subsequent international treaty (e.g. the Lisbon Treaty).

Ican offer you an explanation of this legal chaos in the Lisbon Treaty. Jean-Claude Piris, chief of the Council's legal service, describes that involvement of lawyers in drafting this document was vubelievebly law.[4])

I am afraid that this article might not be a major breakthrough in jurisprudence. I have written it to offer an objective view on the Lisbon Treaty, but also to relieve myself, given that together with many other lawyers I have been condemned – for an indefinite period of time – to the corporal punishment of leafing back and forth through the primary EU law documents.

[4]) cf. PIRIS J. – C., *The Lisbon Treaty – A Legal and Political Analysis,* Cambridge University Press.