

Lucia Serena Rossi
Federico Casolari *Editors*

The EU after Lisbon

Amending or Coping with
the Existing Treaties?

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Preface and Acknowledgments

This volume is the result of a research project on the quasi-constitutional nature of the Lisbon Treaty, a project begun 3 years ago within the framework of the Erasmus Academic Network LISBOAN (Linking Interdisciplinary Integration Studies by Broadening the European Academic Network). The research was aimed, on the one hand, at offering a better understanding of the nature of the Lisbon Treaty and, on the other, at investigating the way in which the Treaty addresses the constitutional pluralism characterizing the European integration process.

In this volume, those investigations are carried a step further through a focus on the central question of whether the EU Treaties need further revising. On 1 December 2013, it was 4 years to the day since the Lisbon Treaty had come into force, following the debacle of the Treaty establishing a Constitution for Europe. In welcoming its entry into force, the president of the European Commission, José Manuel Barroso, enthusiastically declared, ‘I’m delighted that we now have the right institutions to act and a period of stability, so that we can focus all our energy on delivering what matters to our citizens.’¹ However, all too regrettably, the situation that developed on the ground immediately thereafter took a dramatic turn away from that scenario: the eurozone debt crisis—coupled with some other major events, not least of which the problems the institutions of the European Union (EU) have faced in ensuring the enforcement of the rule of law (with the 2010 Roma crisis in France, the ongoing Hungarian crisis of 2011, and the 2012 Romanian crisis)—shaped an environment that made it difficult, at the very least, to fully implement the Lisbon Treaty’s reform. At the same time, those events, and the broader post-Lisbon practice, have brought to light some major inadequacies of the current legal framework in the face of the challenges confronting the Union.

Is that enough to advocate a further comprehensive reform of the Treaties? Should a new reform introduce only some major innovations? Or again, adapting the most famous line from Giuseppe Tomasi di Lampedusa’s novel *The Leopard*—

¹ Doc. ‘European Commission welcomes the entry into force of the Treaty of Lisbon’, IP/09/1855, 1 December 2009.

‘If we want things to stay as they are, things will have to change’—should the current legal framework be left substantially unchanged?

The editors and authors of this volume intend to address these questions in an open-ended fashion, without setting out a commitment to any definitive solutions. In the spirit of that premise, the volume has been divided into four parts. Part I—collecting Chaps. 1–5, by Rossi, Besselink, Luif, McDonnell, and Casolari—takes a horizontal approach to the Treaties’ revision. While Chap. 1 develops the theoretical framework within which to consider reforming the EU Treaties, Chaps. 2–5 lay emphasis on the parameters of constitutional development; the allocation of competences between the Union and its Member States; and the principles of solidarity, flexibility, and loyal cooperation. These constitutional features—‘lying between’ the EU and its Member States—show themselves to be particularly suitable when it comes to assessing the tensions between the EU institutional framework and *die Herren der Verträge* (the Masters of the Treaties), and hence the fault lines generated by the tectonics of the EU lithosphere. Special attention is devoted in this respect to the euro crisis and its impact on the EU’s constitutional design.

In Part II (Chaps. 6–8) the focus shifts to the question of fundamental rights within the EU’s constitutional framework. As is well known, one of the most relevant innovations of the Lisbon Treaty lies in its incorporating the Charter of Fundamental Rights into the Union’s primary law. The chapters collected in this part—by Jacqu e, Van Elsuwege, and Di Federico—take up three main issues relative to the Charter’s application (the interpretation of the Charter’s horizontal provisions, reverse discrimination, and cross-border healthcare) so as to assess whether the new mechanism for protecting fundamental rights is effective and whether (and what) further action is called for.

Part III (Chaps. 9–11) is devoted to another domain significantly reshaped by the Lisbon reform, namely, the Union’s external dimension. Chapter 9 (Wouters and Ramopoulos) frames the question through an overall assessment of the post-Lisbon constitutional design of EU external relations, and the remaining two chapters (Gatti and Comelli) look at some of the most relevant innovations in that domain (namely, the establishment of a European External Action Service and the formal recognition of the European Neighbourhood Policy as a formal strand of the Union’s external action) sketching out possible avenues for dealing with the problems and inconsistencies detected in the current system.

Part IV (Chap. 12) presents some general conclusions on the topic. In the conclusions Advocate General Paolo Mengozzi highlights the common themes emerging from the various contributions, stressing the need for a more general supranational approach to the political crisis the Union is going through.

The bulk of the chapters in this volume are based on papers presented at a roundtable and a workshop held on 14 and 15 November 2012, respectively, at the Bologna University Department of Legal Studies. The roundtable (*The European Union and the Crisis: Amending or Just Completing the Lisbon Treaty*) was made possible by funding from the European Commission under the *Ad Personam* Jean Monnet Chair ‘The Impact of the Lisbon Treaty on European Integration’, while the workshop (*The EU after the Lisbon Treaty: A Quasi-Constitutional Framework to*

Be Revised?) was organized as part of the LISBOAN network. The debate that took place during these two events greatly contributed to the reworking and the finalization of the contributions in this volume.

The editors wish to thank all the chairs and speakers who took part in these events—including Thomas Christiansen, Sir Francis Jacobs, Marc Maresceau, Laurent Pech, and Miguel Poiars Maduro—for their invaluable contribution. We are deeply grateful to Paolo Mengozzi, who agreed to write the conclusions to this volume. We also owe a debt of gratitude to Tobias Kunstein for his precious support at all stages of the LISBOAN research on the quasi-constitutional nature of the Lisbon Treaty, to Oriana Mazzola for her assistance in organizing the two Bologna events, and to Filippo Valente for his support in preparing and revising the manuscript.

Bologna, Italy
October 2013

Lucia Serena Rossi
Federico Casolari

Abbreviations

ACP	African, Caribbean and Pacific Group of States
AFSJ	Area of Freedom, Security and Justice
BVerfGE	<i>Bundesverfassungsgericht</i> (German Federal Constitutional Court)
CEECs	Central and Eastern European Countries
CFI	Court of First Instance of the European Union (now General Court)
CFSP	Common Foreign Security Policy
COREPER	Committee of Permanent Representatives
CRS	Crisis Response System
CSDP	Common Security and Defence Policy
CSOs	Civil-Society Organizations
DCFTAs	Deep and Comprehensive Free Trade Areas
DCI	Development Cooperation Instrument
DG ECHO	Directorate-General for Humanitarian Aid and Civil Protection
DG RELEX	Directorate-General for External Relations
EAFRD	European Agricultural Fund for Rural Development
EAGF	European Agricultural Guarantee Fund
EaP	Eastern Partnership
EBRD	European Bank for Reconstruction and Development
EC	European Community
ECB	European Central Bank
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECOWAS	Economic Community of West African States
ECR	European Court Reports
ECSC	European Coal and Steel Community
ECtHR	European Court of Human Rights
EDF	European Development Fund
EEA	European Economic Area
EEAS	European External Action Service
EEC	European Economic Community
EFSD	European Financial Stability Facility

EFSM	European Financial Stabilization Mechanism
EFTA	European Free Trade Association
EIB	European Investment Bank
EIDHR	European Instrument for Democracy and Human Rights
EMAAs	Euro-Mediterranean Associations
EMP	Euro-Mediterranean Partnership
EMU	Economic and Monetary Union
ENI	European Neighbourhood Instrument (starting on January 1, 2014)
ENP	European Neighbourhood Policy
ENPI	European Neighbourhood and Partnership Instrument (to be renamed European Neighbourhood Instrument, starting on January 1, 2014)
ERCC	Emergency Response Coordination Centre
ESM	European Stability Mechanism
ESS	European Security Strategy
EU	European Union
EUR	Euro
Euratom	European Atomic Energy Community
Europeaid	Directorate-General Development and Cooperation
FAC	Foreign Affairs Council
FAO	Food and Agriculture Organization
FTAs	Free Trade Areas
GATS	General Agreement on Trade in Services
GC	General Court of the European Union (former Court of First Instance)
HR	High Representative of the Union for Foreign Affairs and Security Policy
IFICs	International Financial Institutions and Conferences
IfS	Instrument for Stability (to be renamed Instrument contributing to Stability and Peace, starting on March 16, 2014)
IGC	Intergovernmental Conference
IMO	International and Maritime Organization
INSC	Instrument for Nuclear Safety Cooperation
LIBE	European Parliament's Civil Liberties Committee
OJ	Official Journal of the European Union (former Official Journal of the European Communities)
OSCE	Organization for Security and Co-operation in Europe
PCA	Partnership and Cooperation Agreement
PSC	Political and Security Committee
SAP	Stabilisation and Association Process
SEA	Single European Act
SGEIs	Services of General Economic Interest
SSM	Single Supervisory Mechanism
TEC	Treaty establishing the European Community

TEEC	Treaty establishing the European Economic Community
TESM	Treaty establishing the European Stability Mechanism
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TSCG	Treaty on Stability, Coordination and Governance in the Economic and Monetary Union ('Fiscal Compact')
UN	United Nations
UNEP	United Nations Environment Programme
U.S./US	United States of America
VAT	Value Added Tax
VCLT	Vienna Convention on the Law of Treaties (1969)
VP	Vice-President of the European Commission

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Part I
**The European Union at Crossroads:
General Issues on Treaties' Revision**

Chapter 1

A New Revision of the EU Treaties After Lisbon?

Lucia Serena Rossi

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Abstract This chapter assesses the need for a revision of the Treaty of Lisbon. I start out by arguing that a revision should address economic, institutional, and constitutional issues. I then analyse the different revision instruments introduced by the Lisbon Treaty. This will make it possible to understand what procedures may be required to amend the existing Treaties in crucial areas. Finally, I explore the possibility of revisions on a smaller scale, as a means of differential integration.

Keywords Differential integration • EU fundamental principles • Lisbon Treaty • National constitutional identities • Supremacy of EU law • Treaties revision

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1.1 Unresolved Problems After Lisbon

When the Treaty of Lisbon finally entered into force, on 1 December 2009, most politicians and commentators heaved a sigh of relief. The Treaty had been signed 2 years before (on 13 December 2007) and came after the debacle of the Treaty establishing a Constitution for Europe. The process of revision had been so burdensome that just the thought of embarking on a revision all over again looked like a nightmare; moreover, the new Treaty seemed so full of innovations that exploring—and exploiting—all its potentialities would have required a long time.

Still, it only took a few years for the Member States to amend some of the Protocols annexed to the Treaty,¹ as well as the Treaty itself,² and for there to re-emerge, among politicians,³ the idea that the Treaties needed a new, broader revision. The existing Treaties, based on weak compromises among competing visions of the destiny of the European Union (EU), seem ill-equipped to respond to the crisis affecting the EU, a crisis at once economic and tied in with issues of political leadership and constitutional identity.

The Treaty seems in the first place to clearly lack the instruments needed to tackle the economic crisis of the eurozone. This is mainly because, while the EU is solely competent to set monetary policy, it has no proper competences in social, labour, and economic policy—all areas where it is only allowed to support, coordinate, or supplement the policies of the Member States.⁴ And so it is that in

¹ Under Article 51 TEU, the Protocols annexed to the Treaties have the same legal status as the Treaties themselves; therefore, the Protocols can be modified only through the same procedures established for revising the Treaties. See the Protocol Amending the Protocol on Transitional Provisions annexed to the Treaty on European Union, to the Treaty on the Functioning of the European Union and to the Treaty Establishing the European Atomic Energy Community, *OJ* 2010C 263/1. The Protocol allowing 18 additional members to join the European Parliament has recently entered into force: <http://www.europarl.europa.eu/sides/getDoc.do?type=IM-PRESS&reference=20100223BKG69359&language=EN> (accessed 31 July 2013). See also the Protocol on the concerns of the Irish people on the Treaty of Lisbon, *OJ* 2013 L 60/131, which confines itself to clarifying the interpretation of some provisions the Lisbon Treaty contains on EU competences.

² See the European Council Decision of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro, *OJ* 2011 L 91/1. The Treaties have also been amended by effect of Croatia's Accession Treaty, signed on 9 December 2011 (*OJ* 2012 L 112/10).

³ In 2012, David Cameron announced that the EU would have needed a new revision within the following five years. The need to revise the Lisbon Treaty has been a subject of considerable debate in Germany. See Germany's plans for Treaty change—and what they mean for Britain, Centre for European Reform, 28 March 2013, <http://www.cer.org.uk/insights/germany's-plans-treaty-change—and-what-they-mean-britain> (accessed 31 July 2013). More recently, the Spinelli Group started drafting a project for a new constitution for the EU. Among the politicians most actively pressing for a constitutional reform of the EU is Andrew Duff. See Now is the time for a new fundamental law of the European Union, <http://blogs.lse.ac.uk/europpblog/2013/01/14/new-fundamental-law-of-the-european-union/> (accessed 31 July 2013).

⁴ See Article 2(5) TFEU. For a comprehensive review of the competences of the European Union and its Member States after Lisbon see Rossi (2012a).

those so very crucial areas—unquestionably bound up with monetary policy—the EU institutions mostly make use of instruments based on the so-called open-coordination method, which has proved to be utterly ineffective. As a result of that imbalance of competences, the Member States of the eurozone find themselves locked into a situation where, on the one hand, they are all destined to follow the same course in monetary affairs, and yet, on the other, they mostly proceed in competition with one another in designing their economic policies.

If in these areas (of social, labour, and economic policy) the European Union were empowered to exercise shared competences the EU institutions would be enabled to adopt instruments binding on all the Member States, or at least on the States of the eurozone. However, that would make it necessary to modify Parts One and Three of the Treaty on the Functioning of the European Union (TFEU).

In the second place, the current institutional setup is such that no clear leadership can emerge in the European Union. This is due to the progressive weakening of the European Commission, coupled with a parallel shift toward the intergovernmental method. The quintessential role of the Commission is not only (or even mainly) executive: this is the institution competent to draft proposals for the bulk of EU legislation, but, even more importantly, it also acts as a watchdog of the EU Treaties, entrusted with making sure that the general interest is pursued and that rules are followed. At the beginning of the European integration process (and through the end of Jacques Delors's presidency) the Commission was a strong, independent institution which actually saw to it that Member States complied with the Treaties and with EU legislation. At that time, the drafting of EU normative proposals, making it necessary to set political priorities, also meant that the Commission took on the role of guiding the EU toward increasing integration, and in such a way as to ensure coherence.

As is recognised in the Lisbon Treaty,⁵ the broad political trajectories of the EU are now set by the European Council, with a marginal but increasing involvement of the European Parliament, while the Commission's role in drafting EU norms have become merely technical. To be sure, this diminished influence of the Commission in setting priorities is not to be lamented, corresponding as it does to an increased role of institutions having greater democratic legitimacy; but a drifting of the EU system toward intergovernmentalism does entail some risks. The Commission's increasing dependence on intergovernmental decisions, its lower profile in any decision having political content, and its limited say against the will of the Member States (especially the powerful ones)—all these developments suggest that the Commission is progressively being demoted to a sort of secretariat of the European Council. And yet a strong, independent Commission is still necessary, for it remains the only institution whose mission is to look after the general interest and whose role is to equally force all Member States to comply with the rules. It follows that a weak Commission—and a weakening of the Community method—can only rebound to the benefit of the bigger and more powerful States. In fact, it is only

⁵ See Article 15 TEU.

the Commission—and, where disputes arise, the Court of Justice (ECJ)—that can guarantee the equality of the Member States before the law, as is prescribed by the Treaty of Lisbon (Article 4(2) Treaty on European Union).

For all these reasons, a debate has recently emerged on whether new institutional reforms are in order. Some politicians, for example, have called for direct election of the president of the Commission,⁶ so as to strengthen the political profile, independence, and authority of the Commission, which would thus gain the same democratic legitimacy as the European Parliament. However, even granting that a political consensus can be found for such an innovative reform,⁷ this would make it necessary to revise Title II of the Treaty on European Union (TEU) as well as of Part Six TFEU.

1.2 A ‘Quasi-Constitutional’ Treaty

In addition to the drift toward intergovernmentalism and the need to manage the European crisis an abiding identity issue bulks increasingly large: that of the nature and destiny of the European Union. After the failure of the Treaty establishing a Constitution for Europe, the question remains as to whether the EU system must be governed by a clear constitution, a charter that confers powers on the EU, all the while *limiting* those powers.

The European Union can no longer be considered an international organisation, but it cannot be described as a federal state or a confederation, either. As the European Court of Justice commented in *Van Gend & Loos*,⁸ this is a new kind of legal order. The best way to define the European Union, and probably the only way to understand it, is as ‘a process of integration’. Indeed, the EU is moving along a path of integration and is now in a grey zone, somewhere between an international organisation and a constitutional system. This can explain why the EU has evolved so much but still bears little resemblance to other existing models. The ongoing evolution makes the EU system unstable, and it is no surprise that even the current Treaty cannot mark the denouement of the integration process. Looking back, we can see that great strides

⁶The idea, introduced in 2007 by Jo Leinen, had previously been backed by politicians like Tony Blair, Guy Verhofstadt, Wolfgang Schaeuble, and Guido Westerwelle.

⁷The proposal has also found several opponents, such as Herman Van Rompuy (see <http://www.euractiv.com/future-eu/van-rompuy-opposes-direct-electi-news-516360>; accessed 31 July 2013), and more recently Angela Merkel.

⁸ECJ, Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR I. See Pescatore 2010, de Witte 2010, Mayer 2010, and Halberstam 2010. As regards the still-significant impact of that judgment, see the Editorial Comments (2013a), and Bailleux (2013), p. 359, where the author, as is pointed out in the Editorial Comments just mentioned, argues that the *Van Gend en Loos* case should be ‘fully understood as the result of a mobilization strategy led by the Legal Department of the European Executives to secure the advent of the future United States of Europe’.

have been made toward something like a United States of Europe, and we are almost there, but the home stretch always seems the hardest. As in Zeno's paradox of Achilles and the tortoise, the way to the goal is broken up into an infinite number of new steps.⁹

The Treaty of Lisbon could be described as a quasi-constitutional Treaty, since much of the ill-fated Treaty establishing a Constitution for Europe was folded into it. The definition of competences, the broad use of fundamental principles and values, and the binding force the Charter of fundamental rights are all recognised as elements that elevate the EU Treaties to a constitutional role, and neither was it probably the Treaty establishing a Constitution for Europe, contrary to what its name suggested.

However, the Lisbon Treaty is not yet a constitution. True, the Lisbon Treaty can be argued to contribute to establishing a sort of 'material' constitution, but the problem remains that neither the citizens nor the Member States recognise it as a constitution (material or otherwise).

What could transform a quasi-constitutional treaty into a constitutional one? Three features in particular, I submit. In the first place, the Treaty would need to be approved through a constitutional procedure, or at least through something that the citizens can recognise as constitutional. In this sense, a revision by a convention would undeniably look more 'constitutional' than a classic intergovernmental conference (IGC). In the second place, the Lisbon Treaty doesn't *look* like a constitution. Not only does it lack the 'trappings' of a constitution (the name and symbols of one, unlike what was the case with the Treaty establishing a Constitution for Europe), but its excessive length and awkward partition into two sub-treaties (their boundaries quite inaccurately marked)¹⁰ do not help to make it resemble a constitution. Then, too, even the authority of the EU institutions doesn't seem constitutional: for one thing, the citizens see a cumbersome and opaque institutional system, and, for another, the current division of competences between the EU and the Member States—though clearer after Lisbon—still doesn't make much logical sense from a constitutional perspective. From that perspective, the Common Foreign and Security Policy (CFSP) should become a more 'normal' policy, and the open-coordination method should be replaced by the more effective Community method. And, in the third place, a constitutional system should definitively, and explicitly, clarify all issues relating to the sources of EU law, such as the primacy of EU law, the effect of directives, and the position of international law in the EU hierarchy.

The supremacy of EU law is probably the most fundamental principle of EU legal order, and yet it suffers from two paradoxes. The first one is that almost 50 years have passed since this fundamental principle was first enunciated by the

⁹ See Rossi (1999).

¹⁰ Whereas the nature of Parts I and II of the Treaty establishing a Constitution for Europe was clearly constitutional, there is overlap between the Treaty on European Union—which *could* have been (but is *not*) designed as a constitutional treaty—and the Treaty on the functioning of the EU, which by contrast contains some typical 'constitutional' provisions, such as the rules on competences and those on EU citizenship.

Court of Justice,¹¹ and still none of the existing Treaties makes reference to it: the Treaty establishing a Constitution for Europe expressly referred to it, to be sure, but the Lisbon Treaty confines it to the form of a simple Declaration (No 17).¹²

The second paradox is that, as much as all national constitutional or supreme courts recognise the supremacy of EU law, they have expressed some ‘constitutional reservations’,¹³ and though these reservations are formulated in different ways, they all seem to revolve around the idea of national constitutional identity.

As a consequence, Member States can apply this fundamental—and constitutional—principle in different ways. Although this does not happen in the everyday application of EU law, whose primacy is not questioned, it is still possible for EU law to come into conflict with the top principles of a national constitution, as has been shown by a recent awakening of national constitutional courts after the judgments rendered by the German Federal Constitutional Court and the Polish Court¹⁴ on the Treaty of Lisbon. Moreover, on 31 January 2012, the Czech Constitutional Court found the ECJ’s judgment in the *Landtová* case¹⁵ to be *ultra vires*.¹⁶ More recently, the Portuguese Constitutional Court found that a plan to reduce the amounts of vacation allowance due to civil servants, a plan adopted to

¹¹ See ECJ, Case 6/64, *Costa v E.N.E.L.* [1964] ECR 585. Further discussion can be found in Fennelly (2010), Pernice (2010), Hofmann (2010), and Rasmussen (2010).

¹² In the Declaration, the Conference ‘recalls that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law.’ Attached to this Declaration is an opinion of the Council Legal Service (dated 22 June 2007), which reads as follows: ‘It results from the case-law of the Court of Justice that primacy of EC law is a cornerstone principle of Community law. According to the Court, this principle is inherent to the specific nature of the European Community. At the time of the first judgment of this established case law (*Costa/ENEL*, 15 July 1964, Case 6/64) there was no mention of primacy in the treaty. It is still the case today. The fact that the principle of primacy will not be included in the future treaty shall not in any way change the existence of the principle and the existing case-law of the Court of Justice.’

¹³ This expression was first used by the French *Conseil Constitutionnel* in its judgment on the Constitutional Treaty: decision No 2004-505 DC, 19 November 2004, <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2004/2004-505-dc/decision-n-2004-505-dc-du-19-novembre-2004.888.html> (accessed 31 July 2013).

¹⁴ German Federal Constitutional Court (BVerfGE), 2 BvE 2/08, 30 June 2009, http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html (accessed 31 July 2009); Polish Constitutional Tribunal, Ref. No K 32/09, 24 November 2010, http://www.trybunal.gov.pl/eng/summaries/documents/K_32_09_EN.pdf (accessed 31 July 2013).

¹⁵ ECJ, Case C-399/09 *Marie Landtová v Česká správa sociálního zabezpečení* [2011] ECR I-05573.

¹⁶ Constitutional Court of the Czech Republic, Pl. ÚS 5/12, 31 January 2012, http://www.usoud.cz/en/decisions/?tx_ttnews%5Btt_news%5D=37&cHash=9111a315c9c22ea1989d19a3a848724e2 (accessed 31 July 2013). The Constitutional Court, drawing inspiration from the doctrine of the Federal Constitutional Court of Germany, stressed that constitutional courts maintain their role as supreme guardians of constitutionality even in the realms of the EU and even against potential excesses by EU bodies. In the view of the Constitutional Court, the Court of Justice of the EU overlooked the specific situation stemming from the breakup of the Czechoslovak federation: had

implement a Fiscal Compact, was unconstitutional because incompatible with the constitutional principle of equality. The Court also decided for the unconstitutionality of cuts in sickness and unemployment benefits (also adopted in pursuit of the same objective), on the ground that such cuts stood in conflict with the constitutional principle of proportionality.¹⁷ Finally, on 24 April 2013, the German Constitutional Court reacted to the ECJ ruling in *Åklagaren v Hans Åkerberg Fransson*,¹⁸ also invoking the *ultra vires* argument.¹⁹

This chapter suggests that the EU legal order could be described as a pyramid: at the base of the pyramid we find national laws (so situated because subject to EU law), but the highest principles of each national constitutional identity are located at the top of the pyramid, among the EU's fundamental principles. This is confirmed by Article 4(2) TEU²⁰ and by the preamble to the EU Charter of fundamental rights,²¹ both of which require the EU to respect national identities. In the post-Lisbon era, the ECJ has already applied this principle a couple of times,²² while reaffirming the principle of the supremacy of EU law.²³

the latter Court instead taken that situation into account, it would have concluded that European law was not applicable to the case at hand.

¹⁷ Portuguese Constitutional Court, Acórdão No 187/2013, 5 April 2013, available at <http://www.tribunalconstitucional.pt/acordaos/20130187.html?impressao=1> (accessed 31 July 2013). On this judicial decision, see Watson (2013), where the author considers the failings of the EU's current economic strategy.

¹⁸ See Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* [2013] nyr.

¹⁹ BVerfGE, 1 BvR 1215/07, 24 April 2013, para 2, available at <http://www.bundesverfassungsgericht.de/en/press/bvg13-031en.html> (accessed 31 July 2013). See also Editorial Comments (2013b).

²⁰ Article 4(2) TEU reads as follows: 'The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government'.

²¹ The preamble reads as follows: 'The Union contributes to the preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States'.

²² ECJ, Case C-51/08 *Commission v Luxembourg* [2011] ECR I-04231, and ECJ, Case C-208/09 *Sayn-Wittgenstein* [2010] ECR I-13693.

²³ See ECJ, Case C-571/10 *Servet Kamberaj v Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano (IPES) and Others* [2012] nyr. The issue in this case was whether, under EU law, a national or regional law may allocate funds for housing benefits on a differential basis, depending on whether the beneficiary is a third-country national or a national of the Member State of residence: the ECJ said no, on the ground that housing benefits fall within one of the three fields covered by the principle of equal treatment, and that under the directive on the status of third-country nationals who are long-term residents, housing benefits are a core benefit (and are thus subject to equal treatment). See also ECJ, Case C-399/11, *Stefano Melloni v Ministero Fiscale* [2013] nyr, paras 58–60, where in regard to Article 53 of the Charter, the ECJ held that 'the principle of primacy of EU law, which is an essential feature of the EU legal order' (as is pointed out in Opinion 1/91 [1991] ECR I-69079, para 21, and in Opinion 1/09 [2011] ECR I-1137, para 65), states that national law, even of a constitutional order, cannot be allowed to jeopardise the so-called *effet utile* of EU law. On this last point, see also ECJ, Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125, para 3, and ECJ, Case C-409/06 *Winner Wetten* [2010] ECR I-8015, para 61.

However, the Lisbon Treaty should more clearly set out the respective force of the principles governing the relationship between EU law and national law. According some authors,²⁴ a new balance should be established favouring respect for national identities. It is argued in this chapter that in a future revision of the Lisbon Treaty, Article 4 TEU—which, too, affirms the Member States' duty of loyal cooperation with the EU²⁵—should also contain the principle of supremacy of EU law. Such an amendment would clearly codify in constitutional terms, for all citizens, a situation that is now obvious only to the (few) cognoscenti of EU law.

Even more concealed, now as in the past, is the principle of direct effect, which goes unmentioned in the Treaty after so many years since the Court of Justice established it with reference to the Treaty itself,²⁶ to certain agreements formed by the EU,²⁷ and to directives.²⁸ The principle of direct effect is addressed precisely to individuals entitled to directly claim—against a Member State and before any national judge—the benefits stemming from EU law. Unfortunately, the principle, especially with regard to directives and to the international agreements concluded by the EU, has been formulated in so tortuous a way by the ECJ that its incorporation into the Treaty would probably be too difficult.

A future constitutional revision should tackle this difficulty, enabling citizens to clearly understand the effects of EU law and its relationship to national legislations. This would require an amendment of Articles 288 TFEU (directives) and 216 TFEU (international agreements) and of the TEU (direct effect of the Treaty), while Title II TEU should include the principle of the Treaty's direct effect.

Finally, the position of international law in the EU legal hierarchy should be clarified in keeping with the doctrine set out in *Kadi II*.²⁹ The principle conferring

²⁴ Chalmers (2013).

²⁵ See, in this volume, Chap. 5, by Casolari.

²⁶ See *supra* n. 8.

²⁷ See ECJ, Case 104/81 *Hauptzollamt Mainz v Kupferberg* [1982] ECR 3641; ECJ, Case 12/86 *Demirel v Stadt Schwabisch Gmund* [1987] ECR 2719; and ECJ, Case C-469/93 *Amministrazione delle Finanze dello Stato v Chiquita Italia Spa* [1995] ECR I-4533. For an overview of the topic, see Eeckhout 2011, 323, and Mendez (2013).

²⁸ See ECJ, Case 33/70 *SACE v Finance Minister of the Italian Republic* [1970] ECR 01213; ECJ, Case 41/74 *Van Duyn v Home Office* [1974] ECR 1337; ECJ, Case 148/78 *Criminal Proceedings against Ratti* [1979] ECR 1629; ECJ, Case 8/81 *Becker v Finanzamt Munster Innenstadt* [1982] ECR 53; and ECJ, Joined Cases C-6/90 and C-9/90, *Franovich and Bonifaci v Italy* [1991] ECR I-5357. The possibility of directives having horizontal direct effect is a solution that has been argued by several advocate generals: see opinion of Advocate General Lenz in Case C-91/92 *Faccini Dori v Recreb* [1994] ECR I-3340. See also opinion of Advocate General Jacobs in Case C-316/93 *Vaneetveld* [1994] ECR I-769, and opinion of Advocate General Van Gerven in Case C-271/91 *Marshall v Southampton and South West Hampshire Area Health Authority* [1993] ECR I-4387. However, the ECJ has consistently rejected that solution.

²⁹ ECJ, Joined Cases C-402/05 and C-415/05 *Kadi and Al Barakat International Foundation v Council* [2008] ECR I-6351, paras 281–285, where the ECJ held that the obligations imposed by international agreements cannot jeopardise the constitutional principles of the Treaties. The Court also underlined that the EU legal order is autonomous and that its allocation of powers cannot be affected by an international agreement.

on the EU legal order an autonomous status with respect to international law is as important as, and parallel to, the supremacy of EU law over the law of the Member States: just as the Member States recognise the primacy of EU law with constitutional-identity reservations, so the EU will respect international law so long as the latter does not violate the EU's fundamental—constitutional—principles. I would argue that in a future revision this should be made explicit by amending Article 4 TEU.

1.3 Revision Tools After Lisbon

The Lisbon Treaty could be modified, more or less avowedly, by means of several different tools: revision procedures, *passerelles*, accession treaties, and the Flexibility Clause.

As most often happens in international law, the revision procedures are established by the Treaty on European Union itself.³⁰ While in the past only one procedure was provided, on the model of the classic diplomatic conferences on international law, the Treaty of Lisbon is designed to make revisions easier by introducing two procedures, simpler and more democratic than the previous one (or at least they *look* that way). However, since the Member States want to remain 'Masters of the Treaties', the new procedures are enveloped in caution and limitations.

Article 48(2) TEU sets forth an ordinary revision procedure. This procedure can be initiated by any Member State, the European Parliament, or the Commission, any of which can submit to the Council a proposal for amending the Treaties. The proposal is then transmitted to the European Council and notified to the national parliaments. If, having consulted the European Parliament and the Commission, the European Council decides in favour of the proposal by simple majority, then the president of the European Council will summon a convention. The convention involves broad political participation, and can attain wide visibility, since in it will be national parliamentarians, the heads of state or premiers of all Member States, and members of the European Parliament and of the Commission, while the European Central Bank will be consulted only if institutional changes are considered in monetary policy.

The convention, modelled on the previous experience of the Charter of fundamental rights, is meant to make the new ordinary revision procedure more democratic and transparent than the way all EU Treaty revisions have so far been negotiated at traditional intergovernmental conferences (IGCs), that is, behind closed doors. However, the convention cannot *adopt* amendments: it can only *propose* them, by consensus, to an IGC.

³⁰ For an analysis in which the new revision procedures introduced by the Lisbon Treaty are compared with the previous ones, see de Witte 2012 and Jimena Quesada 2012.

Moreover, recourse to a convention may be circumvented if the European Council—by simple majority, and once it has obtained the consent of the European Parliament—should decide that such a convention is not ‘justified by the extent of the proposed amendments’, and in this case the amendments will be discussed by an IGC. It will fall to the European Parliament, whose consent is required, to prevent the new ordinary revision procedure from taking an intergovernmental drift.

Once the IGC reaches an agreement, and all the Member States ratify the amendments to the Treaties in accordance with their respective constitutional requirements, the amendments so ratified will come into force. In light of the difficulties encountered in the long process that led to the Lisbon Treaty, it is now established (under Article 48(5) TEU) that if a treaty amending the Treaties is signed, and 2 years later four-fifths of the Member States will have ratified it, but one or more Member States are encountering difficulties with ratification, the matter will be referred to the European Council. This, from a legal standpoint, is obviously a useless weapon against reluctant States, but it could be made more effective in the political arena if combined with the idea that a core group of States intends to press ahead with the process in any event by way of differential integration.

The ordinary revision procedure has already been used to adopt a protocol aimed at increasing the number of members in the European Parliament, as well as a protocol on the concerns of the Irish people about the Treaty of Lisbon.³¹ In both cases, in agreement with the European Parliament, no convention was convened.

The second revision procedure is provided for in Article 48(6) TEU, which introduces a new simplified revision procedure requiring neither the convention nor an IGC. This procedure can only be used to amend the provisions of Part Three TFEU, on the Union’s internal policies and action, and cannot be used to increase the competences the Treaties confer on the Union.

Under this procedure, the any Member State’s government, the European Parliament, or the Commission may submit a proposal to the European Council. The Council may decide by unanimity, having first consulted the European Parliament and the Commission. If institutional changes involving monetary policy are considered, the European Central Bank must also be consulted. That decision itself (not requiring the Treaty to be signed) will not enter into force until it is approved by the Member States in accordance with their respective constitutional requirements.

The new simplified revision procedure introduced by Article 48(6) TEU has already been used to create the European Stability Mechanism (ESM).³² On 25 March 2011, the European Council adopted a decision adding a new paragraph to Article 136 TFEU.³³ Since the latter Article refers to Member States, and not to

³¹ See *supra* n. 1.

³² See de Witte (2011).

³³ Decision 2011/199/EU, OJ 2011 L 91/1. The new paragraph reads as follows: ‘The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality.’

the EU, the prohibition against increasing EU competences seems to have been respected.

However, that decision was reviewed by different constitutional courts, and not without incident.³⁴ The ECJ illustrated its position in *Pringle*.³⁵ The Irish Supreme Court sought from the Court of Justice a preliminary ruling on validity, holding that, contrary to the prohibition contained in Article 48(6), the decision encroached on the competences of the EU. The Court decided that the claim was unfounded because there is no EU competence to adopt a measure like the European Stability Mechanism, which in fact had been the object of an international treaty sealed by the States of the eurozone. The Court did not hesitate to affirm, too, that the forming of the ESM Treaty had not infringed Article 3(2) TFEU (under which the EU is solely competent to form international agreements affecting EU law), on the ground that the Treaty establishing the ESM (which pertains to the stability of the eurozone) did not interfere with the EU law (which covers price stability). This leads to a paradoxical question: If—as is clearly established under the principle of conferral—all competences not attributed to the EU rest with the Member States, and the EU had no competence at all to adopt a mechanism like the ESM, why should it have been necessary to amend Article 136 to empower the States of the eurozone to do something that already lay within their competence?³⁶

Therefore, it seems that the Court decided the case under the pressure of the economic crisis and the need to implement any measure that could rescue the euro. However, this judgment sets a precedent that could open the floodgates to the application of the special revision procedure in the future. On the other hand, on 12 September 2012, the German Federal Constitutional Court found that Germany's accession to the Fiscal Compact and the ESM was possible only on condition that any increase of the country's overall liability under the ESM and its implementing measures be subject to the German parliament's approval. Moreover, the German Constitutional Court stressed that, under the laws of the EU, the ESM is barred from engaging in credit financing and from depositing sovereign bonds with the ECB as collateral for loans, since such measures would infringe the prohibition against monetary budget financing under Article 123 TFEU. The Constitutional Court declared that the assenting act for the Treaties of the European Union applied only to a monetary union in the form of a stability-oriented community.³⁷

³⁴ The Treaty on the Stability Mechanism made it almost unscathed through the review of both the German Federal Constitutional Court, on 12 September 2012 (see also *infra*), and the Estonian Constitutional Court on 12 July 2012. See Fahey and Bardutzky (2013).

³⁵ ECJ, Case C-370/12 *Thomas Pringle v Government of Ireland, Ireland and the Attorney General* [2012] nyr. See de Witte and Beukers 2013, noting that *Pringle* represents the first case, in EU law, of judicial scrutiny of a constitutional change (*ibid.*, 826).

³⁶ On this issue see also Borger (2013) and Thomas (2013).

³⁷ BVerGE, 2 BvR 1390/12, 2 BvR 1421/12, 2 BvR 1438/12, 2 BvR 1439/12, 2 BvR 1440/12, 2 BvE 6/12, 12 September 2012, available at <https://www.bundesverfassungsgericht.de/en/press/bvg12-067en.html> (accessed 31 July 2013).

A further revision tool is one that hinges on the EU's decision procedures. Specific conditions are prescribed by Article 48(7) TEU on the so-called *passerelles*, meaning the European Council's unanimous decisions, which can modify the legal basis set out in the TFEU and in Title V TEU³⁸: in these cases unanimity can be replaced by qualified majority, and special legislative procedures by the ordinary legislative procedure. Such decisions must be approved by the European Parliament by a majority of its members and must be notified to the national parliaments. If a national parliament objects within 6 months, the decision will not be adopted. The *passerelles* were introduced with the Treaty of Amsterdam as a form of simplified revision, the point being to make legislative procedures easier or more democratic. They have not been used so far (all amendments to the legislative procedures have been established by the traditional revision procedure), and it seems unlikely that they will be used in the foreseeable future. Nor will a unanimous decision of the European Council be facilitated by the veto power each national parliament has under Article 48(7) TEU, a power serving as a sort of general 'emergency brake', also envisaged by other 'special' *passerelles*³⁹ provided for by the Lisbon Treaty. As no such veto power is provided for by Article 333 TFEU, it can be easier to simplify legislative procedures through enhanced cooperation.

Some minor amendments to the Lisbon Treaty could be made as concerns the so-called Flexibility Clause. Article 352 TFEU now requires the consent of the European Parliament, as well as a specific warning of the Commission to the national parliaments: this Article can be used to fill a lacuna only if an objective relating to the policies provided for by the Treaty (with exclusion of the CFSP) cannot be attained by means of the legal basis contained in the Treaty itself.

Finally, in certain cases even a treaty for a country's accession to the EU as a new Member State could be used to amend the Lisbon Treaty.

Not any amendment however can be made to the Lisbon Treaty by means of an accession treaty. As Article 49 TEU refers to the *adjustments*, not to the amendments, entailed by a new State's accession, only those modifications that prove to be really necessary for such accession should be introduced. However, when Croatia acceded, the Protocol on the Irish concerns was attached to the Lisbon Treaty.⁴⁰ On the other hand, the European Parliament rejected a request by the Czech Republic for an extension of the Anglo-Polish Protocol concerning the Charter of fundamental rights.⁴¹

³⁸ However, Article 48(7) TEU carves out an exception for defence policy as falling outside the scope of the *passerelles*.

³⁹ See Articles 81(2) and 153(2–3) TFEU.

⁴⁰ On the Protocols, see *supra* n. 1.

⁴¹ On 22 May 2013, following the proposal of Andrew Duff, the European Parliament called on the European Council to reject a request to amend the Treaty of Lisbon in order to extend the Anglo-Polish Protocol to the Czech Republic.