

(Lecture Notes 2010 – 2011. Code: EC-01.03-v7A-11.10)

European Union Law

Topic 1(of 4): Genesis, Development and Transition from EEC – EC - EU.

Lecture 3 (of 3):

From the ‘three-pillars’ EU to the *post-ToL* EU having legal personality: an Ever Closer Union?

Aim:

To trace the background, implementation and impact of the Treaty of Nice; to examine elements of the rejected *Treaty establishing a Constitution for Europe* as signed by 25 Member States on 29th October, 2004; and to discuss and evaluate the amendments made to the TEU and EC Treaty by the *Treaty of Lisbon*.

Objectives:

After carefully studying the following notes and other readings relevant to this lecture you should be able to:

1. Explain why another Treaty (the Treaty of Nice (ToN)) was deemed necessary so soon after the ratification of the Treaty of Amsterdam;
2. Discuss, in detail, the major changes to the Treaty of Rome (as amended) made by the Treaty of Nice; and
3. Discuss orally and in writing the changes and the potential impact for the UK and its citizens following the ratification of the *Treaty of Lisbon*; and to note the similarities and differences between this amending Treaty and the never-ratified *Treaty establishing a Constitution for Europe* as signed by 25 Member States on 29th October, 2004.

Introduction

29½ years elapsed between the coming into force¹ of the *Treaty of Rome* that founded the *EEC* and its first major amendment, by the *Single European Act*, which came into force on 1st July 1987. Thereafter the amending Treaties became more frequent: the *TEU* (‘Maastricht’) came into force just over 6 years later²; less than another six years after that it was the *Treaty of Amsterdam (ToA)* that came into force³; and less than four years after ‘Amsterdam’, the *Treaty of Nice (ToN)* was in force⁴

Now, however, the *Treaty of Lisbon* (the ‘Reform Treaty’), that was agreed in principle in October 2007, by all 27 Member States⁵, and which came into force on 1st December 2009,

¹ 1st January 1958

² 1st November 1993

³ 1st May 1999

⁴ 1st February 2003

⁵ In essence, almost identical to the *Treaty establishing a Constitution for Europe??*

has not merely amended the TEU and EC Treaties: it has brought to an end the EC and created a new international legal person, the *European Union* (EU). This is intended to be another stage in the quest for the peoples of Europe [to be] united ever more closely and to be ‘united in diversity’⁶.

The *Treaty of Nice (ToN)* remained in force for just over 6½ years because *France* and the *Netherlands* did not ratify the *Treaty establishing a Constitution for Europe* in 2005. It was the failure to ratify that Treaty and the need for reform that prompted an intergovernmental conference and the resulting *Treaty of Lisbon*. Whereas the *Treaty of Lisbon* was finally ratified on November 3rd 2009⁷, and, as noted, in force as from 1st December 2009, this lecture begins with an overview of why and how the ToN came into force and what discussions were initiated *before* the ToN had come into force with a view to bringing about even more reforms.

The shortcomings of the Treaty of Amsterdam; and further amendments via the Treaty of Nice (ToN)

There were 15 Member States in the EC / EU when the *Treaty of Amsterdam* was signed in 1997 and when it came into force in May 1999. The Treaty was regarded as one that provided a ‘fresh identity’ for the EC and it was responsible for, *inter alia*, the large-scale re-numbering of the EC Treaty provisions, its provisions on equality in *Arts 2* and *3* of the EC Treaty and the incorporation of the closer-cooperation provisions in *Art. IIEC*. However, apart from such changes as importing provisions on asylum and immigration, etc., from the ‘Third Pillar’ of the EU into the EC Treaty, and hence bringing them under Institutional control, it was a Treaty that was largely ineffective in promoting the Institutional changes that were regarded as necessary not merely for the functioning of an already expanded Community but necessary to cope with an enlargement of the Community to 20+ Member States.

True, the *Treaty of Amsterdam* extended the scope of the co-decision law-making procedure and, hence, strengthened the power of the European Parliament by reducing the democratic deficit, but the major the Institutional reforms of reviewing the number of Commissioners and the reviewing of the weighting of the votes in the Council were not addressed. Thus, the ‘fresh identity’ brought about by ‘Amsterdam’ had masked the failure to bring about the major Institutional reforms first identified by the European Council in December, 1993 – i.e., the month following the coming into force of ‘Maastricht’ – and later confirmed by them in June 1995 as being “*necessary to facilitate the work of the institutions and guarantee their effective operation in the perspective of enlargement*”.

The failure of ‘Amsterdam’ to bring about the perceived much-needed Institutional reforms meant that these ‘left-over’ issues had to be dealt with via further Treaty amendments. To this end, an *Inter-Governmental Conference (IGC)* was convened in February 2000 and was concluded in *Nice* in December of that year. This resulted in the *Treaty of Nice* being signed in 2001 though not coming into force until February 1st 2003 because of its rejection

⁶ ‘United in diversity’ was the motto of the EU in the never-ratified *Treaty establishing a Constitution for Europe*.

⁷ By the last signatory, the President of the Czech Republic.

first time around by the Irish electorate in a referendum in June 2001⁸; the second referendum accepting it not being held until October 2002⁹; and then the Irish Government not depositing its *instrument of ratification* until December 18th 2002.

In amending the *EC Treaty*, the *Treaty of Nice* provided for a reform of the Institutions in an enlarged Community of up to 27 Member States by: extending the co-decision legislative process and providing a new ceiling on the number of MEPs¹⁰; by adjusting the number of Commissioners¹¹ and by increasing the power of the President of the Commission¹²; by amending the weighting of the votes¹³ and by increasing the scope of QMV in Council; and by providing for the CFI to have the competence to hear some cases previously exclusively reserved for the ECJ, i.e., amendments were made to each of the principal Institutions.

Some of the Institutional reforms were in place at the time the EU enlarged to 25 Member States, following the accession of the 10 new Member States on the 1st May 2004; some reforms were scheduled to come into force on the 1st January 2005¹⁴; and others only when the EU enlarged to 27 Member States (January 2007)¹⁵ to accommodate the accession of *Romania* and *Bulgaria*.

Another seemingly important amendment to the EC Treaty by the *ToN* was found in *Art.11EC* where the former provisions of ‘closer cooperation’ were replaced by provisions on ‘*enhanced* cooperation’. That this was more than merely a name-change can be deduced from *Arts.43-45TEU* where it was stated that where enhanced cooperation is to be pursued, a *minimum of eight Member States* had to be involved before they could make use of the institutions, etc., (cf. the *Amsterdam* requirement of a ‘*majority*’ of Member States) and that the Member States that wish to pursue such cooperation must ‘*respect* the competences, rights and obligations of those Member States which do not participate therein’ (cf. the former provision of ‘*not affecting*’ the competences, etc.).

In addition to concluding the provisions of Treaty of Nice, the December 2000 meeting of the European Council was also the occasion where each Member State signed the *Charter of Fundamental Rights of the European Union*. (This Charter would have come into force in 2006, had the *Treaty establishing a Constitution for Europe* been ratified). Moreover, the Nice meeting of the European Council agreed to revise the Treaties (of which there were then four – *ECSC*, *EAEC*, *EC* and, of course, the *TEU*) with a view not only of adapting

⁸ When it was rejected by 54% - 46%

⁹ When it was accepted by 63% - 37%

¹⁰ See Arts.189 & 190EC as amended by the Accession Treaty 2003

¹¹ See Art.213EC

¹² See Art.217EC

¹³ See Art.205EC as amended by Art.12 Accession Treaty 2003

¹⁴ e.g., (1) The weighting of votes in Council; (2) The new Commission, with its limitation of one Commissioner from each Member State, was originally scheduled to come into force on 1st January 2005. This date was then brought forward to 1st November 2004 via *Art.45 of the Accession Treaty of 2003*. However, this date had to be amended when the European Parliament objected to the Italian nominee, *Rocco Buttiglione*. Moreover, strong objections to the Latvian nominee led also to her replacement and forced the President of the Commission, *José Barroso*, to re-shuffle his Commission and re-submit his selections to the EP for their approval. The new Commission eventually took office on the 22nd Nov. 2004 after being approved by the EP by a majority of 449–149 votes. The ‘old’ Commission under the Presidency of *Romano Prodi* remained in office until the new Barroso Commission was able to start its duties.

¹⁵ Details that are more precise are given in the next lecture on the Institutions.

the Institutions of the Union to enlargement, but also to *widen* and *deepen* the debate on the future of the Union. This Declaration on the Future of the Union was *annexed* as **Declaration No.23** to the **Treaty of Nice**.

A year after concluding the provisions of the Treaty of Nice, the December 2001 meeting of the European Council in **Laeken** (Belgium) *adopted* a declaration on the '*Future of the Union*'. This declaration provided for a **Convention on the Future of Europe**. The Convention was composed of over 100 members under the chairmanship of a former French President, **Valéry Giscard d'Estaing**. This Convention held meetings between February 2002 and July 2003 when it concluded its work.

In essence, the Convention addressed four questions and formulated a *draft Constitutional Treaty*. The questions addressed were:

- How to simplify the Treaties in order to make them clearer and better understood;
- How to allocate a more precise division of responsibilities between the level of the EU and that of the Member States – i.e., how to divide powers in accordance with the principle of *subsidiarity*;
- What status was to be given to the **Charter of Fundamental Rights of the European Union**; and
- What should be the role of the national parliaments in the *institutional architecture* (i.e., decision-making structure) of the European Union?

Following the conclusion of the Convention's work (July 2003) and the publication of the draft constitution, an IGC was convened in October 2003 and it finally, unanimously, adopted the text of the Constitution in June 2004. The **Treaty establishing a Constitution for Europe** was signed by 25 Member States in Rome on the 29th October 2004 and had it been ratified, as envisaged, it *could* have come into force on the **1st November 2006**.

The Treaty establishing a Constitution for Europe

If the *Treaty Establishing a Constitution for Europe* had been ratified, a number of fundamentally significant changes would have been implemented, including:

- The old 'European Community within the European Union' structure would have ceased to have existed: it was to be replaced by the **European Union** which, henceforth, would have legal personality.
- In essence, the 'three-pillar' structure of the EU would be merged and the separate EU and EC Treaties would be consolidated and replaced by the single **Treaty establishing a Constitution for Europe**. (N.B. the **EAEC** – EURATOM - remains as a Community *outside* the EU)
- The **Charter of Fundamental Rights of the European Union** was to have been incorporated into the Constitution.
- The **European Council** was to be formally recognized as an Institution distinct from the Council
- The post of **President of the European Council** would have been created with the post-holder being appointed for a period of 2½ years.

- Merging the present tasks of the *High Representative for the Common Foreign and Security Policy* with those of the *Commissioner for External Relations* would have created a new post of **European Union Minister of Foreign Affairs**.
- The number of *MEPs* was to increase to 750, the actual allocation to each Member State to be determined before the elections that were due in 2009.
- The ‘co-decision’ procedure for making secondary legislation would become the norm and be known as ‘the ordinary legislative procedure’.¹⁶
- Notwithstanding the provisions in the ToN¹⁷, the current composition of the **Commission** – one Commissioner per Member State – will be retained until 2014.
- National parliaments would have the right to be informed of all new Commission initiatives and, where applicable, they would be able to request the Commission to reconsider the initiatives providing one-third of them consider the principle of subsidiarity is infringed¹⁸.

The Structure of the Constitution

In essence, *the Constitution was divided into four main parts* that were then followed by Protocols and Declarations. Although the Constitution was divided into separate parts, there was continuous numbering of the Articles of the Constitution using Arabic numerals, *plus*, in order to accentuate the division of the Constitution into these four parts, the Arabic numerals were preceded in each case by a Roman numeral corresponding to the relevant part; e.g., the provision stating that the European Union would have legal personality was found in Article 7 of Part I of the Treaty establishing the Constitution: it was written as: **Art.I-7**¹⁹.

The four main parts were as follows:

- Part I: The Constitutional Fundamental Provisions**²⁰;
- Part II: The Charter of Fundamental Rights of the Union;**
- Part III: The Policies and Functioning of the Union; and**
- Part IV: General and Final Provisions.**

The following is a very selective overview of elements of the Constitution that was never ratified.

Part I. The Constitutional Fundamental Provisions: an overview

It’s been traditional for the first Article of EEC / EU / EC Treaties to state the name of the Community / Union established. The Constitution followed suit, stating that ‘this Constitution establishes the European Union ...’: **Art.I-1**

The half-dozen *values* on which the Union is founded were specified in **Art.I-2**, viz;

- respect for human dignity,
- liberty [now known *post-ToL* as ‘freedom’],

¹⁶ See **Arts.I-34** and **III-396** of the *Treaty establishing a Constitution for Europe*.

¹⁷ See Art.213EC

¹⁸ See Protocol 1 annexed to the TEC

¹⁹ **Not Art.I-6** as in the Draft Treaty.

²⁰ Unlike the other parts, there is no name given in the Treaty to Part I of the Constitution.

- democracy,
- equality,
- the rule of law [and]
- respect for human rights

In **Art.I-3**, the *objectives* of the Union were expressed as being the promotion of peace, the Union's values (in Art.I-2, above) and the well-being of its peoples.

In a notable departure from the provisions of **Arts.3(1)(c)** and **14(2)** of the *EC Treaty*, **Art.I-4EU** contained an interesting mix of the guaranteed fundamental freedoms [4(1)] and the prohibition of discrimination on the grounds of nationality [4(2)]. Moreover, the free movement of persons was the first freedom to be noted, relegating 'goods' to number two, and the freedom of establishment was, at last, formally recognized as a fundamental freedom in its own right and not just as a subdivision of freedom of persons.

The express provision of the 'law adopted by the Union's Institutions ... shall have *primacy* over the law of the Member States' was provided for in **Art.I-6**²¹. In other words, the 40-year-old judicial construct²² had been formally recognised as a primary source of law in being given the authority of a Treaty provision. This had to be regarded as inevitable²³, and welcome, in respect of simplification and clarification, given the oft-repeated and forceful judicial dicta emanating from the ECJ since 1964²⁴.

Art.I-7 gave the EU *legal personality*²⁵ meaning that, for the first time, the EU would be able to be a party to international agreements in its own right and be able to become a signatory to the *European Convention on Human Rights*²⁶, for example. It is hardly surprising that the Union should have legal personality given that it was to be the legal successor to the *European Community*²⁷.

Citizenship of the Union was provided for in **Art.I-10** with **Art.I-10(2)(b)** confirming the citizens of the union shall have:

The right to vote and stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State.

Art.I-11 restricted the Union to acting on powers *conferred* on it and to having its actions governed in line with the principles of *subsidiarity* and *proportionality*.

Art.I-16 was a brief Article on the *Common Foreign and Security Policy*, more specific provisions following in **Art.I-40**²⁸. The Union's institutional framework was provided for

²¹ Not Art.I-10 as in the Draft Treaty.

²² As established in Case 6/64, Costa v. ENEL

²³ See Declaration 1 annexed to the Treaty.

²⁴ e.g., see Cases 11/70; 106/77, C-213/89.

²⁵ At present, **Art.281EC** provides that 'The Community shall have legal personality.'

²⁶ Something which the EC did *not* have the competence to do: Opinion 2/94

²⁷ See **Art.IV-438**

²⁸ See also Part III, **Arts.III-294 – III-308**

principally in *Arts.I-19* to *I-29*²⁹, and the making of secondary legislation by the Institutions was provided for in *Art.I-34*, with the reference to the ‘*ordinary legislative procedure*’ being the new terminology for the equivalent EC ‘co-decision’ procedure.

Provisions on terrorism and natural or man-made disasters were contained in the solidarity clause in *Art.I-43*.

The enhanced cooperation provisions of *Art.IIEC* were to be found in *Art.I-44EU* with further references there to the procedures to be followed in the Articles specified in Part III of the Constitution.

That *membership of the Union shall be open to all European States that respect the values referred to in Art.I-2*, was a provision of *Art.I-58*, and a Member State wishing to withdraw from the EU could do so in accordance with *Art.I-60*, the final provision in Part I of the Constitution.

Before concluding the overview of Part I, Europhiles may be proud to be associated with the five elements that were to constitute ‘the symbols of the Union’ found in *Art.I-8*. By contrast, Eurosceptics may wish to avoid reading this provision on the basis that they would be most unlikely to regard it as an ‘Ode to Joy’³⁰.

Part II: The Charter of Fundamental Rights of the Union

In Part II, the Constitution made available to all citizens of the EU many well-established rights³¹ as well as some new rights³². ‘The rights of legality and proportionality of criminal offences and penalties’ was the title of the provision found in *Art.II-109*

Title VIII, ‘*General Provisions Governing the Interpretation and Application of the Charter*’, spanned *Arts.II-111 – II-114*.

Part III: The Policies and Functioning of the Union

This was *the* big part of the Constitution! It spanned *Arts.III-115* to *III-436*.

Provisions on the consistency between policies and the elimination of inequalities were found in *Arts.III-115* and *III-116*, respectively, the unique position of environmental protection requirements was emphasized in *Art.III-119* and further provisions on the prohibition of discrimination were found in *Arts.III-123* and *III-124*.

The establishment and functioning of the *internal market* was provided for in *Arts.III-130* to *III-132*.

²⁹ See also *Arts.I-49* and *I-50*

³⁰ The adopted anthem of the Union.

³¹ e.g., the right to life, *Art.II-62*; prohibition of torture, etc., *Art.II-64*; right to marry and found a family, *Art.II-69*

³² See *Arts.II-99* (right to vote and stand as a candidate at elections to the European Parliament) and *II-102* (right of access to documents), for example

The provisions on the *free movement of persons and services* were contained in **Arts.III-133 to III-150**. The next 10 Articles (i.e., up to and including **III-160**) provided for the other fundamental freedoms.

Arts.III-177 to III-202 were devoted to *economic and monetary policies*.

Under the ‘*Area of Freedom, Security and Justice*’, **Art.III-269** dealt with *Judicial Cooperation in Civil Matters*, and **Arts.III-270 to III-274** dealt with *Judicial Cooperation in Criminal Matters*.

Provisions promoting the *competitiveness of the tourism sector* were found in **Art.III-281**.

Following provisions on the *Common Foreign and Security Policy* found in Part I of the Constitution³³, more detailed provisions were contained in **Arts.III-294 to III-308**.

Extensive ‘*Provisions Governing the Institutions*’, the vast majority of which are already in the EC Treaty, were to be found in **Arts.III-330 to III-385**. In particular, the *preliminary ruling procedure*, whereby a national court can ask the ECJ for the interpretation of a Treaty provision or query the validity of an act of an Institution was found in **Art.III-369**; the judicial review of the legality of acts of Community Institutions, provided for in *Art.230EC*, had been relocated in **Art.III-365**³⁴, with the provision that a well-founded action may be declared void being contained in **Art.III-366**.

Arts.III-360 - 362 replaced *Arts.226-228EC* and provided for the Commission and a Member State to take before the ECJ another Member State that is alleged to have failed to fulfil an obligation under the Constitution, and for the ECJ to impose penalty payments on a Member State that has failed to comply with an earlier judgment of the Court by not taking the measures to comply with that first judgment.

Part IV: General and Final Provisions

Art.IV-437 provided that the Treaty establishing a Constitution for Europe shall repeal the Treaty establishing the European Community [and] the Treaty on European Union ... **Art.IV-437(2)** then went on to provide that the Treaties of Accession for the Member States that have joined the EC / EU from 1973 to date shall be repealed, with **Art.IV-438** then providing that:

The European Union established by this Treaty shall be the successor to the European Union established by the Treaty on European Union and to the European Community.

So, was the Constitution necessary? Would the Treaty have fulfilled the ‘traditional’ requirements of a Constitution?

According to a *pre-Maastricht* (i.e., *pre-European Union*) opinion of the ECJ, the founding Treaty establishing the EEC was a constitutional charter. In *Opinion 1/91*, the ECJ stated:

³³ **Arts.I-16** and **I-40**

³⁴ Note the relaxation of the requirement for a non-privileged applicant to establish ‘individual concern’.

The EEC Treaty, albeit concluded in the form of an international agreement, nonetheless constitutes the constitutional charter of a Community based on the rule of law. As the [ECJ] has consistently held, the Community Treaties established a new legal order for the benefit of which the States had limited their sovereign rights, in ever wider fields, and the subjects of which comprised not only the Member states but also their nationals³⁵.

The EEC Treaty, however, (even after all its amendments, up to and including the Treaty of Nice) did not create a federal state. As *Fairhurst & Vincenzi*³⁶ noted in relation to what is still merely the [intergovernmental] *coordination of action* in respect of, *inter alia*, defence and foreign policy in the European Union:

In a federal state, *defence* and *foreign policy* would be the sole prerogative of the central, federal government. The Community is, therefore, at the most, only an embryonic federal state.

For present purposes, then, issues of simplification and clarification apart, it would appear that the ‘new constitution’ would not have brought the concept of a federal state any closer; and the word ‘Constitution’ in the Treaty implied nothing new nor, of itself, anything federalist. In other words, whilst the Treaty establishing the Constitution for Europe was to replace the EC via the creation of the EU, it had not extended to any significant degree the scope of what was already considered to be a constitutional charter.

However, expressing the view that the EU needs a Treaty destined to fulfill the traditional requirements of a constitution is tantamount to according the ECJ the status of a Constitutional court (and the ECJ conveyed the impression that it was acting as such in *Opinion I/91*). Moreover, the concepts of supremacy / primacy of EC law and direct effect – the ‘supreme’ law providing a source of individual protection at national level – are essential elements of a European constitution.

One cannot ignore that EC law is *sui generis*, however: i.e., it is ‘a new legal order of international law’^{37,38} which has, as the essential characteristics, the primacy of EC law and the establishment of the direct effect of a whole series of provisions. Note, then, that:

The shift from Treaty to Constitution has taken the EC legal order into realms distinct from traditional international law to such an extent that it is likely to mislead to attempt to examine the two from the same perspective. EC law is *sui generis*³⁹.

Accordingly, it seems that in answer to the question: ‘did the EU need a constitution?’ the answer was, perhaps, ‘no’, we already had one based on the rule of law (bearing in mind that the EU would have been - and has become - the legal successor to the EC) and / or, perhaps, ‘yes’, if we wish to ensure the certainty of the primacy of Union law and more democratic control of the *Art.I-II* provisions that restrict the Union to acting on powers

³⁵ See, also, *Case 294/83, Parti Ecologiste Les Verts v. European Parliament* [1986] ECR 1339

³⁶ *Fairhurst, J & Vincenzi, C. Law of the European Community*, 4/e. Harlow: Pearson Longman, 2003, p33

³⁷ As expressed in *Case 26/62, van Gend en Loos*, and oft-repeated by the ECJ.

³⁸ ‘in contrast with international treaties’, *Case 6/64, Costa v. ENEL* [1964] ECR 585

³⁹ *Weatherill, S. Law and Integration in the European Union*. Oxford: Clarendon Press, 1995, p185

conferred on it and to having its actions governed in line with the principles of *subsidiarity* and *proportionality*.

Stages in deciding the fate of the Treaty establishing a Constitution for Europe: Developments after 29th October 2004 and up to March 2007

November 2004: *Lithuania* became the first Member State to ratify the Constitution. {The last (and 16th) Member State of the pre-2007 States to ratify it was *Finland* in late 2006. Romania and Bulgaria, the States acceding in 2007, ratified the Constitution via their accession Treaties. Hence, 18 Member States ratified the *TeCfE*}. However, ..

29th May 2005: More than 69% of the French electorate vote voted in a referendum on the Treaty establishing a Constitution for Europe. Nearly 55% of the votes cast *rejected* the adoption of the Constitutional treaty. More than 60% of the 40-54 age group and nearly 60% of the 18 – 24 age group rejected the Treaty. More than 75% of manual workers also rejected it. As for *abstentions*, these were much higher in the 18-39 age group than for the ‘over 40s’. Of those who abstained, nearly 50% believed that they were not sufficiently informed on the Constitution to go to vote; more than 25% said they wanted to penalize the Government or the President of the Republic; but only 14% (the lowest figure of the 10 reasons specified in a post-referendum questionnaire for not voting) said that they were ‘against Europe’ [or] the European Union ..’. Of the ‘yes’ vote, by far the main reason for voting ‘yes’ (39%), was that the Constitution was perceived as essential in order to pursue European construction.

1st June 2005: 62% voter participation in The Netherlands of which approx. 62% voted ‘no’ in a consultative vote. Constitutionally, the vote was not binding, however, as the Dutch parliament had to ratify the Treaty – a decision they never had to make.

Following the failure of France and The Netherlands to ratify the Treaty, the UK called for a “period of reflection” – although, in fact, it effectively managed to ignore discussing the Treaty during the term of its presidency, in the latter half of 2005. Moreover, the European Council, meeting on 16 and 17 June 2005, considered that “*we do not feel that the date initially planned for a report on ratification of the Treaty, 1 November 2006, is still tenable, since those countries which have not yet ratified the Treaty will be unable to furnish a clear reply before mid-2007.*” Officially, then, at that time, the Treaty was **NOT** ‘dead’.

January 2006: *Austria* assumed Presidency of the Council. It appeared enthusiastic about the Constitutional treaty and willing to attempt to revive it. However, the *Dutch* foreign minister, *Bernard Bot*, said the Treaty *was* “dead”.

19th January 2006: The European Parliament approved a report (*Duff-Voggenhuber*) that called for an extension of the one-year ‘reflection period’ agreed in 2005 in the hope that after a number of debates (“Citizens Forums”) had been organised in the Member States, a decision could be made in the latter half of 2007 that would have the goal of bringing the Constitutional treaty into force in 2009.

29th January 2006: The re-election of the first woman President of Finland, **Tarja Halonen**, appeared to confirm that Finland would not be in a hurry to ratify the Treaty. Indeed, it saw that the future of the Treaty was one of the main challenges it would face during its term of Presidency of the Council in the latter half of 2006.

8th February 2006 **Belgium** became the 14th Member State to ratify the European Constitution. The federal parliament and all the regional parliamentary assemblies approved the Constitution.

28th February 2006: “The rejection of the Constitutional treaty by voters in France was a mistake that should be corrected”, *per Valéry Giscard d’Estaing* in a speech at the London School of Economics. He believed that **Parts I** and **II** of the Constitutional treaty could be subject to a new referendum after the presidential and general elections in 2007 and that **Part III** of the Treaty could be subject to a parliamentary vote.

9th May 2006. Estonia became the 15th Member State to ratify the Constitutional Treaty

“2nd half of 2006”: Finland became the 16th Member State to ratify the Constitutional Treaty (i.e., they ratified during the term of the Finnish Presidency of the Council). Thereafter, no other Member State attempted to ratify the TeCfE: the Treaty was moribund – but it’s a matter of opinion whether it died or did a ‘Dr Who’ and regenerated as the **Reform Treaty** (now known as the *Treaty of Lisbon*).

The Constitution is dead: long live the ‘Constitution’?

The German Presidency of the European Council in the first half of 2007 succeeded in brokering a deal on institutional reform and setting in motion the negotiations that would result in a Treaty (the **Treaty of Lisbon**, aka the ‘**Reform Treaty**’) intended to bring about reforms without the need for referendums (apart from in Ireland, where it’s a constitutional necessity) and be capable of ratification prior to the 2009 elections of MEPs.

The Treaty of Lisbon: a revived ‘Constitution’ in all but name?

Whereas the *Constitutional Treaty* would have repealed and replaced all previous treaties, the **Treaty of Lisbon** was an amending Treaty, with the name of the **TEU** being retained for one Treaty, but all provisions re-numbered, while the EC Treaty was renamed the **Treaty on the Functioning of the European Union** – a Treaty of equal value to the TEU – and which had the vast majority of its provisions re-numbered.

Consider the amendments under three headings, viz;

- **Issues that were in the Constitutional Treaty but dropped by the Treaty of Lisbon**, e.g.;
- Symbols of the EU (though retained by 16 Member States in Declaration 52);
- Primacy of EU law (though **N.B.**: retained in a Declaration – No.17);
- Title of ‘European Union Minister of Foreign Affairs’; and
- Re-naming of secondary legislation

- **Elements that would have been introduced by the CT and which have been retained by the Treaty of Lisbon;**
 - President of the European Council;
 - Extension of the co-decision procedure and renaming it the ‘ordinary legislative procedure’; and
 - Council meetings (other than when composed of Foreign Ministers – when it’s chaired by the High Representative) to be chaired by ministers from a team of three Member States for a period of 18 months
- **Issues introduced by the Treaty of Lisbon, e.g.;**
 - New policy area – climate change;
 - Extended powers of consent given to the EP (see Art.352 TFEU);
 - Additional powers given to national parliaments in respect of time given to consider legislative proposals and powers to call for legislative proposals to be reviewed on the basis that they infringe the principle of subsidiarity.

Some of the principal Treaty provisions (TEU and TFEU) amended by the Treaty of Lisbon include:

(a) The Treaty on European Union

Art.2 TEU provides that the Union is founded on the values of

- Respect for human dignity
- Freedom [*ex* liberty]
- Democracy
- Equality
- The rule of law; and
- Respect for human rights ...

Art.3 TEU lists the Union’s objectives, which include;

- 1 The Union’s aim is to promote peace, its values and the well-being of its peoples;
- 2 The Union shall offer its citizens an area of freedom security and justice without internal frontiers, ...
- 3 The Union shall establish an internal market.
- 4 The Union shall establish an economic and monetary union whose currency is the euro.

Art.5(1) TEU provides that the limits of Union competences are governed by the principle of conferral.

Arts.9-12 provide for some significant democratic principles – including equality, representative democracy and the role of national parliaments in the good functioning of the Union.

Art.13(1) TEU provides for the ‘institutional framework’ and 7 Institutions in total.

Art.47 TEU provides the Union with legal personality.

Art.49 TEU provides that ‘Any European State which respects the values referred to in Art.2 [TEU] and is committed to promoting them may apply to become a member of the Union’.

(b) The Treaty on the Functioning of the European Union

Art.3 TFEU provides for the areas where the EU (“Union”) has exclusive competence, e.g., customs union and the common commercial policy;

Art.4 TFEU provides for shared competence between the Union and the Member States, e.g., environment and consumer protection;

Art.6 TFEU provides for the Union to have the competence to carry out actions to support, coordinate or supplement the actions of the Member States, e.g., education, vocational training, youth and sport.

Art.8 TFEU provides for equality between men and women.

Art.15 TFEU provides that ‘In order to promote good governance and ensure the participation of civil society, the Union’s institutions, bodies, offices and agencies shall conduct their work as openly as possible

Art.20 TFEU establishes Citizenship of the Union. Every person holding the nationality of a Member State shall be a citizen of the union.

Art.26 TFEU provides that the Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market ..

Art.45 TFEU provides for the free movement of workers.

Art.67 TFEU states that ‘The union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States.

Art.81 TFEU refers to the Union developing judicial cooperation in civil matters having cross border implications ..

Art.82 TFEU notes that ‘Judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions ...’ ..

Art.114 TFEU provides for the general position, subject to exceptions, of ‘the European Parliament and the Council, acting in accordance with the ordinary legislative procedure ... adopting measures for the approximation of the provisions ... which have as their object the establishment and functioning of the internal market’.

Art.165 TFEU provides, in part, that ‘The Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function’. Indeed, Union action shall be aimed at: “Developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially the youngest sportsmen and sportswomen”.

Art.168 TFEU states that ‘A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities’.

Arts.223 – 287 TFEU provide for the Union’s Institutions, viz;

- The **European Parliament** (Arts.223-234 TFEU);
- The **European Council** (Arts.235 and 236 TFEU)
- The **Council** (Arts. 237-243 TFEU);

- The *Commission* (Arts.244-250 TFEU);
- The *Court of Justice of the European Union* (Arts.251-281 TFEU, the *preliminary ruling procedure* being provided for in **Art.267 TFEU**);
- The *European Central Bank* (Arts.282-284 TFEU) and
- The *Court of Auditors* (Arts.286-287 TFEU)

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References

- Chalmers, D et al. European Union Law: Text and Materials, 2nd edn., 2010. Cambridge: CUP, Ch.1;*
Fairhurst, J. Law of the European Union, 8th edn., 2010. Harlow: Pearson, Ch.1;
Kaczorowska, A. European Union Law 2nd edn., 2010. Abingdon: Routledge, Chs.1 – 4;

Next Lecture

The prime focus of the next lecture is on the Treaty provisions that create, and confer powers on, the principal Institutions, viz; the European Parliament, the Council, the European Council, the Commission and the Court of Justice of the European Communities (the ECJ)

Workshop Questions

1. To a large extent, the *Treaty of Lisbon* was no more than the latest in the series of amending Treaties, albeit this one has brought about the demise of the EC and established the EU.

Discuss

2. The ratification of the *Treaty of Lisbon* was not be welcomed by many as it is no different from the unwanted and rejected *Treaty establishing a Constitution for Europe*.

Discuss

3. To what extent, if at all, does it appear that the *Treaty of Lisbon* will be instrumental in reducing the democratic deficit of the EU?

4. When compared to the now defunct EC Treaty, where would you rank the *Treaty of Lisbon* on a scale of: (i) it has made ‘no significant change’; (ii) it has ‘clarified the existing law’; (iii) it is ‘innovative’; and (iv) it has ‘established a new “Super State”’? If you think a different, or an additional, category should be inserted into this scale, name it and explain where it should be placed in relation to the other categories.

The Treaty of Lisbon: a few points of comparison with the abandoned Constitutional Treaty

Comparator	Treaty establishing a Constitution for Europe	Amendments made by the Treaty of Lisbon
Mode of Preparation	Convention with 105 participants.	Via IGCs – thus less democratic legitimacy?
Effect of Implementation	Would have repealed and replaced all previous EU / EC Treaties. EU would have had legal personality.	Amended the TEU; TFEU has replaced and succeeded EC. EU has legal personality. EU / EC distinction eliminated
Values of the Union	Half-a-dozen values in Art.I-2	The values are in Art.2 TEU with ‘liberty’ now renamed ‘freedom’
Structure of Primary Legislation	Treaty in IV Parts	Conventional numbering applies to both Treaties
Secondary Legislation	Would have become European Laws and European Framework Laws, etc.	Old (EC) names (Regulations – Directives- Decisions) retained.
Charter of Fundamental Rights	Part II of the Constitutional Treaty	Separate Treaty of equal legal value as the TEU and TFEU – but not legally binding in the UK, Poland or Czech Rep.
Time given to national parliaments to study Commission legislative proposals	Six weeks	Eight weeks
Reduction in the democratic deficit	Extending the co-decision procedure to new areas and renaming it the ‘ordinary legislative procedure’. See also Arts.I-45 to I-52	EP becomes a co-legislator in 44 new areas (Cf. <u>EC</u> Treaty); and note the role of the EP (and national parliaments) in Treaty-revising measures.
Politically contentious symbolism	‘Constitution’ in title; and five named symbols in Art.I-8	No corresponding Treaty provision
Politically contentious posts	President of the European Council and European Union Minister of Foreign Affairs	Former retained; latter renamed ‘High Representative of the Union for Foreign Affairs and Security Policy and External Action Service’