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Citizens and Further Democratisation after the Lisbon Treaty

1. Is the Lisbon Treaty more democratic?

The innovations of the Lisbon Treaty could strengthen the sense of belonging to Europe.¹ The question is only if we will make a proper use of the provisions of the Treaty. The Lisbon Treaty provides for more efficiency in decision making, more democracy by increasing of the role of European Parliament and the National Parliaments and for the stronger external coherence. The purpose of the Lisbon Treaty is summarised as follows:

“It makes the EU more democratic, efficient and transparent. It gives citizens and parliaments a bigger input into what goes on at a European level, and gives Europe a clearer, stronger voice in the world, all the while protecting national interests”.²

The enhanced role of the European Parliament in the legislative process promises a greater involvement of people of Europe in decision making. It

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¹ House of Commons (UK), *The European Union: A Democratic Institution?*, Research Paper No 2014/25.

² European Commission, *Your Guide to the Lisbon Treaty* (rev. 2010), <http://ec.europa.eu/publications/booklets/others/84/en.pdf> (last visited 11.05.2014).

is a wish but also a commitment that the voice of the EU Citizens should be heard. Also, the national parliaments have been given a greater role to play. Should those attributes not appeal to the European audience?

2. Hearing a voice of European People: National Parliaments

One way of giving 'a say' to European people has been through the increased power of national parliaments. Again, the Treaty offers some tools that can be expanded in due course.

Since 2000, we observe a clear incentive to strengthen the role of national Parliaments. The purpose of this exercise has been to provide more internal cohesion between European and national interests, more cooperation and common actions. Since 2000, this aspiration has started to be visible in official documents such as the declaration annexed to the Treaty of Nice, the Laeken Declaration, which underlined the importance of the legitimacy contributed by national parliaments to the European project, and which eventually found its place in the Constitutional Treaty.³ The provisions concerning the national parliaments met general consensus and survived in the Lisbon Treaty almost untouched.

Nevertheless, some minor changes in the Lisbon Treaty could make a difference in practice. The current wording has a stronger element of compulsion. In Title II, 'Provisions on Democratic Principles of the TEU, national parliaments have been assigned a role 'in the evaluation mechanisms' over the implementation of AFSJ Policies (matters moved from the Third Pillar).⁴ In this respect, the new text differs from the Constitutional Treaty, making the role of national parliaments imperative instead of facultative, through a change of wording: National Parliaments 'may' has been replaced by National Parliaments 'shall'. Some other inserted words, for example 'to contribute actively', 'taking part', 'through being involved' add more dynamics to the role national parliaments in comparison with Article I-42.2 of the Constitutional Treaty.⁵

³ The Future of the European Union – Laeken Declaration (15.12.2001) (SN 273/01). See also House of Commons (UK), The Laeken Declaration and the Convention on the Future of Europe, Research Paper No 2002/14.

⁴ See S. Carrera, F. Geyer, *The Reform Treaty & Justice and Home Affairs – Implications for the Common Area of Freedom, Security and Justice*, „CEPS Policy Briefs” 2007, No. 141.

⁵ *Ibidem*.

From the citizens' point of view the extended power of national parliaments is a major improvement in the democratisation of the Union. It also smoothly aligns with the vision of the Treaty to take into consideration diversity of national interests.

For example, the national parliaments are considered in the Lisbon Treaty at several occasions. Importantly, they need to comply with the principle of subsidiarity with regard to legislative proposals in the area of judicial cooperation in criminal matters and police cooperation. They have a right of veto on the initiative authorising a simplified revision procedure. This is quite considerable power to strengthen the position of national parliaments. They are also consulted on the proposals for the use of the flexibility clause. Furthermore, the national parliaments should be notified and informed of any initiative of European Council to authorise the simplified revision procedure, amendment procedure, or on application of a new Member state.

There is also a completely new article 12 TEU a general one embracing different roles and powers dispersed across the Treaty. It summarises that national parliaments contribute actively to the good functioning of the Union. Barrett, however, believes that this article does not 'enhance or improve upon the rights of European Parliaments' provided in different parts of the Lisbon Treaty.⁶ This is not necessarily true. Article 12 TEU expresses an allegiance to a more democratic Europe and adds some speed to the future process inviting national parliaments 'to take part' and 'contribute actively' and also, by its very existence in the first part of the Treaty, demonstrates a strong commitment in making National Parliaments real actors at the European Forum.⁷ Furthermore, even if Barrett does not recognise any substantial merit in article 12 TEU, he nevertheless admits that its scope could be dramatically changed, enlarged and enhanced by the potential ECJ/CJEU jurisprudence.⁸

Two of the Protocols annexed to the Treaty refer to the role of national parliaments: the Protocol on the Role of National Parliaments and the second Protocol on the Application of the Principles of Subsidiarity and Proportionality. The protocols offer national parliaments reinforced power of control. More importantly the protocol on Subsidiarity and Proportionality introduces the Early Warning Mechanism (EWM). The national parliaments can oppose a new EU proposal. Precisely, if

⁶ See G. Barrett, "*The King is Dead, Long Live the King*": *The Recasting by the Treaty of Lisbon of the Provisions of the Constitutional Treaty Concerning National Parliaments*, "European Law Review" 2008, No. 33, p. 69.

⁷ See S. Carrera, F. Geyer, *op.cit.*

⁸ See *ibidem*; G. Barrett, *op.cit.*, p. 71.

the Act proposed by the Commission is rejected by a simple majority of votes of national parliaments, the Commission will have to re-examine the proposed Act (a yellow card). If the majority objects (an orange card) the proposal will be submitted to the Union legislator who will consider its compatibility with the principle of subsidiarity. If the proposal is not compatible with the principle of subsidiarity' then it "shall not be given further consideration". Moreover, national parliaments have been given more time to scrutinize the proposal extended to eight weeks. Certainly the EWM gives to the national parliaments a direct role to play in the EU legislative process. But how strong is this role? At the first glance, the EWM may not appear very convincing. Nonetheless, in the long term it could pave the way for more stable dialogue. It could also lay down grounds for a different form of governance. The EWM has the potential to become a tool playing a major role in reducing the democratic deficit. Clearly the EWM presents some serious flaws. For example, it is limited to checks on the compliance with the principle of subsidiarity only. It is also expressed as a negative right of control on the legislative proposal. In any case, it cannot be transposed into a positive right for a national parliament to formulate a proposal.⁹

National parliaments, as Paskalev points out, are reluctant to engage on issues of substantive European policies. The main reason for this is that parliamentary systems are characterised by 'executive dominance' which means that the role of parliament is not to participate in governance but merely to keep the government accountable.¹⁰ Further, a national parliament's involvement could not be significant without sufficient resources, such as administrative support and expertise, which are lacking so far. However, the most important weakness of the EWM is the limited time offered to national parliaments to issue a reasoned opinion. Although extended to eight weeks in the Lisbon version, it still appears too short for the national parliaments to take advantage of the EWM procedure.¹¹ Nonetheless, the reason why the EWM did not trigger abundant comments may lie in the softness of the procedure. Many see this form of involvement of national parliaments in the legislative process as ineffective, too weak to be able to curb the democratic deficit in the Union. Schutze maintains that the Lisbon protocol rejects the idea of a red card mechanism as a 'hard constitutional

⁹ See S. Carrera, F. Geyer, op.cit.; V. Paskalev, *Lisbon Treaty and the Possibility of a European Network Democracy*, "EUI Working Papers Law" 2009, No. 20, p. 6.

¹⁰ See S. Carrera, F. Geyer, op.cit.; V. Paskalev, op.cit.

¹¹ *Ibidem*.

solution'.¹² Therefore the right to veto legislation seems to be a flexible tool, a 'soft constitutional solution' that transmutes into a monitoring right.¹³ Barrett calls it 'the compliance-monitoring system where national parliaments become the 'watchdogs of subsidiarity'.¹⁴ As such, the right of veto is limited to a soft control on compliance only with the principle of subsidiarity of the draft legislation. There is no possibility that a number of National Parliaments could block the proposal (a clear rejection of the hard solution: a red card). Final improvement in the post-Lisbon era is that the protocol reinforces the judicial control of the principle of subsidiarity. The protocol gives the ECJ(now CJEU) jurisdiction over judicial review brought by Members States (through national parliaments) for the breach of the principle of subsidiarity.

Nonetheless, the significance of the EWM should not be underestimated. It offers 'the institutional framework for the public deliberation on practically all issues of European governance, within the national parliaments and also between them'.¹⁵ This two-layered platform for discussion will streamline the crucial European themes, will make them inherent within the national structure and will subject them to evaluation by other national parliaments. This two-fold mechanism will create a bridge between divergent opinions on the construction of Europe: one is to make the European legislative initiatives more open to scrutiny by national forums and another is to offer to European Parliaments possibility to exchange their views. The second one could eventually lead to the common solutions coming from 'the bottom' the national parliaments, therefore representing the position of the people of Europe. As such, it has much greater chance to be welcome and accepted. Paskalev argues that EWM is the tool necessary to democratise the Union, to make it open, 'inclusive and responsive to the will of all European Citizens who may have but also may not have much in common'.¹⁶

¹² R. Schutze, *Subsidiarity after Lisbon: Reinforcing the Safeguards of Federalism?*, "Cambridge Law Journal" 2009, No. 86, p. 529.

¹³ Ibidem.

¹⁴ See R. Cooper, *The Watchdogs of Subsidiarity: National Parliaments and the Logic of Arguing in the EU*, "Journal of Common Market Studies" 2006, No. 44, p. 288.

¹⁵ See V. Paskalev, op.cit., p. 1.

¹⁶ Ibidem.

3. The Lisbon Treaty tools to make Europe closer to its Citizens

3.1 The European Citizens' Initiative

The introduction of the European Citizens' Initiative is another way of bringing the Union closer to its citizens and reducing its democratic deficit. The idea behind it is to make citizens participate directly in the EU legislative process.

According to Article 24 TFEU, citizens can propose legislation to the European Parliament subject to the collection of one million signatures from at least a quarter of the EU Members. Article 11(4) TEU allows the EU citizens to request "the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties." In this respect, the substantive changes made to the Treaty related to Articles 24 and 25 are particularly important. Article 24 is a crux of the innovation and lays down the legal base to put into practice the European Citizens' Initiative. Article 25 has a double input. It establishes the legal basis for extending citizens' rights:

"[...] the Council in accordance with a special legislative procedure, acting unanimously may adopt provisions to strengthen or to add the rights listed in Article 20(2)."

The scope of this Article is potentially far-reaching, in that it could bring in future a substantial expansion of Citizens' rights. The second point to note about this Article is the reinforcement of the Parliament's power. Yet, it confers to the Parliament a power of consent and not consultation in respect of application of this Article.

The Treaty provides very limited indications concerning the implementation of the Citizens initiative. As stated, the initiative must attract one million signatures and the signatures must come from a significant number of Member States.

Article 11 (4) required a Regulation setting up the modalities for any proposed initiative. The Regulation 211/2011 was adopted in furtherance of this objective.¹⁷ It has the potential to become a vehicle in the democratisation process although its effectiveness depends on various factors: for example, how serious will be the Commission involvement or how the organised civil society will engage with it. European Citizens' Initiatives are a novelty at the European level. Direct democracy was almost inexistent-

¹⁷ See Regulation (EU) No 211/2011, OJL 65/1, 16.02.2011.

ent before the Lisbon Treaty. The only limited example was Article 21 and 194 EC, providing the right to petition the European Parliament, but those provisions were marginal and almost unused.¹⁸ The text of the current provision was inserted at quite a late stage of preparation of the Constitutional Treaty and, with slight modification, survived in the Lisbon Treaty. Dougan believes that some of the features of the European Citizens' Initiative in particular its shortcomings could be attributable to the hasty draftsmanship of the Convention, some others are the result of the compromises reached by the Council, the Commission and European Parliament.¹⁹

The most important question is the extent to which European Citizens' Initiative could make an impact on EU policy making. Bouza Garcia rightly observes that the new Article 11 TEU could enhance democratic values within the EU by transforming the relationship between the Commission and organised civil society.²⁰ According to this thesis, Article 11 (4) TEU, if adequately used by the Commission, could foster a 'democratic spill-over' of deliberation on EU emerging issues.²¹ However, the major asset of the European Citizens' Initiative could lie in expanding the public agenda beyond the preferences established by political institutions and attract attention to matters of public concern that otherwise would be ignored.²² In addition, the European Citizens' Initiative could reinforce democratic participation by coming directly from citizens and representing their voice. Proper development of this new mechanism would boost political consciousness.²³ Dougan argues that the European Citizens' Initiative could curb some EU deficiencies such as lack of the system of political parties or loose relations between political groupings.²⁴ Drawing on national experiences, the overall conclusion is the European Citizens' Initiatives have played a greater role than expected. Within the EU only seven countries have a provision on direct participation enabling their

¹⁸ See F. Chevenal, '*Caminante, no hay camino, se hace camino al andar*': *EU Citizenship, Direct Democracy and Treaty Ratification*, "European Law Journal" 2007, No. 13, p. 647.

¹⁹ See M. Dougan, *What Do We Make of the Citizens' Initiative?*, "Common Market Law Review" 2011, No. 48, p. 1811.

²⁰ See L. Bouza Garcia, *The European Citizens' Initiative and Organised Civil Society: a Contribution to the European Public Sphere?*, paper delivered at the Conference 'The Citizens' Initiative: Normative, Legal and Policy Perspectives, 06.05.2011, Liverpool.

²¹ *Ibidem*.

²² See L. Bouza Garcia, *op.cit.*, p. 1; M. Dougan, *op.cit.*, p. 1813.

²³ See L. Bouza Garcia, *op.cit.*, p. 1; M. Dougan, *op.cit.*, p. 1815.

²⁴ *Ibidem*.

citizens to propose legislation. Three of them, Lithuania, Hungary and France, allow their citizens to suggest a referendum on a Bill.²⁵ Poland is a good example where the procedure was used 55 times, and on five occasions it gave rise to enactment of primary legislation in areas of occupational health and the environment.²⁶ Employed in some German Länder, such procedures have brought 172 successful enactments since 1946 in the field of education and culture and led to a number of democratic reforms.²⁷ In Italy only 13% of a total of 213 initiatives between 1948–2005 ended in legislation.²⁸ In Spain only 5 of 32 initiatives led to the enactment of legislation.²⁹

In Austria, the Initiative served the opposition parties which used it for their own purposes.³⁰ Nonetheless, 29 out of 213 initiatives gave rise to legislation.³¹ This comparative study shows that the new European Citizens' Initiative could become a persuasive tool and a useful mechanism to alter the political agenda at the EU level. All will depend on what use the Commission and the organised civil society would make of the new regulation 211/2011.

The proposal for the Regulation triggered the debate over the minimum age. Diana Wallis, a Vice-President of the European Parliament, called for 'an open procedure' allowing young people over 16 to participate in it and also she believed that the European Parliament should be have a greater role in some initiatives.³² This could have been a big impe-

²⁵ See M. Qvortrup, *The Legislative Initiative: A Comparative Overview of the European Experience*, paper delivered at the Conference 'The Citizens' Initiative: Normative, Legal and Policy Perspectives, 06.05.2011, Liverpool.

²⁶ See A. Rytel, *The Popular Initiative in Poland*, paper delivered at the Institute of Constitutional Law and Political Institutions, 08.05.2006, Gdansk.

²⁷ See T. Shiller, *Direkte Demokratie auf Bundesländer- und Kommunalebene in: Direkte Demokratie. Bestandesaufnahmen und Wirkungen im internationalen Vergleich*, eds. M. Freitag, M. und U. Wagschal, Münster 2007, p. 151–150.

²⁸ See Direct Democracy, *Direct Democracy: Facts and Arguments about the introduction of Initiative and Referendum*, <http://www.democracy-international.org/direct-democracy-facts-and-arguments-about-introduction-initiative-and-referendum> (last visited 11.05.2014); P.V. Uleri, *Italy: Referendums and Initiatives from the Origins to the Crisis of a Democratic Regime* in: *The Referendum Experience in Europe*, eds. M. Gallagher, P.V. Uleri, Basingstoke 1996, p. 106–125.

²⁹ *Ibidem*.

³⁰ See A. Pelinka, S. Greiderer, *Austria: The Referendum as an Instrument of Internationalisation* in: *The Referendum Experience in Europe*, eds. M. Gallagher, P.V. Uleri, Basingstoke 1996, p. 21.

³¹ See A. Pelinka, S. Greiderer, *op.cit.*; M. Qvortrup, *op.cit.*, p. 5.

³² ALDE voices its support for the Citizens Initiative, at <http://www.alde.eu/en> (last visited 2.06.2010).

tus for the young citizens, to make them believe that they could influence and shape the process of European Integration. However, the Regulation 211/2012 did not endorse those wishes. The Regulation is disappointing in this respect, establishing the minimum age to sign the initiative which is the same as for the European elections which was retained in the final version.

The procedure set up in the Regulation 211/2012 for initiating and submitting a Citizens' Directive is not a model of clarity.

First, the Citizens' committee needs to be established, composed of natural persons in age entitled to vote in the European Parliament elections comprising at least 7 organisers, residents of 7 Member States. Then, the Commission must register the proposal within 2 months if the criteria provided in the regulation are satisfied. The Regulation 211/2012 is quite obscure on this point and provides for complex and sometimes incomprehensible rules on which statement of support shall be submitted to the Member State. There are also other conditions to make the initiative receivable. The initiative should be relevant, it needs to consider 'a matter where a legal act of the Union can be adopted for the purpose of implementing the Treaties'; secondly it needs to be 'within the framework of the powers of the Commission to make a proposal'; thirdly, the initiative cannot be receivable if it goes against the Union's values.

One of the important criticisms of the Regulation is exclusion of third-country nationals lawfully residing within the EU (Article 3(4) of the Regulation) from taking part in the initiative. This provision does not sit well with a general dynamic of the European Integration that for a certain number of years claimed the importance to expand the concept of citizenship. This could have been another trigger point for the development of the concept of belonging: giving a voice to third country nationals living and working within the Union.

Another controversial Article of the Regulation is Article 7(1), which requires that the signatories of a European Citizens' Initiative should represent at least one-quarter of Member States. This could lead in practice to unequal participation representing interests of some parts of the EU. Similarly Article 7(2) of the Regulation provides that signatories shall comprise a minimum number of citizens set out in Annex I that corresponds to the number of MEPs in each Member State. Nonetheless, such a distribution again does not secure an equitable representation. Moreover, there is also a problem in the Regulation with the assignment structure that in some circumstances will be detrimental to those who live and work in another Member State. It could be said that the Regulation does not go alongside the principle on free movement.

What, then, is the potential impact of the European Citizens' Initiative? The European Citizens' Initiative is a new participatory democracy tool. The Commission clearly maintains its full power of initiative and the European Citizens' Initiative is not reducing it in any way. However, the European Citizens' Initiative is a useful tool to make the Commission aware of burning issues and make it consider matters brought to its attention in the Initiative. The Commission is called to examine the initiatives within its power. According to the Commission the European Citizens' Initiative will become a vehicle not only towards a more democratic Europe but it will also improve the EU's policy making. Certainly – but how it is going to work?

The procedure laid down in the Regulation presents some serious flaws. First, the Commission still retains too much discretion concerning the admissibility of the proposal. Secondly, the initiators of the European Citizens' Initiative are very much left to themselves in many aspects. For example, there will be a possibility to sign on-line but the Commission disengaged with any on-line collection on its own website. It is purely left to the responsibility of the initiative takers to organise it and ensure security and data protection. There might be a lack of sufficient resources and expertise on the part of initiators to be able to cope with those matters. Similarly, the Commission does not intend to translate the proposed initiative in other languages leaving it to the organisers. Unlike the initiatives in domestic systems, there is no funding available from the Commission. Finally, it is also the organisers' responsibility to ensure that the proposal falls within the Commission's competence. Again the organisers of the initiative might not dispose the necessary means to test it. The Commission's advantageous position presents some risk to the successful operation of the European Citizens' Initiative in particular because of a wide discretion to turn down the initiative in the early stage. In addition, there could be some difficulties in running campaign because of the linguistic, political and cultural diversity.

But the real danger in the serious engagement of EU citizens lies with the excessive power of the Commission. The Commission could lack the political will to make European Citizens' Initiative a serious device. Consequently, this could lead to a degree of disinterest of civil organised societies to go ahead with an European Citizens' Initiative. The first European Citizens' Initiative: *Fraternité 2020*, was registered in November 2012. It was followed by another one in 2013 entitled 'Water and Sanitation are a human right. Water is a public good not commodity'.³³ The full list is available on: <http://ec.europa.eu/citizens-initiative/public/welcome>.

³³ <http://www.citizen-e.info/1/post/2013/03/water-and-sanitation-are-a-human-right-water-is-a-public-good-not-a-commodity.html> (last visited 21.05.2014).

3.2 Participation and transparency

Birkinshaw rightly notes that transparency is a ‘public explanation and exposition how the power is employed in human relationships. The emphasis is upon letting people see and understand what is happening when their interests are under consideration. Decisions should be explained, reasons given and information published pro-actively’.³⁴ ‘Transparency is closely related to Openness. The latter focuses focus upon opening up meetings of governors and officials to the public’.³⁵ The issue regarding transparency has always been a delicate subject within the EU. The question of democratic deficit has been raised in the early stage of the existence of the European Construction demonstrating the need for the stronger citizens’ participation and openness.³⁶ It was also clear that more transparency is necessary in the decision-making process to elevate the citizens’ participation and awareness to the current issues. Slowly, transparency has become a prerequisite of good governance within the EU. The Lisbon Treaty made the ‘fight for more, democratic efficient and transparent Union’ its manifesto. Article 1 of TEU, for example, provides an opening statement that EU should act ‘as openly as possible’ and the Court of Justice should be able to interpret this provision. In relation to Article 1, Article 11 goes much further underlying that ‘the Institutions, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action [...] shall maintain an open, transparent and regular dialogue with representative associations and civil society’.

In addition, Article 15 TFEU imposes on all ‘the Institutions, bodies, offices and agencies of the EU to conduct their work as openly as possible’ in order to ‘promote good governance and ensure the participation of civil society’. The European Parliament and the Council should meet in public when considering or voting on a legislative act. In addition Article 15(3) enlarges the number of bodies subjected to the general rules on openness. Previously, only Commission, Council and Parliament were constraint to observe those rules now it applies to all EU Institutions, bodies, offices

³⁴ P. Birkinshaw, *European Public Law* (2nd ed.), The Hague 2014, p. 271–273.

³⁵ *Ibidem*.

³⁶ See A. Moravcsik, *Is There a ‘Democratic Deficit’ in the World Politics?*, “A Framework for Analysis, Government and Opposition” 2004, No. 39, p. 336–363; L. Siedentop, *Democracy in Europe*, London 2000; G. Majone, *Europe’s Democratic Deficit*, “European Law Journal” 1998, No. 4, p. 10; A.J. Menéndez, *Between Laeken and the Deep Blue Sea, As Assessment of the Draft Constitutional Treaty from the Deliberative-Democratic Standpoint*, “European Public Law” 2005, No. 11, p. 126.

and agencies. Also, the Lisbon Treaty enhances the role of national Parliaments by making them participate in decision making that increases their access to information.³⁷

The idea is to make Europe more open, more citizenfriendly. However, it is not certain that the ordinary EU citizen would be able to make sense of the quite cumbersome procedure. In addition, it is not simple to overcome the general apprehension that Union lacks transparency that has encrusted through the years.

Previously, access to documents was governed by Regulation 1049/2001. The Commission Report on its implementation revealed many flaws leading to some proposals for reform. The Commission proposed to extend the deadline for dealing with applications to 30 working days, since the current deadline was unworkable, as well as to amend the definition of ‘document’, narrowing rather than extending the general principle of openness. The Commission still reserves to itself wide discretion to refuse an application.³⁸ Further, the proposed changes also denied access to investigation files or proceeding of an individual scope unless they are definitively concluded.³⁹ The European Parliament responded to the proposal following the Cashman report often departing from the Commission’s suggestions favouring transparency and openness.⁴⁰

Nevertheless, one of the most important issues questioning the transparency principle relates to the existence of the comities and agencies.⁴¹ From the early days these bodies although needed were not provided by the Treaty and as such not accountable to anyone. The comitology problem has not been fully resolved with the entrance into force of the Lisbon Treaty. The studies led by the University of Utrecht in 2009 pointed out that there is still an underlying problem because ‘the expert bureaucrats decide on most EU regulations after the proposal has been adopted’. The Commission and Member States’ experts composing the comitology committees decide almost half of the content of the regulations after the proposal was agreed by the Council and the European Parliament. The report

³⁷ See P. Birkinshaw, *European Public Law*, op.cit., p. 271–273.

³⁸ Article 3a of the Regulation, P. Birkinshaw, *Transparency*, paper delivered at the IEPL Conference, 25–26.06.2009, Hull), p. 18; P. Birkinshaw, *Transparency and Access to Documents*, in: *The European Union Legal Order after Lisbon*, eds. P. Birkinshaw, M. Varney, The Hague 2010, p. 229.

³⁹ See P. Birkinshaw (2009), *Transparency*, op.cit., p. 18; P. Birkinshaw (2010), *Transparency and Access...*, op.cit., p. 229.

⁴⁰ See P. Birkinshaw (2009), *Transparency*, op. cit., p. 21.

⁴¹ See M.Z. Hillebrandt, D. Curtin, A. Meijer, *Transparency in the EU Council of Ministers: An Institutional Analysis*, “European Law Journal” 2014, No. 20, p. 1–20.

criticises the extensive use of expert committees (250 within the EU) taking 2000 decisions a year revealing still lack of transparency since they are not subjected to any scrutiny and accountability.⁴²

In March 2011, a new Regulation on the comitology procedure came into force. It is too early to assess how effective it is going to be. Will it rebuild the trust and confidence in the European people? The rules are complex and sometimes ambiguous; however, the Regulation marks a step towards more transparent Union and a will to make the Commission accountable.⁴³

Despite the efforts to improve transparency, the resistance of the Institutions is still persistent and without a serious commitment from the Institutions themselves not much can be done.

4. The Lisbon Treaty: Freedom, Security and Justice: Implications for Citizens

The title Freedom, Security and Justice of the Lisbon Treaty has two more issues worth mentioning for its relevance to the European Citizen. First, the simplicity of the Treaty that aims to be accessible and understandable for every ordinary citizen. The efforts in this respect multiplied throughout all revisions of the Treaty with some partial improvements. The second point concerns a better context for the sensitive issues such as migration and the position of the third country nationals. The Lisbon Treaty abolished the Three Pillar Structure ensconcing a simpler and more congruent framework. In the past, the different legal status in particular of Pillar I and III provoked tensions and the excessive complexity of the three Pillars weakened the system. It also led to the substantial deficiencies impossible to overcome without the reform.⁴⁴ The Lisbon Treaty introduces more uniform application of EU Law by putting together matters related to Freedom, Security and Justice and by expanding the Community Method to themes previously contained in the Third Pillar. As a result, the Community Method will apply to Police and Judicial

⁴² See S. Crossick, *Comitology vs Transparency*, <http://crossick.blogactiv.eu/2010/03/23/comitology-vs-transparency> (last visited 8.05.2014).

⁴³ See J. Blom-Hansen, *The EU Comitology System in Theory and Practice. Keeping an Eye on the Commission?*, Basingstoke 2011.

⁴⁴ See S. Carrera, F. Geyer, op.cit., p. 4; D.-U. Galetta, *The European Asylum Policy: Myth and Reality*, in: *The European Union Legal Order after Lisbon*, eds. P. Birkinshaw, M. Varney, The Hague 2010, p. 213.

Cooperation in criminal matters.⁴⁵ This means in practice that the system of voting and decision making established by the EC Treaty and in operation in the Community Pillar will now apply uniformly. These innovations have a clear prospect of making the Union more transparent and more democratic, in particular regarding matters comprised within the old Third Pillar being so far outside of the court scrutiny or parliamentary control and outside the decision making. The instruments used by the third pillar – for example, common positions, conventions and framework decisions – cease to exist for the sake of a uniform nomenclature well-known from the EC Treaty.

What needs to be stressed here are the implications of the expansion of the Community Method. Under the Pillar Structure the democratic deficit was particularly acute and visible in relation to matters covered by the Third Pillar. As mentioned before, the Lisbon Treaty uses the co-decision procedure, now re-named the ordinary legislative procedure, with very few exceptions throughout the Treaty. This confers on the European Parliament the same role in decision making as it already had under the Community Pillar. The Lisbon Treaty therefore sensibly empowers the European Parliament, providing for the democratic control in decision-making concerning sensitive issues such as police cooperation in criminal matters and the conditions of the third country nationals. It constitutes a valid argument for a deepening of democratisation and transparency.

Abolition of the Pillar Structure and expansion of the Community Method throughout the Treaty strengthens considerably the entire “European edifice”, since the legal duality that characterised the Pillar Structure revealed serious limitations and deficiencies. The current framework is more appealing to the ordinary citizen; there is more coherence in the application of EU law and more protection and accountability in issues related to migrants and third country nationals.

5. The role of the CJEU in the delicate matters (ex Third Pillar)

Expanding the Community method throughout the Treaty raises the question of the ECJ/CJEU Jurisdiction over Third Pillar matters so far excluded or partially excluded from its umbrella. The Lisbon Treaty strengthens not only parliamentary control but also judicial control over

⁴⁵ See S. Carrera, F. Geyer, *op.cit.*, p. 4.

AFSJ matters. Previously, the sensitive matters related to criminal and police cooperation and regulation of the conditions of the third country nationals were almost outside the ECJ/CJEU jurisdiction. Thus, the situation of individual conditioned by this regulation almost always invoked the protection of human rights. It seems unacceptable in a democratic society that those decisions escaped judicial control. Also, judicial control is an inherent element of any democratic society, guaranteeing the balance of powers. Therefore, extending the ECJ/CJEU jurisdiction to AFSJ matters is a clear step forward allowing deeper democratisation. Previously, the ECJ/CJEU only had jurisdiction on a voluntary basis. There was no individual *locus standi* and an absence of infringement proceedings initiated by the Commission against Member States. Article 35 TEU provided for the possibility that the Member States recognise the ECJ/CJEU jurisdiction by making a voluntary declaration in this regards.⁴⁶

Conclusion

More direct participation by the citizens of the EU will enable them to feel that they have decided the future of Europe, which in the longer term, will strengthen their sense of belonging. This may lead, even without the Constitutional frame, to attachment and an enhanced sense of European identity, and possibly even patriotism.

The Lisbon Treaty introduces a clearer division of competences and highlights the importance of national commitment. It is not necessarily a step back into intergovernmentalism, but rather recognition of national interests and acceptance of national differences. It is also a sign of the maturity of the Union and a deeper understanding that Europe could develop if the nations strongly believe in it, and that this commitment could come from the national and regional levels. It is worth underlining the importance of hearing the voices of national parliaments, but also regional parliaments since they are the closest to the citizens' interests.

Thus, the current Treaty makes a significant step towards further democratization of the Union. It clearly underlines the citizens' voice, putting in place mechanisms that could change the shape of the European Construction. They have a potential to reduce democratic deficit and bring Union closer to its citizens. We need to wait to see how they would operate in practice and the time would show how efficient they are.

⁴⁶ Ibidem, p. 16.

Citizens and Further Democratisation after the Lisbon Treaty

Abstract

The question this attempts to answer is how the Lisbon Treaty, cherishing diversity in EU development at the expense of the idea of unity, and more devoted to national interests could foster European identity and make an Union that is closer to its citizens?

In particular, our aim is to demonstrate that the efforts of the Lisbon Treaty to make the Union more democratic, by enhancing the role of national parliaments, the early warning mechanism and principle of subsidiarity, the European Citizens' Initiative and the new rules on transparency, have built a framework in which European Identity could take a shape. We would like to point out a certain visibility of the current Treaty. Even without symbols, the Lisbon Treaty carries its manifesto, endowing the Union with the necessary mechanisms. It is now up to the citizens what use they will make of them.