

## **THE LISBON TREATY AND THE ACCESSION OF TURKEY TO THE EUROPEAN UNION\***

*Lúisa Verdelho Alves\*\**

1. On December 13, 2007, the Member States of the European Union (EU) signed in Lisbon a treaty amending the founding Treaties of the EU<sup>1</sup>. After a troubled ratification process, due to the adverse outcome of a national referendum in Ireland, the Lisbon Treaty finally entered into force on December 1, 2009, defining a new trajectory for the EU integration process.

The present article addresses the possible implications of the recent EU treaty reform to the accession of Turkey to the EU. To that end, I propose an analysis of the modifications introduced in the institutional framework of the Union and I inquire whether the legal change at this level is capable of influencing the attitude of the current Member States concerning the accession of Turkey to the EU.

So far the official discussion on whether it should be granted full EU membership to Turkey tends to focus on issues related to Turkey's

---

\* O texto que agora se publica corresponde, no essencial, à Conferência proferida na Istanbul Üniversitesi em 29 de Setembro de 2010.

\*\* Professora-Adjunta do Instituto Superior de Contabilidade e Administração do Porto, mlalves@iscap.ipp.pt

<sup>1</sup> The consolidated version of the Treaty on European Union and the Treaty on the Functioning of the European Union, following the amendments introduced by the Treaty of Lisbon, is published in the Official Journal C83 of 30.3.2010, and can be accessed at <http://eur-lex.europa.eu/en/treaties/index.htm>.

Prior to the Lisbon Treaty, the following amending treaties were adopted: the Single European Act, Official Journal L 169 of 29 June 1987; the Treaty of Maastricht, Official Journal C 191 of 29 July 1992; the Treaty of Amsterdam, Official Journal C 340 of 10 November 1997; the Treaty of Nice, Official Journal C 80 of 10 March 2001 and the Treaty establishing a Constitution for Europe, Official Journal C 310 of 16 December 2004.

eligibility for membership<sup>2</sup>. The argument sketched in the following lines shows that other reasons, whether or not explicitly made, are capable of affecting Turkey's journey to accession.

2. Before considering the implications of the institutional changes to the aspiring Member States it is appropriate to begin by looking briefly at the provision that governs the accession of States to the EU.

Article 49 of the Treaty on European Union (EU Treaty) provides as follows:

“Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union. The European Parliament and national Parliaments shall be notified of this application. The applicant State shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the consent of the European Parliament, which shall act by a majority of its component members. The conditions of eligibility agreed upon by the European Council shall be taken into account.

The conditions of admission and the adjustments to the Treaties on which the Union is founded, which such admission entails, shall be the subject of an agreement between the Member States and the applicant State. This agreement shall be submitted for ratification by all the contracting States in accordance with their respective constitutional requirements.”

The text of this provision corresponds almost entirely to the one adopted by the founding fathers of the Union in 1957. As concerns the requirements for a State to apply for membership in the EU, enunciated in paragraph 1, the Amsterdam Treaty introduced a reference to the values set out on Article 2, requiring candidate countries to respect the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law. The Lisbon Treaty added

---

<sup>2</sup> Other scholars have analysed these issues. See, among many others contributions on this subject, David Kanarek – *Turkey and the European Union: the Path to Accession*. The Columbia Journal of European Law, 2003, pp. 457-474; Ahmet Sözen – *Turkey's democratisation in light of its EU candidate status*, in Inglis Kirsten (ed.) – *The Constitution for Europe and an Enlarging Union: Unity in Diversity*. Europa Law Pub., 2005, pp. 281-305.

that only those States committed to promoting these values may apply to become a member of the Union and included a reference to the conditions of eligibility agreed upon by the European Council<sup>3</sup>. Another important change in paragraph 1 consists in the recognition of the role of the European Parliament and national parliaments in relation to the enlargement of the Union. The Single European Act introduced the requirement for assent of the European Parliament on the application to become a member of the Union. And the Lisbon Treaty further stipulates that an application for membership shall be notified to the European Parliament and national parliaments, involving, therefore, national parliaments in the enlargement of the Union.

However, paragraph 2, pertaining to the final agreement on accession, particularly relevant for our analysis<sup>4</sup>, was left untouched by the various amending treaties. The accession treaty was and remains an agreement between the Member States and the applicant State that needs to be ratified by all the States in accordance with their constitutions to enter into force. Ultimately, each Member State has a veto power over accession.

<sup>3</sup> Even without this express reference in the text of the Treaty, the Copenhagen European Council of 21-22 June 1993 determined the requirements to be satisfied by applicant States.

According to the “Copenhagen criteria”, “Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union. Membership presupposes the candidate’s ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union. The Union’s capacity to absorb new members, while maintaining the momentum of European integration, is also an important consideration in the general interest of both the Union and the candidate countries.” <http://www.consilium.europa.eu/App/NewsRoom/loadBook.aspx?target=2000&infotarget=before&max=15&bid=76&lang=EN&id=347>

<sup>4</sup> Turkey was officially declared a candidate for EU membership in 1999 Helsinki European Council. Accession negotiations were opened after the Brussels European Council 16/17 December 2004 and the adoption of a Negotiating Framework (Luxembourg, 3 October 2005). According to this Negotiating Framework: “These negotiations are based on Article 49 of the Treaty on European Union. The shared objective of the negotiations is accession. These negotiations are an open-ended process, the outcome of which cannot be guaranteed beforehand. While having full regard to all Copenhagen criteria, including the absorption capacity of the Union, if Turkey is not in a position to assume in full all the obligations of membership it must be ensured that Turkey is fully anchored in the European structures through the strongest possible bond.” See [http://ec.europa.eu/enlargement/pdf/st20002\\_05\\_TR\\_framedoc\\_en.pdf](http://ec.europa.eu/enlargement/pdf/st20002_05_TR_framedoc_en.pdf)

3. As to the possible meaning and implications of the treaty reform at the institutional level for Turkey's prospects to become a Member of the EU, it should first be said that the institutional form of the EU is of central importance for the political balance of power between the Member States within the Union. It is therefore worth to explore the institutional innovations contained in the Treaty of Lisbon with a view of reflecting on whether and how the new institutional design of the Union will affect the distribution of power among Member States and the ongoing accession negotiations with Turkey.

The Institutional framework of the Union, according to Article 13 EU Treaty, comprises seven institutions: the European Parliament, the European Council, the Council, the European Commission, the Court of Justice of the European Union, the European Central Bank and the Court of Auditors.

European Union literature has drawn attention to the specificity and distinctiveness of the institutional structure of the Union and its deviation from the classical formula of the separation-of-powers principle into legislative, executive and judicial enshrined in national political systems.<sup>5</sup>

LENAERTS explains that “an organic understanding of the separations of powers is not practicable in the European Union”<sup>6</sup>. The function of the legislative power, as also happens with the executive power, is not entrusted to a single institution. In the words of another commentator, “no single institution can claim the title of «the Community legislative branch» for itself”<sup>7</sup>. Indeed, the law-making function in the Union is shared between the European Parliament, the Council and the Commission, institutions with different sources of legitimacy.

---

<sup>5</sup> See, for example, Koen Lenaerts – *Some reflections on the separation of powers in the European Community*. *Common Market Law Review*, 1991, pp. 11-35; Bruno de Witte, A. Geelhoed and J. Inghelram – *Legal instruments, Decision-Making and Finance*, in Kapteyn, McDonnell, Mortelmans, Timmermans and Geelhoed – *The Law of the European Union and the European Communities*. Austin: Wolter Kluwer, 2008, p. 273; Paul Craig and Gráinne de Búrca – *EU Law*. Oxford: Oxford University Press, 2008, p. 38; Walter van Gerven – *The European Union A Polity of States and Peoples*. Oxford: Hart Publishing, 2005, p.14.

<sup>6</sup> Koen Lenaerts – *Some reflections on the separation of powers...*, p. 12.

<sup>7</sup> Bruno de Witte *et al*, *op. cit.*, p. 322.

The Parliament is the institution which involves the peoples of the Member States<sup>8</sup> in the functioning of the Union. Since 1979, its members are elected by direct universal suffrage in all Member States.

The Council members are ministerial-level representatives of the Member States<sup>9</sup>.

The Commission is the institution designed to promote the general interest of the Union and is expected to be completely independent *vis-à-vis* the Member States, a desideratum reflected in its composition. Following the rules adopted by the Lisbon Treaty on the appointment of the Commission, the European Council, taking into account the elections to the European Parliament and after having held the appropriate consultations, shall propose by qualified majority to the European Parliament a candidate for President of the Commission. This candidate shall be elected by the European Parliament by a majority of its component members. Based on the suggestions made by Member States, the Council, by common accord with the President-elect, shall adopt the list of the other persons whom it proposes for appointment as members of the Commission. The President, the High Representative of the Union for Foreign Affairs and Security Policy and the other members of the Commission shall be subject as a body to a vote of consent by the European Parliament. On the basis of this consent the Commission shall be appointed by qualified majority by the European Council<sup>10</sup>.

The distribution of power among these institutions engaged in law-making varies according to the subject-matter – Different legislative procedures apply in the different spheres of competence of the Union. However, the analysis of the scope of powers attributed to each of these institutions, in the legislative procedures, shows that the central role in the Union legislative process is played by the Council.

The core features of the Union decision process can be summarized as follows.

The Commission has a quasi-exclusive power to initiate legislation.

---

<sup>8</sup> Article 14 (2) EU Treaty, provides that “The European Parliament shall be composed of representatives of the Union’s citizens. They shall not exceed seven hundred and fifty in number, plus the President. Representation of citizens shall be progressively proportional, with a minimum threshold of six members per Member State. No Member State shall be allocated more than ninety-six seats”.

<sup>9</sup> See Article 16 EU Treaty.

<sup>10</sup> See Article 17 EU Treaty.

With few exceptions<sup>11</sup>, the Union legislative procedures start with a Commission's proposal. Nevertheless, the European Parliament<sup>12</sup> and the Council<sup>13</sup> may request the Commission to submit any appropriate proposals. To this "indirect right of initiative" of the Parliament and the Council, the Lisbon Treaty added the possibility of a citizens' initiative: "not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties".<sup>14</sup>

The part played by the Commission should not be underestimated though. In most cases, when the Council adopts an act on a proposal from the Commission unanimity is required to amend that proposal<sup>15</sup>. Furthermore, until the Council has acted, the Commission may alter its proposal<sup>16</sup>. These two rules combined give the Commission the necessary instrument to exert high influence in the decision-making process leading to the adoption of a Union act.

The Parliament, which in the early years of the European integration process played quite a modest role, limited to consultative powers, has gradually been assigned more important tasks, an evolution which is regarded as an imposition of "the fundamental democratic principle that the peoples should take part in the exercise of power through the

---

<sup>11</sup> See Article 18 (2) EU Treaty, establishing that the High Representative of the Union for Foreign Affairs and Security Policy shall contribute by his proposals to the development of the Union's common foreign and security policy and common security and defence policy; Article 76 (b) Treaty on the Functioning of the EU, recognising the power of initiative of Member States in the areas of judicial cooperation in criminal matters and police cooperation; Article 257, para. 1, Treaty on the Functioning of the EU, concerning the procedure for the establishment of specialized courts at the request of the European Court of Justice; and, lastly, the initiative of the European Central Bank and the European Investment Bank in the cases provided for in Articles 129 (4) and 308, para. 3, Treaty on the Functioning of the EU.

<sup>12</sup> Article 225 Treaty on the Functioning of the EU.

<sup>13</sup> Article 241 Treaty on the Functioning of the EU.

<sup>14</sup> Article 11 (4) EU Treaty. See also the first paragraph of Article 24 Treaty on the Functioning of the EU.

<sup>15</sup> Article 293 (1) Treaty on the Functioning of the EU.

<sup>16</sup> Article 293 (2) Treaty on the Functioning of the EU.

intermediary of a representative Assembly”<sup>17</sup>. The landmark in this evolution is the introduction by the Maastricht Treaty of the co-decision procedure, renamed by the Treaty of Lisbon as the ordinary legislative procedure<sup>18</sup>, which granted the Parliament equal status with the Council in the adoption of legislation. Since the last reform, the Treaty also provides, in specific cases, for a special legislative procedure<sup>19</sup>. In such cases, the decisional legislative power is vested exclusively to the Council or to the Parliament. However, a close analysis of the Treaty shows that the exclusive legislative competence of the Parliament is only foreseen in a limited number of areas of the Union legislative competence<sup>20</sup>. In most cases, the Parliament intervenes in this special legislative procedure by way of a simple consultation by the Council on a legislative proposal from the Commission<sup>21</sup>. Moreover, in some legislative matters, in very sensitive policy areas, the Parliament simply does not take part in the Union decision-making process<sup>22</sup>.

In short, despite the remarkable evolution in Parliament’s powers, the “institutional balance” still leans in favour of the Council.

This conclusion reveals another paradox of the European integration process: the prominent role in the Union’s legislative branch is played by an institution composed of Member State ministers, i.e. members of the executive branch. From the perspective of the democratic legitimacy of the Union legislative process these findings have justified the criticism that democratic deficit still has to be remedied. At any rate, the role assigned to the Council in the Union legislative process focuses our attention on the voting rules laid down in the Treaties.

Article 16 (3) EU Treaty stipulates that the Council shall act by

---

<sup>17</sup> Judgment of the Court of Justice of 29 October 1980, *SA Roquette Frères v. Council of the European Communities*, Case 138/79, ECR 1980, p. 3333.

<sup>18</sup> See Article 289 (1) and Article 294, Treaty on the Functioning of the EU, for a description of this procedure.

<sup>19</sup> Article 289 (2) Treaty on the Functioning of the EU.

<sup>20</sup> Articles 223 (2) and 228 (4) Treaty on the functioning of the EU.

<sup>21</sup> See, for example, the following articles of the Treaty on the functioning of the EU: Article 113, harmonisation of tax law; Article 118, language rules for the European intellectual property rights; Article 153, paragraph 1 (c), (d), (f) and (g), social policy; Article 311, para. 3, Union’s own resources; Article 81 (3), judicial cooperation in civil matters; Article 86 (1), judicial cooperation in criminal matters; Article 89, police cooperation.

<sup>22</sup> See, for example, Article 342 of the Treaty on the Functioning of the EU on the language rules of the institutions.

a qualified majority except where otherwise provided by the treaties themselves. However, the number of provisions that provide for a different voting requirement is scarce. Unanimity voting has gradually been reduced by the various amending treaties. And the deliberation by simple majority is even more rare.

The qualified majority voting in the Council is therefore of particular importance for the political distribution of power between the Member States within the Union. It is not surprising though that this was one of the most controversial and disputed topics addressed by the last intergovernmental conferences. The compromise reached in the Constitutional Treaty, later incorporated in the Lisbon Treaty, is of great significance because it represents a departure from the voting regime adopted by the founding fathers of the European Union.

This being said, let us examine the decision-making formula adopted by the Lisbon Treaty with a view of reflecting on whether and how it will affect the balance of political power between the current Member States and the accession negotiations with Turkey.

The Treaty provides for a transitional period<sup>23</sup>. Until 1 November 2014 the system established by the Treaty of Nice to prepare the enlargement to the States of Central and Eastern Europe shall remain in force. Moreover, between 1 November 2014 and 31 March 2017, when an act is to be adopted by qualified majority, a member of the Council may request that it is adopted in accordance with those rules.

This considered, we might first analyse briefly the qualified majority rules still in force.

For calculating the qualified majority, the votes of Member States are weighted as follows: the big Member States, France, Germany, Italy, United Kingdom, each have 29 votes, Spain and Poland, 27 each; Romania, 14; Netherlands, 13; Belgium, Czech Republic, Greece, Hungary, Portugal, 12 each; Bulgaria, Austria, Sweden, 10 each; Denmark, Ireland, Lithuania, Slovakia, Finland, 7 each; Estonia, Cyprus, Látvia, Luxembourg, Slovenia, each 4; and Malta 3 votes.

Where the Council deliberates on a proposal from the Commission, a qualified majority is attained with 255 votes out of the 345 votes, coming from at least the majority of Member States, i.e. 14 Member States. In

<sup>23</sup> See Article 16 (4) EU Treaty read with Article 238 Treaty on the Functioning of the EU and Article 3 Protocol (n.º 36) on transitional provisions concerning the qualified majority.

other cases, decisions are adopted if the 255 votes in favour represent at least two thirds of the Member States, i.e. 18 Member States. The reason for the requirement of a stronger and reinforced majority when a decision is taken without a proposal from the Commission lies in the assumption that the Union's general interest is safeguarded in the Commission's proposal. As already noted, when the Council adopts an act on a proposal from the Commission, unanimity is required to amend that proposal.

In short, a dual requirement is established to attain qualified majority: a majority of member states, 14 or 18 depending on whether or not the decision is taken on a proposal from the Commission, and a majority of votes, 255 votes out of 345, according to the weighting laid down in the Treaty. Consequently, 91 votes can block any proposal that needs to be approved by qualified majority. From this it is evident that the aim of the allocation of weighting votes to the Member States is to achieve a balance between distinct categories of States. Just to give an example: the four big Member States alone can block a decision, but they need the support of other medium size and small Member States in order to approve a measure by qualified majority.

Since the Treaty of Nice the provision on qualified majority also provides for the possibility of a Member State to request verification that the Member States comprising the qualified majority represent at least 62% of the total population of the Union. If this condition is not met, the decision is not adopted. Despite the introduction of this additional criterion of population it is difficult to sustain that the Nice Treaty adopted a triple majority system. PLECHANOVÁ explains that the application of the population criterion makes no difference to the voting power of Member States because the quota of weighted votes is considerably higher than the quota of population, and contends that the introduction of the population criteria "was an example of an incompetent activism which makes the decision-making more complicated but brings no real difference in voting power of individual Member States"<sup>24</sup>.

This was not the only modification introduced since the setting up of the European Union. Each enlargement involved a discussion of the weight of votes to be given to the new Member State, and of the

---

<sup>24</sup> See Bela Plechanová – *The Treaty of Nice and the Distribution of Votes in the Council – Voting Power consequences for the EU after the Oncoming Enlargement*. European Integration Online Papers (EIoP) vol. 7 (2003) n.º 6, p. 5; <http://eiop.or.at/eiop/texte/2003-006a.htm>.

threshold for qualified majority, but the substance of the rule remained unchanged: it was a rule designed to achieve a balance between different categories of States, in which the people of the big Member States were under-represented<sup>25</sup>.

The Lisbon Treaty, however, adopts a different formula.

Article 16 (4) EU Treaty reads as follows:

“As from 1 November 2014, a qualified majority shall be defined as at least 55% of the members of the Council, comprising at least fifteen of them and representing Member States comprising at least 65 % of the population of the Union.

A blocking minority must include at least four Council members, failing which the qualified majority shall be deemed attained.”

And Article 238 (2) further stipulates that “where the Council does not act on a proposal from the Commission or from the High Representative of the Union for Foreign Affairs and Security Policy, the qualified majority shall be defined as at least 72 % of the members of the Council, representing Member States comprising at least 65 % of the population of the Union”. Also, in cases where, under the Treaties, not all the members of the Council participate in voting, a blocking minority must include at least the minimum number of Council members representing more than 35 % of the population of the participating Member States, plus one member, failing which the qualified majority shall be deemed attained.

In addition, the so-called “Ioannina compromise”, that has hardly ever been used<sup>26</sup>, is nonetheless reiterated in a separate Declaration attached to the Treaty of Lisbon. “As from 1 April 2017, if members of the Council, representing at least 55 % of the population, or at least 55 % of the number of Member States necessary to constitute a blocking minority resulting from the application of Article 16 (4), first subparagraph, of the Treaty on European Union or Article 238 (2) of the Treaty on the Functioning of the European Union, indicate their opposition to the Council adopting an act by a qualified majority, the

---

<sup>25</sup> *Idem*, p. 11 and 12.

<sup>26</sup> See, Koen Lenaerts and Piet van Nuffel – *Constitutional Law of the European Union*. London: Sweet & Maxwell, 1999, p. 315; Bruno de Witte, A. Geelhoed and J. Inghelram – *Legal instruments, Decision-Making and Finance*, in Kapteyn, McDonnell, Mortelmans, Timmermans and Geelhoed – *The Law of the European Union and the European Communities*. Austin: Wolter Kluwer, 2008, p. 328.

Council shall discuss the issue. The Council shall, in the course of these discussions, do all in its power to reach, within a reasonable time and without prejudicing obligatory time limits laid down by Union law, a satisfactory solution to address concerns raised by the members of the Council. To this end, the President of the Council, with the assistance of the Commission, and in compliance with the Rules of Procedure of the Council, shall undertake any initiative necessary to facilitate a wider basis of agreement in the Council”<sup>27</sup>. In other words, when Member States, representing at least 55 % of the population, or at least 55 % of the number of Member States necessary to constitute a blocking minority, declare their intention to oppose the adoption by the Council of a decision by qualified majority, this compromise requires the Council to do all in its power, within a reasonable time, to reach a satisfactory solution that could be adopted by a greater number of Member States.

The conclusion that emerges from the description of the new rule is that it sets a dual majority system that combines the criterion of the majority of Member States with that of the majority of EU population. The EU system of decision-making abandons the former division between groups of States and gives Germany, the most populous country, more votes than any other State.

The consideration above uncovers the reason for setting up a threshold for the blocking minority – four Member States. Without this express requirement it would have been possible for three of the largest Member States to block the adoption of measures by qualified majority<sup>28</sup>.

The arguments just expounded lead us to a fairly simple conclusion: the voting system adopted by the Treaty of Lisbon alters the relative position of the big Member States, strengthening the position of Germany. This

<sup>27</sup> Articles 4, 5 and 6 of the Declaration n.º 7 on Article 16 (4) EU Treaty and Article 238 (2) Treaty on the Functioning of the EU reaffirming the so-called “Ioannina mechanism”. These rules were first adopted by the Council in Ioannina, Greece, on 29 March 1994. See Council Decision of March 29, 1994, OJ C105/1, as amended by the Council Decision of January 1, 1995, OJ C1/1.

<sup>28</sup> At present, the Union’s population amounts to 499,20 million. The six largest Member States are: Germany (82 million, 16,43% of the Union’s population), France (64,30 million, 12,88% of the Union’s population), United Kingdom (61,70 million, 12,36% of the Union’s population), Italy (60 million, 12,02% of the Union’s population), Spain (45,80 million, 9,17% of the Union’s population) and Poland (38,10 million, 7,63% of the Union’s population).

loss of voting power by each of the other big States will further increase if Turkey joins the European Union. It is doubtful that the current Member States will give their assent to a further decline of their political influence.

4. The preceding analysis has pointed out the relevance of the debate on institutional reform for the accession negotiations with Turkey. It is suggested that progress in the membership negotiations will reopen the question of the distribution of power among Member States in EU institutions, the Council in particular. The question arises then whether the institutional adaptations necessary to achieve the political consensus regarding the admittance of Turkey can be introduced by the Accession Treaty, or whether they require a prior modification of the Treaties according to the procedure set out in Article 48 EU Treaty for the amendment of the Treaties. The inquiry is directly related to the possible existence, and scope, of procedural limits to the revision of the Treaties. European law scholars have divergent views on this issue, anchored in different conceptions of the legal nature of the European Union, and of the relations between European Union Law and International Law<sup>29</sup>.

The Court of Justice of the European Union already expressed its position on the matter. In *Defrenne*<sup>30</sup>, the Court of Justice stated that “apart from any specific provisions, the Treaty can only be modified by means of the amendment procedure carried out in accordance with Article 236” (now Article 48). In its Opinion 1/92, the Court further added that the powers conferred on the Court by the Treaty may be modified pursuant only to the revision clause<sup>31</sup>. Other rulings confirm

---

<sup>29</sup> See, Ana M. Guerra Martins – *A natureza jurídica da revisão do Tratado da União Europeia*. Lisboa: Lex, 2000; Bruno de Witte – *Rules of Change in International Law: How special is the European Community?* Netherlands Yearbook of International Law, 1994, pp. 299-333; Jean Victor Louis – *Quelques considérations sur la révision des traités instituant les Communautés*. Cahiers de Droit Européen, 1980, pp. 553-558 ; M. Deliege-Sequaris – *Révision des traités européens en dehors des procédures prévues*, Cahiers de Droit Européen, 1980, pp. 539-552.

<sup>30</sup> Judgment of the Court of 8 April 1976, Gabrielle Defrenne v. Sabena, Case 43/75, ECR 1976, p. 455, para. 58.

<sup>31</sup> Opinion 1/92, on the Draft Agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area, ECR 1992, p. I-2821, para. 32.

this interpretation. The Court has held that Member States cannot modify the Treaties by means of an agreement concluded with third countries<sup>32</sup> or a Council resolution<sup>33</sup>.

From this it can be concluded that the Court supports the view of the binding nature of the revision process established in the Treaty, excluding therefore the possibility of modifying the Treaties according to the general rules of International Law.

It remains doubtful, however, that the Member States might still modify the Treaties through an accession agreement, without having to comply with the procedure set out in Article 48 EU Treaty for the amendment of the Treaties.

Indeed Article 49 EU Treaty, establishing the accession procedure, refers to an agreement between the Member States and the applicant State on the “conditions of admission and the adjustments to the Treaties on which the Union is founded, which such admission entails”.

DE WITTE argues that the adjustments mentioned in Article 49 can be considered as amendments, and contends that this provision “is a *lex specialis* providing for treaty amendment on the occasion of the accession of new States, without strict limits as to the nature of those amendments”<sup>34</sup>. However, as the author expressly recognises, most writers tend to disagree with his view on the grounds that the adjustments to the founding treaties allowed on the occasion of accession of a new Member State are merely “technical adjustments” relating to the representation of the acceding State in the Union Institutions.

Obviously, a modification of the Lisbon’s voting regime can hardly be qualified as a mere technical adjustment.

One could argue, however, that the core elements of both the revision process and the accession process are not so dissimilar. Indeed, unanimity of the Member States is a requirement for the adoption and entering into force of both amendment treaties and accession treaties. Despite the proposals made during the preparatory works that led to the adoption of the Lisbon Treaty<sup>35</sup>, which abandoned the need for common

---

<sup>32</sup> Judgment of the Court of 31 March 1971, *Commission v. Council*, European Agreement on Road Transport, Case 22/70, ECR 1971, p. 263, para. 22.

<sup>33</sup> Judgment of the Court of 3 February 1976, *Pubblico Ministero v Flavia Manghera and others*, Case 59-75, ECR 1976, p. 91, para. 19-21.

<sup>34</sup> Bruno de Witte – *Rules of Change in International Law...*, p. 321.

<sup>35</sup> See Contribution for a Preliminary Draft Constitution of the European Union, known

accord of the Member States in the conclusion of those treaties, the Lisbon Treaty retained the requirement of unanimity. Also, with the exception of amendments relating to the extension of qualified majority in decision-making voting and the ordinary legislative procedure to areas in which they do not yet apply, in which case a simplified revision procedure applies<sup>36</sup>, unanimous ratification by all Member States is a condition for the entering into force of both amendment treaties and accession treaties. And in both cases, this may imply the recourse to national referenda, the outcome of which is very difficult to predict<sup>37</sup>.

---

as “Penelope Project”, Working Document produced at the request of the President of the Commission, Romano Prodi.

For future accessions the “Penelope Project” provided for the adoption of the accession treaty by a majority of five sixths, subject to ratification by all Member States.

For the revision of the Treaty, the unanimity rule was replaced by a majority of five sixths both for the adoption of the revision treaty and for the ratifications necessary to entry into force.

[http://ec.europa.eu/economy\\_finance/emu\\_history/documents/treaties/Penelope%20pdf\\_en.pdf](http://ec.europa.eu/economy_finance/emu_history/documents/treaties/Penelope%20pdf_en.pdf)

<sup>36</sup> The simplified revision procedure with regard to the introduction of qualified majority voting and the introduction of the ordinary legislative procedure in a given area under Title V of the EU Treaty or under the Treaty on the Functioning of the EU is an innovation of the Treaty of Lisbon. Article 48 (7) EU Treaty stipulates that the European Council shall act by unanimity after obtaining the consent of the European Parliament, which shall be given by a majority of its component members, provided there is no opposition by a national parliament. At any rate, formal ratification by national organs is not required.

<sup>37</sup> The recourse to popular referenda in the ratification process of amendment treaties has not been usual procedure, but has caused a few embarrassments. The Treaty of Maastricht faced a first negative referendum in Denmark, and the Treaty of Nice a first negative referendum in Ireland. In both cases, the political solution found was to repeat the referendum process and give these States a new possibility of ratifying the treaties. The Constitutional Treaty was rejected by popular vote. Lastly, the Lisbon Treaty was only ratified after a second referendum in Ireland.

For a critical analysis of the arguments expounded against the ratification of EU treaties by popular referendum, see Giandomenico Majone – *The “Referendum Threat, the Rationally Ignorant Voter and the Political Culture of the EU*. RECON Online Working Paper 2009/04.

In what relates to the ratification of Accession Treaties, so far, only States aspiring to accede to the Union held national referenda. However, for future enlargements, the possibility of one or more Member States reverting to the use of national referenda on the enlargement of the Union cannot be set aside. On this point, see Inglis Kirsten – *Membership conditions applied to future and potential member States*, in Inglis Kirsten

Hence, the position of the Member States would not be affected if the decision-making formula were to be modified by means of an accession treaty instead of a revision treaty.

However, the function of the revision clause is not limited to the protection of the position of the Member States. The procedural limits to the powers of revision of the Member States were also designed to respect the role of the European Union institutions in the amendment process<sup>38</sup> and the position of national citizens. And if there were no limits to the power of the Member States to modify the Treaties on which the Union is founded through an accession agreement, they could easily find their way around the procedural rules enacted in the revision clause.

Even without going further into the doctrinal controversy around this issue, it is safe to conclude that the institutional arrangements necessary to achieve the political consensus regarding the accession of Turkey to the EU will most probably require a formal revision of the Treaties.

---

(ed.) – *The Constitution for Europe and an Enlarging Union: Unity in Diversity*. Europa Law Pub., 2005, pp. 225-256.

<sup>38</sup> In this regard it is worth mentioning that one of the more prominent features of the Lisbon reform of the Treaty revision process is the attribution of new powers to the European Parliament. The Parliament gained the power of initiating amendments to the Treaties, the right to participate in the Convention, and its consent is required in the event that the European Council considers that there is no reason to convene the Convention.

On the Lisbon reform of the Treaty revision process see, among others, Frederico Gustavo Pizzetti – *Revisione dei Trattati Fondativi ed accesso e recesso dall'Unione Europea*, in Paola Bilancia e Marilisa D'Amico (eds.) – *La nuova Europa dopo il Trattato di Lisbona*. Milano: Giuffrè, 2009, p. 173; Luísa Verdelho Alves – *O Tratado de Lisboa e o processo de revisão dos Tratados em que se funda a União Europeia*. Revista de Ciências Empresariais e Jurídicas, 2010, p. 229; Tania Groppi – *La revisione della Costituzione*, in Álvarez Conde e Garrido Mayol – *Comentários a la Constitución Europea*. Valência: Tirant lo Blanch, 2004, p. 228.