

# THE LISBON TREATY: A SINUOUS RATIFICATION

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**Abstract:** *This article deals with the intricate ratification process of the Lisbon Treaty, while focusing on the thorny issues of Euroscepticism and democratic deficit within the European Union in the current institutional context. The study is based on a wide research endeavour, whose purpose has been to encompass multiple points of view on the future of the European Union, seen from the perspective of the Treaty of Lisbon and its reception in all member states. These viewpoints include the ones found in the speciality literature, as well as in the press that published representative articles during the debates on the ratification of the Lisbon Treaty. Useful attempts are made in order to classify the member states of the EU according to various relevant criteria in their attitude germane to the ratification of the Treaty, so as to outline new waves of Euroscepticism, opt-outs and criticism. Apart from an institutional and a legal perspective, this study presents a large number of political, national and even cultural aspects encountered in attitudes and courses of action pertaining to the future of European Construction, seen through the eyes of the reform process carried out by the latest EU major legal document.*

**Keywords:** Lisbon Treaty, reform, Euroscepticism, democratic deficit, ratification

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## 1. EUROSCEPTICISM AND DEMOCRATIC DEFICIT: FACTORS IN THE RATIFICATION PROCESS

Given the traumatizing experience of the failed ratification of a major European reform document back in 2005, the European Union's political body could certainly not afford another failure of this kind, after the intricate reflection period that led to the drafting of the Lisbon Treaty, a compromise meant to overcome the dysfunctional institutional framework after the 2004 enlargement (de Poncins, 2008, p. 192). At the moment of signing the Treaty, on the 18<sup>th</sup> of

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December 2007, the expected date for it to come into force was the 1<sup>st</sup> of January 2009, which appeared consistent with the average duration of this process for any major Treaty.

Nevertheless, the ratification course would not go as smoothly as expected, as one member state was required by its internal regulations to hold a referendum on the matter, namely Ireland, which eventually led to the rejection of the document, in a déjà vu of what had happened in the summer of 2005. This paper attempts to argue that Euroscepticism played a significant role in the sinuous ratification process, as did the issue of the democratic deficit within the EU. The first of the two terms, Euroscepticism, refers to the opposition expressed by certain groups of people towards the process of European integration and, in particular, towards the deepening of this process. As in the case of any other supranational construction process, the rise of an opposing current is normal and, to a certain extent, it is the expression of a democratic divergence of opinions. However, the political forces that drive the Eurosceptical trend are usually counterproductive and often trigger memories of past totalitarianism, if one refers to extreme right-wing political groups, which take the national criterion all the way to the top of their argumentation. A Eurosceptical attitude is often attached to a nationalist sentiment, as in the case of Czech President Vaclav Klaus, who appealed to historic arguments and national traumas from the Second World War to block the signing of the Treaty of Lisbon, albeit a contrary opinion from the part of his government and people.

One trustworthy instrument to assess the fluctuations in the level of Euroscepticism across Europe is without a doubt the Eurobarometer. This periodical survey should be used as an alarm signal for identifying the situation of the crisis of values within the European Union, in the eyes of its citizens, so as to come up with viable solutions to crucial problems such as legitimacy and representativeness (Păun, 2007). Having said this, it has to be pointed out that the latest available figures, dating back to 2009, are less than worrying for the European Union, with half of its citizens sustaining their respective countries' membership, although this percentage is far from being uniformly spread amongst member states. As a general trend, the original six countries that founded the Community still benefit from steady support for the integration process, with peak values recorded in Luxembourg and the Netherlands, while other experienced members, such as Spain or the Republic of Ireland, are equally well positioned with regard to European construction (*Standard Eurobarometer 71. Table of Results, 2009, p.91-93*).

On the other hand, Eurosceptical political parties and virulent nationalist discourses have maintained a dangerously low level of support for EU membership in the ever-sceptical United Kingdom, a champion of opposition and opt-outs in the integration course, whose newly-elected Conservative-Liberal-Democratic Government shows less European perspective than its Labour predecessor. With less than a third of its population referring to EU membership as a positive factor,

Britain has been and remains a subject worthy of analysis in any discussion on Euroscepticism and its impact. This being said, the Eurobarometer shows similar worrying tendencies in a part of Europe that longed for European integration until just a while ago (and part of it still does), namely Central and Eastern-Europe. With the rise of right-wing political forces and an ever increasing economic crisis, massive social protests and civic unrest, countries such as Hungary and Latvia are undergoing a decrease in the support for European integration, felt at the level of their citizens and in the political discourse. Partly due to the tendency of nationalist politicians to blame everything that goes wrong within a country on the so-called technocratic process in Brussels, the Eurosceptical attitude in this part of Europe is increasing slowly but surely, with potentially dangerous consequences in the near future. The question asked by the Eurobarometer which led to these conclusions is whether citizens feel their country has benefitted from European integration, to which only about half of British, Hungarian or Latvian citizens answered affirmatively (*Standard Eurobarometer 71. Table of Results*, 2009, p. 95-96). To expand the area, it has to be said that, while Romanians are still favourable to European Union membership, Bulgarians tend to align their opinions to those of the Eurosceptical nations mentioned above and blame the Community for the poor economic situation of the country, fuelled by a dangerously active organized crime.

Another useful Eurobarometer instrument used to monitor the sceptical feeling across Europe towards European integration is the trust of European citizens in the common institutions, especially the Parliament, Commission and Central Bank. As expected, the first of the three benefits from more consistent support, with just about half of European citizens expressing their confidence in the parliamentary assembly, chiefly in Central and East-European states. The interpretation of this result can be regarded as ambivalent, as in this part of the continent, the population tends to lose confidence in national legislative bodies, which fall victims of more and more allegations of corruption and inefficiency, fuelled by a bloodthirsty media. From this perspective, the support for the European Parliament should be considered encouraging, as these citizens may well find a suitable alternative for popular representation in the EP, an institution that has been struggling since its creation to gain more credibility and legitimacy on a supranational scale. On the other hand, the British, who take great pride in their Parliament and democracy, tend to exhibit the lowest support for the European Parliament of all member states, with just a little over one Briton in five having confidence in it. This attitude partly springs from the allegiance of the British nation to its traditional institutions, relying on an unequaled political tradition in Europe, which, if combined with the nature of the British conservative spirit, makes it hard for this nation to share their fidelity with much more recently created institutions - not to mention supranational ones.

As expected, the level of trust in the executive body of the European Union, namely the Commission, is slightly lower than the one in the Parliament (*Standard Eurobarometer 71. Table of Results*, 2009, p. 110-112), an attitude that is consistent with the political tradition across democratic Europe, which makes executive institutions more prone to attract criticism than legislative ones, whose visibility is less prominent in the case of measures taken to directly affect the population (although in reality, it should be the other way around) (Doutriaux and Lequesne, Paris, 2008, p.62-63). Furthermore, the confidence expressed by Europeans in the Central Bank of Frankfurt is equally inferior to that in the European Parliament, especially in a moment of doubt for the future of the single European currency, the euro (Doutriaux and Lequesne, Paris, 2008, p. 114-117). Part of the economic elite has indeed publically expressed its concern as to the fact that states should not give up some of their most important economic control factors in favour of a supranational institution, thus relinquishing a share of its national sovereignty.

Even with this opposition fuelling Euroscepticism on an ever wider scale, it is to be noticed that the same Eurobarometer survey indicates beyond the shadow of a doubt that the dominant attitude towards European construction is either positive, or, in the worst case scenario, neutral, with 46% of European citizens adopting a favourable view of it, 36% taking on a neutral one and no more than 16% painting a negative picture in this respect (Doutriaux and Lequesne, Paris, 2008, p. 130-133).

One can state beyond the shadow of a doubt that the country where Euroscepticism flourishes most even at present is Great Britain, where its history dates back to the admission of the UK to the European Community in 1973 (Branigan, 2007). The British elections have always been a good occasion for such attitudes to be publically expressed, exploiting a population prone to advocate against the European Union. For instance, the UK Independence Party can be referred to as the most powerful Eurosceptic party across the EU, something that its leaders were skilled in exploiting during the latest elections for the European Parliament, in 2009, when the party was ranked second, after the governing Labour Party, with 16.5% of the votes.<sup>1</sup> This proves in fact that such is the opposition towards European construction in Britain that the voters switch sides from the national elections to the European ones to support the main principle, and arguably the only strong one, of the UKIP, which is withdrawal from the European Union. If one adds the significant number of votes gathered by another Eurosceptical and far-right British party, namely the British National Party, at the same elections, then it is to be noticed that a worrying 28% of the total votes cast in Britain went to parties that are frenetically opposed to UK membership of the European Union. Not

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<sup>1</sup> *European Election 2009: UK Results*, BBC News, 8 June 2009, [http://news.bbc.co.uk/2/shared/bsp/hi/elections/euro/09/html/ukregion\\_999999.stm](http://news.bbc.co.uk/2/shared/bsp/hi/elections/euro/09/html/ukregion_999999.stm).

far from these attitudes is the one exhibited by current Prime Minister David Cameron, who, at a time when the ratification of the Lisbon Treaty was endangered by Polish and Czech opposition, campaigned for a referendum on the Treaty, in the event that his party was to win the elections. Luckily for the reform process, the Treaty overcame these hurdles and came into force before the UK elections, which ultimately led to a right-wing coalition, between the Conservatives and the Liberal-Democrats, with no spectacular European affinities.

Moreover, opposition regarding European construction was paradoxically cultivated within a common institution, namely the European Parliament, a phenomenon which is specific to the tolerant and democratic nature of the EU. The parliamentary group called “Europe of Democracies and Diversities”, created in 1999, later to be called “Europe of Freedom and Democracy”, had at the core of its doctrine an obvious Eurosceptical attitude. In fact, perhaps the greatest achievement of this political group so far has been the repulsion of the Constitutional Treaty, which its members advocated from within the European Parliament itself. However, the latest parliamentary elections show a tendency to lower citizens’ support for these Eurosceptical parties, which now have only 32 members, from 9 out of the 27 member states.<sup>1</sup>

As far as the democratic deficit is concerned, it is a widespread belief throughout the European Union that its institutional layout does not represent the European citizens in a coherent manner, nor does it benefit from sufficient legitimacy (Degryse, 2007, p.252-253). This deficit is in fact a structural one, given that the EU is neither a transnational organization nor an intergovernmental one - it is a mix of the two apparently opposing principles, with a unique decision making mechanism and representation formula (Păun, 1999, p.167). This problem has been around since the deepening of European integration, in the 1970s, when the first accession wave took place, and resulted in a permanent attempt to increase the level of legitimacy of the common institutions. For example, the decision that the European Parliament’s members should be elected directly by the citizens, by universal ballot, came in 1979 as a response to this allegation of insufficient representation (Ghica *et al.*, 2007, p.64-65). Ever since, the Parliament’s prerogatives have steadily been widened, with ever more provisions to expand, for instance, codecision mechanisms to more and more domains, included into the Treaties. Hence, the structure and organization of the European Parliament has become close to the one of a national parliament, except for the fact that European Members of Parliament do not benefit from the right to propose Community Laws, a prerogative that is currently reserved for the European Commission.

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<sup>1</sup> *Europe of Freedom and Democracy* website, <http://www.efdgroupp.eu/the-group/national-delegations.html>, accessed 18 June 2010.

What is true is that the turnout to European Parliament voting is still fairly low across Europe, possibly due to the fact that the average citizens feel they have little in common with this institution, although the electoral campaigns sometimes focus on quite punctual European issues that directly concern citizens. Other times, these campaigns do little more than to reiterate the same internal disputes as in the case of the national elections. Nevertheless, the reform process, in light of the Constitutional Treaty and the more recent Lisbon Treaty, has aimed at introducing further reforms that are meant to bring European citizens closer to the EU. Such measures include: a greater role given to national parliaments in the decision making process, the right to citizens' initiative (if one million of them sign for a legal proposal, under certain conditions), the public character of European Council meetings, extended use of codecision - renamed *ordinary legislative procedure* - and the acceptance of the subsidiarity principle as a fundament of European construction.<sup>1</sup> The latter stipulated that any community decision shall be taken at the lowest level possible, so as to involve the citizens that are likely to be affected by it (Millon-Delsol, 1992). Therefore, the European Union will not pass laws in areas that are better covered by national, regional or even local procedures.

## 2. THE TRADITIONAL AND THE NEW OPPOSITION

The ratification period of the Lisbon Treaty lasted from the 13<sup>th</sup> of December 2007, the date it was signed, until the 1<sup>st</sup> of December 2009, the day it came into force, thus being consistent in length with the average duration before a major European Union Treaty would usually become legally binding. Nevertheless, after the failure of the Constitutional Treaty, the ratification of the Lisbon Treaty became of paramount importance to the future of European construction and was carefully monitored by both politicians across Europe and citizens, by means of extensive media coverage.

The opposition towards the adoption of the Treaty, in direct connection with the two phenomena presented above - Euroscepticism and the Democratic Deficit - came from two major sides, which can fall into the categories of traditional and new opposition. The first of these poles includes countries where the anti-European sentiment is widely spread, namely Ireland and Great Britain. Of the two, the ratification process that nearly sealed the fate of the Reform Treaty occurred in the Republic of Ireland, the only member state bound by its national law to hold a referendum for

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<sup>1</sup> *Treaty of Lisbon*, Art. 9C,  
<http://www.consilium.europa.eu/uedocs/cmsUpload/cg00014.en07.pdf>.

the ratification of the Treaty. It was to turn out that this referendum would prevent the Treaty from coming into force on the day it was supposed to, which was the 1<sup>st</sup> of January 2009.

Once the Lisbon Treaty was signed, Ireland began preparations to hold the referendum, according to the procedures laid down in its national Constitution. A positive sign at the time came from within the three-party governing coalition at the time, which expressed their support towards a positive vote in the upcoming referendum, while only two nationalist and a socialist party proclaimed their opposition to the Treaty. Nevertheless, amid a general climate of suspicion towards the outcome of the Lisbon Treaty, the result of the referendum held on the 12<sup>th</sup> of June 2008 was against it, with 53.4% of the voters expressing a No vote and just a bit more than half the eligible voters participating in the ballot.<sup>1</sup>

Needless to say that the situation was a *déjà vu* of what had happened to the Constitutional Treaty three years before, in France and the Netherlands, causing anxiety throughout the European Union and especially in its institutional framework, all the more because the efforts made to create the new Institutional Treaty were considerable. The idea was that if the document was to be permanently rejected on that occasion, similarly to its predecessor, it was unclear whether there would be enough impetus left in the European Union to once again seek such an ambitious solution to the need for reform in the foreseeable future.

The first step in overcoming this situation came once the results of the referendum were made public and prepared the public opinion for a second ballot, thus initiating a massive information campaign across the nation. The reason why this was needed is that a sociological analysis of the reasons why the Lisbon Treaty was rejected in Ireland in the first place showed beyond doubt that the number one cause for this was the insufficient information the population had so as to understand the nature of the document. Hence, it comes to no surprise that a nation prone to a Eurosceptical attitude would be even more suspicious towards such a complex reform document if the information available about it was to be insufficient. This attitude is somewhat understandable, all the more because the Treaty itself is written in an intricate manner, compared to the Constitutional, as this particular one had a unitary layout (Moussis, 2005), while the Lisbon Treaty, as an amending document, has countless references to other Treaties. This not only makes it difficult to read, but it also fuels up an already hostile internal climate, when it comes to the expansion of competences attributed to the supranational bodies of the European Union (Kurpas, 2007).

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<sup>1</sup> *Ireland rejects EU reform treaty*, BBC News, 13<sup>th</sup> June 2008, <http://news.bbc.co.uk/2/hi/7453560.stm>.

A process of negotiation was therefore initiated not only between the Irish Government and its citizens, but also between Ireland, on the one hand, and the EU institutions and decision makers, on the other hand. The purpose of these discussions was clearly to find a middle ground so as to guarantee that the national interests of Ireland are not violated in any way through the approval of the new Treaty, especially in a series of quite punctual matters. For example, Prime Minister Brian Cohen argued that the European Union should commit itself to some amendments to the Lisbon Treaty, which should be included in the next Community Treaty, namely Croatia's upcoming accession Treaty. These modifications referred to the right of every member state to permanently have one Commissioner, as the Lisbon Treaty had originally intended to enhance the functioning of the decision making mechanism by reducing this number to 2/3 of that of member states. In addition to this, issues concerning abortion, taxation and a military status of neutrality were also on Cohen's agenda, with the ultimate goal of gathering the required popular support for the upcoming referendum.<sup>1</sup> After receiving the official confirmation from Brussels that the desired amendments would be included in the next Community Treaty, Ireland held its second referendum on the Lisbon Treaty, on the 2<sup>nd</sup> of October 2009, after a long period of reflection. The high hopes invested in this initiative finally paid off, as the Irish nation gave its approval to the Treaty of Lisbon by means of this second referendum, which resulted in a comfortable majority of Yes voters, with 67.1% of the total votes cast. In fact, the turnout was 6% higher at this second referendum than at the previous one, giving extra legitimacy to the result and taking a load off the shoulders of the artisans of the Reform Treaty, as well as of the European Union as a whole.<sup>2</sup>

Remaining in the area of traditional opposition towards the furtherance of EU reform, it is highly unlikely that Britain (Bulmer and Lequesne, 2005, p.137-138) should not be part of this analysis, although this topic did not hold the front pages of newspapers, as the Irish referenda did. The United Kingdom, in accordance with its national law, is not legally bound to hold any referendum on the Lisbon Treaty, as this is not a Constitutional one, but merely an amending Treaty. Nevertheless, there was one case brought forward before the High Court of the UK asking for the approval of a referendum on the Treaty, based on previous declarations made by members of the British Government. However, the Government defended itself by stating that the promise under discussion was only valid with respect to the Constitutional Treaty and did not affect the newer document, all the more because the Treaty of Lisbon is, as it has been pointed out before, an amending Treaty. This point of view was upheld by the High Court, which ruled that the ratification

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<sup>1</sup> *Brussels European Council 11/12 December 2008; Presidency Conclusions*, [http://www.consilium.europa.eu/ueDocs/cms\\_Data/docs/pressData/en/ec/104692.pdf](http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/104692.pdf).

<sup>2</sup> *Ireland says "Yes" to Lisbon Treaty*, Herald Scotland, 3<sup>rd</sup> October 2009, <http://www.heraldscotland.com/news/politics/ireland-says-yes-to-lisbon-treaty-1.923771>.



procedure of the Treaty was legal and that there were no reasons to hold a referendum on the matter.<sup>1</sup>

Also in the area of experienced member states of the EU, it is worth mentioning that the ratification process of the Lisbon Treaty was jeopardized in Germany as well, where Eurosceptics turned once again to the weapon represented by the Constitutional Court, as it had occurred in the past as well. In a valuable opinion from the 30<sup>th</sup> of June 2009, the Federal Constitutional Court of Germany expressed the principles that the Treaty of Lisbon relied on, with special emphasis on the federal nature of the European Union and its compatibility with the German legal order. The most controversial issue in this respect was that on sovereignty, although the Court clearly stated that the democratic deficit within the EU could only be handled through the diminishing of national sovereignty, in its traditional sense. In spite of this need, the Court concluded that the newly-conceived reform process did not lead to the European Union becoming a federal state, thus there was no incompatibility between its provisions and those of the German Federal Constitution.<sup>2</sup>

Once this hurdle was overcome, the federal judges stated however that there were a few matters that should be dealt with prior to the ratification of the new Treaty. One of these issues involved the right of the Bundestag to exert a form of control over the votes cast by the members of the German Government within the Council of Ministers and other institutions - a problem that refers to the internal order of Germany and not to the substance of the Treaty in any way. Moreover, the Court ruled that it had the right to overrule judgments issued by the European Court of Justice, if these did not comply with German law - a more ambitious assert by Germany, but also a fair solution to potential future claims meant to postpone the ratification of the Lisbon Treaty. In Germany, this did not occur, as, apart from these problems, there were no more obstacles in the way to ratification.<sup>3</sup>

If the abovementioned facts referred to what we wish to call “traditional opposition” towards the deepening of the process of European Integration, then the following aspects fall under the category of “new opposition”, depicting member states that lack experience within the European Community, but still express strong tendencies of Euroscepticism. The paradox is not difficult to notice here, as after long and tedious negotiations with the European Commission in order to become part of the Union, it should come as a surprise that these newly-admitted states (more precisely, in 2004) take the skeptical approach with respect to the future of the transnational

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<sup>1</sup> *Stuart Wheeler loses High Court challenge to the EU Lisbon Treaty*, The Times, 26<sup>th</sup> June 2008, <http://www.timesonline.co.uk/tol/news/uk/article4214748.ece>.

<sup>2</sup> *Act Approving the Treaty of Lisbon compatible with the Basic Law*, Federal Constitutional Court Press Release 72/2009, 30<sup>th</sup> June 2009, <http://www.bundesverfassungsgericht.de/pressemitteilungen/bvg09-072en.html>.

<sup>3</sup> *Decision of the German Constitutional Court*, 30.06.2009, <http://www.bundesverfassungsgericht.de/pressemitteilungen/bvg09-072en.html>.

organization they struggled so hard to enter. Nevertheless, the subsequent analysis should be understood in the ever changing context in international relations, to which it is worth adding the pressures triggered by the economic crisis and the alternation of governments in member states, each with its own perspective on what the European Union should look like.

The Czech Republic is perhaps the most fervent Eurosceptical member state falling into the category of the “new opposition”, with a determined (and stubborn) leader as Vaclav Klaus, who opposed the Treaty of Lisbon in spite of the positive vote given to the document in Parliament. The attitude of the Czech President was not entirely a surprise at the time, as he had already made a public statement upon the rejection of the Treaty in the Irish referendum of September 2008, pledging not to sign the ratification instrument until the situation had been rendered clear. Nonetheless, after the approval of the document by the Irish nation, following the second referendum, President Klaus continued to affirm his opposition towards the Lisbon Treaty, leading to another moment of crisis in its ratification process.

The so-called weapon used by Vaclav Klaus to delay the ratification of the Reform Treaty was mostly the Constitutional Court of the Czech Republic. With the support of a group of sympathetic senators, a procedure was initialized before the Court so as to attack the constitutionality of several articles comprised in the Treaty. Under Czech law, a Treaty cannot be submitted to ratification while such a legal procedure is pending, which was the perfect excuse for Klaus to express his opposition towards the Lisbon Treaty in various speeches. As the Constitutional Court conceded that those particular articles of the Treaty were compliant with Czech Law, the group of senators prepared a second procedure before the same Court, this time attacking the Treaty as a whole.<sup>1</sup> In fact, it was little more than a rather lame attempt to prolong a situation that was deemed to turn against the will of the Czech President sooner or later, especially given the reproaches made around the European Union as to the irrational opposition from Klaus.

On the 3<sup>rd</sup> of November 2009, roughly one month after the approval of the Lisbon Treaty by the Irish nation, the Czech Constitutional Court delivered its final verdict on the Treaty taken as a whole, stating that it was not incompatible with internal law, a verdict that proved to be decisive for its ratification. However, prior to this act, President Vaclav Klaus had asked for one more concession from the part of the European Union, this time regarding the Charter of Fundamental Rights. More precisely, the provisions of the Charter concerning the right to property could allegedly cause a conflict with the Beneš Decrees emitted right after World War Two, which expropriated the possessions of German and Hungarian citizens on the territory of Czechoslovakia

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<sup>1</sup> *Czech Constitutional Court OKs Lisbon Treaty*, CzechNews, 26 November 2008, <http://aktualne.centrum.cz/czechnews/clanek.phtml?id=623170>.

without the appropriate compensations.<sup>1</sup> This argument was in fact far from being new in the political discourse of the Czech Republic, as it has already been raised by right-wing politicians while negotiations were under way for EU accession. Nevertheless, it is difficult to assess the extent to which these claims are genuine and whether it was nothing more than another diversion from Klaus, who intended to make a stand as a promoter of a strong sovereign Czech state.

In reality, there are two aspects that need to be considered in interpreting this situation. Firstly, the same Decrees that Klaus insisted on upholding are part of the national law of Slovakia too, a state that made no claim whatsoever with respect to the Charter of Human Rights. Secondly, and most importantly, the European Union itself asked for a legal opinion from the part of the European Court of Justice during the negotiation process in order to assess the compatibility problems between the Community Acquis and these legal acts. The answer was self-explanatory, as it emphasized on the temporal impossibility from the part of the European Union to challenge the validity of the Beneš Decrees, since they were enacted before the European Communities were created, and *tempus regit actum*. This means that any measure taken by the EU against the abovementioned Decrees would break the basic principle of retroactivity, thus eliminating the potential threat to the Czech Republic in this regard.<sup>2</sup>

In spite of this, Vaclav Klaus promised he would sign the ratification instrument of the Lisbon Treaty on approval of this claim, which was conceded to him and led to his signing the Treaty on the day the Constitutional Court delivered its final verdict on the legality of the document, namely the 3<sup>rd</sup> of November 2009. Ten days later, the ratification document made its way to the Italian Government, marking the completion of the intricate ratification process in the Czech Republic and in the European Union as well and enabling the Treaty to come into force on the first day of the following month, as stipulated within it.

Although less energetic than the Czech opposition, Poland expressed a similar attitude towards the Treaty of Lisbon in the course of its ratification, thus it is worth including it into the category of the “new opposition”. It was the late President’s Lech Kaczynski who expressed publically, after the failed referendum in Ireland, that he had no intention of posing his signature on the document, until the situation was clarified. In the meantime, various discussions were conducted in Polish politics, which led to the signing of a protocol to the Charter of Fundamental Rights of the European Union, next to Great Britain, making this document virtually inapplicable in Polish legal

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<sup>1</sup> *Czech Republic 'planning to delay signing Lisbon treaty'*, Times Online, 21 September 2009, <http://www.timesonline.co.uk/tol/news/world/europe/article6841622.ece#>.

<sup>2</sup> *Legal Opinion on the Beneš Decrees and the Accession of the Czech Republic to the European Union*, Directorate-General for Research, October 2002, [http://www.kbdesign.sk/cla/projects/benes/related/legal\\_opinion\\_benes\\_decrees.htm](http://www.kbdesign.sk/cla/projects/benes/related/legal_opinion_benes_decrees.htm).

courts. This is because the provisions of the Charter are rendered non-mandatory for the two countries, especially the title referring to social and economic rights, which cannot be invoked in domestic courts as a consequence. For Poland, the arguments that were most frequently invoked pertained to social and ethical issues regarded as traditional, such as same-sex marriage, contrary to the UK, where the main point of concern was the extended right of workers to go on strike.

Internally, the perspective taken by Poland with regard to the Lisbon Treaty was quite complex, as the ruling party, led by Prime Minister Donald Tusk, had initially expressed its support for the Charter, in contrast with the Kaczynski brothers' Law and Justice Party. Nevertheless, the situation was more complicated than that, given that the Government needed the support of this party to achieve the ratification of the Lisbon Treaty in the Polish Parliament, which made Tusk change his initial attitude towards it. On the other hand, it is likely that Poland will eventually adopt the Charter of Fundamental Rights in the future, as Donald Tusk himself implied.<sup>1</sup>

It was the second referendum on the Reform Treaty in Ireland, in October 2009, which determined President Kaczynski to sign the ratification instrument, leaving the fate of the Treaty in the hands of the last two countries that had not completed the process at the time, namely Ireland and the Czech Republic - the former clearly not facing any more obstacles in the way to ratification.<sup>2</sup>

### **3. THE RATIFICATION PROCEDURE**

The Treaty of Lisbon, as in the case of other European Community/Union Treaties, was submitted to a sinuous process of ratification, before it finally became legally binding, on the 1<sup>st</sup> of December 2009, almost one year later than it had been expected to. There are various considerations that need to be made with regard to this process, so as to comprehend the reason why it took member states so long to get the necessary "paperwork" done, as well as the hurdles that had to be overcome along the way.

There are various steps that together form the lifeline of an international Treaty, some encountered in the case of European Treaties as well, while others are particular traits of the latter. First, the signing and ratification procedures have to comply with international law, making them safe from subsequent challenges from the part of their opponents. Therefore, the most important

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<sup>1</sup> *EU-Poland: Opt-out Protocol to the Charter of Fundamental Rights*, Statewatch News, 1<sup>st</sup> January 2008, <http://www.statewatch.org/news/2008/jan/01eu-poland.htm>.

<sup>2</sup> *Poland ratifies Lisbon Treaty as Czech cloud hangs overhead*, EU Observer, 10<sup>th</sup> October 2009, <http://euobserver.com/18/28809>.

steps undergone by the Treaty of Lisbon commenced with the drafting phase, which was conducted under the auspices of the European Council. The summit of Brussels in the summer of 2007 mandated an Intergovernmental Conference to prepare the draft of the new Reform Treaty, as it has occurred with previous such documents within the European Union. The purpose of this mandate is to provide the instance chosen to find the appropriate formulation for the Treaty with legitimacy, thus proving that the latter reflects the will of the member states. Contrary to national procedures in democratic states, however, this mandate was not conferred to the Constituent Assembly by Parliament, which represents the will of the people (in this case, the European Parliament), because in the case of the European Union, it is customary that the intergovernmental element at its highest level should be the one providing the impetus for further reform (Mads and Usher, 2003, p.240-241).

The following step in the evolution of the draft was for the Conference to choose the nature of the Treaty and the different approach taken by it, in comparison with its predecessor, the Constitutional Treaty. More precisely, it was decided that the new Treaty should not aspire to the status of a Constitution, so as not to fall into the same trap as its precursor. In exchange, the new document was given the name of Reform Treaty, which it would bear even today, had it not been for the Portuguese capital hosting its signing in December 2007. Along with its name, it was decided that the form of the new Treaty should be that of an amending one, which would replace articles from both the Treaty of Rome, henceforth named “Treaty on the Functioning of the European Union” and the Treaty of Maastricht, still referred to as the “Treaty on the European Union”.

Furthermore, the panel of experts that created the text of the new Treaty had to find an appropriate formula to make the text of the Charter of Human Rights<sup>1</sup> legally binding, without making this too obvious, so as not to openly confront the opposition that had rejected the Constitutional Treaty on these grounds - amongst others - in France and the Netherlands (Pécheul, 2008, p.101-102). Whilst this document included the text of the Charter as a national Constitution would normally do, it was decided that such a measure should be avoided in the new Treaty, but without abandoning the Charter, which awaited its empowerment since its approval in 2000 (Mads and Usher, 2003, p.399). The formula that was agreed upon was that of having a single article embedded in the text of the Treaty, which would give legal value to the Charter, a measure that is both effective and discrete, and does not bring the European Union much closer to a super-state, as the opposition might have argued.

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<sup>1</sup> *Charter of Fundamental Rights of the European Union*, in Official Journal of the European Union, 14 December 2007, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:0001:0016:EN:PDF>.

The Intergovernmental Conference in charge of drafting the Treaty had as a solid starting point the project presented to it by the Portuguese Presidency of the European Union (July-December 2007), bearing the name of “Draft Treaty Amending the Treaty on European Union and the Treaty Establishing the European Community”.<sup>1</sup> In order to make sure that transparency was guaranteed at all times, the draft was made public on the Council of Ministers’ website and subjected to public debate. Moreover, along with scholars and political representatives from all the member states, the workgroup also included three members delegated by the European Parliament, in order to represent the supranational interests of this institution. The work of the Conference was far from simple, as countless pressures from the part of member states, such as Poland and the Netherlands, exerted their influence on the final shape of the Treaty’s draft.

It was the October 2007 European Council in Lisbon, led by Portuguese Prime Minister José Sócrates, at the time President of the Council, that the final adjustments were made to the future Treaty of Lisbon, based on Polish claims to benefit from a cushion period until new qualified majority voting rules were applied in the Council of Ministers. This new form of the old Ioannina Compromise (Sauron, p.44-45), along with the nomination by Poland of an Advocate General at the European Court of Justice, guaranteed the Polish support, needed to sign the Reform Treaty the following month.<sup>2</sup> Indeed, on the 13<sup>th</sup> of December 2007, the much-awaited day of the official signing ceremony came, regrouping executive leaders from all the member states, with a temporary absence of British Prime Minister Gordon Brown, who put his signature on the Treaty a few hours later. Given that the Portuguese capital hosted the ceremony, more precisely the picturesque Jerónimos Monastery, the Reform Treaty was permanently given the unofficial name of Lisbon Treaty, in light of the European Union’s tradition in this regard.

Apart from the brotherhood atmosphere and the symbolism of this event, as shown in the traditional “family photo” of all the participants (including the Presidents of the European Parliament, Commission and Council), the moment started a chain of events that proved to be hard to predict, let alone control, before the Treaty of Lisbon finally became law two years after its signature. The procedure of ratifying the freshly-signed Treaty was similar to that of previous such documents, and consisted of two major steps. The first was for member states to undergo a parliamentary ratification process, according to national regulations, followed by the signing of the ratification instrument by their head of state. The second step was merely a formal one and it

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<sup>1</sup> *Draft Treaty Amending the Treaty on European Union and the Treaty Establishing the European Community*, Presidency of the IGC, 5<sup>th</sup> October 2007, <http://www.consilium.europa.eu/uedocs/cmsUpload/cg00001re01en.pdf>.

<sup>2</sup> *Declaration ad Article 222 of the Treaty on the Functioning of the European Union on the number of Advocates-General in the Court of Justice*, DS866/07, 18 October 2007.

consisted of depositing the ratification file with the Government of Italy, which had been chosen for this task.<sup>1</sup>

As previously mentioned, by then, the regulations of each member state but one stipulated or had been changed so that national parliaments were allowed to vote for the ratification of the Lisbon Treaty. Nevertheless, the Republic of Ireland was compelled by domestic law to hold a referendum for the approval of the Treaty, while other member states, despite rumours and previous public statements invoking potential referenda as well, did not recur to this instrument.

The very first member state to have ratified the document was Hungary, whose legislature expressed a categorical “yes” for it no later than four days after its signing, which seems extraordinary for such a complicated endeavour. For the procedure to be complete, Hungary finalized the ratification process on the 6<sup>th</sup> of February 2008<sup>2</sup>, once the ratification instrument, with the Presidential assent granted, was deposited at the Italian Government.

The other member states followed Hungary in the ratification effort, so that by the end of 2008, all but four member states had deposited their files. This did not mean, however, that the Treaty of Lisbon had a green light to come into force, as it needed to be ratified by all of the EU members before it could become law - and at least three of the four countries failing to act positively on it by 2009 were raising serious questions as to whether they would ever complete the process. While this was not the case of Germany, where support for the Treaty at the highest political level was reassuring, Poland, the Czech Republic and Ireland each posed severe problems in terms of ratification, as it has been pictured above.

On the other hand, there were two countries that had ratified the Lisbon Treaty with an absolute majority in their respective parliaments, namely Italy (in both the Chamber of Deputies and Senate)<sup>3</sup> and Malta<sup>4</sup>, with the rest approving the document with a comfortable majority (as in the case of Romania, where only one vote was cast against the Treaty and another MP abstained from voting). The closest vote was expressed, as expected, in the British House of Commons, but not even there was the ratification process even close to a standstill, with a difference of almost 150 MPs between those supporting the Treaty and those voting against it.<sup>5</sup>

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<sup>1</sup> *Treaty of Lisbon*, Article 6 (2)

<http://www.consilium.europa.eu/uedocs/cmsUpload/cg00014.en07.pdf>.

<sup>2</sup> *Hungary First to Ratify EU Treaty*, Deutsche Welle, 22<sup>nd</sup> October 2010, <http://www.dw-world.de/dw/article/0,,3010107,00.html>.

<sup>3</sup> *Italy's Senate Approves EU Treaty*, EUBusiness, 23 July 2008, <http://www.eubusiness.com/news-eu/1216842483.98>.

<sup>4</sup> *The Malta Government Gazette*, no. 115, 5 February 2008, <http://www.doi.gov.mt/en/gazetteonline/2008/02/gazts/GG%205.2.pdf>.

<sup>5</sup> *EU Treaty Bill Clears the Commons*, BBC News, 11 March 2008, [http://news.bbc.co.uk/2/hi/uk\\_news/politics/7290871.stm](http://news.bbc.co.uk/2/hi/uk_news/politics/7290871.stm).

The last ratification instrument to be deposited was that of the Czech Republic, on the 13<sup>th</sup> of November 2009. The Treaty of Lisbon stipulated that it would come into force only on the first day of the month following this event, which meant that the 1<sup>st</sup> of December 2009 was the day the ratification process officially came to an end, with the Treaty becoming part of the EU's legal system.

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