

## The Treaty of Lisbon

The Lisbon Treaty establishing a new legal framework for the European Union entered into force on 1 December 2009. The objective of the Treaty is to reform the European Union, which now consists of 27 members, with the aim of enabling it to function more efficiently and democratically. The Lisbon Treaty integrates most of the innovations of the Treaty establishing a Constitution for Europe, the ratification of which failed owing to the “No” votes of the referendums held in the Netherlands and France. The present article describes the general institutional changes to the European Union, some of which impact on economic and monetary policy, such as the strengthening of the European Parliament and of the national parliaments, and the improvement in voting modalities in the Council. Furthermore, key amendments in the field of Economic and Monetary Union are highlighted, such as the strengthening of the role of the euro-area countries and of the Commission in coordinating economic policy as well as the ECB gaining the official status of an EU institution. On balance, the established monetary framework of the 1992 Maastricht Treaty remains unchanged, the centrepiece of which is the independent system of national central banks and the European Central Bank committed to the primary objective of maintaining price stability.

## Key institutional changes

*Fundamental changes: new structure*

The Lisbon Treaty, which entered into force on 1 December 2009, amends the existing Treaties: the Treaty on European Union (TEU) and the Treaty establishing the European Community. The latter Treaty has been renamed the Treaty on the Functioning of the European Union (TFEU). The Lisbon Treaty integrates most of the innovations of the Treaty establishing a Constitution for Europe, the ratification of which failed owing to the “No” votes of the referendums held in the Netherlands and France. As part of the reform of the European Union, the existing three-pillar structure (the European Communities, a common foreign and security policy, and police and judicial cooperation in criminal matters) was abolished. The legal successor to the European Community is the European Union, which has its own legal personality. The European Council has officially gained the status of an EU institution and will consist in future not only of the Heads of State or Government of all the member states and the President of the Commission, but will also have its own President, whose official position has been newly created. The European Council provides the Union with the necessary impetus for its development and defines the general political objectives and priorities.

*Strengthening of the European Parliament: codecision procedure becomes the norm for legislation*

As a further step towards enhancing the democratic legitimacy of the European Union, the role of the European Parliament has been strengthened. Its powers have been expanded: it elects the President of the Commission; the Commission is subject as a body to a vote of approval by the European Parlia-

ment. The codecision procedure, in which the Council and the Parliament jointly adopt legislation, has also become the ordinary legislative procedure of the European Union (Articles 289 (1) and 294 of the TFEU). The European Parliament and the Council thus, for the first time, have largely equal status as legislative bodies of the European Union. Simultaneously, the number of cases in which this legislative procedure is to be applied has been further increased. It now also applies to the amendment of certain provisions of the Statute of the ESCB and of the ECB (Article 129 (3) of the TFEU and Article 40.1 of the Statute of the ESCB and of the ECB<sup>1</sup>).

Furthermore, the democratic legitimacy of the European Union is to be strengthened by the greater involvement of national parliaments in the activities of the European Union and by expanding their scope of influence.<sup>2</sup> Draft EU legislation must be made available to national parliaments at an early stage. In response, a reasoned opinion may be sent stating why the national parliament considers the draft legislative act to be incompatible with the principle of subsidiarity, namely because the objectives of the proposed action can be sufficiently achieved at national level. If one-third of national parliaments submit such reasoned opinions, the Commission has to review the legislative proposal. Moreover, the national parliaments also have the option of monitoring compliance with the principle of

*National parliaments have stronger influence*

<sup>1</sup> Protocol on the Statute of the European System of Central Banks and of the European Central Bank.

<sup>2</sup> Article 12 of the Treaty on European Union, Protocol on the Application of the Principles of Subsidiarity and Proportionality, Protocol on the Role of National Parliaments in the European Union.

subsidiarity at a later stage by seeking a judicial review before the Court of Justice of the European Union.

*Improved voting modalities for the Council as a result of more decision-taking by qualified majority...*

The Lisbon Treaty has also brought about key changes in the Council's voting modalities. In many cases, the use of qualified majority voting (QMV) has replaced the principle of unanimity. QMV has become the standard voting procedure in the Council (Article 16 (3) of the TEU). One of the provisions affected by the change from unanimity to QMV is that concerning the appointment of the members of the Executive Board of the ECB (Article 283 (2) of the TFEU). Besides this, it is mainly in the areas of justice and home affairs that the requirement for unanimity has been modified. This facilitates decision-making by the European Council and the Council of Ministers. Unanimity is still required, in particular, for decisions relating to the common foreign and security policy, common defence policy and social policy.

*... and by amending the rules on attaining a qualified majority*

One fundamental improvement consists in the introduction of a second voting key.<sup>3</sup> In future, the size of the population of the individual member states will be (one of) the crucial factor(s) determining whether a qualified majority is attained (and not, as is currently the case, acting only on a proposal), thus sustainably strengthening representativeness in the Union. This amendment will not enter into force until 1 November 2014, however.

Under these rules, a qualified majority is attained when, acting on a proposal from the Commission or from the High Representative of the Union for Foreign Affairs and Security

Policy, at least 55% of Council members from at least 15 member states, comprising at least 65% of the population of the Union, vote in favour of the proposal (Article 16 (4) of the TEU). When the Council is acting neither on a proposal from the Commission nor from the High Representative but on the initiative of another EU institution, say, if the Governing Council of the ECB recommends changes to certain provisions of the Statute of the ESCB and of the ECB (Article 129 (3) of the TFEU and Article 40.1 of the Statute of the ESCB and of the ECB), a qualified majority is attained if 72% of the Council members, representing member states comprising at least 65% of the population of the Union, vote in favour of the initiative (Article 238 (2) of the TFEU).

The principle of conferral developed by the European Court of Justice has been expressly anchored in the Treaty on European Union to govern the relationship between the Union and its member states. Under this principle, the Union can act only within the limits of the competences which the member states have conferred upon it in the Treaties. Competences which have not been conferred remain with the member states (Articles 4 (1) and 5 (1) and (2) of the TEU). The monetary policy of the euro-area countries falls within the sole (exclusive) competence of the European Union, for example. The internal market is one instance of shared competence (between the Union and its member states). This

*Division of competences between the EU and its member states*

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<sup>3</sup> The Deutsche Bundesbank and representatives of the European Parliament also advocated such a second key in the reform of the voting procedure of the Governing Council of the ECB.

also includes, for instance, legislative proposals on European financial supervision. In all areas of shared competence, the principle of subsidiarity – which has been further strengthened – must be observed. This means that a centralised solution may be chosen only if the objectives of a proposed action cannot be sufficiently achieved by the member states themselves (Article 5 (3) of the TEU). It is against these principles and, in particular, the principle of conferral, that any legislative proposals for financial supervision at the European level will have to be measured. Another matter that will have to be scrutinised is whether the implementation of harmonised supervisory regulations by national supervisory authorities is sufficient and whether it is, therefore, unnecessary to give powers of decision-making and implementation to European supervisory authorities.

*Simplified revision procedure for Treaties*

The provisions of Part Three of the Treaty on the Functioning of the European Union – “Union Policies and Internal Actions” – which also contains the chapters on economic policy and monetary policy, can be amended in future by a unanimous decision of the European Council; in other words, it will not be necessary to convene an intergovernmental conference for this purpose (Article 48 (6) of the TEU). Any amendments still need to be ratified by all the member states, however. Such amendments may not lead to an extension of the competences conferred upon the Union. Furthermore, the “passerelle clause” (Article 48 (7) of the TEU) allows voting on certain areas to switch from unanimity to QMV if this is unanimously approved by the European Council and has the consent of the European

Parliament. It would be possible in this way to amend, for instance, the requirement of unanimity for the transfer of tasks in the field of financial supervision to the ECB (Article 127 (6) of the TFEU).

Where amendments to Treaty legislation, such as those allowed by the passerelle clause, are possible without a ratification procedure, note should be taken of the judgement passed by the Federal Constitutional Court of Germany on the acts to ratify the Lisbon Treaty, which sets limits on the transfer of competences to the European Union.<sup>4</sup> Especially in such cases, the Federal Constitutional Court prescribes an effective right of participation for the Bundestag and, if its competence is affected, of the Bundesrat. The same is to apply to invoking the “flexibility clause” if action by the Union should prove necessary to attain the objectives set out in the Treaties and the Treaties have not provided the necessary powers (Article 352 of the TFEU). Consent given by a representative of the German government in the European Council or the Council is therefore not sufficient. German legislators have complied with the demands of the Federal Constitutional Court and have amended the supplementary national legislation accompanying the Lisbon Treaty.<sup>5</sup> Parliament must give its consent by act of parliament before a German member of the Council can vote in favour of a meas-

*Federal Constitutional Court judgement stipulates Bundestag involvement even in Treaty revisions without a ratification procedure*

<sup>4</sup> Federal Constitutional Court, judgement of the Second Senate of 30 June 2009, 2 BvE 2/08.

<sup>5</sup> Acts of 22 September 2009, Federal Law Gazette I, page 3022.

ure where the passerelle or flexibility clauses are applied.<sup>6</sup>

*Higher profile  
in the external  
representation  
of the  
European  
Union*

The newly created functions of the President of the European Council, who is elected for a term of two and a half years, and the High Representative of the Union for Foreign Affairs and Security Policy are designed to heighten the influence, cohesion and profile of the EU in foreign policy issues (Articles 15 (5) and (6), and 18 of the TEU). The President of the European Council is to represent the Union externally in matters concerning its common foreign and security policy without prejudice to the powers of the High Representative. The High Representative is also one of the Vice-Presidents of the Commission, presides over the Foreign Affairs Council, and is to ensure the consistency of the Union's external action. It remains to be seen how the newly created official roles of President of the European Council and High Representative will function in practice under the rotating EU presidency.

*Explicit  
provision on  
withdrawal  
from the Union*

For the first time, there is an explicit provision for the withdrawal of a member state from the European Union (Article 50 of the TEU). A withdrawal would be effected by an agreement concluded by the Union with the state concerned. There is no express provision for the exclusion of a member state. Rather, the Treaty on European Union contains only provisions for the event of a clear risk of a serious breach of the Union's fundamental values by a member state (Article 7 of the TEU). The question of whether it would be possible, applying general principles of international law, to terminate a country's membership of the

EU is just as much unresolved as the issue of the renewed granting of a derogation to a member state whose currency is the euro.

## Changes in the area of Economic and Monetary Union (EMU)

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The changes introduced in the area of EMU are of secondary significance compared with the general institutional reforms. The monetary constitution of Maastricht thus remains unaltered.

The member states and the Union – including its institutions – are obliged to maintain price stability; they work for the sustainable development of Europe based on balanced economic growth and price stability (Article 3 (3) sentence 2 of the TEU). The obligation to maintain price stability is enshrined in the Maastricht Treaty as a cornerstone of the monetary constitution of the Community and all the member states, and was purposely included as an objective in the Lisbon Treaty.

A special provision in the Treaty on the Functioning of the European Union (Article 137) and a dedicated protocol have anchored the – previously informal – Euro Group in EU law. This has created an institutionalised framework for the finance ministers of the member states whose currency is the euro “to discuss questions related to the specific responsibil-

*Strengthening  
of the Euro  
Group*

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<sup>6</sup> In certain other cases, the German member of the Council may vote in favour of a measure or abstain from voting only after the Bundestag and, if necessary, also the Bundesrat have taken a decision on this matter.

ities they share with regard to the single currency". Unlike the ECOFIN Council, which has a semi-annual rotating chair, the members of the Euro Group elect a president for two and a half years.

*Possibilities for euro-area countries to coordinate economic policy*

Economic policy essentially remains the responsibility of the member states. However, the possibility of a more extensive coordination of economic policy among the euro-area countries has been created. The euro-area countries, acting by a qualified majority, can adopt measures to strengthen the coordination and surveillance of their budgetary discipline and set out economic policy guidelines (Article 136 of the TFEU).

*Commission's scope extended with regard to the Stability and Growth Pact*

Furthermore, the Treaty expands the Commission's scope for action within the excessive deficit procedure. In order to prevent excessive deficits, the Commission has been given the right to issue an early warning to member states that fail to fulfil their fiscal policy obligations (Article 126 (3) of the TFEU). In addition, the Commission can address a warning to a euro-area country if its economic policies are not consistent with the broad guidelines recommended by the Council or risk jeopardising the proper functioning of EMU (Article 121 (4) of the TFEU). The extent to which the Commission will make use of this new scope for action remains to be seen. Moreover, the Council's decision on whether an excessive deficit exists in a member state is now based on a proposal from the Commission rather than a recommendation, as was previously the case. Consequently, the Commission's proposal can be amended only on the basis of a unanimous decision by the Council.

Nonetheless, the Council must still adopt the Commission's proposal by a qualified majority. A further, indispensable change in comparison with the previous legal position is that, for decisions regarding the existence of an excessive deficit, the member state concerned is not entitled to vote; the voting rights of all other member states with an excessive deficit can be exercised. However, the voting rights of member states with a derogation are suspended for decisions in the framework of multilateral surveillance as well as for measures relating to excessive deficits concerning those member states whose currency is the euro (Article 139 (4) of the TFEU).

In addition to a number of mainly technical adjustments, the chapter on monetary union also contains an institutional amendment. The ECB has been formally designated an institution of the European Union and, as such, now forms part of the institutional framework of the Union together with the European Council, the Council, the European Commission, the European Parliament, the Court of Justice of the European Union and the European Court of Auditors (Article 13 of the TEU and Article 282 of the TFEU). Previously, the ECB had a special status as an institution *sui generis* rather than being an institution of the European Union.

*ECB now (also) part of the institutional framework of the EU*

Nonetheless, the ECB is not comparable with the other EU institutions for a number of reasons. While all the other institutions are obliged to participate in achieving all of the Union's aims, the ECB – as part of the ESCB and the Eurosystem – remains committed to its primary objective of maintaining price sta-

*ECB's stability mandate still takes precedence*

bility.<sup>7</sup> For the ECB, therefore, this greatly limits the duty of sincere cooperation associated with EU institution status. In particular, for example, the Council cannot demand of the ECB an *ex ante* coordination of monetary policy with other policy areas such as fiscal policy by invoking a duty of sincere cooperation.

*Its specific characteristics remain unchanged ...*

Unlike the other EU institutions, the ECB – alongside the Union – has legal personality. The ECB is entirely separate from the EU budget; it is funded by the national central banks. As shareholders, they own the ECB's capital, decide how its profits should be used and bear its losses. Consequently, official liability for the ECB on the part of the Union is expressly ruled out; given its legal personality, the ECB itself is liable (Article 340 of the TFEU). It is therefore likely that the ECB's new role as an EU institution will ultimately be of a formal and symbolic nature.

*... as does the ECB's integration in the Eurosystem*

Given the political proviso for the Lisbon Treaty that the established monetary framework created through the 1992 Maastricht Treaty should not be changed, the Eurosystem's tasks and their distribution within the system were left unaltered. The relevant provisions in the Statute of the ESCB and of the ECB remain unchanged and are simply reiterated in the new section on the ECB (Articles 282 and 283 of the TFEU). The term "Eurosystem", which has been used in practice since the euro was introduced in 1999, was incorporated into the Treaty on the Functioning of the European Union to designate the ECB and the national central banks of those member states whose currency is the euro.

The basic central bank tasks are still to be carried out by the whole system and still entail, in particular, defining and implementing monetary policy, managing the foreign reserves of the member states and promoting the smooth operation of payment systems (Article 127 (2) of the TFEU). The system is governed by the decision-making bodies of the ECB. The supreme decision-making body of the ECB is the Governing Council. It comprises the governors of the national central banks of the euro-area countries and the members of the Executive Board of the ECB. In particular, the Governing Council of the ECB formulates the monetary policy of the euro area and takes all key decisions necessary to ensure the performance of the tasks entrusted to the ESCB. The main task of the Executive Board of the ECB is still to manage the current business of the ECB. Pursuant to the principle of decentralisation enshrined in Article 12 (1) third subparagraph of the Statute of the ESCB and of the ECB, operations which form part of the tasks of the ESCB, particularly in the area of monetary policy, are still generally to be carried out by the national central banks.

The independence of the central banks of the ESCB – the ECB and the national central banks<sup>8</sup> – and their decision-making bodies remains unchanged (Article 130 of the TFEU). The same conditions still apply to their functional, institutional, personal and financial independence. The separate arrangements

*No change to guarantee of independence for ECB and national central banks*

<sup>7</sup> As before, the system will support the general economic policies in the Union only insofar as this is not detrimental to its primary objective.

<sup>8</sup> With the exception of the Bank of England.

incorporated for the ECB in Article 282 (3) sentences 3 and 4 of the Treaty on the Functioning of the European Union do not contain any changes with respect to the previous guarantee of independence.

*Transfer of financial supervisory tasks to the ECB*

Finally, the procedure under which specific tasks relating to the prudential supervision of credit institutions and other financial institutions with the exception of insurance undertakings can be transferred to the ECB has been changed. While the previous legal position envisaged that the Council, acting unanimously after receiving the assent of the European Parliament and consulting the ECB, could confer tasks upon the ECB, the new provisions do not, in this case, follow the rule running through the Lisbon Treaty that decisions must be jointly adopted by the Council and the European Parliament. Before making its decision, which must still be unanimous, the Council is now obliged only to consult the European Parliament (as was previously already the case for the ECB) (Article 127 (6) of the TFEU). As things stand at the EU level, the Secretariat of the European Systemic Risk Board is to be entrusted to the ECB on this basis.

It is imperative that the involvement of the ECB General Council's members in the European Systemic Risk Board does not cause them to lose sight of their primary objective of maintaining price stability. In this context, care must be taken to ensure that a clear distinction is made between the functions of this new body and the financial stability tasks conferred upon the Eurosystem, which must be carried out independently. In particular, the independence of the members of the ECB Governing Council, who will also become members of the European Systemic Risk Board, will therefore be of paramount importance when fulfilling Eurosystem tasks.

Article 133 of the Treaty on the Functioning of the European Union has created a new legal basis for euro monetary law. This provision grants the Council and the European Parliament the right to lay down the measures necessary for the use of the euro as the single currency; this is without prejudice to the powers of the ECB; the ECB must be consulted before the measures are adopted. This provision is a new addition; its forerunner envisaged only measures for the "rapid introduction" of the euro.

*New legal basis for euro monetary law*