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The Lisbon Compromise: A Synthesis Between Community Method and Union Acquis

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Abstract

Lisbon is a return to the community method: the word "Constitution" has disappeared along with the goal of drafting a self-sufficient document. A new treaty is proposed for ratification by Member States modifying on one side the Treaty on European Union ("TEU") and on the other side the Treaty establishing the European Community ("EC Treaty"); this last part of the modifying treaty is designated as the Treaty on the Functioning of the European Union ("TFEU"). Nothing has improved as regards clarity and simplification: the amendments cover 152 pages and prove very difficult to read in the absence of consolidation, not to mention the seventy-six pages of protocols and twenty-five pages of declarations. But, on the other hand, the method of amending existing treaties is well known, as it is no different from the Single European Act ("SEA"), Maastricht, Amsterdam, and Nice treaties. One may also observe that the "constitutional period" has not been entirely deprived of positive effects; it has had a certain pedagogical role. Some modifications, namely institutional, have become more easily acceptable because they have been explained so many times: for instance, the extension of the co-decision procedure and the institution of a more permanent presidency of the European Council.

THE LISBON COMPROMISE: A SYNTHESIS BETWEEN COMMUNITY METHOD AND UNION ACQUIS

*Jacqueline Dutheil de la Rochère**

INTRODUCTION

After the double “no” of the people of the Netherlands and France, the institutional reform of the Union had come to a deadlock. Two thirds of the Member States had ratified the Constitutional Treaty; one third were definitely hostile for various reasons. There was no way out but a compromise; the result is one of mutual concessions and difficult to analyse in terms of concepts.

Lisbon is a return to the community method: the word “Constitution” has disappeared along with the goal of drafting a self-sufficient document. A new treaty is proposed for ratification by Member States modifying on one side the Treaty on European Union (“TEU”) and on the other side the Treaty establishing the European Community (“EC Treaty”); this last part of the modifying treaty is designated as the Treaty on the Functioning of the European Union (“TFEU”).¹ Nothing has improved as regards clarity and simplification: the amendments cover 152 pages and prove very difficult to read in the absence of consolidation, not to mention the seventy-six pages of protocols and twenty-five pages of declarations. But, on the other hand, the method of amending existing treaties is well known, as it is no different from the Single European Act (“SEA”), Maastricht, Amsterdam, and Nice treaties.

One may also observe that the “constitutional period” has not been entirely deprived of positive effects; it has had a certain pedagogical role. Some modifications, namely institutional, have become more easily acceptable because they have been explained so many times: for instance, the extension of the co-decision procedure and the institution of a more permanent presidency of the European Council.²

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1. Draft Treaty of Lisbon, O.J. C 306/01 (2007), *opened for signature* Dec. 13, 2007 (not yet ratified) [hereinafter Treaty of Lisbon].

2. *See id.* arts. 1, 2, ¶¶ 5, 237-40, at 17, 115-17.

On one side, the Lisbon compromise is different from the Constitutional Treaty: it proposes a new balance of powers and interests. On the other side, Lisbon confirms a number of characteristics of the Constitutional Treaty: it promotes a stabilization of Union law succeeding to Community law.

I. *THE LISBON COMPROMISE: A NEW BALANCE OF POWERS AND INTERESTS IN COMPARISON WITH THE CONSTITUTIONAL TREATY*

It seems possible to characterise the Lisbon compromise as establishing a new balance of powers between the Union and its Member States and introducing new elements of possible diversification in an ever wider Union.

A. *New Balance Between Union and Member States*

Step by step, from the SEA to Amsterdam—the Treaty of Nice added nothing in that connection—the Union covers more substance and has been felt as threatening more and more the national identity of Member States. The new compromise is the expression of a firm reaction on the ground of powers and institutions

1. The Theory of Assigned Powers Taken Seriously

Some modifications of the Constitutional Treaty have as their main object to assuage critics and respond to reluctance developed in the “no” countries. Free competition is a good example: it was mentioned among the objectives of the Union and disappears as such in the Treaty of Lisbon, but a reference to free competition is maintained in the subsequent paragraph,³ together with the special provisions regulating competition within the internal market, which are maintained unchanged.⁴ This is to ease the reluctance of the part of the French electorate obsessed by the threat of excessive European liberalization.⁵ On balance, the Protocol on the internal market and competition annexed to the new treaty provides that if necessary the Union may adopt measures in the area of competition on the basis of

3. See *id.* art. 1, ¶ 4, at 11.

4. See *id.* art. 2, ¶¶ 76-78, at 69-70.

5. See *Liberalisation des postes: pays du nord et du sud de l'Europe s'affrontent*, LE MONDE (Fr.), Dec. 12 2006, at 14.

Article 308 TFEU.⁶ The difference with the Constitutional Treaty resides in the fact that free competition is presented as an objective less general than, for instance, sustainable development.

The same care for special fears coming from France or the Netherlands is visible in the new provisions of the Protocol on services of general interest which leaves ample freedom of organization to national authorities, either central or regional/local.⁷ Similarly, a provision on the admission of new members according to the criteria approved by the European Council—the so-called Copenhagen criteria of June 1993—was added, the idea being to ensure better control of future enlargements of a Union which will have amongst its objectives to “contribute to the protection of its citizens.”⁸

But what seem to be the more significant provisions of a new global approach are the general provisions on conferred powers. In comparison to the Constitutional Treaty, the Treaty of Lisbon underlines, either by a new drafting or through declarations, that any transfer of power to the Union must be interpreted restrictively and that a power, once devolved to the Union, may be handed back to Member States.⁹ A negative formulation is retained for Article 3b of the TEU: the Union has *only* the powers assigned to it.¹⁰ Equally, the Protocol on the exercise of shared competences indicates that when the Union adopts a provision in a defined area, the Member States retain their right to legislate in the same area outside the ambit of the European Union (“EU”) provision; in other words the doctrine of pre-emption must be interpreted restrictively.¹¹ In the same line, the Declaration on Article 308 of the Treaty on the Functioning of the European Union indicates that Article 308 cannot be used to enlarge the domain of competences of the Union with the consequence that the treaties would be modified without using the special procedure of amendment provided to this

6. Treaty of Lisbon, *supra* note 1, Protocol on the Internal Market and Competition, at 156.

7. *See id.* Protocol on Services of General Interest art. 1, at 158.

8. *See id.* art. 1, ¶¶ 4, 57, at 11, 40.

9. *See id.* art. 1, ¶¶ 5-6, at 12-13.

10. *See id.* art. 1, ¶ 6(2), at 12.

11. *See id.* Protocol on the Exercise of Shared Competence, at 158.

end.¹²

A number of new provisions insist on the necessity of a restrictive interpretation in connection with external competences of the Union. Article 308 is modified to specify that it cannot be used in order to adopt provisions related to the objectives of the common foreign and security policy; this is repeated in the Declaration on Article 308 of the Treaty on the Functioning of the European Union.¹³ The Declaration concerning the legal personality of the EU indicates that the fact that the Union has a legal personality does not confer to it any power to legislate further than within the limits of the powers attributed to it,¹⁴ and the Declaration concerning the common foreign and security policy emphasizes that the provisions on common foreign and security policy, including the designation of a High Representative for the Union, do not modify the responsibilities and powers of each Member State as regards the conduct of its foreign policy, nor attribute new powers to the Commission or to the European Parliament.¹⁵

The possibility of handing back powers to the Member States is implied by the new drafting of Article 33 TEU on the revision of treaties which can result in “increasing or reducing” the powers of the Union.¹⁶ The Declaration in relation to the delimitation of competences suggests a way of reducing competences of the Union by abrogation of EU legislation in areas of shared competences.¹⁷

Of similar inspiration appear the new provisions of the Treaty of Lisbon on national security, which remains the exclusive responsibility of each Member State.¹⁸ The general principle that the Union has only the powers assigned to it by the treaties, while all residual powers are left to the Member States, already existed. What changes is the perspective of interpretation.

12. *See id.* Declaration on Article 308 of the Treaty on the Functioning of the European Union, ¶ 42, at 263.

13. *See id.* Declaration on Article 308 of the Treaty on the Functioning of the European Union, ¶ 41, at 262.

14. *See id.* Declaration concerning the legal personality of the European Union, ¶ 24, at 258.

15. *See id.* Declaration concerning the common foreign and security policy, ¶¶ 13-14, at 255.

16. *See id.* art. 2, ¶ 64, at 58 (new Article 61E).

17. *See id.* Declaration in relation to the delimitation of competences, ¶ 18, at 256.

18. *See id.* art. 1, ¶ 5(2), at 12.

The competent authorities and the Court will have to take account of the new constraints and limitations included in the treaties, protocols and declarations when assessing the soundness of a legal basis; one may imagine that the doctrine of implied powers is less likely to prosper than in the past. But the trend had already changed since new areas of competence had been introduced with the revisions of Maastricht and Amsterdam. The Court of Justice has already had occasions to retain a restrictive interpretation of the provisions of the EC Treaty referring to the internal market.¹⁹ More surprising, if brought together with the maintained objective of an “ever closer Union,” is the possibility which is introduced to withdraw certain powers of the Union and hand them back to the Member States. Should we think of a retractable Union? Or is it pure concession to public opinion?

2. The New Role of National Parliaments

This is another aspect of the new balance between Member States and the Union, visible in the Treaty of Lisbon as compared to the Constitutional Treaty. National parliaments have always played a role in the development of the Communities and the Union, either through the procedure of ratification of the various amendments to the treaties or by implementing secondary legislation, namely through transposition of directives; but they were not mentioned specifically in the treaties, being by essence national institutions. Apart from the informal Conference of Community and European Affairs Committees of Parliaments of the European Union (“COSAC”) launched in 1989, which gathered representatives of national parliamentary committees specialized in European questions and of the European Parliament, the national parliaments made a first institutional appearance in the first European Convention in 1999-2000 and, again, in the Convention on the Future of Europe.²⁰ The contribution of national parliaments to the functioning of the Union was the object of a protocol to the Constitutional Treaty, which is maintained as the Protocol on the Role of National Parliaments in the

19. See *Germany v. European Parliament & Council*, Case C-376/98, [2000] E.C.R. I-8419 (concerning the legal basis of a directive on advertisement for tobacco).

20. See WALTER VAN GERVEN, *THE EUROPEAN UNION: A POLITY OF STATES AND PEOPLES* 256 (2005).

European Union to the Treaty of Lisbon.²¹ But what is more unusual is that a new Article 8C is added to the TEU by the Treaty of Lisbon.²² The intention, quite symbolically, has been to gather in one article at the beginning of the treaty, in a title generally devoted to "democratic principles," various provisions scattered in the previous treaties and annexed documents, in order, to: (1) underline the complementary role played by national parliaments, and (2) emphasize the continuum between national institutions and European institutions which formerly had been maintained carefully apart, the European Community ("EC")/EU treaties dealing exclusively with the European level.²³

Article 8C deals successively with the notification to national parliaments of draft European legislation in accordance with the provisions of the Protocol on the Role of National Parliaments and the responsibility of national parliaments in the control of subsidiarity.²⁴ The Treaty of Lisbon introduces a new process of alert, defined at Article 7 of the Protocol on the application of principles of subsidiarity and proportionality.²⁵ If a draft European legislative act is contested by a majority of national parliaments on the basis that it is incompatible with the principle of subsidiarity, the Commission may choose to maintain the proposal, but must justify, in a reasoned opinion, why it considers that the proposal complies with the principle of subsidiarity.²⁶ This reasoned opinion, along with the reasoned opinions of the national parliaments, is submitted to the Union legislator, which is made up of the European Parliament and the Council, which then considers whether the proposal is compatible with the principle of subsidiarity. If the legislator concludes that the proposal is not compatible, the proposal is brushed aside.²⁷

Further, Article 8C deals with other aspects of the role of national parliaments. In the area of freedom, safety and justice,

21. See Treaty of Lisbon, *supra* note 1, Protocol on the Role of National Parliaments in the European Union, at 148.

22. See *id.* art. 1, ¶ 12, at 15-16.

23. See *id.*

24. See *id.*

25. See *id.* Protocol on the Application of Principles of Subsidiarity and Proportionality, at 150-52.

26. See *id.* Protocol on the Application of Principles of Subsidiarity and Proportionality art. 7(3), at 152.

27. See *id.*

the national parliaments are involved in the evaluation of the implementation of common policies, in the political control of Europol, and in the evaluation of the activities of Eurojust.²⁸ The national parliaments take part in the process of revision of the European treaties in the conditions defined by Article 48 of the TEU—they are kept informed and may object.²⁹ They are informed of any application for adhesion of a new Member State.³⁰ Finally, Article 8C refers to the cooperation between national parliaments and the European Parliament as provided for by the Protocol on the role of national parliaments.³¹ There is nothing very new in that cooperation except that such cooperation will prove necessary in order to make the alert system work. What seems significant is that the Treaty of Lisbon insists on the importance of national parliaments in the new institutional balance between the European level and the national level. The European Parliament no longer has the monopoly of the democratic legitimation of European initiatives; national parliaments play a complementary and significant role, closer to the citizens of the Union. Globally, Member States are recognized as constituent elements of the Union; it underlines a characteristic of this organization which has no precedence on the international scene.

B. New Elements of Diversification in an Ever Wider Union

The post-Nice Union has attained a membership of twenty-seven as of January 1, 2007.³² This wide Union, stretching from the Atlantic to the Black Sea, has little in common with the Western community of six of the beginning.³³ Where uniformity and irrevocability were compulsory rules, diversification has become a necessity. The Treaty of Lisbon takes account of this new dimension and introduces in positive law the possibility for one Member State to leave the Union. The new Article 49A of the TEU imposes a delay of two years before withdrawal becomes effective and provides that the State concerned negotiate with

28. *See id.* art. 1, ¶ 12, at 15.

29. *See id.*

30. *See id.* art. 1, ¶ 12, at 16.

31. *See id.*

32. *See* Europa, European Countries, http://europa.eu/abc/european_countries/index_en.htm (last visited Mar. 10, 2008).

33. *See generally* VAN GERVEN, *supra* note 20.

the Union the framework of their subsequent relationship.³⁴ These provisions are realistic considering the size of the Union and the variety of situations which may develop in the future.

Inside the Union, the possibilities of diversification initiated with the Amsterdam Treaty and confirmed by the Constitutional Treaty are brought a step further with the Treaty of Lisbon.

1. Enhanced Cooperations

A new Article 10 of the TEU, which reproduces provisions of the Constitutional Treaty, brings together various pieces which were scattered in the previous treaties.³⁵ Whereas the Constitutional Treaty required that at least one third of the Member States enter an enhanced cooperation, the Treaty of Lisbon requires only nine Member States,³⁶ a threshold which might prove to be easier to reach as the number of Member States increases. Some other new elements are introduced by the Treaty of Lisbon. The representatives of the participating Member States in the Council may, unanimously, decide that in matters where the unanimity rules apply, they will adopt the qualified majority rule.³⁷ In the area of defense policy, a special type of cooperation is introduced, called the "permanent structured cooperation," which is authorized by the Council voting at a qualified majority; the special conditions of this cooperation are defined in the Protocol on permanent structured cooperation established by Article 28A of the Treaty on European Union.³⁸

Further, and perhaps more important, the use of enhanced cooperation is made easier in the area of freedom, security and justice through a mechanism of emergency brake. Concerning either the adoption of directives of harmonization of criminal law or the establishment of the European public prosecutor, in case of persistent disagreement making impossible a unanimous vote, the question may be submitted directly to the European

34. Treaty of Lisbon, *supra* note 1, art. 1, ¶ 58, at 40-41.

35. *See id.* art. 1, ¶ 22, at 22-23.

36. *See id.* art. 1, ¶ 22(2), at 22-23. *But cf.* Consolidated Version of the Treaty on European Union, art. 2, 3(g) O.J. C 321 E1, at E31 (2006).

37. *See* Treaty of Lisbon, *supra* note 1, art. 2, ¶ 278, at 130 (new Article 280H).

38. *See id.* art. 1, ¶¶ 49-53 at 35, 37-38; *see also id.* Protocol on Permanent Structured Cooperation Established by Article 28A of the Treaty on European Union, O.J. C 306/1, at 153-55 (2007).

Council.³⁹ After a certain lapse of time, if nine Member States so wish, they may establish an enhanced cooperation without having to obtain the authorization to proceed which is normally required under Article 10 of the TEU and Article 280D of the TFEU.⁴⁰

2. Multiplication of Derogatory Situations

Since Maastricht, the derogations are increasingly used either because of the philosophy of certain policies such as the common currency, which generated the Eurogroup, the opening of borders, which engendered Schengen and its avatars, or because of the special requirements or fears of certain Member States which hold themselves unable to endure the common discipline. The Treaty of Lisbon maintains this trend by letting certain newcomers join the list of Members requiring special treatment.

The special position of Denmark as regards security and defence policy on one side, and in the area of freedom, security and justice on the other, is reaffirmed in the Treaty of Lisbon.⁴¹ Conversely, the position of the United Kingdom and Ireland on the area of freedom, security and justice has noticeably changed in the Treaty of Lisbon. These two countries have the option to take part, on a case-by-case basis, in measures adopted in the area of border checks, asylum and immigration and judicial cooperation in civil matters. The Constitutional Treaty extended this “opt out” option to certain aspects of administrative cooperation and police cooperation. The Treaty of Lisbon extends it to judicial cooperation in criminal matters and to the Schengen *acquis*.⁴² Under the Treaty of Lisbon, judicial cooperation in criminal matters and police cooperation—the previous so-called third pillar—enter the common EU regime, which implies that the jurisdiction of the Court is without limitation. Therefore, the main difficulty has been to find a solution for situations where the United Kingdom or Ireland would decide not to take

39. *See id.* art. 2, ¶ 67, at 63-67.

40. *See id.*

41. *See id.* Protocol on the Position of Denmark, ¶ 21, at 187-91.

42. *See id.* Protocol on the Position of the United Kingdom and Ireland in Respect of the Area of Freedom, Security and Justice, ¶ 20, at 185-86; *id.* Schengen Protocol, ¶ 18(g), at 183-84. Up until now, Ireland and the United Kingdom are entitled to participate in the Schengen *acquis* on the basis of specific arrangements.

part any longer under the new regime in measures they adhered to under the previous regime. In such circumstances, the Council will have to decide at a qualified majority on said "opt out."⁴³ If the Council is of the opinion that the attitude of one of these two countries creates a risk for the efficiency of the contemplated measure, Ireland or the United Kingdom may be entirely excluded from the policy concerned. This complex formula adopted by the Intergovernmental Conference ("IGC") of 2007 is a typical example of the prodigious efforts which have been developed to keep everyone on board. The same could be said of the Protocol on transitional provisions.⁴⁴

The Protocol on the Charter of Fundamental Rights is equally sophisticated and introduces a newcomer, Poland, in the group of partly dissenting countries.⁴⁵ This Protocol tries to limit the application of the Charter by British and Polish courts to the extent that the rights and principles the Charter contains are recognized in the law and practices of the United Kingdom and Poland respectively.⁴⁶ The British government was especially anxious to limit the possible effects of social principles mentioned in Title IV of the Charter in the United Kingdom.⁴⁷ One may doubt the efficiency of this barrier so erected against the rising tide of European fundamental principles. However, the efforts made in the last days of the IGC to accommodate British requests were the price to pay in order to have the compulsory character of the Charter clearly established by the Treaty of Lisbon. As to the attitude of Poland, one cannot avoid being puzzled when reading its declaration "that, having regard to the tradition of social movement of 'Solidarity' . . . [Poland] fully respects social and labour rights, as established by European Union law, and in particular those reaffirmed in Title IV of the Charter of Fundamental Rights of the European Union."⁴⁸

43. *See id.* Schengen Protocol, ¶ 18(g), at 184

44. *See id.* Protocol on Transitional Provisions, at 159-64.

45. *See id.* Protocol on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom, at 156-57.

46. *See id.* Protocol on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom, at 157.

47. *See* Mark Hall, *Mixed Reaction to "Opt-Out" From EU Charter of Fundamental Rights*, EUR. INDUST. REL. OBSERVATORY ONLINE, Aug. 21, 2007, <http://www.eurofound.europa.eu/eiro/2007/07/articles/uk0707049i.htm>.

48. Treaty of Lisbon, *supra* note 1, Declaration by the Republic of Poland Concerning the Protocol on the Application of the Charter of Fundamental Rights of the

This is the new landscape which takes shape through the Lisbon compromise, accommodating a wide variety of experiences and needs in an entity which maintains its ambition to pursue the process of integration initiated by the European Communities. Even if the conditions of interpretation of the new treaty may imply more consideration for certain requirements of the Member States, on the whole continuity should prevail.

II. THE LISBON COMPROMISE CONFIRMS THE CONSTITUTIONAL TREATY: STABILIZATION OF UNION LAW, SUCCEEDING TO EUROPEAN COMMUNITY LAW

The Treaty of Lisbon confirms most of the institutional innovations of the Constitutional Treaty, the only important difference appearing in the transitional provisions on conditions of vote in the Council. Leaving aside that tricky question, we would like to insist on another aspect of the continuity between the Constitutional Treaty and the Treaty of Lisbon: both confirm the existence of Union law in the continuity of Community law.

A. *Unity of Union Law*

Since Maastricht in 1992, the European entity cohabitates two legal systems: one of integration which developed the very special features of Community law through fifty years of case law of the European Court of Justice, and the other of cooperation placed under a limited control of the Court. This cohabitation has not been deprived of difficulties, which the European judge has tried to overcome by extending the reference to principles of interpretation of EC law in the area of EU law.⁴⁹ However, this method has limits due to the necessary respect of the princi-

European Union in Relation to Poland and the United Kingdom, ¶ 62 at 270. Poland has also affixed another declaration stating that every country maintains its right to legislate on family law and public morality. *See id.*, Declaration by the Republic of Poland on the Charter of Fundamental Rights of the European Union, ¶ 61, at 270. Poland's observation—that the Charter does not create new Union competences—is another example of the tendency, expressed in the Lisbon documents, of restrictive interpretations of Union competences to prevail.

49. *See* Maria Pupino, Case C-105/03, [2005] E.C.R. I-5285 (demonstrating the interpretation of a justice and home affairs framework-decision along the line of interpretation currently used for directives).

ple of assigned powers; for instance, in the matter of the prevention of terrorism, the European Court of Justice ("ECJ") has had to acknowledge that the instruments of Community law were not available to implement second and third pillar objectives.⁵⁰ The Treaty of Lisbon, following the Constitutional Treaty, introduces a threefold revolution: end of the pillars structure, legal personality of the Union, and consecration of the legal value of the Charter of Fundamental Rights.⁵¹ These features, which are the basis of the new unity of Union law after twenty five years of cohabitation between Union law and Community law, will retain our attention only briefly, as they are so well known.

The pillars structure introduced by the Maastricht Treaty is abolished; as a consequence, the European Community disappears.⁵² The only surviving organization is the European Union with its institutions, its legislative and budgetary procedure, its common system of judicial control, etc. Most significant is the inclusion under the common law of police cooperation and judicial cooperation in criminal matters, the former third pillar. However, not surprisingly, the questions of foreign security and defence policy remain under a special regime of cooperation.⁵³

The Union now has a legal personality, replacing that of the disappearing Community. Although authors used to believe that the Union already had an implied legal personality due to the fact that it was entitled to conclude external agreements in the domains of common foreign and security policy and justice and home affairs, the express recognition clarifies the legal personality of the Union *vis-à-vis* third countries.⁵⁴ The Union will be entitled to conclude international agreements in the entire area of external competences of the Union as defined by the new

50. See *Parliament v. Council*, Joined Cases C-317 & C-318/04, [2006] E.C.R. I-4721.

51. Treaty of Lisbon, *supra* note 1, art. 2, ¶ 12, at 46-48; *id.* art. 1, ¶ 55, at 38; *id.* art. 1, ¶ 8, at 13.

52. *Id.* art. 2, ¶ 2(a), at 42. *But see id.* art. 4(2), at 134 ("Protocol No. 2 annexed to this Treaty contains the amendments to the Treaty establishing the European Atomic Energy Community.").

53. See, e.g., *id.* art. 1, ¶ 25, at 25; *id.* art. 1, ¶ 49, at 34.

54. See, e.g., Europa.eu, External Relations—Unified External Service of the European Commission, http://ec.europa.eu/external_relations/delegations/intro/role.htm (last visited Feb. 26, 2008) (mentioning the powers of the Delegations of the External Service in conducting negotiations with non-European Union ("EU") Member States).

treaty.⁵⁵ Obviously, this does not solve the various existing problems, such as that of the place of the Union in various international organizations, the number of votes allowed to it when it is a member along with its Member States, and more generally, the question of compatibility between various international agreements to which the EC/EU and/or its Member States are parties. In that connection, it is interesting to observe that the Union should succeed to the European Community for the implementation of the so called “disconnection clauses” quite frequently introduced in multilateral agreements of which EU Member States and the European Community are signatories.⁵⁶

The existence of the Charter is another sign of unity of Union law. It might be recalled here that it is at the occasion of the drafting of the Charter by the first convention in 2000 that the difficulty to refer cumulatively or alternatively to EC law and Union law appeared for the first time with striking clarity. The general provision defining the field of application of the Charter could not avoid a reference to Union law in preference to Community law, which would have been too restrictive.⁵⁷ Under the Constitutional Treaty, the Charter would have become Part II of

55. *But see* Treaty of Lisbon, *supra* note 1, Declaration concerning the legal personality of the European Union, ¶ 24, at 258 (asserting that recognition of the legal personality does not extend further the power of the Union to legislate or to act).

56. A disconnection clause in a multilateral agreement is a clause by means of which the EU Member States “disconnect” themselves, with the agreement of their signatories, from the general regime of the multilateral agreement, to the extent to which the subject matter is covered by the European Community (“EC”)/EU law and only as far as their mutual relations are concerned. *See* Magdalena Lièková, *European Exceptionalism in International Law*, 19 EUR. J. OF INT’L L., issue 3 (forthcoming 2008) (“The content of disconnection clauses varies from one treaty to another, but it can be expressed as follows: ‘Notwithstanding the rules of the present Convention, those Parties which are members of the European Economic Community shall apply in their mutual relations the common rules in force in that Community.’” (quoting the Convention on Mutual Administrative Assistance in Tax Matters art. 27(2), Jan. 25, 1988, *available at* http://www.oecd.org/document/14/0,2340,en_2649_33767_2489998_1_1_1_1,00.html)).

57. *See* Charter of Fundamental Rights of the European Union art. 51(1), O.J. C 303/1, at 13 (2007) [hereinafter Charter] (“The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law.”); *see also* Draft Treaty Establishing a Constitution for Europe, art. II-111, O.J. C 310/1, at 53 (2004) (not ratified) [hereinafter Constitutional Treaty]. In the present situation, the institutions are those of the Union while the principle of subsidiarity is referred to by the EC Treaty. *See* Consolidated Version of the Treaty Establishing the European Community art. 5, O.J. C 321 E/37, at E/46 (2006) [hereinafter EC Treaty].

the founding document. Under the Treaty of Lisbon, there is only a mention to the fact that the Charter has the same value as the treaties.⁵⁸ One may regret that the version of the Charter referred to in the Treaty of Lisbon, as in the Constitutional Treaty, is not that proclaimed at Nice in December 2000; the new version of Final Provisions is more protective of national competences than the previous one. However, the new proclamation which has taken place in Strasbourg on December 12, 2007 has a surprising and welcomed symbolic bearing in this period where European symbolism is banished.⁵⁹ This Charter, despite the restrictions of interpretation as regards the United Kingdom and Poland, has now an indisputable value of primary law.⁶⁰ It is a strong element of unity of Union law around values which, although widely borrowed from the European Convention on Human Rights, are specific to the regional entity concerned, namely as regards social rights. New legal questions will have to be faced: that of the articulation between fundamental rights which appear in the Charter (primary law) and other fundamental rights qualified general principals of union law that the court may apply if needed.⁶¹

B. *Union Law in the Continuity of Community Law*

The notion of *acquis communautaire* was introduced in the Maastricht Treaty in order to designate what is essential in the community system and should survive any transformations implied by the development of the Union.⁶² The disappearance in the Treaty of Lisbon of Article 3 of the TEU, which is replaced by redrafted Articles 4 and 5 of the TEU, raises the question of

58. See Treaty of Lisbon, *supra* note 1, art. 1, ¶ 8, at 13.

59. See, e.g., Europa.eu, The Brussels European Council—21 and 22 June 2007, http://europa.eu/scadplus/constitution/european_council_2007_en.htm, (last visited Feb. 26, 2008) (European Council convening an Intergovernmental Conference (“IGC”) to adopt a new treaty with none of the symbols of the EU).

60. The absence of express recognition of the compulsory character of the Charter under the Nice Treaty had not prevented the Court of First Instance (“CFI”), and then the International Court of Justice (“ICJ”), prompted to do so by its Advocates General, to find in certain provisions of the Charter the basis of justiciable rights. See, e.g., Unibet (London) Ltd. & Unibet (International) Ltd. v. Justitiekanslern, Case C-432/05, [2007] E.C.R. I-2271, ¶ 37 (reaffirming the principle of effective judicial protection in the light of the Charter provisions).

61. Consolidated Version of the Treaty on European Union art. 6(3), O.J. C 321 E/1, at E12 (2006) [hereinafter TEU].

62. *Id.* art. 3.

the survival of the *acquis* in the changing world from Community to Union.⁶³ We would be tempted to argue that although the specific concept of *acquis* is abandoned, some fundamental characteristics of Community law should survive. We will select some of them.

On the question of definition of competences, the Treaty of Lisbon, following the Constitutional Treaty, could be presented as introducing fundamental changes in comparison with the present state of affairs. Indeed, a new system of enumeration of exclusive competences, shared competences, and competences of cooperation has been adopted to comply with the request of influential Member States, among them Germany. But in reality, the categorization is far from strict and rigid and reflects the case law of the Court through fifty years of implementation of EC law, either in the three categories defined, or in the exceptions admitted for the policies which do not fit in said categories (coordination of economic policies, common foreign and security policy). This sense of reality, typical of the Community law period, survives in the new status of the Union. As indicated above in Part I, the Court, where competent—that is to say in all matters except common foreign and security policy—may be induced by new provisions on limitations to interpret more restrictively the conferred competences.

The flexibility clause of Article 308 is maintained in the Treaty of Lisbon.⁶⁴ Its scope is expressly limited on three points. First, it cannot be used to attain the objectives of the common foreign and security policy; this is a logical consequence of the specificity of the common foreign and security policy, maintained in the Treaty of Lisbon. Second, Article 308 may not be used to proceed to harmonisation of national legislation in areas where such harmonisation is excluded by the treaty; this is quite obvious: the flexibility clause cannot be used *contra legem*. Third, the national parliaments, as mentioned above, are kept informed on the use of the flexibility clause so that they can appreciate that the principle of subsidiarity is duly taken into account. It is true that combined with the fact that the areas of competences of the Union, over the years, have been extended, including by the Treaty of Lisbon which adds the item of energy

63. See Treaty of Lisbon, *supra* note 1, art. 1, ¶ 5, at 12.

64. See *id.* art. 2, ¶ 289, at 131.

among shared competences, one may doubt that the flexibility clause will be used frequently in the future Union. Nevertheless, the presence of this clause remains characteristic of the sort of methods which have prevailed in the European Community until recently—some of the agencies have been created on such legal basis, but this should not be carried on. It seems extremely important to keep this possibility of pragmatic evolution without treaty amendment. The unanimity vote in the Council is a sufficient guarantee that there will be no abuse.⁶⁵

The supremacy upon the law of the Member States is a typical attribute of EC law, heralded very early by the Court of Justice in founding cases such as *Costa v. E.N.E.L.*⁶⁶ One cannot imagine any uniformity of application of EC law without this principle of supremacy being enforced. The reasons which existed at the very beginning of the Community to justify this assertion are even stronger in a Union of twenty-seven members. It is well known that the Constitutional Treaty introduced a special written provision in order to make more visible this judge-made principle of supremacy of Union law upon the law of Member States.⁶⁷ It is equally known that this written provision, although it simply reproduced a well established case law principle of the Court, was felt as excessively intrusive by various circles hostile to the very idea of a constitution for the Union. In the Treaty of Lisbon the express reference to the principle of supremacy of Union law has disappeared, but the reality certainly has not. Such a disappearance would threaten too dramatically the very existence of common rules in the Union. Interestingly enough, the IGC adopted a Declaration on the principle of supremacy, recalling that according to the case law of the Court, the treaties and the law adopted on the basis of the treaties prevail upon the law of the Member States.⁶⁸ Quite interesting is the legal situation of this principle of supremacy which was currently accepted on the basis of the case law of the Court, but, because it had been inscribed in the Constitutional Treaty and then suppressed, now needs to be more strongly supported by a declara-

65. See *id.* art. 2, ¶ 289, at 131.

66. See *Costa v. E.N.E.L.*, Case 6/64, [1964] E.C.R. 585, ¶ 3.

67. See Constitutional Treaty, *supra* note 57, art. I-6, O.J. C 310/1, at 12 (2004).

68. See Treaty of Lisbon, *supra* note 1, Declaration concerning primacy, ¶ 17, at 256 (an Opinion of the Council Legal Service, dated June 22 2007, confirming this view, is annexed to the above mentioned declaration).

tion and a legal opinion. All that caution is probably superfluous; on the most controversial question of the accommodation of national constitutions with the principle of supremacy of Union law, one may trust the Court of Justice of the Union and the supreme courts of the various Member States to pursue the pacific coexistence initiated during the EC law period.⁶⁹ For Union law as for Community law there is no way out of the affirmation of its own supremacy.

The conditions of implementation are another typical feature of Community law, which should survive in Union law. Through the years a specific system has developed, combining direct implementation through community mechanisms in a limited number of situations, and indirect implementation by Member States in most cases. A cross control is exerted, on one side, by Member States on measures of implementation adopted by the Commission—through the so-called comitology procedures⁷⁰—and, on the other side, by the Commission on implementation, or more accurately non-implementation by Member States. The Convention has tried to introduce more clarity in a system which had developed through practice and case law and had become quite complex, although reasonably balanced between national level and European level. The Treaty of Lisbon retains this line. It comes back to the traditional denomination of regulations and directives, which the Constitutional Treaty had abandoned for complex and confusing new denominations; but what matters more is that the Treaty of Lisbon retains the distinction between legislative procedure and non-legislative procedure. We will mention incidentally the introduction of delegated legislation by Article 249B of the TFEU, which may raise questions of interpretation (delegation to the Commission, by a legislative act, of the power to adopt non-legislative acts which could modify “non-essential elements” of a legislative

69. See the case law of the constitutional courts of Germany, Italy, Spain, Poland, France.

70. See EC Treaty, *supra* note 57, art. 202, O.J. C 321/1, at 135 (2006). The condition of validity of the use of committees has been defined by the Court in the seminal case *Einfuhr- und Vorratsstelle für Getreide und Futtermittel v. Köster et Berodt & Co.*, Case 25/70, [1970] E.C.R. 1161. Further, the mechanism of comitology has been the subject of successive decisions of the Council. See Council Decision No. 87/373/EEC, O.J. L 197/33 (1987); Council Decision No. 1999/468/EC, O.J. L 184/11 (1999); Council Decision No. 2006/512/EEC, O.J. L 200/11 (2006).

act).⁷¹ As to implementation, Article 249C of the TFEU establishes clearly that it is the responsibility of Member States to adopt measures of implementation of the acts of Union law.⁷² Then in paragraph 2 comes the exception: when uniform conditions of implementation prove to be necessary, the legislative acts will confer to the Commission the power to adopt said measures of implementation or, in specific cases duly justified, to the Council. Further, the Member States will control the exercise by the Commission of this power of implementation, following general conditions defined by the Council and the European Parliament acting under ordinary legislative procedure. Thus Article 249 does not break with existing practice; it specifies as clearly as possible the main features of direct and indirect implementation which have developed through fifty years of Community law experience.⁷³ The noticeable differences are: (1) that the Commission is expressly designated as responsible for the adoption of acts of execution when uniform conditions of implementation are necessary,⁷⁴ and (2) that the definition of the conditions of the control exercised by the Member States on the Commission is no longer a monopoly of the Council; it includes the Parliament through the co-decision procedure.

Such appear at this very preliminary stage the elements of a compromise which takes realistically into account the political situation of an enlarged Union that contradictory trends cross through: union versus national identity; competition versus protection, etc. A quick ratification within a year will bring the only evidence that the right political balance has been found. Certain lawyers would have regretted that under the new name of Union law a long and rich experience of multilevel law making and law implementation be abandoned. It does not seem to be the case.

71. See Treaty of Lisbon, *supra* note 1, art. 2, ¶ 236, at 113-14.

72. See *id.* art. 2, ¶ 236, at 114.

73. See *id.* art. 2, ¶ 236, at 113-14.

74. Compare *id.* art. 2, ¶ 236, at 113-14, with EC Treaty, *supra* note 57, arts. 202 & 211, O.J. C 321 E/37, at E/135 & E/138-39 (ambiguous provisions) and Commission v. Council, Case 16/88, [1989] E.C.R. I-3457 (less ambiguous conditions of implementation).