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EDITORIAL COMMENTS

"*Protocology*"

The Treaty of Maastricht has a lot to answer for. It put in place the very complex "three pillar compromise" which will only now – as the entry into force of the Treaty of Lisbon comes in sight – be abandoned. It initiated a sort of planned and semi-permanent process of Treaty amendment, where the institutional "hot potatoes", in particular, are put on the plate of the next intergovernmental conference – though many people think that the enormous difficulties of ratifying the Treaty of Lisbon (to which we return below) mean that this process will now come to a halt for a while. And it started a new use by the Member States of what we will call "Protocology". While the process of broadening the substantive scope of European integration and the incremental reform of the institutional system that started at Maastricht is accompanied by all kinds of novelties – popular referenda, involvement of and close scrutiny by constitutional courts, personal campaigns by some heads of State – the use of opt-outs and protocols to the treaties has become almost accepted as a regular but questionable means to win over certain Member States, either during the negotiations or in the ratification process.

With regard to the position of the Member States,[1] the protocols to the original treaties or accession treaties were essentially used to preserve a certain degree of readability of the main text and not to overload it with provisions of limited geographical or other specific significance. The common characteristic of these protocols was their temporary nature. Often they contained transitional arrangements. However, since Maastricht, the nature of some of the protocols changed, in the sense that the possibilities for the Member States to deviate from the main regime became indefinite and potentially permanent.

The most well-known protocols concern the opt-out for the UK from the third stage of the EMU,[2] rapidly followed by the Danish opt-out.[3] Another *de facto* opt-out for the UK – now superseded – was Protocol No. 14 on Social Policy.[4] Technically speaking, it was the other – then eleven – Member States

1. This in contrast to protocols on more general institutional or substantive matters.
2. Protocol No. 11 annexed to the EC Treaty.
3. As a result of the Decision taken at the Edinburgh European Council, (11/12 Dec. 1992), briefly discussed below.
4. UK "joined the club" in 1997. With the Treaty of Amsterdam, the Social Agreement became a normal part of the EC Treaty.

that decided to apply the Agreement on Social Policy among themselves. This agreement was nothing other than the draft amended version of the EC Treaty Chapter on Social policy, which the UK refused to accept. With the Amsterdam Treaty, another rather complex opt-out/opt-in facility in the area of migration policy was laid down in three different protocols, in relation to the UK, Ireland and Denmark.[5] The Lisbon Treaty not only maintains this system, but extends it to areas in which those three Member States fully participated until now.[6]

Certain protocols cannot be considered to lay down genuine opt-outs, but they do address the issues at stake in a fashion which seems to amount to a permanent derogation from rules envisaged or an already existing EU law regime. A recent effort of this kind is the Protocol on the Charter of Fundamental Rights,[7] applying to the UK and Poland. The Protocol aims at limiting, on a permanent basis, the justiciability of the Charter by the ECJ and the national courts in those two countries (Art. 1). Similarly, Article 2 apparently has the purpose of limiting the applicability of the Charter's provisions. Whether the Protocol really does what some people hope it will is quite a different question. On one of the many readings, the Protocol can be considered as restating the law that applies to all the Member States: no judicial review in the light of the Charter outside the scope of EU law.[8]

Two other, older Protocols, drafted at the time of the Maastricht Treaty, have a comparable effect of derogating from the main EC Treaty rules. The reason behind their adoption was indeed that the issues they address were, and are, perceived as highly sensitive in the Member States concerned. Thus the Danish second home protocol[9] allows Denmark to maintain the existing legislation on the acquisition of second homes, which prohibits nationals of other Member States from acquiring these. The Irish abortion protocol,[10] vigorously supported by the "pro-life movement", is a less clear-cut derogation. It seeks to secure a special position with regard to the protection to life of the unborn laid down in the Irish Constitution. Yet, in particular when placed in the context of

5. Protocol on the application of certain aspects of Article 14 of the Treaty establishing the EC to the United Kingdom and Ireland, Protocol on the position of the United Kingdom and Ireland, and Protocol on the position of Denmark.

6. For a brief discussion see Dougan "The Lisbon Treaty, Winning minds not hearts", 45 CML Rev. (2008), at 669–670.

7. Protocol No. 30 on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom.

8. Cf. Dougan op. cit. *supra* note 6, at 669–670.

9. Protocol No. 1 annexed to the EC Treaty.

10. Protocol No. 17 annexed to the EU *and* the EC Treaty. As is well known, comparable concerns about abortion, and nowadays also same-sex marriage, are the main reasons for Poland's adherence to the Protocol on the Charter.

the time,[11] there was reasonable fear that the relevant Irish constitutional provision might be used to deprive Irish women of their right to travel to another Member State for abortion or to receive information about this type of medical treatment abroad. From this perspective, the Irish abortion protocol can be perceived as a potential limitation of the Treaty freedoms.

Finally, a third category of protocols has recently emerged. These can be labeled as the "post referendum" protocols and they aim mainly at comforting the population of the Member States where the majority voted against the ratification of the new treaty. The ultimate goal seems to be to facilitate a new referendum on the same matter. Until now we have witnessed two such occasions. First, when the people in Denmark voted "no" at the time of the ratification of the Maastricht Treaty, in June 1992. Recently, when the same thing occurred in Ireland – the negative referendum on 12 June 2008 – the European Council of 18/19 June 2009 followed the tried and tested solution from 1992:[12] a binding decision of the Heads of State or Government of the Member States of the European Union, meeting within the European Council, accompanied by a declaration on certain specific concerns.[13] At the end of the day, the decision and declaration in the earlier Danish case was integrated into the Amsterdam Treaty, though not as a Protocol. In the Irish case, it is envisaged to incorporate the relevant text as a Protocol to the Lisbon Treaty at the time of the conclusion of the next Accession treaty.[14] As in the case of opt-out/opt-in protocols and "special cases" protocols, the decisions concerning Denmark and Ireland aim to deal with specific concerns of the Member States at issue. While the creation of a new opt-out or a straightforward derogation is avoided, Ireland and Denmark get "special treatment",[15] though without re-opening the negotiation and ratification process.[16]

11. Cf. *Grogan* (C-159/90), which was decided in October 1991; *Open Door and Dublin Well Woman v. Ireland* was pending in Strasbourg (the ECrtHR gave judgment on 29 Oct.1992); and the Irish Supreme Court was dealing with *X. v. Attorney General* (injunction against a 14-year old rape victim to travel abroad), judgment of 26 Feb. 1992.

12. Decided at the Edinburgh European Council of 11/12 Dec. 1992.

13. In the case of Denmark on social policy, consumers, environment and distribution of income; in the case of Ireland on worker's rights, social policy and other issues.

14. For a more detailed discussion of this and the legal nature of the decision, see Editorial comments: *An ever mighty European Council – Some recent institutional developments*, 46 CML Rev., 1383–1393.

15. In the case of Denmark, that country got only very little more in addition to what it already possessed under the Maastricht Treaty. A notable exception was the automatic opt-out from Stage III of the EMU. Cf. Howarth, "The compromise on Denmark and the Treaty on European Union: A legal and political analysis", 31 CML Rev. (1994), 765. On Ireland, see below.

16. Though ultimately a ratification may be involved, but then it relates primarily to a different instrument, such as an accession treaty.

The deviating position under the consecutive Treaty revisions pursued by some Member States and honoured by the others has resulted, in the meantime, in a real science: how to draft, read, and understand clever – though often much debated – legal constructions accommodating political aspirations, nevertheless without damaging the result of sometimes extremely laborious compromises reached in the negotiations.

The mixed blessings of referenda

Ever since the Maastricht Treaty, referenda have caused considerable problems in the ratification process. Apart from the negative result of the first Danish referendum in 1992, the referendum in France in September 1993 was also a close shave. Already then, the weak legitimacy of Member State action and, indirectly, also the EC/EU itself became apparent, a problem that seems only to be reinforced in subsequent years. At the same time, holding a referendum, even where it is not a constitutional obligation as in Ireland and under certain circumstances in Denmark,[17] became rather fashionable. At the time the Constitutional Treaty was being ratified, referenda with a positive outcome took place in Luxembourg (56.6% in favour) and Spain (76.7% in favour). Further referenda were envisaged in Poland, Portugal, the Czech Republic, the UK, and indeed in Ireland and Denmark, but they were postponed for an indefinite period of time after the negative votes in France (54.9% against) and the Netherlands (61.6% against).

Although they are far from uncontested as a means of direct democracy, the organization of referenda on European matters may be considered laudable, as a means of bringing Europe closer to citizens and tackling the problem of weak legitimacy. However, the tragedy is that referenda may also turn into dangerous instruments, in particular if governments are not able to explain "Europe" and convince their citizens. In addition to this, it is alarming that there is not just opposition to new amendments and some recent policies, but also to the *acquis communautaire*, including the well-established rules and principles of the common market.

In some countries, like the Netherlands and more recently Ireland, parts of the "no-camp", strongly supported by some media, managed to run dishonest and misleading smear campaigns. One may suspect that in some cases the ultimate goal is to gain popularity and power for certain politicians and political movements rather than participating in a meaningful process of opinion-forming about the issues at stake. Yet even more depressing is frequently the

17. In relation to the ratification of the Amsterdam Treaty, a referendum took place in Denmark (28 May 1998, with 55.1% votes in favour) and Ireland (22 May 1998, with 61.7% in favour).

inability of the proponents and in particular politicians in charge to counter the arguments. After a hard lesson during the first Irish referendum in 2008 and helped by the economic crisis, the government of Brian Cowen succeeded in turning the tide. Some leading European politicians supported the campaign in person, though equally or even more important was the mobilization and participation of civil society (not to mention an autonomous yes-campaign by Ryanair).

As already mentioned, the Decision "on the concerns of the Irish people on the Treaty of Lisbon", taken at the June 2009 European Council, gave the Irish Government the pretext for holding a new referendum. Without analysing the content of the Decision in depth, it is submitted that the issues addressed illustrate the point just made: they are all about communication and not about substance. At first sight, the Decision confirms or at most clarifies what the law is. In relation to the guarantee as to the right to life, it is useful to point out that the Irish abortion protocol mentioned above is not repealed by the Lisbon Treaty. Insofar as measures under the current Title IV could interfere with the protection of the family, note that Ireland has opted out. In the area of education, there is no power to harmonize, and education is a matter of supporting competences only. A proviso that may be made in relation to these three "ethical" issues is indeed the application of the Charter of Fundamental Rights and of some other provisions – for instance, the internal market rules or the anti-discrimination legislation – that have in the meantime demonstrated their potential to interfere profoundly with areas left to the Member States. In this respect the guarantees could become relevant in the future. The clauses on taxation and on security and defence restate what the Treaty of Lisbon already provides. An interesting feature is that both sections address the issues in broader terms than for Ireland only. This neutral wording, not specific to Ireland, is another indication of the nature of these provisions: a confirmation of what already exists.

It is to be noted that another matter of great importance for the Irish, the preservation of an Irish Commission member, is not reflected in the binding decision. However, it has been announced that under the Lisbon Treaty, a decision will be taken "to the effect that the Commission shall continue to include one national of each Member State".

The Czech saga

In some countries, it is not a referendum but a "euro-recalcitrant" president who may try to extort a protocol. The hostile attitude of the Czech President Klaus to the EU in general and the Lisbon Treaty in particular is well known – this is not the place for further explanations. Despite the fact that the

Czech Constitutional Court found the Lisbon Treaty to be compatible with the Czech constitutional order, in its decision of 26 November 2008,[18] and that both Chambers of the Parliament gave their consent to the Treaty, the President refused to sign the ratification instrument. Whether he is obliged to do so was, until recently, unclear under Czech constitutional law. The first pretext was the need to wait for the Irish referendum in October 2009. Meanwhile, a group of 17 senators (close to Klaus) brought two new cases before the Constitutional Court. The first one, of 1 September 2009, attacked the amendments to the Acts on the rules of procedure of the Chamber of Deputies and the Senate. These amendments concerned the rules on how to approve the use of *passerelles* in the Lisbon Treaty. Their claim that qualified majority should be required instead of a simple majority vote was clearly inspired by the *Lisbon* judgment of the German Constitutional Court.[19] The case was dismissed on 6 October as manifestly ill-founded.[20] The second case,[21] brought on 29 September, concerned the constitutionality of the Lisbon Treaty in its entirety and not just selected provisions as was the case in the first *ex ante* review decided in November 2008. Moreover, the compliance of the Maastricht Treaty as a whole and the Treaty of Rome as a whole with the Constitution was also to be put on trial, as well as the Irish guarantees. The senators argued that the Decision on the concerns of the Irish people on the Treaty of Lisbon is an international treaty. Under the Czech Constitution, such a treaty requires the approval of the constitutional majority of both Chambers of the Parliament. The Constitutional Court gave the case preferential treatment. On 3 November 2009 it decided unanimously that the Lisbon Treaty does not contravene the Czech constitutional order. While this judgment definitely cleared the way to ratification, the Court also resolved two contentious issues of Czech constitutional law: it found that the President of the Republic is obliged to ratify, without unnecessary delay, an international treaty to which the Parliament has given its consent. It also made clear – pointing at the risk of abuse of procedural mechanisms – that the *ex ante* review of the constitutionality of an international treaty must be brought without unnecessary delay.[22]

While this case was pending before the Constitutional Court, Klaus invented a new hurdle: objections to the Charter of Fundamental Rights. In a nutshell, the problem was that, according to the President, the binding force of the EU

18. Pl. ÚS 19/08 available (in English) at www.concourt.cz . Cf also the case Note by Bříza in (2009) EuConst, 142.

19. See Thym, "In the name of sovereign statehood: A critical introduction to the Lisbon judgment of the German Constitutional Court", in this *Review*.

20. Pl. ÚS 26/09 available at www.concourt.cz

21. Pl. ÚS 29/09. For summaries in English see www.concourt.cz , at "*Current affaires"*.

22. The relevant provisions of the Act on the Constitutional Court are silent on time limits.

Charter of Fundamental Rights could lead to legal challenges against the Beneš Decrees. These decrees of the wartime Czechoslovak Government in exile, led by Edvard Beneš, are at the origin of the expulsion and property seizure of some 3 million Germans and partly also Hungarians from Czechoslovakia at the end of World War II. The decrees were accepted by the allies at Postdam in 1945. At the time of the Czech accession to the EU, they came into the limelight since some people in Germany wanted to make the abolition of the decrees a condition for Czech membership. At the end of the day – the decrees have been screened unofficially[23] – this so-called Sudeten question was kept out of the Accession Treaty.

The move by Klaus was politically sly, playing the emotional card and stirring up old fears. In legal terms, it is nonsense. Disputes involving the Beneš Decrees are outside the temporal scope of EU law and therefore also outside the scope of the Charter.[24] Were it otherwise, then the decrees could also already be challenged now, under the well-established case law of the ECJ about the protection of fundamental rights in the EU. Meanwhile, the delaying[25] or probably, at this stage, face-saving tactic of the Czech President, gave rise to potential new demands, this time by Slovakia: the Beneš Decrees are also part of the Slovakian legal system. From this perspective, it is understandable that the Slovaks wanted to have the same guarantees.[26] For a while it seemed that the Czechs and Slovaks might be reunited in a protocol on a less glorious part of their common history. At the end of the day, however, the Slovakian Government abandoned the issue.

The final solution is as staggering as the whole course of events around the Czech ratification. Since certain countries – reportedly Hungary and Austria – did not agree to any explicit reference to the Beneš Decrees whatsoever, on the occasion of the next Accession Treaty the Czech Republic is going to join the UK/Polish Protocol on the Charter of Fundamental Rights.[27] Above,

23. Cf. e.g. Legal Opinion concerning Beneš – Decrees and related issues, by Frowein, of 12 Sept. 2002, available at www.mpil.de/shared/data/pdf/frowein.pdf.

24. Cf. Art. 51 of the Charter. Note also cases on the application of EC law to situations that occurred before accession, e.g. Case C-302/04, *YNOS* v. *Varga*, [2006] ECR I-371 and Case C-C-261/05, *Lakép Kft*, [2006] ECR I-20. Cf. also case *Prince Hans-Adam II of Liechtenstein* v. *Germany*, ECtHR, judgment of 12 July 2001, where the Strasbourg Court found the Beneš Decrees outside its jurisdiction *ratione temporis*.

25. Note that delaying the ratification became especially attractive after a letter from David Cameron "restating" the UK Conservative party's position about a referendum on the treaty if the ratification was not fully accomplished in the rest of Europe (EUobserver, 23 Sept. 2009).

26. However, Slovakia's foreign ministry emphasized that "we have become, against our will, part of the process". Cf. EurActiv 19/10/09.

27. Cf. the Protocol on the application of the Charter of Fundamental Rights of the European Union to the Czech Republic, Annex I to the presidency conclusions of the Brussels European Council 29/30 Oct. 2009.

we have already observed that, on a restrictive interpretation, the Protocol hardly adds anything new to the existing text of the Charter. On the other hand, it is also true that the Protocol cannot be ignored altogether. In any case, due to the capricious behaviour of a president, the potential limitation of the applicability of the Charter leads to a bizarre paradox, since at the same time, the Czech Constitutional Court (judgment of November 2008) saw adequate protection of human rights in the European Union as one of the "red lines" enabling the transfer of powers to the EU.

Hitches in the ratification process: A missed opportunity at Lisbon?

Under the Lisbon Treaty, the ordinary procedure for revising the Treaties still requires ratification by all Member States in accordance with their respective constitutional requirements. Some lessons have been drawn from the problems that emerged in the past. The procedures followed in the Danish and Irish case seem to be institutionalized: "If, after two years, four fifths of the Member States have ratified the amendments and one or more Member States have encountered difficulties in ratification, the matter shall be referred to European Council." Yet, Article 48(5) TEU does not say what the European Council is then supposed to do. Apart from moving some minor issues to a number of special revision procedures, the Lisbon Treaty does not contain other provisions that could facilitate the ratification and the entry into force of a new treaty.

A rough remedy for deadlock situations – voluntary withdrawal (which is explicitly laid down in Art. 50 TEU Lisbon) – is not only unrealistic, but also has its legal limitations. As this decision is to be taken by the Member State concerned in accordance with its own constitutional requirements, a situation in which other Member States are held hostage can not be excluded: no ratification of new amendments but also no national agreement on withdrawal.[28] A step such as that proposed in the Commission's earlier feasibility study, entitled Pénélope, was not taken.[29] In fact, in that study there were two possible steps: the revision could enter into force in case of ratification by five-sixths or three quarters of the Member States.[30] The Member State which did not manage to accomplish the ratification could, two years after entry into force, apply for withdrawal. A complex but balanced proposal was made to deal with

28. One may suppose that a withdrawal too will be submitted to a referendum!

29. Constitution of the European Union, working document of 4 Dec. 2002, prepared at the request of Commission President Prodi, under the responsibility of François Lamoureux,

30. Depending on whether the Principles or the Fundamental Rights were revised or the Policies or "Additional Acts".

problems in the process for the ratification and entry into force of the treaty that was the object of the feasibility study itself, the Constitutional Treaty.

However amazing the creativity of lawyers may be, though, the fact remains that the first and most important level to deal with ratifications is political, and concerns, above all, the ability of European and especially national politicians to regain popular support for European integration.

Editorial note

The Editors would like to announce that the new numbering introduced by the Treaty of Lisbon will be implemented as of Vol. 47 No. 1. Citation details may be found on the website of the *Review*.