

The Lisbon Treaty 10 years on: Success or Failure?



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Preface

Following a rather lengthy negotiation and ratification process, the Lisbon Treaty entered into force in December 2009. A decade characterised by several serious crises has passed since. It is now time to look back and evaluate the Treaty, with a view to the current state of affairs in the European Union. Has the Treaty been a success for the European Union? Has it been an effective tool to meet the political needs and challenges?

In this anthology, four scholars analyze the institutional and constitutional changes that the Lisbon Treaty has brought. Focus is on democracy and efficiency, fundamental rights, and the EU as a global actor. The Treaty is also analyzed in the light of the crises that have plagued the Union over the past decade: the economic and financial crisis, the migration crisis, the crisis of the rule of law and Brexit.

The EU constitutes a legal order that only has assigned powers; it has only competences conferred upon it by the Member States through the Treaties. The Lisbon Treaty, which represents the latest amendment to the EU Treaties, thus governs what the EU can do. It is therefore of utmost importance that it is well-functioning and effective.

We hope that this anthology will provide new perspectives and insights on the Lisbon Treaty and its application, the challenges facing the EU, and the future of the EU as a whole.

Göran von Sydow
Director

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Executive summaries

In December 2009, the Lisbon Treaty came into force after a long and thorny ratification process. Now, a decade later, it is time to take a step back and reflect on some of the institutional and constitutional changes that the Lisbon Treaty has brought. Has it been efficient to meet the policy needs? This question is of importance, because all EU activities are based on the treaties; the EU has only the competence conferred on it by the treaties. The EU and its Member States therefore need a well-functioning framework.

In this anthology, four scholars analyze the institutional and constitutional changes that the Lisbon Treaty has brought: one political scientist, one historian, and two legal scholars. Focus is on democracy and efficiency, fundamental rights, and the EU as a global actor. The Treaty is also analyzed in the light of the crises that have plagued the Union over the past decade.

Luuk van Middelaar – The Lisbon Treaty in a Decade of Crises: The EU's New Political Executive

The Lisbon Treaty was put to the test from the start. Since it came into force, the European Union has been plagued by several crises, including the sovereign debt crisis, geopolitical tensions with Russia over Ukraine, the refugee crisis, and the UK vote for Brexit. How has the Lisbon Treaty fared in these storms? Does the Union need to equip itself with a new Treaty in the near future? This contribution is divided into four parts. It first examines how the authors of the Lisbon Treaty dealt with the issue of executive power. It then examines the role of the main executive players in the crises, with a focus on the European Council and its presidency, the Commission and its presidency, and on the institutions and bodies in the fields of foreign and monetary affairs. Subsequently, it looks at some informal practices of crisis management that emerged post-Lisbon and some of the formal changes to the Treaty that have been adopted or are under discussion. It concludes that the Lisbon Treaty has proven up to its task. The dual executive of the European Council and the Commission works well, provided all actors conceive their role properly. The Treaty offers enough flexibility for further development, but when necessary, the Member States will go outside the Treaty framework. However, the most pressing issues – public defiance and geopolitical threats from Washington, Beijing, and Moscow – can only be properly addressed by leadership and political will.

R. Daniel Kelemen – The Impact of the Lisbon Treaty: From Misdiagnosis to Ineffective Treatment

The Lisbon Treaty promised to make the EU more democratic and more efficient. It largely failed to do so. The Lisbon Treaty failed because it was based on a faulty diagnosis of the most important challenges to democracy and efficiency in the

EU. It introduced reforms designed to target problems that were exaggerated or non-existent, while failing to introduce the sorts of reform needed to address the actual challenges to democracy and efficiency in the EU. The Lisbon Treaty focused too much on supposed democratic deficits at the EU level while ignoring the EU's vulnerability to democratic deficits amongst its Member States. The reforms designed to enhance transparency and efficiency did not do enough to address the biggest source of opacity and inefficiency in the EU – the European Council. Quite to the contrary, the Treaty elevated the role of the European Council in ways that have undermined both democracy and efficiency. Finally, the Lisbon Treaty focused on the legislative process while largely ignoring the mounting challenges to the implementation and enforcement of EU legislation. There can be nothing more inefficient in a democracy than passing laws only then to ignore them. Failing to bolster the EU's capacity to enforce its laws has only encouraged the further deterioration of the rule of law within the EU over the past decade.

Anne Thies – The Lisbon Treaty and EU External Relations Law: Accommodating Stakeholders, Values, Principles and Objectives

Since the entry into force of the Lisbon Treaty, we have seen further clarification of the legal framework for EU external action, which has strengthened the EU as a global actor, at least from a legal perspective. The EU has been equipped with increased external powers, additional actors and an ambitious agenda that is defined by the EU's commitment to values, principles and objectives with an international outlook. The Court of Justice of the EU, at the request of Member States and EU institutions, has interpreted Treaty novelties in litigation and Opinion proceedings. The Court has applied structural principles in the interests of institutional balance, democracy and the protection of fundamental rights, so its case law has further constitutionalised EU external relations law. The Court has also affirmed its own jurisdiction in matters related to the EU's Common Foreign and Security Policy (CFSP), bringing it closer to other areas of EU competence, even if the CFSP continues to be subject to special procedures and limited judicial review in principle. The EU's international treaty-making and involvement in international collaboration have made it increasingly clear that the EU Commission, Council and Parliament are prepared to be guided by the EU's values, principles and objectives in accordance with the Lisbon Treaty. However, EU Member States' further willingness to overcome disagreement and pull their collective weight (both within and outside the institutions) is required to realise the EU's full potential as a significant contributor to good global governance and to do justice to the EU's rules-based nature.

Eleanor Spaventa – Fundamental Rights at the heart of the Lisbon Treaty? Changes and challenges 10 years on

The Lisbon Treaty has brought some important changes in fundamental rights protection and, in particular, the extension of the jurisdiction of the Court of

Justice of the European Union to encompass cooperation in criminal matters, the constitutionalisation of the Charter of Fundamental Rights of the European Union and the possibility for the European Union to accede to the European Convention on Human Rights (ECHR). However, several problematic areas remain. In certain areas of EU law, such as immigration and European Arrest Warrant, the European Court of Justice's application of fundamental rights has been timid, privileging the effectiveness of EU law over meaningful rights protection. The Court has also blocked EU accession to the ECHR. These shortcomings could be easily addressed through changes in legislation or in interpretation. On the other hand, and much more importantly, recent developments in Hungary and Poland have shown how difficult it is for the EU to react to threats to fundamental rights protection, the rule of law and democracy in its Member States. In this respect, the Lisbon Treaty is a missed opportunity since, for lack of imagination if nothing else, it failed to ensure that the EU could address and react to the breaches of its foundational values perpetrated by Member States.

1 Introduction

Anna Södersten

In December 2009, the Lisbon Treaty entered into force after a long and thorny ratification process. In the years that followed, academic scholars sought to examine the legal and political implications of the new treaty. Endless numbers of books and articles were written, and numerous seminars and conferences were organised on the topic. The Lisbon Treaty seemed like a never-ending source of discussion and analysis.

Now, a decade later, it is time to take a step back and reflect on some of the institutional and constitutional changes that the Lisbon Treaty has brought. Has the treaty been applied as originally intended? Has it delivered? Has it been efficient in meeting policy needs? The questions are of importance because all EU activities are based on the treaties; the EU has only the competence conferred on it by the treaties. The EU and its Member States need a well-functioning framework, but how does the treaty stand after the last decade, which has been so plagued by crises?

1.1 The Long Roads to Lisbon

The EU's reform process started in 2000 at the Intergovernmental Conference in Nice, where a 'Debate on the future of the European Union' was launched. Not everyone had found the Nice Treaty satisfactory, and it had left some issues unresolved.^{1,2} In 2001, the European Council adopted the Laeken Declaration,³ which called for a simplification and reorganisation of the EU Treaties. Some key issues were set out: the division of competences between the Union and its Member States; the simplification of the Union's legislative instruments; the maintenance of interinstitutional balance and an improvement to the efficacy of the decision-making procedure; and the constitutionalisation of the Treaties.

The issues presented in the Laeken Declaration were discussed at the Convention on the Future of Europe. The Convention was formed in order to bring together the main parties concerned for a debate. It was comprised of representatives of the Member States, the European Parliament, the national parliaments, and the Commission. Its objective was to present a draft 'Treaty establishing a Constitution

¹ Bruno de Witte, 'The Nice Declaration: Time for a Constitutional Treaty of the European Union?' *The International Spectator* Volume XXXVI, No. 1, January–March 2001.

² The Nice European Council meeting in December 2000 – Declaration on the Future of the European Union.

³ Presidency Conclusions of the Laeken European Council (14 and 15 December 2001): Annex I: Laeken Declaration on the Future of the European Union, *Bulletin of the European Union* (2001) No. 12, 19–23.

for Europe' to the next intergovernmental conference.⁴ In 2003, the Convention agreed on a text which became the draft Treaty establishing a Constitution for Europe ('The Constitutional Treaty').⁵ The text was the basis for negotiations between the Member States. In 2004, the European Council adopted it.

As with all EU Treaty revisions, the Constitutional Treaty had to be ratified by all Member States. In some Member States, a decision on ratification has to be made by the national parliament. In other Member States, a referendum must be organised. It all depends on the national (constitutional) rules. In France and the Netherlands, the draft Constitutional Treaty was rejected in (non-required, consultative) referendums in May and June 2005. As a result, the ratification process could not be completed. The Constitutional Treaty had to be abolished. The European Council decided that a 'period of reflection' would be necessary.⁶

In June 2007, the European Council approved a mandate for an Intergovernmental Conference to draft a new 'Reform Treaty'.⁷ In October that year, under the Portuguese presidency, agreement was reached, and a draft treaty text was presented: the Lisbon Treaty.

There was a common belief that the Constitutional Treaty had failed because it claimed to be a constitutional document; it had made the EU look like a federal state and was therefore a threat to national sovereignty. Consequently, in the Lisbon Treaty, many of the 'constitutional' elements were left out.⁸ Thus, provisions on the EU 'anthem' and 'flag' were deleted. Sensitive provisions, such as the provision on the primacy of EU law over the law of the Member States, were also deleted. Further, unlike the Constitutional Treaty, the Lisbon Treaty did not repeal and replace the existing treaties. Rather, it is an amending treaty that reforms the previous treaties (including the EEC Treaty, the Maastricht Treaty, the Amsterdam Treaty, and the Nice Treaty).

Nevertheless, most academic commentators today agree that the difference between the Constitutional Treaty and the Lisbon Treaty is primarily cosmetic; the drafting of the Lisbon Treaty was merely a 'repackaging' of the content in the

⁴ Four main issues were addressed: a better division of competences; simplification of the EU's instruments for action; increased democracy, transparency and efficiency; and the drafting of a constitution for Europe's citizens. The Convention's work was divided into three phases: (1) a 'listening phase', in which it tried to identify expectations and needs of Member States and Europe's citizens; (2) a phase in which the ideas were studied, and (3) a phase in which recommendations based on the essence of the debate were drafted.

⁵ Jean-Claude Piris, *The Constitution for Europe – A Legal Analysis* (Cambridge: Cambridge University Press, 2006).

⁶ See the Declaration by the Heads of State or Government of the Member States of the European Union on the Ratification of the Treaty establishing a Constitution for Europe (18 June 2005).

⁷ See Presidency Conclusions of 23 June 2007.

⁸ E.g., see chapter 3 in this volume, R. Daniel Kelemen, 'The Impact of the Lisbon Treaty: From Misdiagnosis to Ineffective Treatment'.

Constitutional Treaty. However, this was sufficient for the EU leaders to give it a try. In France and the Netherlands, referendums were not even deemed necessary.

On 13 December 2007, the national governments signed the Lisbon Treaty. The treaty was to enter into force on 1 January 2009. The timing was important: a new European Parliament was to be elected in June 2009, and it was to take its seat under the new rules. Yet more hurdles were to come, and the treaty's entry into force was delayed.

In June 2008, the treaty was rejected in a referendum in Ireland. Would also the Lisbon Treaty fail? Following this referendum, the European Council agreed on certain guarantees that would address some of the Irish concerns. Most importantly, the new system for Commissioners (which meant a reduction of the number of commissioners) was to be abolished, although a revision of the Lisbon Treaty was never made.⁹ Following these guarantees, a second referendum was held in October 2009. This time, Ireland voted yes to the treaty.

However, the story did not end here: the ratification process also became an issue in other Member States. In some Member States, the Supreme Courts had to decide whether the Lisbon Treaty was compatible with the domestic constitution (for example, Germany, Latvia, and the Czech Republic). The situation was particularly complicated in Poland and the Czech Republic, where, some academic commentators would argue, political leaders tried to exploit the situation (recall that all Member States had to ratify the new Treaty) in order to achieve changes to the already-agreed-upon treaty text (or, rather, exemptions from it).¹⁰ To some extent, this succeeded. The Czech Republic finally managed to get certain guarantees from the European Council that the Protocol on the EU's Charter of Fundamental Rights with the United Kingdom and Poland would also cover the Czech Republic, and this made ratification possible. Poland decided to ratify the Lisbon Treaty after the second Irish referendum. The Lisbon Treaty finally entered into force on 1 December 2009, after it had been ratified by all Member States.

1.2 Time to Reflect?

Ten years have now passed since the Lisbon Treaty came into force. The treaty has brought changes in a range of different policy areas. One example is the new legal basis for energy where a specific legal basis did not exist prior Lisbon. One may ask what this legal basis has brought to the table: how has it changed the EU's possibilities to legislate in the energy field? Other examples are the provisions on administrative cooperation and on space policy. Our perspective,

⁹ Ironically, the new Commission system was not introduced by the Lisbon Treaty, but by the Nice Treaty.

¹⁰ Michael Dougan, 'The Development of European Integration and EU Constitutional Reform', in Dennis Patterson and Anna Södersten (eds.), *EU Law and International Law* (Chichester: Wiley-Blackwell, 2016), 36.

however, is broader. We leave the ‘substantive’ policy areas aside and focus instead on institutional and constitutional changes.

Further, when it comes to the institutional and constitutional changes, our ambition is not to be exhaustive. However, we hope that we have at least captured parts of the core. In the Laeken Declaration, the starting point for the discussions on a new constitution for Europe, it was stressed that the EU needs to become ‘more democratic, more transparent, and more efficient’. Did the Lisbon Treaty achieve this? Closely related questions include: what is the role of fundamental rights in the EU system post-Lisbon, and how has the Lisbon Treaty changed the EU as a global actor?

As mentioned, a great deal has already been written about the Lisbon Treaty and its implications. What we are trying to do here is to reflect on the past decade. It is important to bear in mind that the last decade has been a special chapter in the history of the European Union. It has been plagued by some of the most serious crises in its existence: the economic crisis and the Euro crisis, the rule of law crisis, the migration crisis, and Brexit. Any evaluation of the Lisbon Treaty ten years on must relate to these crises. But the anthology is very much a forward-looking exercise as well. It shows how far we have come at this point, and it asks: where do we go from here? In other words, it is very much also an exercise on the ‘State of the Union’.

However, in some respects, an evaluation might come too early. We can see that some of the provisions that were hailed as important innovations have not yet been applied, and some provisions only have been applied very sparsely. Does this mean that they are to be regarded as ‘dead letters’? History shows that we might have to be patient. Less than 15 years after the Community Treaties had come into force (1958), Judge Pierre Pescatore noted that the flexibility clause (then Article 235 EEC) was feared to remain a dead letter, but that it was becoming more and more significant.¹¹ Thus, it might take some time before some of the Lisbon Treaty provisions will be applied (if that can be regarded as a problem at all).

1.3 The Contributions to this Volume

The anthology features pieces written by four prominent scholars: one political scientist, one historian, and two legal scholars.

The anthology opens with an illuminating analysis written by Professor *Luuk van Middelaar* who describes the treaty as a success. He argues that the dual executive of European Council and Commission works well, and that the treaty offers

¹¹ Pierre Pescatore, in *The Law of Integration* (Leiden: A.W. Sijthoff, 1974, originally published in French in 1972: *Le droit de l'intégration: émergence d'un phénomène nouveau dans les relations internationales selon l'expérience des Communautés européennes*).

enough flexibility for further development. He also finds that the Member States will go outside the treaty framework when necessary and that the most pressing issues – public defiance and geopolitical threats from Washington, Beijing, and Moscow – can only be properly addressed by leadership and political will.

The anthology continues with a thought-provoking critique written by Professor *R. Daniel Kelemen*. He argues that the Lisbon Treaty largely failed in its promise to make the EU more democratic and efficient. In his view, the treaty focused too much on the so-called democratic deficit at the EU level and failed to recognise what was going on at the national (Member State) level (that is, the rule of law crisis). He concludes that the EU must strengthen its ability to sanction Member States who slide into authoritarianism, defend the integrity of European elections, end the culture of secrecy and unanimity in the Council, and strengthen the ability of the Commission and EU courts to enforce EU law.

In the next piece, Professor *Anne Thies* provides a thorough analysis of the changes introduced in the field of external relations. From a legal perspective, she argues, the Lisbon Treaty has strengthened the EU as a global actor: the legal framework for EU external action is now clearer, and the EU has been equipped with increased external powers, additional actors, and an ambitious agenda that is defined by the EU's values, principles and objectives. However, the EU Member States need to overcome disagreement and pull their weight together in order to realise the EU's full potential as a global actor.

Our last focus area is fundamental rights, which, as some commentators have claimed, are at the heart of the Lisbon Treaty.¹² Rightly so, as the Lisbon Treaty brought some important changes to the field: the Charter of Fundamental Rights of the EU was made legally binding, it introduced a possibility for the EU to accede to the European Convention of Human Rights (ECHR), and the jurisdiction of the European Court of Justice was extended to encompass cooperation in criminal matters. In a stimulating analysis, Professor *Eleanor Spaventa* describes these changes, and argues that several problem areas remain. She also points to the recent developments in Hungary and Poland, which illustrate how difficult it is for the EU to react to threats to fundamental rights protection, rule of law and democracy in its Member States. In Spaventa's view, the Lisbon Treaty is a missed opportunity: a revision of the mechanism to protect EU values is impossible as long as some Member States are in breach of it. This means that the problem will only be addressed by a piecemeal approach.

¹² Jean-Claude Piris, *The Lisbon Treaty: A Legal and Political Analysis* (Cambridge: Cambridge University Press, 2010), 71 (citing J. Rifkin, *The European Dream* (New York: Jeremy P. Tarcher/Penguin, 2004)): 'Human rights is at the "heart and soul" of the Constitution.'

1.4 The Last Major Revision?

As the authors in this anthology show, the Lisbon Treaty has to a large extent been a success, but many issues remain. The main problem seems to be the rule of law crisis, which strikes at the very core of the Union: its principles and values. Thus, the need for further reform of the Union seems desired and urgent.

Yet the Lisbon Treaty might be the last major treaty revision for some time to come. The new Commission President, Ursula von der Leyen, is planning to convene a 'Conference on the Future of Europe', which will debate how to reform the EU institutions and strengthen democracy. But it is hard to imagine that it will result in a treaty revision. The prospects for a revised treaty are not very good.¹³ Today, Europe is more polarised than it has been for many years. Perhaps the only way forward will be to use existing instruments. As one of the authors in this anthology notes, the need for future reform can be made by other means (e.g., simple revisions, enhanced cooperation, passerelles, or bilateral action). In other words, treaty revision might not be the only way to reform the Union. One question remains: is this sufficient for Europe?

¹³ Carlos Closa, 'Between a rock and a hard place: the future of EU treaty revisions', SIEPS, March, Issue 2014:2epa.

2 The Lisbon Treaty in a Decade of Crises: The EU's New Political Executive

Luuk van Middelaar

Introduction

For the European Union, the entry into force of the Lisbon Treaty on 1 December 2009 coincided with the start of a period of unprecedented political turbulence, inaugurated by the sovereign debt crisis (2010–2012) and followed by geopolitical tensions with Russia over Ukraine (2014–present), the refugee crisis (2015–2016), and the dual 2016 challenge of the UK vote for Brexit and the US election of President Trump. The Union's new constitutional foundation, which had been conceived, among others, to increase its capacity to act internally and externally, was therefore immediately put to the test.¹⁴

In order to judge how the Lisbon political set-up fared in these storms and how it might be improved, this contribution proceeds in four steps. First we will put the demand for a Union that acts in its historic perspective and look at how the authors of the Lisbon Treaty dealt with the issue ('Changing the game'). Then we will examine in some detail the role of the main executive players in the crises, with a focus on the European Council and its presidency, the Commission and its presidency, and on the (partly new) institutions and bodies in the fields of foreign and monetary affairs ('Testing the new cast'). Subsequently, we will look at some informal practices of crisis management that emerged post-Lisbon ('Improvising crisis bodies'). Finally, we will examine the formal changes to the Treaty that have been adopted or are under discussion. This will allow us, by way of conclusion, to answer the question as to whether the European Union needs to equip itself with a new Treaty in the near future ('Changing the rules?').

¹⁴ Apart from on the literature referenced in the footnotes, this contribution relies to a large extent on the author's personal experiences and observations as the chief speechwriter and a member of the private office of European Council presidents Herman Van Rompuy (January 2010–November 2014) and, transitionally, Donald Tusk (December 2014–February 2015). Since March 2015, the author has also been a non-paid 'special advisor' to European Commission First Vice-President Frans Timmermans. These experiences in the heart of the EU's executive have previously crystallised in Van Middelaar's book *Alarums and Excursions: Improvising Politics on the European Stage* (Newcastle upon Tyne: Agenda Publishing, 2019).

2.1 Changing the game

2.1.1 From rules-politics to events-politics

Surviving a series of crises requires the capacity to act: to react to events, to adapt to unforeseen circumstances, and to take swift decisions under time pressure. Although it has been commonplace in EU discourse since the 1990s to ask for a Union that acts, it is less understood that this implies a radical departure from the body's initial set-up. The original European Community, in its different guises, was designed not to act, but rather to regulate. Its main objective, especially from the 1957 Rome Treaty, was to create a stable framework for economic exchange among private economic actors and thereby, indirectly, to foster trust and stability among member nations. For such a market-building enterprise, patience and predictability are virtues.

In the past decade we have witnessed Europe's metamorphosis from a system based purely on the politics of rules to a system that can also engage in the politics of events.¹⁵ This transformation was partly facilitated by the Lisbon Treaty, but it also took place, perhaps to a greater extent, under the sheer pressure of events. Constructing and running a common market, as the EU institutions were traditionally equipped to do, is rules-politics in pure form. It is an ingenious mechanism that produces consensus and results, but it can work only within a certain set-up, due to the erroneous belief that history runs along predictable lines. In events-politics, by contrast, what matters is getting a grip on unforeseen events. This form of political action is not played out within a specific framework; it occurs when that framework itself is put to the test, in the most extreme case by a war or disaster. In 2008, the disaster was the credit crisis, when the economy refused to continue behaving according to forecasting models. The solution to an unforeseen situation may, of course, lie in the creation of a new regulatory framework (we then see an interplay between events-politics and rules-politics), but certain political decisions can only be translated into one-off acts (in the military domain, for example).

The politics of rules requires a politician with the temperament and technical expertise to participate in a balancing act. The public values honesty and dependability but, in our highly regulated welfare states, it cannot always see the difference between a politician and an expert. The politics of events, by contrast, requires politicians who can improvise. They need to convince parliament and the public with a narrative that reveals why this or that decision is necessary, now. Authority is won by the (elected) individual who, judging the situation correctly, displays initiative, courage and incisiveness at the right moment.

As the European Union experienced during the past decade, a system built for rules-politics cannot be transmogrified for use in events-politics. For example, controlling an influx of refugees requires more than merely the application of

¹⁵ This is the main overall thesis of the author's *Alarums and Excursions*, see in particular pp. 10–14.

fish-quota techniques with ‘asylum quotas’. And forming close ties with Ukraine and other neighbours of Vladimir Putin’s Russia demands more strategic insight than can be learnt through the economic tick-box approach of World Trade Organisation guidelines. It is not enough to design formal executive actors on paper if one does not break with the ingrained habits of the exercise of regulatory power.

2.1.2 The Lisbon compromise

The authors of the Lisbon Treaty, which was mainly drafted in the years 2002–2004 (leaving aside some 2007 adjustments prior to its 2009 ratification), could not, of course, foresee what tumult would happen to the Union after 2009. Nevertheless, the question who decides in times of crisis – who governs – was central to the institutional and constitutional debates that shaped the current Treaty text.¹⁶ For sure, as this volume makes clear, the Lisbon Treaty brought many other important changes in terms of efficiency, legitimacy and policies; but for the representatives from institutions and Member States negotiating the Treaty, an adequate institutional set-up for a Union that would act was crucial. Apart perhaps from the possible mention of God and/or Christianity in the Treaty’s preamble, the topic of political leadership was also what drew most public attention. The conflicting views on the matter – between bigger and smaller states, between France and Germany, between institutional actors and Member States’ representatives – have resulted in a treaty text full of delicate equilibriums, and full of presidents.

The landmark May 2000 Humboldt speech by Joschka Fischer, which kicked off the EU-wide constitutional debate, had the merit of boldly asking where a future European government would be. The German Foreign Minister did so after half a century during which that classic constitutional term had been taboo. (After all, were the Community, and later the Union, not different, *sui generis*, immune from pre-1914 power relations?¹⁷) According to Fischer, less cautious, there were two clear options for Europe’s evolution: either you could build a future European government on the European Council – that is, on national governments – or you could build it on the Commission by a further transfer

¹⁶ For the European Convention, see the comprehensive volume Giuliano Amato, Hervé Bribosia & Bruno De Witte (eds.), *Genesis and destiny of the European Constitution* (Brussels: Bruylant, 2007). For some accounts by participants and privileged observers, see Guy Milton and Jacques Keller-Noëllet, *The European Constitution – its origins, negotiation and meaning* (London: John Harper Publishing, 2005), Peter Norman, *The Accidental Constitution: The Story of the European Convention* (Brussels: EuroComment, 2003) and Olivier Duhamel, *Pour l’Europe: le texte intégral de la Constitution expliqué et commenté* (Paris: Seuil, 2003). As an intern at the European Commission (2002–2004), the author followed the European Convention and the subsequent IGC from the start.

¹⁷ For example, Commission president Walter Hallstein claimed in 1962 that the economy could replace politics: ‘The very nature of this world necessitates a redefinition of what we ordinarily mean by words like “politics” and “economics”, and a redrawing, perhaps even the elimination, of the semantic frontier between the two’. Walter Hallstein, *United Europe: Challenge and Opportunity* (Cambridge, MA: Harvard University Press, 1962), 58.

of competences and direct election of its president.¹⁸ Thus, the German minister identified the two lines of thought that had in fact, since the 1960s, both been pushed by various actors – the two institutional approaches whereof bits and pieces have become part of the EU mechanics.¹⁹ Let us briefly look at both.

The European Commission likes to call itself the ‘European executive’, leaving aside whether that is to be seen as the administrative executive – i.e. the civil service – and/or the political executive – i.e. a government-like body.²⁰ Over time, it has developed an accountability relationship with the European Parliament, various aspects of which – most clearly seen at times of nomination and dismissal – resemble the relationship between a national parliament and government in a parliamentary system.²¹ Essential in this political upgrading of the Commission has been the parallel upgrading of the European Parliament, which in every Treaty change since 1985 gained competences and was made a full co-legislator, on a par with the Council of Ministers, by the Lisbon Treaty. In all these steps, the Parliament has drawn on the symbolic and practical power of its direct election by EU citizens since 1979. This federalist institutional approach has generally been favoured by Germany, Italy and the Benelux countries (although the Netherlands has had second thoughts since the 2000s). At the same time, however, the Commission retains important tasks as ‘guardian of the Treaties’, acting as an honest broker between Member States and an executive implementer, roles which encompass traits of a judicial and technocratic body, and which many small Member States still today see as a guarantee against big

¹⁸ Joschka Fischer, ‘Vom Staatenverbund zur Föderation – Gedanken über die Finalität der Europäischen Union, 12 May 2000 (‘Humboldt-Rede’). In full, the passage reads: ‘Ebenso stellen sich für die europäische Exekutive, die europäische Regierung, zwei Optionen. Entweder entscheidet man sich für die Fortentwicklung des Europäischen Rats zu einer europäischen Regierung, d.h. die europäische Regierung wird aus den nationalen Regierungen heraus gebildet, oder man geht, ausgehend von der heutigen Kommissionsstruktur, zur Direktwahl eines Präsidenten mit weitgehenden exekutiven Befugnissen über. Man kann sich hier aber auch verschiedene Zwischenformen dazu denken.’

¹⁹ It is important to distinguish both these traditions, federalism and confederalism, from a third, functionalism, or European integration through depoliticisation, which shaped the early Treaties (role of High Authority, Council of Ministers). In a theatre metaphor, whereas functionalism aims for backstage politics, minimalising drama by turning political choices into technical problems to be solved out of public sight, federalism and confederalism, although rivals, both seek a political stage to play out choices embodied by political actors in front of a public. Their fight is not about the need for politics (and the limits of depoliticisation), but about what that stage should be: summits or the European Parliament. See Luuk van Middelaar, *The Passage to Europe: How a Continent Became a Union* (London and New Haven: Yale University Press, 2013), 1–11 and idem, *Alarums & Excursions*, 5–10.

²⁰ This classic political science distinction has been developed in France since the early 19th century, see e.g. Pierre Serrand, ‘Administrer et gouverner: histoire d’une distinction’, *Jus Politicum* n°4 (July 2010).

²¹ An essential element that is lacking here is the political relationship between the term in office of the Parliament and the Commission that characterises parliamentary systems. In a conflict between them, the Commission cannot dissolve Parliament to gain support from voters for its view of the matter. The Parliament can send the Commission home, but the Commission that replaces it can only sit out the rest of its five-year ‘term of office’ (Art. 17 (3) TEU), a procedure that reflects its civil service origins.

state power play. The Lisbon Treaty has not solved this inbuilt tension between the technocratic expert and the political operator.

The European Council constitutes the second basis for a future European government, according to Fischer. Established in 1974, its first role was that of a court of appeal or decision-maker of last resort in a period of interminable deadlocks in the Community due to a veto culture among ministers. Composed of the Member States' heads of state or government plus the Commission president, and until 2009 chaired by a six-monthly rotating presidency, the European Council met only three or four times per year, with the full pomp of a summit. Within a decade, it had established itself as the Community's highest political authority, although this was not clear in the legal texts. As early as the 1970s, its inventor, French President Valéry Giscard d'Estaing, assigned to its Chair the role of external spokesman for the ensemble of Member States.²² As president of the European Convention that drafted the Constitutional Treaty which eventually became the Lisbon Treaty, it was the same Giscard d'Estaing who pushed 30 years later for his brainchild to secure a permanent, stable Chair.²³

Confronted with these two rival visions and this dual institutional logic, the drafters of the Lisbon Treaty, in its 2002–2004 constitutional guise, essentially did what European politicians do in those cases: they found a compromise. Faced with a choice, they refused to choose and took both options. On the one hand, at the request of Germany, the smaller Member States and the EU institutions, they strengthened the Commission, in particular by deciding that the Commission president would henceforth be elected by the Parliament (upon a proposal by the European Council).²⁴ This would give EU voters the sense that their vote made a difference. On the other hand, fulfilling the wish of France, the UK and Spain in particular, they strengthened the European Council by giving it a permanent president, in situ for 2.5 years for a maximum of two periods, and granting it full Treaty status.²⁵ Shortly before the 2004 enlargement, the leaders of the large Member States, with an eye to the Union's performance on the world stage, wanted to avoid an inexperienced prime minister holding the six-monthly rotating Chair during an international crisis.²⁶ As so often, the breakthrough

²² Having established the regularity of the previously irregular and somewhat haphazard summits, the Frenchman surmised: 'Once that regularity was established, the scope of the power of the leaders would do the rest and the institution would consolidate of its own accord: a European executive power would begin to take shape.' Valéry Giscard d'Estaing, *Le Pouvoir et la vie*, Vol. I (Paris: Compagnie 12, 1988), 119.

²³ For the European Council, see a.o. Wolfgang Wessels, *The European Council* (Macmillan, London 2015) and Pierre de Boissieu and others, *National Leaders and the Making of Europe: Key Episodes in the Life of the European Council* (London: John Harper Publishing, 2015).

²⁴ Art. 17 (7) TEU.

²⁵ VGE had wanted the European Council to be ranked first among the EU institutions in Art. 13 TEU but had to concede this protocol privilege to those defending the role of the European Parliament.

²⁶ Memories of the Belgian presidency's haplessness in the early days after the 9/11 attacks in 2001 and of the Greek presidency's inability to overcome the stalemate of the Iraq crisis were still fresh.

bringing these two ideas together came as a result of a Franco-German deal, sealed in January 2003 between the respective Foreign Ministers Dominique de Villepin and Joschka Fischer.²⁷ Although it was quite a saga before the Lisbon Treaty finally entered into force on 1 December 2009, this elementary deal, once accepted by the Convention, was never questioned, and so the EU acquired two executive presidents.

The Lisbon Treaty contains many other innovations with a view to the Union's capacity to act, most importantly in the field of foreign affairs. The creation of an EU diplomatic service, composed of both Commission personnel and Member States' diplomats, was a breakthrough; so was the fusion (or 'double-hatting') of the European Commissioner for external relations with the High Representative for the Common Foreign and Security Policy, the latter formerly embedded in the Council, the idea being to bring the financial means available within the Commission – for instance, development aid – together with the political will from national capitals. Both innovations required rather convoluted institutional compromises, similar to the one seen above, assessed elsewhere in this volume. In another field of executive action, however, that of monetary affairs – though dear to the Convention Chairman Giscard d'Estaing, who in the 1970s had initiated a forerunner to the euro – hardly any changes were made. And yet that is where, just weeks after the Lisbon Treaty's entry into force, a crisis would strike hard and fast.

2.2 Testing the new cast: formal institutional dynamics (2009–2019)

How did the EU institutions fare and act during the crises that befell the Union after the Lisbon Treaty's entry into force? We look here into the executive institutions one by one, a perspective which offers a vaguely chronological account, since it focuses first on the European Council and the euro crisis (2010–2012), then on the Commission and the refugee crisis (2015–2016), to conclude with sections on the executive Councils and the European Central Bank (ECB).

2.2.1 The European Council and its stable presidency

In times of crisis, people look to the European Council and its most important members.²⁸ Who but the gathered heads of state or government, under the leadership of Angela Merkel and Nicolas Sarkozy, could have defended the many crisis measures after 2010 before their national tribunes, thereby saving the embattled European currency? Where but at a summit of Europe's leaders could a firm European response have been given to the Russian invasion of Crimea in 2014 that kept all the various positions in the Union, from Cyprus to Poland,

²⁷ Dominique de Villepin and Joschka Fischer, 'Contribution franco-allemande à la Convention européenne sur l'architecture institutionnelle de l'Union', 15 January 2003 (via www.cvce.eu).

²⁸ This section draws on Van Middelaar, *Alarums & Excursions*, 176–191.

in a united front? This taming function is of vital importance to the Union – yet it cannot be found in the texts. The Lisbon Treaty limits itself to the procedure: ‘When the situation so requires, the President shall convene a special meeting of the European Council’.²⁹ The chapter on foreign affairs repeats this provision for use in international crises.³⁰

Separately and together, European Council members have the authority to take quick, far-reaching decisions that go beyond existing frameworks. Only they can mobilise all the Union’s diplomatic and bureaucratic apparatus to achieve a specified goal. This is true in a political sense, because all members are assumed to be ‘in charge’ at home, and therefore able to bind their own governments and parliaments to European decisions. It is also true in an institutional sense, because the circle of presidents and premiers is able to step outside the formal framework of the Treaty in emergencies, such as an informal meeting of leaders of the Member States.³¹ Not constrained by the rule-making factory, they can move onto unknown territory and, outside the Treaty if necessary, step into the future together. For engagement in events-politics, this is a trump card.

The Lisbon innovation of a stable presidency paid off. Although academic historians tend to brush off ‘what if’ questions as speculative, one may nevertheless wonder how the 2010–2012 Eurozone crisis would have been dealt with without a permanent summit Chair. The magnitude of the crisis made it *Chefsache* from the start, a matter for the joint leaders. This is so for at least three reasons: massive sums of rescue money had to be mobilised with an appeal to national taxpayers; painful economic reforms, which put the very survival of more than one government at stake, had to be defended; and the EU Treaty change and the intergovernmental treaties that allowed and created rescue mechanisms and bolstered creditworthiness all required ratifications in all euro area parliaments. Herman Van Rompuy’s first (informal) summit, on 11 February 2010, turned into an emergency operation to calm the markets. From that moment on, the summit Chair steered the work between Member States and institutions. Without a Lisbon Treaty, after Spanish and Belgian six-month presidencies during the first and second half of 2010, the crisis management would have fallen, during the most dangerous period (August–November 2011) and when a solution was engineered (May–June 2012), to a succession of three successive non-Eurozone leaders, the Prime Ministers of

²⁹ Art. 15 (3) TEU.

³⁰ Art. 26 (1) TEU: ‘If international developments so require, the President of the European Council shall convene an extraordinary meeting of the European Council in order to define the strategic lines of the Union’s policy in the face of such developments’.

³¹ A fine example is the political declaration of 11 February 2010 by the Heads of State or Government of the European Union, in which leaders assumed a shared ‘responsibility’ for the ‘financial stability’ of the Eurozone, thereby laying the political ground for later rescue operations. Ministers can also use this formula of going outside the Treaty, but it is less common and currently happens only with the authority of the European Council (as on 9 May 2010 with the setting up of the ad hoc rescue funds).

Hungary, Poland and Denmark (January 2011 until June 2012).³² While the Eurogroup of eurozone finance ministers was not up to its task, and as rifts between northern and southern Member States were hardening, it is difficult to see what institutional actor other than a European Council president could have brought all institutions and national actors together at the highest level.

The European Council can be seen as a political power station, generating energy from the participating leaders' power at home and from the dynamism of their meetings. There is a danger, however, that the power station operates in a vacuum, that the spectacle of a summit will be without consequences. The energy generated is lost if not channelled by the Brussels and national administrations. In this energy transmission, the Lisbon invention of a stable presidency has a vital role. The modest but essential remit is to lay the institutional wiring and maintain the connections so that the Union has a vehicle for events-politics when things get tense. According to the first occupant of the position, the competences assigned by the Treaty are 'rather vague, even meagre'. The president of the European Council does not have any executive decision-making power, 'no budgetary responsibility, no administration of his own and no right of appointment';³³ his or her task is to enable collective decision-making.

In contrast to their six-monthly rotating predecessors, who were leaders of government at home and could therefore deploy their national administrations and governments, the permanent presidents have a limited support apparatus and no hold on the Council of Ministers. Herman Van Rompuy felt disconnected from the other Union institutions; his successor, Donald Tusk, felt the same. From day one, the Belgian tried to compensate for the lack of formal links by developing informal relationships. Council and Commission presidents Van Rompuy and Barroso arranged to have breakfast together once a week, for example, a tradition upheld by their successors, and there were monthly meetings with the president of the Parliament. As a matter of principle, the president visited all 28 members of the European Council in their own seats of government once a year, a tour of the capitals that strengthened relationships of trust and made the importance of all Member States visible. This routine maintenance has been abandoned by his successor Donald Tusk in favour of visits prompted by current events.

On paper, European Council meetings are prepared by the General Affairs Council. In practice, this forum does not fulfil any such role. The main reason is that not all General Affairs Council members – often junior ministers with the

³² At the level of Eurozone ministers, a permanent Eurogroup Chair had been in place since 2005 – a position held by Jean-Claude Juncker at the time (2005–2013) – but the magnitude of the problems went beyond the ministers' remit and the Chair himself was unable to break the impasse.

³³ Herman Van Rompuy, *Europe in the Storm: Promise and Prejudice* (Louvain: Davidsfonds, 2014) 114–115.

Europe portfolio, or members of a coalition party – have the ear of their leader in the European Council. Because personal trust is crucial in the final negotiating phase, these ministers are often unable to remove obstacles at their own level. Instead, two other bodies take on the preparations for summits. One is the formal network of the permanent representatives based in Brussels (COREPER-II), a well-oiled machine with members who, in their own countries, sometimes lack sufficient weight. The other is the informal network of EU advisers to the 28 members of the European Council, also known as ‘sherpas’, because their task is to bring their leaders ‘to the summit’. These are the civil servants with responsibility for the EU in the German Federal Chancellery, the Elysée Palace, 10 Downing Street and all the other capitals, as well as in the Commission. This second organ, although informal and scattered, has gained considerable power over the past few years, as presidents and prime ministers have needed to concern themselves more and more intensively with ongoing crises. Unlike the circle of ambassadors, that of the sherpas is not led by the rotating presidency but by the chief of staff of the European Council president. The sherpa network, powerful and invisible, reinforces the executive power of Europe’s system of government.

2.2.2 The Commission and its president

For the European Commission’s executive role, the Lisbon Treaty formally meant more continuity than change. Its president when the new framework entered into force, José Manuel Barroso, had just been elected for a second mandate by the Parliament. Some MEPs had wanted to delay the vote until after the Treaty’s entry into force in order to use the Parliament’s new power in the nomination procedure, but Barroso, supported by the European People’s Party group (EPP) in the Parliament, overcame this hurdle and received a majority vote in September 2009 (even if he would not get a confirmation vote for his full college until 9 February 2010). For Barroso, following a first mandate (2004–2009) during which he alone had been the ‘face of Europe’, the main practical change arising from Lisbon was the arrival of a new, full-time Brussels player in the person of European Council president Herman Van Rompuy.

After some early skirmishes, in particular over external representation prerogatives and the primacy of Eurozone crisis management,³⁴ the two presidents established a good working relationship. They both understood that they could not do their work or lead their institution without the support of the other. The Commission needs the public backing of the European Council as the Union’s highest authority for its grand policy initiatives, while the European Council and its leaders cannot

³⁴ In this early phase, matters came to a head when, in March 2010, European Council leaders entrusted Herman Van Rompuy – and not José Manuel Barroso, to the latter’s regret – with the chairmanship of a taskforce to improve the ‘economic governance’ of the Eurozone. The Commission participated in the task force meetings (at the invitation of the Chair), but also followed a parallel track, coming up with a set of proposals in September 2010, later dubbed the ‘six-pack’, weeks before the taskforce would make its own, largely overlapping recommendations. This left even the most astute outside observers at a loss.

work without the expertise and procedural legitimacy provided by the other EU institutions, and the Commission in particular. This was a lesson the French and German leaders learned after the debacle of their October 2010 Deauville declaration on the Eurozone which, rather than tame the crisis, made it worse. As a full member of the European Council, the Commission president is in an ideal position, following the example set by Jacques Delors (1985–1995),³⁵ to get the blessing of national leaders for ambitious policy proposals. The dynamic can also play out differently. When the June 2012 European Council decided the EU needed central banking supervision, entrusting that task to the ECB whose board members had suggested the idea in the first place, and setting a strict deadline for the first phase of the work ('as a matter of urgency by the end of 2012'³⁶), the Commission came up with a legislative proposal for a banking union in September 2012,³⁷ and agreement in the Council was found (just) in time.³⁸ This was sound institutional interplay, though without the political lead role for the offices of Berlaymont.

This is why, in the public perception, the Barroso-II Commission lost the political initiative to the European Council. Commentators looked for explanations in (or blamed) either the Lisbon arrangements or factors of personality. These may have played a role, but it makes more sense to explain the shift in terms of the Union's need to engage in event-politics, which requires not only the type of technocratic and procedural input the European Commission can provide but also the full capacity to convince reluctant public opinions across the Union of, at times, controversial measures. In other words, this shift is not cyclical but structural.

These constraints were on display during the mandate of the second presidential couple under Lisbon, that of European Council president Donald Tusk and Commission president Jean-Claude Juncker (2014–2019).³⁹ The latter wanted to regain the political initiative for his institution. He used his election by the European Parliament – the first under the Lisbon rules (Art. 17(5) TEU) and beefed up by the Europarties thanks to the *Spitzenkandidaten* procedure – to

³⁵ For the relationship between the Commission and the European Council in the period 1985–2000, see Luuk van Middelaar, 'La Commission et le Conseil européen', Vincent Dujardin a.o. (eds.), *Histoire de la Commission européenne, tome 3* (Brussels: Commission européenne, 2019) 185–194.

³⁶ Euro area summit statement 29 June 2012.

³⁷ European Commission, 'A Roadmap towards a Banking Union: Communication to the European Parliament and the Council' COM(2012)510 final, 12 September 2012.

³⁸ Council of the European Union, 'Proposal for a Council Regulation conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions', 17812/12 / ECOFIN 1080, 14 December 2012. Agreement with the European Parliament was reached shortly thereafter.

³⁹ The fact that these mandates are almost fully overlapping is pure coincidence, with the Commission president starting in principle on 1 November (in function of the EU's five-year electoral cycle) and the European Council presidency on 1 December (a date linked to the ratification of the Lisbon Treaty itself).

announce a ‘political Commission’.⁴⁰ While Juncker never quite defined what this watchword meant, it is safe to interpret it as a claim on political primacy in the EU.

This became particularly clear during the worst and most dramatic crisis to hit Europe during his mandate, the refugee crisis of 2015–2016. One and a quarter million refugees applied for asylum in the Union in 2015, twice as many as the year before.⁴¹ The images were dramatic: small boats on the Mediterranean, handcarts on Balkan roads, full trains stranded on the way to the rich north. The public, in fearful bewilderment, had the impression the authorities had lost control. Could Europe act? Was Europe authorised to act?

From the Commission’s perspective, the answer to the emergency situation was self-evident: the crisis demanded solidarity – internationally with the refugees and between Europeans. The salving of consciences and the logic of integration pointed in the same direction. This line of thinking crystallised in the Juncker proposal for ‘asylum quotas’, the centralised redistribution of asylum seekers to relieve frontline states. For the governments, however, the matter was less simple. They had to weigh arguments for solidarity against other principles and interests. Borders and migration touch upon national sovereignty and identity, while the transfer of powers, or interference from Brussels, were not popular themes. In a time of fear of terrorism, a local incident with an asylum seeker could lose you a general election. Taking in extra refugees and distributing them was a drastic measure, way beyond day-to-day Brussels market decisions. The idea and its implementation required solid support.

As a result of such political and constitutional sensitivities, the heads of state and government said in April 2015, at an emergency summit after a Mediterranean shipwreck, that they did not want compulsory asylum quotas. In June, they repeated that, to the fury of Juncker, whose Commission had proposed, in May, the redistribution of 40,000 asylum seekers. In September, after a dramatic summer and with chancellor Merkel having changed her position (‘Wir schaffen das’), Juncker put forward the relocation of another 120,000 refugees. To overcome political resistance, in particular from Central and Eastern European Member States, the Luxembourg Chair of the Council of Ministers, encouraged by his countryman Juncker and with Berlin’s support, called suddenly for a vote on 22 September 2015, outvoting the reluctant Member States at the level of justice ministers. Europe proved it could act.

The revolutionary decision on compulsory asylum quotas proved a fiasco. Of the 160,000 asylum seekers to be redistributed, only a few hundred had moved after three months, a mere 5 per cent after more than a year, and a little

⁴⁰ Jean-Claude Juncker, ‘Time for Action – Statement in the European Parliament plenary session ahead of the vote on the College’, 22 October 2014.

⁴¹ For an extensive analysis of the migrant crisis, with a focus on the role played by the Juncker Commission, see Van Middelaar, *Alarums & Excursions*, 91–114.

over 10 per cent after eighteen months.⁴² This was clearly not purely the fault of recalcitrant Slovaks and Romanians. The formal decision of 22 September 2015 had no material consequences, or at best its workings were agonisingly slow. Attempting to demonstrate a capacity to act, Europe looked ridiculous. What went wrong? In essence, this: the Brussels machinery tried to control an unprecedentedly dramatic event using the old prescriptions of the politics of rules. It had overreached itself, falling prey to a triple hubris.

First of all there was technocratic overreach. The Commission relied on its panacea of depoliticization but came up against political emotions that ascended to unparalleled heights, touching on citizenship, identity, sovereignty and even religion. Yet Brussels shared out the burden of the asylum seekers as if dealing with fishing quotas or CO₂ emissions. Then there was practical overreach. Sharing out asylum seekers is one thing, but how do you get them to their destinations? Even the relocation of the very first 19 Eritreans, who left Rome on 9 October for Sweden, had required ‘intensive preparatory work on the ground by the Italian and Swedish authorities, by Frontex and other EU agencies, by local NGOs, and by the special envoys which the European Commission has deployed’, according to a Brussels press release.⁴³ There were still 159,981 refugees to go. The fact that most frontline states had never set up the necessary reception centres and registration procedures became obvious.

Lastly, and most importantly in our context, there was institutional overreach. In the migrant crisis, the Juncker Commission engaged in a battle with the European Council for prestige and power. To demonstrate its own political calibre, it tried to exclude the customary crisis tamer, the forum of government leaders. The Commission thereby deprived both itself and the Union of the means to compensate for some of its weaknesses, because what more effective means could there be of overcoming fierce public resistance in several Member States than a summit, at which all governments commit themselves at the highest level and in full view? What better means of mobilising the necessary capacity for action than to have the gathered leaders take the reins? The vehicle of events politics was blatantly passed over. Commission president Juncker wrote in late August 2015, ‘We have had many summits of government leaders [...] but what we need is for all EU Member States to accept the European measures now and implement

⁴² From 22 September 2015 to 6 December 2016, according to the Commission, 8,162 asylum seekers were relocated: 6,212 from Greece and 1,950 from Italy. After a hesitant start, the numbers grew to some 1,400 per month, meaning that the planned relocation of 160,000 would take around ten years. See the following sources: European Commission, ‘Relocation and resettlement: state of play’, 6 December 2016; figures for 31 April 2018, Factsheet International Organization for Migration, ‘IOM’s activities for the EU relocation scheme’, available at: http://eea.iom.int/sites/default/files/publication/document/EU_Relocation_Info_Sheet_-_April_2018.pdf (last accessed 2 November 2019).

⁴³ European Commission, ‘Communication from the Commission to the European Parliament, the European Council and the Council. Managing the Refugee Crisis: State of Play of the Implementation of the Priority Actions under the European Agenda on Migration’, COM (2015) 510, 14 October 2015.

them'.⁴⁴ In sum, from summer 2015 to early winter 2016, the Commission was blind to the gap between what was administratively possible and what, in this exceptional situation, was politically required. It led to awkward tensions and the most strenuous period among EU leaders since the Iraq War.⁴⁵ The whole episode also considerably deepened the rift between West and East Europe, resulting in irritation and distrust which proliferate to this day.

In the end, the migrant crisis was managed in other ways, in particular through the Turkey deal of March 2016, an improvised act of event-politics (the analysis of which is beyond the scope of this paper). This accord did not put an end to human drama at Europe's borders, but it at least restored a sense of public order and control. As to the Commission's subsequent political positioning within the Union's executive framework, from spring 2016 president Juncker stepped back from the confrontational approach, realising he had overplayed his hand. A period of more constructive inter-institutional cooperation ensued, the best example of which is offered by the Brexit negotiation (see below).

2.2.3 The 'executive' Councils: Foreign Affairs and the Eurogroup

The Lisbon Treaty introduced two significant changes to the Council of Ministers. Both are part of the emancipation of the executive. In the name of transparency, the drafters made a keen distinction between the Council in 'legislative deliberations', when members vote (in public and viewable via livestream), and the Council when it engages in consultation, negotiation or decision-making (behind closed doors).⁴⁶ In the former case, the Council of Ministers, as co-legislator, is the partner of the European Parliament, which also meets in public. In the latter, it stands alone. What happens behind closed doors remains confidential, but it cannot then be law-making. Potentially, therefore, there is room for the Council of Ministers to act as an executive.

The second separation of functions concerned the slicing up of the old General Affairs and External Relations Council, for years the Brussels bastion of foreign ministers, into a Council for general affairs and a Council for foreign affairs, the first with a legislative task, the second with an executive task. The intention was for the General Affairs Council to grow to become an umbrella organ for all the legislative work and legally binding decision-making. Since this new Council has not lived up to its promise in practice, legislative work remains distributed among ministers in the various configurations of the Council, such as for agriculture, or for economics and finance – a failed emancipation of the legislative power.

⁴⁴ Jean-Claude Juncker, 'In mijn Europa klopt ook een hart', opinion piece in *NRC Handelsblad*, 27 August 2015.

⁴⁵ This included a very bad working relationship between the European Council and Commission presidents. The Tusk–Juncker animosity was on full display in the remarkable BBC documentary *Inside Europe* (2019), part 3/3.

⁴⁶ Rules of Procedure of the Council, Art. 7.

Yet the clarity achieved by the splitting of the two councils has been preserved in the case of the Foreign Affairs Council. In this forum, the foreign ministers deal with issues that are foreign for the Union as a whole. These rarely involve law-making. It produces many declarations about countless crises in the world, so to call it an ‘executive power’ seems overblown; also, it does not have as much margin of manoeuvre as the government leaders, although it does take decisions on sanctions against Iran, or on military and other crisis missions. For wars close by, or for issues with profound domestic consequences (security, energy), the foreign ministers act under the aegis of their presidents and premiers.⁴⁷ When in late February 2014 the Ukraine crisis changed from a popular revolt on Maidan to Russia’s annexation of Crimea, it became a matter for the leaders. For day-to-day affairs or distant crises, the foreign ministers act on their own authority. In doing so, they undeniably fulfil an executive function.

With the Lisbon Treaty, the gathering of foreign ministers also acquired a permanent Chair in the person of the Union’s High Representative, who also is vice-president of the Commission and runs the Union’s new diplomatic service. Since more will be said about these Lisbon innovations elsewhere in this volume, suffice it to remark here that this permanent presidency is another sign of the emancipation of executive functions within the Union. Permanent presidents offer continuity and a point of contact; they allow a form of collective leadership and ownership of decisions in an order based on collective responsibility. They also personify European authority.

What goes for the foreign ministers also holds true for the finance ministers of eurozone countries. They, too, have extricated themselves from a mixed body, in their case the Economic and Financial Affairs Council (ECOFIN): since the launch of the euro, they have met monthly as the Eurogroup.⁴⁸ They, too, have had a permanent Chair since 2005, in contrast with all other legislative and policy-making Council formations, which kept the rotating presidency. Participation in Eurogroup meetings is limited to the ministers, a Euro-commissioner and a member of the board of the European Central Bank, each with one adviser. Consultation takes place behind closed doors; a club feeling and a business-like style set the tone. Law-making and other binding judicial acts are not formally undertaken by the eurozone ministers. Instead, the Lisbon Treaty confirmed that these still lie at the Union level with all the finance ministers, whether inside or outside the eurozone.⁴⁹

⁴⁷ Stefan Lehne, ‘Are Prime Ministers taking over EU foreign policy?’ *Carnegie Europe*, 16 February 2015; https://carnegieendowment.org/files/prime_min_for_policy.pdf

⁴⁸ The classic study from before the euro crisis is Uwe Puetter, *The Eurogroup: How a Secretive Circle of Finance Ministers Shape European Economic Governance* (Manchester: Manchester University Press, 2006); for an update by the same author, see *The European Council and the Council: New Intergovernmentalism and Institutional Change* (Oxford: Oxford University Press, 2014), 155–170.

⁴⁹ The Treaty does enable the ECOFIN Council to vote without the Member States from outside the Eurozone (Art. 139, para. 4, TFEU), whereby the Eurogroup de facto takes legally binding decisions.

Since the euro crisis, the Eurogroup has engaged in more executive decision-making than ever, the main reason being that the gathering of euro finance ministers forms, as per the rules, the Board of Governors of the stability mechanism ESM, the new emergency fund that decides on loans to Member States in need of money.⁵⁰ This Board is therefore de facto none other than the Eurogroup. This betokens a major upgrade for the body, which in its capacity as emergency creditor takes binding and hugely far-reaching decisions.

It was a branch of crisis management that brought the executive nature of the Eurogroup into the public eye from 2010 onwards. The frequency of meetings increased; members sometimes came together at extremely short notice or met by video conference. The public impact of its decisions increased too, first of all in countries with aid programmes. Yet there was a determination to cling to the private and informal character of these gatherings, with relatively limited communication, especially given the intense interest among both markets and the public. This way of working faced increasing criticism, reaching a peak in early 2015 when a government came into office in Greece that publicly demanded a left-wing course in EU affairs. This led to polemical exchanges between the Greek minister Yannis Varoufakis and Eurogroup Chair Jeroen Dijsselbloem. The underlying conflict concerned whether the Eurogroup as a technocratic body merely applies currency union rules, as most of the national financial experts see it, or also takes political decisions, as the Greek minister contended, and whether it has the political authority to do so. This matter is unresolved and highlights the stronger legitimacy required by event-politics compared to rule-making.

2.2.4 The European Central Bank

One final institution should be mentioned as part of the executive cast: the European Central Bank (ECB). Although its mandate did not change with the Lisbon regime, it, too, changed as a result of the monetary crisis.

As the independent executor of rules-bound monetary policy, the ECB – at the insistence of the Germans and to the disappointment of the French – was from the start kept at a distance from politics. In the financial storms since 2008, however, the Frankfurt-based institution has undergone a fascinating metamorphosis. Starting out as a prudent implementer of the task given it by the Treaty – that of securing price stability in the eurozone (a low and constant inflation rate) – it is becoming, with its energetic behaviour on the financial markets, an enforcer of financial stability. Since January 2015, its massive purchases of billions of euros of national debt have attracted attention, but in the banking crisis and at earlier moments in the euro crisis, the ECB took decisions off its own bat that impressed the markets, known in the jargon as ‘non-standard measures’.

⁵⁰ Treaty Establishing the European Stability Mechanism, Art. 5 (1).

Two striking elements are involved in the transformation of the ECB into a political forum and political player. First, its executive board, consisting of the six directors in Frankfurt and the 19 presidents of the national banks, resorted several times in emergencies to a majority decision, a break with the mores of the earlier stable years when Dutchman Wim Duisenberg was its president (1998–2003), when all decisions were taken collectively. In May 2010, under the presidency of former French National Bank president Jean-Claude Trichet, the president of the powerful German Bundesbank, Axel Weber, was voted down. The simple fact of a majority decision indicates disagreement and conflict; it shows that the ECB is not purely a committee of monetary experts that draws academic conclusions by consensus, but it is also a political forum of clashing interests and values.

The ECB also reached for a second instrument from the toolkit of the political executive, one that administrative implementers do not normally have at their disposal: bluff. Well remembered are the three words used by Bank president Mario Draghi in July 2012 in the City of London, when he said his institution would do ‘whatever it takes’ to save the euro. His words were effective primarily because he added, in his bass Roman voice, ‘and believe me: it will be enough’.⁵¹ He thereby challenged the speculators besieging the currency: are you sure that you want to bet millions on the collapse of the euro? The fact that this banking bluff was introduced with the limiting, bureaucratic and orthodoxy-reassuring phrase ‘within our mandate’ was neglected by many; it indicates the balancing act of Draghi’s new Bank, on the border between rules-politics and events-politics.

2.3 Improvising crisis bodies: informal institutional dynamics

Having examined how the formal executive institutions fared during the past decade, we now turn briefly to three sets of emerging institutional practices. All three show how, under the pressure of events, the Union innovates and adapts without full-blown Treaty changes. These informal practices show how the Lisbon Treaty allows for evolution. However, they may also point to future treaty changes.

2.3.1 The Euro summit

The most visible of these three informal changes has been the progressive establishment of another institution at leaders’ level: the Euro summit. Whereas it was an old wish of Paris to have a political body at presidential level overseeing the euro area, Berlin always resisted it for fear of (in its view) needlessly ‘politicising’ economic and monetary policy and undermining the independence of the ECB.

At the height of the 2008 banking crisis, when the German banking system was also in trouble, then European Council president Nicolas Sarkozy managed to convene the first ever summit of euro area leaders in October 2008. Although

⁵¹ *Financial Times*, ‘ECB “ready to do what it takes”’, 26 July 2012.

German Chancellor Angela Merkel had let it be known privately as late as January 2010 that she did not want such a summit ever again to be held, the eruption of the 2010 Greek crisis forced the European Council Chair to build on Sarkozy's precedent and convene a meeting of the 16 euro area leaders. It took place in the margins of the March 2010 European Council: the meeting of the 27 EU leaders was briefly interrupted so the 16 eurozone leaders could do business among themselves. After this discreet meeting under the cover of the ordinary summit, a separate and therefore visible summit of eurozone leaders followed on 7 May 2010. It was a very dramatic meeting, needed to stave off an acute threat to the eurozone and setting in motion the decisions of the 'one-trillion-dollar weekend'⁵² during which the precursor to the ESM rescue fund was designed (the 750 billion euro European Financial Stability Facility, or EFSF) and the ECB stepped up its action. The precedent had now been firmly set.

After another special crisis summit in the summer of 2011, plus several in the margins of regular meetings, the body acquired an official status. On 23 October 2011, it named itself Euro Summit; three days later, in consultation with the complete European Council, it gave itself a package of tasks, rules of procedure and an administrative machinery.⁵³ The Fiscal Stability Treaty of early 2012, although formally external to the Union Treaty, stipulated summits at least twice a year.⁵⁴ Yet resistance to the forum remained in both Germany and non-euro countries such as Poland. Partly for this reason, the frequency of meetings reduced as the euro crisis was brought under control. Formally, there was just one Euro summit in 2012–2014; when the Greek crisis flared up again in 2015, the number rose to four.

Euro summits have proved themselves mainly as a means of reaching decisions in times of crisis. For the daily decisions of eurozone countries, the complete European Council where necessary serves as the top of the euro decision-making pyramid (if a slightly lopsided one, since the 28 leaders have below them the Eurogroup with its 19 finance ministers and their own preparatory organs). The emergence of the Euro summit is illustrative of a Union that institutionally renews itself under the pressure of events – first outside the treaty, then step by step within existing structures – and acquires the capacity to take quick and authoritative collective decisions.

It can be safely assumed that if the Treaty of Lisbon undergoes a full revision in the future, the Euro summit will get full Treaty status. The constitutional lesson here is that treaty changes can be as much about codification as modification.

⁵² Matthew Lynn, *Bust: Greece, the Euro and the Sovereign Debt Crisis* (Hoboken NJ: John Wiley & Sons, 2011), 149.

⁵³ European Council 23 October 2011, conclusions, pt. 7; 'Statement by the Heads of State or Government of the euro area', 26 October 2011; 'Statement by the Heads of State or Government of the European Union', 26 October 2011.

⁵⁴ Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, Art. 12.

2.3.2 Crisis cabinets

Another remarkable phenomenon in events-politics, though largely under the radar, is the creation of informal groups of leaders steering decision-making.⁵⁵ Within the EU, such informal inner circles are a delicate, controversial matter. The ultimate fear of smaller Member States is to be dominated by a *Directoire* of the big states, as they were when, at the Congress of Vienna (1814–1815), only five powers redesigned the map of Europe. After the Second World War, the European Community put an end to this raw power logic. However, in practice, France and (West) Germany sometimes behaved as if they alone called the shots. From De Gaulle and Adenauer in the 1960s to ‘Merkozy’ in 2010–2011, this has always created deep distrust among the other leaders. The dilemma for the smaller states is whether to discard any big state initiative as dangerous and illegitimate or to recognise that you cannot stop them from meeting and try to harness the forces into common structures.

The latter approach leads to mixed forums, to inner circles with a limited number of EU and national representatives. They may turn out to be more legitimate and workable than a Franco-German set-up (which, during the euro crisis, had led in October 2010 to the Deauville debacle). The best example of such a mixed inner circle was the Frankfurt Group, where many euro crisis decisions were prepared between October 2011 and March 2012. It had its origin in the farewell party for ECB president Jean-Claude Trichet in the Frankfurt Opera House (hence its name), where Merkel, Sarkozy, Van Rompuy, Barroso, Juncker (as Eurogroup president), IMF managing director Christine Lagarde and Trichet gathered in the wings to overcome a Franco-German conflict on how to deal with the crisis. In the months that followed, they worked through the storm (with Trichet’s successor Mario Draghi taking the Frenchman’s place).

Embedding such work in formal structures is obviously indispensable, in the EU even more so than in a national context. At the same time, crisis management with 30 people in a summit room is impossible. This conundrum asks from all participants a careful balancing between events, political authority and the law.

In EU foreign affairs – a field where the practical inequality between Member States in terms of history, responsibility and capacity to act is more readily accepted – such informal groups are more common. One can think, pre-Lisbon, of the 2003 Paris-London-Berlin initiative vis-à-vis Iran, which was soon embedded in formal EU structures thanks to the involvement of High Representative Javier Solana (and, later, that of his successors Catherine Ashton and Federica Mogherini). During the stand-off with Russia over Ukraine, the Normandy Format was established in the spring of 2014, bringing together

⁵⁵ This phenomenon has largely escaped scholars and academic literature is therefore scarce. For an exception, see Tom Delreux and Stephen Keukeleire, ‘Informal division of labour in EU foreign policy-making’, *Journal of European Public Policy* 24 (2017) 1471–1490.

the leaders of France, Germany, Russia and Ukraine (in this case without EU involvement, although the president and chancellor systematically debriefed their colleagues in the European Council).

Within the EU, such informal gatherings can never play one camp against another and can only work if they bridge the various positions in a certain conflict situation. Concretely, the Germano-French preparation in the euro crisis was essential precisely because they deeply disagreed and because both spoke implicitly for a group of like-minded states, North and South. In this regard, it is striking that in the refugee crisis no informal crisis body bridging all positions emerged, only groups of like-minded states.⁵⁶ This was probably due to animosity among the key players. It may have contributed to the public perception of chaos and loss of control.

Unlike the Euro summit, which will seamlessly find its way into a future treaty, these informal groupings, hurting too many sensibilities, are probably bound to remain at the border of practice and the law.

2.3.3 The Brexit negotiator

Not much has been said so far about the fourth of the big crises that hit the Union in the last decade: the UK's prospective departure following the 2016 referendum. Unlike the euro turmoil, the geopolitical conflict with Russia and the refugee drama, Brexit did not require immediate action in the full sense of the word. Although the referendum outcome proved a true political shock for the EU, most of the uncertainty lay on the side of London (as is still the case more than three years later). Quickly, the EU27, as they were soon called, were able to organise themselves as a bloc, almost to their own surprise. An atmosphere of fear and threat – other departures might follow, it was feared in those early days – tinged with resentment and anger toward its originator, explains how fast all parties agreed to the principles of the divorce negotiations. Their basis was laid out by the presidents of the four political institutions on the day after the referendum and confirmed by the 29 June 2016 European Council, the first in the so-called Art. 50 format without the withdrawing state.⁵⁷

This political cohesion proved durable, in large part due to the nomination of a Chief Negotiator of the Union in the person of Michel Barnier. Although the

⁵⁶ Such a group, in analogy with the Frankfurt group, could, for instance, have consisted of the leaders of Germany (North), Hungary (East) and Italy (South), plus both EU presidents (and perhaps a UNHCR representative, comparable to the presence of the IMF in monetary matters).

⁵⁷ 'Joint statement by Donald Tusk, President of the European Council, Martin Schulz, President of the European Parliament, Mark Rutte, holder of the rotating Presidency of the Council of the EU, and Jean-Claude Juncker, President of the European Commission, on the outcome of the United Kingdom referendum', 24 June 2016 (EUCO/381/16). 'Informal meeting at 27 – Brussels, 29 June 2016 – Statement'.

position is not an institutional innovation in itself,⁵⁸ the incumbent used it in an unprecedented manner for both negotiating with the UK and cementing the EU27's unity. Barnier was made Director-General in the Commission by president Juncker with a dedicated team of experts at his disposal in the Art. 50 Task Force, but as (twice) former Commissioner and as former French foreign minister he immediately outshone this civil servant mandate. As negotiator, he permanently toured all EU capitals, listening to and gathering support among presidents and prime ministers for the EU position vis-à-vis London. He was also invited to all European Council meetings in Art. 50 format, which is exceptional for an institution with a strict 'members only' policy and with only a handful of civil servants in the room.

In the tradition of his countryman Delors, Michel Barnier succeeded in drawing upon the Commission's formal negotiating role, technical expertise and thinking power (even if inheriting some of its technocratic limits) and in mobilising the indispensable political authority provided by the full European Council. In a welcome contrast to the mismanagement of the refugee crisis on precisely this point,⁵⁹ it is an example of the Union's potential to deal with disruptive situations, on condition that the institutions develop a productive interplay and acknowledge their own and each other's strengths and weaknesses.

2.4 Changing the ground rules? Prospect of post-Lisbon Treaty revision

Asked in the early days of his mandate about the prospects of Treaty change, European Council president Van Rompuy used to quip: 'I will die under the Lisbon Treaty – and I intend to live long.' After almost a decade of wrestling with a new constitutional settlement and its ratification (2000–2009), it was widely assumed that the Lisbon Treaty was the very last major treaty revision in the foreseeable future. This assumption has proved both right and wrong.

It was wrong because, within a year, as part of the euro firefighting, leaders set in motion a first simplified Treaty change. Something like it was bound to happen. Treaty-making is less a matter of blueprints than of responding to a new turn in history. Lisbon could not foresee everything. More changes may come, as we will discuss below. And yet the assumption of Lisbon as a true milestone was right, too. The Union's new basic constitutional structure has proved solid. After a frantic quarter of a century of institutional initiatives and adjustment to the post-Cold War world – from the Single European Act (1986) via Maastricht (1992), Amsterdam (1997) and Nice (2001) to Lisbon (2009) – the Union

⁵⁸ For agreements between the Union and third countries, Art. 218(3) TFEU allows the Commission, or the High Representative, to recommend to the Council the nomination of 'the Union negotiator or the head of the Union's negotiating team'.

⁵⁹ I am referring to the structural analogy of the Commission–European Council interplay, leaving aside that the refugee crisis in many respects was a much more daunting challenge than Brexit.

has come to rest and Lisbon stands proud. There is no diplomatic, academic or public clamour for a fundamental revision.

In this concluding section, we will examine the prospects of post-Lisbon Treaty revision. Is there a need for future full-blown reform, or do other institutional means (e.g. simple revisions, enhanced cooperation or Member State action) suffice to make Europe ready to face its new challenges? We will answer this question by looking at four potential drivers for future constitutional change.

2.4.1 Eurozone

In the euro crisis, a first (simplified) Treaty change under Lisbon was set in motion by the European Council as early as October 2010, the amendment's text being agreed in December and adopted in March 2011.⁶⁰ Chancellor Merkel wanted to replace the improvised rescue mechanism of spring 2010, the European Financial Stability Facility (EFSF), with something more permanent and legally robust, which eventually became the European Stability Mechanism, or ESM. She convinced her colleagues, and the new simplified revision procedure (Art. 48(6) TEU) was used to amend Article 136 TFEU, adding two sentences in a new paragraph. Since the simplified procedure can only be used when the planned amendment does not increase the Union's competences, it says that 'Member States whose currency is the euro' (not the Union) 'may establish a stability mechanism ... to safeguard the stability of the euro area as a whole.'⁶¹ To deter other requests for Treaty change, Van Rompuy and Merkel stressed that the amendment was a targeted, 'surgical' operation.

One year later, in December 2011, there were again calls for Treaty change in order to tame the euro crisis, and in particular to strengthen the Stability and Growth Pact. However, when UK Prime Minister David Cameron vetoed the proposal at a fractious 8–9 December summit, 25 of the 27 Member States decided to lay down stricter budgetary rules in a separate treaty, outside but closely linked to the EU Treaties. On this occasion, the Lisbon Treaty did prove immune to change. The resulting Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, or Fiscal Compact, entered into force on 1 January 2013. Its proximity with the EU legal order is emphasised by a final clause, stipulating that '[w]ithin five years, at most' after its entry into force 'the necessary steps shall be taken' to integrate the Treaty's substance into EU law.⁶² This means that, since 1 January 2018, the 25 signatory states are

⁶⁰ European Council decision 2011/119, after consultation of the European Parliament, the Commission and the ECB, aiming at the amendment of Art. 136 by inserting the following text as § 3: 'The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality.'

⁶¹ See footnote above. For the same reason, the ESM Treaty itself was an intergovernmental Treaty, not incorporated into EU law.

⁶² TSCG (see above), art. 16.

formally behind schedule as regards the incorporation of the Fiscal Compact's rules into the Lisbon Treaty. Here we have a revision in waiting.

Although the immediate monetary storm has been tamed and the EMU framework is now more robust than in 2010, many policymakers argue that the monetary union has not yet reached a stable state. The European Commission put forward a number of ideas, most ambitiously in May 2017, to deepen the EMU. These include a European Monetary Fund to replace the intergovernmental ESM; a specific euro area budget; unified eurozone external representation; a full-time permanent Chair for the Eurogroup; and integration of the Fiscal Compact into EU law.⁶³ However, both the risk-sharing elements and the implied policymaking centralisation of these ideas – some of which have meanwhile been put forward as formal Commission proposals – have met with resistance from (northern) Member States, their strong support among other Member States and many experts notwithstanding.

It seems safe to venture that only a new financial crisis would be able to overcome the political resistance against further deepening of the EMU and, if needed, force changes to the Lisbon Treaty. However, as the crisis management in 2010–2012 has shown, resistance to formal Treaty change remains strong even in an emergency situation, more so since (eurozone) Member States now have experience of going outside the Treaty in order to circumvent political vetoes or avoid ratification hiccups. This being said, if the Lisbon Treaty were opened for other reasons, the Commission and other actors would probably use the occasion to make the case for some of the above ideas on deepening the EMU, just as the Euro summit would likely be discretely codified.

2.4.2 Geopolitics

The strongest push for institutional change currently comes from geopolitical pressure. While Russia's menace on Europe's eastern borders has become a familiar feature of the landscape, both the strength and assertiveness of China under President Xi and the disruptive coolness of the United States under President Trump⁶⁴ pose stark new challenges to the bloc in terms of security and defence.

In the field of defence, Member States in 2017 triggered one of the Lisbon Treaty's sleeping beauties, the provision on Permanent Structured Cooperation (PESCO).⁶⁵ However, while France (at the provision's origin) favoured bringing together a small number of militarily operational Member States in order for the Union to act, Germany (reluctant in the military domain) pushed for the

⁶³ European Commission, 'Reflection paper on the deepening of the Economic and Monetary Union', COM (2017) 291, 31 May 2018.

⁶⁴ Although shocking moments are not lacking in his presidency, Donald Trump's brutally pragmatic characterisation of the European Union as 'a foe', in July 2018, signified a rupture in the Transatlantic relations since 1945 (Interview CBS Evening News, 15 July 2018.)

⁶⁵ Protocol n° 10 on Permanent Structured Cooperation established by Art. 42 (6) TEU.

maximum of Member States to sign up in order to safeguard political cohesion. As of today, 25 of the 28 Member States participate in PESCO. Unsurprisingly, in September 2017, French president Macron launched a new initiative, the European Intervention Initiative (EII or EI2) in order to forge a common strategic culture among willing and able states. Participation is upon invitation only. Currently fourteen European states are members, including the Netherlands, Germany and (since September 2019) Sweden, but also the United Kingdom (in the process of leaving the EU), Denmark (which has an opt-out on EU defence policies) and Norway (a non-EU state). Although synergy with EU objectives and PESCO is sought, it is unlikely that EI2 will be integrated into EU law, as this would preclude the participation of the post-Brexit UK and Denmark.

In order to improve the Union's capacity to act on the world scene, the European Commission proposed, in September 2018, to broaden the scope of majority voting (QMV) in external affairs. In his annual State of the Union speech, Jean-Claude Juncker proposed QMV for: (1) positions on human rights in international fora; (2) decisions to establish sanctions against regimes; and (3) decisions on civilian Common Foreign and Security Policy missions.⁶⁶ In a Franco-German declaration a few months earlier, Chancellor Merkel and President Macron had asked for the idea to be explored.⁶⁷ It entails using the Lisbon Treaty's passerelle clause for simplified Treaty revision (Art. 48(7)), which allows the European Council to decide by unanimity to change the voting regime in most policy fields (all except defence and military matters) from unanimity to QMV. Although the Commission correctly argues that consensus has been known in the EU to be produced 'under the shadow of the vote'⁶⁸, including in the external matter of trade, this type of negotiation dynamic seems more appropriate for economic issues with a give-and-take character than for salient matters of high politics. (The above-mentioned fiasco of the asylum quotas gives pause for thought in this respect.) It is unlikely that Member States who are currently outliers when it comes to human rights declarations (Hungary has been known to block China-related EU statements) would easily forfeit their veto right. In the circumstances, it seems more promising to encourage the use of constructive abstention (as Art. 31 TEU) or to adopt statements with all-but-one, which politically send the same message.⁶⁹

⁶⁶ Jean-Claude Juncker, 'State of the Union 2018: The Hour of European Sovereignty', 12 September 2018.

⁶⁷ Franco-German Council of Ministers, 'Meseberg declaration: Renewing Europe's Security and Prosperity', 19 June 2018.

⁶⁸ J.H.H. Weiler, 'The Transformation of Europe', *The Constitution of Europe: Do The New Clothes Have an Emperor? And Other Essays on European Integration* (Cambridge: Cambridge University Press, 1999), 72.

⁶⁹ As proposed in the recent EU-China report of the Dutch Advisory Council on International Affairs (AIV), 'China en de strategische opdracht voor Nederland in Europa', June 2019. For a precedent involving Hungary's veto of a statement on Israeli settlements: Andrew Rettman, 'EU ignores veto on Israel, posing wider questions', *EUObserver*, 1 May 2019.

With the Lisbon innovations in place, the key for the EU to grow into a more credible geopolitical actor lies not in further treaty amendments but in political will, practice and mutual trust. It requires (big Member State) national capitals to see their own strategic interests in terms of a wider European interest and to act accordingly. In principle, all the instruments are there. Those that are not can be created within the Lisbon framework. To take one example, the current Union has no decision-making forum to deal with issues like 5G/Huawei, where various economic, trade and hard security considerations must be weighed against each other. As China will loom larger over the Union's economic and geopolitical interests in the years ahead, one can imagine the decision-making structure going beyond ad hoc taskforces to a dedicated Commissioner and/or a new Council configuration, which could be an 'Economy and Security Council'.⁷⁰ In such cases, if Member States feel a pressing need and not all are willing to cooperate, just like in monetary matters, there is more likely to be (temporary) Member State cooperation outside or alongside the Lisbon Treaty than a full Treaty change.

2.4.3 Membership

Formally speaking, every change in membership involves an amendment of the EU Treaties. Those changes that are directly related to new membership – voting arrangements in the Council, seat distribution in the European Parliament, territorial working, languages – are dealt with via the accession clause, Art. 49 TEU.⁷¹ However, an increase in membership in the past often led to wider discussions about the Union's institutional set-up and to new policy initiatives. The reason is that changes in membership do not impact only on the number of persons around decision-making tables (say, from 15 to 25 ministers) but also on the power dynamics within the Union – between big and small Member States, between stronger and weaker economies, between regions or policy preferences. The then imminent 'big bang' eastern enlargement with ten new members was a key driver for institutional debate from 2000, which resulted in the Lisbon Treaty itself.

However, it is unlikely that future accessions would result in such wide institutional debates. The accession process itself has slowed down. The most daunting candidate country, Turkey, will in all likelihood never join the Union; nor will the entry of a number of Western Balkan countries from 2025 onward change the fundamentals, except for one issue. A membership of close to 35 countries could result in the European Council going back on its 2008 decision, related to Ireland's difficult ratification of the Lisbon Treaty, to restore the principle of one Commission per Member State, and returning to what the

⁷⁰ As proposed by the above-mentioned Dutch AIV report.

⁷¹ Formally, national ratification procedures tend to be as heavy for accession treaties (Art. 49 TEU) as for revision treaties (Art. 48 TEU), but politically they are less sensitive and hardly ever give rise to a referendum. (The one exception: in 1972, France held a referendum about the UK's accession to the European Economic Community.)

Treaty intended – a rotating representation of two-thirds of Member States in the College of Commissioners.

Just like accession, a Member State's withdrawal impacts the inner workings of the institutions and the power relations between members. It is one reason among many why the UK's departure will be disruptive for the Union. However, Brexit will probably not result in EU Treaty change. A legal study concludes that the Lisbon Treaty can even accommodate post-Brexit participation of the UK 'in a policy, policy areas, agency or other Union arrangement'⁷² without extra safeguards. While the Lisbon innovation of Art. 50 TEU, the infamous exit clause, may have triggered an unexpected series of events in the UK, on the Union's side it has served its purpose in preserving the bloc's cohesion and interests during the divorce.

2.4.4 Democracy and legitimacy

A fourth and final possible driver for Treaty revision is public dissatisfaction with the accountability of the Union's decision-making and its leaders. In this respect, the crises of the past decade have brought about a massive change in public perception, way beyond anything the drafters of Lisbon imagined.

The euro crisis revealed to many EU citizens, starting with those in countries under market pressure, the importance of euro-related decisions for their jobs, savings and pensions. For the first time in the EU's history, national elections were decided on European issues.⁷³ At certain moments, it seemed to Greek or Portuguese citizens that their fate was decided in the Bundestag in Berlin, not by their own governments or by EU institutions. Public outrage hit the Troika in particular, the technocratic body composed of Commission, ECB and IMF officials which the creditors sent to Athens, Dublin and Lisbon to discuss (or impose) budgetary cuts and reforms. Observing a 'black hole' in democratic accountability between national parliaments with budgetary rights but lacking an EU perspective and a European Parliament with an EU-wide view but no budgetary rights, four French academics, including Thomas Piketty, proposed the creation of a Eurozone Assembly, composed of both MEPs and MPs from eurozone countries.⁷⁴ The proposal had its flaws⁷⁵ and did not gain much political traction, but the conundrum it revealed is real.

The migrant crisis in its turn split societies between fence-builders and Samaritans, set national publics in the west, east and south against each other,

⁷² European Parliament, 'The impact of the UK's withdrawal on the institutional set-up and political dynamics within the EU', May 2019, ch. 4, quote on p. 59.

⁷³ Van Middelaar, *Alarums & Excursions*, 232–235.

⁷⁴ Stéphanie Henneke a.o., *Pour un traité de démocratisation de la zone euro* (Paris: Seuil, 2017); idem a.o. (eds.), *How to Democratize Europe* (Cambridge MA: Harvard University Press, 2019).

⁷⁵ For an assessment by the author, see Luuk van Middelaar and Vestert Borger, 'A Eurozone Congress', in: Henneke a.o., *How to Democratize Europe*, 115–121.

and has been blamed for the further rise of populism, in particular for the success of the AfD in Germany. In Hungary, Prime Minister Viktor Orbán organised a referendum to delegitimise the Council decision on asylum quotas. Individual heads of government have been punished in the ballot box. Specific decisions, such as the EU-Turkey deal, have come under the scrutiny of experts and the courts. Although the EU decision-making procedures as such did not come under the wider public's critique, unlike in the euro crisis, there is no reason to think the migrant crisis left no scars on the EU's public standing.

Both periods of turmoil show vividly how crisis management requires a kind of public communication and democratic accountability the Union has not historically offered. The capacity to act requires the capacity to convince. Perhaps EU political actors, and some analysts, tend to underestimate the metamorphosis from rules-politics to events-politics. However, the wider European public certainly gets it, as its increasing defiance and more passionate engagement both make clear. The remarkable voter turnout at the 2019 European Parliament elections – turnout went up for the first time since 1979, with a 9 percentage point increase to just above the symbolically important 50 per cent – is another EU-wide testimony to that civic engagement.

In Brussels circles, a vague yet fundamental uneasiness about democratic legitimacy is at times boldly translated into ready-made institutional proposals. Thus Jean-Claude Juncker proposed in his 2017 State of the Union the merger of the presidencies of the Commission and the European Council, under the adage 'more democracy means more efficiency', and because to have 'one captain ... steering the ship' would be easier for the public to understand.⁷⁶ This idea would require a Treaty change, since it would put the Treaty-prescribed independence of the Commission at risk. Not a single member of the European Council endorsed it. President Macron also put forward institutional amendments – in particular, the creation of transnational constituencies for the European Parliament. In 2018, the EP shot the proposal down, but with the promise to reconsider it for the 2024 election. Following the 2019 elections and the distribution of the top jobs, it was agreed to hold a Conference on the Future of Europe at the end of the year, with liberal MEP and former Belgian PM Guy Verhofstadt as Chair. Although a conference is not like the European Convention of Giscard d'Estaing in 2002, this yet to be determined gathering might open a small door to changes in the Lisbon Treaty sooner than the other scenarios described above. One should hope the future *conférenciers* will see beyond ready-made Brussels recipes and look the conundrum of a Union that acts while being accountable coolly in the eye.

⁷⁶ Jean-Claude Juncker, 'State of the Union 2017', 13 September 2017.

2.5 To conclude: the strength of Lisbon

Ten years after its entry into force, the EU's Lisbon Treaty may be called a success. It has struck the right balance in the division of competences between the national level and the central EU level, an important debate at the time of its drafting. Today, hardly anybody is asking for a 'repatriation' of competences (not even the pre-referendum UK government could find substantial candidates⁷⁷), nor for investing the Union with new missions requiring Treaty change.⁷⁸ As regards the Union's political executive – the key debate at the time and central to the present contribution – the analysis above shows how the new dual executive of the European Council and Commission works very well in principle provided all actors understand their role. The past ten years offer examples indicating that it is most risky, if not irresponsible, to sideline either the expertise and legislative prerogatives of the Commission (as happened in the early phase of the euro crisis) or the public authority of the European Council (as happened in the migrant crisis). A Union that acts needs both, as was successfully shown in the later phase of the euro crisis and during the Brexit divorce proceedings. The Treaty cut a previously existing chain of command between the levels of leaders (rotating European Council presidency) and ministers (rotating Council presidency) by abolishing the former. This disadvantage has been compensated by the continuity offered by permanent presidencies, and it can be further overcome thanks to links between the permanent presidencies of the European Council and the two most 'executive' Councils, the Eurogroup and the Foreign Affairs Council.

As regards future adaptation in the light of experience, the Lisbon Treaty offers the flexibility for development without touching its foundations. The new light revision procedure was used as early as 2011, and the introduction of more majority voting thanks to the passerelle clause (in particular, in foreign affairs) is currently under consideration. At the same time, the political and public constraints of Treaty change will encourage and/or oblige Member States to go outside the Treaty when the situation requires it, as they did in the euro crisis. Characteristically, however, in the two intergovernmental treaties concluded in that period (the ESM Treaty and the Fiscal Compact), the Member States wanted to remain as close as possible to the EU legal framework, even using its institutions. In emergencies, it may also happen that leaders act slightly outside the formal institutions, as they did in the migrant crisis.⁷⁹ On the downside,

⁷⁷ UK government, 'Review of the balance of competences', 2012–2014.

⁷⁸ See Hubert Védrine, Luuk van Middelaar and Pierre Sellal, 'Il faut que l'Europe achève ce qui est resté incomplet', *Le Monde* 4 March 2019.

⁷⁹ According to its authors, the Turkey deal of 18 March 2016 was not concluded by the European Council, an EU institution, but by the EU heads of state or government, an informal circle of leaders. In three parallel cases brought before the European Court of Justice, the Court upheld this distinction and declared that it lacked jurisdiction (e.g. General Court, 'NG vs. European Council', 28 Feb. 2017). For an example from the euro crisis, see the statement of EU heads of state or government of 11 February 2010, analysed in Van Middelaar, *Alarums & Excursions*, 26–32.

these acts are sometimes legally contested; on the upside, they show the political will to act, and to do so jointly.

A final word of caution. The Lisbon Treaty offers a constitutional framework and a toolbox. It cannot substitute for a lack of political will. The two most pressing issues the Union currently faces – public defiance and geopolitical threats from Washington, Beijing and Moscow – cannot be solved by institutional change, but only by leadership, political will and the public awareness of a changing world.⁸⁰

⁸⁰ This was recognised by incoming EU High Representative Josep Borrell in his hearing in the European Parliament, 7 October 2019.

3 The Impact of the Lisbon Treaty: From Misdiagnosis to Ineffective Treatment

R. Daniel Kelemen

Introduction

The Treaty of Lisbon, which took effect on 1 December 2009, was the final product of a reform exercise launched with the Laeken Declaration in December 2001. The route from Laeken to Lisbon was tortuous. Member State governments decided that the reforms they had agreed to in the Nice Treaty earlier in 2001 had left important issues unresolved, and that the EU's institutions needed more far-reaching reforms to cope with the impending enlargement to the East, to equip the EU with a stronger voice on the world stage, and to address what they perceived as citizens' concerns about the EU's lack of efficiency, effectiveness and democratic accountability. With the Laeken Declaration, EU leaders set the stage for a Convention on the Future of Europe, which was to address these questions and propose fundamental institutional reforms.

By the summer of 2003, the Convention – including representatives of the governments and parliaments of EU Member States and candidate countries, as well as representatives of EU institutions – produced a draft Constitutional Treaty for the EU. That Treaty, formally the Treaty Establishing a Constitution for Europe, was finally signed by Member State governments on 29 October 2004, but its ratification was derailed when French and Dutch voters rejected the Treaty in referendums in May and June 2005. EU leaders did not simply give up when the Constitutional Treaty was rejected. Instead, after a period of reflection, they essentially stripped out the symbolic elements of that Treaty (such as mentions of an EU anthem and flag) that had given it the appearance of a constitutional document and repackaged it more modestly as a reform treaty. While most substantive provisions of the Lisbon Treaty remained the same as those in the Constitutional Treaty, leaders claimed that the new treaty was far less ambitious, and most governments deemed that it could be ratified by their parliaments without the need for referendums.⁸¹ National governments finally

⁸¹ Ireland was an important exception in this regard, as it did require a referendum for the ratification of the Lisbon Treaty. Irish voters initially rejected the Lisbon Treaty in a 2008 referendum, but finally endorsed it in a second referendum held in 2009.

signed up to the Lisbon Treaty in December 2007, and it was ratified and entered into force two years later.

In launching the reform drive that led to the Lisbon Treaty, EU leaders promised the new Treaty would make the EU more democratic, more transparent and more efficient. They argued that this was crucial to maintaining and enhancing the EU's legitimacy in the eyes of citizens. As they put it in the Laeken Declaration, 'The European Union derives its legitimacy from the democratic values it projects, the aims it pursues and the powers and instruments it possesses. However, the European project also derives its legitimacy from democratic, transparent and efficient institutions'.⁸² Did the Lisbon Treaty succeed in achieving these lofty goals?

In short, the answer is no. That is not to say that the Lisbon Treaty was a total failure or that the framework it establishes for the EU is profoundly flawed. The basic structures of the EU functioned before the Lisbon Treaty, and they have continued to function after it. The Lisbon Treaty introduced a range of reforms involving the EU's legislative procedures, the role of the European Parliament and national parliaments in EU decision-making, and leadership positions for EU institutions. Some of these changes have helped enhance the democracy, transparency and efficiency of the EU. However, many of them have had little impact, and others have arguably been damaging. In this paper, I outline a number of these reforms and assess their impact on democracy and efficiency in the EU. I also highlight some of the challenges to democracy and efficiency in the EU that Lisbon failed to address and which continue to plague the Union today.

What did EU leaders get wrong in Lisbon? The reforms introduced at Lisbon did not deliver what leaders promised, because they were based on a faulty diagnosis of the actual challenges to democracy in the EU and to the efficiency of European governance. As in medicine, treatments in politics and policy that are based on a faulty diagnosis of the patient's malady are usually ineffective. The Lisbon Treaty administered treatments where they were not needed for problems that did not exist, while at the same time failing to administer treatments where they desperately were needed to address the Union's actual ills.

With regard to democracy, the Lisbon Treaty focused great attention on supposed democratic deficits at the EU level, when in fact the greatest threats to democracy and the rule of law in the EU stemmed from deficiencies at the national level in some EU Member States. Indeed, these national democratic deficits have grown much worse since Lisbon, and the Treaty framework has proved

⁸² Laeken Declaration on the Future of the European Union, Bulletin of the European Union. Presidency Conclusions of the Laeken European Council (14 and 15 December 2001). Luxembourg: Office for Official Publications of the European Communities, 19–23.

inadequate to deal with them. With regard to the related norm of transparency, EU leaders focused on obscure issues to do with clearer delineation of EU and national competences while refusing to address the most glaring problems with transparency in the EU, such as the secretive operation of the Council and the opacity of the Commission's approach to enforcing EU law. More generally, leaders had promised the new Treaty would make the EU's institutions more understandable to citizens. However, as we discuss below, some of the reforms they introduced rendered the EU less comprehensible. Finally, with regard to efficiency, great focus was placed on the reform of decision-making procedures that were not that problematic to begin with, while little attention was paid to efficiency in the enforcement of EU law. Efficiency can be defined as the quality of achieving maximum productivity with minimum wasted effort or expense. There can be nothing more inefficient in government than spending time and money passing new laws that states can then ignore with impunity, something that happens all too often in the EU. However, the Lisbon Treaty did little to address the problem of Member State non-compliance with EU law.

Finally, it is important to recognise that some of the Lisbon Treaty's shortcomings were not simply consequences of unintentional misdiagnoses of the EU's problems. Despite all the talk about enhancing democracy and efficiency, some of the choices that member governments made in the Lisbon Treaty – both reforms they introduced and potential reforms they chose not to introduce – were not guided by a desire to make the EU more democratic or efficient. Rather, they were simply designed to safeguard national power. Some reforms that might strengthen democracy, transparency and efficiency in the EU would involve handing EU institutions more authority than member governments were willing to give them. To the extent that the Lisbon Treaty failed to strengthen democracy and efficiency in the EU, this was at least in some respects a failure by design.

3.1 Key Lisbon Treaty Reforms Concerning Democracy and Efficiency

3.1.1 Changing Voting Rules in the Council

Perhaps the most important efficiency-enhancing reform the Lisbon Treaty introduced was to make it easier to pass legislation in a host of policy areas.⁸³ Though the EU was by no means mired in gridlock prior to Lisbon, its legislative processes were relatively slow and risked getting slower with enlargement.⁸⁴ The Lisbon Treaty lowered the bar to passing legislation, firstly simply by extending qualified majority voting (QMV) to over forty policy areas that had previously been subject to unanimity voting, and secondly by lowering the threshold

⁸³ A Verdun, 'Decision-Making Before and After Lisbon: The Impact of Changes in Decision-Making Rules' (2013) 36(6) *West European Politics* 1128–1142.

⁸⁴ R Hertz and D Leuffen, 'Too Big to Run? Analysing the Impact of Enlargement on the Speed of EU Decision-Making' (2011) 12(2) *European Union Politics* 193–215.

necessary to achieve a qualified majority in areas where QMV would apply. Prior to Lisbon, the main EU decision-making procedure that involved QMV had been known as the co-decision procedure (in reference to the co-equal role given to the European Parliament under that procedure, which is discussed below). Co-decision had grown in importance since it was first introduced in the Maastricht Treaty, and was used as the basis for roughly half of the legislative proposals in the years just before the Lisbon Treaty was ratified. The Lisbon Treaty renamed co-decision the ordinary legislative procedure and extended it to most areas of EU law-making. In the years since Lisbon came into effect, roughly ninety per cent of legislative proposals in the EU have been made under the ordinary legislative procedure, and therefore have involved QMV.

At the same time that it extended the use of QMV, the Lisbon Treaty changed the QMV formula in a way that lowered the threshold needed to pass legislation. The Nice Treaty had introduced a triple majority QMV voting system that imposed a high threshold. Under the Nice version of QMV, the supermajority needed for legislation to pass had to include 1) a majority of Member States who 2) together accounted for 74 per cent of the weighted votes in the Council, and who 3) together accounted for at least 62 per cent of the EU's total population. Not only was this convoluted system likely to confuse voters, but it also established a rather high threshold that many feared might produce gridlock. The new voting procedures introduced in the Lisbon Treaty still involved a substantial supermajority, but they lowered the threshold necessary to pass legislation, and made it at least somewhat more intelligible to voters. Under Lisbon's new double majority system, for legislation to pass it must be supported by at least 55 per cent of the Member States in the Council, and those States must together represent at least 65 per cent of the EU's population.⁸⁵

How much impact has the expansion and reform of QMV had on the efficiency of the EU? It remains premature to reach a definitive conclusion, as the new QMV rules only took effect from November 2014, and until 2017 Member States could request, on a case-by-case basis, that the old voting rules be applied. Also, it is impossible to assess the impact of the extension of QMV in isolation, since the extension of QMV was generally linked to the new ordinary legislative procedure, and that procedure simultaneously extended the role of the European Parliament. While QMV tends to decrease the duration of the EU's legislative process compared to unanimity voting,⁸⁶ strengthening the role of the European

⁸⁵ As a safeguard to reduce the chance of large states banding together to stop legislation, a blocking coalition must include at least four Member States collectively making up at least 35 per cent of the EU's population.

⁸⁶ H Schulz and T König, 'Institutional Reform and Decision-Making Efficiency in the European Union' (2000) 44(4) *American Journal of Political Science* 653–666; T König, 'Divergence or Convergence? From Ever-Growing to Ever-Slowing European Legislative Decision Making' (2007) 46(3) *European Journal of Political Research* 417–444.

Parliament (EP) tends to increase the duration of the process.⁸⁷ So, the two key aspects of the ordinary legislative procedure may to some extent cancel each other out when it comes to efficiency. Indeed, this cancelling out effect might help explain why a recent study⁸⁸ found that the impact of the Lisbon Treaty on legislative efficiency has been very modest.

Stepping back, we can consider other reasons why the expansion of QMV under the Lisbon Treaty, while welcome, has not yet and is unlikely in the future to profoundly increase the efficiency of EU decision-making. Despite the formal expansion of QMV in many areas, strong informal norms of seeking consensus in the Council persist, and the overwhelming majority of votes are supported unanimously.⁸⁹ To be sure, consensus may be achieved in the shadow of potential voting (such that countries who anticipate they could be outvoted agree to endorse the group consensus for strategic reasons).⁹⁰ But even if the scale of consensus decisions is exaggerated by strategic behaviour, it remains true that there are strong norms in the Council of seeking consensus and of avoiding imposing the will of the majority of states on the minority by outvoting them. We can expect that such norms would be particularly influential in the most sensitive areas of EU policymaking, many of which were the areas where the Lisbon Treaty extended QMV.⁹¹

Speeding up the EU legislative process was supposedly a key aim of the Lisbon Treaty. But if member governments were serious about this objective, they would need to give up the norm of constantly seeking consensus in the Council, which inevitably slows the legislative process and often blocks legislation even where it could win a qualified majority if put to a vote. Any true breakthrough in speeding up the EU legislative process will only come when government representatives in the Council allow the Council to function like a typical upper legislative chamber, and become more comfortable simply voting and imposing the will of the majority (or QMV supermajority) on the minority. Of course, it may be the case that the Lisbon Treaty reforms would have had a greater impact on decision-

⁸⁷ J Golub, 'Survival Analysis and European Union Decision-Making' (2007) 8(2) *European Union Politics* 155–179.

⁸⁸ J Bølstad and J Cross, 'Not all Treaties are Created Equal: The Effects of Treaty Changes on Legislative Efficiency in the EU' (2016) 54(4) *Journal of Common Market Studies* 793–808.

⁸⁹ Ibid; C Wratil and S Hobolt, 'Public Deliberations in the Council of the European Union: Introducing and Validating DICEU' (April 2019) 20(3) *European Union Politics* 511–531.

⁹⁰ D Finke, 'Underneath the Culture of Consensus: Transparency, Credible Commitments and Voting in the Council of Ministers' (2017) 18(3) *European Union Politics* 339–361; S Hagemann, S Bailer and A Herzog, 'Signals to their Parliaments? Governments' Use of Votes and Policy Statements in the EU Council' (2019) 57(3) *Journal of Common Market Studies* 634–650.

⁹¹ This may help explain Bølstad and Cross's finding that the impact of the Lisbon Treaty on legislative efficiency was much less than that of the 1997 Amsterdam Treaty (since the latter Treaty had extended QMV to less sensitive policy areas where states might be more willing to actually put matters to a vote if necessary to overcome minority opposition). J Bølstad and J Cross, 'Not all Treaties are Created Equal'.

making efficiency had the EU not been hit by a succession of major crises such as the Eurozone crisis, the refugee crisis and Brexit shortly after the Treaty came into force. The crises dominated the EU policy agenda in ways that may have slowed decision-making in other fields. We cannot assess the scale of the impact with any certainty; however, we can say with confidence that the persistence of strong norms of consensus and the assertive role of the European Parliament will continue to substantially counteract the efficiency gains associated with the extension of QMV.

3.1.2 Empowering the European Parliament

The Lisbon Treaty introduced a number of reforms designed to strengthen EU democracy by enhancing the role of the European Parliament. As noted above, in the legislative arena, the Treaty extended the ordinary legislative procedure (previously known as the co-decision procedure) to roughly forty new policy areas. This gives the Parliament nearly equal power to the Council of Ministers in areas such as asylum, immigration, police and judicial cooperation, agriculture, structural funds and transportation. Anyone who sees the Parliament – the only directly elected EU level body – as a key channel for democratic participation in EU law-making will welcome this reform. Increasing the Parliament’s influence in EU law-making did not serve to make the EU more efficient, as Parliamentary involvement can lengthen legislative processes; most would agree, however, that it made the process more democratic.

The Lisbon Treaty also bolstered the Parliament’s role in the selection of the Commission President and the College of Commissioners.⁹² However, the provisions the Lisbon Treaty added to strengthen the EP in this respect contained ambiguities that have led to inter-institutional conflict. Before Lisbon, treaties had already given the Parliament the power to approve (or disapprove) the Council’s nominee for Commission President. The Lisbon Treaty went a step further by adding language stating that the Council shall propose a candidate for Commission President, ‘taking into account the elections to the European Parliament’ and that the candidate must then be ‘elected’ by a majority of MEPs. In other words, Lisbon was more explicit about politicising the selection of the Commission President by linking it to the European Parliament elections.

The obvious ambiguity in this provision concerned what it should mean for the Council to ‘take into account’ the EP elections. In the run up to the 2014 elections, leaders of the Europarties represented in the European Parliament seized on this provision to launch what they called the *Spitzenkandidaten* process. In short, the idea was that each Europarty would put forward a candidate for the Commission Presidency ahead of the Parliamentary elections. Then the Parliament would demand that governments in the Council nominate the ‘winning candidate’

⁹² M Shackleton, ‘Transforming Representative Democracy in the EU? The Role of the European Parliament’ (2017) 39(2) *Journal of European Integration* 191–205.

(initially taken to mean the candidate of the party that won the most seats, but later taken by some simply to mean the candidate that could put together a majority coalition in the Parliament after the election) as Commission President. In other words, where the Lisbon Treaty had ambiguously linked the Council's selection of the Commission President to the outcome of the Parliamentary elections, the Parliament tried to transform these elections into an actual contest for the Presidency.

In 2014, the gambit succeeded. The Europarties put forward *Spitzenkandidaten* and after the European People's Party (EPP) came out on top in the election, all the major Europarties rallied around the EPP's candidate, Jean-Claude Juncker. While governments in the European Council initially tried to resist the Parliament's demand that Juncker become President, eventually all except for Hungary and the UK acquiesced and supported his appointment.

The Europarties sought to repeat the process in 2019, putting forward *Spitzenkandidaten* who campaigned across Europe and participated in televised debates. However, for a variety of reasons, the Socialists and Liberals in the Parliament were unwilling to rally behind Manfred Weber, the *Spitzenkandidat* of the party (the EPP) that again won the largest share of seats. EPP MEPs and most EPP leaders in the Council then responded by refusing to back the candidate of the second largest party, the Socialists' Frans Timmermans. Opponents of the *Spitzenkandidaten* process in the European Council took advantage of the divisions amongst the Europarties and put forward an alternative EPP candidate who had not been a *Spitzenkandidat*, German Defence Minister Ursula von der Leyen. She won unanimous approval in the European Council and ultimately was confirmed by a narrow margin after a vote in the European Parliament.⁹³

These developments underline the fact that the Lisbon Treaty provisions empowering the European Parliament to play a greater role in the selection of the Commission President proved too flimsy a basis on which to build the *Spitzenkandidaten* system. Ultimately, the debacle that unfolded in 2019 – in which the Europarties organised campaigns and debates amongst *Spitzenkandidaten* only to see those candidates cast aside by the Council – could only serve to undermine public confidence in the EU's democratic process. If the EU is ever to have a system whereby it elects a European Commission President through a pan-European vote of some sort, it would require an explicit Treaty basis for that.

More generally, the measures put in place by the Lisbon Treaty to strengthen the role of the European Parliament were counteracted to an extent by the tendency that emerged in subsequent years to circumvent the Community method of EU law-making entirely in favour of shifting the locus of decision-making to the

⁹³ R D Kelemen, 'This is How Europe got its New President' *The Washington Post* (Monkey Cage Blog), 17 July (2019).

European Council and relying on intergovernmental methods. The Parliament hoped that it could transform the EU into a kind of parliamentary system of government, whereby the Commission President would be a prime minister backed by, and responsive to, a political majority in the Parliament. National leaders, however, rejected this vision in favour of an approach that sees the ultimate locus of leadership and legitimacy residing in the European Council, which would both select the Commission President and set the overarching policy agenda for the Commission. With the spectacular failure of the 2019 *Spitzenkandidaten* process, the Parliament's vision has suffered a humiliating defeat, and the European Council clearly has the upper hand.

3.1.3 National Parliaments

The Lisbon Treaty included several measures designed to strengthen the role of national parliaments in the legislative process. These reforms responded to the commonplace critique that the EU had undermined national parliaments (and thereby national democracies) by enabling national governments to escape their scrutiny by making decisions behind closed doors in the Council in Brussels and then presenting them to their parliaments back home as *faits accomplis*. According to some, the way to address this issue was to provide for a greater role of national parliaments in EU decision-making, and the Lisbon Treaty did just that. Indeed, as Auel notes, 'When the Treaty of Lisbon finally came into force in December 2009, it was hailed as the Treaty of Parliaments.'⁹⁴ Article 12 of the Treaty formally recognised the role of national parliaments in the EU, and together with other provisions it established new opportunities for inter-parliamentary cooperation and dialogue with EU law-makers. Most importantly perhaps, a protocol to the Treaty established an early warning system (EWS) or yellow card system that empowered national parliaments to check that proposed EU legislation respects the principle of subsidiarity. The principle of subsidiarity, which is enshrined in Article 5(3) of the Treaty on European Union (TEU), states that the Union shall only take actions when the objectives of the proposed actions cannot be sufficiently achieved by the Member States. In other words, policymaking should remain at the lowest level possible, and the EU should only step in when national (or regional or local) governments cannot adequately address an issue. Under this EWS, legislative proposals are forwarded to national parliaments, which may then issue an opinion on whether the proposal over-extends EU power in violation of the principle of subsidiarity. If, within eight weeks of the notification of the proposal, one-third of national parliaments decide that a Commission proposal violates subsidiarity, they can issue a so-called 'yellow card' calling for a halt to the legislative initiative. The Commission may still choose to continue with its legislative initiative in the face of this opposition, but it must offer a reasoned opinion as to why its proposal

⁹⁴ K Auel, 'National Parliaments as Multi-Arena-Players: A New Deliberative Role Within the EU Multilevel System?', in N Behnke, J Broschek, J Sonnicksen (eds), *Configurations, Dynamics and Mechanisms of Multilevel Governance* (Cham: Palgrave MacMillan, 2019) 117–134 at 130.

does not violate subsidiarity, and its proposal may then be blocked by a vote of either 55 per cent of the Member States or 50 per cent of votes cast in the European Parliament.

What impact have these provisions on national parliaments had on democracy, transparency and efficiency in EU law-making? In short, very little at all. National parliaments have only triggered the yellow card procedure three times. In none of those cases did the Commission find that the principle of subsidiarity had been breached, though in one case it did decide to withdraw the proposal for political reasons.⁹⁵

The Lisbon Treaty's provisions on national parliaments have been rarely used and have had at most a modest impact because they were based on a misdiagnosis of the EU's ills. Many national parliamentarians and academic critics of the EU's supposed democratic deficit were eager to blame the EU policy process for the inability of national parliaments to control their own governments; but in reality, the causes of the impotence of most national parliaments in Europe were always to be found in domestic politics, not at the EU level.

In short, many parliaments in Europe are thoroughly dominated by their executives as a result of the dynamics of party discipline and other domestic institutions. To be sure, a handful of national parliaments across Europe, such as the Danish Folketing⁹⁶ and the Swedish Riksdag,⁹⁷ are powerful and have for years managed to do a quite effective job at holding their governments accountable for their actions in Brussels. However, most national parliaments in Europe are thoroughly dominated by their executives. Giving weak parliaments that had rarely shown great interest in scrutinising EU legislative processes before Lisbon more opportunities to participate in EU law-making and to attempt to block legislation was never likely to make much difference, and indeed it has not. It may be true that many national governments attempt to circumvent scrutiny by their national parliaments when they engage in policymaking at the EU level; but the answer to this democratic deficit must be found at the national level through domestic reforms that empower parliaments to hold their executives accountable. National parliaments should not expect the EU to help them make up for their impotence at home.

⁹⁵ It is important to note that some scholars suggest that the EWS has had more subtle, but still important, effects on national parliaments. For instance, studies suggest that the EWS has encouraged national parliaments to become more active in monitoring EU decision-making and more engaged in the process, thereby enhancing the legitimacy of EU legislation. K Auel, 'National Parliaments as Multi-Arena-Players'; K Auel and C Neuhold, 'Multi-Arena Players in the Making? Conceptualizing the Role of National Parliaments Since the Lisbon Treaty' (2017) 24(10) *Journal of European Public Policy* 1547–1561.

⁹⁶ F Laursen, 'The Role of National Parliamentary Committees in European Scrutiny: Reflections Based on the Danish Case' *Journal of Legislative Studies* (2005) 11(3–4) 412–427.

⁹⁷ K Auel, 'Doing Good, but Reluctant to Talk About It: The Swedish Riksdag and EU Affairs' Swedish Institute for European Policy Studies European Policy Analysis 2018:9epa.

3.1.4 The European Council

Another important set of reforms in the Lisbon Treaty sought to institutionalise and strengthen the role of the European Council.⁹⁸ Though the European Council had existed since 1974, it was only with the Lisbon Treaty that it was formally established as an institution of the European Union. In addition to formally institutionalising the European Council, the Lisbon Treaty created a new leadership position, a permanent President of the European Council who would serve a two-and-a-half-year term, which could be renewed once. The main stated aim of this new position was to increase the efficiency of EU decision-making by bringing greater continuity to the leadership of the European Council, which had previously rotated every six months depending on which Member State held the rotating Presidency of the Council of Ministers. Has the creation of the new position of President of the European Council enhanced efficiency, transparency and democracy in the EU? The answer is quite simply no. In fact, it was never truly intended to do so.

First, it should be noted that while the Lisbon Treaty established a new permanent President of the European Council, it did not get rid of the institution of the Council Presidency, which rotates between member governments every six months. To address the discontinuities created by the turnover of Council Presidencies every six months, groups of three Member States who are to hold the Council Presidency in succession were required to participate in a so-called 'trio Presidency' agreeing to a joint 18-month agenda. Van Gruisen finds that the trio Presidency has improved the efficiency of legislative decision-making compared to the previous, simple six-month rotation scheme.⁹⁹ Still, if the Lisbon Treaty had been serious about maximising the efficiency of Council decision-making, it would have eliminated the rotating Presidency altogether. Instead, Lisbon ended up with an awkward hybrid arrangement¹⁰⁰ in which the European Council, which gathers the heads of Member State governments, and the regular Council of the European Union, which gathers the various ministers of those governments, are under separate leadership.

If we take a step back, it becomes clear what chaos the Lisbon Treaty has created in terms of leadership. On the one hand, we have a European Council guided by a permanent President which establishes a set of policy priorities (a five-year Strategic Agenda). On the other hand, we have a trio Presidency of the Council, composed of three separate six-month national Presidencies, which sets its own

⁹⁸ U Puetter, *The European Council and the Council: New Intergovernmentalism and Institutional Change* (Oxford: Oxford University Press, 2014); S Fabbrini and U Puetter, 'Integration without Supranationalisation: Studying the Lead Roles of the European Council and the Council in Post-Lisbon EU Politics' (2016) 38(5) *Journal of European Integration* 481–495.

⁹⁹ P van Gruisen, 'The Trio Presidency and the Efficiency of Council Decision-Making: An Empirical Study' (2019) *Journal of Common Market Studies* 1–18.

¹⁰⁰ A Warntjen 'The Elusive Goal of Continuity? Legislative Decision-Making and the Council Presidency Before and After Lisbon' (2013) 36(6) *West European Politics* 1239–1255.

priorities. These rotating Presidencies control most of the Council's day-to-day agenda and can, if they choose, block progress on issues.¹⁰¹ Finally, the President of the European Commission sets out his or her own political priorities, such as the ten priorities Juncker set out prior to his election in 2014.

The huge confusion in terms of EU leadership produced by the Lisbon Treaty was symbolised in 2012 when the EU won the Nobel Peace Prize. Who would go to Oslo to receive the prize on behalf of the EU? Who was the EU's leader? Under the Lisbon arrangements, there was no clear leader or voice of the EU on the world stage – not the President of the European Council, not the Commission President, and not the High Representative of Foreign Affairs and Security Policy. Ultimately, three of the EU's 'presidents' – the President of the Commission, the President of the European Council and the President of the European Parliament – travelled to Oslo to receive the prize together on behalf of the EU.

The ambiguity in leadership that the Lisbon Treaty produced was not accidental. In fact, part of the reason that member governments were eager to establish a permanent President of the European Council was that they wanted to prevent the President of the European Commission from becoming the *de facto* leader of the EU on the world stage. By linking the selection of the Commission President more strongly to the European Parliament elections, member governments knew they would be adding to the Commission President's democratic legitimacy. But a more firmly legitimated 'political' Commission President might also become a more powerful one, and one who felt more comfortable asserting him or herself as the leader of the EU. To nip this possibility in the bud, the Lisbon Treaty established the President of the Council as an alternative source of EU leadership, and one that would be firmly tied to the member governments and taking an intergovernmental rather than supranational perspective.¹⁰²

3.1.5 European Citizens' Initiative

In an effort to strengthen EU democracy, to encourage more direct participation by citizens in the EU policy process, and to foster a pan-European civil society, the Lisbon Treaty also introduced the possibility for European Citizens' Initiatives, or ECIs (Article 11 TEU and Article 24 TFEU). More details governing the operation of these initiatives were set out in a 2011 Regulation (Reg. 211/2011). In essence, if a transnational committee of citizens can gather at least one million signatures and meet minimal thresholds of signatures in at least seven different Member States, then the organisers will be able to present their initiatives before the European Parliament and the Commission will be required to respond to them formally. A successful initiative cannot force the Commission to introduce legislation, but the Commission does at least have to issue a communication

¹⁰¹ Ibid.

¹⁰² I Tömmel, 'The Standing President of the European Council: Intergovernmental or Supranational Leadership?' (2017) 39(2) *Journal of European Integration* 175–189.

explaining how it plans to respond to the initiative. Has the ECI played an important role in strengthening EU democracy as its advocates had hoped?

In short, the answer is no. Certainly, many civil society organisations have demonstrated interest in the ECI and the procedure has shown some potential. More than 70 ECIs have been launched and over a dozen have managed to be officially registered with the Commission. However, only four of these ECIs have managed to reach the one million signature threshold and none of these have resulted in the introduction of legislation. Also, as a recent study concluded, public awareness of and media attention to ECIs remains extremely limited.¹⁰³

Organisers of ECIs have highlighted the high administrative burden and various bureaucratic challenges involved in the current system, which led to the failure of many of the initiatives. In response, in 2019 EU law-makers agreed to a new regulation to facilitate ECIs (Regulation 2019/788), which will come into force next year.

It is certainly possible that we will see more successful ECIs in the future, once the new regulation comes into force. Moreover, the process of attempting to launch ECIs, whether successful or not, may contribute over the long term to the gradual strengthening of cross-border ties between civil society organisations. Nevertheless, while ECIs may be a welcome innovation, they will never resolve the fundamental challenges facing democracy in the EU. ECIs will never do more than occasionally catapult an issue on to the policy agenda, forcing leaders at least to consider it. While welcome, the development of ECIs can be no substitute for the further democratisation of the EU's core institutions and legislative processes.

3.2 What Lisbon didn't do

Perhaps more important than what the Lisbon Treaty did was what it failed to do. While the Lisbon Treaty introduced a number of reforms designed to tackle problems that were exaggerated or non-existent, it failed to anticipate and to address what were actually the most serious threats to democracy and efficiency in the EU. Lisbon's shortcomings have been laid bare in a number of the major political crises the EU has faced in recent years, and again, most recently, in the collapse of the *Spitzenkandidaten* process in 2019. Indeed, it is striking that a decade after the Lisbon Treaty came into effect, the nominee for Commission President, Ursula von der Leyen, found herself pledging to the European Parliament to convene yet another Conference on the Future of Europe to again debate how to reform EU institutions and strengthen EU democracy. To understand some of the institutional problems the EU has faced in recent years

¹⁰³ D Hierlemann and C Heusmann, Policy Brief: More Initiative for Europe's Citizens? Bertelsmann Stiftung, 2018. Available at <https://www.bertelsmannstiftung.de/en/publications/publication/did/einwurf-2-2018-1/>

and the challenges it faces going forward, it is important to revisit what EU leaders missed and got wrong in their diagnosis of the EU's ills at Lisbon.

3.2.1 The Real Democratic Deficit

Firstly, and most importantly, EU leaders at Lisbon focused on the wrong democratic deficits.¹⁰⁴ As developments in recent years have demonstrated, the main democratic deficits in the EU stem not from the EU level, but from democratic backsliding amongst Member State governments. Just a year after Lisbon was ratified, a government was elected in Hungary that set about dismantling liberal democracy. By the end of the decade, they had succeeded in consolidating the first hybrid authoritarian regime in the EU.¹⁰⁵ In 2019, Hungary became the first EU Member State ever to be downgraded by Freedom House to the status of only 'partly free'.¹⁰⁶ Meanwhile the example set by the Orbán regime has inspired other aspiring autocrats in other EU Member States, such as Jarosław Kaczyński in Poland, who have set about deploying the Orbán playbook in order to dismantle the rule of law and democracy.¹⁰⁷

The erosion of democracy and the rule of law in EU Member States is not a problem only for citizens of those states; it is a problem for the EU as a whole. Firstly, the emergence of autocratic member governments affects the Union as a whole because such regimes cannot be relied on to respect the law norms and to implement EU policies in good faith. This inevitably affects citizens and businesses in other Member States that must interact with such regimes when they live, work or conduct business there.¹⁰⁸ Secondly, national autocracies can poison EU level democracy: not only can autocratic regimes offer spoilers on sensitive issues within the Council, but they can undermine the legitimacy of the European Parliament by holding EP elections that are less than free and fair and by sending MEPs from autocratic ruling parties who then take up powerful positions within the Parliament.¹⁰⁹

While the Lisbon Treaty was fixated on the supposed shortcomings of EU level democracy, it was blind to the potential for the emergence of autocracy at the national level and did not put in place the necessary defences. The Lisbon

¹⁰⁴ R D Kelemen, 'Europe's Other Democratic Deficit: National Authoritarianism in Europe's Democratic Union' (2017) 52(2) *Government and Opposition* 211–238.

¹⁰⁵ A Bozóki and D Hegedüs, 'An Externally Constrained Hybrid Regime' (2018) 25(7) *Democratization* 1173–1189; L Way and S Levitsky, 'How Autocrats can Rig the Game and Damage Democracy' *Washington Post*, 4 January 2019.

¹⁰⁶ Freedom House, (2019) *Freedom in the World 2019*. Freedom House: Washington DC. Available at: https://freedomhouse.org/sites/default/files/Feb2019_FH_FITW_2019_Report_ForWeb-compressed.pdf, p. 13.

¹⁰⁷ L Pech and K L Scheppele, 'Illiberalism Within' (2017) 19 *Cambridge Yearbook of European Legal Studies* 3–47.

¹⁰⁸ F Timmermans, 'Opening Remarks of First Vice-President Frans Timmermans' Brussels, 19 July 2017. Available at: http://europa.eu/rapid/press-release_SPEECH-17-2084_en.htm.

¹⁰⁹ R D Kelemen, 'The European Union's Authoritarian Equilibrium' (forthcoming) *Journal of European Public Policy*.

Treaty identified democracy and the rule of law as cornerstones of the Union (Article 2 TEU), and it maintained the existing mechanism (Article 7 TEU) to sanction states that engage in a ‘serious and persistent breach’ of these Article 2 values. However, that mechanism was profoundly flawed, and over the past decade, the EU has failed miserably to deal with the democratic backsliding of Member State governments.¹¹⁰ The central flaw of Article 7 is that it places ultimate responsibility for the defence of the EU’s core democratic values in the hands of the Council and requires unanimous agreement of member governments in the Council before any sanctions can be imposed on a state that systematically violates those values. Once Orbán had consolidated his hybrid authoritarian regime with the help of his EPP allies at the EU level,¹¹¹ he was in a position to wield his veto within the Council to protect other backsliders (such as the Law and Justice party regime in Poland), despite EU censure. The European Commission triggered Article 7 against the Polish government in December 2017 and the European Parliament finally triggered Article 7 against the Hungarian government in September 2018. However, the Council has still refused to take a vote on even the first stage of the procedure, and it is clear that with the two Member State regimes vowing to protect one another, that there will never be the unanimity in the Council needed to impose sanctions. In other words, Article 7 has proved itself to be totally ineffectual.¹¹²

3.2.2 The Undemocratic Political Culture in the Council

The failure of the Council to address democratic backsliding relates to a second, broader problem that the Lisbon Treaty did not manage to address: the undemocratic political culture in both the European Council and the Council of the EU. The Lisbon Treaty did require regular Council meetings to be open to the public when they deliberate or vote on draft legislative acts, or discuss other strategic questions.¹¹³ However, neither this change nor the formal extension of QMV to new policy areas altered the deep-seated pattern whereby the Council (both the European Council and regular Council formations) still seeks whenever possible to operate behind closed doors and to reach agreements by unanimity. It also did not affect the European Council meetings, where national leaders still operate in a culture of diplomatic secrecy and seek unanimous agreement. These practices not only lack transparency, but they also often enable one or a small handful of states to block initiatives supported by large majorities of states and citizens. In other words, while the Council represents democratically elected governments, its practices are often opaque and undemocratic. Its culture is one of diplomatic secrecy, and it is often crippled by what amounts to a *liberum veto* problem reminiscent of that which famously hobbled the eighteenth century

¹¹⁰ D Kochenov and L Pech, ‘Better Late than Never? On the European Commission’s Rule of Law Framework and its First Activation’ (2016) 54(4) *Journal of Common Market Studies* 1062–1074.

¹¹¹ R D Kelemen, ‘Europe’s Other Democratic Deficit’.

¹¹² L Pech and K L Scheppele ‘Illiberalism Within’.

¹¹³ C Wratil and S Hobolt, ‘Public Deliberations in the Council of the European Union’.

Polish-Lithuanian Commonwealth. A more democratic and efficient EU will require a transformation in the practices of the Council such that it finally begins acting like the upper chamber in a bicameral legislature (alongside the European Parliament), operating with transparency and routinely making decisions by majority or QMV.

3.2.3 The Erosion of Enforcement

Finally, some of the principal shortcomings of the EU with respect to efficiency – and even with respect to democracy – concern the enforcement of European law. The Lisbon Treaty was quite fixated on speeding up EU law-making, while it did very little¹¹⁴ to strengthen the EU's capacity to enforce those laws. Even at the time the Lisbon Treaty was drafted, there were clear problems with Member State compliance with EU law. Those problems have grown far worse since then, and yet, remarkably, instead of confronting those problems, the Commission has dramatically relaxed its approach to enforcing EU law since the Lisbon Treaty was adopted.

Consider first some aggregate figures on enforcement activity. In the five years prior to the ratification of the Lisbon Treaty, the European Commission was referring nearly 200 infringement cases a year to the European Court of Justice (CJEU). Those numbers declined steadily since 2008, and in the past five years the Commission has been referring an average of only 35 cases per year (in other words, a decrease of more than 80 per cent in referrals over the past decade). As Falkner¹¹⁵ and Hofmann¹¹⁶ both explain, there is no evidence to suggest the decline in Commission enforcement activity is due to the fact that compliance with EU law has improved. Quite to the contrary, there is plenty of evidence to suggest that compliance has deteriorated – particularly given the brazen defiance of multiple EU norms by the backsliding governments mentioned above, and some highly publicised episodes in which multiple member governments openly defied duly enacted EU legal obligations, such as the 2015 refugee relocation scheme which was eventually abandoned after mass non-compliance by member governments.

¹¹⁴ The only notable measure the Lisbon Treaty took to address these was the addition of a provision (Article 260(3)) that would allow the Commission more quickly to seek the imposition of penalty payments for non-compliance in a particular type of infringement procedure (i.e. in cases where the Member State fails even to notify the Commission of what it has done to transpose a directive). For overviews of the evolution of EU infringement and sanctioning procedures in recent years, see M Smith, 'The Evolution of Infringement and Sanction Procedures', in A Arnulf and D Chalmers (eds), *The Oxford Handbook of European Union Law*. (Oxford: Oxford University Press, 2015) 350–375; and S Peers, 'Sanctions for Infringement of EU Law after the Treaty of Lisbon' (2012) 18 *European Public Law* 33–64.

¹¹⁵ G Falkner, 'A Causal Loop? The Commission's New Enforcement Approach in the Context of Non-Compliance with EU Law even after CJEU Judgments' (2018) 40(6) *Journal of European Integration* 769–784.

¹¹⁶ A Hofmann, 'Is the Commission Levelling the Playing Field? Rights Enforcement in the European Union' (2018) 40(6) *Journal of European Integration* 737–751.

What then explains the decline in enforcement activity? It seems that the Commission has been retreating from fulfilling its obligations as the guardian of the Treaties and the primary enforcer of EU law. By its own admission,¹¹⁷ the Commission has decided to take a more ‘strategic’ approach to enforcement, closing cases where it deems this appropriate from a policy (rather than strictly legal) point of view. Unfortunately, there is little transparency in the enforcement process, and the Commission has complete discretion in deciding whether or not to refer infringement cases to the CJEU. There is reason to believe that in the context of a period where the EU was beset by a series of crises and faced defiance by Member States on a number of sensitive policy issues, the Commission has simply decided to back off from enforcing EU law. As Falkner¹¹⁸ put it, the Commission seems to be backing off enforcement because it is ‘facing the governments’ unwillingness to accept stricter enforcement, the mounting politicization, and lacking resources for ever more proceedings.’ This is deeply problematic. The deterioration of EU law enforcement undermines legal certainty and the rule of law. Ultimately, the failure to enforce EU law makes a mockery of the democratic processes that produced those laws. Moving forward, if the EU is to become more democratic and more efficient, the capacity of the Commission and EU courts to ensure the effective implementation of European law must be strengthened.

3.3 Conclusions

The Lisbon Treaty marked the culmination of nearly a decade of debate over reform of EU institutions. The Treaty certainly introduced some reforms that strengthened EU democracy, such as increasing the role of the European Parliament by making co-decision the EU’s ordinary legislative procedure. Furthermore, the Treaty introduced other reforms that at least had the potential to enhance the efficiency of EU governance, such as the reform of QMV procedures designed to lower the threshold necessary for passing legislation. Other reforms introduced at Lisbon, such as the Citizens’ Initiative, have not had much impact on democracy or efficiency but can be seen as promising experiments to increase citizen engagement. Finally, Treaty reforms designed to increase the involvement of national parliaments in EU law-making have had little visible impact because they targeted a problem – the lack of engagement of national parliaments in EU affairs – that was rooted more in domestic politics (in the dynamics of many executives’ dominance over their parliaments) than at the EU level.

But despite all these reforms – the good, the bad and the unimportant – the EU has on the whole become less democratic and less efficient in the decade since Lisbon was ratified. To be clear, that does not mean that the EU has become

¹¹⁷ European Commission (2017) Communication on ‘EU Law: Better Results through Better Application’, 2017/C 18/02. Brussels.

¹¹⁸ G Falkner, ‘A Causal Loop?’, 780.

weaker or that it is unravelling. Quite to the contrary, in response to the crises the EU has faced in recent years, European leaders have handed the EU a range of new powers – for instance, in the realm of banking regulation and fiscal supervision in response to the Eurozone crisis, or in the realm of border security in reaction to the refugee crisis. And yet, even in the midst of these moves that have strengthened the EU in some respects, EU democracy is being challenged by the emergence of authoritarian member governments, and the efficiency of EU governance has been undermined by a growing reliance on addressing policy challenges not through the normal legislative process, but instead through secretive, half-baked bargains made in the European Council in moments of crisis.¹¹⁹

The primary challenges to democracy and efficiency in the EU today stem not from reforms introduced at Lisbon, but from issues and threats the Lisbon Treaty failed to recognise or address at all. As EU leaders once again contemplate holding a conference on the future of Europe in 2020, we must hope that this time around they will properly diagnose the central challenges to democracy and efficiency in the EU. Above all, EU leaders must introduce reforms designed to strengthen the EU's ability to sanction member governments who slide into authoritarianism, to defend the integrity of European elections, to protect the voting rights of European citizens, to end the culture of secrecy and unanimity in the Council, and to strengthen the ability of the Commission and EU courts to enforce European law.

A detailed discussion of reform options goes beyond the scope of this paper, but EU leaders debating the future of the EU should consider *inter alia* the following reforms:

- Adopt a Regulation affirming the European Commission's power, without need to resort to Article 7, to suspend EU funding to states that engage in serious and persistent breaches of the rule of law¹²⁰ and other democratic norms and fundamental EU values enumerated in Article 2.
- Adopt an EU Voting Rights Regulation to safeguard the integrity of European Parliament elections (i.e. by establishing enforceable guarantees that EP elections organised by national authorities are free and fair) and to protect the right of EU citizens to vote in national elections (i.e. by prohibiting states from erecting unjustifiable barriers to voting by citizens who have exercised their free movement rights).
- Introduce procedural reforms designed to strengthen EU law enforcement via the infringement procedure (Article 258) and sanctioning procedure (Article 260). As EU level partisan politics intensifies and aspects of the Commission

¹¹⁹ E Jones, R D Kelemen, and S Meunier, 'Failing Forward? The Euro Crisis and the Incomplete Nature of European Integration' (2016) 49(7) *Comparative Political Studies* 1010–1034.

¹²⁰ The Commission introduced in 2018 a legislative proposal for regulation of the European Parliament and the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States COM(2018) 324 final, 2018/0136 (COD).

become more politicised, its law enforcement functions must be insulated from politics. Above all, steps must be taken to reverse the precipitous decline in infringement actions in recent years, and instead send a very strong signal to Member States that EU law will be enforced vigorously and that violators will face financial sanctions.

4 The Lisbon Treaty and EU External Relations Law: Accommodating Stakeholders, Values, Principles and Objectives

Anne Thies

Introduction¹²¹

Diverging views held by different Member States have often made it difficult for the EU to speak (effectively) with one voice in matters of foreign policy. The lack of agreement between Member States has become most visible in moments of global crisis (e.g. Libya, Syria, migration, Russia/Ukraine),¹²² often blocking decision-making in the EU institutions and arguably hindering the EU's development and influence as a global actor in a way that could be expected in light of its rules-based nature, size and (economic) capacity.¹²³ Moreover, where the EU has been able to take unified action to respond to global challenges, it has been criticised for falling short of its own standards and commitments.¹²⁴ High expectations regarding the capacity of the newly established office of the High Representative and the European External Action Service (EEAS) to increase the coherence of EU external action by bridging the work undertaken by the Council and the Commission have been only partially satisfied. Moreover, the EU's internal political changes and challenges, such as rising populism and the

¹²¹ Many thanks to Marise Cremona, Christina Eckes, Rosemary Auchmuty, Chris Hilson and the editors for their valuable comments on an earlier version of this chapter.

¹²² See Chapter 2 in this volume, L van Middelaar, 'The Lisbon Treaty in a Decade of Crisis: The EU's New Political Executive'.

¹²³ Regarding the EU's position on developments in Libya, see, for example, <https://uk.reuters.com/article/uk-libya-security-eu/france-blocks-eu-call-to-stop-haftars-offensive-in-libya-idUKKCN1RM2WN>

¹²⁴ For criticism of the EU-Turkey refugee deal, see, for example, S Peers, 'The final EU/Turkey refugee deal: a legal assessment', <http://eulawanalysis.blogspot.com/2016/03/the-final-euturkey-refugee-deal-legal.html>; European Parliament commentary, <http://www.europarl.europa.eu/legislative-train/theme-towards-a-new-policy-on-migration/file-eu-turkey-statement-action-plan>. In June 2019, a call to prosecute the EU and some Member States was submitted to the International Criminal Court for allegedly being aware of an increased number of fatalities when changing policy regarding search and rescue operations of refugees and migrants in the Mediterranean; see K Carlson, 'Migration in the Mediterranean: why it's time to put European leaders on trial', *The Conversation*, 26 July 2019, <http://theconversation.com/migration-in-the-mediterranean-why-its-time-to-put-european-leaders-on-trial-120851>

rule of law crisis in the Member States,¹²⁵ have threatened the credibility of the EU as a global actor that is guided by its values and principles, including the promotion of democracy and the rule of law.

In spite of the particularities and challenges outlined above, the ten years following the entry into force of the Lisbon Treaty have seen important milestones in the development of EU external relations law which have strengthened the basis for effective EU external action, at least in principle. The Lisbon Treaty codified an ambitious agenda for the EU as a global actor, which has come with powers, resources and obligations. It extended EU external competences, introduced a long list of specific external objectives, and provided for the establishment of new actors dealing with EU foreign and security policy. The significant vertical and horizontal shift of external relations and powers has led to new tensions between EU institutions and between Member States and the EU, all trying to find their feet in a new framework for EU external action. The increased external powers of the EU, in particular in the field of the Common Foreign and Security Policy (CFSP), have raised constitutional questions regarding the accountability of the EU toward individuals and the extent to which the Court of Justice (CJEU¹²⁶) is in a position to exercise judicial review in such matters. To what extent has subsequent litigation clarified new procedures and checks and balances in EU external relations law, which the Lisbon Treaty envisaged? Is the Court's case law likely to exacerbate or reduce tensions between EU institutions and Member States in their capacity as Council members and as parallel global actors outside the EU institutional structure? What has been the basis for the CJEU to further constitutionalise EU external relations law, accommodating different stakeholders in EU external policy decision-making and protecting individuals affected by EU external action? And have the EU's political institutions managed to comply with the Lisbon Treaty's commitment to EU values, principles and objectives when acting on the global stage? These are all crucial questions when assessing the role of the Court and other EU institutions in the development of EU external relations law ten years after the entry into force of the Lisbon Treaty.

Academic legal commentary has so far been fragmented. For instance, some scholars have focused on the positioning of the CFSP in the EU's competence regime.¹²⁷ Others have assessed the judicial approach to institutional balance in

¹²⁵ See Chapter 2 in this volume, L van Middelaar, 'The Lisbon Treaty in a Decade of Crisis: The EU's New Political Executive'.

¹²⁶ Unless otherwise specified, 'CJEU', 'Court of Justice' and 'Court' are used interchangeably in this chapter.

¹²⁷ For example, R Wessel, 'Lex Imperfecta: Law and integration in European foreign and security policy' (2016) 1 (2) *European Papers* 439–468; P Van Elsuwege, 'EU external action after the collapse of the pillar structure: in search of a new balance between delimitation and consistency' (2010) 47 *Common Market Law Review* 987–1019.

international treaty-making and implementation.¹²⁸ Cremona and others have assessed more generally the role of the CJEU in shaping the framework for EU external action on the basis of EU structural principles¹²⁹ and highlighted the scope of individuals' access to judicial review in the context of the CFSP.¹³⁰ At the same time, EU institutions have been criticised for not complying with the EU's commitment to the protection of rights in, for instance, its trade and investment treaties with third countries.¹³¹

This is the first opportunity to examine the most important developments of EU external relations law in the first ten years following the entry into force of the Lisbon Treaty from a holistic perspective, which is crucial for a better understanding of the overall direction of the development of EU external relations law and its constitutionalisation. The chapter takes the Lisbon Treaty reform as a starting point for its analysis in order to discuss the current constitutional framework for EU external action and the role played by the Court of Justice in its development. At the same time, the chapter highlights current legal challenges faced by the EU in its development as global actor. The chapter thereby advances three partially overlapping themes that are closely linked to important Lisbon Treaty novelties: (1) institutional reform and consequent litigation; (2) the post-Lisbon 'normalisation' of the CFSP; and (3) the impact of codified values and principles on policymaking.

The chapter claims that the Lisbon Treaty has provided the institutional and procedural basis for all stakeholders' contribution to external action and established explicit benchmarks for its lawfulness. It argues that such developments bring the area of external policymaking closer to the policymaking in the EU internal legal order and correspond to the EU's nature as a rules-based actor. Moreover, the chapter demonstrates that the Court has played an important role in interpreting relevant Treaty provisions and has prepared the

¹²⁸ For example, P Koutrakos, 'Institutional balance and the duty of cooperation in treaty-making under EU law' (2019) 68 (1) *International and Comparative Law Quarterly* 1–33; C Hillion, 'Conferral, cooperation and balance in the institutional framework', in M Cremona, *Structural Principles in EU External Relations Law* (Portland; Oxford: Hart Publishing, 2018) 117–174; A Dashwood, 'EU acts and Member State acts in the negotiation, conclusion, and implementation of international agreements', in M Cremona and C Kilpatrick (eds), *EU Legal Acts: Challenges and Transformations* (Oxford University Press, 2018), 189–249.

¹²⁹ M Cremona (ed), *Structural Principles in EU External Relations Law*, with contributions on particular structural principles.

¹³⁰ M Cremona, "'Effective judicial review is the essence of the rule of law": challenging Common Foreign and Security Policy measures before the Court of Justice' (2017) 2 (2) *European Papers* 671–697; S Poli, 'The Common Foreign and Security Policy after *Rosneft*: still imperfect but gradually subject to the rule of law' (2017) 54 (6) *Common Market Law Review* 1799–1834; P Van Elswege, 'Judicial review of the EU's Common Foreign and Security Policy: lessons from the *Rosneft* case', in *Verfassungsblog*, 6 April 2017, <https://verfassungsblog.de/judicial-review-of-the-eus-common-foreign-and-security-policy-lessons-from-the-rosneft-case/>

¹³¹ For example, V Kube, *EU Human Rights, International Investment Law and Participation: Operationalizing the EU Foreign Policy Objective to Global Human Rights Protection* (Cham: Springer, 2019).

EU for more effective decision-making in accordance with the principles of democracy, institutional balance and conferral. The chapter claims that the new constitutional framework for EU external action also accommodates the Member States' voices, both as represented in the Council and as separate global actors outside the EU institutional structure, depending on both EU and international law requirements applicable in particular scenarios. Furthermore, the present analysis shows that the Court has managed to constitutionalise external relations law further by emphasising the need for comprehensive protection of individual rights in all policy fields. Yet the chapter concludes that, in spite of a high level of legal clarification achieved in the first ten years since the entry into force of the Lisbon Treaty, the EU's impact on the global stage remains limited without greater political willingness of the Member States to pull their weight collectively.

4.1 Institutional reform and consequent litigation

Traditionally, EU foreign affairs were led by the European Council, the Council and the Commission, involving the Member States where required in light of retained powers, political expectations, and requirements imposed by international law and treaty regimes. In addition to vertical and horizontal power struggles, external policies and actions undertaken by different actors risked lacking coherence. Moreover, the limited role for the European Parliament in the EU's external policy- and treaty-making called into question the democratic legitimacy of the EU as a global actor. The Lisbon Treaty brought significant institutional reform by enhancing the powers of the European Parliament in external action, creating the new office of High Representative of the Union for Foreign Affairs and Security Policy (HR),¹³² and triggering the establishment of an External Action Service (EEAS) to work in collaboration with the diplomatic services of the Member States and assist the Council and the Commission in achieving EU external objectives.¹³³ The resulting reallocation of power and tasks related to EU external action and international treaty-making, combined with the overall increase in EU competence and external policymaking more broadly (for example, in the fields of trade and investment, and the CFSP), has generated a considerable amount of inter-institutional litigation brought before the Court of Justice (see discussion below).

Institutional disagreement regarding, *inter alia*, the horizontal allocation of treaty-making powers and related procedural matters has also led to an increased number of Opinions sought under Article 218 (11) of the Treaty on the

¹³² The HR takes part in the work of the European Council (Article 15 (2) Treaty on European Union [TEU]) – chairing the Foreign Affairs Council and representing the EU for CFSP matters (Article 27 TEU) – and acts as one of the Commission's Vice-Presidents (Article 17 (4) TEU). The HR is asked to bridge the two branches of shared EU executive external power in one person (Article 18 TEU); the EU's CFSP, which is led by the Council, and EU external action in the fields of trade, development, enlargement and neighbourhood policy, which is led by the Commission.

¹³³ Article 27 (3) TEU.

Functioning of the European Union (TFEU). Such Opinion proceedings have required the Court to provide an *ex ante* review of EU agreements to ensure their compatibility with the EU Treaties and facilitate subsequent implementation from both an international and EU law perspective. More specifically, since the entry into force of the Lisbon Treaty, the Court has been asked ten times to review draft/signed EU agreements;¹³⁴ this number is noteworthy when compared to the total of 23 Opinion requests submitted over the last decades.¹³⁵ Such a high number of Opinion requests reflects significant institutional disagreement, as well as institutional willingness to enable the Court of Justice to interpret, in an authoritative way, core Treaty provisions on treaty-making and decision-making related to the EU's participation in international fora.

Both inter-institutional litigation and Opinion proceedings have given the Court the opportunity to bring further legal clarification to matters of constitutional significance prompted by the Lisbon Treaty reform. Complementing existing case law, in which the Court has employed structural principles to develop the legal framework for EU external action and strengthen the EU's 'actorship' in international fora,¹³⁶ the Court has applied the principles of conferral, institutional balance and democracy when interpreting relevant Treaty provisions.¹³⁷ The Court has affirmed its jurisdiction with regard to CFSP matters, reminded the institutions of their respective roles in international treaty- and other decision-making, and confirmed their rights. Moreover, the Court has engaged with the principle of autonomy when defining the reach of its own jurisdiction and its effects on the EU's capacity to submit to international agreements that provide for their own dispute settlement mechanisms.

¹³⁴ Opinion 1/09 (*Agreement Creating a Unified Patent Litigation System*), of 8 March 2011, EU:C:2011:123; Opinion 1/12 – withdrawn; Opinion 1/13 (*Accession of Third States to the Hague Convention*), of 14 October 2014, EU:C:2014:2303; Opinion 2/13 (*Accession of the European Union to the ECHR*), of 18 December 2014, EU:C:2014:2454; Opinion 1/14 (*Malta*) – removed from the register on 1 September 2015, EU:C:2015:607; Opinion 1/15 (*EU-Canada PNR Agreement*), of 26 July 2017, EU:C:2017:592; Opinion 2/15 (*EU-Singapore Free Trade Agreement*), of 16 May 2017, EU:C:2017:376; Opinion 3/15 (*Marrakesh Treaty on access to published works*), of 14 February 2017, EU:C:2017:114; Opinion 1/17 (*EU-Canada CET Agreement*), EU:C:2019:341. According to the European Parliament Resolution 2019/2678(RSP) of 4 April 2019, the CJEU has also been asked to assess the compatibility of the proposed accession by the European Union to the Council of Europe Convention on preventing and combating violence against women and domestic violence and on the procedure for that accession. See <https://oeil.secure.europarl.europa.eu/oeil/popups/summary.do?id=1581211&t=d&l=en>

¹³⁵ See M Cremona, 'The Opinion procedure under Article 218 (11) TFEU, reflections in the light of Opinion 1/17', in C Eckes, P Eeckhout, A Thies (eds), 'Opinion 1/17 in its broader context', special issue of *Europe and the World – A Law Review* (2020, forthcoming).

¹³⁶ M Cremona (ed), *Structural Principles*.

¹³⁷ For recent scholarly commentary, see, for example, P Koutrakos, 'Institutional balance and the duty of cooperation in treaty-making under EU law'; C Hillion, 'Conferral, cooperation and balance in the institutional framework'; A Dashwood, 'EU acts and Member State acts in the negotiation, conclusion, and implementation of international agreements'.

4.1.1 The principles of democracy, institutional balance and conferral

The EU works through its institutions that represent different stakeholders and interests and perform the EU's specific checks and balances. As mentioned above, the Council and the European Council (i.e. Member States' representatives) as well as the European Commission (i.e. EU representatives) have traditionally been the driving forces in EU external relations. The capacity of the European Parliament (i.e. EU citizens' representatives) to shape external policy and scrutinise executive action in the interest of democratic accountability had been limited. The Lisbon Treaty increased the European Parliament's powers related to the negotiation and conclusion of international agreements in order to match the European Parliament's position in EU internal law-making, ensuring respect for the democratic principle and committing the European Parliament to contribute to the coherence of EU external action. According to Article 218 (6) (a) TFEU, the European Parliament's consent is needed for most international agreements. Moreover, according to Article 218 (10) TFEU, the European Parliament 'shall be immediately and fully informed at all stages of the procedure' of treaty negotiations.

The European Parliament enforced its position under Article 218 (10) TFEU in several cases related to CFSP treaty-making which it brought before the Court of Justice in 2011.¹³⁸ The Court's jurisdiction for CFSP matters has historically been weak in order to avoid judicial interference with executive discretion in the field, and the Lisbon Treaty has continued to limit the Court's jurisdiction with respect to CFSP provisions and acts (Article 24 of the Treaty on European Union [TEU]; Articles 2(4), 275 TFEU). Yet the Court affirmed its jurisdiction to deal with inter-institutional litigation in the field of CFSP where the choice of the appropriate legal basis and, thereby, compliance with the appropriate procedure were challenged. In the cases *Mauritius* and *Tanzania*, the European Parliament (supported by the Commission) asked for annulment of the Council Decisions signing and concluding agreements related, *inter alia*, to the transfer of pirates, while also asking for the effects of the decisions to be maintained. According to the European Parliament, the agreements did not fall exclusively within the area of CFSP, which meant that its consent was required under Article 218 (6) TFEU. In the *Mauritius* case, the Court rejected the claim of the European Parliament in the interests of institutional balance, legal certainty and consistency, stipulating the need to match the applicable procedure under Article 218 TFEU to the correct choice of substantive legal basis (here, CFSP).¹³⁹ Given that the agreements fell at least 'predominantly within the scope of the

¹³⁸ Case C-658/11 *Parliament v Council (Mauritius)* EU:C:2014:2025; Case C-263/14 *Parliament v Council (Tanzania)* EU:C:2016:435; for a more detailed analysis, see P Van Elsuwege, 'Securing the institutional balance in the procedure for concluding international agreements: *European Parliament v Council (Pirate Transfer Agreement with Mauritius)*' (2015) *Common Market Law Review* 1379–1398.

¹³⁹ *Mauritius*, paras 52, 55f, 60.

CFSP¹⁴⁰, the Council had chosen correctly CFSP as the substantive legal basis and, as a consequence, the conclusion of the agreements did not require the consent or consultation of Parliament.¹⁴¹

However, so the Court continued, treaty-making in the field of CFSP also had to meet the procedural requirements codified in Article 218 TFEU. The Court explained that the new Article 218 TFEU ‘now lays down a single procedure of general application’ for the negotiation and conclusion of international agreements, which was in accordance with the ‘requirements of clarity, consistency and rationalisation’ following the Lisbon Treaty.¹⁴² The Court concluded that this procedure was also applicable in the field of CFSP, given that no special procedure – as indeed exists for other fields, such as trade (Article 207 TFEU) – had been established.¹⁴³ While the Court reiterated that the European Parliament had a limited role in relation to CFSP, given ‘its exclusion from the procedure for negotiating and concluding an agreement relating exclusively to the CFSP’, the Court confirmed the European Parliament’s ‘right of scrutiny in respect of that EU policy’ under Article 218 (10) TFEU.¹⁴⁴ It emphasised that the European Parliament’s ‘information requirement’ was an expression of the democratic principle, which was the basis for Parliament’s participation in the EU legislative process and constituted one of the founding principles of the EU.¹⁴⁵

In addition to the European Parliament seeking judicial support regarding its new role in international treaty-making, the EU’s contribution to international treaty-making since the Lisbon Treaty has also led to inter-institutional litigation brought by the Commission and the Council.

In *Commission v Council* (EU-Australia, emission allowances),¹⁴⁶ the Court of Justice assessed the extent to which the Commission was obliged under Article 218 (4) TFEU to inform the Council (and its designated special committee) during treaty negotiations, and examined whether the Council decision authorising the opening of negotiations could lawfully provide for ‘detailed negotiating positions’ to be established by the designated committee. The possibility for the Council committee to influence the content of the negotiations through such (binding) detailed positions was particularly controversial, as it could limit the Commission’s own negotiating power.¹⁴⁷ For the first time, the Court applied the

¹⁴⁰ *Tanzania*, para 55; see also *Mauritius*, para 45.

¹⁴¹ *Mauritius*, para 61f; *Tanzania*, para 55.

¹⁴² *Mauritius*, paras 52, 72; *Tanzania*, para 68.

¹⁴³ *Mauritius*, paras 52, 72; *Tanzania*, para 68.

¹⁴⁴ *Mauritius*, paras 83f; *Tanzania*, para 69.

¹⁴⁵ *Mauritius*, para 81; *Tanzania*, para 70.

¹⁴⁶ Case C-425/13, *Commission v Council* (EU-Australia – mutual recognition mechanism for trading greenhouse emission allowances) EU:C:2015:483.

¹⁴⁷ *Ibid*, para 40.

principle of institutional balance as a benchmark for the lawfulness of an act of EU law (here, a Council decision); this principle has since been used as a basis for judicial review of other pieces of EU secondary law.¹⁴⁸

The Court recognised the need for the committee to be provided with ‘all the information necessary for it to monitor the progress of the negotiations, such as, in particular, the general aims announced and the positions taken by the other parties throughout the negotiations’ and held that it was ‘only in this way that the special committee [was] in a position to formulate opinions and advice relating to the negotiations’.¹⁴⁹ The Commission was considered obliged to report regularly to the Council, which needs to have ‘clear knowledge of the course of the negotiations concerning the preparation of a draft agreement that will be submitted to it for approval’.¹⁵⁰

According to the Court, Article 13 (2) TEU ‘reflects the principle of institutional balance, characteristic of the institutional structure of the European Union, a principle which requires that each of the institutions must exercise its powers with due regard for the powers of the other institutions’.¹⁵¹ Yet the Council decision provision that stated that the committee could establish ‘detailed negotiating positions’, which the CJEU considers to have the ‘intention [...] that the negotiating positions have binding effects on the negotiator’, would be contrary to Article 218 (4) TFEU.¹⁵² Asking the special committee to establish such positions would cause it to go beyond its consultative function assigned by Article 218 (4) TFEU and would invest the Council with ‘the power to impose “detailed negotiating positions” on the negotiator’ (here the Commission) which is not conferred by Article 218 (4) TFEU.¹⁵³ The Court concluded that the Council infringed its obligations under Article 13 (2) TEU ‘to act within the limits of the powers conferred on it by Article 218 (20 to (4) TFEU’ and thereby also the principle of institutional balance.¹⁵⁴

However, there have also been cases in which the Court reiterated the central power of the Council in the context of international treaty-making, protecting its prerogative to sign agreements and indirectly accommodating the Member

¹⁴⁸ S Platon, ‘The principle of institutional balance: rise, eclipse and revival of a general principle of EU constitutional law’, in K Ziegler, P Neuvonen, V Moreno-Lax (eds), *Research Handbook on General Principles of EU Law* (Research Handbooks in European Law Series, Edward Elgar Publishing, forthcoming, 2020), notes 81/82, with reference to Case C-425/13, *Commission v Council* [2015]; Case C-660/13 *Council v Commission* [2016].

¹⁴⁹ Case C-425/13, *Commission v Council* (EU-Australia – mutual recognition mechanism for trading greenhouse emission allowances) EU:C:2015:483, paras 65f.

¹⁵⁰ *Ibid.*, paras 67.

¹⁵¹ *Ibid.*, para 69, with reference to judgment in *Council v Commission*, C-409/13, EU:C:2015:217, paragraph 64 and the case law cited.

¹⁵² *Ibid.*, paras 87, 88.

¹⁵³ *Ibid.*, paras 89, 90.

¹⁵⁴ *Ibid.*, paras 91, 92.

States' voice in the EU treaty-making through their Council representatives (see also discussion below on Member States' capacity to maintain their voices within and in addition to the Council). The Court has thus arguably preserved the overall 'symmetry in treaty-making'.¹⁵⁵ In *Council v Commission (EU-Switzerland MoU)*, the CJEU concluded that the Commission's position as representative in negotiations (Article 17 (1) TEU) does not involve any power to sign non-binding agreements.¹⁵⁶ The CJEU held that policy assessment and the signing of non-binding agreements are left to the Council unless it authorises the Commission to sign (Article 16 (1) and (2) TEU).¹⁵⁷

In addition to addressing inter-institutional disagreement in the context of the EU's international treaty-making, the Court of Justice has also dealt with power struggles between EU institutions in the context of treaty implementation, including the EU's participation in international fora and the EU's contribution to such fora's activities more broadly. Again, the Court was required to bring further clarification to the implications of the Lisbon Treaty reform regarding the (horizontal) allocation of powers and tasks, and their interaction with powers and tasks of other EU institutions. As in the context of treaty-making, the Court employed EU principles when interpreting relevant Treaty provisions.

For instance, the Court further defined the reach of the principle of institutional balance in the context of the EU's participation in the activities of an international tribunal. In *Council v Commission (ITLOS)*, the Court held that the Commission could submit a written statement to the International Tribunal on the Law of the Sea on behalf of the EU without the prior approval of the Council in the context of an advisory opinion procedure.¹⁵⁸ According to the Court, the matter fell at least partially within the exclusive competence of the EU, and the EU was competent to take part in the advisory opinion procedure.¹⁵⁹ In light of the 'general principle that the [EU] has legal capacity and is to be represented', the Court interpreted Article 335 TFEU and recognised the Commission's capacity to represent the EU in both national and international judicial proceedings.¹⁶⁰ The approval of the Council was not required to comply with the principle of institutional balance and Article 218 (9) TFEU, as the Commission's submission was not part of the EU's participation *in* a body set up by an international agreement; instead, the EU had been invited to express a position *before* ITLOS.¹⁶¹ The Council's approval of the content of the statement was not required in light of Article 16 (1) TEU either, as the matter did not

¹⁵⁵ P Koutrakos, 'Institutional balance and the duty of cooperation in treaty-making under EU law', 12.

¹⁵⁶ Case C-660/13 *Council v Commission (EU-Switzerland MoU)* EU:C:2016:616.

¹⁵⁷ *Ibid*, para 43.

¹⁵⁸ Case C-73/14 *Council v Commission (ITLOS)* EU:C:2015:663.

¹⁵⁹ *Ibid*, para 55.

¹⁶⁰ *Ibid*, para 58.

¹⁶¹ *Ibid*, para 63.

involve policymaking but consisted of ‘legal observations aimed at enabling the court to give, if appropriate, an informed advisory opinion on the questions put to it’.¹⁶²

It should be added that the Lisbon Treaty reform related to Article 218 TFEU has not only led to horizontal inter-institutional struggles and litigation. The Court has also interpreted this provision in the context of what seem to be power struggles of a more vertical nature, involving Member States either directly in cases brought by them against the EU institutions, or in the context of inter-institutional litigation that concerns the Member States’ capacity to maintain their individual voices as separate global actors in addition to that of the Council.

In 2014, the Court of Justice was asked in *Germany v Council (OIV)* to interpret one aspect of Article 218 (9) TFEU, according to which ‘[t]he Council, on a proposal from the Commission or the High Representative of the Union for Foreign Affairs and Security Policy, shall adopt a decision [...] establishing the positions to be adopted on the Union’s behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects [...]’.¹⁶³ Soon after the entry into force of the Lisbon Treaty, the Commission and the Council started invoking Article 218 (9) TFEU when preparing and submitting proposals to the International Organisation of Vine and Wine (OIV), to which not the EU in its own right but only its Member States are parties, the EU holding guest status. Germany claimed that this Treaty provision did not provide the legal basis for the EU institutions to contribute to the work of the OIV in this way, as the EU had not concluded the agreement establishing the OIV. However, based on a literal interpretation of Article 218 (9) TFEU, and in light of both the nature of OIV’s recommendations and the legal implications for the EU’s *acquis*, the CJEU held that Article 218 (9) TFEU was applicable and had been applied correctly.

So-called ‘hybrid decisions’, which have been adopted by both the Council and the representatives of Member States to authorise signature and the provisional application of international agreements, have also led to litigation.¹⁶⁴ Such hybrid decisions have been considered in the literature to undermine the Council’s decision-making power under Article 218 (5) TFEU on the one hand, while enabling joint action of the EU and its Member States in the interest of the principle of sincere cooperation on the other.¹⁶⁵ In 2015, the Court held that hybrid decisions are not permitted as they infringe the principle of institutional balance; according to the Court, ‘the rules regarding the manner in which the

¹⁶² Ibid, para 71.

¹⁶³ Case C-399/12 *Germany v Council* EU:C:2014:2258.

¹⁶⁴ P Koutrakos, ‘Institutional balance and the duty of cooperation in treaty-making under EU law’, 13, with reference to recent agreements in the field of air transport, note 57.

¹⁶⁵ Ibid.

EU institutions arrive at their decisions are laid down in the Treaties and are not at the disposal of the Member States or of the institutions themselves'.¹⁶⁶

The vertical allocation of power was also at the core of the *Commission v Council (Antarctica)* cases, where the Commission sought the annulment of a Council decision that approved the submission of a position in an international body to be made on behalf of both the Council and the EU Member States.¹⁶⁷ Advocate General Kokott considered (voluntary) Member State action alongside the EU to be excluded, as the EU's exercise of shared competence through adoption of the pertinent Council decision would pre-empt the Member States in that context.¹⁶⁸ The Court confirmed the existence of shared competence and acknowledged the Council's capacity in principle to decide to act alone.¹⁶⁹ Different to the case on hybrid decisions discussed above, however, the Court avoided addressing the Member States' capacity to involve themselves as they see fit. Instead, the Court concluded that the exercise of EU competence without the Member States would be incompatible with the relevant international treaty regime.¹⁷⁰ In other words, the Court based its conclusion on the requirements of international law, without positively recognising or denying Member States' capacity to retain their voices in international fora in addition to the Council.

4.1.2 The principle of autonomy and judicial review in light of substantive EU law

In addition to the Court's task to interpret the Treaties to settle disagreement regarding questions of competence and institutional matters, Opinion proceedings have given the Court the opportunity to define and defend its own jurisdiction vis-à-vis other (international) courts and tribunals.¹⁷¹ Since the entry into force of the Lisbon Treaty, the EU's political institutions have made several attempts to conclude or accede to international agreements that establish international dispute mechanisms. In most cases, the Court denied the compatibility of the draft agreement with the EU legal order, referring in its reasoning to the autonomy of the EU's legal order and the Court's own exclusive jurisdiction for disputes arising between Member States on matters of EU law (Article 344 TFEU), as well as more broadly to its exclusive role in the

¹⁶⁶ Case 28/12 *Commission v Council* EU:C:2015:282, para 42. For more detailed analysis, see P Koutrakos, 'Institutional balance and the duty of cooperation in treaty-making under EU law', 13f.

¹⁶⁷ Joined Cases C626/15 and C659/16 *Commission v Council (Antarctica)* EU:C:2018:925. For more detailed discussion, see C Eckes, 'Antarctica: has the Court got cold feet?', 3 December 2018, *European Law Blog*, <https://europeanlawblog.eu/2018/12/03/antarctica-has-the-court-of-justice-got-cold-fee/>

¹⁶⁸ *Antarctica*, Opinion of AG Kokott, paras 111–123.

¹⁶⁹ *Antarctica*, para 126.

¹⁷⁰ *Ibid*, paras 128ff.

¹⁷¹ On the CJEU's decisions defining the scope of its jurisdiction for CFSP matters, see sections 4.1.1 and 4.2.

authoritative interpretation of EU law.¹⁷² Even though the Lisbon Treaty had envisaged the EU's accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 6 (2) TEU), the Court denied the draft accession agreement's compatibility with the EU Treaties.¹⁷³ Yet the Court held in 2019 that the EU-Canada Comprehensive Economic and Trade Agreement (CETA), which envisages the establishment of an Investment Court System, is compatible with the EU Treaties.¹⁷⁴ CETA entered into force provisionally in 2017¹⁷⁵ and has been considered by critics to favour the rights of investors and to constrain governments to protect public interests through regulatory standards.

Moreover, the Court has increasingly shown a willingness to review draft agreements in Opinion proceedings with regard to their compatibility with EU substantive law, such as EU fundamental rights obligations.¹⁷⁶ Recently, the Court affirmed its own jurisdiction to assess the EU's draft international agreements' compatibility with substantive EU law more broadly.¹⁷⁷ The Court's willingness to undertake such a comprehensive *ex-ante* review has raised questions of constitutional significance which deserve further attention, going beyond the scope of this contribution. It will be necessary to think more about the kinds of parameter the Court should apply to achieve an appropriate balance between its established respect for executive scope for manoeuvre on the global stage on the one hand,¹⁷⁸ and the need for EU law compliance on the other. For instance, it is not currently clear how the Court's disposition to review draft agreements in light of 'substantive EU law' relates to its regular reluctance to assess EU measures in light of international legal obligations that have become an integral part of the EU according to Article 216 (2) TFEU but arguably do not contain EU obligations that are enforceable within the EU legal order (e.g. when denying the

¹⁷² Opinion 1/09 (*Agreement creating a Unified Patent Litigation System*), of 8 March 2011, EU:C:2011:123, paras 78, 89; Opinion 2/13 (*Accession of the European Union to the ECHR*), of 18 December 2014, EU:C:2014:2454, paras 170ff, 200. For an analysis of the Court's approach until 2013, see B De Witte, 'A selfish court? The European Court of Justice and the design of international dispute settlement beyond the European Union', in M Cremona, A Thies (eds), *The European Court of Justice and External Relations Law – Constitutional Challenges* (Hart, 2014) 33–46, 41. For analysis and reference to academic debate (e.g. at note 19), see P Eeckhout, 'Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky?' (2015) 38 (1) *Fordham International Law Journal* 1–38.

¹⁷³ See also Chapter 5 in this volume, E Spaventa, 'Fundamental Rights at the Heart of the Lisbon Treaty?'

¹⁷⁴ Opinion 1/17 (*EU-Canada CET Agreement*), EU:C:2019:341. For analysis, see C Eckes, P Eeckhout, A Thies (eds), 'Opinion 1/17 in its broader context', special issue of *Europe and the World – A Law Review* (2020, forthcoming).

¹⁷⁵ <http://ec.europa.eu/trade/policy/countries-and-regions/countries/canada/>

¹⁷⁶ Opinion 1/15 (*EU-Canada PNR Agreement*), of 26 July 2017, EU:C:2017:592.

¹⁷⁷ Opinion 1/17 (*EU-Canada CET Agreement*), of 30 April 2019 (*Digital Reports*) EU:C:2019:341, para 167.

¹⁷⁸ M Cremona, 'A reticent court? Policy objectives and the Court of Justice', in M Cremona, A Thies (eds), *The European Court of Justice and External Relations Law – Constitutional Challenges* (Oxford: Hart Publishing, 2014), 15–32.

direct effect of World Trade Organization agreements).¹⁷⁹ Furthermore, related to the previous point, one could question the extent to which the EU executive and legislative institutions should be shielded from judicial review and be in a position to change, in a legitimate way, existing EU law through international treaty-making, even if that means deviating from existing internal EU law.¹⁸⁰ After all, greater involvement of the European Parliament has increased the democratic legitimacy of the EU as a global actor. As a consequence, the EU's capacity to modify its existing law through international treaty-making has arguably been strengthened.

4.2 The post-Lisbon 'normalisation' of the CFSP

As outlined in the introduction, the second theme addressed in this chapter is the extent to which the Lisbon Treaty reform and subsequent litigation have increasingly aligned the EU's CFSP with other EU external policy fields with regard to their legal framework, operation and monitoring. After outlining how the Lisbon Treaty has placed the CFSP next to other areas of EU external policy, this section demonstrates how the Court of Justice has brought the CFSP even closer to other areas of EU external action with regard to its own jurisdiction, the applicability of decision-making procedures, and the reach of rights for the protection of affected individuals.

The Lisbon Treaty made the EU's legal personality explicit (Article 47 TEU)¹⁸¹ and extended the scope of EU external competences. In this process, the Treaty not only extended existing EU (formerly European Community) competence to cover more matters,¹⁸² but also integrated the area of CFSP in the EU's competence portfolio. The EU's CFSP has remained subject to the limited jurisdiction of the Court as well as different procedures from those applied to former Community policy areas (such as trade, development or humanitarian aid).¹⁸³ The specific provisions on the EU's CFSP reflect Member States' reluctance to relinquish their individual voices in the field and to make the EU's political discretion – and, given the particularities of the running of the EU's CFSP, indirectly also that of the Member States – subject to comprehensive judicial review.

¹⁷⁹ A Thies, 'EU membership of the WTO: international trade disputes and judicial protection of individuals by EU Courts', in T Isiksel, A Thies (eds), Special issue 'Changing subjects: rights, remedies and responsibilities of individuals under global legal pluralism' (2013) 2 (2) *Global Constitutionalism* 237–261, 245f.

¹⁸⁰ On venue choice as an element of legal agenda setting and sequencing, see A Thies, B de Witte, 'Why choose Europe? The place of the European Union in the architecture of international legal cooperation', in S Blockmans, B Van Vooren, J Wouters (eds), *The Legal Dimension of Global Governance: What Role for the EU?* (Oxford: Oxford University Press, 2013), 23–38.

¹⁸¹ According to Article 47 TEU, '[t]he Union shall have legal personality'. While there is no reference to the EU's legal personality being 'international', the CJEU has long interpreted such provision to grant also international legal personality; see Case 22/70 *Commission v Council (AETR/ERTA)* [1971] 263.

¹⁸² See, for example, foreign direct investment in the exclusive competence of trade, Articles 3 (1) (e) and 206 of the Treaty on the Functioning of the European Union [TFEU].

¹⁸³ Article 24 TEU, Articles 2 (4), 275 TFEU.

Yet, also in the exercise of CFSP competence, the EU institutions' activities are framed by the EU's values, principles and specific objectives of external action (see section 4.3 for the impact of values and principles on policymaking). Furthermore, the Court of Justice has already contributed to further legal integration of the EU's CFSP in several ways. The Court has recognised its own jurisdiction with regard to institutional/procedural matters related to international treaty-making in the field of CFSP and strengthened the role of the European Parliament when recognising its entitlement to information in the context of CFSP treaty-making, employing the principle of democracy (see section 4.1 above).¹⁸⁴

Moreover, the Court has affirmed the need for (judicial) protection of individuals affected by EU conduct in the context of CFSP, adopting a narrow interpretation of the limits to its jurisdiction.¹⁸⁵ In the *H* case, the Court accepted its jurisdiction for annulment and compensation actions challenging measures adopted in the context of operational CFSP action.¹⁸⁶ The Court held that a decision by the EU Head of Mission on the redeployment of seconded national staff in the context of an EU Police Mission could not be exempt from judicial review on the basis of limitations under Article 275 (1) TFEU, thereby establishing (exceptional) jurisdiction of the Court in the field of CFSP. According to the Court, the rule of law, including the principle of effective judicial protection, and the value of equality required that the Court could deliver rulings with regard to both EU and seconded national staff working for the European Union Police Mission in Sarajevo.¹⁸⁷

In *Rosneft*, the Court affirmed in a preliminary ruling its jurisdiction to review the lawfulness of restrictive measures that had been adopted in the form of CFSP decisions by the Council against Russian undertakings, including the oil company Rosneft ('targeted restrictive measures'). The Court considered its judicial monitoring necessary to protect the principle of effective judicial protection, confirming its approach in *H* and referring even more extensively to

¹⁸⁴ C Eckes, 'Common Foreign and Security Policy: the consequences of the Court's extended jurisdiction' (2016) 22 (4) *European Law Journal* 492–518.

¹⁸⁵ M Cremona, 'Effective judicial review is the essence of the rule of law': challenging Common Foreign and Security Policy measures before the Court of Justice' (2017) 2 (2) *European Papers* 671–697; P Van Elslande, 'Upholding the rule of law in the Common Foreign and Security Policy: *H v Council*' (2017) 54 *Common Market Law Review* 841–858. See also Opinion 1/17 (*CETA*), Opinion of AG Bot, 29 January 2019, para 195, on the EU's obligation to comply with EU fundamental rights in all its activities, confirming the CJEU's approach in Cases C-402/05 P and C-415/05 P *Kadi and Al Barakat International Foundation v Council and Commission*, EU:C:2008:461, para 285.

¹⁸⁶ Case C-455/14 P, *H v Council of the European Union, European Commission and European Union Police Mission (EUPM) in Bosnia and Herzegovina*, Judgment of the Court (Grand Chamber) of 19 July 2016, EU:C:2016:569.

¹⁸⁷ *Ibid.*, paras 39–57, in particular para 41.

Article 47 of the Charter reaffirming the principle of effective judicial protection and its implications for the scope of the Court's jurisdiction.¹⁸⁸

Overall, the Court has exercised its jurisdiction in a way that has brought the prerequisites for lawful decision-making in the area of CFSP more closely to what is required in other areas of EU external action.¹⁸⁹ The Court has accommodated the voice of the European Parliament in the EU's international treaty-making in a way that reflects the position it holds in the context of other international – and hence internal – law-making, and the Court has reiterated the need for compliance with EU fundamental rights and other principles for the protection of individuals. Recognising the importance of the European Parliament's contribution and accountability towards individuals, the Court has further imported the EU's specific system of checks and balances to the sphere of all EU external policy- and treaty-making. While EU citizens are consequently also more strongly represented in matters related to CFSP, such constitutionalisation comes at the expense of Member States' voices, challenging their explicit intention to deal with matters of CFSP differently from other EU competences, protecting their individual voices through specific procedures and prerogatives as separate CFSP actors.¹⁹⁰

4.3 The impact of values and principles on policymaking

As discussed above, the Lisbon Treaty brought institutional reform and established a comprehensive EU competence for matters of CFSP, and both Treaty novelties have since been subject to litigation and judicial clarification. In addition to such matters related to the EU's competence regime, actors and internal procedures, the Lisbon Treaty codified a dimension of the EU's framework for external action that is of a more substantive nature, while also making explicit the EU's commitment to international law and multilateralism. More specifically, the Lisbon Treaty established in Article 21 (1) TEU that:

The Union's action on the international scene shall be guided by the *principles* which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.

¹⁸⁸ S Poli, 'The Common Foreign and Security Policy after *Rosneft*'; P Van Elsuwege, 'Judicial review of the EU's Common Foreign and Security Policy: lessons from the *Rosneft* case', in *Verfassungsblog*, 6 April 2017, <https://verfassungsblog.de/judicial-review-of-the-eus-common-foreign-and-security-policy-lessons-from-the-rosneft-case/>

¹⁸⁹ For a critique of the CJEU's integrationist approach and plead for strengthening the role of domestic courts in CFSP, see P Koutrakos, 'Judicial review in the EU's Common Foreign and Security Policy' (2018) 67 (1) *International and Comparative Law Quarterly* 1–35.

¹⁹⁰ Article 24 TEU, Article 2 (4) TFEU; Declarations 13 and 14 concerning the Common Foreign and Security Policy.

The Union shall seek to develop relations and build partnerships with third countries, and international, regional or global organisations which share the principles referred to in the first subparagraph. It shall promote *multilateral solutions* to common problems, in particular in the framework of the United Nations [emphases added].

Moreover, EU external action is framed by Member States' commitment to EU values and specific external action objectives (Article 3 (5), Article 21 (2) TEU), which include support of the rule of law, human rights and principles of international law; the preservation of peace and conflict prevention; the fostering of sustainability and economic integration; and the promotion of multilateralism and good global governance. Prior to the Lisbon Treaty, the Member States had already obliged the EU to promote its values in the world and to respect international law and multilateral solutions.¹⁹¹ However, the explicit inclusion of Article 21 TEU has provided a legal framework for such promotion through any policy and action. Such comprehensive commitment has required all EU institutions to engage more explicitly with the EU's values, principles and objectives, and to accommodate them when developing external policy, whichever external objective is being pursued primarily.¹⁹²

The following paragraphs turn to some examples of recent EU standard setting practice in the fields of trade and investment and the CFSP to begin assessing the way in which the EU institutions have endorsed the above-mentioned values, principles and objectives in the EU's legal framework for external action. The analysis focuses on examples of the EU's promotion of human rights, gender equality and sustainable development and its commitment to multilateralism, as these are of particular relevance when assessing the EU's impact as a rules-based global actor that is committed to good global governance.

4.3.1 EU trade agreements and good global governance

The exclusive nature of EU trade competence, the potential effects of trade liberalisation on the protection of human rights and sustainable development, and the significance of the EU as trading partner of many countries and regional blocs around the globe have together made the EU's preparation, negotiation and implementation of trade agreements a particularly important case study for assessing the EU's commitment to good global governance. The following paragraphs provide a snapshot of the EU's current approach and the mechanisms employed to comply with the EU's own values, principles and objectives when concluding international trade agreements.

¹⁹¹ For CFSP, see Art 11 of the Treaty on European Union (consolidated version 1997) and Javier Solana, 'EU values in action around the world', *Foreign Policy*, No. 151 (Nov.–Dec., 2005), 6–7.

¹⁹² For study of the constitutional relevance of EU foreign policy objectives, see J Larik, *Foreign Policy Objectives in European Constitutional Law* (Oxford: Oxford University Press, 2016).

While, in the context of international trade negotiations, the EU Commission has undertaken Sustainable Impact Assessments (SIA) since 1999, assessing the (potential) economic, social and environmental impacts of international trade agreements in the EU, in the partner country and in developing countries, it was after the entry into force of the Lisbon Treaty that human rights were explicitly incorporated in the assessment. In 2012, the Council adopted the EU's Strategic Framework and Action Plan on Human Rights and Democracy to reflect the EU's commitment under Article 21 TEU.¹⁹³ Even though the EU had included human rights clauses in international trade agreements since the early 1990s,¹⁹⁴ by incorporating human rights in its impact assessment, the EU made its commitment to engage with the impact of trade liberalisation on human rights more explicit and subject to later evaluation. In July 2015, the Commission adopted 'Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives', which (a) focus on the methodology of impact assessment when proposing a new policy initiative and when negotiating a bilateral or plurilateral trade agreement; and (b) describe the principles and approach applicable to the entire cycle of a policy, and hence also in the context of *ex post* evaluations.¹⁹⁵ In October 2015, the Commission adopted its strategy 'Trade for all – Towards a more responsible trade and investment policy', the aims of which are to deliver economic results for consumers, workers and small companies, to increase efficiency and transparency, and to ensure 'EU trade policy is not just about interests but also about values'.¹⁹⁶ Based on all those developments, the Commission in 2016 published the second edition of its *Handbook for Trade Sustainability Impact Assessment*, which included the assessment of human rights impacts, and which also underlined 'the importance of close dialogue with all relevant stakeholders, including the more vulnerable ones'.¹⁹⁷ The Commission is currently revising its *Better Regulation Agenda*,¹⁹⁸ and has developed a *Better Regulation Tool Box* which also provides guidance in the context of impact assessment in external action.¹⁹⁹

Tailored according to its country-specific impact assessments, the EU Commission has been able to include sustainable development chapters in many of its bilateral and multilateral trade agreements, both in the context of more traditional trade agreements (e.g. Colombia, Ecuador, Peru) and in what

¹⁹³ https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/131181.pdf

¹⁹⁴ L Bartels, 'Study: The European Parliament's role in relation to human rights in trade and investment agreements' (EU, 2014), <http://www.europarl.europa.eu/cmsdata/86031/Study.pdf>

¹⁹⁵ http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153591.pdf

¹⁹⁶ http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf

¹⁹⁷ http://trade.ec.europa.eu/doclib/docs/2016/april/tradoc_154464.pdf; with reference to the full list of SIAs conducted, see <http://ec.europa.eu/trade/policy/policy-making/analysis/sustainability-impact-assessments/>

¹⁹⁸ https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how_en

¹⁹⁹ https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how/better-regulation-guidelines-and-toolbox/better-regulation-toolbox_en

have been called ‘new generation’ trade agreements that cover a wide range of issues including trade in goods and services, foreign direct investment, public procurement, commercial aspects of intellectual property and competition (e.g. Singapore, Vietnam).²⁰⁰ Such chapters aim to do justice to the promotion of the EU’s values, principles and objectives by also including trade with third states and sustainable development, social protection of workers and environmental protection, and by anchoring the commitment of all trade partners to respect international environmental protection agreements, labour and human rights. In addition to anchoring existing international legal obligations of the parties in the trade agreements, the Commission claims that its trade negotiations have been decisive in trading partners’ signing of core International Labour Organization (ILO) conventions on labour rights, which they had not been bound by beforehand.²⁰¹

In 2014, the EU started negotiating a modernised EU-Chile Association Agreement which had been in force since 2003 for the trade part and since 2005 as a whole; it covers political dialogue, trade and cooperation.²⁰² After Chile suggested modernising the agreement in 2013, a joint working group was set up: its conclusions of 2017 have been the basis for the EU’s negotiation directive.²⁰³ The EU made explicit its commitment ‘to tackle its priorities and guidelines stated in the EIDHR’ (European Instrument for Democracy and Human Rights)²⁰⁴ and its Human Rights strategy in Chile when suggesting that particular emphasis be put on economic, social and cultural rights, and prioritising women and girls’ rights and gender equality, ‘particularly with regard to a life free from violence and the strengthening of a culture free from gender stereotypes. In addition, economic empowerment for women as well as political participation will also be covered’.²⁰⁵ The EU’s current proposal for a Modernised Agreement with Chile includes – for the first time in EU trade negotiations – an entire chapter on gender equality, also anchoring international law and

²⁰⁰ For a regularly updated list and links to trade agreements that include rules on trade and sustainable development, see <http://ec.europa.eu/trade/policy/policy-making/sustainable-development/>.

²⁰¹ For Commissioner Malmström’s comment on Vietnam’s increased commitment to ILO Conventions triggered by the negotiation of its FTA with the EU, listen to policy podcast ‘Human rights in EU trade agreements: the human rights clause and its application’ by the European Parliament Research Service, 8 July 2019, <https://epthinktank.eu/2019/07/08/human-rights-in-eu-trade-agreements-the-human-rights-clause-and-its-application/>

²⁰² https://eeas.europa.eu/delegations/chile/18359/chile-and-eu_en

²⁰³ *Ibid.*

²⁰⁴ The EIDHR is a ‘thematic funding instrument for EU external action aiming to support projects in the area of human rights, fundamental freedoms and democracy in non-EU countries’ and ‘designed to support civil society to become an effective force for political reform and defence of human rights’, https://ec.europa.eu/europeaid/how/finance/eidhr_en.htm_en; Regulation (EU) No 235/2014 of the European Parliament and of the Council, of 11 March 2014, establishing a financing instrument for democracy and human rights worldwide (2014–2020), OJ L 77/85.

²⁰⁵ https://ec.europa.eu/europeaid/how/finance/eidhr_en.htm_en

standards (e.g. the Convention on the Elimination of Discrimination against Women [CEDAW], ILO Conventions).²⁰⁶ This chapter was drafted following an *ex post* evaluation of the impact of the current agreement and an assessment of the potential impact of a modernised agreement with a chapter on gender equality to address, for example, workforce inequalities.²⁰⁷

Another recent example of the incorporation of values and international law commitments in trade agreements is the EU-Mercosur trade agreement which, after 20 years of negotiations, was agreed on in principle on 28 June 2019. The trade agreement, which is part of the more comprehensive EU-Mercosur Association Agreement, is the most expansive trade agreement concluded by the EU to date: it also promotes EU values and integrates the parties' commitments to international agreements, including ILO core conventions (Article 4) and a wide range of environmental protection agreements (Articles 5 to 9, including the Paris Agreement on Climate Change, Convention on Biological Diversity [CBD] and the Convention on International Trade in Endangered Species of Wild Fauna and Flora [CITES]).²⁰⁸

However, while the EU's commitment to the promotion of EU values, human rights and good global governance has become an increasingly visible dimension of EU trade policy in principle, the EU has been criticised for its institutional lack of awareness of EU human and fundamental rights obligations in detail, and for not pursuing a coherent approach in the promotion of human rights through trade and investment policy.²⁰⁹ Even though Trade and Sustainable Development chapters include labour and environmental rights, human rights have not been incorporated more fully into the text of the other parts of trade and investment agreements.²¹⁰ Moreover, even the most recent Trade and Sustainable Development chapters are excluded from dispute settlement.²¹¹ Whereas the enforcement of labour and environmental rights could play a particularly strong

²⁰⁶ See full text of current draft chapter on gender equality at https://trade.ec.europa.eu/doclib/docs/2018/june/tradoc_156962.pdf

²⁰⁷ For an overview and regular updates, see <http://ec.europa.eu/trade/policy/countries-and-regions/countries/chile/>

²⁰⁸ For text of the chapter 'Trade and sustainable development' agreed on in principle on 28 June 2019, see http://trade.ec.europa.eu/doclib/docs/2019/july/tradoc_158166.%20Trade%20and%20Sustainable%20Development.pdf; for regularly updated details and link to full text, see <https://ec.europa.eu/trade/policy/in-focus/eu-mercosur-association-agreement/>

²⁰⁹ V Kube, *EU Human Rights, International Investment Law and Participation*; V Kube, 'The Polisario case: do EU fundamental rights matter for EU trade policies?' *EJIL: Talk!* 3 February 2017, <https://www.ejiltalk.org/the-polisario-case-do-eu-fundamental-rights-matter-for-eu-trade-policies/>; S Velluti, 'The promotion and integration of human rights in EU external trade relations' (2016) 32 (83) *Utrecht Journal of International and European Law*, 41–68.

²¹⁰ V Kube, *EU Human Rights, International Investment Law and Participation*, 226.

²¹¹ See, for example, Art 13.16 (1) of the EU-Vietnam Trade Agreement (NB: there is no chapter on SD in the EU-Vietnam Investment Protection Agreement), which was signed on 30 June 2019; Art 15 (5) of the Trade part of the EU-Mercosur Association Agreement (agreed on in principle on 28 June 2019); Art X.13 (2) of the Chapter on SD proposed by the EU to Australia in February 2019.

role in the context of investment arbitration, it is left to arbitrators to determine the precise impact of parties' commitment to environmental and human rights on investment protection.²¹² It has been suggested in academic commentary that *ex-ante* human rights impact assessment and civil society monitoring bodies could be further developed to give precise shape to the EU's 'constitutional human rights mandate' and break it down 'into clear benchmarks to which EU international economic law making can be held accountable'.²¹³

With regard to the implementation of trade agreements, the EU Commission has been encouraged by civil society and the European Parliament to use trade agreement clauses 'in a more robust way in order to respond to serious breaches of human rights and democratic principles' by third countries; so far, the EU has entered dialogue on human right issues but has never suspended any trade commitments under its agreements.²¹⁴ At the same time, the fact that the EU has human rights clauses in trade agreements with arguably less powerful states (e.g. Armenia, Chile, Colombia, Mexico, Western Balkan countries) but not in trade agreements with more powerful states (e.g. Canada, Japan, South Korea) is concerning as regards the coherence of the EU's approach and its leverage in future trade negotiations with important trading nations (e.g. China and India). Such inconsistency can be explained partially by the EU's own priorities and the nature of diplomatic relations. At the same time, Member States' retained powers regarding human rights policies, as well as their diverging interests and domestic pressures with regard to different EU trading partners, might hinder the development of a coherent EU voice on those matters.

4.3.2 Foreign policy, multilateralism and the promotion of rights
As discussed above, the EU now holds comprehensive CFSP competence, which it needs to exercise in compliance with EU law. Representing the EU for matters relating to CFSP, conducting 'political dialogue with third parties on the Union's behalf', and expressing 'the Union's position in international organisations and at international conferences' (Article 27 (2) TEU), the EU High Representative has increased the EU's visibility on the global stage. Yet the extent to which the EU High Representative as a foreign minister has been in a position to engage satisfactorily with world powers has been questioned, given that the position does not match that of their heads of state or government, who now often themselves deal with important matters of international relations.²¹⁵ The parallel presence of 28 Member States as active participants in international relations

²¹² V Kube, *EU Human Rights, International Investment Law and Participation*, 226.

²¹³ *Ibid.*, 2.

²¹⁴ See recent briefing and policy podcast 'Human rights in EU trade agreements: the human rights clause and its application', by the European Parliament Research Service, 8 July 2019, <https://epthinktank.eu/2019/07/08/human-rights-in-eu-trade-agreements-the-human-rights-clause-and-its-application/>

²¹⁵ S Lehne, 'Is there hope for EU foreign policy?' 5 December 2017, <https://carnegieeurope.eu/2017/12/05/is-there-hope-for-eu-foreign-policy-pub-74909>

within and outside the EU institutional framework has often made it difficult for the EU to speak with one voice that convincingly reflects the EU's own set of values, principles and objectives.

The EU High Representative has been assisted by the EEAS, which comprises officials from the Council and the Commission and staff seconded from national diplomatic services of the Member States (Article 27 (3) TEU). The establishment of the EEAS encountered difficulties, as EU Member States were reluctant to transfer comprehensive powers and financial support, and the EU Commission was keen to protect its own powers.²¹⁶ As a consequence, the EEAS has arguably not (yet) developed into what could be regarded as an EU foreign ministry, and has been labelled as 'a kind of secretariat, interposed between the council and the commission with a weak institutional culture and limited buy-in from either side'.²¹⁷ Moreover, as a rules-based actor, the EU has been considered to have 'had trouble adjusting to a multipolar world increasingly ruled by power politics', and to have 'downscaled its ambition to transform its neighbo[u]rs in its own image and switched to a defensive mode, focusing on stability and resilience'; moreover, as a crisis manager, the EU has 'had some wins but displayed many weaknesses, including in Libya, Syria, and Ukraine'.²¹⁸

Whatever the level of unity in representation and voice the EU might have achieved by now, also in the field of CFSP the EU is in principle to be guided in its action by its commitment to the promotion of the rule of law, democracy, rights and multilateral solutions (Article 21 TEU). Given the EU's effort to continue making explicit its commitment to good global governance, it can be argued that the EU has at least managed to clarify its position as a rules-based global actor in matters of peace and security. The EU has adopted its Global Strategy for Foreign and Security Policy (EUGS), an important step in strengthening a framework for foreign policy that is united, responsible, promotes peace and security, advances prosperity that is shared, meets sustainability requirements, promotes human rights, tackles poverty and 'promote[s] a rules-based global order with multilateralism as its key principle and the United Nations at its core'.²¹⁹ The EUGS identified five priority areas, which were endorsed by the Foreign Affairs Council in October 2016:

²¹⁶ For a comprehensive study of the EEAS' contribution to the coordination of the EU institutions and Member States at an administrative level, see M Gatti, *European External Action Service - Promoting Coherence through Autonomy and Coordination* (Nijhoff: Brill, 2016).

²¹⁷ S Lehne, 'Is there hope for EU foreign policy?' 5 December 2017, <https://carnegieeurope.eu/2017/12/05/is-there-hope-for-eu-foreign-policy-pub-74909>

²¹⁸ Ibid.

²¹⁹ For full text, see https://eeas.europa.eu/sites/eeas/files/eugs_review_web_0.pdf; for further details also concerning the implementation of the strategy see https://eeas.europa.eu/topics/eu-global-strategy_en

- (i) investing in the resilience of states and societies to the East and South, and an integrated approach to conflicts and crises;
- (ii) strengthening security and defence;
- (iii) reinforcing the internal/external policy nexus, with special attention to migration, counterterrorism and hybrid threats;
- (iv) updating existing or preparing new regional and thematic strategies; and
- (v) stepping up public diplomacy efforts.²²⁰

In that context, the EU also committed itself to ‘cross-cutting dimensions within all five building blocks’: (1) mainstreaming human rights, women, peace and security, gender equality and women’s empowerment into all EU policies; and (2) sustainable development goals.²²¹

It would go beyond the scope of this chapter to analyse all EU external relations activities’ compliance with commitments under the EU Treaties and other (self-imposed) legal obligations: this would include a large variety of instruments and actions taken in a large variety of settings, such as established partnerships, political dialogues, and ad hoc crisis and emergency response. The following paragraphs will instead focus on the EU’s involvement with the UN from an institutional point of view and its contribution to the promotion of women’s rights and gender equality in particular, being one of the EU’s cross-cutting commitments in accordance with its values, principles and external objectives established under Article 21 TEU. It is argued that in spite of ongoing challenges regarding the EU’s ambition to implement its Global Strategy (2016) as a ‘strong and reliable partner for peace, security and human development’,²²² focusing on ‘security and defence, multilateralism, and the idea of a more “joined-up”, a more effective European Union’,²²³ the EU has taken concrete steps as part of its CFSP to comply with its established commitments since the entry into force of the Lisbon Treaty. For instance, EU strategies, frameworks, action plans and collaborative projects reflect its commitment to its own values, principles and objectives and its growing capacity to contribute to good global governance.

In addition to endorsing Member States’ international commitments in the area, EU institutions have brought the promotion of equality onto the agenda for any

²²⁰ Council, CFSP Annual Report 2017, 10650/17, 5 July 2017, p. 3; https://eeas.europa.eu/sites/eeas/files/st10650_en-cfsp_report_2017.pdf

²²¹ *Ibid.*

²²² See A/RES/65/276*, Resolution adopted by the General Assembly on 3 May 2011, <https://eeas.europa.eu/sites/eeas/files/n1052910.pdf>; https://eeas.europa.eu/headquarters/headquarters-homepage/9875/european-union-united-nations_en

²²³ Speech by High Representative/Vice-President Federica Mogherini on the implementation of the EU Global Strategy at the plenary session of the European Parliament on 17 July 2019, with reference to particular EU initiatives, https://eeas.europa.eu/topics/eu-global-strategy/65571/speech-high-representativevice-president-federica-mogherini-implementation-eu-global-strategy_en

kind of EU external action, including foreign policy. The Commission adopted the Strategy for equality between women and men (2010–2015), which covered EU action regarding accession, its European Neighbourhood Policy (ENP), development, cooperation with international organisations (ILO, OECD, UN, African Union, UN Women, and civil society), conflict prevention, peacebuilding, humanitarian aid, and trade.²²⁴ In the Council European Pact for Gender Equality (2011–2020), gender mainstreaming was also confirmed to be relevant in external actions.²²⁵ In 2012, the Council adopted the already mentioned EU Strategic Framework and Action Plan on Human Rights and Democracy, which, *inter alia*, refers in its action plan to a rights-based approach to development cooperation and to human rights and gender equality to be systematically included in conflict prevention and crisis management activities.²²⁶

The already mentioned EU Global Strategy (2016) envisaged the promotion of a rules-based global order and human rights, sustainable development goals, the indivisibility and universality of human rights, the role of women in peace efforts, and the mainstreaming of human rights and gender issues.²²⁷ The EU institutions and Member States highlighted their rights-based approach again in their joint statement on the New European Consensus on Development – Our World, Our Dignity, Our Future (2017).²²⁸

In its Conclusions of 20 June 2019, the European Council included its New Strategic Agenda 2019–2024, which is intended to guide the institutions. It focuses on four main priorities – (1) protecting citizens and freedoms; (2) developing a strong and vibrant economic base; (3) building a climate-neutral, green, fair and social Europe; and (4) promoting European interests and values on the global stage – and sets out how to deliver those priorities.²²⁹ The European Council recognises in its Conclusions that ‘[t]he EU can only engage with other global powers on an equal footing if it avoids a piecemeal approach and presents a united front, backed up by EU and Member State resources’.²³⁰

In its renewed Gender Action Plan (2016–2020), the EU reiterates that ‘gender equality is at the core of European values and enshrined within the European Union (EU) legal and political framework. The EU and its Member States are

²²⁴ European Commission, Strategy for equality between women and men (2010–2015), pp8f; <https://op.europa.eu/en/publication-detail/-/publication/c58de824-e42a-48ce-8d36-a16f30ef701b>

²²⁵ Council conclusions of 7 March 2011 on European Pact for Gender Equality (2011–2020), OJ C 155, 25.5.2011, p. 10–13.

²²⁶ https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/131181.pdf

²²⁷ See above note 102.

²²⁸ https://ec.europa.eu/europeaid/new-european-consensus-development-our-world-our-dignity-our-future_en

²²⁹ <https://www.consilium.europa.eu/media/39922/20-21-euco-final-conclusions-en.pdf>

²³⁰ European Council, Conclusions, EUCO 9/19, 20 June 2019, p. 11; <https://www.consilium.europa.eu/media/39922/20-21-euco-final-conclusions-en.pdf>

at the forefront of the protection, fulfilment and enjoyment of human rights by women and girls and strongly promote them in all external relations'.²³¹ The Gender Action Plan has focused on taking action and transforming lives through four areas: (1) ensuring girls' and women's physical and psychological integrity; (2) promoting the economic and social rights/empowerment of girls and women; (3) strengthening girls' and women's voice and participation; and (4) shifting the European Commission services and the EEAS's institutional culture to deliver more effectively on EU commitments. The EU has recently adopted its first ever Action Plan on Women, Peace and Security, which was endorsed by the Political and Security Committee (Article 38 TEU) on 16 July 2019.²³² The Action Plan includes concrete steps and constitutes an operational tool for the implementation of the Women, Peace and Security agenda and EU priorities for the coming years (2019–2024).

Prior to the Lisbon Treaty, the EU had already started joining international organisations and groups as a full member in its own right²³³ and obtained special status in some important international organisations.²³⁴ Yet there are also international organisations and treaty regimes that do not (yet) allow full EU membership, even in areas for which the EU holds extensive competence according to the EU Treaties.²³⁵ In 2011, the EU was granted enhanced observer status by the UN General Assembly,²³⁶ which has enabled the EU representative to speak on behalf of the EU and its Member States, while voting rights remain with its Member States only.

²³¹ Council conclusions on EU Gender Action Plan 2016-2020, 26 October 2015, p. 2; <https://www.consilium.europa.eu/media/24467/st13201-en15.pdf>

²³² <https://data.consilium.europa.eu/doc/document/ST-11031-2019-INIT/en/pdf>; [https://www.consilium.europa.eu/en/meetings/mpo/2019/7/political-and-security-committee-\(280585\)/](https://www.consilium.europa.eu/en/meetings/mpo/2019/7/political-and-security-committee-(280585)/)

²³³ Some important examples are the WTO, G20, Food and Agricultural Organization (FAO), the European Bank for Reconstruction and Development (EBRD), Eurocontrol, the Energy Commission, the Codex Alimentarius Commission, the Hague Conference on Private International Law; C Kaddous (ed), *The European Union in International Organisations and Global Governance* (Oxford: Hart Publishing, 2015); F Hoffmeister, 'Outsider or frontrunner? Recent developments under international and European law on the status of the European Union in international organizations and treaty bodies' (2007) 44 *Common Market Law Review* 41–68.

²³⁴ The EU has observer status at the International Labour Organization (ILO): see OJ 189, C 24/8, renewed by exchange of letters OJ 2001, C 165/23; see K E Jørgensen, R Wessel, 'The position of the European Union in (other) international organizations: confronting legal and political approaches', in P Koutrakos, *European Foreign Policy – Legal and Political Perspectives* (Cheltenham: Edward Elgar Publishing, 2011), 261–286, 270. It is an important donor to the organisation, also covering the field of development, <https://www.ilo.org/brussels/donors/european-union/lang--en/index.htm>; the EU is also a partner of the World Health Organization (WHO), <http://www.euro.who.int/en/about-us/partners/the-european-union-and-its-institutions>

²³⁵ KE Jørgensen, R Wessel, 'The position of the European Union in (other) international organizations', 264, with reference to the International Maritime Organization (IMO), the Civil Aviation Organization (ICAO), the River Rhine Commissions, the International Energy Agency, the executive board of the UN High Commissioner of Refugees (UNHCR) or bodies under the UN Convention on the Law of the Sea (UNCLOS).

²³⁶ Participation of the European Union in the work of the United Nations, Resolution adopted by the General Assembly on 3 May 2011, GA Res A/65/276; <https://undocs.org/A/RES/65/276>

In the particular context of democracy, human rights and gender equality, the EU has been actively collaborating with other international organisations. For instance, the EU has maintained a strategic partnership and joint programmes with the Council of Europe, including ‘technical and support projects in support of democratic stability’ (e.g. EU enlargement region, Eastern Partnership, Southern Mediterranean countries).²³⁷ The EU and UN Women have been in a strategic partnership since 2012, ‘working jointly for gender equality and women’s empowerment worldwide to reach a Planet 50–50 by 2030’.²³⁸ The EU, UN Women and the ILO are part of a strategic partnership working towards economic empowerment of women at work (through the private sector).²³⁹ In 2017, the EU, UN and UN Women started the Spotlight Initiative to eliminate all forms of violence against women and girls in line with the 2030 Agenda for Sustainable Development, and the EU is the main contributor to the budget of EUR 500 million.²⁴⁰

In sum, the EU’s commitment to its values and principles has started to become a visible dimension of important aspects of its CFSP framework and activities, providing further direction for all internal participants (i.e. EU institutions and Member States) in the interest of good governance and individual rights. The EU’s ambitious global strategy and action plans have prepared the EU to become an important contributor to good global governance through collaboration with global and regional institutions. The EU’s experience with an internal legal order that has been shaped by its commitment to, *inter alia*, equality and rights has placed the EU in the position of a credible partner in its relationship with other international organisations in principle. To what extent the EU will be in a position to realise its full potential as a rules-based actor remains subject to its Member States’ capacity and willingness to reach agreement with regard to specific global challenges, and to defend and promote jointly and individually the EU’s values and principles to which they have subscribed under the Lisbon Treaty.

4.4 Conclusion

This chapter has demonstrated that the first ten years after the entry into force of the Lisbon Treaty have brought significant developments in the field of external relations law. In spite of procedural and substantive legal challenges from both the EU’s internal and the international legal order, the EU has started

²³⁷ <https://www.coe.int/en/web/der/european-union>

²³⁸ Joint statement on the Memorandum of Understanding between the European Union and the United Nations Entity for Gender Equality and the Empowerment of Women, 15 June 2016; <https://www.unwomen.org/en/news/stories/2016/6/joint-statement-on-the-mou-between-the-eu-and-un-women>; see for list of activities: <https://www.unwomen.org/en/partnerships/donor-countries/top-donors/european-union>

²³⁹ <https://www.empowerwomen.org/en/resources/documents/2018/06/womens-economic-empowerment-through-responsive-business-conduct-in-g7-countries>

²⁴⁰ <https://www.un.org/en/spotlight-initiative/index.shtml>

to find its feet as a global actor from a legal perspective. At least in principle, we have a constitutional framework for EU external action that is prepared to accommodate the interests of national and EU stakeholders in its decision-/ treaty-making and implementation of external policies. The EU has increased its visibility on the basis of its increased powers, additional actors and an ambitious agenda that is shaped by its commitment to values, principles and objectives with an international outlook. The EU has become an active participant in international fora and contributes to international treaty-making in a variety of policy fields, driven by both internal and external EU objectives.

Following the Member States' ratification of the Lisbon Treaty, the EU institutions have played an important role in implementing Treaty novelties, such as the creation of the EEAS. Moreover, the institutions (and Member States) have sought judicial clarification of Treaty provisions relevant to the functioning of EU external policymaking and international treaty-making. As a consequence, the Court of Justice has been in a position to develop EU external relations law further, strengthening the legal grounds for the EU's 'actorness' on the global stage and EU accountability, also in the area of CFSP. Increasingly, the Court has done so on the basis of structural principles, both relational and systemic.²⁴¹ The Court has applied EU principles to address power struggles between EU institutions and Member States, recognising Member States' constraints in the interest of strengthening the EU as a global actor. The Court has also brought more legal certainty regarding the Lisbon Treaty's vertical and horizontal allocation of powers in the context of institutional decision-making, including the degree of involvement of the European Parliament in the context of international treaty-making. At the same time, the Court has recognised the need for the involvement of EU Member States alongside the EU, where it identified such a need under the pertinent international treaty regime. Overall, the Court has further integrated the EU-specific system of checks and balances in EU external relations law.

The EU Treaty framework makes it obligatory for EU foreign power to be exercised with respect for, *inter alia*, the rule of law, democracy, rights, economic integration and multilateral solutions, and to do so in a coherent way. Those framing and systemic Treaty obligations have been recognised in strategies, action plans, treaty negotiations and positions, and the EU has actively endorsed international law commitments in its treaty-making (e.g. by anchoring international treaties and standards in EU trade agreements with third states and regional blocs). Even in the context of the CFSP, the EU has actively promoted human rights in its agenda-setting, action plans and international collaboration. Recent EU practice in the context of treaty-making and engagement in international organisations and partnerships seems to demonstrate EU institutions' commitment to

²⁴¹ M Cremona, 'Structural principles and their role in EU external relations law', in M Cremona (ed), *Structural Principles in EU External Relations Law* (Oxford: Hart Publishing, 2018), 3–29.

a holistic approach in their external action, taking account of its rules-based nature and the wide range of EU external objectives. In accordance with the values and principles guiding EU external action (Article 21 TEU), the Court of Justice has reiterated the reach of EU fundamental rights, and the rule of law more generally, when assessing the scope of the EU's obligations as a global actor vis-à-vis affected individuals, also in the area of CFSP.

In a nutshell, this chapter has shown that the Lisbon Treaty reform and judicial clarification of external relations law have made room for stakeholders, values, principles and objectives in a way that is sufficiently balanced to reduce tensions between EU institutions and Member States, while placing accountability towards individuals at the core of EU external action. Moreover, recent practice and implementation of the EU's ambitious agenda show the EU's capacity to comply with its (at least partially) self-imposed standards and act effectively as a force for good global governance. Yet it is unlikely that full compliance with what have been identified as EU values and principles will be achieved without more unity between EU Member States that are willing to pull their weight collectively (both within and outside the EU institutions).²⁴² The current challenges regarding, for instance, adherence to the rule of law within the internal legal order, and the pursuit of individual Member States' self-interests in the context of foreign affairs – in the field of CFSP but also in areas of shared competence, such as freedom, security and justice – are possibly the biggest hurdles on the way to an EU foreign power that does justice to its rules-based nature.

²⁴² For a recent analysis of how Member States have interacted and cooperated in small groups to enhance European foreign policy (rather than undermine it), see L Aggestam, F Bicchi, 'New directions in EU foreign policy governance: cross-loading, leadership and informal groupings' (2019) 57 (3) *Journal of Common Market Studies* 515–532.

5 Fundamental Rights at the heart of the Lisbon Treaty? Changes and challenges 10 years on

Eleanor Spaventa

Introduction

The Lisbon Treaty introduced important changes in relation to fundamental rights protection in the EU. The most important is, of course, the constitutionalisation of the Charter of Fundamental Rights, which has been given the same legal value as the Treaties themselves.²⁴³ Furthermore, the Lisbon Treaty imposed on the EU a duty to accede to the European Convention on Human Rights (ECHR)²⁴⁴ so as to provide the same guarantees of an independent human rights scrutiny as enjoyed within the domestic context. And, just as important from a fundamental rights perspective, the Lisbon Treaty gave full jurisdiction to the Court of Justice in the field of cooperation in criminal matters. This has been of crucial importance because it is in this field, and in the field of asylum and immigration, that the individual is at her most vulnerable. On paper, then, the Lisbon Treaty was excellent news for fundamental rights protection in the EU: It filled the gaps in the jurisdiction of the Court of Justice whilst at the same time providing a clear catalogue of fundamental rights together with the competence and the will to accede to the ECHR. Yet, ten years on, it is not obvious how much these constitutional changes have delivered in terms of effectiveness of fundamental rights protection.

In particular, the Court of Justice of the European Union has embraced its role as a fundamental rights court with some ambiguity, especially when effective fundamental rights protection has been perceived as antagonistic to deeper EU integration. Furthermore, ten years on, we have had to come to terms with what the Lisbon Treaty failed to do: The rule of law crisis in Poland and Hungary is a painful demonstration of the limp nature of the European Union project, which makes it very difficult, if not altogether impossible, to guarantee that our core values are upheld in all the constituent parts of the EU.

In this contribution, I will cast a critical eye at the protection of fundamental rights post-Lisbon. In particular, after a short introductory section on the legal

²⁴³ Art. 6(1) TEU.

²⁴⁴ Art. 6(2) TEU.

framework for fundamental rights protection, I will concentrate on the tensions between the EU integration project, with its limited competences and the need to ensure national autonomy at least in certain spheres, and the centralising push needed in order to ensure a mature fundamental rights system. Those tensions are particularly visible in the Court of Justice's case law; and whereas I am very critical of that jurisprudence, I also think it highlights a broader constitutional question: How far is it possible to develop a *sui generis* legal order without embracing a federal system? In other words, the 'deeper the integration', the more difficult it is to draw a precise line between national and EU dimensions, especially in the fundamental rights field; furthermore, the more integrated the Union, the more domestic violations of fundamental rights affect its functioning. In order to solve these problems, a generalised and uniform protection of EU fundamental rights would be needed, and this is only possible if we accept the universal reach of the Charter. To do so would deeply transform the Union, as there would no longer be any area subtracted from EU oversight. In this respect, the Lisbon Treaty has only very partially addressed the constitutional problems inherent in providing effective and uniform fundamental rights protection in the EU.

5.1 The legal framework for fundamental rights protection in the EU

The Charter of Fundamental Rights,²⁴⁵ first proclaimed in 2000 and given full legal effect with the Lisbon Treaty, is meant to be a codification of existing rights. It draws on a number of sources, such as the case law of the Court of Justice, the common constitutional traditions of the Member States, the European Convention on Human Rights and other international Treaties. It offers a relatively clear catalogue of rights, updated to include new generation rights such as data protection and bioethical rights, and is premised on the 'equivalence' of rights, thereby rejecting the traditional hierarchy between civil and political rights, on the one hand, and social rights on the other.²⁴⁶ Its structure departs from traditional constitutional documents in that the Charter is divided into six thematic titles, each enshrining a constitutional value (dignity, freedoms, equality, solidarity, citizens' rights, justice). The seventh title, the most complex one, determines the scope of application of the Charter, the relationship between its provisions and rights protected in other documents, especially the ECHR, and the conditions under which rights in the Charter can be limited.

²⁴⁵ Charter of Fundamental Rights of the European Union, OJ (2010) C 83/403.

²⁴⁶ Post-war Western democracies (in particular, but not only) privileged civil and political rights over social rights. This is due to a number of reasons, including the historic post-dictatorship/genocide context; and practicality, since civil and political rights mostly require a duty of abstention from the State, whereas social rights require the State to take active steps to ensure the enjoyment of those rights. This is also reflected in enforcement at the international level, where civil and political rights are enforced also through the ECHR, acquiring therefore an almost 'super status'. The relative importance of civil and political versus social rights is also a matter of cultural debate between different conceptions of 'freedom' (from state intervention or from material need). By rejecting any hierarchy and by articulating rights along fundamental values, the Charter drafter then sought to overcome this debate and adopt a holistic approach.

5.1.1 The application of the Charter to the EU and its institutions

The Charter is addressed first and foremost to the EU and its institutions;²⁴⁷ after all, the main purpose of codification was to ensure that, in its legislative and administrative role, the EU was clearly bound by limits equivalent to those that apply at the national level. Since fundamental rights have always applied to EU institutions through the case law of the Court,²⁴⁸ the Charter might have made a difference in the confidence with which the Court interpreted its role of fundamental rights guarantor. For instance, in *Digital Rights Ireland*, the data retention directive was annulled for being a disproportionate interference with privacy rights,²⁴⁹ one of the very few instances in the history of the EU where a Directive was annulled in its entirety. In Opinion 1/15 on the Passenger Name Records Agreement with Canada, the Court set clear limits to the data that could be transferred to a non-European State,²⁵⁰ and in *Schrems*, the Court annulled a Commission adequacy decision in relation to data transferred to the United States on the grounds that it deprived the national authority of the possibility of ensuring data protection compliance.²⁵¹

It is not only in relation to privacy law that the Court has been active; in *Ledra Advertising* and *Florescu*, the Court of Justice clarified that the Charter always binds the EU institutions, no matter in what capacity they act and regardless of whether the acts adopted have binding legal effects.²⁵² This interpretation led to the applicability of EU fundamental rights to the memoranda of understanding adopted between the Commission and Member States in receipt of ‘bail-out’ funds in the context of the euro crisis. This means that even when EU institutions act outside the scope of the Treaties (such as they do in relation to the euro crisis), fundamental rights and, consequently the jurisdiction of the Court within the preliminary ruling procedure are, at least in theory, guaranteed.

The picture is not univocal, however. For instance, in the field of immigration, the constitutionalisation of the Charter has not led to a more assertive application of fundamental rights standards. The most blatant example of this is the *EU-*

²⁴⁷ Article 51 Charter.

²⁴⁸ See Case 29/69 *Stauder* [1969] ECR 419; Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125; Case 4/73 *Nold* [1974] ECR 491.

²⁴⁹ Case C293/12 and C594/12, *Digital Rights Ireland and Others*, EU:C:2014:238; on the limits of data retention imposed by EU data protection law and the Charter on national authorities see, e.g., Joined Cases C-203/15 and C-698/15 *Tele2 Sverige AB*, EU:C:2016:970.

²⁵⁰ Opinion 1/15, EU:C:2017:592; see also pre-Lisbon and in relation to the Passenger Name Record Agreement with the USA Case C-317/04 and C-318/04 *Parliament v Council*, EU:C:2015:190.

²⁵¹ Case C-362/14, *Schrems* EU:C:2015:650.

²⁵² Joined Cases C-8/15 and 10/15 P *Ledra Advertising* EU:C:2016:701; Case C-258/14, *Florescu*, EU:C:2017:448, although, of course, a non-binding act can only be challenged through a preliminary ruling and not through direct action.

Turkey Statement.²⁵³ It might be recalled that, pursuant to the statement, irregular migrants who arrive on the Greek shores from Turkey can be returned if they have not obtained international protection. In return, the EU would accept a refugee from Syria and would also pay a considerable amount of money to Turkey.²⁵⁴ The agreement is problematic for all sorts of reasons, especially since it transfers vulnerable migrants to a place that would be difficult to define as a safe port, and where human rights compliance both within refugee camps and outside is ‘problematic’ (to say the least). It is not surprising, then, that the validity of the Statement was challenged, also on human rights grounds, in front of the Court of Justice of the European Union. The Court washed its hands of the issue by declaring it to be an act of the Member States acting collectively rather than an act of the EU. Yet, the agreement is published only on the website of the European Council, it is named the *EU-Turkey* agreement and, most importantly, the financial retribution to Turkey comes exclusively from the EU coffers.

Similarly unsatisfactory is the approach of the Court to the (then) Dublin II Regulation.²⁵⁵ It might be recalled that the Dublin system provides that the port of first entry, that is the place where the non-European undocumented migrant first arrives, is responsible for processing and offering international protection to asylum seekers. Following the migration crises that stemmed first from the conflict in Syria and later from conflicts and climate changes in Africa, Greece and Italy have been the shores of destination for the great majority of migrant fluxes. Greece, in particular, found itself unable to cope with the influx and, as a result, the situation in the migrant camps deteriorated rapidly, resulting in conditions that were unsafe and degrading. It is in this context that a case was brought in front of the European Court of Human Rights – migrants whose first port of entry was Greece and who had then arrived in Belgium and applied there for asylum were faced with a deportation order pursuant to the Dublin Regulation. The claimants successfully argued that, given the conditions in the reception camps in Greece, their forced return would have breached their right not to face degrading treatment as guaranteed by the ECHR.²⁵⁶

²⁵³ Case T-192/16 *NF v Council*, EU:T:2017:128, confirmed in appeal in Joined Cases C-208 to 210/17P, EU:C:2018:705.

²⁵⁴ Turkey has now suspended the operation of the agreement because the EU has failed to pay the agreed sums and is using the threat of re-opening its borders to asylum seekers trying to reach the EU as leverage in its international relations with the EU.

²⁵⁵ Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third country national (OJ [2003] L50/1); this Regulation has now been repealed and substituted by Regulation 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third country national or a stateless person (OJ[2013] L108/31), known as the Dublin III Regulation.

²⁵⁶ *MSS v Belgium and Greece* (Appl No 30696/09), judgment of 21 January 2011, esp. paras 358, 360, and 367.

From the EU perspective, this case puts a significant spanner in the Dublin system in that it impacts on the Member States' ability to return migrants to the port of first entry when the conditions in the migrants' camps or in the processing of the applications in that State are not satisfactory. It is in this context that the Court of Justice was called to decide a similar case. This time, the claimants were in the United Kingdom and were also resisting deportation to Greece; they argued that their deportation would be contrary to the Charter of Fundamental Rights, so that the national court made a preliminary reference to the Court of Justice.²⁵⁷ It should be recalled that the Charter contains an equivalent right to Article 3 ECHR and that the EU cannot fall below the ECHR protection. The Court of Justice was, therefore, reluctantly forced to mirror the decision of the European Court of Human Rights, but it did so trying to preserve as much as possible of the Dublin system and introducing a very stringent test, arguably more stringent than that provided for by the Court of Human Rights, which focused on whether the Belgian Government 'knew or ought to have known that he (the applicant) had no guarantee that his application would be examined by the Greek authorities'.²⁵⁸ The Court of Justice, on the other hand, held that the Member State must not transfer an asylum seeker to the port of first entry where it 'cannot be unaware that *systemic deficiencies* in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to *substantial grounds* for believing that the asylum seeker would face a *real risk* of being subjected to inhuman or degrading treatment within the meaning of that provision'.²⁵⁹

The reason for the Court's reluctance in enforcing fundamental rights in these cases is both complex and simple: the Court's role has changed in the past 60 years; it started as a guardian of the Treaties when the Treaties were limited to seeking economic integration, but is also now, and increasingly, the guardian of our fundamental rights. Yet the instinct to protect the effectiveness of EU law, and the very possibility to maintain that law, acquires a heavier weight than it perhaps should. In cases relating to the Dublin Regulation (and in cases relating to the European Arrest Warrant), a serious application of fundamental rights standards would undermine the very basis upon which these measures are built: that of mutual trust between Member States, mutual trust that also encompasses trust in the standard of fundamental rights protection.

Although the protection of fundamental rights in relation to acts of the EU institutions might have improved by virtue of the Charter, there are some areas in which the protection afforded by the Court of Justice is far from satisfactory. In practice, in the case of migration, this is because, as we shall see further

²⁵⁷ Joined Cases C-411/10 and C-493/10 *NS v Secretary of State for the Home Department*, EU:C:2011:13905.

²⁵⁸ *MSS v Belgium and Greece* (Appl No 30696/09), judgment of 21 January 2011, para 358.

²⁵⁹ Joined Cases C-411/10 and C-493/10 *NS*, operative part of the ruling, emphasis added.

below, a stringent and serious protection of fundamental rights would come at the expense of the effectiveness of EU measures. If the Court took the rights of asylum seekers seriously, then the Dublin system would become highly ineffective.

5.1.2 The application of the Charter to national rules when a Member State implements EU law

The Charter also applies to the acts of the Member States when they implement EU law. In practice, this means that when a Member State gives effect to any piece of EU primary or secondary legislation, including when it derogates from the free movement rights guaranteed by the Treaty, it must comply with the provisions of the Charter. The obligation to comply with fundamental rights as general principles of EU law was there even before the Charter; thus, Article 51 is a codification of the pre-existing situation.²⁶⁰ However, what changes with codification is that national courts acquire a new awareness of the scope of application of EU fundamental rights, often pushing the boundaries of the application of the Charter, and make a much more diffuse use of EU fundamental rights. The reason national courts might be attracted to applying the Charter in preference to their own constitutional fundamental rights guarantees has much to do with effectiveness. National courts can apply directly EU fundamental rights and set aside domestic legislation which is incompatible with them (before or after a preliminary ruling by the Court of Justice), whereas in many national legal systems, the fundamental rights scrutiny is concentrated in the hands of a superior or constitutional court, hence depriving the lower courts of the possibility to rule on fundamental rights compatibility directly.

The application of EU fundamental rights to national rules, as beneficial as it might be in some circumstances, might raise considerable difficulties. Consider the field of minimum harmonisation – in some areas, the EU adopts Directives that are aimed at setting a minimum mandatory standard, whilst at the same time allowing the Member States to provide more extensive protection if they so wish. These instruments are of the utmost importance exactly because of the guarantees and flexibility they entail – they set a standard, stop a potential deregulation at the expense of vulnerable categories or interests (workers, consumers, minorities, but also the environment), whilst at the same time allowing Member State to set higher standards of protection. And yet, in some cases, the application of the Charter has come at the expense of the higher standard provided for in national law. Take, for instance, the cases of *Alemo-Herron* or *Achbita*.²⁶¹ In both cases, the Court applied the right to pursue a business as guaranteed by the Charter at the expense of other, non-economic, rights (social and non-discrimination rights respectively). Taken at face value, those cases prevent national authorities from

²⁶⁰ See Case C-5/88 *Wachauf*, EU:C:1989:321.

²⁶¹ Case C-426/11 *Alemo-Herron*, EU:C:2013:521; Case C-157/15 *Samira Achbita v G4S Secure Solutions*, EU:C:2017:203.

striking a different balance between competing values; and yet, the balancing exercise needed when assessing the comparative strengths of competing rights is also the result of societal and cultural choices made (legitimately in the case of minimum harmonisation) at national level. The application of the Charter then carries the risk of imposing a ‘one size fits all’ interpretation to fundamental rights since, differently from the ECHR, the standard applied is not merely or necessarily a minimum standard.

The second problem that arises in relation to the applicability of EU fundamental rights to national rules concerns the difficulties in drawing the Charter’s outer boundaries. The case law here might seem, at least at first sight, inconsistent. Take, for instance, *Åkerberg Fransson*,²⁶² in which the Court held that since VAT is largely harmonised then the Charter would apply to penalties for breach of tax rules, even though the case did not concern specifically VAT fraud. As a result, the Charter applied to a situation which was only very indirectly linked to EU law (the VAT fraud was a marginal part of the broader tax fraud case). Contrast this broad application of the Charter to national rules with the case of *McB*. Here, the claimant was challenging the Irish rules on attribution of paternity; while family law is by and large excluded from the reach of EU law, the case concerned the application of the Brussels II Regulation which determines jurisdiction also in cross-border custody cases. As such, the situation fell squarely within the scope of EU law, and yet the Court refused to apply the Charter to the national rules.²⁶³

This apparent contradiction is due to the very constitutional structure of the EU. It should be noted that the EU has limited competences and that the type and intensity of those competences varies. By and large, when the EU has strong harmonising competence (internal market, VAT, etc.) it will be easier to establish the necessary proximity to trigger the Charter. On the other hand, where the competence is limited to the coordination of national rules, such as it is the case in relation to the Brussels II Regulation, the Court will be more careful to ensure that the application of the Charter does not impinge on national regulatory autonomy.

²⁶² Case C-617/10 *Åklagaren v Hans Åkerberg Fransson*, EU:C:2013:280; noted in E Hancox, ‘The Meaning of “Implementing” EU Law under Article 51(1) of the Charter: *Åkerberg Fransson*’ (2013) 50 *Common Market Law Review* 1411; on this case and the reaction it provoked in the German Federal Constitutional Court, see F Fontanelli, ‘*Hic Sunt Nationes*: The Elusive Limits of the EU Charter and the German Constitutional Watchdog’ (2013) 9 *European Constitutional Law Review* 315; and ‘Ultra Vires – Has the Bundesverfassungsgericht Shown Its Teeth?’, editorial (2013) 50 *Common Market Law Review* 925; D Sarmiento, ‘Who is Afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in the EU’ (2013) 50 *Common Market Law Review* 1267.

²⁶³ Case C-400/10 PPU *McB* [2010] ECR I-8965.

This is further confirmed by the case of *Siragusa*,²⁶⁴ where the Court laid down the test to determine the applicability of the Charter, declaring relevant factors to be whether the domestic legislation is intending to implement EU law, the nature and objectives of national law and the existence of specific norms of EU law. It must be said, though, that even after *Siragusa*, it is not always easy to determine whether the Charter applies or not to national rules.

After this very brief summary of the application of fundamental rights post-Lisbon Treaty, we are now going to focus on three different areas that have raised significant issues, at least from a fundamental rights perspective. First, the relationship between EU law and the European Convention on Human Rights, focusing in particular on the principle of autonomy of EU law (section 5.2); second, the tension between the principle of autonomy of EU law and (domestic) fundamental rights protection (section 5.3); and third, the problems inherent, from a fundamental rights perspective, in a multilevel system, with particular regard to the rule of law crisis (section 5.4). In this respect, it should be noted that the Charter is not of universal application. As mentioned above, it applies only when the Member State is acting within the field of EU law; no infringement proceedings can be brought by the Commission for a broader and more general violation of the Charter by a Member State. This, of course, has led to the EU's inability to react effectively to changes brought about by Poland and Hungary.

5.2 The autonomy of EU law as an impediment to accession to the ECHR: weakening fundamental rights protection in the EU?

The system of protection of fundamental rights across the territory of the European Union can be summarised in the following way: If a rule emanates from national authorities, then judicial protection will be afforded first and foremost by the national courts relying on domestic and/or international fundamental rights. Having exhausted domestic remedies, however, a claimant who believes that her European Convention rights have been breached can also bring her case in front of the European Court of Human Rights. The residual protection offered by access to an independent supranational court seeks to ensure a safety net, a minimum standard that always applies.

On the other hand, if the rule emanates from the European Union, it is only the General Court and the Court of Justice of the European Union that can, as a matter of EU law, assess whether the EU act breaches fundamental rights. Furthermore, because the EU is not a party to the ECHR, there is no 'external' court that guarantees a minimum (independent) standard. Of course, this state of affairs is far from satisfactory since the EU, which has extensive legislative and administrative powers, is not bound by the same standards and guarantees

²⁶⁴ Case C-206/13 *Siragusa*, EU:C:2014:126, para 24.

that apply to all of its Member States.²⁶⁵ It is in this context that there has been a discussion, at both academic and political levels, as to the need for the EU to accede to the European Convention on Human Rights and to accept the jurisdiction of its Court. This debate eventually resulted in the changes brought by the Treaty of Lisbon, which provided an obligation for the EU to accede to the Convention along with the competence for doing so.²⁶⁶

As a result, after long and complex negotiations, in 2013 the Council of Europe and the EU concluded a draft agreement on the accession of the EU to the ECHR. The draft agreement sought to accommodate the specificity of the EU within the Convention system – a system devised for nation states and not for a supranational organisation. It provided, inter alia, the possibility for the European Court of Human Rights to suspend a case and enquire with the European Court of Justice as to the proper interpretation of EU law (so as to safeguard the Court of Justice's absolute monopoly over the interpretation of EU law), and the possibility for the European Commission to intervene in cases where EU law was at issue. However, the European Court of Justice, in Opinion 2/13,²⁶⁷ found that the draft agreement was not compatible with EU law, with the result that there is now no realistic prospect of EU accession to the ECHR. We shall not engage in an analysis of the Opinion,²⁶⁸ but rather highlight the tension (visible also in the relationship with national fundamental rights) between the principle of autonomy of EU law, as protected by the Court of Justice, and meaningful fundamental rights protection.

In this respect, the most problematic part of Opinion 2/13 concerns the request by the Court of Justice that EU law be treated in a 'special way', different from national law, allegedly so as to protect the autonomy of the EU legal order.²⁶⁹ This request concerned, in particular, those areas where the Member States are bound by the principle of mutual trust, pursuant to which national authorities must

²⁶⁵ The European Court of Human Rights has held that there is a presumption of ECHR compliance in the case of acts of the EU; however, in case *Bosphorus v Ireland* (Appl No 45036/98), ECtHR 2005-VI, it held that this presumption can be rebutted if the claimant can show that fundamental rights protection in EU law has been manifestly deficient. Furthermore, the European Court of Human Rights accepts jurisdiction (see *Matthews v UK* (Appl No 24833/94), ECtHR 1999-I) vis-à-vis primary EU law, where the Court of Justice has no judicial review powers. In both cases, it is the Member States (collectively or singularly) that are held responsible for violating the ECHR since the EU is not party to it.

²⁶⁶ The CJEU had previously held that there was no competence, as things stood at the time, to accede to the ECHR, see Opinion 2/94, *Accession to the European Convention on Human Rights* [1996] ECR I-1783.

²⁶⁷ Opinion 2/13, EU:C:2014:2454.

²⁶⁸ Opinion 2/13 had given rise to extensive academic analysis and criticism, see, e.g., B De Witte and Š Imamović 'Opinion 2/13 on Accession to the ECHR: defending the EU Legal Order against a Foreign Human Rights Court' (2015) 40 *ELRev* 683; E Spaventa 'A Very Fearful Court? The protection of Fundamental Rights in the European Union after Opinion 2/13' (2015) 22 *Maastricht Journal of European and Comparative law* 35.

²⁶⁹ On the autonomy of EU law in relation to the ECHR, see also Case C-601/15 PPU *JN*, EU:C:2016:84.

trust authorities in another Member State to protect effectively and satisfactorily fundamental rights.

Take, for instance, the European Arrest Warrant, which requires Member States to surrender individuals suspected of having committed, or already convicted for, a crime in a Member State different from the one where they are located; or the Dublin system which, as mentioned above, allows Member States to deport asylum seekers to the port of first entry. In order to ensure the ‘effective functioning’ of those instruments, the national courts must not concern themselves with whether fundamental rights are upheld in practice in the country where the individual has to be transferred. Rather, the national courts must be driven by the principle of mutual trust, trust in the fact that fundamental rights are effectively protected within all of the Member States of the European Union. Accession to the European Convention on Human Rights would risk undermining this system since, under the Convention, national authorities have a duty to ensure that the transfer of individuals to another jurisdiction does not violate their Convention rights. After accession, therefore, mutual trust would stretch only insofar as the Member States actually respected the ECHR – and this, for the Court of Justice, is unsatisfactory, given the significant differences and gaps in fundamental rights protection amongst the Member States.

The outcome of Opinion 2/13 is thus twofold. First, it dramatically reduces, if not altogether eliminates, the possibility for the EU to accede to the Convention, even though such accession is demanded by the Lisbon Treaty. Second, and perhaps more importantly, it is an admission of the deficiency of the very system of fundamental rights protection in the EU. The Court must rely on the principle of mutual trust exactly because effective and uniform protection across the EU is a legal fiction, and one that cannot be counteracted by the EU since it does not have the competence to sanction fundamental rights violations at the State level. While it is true that the Court of Justice has accepted some exceptions to the operation of the principles of mutual trust, it has done so only in a very limited way and arguably because it did not have any choice. For instance, as mentioned above, as a result of a European Court of Human Rights case, the Court of Justice had to accept a limit to the operation of the Dublin system (then incorporated in the Dublin III Regulation).²⁷⁰ Similarly, and as we shall see in more detail in the next section, the Court had to accept to limit the operation of the European Arrest Warrant because of the pressure exercised by the German Constitutional Court.²⁷¹ Again, though, the fundamental rights exception is very limited, and the principle of mutual trust continues to be mandatory under EU law. A good illustration of the unwillingness to limit the effectiveness of the

²⁷⁰ See *MSS v Belgium and Greece* (Appl No 30696/09), judgment of 21 January 2011 and Joined Cases C-411/10 and C-493/10 *NS*, respectively, analysed in section 5.1.1 above.

²⁷¹ See Joined Cases C-404/15 *Aranyosi* and C-659/15 *Robert Căldăraru*, EU:2016:198.

European Arrest Warrant is evident in the *LM* ruling.²⁷² In this case, an Irish Court enquired as to whether it should give effect to a European Arrest Warrant issued by Poland, given that the Commission had issued the reasoned proposal to start an Article 7(1) TEU procedure (discussed also below) for breach of the values enshrined in Article 2 TEU and, in particular, for breach of the rule of law in relation to the independence of the judiciary.

The claimant in the main proceeding argued that to give effect to the European Arrest Warrant would entail a breach of Article 47 Charter since he would not have access to an impartial tribunal (based on the Commission's reasoned proposal). The Court of Justice acknowledged that the judicial authority tasked with executing the European Arrest Warrant could refuse to do so where the right to a fair trial under Article 47 Charter would be breached because of the lack of an independent tribunal. However, the Court also found that a general and systemic risk is not enough to refuse surrender – rather, the executing authority must assess whether there is a 'real risk' that the right to a fair trial of *the* person to be surrendered would be compromised in practice.²⁷³ Hence, not even demonstrable and demonstrated systemic deficiencies in judicial protection are enough to overrule the basic principle of mutual trust, so that the good functioning of the European Arrest Warrant appears to take precedence over the need to react to systemic rule of law infringements by one of the Member States.

Post-Lisbon, then, we have two problematic developments from a fundamental rights perspective, both stemming from the Court of Justice's interpretation of the need to protect the autonomy of EU law. First, there is no realistic chance of the EU acceding to the ECHR, depriving individuals affected by EU rules from the residual protection which would be available in the national context. Second, the need to protect the functioning of (problematic) EU rules takes precedence over fundamental rights concerns and the bar is set very high, much higher than it would be in other contexts, to claim fundamental rights protection.

5.3 The autonomy of EU law and national fundamental rights: the risk of lowering domestic constitutional standards and the 'constructive dialogue' between courts

As mentioned above, one of the effects of the codification of fundamental rights in the Charter, and of the explicit recognition of the Charter as a source of EU law, has been to make national courts much more aware of Charter rights, hence increasing dramatically the preliminary references in this field. We also saw that the application of the Charter is not a neutral act: It might increase the

²⁷² Case C-216/18 PPU *LM*, EU:C:2018:586.

²⁷³ This is all the more surprising since the Court, in a proceeding brought by the Commission, found that the judicial reforms in Poland which undermined the independence of the judiciary had breached its Treaty obligations under Art 19 TEU, i.e., the duty for Member States to ensure effective remedies; see Case C-619/18 *Commission v Poland*, EU:C:2019:531.

effectiveness of fundamental rights protection, but it also might result in the exclusion of the application of domestic fundamental rights. This might be fine where there is a clear gain to the individual so that her rights are better protected at the EU level; it might be less fine when the protection afforded by EU law is less than that provided for at the national level or when there is a conflict of individual rights such that enhanced protection for one individual necessarily translates in reduced protection for the counterparty.

The complex relationship between national and EU fundamental rights has always been an issue, and this is reflected in the Charter itself: Article 52 provides that rights contained in the Charter that result from the common constitutional traditions must be interpreted in ‘harmony’ with these traditions; and Article 53 provides that nothing in the Charter should be construed as affecting rights guaranteed, *in their respective field of application*, also by national constitutional law. This provision was interpreted by some as guaranteeing that the highest standard of fundamental rights protection would always apply, whether that would be the domestic or the European one. Yet, when assessing the compatibility of EU law with fundamental rights that cannot be it, since we would otherwise have 28 different standards applying to the same EU rule. This was confirmed by the Court in *Melloni*.²⁷⁴ another case relating to the European Arrest Warrant. In principle, the *Melloni* case should not be controversial since it restates a constitutional proposition, the supremacy of EU law, that has remained constant throughout the years. Nonetheless, the case unveiled issues relating to differing standards in fundamental rights protection between EU and its Member States that become very problematic in the field of criminal law (and immigration) when the effect of EU law is to lower the protection available to individuals.

It is in this context that we can see a clash or a dialogue, depending on the perspective, between the European Court of Justice, interested in protecting the autonomy and effectiveness of EU law, and national courts that are unwilling to see fundamental rights guarantees significantly weakened, especially given the fact that, since the EU is not party to the ECHR, there is no ‘independent’ adjudicator. Take, for instance, the case of *Aranyosi and Căldăraru*.²⁷⁵ This case related to the execution of a European Arrest Warrant to a Member State where there was a risk of fundamental rights violation (due to conditions in detention). Before the Court of Justice could answer the question referred by the national court, however, the German constitutional court delivered a warning: It stated that national authorities executing European Arrest Warrants should ensure that

²⁷⁴ Case C-399/11 *Melloni v Ministerio Fiscal*, EU:C:2013:107, noted in N de Boer (2013) 50 *Common Market Law Review* 1083.

²⁷⁵ Joined Cases C-404/15 *Aranyosi* and C-659/15 *Robert Căldăraru*, EU:2016:198.

the principle of individual guilt would be respected, thus departing, in theory, from *Melloni*.²⁷⁶

For this reason, when deciding *Aranyosi and Căldăraru*, the Court of Justice had to compromise on its own absolute request that national courts do not concern themselves with fundamental rights standards in other Member States. It did so in very stringent terms, limiting the duty of the national court to an assessment as to whether there are substantive grounds to conclude that the surrendered person would face a real risk of inhuman and degrading treatment. This case law opened the way to a more realistic assessment of fundamental rights protection in the Member States.²⁷⁷ It also highlights again the structural problem mentioned above – on the one hand, EU competences have been increased to allow action in fundamental rights sensitive areas; on the other hand, there is no competence at EU level to ensure that Member States comply with even minimum standards of fundamental rights protection. This fact creates a real tension between national courts, which see as their primary responsibility the protection of individuals, and the Court of Justice, which sees as its primary responsibility the protection of the EU legal order and has acted, sometimes for the better, sometimes for the worse, as an enabler of deeper integration.

5.4 The rule of law crisis: the failure of the Lisbon Treaty

We have looked at the Charter and at some critical aspects of fundamental rights protection in the EU. However, the problems highlighted above are comparatively easy to solve, either through a change in the case law of the Court or through legislative changes, especially in relation to immigration. More difficult is the rule of law crisis, whereby EU Member States might decide to depart from the values of democracy, rule of law and fundamental rights protection, three values inextricably intertwined, without the EU being able to do much about it.

In this respect, the Lisbon Treaty is a failure since it did not substantially amend Article 7 TEU, a provision which has always been considered rather symbolic. As a result, the EU finds itself unable to effectively address the authoritarian turn in Hungary and Poland that might also spread to other countries.

Here it is perhaps useful to recall both the history and the functioning of Article 7 TEU. As is well known, the EU does not have a specific competence in

²⁷⁶ Order of 15 December 2015, 2BvR 2535/14 (<https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2016/bvg16-004.html>), the Constitutional Court then found that, in the case at issue, the review pursuant to national law was not necessary since the execution of the European Arrest Warrant was already limited under EU law.

²⁷⁷ See, e.g., Case C-163/17, *Jawo*, EU:C:2019:218 and Joined Cases C297/17, C318/17, C319/17 and C438/17, *Ibrahim et al.*, EU:C:2019:219.

fundamental rights protection and is not a fundamental rights organisation.²⁷⁸ This means that the Commission does not have enforcement powers (i.e., the power to bring a State in front of the Court of Justice) on the sole grounds that the Member State does not comply with fundamental rights. After all, the Charter applies only when the national authorities implement EU law; when national authorities are exercising their own prerogatives, the Charter has no place, and it is for the national courts and the European Court of Human Rights to act as guarantors of the fundamental values that should be the minimum common denominator across the national polities of the European Union.

When preparing for enlargement to the States of Central and Eastern Europe, there was a fear that those very recent democracies might not uphold the EU values to the desired standards. This led to two developments: first of all, the European Council in its Copenhagen conclusions decided that respect for these values was a precondition for accession.²⁷⁹ Secondly, in the Amsterdam Treaty and later the Nice Treaty, the EU equipped itself with a sanctioning mechanism against Member States that violate these values. Copenhagen criteria and Article 7 TEU should have then guaranteed that EU values would not be compromised.

This proved to be an optimistic assumption: Article 7 TEU provides a declaratory and a sanctioning mechanism. Article 7(1) TEU provides the power for the Council, acting with a four-fifths majority (22 members), to declare that there is ‘a clear risk of a serious breach’ of the values enshrined in Article 2 TEU; that is, democracy, rule of law and fundamental rights in a given Member State. Prior to the declaration, the Council can engage in a sort of enhanced dialogue with the relevant Member State and address recommendations to it. Sanctions cannot be imposed, however, unless there is a finding that there is a ‘serious and persistent’ breach of the values enshrined in Article 2 TEU. In this case, the decision has to be taken unanimously (without, of course, the vote of the Member State in question) by the European Council (i.e., at the highest political level).

The problem with Article 7 TEU is that it is eminently political, making it very difficult to reach the high majority in Council (even the lower 4/5 threshold required by Article 7(1) TEU), as demonstrated by the situation vis-à-vis Poland and Hungary. Both countries have introduced reforms that compromise the rule of law in their territory, especially by significantly weakening the independence of

²⁷⁸ See also Opinion 2/94 where the Court clarified that in order to accede to the ECHR, specific competence would have to be provided in the Treaty; said competence was then provided in Article 6(2) TEU by the Lisbon Treaty, but accession has stalled following Opinion 2/13, which declared the draft accession Treaty between the Council of European and the EU incompatible with the Treaties.

²⁷⁹ Copenhagen European Council Conclusions, 21–22 June 1993 (<https://www.consilium.europa.eu/media/21225/72921.pdf>), ‘Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union’.

the judiciary, thereby also undermining the right to effective judicial protection guaranteed by Article 47 of the Charter.²⁸⁰ In relation to both states, Article 7(1) TEU has been triggered, by the Commission in the case of Poland and by the European Parliament in the case of Hungary.²⁸¹ But because of the supermajority required in Council, it is very unlikely that the procedure will yield any results, at least for the foreseeable future. Even worse, Article 7 TEU can be seen as a tool for contagion: It takes only two Member States acting with impunity to assure other States that their actions will similarly be unsanctioned, since culprit Member States will never vote against one another.

The fact that Article 7 TEU is an ineffective mechanism to protect democratic values, fundamental rights and rule of law in the EU has led the Commission to find alternative avenues to sanction reforms introduced by the Polish and Hungarian Governments. For instance, the Commission brought successful cases by relying on the age discrimination directive to address the forced retirement of judges, and on Article 19 TEU on effective national remedies to address the issue of independence of the judiciary in Poland.²⁸² Furthermore, the Commission has also proposed that the reception of EU funds should be made conditional upon the respect of the rule of law.²⁸³ This proposal, if adopted, would have a real impact on both Hungary and Poland since those countries are active recipients of EU funding.

Be that as it may, the situation remains unsatisfactory because this piecemeal approach does not really address the systemic issues that threaten democracy within the European Union. The Treaty of Lisbon was indeed a missed opportunity, since it did not provide an effective mechanism to prevent Member States from breaching the core values enshrined in Article 2 TEU. In this regard, the Treaty of Lisbon represents a failure in foresight and imagination. It should also be remembered that the EU finds itself between a rock and a hard place insofar as enforcement of its key values is concerned: If it were to provide for suspension or expulsion, it would imply that the EU is a mere international

²⁸⁰ In relation to Poland, see Case C-619/18, *Commission v Poland* (Independence of the Judiciary), EU:C:2019:531.

²⁸¹ European Commission, Reasoned proposal in accordance with Article 7(1) of the Treaty on the European Union regarding the Rule of Law in Poland, COM(2017)835 final, 20 December 2017; European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL)), P8_TA(2018)0340.

²⁸² Case C-619/18, *Commission v Poland*; Case C-286/12 *Commission v Hungary* (compulsory retirement for judges), EU:C:2012:687; Case C-235/17 *Commission v Hungary* (right to property), EU:C:2019:432; Case C-66/18 *Commission v Hungary*, pending, where the Commission is relying on GATT provisions to challenge the legislation that de facto obliged the Central European University to move from Budapest to Austria.

²⁸³ Commission Proposal for a Regulation of the European Parliament and the Council on the protection of the Union's budget in case of generalized deficiencies as regards the rule of law in the Member States, COM(2018)324.

organisation, membership of which can be terminated if the contracting party does not respect the rules of the game. If, on the other hand, the EU were to provide for enforcement of fundamental rights standards in fields not regulated by EU law, then it would radically change its nature. If infringements of fundamental rights became a matter of EU law, then there would be no scope for identifying areas untouched by EU law. This would mean taking a big leap towards becoming a federal entity, rather than a system characterised by conferred competences.

5.5 Concluding remarks

It might be true that the Lisbon Treaty put fundamental rights at its heart, and it cannot be denied that the reforms it introduced, both in expanding the jurisdiction of the Court and in constitutionalising the Charter, have been crucial in creating a more mature constitutional system for the EU. And yet, 10 years on, some of the promises inherent in the fundamental rights focus of the Treaty of Lisbon have failed to deliver. In particular:

- It is not always clear when and how the Charter applies to domestic rules;
- In some instances, the Court has privileged the interest in having a EU framework over the imperative of protecting fundamental rights, with the consequent lowering of protection standards, especially in the fields of asylum and criminal law;
- Although the Treaty of Lisbon provided for the competence to accede to the ECHR, this has not been possible because of the opposition of the Court of Justice of the European Union to having a competing fundamental rights court;
- The Treaty of Lisbon has not provided an effective mechanism to sanction systemic threats/breaches of the principle of democracy, rule of law and fundamental rights.

As mentioned above, some of these problems will solve themselves, either by means of interpretation of the Court or by legislative action. However, until the crisis is over, the problem of enforcement of the EU founding values against recalcitrant Member States will be addressed only with a piecemeal approach. A revision of Article 7 to provide a more effective mechanism to protect EU values is impossible as long as some of the Member States are in breach of these very same values. After all, turkeys tend not to vote for Christmas.

Svenska sammanfattningar

Lissabonfördraget trädde ikraft för ett decennium sedan. Det är nu dags för en första utvärdering. Har fördraget inneburit en framgång för EU-samarbetet? Har det varit ett effektivt redskap för att möta de politiska behoven och utmaningarna? Vad fungerar och vad fungerar mindre väl?

I den här antologin analyserar fyra forskare de institutionella och konstitutionella förändringarna sedan Lissabonfördraget trädde ikraft. Fokus ligger på demokrati och effektivitet, grundläggande rättigheter och EU som global aktör. Fördraget analyseras även i ljuset av de kriser som har präglat unionen under det senaste decenniet: den ekonomiska och finansiella krisen, migrationskrisen, krisen om rättsstaten och brexit.

Det bör påminnas om att EU i mångt och mycket är ett rättsligt samarbete. Det betyder bland annat att EU endast har tilldelade befogenheter; det är medlemsstaterna som tilldelar EU befogenheter genom fördrag. Lissabonfördraget styr alltså vad EU får göra och det är därför av yttersta vikt att det fungerar väl.

Luuk van Middelaar: Lissabonfördraget, tio år av kriser och EU:s nya politiska verkställande makt

Lissabonfördraget prövades redan från första stund. Alltsedan fördraget trädde i kraft har Europeiska unionen nämligen drabbats av flera kriser, däribland statskuldskrisen, geopolitiska spänningar med Ryssland i fråga om Ukraina, flyktingkrisen och den brittiska folkomröstning som utmynnade i ett ja för utträde ur EU. Hur har Lissabonfördraget klarat stormarna? Behöver unionen ett nytt fördrag inom en snar framtid? Det här bidraget är indelat i fyra delar. I den första undersöks hur Lissabonfördragets upphovsmän hanterade frågan om den verkställande makten. Därefter granskas de aktörer som huvudsakligen agerade i kriserna, med fokus på Europeiska rådet och dess ordförande, Europeiska kommissionen och dess ordförande samt på institutioner och organ inom områdena utrikesfrågor och monetära frågor. I en tredje del framhålls de informella vägar för krishantering som har vuxit fram efter det att Lissabonfördraget trädde i kraft, men även några av de formella fördragsändringar som har antagits eller är föremål för diskussion. I den sista delen dras slutsatsen att fördraget är fullgott med tanke på EU:s uppgift. Förutsatt att alla aktörer fullgör sina roller på rätt sätt har EU en välfungerande dubbel verkställande makt i form av Europeiska rådet och Europeiska kommissionen. Fördraget erbjuder tillräckligt med flexibilitet för att unionen ska kunna utvecklas vidare, samtidigt som medlemsstaterna kan gå utanför fördragets ramar när det är nödvändigt. Men om EU ska kunna hantera de mest akuta frågorna – allmänhetens misstro och geopolitiska hot från Washington, Beijing och Moskva – krävs något annat, nämligen ledarskap och politisk vilja.

R. Daniel Kelemen: Lissabonfördragets inverkan på demokrati och effektivitet

Löftet med Lissabonfördraget var att göra EU mer demokratiskt och mer effektivt. Detta löfte har i allt väsentligt inte infriats. Att Lissabonfördraget blev ett misslyckande beror på att det baserades på en felaktig bedömning av de utmaningar som EU stod inför i fråga om demokrati och effektivitet. Fördraget medförde reformer som utformades med sikte på överdrivna eller obefintliga problem, medan det saknade reformer som inriktades på de faktiska utmaningarna. Lissabonfördraget fokuserade vidare för mycket på det som kallas det demokratiska underskottet på EU-nivå, samtidigt som man förbisåg EU:s sårbarhet för demokratiskt underskott bland medlemsstaterna. De reformer som syftade till att öka öppenheten och effektiviteten räckte inte för att man skulle kunna ta itu med den största källan till bristen på insyn och ineffektivitet i EU – Europeiska rådet. Tvärtom upphöjde fördraget Europeiska rådets roll på ett sätt som har undergrävt såväl demokratin som effektiviteten. Slutligen fokuserade Lissabonfördragets upphovsmän på lagstiftningsprocessen och bortsåg till stor del från de växande utmaningarna med att genomföra EU-lagstiftningen och se till att den efterlevs. Ingenting kan vara mer ineffektivt i en demokrati än att anta lagar för att sedan inte bry sig om dem. Att man misslyckats med att stärka EU:s förmåga att trygga efterlevnaden av unionens lagar har under det senaste decenniet lett till en försvagning av rättsstaten inom EU.

Anne Thies: Lissabonfördraget och värden, principer och mål i EU:s yttre förbindelser

Sedan Lissabonfördraget trädde i kraft har den rättsliga ramen för EU:s yttre åtgärder förtydligats ytterligare. Detta har stärkt EU som global aktör, åtminstone ur ett rättsligt perspektiv. EU har utrustats med ökade externa befogenheter, fler aktörer och en ambitiös dagordning som definieras av EU:s engagemang för värden, principer och mål i ett internationellt perspektiv. EU-domstolen har, på begäran av medlemsstaterna och EU-institutionerna, tolkat de nya fördragsbestämmelserna i tvister och yttrandeförfaranden. I sina tolkningar har domstolen tillämpat strukturella principer med omsorg om institutionell balans, demokrati och skydd av grundläggande rättigheter. Domstolens rättspraxis har således inneburit ytterligare ett steg i konstitutionaliseringen av EU:s lagstiftning om yttre förbindelser. EU-domstolen har också bekräftat sin egen behörighet i frågor som rör EU:s gemensamma utrikes- och säkerhetspolitik (GUSP), vilket har fört den närmare andra områden inom EU:s befogenheter, även om utrikes- och säkerhetspolitiken fortfarande omfattas av särskilda förfaranden och i princip begränsad rättslig prövning. EU:s arbete med internationella fördrag och engagemang för internationellt samarbete har gjort det allt tydligare att kommissionen, rådet och parlamentet är beredda att vägledas av EU:s värden, principer och mål i enlighet med Lissabonfördraget. Men om EU ska kunna förverkliga sin potential som en viktig aktör för god global styrning – och för att EU:s regelbaserade ordning ska komma till sin rätt – krävs det att medlemsstaterna visar större vilja att övervinna oenigheter och göra gemensamma insatser, både inom och utanför institutionerna.

Eleanor Spaventa: Grundläggande rättigheter – utmaningar och framgångar efter ett decennium med Lissabonfördraget

Lissabonfördraget har medfört ett antal viktiga förändringar när det gäller skyddet av de grundläggande rättigheterna. Det handlar i synnerhet om att EU-domstolens behörighet utvidgades på det straffrättsliga området, att EU:s stadga om de grundläggande rättigheterna gjordes rättsligt bindande och att EU ålades att ansluta sig till Europeiska konventionen om mänskliga rättigheter (Europakonventionen eller EKMR). Flera problem kvarstår dock. Inom vissa EU-rättsliga områden, såsom migration och Europeiska arresteringsordern, har EU-domstolen varit blygsam i sina tolkningar av bestämmelserna om de grundläggande rättigheterna, eftersom den har prioriterat EU-rättens effektiva genomslag framför ett meningsfullt rättighetskydd. Domstolen har också blockerat EU:s anslutning till Europakonventionen. Dessa brister skulle enkelt kunna hanteras genom ändringar i lagstiftning eller ändrade tolkningar. En viktigare fråga är den senaste tidens utveckling i Ungern och Polen, som visar hur svårt det är för EU att reagera på hot mot skydd av grundläggande rättigheter, rättsstatsprincipen och demokrati i medlemsstaterna. I det avseendet är Lissabonfördraget ett förlorat tillfälle eftersom upphovsmännen misslyckades – om inte annat så av brist på fantasi – med att se till att EU kan ta itu med och reagera när medlemsstaterna bryter mot unionens grundläggande värden.

”Following a rather lengthy negotiation and ratification process, the Lisbon Treaty entered into force in December 2009. A decade characterised by several serious crises has passed since. It is now time to look back and evaluate the Treaty, with a view to the current state of affairs in the European Union. Has the Treaty been a success for the European Union? Has it been an effective tool to meet the political needs and challenges?”



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