Articles

HOW WILL THE TREATY OF LISBON AFFECT EMU?

BY

Baron FRANKAL, Iníго Arruga OLEAGA and Wouter COUS-SENS (1)

The authors are respectively Senior Economist, Principal Legal Counsel and Economist at the European Central Bank.

This paper considers how the Treaty of Lisbon will affect the economic and monetary union (EMU) established by the Treaty of Maastricht, the defining feature of which was the introduction of the euro. It does not recount or explain the history of the EMU provisions that are changed by Lisbon, nor does it elaborate on those left unchanged. This includes the great majority of the provisions governing EMU's most important aspects, reflecting the fact that reforming EMU was not a particular intention of Lisbon. Rather, this new Treaty focuses on improving the Union's institutional framework and increasing its capacity to act on the global stage. Nonetheless, Lisbon does introduce several changes to EMU, both specifically and as an indirect consequence of other changes. The purpose of this paper is to consider how the provisions of the current Treaties are modified by Lisbon. Our analysis shows that EMU's monetary pillar is left essentially untouched, whilst its economic pillar is provided, at least potentially, with a greater degree of decision-making autonomy for the euro area.

Keywords : Lisbon, Treaty, EMU, euro, Eurogroup, economic governance, institutions, QMV, amendment procedure, passerelle, monetary policy, ECB, ESCB, Eurosystem, EDP, BEPG

(1) The views expressed in the paper are those of the authors alone, and do not necessarily reflect the views or the policy of the European Central Bank. The authors would like to thank Monika Pisáková, Theo Martens, Frank Moss, Guy Milton, François Pouget and Bernadette Ehlers for their help, support and comments in the preparation of this article.

INTRODUCTION

EU Treaties come in various shapes and sizes, from the epoch-making, like Rome in 1957 and Maastricht in 1992, which founded, respectively, the European (Economic) Community and the European Union, to the specific, like the Accession Treaties and the Single European Act of 1987, which created today's Internal Market. With the fall of the Berlin Wall came, eventually, the anticipation of a new wave of members, and three new Treaties to reform the EU (which we use in a general sense in this article to also include the Community) in preparation for that: Amsterdam, Nice and the failed Constitutional Treaty (where most of Lisbon's innovations are to be first found). Thus, for almost thirty years after Rome there was no major Treaty, and then in the twenty years after that, there have been six. The Treaty of Lisbon, which was signed in that city on 13 December 2007, is likely to be the last of that wave.

Section One of the paper considers the main innovations of the Treaty of Lisbon (which we refer to as the new Treaty, or Lisbon (2)) which will indirectly affect EMU. *Section Two* provides a more detailed description and analysis of the direct changes to EMU which affect all 27 Member States. *Section Three* does the same for those changes to EMU which affect only the euro area countries. The *Conclusion* summarises the changes and their likely effect over the medium-term if Lisbon enters into force, as expected, in 2009.

(2) The Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community. Lisbon has only two main articles: Art. 1 amends the TEU and Art. 2 the TEC/TFU. Each of these two is divided into points which neatly contain each change introduced by Lisbon. The footnotes of this paper include, between square brackets, the references to these relevant points but omit the article number, and so reference must be made to whether the point is concerning the TEU (in which case it is Art. 1) or the TFU (2). In addition, Lisbon has two series of Protocols: the A series, which is mostly new Protocols to be attached to the TEU and TFU and the B series which are attached to the Treaty of Lisbon itself. The B series includes Protocol no.1 amending all the existing Protocols, which includes the changes to the ECB Statute. Finally, there are a series of declarations and equivalence tables. For brevity, the Statute of the European System of central banks and of the European Central Banks is referred to in this article as the ECB Statute.

I. Lisbon's main innovations and their relevance to EMU

Lisbon's main impact is on the functioning of the Union's institutions, and we first focus on them (3). We then consider other relevant innovations. Like the Treaties of Amsterdam and Nice, Lisbon modifies the two founding Treaties, i.e. the Treaty establishing the European Community (TEC) and the Treaty on European Union (TEU) (4). These two Treaties continue to be the basis on which the EU functions. However, the new Treaty simplifies the Union's basic architecture, which currently consists of a Community pillar (governed by the TEC) and foreign policy and home affairs pillars (5) (governed by the TEU), with the three pillars together forming the Union. With Lisbon, the pillars cease to exist, as does the Community, which is replaced by the Union, which is given legal personality (6). The TEC is renamed the Treaty on the Functioning of the Union (TFU).

1. The European Council

The European Council, the gathering of EU Heads of State or Government and the President of the European Commission, has been meeting informally since 1974 and was first mentioned in the Treaties in 1987. Whilst maintaining its current role, Lisbon makes the European Council a full-fledged Union institution, mentioning it second after the European Parliament. It is tasked with defining the general political direction and priorities of the Union. A potentially powerful new institutional role created by Lisbon is a permanent President of the European Council, who will drive forward its work and chair its meetings. This replaces the current system whereby the European Council is chaired by the Head of State or Government holding the rotating six-monthly presidency. The President, elected by a Qualified Majority Vote (QMV) of the European Council (7), cannot hold national office and will have a two and a half-year term, renewable

(3) We do not discuss either the Court of Auditors, the Court of Justice or the Union's advisory bodies, as there are no changes of particular relevance to EMU.
(4) It also modifies the Treaty establishing the European Atomic Energy Community, through Lisbon's Protocol 2 amending the Treaty establishing the European Atomic Energy Community.
(5) The full titles of these pillars are Common Foreign and Security Policy, commonly known as "CFSP" and Police and Judicial Co-operation in criminal matters.
(6) The separate legal personalities within the Union structure that currently exist continue to do so, i.e., of relevance to EMU, those of the ECB and the European Investment Bank.
(7) The QMV rules for the European Council replicate those of the Council, meaning the two Presidents (of the European Council and of the Commission) do not vote (new Art. 201a TFU) [189].

once. The President is made accountable to the European Parliament by being required to report to it after every European Council meeting, meaning at least four times a year (a formal change from twice, but only a recognition of current practice).

In the medium-term, a more focused and active European Council may have an effect on EMU. If the European Council and its President were to put in place more high-level policy processes, a possible candidate for such discussions could be economic issues, and in particular economic governance. Although some specific provisions for furthering euro area economic governance are separately provided for (see below), Lisbon does not provide for a European Council in euro area composition. However, nor is not excluded and so, as now, nothing would prevent the members of the European Council from the euro area meeting informally to discuss issues of common concern.

2. The Council

The most notable change from the EMU perspective is the increase in the number of legal bases where the Council decides in euro area composition (see below). Less relevant are that the Council of Ministers will now have ten formations (8), the additional one arising from splitting the current General Affairs and External Relations Council. Apart from the latter, which is renamed the Foreign Affairs Council and chaired by the High Representative for foreign and security policy, other Council formations keep the current rotating Presidency system, which incorporates the "trios" already agreed on, whereby 18-month team Presidencies consist of, in practice, one large Member State, one medium-sized one and one smaller one (9). When the Council is acting as part of the EU legislature, i.e. discussing or deciding on legal acts, Lisbon requires it to meet in public (10).

(8) The current nine formations are : *General Affairs and External Relations; Economic and Financial Affairs*; Cooperation in the fields of Justice and Home Affairs; *Employment, Social Policy, Health and Consumer Affairs; Competitiveness; Transport, Telecommunications and Energy; Agriculture and Fisheries; Environment*; and *Education, Youth and Culture*.

(9) See new Arts. 9C(9) TEU [17] and 201b TFU [189]. The predetermined Presidencies (which were also designed to contain both older and newer Member States) to 2020 were established by amending the Council's Rules of Procedure, through the Council Decision of 1 January 2007 determining the order in which the President of the Council shall be held (2007/5/EC).

(10) New Art. 9C(8) TEU [17] and 16A TFU [28].

Lisbon extends QMV to several new Treaty articles, mainly in the area of justice and home affairs. Notable from the EMU perspective is the appointment of ECB Executive Board members and the extension of QMV in the simplified amendment procedure of the ECB Statute (see below for both). QMV also becomes the rule for new measures necessary for the use of the euro (11), and, of lesser relevance, for measures creating uniform European intellectual property rights (12).

Lisbon introduces a new QMV system. Currently, each Member State has a fixed amount of weighted votes, which represents a political agreement set out in the Nice Treaty. This ranges from 29 for France, Germany, Italy and the UK to three for Malta. A proposal normally passes with 255 votes from a total of 345, provided this represents a majority of the Member States (i.e. 14 out of the current 27) and at least 62% of the total EU population (13). Lisbon simplifies this requirement of three majorities (of weighted votes, Member States and population) to two. The first majority is the number of Member States, with 55% being the normal threshold for a QMV vote to pass (i.e. 15). The second is at least 65% of the total EU population (a threshold reached today e.g. by the votes of France, Germany, Italy, Poland, Spain and the UK, which total 70.3% of the EU27 population). Of equal importance, a blocking minority consists of at least four Member States and at least 35% of the total EU population (the votes of Germany, France and one of the other "big 6"). The new system is introduced in 2014, although its use only becomes mandatory from 2017 (14). In brief, drawing on the work of Baldwin & Widgrén (15), it brings two main changes. Firstly, it benefits the

(11) New Art. 111a TFU [97], although the Parliament and Council can only act without prejudice to the powers of the ECB and after its formal consultation.
(12) New Art. 97a TFU [84].
(13) As verified at the request of a Member State.
(14) Between 2014 and 2017, any Member State can request that a vote is taken using the old system. Also from 2014, the so-called "Ioannina compromise" comes into operation, as set out in Declaration 7 attached to the Lisbon Treaty. This is a mechanism designed to slow legislative acts to which there is opposition in the Council, but less than a blocking minority. If Council members representing 75% of the population requirement for a blocking minority *or* of the number of Member States oppose an act adopted by QMV, then the Council must discuss the issue. From 2017, this threshold drops to 55%, meaning (in the EU 27) that any three Member States or any two larger Member States with populations totalling 96 million could apply this brake. If applied, the Council must do all in its power to reach a satisfactory solution. However, a simple majority of the Council can then ask for a vote to be taken, allowing the act to proceed.
(15) BALDWIN & WIDGRÉN in Council voting in the Constitutional Treaty, "Council voting in the Constitutional Treaty : Devil in the details".

bigger Member States, and in particular Germany (16). Secondly, the new system is more efficient than the old. Whereas the "passage probability" of a random issue under the current system is only 3%, with Lisbon it rises to 10%. This should make decision-making, including in the field of EMU, easier.

These QMV rules are relevant when the Council acts on the basis of a proposal from the Commission, for example, decisions on the external representation of the euro area. However, in line with current practice, where the Council does not act on the basis of a Commission proposal, there is, as a rule, a higher threshold of 72% of Member States (rather than 55%), for example in the case of a balance of payments crisis (17). However, in a considerable number of EMU areas this higher threshold does not apply, as Lisbon expressly provides for the normal QMV rules to be applied (18). This includes for the appointment of ECB Executive Board members and for certain decisions and recommendations under the BEPGs and EDP, and obviously makes it easier to reach decisions on these issues.

Lisbon means that QMV will also apply in the context of the simplified amendment procedure for certain parts of the ECB Statute (19). This procedure allows the Council to amend various provisions of the Statute which mainly concern the ECB's operations, including the opening of accounts, the requirement that the ECB lend against adequate collateral, the oversight of payments systems, foreign exchange operations, minimum reserves and the collection of statistical information. Currently, Council unanimity is required to amend these parts of the ECB Statute when the Council acts on the basis of a Commission proposal, and QMV when it acts on an ECB recommendation. As earlier noted by the ECB (20), with the new Treaty a lower threshold QMV when the Council acts on the basis of a Commission proposal, however a higher QMV threshold is required when

(16) However, populations (calculated, as now, on the basis of residency) change over time, and Eurostat estimates that today's figure for Germany, of 82.6 million, will be reduced to 74.6 million by 2050. The corresponding figures for France are 60.2 and 65.7 and for the UK 59.9 and 64.3. Also notable are Italy (58.2, 52.7), Poland (38.1, 33.7), Romania (21.7, 17.1) and Netherlands (16.3, 17.4). The other Member States whose populations are predicted to grow are Belgium, Sweden, Austria, Ireland, Cyprus, Luxembourg and Malta.

(17) Articles 119 and 120, on measures to be taken by a Member State with a derogation (and Denmark and the UK) in case of a balance of payments crisis, are not changed.

(18) Article 116a 2-4 TFU [101].

(19) Old Art. 107(5) TEC, new Art. 107(3) TFU [93].

(20) See the letter of 16 April 2004 of the ECB President to the President of the EU Council, www.ecb.int/pub/pdf/other/letter040427.en.pdf

it acts on an ECB recommendation. Finally, in addition to the move to QMV for the activation of this procedure, the role of the Parliament here is increased with consultation being replaced by co-decision.

3. The High Representative for foreign and security policy

Lisbon enhances the role of the High Representative, who becomes simultaneously a Commission vice-president (and so has a 5 year term) and will be supported by a new "external action service", which will be drawn from the external relations machineries of the Commission and the Council and Member States' own foreign policy and diplomatic resources. The High Representative will conduct the Unions' common foreign policy and chair its Foreign Affairs Council and, to ensure overall consistency in the Union's external action, is in charge of the Commission's external responsibilities. The holder of this position is chosen by the European Council, acting by QMV, but with the agreement of the Commission President (21) and subject to the vote of the European Parliament on the body of Commissioners. The High Representative also takes part in the European Council's work.

4. The Commission

The main change Lisbon brings to the Commission is a change in the number of Commissioners. Whilst the 2009 – 14 Commission will have one Commissioner from every Member State (22), the Commission selected after the 2014 European Parliamentary elections, should instead have a number of Commissioners – including the President and High Representative (23) – equal to only two-thirds of the number of Member States. They will be chosen through a system that needs to be agreed, unanimously, by the European Council. However, it must be based on a strictly equal rotation between the Member States, reflecting the demographic and geographical range of all the Member States. Like the Council's new QMV voting system,

(21) New Art. 9E TEU [19].
(22) Strictly speaking, if the Lisbon Treaty is not yet in force before the next Commission takes office, according to Article 4 of the Nice Treaty's Protocol on the enlargement of the European Union, there cannot be 27 Commissioners in the Commission to be selected after the 2009 European elections but there must be less, the precise number being decided, unanimously, by the Council.
(23) New Art. 9D (5) TEU [18].

reducing the number of Commissioners was done with the intention of making the body more efficient – and this should have the same positive consequences for EMU as in other fields. This change was controversial, as it means that at any single point in time, the Commission would not have a national of one third of Member States, including France, Germany Italy and the UK, all of which, until 2004, had two Commissioners. Bearing this in mind it is highlighted that Lisbon contains a "get out clause" : the reform will not take place if the European Council, acting unanimously, changes the number of Commissioners. Although unlikely, given that, for different reasons, not only the larger but also many of the smaller and of the new Member States see "having a Commissioner" as a crucial point of influence, there is a possibility that when the decision is ultimately taken, the current system may, in fact, be maintained.

A more subtle change is in the Commission's appointment. Currently, the European Council, acting by QMV (24), nominates the person it intends to appoint as Commission President. The European Parliament then votes on that choice, approving it by simple majority. Together with the nominee for President, the Council then, again acting by QMV, nominates the full list of Commissioners, based on proposals from the Member States. Parliament then votes on those nominations as a body, again approving them by a simple majority (25). Finally, the Council formally appoints the whole Commission through a Decision. The new Treaty develops this procedure, with new language that stresses the centrality of the Parliament in the process. In particular, the European Council must take into account the European Parliamentary elections and must hold "appropriate consultations". It then "proposes" to the Parliament a candidate for Commission President, which the Parliament then "elects" (a change) by an absolute majority (26) (it gives "consent" to for the other Commissioners). This represents an acceptance of the way that the appointments procedure in particular for the Commission President and to a degree for the other Commissioners has become more political. In practice, Lisbon is likely to accelerate the tendency whereby rather than the "emergence" of a candidate from behind the Euro-

(24) Prior to Nice, Council unanimity was required, with President Barroso being the first to be chosen by QMV.

(25) Parliamentary approval was introduced by the Maastricht Treaty, with the 1995 Santer Commission being the first to be approved.

(26) New Art. 9D (7) TEU [18].

pean Council's closed doors, the Commission Presidency goes to a leading centre-right or centre-left candidate, depending on the results of the European elections.

5. The European Parliament

The main change Lisbon brings for the Parliament is that its powers are increased (27) by extending the co-decision procedure to many additional Treaty articles, on top of the areas already covered. These new areas include several articles relevant to EMU. As regards the euro, co-decision becomes relevant for new measures necessary for the use of the euro and for the already-existing simplified amendment procedure for certain articles of the ECB Statute (see above). If detailed rules for the multilateral surveillance of economic policies are adopted in the future, Lisbon means it will be by co-decision. Of wider relevance, co-decision also becomes more relevant for legislation in the field of services (28), the free movement of capital (29) and intellectual property rights (30). To stress the way that co-decision, i.e. the full and equal involvement of Parliament in the legislative process, has become the norm, the procedure is renamed the ordinary legislative procedure. At the same time, the consultation procedure is significantly extended. The extension of both codecision and consultation can be partly explained by the fact that the cooperation procedure is abolished, meaning that the various EMU legal bases where this procedure still applied have been amended to provide either for the codecision or the consultation procedure. As regards the EU budget,

(27) Parliament's powers have grown with each new Treaty. The 1987 Single European Act introduced the *cooperation procedure* for some policy areas, which complemented the then-prevailing *consultation procedure*. It also introduced the *assent procedure*. *Maastricht* further extended Parliaments' rights by establishing *co-decision*. For the first time this gave MEPs the power to amend or stop some legislative proposals. If Council and Parliament could not agree on a text after two readings, a negotiated compromise was expected to be reached through a Conciliation Committee. *Amsterdam* simplified co-decision and further strengthened Parliament by ending the situation where, in some cases, the Council could unilaterally adopt a text if the Conciliation Committee did not reach agreement. It also extended co-decision from 15 to 38 areas. *Nice* extended it to 43. Parliament also plays an increasing role in the implementation of legislation, i.e. *comitology*. Since the introduction of co-decision, *Parliament has fought*, successfully, for a greater role in scrutinising implementing powers delegated to the Commission. With a new Council Decision (2006/512/EC), Parliament (by absolute majority) can now, like the Council, block such implementing legislation for any reason.

(28) Such as a Regulation in relation to services of general interest (Art. 16 TFU) [27] and a directive liberalising specific services (Art. 52(1) TFU) [58].

(29) Such as provisions relating to the movement of capital to or from third-countries, (Art. 57(2) TEC/TFU) [60].

(30) New Art. 97a TFU [84].

the distinction between "compulsory" and "non-compulsory" expenditure is removed, meaning that Parliament's influence is extended to the entire budget (31). The other change is that the number of MEPs is reduced, from today's 785, to 751 (of which one is the President). How many MEPs come from each Member State is also consequently changed, on the basis of a proposal from Parliament itself. In a symbolic move, Parliament will now be composed not of "peoples of the states" but of "representatives of the Unions' citizens" (32).

6. National parliaments, subsidiarity and proportionality

Lisbon strengthens the involvement of national parliaments in the European policy, most notably in the fields of justice and home affairs and in Treaty revision procedures, including the passerelles (see below). For the first time, national parliaments will have a role (albeit a very limited one) in legislation in areas of relevance to EMU. Lisbon ensures that all draft legislative acts are forwarded in advance to national parliaments (33), which may respond with a reasoned opinion about whether the proposal complies with the principle of subsidiarity. The new Treaty then says that if, within an eight-week period (34), one third (35) of national parliaments consider the proposed act not compliant with the principle of subsidiarity, it must be reviewed. Examples of such legislation in recent years would have included the Services Directive, MiFiD and the Payment Services Directive.

Both the Protocols on the role of National Parliaments in the EU and on the application of subsidiarity and proportionality principles are redrafted and, for the first time, they both explicitly mention the European Central Bank, with ECB recommendations of a legislative nature explicitly included within the definition of "draft legislative

(31) Art. 268 TFU [257].
(32) New art 9A(2) TEU [15].
(33) According to Gueugen and Marissen, there are only 60-70 EU legislative acts a year, compared to 2,000-3,000 implementation acts (i.e. comitology), as well as the execution of the Commission's autonomous powers (mainly in the competition field) and a wide variety of quasi-legislative acts of the Council, D. GUEGUEN and V. MARISSEN, "The Comitology Reform : 70 legal texts adopted in co-decision annually, over 2,500 regulations in Comitology", Brussels, *Eurpolitics 2007*, quoted in The Treaty of Lisbon : implementing the institutional innovations, CEPS, Egmont, EPC Joint Study, November 2007.
(34) Unless there is a particular reason for urgency.
(35) Or sometimes in the area of justice and home affairs cases, one quarter, see the Protocols on the role of national Parliaments in the European Union and on the application of the principles of subsidiarity and proportionality attached to the Lisbon Treaty, and in particular Art. 7 of the latter.

acts" that need to be forwarded (36) to national parliaments and which need justification with regard to subsidiarity. If an ECB recommendation is forwarded to national parliaments and one third consider the proposed act not compliant with subsidiarity, the ECB is bound to review its draft and then to give a reason as to why it is subsequently maintained, amended or withdrawn. However, it will remain the case that for the vast majority of ECB legal acts and instruments, because these are adopted within the exclusive competence of the Union, subsidiarity cannot, by definition, apply. By contrast, the principle of proportionality (37), which means that EU actions cannot go beyond what is necessary to achieve a specified objective, will unambiguously apply to the ECB. Interestingly, whilst the Court of Auditors needs to forward its Annual Report to national parliaments, the ECB does not. In this way, the ECB's parliamentary accountability remains exclusively with the European Parliament.

7. Voluntary withdrawal from the Union

Lisbon includes a specific provision on voluntary withdrawal (38) to help ensure that any such unlikely happening would take place in an orderly fashion. First, the Member State wishing to withdraw notifies the European Council of its intention. It and the Union then negotiate a withdrawal agreement, setting out withdrawal arrangements and regulating the future bilateral relationship. The Council concludes this agreement, by QMV (without the representative of the withdrawing Member State), after obtaining the European Parlia-

(36) Although not by the ECB, the Council is charged with the forwarding.
(37) The principle of proportionality derives from Article 5 TEC and applies to all actions falling within the exclusive competence of the Community, see *von der Groeben / Schwarze, Kommentar zum Vertrag über die Europäische Union und Vertrag zur Gründung der Europäischen Gemeinschaft*, 6th ed. 2003, paragraph 43, Article 5. The effective legal requirements of proportionality for the ECB are two. Firstly, it must have recourse to the 'least onerous means' to achieve set objectives, see *Case C-180/00 Kingdom of the Netherlands v Commission of the European Communities and Case C-189/01 Jippes and Others [2001] ECR I-5689*, *Case 11/70 Internationale Handelsgesellschaft / Einfuhr- und Vorratsstelle für Getreide und Futtermittel [1970] ECR 1125,* paragraph 2, *Case C-84/94 United Kingdom of Great Britain and Northern Ireland v Council of the European Union [1996] ECR I-5755,* paragraphs 57 and 58 and *Case C-233/94 Federal Republic of Germany v European Parliament and Council of the European Union [1997] ECR I-2405*, paragraph 56. Secondly it must analyse the costs of a proposed legal instrument, see case 240/90 *Germany v. Commission* [1992] ECR I-5383, para. 19 and *von der Groeben/Schwarze, Kommentar zum Vertrag über die Europäische Union und Vertrag zur Gründung der Europäischen Gemeinschaft*, 6th ed. 2003, para. 39, Article 5.
(38) New Art. 49A TEU [58].

ment's consent. No special provisions are included for the withdrawal of euro area Member State. In this case, although the ECB's involvement in such negotiations is not explicitly mentioned, a close association is implicit. This is the case because the Treaties are effectively being amended, and so a parallel with the procedure for revising the Treaties can be drawn, where the ECB is involved in case of institutional changes in the monetary field (39). The Treaties cease to apply to the departing country, either as per the withdrawal agreement, or two years after the initial notification, implying a withdrawal may occur even if no agreement is reached. It is important to stress that this "exit clause" does not provide for Member States withdrawing from the euro area without simultaneously withdrawing from the EU, meaning the clause in no way allows for a Member State to discard the euro without withdrawing from the EU. Nor does the provision deal with the withdrawal of a Member State which has the euro as its currency and the resulting implications for EMU. These aspects are likely to be addressed in the withdrawal agreements.

8. EU enlargement

Regarding accession of new Member States to the EU, Lisbon adds an oblique reference to the conditions for eligibility agreed upon by the European Council, meaning the so-called Copenhagen criteria (40), which must now be taken into account (41). These are political (on institutional stability, democracy, the rule of law and human rights), economic (a functioning market economy able to cope with the competitive pressure and market forces within the EU) and the adoption of the EU's total body of law (the *acquis*, including as regards EMU). An additional criteria is that the Union's capacity to absorb (or integrate) new members is also an important consideration. In practice, every enlargement proceeds at its own pace and with its own specificities. Potential applicants, which currently need to respect the EU's values (which are expanded (42)), now also need to be committed to promoting them.

(39) Art. 48 TEU [56]. Indeed the ECB did draw this parallel in its Opinion CON/2003/20 of 19 September 2003 at the request of the Council of the European Union on the draft Treaty establishing a Constitution for Europe, *OJ* C 229/7.
(40) As agreed at the Copenhagen European Council of 1993.
(41) New Art. 49 TEU [57].
(42) See New Art. 1a TEU compared to old Art. 6(1) TEU [3].

9. Energy policy

Lisbon adds new wording, and the possibility of a new legal basis for action, on climate change policy. Although this is specifically to do with international measures (43), the link to energy policy is explicit (44). That this may have relevance to EMU is neither clear nor certain. However, if the commitments made by the European Council in March 2007 (45), which are currently being translated into binding legal acts, were to be made effective – which is helped by this new clause, given that the targets are entirely unrealistic without a corresponding international agreement – achieving these targets requires radical policies to move Europe towards a low carbon economy which would have a significant impact on the euro area's economy and so on EMU.

10. Enhanced co-operation

Enhanced Co-operation is a Treaty mechanism that allows a self-selecting group of some, but not all, Member States to develop common policies using the EU's institutions, procedures and mechanisms. However, the involvement of non-participating Member States in the preparatory stages of this process (although they cannot vote), together with a long list of relatively strict legal and complex procedural requirements has meant that it has never actually been used (46). However, the increased economic heterogeneity introduced by the 2004 and 2007 enlargements, together with the difficulties of further developing European integration involving all Member States (as graphically shown by the 7-year process leading to the new Treaty) increase the medium-term likelihood of the procedure being used in the future (47).

(43) Art. 174 TEC/TFU [143], EU policy will contribute to, "*promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change*".

(44) New Art. 176A TFU [147].

(45) Principally a binding 20% reduction of Europe's greenhouse gas (GHG) emissions by 2020 and an increase in the use of renewable energies to 20% in the same time frame.

(46) Although the threat of enhanced co-operation has been successfully used a "Sword of Damocles" to overcome political blockages in policy areas requiring Council unanimity, e.g. in the cases of the European Arrest Warrant and the European Patent.

(47) See further, the Deubner Report (2000), "Harnessing Differentiation in the EU – Flexibility After Amsterdam : A Report on Hearings with Parliamentarians and Government Officials in Seven European Capitals", in *Stiftung Wissenschaft und Politik and European Commission Forward Studies Unit*, Working Paper and Gomes de ANDRADE, N. (2005), "Enhanced Co-operation : The Ultimate Challenge of Managing Diversity in Europe", in *Intereconomics*, July/August 2005, pp. 201-211.

Lisbon brings some minor improvements (48). Firstly, it widens the potential scope of enhanced co-operation to all EU fields, including defence (49). Secondly, it removes the possibility for a Member State to halt the procedure by referring a proposal to the European Council. Thirdly, conditions for initial participation in the project can now be laid down (making it explicitly possible to exclude countries which do not fulfill them) and the Commission's role is potentially strengthened. Fourthly, participating Member States can decide to change the applicable decision-making method. A fixed minimum threshold for enhanced co-operation is set at nine Member States (instead of the current eight).

Enhanced cooperation cannot be used in areas of exclusive EU competence, such as monetary policy. However, the procedure would potentially be applicable for economic policy, including fiscal co-ordination (50). In this context it should be noted that a separate special "enhanced co-operation" type procedure is also introduced for euro area Member States to further co-ordinate economic policy (see below).

11. The Charter of Fundamental Rights

The EU Charter of Fundamental Rights was originally agreed at the Nice European Council in December 2000. Lisbon (51) recognises the rights, freedoms and principles set out in the Charter (52) and makes them legally binding for the Union, its institutions (including the ECB) and for the Member States when they are implementing Union law. The Charter prevails over secondary Union law, meaning that if there are any conflicts between the Charter and any specific ECB provisions, including the ECB's Conditions of Employment adopted by the ECB's Governing Council, the Charter will prevail. Of relevance may be Art. 42 of the Charter, on public access to documents, Art. 28 on collective agreements and Art. 41 on good administration.

(48) New Art. 10 TEU [22] and Art. 280 A-I TFU [278].
(49) Although there is a separate dedicated closer cooperation procedure in the CFSP field, known as "structured cooperation".
(50) Although initiatives which do not respect the current dense framework for the coordination and surveillance of economic policies would be excluded.
(51) New Art. 6 TEU [8].
(52) As adapted at the end of 2007, see *OJ* C 303, 14.12.2007, pp. 1-16.

On access to documents, there is a change to the relevant provision in the Treaty. Currently the general rules (53) do not apply to the ECB, although, on the theoretical basis that the same principles of access do apply, the ECB adopted its own, very similar, regime (54). Lisbon amends the relevant article (55) to introduce a general obligation on the Union's institutions to conduct their work as openly as possible. Also taking into account the OLAF case (56), this obligation applies to the ECB and, in essence, guarantees in European law that those to whom an ECB legal instrument applies must know of and have access to it. In the Treaty, the legally-binding effect is explicitly limited to where the ECB is exercising its administrative tasks.

As regards collective agreements, the Charter provides the right to negotiate and conclude these, and, in certain circumstances, for collective action, including a strike. However, at the same time, Lisbon maintains the *lex specialis* of the adoption of the ECB's conditions of employment by the Governing Council under Art. 36.1 of the ECB Statute.

Finally, the "right" to good administration means that the ECB is bound to consider the opinions of those affected before acting. In terms of legislation, this may mean that the ECB would need to make its pre-legislative consultation more consistent. Such consultation can be of two types. The first relates to policy developments and is made at an early stage. The ECB has publicly consulted in this way 14 times (57), e.g. on a single list of Eurosystem-acceptable collateral or the TARGET2 payment system. The second type is a consultation

(53) As set out in old Art. 255 TEC setting out the right of access to European Parliament, Council and Commission documents. This is the basis of the EU's regime on public access which is set out in Regulation EC/1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, *OJ* L 145, 31.5.2001, p. 43. Art. 255 TEC is revised by Lisbon [28, 244].

(54) Decision ECB/2004/3 of 4 March 2004 on public access to European Central Bank documents, *OJ* L 80, 18.3.2004, p. 42. This repealed and replaced Decision ECB/1998/12 of 3 November 1998 concerning public access to documentation and the archives of the ECB, *OJ* L 110, 28.4.1999, p. 30. All public ECB legal instruments are published in the *Official Journal of the European Union*, except national opinions.

(55) New Art. 16A TFU [28].

(56) Case C-11/00, *Commission* v. *ECB* [2003] I-7147. See annotation by Odudu in 41 CML Rev. (2004), 1073-1092.

(57) The consultations have been concerned with policy developments in the fields of e-payments, securities clearing and settlement issues, possible legislation on the incorporation of counterfeit deterrence technology in products capable of handling digital images and the ESCB-CESR Standards. See http ://www.ecb.int/ecb/cons/previous/html/index.en.html. The ECB received between 13 and 59 responses to these consultations.

on the draft text of the legal instrument, preceding its submission to the legislating body, in the case of the ECB the Governing Council. This is a key "better regulation" tool systematically used by the Community and many Member States to reinforce constructive dialogue between regulators and stakeholders. Mirroring best EU practice would require the broad use of such consultations for every ECB legal instrument affecting third parties. Also relevant in this context may be post-legislative assessment (58), meaning a routine review of legislation after implementation to assess the legislation's impact. This is of less relevance for ECB legislation because, compared to other European laws, ECB legal instruments are generally amended much more frequently, often for technical reasons.

12. New definition of a decision

Whilst Union legal acts keep their denomination and scope (59), Lisbon introduces a new definition of decisions. Because decisions under this new framework will be binding in their entirety *erga omnes*, unless addressed to specific addressees, this will potentially allow the institutions to issue less regulations. This is particularly convenient for the ECB, which is anyway inclined to issue decisions and guidelines rather than regulations.

13. The ordinary procedure for revising the Treaties

Lisbon changes the basic Treaty amendment mechanism, so that, as a rule, any future IGC will be preceded by a Convention (60). Treaty changes will still require unanimous agreement by all Member States at an IGC, followed by ratification, again in all Member States. Another innovation is that the European Parliament is given the right to submit proposals for revising the Treaties (along with the Commission and any Member State) and new wording stresses that such proposals can either increase or reduce the Union's compe-

(58) Such as Article 8 of Regulation EC/2560/2001 of the European Parliament and of the Council on cross-border payments in euro, which requires the Commission to submit a report on the application of the Regulation, accompanied, where appropriate, by proposals for amendments. Similarly, Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems, *OJ* L 166, 11.6.1998, p. 45 and Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements, *OJ* L 168, 27.6.2002, p. 43.
(59) Art. 249 TFU [235].
(60) Unless the European Council decide otherwise, by simple majority and after obtaining the European Parliament's consent.

tences. Before such a Convention is convened, the ECB must be consulted, in the case of institutional changes in the monetary area. As to the composition of the Convention, the ECB's participation is not explicit. As to the composition of an IGC, the present practice is that both the Commission and the Parliament have an observer role, which is justified by the fact that they must be consulted on any Treaty revision. Since the ECB must also be consulted in case of institutional changes in the monetary area, and, with Lisbon, becomes an institution (see below), it may be the case that, in cases where it has been consulted, the ECB could also be granted observer status at IGCs.

14. New "passerelle" clauses

It is already the case that some of the Treaties' provisions on decision-making procedures can be revised through various lighter amendment procedures. Currently, these so-called "passerelle" clauses are limited to selected narrow policy areas (61). Lisbon introduces two far more sweeping provisions to enable such Treaty revision in the future. The first new passerelle (62) enables the European Council to change the basis for agreement for certain acts from unanimity to QMV. The second enables it to amend the procedure for adopting a legislative act from a special legislative procedure to the ordinary one, i.e. co-decision on the basis of a Commission proposal. Both decisions require European Council unanimity and the consent of the European Parliament. In addition, all national parliaments must be notified and if any single one makes known its opposition within six months, the decision is not adopted. This "silent ratification" compensates for the fact that no formal ratification of these Treaty changes is necessary. Compared to the need for ratification in all Member States, this procedure favours such changes, especially given the six-month deadline. The motivation to use them may well materialise : given that Member States will be extremely reluctant to go through the whole Treaty revision process again in the medium-term, the passerelle clauses offer a possible way forward if some years' practical experience of Lisbon show that the Union's workings might be improved in this way. However, the fact that activating a

(61) For example in the fields of social policy, the environment and police and judicial cooperation in criminal matters.
(62) Both of these passerelles are set out in new Art. 48(7) TEU [56].

passerelle clause requires the agreement of every single Member State government, the consent of the European Parliament and the non-opposition of every single national parliament is a high barrier.

As for the potential effects of these passerelles on EMU, the first (changing from unanimity to QMV), is limited in scope to provisions in the TFU and Title V of the TEU, namely on external action and CFSP. Most EMU decisions are already subject to QMV. The ones that are not, and which could potentially be amended with the new passerelle, are those on : a Council Regulation on the implementation of the Excessive Deficit Procedure (EDP) replacing the provisions of the EDP Protocol (63); a Council Regulation to confer new tasks on the ECB in respect of (non-insurance) prudential supervision (64); the Union's participation in an international exchange-rate agreement (65); and, for the fixing of the euro conversion rate of a new euro area entrant (the actual substance of these provisions are all elaborated in Section 3).

The scope of the second passerelle (moving from a special legislative procedure to the ordinary one) is limited to provisions in the TFU. However, this includes almost all EMU provisions, and, given the limited role of the Parliament in many of EMU's legal bases, has a far greater potential for relevancy. It includes : the Council specifying definitions regarding the Treaty's prohibitions on privileged access; the composition of the Economic and Financial Committee (66); and, as above, the Council Regulation on the implementation of the EDP and conferring prudential supervision tasks on the ECB. It could also be used to change the mode of decision-making for the adoption of complementary Union legislation establishing the rules and definitions of certain provisions of the ECB Statute (67). This includes the provisions on : consultation of the ECB on draft national legislative positions; natural and legal persons subject to the ECB's statistical reporting requirements; the ECB's sanctioning regime; and, minimum reserve requirements for credit institutions.

(63) New Art. 104(14) TFU [90].
(64) Art. 105(6) TEC/TFU [91].
(65) New Art. 188O(1) TFU [174].
(66) Art. 114(3) TEC/TFU [99].
(67) As set out in Art. 107(6) TEC/TFU [93].

There is a particular point regarding the activation of this second passerelle. Currently, on some occasions, the current ("special") procedure requires consultation of the ECB. This is the case, for example, with replacing the EDP Protocol or giving the ECB prudential supervision tasks (as above). However, if these special legislative procedures foreseeing ECB consultation were moved, by using the passerelle, to the ordinary procedure, the question is whether the ECB would still need to be consulted. There are two possible views. On the one hand, it would seem that, because consultation of the ECB is not expressly provided for by the passerelle, in making the decision to move to the ordinary procedure, the Council would be deciding, along with the removal of any other "special" elements, not to maintain the need for ECB consultation. On the other hand, it would not be expected that the passerelle would refer to the ECB, since any such decision to use the passerelle is of no concern to the ECB. However, once that (now ordinary) procedure were to actually be used, the Treaty's reasoning for including ECB consultation, which is essentially in order to utilise its expertise, remains the same and indeed is left untouched by Lisbon. Hence, the case can also be made that the need to consult the ECB in such cases could be inferred. In any case, at least as regards any decision on giving the ECB prudential supervision tasks, this would be a one-off decision and so it is highly unlikely ever to be subject to a passerelle. Rather, if there was unanimous agreement, the provision itself would be acted on.

15. The new simplified amendment procedure for EU internal policies and actions

As well as passerelles (which Lisbon confirms are a specific type of simplified amendment procedure (68)), the current Treaties also contain several other simplified amendment procedures allowing for more technical parts of the Treaties to be changed without using the ordinary Treaty revision procedure. Several of these procedures are relevant to EMU, such as the procedure to amend the Protocol on the Excessive Deficit Procedure (69), the Protocol on the Conver-

(68) As clear from the new subtitle, "Simplified revision procedures" introduced by Lisbon [56].
(69) Art. 104(14) TEC/TFU [90], requiring Council unanimity and consultation of both Parliament and the ECB.

gence Criteria (70) and that to amend the voting modalities of the ECB's Governing Council (71).

Lisbon introduces a whole new simplified amendment procedure for changing any provision in Part three of the TFU, namely on the Union's internal policies and actions (72), although no such revision can enlarge the Union's competences. The simplification lies in the fact that neither a Convention nor an IGC is required. The political barrier to any such change is high : European Council unanimity is needed, as is ratification in all Member States. If there are institutional changes in the monetary area, the ECB must be consulted before any such European Council decision (as must the Parliament and the Commission). However, although Part three of the TFU includes most of the provisions on EMU (in particular in Title VII, Economic and monetary policy), the introduction of this clause is not highly significant for EMU, and in fact this new simplified amendment procedure will apply only to a rather small part of EMU provisions. This is because firstly Lisbon moves several provisions of the current EMU chapter of the TEC to the TEU or to other Parts of the TFU (73), and secondly many other key elements are duplicated in Protocols annexed to the Treaties (and mainly the ECB Statute). Provisions included in either a Protocol, the TEU or a part of the

(70) Art. 6 of the TEC Protocol on the Convergence Criteria, which is maintained (but slightly updated) by Lisbon.

(71) Art. 10.6 of the ECB Statute, as inserted by Art. 5 of the Nice Treaty. This procedure was used to amend the voting modalities of the Governing Council in preparation for enlargement in 2003 with the effect that when the 16th Member State joins the euro area, the Governing Council has the option of moving to a rotation system. This change will introduce two or three "wheels" whereby when the Governing Council has first 21 members (or at the latest 25) and then 28 members, only some of its members will vote on monetary policy decisions (although all participate in the discussions). When the 19th Member State joins, the new system becomes mandatory, Decision of the Council, meeting in the composition of Heads of State or Government, of 21 March 2003 on an amendment to Art. 10.2 of the Statute of the European System of Central Banks and of the European Central Bank, *OJ* 2003, C 29/6, as ratified by all (15) Member States. For more details of the new Governing Council Voting Modalities, see, "The adjustment of voting modalities in the Governing Council", *ECB Monthly Bulletin*, May 2003, and also A. BELKE and B. STYCZYNSKA, "The Allocation of Power in the Enlarged ECB Governing Council", *CEPS*, December 2004, pp. 1-28(28).

(72) New Article 48(6) TEU [56].

(73) Including, in particular : the definition of the ECB as an institution, new Art. 9(1) TEU [14]; the composition of the ESCB and of the Eurosystem, new Art. 245a(1) TFU [227] (Part six); the governance of the ESCB by the ECB's decision-making bodies and the ESCB's mandate, in new Art. 245a(2) TFU [227] (Part six); the provisions on the ECB's legal personality and the ECB's exclusive competence to authorise the issue of euros, new Art. 245a(3) TFU [227] (Part six); and the ECB's capacity to adopt measures necessary to its missions, including legal acts, new Art. 245a(4) of the TFU [227] (Part six). Also excluded are the provisions on exchanges rates, moved to TFU Part V and the provisions on the powers of non-euro area Member States in monetary matters, moved to TFU (Part six).

TFU other than Part Three cannot be amended by this simplified amendment procedure because otherwise there would be two different and rival sets of legal provisions in the Treaties dealing with the same issue (74). This means that relevant EMU provisions that could potentially be amended in this new way are mainly those related to the economic leg of EMU, including on economic policy guidelines, surveillance and Excessive Deficit Procedures. The same applies to the prohibitions on monetary financing, privileged access and bail outs, the provisions on the adoption of the euro by Member States with a derogation, and Lisbon's new provisions specific to the euro area countries (see below).

II. Lisbon innovations of particular relevance to EMU affecting all Member States

Having provided, in *Section One*, a survey of Lisbon's main institutional changes, focusing on their interaction with EMU, *Sections Two* and *Three* provide comprehensive and detailed consideration of the changes made by Lisbon which are of particular relevance to EMU. This section looks at those innovations which essentially affect all 27 Member States.

1. The Union's objectives

Currently, the Union has objectives and the Community has tasks (75). Lisbon replaces this duality with a single set of Union objectives (76). Whilst the importance of these objectives should not be overestimated, they are potentially significant as they can be a basis for legal action (77) and are also referred to by the ECJ (78). Lisbon's objectives contain subtle developments : promoting a high level of unemployment becomes aiming for full employment; the promotion of a high level of social protection is dropped, while that of social progress and scientific and technological advance is added;

(74) The Art. 48(6) simplified amendment procedure is *lex specialis* compared to the more general Art. 48(2)-(5) of the TEU [56] and so must be interpreted strictly, meaning it cannot be extended to provisions which are not expressly subject to it.
(75) At, respectively, Art. 2 TEU and Art. 2 TEC .
(76) New Art. 2 TEU [4].
(77) Art. 308 TEC/TFU [289].
(78) C-339/89, *Alsthom Atlantique SA v. Compagnie de construction mécanique Sulzer SA* [1991] E.C.R. I-107, para 9.

promoting a high degree of competitiveness becomes a reference to sustainable development being based on a highly competitive social market economy (79).

There are two further changes of particular relevance to EMU. The first is that the current task of promoting non-inflationary growth is changed into a requirement for the Union to work for sustainable development based on balanced economic growth and price stability (80). Having requested that price stability becomes a Union objective in its Opinion to the earlier IGC in September 2003 (81), the ECB unsurprisingly welcomed this in its Opinion to the IGC of July 2007 (82). Price stability was already, and remains, the primary objective of the Eurosystem/ESCB, with the ECB defining price stability (83). It was also already the primary objective of both the Community's monetary policy and exchange rate policy (84). In addition, price stability now becomes an unambiguous objective of the whole EU and the Member States are expected to work towards this objective in framing their economic policies (85).

(79) It has been much remarked that the text differed here from the Constitutional Treaty's (which was otherwise followed) by excluding a reference to an internal market where competition is free and undistorted. However, Lisbon ads a new Protocol to the TEU instead, which a full and legally-binding part of the Treaty. This considers the internal market to include a system ensuring that competition is not distorted.
(80) Old Art. 2 TEC, new Art. 2(3) TEU.
(81) For a full explanation of the ECB's rational, see "The European Constitution and the ECB", in the *ECB Monthly Bulletin*, August 2004, p. 51.
(82) Opinion of the European Central bank of 5 July 2007 at the request of the European Union on the opening of an Intergovernmental Conference to draw up a Treaty amending the existing Treaties (CON/2007/20), required as Art. 48 TEU states that the ECB must be consulted as regards any changes to the Treaties introducing "institutional changes in the monetary area".
(83) The ECB's Governing Council essentially adopted a definition of price stability in October 1998 ("*a year-on-year increase in the Harmonised Index of Consumer Prices (HICP) for the euro area of below 2%*" with price stability to be maintained over the medium term, the Monetary Policy Strategy of the ESCB, 1999), which was reviewed in May 2003, ("*in the pursuit of price stability, the Governing Council aims to maintain inflation rates below, but close to, 2% over the medium term*", Reflections on the ECB's Monetary Policy Strategy). The TEC provides a quantitative definition of price stability, however this different definition is linked to the very specific purpose of assessing the degree of convergence of a country wanting to adopt the euro which is based on a relative rather than an absolute assessment. This is set out in Article 121(1) TEC, *"[the achievement of a high degree of price stability] will be apparent from a rate of inflation which is close to that of, at most, the three best performing [EU] Member States in terms of price stability"*. Article 1 of Protocol 21 on the convergence criteria further clarifies this, to *"a price performance which is sustainable and an average rate of inflation that does not exceed by more than 1½ percent [of that of the three best performing EU Member States]*.
(84) Old Art. 4(2) TEC and new Art. 97b TFU [85].
(85) According to Arts. 98 and 99 TEC/TFU, Member States must conduct their economic policies with a view to contributing to the Union's objectives.

The second point of interest is the objective of the establishment of an economic and monetary union whose currency is the euro. As EMU and the euro are of course already established, this is to highlight their importance. It is also an example of Lisbon systematically replacing all current references to "ecu" with "euro". Lisbon is not the first time the actual word "euro" is been used in the Treaties (86). However, it is the first time that the word has been used in Bulgarian and, in the latter phase of finalising the new Treaty, this became a controversial issue, as it became evident that, with the signature of Lisbon, a longstanding dispute about the spelling of the word euro would be definitively decided.

The controversy dates from the Madrid European Council meeting of 1995 which decided that "*the name given to the European currency shall be euro… [and] shall be the same in all the official languages of the European Union, taking into account the existence of different alphabets*". These Conclusions were reproduced in a binding Council Regulation (87). This decision meant that the word "euro" did not represent the first four letters of the name of the continent, but was a separate word in its own right. Because of this, many Member States needed to adopt legislation to introduce linguistic accommodations into their respective languages to allow for the use of this new term. (88) With the 2004 accessions, it was discovered that several of the new Member States, namely Hungary, Latvia, Lithuania, Slovenia and, in some cases, Malta, had been using a different spelling (89). This alternative spelling was used in the official translations of the *acquis communautaire*. Whilst Lithuania, Slovenia and Malta decided to amend the spelling, Hungary and Latvia did not. With the 2007 accessions, it became evident that the same situation, including

(86) It was used in the Nice Treaty, with the change made to the ECB Governing Council's voting modalities referred to at footnote [70]. Article 10.2 of the ECB Statute, attached to the TEC refers in the first sub-paragraph to Member States that "*have adopted the euro*". The first use of the word however predates even Nice, as Protocol No 1 to the 2003 Act of Accession amended TEC Protocol No 11 on the EIB, which concludes with a note that "*the unit of account shall be defined as being the euro*".

(87) EC 974/98 of 3 May 1998 on the introduction of the euro, as amended by Council Regulation (EC) No 2169/2005 of 21 December 2005.

(88) Examples include Ireland, where Parliament rejected "eora", the first four letters for Europe in Gaelic, in favour of euro, a unique noun with no gender or declension and Italy, where "euri" was rejected by the Senate as the plural form. In Greece the letter omicron rather than omega was used, again in order to preserve the word "euro" in the plural, rather than "eura".

(89) Namely "euró" in Hungarian, "eiro" in Latvian, "euras" in Lithuanian, "evro" in Slovenian and "ewro" in Maltese.

the Bulgarian version of the Bulgarian Accession Treaty (90). Bulgaria also decided not to amend the spelling.

The controversy became institutionalised in 2006 when, for the first time, the ECB covered the issue in its Convergence Report (91). Along with central bank independence, confidentiality and the prohibition on monetary financing, the ECB stated that in order to be compatible with the Treaty, national legislation needed to be adapted to ensure "*compatibility with the single spelling of the euro required by Community law*". In the cases of Hungary, Latvia (Bulgaria was not covered by the 2006 report), this had not been done, making Hungarian and Latvian law not compliant with Treaty requirements – and hence not convergent for the purposes of adopting the euro. In the final version of the Treaty, as signed in all language versions, the Hungarian and Latvian term used was the single spelling of euro, whilst the Bulgarian version used the amended version, еврото. Consequently, corrigenda of relevant EU law that used the earlier Bulgarian spelling must now be produced.

2. *Prudential supervision*

At present, the ESCB contributes to the smooth conduct of policies pursued by competent authorities relating to the prudential supervision of credit institutions and the stability of the financial system. The Council could decide, acting unanimously, following consultation of the ECB and after receiving the assent of the European Parliament, to confer specific tasks on the ECB concerning policies relating to the prudential supervision of credit institutions and other financial institutions excluding insurance undertakings. The change brought about by Lisbon concerns the role of the Parliament, which now need only to be consulted, and so could no longer veto a Council decision to confer prudential responsibilities on the ECB.

(90) "EBPO" (Bulgarian version) was used instead of "EYPO" (EU version). The EU view was that the Bulgarian transliteration of "euro" should accurately reflect its literation in the Roman and Greek alphabets. As the Roman letter "U" corresponds to "У" in Cyrillic, this means a spelling of "EУPO". In the case of "EBPO", the Cyrillic letter "B" corresponds to the Roman "V". By contrast, Bulgaria maintained that the only precedent for the spelling of "euro" in a non-Roman alphabet was that of the Greek spelling, where the name of the single currency "ΕΥΡΩ" (ευρώ) was not transliterated but instead derived from the Greek spelling of Europe.
(91) See : http://www.ecb.europa.eu/pub/convergence/html/index.en.html

3. Prohibitions on monetary financing, privileged access and "bail outs"

Lisbon brings only very minor changes to these provisions (92). Apart from replacing outdated provisions, the main innovation is that if the Council adopts a regulation specifying definitions of the monetary financing, bail-out or privileged access prohibitions, whereas now this would be through the co-operation procedure (giving the Parliament the right to two readings and, by an absolute majority, to amend or reject it unless the Council then acts by unanimity) with Lisbon, the Parliament is only consulted (although the passerelle clause could be used to make it subject to the ordinary legislative procedure).

4. Amendment of the ECB Statute

Although no specific substantive changes are made, the ECB Statute is updated (93). This includes, for example, the deletion of references to the various stages of EMU, to the capital key and to the seat of the ECB, which means the deletion of some provisions and revised numbering. The Statute is also amended to appropriately reflect the cross references to the new TFU numbering and the introduction of the definition of the Eurosystem. In terms of substantive change, the relevant innovations made in the rest of the Treaties, as covered in this paper, are also reflected in the Statute, for example to the specific Statute amendment procedure introduced in the TFU, and the change to the appointment procedure of members of the ECB Executive Board. Some systematisation of the specific amendment procedure is introduced, including the moving of the provision on the special amendment procedure for the voting modalities at the Governing Council.

III. Lisbon's innovations of particular relevance to EMU affecting the euro area

This Section considers in detail the remaining changes made by Lisbon of particular relevance to EMU, which are those that affect only

(92) Arts. 101, 102 [88] and 103 [89] TEC/TFU.
(93) See footnote 2.

or especially the euro area countries. Some areas of minor change, such as coins (94) and nomenclature (95) and the movement of certain provisions with no relevant effect (96), are not further detailed. Nor is the repeal of certain outdated provisions, which reflects the efforts made to remove details of the original transition to EMU in the 1990s, such as the Protocol on the transition to the third stage of EMU (97). Similarly, in making permanent a currently temporary legal basis for taking measures relating to the use of the euro (98) Lisbon takes account of the reality that such a provision is needed for ongoing legislation on the euro. There are other such measures (99) : the language used on the ECB's advisory role in the new TFU section on the ECB is new, but brings no substantive change (and parallel provisions in the TFU and ECB Statute are unchanged) (100); and there are some further movements of articles from one part of the Treaties to another, but with no substantive change (101).

1. Monetary policy explicitly becomes an exclusive EU competence

For the first time Lisbon introduces a formal classification of the Union's competences (102). Drawing on ECJ case-law, Union competences are divided into three categories : (i) exclusive competences;

(94) Lisbon downgrades Parliament's role in decision-making from the cooperation procedure to consultation.
(95) Lisbon creates a single name for the Statute : the Statute of the ESCB and of the ECB (Art. 2A (K, Treaty of Lisbon [2] and new Art. 107 TFU [93]), it gets rid of the abbreviation ECB, using instead European Central Bank (Art. 2A (j), Treaty of Lisbon [2]) and it prefers ESCB to European System of Central Banks (New Art. 105 TFU [91]).
(96) Another miscellaneous change of no substantive effect is that Art. 122 (4), (5) and (6) are repealed, to be replaced by redrafted provisions, including in new Art. 116A, which provides, an innovation, a list of the provisions in the Treaty that do not apply to non-euro area Member States.
(97) Protocol 10 TEU, the removal of which means that the reference to the "irreversible character" of the EU's adoption of the euro disappears.
(98) Old Art. 123(4) TEC, new Art. 111a TFU [97].
(99) Including in the Protocols attached to the TEC on certain provisions relating to Denmark and (in a separate Protocol) the UK (Protocol No 1 to the Lisbon Treaty amending the Protocols annexed to the Treaty on European Union, to the Treaty Establishing the European Community and/or the Treaty Establishing the European Atomic Energy Community). This is essentially a terminological exercise, with phrases such as "participation in the third stage" replaced by the country "renouncing its exemption" and reference being added to when Denmark and the UK did actually notify the Council of their intention not to participate (twice in the case of the UK, on 16 October 1996 and then again on 30 October 1997). References to Stage 3 are replaced by adoption or introduction of the euro.
(100) Old Art 105(4) TEC, new Art. 245a(5) TFU.
(101) Old Art. 112 TEC becomes new Art. 245b TFU [228], with streamlined paragraphing; Old Art. 113 becomes new Art. 245c TFU [229].
(102) New Art. 2A-E TFU [12].

(ii) shared competences; and (iii) supporting, coordinating or complementary competences. Euro area countries' monetary policy is an exclusive EU competence (103), meaning that subsidiarity cannot apply and enhanced cooperation cannot be used. It also means that only the Union can legislate in this area as these monetary policy responsibilities have been irrevocably transferred to the Union (and, given the singularity of monetary and exchange rate policy, no residual competence can exist). Member States whose currency is the euro can only act if empowered to do so by the Union or when implementing Union acts. Lisbon does not provide a precise definition of "monetary policy". However, it is clear that, as now, it is defined in a broad sense, to encompass the tasks set out in the Treaty's current Chapter on monetary policy (104). This means the Union is exclusively competent for the range of tasks set out in that Chapter, which include the setting of interest rates, various payment system functions, banknote issuance, and exchange rate policy.

Lisbon provides the Union with a competence to take measures to coordinate Member States' economic and employment policies (105). In particular, the Council adopts guidelines in respect of the Member States' economic policies, and the Union defines guidelines in respect of Member States' employment policies and takes initiatives to ensure coordination of Member States' social policies. This competence is not specifically classified. However, as it is neither an exclusive competence or a supporting, coordinating or complementary competence, it is a shared competence. This means that both the Union and Member States can legislate in the area. However, Member States can only exercise these competences to the extent that the Union does not.

As well as some updating of the language and references, Lisbon moves the main reference to the Union's economic and monetary policies from its current place at the beginning of the TEC to the opening of the TFU Title on EMU (106). This now effectively states that the activities of both the Union and the Member States, as regards EMU, will include the adoption of an economic policy based on the close co-ordination of Member States' economic policies, the

(103) New Art. 2B TFU [12].
(104) TEC Chapter 2, Title VII. This was set out in the ECB's Opinion of 19 September 2003 at the request of the Council of the European Union on the draft Treaty establishing a Constitution for Europe (Con/2003/20).
(105) New Art. 2B and 2D TFU [12].
(106) Old Art. 4(1) TEC, new Art. 97b TFU [85].

creation of the euro, and the definition and conduct of a single monetary policy and exchange rate policy (the primary objective of both of which is to maintain price stability, see above). The reference to the guiding principles of these activities being stable prices, sound public finances and monetary conditions, and a sustainable balance of payments is also kept. As its content also appears in the Treaty's EMU policy provisions, it is interesting that Lisbon did not delete this article, or at least reduce it. Rather, as the opening Article of the EMU Title, it is highlighted. In effect therefore, Lisbon highlights the fact that coordinated economic policies, the euro and the definition and conduct of a single monetary policy are essential parts of the activities of both the Union and the Member States.

2. The ECB becomes an institution

Lisbon makes the ECB a Union institution, including it in the list of Union institutions that appears in the TEU (107). However, whilst mentioned in the TEU, all the actual provisions on the ECB are to be found in the TFU (108). Currently, the ECB is a body of the Community, because it is created by the Treaties (109). There is no change in the ECB's legal personality, which is independent of that of the EU (110). The duty of mutual sincere co-operation between institutions is now unambiguously and expressly applicable to the ECB (111). However, as this duty, which is anyway vague, is without prejudice to the powers of each institution and the procedures set out in the Treaties and was already entirely applicable to the ECB, this represents no change (112).

The ECB becoming an institution is a formal change in the legal status of the ECB (from body to institution) with almost no practical conse-

(107) New Art. 9(1) TEU [14].
(108) And of course in the ECB Statute. As regards the TFU, they are mainly at new Art. 245a. This is a clear legacy of the process of placing the text of the Treaty establishing a Constitution for Europe into the current Treaties. Although in every sense an institution ("The European Central Bank is an institution", Article I-30), it was placed, together with the Court of Auditors in a separate chapter (Part I, Title IV, Chapter II) from the main institutions, titled "Other institutions". Lisbon recognises the differentiation between these two groupings of institutions by placing the key active provisions of the first in the TEU and the second in the TFU. New Art. 1 TEU confirms that the two treaties are entirely equal.
(109) Old Art. 8 TEC.
(110) Old Art. 107(2) TEC, new Art. 245a(3) [227].
(111) New Art. 9 TEU, previously the duty of sincere or loyal co-operation, or co-operation in good faith, based on Old Art. 10 TEC [14].
(112) For an full explanation of the principle of sincere co-operation, see LENAERTS and VAN NUFFEL, *op. cit.*, pages 115-123.

quences, because the detailed *lex specialis* regime applied to the ECB by the Treaties is not changed at all. Lisbon does not amend any of the main features relevant for the ECB, namely its primary and secondary objectives and tasks, its powers to adopt legal acts, its own legal personality and independence. This includes the institution's financial independence, which is explicitly mentioned in Lisbon, although it represents no real change because the TEC and the Statute already provide the ECB with its own budget. Innovative language is introduced into the TFU in this respect, namely that the ECB "*shall be independent in the exercise of its powers and in the management of its finances*" (113). By means of a new provision (114), Lisbon introduces a Treaty basis for interinstitutional agreements (115) covering explicitly only the Parliament, the Council and the Commission. However, as currently, it is feasible that the ECB (like the Court of Auditors or the Court of Justice) could sign an interinstitutional agreement, in possible areas of interest, such as on the preparation of the Convergence Reports for the adoption of the euro by Member States with a derogation or the linguistic regime for the adoption of EU law.

One set of interesting Lisbon changes include that for the first time the ECB can be taken to the ECJ, either by another institution or by a Member State, if it fails to act (116) (as is already the case for the other institutions). Also, Lisbon maintains and makes explicit the ECJ's ability to review all ECB legal acts, which would include Guidelines, which are instruments used for the internal workings of the Eurosystem, if they are intended to produce legal effects vis-à-vis third parties (117).

(113) New Art. 245a(1) and (3) TFU [227].
(114) New Art. 252a TFU [240].
(115) Of which many already exists, e.g. on drafting legislation, where the interinstitutional agreement [XXX] is the primary basis of the Joint Practical Guide of the European Parliament, the Council and the Commission for persons involved in the drafting of legislation within the Community institutions, as also generally applied by the ECB.
(116) Art. 232 TEC/TFU [216]. As now, such an action can only be brought if the ECB has been called upon to act and has not, within 2 months, defined its position. A natural or legal person may also now, under the same conditions, complain to the Court if the ECB has failed to address an act (other than a recommendation or opinion) to that person.
(117) Pursuant to Article 17.2 of the ECB's Rules of Procedure, the Governing Council adopts ECB guidelines. This article does not enter into a discussion about the legal character of ECB guidelines, which are adopted further to Article 12.1 of the ECB Statute. Under Article 14.3 of the Statute, NCBs must act in accordance with the ECB's guidelines, which are intended to apply to all Eurosystem central banks, including the ECB, and not to third parties. However, in some cases, and in particular the guidelines in respect of the "General Documentation" on Eurosystem monetary policy instruments and procedures and on the TARGET 2 payment system, the Guidelines are so detailed and prescriptive, and copied into national law in such an identical manner, that they could in fact be characterised as acts intended to have legal effects vis-à-vis third parties.

It similarly extends the ECJ's jurisdiction to relevant acts of Union bodies, offices and agencies, although the grounds for any revision by the ECB are unchanged by Lisbon (118).

3. The Eurosystem and the ESCB

Lisbon introduces into the Treaties the term "Eurosystem", which is already in widespread usage and means the ECB together with the NCBs of the Member States whose currency is the euro – as opposed to the ECB together with the NCBs of *all* Member States, which is termed the ESCB (European System of Central Banks). However, the term Eurosystem is mentioned only once, with the remainder of the TFU, as now (TEC), using "ESCB" to mean both the Eurosystem and the ESCB (119) and leaving it to the reader to use the keys provided in the TFU and the Statute that differentiate between when Eurosystem is meant and when ESCB (120). Lisbon does not change the status of the Eurosystem in any way (121). Similarly, the status of the ESCB is also entirely unchanged. However, whereas currently the ECB and the ESCB were both only mentioned in the TEC, in Lisbon, the ESCB is not mentioned in the TEU (like the ECB), but only in the TFU. The main provisions on the tasks to be carried out through the Eurosystem, including the definition and implementation of the monetary policy of the Union, are unchanged (122). The Eurosystem remains governed by the decision-making bodies of the ECB and the tasks given to it by the Treaties remain unchanged. As is the case with the ECB's advisory role, the provisions on the ECB and the Eurosystem in the Institutional Part of the TFU (123) use modified language, with Lisbon proclaiming when defining the Eurosystem that the ECB, together with the euro area national central banks shall conduct the monetary policy of the Union.

(118) Art. 230 TFU [214].
(119) To distinguish between the two, it is necessary to refer to Old Art. 122(3) TEC/ new Art. 118a(1) TFU [103] or Old Art. 43/new Arts. 42.1-5 of the ECB Statute.
(120) Art. 43.1 to 43.6 of the current ECB Statute. As a result of the Lisbon's deletion of Art. 37 of the Statute (on the seat of the ECB), the key will now (without changes other than necessary new cross references) be in in Art. 42. 1 to 42.6 of the ECB Statute.
(121) Old Art. 8 TEC, new Art. 245a(1) TFU [227] and Art. 1.1 of the ECB Statute.
(122) Art. 105 TEC/TFU; new Art 245a(1) TFU. The two definitions are duplicated in new Art. 1.1 of the ECB Statute.
(123) Article 245a TFU (1)-(5) [236].

4. ECB Board members to be appointed by QMV

ECB Executive Board members are currently appointed by common accord of the Heads of State or Government governments of euro area Member States (124). They will now be appointed by the European Council, acting by – and this is the significant change – a qualified majority of the members from euro area countries. Whether this will make any difference is a moot point. Even when replacing the six original Executive Board members, which was done with unanimity, each of the members from France, Italy, Germany and Spain was replaced by a national of the same country, with the remaining seats being filled with appointments of nationals of other euro area Member States. This is despite the fact that in 1998, the Heads of State or Government agreed that for future appointments, "appropriate weight and appropriate consideration, according to a balanced principle of rotation" would be given to nationals of Member States that had not yet provided Executive Board members. Moving from unanimous to majority voting should help avoid the situation where the appointment of Board members becomes subject to a protracted dispute between Member States. It also brings the appointment procedure in line with the applicable decision-making procedure for other key nominations.

5. Exchange rate policy

Lisbon makes only a very minor change to the substance of the provisions on exchange rate policy and the conclusion of monetary and exchange rate agreements. However, it moves them from the Title on EMU to a new Part on EU external action (125). By this movement, Lisbon implies that these policies are to be pursued under the overall banner of the Union's external activities, and with a view to its overall objectives. However, the moving of the provisions into this new environment does not change their scope in any way. In terms of responsibilities within the Commission, the moving of these provisions to EU external action would suggest that the High Representative (as opposed to the Commissioner for Economic and Monetary Affairs) would be the Commissioner expected to play the lead role in

(124) Old Art. 112 TEC, which now becomes new Art. 245b TFU. See also Art. 122(5) TEC/TFU [228].
(125) Old Art. 111(1), (2), (3) and (5) TEC to new Art. 188O TFU [174].

this policy area through his overall responsibility for coordinating the Commission's responsibilities in the fields of external action (126).

6. External representation of the euro

The changes to the current text made by Lisbon clarify the current provisions but do not change them, in particular regarding the allocation of responsibilities. The ECB's role in the external representation of the euro area is unchanged (127). It remains the case that the euro area countries, should they wish to do so can decide, by QMV, to mandate a particular body or person to represent the euro area in a unitary way in relevant international fora (128). A good example of this would be unitary representation at the International Monetary Fund, which has been discussed both by the Eurogroup and the European Parliament (129). On the one hand, the new Treaty makes this a little less likely, as instead of it being the case that the Council "shall" decide on the representation of an EU position, suggesting an obligation, Lisbon says only that the Council "may" (as before, with the due involvement of the Commission and the ECB). However, what it may adopt is much more focused, namely "*appropriate measures to ensure unified representation*". In any case, both theory (130) and practice show that "shall" does not mean any obligation to act (but rather that if the Council acts, it must do so in this particular way). Also, any position to be adopted is a "*common*" one. Purpose can also be seen with the reason "*In order to secure the euro's place in the international monetary system*".

Other considerations are whether giving the Union legal personality (131) and the new EU foreign policy positions created by Lisbon are relevant in this context. For the first, the answer is essentially no, because the Community already has legal personality and the Union already has effective international legal personality in this respect, as

(126) New Art. 9 E(4) TEU [19].
(127) Art. 6 ECB Statute.
(128) Old Art. 111(4) TEC, new Art. 115C TFU [100]. An earlier attempt to do this was the 1998 Commission proposal for a Council Decision on the representation and position taking of the Community at international level in the context of economic and monetary union (Com (1998) 637 final).
(129) For a good examination of the case for a single euro area chair, see "Powerless Europe : Why is the Euro Area Still a Political Dwarf?", Lorenzo BINI SMAGHI, *International Finance 9 :2*, 2006 : pp. 1-19.
(130) C-378/00, *Comm. v. Parl. and Council*, para 43.
(131) New art. 46A TEU [55].

provided for in Amsterdam in 1997 and Nice in 2001 (132). Perhaps of more relevance, and as elaborated in Section One, the international representation of the euro may be affected by the proliferation of actors able to represent the euro in international fora. The President of the Commission and its Economic and Monetary Affairs Commissioner and the High Representative can all point to a part of their task relevant to external representation, as can the ECB President. Although without Treaty basis, the Eurogroup President is also a big potential player in this context. Despite the intuitive reaction that such numeracy may lead to confusion, this is unlikely to be the case. All of these actors each have their own responsibilities that do not impinge on those of the others. As for the President of the European Council, any role here is effectively ruled out as his external representation mandate is limited to CFSP.

Finally, Lisbon reflects the change of the status of two French islands, Saint-Barthélémy and Saint-Martin, which were municipalities of the French overseas department of Guadeloupe, but, in 2007, became 'overseas collectivities'. In order to ensure that these islands continue to be part of the EU, and thus to ensure the direct applicability of EU monetary law (133), Lisbon amends the Treaty (134) to the effect that the reference to French overseas departments is replaced by a reference to "Guadeloupe, French Guiana, Martinique, Réunion, Saint-Barthélémy, Saint-Martin' (135). In addition, Lisbon introduces a new simplified amendment procedure to further revise the lists of overseas countries and territories associated of Denmark, France the Netherlands associated with the Union (OCTs) and of the French territories belonging to the Community (136) in case other overseas departments of France wish to become OCTs. In this case,

(132) Maastricht created an association of States established by Treaty, the legal code words for an international organisation. However, the Union fell short of this in the important respect of not having an international legal personality, meaning it was unable to create rights and obligations in international law distinct from those of the Member States. In practice, Amsterdam and Nice gave this to the Union, which is already now unambiguously considered a subject of international law: ambassadors are accredited to the Union not the Communities; Member States have Permanent Representations to the Union; and both CFSP legal instruments and international agreements with third parties refer to the Union and are concluded by the EU Council on behalf of the Union. The remaining legal debate is well covered in "Some reflections on the CFSP legal order", R.G. Bono, *Common Market Law Review*, 43, p. 337-394, 2006.

(133) And in particular Council Regulation (EC) No 974/98 of 3 May 1998 on the introduction of the euro.

(134) Old Art. 299(2) TEC, new Art. 299 TFU [287].

(135) Old Art. 299(2) TEC; new Art. 311a TFU [293].

(136) New Art. 311a TFU [293].

new monetary arrangements will be necessary for these territories, since Union law, including monetary law, applies only within the Union, unless extended by the specific decision of the Council (137) or by means of a monetary agreement (138).

7. The Euro Group

Lisbon introduces into the Treaties the first reference to the monthly meetings of the euro area countries' finance ministers known as the – oddly spelt – Euro Group (139). The new Treaty ensures that the Commission takes part in Euro Group meetings, that the ECB is invited to take part and that a President is elected, by a simple majority of the ministers, for two and a half years.

Although an entirely informal body, to date without a Treaty anchor, the Eurogroup has slowly, but steadily, solidified and deepened, including through the creation of lower-level policy committees. Even in the absence of formal competencies, the Eurogroup has shown its ability to develop enhanced commitment devices within its current framework. Its functioning and visibility were helped by the election of a 2-year President in 2005. Lisbon adds to the Treaties a new Protocol on the Euro Group, which confirms that its meetings ("*when necessary*") are informal. This means it has no decision-making capacity; all decisions in this context continue to be made by the Ecofin configuration of the Council. However, the Euro Group is mandated to discuss the ministers' specific responsibilities with regard to the euro. This clearly foresees the possibility that the Euro Group may discuss items to be subsequently discussed by the Ecofin and means that once the euro area countries have a QMV of the Council, they would, should they choose to do so by agreeing to vote *en bloc*, be able themselves to effectively act as a decision-making body.

8. Adoption of the euro

Currently, the decision to abrogate the derogation of a Member State (meaning the decision to allow an EU country to adopt the euro) is

(137) As was the case e.g. with MAYOTTE and St. PIERRE, see "Monetary and Exchange Rate Arrangements of the euro area with selected third countries", *ECB Monthly Bulletin*, April 2006.
(138) As was the case with Vatican City, San Marino and Monaco [legal instruments]. The Union is currently in the process of agreeing a similar monetary agreement with Andorra.
(139) New Art. 115B TFU [100].

effectively taken by the economic and finance ministers of the 27 Member States, in their Ecofin Council configuration. This is done on the basis of a proposal by the Commission and further to convergence reports by both the Commission and the ECB (140). The (Ecofin composition of the) Council can only abrogate a country's derogation on the basis of a Commission proposal (141), following consultation of the Parliament and a discussion by the Council in the composition of Heads of State or Government. Lisbon does not change this overall framework (142), although the discussion will be by the European Council. It also introduces an important novelty : before the whole Council decides, the euro area countries alone will now provide a recommendation of their own, which will be made on the basis of a QMV vote (143). Whilst in theory the whole Council could then come to a different decision, this would seem extremely unlikely, especially as euro area countries will in due course constitute a majority in the Council.

9. Innovations regarding the Broad Economic Policy Guidelines

Lisbon introduces several innovations to the Broad Economic Policy Guidelines (BEPGs) procedures. Currently, when a Member States' economic policies are not consistent with the BEPGs adopted by the Council, or they risk jeopardising the proper functioning of EMU, the Council may, acting by QMV on a Commission recommendation, make recommendations to the Member State concerned. This has generally been used to send early warnings to Member States. Remarkably, when the Council takes this decision, the Member State in question is also entitled to vote.

With Lisbon, the Commission is given the power in such circumstances to directly address a Member State with a warning – without

(140) Old Art. 122 TEC and new Arts. 117a(1) [102, 108] and 116a TFU [101].

(141) According to new Art. 115 TEC/TFU (unchanged), if the Council wishes to discuss abrogating the derogation of a Member State which the Commission had *not* made a proposal on (which was the case of Lithuania in 2006), it – or even a single Member State – can formally request the Commission to make a proposal. Whilst this would undoubtedly exert a considerable amount of political pressure, the Commission need only examine the request and can respond by providing the reasons why it is not making the proposal, which anyway would presumably be set out in its Convergence Report.

(142) One additional element is that the Council must now decide within six months of receiving a Commission proposal. However, in practice, the timetable is anyway standardised, with a Commission proposal normally being received in May of a given year, and the Council deciding in July.

(143) The Council separately decides, unanimously, the actual conversion rate. This is not changed, and there is no similar recommendation. The actual convergence criteria also remain unchanged.

the involvement of the Council (144). If, in spite of this warning, the Member State still does not correct its policies, the Commission can then still recommend to the Council that it makes the necessary recommendations to that country. However, with the new Treaty, although the representatives of the Member State being addressed can take part in the discussion, their vote on the recommendations is taken away. Lisbon also provides here a greater recognition of euro area specificity. All decisions taken in this field concerning euro area countries are to be taken only by euro area countries. When the Council adopts the parts of the BEPGs concerning the euro area generally, only Member States whose currency is the euro have a right to vote (145). However, all Member States will be present in the Ecofin for these discussions. The same holds when the Council adopts recommendations addressed to euro area countries whose policies, as above, are inconsistent with their BEPGs or risk jeopardising the proper functioning of EMU (146).

It is also worth noting that in all decisions under the BEPGs where not all Council members vote (either because the Member State concerned is excluded or because it concerns a euro area matter and therefore only euro area countries vote), the new normal QMV threshold applies (see above). This amounts to a significantly lower threshold than under the current system, where, because these measures are taken on the basis of a recommendation (and not a proposal) from the Commission, the votes of at least two thirds of the Member States are required to adopt a decision.

10. Innovations regarding the Excessive Deficit Procedure

Lisbon also makes several amendments to the EDP. Currently, when the Commission considers that an excessive deficit exists in a Member State, or may occur, it can address an opinion to the Council. On that basis the Council decides whether or not to address an early

(144) Although, under the reformed Stability and Growth Pact, the Commission already has the right to issue direct policy advice to a Member State in relation to the adjustment path towards the medium-term budgetary objective (MTOs). The Council can also formulate non-binding policy invitations to the Member State concerned in the context of its Opinions on the Stability and Convergence Programmes. Less formally, the Commission can also use communications on public finances or regular fiscal surveillance exercises, such as the euro area countries' Mid-Term Budgetary Review or the Council's fiscal policy discussions on Commission economic forecasts.
(145) New Art. 116a(2) TFU [101].
(146) New Article 116a(4)a TFU [101].

warning to the Member State concerned. As with the BEPGs, Lisbon enhances the Commission's role in the EDP procedure, giving it the right to directly address a warning to the Member State concerned. Subsequently, when the Council's adopts a decision on the existence of an excessive deficit, this will now be based on a Commission proposal rather than a recommendation, meaning that the Council cannot amend the Commission's proposal, unless it acts unanimously. In this way, Lisbon clearly strengthens the Commission's hand. Also, similarly to the BEPGs, the representatives of the Member State concerned lose their votes in these Council decisions on whether an excessive deficit exists. By contrast, once a country is in an EDP, the Council's subsequent recommendations and decisions continue to be based on Commission recommendations. However, with Lisbon these recommendations must be acted on without undue delay (147).

Again mirroring the BEPGs, all Council recommendations and decisions under the EDP relating to euro area countries, are, with Lisbon, only taken by euro area countries. This is a change from the current arrangements whereby all Member States are entitled to vote on Council decisions on the existence of an excessive deficit in a euro area Member State, Council recommendations to euro area Member States with a view to remedying this situation, and Council decisions to make these recommendations public. Finally, as above, the QMV threshold for these Council decisions is significantly lowered, from two thirds of Member States to the new normal QMV rules. This should make it easier to reach agreement on such decisions.

11. A special "enhanced co-operation" mechanism for euro area economic governance measures

Lisbon introduces a provision (148) that provides a new legal basis for the euro area countries to adopt legally-binding measures (applying only to themselves) to strengthen the coordination and surveillance of their budgetary discipline and to set out new economic policy guidelines for the euro area economy. Whilst non euro area Member States are entitled to participate in preparatory discussions on such measures, they cannot vote on them, which is done only by

(147) Article 104 (7) TFU [90]. As now, once in an EDP, the representatives of the Member State being addressed have no right to vote.
(148) New Art. 115A TFU [100].

euro area countries, with measures being adopted with a (euro area) QMV of the Council. Any such measures must be compatible with the Treaty and adopted in accordance with the relevant procedures on the BEPGs and EDP (149). This euro-area specific "enhanced co-operation" mechanism can thus be used to complement or strengthen existing procedures on coordination and surveillance of economic and budgetary policies. Measures that could be taken in this context would include e.g. a greater use of common economic forecasts in the context of budgetary policy or a stricter surveillance of the euro area-specific parts of the BEPGs. One specific example might be the formal endorsement of the Eurogroup Orientations for fiscal policies that were adopted in Berlin in April 2007, which, at that point, would become a legally binding document for the euro area countries.

CONCLUSION

The Treaty of Maastricht was an utter revolution, bringing EMU into being with a detailed framework that was virtually untouched in the subsequent Treaties of Amsterdam and Nice. To that list can be added Lisbon. However, Lisbon does, on the whole, make more significant changes to the Union's general structures than its two immediate predecessors and can therefore be expected to have a more significant impact : a successful EMU requires a successful Union. The innovations introduced by the new Treaty to the European Council, to qualified majority voting, to the Parliament's powers and to the Commission, will, over time, bring their worth to bear on EMU. Of potentially more direct relevance is the expansion of the Treaties' simplified amendment procedures, including the passerelles. EMU's main institution is the ECB, which Lisbon grants the status of a full Union institution. Because all the specific provisions regarding the new institution's primary and secondary objectives, powers, tasks, independence, legal personality and ability to adopt legal acts are unchanged, Lisbon will have little if any impact on the day to day or indeed medium-term workings of the ECB. However, on the margins, e.g. in the application of the Charter of Fundamental Freedoms, it is not meaningless. History is unlikely to record the Lisbon Treaty as a particularly memorable chapter of EMU. However, if it does, it

(149) Art. 99 TEC/TFU [86]; Art. 104 TEC/TFU [90].

will probably highlight that Lisbon provides the euro area with certain new tools and sharpens the potential of existing ones, not least the institutional flagship of the Euro Group. If in the future the euro area countries wished to increase the amount of integration between them in the field of economic policy, Lisbon's EMU legacy is likely to be that, in a cautious and incremental way, it helps them to do that.