Lisbon Treaty - the Reform Treaty of the European Union

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Introduction

The Lisbon Treaty, which has also been referred to as the Reform Treaty of the European Union, was first ratified by Hungary on 17 December 2007, and only finally ratified by the Czech Republic on 13 November 2009, following a second referendum in Ireland as well as constitutional court challenges in the Czech Republic, Germany and Poland. According to article 6 of the Lisbon Treaty, it will enter into force on 1 December 2009.

Treaty basis

The European Communities have now existed since 1951 on the basis of the original treaties, which during the years have been amended and supplemented.

Especially, the Maastricht Treaty in 1991 introduced a superstructure in the format of the European Union, which in addition to the Communities, with notably the Internal Market, also included cooperation on Home and Justice matters as well as Foreign and Security policies.

The new areas of cooperation were characterised by being established on an intergovernmental basis, which implied that contrary to the situation within the Communities, it was not possible to adopt supranational rules with direct effect for the legal systems of the Member States. However, this did not remove from the new areas the basic character of being cooperation with binding legal obligations.

With the Amsterdam Treaty in 1997, the civil law part of Home and Justice matters were transferred to the Communities, whereas the criminal law part remained subject to the intergovernmental procedure. At the same time, the European Court of Justice was granted jurisdiction over the entire field of Home and Justice matters, albeit with a limited competence. The cooperation on Foreign and Security policies remained outside the scope of Court jurisdiction.

This treaty basis presents several problems, as the same treaties regulate at several levels, reaching from constitutional issues to detailed market regulations and complicated procedural provisions. One of the possible explanations for the quite common objections to the EU has been that the individual citizen was not in any reasonable way able to read and understand the treaties, and especially not able to overview the implications of the treaties for the life of the individual citizen.

Referenda

This problem was clearly visible in the case of the Maastricht Treaty, which was presented mainly as a collection of amendments and supplements to the existing treaties, which could be read only with great difficulty by any reader that did not have a thorough knowledge of the existing treaties. Apart from this technical problem, there was a real political issue as to how much the European citizens wished to have an expansion from the Communities to the Union. However, it seems clear that choice of a complicated amendment format did not support efforts to have a reasonable discussion about the political issue.

In Denmark, following the first rejection by referendum i 1992, the solution was the adoption by a majority of the parties represented in the Parliament of national compromise. This implied that Denmark would in advance abstain from participating in the use of the expansion clauses that were introduced by the Maastricht Treaty. The so called four Danish reservations included the Euro, the transfer of Home and Justice competence to the Communities, the development of a Defence aspect of Foreign and Security policies, and also the understanding of the EU citizenship.

These reservations were approved by the other Member States in the so

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called Edinburgh Agreement, which became the foundation for the second and successful referendum in 1993, and which subsequently was integrated into protocols of the Amsterdam Treaty.

Together with the expected enlargement of the EU to comprise the Central and East European countries, the wish to establish a more transparent treaty basis led to the convening of a convent, with participation from national Parliaments and EU institutions, which worked on a new draft treaty that was adopted in 2004. The ambition was to establish a brief and clear text that could gain a broad acceptance from the European citizens, whilst the technical rules were to be relocated in appendices.

However, the drafting encountered two serious problems. The final text became substantially longer than the existing treaties. In addition, the level of ambition rose so as to produce a Constitutional Treaty, which although it has little real constitutional content, managed to touch upon on number of issues in a way that offended the feeling of national sovereignty held by many people.

Furthermore, the debate about the Constitutional Treaty was in many cases diverted into other issues, and as an example the debate in France was to a wide extent concerned with the issue of the possible negative impact of the Internal Market on French national interests, although the Constitutional Treaty did not in any way modify the rules of the Internal Market.

The referenda in France and the Netherlands went against the Constitutional Treaty, as it had previously happened in Denmark with the Maastricht Treaty and in Ireland with the Nice Treaty. However, different from these previous occasions, there was no initiative towards new referenda in France or the Netherlands. Instead, the ratification stopped also in other countries, including the United Kingdom and Denmark, and it became clear that there was no future for the Constitutional Treaty.

This development caused irritation amongst the Member States that had already ratified the Constitutional Treaty, and it thus also became clear that it would be difficult to continue the Union based only on the existing treaties. The solution became the initiation of a reflection period that was to be followed by a new initiative.

New Initiative

The new initiative developed during the summer of 2007 to become the draft Reform Treaty, which after a number of adjustments was adopted on 18 October 2007.

It was subsequently signed on 13 December 2007 and is now referred to as the Lisbon Treaty. It was for each Member State to decidewhether the new treaty should be submitted to a referendum, and in Denmark, under article 20 of the Constitution, this depended on whether any additional competence is transferred from Danish authorities to the Union.

In the same manner as the Maastricht Treaty, the Lisbon Treaty has been drafted only as an amendment treaty, and it is therefore difficult to read on its own. However, several initiatives on the internet supply consolidated and comparative texts, including now also the Official Journal of the European Union.

As a point of departure, provisions on institutional issues within the EU therefore will not require a referendum under Danish constitutional law, whereas an extension of the legislative competence of the EU will do so. Formally, a move from unanimity to majority voting will not entail a transfer of competence, but many will perceive it this way, as majority voting will leave less room for Denmark to exercise control of the EU legislation.

Based on advice from the Danish Ministry of Justice, the Danish government found that the Lisbon treaty did not entail any transfer of competence to the EU for Denmark, and accordingly that a referendum would not be required.

In Ireland, a first referendum was unsuccessful in 2008, but a second referendum was successful in 2009, as was previously the case with the Nice Treaty.

Treaties

A main point of the new treaty is that the concept of the Communities will be entirely replaced by the Union, and that the existing EC Treaty becomes the FEU Treaty (the Treaty on the Functioning of the European Union). The entire remaining section on Home and Justice matters is transferred from the EU to the FEU Treaty, whilst the main provisions on the policies, principles and institutions of the Union are transferred from the FEU to the EU Treaty.

In this manner the desired separation is achieved, between a short treaty that in main points sets out the Union, and a technical treaty that describes the cooperation in more detail. However, the cooperation on Foreign and Security policies is kept in the EU Treaty, so as to underline its special intergovernmental character.

Thus, it is still not possible to adopt legislation as such within the area of Foreign and Security policies. On the other hand, the possibilities of defence cooperation are strengthened for the Member States that may wish to so engage. In this relation, a special agency is established for defence capabilities development, research, acquisition and armaments (European Defence Agency), in order to support the activities of the Member States concerned.

The EU is now explicitly granted legal personality, in the same manner as previously was the case for the Communities. In the general debate, much emphasis has been placed on this point. However, it seems clear that the

EU already implicitly had legal personality according to international public law. In order to cut short any negative debate on this issue, the Lisbon Treaty explicitly stipulates that the legal personality does not entail any increased competence for the EU.

For the cooperation on Home and Justice matters, a transfer takes place to the supranational cooperation so that legislation with direct effect may now be adopted within the entire field of cooperation. At the same time, the National Parliaments are given an oversight competence in this field, which is to be further regulated through the later adoption of a legislative act. The entire field is also subjected to the ordinary jurisdiction of the European Court, although a reservation is upheld for actions undertaken by the police forces of the Member States. Likewise, a five year transition period will apply for the transfer of competence in the field of penal law.

Institutions

For the European Court, it is now formalised that it constitutes the Court of the entire Union, and it will be referred to as the Court of the EU, whilst the Court of First Instance will be change name to the General Court. At the same time, a special panel will be established to propose candidates to the Council, as was already the case at the establishment of the Administrative Court in 2005. The number of judges is unchanged, but it is foreseen that the number of Advocates General will rise from 8 to 11. In this case, a declaration to the treaty stipulates that Poland shall have a permanent Advocate General.

Presently, Member States may be subjected to a fine in case they fail to respect a ruling from the European Court, in which it is established that they have violated EU law. The Lisbon Treaty expands this competence as far as lacking implementation of EU law is concerned. In such cases, the Commission may already in main case demand that a fine be issued by the Court.

For the Commission, the present working name will be formalised so that it will be referred to as the European Commission, but at the same time an official abbreviation is introduced so that the treaty text will refer only to the Commission. From 2014, the number of Commissioners will be reduced to 2/3 of the number of Member States, and at the same time a system will be introduced for rotation amongst the Member States of the right to have a Commissioner.

It would appear to be a limited advantage to reduce the number of Commissioners, as most Member States have strong feelings about representation in the Commission, and a fear that the larger Member States will achieve overrepresentation. To counter this fear, the Lisbon Treaty is very explicit in stipulating that absolute equal treatment shall apply in the rotational system.

The European Parliament has for a long time wished to have the right to approve the members of the Commission individually. However, it will still only be the President of the Commission who will need individual approval, and only the entire Commission that may be forced to resign by the Parliament. In addition, a new practice is codified, whereby the President may force an individual member of the Commission to resign.

The European Council, consisting of the heads of state and government, which decides the EU policy without being able to adopt legislation, will in the future have a permanent President for a 2½ year period. The President will represent the Union externally and may to a certain extent be regarded as a common European head of state, but will have very limited competences.

In the normal Council, referred to as the Council of Ministers, which does adopt legislation, the presidency will continue to rotate amongst the Member States on a 6 month basis, but in the future so that three Member States will cooperate on an 18 month period. This will give continuity to the presidency and may lighten the presidency burden for smaller countries.

However, the Council for external affairs will have a permanent presidency in the form of the High Representative for Foreign Affairs and Security Policy. This person will be appointed separately, as will the new President of the European Council. However, the High Representative is an existing function, for which the competences are expanded, also by having charge within the Commission of all external affairs. In addition, a special secretariat for the external representation will be created so as to support the High Representative.

For the European Parliament a maximum number of members is set at 750. A single Member state will at most have 96 and at least 6 members. During a final meeting, Italy secured an extra member of the Parliament, as the President will not be counted in the membership, which will thus effectively be 751. At the coming election, Denmark is expected to have 13 seats, but the final distribution of seats between the Member States has not yet been determined.

Procedures

In the existing treaties a distinction was made between obligatory and non-obligatory expenditures, but this distinction is now discontinued. In the future, the Parliament will have final say over the entire budget, and not only as presently over the non-obligatory expenditures. At the same time, the procedure for adopting the budget is simplified, so as to follow the likewise simplified procedure for co-legislation by the Council and Parliament.

For legislation, the present terminology is maintained with regulations and directives. However, a new classification is introduced comprising respectively legislative and non-legislative procedures and acts.

The purpose is to allow for general reference to activities, as for example a new

principle of public access to Council meetings is introduced, but only in relation to legislative procedures.

The terminology is not very well chosen, as non-legislative acts also include acts of implementation and delegated acts, which for example the Commission may adopt on the basis of a delegation from the Council and Parliament. In spite of the new terminology, a non-legislative act may thus constitute a legislative act in a traditional sense.

The main procedure will now be, as it has in fact been since the Amsterdam Treaty, co-legislation by the Council and Parliament, using qualified majority in the Council. This is now referred to as the ordinary legislative procedure, and in addition there will be special legislative procedures, which as an example may only include a hearing of the Parliament or use of unanimity in the Council.

However, the number of areas subject to the use of qualified majority in the Council are expanded, but only a smaller portion relate to areas of substance, whilst the other concern more technical issues. At the same time, the definition of qualified majority will change, but only from 2014 where a transition period is introduced until 2017.

This entails abolition of the weights that are presently assigned to the individual Member States, and which have been the subject of much discussion, both before and after the Nice Treaty. Instead, qualified majority will be constituted by 55% of the Member States that must represent 65% of the European population. A blocking minority must include at least four Member States.

In this connection, it is important to consider the so called Luxembourg compromise, which allows an individual Member State to lay down a veto if it felt that vital national interests were concerned. This right of veto has never been codified, nor repudiated, but continues to exist as an informal agreement amongst the participating countries who may thus constitute a blocking minority.

At a more formal level, the European Council meeting at Ioaninna reached an agreement under which the Council should continue the negotiation concerning a proposal, if a blocking minority was almost established. This practice is continued in the Lisbon Treaty, but only at the level of a declaration, which foresees the adoption in 2014 of a legislative act to regulate the mechanism. It is foreseen that the threshold for continued negotiation will be 75% of the Member States necessary for a blocking minority. In 2017 this is to be reduced to 55%.

Other limiting mechanisms are introduced in special areas. This includes consideration of the National Parliaments, who will have the possibility of blocking proposed legislation, which is found to violate the principle of proportionality. However, this requires that a third of the National Parliaments submit a statement on this issue within the deadline of 8 weeks set in the treaty. More generally, half the National Parliaments may require the Commission to reconsider a proposal for new legislation.

Future amendments of the treaties will in general require the convening of a convent, as was done for the Constitutional Treaty. However, it will also be possible to proceed without a convent. Furthermore, certain parts of the treaties may be amended by the Council, but this applies only to provisions that do not entail an extension of EU competence, and will in any case require national ratification, so that provisions such as Article 20 of the Danish constitution may find application.

In a more simplified manner, provisions have been inserted that allow the transition in certain areas from unanimity to qualified majority or from special to ordinary legislative procedure. This will not be subject to national ratification, but each of the National Parliaments will have a right of veto.

Finally, the Lisbon Treaty takes a very clear stand on the division of competences between the EU and the Member States, in distinguishing between exclusive competences and shared competences, as well as supporting competences, where the EU may only adopt measures that cannot replace national law. The individual fields of competence are listed for each category and correspond to the distribution that was previously implicit in the treaties as well as regulated by the jurisprudence of the European Court.

Citizens

For the individual citizen, legal protection of fundamental rights is enhanced through the integration of the European Charter in the treaties. In this connection, it is explicitly stipulated that the Charter, comprising a restatement of rights from international conventions and national constitutions, does not constitute any extension of EU competence. At the same time, the EU is obliged to seek membership in the European Convention on Human Rights.

At a more formal level, a new possibility is opened for a citizens' initiative, as 1 million citizens out of the European total of 488 million may request that the Commission submit a proposal for new legislation. However, this only applies if the citizens represent a substantial number of Member States, and the Commission is not bound by the request. The practical value of the citizens' initiative would appear to be limited.

Conclusion

For Denmark, the new Lisbon treaty does not entail any limitation of the reservations approved by the Amsterdam Treaty. To the contrary, Denmark has been granted the right of sector-wise opt-in, in the same manner as Ireland and United Kingdom, whereas previously Demark could only in

general decide to opt in. However, it will still require the use of Article 20 in the Danish constitution, as set out in the National Compromise.

Ireland, Poland, and United Kingdom have been granted new op-outs in the Lisbon treaty, in relation to different aspects of the European Charter and the change to majority voting on criminal law matters. At the last moment before ratification, a political agreement was reached to extent the op-out for the European Charter also to the Czech Republic, but at the treaty level this op-out will be formalised only at the time of the next treaty of accession to the EU.

In general, the evaluation of the Lisbon Treaty should be very positive. The existing system for EU cooperation has been trimmed and made more effective, without any setting aside of national interests, and from a presentational point of view, the consolidated text will be much easier to approach. However, there are still a number of areas that have not been codified. This includes for example the issues of constitutional supremacy, direct effect, and for the internal market, the principle of mutual recognition.

A reading of the treaties therefore continues to need to be supplemented by a thorough knowledge of principles of EU law.

Footnotes:

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