

With the support of the Lifelong Learning Programme of the European Union

Project no. 177316-LLP-1-2010-DE-ERASMUS-ENWA

## **LISBOAN**

### **Linking Interdisciplinary Integration Studies by Broadening the European Academic Network**

## **Report on the workshop “The EU after the Lisbon Treaty: A quasi- constitutional framework to be revised?”**

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Workshop Venue: School of Law, Bologna

Deliverable No. 58

**15 November 2012, Project month 26**

Dissemination level: Public

Funding Disclaimer: This project has been funded with support from the European Commission. This publication reflects the views only of the author, and the Commission cannot be held responsible for any use which may be made of the information contained therein.

## Workshop “The EU after the Lisbon Treaty: A quasi-constitutional framework to be revised?”, 15 November 2012, Bologna

### Introduction:

The Interdepartmental Research Centre on European Law (CIRDE) has organized the workshop “The EU after the Lisbon Treaty: A quasi-constitutional framework to be revised?” within the LISBOAN Project. LISBOAN (“Linking Interdisciplinary Integration Studies by Broadening the European Academic Network”) is an Erasmus Academic Network that aims to strengthen teaching and researching of the Lisbon Treaty. In particular, the workshop was intended to draw the preliminary conclusions from the research activities carried out within the Working Package VII “The quasi constitutional nature of the Lisbon Treaty”. The workshop was held on the 15th of November 2012 at the School of Law of the *Alma Mater Studiorum* – University of Bologna, and was attended by university students, Phd candidates, scholars, and some experts.

The day before a roundtable on “The European Union and the crisis: amending or just completing the Lisbon Treaty” was held in the framework of the *Ad Personam* Jean Monnet Chair “The Impact of the Lisbon Treaty on European Integration” chaired by Professor Lucia Serena Rossi. Starting from the perspective adopted by Professor Miguel Poiaras Maduro in his [report](#) to the European Parliament “A new governance for the European Union and the Euro: Democracy and Justice”, the speakers of the roundtable exchanged their views on the gaps and lacuna of the way in which the Lisbon Treaty legal framework is facing the economic and financial crisis and on the possibility to amend or integrate that framework. The roundtable was opened by a welcoming speech given by Professor Lucia Serena Rossi from CIRDE, who is also the leader of the Working Package VII of the LISBOAN project devoted to the quasi-constitutional nature of the Lisbon Treaty. The roundtable speakers were: Professor Leonard Besselink, from the University of Amsterdam, who provided a general survey on the parameters of constitutional development, Sir Francis Jacobs, from King’s College London, who highlighted the role played by the European Court of Justice in the light of the Lisbon Treaty as well as its contribution to the evolution of the actual legal order, Dr. Alison McDonnell, from the University of Leiden, who described the role the principles of flexibility and solidarity may play in dealing with the crisis, and Miguel Poiaras Maduro, from the European University Institute, who summarized the views expressed in the above mentioned report. In particular, he argued that the solution to the crisis and the future of EU governance must depart from a renewed justification of the project of European integration which must be founded on its democratic and justice enhancing potential. This should lead to an alternative model of governance based on a new EU budget, new EU policies, more EU politics and a more effective political authority.

The workshop was opened by Professor Lucia Serena Rossi. She provided background on the rationale of the workshop that aimed to assess, after 3 years from the entry into force of the Lisbon Treaty, whether or not the actual legal framework should be subject to further revisions.

During the **morning session**, chaired by Prof. Mar Maresceau, from the University of Ghent, some general institutional topics were faced. They concerned the EU competences, the EU legal acts, and the EU external dimension.

The first presentation by Professor Paul Luif from the Austrian Institute for International Affairs was devoted to the allocation of competences between the EU and the Member States. In

particular, he considered what lessons can be learnt from the role played by pre-emption in the United States.

Professor Thomas Christiansen, from the University of Maastricht, assessed the implementation of Treaty provisions on comitology and delegated acts (*i.e.* Articles 290 and 291 TFEU). He argued that such implementation still remains a work in progress, and it will take time for these reforms to filter through in terms of changing practices and changing outcomes. In this respect, the case of the comitology reform is particularly relevant in so far as the way in which it has had an impact on inter-institutional relations appears to be quite different at this stage than it did when the Lisbon Treaty was signed. Moreover, one has to take into account that the European Court of Justice might still have its say on the implementation of the new system – for instance on the distinction between the use of Articles 290 and 291 TFEU – which could further change the inter-institutional relations.

The third presentation by Professor Jan Wouters, from the University of Leuven, concerned the Lisbon Treaty's constitutional design of EU external relations. Wouters explained that, although some positive innovations have been introduced by the Lisbon Treaty in order to enhance consistency to the EU external action, the relevant practice shows that many doubts can still be raised as to whether such consistency may be fully achieved. Furthermore, as revealed, for instance, by the conclusions of the 2009 United Nations Climate Change Conference (the Copenhagen Summit), in many cases the EU external efforts remain ineffective.

Finally, the presentation by Michele Comelli, from Istituto Affari Internazionali, focused on the evolution of the European Neighbourhood Policy after the 2011 revision and its future prospects. According to Comelli, the ENP revision carried out in Spring of last year through the joint communication COM(2011) 303 has resulted in an attempt to deepen both positive and negative conditionality in the EU's relations with neighbouring countries. The EU acknowledged that in the past it was too accommodating with authoritarian regimes in power in the Southern Mediterranean countries and that for the future the EU would be more serious in making conditionality work. However, the question is not only about how to evaluate the performance of neighbouring countries, but also what to do with countries underperforming in democratic practices and not respecting the rule of law and human rights. While it is clear that sanctions and related measures have to be taken in the case of gross human rights violations, the question is what do to in less serious cases. Also, when it comes to the post-Arab Spring countries, the problem lies in the possible rejection of the conditionality logic by the countries that have gone through a democratic process of reforms through a purely endogenous path. Comelli also stressed that the 2011 ENP revision does not take into account the innovations brought about by the Lisbon Treaty and notably the introduction of Article 8 TEU and the opportunities that can stem through its use.

The **afternoon session** of the workshop, chaired by Professor Paolo Mengozzi, Advocate General of the European Court of Justice, was devoted to some specific topics whose analysis well reflects the evolving nature of the EU legal order.

The first presentation by Professor Laurent Pech, from the University of Ireland, assessed the impact of the rule of law in the EU after Lisbon. In considering the main Treaty provision concerning the rule of law – *i.e.* Article 2 TEU – Pech noted that the use of the term “value” rather than principle in Article 2 TEU does not seem to reflect any clear intention to introduce a new and meaningful distinction between, for instance, foundational but non-justiciable EU values

and foundational legally enforceable principles. Irrespective of this ill-advised terminological change, one may nonetheless contend that Article 2 TEU represents a positive development in the sense that European citizens can only welcome the explicit linkage of the EU's constitutional system with the key and traditional tenets of Western constitutionalism. Another remarkable aspect is that the rule of law is hardly ever mentioned in primary law as a *stand-alone principle*. In most cases, the principles of democracy and respect for fundamental rights immediately accompany the rule of law. This is particularly true whenever the rule of law is mentioned as an objective of the EU's external policies.

The second presentation by Dr. Federico Casolari, from the Interdepartmental Centre on European Law, concerned the evolution of the principle of loyal cooperation. The aim of this presentation was to assess whether the entry into force of the Lisbon Treaty and the subsequent practice have contributed to reshape the content of this principle and its interaction with other EU principles enjoying the same status. Casolari concluded that the main innovations introduced by the Lisbon Treaty (namely the interaction with the protection of the Member States' national identities and the codification of the loyalty duties) do not represent just an example of *cosmétique juridique*: they are really able to influence the way in which the principle of loyalty will be implemented in the near future. In particular they suggest the search of a more balanced cooperation between EU institutions and Member States that, under certain circumstances, could set aside EU obligations inconsistent with the national constitutional structures. Casolari concluded that, in absence of a real unitary approach among Member States in facing the implementation of EU policies, the loyal cooperation will continue to represent the veritable cornerstone of EU integration process, the solidarity principle playing a limited role in this respect.

The fourth presentation by Professor Jean-Paul Jacqu , from the University of Strasbourg, was focused on the protection of human rights. In particular, he considered the implementation by the European Court of Justice of the EU Charter of fundamental rights that has filled a lacuna in the protection of individuals *vis- -vis* EU institutions. Jacqu  explored the application of the Charter in pure internal situations, the horizontal effects of its provisions, and the recourse to the Charter in order to ensure a coherent implementation of EU law by the Member States.

In his speech, Professor Peter Van Elsuwege, from the University of Ghent, focused on the phenomenon of reverse discrimination. Based upon an analysis of the recent case law of the ECJ, it is contended that the requirement of a "cross-border element" to bring a situation in the ambit of EC law has been interpreted in an increasingly flexible manner. It is argued that this approach, which seems to be inspired by a desire to avoid reverse discrimination as much as possible, leads to legal uncertainty. In addition, the ECJ's case law on purely internal situations appears to disregard the trend towards regional devolution in many Member States. This approach entails the risk that new barriers to free movement of persons may be introduced within rather than between the EU Member States. The combination of both observations leads to the conclusion that the distinction between cross-border situations and purely internal situations becomes increasingly blurred.

The last presentation by Dr. Giacomo Di Federico, from the Interdepartmental Centre on European Law, was focused on the access to health care in the post-Lisbon era. After more than a decade of judicial activism, the European legislator has adopted Directive 2011/24/EU of 9 March 2011 on the application of patients' rights in cross-border healthcare that largely codifies the case law of the Court of Justice on Art. 56 TFEU, but betrays a conservative approach on the part of the Member States. Indeed some of the most controversial judgments have not been

transposed into positive law. This presentation by Giacomo Di Federico analyzed the content of the Directive and assessed its added value taking into account the constitutional changes introduced by the Lisbon Treaty. Most notably, it explored the impact of the principle of solidarity and of Art. 35 of future developments in the field of healthcare and investigates the possible links with the progressive affirmation of European citizenship.

Both workshop sessions stimulated the debate between speakers and the general public attending the event. At the end of the workshop, the participants agreed to publish a revised version of their contributions in a collective volume edited by Lucia Serena Rossi. The deadline for the paper submission has been fixed on April 30, 2013.

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