

# **The Treaty of Lisbon from a Christian-Social Perspective**

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## List of Abbreviations

CFSP	Common Foreign and Security Policy
CSDP	Common Security and Defense Policy
EC	European Community
ECPM	European Christian Political Movement
ESDP	European Security and Defense Policy
EU	European Union
IGC	Intergovernmental Conference
JHA	Judicial and Home Affairs
TEC	Treaty Establishing the European Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

# 1. Introduction

On 13 December 2007 the Heads of State or Government of the European Union (EU) signed the Treaty of Lisbon. It is at this moment subject to ratification by the member states. Ratification means that the Treaty must be approved by the national parliaments and, in the case of Ireland, also by the citizens by means of a referendum. This referendum will take place on 12 June 2008. The target date for the Treaty to take effect is 1 January 2009, but the ratification could take longer and is certainly not a foregone conclusion. If only one nation does not approve the Treaty, it cannot go into effect.

We have already noticed this with the Treaty establishing a Constitution for Europe, briefly, the Constitutional Treaty, which the Treaty of Lisbon replaces.<sup>1</sup> This Constitutional Treaty, in turn, came in the place of the two basic Treaties as revised several times, most recently by the Treaty of Nice in 2000. The two Treaties on which the EU is based are the Treaty Establishing the European Community (TEC), i.e., the Treaty of Rome of 1957, and the Treaty on European Union (TEU), i.e., the Treaty of Maastricht of 1992. The Constitutional Treaty, with the popular but misleading appellation of “European Constitution,” was rejected by the citizens of France and the Netherlands on 29 May and 1 June 2005, respectively, by means of a referendum. Thereupon, Europe’s leaders instituted a period of reflection that ended up lasting two years. Next they made a new attempt in 2007 by means of negotiations to arrive at a substitute Treaty. Under the German Presidency they reached agreement about the mandate for these negotiations in June 2007, which received the form of a so-called Intergovernmental Conference (IGC). The IGC was conducted and completed under the Portuguese Presidency, resulting in the signing of the new Treaty on 13 December 2007 in Lisbon. Whereas the Constitutional Treaty would replace the EC and EU Treaties, the Treaty of Lisbon introduced changes in these Treaties, which therefore continue to exist. The name of the EC Treaty has been changed, however, into “Treaty on the Functioning of the European Union” (TFEU).<sup>2</sup>

The present publication is a translation of a Dutch publication, made suitable for European use as a European Christian Political Movement (ECPM) publication. In this publication about the Treaty of Lisbon, two questions are central. Firstly, which changes does the Treaty of Lisbon introduce with regard to the present situation? Secondly, how can these changes be evaluated from a Christian-social perspective? In Chapter 2, the most important - and thus not all - changes of the new Treaty will be discussed.<sup>3</sup> Without always explicitly stating so, these have to do with the changes as compared to the Treaty of Nice. After all, the Treaty of Nice is at this moment still in force and will remain so until the Treaty of Lisbon comes into effect. Less important are the differences with the Constitutional Treaty, which, however, have indeed received much attention in public debate. In the context of the comparison between the Treaty of Lisbon and the Treaty of Nice, the differences with the Constitutional Treaty will also be discussed.

First to be discussed, in evaluating the Treaty of Lisbon in Chapter 3, is the question how the deepening of the process of integration that the Treaty of Lisbon brings with it can be assessed. Further, the changes discussed in Chapter 2 will be evaluated in light of their contribution to a more efficient, more transparent, and more democratic EU. It will be argued that these three criteria, which the negotiators of the Constitutional Treaty and then of the Treaty of Lisbon employed, are also useful for a Christian-social evaluation. For the evaluation in Chapter 3, this publication will connect to and build on the basic publication *Towards Europe*, which can be found on the website of the ECPM (<http://www.ecpm.info/en/page/15198>).<sup>4</sup> The publication will be

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<sup>1</sup> For a very thorough, detailed commentary on the Constitutional Treaty, see Barents, 2005.

<sup>2</sup> For a “consolidated” version of the European Treaties, in which the changes made by the Treaty of Lisbon are incorporated, see [http://www.minbuza.nl/verdragen/nl/Geconsolideerde\\_EU\\_en\\_EG\\_Verdragen](http://www.minbuza.nl/verdragen/nl/Geconsolideerde_EU_en_EG_Verdragen).

<sup>3</sup> In this respect, grateful use is made particularly of the once more very thorough and detailed commentary of Barents, 2008. For reference to articles in the European Treaties – TEU and TFEU – the new numbering is applied that was introduced by the Treaty of Lisbon.

<sup>4</sup> Anker and Luitwieler, 2002.

concluded in Chapter 4 with a number of conclusions and recommendations for the present and future position of the ECPM with regard to the EU.

## 2. Main Points of the Treaty of Lisbon

This chapter will discuss the most important changes introduced by the Treaty of Lisbon.<sup>5</sup> After a discussion in # 2.1.1 and # 2.1.2 of the differences in form between the Constitutional Treaty rejected by referendum and the new Treaty intended to replace it, the rest of this chapter will deal with the changes in content in regard to the Treaty of Nice now in force. In this context, the (other) differences with the Constitutional Treaty will come up for discussion.

### 2.1. General Points

#### 2.1.1. Standard Amendment Treaty

This publication concerns the “Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community.” This full appellation indicates that the Treaty of Lisbon concerns a standard amendment Treaty. This means that the two basic Treaties continue to exist – the EU Treaty next to the EC Treaty (the latter, it is true, henceforth named the TFEU) – and that changes are made to these Treaties, just as the Treaties of Amsterdam and Nice did. The Constitutional Treaty was, on the contrary, a single text, which combined and would have replaced the previous Treaties, as well as containing new elements.

#### 2.1.2. Differences in Form from the Constitutional Treaty

Although, in contrast to the Constitutional Treaty, the Treaty of Lisbon is a standard amendment Treaty, the content of both Treaties is almost completely the same. The differences particularly concern the form.<sup>6</sup> These differences of form are, however, of political significance; they show that the Treaty of Lisbon has another political character than the Constitutional Treaty. In addition to the – most important – difference in presentation, it involves the following points.

First, there is a difference in terminology. As has already been said, both Treaties have a different name. Moreover, there is no longer talk about “laws” and “framework laws,” but the terms “regulations” and “directives” continue to be used. The “Minister for Foreign Affairs” is now called the “High Representative.” These changes, however, alter nothing of intrinsic significance.

Second, the five symbols of the EU, including flag and anthem (“hymn”), have been eliminated from the Constitutional Treaty. Sixteen member states, however, in signing the Treaty of Lisbon, ultimately accepted a Declaration in which they state that the symbols have a lasting value for them.<sup>7</sup> It is true that the symbols are now no longer part of the Treaty itself, but, in practice, they simply continue to be used.

Third, the Charter of Fundamental Rights, which had been included as Part II in the Constitutional Treaty, was not included in the Treaty of Lisbon. Article 6, Paragraph 1 TEU, however, does indeed refer to the Charter, with the remark that it has the “same legal value as the Treaties.” Through that, there is, from a legal standpoint, not a bit of difference. Poland and the United Kingdom, however, have obtained a so-called “opt-out,” which holds that the Charter is not legally binding for these member states.<sup>8</sup>

Fourth, in contrast to the Constitutional Treaty, the Treaty of Lisbon does not include the principle that EU law takes precedence over national law. A Declaration was, however, accepted that affirmed this primacy principle.<sup>9</sup> Again, all of this changes nothing in the existing situation. The

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<sup>5</sup> What the most important changes are is also determined in light of the criteria of evaluation employed in Chapter 3, namely, whether changes are related to a further deepening of the integration process and to the efficiency, transparency, and democracy of the EU.

<sup>6</sup> Barents, 2008, Chapter 5; Van Ooik, 2008; Kurpas, 2007.

<sup>7</sup> Declaration No. 52.

<sup>8</sup> Protocol No. 7.

<sup>9</sup> Declaration No. 17.

principle was never a part of the Treaties but was already established in the 1960s by the jurisprudence of the Court of Justice.<sup>10</sup> As such, it is and remains applicable. In the course of time, the EU as “community legal order”, which is based particularly on this principle, has only grown stronger.

The above-named differences change nothing in the existing situation with respect either to content or to law. Seen politically, however, they have significance in the sense that the Treaty of Lisbon radiates a less “state-like” and less “constitutional” implication. With that, the status of the intended changes is less pretentious, and they stand in another context than was the case in the Constitutional Treaty.

### **2.1.3. Abolition of the Pillar Structure**

The most important change in content that the Treaty of Lisbon brings about as compared to the present situation (Treaty of Nice) is that the so-called “three-pillar structure” of the EU is abolished. This structure had been introduced with the Treaty of Maastricht that took effect in 1993. The three pillars are, respectively, the European Community (EC), the Common Foreign and Security Policy (CFSP), and Judicial and Home Affairs (JHA). In the original plan, the pillars were governed by different decision-making models. In the first pillar, the community, or supranational model applies, while in the second and third pillars the intergovernmental model is applicable. In policy matters falling under the first pillar (EC), the so-called “community method” is applicable. This method means that the European Commission has the exclusive right to initiate legislation, decision-making takes place by (qualified) majority through the Council of Ministers and the European Parliament on equal terms, and the European Court of Justice oversees the observance of legislation. In the second and third pillars (CFSP and JHA), the role of the Commission, Parliament, and Court is much weaker, and the Council and the European Council are dominant in decision-making, which in principle takes place unanimously.

With the Treaty of Amsterdam, however, which went into effect in 1999, a part of the third pillar (asylum, immigration, border controls, and judicial cooperation in civil matters) was transferred to the first pillar. This part thereby became subject to the supranational model. Moreover, supranational elements were introduced into the remaining part of the third pillar (judicial and police cooperation in criminal matters). All in all, it can be stated in sum, that at this moment the regime in the first pillar is of a supranational nature, the regime in the second pillar intergovernmental, while the third pillar contains both intergovernmental and supranational elements.<sup>11</sup>

The pillar structure is now, with the Treaty of Lisbon, abolished.<sup>12</sup> The EU henceforth has a uniform structure, obtains legal personality,<sup>13</sup> and a single institutional framework. The EC is merged into the new EU. As has been said, the existing Treaties indeed continue to exist, which have equal legal force. Because the EC no longer exists, the EC Treaty gets a new name: “Treaty on the Functioning of the European Union” (TFEU). As a result of the attribution of legal personality, the Union can, for instance, become a member of international organizations and establish representations in third countries and international organizations. Concretely, the abolition of the pillar structure means that the remaining part of the third pillar (judicial and police cooperation in criminal matters) comes to fall under the supranational model. The old third pillar is therefore really abolished, even though a number of exceptions continue to exist (see further # 2.6).<sup>14</sup>

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<sup>10</sup> Case 26/62, *Van Gend & Loos*, Jur. 1963; Case 6/64, *Costa/ENEL*, Jur.1964.

<sup>11</sup> Barents, 2008, p. 134, 137.

<sup>12</sup> Barents, 2008, Chapter 6.

<sup>13</sup> Article 47 TEU.

<sup>14</sup> See for more detail: Carrera and Geyer, 2007; Barents, 2008, p. 604, 607-609.

Furthermore, uniform framework for decisions and decision-making procedures has been introduced. Also, the EU is bound in its actions to the Charter of Fundamental Rights, on the basis of Article 6, Paragraph 1 TEU, named in the previous subparagraph.

There is, however, an important exception to the new uniformity of the EU. It concerns the CFSP (see # 2.7). The second pillar is abolished formally, but, in terms of content, this pillar, i.e. its intergovernmental regime simply continues to exist. Stronger still, the Treaty of Lisbon, in a certain sense, strengthens this (deviating) regime.<sup>15</sup> In contrast to the Constitutional Treaty, the Treaty of Lisbon states explicitly that the CFSP is subject to “specific rules and procedures.”<sup>16</sup> Also, the IGC 2007 adopted two Declarations about the CFSP, one of which makes clear that the provisions about the CFSP “do not give new powers to the Commission to initiate decisions nor do they increase the role of the European Parliament.”<sup>17</sup> The Treaty of Lisbon stipulates that the so-called “flexibility clause” cannot be applied in the area of the CFSP (see # 2.4).

The *de facto* continuation of the intergovernmental character of the CFSP thus makes the Treaty of Lisbon’s abolition of the pillar structure not to be as radical as at first glance – formally – it seems.

## **2.2. National Democracy**

### **2.2.1. Citizens’ Initiative**

Just like the Constitutional Treaty, the Treaty of Lisbon introduces the European citizens’ initiative.<sup>18</sup> This means that at least one million citizens from a “significant” number of member states can request the European Commission to come with a proposal in a particular policy area. The Commission is, however, not obliged to do this.

### **2.2.2. National Parliaments**

The role of national parliaments in European decision-making is more clearly articulated and strengthened. New in comparison with the Constitutional Treaty is that a separate article in the Treaty of Lisbon is incorporated about national parliaments.<sup>19</sup> In this article, six functions are described in which is expressed that national parliaments contribute actively to the good functioning of the Union. In terms of content, however, this article is nothing more than a reflection of the role of national parliaments as this is provided for in the existing Treaties, including the changes which the Treaty of Lisbon brings to these. The following points are new as compared to the present situation (Treaty of Nice).

Just like the Constitutional Treaty, the Treaty of Lisbon arranges for the national parliaments to be better provided with information by the EU institutions.<sup>20</sup> In addition to discussion documents (green and white papers, and communications), the European Commission henceforth also sends the annual legislative program to the national parliaments, as well as “any other instrument of legislative planning or policy.” This occurs at the same time as these go to the European Parliament and the Council of Ministers. Furthermore, the Commission sends its legislative proposals henceforth directly to the national parliaments, likewise at the same time as to the European Parliament and the Council of Ministers. Also, legislative proposals that come from other EU institutions or initiators are forwarded directly or via the Council to the national parliaments. In addition, in principle a period of eight weeks – Constitutional Treaty: six weeks – needs to elapse between the sending of a legislative proposal to the national parliaments and the time that it is placed on the agenda of the Council for consideration. Between this placing on the

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<sup>15</sup> Barents, 2008, p. 639-640; Kurpas, 2007, p. 2.

<sup>16</sup> Article 24, Paragraph 1 TEU.

<sup>17</sup> Declaration No. 14 concerning the CFSP.

<sup>18</sup> Article 11, Paragraph 4 TEU.

<sup>19</sup> Article 12 TEU.

<sup>20</sup> Protocol No. 1 on the role of national parliaments in the European Union.

agenda and the adoption of a position, ten days, in principle, need to elapse. Furthermore, the Council must directly and simultaneously send to the national parliaments and governments the agendas and the results of its sessions, including the minutes of the sessions about legislative proposals. Finally, the Court of Auditors must henceforth send its annual report for information to the national parliaments at the same time as to the European Parliament and the Council.

In addition to the better provision of information to national parliaments, they can register objection if they are not in agreement with the (EU) level at which legislative proposals are decided upon (“subsidiarity test”). The arrangement about this is included in a Protocol that was also attached to the Constitutional Treaty.<sup>21</sup> The Treaty of Lisbon, however, introduces two changes to this. Firstly, the deadline for national parliaments to submit a reasoned opinion about a legislative proposal is extended from six to eight weeks. Secondly, the so-called “yellow-card procedure” is supplemented by an “orange-card procedure.” In these procedures, each national parliament has two votes, which in the case of a bicameral system – as in the Netherlands – are divided between both chambers. The yellow-card procedure means that if at least one-third of (the total number of votes of) the national parliaments is of the opinion that the legislative proposal in question should be decided on at the national instead of the European level, this proposal must be reviewed. The threshold lies at one-fourth if it concerns a legislative proposal in regard to the area of freedom, security, and justice (see # 2.6). On the basis of this review the initiator of the legislative proposal – usually the Commission – may take a reasoned decision to maintain, amend, or withdraw the proposal.

The orange-card procedure is that, if at least half of (the total number of votes of) the national parliaments finds that the legislative proposal in question – if it originates with the Commission – does not comply with the subsidiarity principle, the Commission must review this proposal. If the Commission decides to maintain the proposal, it must, in a reasoned opinion, justify why it believes the proposal does comply with the subsidiarity principle. The consideration of the proposal is (after all) stopped if 55% of the member states in the Council or a majority (of the votes cast) in the European Parliament share the opinion of the national parliaments in question.

## **2.3. EU Institutions and High Representative**

### **2.3.1. European Parliament<sup>22</sup>**

The European Parliament consists at this moment of 785 members. In the Constitutional Treaty this number was reduced to a maximum of 750 members, while applying a minimum of six and a maximum of 96 members per member state. The Treaty of Lisbon maintained the 750 maximum formally, but practically the President of the Parliament is not counted, so that an extra seat could be allocated to Italy.<sup>23</sup> This brings Italy to the same level as the United Kingdom. In practice, the European Parliament thus numbers 751 members.

The position of the European Parliament is in various respects strengthened. Thus it gets a greater say in the annual budget. Because the distinction between compulsory and non-compulsory expenditure has been abolished, the Parliament gets a decisive voice in regard to all expenses of the Union and is put on an equal footing with the Council in this regard.

Besides, the co-decision procedure – which places the Parliament on an equal footing with the Council in the legislative process – is extended. This also has to do with the fact that decision-making by a qualified majority in the Council on the initiative of the Commission and in combination with the co-decision right of the European Parliament, is henceforth the rule (“ordinary legislative procedure”; see # 2.5). Therefore, the extension of the co-decision procedure – which is continued in the ordinary legislative procedure – concerns, firstly, policy

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<sup>21</sup> Protocol No. 2 on the application of the principles of subsidiarity and proportionality.

<sup>22</sup> Article 14 TEU; Article 223-234 TFEU.

<sup>23</sup> Declaration No. 4.

areas that were already decided on by a qualified majority, but where until now no co-decision applied, for example, the common agricultural policy. Secondly, it concerns policy areas where until now matters were unanimously decided but henceforth by a qualified majority, particularly police and judicial cooperation in criminal matters. Thirdly, there are policy areas in which the EU has obtained new competences, such as energy (see # 2.4). In all, it concerns more than 40 new instances.<sup>24</sup>

Moreover, in a number of cases, the consultation procedure has been replaced by the assent procedure, while the consultation procedure has replaced the abolished cooperation procedure.<sup>25</sup> By this also the European Parliament gets a greater role in decision-making (see further # 2.5).

Finally, the political accountability relationship between the European Commission and the Parliament is strengthened. For the first time, a provision is included in the Treaty, which says that the Commission, as a body, is responsible to the Parliament.<sup>26</sup> This is more or less a codification of existing practice. Another part of the political accountability relationship is that the position of the Parliament in the appointment procedure of the President of the Commission is to some extent strengthened. Just like the Constitutional Treaty, the Treaty of Lisbon stipulates that the European Council by a qualified majority nominates a candidate, taking into account the elections to the European Parliament. Then this candidate is “elected” – instead of “approved” – by a majority vote in the Parliament. Although it can be questioned whether these formulations constitute any difference in practice, it seems that, in any case, the importance of the European elections is increased. These elections and the campaign preceding them could be made more attractive by political parties being stimulated to present candidates for the Commission Presidency.<sup>27</sup>

### **2.3.2. European Council<sup>28</sup>**

The position of the European Council, consisting of the Heads of State or Government, plus the President of the Commission, is strengthened. Until now the institutional structure of the EU consisted of the following five institutions: Council of Ministers, European Commission, European Parliament, Court of Justice, and Court of Auditors. With the Treaty of Lisbon, the European Council – just as the European Central Bank – also becomes an official institution.<sup>29</sup> With this, the European Council comes to stand at the head of the institutional structure.<sup>30</sup> The European Council could already make decisions, but now that it becomes an official institution, they obtain a legal character. What does not change is that the European Council cannot adopt legislative acts.

Furthermore, the European Council gets a permanent President, who is appointed by a qualified majority for a period of two and a half years. He or she is eligible for reappointment once. Formally, this President gets procedural competences above all, such as the preparation and chairing of the – actually – tri-monthly European Council meetings, but practically his or her importance will depend on the personality concerned. This comes up particularly in regard to the

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<sup>24</sup> It appears to be rather difficult in practice to determine the precise number. This number is also dependent on the classification, combining or, on the contrary, splitting up of instances, as the case may be. Compare in this connection the differences between Appendix 1 of Chapter 12 of Barents, 2008, and Appendix 3 of the Report on the Treaty of Lisbon of the Committee on Constitutional Affairs of the European Parliament, 29 January 2008 (A6-0013/2008).

<sup>25</sup> See (the differences between) Appendices 2 and 3 of Chapter 12 of Barents, 2008, and Appendix 4 of the Report on the Treaty of Lisbon of the Committee on Constitutional Affairs of the European Parliament, 29 January 2008 (A6-0013/2008).

<sup>26</sup> Article 17, Paragraph 8 TEU.

<sup>27</sup> Kurpas, 2007, p. 5.

<sup>28</sup> Article 15 TEU; Articles 235-236 TFEU.

<sup>29</sup> Article 13 TEU.

<sup>30</sup> Barents, 2007, p. 178.

responsibility of the permanent President to represent the Union externally, “at his level and in that capacity,” in areas that fall under the CFSP.

### **2.3.3. Council of Ministers<sup>31</sup>**

The Council of Ministers, which consists of various formations in which the ministers from the member states come together by policy area, gets a team Presidency of three member states for a period of eighteen months.<sup>32</sup> The member states rotate in this on an equal basis. The team Presidency comes in place of the present Presidency, which rotates semi-annually among the member states. An exception is formed by the Foreign Affairs Council, which gets a permanent President in the person of the High Representative of the Union for Foreign Affairs and Security Policy (see # 2.3.5). Furthermore, it is important to note that henceforth the Council shall deliberate and vote in public on legislative acts (but not on non-legislative activities).

### **2.3.4. European Commission<sup>33</sup>**

At this moment, each member state has a Commissioner in the European Commission. This will remain so until 31 October 2014, but beginning 1 November 2014 the Commission will consist of two-thirds of the number of member states, unless the European Council decides unanimously to change this number. In the present Union of 27 member states, two-thirds amounts to 18 Commissioners. This number includes the President and the High Representative, who will become one of the Vice-Presidents. In the reduced Commission, the member states will rotate on the basis of a strictly equal system of rotation.

The position of Commission President is somewhat strengthened. Firstly, he or she will, as already said, be elected, on nomination by the European Council, by a majority vote in the European Parliament, taking into account the result of the European elections. That might give his or her position a greater democratic legitimacy, upon which he or she might appeal. Secondly, he or she no longer needs the explicit approval of the rest of the College for appointing Vice-Presidents and for a request to an individual Commissioner to resign.

### **2.3.5. High Representative<sup>34</sup>**

As has already been indicated in # 2.1.2, the High Representative in the Constitutional Treaty was still called “Union Minister for Foreign Affairs.” In this connection, only the name is changed; nothing is altered in terms of content. The High Representative is appointed by the European Council by a qualified majority and with agreement of the Commission President. The new position is a fusion between the present functions of Secretary-General of the Council/High Representative for the CFSP and the Vice-President of the Commission in charge of external relations (“double-hatted”). He or she is in the name of the Council responsible for the development and implementation of the CFSP and the Common Security and Defense Policy (CSDP). He or she is the President of the Foreign Affairs Council. At the same time the High Representative is one of the Vice-Presidents of the Commission. As such, he or she is in charge of external relations. Insofar as he or she acts as Commissioner, he or she is subject to the procedures for the operation of the Commission. The High Representative is supported by a ‘European External Action Service’. This is made up of officials of the Council, Commission, and the member states.

## **2.4. Competences<sup>35</sup>**

In the Treaty of Lisbon, following the Constitutional Treaty, the principle of the conferral (attribution) of competences is laid down for the first time.<sup>36</sup> This principle means that the EU

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<sup>31</sup> Article 16 TEU; Articles 237-243 TFEU.

<sup>32</sup> See the draft decision of the European Council about this that is included in Declaration No. 9.

<sup>33</sup> Article 17 TEU; Articles 244-250 TFEU.

<sup>34</sup> Articles 18 and 27 TEU.

<sup>35</sup> See Barents, 2008, Chapter 14.

exercises only those competences that are conferred upon it by the member states. It is not new that the competences of the EU are based on this principle. The making explicit of this in Article 5, Paragraph 1 TEU confirms, indeed, the importance of this principle, particularly in comparison with the subsidiarity principle also named in this article, which only refers to the exercise of competences.<sup>37</sup> Compared with the Constitutional Treaty, the principle of conferral of competences is more pointedly written here. Both Article 4, Paragraph 1 and Article 5, Paragraph 5 TEU add that the competences not conferred upon the Union in the Treaties remain with the member states. Moreover, this is underscored in a Declaration.<sup>38</sup> These additions, however, result self-evidently from the nature of the conferral principle. The Declaration just named emphasizes also that the ordinary revision procedure (of the Treaties) can be used to increase the competences conferred upon the Union as well as to reduce them (see # 2.5). Viewed legally, the last-named points have absolutely no surplus value, but viewed politically, significance can indeed be attached to them and they might produce a certain effect.

Just like the Constitutional Treaty, the Treaty of Lisbon includes a division of competences, making a distinction between three categories of competence. The policy areas that fall under the various categories are subsequently specified.<sup>39</sup> All of this does not occur in the present Treaties. The first category concerns policy areas in which the Union is exclusively competent. This means that only the Union may legislate and adopt legally binding acts; the member states have no competences of their own. The member states can only adopt acts if they are authorized to do so by the Union or to implement Union acts. Examples are the common commercial policy and the monetary policy for the member states whose currency is the euro.

In the case of shared competences, the EU and the member states each have their own competences. There can be four situations here.<sup>40</sup> If the Union has not yet acted, the member states may exercise their own competences. If the Union acts, the member states may not act on the basis of their own competences (except, again, if they are authorized by the Union or to implement Union acts). If the Union decides no longer to exercise its competence, the member states exercise their competences again. If the Union, however, decides to reverse the previous situation and to again exercise its competences, it again applies that the member states may not act on the basis of their own competences. New in comparison with the Constitutional Treaty is that the third situation is explicitly mentioned in Article 2, Paragraph 2 TFEU, and also in the already mentioned Declaration No. 18, which explains and elaborates this situation. Also new is a Protocol that makes explicit that when the Union exercises a shared competence in a particular area, this covers only “those elements governed by the Union act in question and therefore does not cover the whole area.”<sup>41</sup> Most of the competences of the EU fall under the category of shared competences. Examples are the internal market and the area of freedom, security, and justice (see # 2.6).

The third category concerns areas in which the EU can act in a supporting, coordinating, or supplementing role.<sup>42</sup> In these areas the Union has no competences of its own, but it is competent to coordinate the exercise of the competences of the member states, without being permitted to supersede their competences in these areas. In this matter a prohibition of harmonization of national laws and regulations is operative. Examples are culture and tourism.

Furthermore, still two other categories are mentioned: the coordination of economic and employment policies, and the CFSP. It is strange that these policy areas are not assigned to one

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<sup>36</sup> Article 5 TEU.

<sup>37</sup> Barents, 2008, p. 358-359.

<sup>38</sup> Declaration No. 18 in relation to the delimitation of competences.

<sup>39</sup> Article 2 and Articles 3-6 TFEU, respectively.

<sup>40</sup> Barents, 2008, p. 368.

<sup>41</sup> Protocol No. 8 on the exercise of shared competence. According to Barents, this Protocol has, however, little added value (Barents, 2008, p. 369).

<sup>42</sup> These three words have no essentially different meaning (Barents, 2008, p. 374).

of the three categories just mentioned. The specific competence provisions about these policy areas make clear that economic policy and the CFSP are in fact shared competences, while employment policy is a supporting competence.

This touches on a more general point in this regard, namely, the relative value of the distinction between the various categories of competence in the new Treaty.<sup>43</sup> The intention of this distinction is to provide more clarity concerning the division of competences between the EU and national levels. The specific competence provisions in the TFEU and – as to the CFSP – in the TEU should be interpreted in the light of the competence categories. In practice, however, it is exactly the other way around: the competence categories are so general and unclear that the nature, content, and extent of the competences are determined by the specific competence provisions. The relatively small value of the distinction between competence categories is also seen from the fact that certain competences of the EU are not even mentioned, such as the rule-giving competence with relation to European citizenship and services of general interest.

All in all, the existing division of competences remains as it was, but it is now for the first time included in the Treaties. Moreover, the Treaty of Lisbon, in line with the Constitutional Treaty, creates a number of new competences.<sup>44</sup> These concern intellectual property, services of general economic interest, space, energy (shared), tourism, sport, civil protection, and administrative cooperation (all four supporting, etc.). Therefore, in regard to the four last named policy areas, the member states' own competence remains decisive.

Finally, it must still be pointed out in this connection, that the so-called “flexibility clause,” in renewed form, is retained (Article 352 TFEU).<sup>45</sup> This clause gives the Union the competence to adopt measures in instances in which the Treaties do not provide the necessary powers, if that is regarded as necessary to realize one of the objectives of the Treaties. Compared with the present clause, it can be stated, on the one hand, that the new clause contains a broader competence, because this is no longer linked to the internal market but to the objectives of the EU.<sup>46</sup> On the other hand, the competence is more limited, because no harmonization of laws or regulations may take place in instances in which the Treaties exclude this. Moreover, for the competence to be used, the approval – instead of the advice – of the European Parliament is required, and Article 352 TFEU, cannot be changed by means of the (second) simplified revision procedure (see # 2.5). New in comparison with the Constitutional Treaty is the addition that the competence may not be used in the area of the CFSP. New, also, is that a Declaration states that the flexibility clause may not be used in order to evade the ordinary (heavy) Treaty revision procedure.<sup>47</sup> In spite of the fact that the flexibility clause is thus partially curtailed, it can be said that, although the (first) simplified revision procedure may not be employed in order to increase the competences of the EU (see # 2.5), this is nevertheless possible on the basis of the flexibility clause.<sup>48</sup>

## **2.5. Decision-making**

In line with the Constitutional Treaty, the Treaty of Lisbon stipulates that henceforth the rule is that legislative proposals are decided on in the Council by a qualified majority.<sup>49</sup>

The manner in which this qualified majority comes about is changed. At the moment, the Treaty of Nice's complicated triple majority system is in effect. For a Union of 27 member states, this system involves that, when the Council decides on a Commission proposal, the qualified majority

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<sup>43</sup> Barents, 2008, p. 360-361, 376-377.

<sup>44</sup> Strictly speaking, these are however no new competences, because, on the basis of existing competence attributions, European initiatives are already developed in these policy areas (Barents, 2008, p.571).

<sup>45</sup> Old Article 308 TEC.

<sup>46</sup> Barents, 2008, p. 374-376.

<sup>47</sup> Declaration No. 42 on Article 352 TFEU.

<sup>48</sup> Barents, 2008, p. 376.

<sup>49</sup> Article 16, Paragraph 3 TEU.

is reached when 73.91% of the (weighted) number of votes, a majority of the number of member states, and – on request – 62% of the EU population is in favour. Whenever the Council does not decide on the initiative of the Commission, the member state criterion is two-thirds of the number of member states.

In place of this, the Treaty of Lisbon introduces a system of double majority.<sup>50</sup> When the Council decides on a Commission proposal, this decision is regarded as taken when at least 55% of the member states (at least 15) and at least 65% of the EU population is in favour. A blocking minority is formed by at least four member states. Whenever the Council does not decide on the initiative of the Commission or of the High Representative, these percentages are 72% and 65%, respectively.

In comparison with the Constitutional Treaty, the provisions on this point are, however, adapted in several respects. Firstly, the new decision-making rules will go into effect only beginning 1 November 2014 (instead of beginning 1 November 2009). Secondly, a transitional period will be in effect between 1 November 2014 and 31 March 2017, in which each member state can ask for application of the present Nice rules.<sup>51</sup> Thirdly, the so-called Ioannina formula, in revised form, is continued in a Declaration.<sup>52</sup> Just as in the case of the Constitutional Treaty, it obtains that if member states, which represent at least three-quarters of the population or of the number of member states necessary to form a blocking minority in the Council, oppose the particular decision, the Council shall discuss the issue anew. During these discussions the Council will do everything in its power, within a “reasonable time,” to find a satisfactory solution to meet the objections of the respective member states. In practice, this means that consensus will (as much as possible) be pursued. New, in comparison with the Constitutional Treaty, is that, beginning 1 April 2017, member states, which represent 55% (instead of three-quarters) of the population or of the number of member states necessary to form a blocking minority, can already put this mechanism into operation. The renewed Ioannina formula can, according to a Protocol to that effect, only be revised or abolished unanimously, so that it will, in practice, remain in force for an indefinite period of time.<sup>53</sup>

Another point that is important in this regard is that the number of instances in which the Council decides by a qualified majority is considerably extended. It concerns, on the one hand, subjects which until now are decided on by unanimity but henceforth by a qualified majority, particularly in the area of judicial and police cooperation in criminal matters (the remnant of the old third pillar). On the other hand, it concerns those policy areas, mentioned in the preceding section, in which the EU has obtained new competences. With regard to this, there are, respectively, 21 and 28 new instances.<sup>54</sup>

In a number of instances, qualified majority decision-making in the Council is combined with the possibility to make an appeal to the European Council. If a member state thinks that a proposal would affect fundamental aspects of its social security system or criminal justice system, it can request that the matter be referred to the European Council.<sup>55</sup> In such an instance, the legislative procedure is suspended. The European Council shall then, within four months, refer the proposal back to the Council or – in the instance of social security – not act or request the Commission to come with a new proposal. A number of these and other instances are discussed further in the following section.

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<sup>50</sup> Article 16 TEU; Article 238 TFEU.

<sup>51</sup> Protocol No. 11 on transitional provisions, Article 3.

<sup>52</sup> Declaration No. 7.

<sup>53</sup> Protocol No. 10.

<sup>54</sup> At least according to Appendix 2 of the Report on the Treaty of Lisbon by the Commission on Constitutional Matters of the European Parliament, 29 January 2008 (A6-0013/2008); see the earlier remark in footnote 24.

<sup>55</sup> Articles 48, 82, and 83 TFEU.

Just like the Constitutional Treaty, the Treaty of Lisbon stipulates that qualified majority decision-making in the Council at the initiative of the Commission and in combination with co-decision of the European Parliament, is the “ordinary legislative procedure.”<sup>56</sup> This procedure concerns a continuation of the present co-decision procedure.<sup>57</sup>

In addition to the ordinary legislative procedure as the basic rule, the Treaty of Lisbon, in line with the Constitutional Treaty, introduces the “special legislative procedure.”<sup>58</sup> According to this procedure, either the Council alone decides, at the initiative of the Commission, in most instances with unanimity and a role for the European Parliament in the form of assent or – usually – consultation, or the European Parliament alone decides, with a role for the Council. The great majority of the instances concern the former variant (Council acts).<sup>59</sup> In view of the number and importance of the subjects that fall under the special legislative procedure – read: are Council acts and thus “executive legislation” – this concerns essentially two legislative procedures existing side by side. In practice, it is therefore not the case that the ordinary legislative procedure is the basic rule and the special legislative procedure the exception.<sup>60</sup> Furthermore, it should be noted that the cooperation procedure is abolished.

Finally, in the context of decision-making, attention can be paid to the three revision procedures that the Treaty of Lisbon, in line with the Constitutional Treaty, introduces.<sup>61</sup> The “ordinary revision procedure” involves a continuing of the present Treaty revision procedure by means of an IGC but preceded by the preparatory work of a Convention. This Convention, consisting of representatives of the national parliaments, the governments of the member states, the European Parliament, and the Commission, adopts by consensus a recommendation to the IGC. This concerns an institutionalization of the work of the European Convention, which in 2002-2003 made a draft of the Constitutional Treaty. The European Council, however, can decide, by a simple majority and after obtaining the consent of the European Parliament, not to convene a Convention, “should this not be justified by the extent of the proposed amendments.” A difference with the Constitutional Treaty is that the Treaty of Lisbon not only lays down that a Treaty revision can be used in order to increase the competences conferred upon the EU but also to reduce them. As already came up in the previous section, this point is once more emphasized in Declaration No. 18.

Furthermore, the Treaty of Lisbon contains two “simplified revision procedures.” The first concerns the revision of the third part of the TFEU about Union policies and internal actions. This decision can be made with unanimity by the European Council, after consultation of the European Parliament, the Commission, and – if it concerns institutional changes in the monetary area – the European Central Bank. Just as with an ordinary Treaty revision, this decision must, besides, be

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<sup>56</sup> Articles 289, Paragraph 1 and Article 294 TFEU.

<sup>57</sup> It concerns a total of more than 80 instances. See (the differences between) Appendix 1 of Chapter 17 of Barents, 2008, and Appendix 3 of the Report on the Treaty of Lisbon of the Committee on Constitutional Affairs of the European Parliament, 29 January 2008 (A6-0013/2008).

<sup>58</sup> Barents, 2008, p. 456-458, 463-464.

<sup>59</sup> A little under 30 instances as opposed to only 3 acts of Parliament. See (the differences between) Appendix 2 of Chapter 17 of Barents, 2008, and Appendix 4 of the Report on the Treaty of Lisbon of the Committee on Constitutional Affairs of the European Parliament, 20 January 2008 (A6-0013/2008). The appendices mentioned regarding the special legislative procedure contain thus also – and mainly – the instances in which the Council (still) decides with unanimity. For an overview of these instances, see also the appendix of Chapter 10 of Barents, 2008.

<sup>60</sup> Barents notes that the term “special” thereby “has only a cosmetic character to avoid association with executive legislation”, which is the ordinary pattern in the EU but “is fundamentally in conflict with the democratically based principle of a hierarchy of norms” (Barents, 2008, p. 457-458). Moreover, there are more than 50 instances in which the Council, on the basis of the TFEU, can adopt implementation acts, on the initiative of the Commission or not and with a form of involvement by the European Parliament or not (see Appendix 3 of Chapter 17 of Barents, 2008).

<sup>61</sup> Article 48 TEU.

ratified by all the member states. This procedure “shall not increase the competences conferred on the Union in the Treaties.”

The second simplified revision procedure is the substitution of unanimous Council decision-making by qualified majority decision-making, and the substitution of the special legislative procedure by the ordinary legislative procedure (“passerelle clauses”). The first case should concern instances that occur in the third part of the TFEU or in Title V of the TEU about the external action of the Union, including the CFSP but excluding military and defense policy. The second case may concern the TFEU as a whole. The two passerelle clauses can be put into operation by a unanimous decision of the European Council and after the consent of a majority of the members of the European Parliament. Each national parliament can, however, stop the application of the passerelle clauses, if it registers an objection within six months. This makes it improbable that the passerelle clauses will actually be used.

## **2.6. Area of Freedom, Security, and Justice<sup>62</sup>**

As we already saw in # 2.1.3, the material about the area of freedom, security, and justice – the concept introduced by the Treaty of Amsterdam – was, until the Treaty of Lisbon, divided between the third pillar (judicial and police cooperation in criminal matters) and the first pillar (asylum, immigration, border controls, and judicial cooperation in civil matters). With the Treaty of Lisbon, which abolishes the pillar structure, judicial and police cooperation in criminal matters also moves from the intergovernmental to the supranational, or community regime. Concretely, this means that the Commission takes the initiative in legislation, which is decided on by the Council (with qualified majority instead of unanimity) and the European Parliament on the basis of equality (ordinary legislative procedure), while the jurisdiction of the Court of Justice is applicable. With regard to this, there are, however, a number of exceptions,<sup>63</sup> of which a number will pass in review immediately.

The general Article 67 TFEU lays down that the EU is an area of freedom, security, and justice (new name), in which the fundamental rights and various legal systems and traditions of the member states will be respected. This means that no internal border controls will occur and that a common policy will be developed in the area of asylum, immigration, and control of the external borders. The EU strives for a high level of security through combating crime, racism, and xenophobia, through police and judicial cooperation, and through mutual recognition of judgments in criminal matters and, if necessary, the approximation of criminal laws. This description is significantly broader than that of the present Nice provisions.<sup>64</sup>

Moreover, in the Treaty of Lisbon the content and sphere of operation of the competences of the EU in the area of border controls, asylum, immigration, judicial cooperation in civil matters, and judicial and police cooperation in criminal matters, is more broadly formulated than in the Treaty of Nice.<sup>65</sup> This applies particularly to the new provisions about judicial cooperation in criminal matters. This has to do with measures that promote mutual recognition of judicial decisions, in the context of which minimum harmonization takes place in regard to criminal case law (for example, the mutual admissibility of evidence between the member states) and criminal law (definition of criminal offenses and sanctions).

As has been said, there continue to exist in this regard a number of exceptions to the ordinary legislative procedure. So the special legislative procedure is applicable to certain parts (consultation or assent of the European Parliament). Moreover, it is possible for a member state, when determining the minimum rules in the area of criminal case law and criminal law, to make an appeal to the European Council, whenever it is of the opinion that “fundamental aspects of its

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<sup>62</sup> Articles 67-89 TFEU.

<sup>63</sup> See footnote 14.

<sup>64</sup> Barents, 2008, Chapter 22.

<sup>65</sup> Ibid.

criminal justice system” are at stake. Should the European Council reach consensus, then the case is referred to the Council within four months. Should a difference of opinion remain, then at least nine member states can establish ‘enhanced cooperation’ (see # 2.8). Just like the Constitutional Treaty, the Treaty of Lisbon stipulates that the Council can, with unanimity, set up a European Public Prosecutor’s Office. New in comparison with the Constitutional Treaty is that an appeal procedure (by at least nine member states) to the European Council is also possible in this case, together with the possibility for at least nine member states to establish enhanced cooperation, should consensus in the European Council fail to occur.<sup>66</sup> With regard to operational police cooperation, the Constitutional Treaty stipulated that the Council decide with unanimity. The Treaty of Lisbon now adds to this the possibility for at least nine member states to appeal to the European Council and, if consensus there is lacking, to establish enhanced cooperation.<sup>67</sup> Finally, viewed institutionally, it is of importance to note that Eurojust and Europol are integrated into the institutional structure.

## **2.7. CFSP and CSDP**

In the area of the CFSP, the Treaty of Lisbon changed little in terms of content.<sup>68</sup> As already explained in # 2.1.3, the Treaty of Lisbon formally abolished the pillar structure of the EU, but in practice the old second pillar (CFSP) and its intergovernmental character remained intact and were even strengthened. New is that the competence of the EU with regard to the CFSP is spoken about plainly (see # 2.4).<sup>69</sup> The European Council and the Council are dominant in decision-making, which in principle occurs with unanimity. The European Council is henceforth an official institution, which is a confirmation of its status as an important institution – perhaps even the most important, certainly as it concerns the CFSP. The European Council sets the general guidelines of the CFSP for determining the strategic interests of the EU. Furthermore, it can also adopt decisions but no legislative acts. The Council has subsequently the task, on the basis of the general guidelines and strategic policy lines of the European Council, further to develop and implement the CFSP by means of decisions.

The changes of the Treaty of Lisbon with relation to the CFSP are primarily institutional in nature (see # 2.3.5). In developing and implementing the CFSP by the Council, an important role is set apart for the new High Representative, who as such is President of the Foreign Affairs Council. He or she contributes by means of his or her proposals to the preparation of the CFSP, guarantees the implementation of the decisions of the European Council and the Council, and represents the Union in the area of the CFSP. This function will undoubtedly make for new dynamics in the CFSP. The High Representative is aided by a “European External Action Service.”

With regard to the Common Security and Defense Policy (CSDP), the Treaty of Lisbon and the Constitutional Treaty are in total agreement.<sup>70</sup> The Treaty of Lisbon puts through important changes in this area as compared to the Treaty of Nice now in effect.<sup>71</sup> For the first time, it is named separately as the Common Security and Defense Policy – until now it was called the European Security and Defense Policy (ESDP) – unattached to the CFSP but nevertheless formally an “integral part” of it. The CSDP supplies the Union, according to Article 42 TEU, with an operational capacity to carry out civil and military missions – the so-called Petersberg tasks – outside the Union for peacekeeping, conflict prevention, and strengthening international security. In combination with the – not limitative – summary of the Petersberg tasks in Article 43 TEU, this formulation means that the Treaty of Lisbon formulates and conceives the Petersberg tasks more broadly than the Treaty of Nice. The Petersberg tasks can be entrusted by the Council to a group

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<sup>66</sup> Article 86 TFEU.

<sup>67</sup> Article 87 TFEU.

<sup>68</sup> Articles 23-41 TEU; see Barents, 2008, Chapter 23.

<sup>69</sup> Article 24, Paragraph 1 TEU.

<sup>70</sup> Articles 42-46 TEU.

<sup>71</sup> Barents, 2008, Chapter 24.

of member states. Although this is not formally the case, this in practice concerns a form of enhanced cooperation.

Furthermore, the Treaty of Lisbon introduces the European Defense Agency, which in fact was already set up and comes under the Council. Briefly, this agency aims to coordinate the military infrastructure of the participating member states and can be regarded as an “embryonic ministry of defense” of the EU.<sup>72</sup> “Participating” member states, because the European Defense Agency, to be sure, stands open for all member states, but in practice not all member states will participate (immediately). Within the agency, besides, specific groups of member states will be formed that execute joint projects. Although it is not officially the case, the activities of the European Defense Agency, in practice, also amount to a form of enhanced cooperation. Official, however, is the introduction of a so-called “pre-defined” variant of enhanced cooperation, named “permanent structured cooperation.”<sup>73</sup> By this is meant the execution, by a group of member states, of (those parts of) the Petersberg tasks, for which their military capabilities must fulfill “higher criteria,” and which states, in view of this, have made “more binding commitments.”<sup>74</sup> Permanently structured cooperation actually goes a step further than the aforementioned entrusting of the Petersberg tasks to a group of member states.

Although the CSDP is therefore, in practice, not a matter of all member states, Article 42, Paragraph 2 TEU stipulates, with an eye to the future, that the CSDP includes the “progressive framing of a common Union defense policy.” A difference with the present Nice provision is that this is no longer linked with the CFSP, “which – viewed theoretically – may imply a certain aloofness from NATO.”<sup>75</sup> Another difference from the Treaty of Nice concerns the formulation that the progressive framing of a common defense policy will – instead of “might” – lead to a common defense as soon as the European Council decides on that unanimously.

## **2.8. Flexibility**

The Treaty of Lisbon brings about an increase in “flexibility,” in the sense of (possible) differentiation between member states in the degree to which they take part in European integration.

In the first place, it is made easier and more attractive, via a general mechanism, for a limited number of member states making use of the Treaty framework, to integrate further in a particular policy area than the rest.<sup>76</sup> This general mechanism is named “enhanced cooperation” and amounts to the formation of a core group by member states that wish to make more progress with each other in a particular policy area.<sup>77</sup> The provisions about this were introduced in the Treaty of Amsterdam, and the conditions for entering into enhanced cooperation were subsequently relaxed in the Treaty of Nice. These conditions are further relaxed by the Treaty of Lisbon.

The Treaty of Nice stipulated that a minimum of eight member states is necessary in order to establish enhanced cooperation. The Constitutional Treaty set this minimum number at one-third, and the Treaty of Lisbon at nine member states. In the present Union of 27 member states, one-third or nine makes no difference, but in light of future enlargements, the Treaty of Lisbon represents a slight relaxation at this point. Moreover, the decision to establish enhanced cooperation will be absolutely taken in the Council by a qualified majority, with the exception of the CFSP (unanimity). The Treaty of Nice had, it is true, formally abolished the unanimity rule and replaced it by qualified majority, but in practice this was not the case. One member state, namely, could request that the matter be referred to the European Council. After that, the matter returned

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<sup>72</sup> Barents, 2007, p. 182; 2008, p. 688.

<sup>73</sup> Articles 42, Paragraph 6 and Article 46 TEU.

<sup>74</sup> These commitments are laid down in Protocol No. 4 on permanent structured cooperation.

<sup>75</sup> Barents, 2008, p. 690.

<sup>76</sup> For more detail, see CEPS, EGMONT, and EPC, 2007, p. 97-119.

<sup>77</sup> Article 20 TEU; Articles 326-334 TFEU.

to the Council, but it was not guaranteed that the Council would actually make a decision (with qualified majority). Moreover, the member states wishing to establish enhanced cooperation are expected to specify, in their request to the Commission, its “scope” and its “objectives.” This implies that enhanced cooperation can go further than the adoption of a single measure for which insufficient support appears to exist in the Council. In this way a broader and more structural form of cooperation can be undertaken, comparable with the Schengen area and the Euro zone, without the necessity of a Treaty change (by consensus).

Another relaxation concerns the introduction of a “passerelle” system in the context of enhanced cooperation. This means that the Council, in its special configuration, can decide to replace the unanimity rule by qualified majority, and the special legislative procedure by the ordinary legislative procedure, for the sake of enhanced cooperation. A Declaration indicates that the participating member states can already make use of this possibility when requesting to establish enhanced cooperation.<sup>78</sup> This also amounts to an indirect, simplified Treaty revision procedure, the result of which is part of the “acquis” of enhanced cooperation, which is binding for possible future participants in the enhanced cooperation.

In the second place, from now on enhanced cooperation can be applied in more areas than is the case now. It concerns judicial and police cooperation in criminal matters, and the CFSP and the CSDP. As was discussed already in # 2.6, the Treaty of Lisbon provides, just like the Constitutional Treaty, the possibility to establish enhanced cooperation in the area of minimum harmonization of criminal case law and criminal law, should an appeal procedure to the European Council not result in a consensus. New in comparison with the Constitutional Treaty is that this possibility also exists for the setting up of a European Public Prosecutor’s Office and for operational police cooperation.

The Treaty of Nice had set down that enhanced cooperation in the area of CFSP could only relate to the implementation of a joint action or a common position, and was not possible in the area of defense. The Treaty of Lisbon stipulates, following the Constitutional Treaty, that enhanced cooperation henceforth is absolutely possible in the area of either CFSP or CSDP. Furthermore, the possibility has been created in the area of defense to enter into a so-called “pre-defined” variant of enhanced cooperation in the form of “permanent structured cooperation.” Also, the activities of the European Defense Agency and the entrusting of the Petersberg tasks to a group of member states in practice amount to a form of enhanced cooperation (see # 2.7).

In the third place, there is more flexibility, because a number of new instances have been introduced where certain member states do not participate in European integration (“opt-outs”). An example is the Charter of Fundamental Rights, which is not legally binding in the United Kingdom and Poland.

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<sup>78</sup> Declaration No. 40.

### 3. Evaluation of the Treaty of Lisbon

In this chapter, the changes of the Treaty of Lisbon described in the previous chapter are first evaluated in light of the question as to how far they contribute to a further deepening of the integration process as regards the content of policy and how that can be assessed (# 3.1). Then the changes will be evaluated in the light of the question as to how far they lead to a more efficient, more transparent, and more democratic Union (# 3.2). As indicated in the Introduction, a comparison and connection is made with *Towards Europe* in this respect.

#### 3.1. Evaluation as regards the Content of Policy

##### 3.1.1. Criteria for Division of Competences

An important step in the development of a Christian-political view of the EU is that the EU must also be viewed as government. This is because at the EU level competences are exercised in a way that is binding for member states and citizens.<sup>79</sup> A Christian view of government implies, further, that also the EU institutions stand in the service of God for the good of the citizens.<sup>80</sup> In the exercise of their tasks, they have as goal the promotion of “public justice.” The content of EU policies can therefore be evaluated in the light of that ideal. Public justice is less useful as criterion for the division of competences between the EU and national governmental levels. Also, the principle of “sphere sovereignty” does not seem suitable for this. In the search for such a criterion, *Towards Europe* finally ended up with the more practical subsidiarity criterion.<sup>81</sup> Concretely, this was so interpreted that, if a policy area is boundary-crossing, a better result can be achieved by deciding at the EU level, and – connected with public justice – if the cultural diversity of the member states is not of decisive importance, this policy area should have to be (partly) regulated at the EU level. While the vertical subsidiarity criterion can be employed for the division of competences between the EU and national (and subnational) governments, the horizontal principle of “sphere sovereignty” can be applied to the recognition of responsibilities of the associations, including the government, and the relations that exist between these associations in national and international political contexts.

##### 3.1.2. Further Deepening of the Integration Process

In this light, how can the changes be evaluated that the Treaty of Lisbon brings about? In the first place, to do this, it is of importance to obtain a good view of the consequences of the new Treaty for the division of competences between the EU and national levels. As already observed in # 2.4, the existing division of competences does not change, but is now for the first time included in the Treaty itself. Shifts have appeared, however, within the existing division of competences that signify a further deepening of the integration process. Moreover, the Treaty ascribes new competences to the EU, which also result in a further deepening.

In general, in this connection, the abolition of the pillar structure by the Treaty of Lisbon should be pointed out. Although this abolition, as was already indicated in # 2.1.3, is not as radical as it – formally – at first glance seems, actually a crucial step is made in the direction of a further deepening of the integration process.<sup>82</sup> A step which, *nota bene*, did not appear attainable on the notorious “Black Monday” of the Dutch Presidency in the run-up to the Treaty of Maastricht (!). The Dutch cabinet rejects the formation of a European “super-state” and in this context considers the new Treaty significant for changed European political dynamics.<sup>83</sup> In this respect, above all, an appeal is made to the differences in form discussed in # 2.1.2 between the Constitutional

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<sup>79</sup> Anker and Luitwieler, 2002, Chapter 3; Kuiper, 2003, p. 93-94.

<sup>80</sup> Romans 13:4.

<sup>81</sup> Anker and Luitwieler, 2002, Chapter 4.

<sup>82</sup> Barents, 2007, p. 183; 2008, p. 134-135.

<sup>83</sup> Lower House, meeting year 2006-2007, 21 501-20, no. 344; Lower House, meeting year 2007-2008, 31 202, no. 1.

Treaty and the Treaty of Lisbon concerning terminology, abolition of symbols, the omission of the Charter, and the primacy principle. These changes aim to make the EU less “state-like” and to make the Treaty less “constitutional.” Time will tell how this altered European politics will develop further.

To evaluate the “state-likeness” of the EU, however, mainly the content must be examined.<sup>84</sup> The EU is no (super-)state, formally, but, viewed practically, the EU institutions function surely as a common government, which exercises competences in an authoritative way that are binding for the member states and citizens of the Union. The EU is thereby no state but does certainly have state-like characteristics. The Treaty of Lisbon strengthens the governmental character of and the exercise of competence by the EU institutions.<sup>85</sup> In reality, the new Treaty, compared with the present situation (Treaty of Nice), further increases the “state-likeness” of the EU. In accordance with what has been argued in the previous chapter, it concerns the following elements.

The abolition of the pillar structure means, concretely, the transfer of the remainder of the old third pillar – police and judicial cooperation in criminal matters – to the supranational decision-making regime (see # 2.6). This particularly means that from now on these areas will be decided on with qualified majority instead of unanimity in the Council of Ministers.<sup>86</sup> Furthermore, we also saw in # 2.6 that the content and sphere of operation of the competences of the EU are formulated more broadly in various spheres within the area of freedom, security, and justice – besides police and judiciary, also asylum and immigration, for example.

Furthermore, there are still other areas that henceforth will be decided on with qualified majority, among which the areas in which the EU has obtained new competences, such as energy (see # 2.4 and 2.5).

Then, it can be argued on the basis of # 2.7, that also in the area of the CFSP and the CSDP steps are taken by the Treaty of Lisbon that actually amount to a deepening, i.e. intensification of the cooperation in these policy areas. Although the intergovernmental character of the CFSP has remained intact and is even strengthened, the creation of the (potentially) important figure of the High Representative, supported by a service of his or her own, shows that the CFSP, literally and figuratively, receives more “face” and is further developed. This is even more true for the CSDP, in view of the more broadly formulated Petersberg tasks, the entrusting of these – formally or practically in the form of enhanced cooperation – to groups of member states, and the institutionalization of the European Defense Agency.

Finally, it came up in # 2.8 that the relaxation of the conditions for entering into enhanced cooperation implies, among other things, the possibility, without a (heavy) Treaty revision, to start a further deepening of the integration process in a particular policy area, which subsequently binds possible future participants. Moreover, there are new possibilities for enhanced cooperation built into the Treaty, such as in the area of judicial and police cooperation in criminal matters and, as already observed, defense (among other things “permanent structured cooperation”). Related to this, the simplified revision procedures (see # 2.5), but especially the renewed flexibility clause (see # 2.4) – although these instruments are also restricted – offer the possibility for further deepening of European cooperation.

All in all, it can be stated that the Treaty of Lisbon brings about a substantial deepening of the integration process and also offers new possibilities for this.

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<sup>84</sup> Remarkably enough, the Dutch Council of State, in its advice on the character and way of ratification of the new Treaty, seems also to have an eye more to the political dimension than to the content (Lower House, meeting year 2007-2008, 31 091, no. 4).

<sup>85</sup> Cf. Barents, 2008, Chapter 25.

<sup>86</sup> See also Van Keulen, Limonard, and Rood, 2007.

### 3.1.3. Assessment

Now that it is clear what the further deepening of the integration process brought about by the Treaty of Lisbon involves, the question arises how this deepening can be assessed from a Christian-social perspective. As has been said, the subsidiarity criterion is usable for this. The transfer of competences in the area of police and judicial cooperation in criminal matters can, in this light, be assessed positively. These matters clearly are boundary-crossing, and better results can be obtained by deciding on them at the EU level. A relatively heavy decision-making procedure (two-thirds of the number of member states and an ordinary majority of the EU population in the Council, in combination with two-thirds of the number of members in the European Parliament) has been advocated for the fight against crime and terrorism in light of the singularity of and diversity among the member states.<sup>87</sup> For the most sensitive parts, the Treaty of Lisbon does indeed provide a more heavy decision-making procedure in the form of unanimity (possibility for setting up a European Public Prosecutor's Office; operational police cooperation) or a possibility of appeal to the European Council (minimum harmonization in the area of criminal case law and criminal law).

The broader competences of the EU in the other spheres within the area of freedom, security, and justice, such as asylum and immigration, can – in keeping with *Towards Europe* – also be positively evaluated.<sup>88</sup>

The new competences that the Treaty of Lisbon creates for the EU can be positively assessed – certainly and in any case as regards the increasingly boundary-crossing energy policy.

Also the deepening in the area of the CFSP and the CSDP does not, in advance, need to be negatively assessed. For many Christian-democrats the line was always that the intergovernmental character of these policy areas must be maintained and that there should be close cooperation – and not competition – with NATO.<sup>89</sup> Recently, however, the discussion about this has flared up again. Supporters of the present view point to the fact that these policy areas pre-eminently touch upon the sovereignty of the member states. Moreover, a common policy in this field would not be attainable due to the division between the member states. A case in point is the American incursion into Iraq and – meanwhile – the question of Kosovo. On the other hand, it can be argued that, from a Christian point of view, the sovereignty of member states cannot be a goal as such,<sup>90</sup> that these policy areas are pre-eminently boundary-crossing, and that the limited feasibility of unity does not mean that it can and should not to be aimed at.

A lance is broken here for the importance of a common policy in this area, that is not so much directed at the development of the EU as a military power but rather at the promotion of peace, justice, and security in the world. With this, the EU should not to position itself opposite to the United States but rather to collaborate with NATO and (thus) with the United States. The ideal of unity among the member states can certainly be pursued and, in the context of this, a less heavy decision-making procedure can be considered.

The inbuilt possibilities for further deepening by means of enhanced cooperation within core groups, although perhaps regarded as necessary in order to attain progress in particular areas, can be assessed negatively in light of a number of objections, including the creation of first- and second-rank member states (see also # 3.2.3).<sup>91</sup> This certainly applies to the possibility for creeping deepening created by particular parts of the provisions on enhanced cooperation, but also by the flexibility clause.

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<sup>87</sup> Van Dalen and Luitwieler, 2007, p. 106.

<sup>88</sup> Anker and Luitwieler, 2002, p. 44-45; Van Dalen and Luitwieler, 2007, p. 105-106.

<sup>89</sup> Anker and Luitwieler, 2002, p. 46-48; Van Dalen and Luitwieler, 2007, p. 106.

<sup>90</sup> Anker and Luitwieler, 2002, p. 26.

<sup>91</sup> See earlier: Van Dalen and Luitwieler, 2007, p. 108.

## 3.2. More Efficient, More Transparent, and More Democratic?

### 3.2.1. Criteria

The criteria efficiency, transparency, and democracy are also useful for a Christian-political evaluation of the EU, in general, and of the Treaty of Lisbon, in particular.

In keeping with *Towards Europe*, it can be argued that that, once agreement exists about the competences exercised by the European government, this also ought to happen in an efficient and effective manner.<sup>92</sup>

With regard to transparency, the Bible speaks positively about things that happen honestly, openly, and publicly. He who knows himself to be upright and truthful has no difficulty showing it and will gladly render account of it. On the other hand, the Bible speaks negatively about things that remain hidden, covered, and secret. From this, Christian politics can derive the duty to bring things to light as clearly as possible. The Bible names goodness, justice, and truth as fruit.<sup>93</sup>

With regard to democracy, the recognition of the EU institutions as government also implies requirements may and must be made as to the manner in which the government exercises its competences. The government's exercise of competences or power calls for counter-power. If power is too much concentrated in one institution or in the hands of individuals, the danger of misuse of power always lies in wait. Therefore, it is important that "checks and balances" are in the political system and that there is control over and accountability by the governing power.<sup>94</sup> Both transparency and democratic control are necessary if the EU really endeavors to strive for public justice.

### 3.2.2. Regarding Parts, Certainly . . .

To what extent will the EU function more efficiently under the Treaty of Lisbon? On paper, certainly a number of improvements can be mentioned. The system of double majority decision-making in the Council means that decisions can be taken more simply than is now the case.<sup>95</sup> True, the new system goes into effect later than the Constitutional Treaty aimed at, it is then coupled with a transitional period in which application of the present decision-making rules can be requested, and an appeal to the Ioannina mechanism remains possible. The new system will apply to more areas (instead of unanimity) than is now the case, whereby it will be easier to come to decisions in these areas. Moreover, the Commission will be reduced, which should lead to a more efficient functioning of this institution.<sup>96</sup> In practice, the specific decision-making procedure in the Council is of subordinate importance, because there will often be no vote and consensus will be sought.<sup>97</sup> Also, we will just have to wait to see whether the Commission will really be made smaller. Since a unanimous decision must still be made by the European Council about the precise rotation system among the member states, member states that refuse to surrender their own Commissioner for a certain period of time still have the possibility to block this.

Will the EU be more transparent because of the Treaty of Lisbon? Improvements have been realized in this regard but also changes for the worse. A real improvement, in keeping with *Towards Europe*, is that the Council henceforth will deliberate and vote in public on legislative acts.<sup>98</sup> Because of this, national parliaments are better able to control their ministers. Formally, the EU gets a uniform structure, which creates greater clarity, but, in practice, next to the

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<sup>92</sup> Anker and Luitwieler, 2002, p. 34, 48.

<sup>93</sup> John 3:19-21; Ephesians 5:8-13.

<sup>94</sup> Kuiper, 2003, Chapter 3; Anker and Luitwieler, 2002, p. 52-53.

<sup>95</sup> See earlier: Van Dalen and Luitwieler, 2007, p. 105-106.

<sup>96</sup> See earlier: Van Dalen and Luitwieler, 2007, p. 106.

<sup>97</sup> In about one-quarter of the instances in which it can be decided with qualified majority, there is a vote (Barents, 2008, p. 208).

<sup>98</sup> Anker and Luitwieler, 2002, p. 53; Van Dalen and Luitwieler, 2007, p. 107.

supranational regime – that applies to most policy areas – the intergovernmental regime for the CFSP continues to exist. It is positive that the new Treaty, as has also been advocated in *Towards Europe*, contains a division of competences, which, in any case, creates clarity on paper about “who does what.”<sup>99</sup> As has already come up in # 2.4, the division of competences, however, offers insufficient foothold when it concerns a concrete instance, for which one has to fall back on the specific competence provisions of the TFEU.

A change for the worse is that the choice has been made to maintain the two basic Treaties and to allow them, with the Treaty of Lisbon, to undergo a new amendment round.<sup>100</sup> Furthermore, there are additions of all kinds of Protocols, Declarations, and exception and transition provisions. All of this hardly promotes the understanding of the EU and the readability of the Treaty text. It is per se positive that the complicated triple majority system of decision-making in the Council has been replaced by a double majority system. The proposal that had been included on this point in the Constitutional Treaty is however adapted in the Treaty of Lisbon in such a way – with a transitional period of time and escape clause – that also the new system is certainly not simple.

What does the Treaty of Lisbon mean for the democratic quality of the EU? Improvements can be named here on parts. It is positive that qualified majority decision-making in the Council, in combination with co-decision by the European Parliament, is from now on the rule (ordinary legislative procedure). This puts the Parliament on equal footing with the Council in the legislative process. This has also been propagated in *Towards Europe*.<sup>101</sup> It is true that, in practice, what it comes down to is that the special legislative procedure, in which the role of the European Parliament is generally weaker, applies frequently and in important areas and therefore does not actually form an exception to the rule. The extension of the Parliament’s competences in the area of the annual budget and the co-decision right is also positive. Just as democratic in nature is the strengthening of the political accountability relationship between Commission and Parliament by explicating this relationship in the Treaty and by taking into account the elections to the European Parliament in the appointment procedure of the Commission President.

In this connection, the question arises how the politicizing of the relationship between the Commission and Parliament can be evaluated. The answer, among other things, is dependent on the question whether the Commission or the European Council – whose position is strengthened considerably, particularly, by the coming of a permanent President – can and should be regarded as EU “government”. The problem is that the European leaders do not make a choice about this point, and both institutions fight for this position. Since, for the sake of efficient decision-making about EU policy areas – provided consensus exists about which policy areas that would have to be – a supranational regime is to be preferred above an intergovernmental regime, it appears, from a normative viewpoint, that the Commission could better claim the status of government than the European Council. From this line of reasoning, a politicizing of the relationship between Commission and Parliament can be valued positively. In *Towards Europe*, a preference was also expressed for the supranational regime and the community method, and although no plea was made for the Commission as EU government, it was still advocated to give the Parliament the possibility to dismiss individual Commissioners.<sup>102</sup>

Omitting choices also comes to light when it concerns the strengthened position of the national parliaments in EU decision-making. It is per se positive that the providing of information by the EU institutions to the national parliaments has been improved. This applies, however, not just to the possibility, which they have under certain conditions, to ask the Commission to review or to withdraw a proposal. The effectiveness of this so-called “subsidiarity test” can (still) be doubted, since a period of time for action of eight (instead of six) weeks is still short, and a good

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<sup>99</sup> Anker and Luitwieler, 2002, p. 51; Van Dalen and Luitwieler, 2007, p. 105-106.

<sup>100</sup> See earlier: Anker and Luitwieler, 2002, p. 54-55; Van Dalen and Luitwieler, 2007, p. 105. Cf. Barents, 2008, p. 138-139.

<sup>101</sup> Anker and Luitwieler, 2002, p. 52; Van Dalen and Luitwieler, 2007, p. 108.

<sup>102</sup> Anker and Luitwieler, 2002, p. 53; Van Dalen and Luitwieler, 2007, p. 107-108.

coordination between the national parliaments is required. More fundamental is the criticism that the test means that national parliaments can put an intergovernmental spoke in the supranational wheel of EU decision-making. Once competences have been placed at the EU level, it is better to leave parliamentary input in the legislative process to the European Parliament. They decide, together with the Council, and at the initiative of the Commission, about legislation. The national parliaments need to concentrate primarily on controlling their ministers in the (European) Council. Because member states should ultimately have to decide on the question “who does what,” it is more fitting to have the Council of Ministers execute a possible subsidiarity test. *Towards Europe* also included a plea for a “closing” democratic model, in which the European Parliament and the national parliaments have separate but complementary tasks, and for the Council of Ministers, as the most fitting institution, to execute the subsidiarity test.<sup>103</sup>

Concerning the European citizens’ initiative, we will need to wait to see whether this gives citizens the possibility, in fact, to exert influence on European policy makers, certainly because it is the question whether and how the Commission shall react to such a request. Furthermore, the question can be posed whether citizens are not more benefited by a strengthening of the bond with their European leaders, such as they have chosen via national and European elections. This would be a strengthening of representative democracy in the Union.

A last point is that with the – simultaneous – strengthening of the position of the Commission President and the introduction of the permanent President of the European Council and the High Representative, power is concentrated in the hands of individuals. It is doubtful whether this will be counterbalanced by sufficient democratic control and accountability.

### **3.2.3. . . . but Not with Regard to the Total Picture**

The last named points touch on a more fundamental problem of the Treaty of Lisbon. Although regarding parts a number of improvements are introduced in terms of efficiency, transparency, and democracy, the total picture of the new Treaty is less favorable in light of these criteria, because of the lack of choices.

The European leaders have made no fundamental choices, also because different member states have different preferences for different decision-making regimes. As a result, compromises are made in order to keep all member states satisfied.<sup>104</sup> The decision-making regimes concern, particularly, the intergovernmental and the supranational variant. In general, it can be stated that the large member states prefer the intergovernmental regime and the small member states the supranational regime. In the intergovernmental regime, the European Council and the Council of Ministers are dominant in decision-making, and, in principle, unanimity applies. This is to the advantage of the large member states, because, both on paper and in practice, they have a stronger position in these institutions than the small member states. In the supranational regime, the Commission, Parliament, and Court of Justice play an important role, and qualified majority decision-making applies in the Council. Particularly the strong position of the Commission, which, as the promoter of the general interest also takes into account – or, in any case, is expected to do so – the interests of the small member states, assures that this regime is relatively advantageous to small member states.<sup>105</sup>

The uniqueness of the EU is that these regimes exist next to and through each other. This is often called the peculiar nature of the EU (“sui generis”). By omitting fundamental choices and instead continuing “stacking” various, contradictory regimes, the Treaty of Lisbon contributes to the strengthening of the sui generis character of the Union. Contributing to this is also the increased “flexibility” of the Union, which the Treaty of Lisbon brings about. As discussed in # 2.8,

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<sup>103</sup> Anker and Luitwieler, 2002, p. 52.

<sup>104</sup> Cf. Barents, 2008, p. 134-135, 141, 149, 202.

<sup>105</sup> Barents, 2008, p. 197-198.

the facilitating of core group formation in general is meant here as well as the extension of this possibility to new policy areas and the new “op-outs” that some member states have obtained.

To a certain extent, it needs to be recognized that the lack of choices is inherent in (the dynamics of) the integration process and is necessary in order to be able to come to a consensus, and thus to be able to continue with European integration. Yet vigilance is necessary that the *sui generis* character of the EU is accepted or even applauded as an immutable fact, since a price must be paid for this in terms of efficiency, transparency, and democracy.<sup>106</sup>

An attempt has been made to make a number of EU institutions separately more efficient, for example, by reducing the Commission and introducing a team Presidency of the Council. It is, however, the question whether the institutional structure in its entirety will work more efficiently, for example, because all kinds of existing and new presidents are going to function next to – and in competition with – each other: the Commission President, the new permanent President of the European Council, the new High Representative as President of the Foreign Affairs Council, and the rotating team Presidency for the other Council configurations. Their competences have not been clearly defined, and they can encroach on each other’s turf.<sup>107</sup>

Also in regard to transparency, there are parts in which improvements have indeed been realized, such as the new division of competences and the partially public Council meetings, but the total picture is one of less transparency. Because the Treaty of Lisbon changes and thus complicates the existing Treaties, the whole has become even more unreadable. On this point the Constitutional Treaty that would replace the existing Treaties was at least an improvement. No matter that the European citizens would have obtained a better comprehension of the working of the various EU institutions and their mutual relationships. On the contrary. By maintaining the present institutional structure, again adding new changes and even strengthening some institutions at the same time – and thereby therefore strengthening the *sui generis* character – the totality becomes still more incomprehensible and more opaque.

The same situation occurs concerning the democratic quality of the EU. Also here the Treaty of Lisbon puts through a number of improvements, such as a greater say of the European Parliament in respect to the annual budget and extension of its co-decision right in the legislative process. As we again look at the total picture, however, it must be recognized that the aforementioned continuation and strengthening of the *sui generis* character causes problems in the area of democratic control and accountability. Personification of the *sui generis* character is the new figure of the High Representative. He or she is Vice-President of the Commission charged with external relations as well as President of the Foreign Affairs Council, and in that function responsible for the common foreign, security, and defense policy. The so-called “double-hat construction” implies the risk that the High Representative, depending on the situation, can put on another hat and by so doing can duck out of adequate democratic control.

Although the Treaty of Lisbon strengthens various institutions, some institutions are more strengthened than others. From a democratic point of view, another point of concern is therefore that the position of the (European) Council – particularly in comparison with the Commission – is strengthened the most, because it gets a permanent President and probably also as consequence of the High Representative, who gets his own civil service.<sup>108</sup> The European

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<sup>106</sup> See earlier: Anker and Luitwieler, 2002, p. 50-51; Van Dalen and Luitwieler, 2007, p. 107-108. In this connection, it is remarkable that, in the Laeken Declaration of December 2001, in which the mandate was formulated for the negotiations about the Constitutional Treaty, and which provided the negotiators with the criteria of efficiency, transparency, and democracy, the existent institutional structure was taken as the point of departure (Barents, 2008, p. 205).

<sup>107</sup> See also Van Keulen, Limonard, and Rood, 2007.

<sup>108</sup> *Ibid.*

Council is the least transparent and democratically controllable institution, and this problem becomes only more urgent when power is concentrated in the hands of individuals.<sup>109</sup>

Barents writes concerning the consequences of striving for a precarious balance between the institutions as compromise between member states: “As long as the Union can be considered as a common government in respect to content but cannot act as a fully fledged government institutionally, it continues to be a matter of a suboptimal organization in terms of democracy and effectiveness in comparison to the national state.”<sup>110</sup> If this compromise – and thus the *sui generis* character of the EU – is taken as the point of departure, efficiency, transparency, and democracy are usable as evaluative criteria only to a limited extent, as Barents rightly remarks. According to him also, it is inherent in the maintaining of the existing institutional balance, that this is at the cost of efficiency, transparency, and democracy.

### 3.2.4. The Importance of Choices

Here the *sui generis* compromise is, however, exactly questioned, and the making of fundamental choices about the setup of the institutional structure is pleaded for.<sup>111</sup> This does not mean that we must not strive for a certain balance between the institutions – this can exactly provide for the desired “checks and balances.” Yet it does mean that it would be better if a choice were made for the supranational or the intergovernmental model. In other words, a balance is sought between the institutions of and within the two models. The heart of the supranational model is formed by the community method, in which the European Commission takes the initiative in legislation, decision-making takes place by (qualified) majority in the Council of Ministers and with the co-decision of the European Parliament, and the European Court of Justice oversees the observance of legislation. In this respect, it can be considered whether the European Parliament should not also get the right of initiative. Moreover, the European Parliament exercises political control over the Commission, which can be compared to a government. Among other things, this control may concern the right of Parliament to be able to dismiss Commissioners. In the intergovernmental model the primacy lies with national governments, which in principle make decisions unanimously in the Council of Ministers and the European Council, and with the national, parliaments which control national governments.

A preference is expressed here for the supranational model insofar as it concerns policy areas that, in our opinion, on the basis of the subsidiarity criterion need to be decided on at the EU level.<sup>112</sup> This model guarantees the best that desired results are obtained on these boundary-crossing policy areas.<sup>113</sup>

This is of course an ideal picture that is difficult to realize in practice – precisely because of the big, opposing interests of the member states. Also if a choice between the two models is not feasible, it is yet in any case desirable to make a clean distinction between the two models in EU policy-making and the setup of the institutional structure. With this is meant that the two models are not combined with each other in individual policy areas. Therefore, once it has been decided to deal with a certain policy area at the EU level, the community method applies, and this will not be combined again with an emergency brake possibility in the form of, for example, an appeal procedure to the European Council or a subsidiarity test by the national parliaments. Also institutionally, compromises are avoided, such as the High Representative who is in between a supranational and an intergovernmental figure.

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<sup>109</sup> See earlier: Anker and Luitwieler, 2002, p. 53; Van Dalen and Luitwieler, 2007, 107-108.

<sup>110</sup> Barents, 2008, p. 202.

<sup>111</sup> See before: Van Dalen and Luitwieler, 2007, p. 107-108. Cf. Pijpers, Kuiper, and Sap, 2006.

<sup>112</sup> See, for the desired division of competences between the EU and national level, Van Dalen and Luitwieler, 2007, p. 105-106, elaborating on Anker and Luitwieler, 2002, Chapter 4.

<sup>113</sup> Cf. Barents, 2008, p. 201.

### **3.3. Epilogue: About the Legitimacy of European Integration**

In the light of efficiency, transparency, and democracy, it would, therefore, have been better had the European leaders made clear choices with regard to the design of the Union structure and the direction of the integration process. Moreover, it is important for the legitimacy of the EU that the EU population be informed clearly about the substantive choices of the Treaty of Lisbon, namely, the important institutional changes and the substantial deepening of the integration process (see Chapter 2 and # 3.1.2).

The further formation of the sui generis EU governmental level and the deepening of the integration process by the Treaty of Lisbon have profound consequences for the member states, which, however, are difficult to calculate and predict. Without dispute, an important task and challenge presents itself to the national leaders to look after the legitimacy of European integration and to strengthen it. They should lead and serve the national political communities in a credible way.

In the final analysis, national governments are the closest government in the experience of citizens, whom they, also in a political sense, (want to) continue to address. Of a European "demos," there is (as yet) nothing of the kind. Also in a further deepening and expanding European Union in the future, justice should therefore be done to both the EU and national levels. If the national governmental level wishes to remain strong and healthy, head of an independent political community, then there shall have to be an effort for a division of competences that does justice to both levels and for adequate political control over and accountability by the European government. For Christian-social politics, all of this means commitment to public justice on two fronts: national and European.

## 4. Conclusions and Recommendations

What conclusions can be drawn, on the basis of Chapters 2 and 3, with regard to the content and evaluation of the Treaty of Lisbon? And what recommendations can be made for the political-administrative practice of the EU, in general, and the position of the ECPM, in particular?

### 4.1. Conclusions

1. In terms of content, the Treaty of Lisbon brings about radical changes compared to the Treaty of Nice that is currently in force, which both concern the Union structure and mean a deepening of the integration process.
2. Although there are differences between the Treaty of Lisbon and the Constitutional Treaty, these differences concern the form above all, and the two Treaties are almost identical in terms of content. These differences in form are, however, of political significance; the Treaty of Lisbon radiates a less “state-like” and “constitutional” implication.
3. The articulation and further strengthening of the position of the national parliaments in the Treaty of Lisbon can in any case be positively assessed in the sense that this has led in member states to a greater awareness, more active attitude, and better support of the parliament.
4. The substantial deepening of the integration process consists, particularly, in further cooperation in the sphere of the area of freedom, security, and justice, including police and judiciary, a number of new policy areas, such as energy, in which the EU has obtained competences, and the common foreign, security, and defense policy.
5. In the light of the subsidiarity criterion, in any case the further integration in the sphere of the area of freedom, security, and justice, including police and judiciary, and the new competence of the EU with respect to energy can be positively assessed.
6. Negatively, in this connection, is especially the possibility built into the Treaty for further, possibly creeping integration via the mechanism of enhanced cooperation and the flexibility clause. Core group formation contains the possibility, without a (heavy) Treaty change, to start a further deepening of the integration process in a particular policy area, which subsequently binds possible future participants.
7. With regard to the structure of the Union, the Treaty of Lisbon can be positively assessed in the light of efficiency, transparency, and democracy regarding parts.
8. This concerns, for instance, the introduction and extension of simpler decision-making in the Council of Ministers, the partially public Council meetings, and the strengthened position of the European Parliament in the legislative and budget processes.
9. This does not, however, apply to the total picture of the new Treaty, which strengthens the sui generis character of the EU. In the light of efficiency, transparency, and democracy, it would have been better had the European leaders made more clear choices.
10. In the current proposals the position of the European Parliament, the Commission President, and the (European) Council (especially by the permanent President and the High Representative) are simultaneously strengthened, where, however, the least transparent and democratically controllable European Council is the biggest winner.
11. It would have been better had fundamental choices been made in respect to the design and direction of the integration process (supranational or intergovernmental).
12. For the legitimacy of the EU, it is important that the EU population be clearly informed about the substantive choices of the Treaty of Lisbon, namely, the important institutional changes and the substantial deepening of the integration process.

### 4.2. Recommendations

1. The ECPM should be conscious of and account for the dilemma, on the one hand, of a principled approach of the EU based on appropriate principles, and, on the other hand, the reality of the actual ongoing and apparently unavoidable integration process.

2. For the principled as well as the realistic approach, it applies that a constructive, positive-critical stance is the right way.
3. In order to create a basis, it is important the ECPM parties and politicians are clear and honest in the political-social debate and to the grassroots support about the actual advanced status of the integration process, which will be further deepened by the Treaty of Lisbon. In this connection, the ECPM needs to point to the challenges facing the Union and the advantages of the integration process.
4. It is important that the ECPM makes clear choices about the desired direction and design of the EU – contrary to the thought that a “sui generis” Union is unavoidable or even desirable – and to present those choices in the political-social debate and to the grassroots support.
5. The supranational model takes preference insofar as it concerns policy areas, which, according to our vision, need to be decided on at the EU level. In any case, a clean distinction needs to be made between the supranational and the intergovernmental model in EU policy-making and the setup of the institutional structure.
6. In view of the existing and desired cultural diversity among the member states, justice needs to be done to the EU as well as to the national level. In this connection, the ECPM needs to reflect permanently on the desired boundaries as regards the content of policy as well as the geographic boundaries of the EU. In this respect, one should ask the question whether there can and must be placed “boundaries” to the steadily increasing boundary-crossing of policy areas.
7. Because it is the question whether the new division of competence categories offers sufficient foothold and can be made effective, a continuous effort of the member states is required to come to a desired division of competences between the EU and national levels.
8. Since and as long as a European “demos” is lacking, the national communities form the primary political environment of citizens, in which the national governments need to invest in order to guarantee permanently the legitimacy of European integration.
9. For the parliaments and Christian-democratic representatives, this means, particularly, a more active attitude in regard to the start, course, and results of the EU decision-making process. In order to improve the control of the parliament over its own ministers in the Council, a form of “negotiation reservation” may be introduced.
10. In general, it is crucial that the leadership of the ECPM invest in the development of vision for and knowledge about the EU. In particular, there needs to be an investment in good support of Christian-democratic politicians as well as exchange and attuning of knowledge among them. Perhaps a permanent workgroup Europe, meeting regularly, needs to be installed.
11. As a standard for evaluating the content of policy, the ECPM uses the principle of public justice. New reflection is necessary in the ECPM as to how, in the light of this principle, EU policies can be assessed. EU policy-making is often presented as the politics of (national) interest. The ECPM, however, should rather reflect on which political goals, according to it, ought to be aimed at in Europe and the world.
12. Gratitude is appropriate if one realizes that the European Union has brought peace and security and still continues with the strengthening of constitutional rights and democratic relationships, also in countries with which it has a neighborhood relationship. The ECPM should reflect more on this significance of Europe and the contribution Christian-social politics can make to spreading a European sphere of influence of peace, justice, and security in the world.

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