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The Lisbon Treaty: A Preliminary Study

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Summary

In 2007 the Heads of State and Government of the 27 Member States of the EU signed a Treaty by virtue of which the European Union Treaty (EUT) and the constitutional Treaty of the European Community Treaty (ECT) were modified, opening a new process of ratification which, if successful, should lead in 2009 to a new reformed EUT and to a Draft Treaty of the European Union (DTEU) to replace the present ECT. This implies the possible end to one of the gravest crises ever suffered in the process of European integration.

I Introduction

On 13 December 2007 the Heads of State and Government of the 27 current Member States of the EU signed, in the Monastery of the Jeronimos of Portugal's capital city, a Treaty by virtue of which the European Union Treaty (EUT) and the constitutional Treaty of the European Community Treaty (ECT) were modified. Thus, a new process of ratification was opened, which, in the case of concluding without unforeseen surprises, should lead in 2009 to a new reformed EUT and to a *Draft Treaty of the European Union* (DTEU) to replace the present ECT. The Treaty was the fruit of a brief Intergovernmental Conference (IGC'07) which essentially was limited to giving the legal form of a reform treaty to the detailed closed mandate that it had received in the previous month of June from the European Council. It meant the probable end to one of the gravest crises ever suffered in the long process of European integration.

The appraisal that this Reform Treaty merits has been, as is usually the case in any modification of constitutional treaties, quite diverse. Whereas for some it is 'the best agreement possible', for others it is simply 'tedious'. Deep down, and necessarily, any assessment will really depend on the personal position that one adopts in view of the process of integration and of the degree of integrating ambition that each aspires to achieve for the EU of the future.

Be as it may, to facilitate the task for those curious enough to venture into the difficult reading of the Lisbon Treaty, Professor Urrea Corres and the author of the present text have undertaken, at the request of the Elcano Royal Institute and from the very first presentation of the projects for treaty reform¹ to their very end² a consolidation of the resulting texts that this Institute has been publishing on its web page (www.realinstitutoelcano.org). So as to complete this task, we now put forth a final version of a non-official character –with reservations, therefore, regarding the possibility of errors or inaccuracies– to which we add this brief preliminary study to gather some initial reflections on the contents and scope of this final reform of the constitutional treaties.

To this aim, hoping to reconcile the inevitably technical and legal nature of the material with the Elcano Royal Institute's aim of making it known, we shall try to place the present reform in the general historical context of European Integration (II), in such a way that the value of the Lisbon Treaty can be adequately gauged as a way out of the EU crisis resulting from the shock waves sent by the French and Dutch referendums for ratifying the Treaty establishing a Constitution for Europe (III). After this, we will be in the position to analyse the real meaning of the return to the classic path of treaty reform –embodied in the Treaty of Lisbon– as against the failed constitutional method (IV), as well as the scope of the new EUT and FTEU; both in terms of the maintenance of the basic essence of the European Constitution (V) and in terms of the material toll paid for the sake of acceptance by all (VI). Finally, having outlined the advantages of 'not crying victory' until the new

¹ IGC 1/07 and IGC 2/07 of 23 July 2007.

² IGC 14/07 of 3 December 2007.

ratifying process now opened has been concluded (VII), we propose an initial personal assessment of the full scenario (VIII).

II. From the Schuman Declaration to the Constitutional Treaty: five decades of effective European Integration

1. From the Romantic Vision of a United Europe to Community Realities: The Difficult Challenge of Peaceful European Construction

Before zooming in on the contents of the Lisbon Treaty, it is probably not a bad idea to recall – particularly for the youngest European generations and for those who claim to value the successive reforms of the constitutional treaties from myopic ‘short-term’ or ‘maximalistic’ analyses– that the dream of a united Europe is as old as Europe itself, and that putting it into practice has not been free of tremendous difficulties. Indeed, the notion of *crisis* is practically inseparable from the notion of European integration.

In fact, the concept of Europe is quite imprecise, often alluding to what Chabod refers to as ‘a certain form of civilisation, a ‘way of being’, that distinguishes the European from the peoples of other continents’, more than the Caucasian race does, for being ‘above all a certain civil habit, a certain way of thinking and feeling differently’.³ We may recall that Ortega y Gasset believed that most of what he called ‘mental contents’, that is, opinions, wishes, presumptions or norms ‘do not come to the Frenchman from his France, nor to the Spaniard from his Spain, but rather from the common European foundation’,⁴ which obviously did not prevent Ortega –as would later emerge in article 1-8 of the European Constitution– from conceiving European unity as ‘a homogeneity that is not alien to diversity’, in which a ‘maze of European peoples’ were called to develop in a ‘common historical space’ whose destiny ‘made them at the same time progressively homogeneous and progressively diverse’.⁵

Nevertheless, the historical emergence of this notion of Europe (‘united in diversity’) has not been exactly a simple task, either in the identification of its geographical limits, or in the historical means of achieving it. In fact, the historical manifestations of this European ideal of ‘union in diversity’ have not been very promising in practice. Even so, from classical Greek times, in whose core we find the controversial etymological and mythical origin of the term *Europe* and the ‘idyllic’ image of her abduction, to the times of Napoleon, including the Roman Empire and the Holy Roman Empire, in the minds of men of power was the dream of a political construction that would integrate a geographical unit which, regardless of the diffuse borders it might have had in different ages, would make patent the deeply-rooted desire of attaining this common historic destiny.

Yet the process of European integration initiated in the early 50s in Paris had a clear difference with respect to previous attempts. For the first time, it was not based on integration by absorption or on military dominance. These were sovereign States that voluntarily gave up a substantial portion of their competences in order to attribute them to a superior entity, which would carry them autonomously and with no possibility of adducing national norms that would oppose the acts undertaken by this superior entity. It is, then, an eminently legal process that underlies current European construction. It is the reason behind the norm substituting the force of cannons and bonfires. And this, no doubt, is the greatest historical merit of the EU: having managed to live in peaceful coexistence for over half a century through a framework of progressive voluntary integration which, aside from peace, democracy and stability, has brought with it economic development and unequalled social well-being.

³ *Historia de la idea de Europa*, EDERSA, Madrid, 1992, p. 25.

⁴ *La rebelión de las masas*, Espasa Calpe, Madrid, 1986, p. 197.

⁵ ‘Meditación de Europa’, 1946, in *Obras completas*, vol. IX, p. 255-258.

Of course, a process of these dimensions does not arise by spontaneous generation. Its roots are embedded in historical conditioning factors that, in the wake of two World Wars, convinced the winning powers of the forcefulness behind the words of Phillipe Lamour ('make Europe, not war'). And in order to 'not make war' and thus turn the famous petition formulated later on in Zurich by Winston Churchill (1946) into reality ('never again a war amongst ourselves'), it was not enough to avoid, at Yalta and Potsdam, the errors of Versailles; what was needed was to decidedly undertake the task of 'building Europe'. Overcoming the Franco-German question within a united Europe was the only possible medicine for healing the open wounds, and the vaccine against future relapses, representing what was once referred to as 'amending history'. The question raised immediately thereafter was the problem of dosage. While some prescribed a shock therapy based on the *federal model* that would lead to the constitution of something resembling the 'United States of Europe', others advocated a milder and progressive treatment centred on the mere *political cooperation* of sovereign States. It was a dialectical question, federalism *versus* intergovernmental cooperation, which in the end still beats latently today and which gave birth to what is now known as *functionalistic European integration*.

2. From the Schuman Declaration to the Treaty of Nice: the fruitful history of effective and open European integration

Given this inspiration of *functionalistic European integration*, the French Minister of Foreign Affairs, taking advantage of the valuable work of Jean Monnet, launched in 1950 a concrete proposal of union based on a 'step by step' philosophy, according to which 'Europe would not be made suddenly nor in a set construction' but rather 'by concrete realisations'. And the first of these concrete realizations 'based on a *de facto* solidarity' that established 'the common bases of economic development' was the creation in 1952 of the European Coal and Steel Community (ECSC) through the Treaty of Paris. Its six member States (Germany, France, Italy, Belgium, the Netherlands and Luxemburg) affirm in the preamble of the constitutional Treaty to be 'resolved to substitute secular rivalries for a fusion of essential interests, to fuse with the institution of an economic community the first fundamentals of a broader and deeper community and to establish the bases of institutions capable of orienting a destiny hereafter shared'. Five years after this initial seed germinated for those six member States, another two international treaties were drawn up, known as the treaties of Rome, which created the European Economic Community (EEC) –aimed to achieve a common market founded on four basic liberties (freedom of circulation of persons, services, goods and capital) and escorted by common policies for agriculture, transport and competition– and the European Atomic Energy Community (EURATOM), created to set up the necessary conditions for the formation and rapid growth of the nuclear industry.

The basic characteristic of this process of integration initiated with the creation of the three European Communities is its openness. It is conceived as an *open process*. Both towards the outside, with respect to the States that might belong, and towards the inside, with regard to the degree of competences that the states voluntarily attribute to these Communities. Indeed, all the European States that fulfil some minimal requisites –more specifically, the existence of a democratic regime, guarantees of basic rights and a degree of economic development that allows to bear the economic obligations deriving from the treaties– could later join in. Thus, in 1973, after a great deal of Franco-British friction, the six members became nine with the entry of the UK, Denmark and Ireland, to become 10 after Greece joined in 1981, 12 with the entry in 1986 of Spain and Portugal, 15 in 1995 with the incorporation of Austria, Sweden and Finland, and 27 since the massive –and, for some, hasty– arrival of the countries of Eastern and Southern Europe in May 2004 (Hungary, Poland, the Czech Republic, Slovakia, Slovenia, Latvia, Lithuania, Estonia, Malta and Cyprus) and January 2007 (Rumania and Bulgaria). And the process remains open for the possible future incorporation of other European states such as Croatia, or perhaps even Turkey.

Meanwhile, as regards internal opening up, the *process of community perfectionism* has meant a progressive widening of the array of powers and competences attributed to the European Communities and an adaptation of the communities' institutional structure to ensure greater efficiency and democracy. This gave rise to a chain of constituent treaties, with the Single European Act (1986), the Maastricht Treaty (1992), the Amsterdam Treaty (1997) and the Treaty of Nice (2001), up to the present Lisbon Treaty.

After the Treaty of Nice, however, a new route was sought to provide a qualitative political leap in this process of successive perfectionism along the road to European integration, both in the means of preparing it and in the contents *per se*. The notion was to forge a European Constitution whose text would stem from a prior Convention –along the lines of that drawn up before the Charter of Fundamental Rights– although in the end, for obvious legal reasons deriving from the current EUT article 48, it had to be backed up by an intergovernmental conference and its subsequent process of ratification.

3. From the Declaration of Nice to the European Constitution: The Hurried Re-birth of Hope for a European Constitution

Indeed, the Treaty of Nice contains a Declaration (number 23) related to the future of the Union that acknowledges the advantages of 'a broader and deeper debate about the future development of the Union' that should be more inclusive than that of the traditional intergovernmental conferences, with the participation 'of all interested parties: representatives of the national parliaments and all the media that reflect public opinion, such as political, economic and university circles, representatives of civil society, etc'. In this way, using what some call the system of 'Russian dolls' and others refer to as 'the *rendez-vous* clause' –according to which the latest reform of the treaties foresees within itself the following one– already issued was the summons to a new intergovernmental conference, scheduled for 2004, where very specific matters would be addressed.⁶

And so it was that a post-Nice reform began to materialise, with qualitative differences in its drawing-up procedure and in its content, signalling the opening of a constitutional process for the subsequent treaty reform. Thus, after a Swedish presidency engaged in the preparation of studies, the Belgian presidency concluded with a European Council (15 December 2001) that agreed upon what is known as the Declaration of Laeken (Declaration on the future of the European Union). In it, six dozen questions about the future of the Union were put forth, expanding considerably on the four matters outlined in the Declaration of Nice. It also recognised explicitly that the Union is at a crossroads, at a turning point, with new challenges within it (adoption of the euro in 2002, growth towards the east and south of Europe, expectations for the European citizen...) and outside (globalised world, international terrorism...) that called for *profound reforms* of the Union in order to become more democratic, transparent and efficient.⁷ It explicitly opened "the road to a Constitution for European citizens", and to retrace this path it scheduled a Convention on the future of Europe with the aim of guaranteeing 'the broadest and most transparent preparation possible of the next Intergovernmental Conference'. In this way, the European Council of December 2001 made the decision to 'summon a Convention that would bring together the main participants in the

⁶ Specifically, the following matters are set on the agenda of the IGC'04: 'How to establish and supervise a more precise delimitation of competences between the EU and the member States, reflecting the principle of subsidiarity; the statute of the Charter of Fundamental Rights of the European Union proclaimed in Nice, in accordance with the conclusions of the European Council of Cologne; the simplification of the Treaties in order to classify them and facilitate their comprehension without modifying their meaning; the function of the national parliaments in European architecture'. The Heads of State and Government thereby acknowledged in Nice 'the need to improve and oversee the democratic legitimacy and transparency of the Union and its institutions, in order to approximate these to the citizens of the member States'.

⁷ Italics have been added.

debate on the future of the Union’, and whose specific objective was to ‘examine the essential matters that the future of the development of the Union presents, and investigate the different proposals’.

The Convention began its work on 27 February 2002, and finished on 10 July 2003. It was presided by Valéry Giscard d’Estaing, and its work was propelled by a Praesidium⁸ whose intense activity was organised in plenary sessions, in 11 work groups⁹ and in debate circles.¹⁰ Despite the non-determinate terms of the Laeken mandate (‘to examine issues’ and ‘investigate the different proposals’), the Convention finally interpreted it in the sense of offering a text titled *Treaty Project by which a Constitution for Europe is instituted*, which was presented to the President of the European Council in Rome in July 2003.

Upon the groundwork of this project, the intergovernmental conference set to work on 4 October of that same year 2003, and maintained in essence the text presented by the Convention without entering into global renegotiations, although some fairly substantial modifications that in general terms improved the text were introduced. It did, however, come across some obstacles involving institutional issues –especially those presented by Spain and Poland in regard to the configuration of the new qualified majority in the Council– that impeded agreement in December of 2003. Agreement came a year later, when the IGC’04 finished its reports on 29 October 2004 with the signing in Rome of the *Treaty by which a Constitution for Europe is established* (hereafter, Constitutional Treaty).

A process of ratification was thereby opened, in which open questions in relation with the possibility of unexpected obstacles such as those encountered with the Maastricht Treaty regarding Denmark, or the case of Ireland with the Treaty of Nice, dangled like swords of Damocles over its eventual effectiveness. It was no accident that a superfluous Declaration 30 was included to make reference to the event that not all member States should managed to achieve ratification.¹¹ After all, some members harboured suspicions of hindrances involving those States that were always on ‘the razor’s edge’.

But there is no question that the majority were convinced the Union had entered a new phase within the process of integration. With Nice, the phase of functional integration based on the Monnet method of ‘step by step’ had come to a close, and through the re-founding of the Union (art. IV-438) a capital step had been taken, dressed in the political ambition of a greater transparency, greater efficiency, and above all, greater legitimacy. In other words, a stage of ‘constitutional hope’ had begun, with a Constitutional Treaty whose contents were received, in general terms, favourably by the majority sector of the iuscommunity Doctrine, which we will not draw into discussion for the time being.¹² It would appear, at any rate, that after five decades of effective economic integration, the EU was willing to reinforce its political dimension with a transcendental leap in the Monnet policy of moving ‘step by step’. It would appear that the use of the Convention to draw up the European Constitution had lent this new constitutional process and its political aspirations a greater

⁸ The Praesidium was made up of the President and the two Vice-presidents of the Convention and by nine members representing all the governments that had held the presidency of the EU during the Convention (Spain, Denmark and Greece), two representatives of the national parliaments, two representatives of the European Parliament and two representatives of the Commission.

⁹ These work groups were: subsidiarity, charter, judicial personality, national parliaments, complementary competences, economic governance, external action, defence, simplification, freedom-security-justice and social justice.

¹⁰ On the Court of Justice, budgetary procedure and internal resources.

¹¹ Accordingly, it was specified that, if two years after the signing of the Constitutional Treaty ‘four-fifths of the member States have ratified it and one or several member States have encountered difficulties for proceeding to such ratification, the European Council *will examine the matter*’. The italics are ours.

¹² There is abundant scientific output from very diverse perspectives that dissects the contents of the Constitutional Treaty in all its formal and material aspects. See, for a thorough view, A. Mangas Martín, *La Constitución europea*, Iustel, Madrid, 2005.

legitimacy, transparency and visibility. It would appear that, with the enlargement to include 27 member States, the EU sealed a bleeding wound and reconciled the convulsive history of 20th century Europe. It would appear, in sum, that the EU was getting ready to truly face, with certain guarantees of success, the difficult challenges of globalisation which needed to be confronted if it wanted to keep its niche on the international scene, between the hegemony of the US and the emergence of Asia, as well as to try to maintain a model of economic and social well-being impossible to find beyond European borders.

However, the ratification process soon revealed that the qualitative political leap incarnated by the Constitutional treaty would never become a reality. To the contrary, the Union was about to enter a period of disorientation that could well be labelled a profound crisis, even though the ordinary institutional workings proceeded in normal fashion. And the surprise had not come precisely from those States that had engendered suspicions about their convictions when it came down to propelling the national process of ratification. The surprise had come, no less, from the very nucleus of founding States, from France and the Netherlands.

III. The Crisis of Constitutional Treaty Ratification: the stark manifestation of the different models for integration in the core of the Union

1. The Negative Referendums in France and the Netherlands: The End of Constitutional Aspirations and the Onset of a Far-reaching Crisis

So it was that the rejection of the Constitutional Treaty in respective referendums celebrated in France (29 May 2005) and the Netherlands (1 June 2005) gave rise to a state of generalised political despair in Europe that not only paralysed the ratification process but led the Constitutional Treaty, and along with it the very future development of the EU, to an unsettling ‘dead-end’ with no clear way out. What was worse, it unravelled the ‘constitutional hopes’ that the novelty of the European Convention, and the later acceptance of the constitutional text at the IGC’04, had awakened in many minds. In the view of some, what these referendums made evident was the ‘tug-of-war between democracy at the European level and democracy on a national level’.¹³

The case is that stark reality interrupted the new ‘European dream’ and placed us in the uncomfortable position of having to search for a legal outlet, and above all, a political outlet to the constitutional muddle that the French *non* and the Dutch *nee* generated; furthermore, some States froze their internal ratification processes while waiting for the scenario to be cleared up. And clearing up took its time. On the one hand, the European Council, by virtue of that useless anticipation in Declaration 30 which foresaw that the Council should ‘examine the issue’ if some member State found difficulties in ratifying, decided to open a ‘reflection period’ that would serve to seek out a satisfactory solution reminiscent of the previous cases of Denmark (Maastricht Treaty) and Ireland (Treaty of Nice). But this ‘reflection period’ –and the subsequent ‘period of reflection about that reflected upon’– did not manage to clear things up much.¹⁴ The Commission solely began coordinated actions to inform European citizens about the contents of the Constitutional Treaty and encourage debate with regard to the member States (the so-called *Plan D* of democracy, dialogue and debate). Time elapsed with no solution yet on the horizon. Quite the contrary, some member States showed signs of a heightened desire to see the Constitutional Treaty definitively

¹³ According to this position, the EU, still sticking to its iusinternationalistic origins, ‘must pass through national democracy in order to create the democratic Europe. Thus, a constitutional text negotiated at the supranational level by European political actors was paralysed by the negative referenda of two member States’; F. Aldecoa Luzarraga & M. Guinea Llorente, ‘¿Hacia dónde va la Unión Europea? La salida del laberinto constitucional ante el Consejo Europeo de junio de 2007’, *Revista General de Derecho Europeo* 2007, nr 14, www.iustel.com.

¹⁴ Revealing in this sense is the report presented by the Spanish government to the *Congreso de los Diputados* (Lower House) in February 2006 affirming that the process of debate was contributing very little; available at www.realinstitutoelcano.org.

buried rather than find a remedy that would allow France and the Netherlands to overcome their internal difficulties for ratification. But it could not be ignored that a majority of member States (18 of the 27) had already ratified it. It was therefore necessary to come upon a solution that would ‘square the circle’, uniting the aspirations of those who wished to salvage the Constitutional Treaty with minor modifications and those on the other hand who wanted to take advantage of the situation to give it a definitive burial.

2. The Difficult Balance between Constitutional Aspirations and National Resistance: The Censurable Position of Some Member States

In this context, some member States –the UK, Poland and the Czech Republic are perhaps the outstanding examples– took advantage of the situation to attempt a reopening of the negotiations about certain relevant institutional aspects and materials within the Constitutional Treaty that had already been accepted and signed by all in Rome on 29 October of 2004. Indeed, during the never-ending ‘reflection period’, very diverse proposals sprouted, which, though they will not be analysed here,¹⁵ in some cases represented serious doubts about the conception that some States held of the very process of European integration.

Symptomatic in this respect was the apparent dichotomy that these States tried to establish between the *Europe of results* and the *Europe of the constitution*. It suffices to recollect as one example the informal encounter of Heads of State and Government that was organised by the British presidency in *Hampton Court* (27 October 2005) where, no less, the Commission’s President flirted with the possibility of entering into a resolution of the topics of real interest for citizens (energy, immigration, climatic change, research and development, globalisation), leaving abstract philosophising about institutional or constitutional reforms on the sidelines. The dichotomy was as wrong as it was ill-intended, since in order to face the real challenges of Europe what was needed was precisely a reform of the constituent treaties that would adapt them in the institutional sense to the existence of 27 members instead of the 15 of Nice, and that would introduce at the same time competencies (sufficient and flexible ones) as well as efficient procedures (not based on unanimous agreement) and democratic ones (full participation of the European Parliament through the procedure of co-decision) for an adequate decision-making process in these areas.

This deliberate dichotomy revealed a severely worrying situation which, despite all, has survived to date. It made evident the noteworthy internal differences existing within the EU surrounding its model. In opposition to those desiring a strong and integrated Europe with aspirations of advancing toward political union, there arose a substantial group of States who conceived the EU, beyond the internal market and some specific accompanying policies, as nothing more than a realm of intergovernmental cooperation in which they might even be willing to demand a re-nationalisation of competences currently attributed to the Union.

As it turns out, the position held by the two States most directly concerned was a transcendental one. After all, in the earlier precedents of Maastricht and Nice, it had been left to the States involved (Denmark and Ireland in those cases) to propose ways to overcome the internal obstacles for ratification. Despite the loud initial silence of both States, we can now discern that the current French President, Nicolas Sarkozy, played a key role with his provocative proposal of a *mini-Treaty* –announced during the election campaign– making clear on the one hand his intention of not

¹⁵ Previously analysed in Soluciones al actual ‘impasse’ constitucional en la Unión Europea: la opción del Tratado reducido, DT 16/2007, Elcano Royal Institute,

http://www.realinstitutoelcano.org/wps/portal/ri/elcano/contenido?WCM_GLOBAL_CONTEXT=/Elcano_es/Zonas_es/Europa/DT+16-2007.

English version

http://www.realinstitutoelcano.org/wps/portal/ri/elcano_eng/Content?WCM_GLOBAL_CONTEXT=/Elcano_in/Zonas_in/Europa/DT+16-2007

holding a second referendum, but making manifest at the same time his firm desire of achieving a quick route that would allow the process to be re-launched. This process, according to his proposal, would regain in a first stage (that of the mini-Treaty *per se*) the crucial aspects of the Constitutional Treaty, leaving for later on –perhaps *ad calendas graecas*– the rest of the constitutional contents. The initial proposal focused the contents of its mini-Treaty on the chapter in part I dealing with institutions, but gradually made its position more flexible, accepting new elements that progressively made it possible to speak of Nice *plus*, Constitutional Treaty *minus*, selective retrieval, etc.¹⁶ A notion emerged, graphically evoked by Araceli Mangas, of the inevitable shipwreck of the Constitutional Treaty in which it was a matter of ‘salvaging the treasures’.¹⁷ The Prime Minister of the Netherlands –Jens Meter Balkenende once again– also made clear from the start his desire to find a graceful way out for his country, allowing it to also avoid a second referendum. For this reason, he called for a necessary reinforcement of the position of the national parliaments. In addition, the valuable provision of flexible negotiations manifested on 26 January 2007 in Madrid by the so-called ‘Friends of the Constitution’ (the 18 who had already ratified it, plus Sweden, Portugal, Ireland and Denmark) left the road ready for the German presidency to channel the problem towards a solution.

Nevertheless, as we pointed out earlier, the main obstacle did not come from the two States that had had internal difficulties in ratifying the Constitutional Treaty and yearned for a solution that would not drag down the entire EU; nor from the majority group of States that had ratified it without difficulty (in some cases, as in Spain, after a referendum). The main stumbling block proved to be, ironically, the three States that had signed the Constitutional Treaty straight away in Rome, but that, ignoring the old principal of *pacta sunt servanda*, took advantage of the critical circumstances to reopen the negotiation of some crucial aspects that had already been sealed, and set ‘red lines’ under the most varied matters, some of them even quite bizarre. The scene for the German presidency suddenly promised to be far from a ‘rose garden’.

IV. The Reform Treaty: return to the classic path of reforming constituent treaties

1. Breaking out of the Constitutional *Impasse*: The Successful German Presidency and the Odd *Mandate-Treaty*

This brings us to the first milestone of the German presidency: the signing of the so-called Declaration of Berlin, on 25 March 2007, in commemoration of the 50th anniversary of the Treaties of Rome. While its conception was an initiative of the Commission,¹⁸ the German presidency held it to be a sort of Declaration of Messina revisited; and so, 52 years later but amid events reminiscent of the miscarried European Community of Defence, a new project of integration could be launched that was more realistic, to take the place of a Constitutional Treaty that many gave up for dead. Then again, there was a significant difference: it would not only be signed by the government representatives, but, as suggested by the President of the Commission in his speech previous to the European Council of 14 June 2006,¹⁹ the presidents of the Commission and of the European Parliament would also sign. Yet another difference resided in the fact that the 18 States that had already ratified the Constitutional Treaty, while open to negotiations to achieve a satisfactory

¹⁶ The wide panoply of options flowering at that time has been studied by several authors in I. Méndez de Vigo (Dir.), *¿Qué fue de la Constitución europea? El Tratado de Lisboa: un camino hacia el futuro*, CEU-Fundación Rafael del Pino-European University Institute, Planeta, Madrid, 2007.

¹⁷ A. Mangas Martín, ‘El rescate del Tratado Constitucional: ¿qué y cómo se puede salvar?’, ARI 17/2007, Elcano Royal Institute,

http://www.realinstitutoelcano.org/wps/portal/ri/elcano/contenido?WCM_GLOBAL_CONTEXT=/Elcano_es/Zonas_es/Europa/ARI+17-2007.

¹⁸ The well-known communication to the European Council on 10 May 2006, *A Citizen’s Agenda-Delivering Results for Europe*; COM (2006) 211 final.

¹⁹ Speech 06/373, Strasbourg.

outcome for all, were not going to just forget all about it, as became very clear in the aforementioned meeting in Madrid on 26 January of 2007.

At any rate, negotiation of the contents of the Declaration let the parties see at a glance that this style was to mark the German presidency. It was prepared with utter silence and confidentiality through bilateral meetings of the presidency with the personal representatives of the different Heads of State or Government: through that which community jargon has come to denominate the *sherpas*. Leaving aside other considerations about the sparseness of some of the affirmations of the Declarations and the lack of concretion of others, for our purposes here we can say that it merely underlined the benefits of ‘endowing the European Union with renewed common fundamentals from here to the elections to the European Parliament of 2009’. No more. Yet all in all, it was not too daring to deduce that these ‘renovated common fundamentals’ should be specified in a new treaty in order to face with guarantees of success the challenges presented by a EU with 27 member States in a globalised world that scarcely resembled that of the ‘cold war’ period. But there was nothing definitively stated about the way chosen to wrench the EU from the crisis in which it was bogged down. There was no sign of overcoming the profound differences that divided the positions of the member States that had already ratified the Constitutional Treaty and those of the States that had left a whole trickle of demands of all sorts, with the intention of seeking an alternative route to the Constitutional Treaty. There was not even a clue as to the procedural method that would be used by the presidency. The whole game was left to the single card of the European Council that the German Presidency would bring to a close in June of 2007.

Against all odds, in the scant three months that separated the Declaration of Berlin from this European Council, the German presidency was able to find a route leading out of the constitutional labyrinth in which the EU was drifting. It began by sending out, in April of 2007, a questionnaire to the 27 so that each State could express its demands or aspirations, and concluded two months later in classic Community summit style, that is, in a European Council meeting that, *in extremis*, came to an agreement when many mass media had given up on any chance of consensus. A European Council in which, to be sure, there were no plenary sessions for negotiating –other than that to approve the final agreement– but only meetings outside of it of all type and size. In this way, the German Chancellor –so reticent to improvise and risk unplanned moves– ‘bet it all on one card’, and, so to speak, won the game in the end.

So it is that after two long years of constitutional impasse, the EU finally found, through the European Council on 21-22 June 2007, the way out of its dire straits. The summit closed in the wee hours of 23 June, with a valuable agreement establishing very precisely that which a limited semantic imagination insisted on calling a ‘road map’. It approved, in effect, a mandate for the summons to a new intergovernmental conference²⁰ that was extremely precise in its contents and constituted ‘the basis and the exclusive framework for the work of the IGC’ that was to be summoned. Given this scenario, the new intergovernmental conference was destined to drawing up, in classic community style, a new reform treaty that would modify the current EUT and ECT.

Actually though, the guidelines of the mandate were so extremely precise and detailed that in effect they embraced the bulk of the final content of the reform treaty, which obviously limited the margin of diplomatic negotiation to a great extent. But this also meant a reduced likelihood of another failure, and the ordinary schedule for the development of the IGC could be cut back considerably, which became particularly relevant in view of the calendar imposing a subsequent ratification process that was to conclude before the elections to the European Parliament (in June 2009).

From this important agreement by the European Council in June 2007 some clear conclusions can be drawn. The first –and most superficial– is that the German presidency concluded its mandate

²⁰ See annex I to the conclusions of the Presidency.

successfully. It handed over to the Portuguese presidency the relay in the form of a settled agreement that saved the EU from one of the most complicated crises of its history. The second conclusion –not as evident just a few months earlier– was that the groundwork of negotiation and the core contents of the reform treaty would be the Constitutional Treaty itself. This meant that no ‘clean slate’ was made of the document signed by all in 2004 and already ratified by 18 States. The third conclusion was that the negotiation of the new reform treaty should be carried out in an extraordinarily brief time period. So as to comply with the calendar established by the Declaration of Berlin –before the elections to the European Parliament in 2009– the new treaty should be signed at the very latest in December of 2007, as the ratification process could in no case be less than 12 to 14 months in duration –for Belgium, for instance, it was constitutionally impossible to achieve it in a shorter time slot–. And the fourth conclusion of the mandate, deriving from the previous one, is that the negotiation of the new reform treaty in that record time of just half a year would be done solely within the strict confines of an intergovernmental conference cut along the classic pattern, with no intervention at all of a new Convention or body similar to those that had earned great protagonism in the initial phase of preparation of the Constitutional Treaty. It would have to be, therefore, a fleeting intergovernmental conference with no margin for negotiations to reopen the ‘hot topics’ that might threaten a happy ending in Lisbon. In effect, the IGC’07 proved to be the quickest intergovernmental conference ever in the history of the European Community. It was probably also the most technical one.

2. The Fleeting IGC’07: Return to the Classic Diplomatic Method of Negotiating Reform Treaties

It should not seem strange, against such a background, that when the German Government presented a proposal of treaty review to the Council,²¹ the European Parliament,²² the Commission²³ and the European Central Bank²⁴ expedited, with unusual speed, the legal reports required by the Council, despite the untimely period for such a task (the month of July). In view of these reports, the Council put forth, according to the provisions of the EUT article 48 in force, the corresponding favourable order regarding the calling of a Conference of Government Representatives of the member States, opened on 23 July. In accordance with the initial calendar,²⁵ the possible final date was set at 18 October 2007.

The labour of the hasty IGC’07 was clearly facilitated by the fact that the contents of the summons mandate were extremely detailed and precise, which in itself stood as a novelty with respect to previous reforms where the mandates were much more open and the deadlines for the IGC work were much more ample. On this occasion in fact, the mandate was so wordy and detailed that one could say it already expounded, in essence, nearly all the contents of the future reform treaty. The task of the IGC’07 was, therefore, more technical than political; and with the exception of some very specific aspects, it consisted in giving the legal shape of a reform treaty to contents that the European Council of June had fixed ‘in raw form’. Illustrative is the fact that the intergovernmental conference had entailed nearly 30 meetings of legal and judicial experts, and just three of Ministers. Even the documents arising from the IGC were quite scarce. Then again, aside from the initial documents cited above that were presented on 23 July (treaty projects, protocols and declarations)²⁶ and the project for the preamble presented the following day²⁷ up to those appearing in early December with the final versions of the Lisbon Treaty²⁸ and the final Act,²⁹ there are scarcely half a

²¹ Doc. 11222/07.

²² Resolution of 11 July 2007 on summons to the IGC.

²³ Communication The reform of Europe for the 21st century, COM (2007) 412 final of 10 July 1007.

²⁴ Sentence of 5 July 2007, doc. 11624/07.

²⁵ IGC 6/07 of 24 July 2007.

²⁶ IGC 1/07 and 2/02, *cit.*

²⁷ IGC 4/07 of 24 July 2007.

²⁸ IGC 14/07, *cit.*

dozen documents, and most contain the letters sent to the IGC'07 by the Committee of Regions,³⁰ the Accounting Committee,³¹ the Data Protection Authority,³² the European Central Bank³³ and the Economic and Social Committee,³⁴ some of these greatly lacking both in insight and far-sightedness.

Whatever the case, the methods of negotiation and preparation of the reform treaty symbolise a return to the classic means of reform of constituent treaties, that is, the 'hard core' diplomatic method. Even more 'hard core' than in the intergovernmental conferences previous to the drawing up of the Constitutional Treaty, as the documents prepared by it –with formal transparency and temporal immediacy, granted– were hardly intelligible for non-experts.

All in all, the Heads of State and Government could not free themselves from having to discuss some delicate aspects in the session which brought the intergovernmental conference to a close. Namely, to clarify how this sort of 'revised Ionninna Compromise' advocated by the Polish delegation was to operate; the adoption of a declaration about the designation of the High Representative of the PESC for the transitory period that mediated between the date when the Lisbon Treaty would take effect (foreseen for January 2009) and the investiture of the new Commission (autumn of 2009); or the new distribution of seats in the European Parliament in response to a last-minute demand presented by Italy, so that in the end the European Parliament would have 750 seats plus that of the President, attributing the resulting additional seat to Italy. There were also some final touches for the attribution of a general counsel to Poland. Not to mention the incredible Czech petition at the last minute –apparently silenced by the President of Luxemburg, Juncker– for re-opening the delicate question of the possibility of renationalising certain powers already attributed to the EU. We will remain with the image of a European Council that arrived at an agreement on a Reform Treaty that hoped to seal, for once and for all, a long period of crisis.

3. The Classic Route To a Reform Treaty: The Existence of a *Basic Treaty* and a *Treaty for Development*

With this reform treaty, the EUT would maintain its current name, whereas the ECT would come to call itself the *Treaty on the Functioning of the European Union*, although both would have the same legal value. In this respect, article 1.3 of the future EUT puts forth expressly that 'the Union is founded on the present Treaty and on the Draft Treaty of the European Union. The two treaties have the same legal value. The Union will substitute and succeed the European Community'.

With this message, even the name evokes the classic road of old. One could hardly have imagined a denomination more distant from constitutional language and more in agreement with the old functionalistic postulates than that of 'Draft Treaty'. But there is an evident simplification involving the plain disappearance of the current structure of pillars, so that from now on only a European Union exists, substituting and replacing the present European Community. We end up, then, with a basic treaty, the EUT, regulating the most relevant aspects of the EU and, shall we say, a developmental Treaty, the DTEU, specifying the functions of that Union in its diverse facets (institutional, procedural, competential, etc).

²⁹ IGC 15/97 of 3 December 2007.

³⁰ IGC 7/07 of 27 July 2007; IGC 12/07 of 3 September 2007.

³¹ IGC 8/07 of 3 September 2007; IGC 11/07 of 3 September 2007.

³² IGC 9/07 of 3 September 2007.

³³ IGC 10/07 of 3 September 2007.

³⁴ IGC 13/07 of 11 October 2007.

In other words, the parties involved opted for a treaty that would accommodate all those contents of the Constitutional Treaty that were acceptable to all, even though there have been some inevitable concessions made in order to secure final agreement.

Thus, the European integration process has ploughed out a Treaty of Reform that, as the President of the Constitutional Commission of the European Parliament describes it, will be ‘better than the Treaty of Nice, but worse than the Constitutional Treaty’, and in which the ‘substance of the Constitutional Treaty has been preserved’.³⁵ Actually, not only the substance: practically all the contents of the Constitutional Treaty are there in writing.³⁶

V. Characterisation and Contents of the Lisbon Treaty: Maintaining the Essence of the Constitutional Treaty

1. General Characterisation: An Extremely Complex Simplified Treaty

Regardless of the actual contents of the Constitutional Treaty rescued by the Lisbon Treaty, the first impression on reading the Treaty of Lisbon is that of extreme complexity. The Treaty in itself follows, *prima facie*, a very simple structure that appears similar to that of previous modifications of the constitutional treaties. It contains just seven articles, preceded by a brief preamble that makes manifest the desire to ‘complete the process initiated by the Amsterdam Treaty and the Treaty of Nice in order to reinforce the effectiveness and democratic legitimacy of the Union and enhance the coherence of its action’, for which reason the signing States ‘have convened to modify the Treaty of the European Union Treaty, the Constitutional Treaty of the European Community and the Constitutional Treaty of the European Atomic Energy Community’. Of these seven precepts, the last five are succinct final provisions that respectively contain the celebration of the treaty for an unlimited time (art. 3), the reference to adjacent protocols (art. 4), the enumeration of new treaties resulting from the consolidation of the reforms introduced by this treaty (art. 5), its mechanism for entering into force (art. 6), and the determination of the authentic languages of the text (art. 7). However, the first two articles of modification of the EUT (art. 1) and the ECT (art. 2) leave a long trail of 173 pages of endless successive modifications that prove extremely complicated and irritating to follow, especially considering that in the case of the ECT there are as many horizontal modifications (sections 1 to 9 of article 2) as there are specific ones (sections 10 to 295 of article 2).

Equally wordy and entangled is the part that covers the protocols annexed to the treaties (EUT and DTEU), as well as the annex protocols of the Treaty of Lisbon itself, be it to modify the adjacent protocols of the EUT, of the ECT or, in one case, the TCEEA, or else to modify the TCEEA itself, whose legal regimen is left as an *ad hoc* Protocol. Not to mention, of course, the corresponding annexes of the Lisbon Treaty that contain the tables of agreements nor the ever-present declarations, in this case very considerable in number: to be exact, there are 65 declarations, between declarations relative to treaty provisions (43), declarations relative to adjacent protocols of the treaties (7) and declarations annotated by the Conference and that appear annexed to the Final Act (15). Not to imply that the contents of these protocols and declarations is of lesser significance. They contain key aspects for an understanding of transcendental institutional matters, up to the entire contents of the TCEEA, including the exception that the UK and Poland would have with regards to the Charter of Fundamental Rights.

³⁵ Jo Leinen, *Bulletin Quotidien Europe* no. 9454 of 26.6.2007, p. 4. In a similar sense, the opinion of Araceli Mangas, who considered that a ‘selective rescue’ had taken place, not affecting the ‘substance and the balance achieved in 2004’; A. Mangas Martín, ‘Reflotar Europa tras hundir la nave constitucional’, *El Mundo*, 25 June 2007.

³⁶ In this respect, we agree with the statement that ‘the European Constitution has been retrieved in its practical totality’; J.I. Torreblanca, *Europa vuelve a funcionar*, ARI 70/2007, Elcano Royal Institute, Madrid, 2007, http://www.realinstitutoelcano.org/wps/portal/ri/elcano/contenido?WCM_GLOBAL_CONTEXT=/Elcano_es/Zonas_es/Europa/ARI+70-2007+copia.

In light of all this, we can at least be thankful that the preamble of the Lisbon Treaty does not dare make any reference to the desire to improve ‘the transparency of the Union and its institutions, in order to make these closer to the citizens of the member States’ specifically dealt with in Declaration 23 of the Treaty of Nice. Not even intentionally could its authors have created a less appealing text for curious bypassing readers interested in getting an idea *a grosso modo* of its contents. In short, a case of ‘horror for the profane’ yet ‘paradise for jurists’.

To sum up, we have here a *reduced treaty*, simplified in its form, that is otherwise very *complex*.

2. Substantial Maintenance of the Novelties of the Constitutional Treaty: The Selective Retrieval of Contents

Delving into the actual contents of the Lisbon Treaty, one notes from the start that, other than certain exceptions discussed below,³⁷ the main material contributions gathered in the Constitutional Treaty are maintained here, both at the structural level and in terms of institutions and their competences. Thus, as we mentioned in dealing with the nature of the new reform treaty, the structure of the EU is unique, relegating to oblivion the present division of the Union into one community pillar (EC and EURATOM), and two extra-community pillars (Foreign Affairs and Common Security and Police and Judicial Cooperation in Penal Matters). In this sense, the advance with respect to current regulation is obvious. Regardless of the fact that Foreign Policy and Common Security are kept within the EU as decisive mechanisms and a conceptual consideration that makes it necessary to continue cataloguing this policy as based on the method of cooperation and not on that of integration, which inspires the rest of the competences of the Union.

Meanwhile, in terms of institutional regulation and specific matters, the reforms gathered in part 1 of the Constitutional Treaty are plainly integrated in the reforms foreseen by the Lisbon Treaty for the EUT and for the ECT. Therefore, the new Title III of the future EUT offers in a first general view of the institutional system and will expound the modifications with regards to the new composition of the European Parliament, the conversion of the European Council into an institution, the creation of the presidency of the European Council, the new composition of the Commission and the reinforcement of its President, as well as the creation of the new position in the area of directing foreign affairs, which, despite its name, will maintain the double-headed nature of Vice-president of the Commission and President of the Foreign Affairs Council. Nor will the system of voting by double majority be changed (55% of the States and 65% of the population). One novelty regarding the Constitutional Treaty is that the European Central Bank and the European Court of Auditors become institutions.

From here on, the DTEU will regulate, on the one hand, the development of the institutional provisions, as well as the specific regulation of the consulting bodies and that of the European Ombudsman.³⁸

Likewise, in terms of the allotment of competences, the novelties introduced by the Constitutional Treaty are maintained in integral form, including the contents of the protocols on subsidiarity and proportionality. What is sacrificed, however, is a good portion of simplification and visibility, as its former placement under a single title in the Constitutional Treaty (arts. 1-11 to 18) gives way to its dispersion in the EUT and the DTEU. What is more important, the advances with regards to the Space of Freedom, Security and Justice are kept in full. Not only because, as mentioned earlier, the consideration of the police and Judicial Cooperation in Penal Matters disappears as an extracommunitary pillar, but above all because it is considered in all its integrity as a shared

³⁷ *Vid. infra*, VI.

³⁸ Actually, the mandate by the European Council in June 2007 already specified new clarifications about the placement of these provisions on a list at the end of annex 1 of the conclusions of the presidency of the European Council and which took precise shape in the very first text of the Treaty project presented by the presidency; IGC 1/07, *cit.*

competence of the Union; although it maintains the territorial exception for the UK, Ireland and Denmark, just as the Constitutional Treaty did.

The same could be said of other aspects, such as the single legal personality or reinforced cooperation (that establishes the number of States at a fixed threshold of nine States instead of the reference to one-third of the States).

At the same time, parts III and IV of the Constitutional Treaty are also largely salvaged. The provisions of part III are spread throughout the articulation of the EUT and, even more so, the DTEU. Indeed, it is truly difficult to locate specific provisions of part II of the Constitutional Treaty that have not been accommodated into the DTEU. Finally, in part IV, with the exception of the logical elimination of the precepts related with judicial derogation, succession and continuity, the bulk of the text on unlimited duration, protocols, and annexes to the review procedures is maintained (including the simplified review procedure and the procedure for simplified review relative to the internal policies and actions of the Union).

3. The Charter of Fundamental Rights and the Union's Support to the ECHR: Two Sides of the Same Coin

Another relevant aspect to bear in mind of course is that of human rights, especially in relation to the Charter of Fundamental Rights which, as we know, was solemnly proclaimed in Nice. Although in practice it has been used on several occasions by the Court of Justice as an interpretative criteria –and curiously enough by the European Court of Human Rights and by Spain's own Constitutional Court– it lacks at present a legally binding character; and it would have been the Constitutional Treaty that would attribute it such a character and include it in part II. The IGC'07 contemplated the matter of how to 'rescue' this binding character, through whatever legal form decided upon (integral reproduction in the new treaty, annexed protocol, direct reference to it...) and at the same time satisfy the demands of those States that objected to its inclusion in the treaty.

In the end, the Charter will not form part of the Treaty, though its legally binding character is fully preserved. The Lisbon Treaty opted to include in the future EUT a provision regulating everything relative to fundamental rights. In this sense, EUT article 6 will have a newly minted first section through which 'the Union acknowledges the rights, liberties and principles announced in the Charter of Fundamental Rights of 7 December 2000, as was adopted on 12 December 2007 in Strasbourg', making explicit just afterwards that 'it will have the same legal value as the Treaties'. And it will also include a paragraph expressly acknowledging that the 'rights, liberties and principles set forth in the Charter will be interpreted according to the general provisions of title VII of the Charter by which its interpretation and application are governed, and taking into due account the explanations to which the Charter makes reference, indicating the sources of these provisions'.

Along these lines, it is probably relevant to evoke both the solemn ceremony on the eve of the signing the Lisbon Treaty, that took place in Strasbourg with the Presidents of the European Council, the European Parliament and Commission, in the sense underlined by this precept of the EUT, and, above all, its integral publication in the *Official Diary* in the terms required by the European Parliament.³⁹

Meanwhile, with regards to the important aspect of the adherence to the ECHR, the second section of the future article 6 of the EUT addresses the provision of the Constitutional Treaty to the effect that the 'Union will adhere to the European Convention for the Protection of Human Rights and Fundamental Liberties'. And finally, with regard to the concept of fundamental rights in the EU, the third section of the said precept maintains as well the provision that 'fundamental rights guaranteed

³⁹ Resolution of the European Parliament on 29 November 2007.

by the European Convention for the Protection of Fundamental Human Rights and Liberties and which are the fruit of constitutional traditions common to the member States will form part of the right of the Union as general principles’.

We have, then, an important step forward in the realm of human rights. The binding character of the Charter settles a long bumpy road that could not be travelled along successfully in Nice, whereas the introduction of an attribution of competence to permit the adherence of the EU to the ECHR crowns an ancient desire that will contribute to a better and greater coherence and coordination among the jurisprudences of the European Court of Human Rights, and the Court of Justice of the EU. The Charter and accession are two sides of one same coin: the effective and harmonious protection of fundamental rights in the realm of the EU. Although, as we shall see, only for 25 of the 27 member States.

4. The Incorporation of New Material Elements: Energy and Climate Change

The Lisbon Treaty also includes some particularly relevant aspects that the Constitutional Treaty had not contemplated in its articulation and which over the recent months of the so-called ‘reflection period’ made their way into the community agenda: climate change and energy.

The first of these novelties refers to the inclusion of an explicit reference to ‘the particular need to fight against climate change with measures on an international level’ within the article relative to the environment. And the novelty with reference to energy, of heightened interest in light of the current debate about the crises deriving from the problems of gas supply in the dispute between the EU and Russia, refers to the spirit of solidarity among the member States, and above all to the increase in the (pending) interconnection of energy networks.

Granted, a good part of these measures could have been adopted with valid reason within the current community competences, if there were, of course, a political willingness to do so. Thus the external competential derivation arising from the internal competence existing in the area of the environment would be, in our opinion, a more than sufficient basis for adopting the intended actions on the subject of climate change. All in all, its inclusion is welcome. It may even facilitate the adoption of this type of action by the Union, and it will surely transmit to public opinion in the States that had already ratified the Constitutional Treaty the political sensation of a certain compensation for the high toll paid to the States to which the exceptions detailed below were conceded.

VI. The price paid for agreement with the Lisbon Treaty: pruning away all constitutional appearances

1. The Disappearance of all Hints of a Constitution: How to Make it Seem Not to Be What it Really Is

Together with the renouncement to transparency and to all attempts at simplification, the most costly toll paid by the 18 States that had already ratified the Constitutional Treaty was, so to speak, the ‘appendectomy’ of all inklings of a constitution in the future reform treaty. Of course, the term ‘European Constitution’ as a qualifier of the term ‘Treaty’ was eliminated. And as we have said before, the Lisbon Treaty is a ‘simple’ *reform treaty*, reforming precisely the constituent treaties; not a single unique text nor a re-founding one, nor a derogation of the actual treaties, as foreseen in articles IV-437 and 438 of the Constitutional Treaty, and of course there is no reference to a *European Constitution* in the title. This implies that one of the errors of the Convention and of the IGC’07 was precisely attributing the qualifier of Constitution to a text that did not cease to have the form of an international treaty, possibly leading a certain segment of the citizenship to the false perception that the Union might develop in the future into some form of ‘European superstate’.

Along these lines, the 'Minister of Foreign Affairs' was relieved of that name to become simply 'The High Representative of the Union for Foreign Affairs and Security Policy'. The words 'laws' and 'framework laws' were also abandoned, so as to refer to the traditional rules and directives. The precept of the Constitutional Treaty was likewise eliminated in relation to the symbols of the Union (art. 1-8), although a declaration adopted by Belgium, Bulgaria, Germany, Greece, Spain, Italy, Cyprus, Lithuania, Luxemburg, Hungary, Malta, Austria, Portugal, Rumania, Slovenia and Slovakia affirms that the flag, the anthem, the euro and the currency 'will continue to be, for them, the symbols of the common membership of citizens to the European Union and their relationship with it'.

Also included in the vanishing act was the precept of the Constitutional Treaty which for the first time made express reference to the principle of precedence of the Law of the EU (art. 1-6). It was to be replaced by a Declaration limited to remind us 'that in accordance with the reiterated jurisprudence of the Court of Justice of the European Union, the Treaties and the Laws adopted by the Union upon the basis of these take precedence over the Law of the member States, in the conditions established by the jurisprudence in question'. Furthermore, the Conference decided to incorporate into the Final Act thereof the ruling on the Legal Service of the Council on the precedence which, among other aspects, establishes with all clarity that 'the principle of precedence of Community Law is inherent to the specific nature of the European Union'.⁴⁰

Moreover, the future first article that will be the gateway of the new EUT would not contain express reference to the double legitimacy of the Union (States and citizens), restricting itself to establishing in an extremely sober fashion that 'the Union will be founded on the present treaty and on the treaty of the functioning of the European Union' which was to substitute the current ECT. And that is that.

Likewise, the precept that made reference to the objectives of the Union would eliminate its comment to the effect that 'competition be free and not be falsified', at the same time that there would be a protocol for services of general economic interest. In it, the emphasis is on 'the importance of services of general interest', and it was agreed in its two articles that the common values of the union with respect to these services would include in particular 'the essential role and the wide margin of manoeuvrability of the national, regional, and local authorities to lend, have carried out and organise the services of general economic interest as close as possible to the needs of users', as well as 'the diversity of the services of general economic interest and the disparity of the needs and preferences of users that may result from the different geographic, social and cultural situations'.

Finally, also lost along the wayside is the preamble of the Constitutional Treaty, except for the first section, which would be added to the preamble of the future EUT in a starring position: 'Inspired by the cultural, religious and humanistic heritage of Europe, from which the universal values of inviolable and unalienable rights of the person, freedom, democracy, equality and the Lawful State have developed'.

At first glance these might seem to be modifications of tremendous significance; and they certainly do affect political and judicial aspects that are not to be disdained, within a text of intended *constitutional character*, while at the same time their symbolic nature obviously reveals a political bottom-line of evident mistrust before the EU. But deep down, viewed with some perspective and cool frankness, they are more or less 'cosmetic' eliminations. The Ministry of Foreign Affairs would lose its pompous name, but its material powers and institutional situation would remain untouched. The European laws and framework laws would be stripped of their expressive denomination, but that does not mean they would lose in characteristic obligatory contents. The

⁴⁰ Document 11197/07, JUR 260.

express reference to the symbols would be sacrificed, but there was no chance that the *euro* would be snatched from the purses of the citizens of those States that had adopted the *euro* as their own currency, nor would the European flag cease to fly over public buildings, nor the anthem be silenced on pertinent occasions; and the elimination of the express reference to the future Union did not mean it would be less firmly based on diversity. Nor would the transcendental value of the unrenounceable principle (jurisprudence) of precedence be put into question, regardless of attempts to ‘conceal’ it in a Declaration in lieu of including it within the treaty. As the guidelines of the Judicial Service of the Council cited earlier affirms, ‘the fact that the principal of precedence is not included in the future Treaty does not at all alter the existence of this principal nor the jurisprudence in force of the Court of Law’,⁴¹ but its disappearance from the text makes once again manifest the conception of the integration process harboured by those States that reject seeing such an elementary principle in the text of the Treaty. And, though not stated explicitly in the EUT, nothing would change in the unlikely case that the basic legitimacy of the States as *Herren der Verträge* (‘Treaty Lords’), be accompanied by a heightened democratic legitimacy deriving from the election of the European Parliament by direct universal suffrage. Also from the equivalence of this with the Council in the ordinary legislative process in the terms foreseen by the Constitutional Treaty and with respect to which the assumptions would not be modified, proceeding to be governed by this legislative procedure, so that the unanimous vote in the Council be replaced in dozens of cases by the qualified majority. In other words, the fact that ‘the name of Constitution has been reportedly abandoned is a concession made to political discourse precisely to save the contents of that Constitution’.⁴²

2. Institutional and Competential Modifications: More than Cosmetic Concessions in a Process of Increasing Intergovernmental Trends

There are, even so, other concessions to some States that are not merely cosmetic. For instance, as the result of a negotiation planted through the demands of Poland in terms that were not exactly loyal with respect to aspects already agreed upon –and signed– with the other associates in the IGC’04, the system of voting by double majority rescheduled its entry into effect, delayed through a complicated system articulated in two stages. Between 2009 (slated date of effectiveness of the new reform treaty) and 1 November 2014, the current mechanism of article ECT 205.2 (WTEU art. 238) will continue to be applied. Scheduled between the latter date and 31 March 2017 is a transitory (supplementary) period in which any member of the Council may request that the measure in question continues to be approved according to regulation currently in force. At the same time, it rescues a sort of ‘Ioannina Compromise’ that does not lend itself to easy interpretation.

On this same list of exceptions for those that could well be called *Rebel States* there is also a declaration that makes it clear that the ‘the provisions referring to Foreign Policy and Common Security, including that related to the High Representative of the Union for Foreign Affairs, Security Policy and the Service of Foreign Action will not affect the legal bases, responsibilities and competences existing in each member State in relation with the formulation and conduct of its foreign policy, its national diplomatic service, its relations with third countries, and its participation in international organizations’. Hence, another exception of some substance.

Finally, as a concession to one of the demands presented by the delegation of the Netherlands, it was agreed to include a new article in the EUT that would make mention of the reinforced role of the national parliaments. Thus, a precept was included in the EUT according to which ‘the national parliaments will contribute actively to the correct functioning of the Union’, and where their

⁴¹ At this point in the process of European integration it should not be necessary to recall that ever since the very early sentencing of 15 July 1964, in the context of the case *Costa vs. ENEL*, the principle of primacy has been maintained by the Court of Justice in constant and unbroken jurisprudence as a cornerstone of community judicial provisions.

⁴² F. Aldecoa Luzarraga & M. Guinea Llorente, ‘El proyecto de Tratado de reforma: una Constitución sin nombre’, *Revista General de Derecho Europeo* 2007, nr 14, www.iustel.com.

sections specified the concrete condition on which those who would participate in the workings of the EU: to be informed of the legislative projects, to oversee the respect of the principal of subsidiarity, participation in the control of Europol and Eurojust in the framework of the Space of Liberty, Security and Justice, participation in the review procedures, being informed of the requests for membership by new States, and participate in the interparliamentary cooperation between the national parliaments with the European Parliament. In itself, this precept does not relay any substantial novelty whatsoever not already regulated in the protocols about participation of the national parliaments and of application of subsidiarity or in the EUT and DTEU, and one could well say that it was the toll exacted fundamentally by the Netherlands in exchange for backing the new Treaty without subjecting it to referendum. However, it is inserted in an entire process of reinforcement of the States which leads the EU to a clearly intergovernmental inclination. Besides, the reinforcement of the position of the national parliaments does not cease to reflect, in our opinion, an evident mistrust of the European Parliament on the part of those who forget quite easily that in the EU it is cloaked in a democratic legitimacy identical to that of the national parliaments on the internal level; both formal (chosen by direct universal suffrage) and material (with legislative competences, those of control of the community executive and budgetary ones very similar to those of any other parliament).

At the same time, in relation with the control of subsidiarity, the early alert mechanism introduced the Constitutional Treaty is also modified. This is done in two ways. One is of a nearly anecdotal character, and the other much more meaningful. In the first place, the time limit for the release of the report foreseen to this effect is extended from six to eight weeks, bending to the generalised criticism coming from different sectors in view of the scarce time that the national parliaments –and in some cases the regional ones– had to prepare the report in question. But in the second place, article 7 of the Protocol on the application of the principals of subsidiarity and proportionality introduces in its third section the provision stating that, in the hypothetical case of a simple majority of the votes attributed to the national parliaments considered, there is a violation of the principle of subsidiarity –that is, in the usual case, where the opinion of the Commission that presents the proposal clashes with that of the national parliaments– would not only lead to the consequential ‘the proposal must be studied again’, but that ‘by a majority of 55% of the members of the Council or by majority of the votes cast in the European Parliament’ it could be dismissed. This, of course, is more than a cosmetic modification. It clearly upsets the underlying consensus in the regulation set by the Constitutional Treaty from the long-pondered proposals elaborated by the Convention based on the final report of its Group 1 on subsidiarity. Indeed, for some important observers –and one European protagonist of the first order in this area– this simply and bluntly constitutes ‘nonsense’.⁴³ We could not agree more wholeheartedly.

In this same order of affairs, it is also not trivial to speak of the stubborn insistence of the Lisbon Treaty in leaving clear something about which no one has the slightest doubt; that is, that the competencies not attributed to the Union correspond to the States. It is therefore striking that the EUT on two occasions insists on this matter. First, by expressly establishing in what will be EUT article 4.1 that ‘all competence not attributed to the Union in the Treaties corresponds to the States’. And immediately thereafter, EUT article 5 on competencies, after leaving perfectly clear in the first section that the system is governed by the principal of express attribution of competence, again insists in its second section on regulating the principal of subsidiarity that ‘all competence not attributed to the Union in the Treaties corresponds to the member States’, but of course it is even more striking that some States are not satisfied with this reiterated –and unnecessary– insistence, and demanded that it be repeated again with a particular character in other quarters. Thus for instance, on regulating the issue of the fundamental rights in the EUT, it is made explicit that ‘the provisions of the Charter will not broaden in any way the competences of the Union as they are

⁴³ I. Méndez de Vigo, ‘El Tratado de Lisboa: epílogo a los años en que vivimos peligrosamente’, in *ib.* (Dir.), *op. cit.*, p. 321-344, on p. 336.

defined in the Treaties' (future art 6.1, second clause), despite the fact that the Charter itself foresees it with total clarity in its horizontal provisions. Likewise, it is emphasised that 'national security will continue to be the exclusive responsibility of each member State', something which no one doubted (future art. 4.2 *in fine* EUT). Similarly, the new Protocol on the services of general economic interest returns again and again to the idea that the 'dispositions of the treaties will not affect in any way the competencies of the member States in lending, having carried out and organising services of general interest that are not economic'. In short, a heavy-handed repetitive reference to the role of the States that is unnecessary from any standpoint.

In this same competential sphere, of equal concern is the prospect of having to adopt a new Protocol on the exercise of shared competencies in order to establish something so elementary –for anyone with a knowledge of the theory of *pre-emption* as applied by the Court of Justice– as that 'when the Union has taken measures in a determined realm, the scope of this exercise of competence will only embrace the elements governed by the act of the Union at hand, and therefore, will not include all the realm in question'. Of course it may be easier to understand the philosophy underlying this protocol if we bear in mind that the Lisbon Treaty has also insisted on adding a section to the precept of the DTEU that will regulate the shared competencies to establish that 'the member States will again exercise their competence to the degree that the Union has decided to stop exerting its own' (DTEU art. 2.2).

Producing even greater concern, albeit obvious in the end analysis: for the first time in the history of the community, the regulation of the procedure of ordinary review will add a clause to that which is regulated in article III-443 of the Constitutional Treaty to establish, no less, that the review projects of the Treaties 'may have as their finality, among other things, that of increasing or *reducing* the competencies attributed to the Union in the Treaties' (future EUT art. 48).⁴⁴ It is evident that the materialisation of that provision requires unanimous vote, which lends it a certain air of nodding to some member State's public opinion. But it is no less evident that, together with the new reference introduced by regulating the shared competences in the DTEU and to the new protocol about the exercise of these competencies, it points to the desire of some member States – increasingly blatant– of re-nationalising certain competences of the Union. We could say that the 'step by step' policy also admits the 'step backwards'.

3. The Worrying Reinforcement of *Europe a la Carte*: A Trickle of Exceptions

The Treaty of Lisbon contains a Protocol on the application of the Charter of Basic Rights for the UK and Poland according to which 'the Charter does not widen the competence of the Court of Justice of the European Union nor that of any court of Poland or of the United Kingdom to appreciate that the legal or regulatory provisions or the provisions, practices or administrative actions of Poland or the United Kingdom are not compatible with the rights, liberties and fundamental principals that it reaffirms'. That is, the Charter will not have a legally binding character for these two member States. But for the other 25, yes indeed.

If there were any doubt at all in the mind of the reader about the above wording, in the context of social rights it is insisted that 'in particular, and in order to not give rise to doubts, none of that which is provided in title IV of the Charter [Solidarity] creates defensible rights in justice applicable to Poland or the United Kingdom, except in the measure to which Poland or the United Kingdom have contemplated these rights in their national legislation'. This is hardly compatible with the unilateral Declaration introduced by Poland for the case of the Charter, which, after recalling its tradition in the protection of social rights since the 'Solidarity' social movement declares that 'it fully respects those rights, in agreement with that established in the Laws of the

⁴⁴ Italics added.

European Union, and in particular those reaffirmed in Title IV of the Charter of Fundamental Rights of the European Union’.

This same subject of fundamental rights also withholds the surprising acceptance of a unilateral Declaration by Poland –to be certain, at that time hidden within the mandate in a footnote– according to which ‘the Charter does not affect in any way the right of the member States to legislate in the realm of public moral, the family Rights, as well as the protection of human dignity and the respect of physical integrity and human moral’.

Moreover, along these same lines, the exceptions in light of the Charter obviously topped off those which, as for example in the case of the Space of Liberty, Security and Justice, already existed in the Constitutional Treaty. Indeed, these had already given rise in the Constitutional Treaty to technical and procedural problems that became increasingly alarming in nature (specific moment at which one must present the *opt out* clause, composition and action of the institutions, etc.). All in all, the deep-set problem that can be deduced from this watering can of exceptions is that we can see, above all in a political sense, that frequently evoked existence of very unequal conceptions of the process of European integration. The Lisbon Treaty disguises, behind its jingle-jangle formulation, profound and significant differences among the member States that become increasingly difficult to reconcile in a single text acceptable to all.

Whatever terminology we use here to describe the disparity of positions, well aware of the simplification that it disguises, it would seem evident that there lies an increasingly perilous gap between the more federalising side –or shall we say the more integrating side, so as to not provoke anyone– that States such as Germany, Luxemburg, Belgium or even Spain might represent; and the clearly intergovernmental side –in some cases clumsily impeding any advance towards integration– held by the UK, Poland, the Czech Republic and Denmark.

Therefore, one does not need great political experience or intuition to affirm that the traditional method of reform of constitutional treaties is reaching its limit. It is a model that is on its way out. In a ‘Europe of 27’, with different conceptions of the process of integration, it will be prove increasingly difficult to manage in the future modifications that would allow for a joint advancement of *all* the member States. It is no coincidence that this reform, as suggested earlier, does not carry the familiar label of ‘system of Russian dolls’ –Declaration 23 of the Treaty of Nice was the final and clearest example of these reforms that contain an announcement of the following one–. For this reason, resorting to mechanisms of flexibility is probably inevitable. In fact, these already exist, very naturally, in many aspects of the original law (monetary policy, space of liberty, security and justice, etc), and derived law allows for it through the interesting mechanism of reinforced cooperation. In addition, the new treaty of reform increases, as specified above, the disparity of legal regimes in areas as essential as fundamental rights. Yet it seems obvious that in the future the traditional reforms of treaties may still be looked down upon in practice, with carefully timed advances through cooperation that is reinforced but to not forcefully affect the other member States, at least in the early stages. This obviously entails its advantages, yet as the recent experience of the Treaty of Purüm tells us, it also withholds its share of risks. The difference between a *Europe at different speeds* and a *Europe a la carte* will probably signal the point between what is inevitable and what is distorting. And that contained in the Treaty of Lisbon resembles more closely, we believe, the *Europe a la carte* than the *Europe at different speeds*.

VII. The effectiveness of the Lisbon Treaty: Immerse in yet another ratification process, and ‘not counting chickens before they hatch’

When does the Lisbon Treaty become effective? Its article 6.2 stipulates that ‘This treaty shall enter into force on 1 January 2009, provided that all the instruments of ratification have been deposited, or, failing that, on the first day of the month following the deposit of the instrument of ratification by the last signatory State to take this step’. In other words, the effectiveness of the Lisbon Treaty is exposed in practice to the same risk that, in 2005, produced the derailment of the Constitutional Treaty.⁴⁵ If just one member State does not manage to ratify this Treaty, we will probably find ourselves in the same situation as when the French and Dutch referenda forced a sudden landing. Or even worse.

Therefore, we should not ‘count our chickens before they hatch’. With the signing on 13 December, we simply were able to redirect a process that was paralysed, but there are still 27 stations to be passed before we reach our final destination. Only when the last ratification instrument has been deposited will the journey begun in Laeken come to an end. We must not forget that Ireland is sure to hold a referendum, and despite promises in the contrary sense, it is feasible that one be celebrated in another State whose name we will not mention. There are no guarantees, then, that the long road still looming beyond the ‘road map’ designed by the German presidency will be free of hurdles and detours... And in such a case, there is no ‘Plan B’ available. Although, as pointedly affirmed by Professor Andrés Sáenz de Santa María in the midst of a period of reflection, ‘the best plan B is to comply with the commitments acquired’.⁴⁶ We shall hope, therefore, that on this occasion all the member States are able to do so.

VII Final Considerations: the Attempt to Keep the Union from Seeming to be what it really is

Having come this far, it does not seem proper to conclude this preliminary study without dedicating a few brief lines of overall assessment of the Lisbon Treaty. To be certain, criticism has come from numerous voices. In the minds of a fair portion of the iuscommunitary doctrine of Spain, the way out of the labyrinth surrounding the failure of the Constitutional Treaty after the negative referendums of France and the Netherlands has come at a very high price. The general atmosphere in the Spanish doctrine that has analysed the Reform Treaty to date is not exactly optimistic. For a number of authors, with Professor Mangas Martín in the lead, it is tantamount to having constructed a ‘Europe tailored to suit the governments’, done ‘from the governments, for the governments, and according to the dimensions of the governments’.⁴⁷

Beyond the predominating legal realm of analysis of Treaty reform there are authors, such as political scientist Santiago Petschen, who go even further in their criticism and see in the new reform treaty a ‘definitive consolidation of the Europe of political *establishment* of States’ which leads us to an ‘EU without a soul, without poetry, with many eurosceptics and knowingly formed by a series of countries united more by cold technique than by enthusiastic hope’.⁴⁸

⁴⁵ To this respect, of interest is the study by M. Urrea Corres, ‘Los procedimientos de reforma de los tratados comunitarios y la entrada en vigor del Tratado Constitucional’, *Revista General de Derecho Europeo* 2007, nr 13, www.iustel.com.

⁴⁶ P. Andrés Sáenz de Santa María, ‘El largo camino hacia la Constitución europea: el mejor plan B es cumplir los compromisos adquiridos’, *Revista General de Derecho Europeo* 2006, nr 10, www.iustel.com.

⁴⁷ For this reason, in the author’s opinion, ‘when a Europe is made to suit the governments, the risk is that not only do they present demands of their own for exceptional and contrasting causes, but that these governments look askance at the rest and try to take possession of the objections and reticent positions of others’, so that ‘any reform will be an occasion for backmail’. A. Mangas Martín, ‘Europa a la medida de los gobiernos’, *Revista General de Derecho Europeo* 2007, nr 14, www.iustel.com.

⁴⁸ Hence, this author, with evident resignation and a yearning for the existence of true European leaders, concludes that ‘we have no other choice than to accept mediocrity. We have no other choice than to resign ourselves to watch how the

Finally, it is also the moment to bring up the assessment of a protagonist of the Convention who tends to avoid stridencies or poorly focused appraisals. For the figure who represented the European Parliament in the Praesidia of the two Conventions carried out to date, ‘at no time like the present was the notorious lack of vision and ambition of national leaders as patent in European politics. This forces us to contemplate what happens with a project that, after accumulating success after success over the past five decades, now appears before the eyes of Europeans as something exhausted, begrudged, overdosed on hope’.⁴⁹

From our point of view, there are good reasons for detecting some serious shadows in the Reform Treaty, both in its form and its content. With regard to the former, because, above all other more concrete aspects, the format of the Lisbon Treaty appears by any reckoning at the antipodes of what could be considered minimal demands for transparency and simplification. Unmanageable, illegible, opaque, incomprehensible... are adjectives that may be applied to this treaty. As Luxemburg President Jean Claude Juncker pointed out with humour, it is ‘a very complicated simplified treaty’. And in any case, as a careful reading demonstrates –at least for those who have had the unyielding patience to actually read it through– few texts could be further from that praiseworthy intention accepted by all in Nice (2000) and Laeken (2001) of acknowledging ‘the need to enhance and oversee the democratic legitimacy and the transparency of the Union and its institutions, in order to make these closer to the citizens of the member States’.

On the other hand, with respect to the content, we might also criticise the Lisbon Treaty because the agreement, aside from being minimal for the sake of the securing the necessary consensus, comes in exchange for accepting new exceptions in matters as capital as human rights, which carries a very serious risk of desegregation within the Union. There are member States for which the notions of *variable geometry* or *Europe a la carte* hold considerable meaning, and are not just circumstantial euphemisms.

In sum, what should probably be imposed above all else is a ‘possibilistic’ appraisal. From this perspective there are, in our opinion, some motives for reasonable optimism. In the first place, the Lisbon Treaty has the unquestionable merit of extracting the Union from a long period of crisis and giving it a certain ‘psychological impulse’ and even a moderate optimism to face the future. In this sense, it can indeed be considered –as in the editorial of one of the most prestigious journals in Community Law– ‘the best possible compromise’.⁵⁰

Secondly, the Lisbon Treaty contains in substance practically all the novel aspects of the Constitutional Treaty. It maintains, thereby, instruments and mechanisms that enhance the efficiency and also the democracy of the EU. The stable presidency, the figure of high representative as vice president of the Commission, the reduction of the number of commissioners, the noteworthy increase of assumptions whose decision in the Council will be done by qualified majority instead of unanimity, the generalisation of the procedure of co-decision as an ordinary legislative procedure, the single legal personality, the popular initiative, or a more efficient Foreign Policy are some good examples.

members of the political establishment enjoy their discussions and courtesan games. Their leadership is a matter of state on which they lean in order to act in Europe. Until European leaders appear, it will be very difficult to face change’; S. Petschen, ‘El Mandato para el Tratado de Reforma: la consolidación definitiva de la Europa del “establishment” político de los Estados’, ARI nr 95/2007, Elcano Royal Institute, Madrid, 2007, http://www.realinstitutoelcano.org/wps/portal/ri/elcano/contenido?WCM_GLOBAL_CONTEXT=/Elcano_es/Zonas_es/Europa/ARI+99-2007.

⁴⁹ I. Méndez de Vigo, *loc. cit.*, p. 338-339.

⁵⁰ *Common Market Law Review* 2007, nr 5, Editorial, p. 1235.

In the third place, and despite its modesty, it also introduces new competential titles in areas such as energy or climatic change that connect directly with some of the main concerns of European citizens. One case in point is that the national and international press of 14 December contained more media echoes and backing of the firm position held by the EU as opposed to the US in the Bali summit on climate change than mention of the grey signing of the Lisbon Treaty. The exception being, of course, the ‘outcry’ about one President who announced he would arrive late to the signing.

Fourth, it can also not be denied that, under the rough crust of the Lisbon Treaty, indisputably complex as it is, there lies a future tandem of EUT and WTEU that prove technically more adequate and simplified than the current constituent treaties. And to some extent, they are also more coherent than the Constitutional Treaty itself, whose part III was by any standards out of proportion and inappropriate for a legal text that aspires to be called a Constitution. Now we will have a basic treaty, the EUT, whose contents contain the norms of constitutional character of the Union, and a treaty of development, the DTEU, which concretely and precisely outlines the judicial system, the institutional system and the competential system of the Union.

The final problem is that even these advances reveal with all clarity the conception that some Member States have of the process of European integration. Deep down, as we said in our comments on the mandate of the IGC’07,⁵¹ we are left with the feeling that it was forced into disguise, to ‘not appear to be what it is’, as if to transmit to the citizenship the (false) impression that we are advancing less than we really are. As if somehow the achievements made were being covered up.

In closing, as a synthesis of that sweet and sour taste left by the Lisbon Treaty, perhaps it is appropriate to repeat the graphic appraisal that Anthony Arnall made of the mandate to the IGC’07: ‘The tone of the Conclusions of June’s European Council is that of a frustrated parent seeking to impose discipline on squabbling children’.⁵² To some degree, the *squabbling children* got what they wanted. Once again, and probably not for the last time unless the Group of Wise Men that designs the future Union for the period 2020-30 is capable of coming up with the ‘magic wand’ that would avoid such a prospect.

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⁵¹ ‘Hacia un nuevo tratado europeo: de cómo recuperar la esencia del Tratado Constitucional sin que realmente lo parezca’, ARI nr 76/2007, Elcano Royal Institute, Madrid, 2007,
http://www.realinstitutoelcano.org/wps/portal/riecano/contenido?WCM_GLOBAL_CONTEXT=/Elcano_es/Zonas_es/Europa/ARI+76-2007.

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⁵² Editorial in *European Law Review* 2007, p. 605-606.