

Student Paper

‘The Union shall respect cultural diversity and national identities’ Lisbon’s concessions to Euroscepticism – true promises or a booby-trap?

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The Union shall respect the Member States’ cultural and linguistic diversity.
– Article 3(3) Lisbon Treaty

The Union shall respect (...) their national identity.
– Article 4(2) Lisbon Treaty

1. Introduction

The Lisbon Treaty states that the Union shall respect cultural diversity and national identity. Although the principles of subsidiarity and conferral are essential in the creation of powers for the Union, some of its institutions seem to express a progressive approach toward the development of a more centralised political entity, meaning that increasingly more powers would be exercised at the European Union level with less Member State sovereignty and autonomy. One of the first clear attempts to increase Union power was the rejected European Constitution, after which the Lisbon Treaty was created as a normal amendment treaty.¹ However, divergent perspectives exist on the nature of the Lisbon Treaty: is it merely an amendment treaty or is it a step towards a ‘new Union’? And, more importantly, how does the Union combine these ideals with the statement that cultural diversity and national identity will be respected?

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1 Lisbon is thus a normal amendment treaty and does not replace or repeal the former treaties. Strictly speaking, the former Treaties remain in force.

With regard to diversity and national identity-based Euroscepticism, it seems that some contradictory developments have taken place: on the one hand, controlling² or even restricting³ the Union's powers, on the other the expansion of powers in essential fields.⁴ A similar development can be seen with regard to the diversity among the Member States: some innovations seem to streamline or even restrict diversity; others protect and stimulate diversity. The question arises how these statements or 'promises' should be evaluated in relation to the new procedures and competences under the Lisbon Treaties.⁵ Do these competences and procedures under the Lisbon Treaties provide for a 'more democratic'⁶ and respecting Union than those under the former Treaties? Altogether, these actions seem to send out a progressive signal toward European integration by increasing the Union's powers. This is where Euroscepticism comes in: to what extent can the novelties under the Lisbon Treaties be evaluated in the light of some major Eurosceptic arguments opposing further European integration? Is the Union giving in?

Taking the foregoing questions as a guideline, this contribution provides a critical and normative observation of several essential developments and changes in relation to cultural diversity and national identity. Whilst the focus is an abstract and general one, several specific examples are discussed in a slightly more in-depth manner as they, in my opinion, have a great influence on the level of Euroscepticism and are, moreover, strongly linked to cultural and national identity. Since the Lisbon Treaty has entered into force rather recently, it is not yet clear what certain novelties exactly entail and how some procedures will work out in practice, and, additionally, how Member States appreciate certain interpretations and new competences. For that reason, and with regard to the validity of the views expressed in this contribution, it should be emphasised that the comments made are of a normative nature and are based on a critical analysis of the wording of the Treaties in conjunction with the Union's most recent initiatives, perspectives and proposals.

As observed in the Introduction, Euroscepticism is the phenomenon that opposes European integration by means of the Europeanisation of policies, legislation and politics, whilst the roots of Euroscepticism are diverse.⁷ It goes beyond the scope of this contribution to discuss all the different kinds of Euroscepticism. Therefore, it suffices to emphasise that this contribution concentrates on Euroscepticism based on the notion that with Europeanisation and European

2 Although the European Parliament is of course a Union institution, its new role in the codecision procedure is important to provide for an extra level of control, albeit *internal*. The role directed towards the European Parliament can in itself be considered as an expansion of Union competences. Thus, it cannot be said that the control mechanism, as carried out in the codecision procedure, restricts Union competences, as the European Parliament itself is a Union institution.

3 Review and opposition by National Parliaments for instance. This *external* critical review can lead to an adaptation of the proposal. This means that National Parliaments can directly influence European decision-making and restrict the framework within which proposals are considered acceptable.

4 For instance criminal law and within the AFSJ. See Section 3, *infra*.

5 With regard to the terminology: strictly speaking, the Treaty on the European Union (TEU) is referred to as the 'Lisbon Treaty'. The Treaty on the Functioning of the European Union is referred to as the TFEU. However, in addition, in this contribution the term 'Lisbon Treaties' refers to both the TEU and the TFEU.

6 The term 'more democracy' is used in multiple documents of various Union institutions to indicate the need to abolish the democratic deficit of the former Union. For instance, <European Commission, Communication from the Commission to the Council (COM(2007) 412 final), 10 July 2007>. European Council, <Presidency Conclusions of the European Council 11 and 12 December 2008, 13 February 2009>, and also the Laeken Declaration on the future of Europe (2001). However, in fact the term 'more democracy' or 'more democratic' is an ambiguous one. In the end, democracy is not measurable and, furthermore, different types of democratic procedures exist: which one is 'more democratic'?

7 Cf. P. Taggart & A. Szczerbiak, 'Introduction: Opposing Europe? The Politics of Euroscepticism in Europe', in P. Taggart & A. Szczerbiak (eds.), *Opposing Europe? The Comparative Party Politics of Euroscepticism*, 2008, pp. 1-15, at pp. 7-8. Furthermore, it is always important to determine the background of Eurosceptics as this can influence their perspective. See for instance R. Harmsen & M. Spiering, 'Euroscepticism and the revolution of European political debate', in R. Harmsen & M. Spiering (eds.), *Euroscepticism: Party Politics, National Identity and European Integration*, 2004, pp. 13-35. C. Gifford, *The Making of Eurosceptic Britain*, 2008, pp. 5-6.

integration national identity, sovereignty and cultural diversity are distorted.⁸ This distortion is undesirable as law and politics find their roots in culture and tradition. If mixed with values stemming from other cultures, legislation may be incorrectly applied due to the misinterpretation of certain norms and values.⁹ In short, the Euroscepticism referred to in this contribution relates to the cultural constraints argument, which reasons that differences among cultures frustrate legislative and political cooperation and that this cooperation should therefore be abandoned or restricted as far as possible: a decrease in diversity is considered to be a negative development.¹⁰ However, in my perspective this statement should be somewhat nuanced. A distinction should be made between a *voluntary*¹¹ decrease in diversity and a *forced*¹² decrease in diversity. In my view, only the latter lacks legitimacy, especially if read in conjunction with the promises made in Article 3(3) and Article 4(2) Treaty on the European Union (TEU).

In the subsequent section (Section 2) attention is paid to the term 'diversity' as well as to the manner in which the European Union's ideals are reflected in the Union's recent initiatives and activities. In Section 3 the competences under the Lisbon Treaties are analysed and a normative evaluation of the Treaties' novelties in the light of Euroscepticism related to cultural diversity and national identity is provided. Section 4 discusses the Lisbon Treaties' procedures. Again, a normative approach to the most relevant changes is taken. Finally, in Section 5 some resuming thoughts are presented as well as the conclusion which is drawn from the question of to what extent the Lisbon Treaty's promises concerning diversity and national identity should be regarded as true promises or whether they are just window-dressing.

2. Diversity and the Union's desire: towards a transfer of powers?

The manifest rejection of the Constitutional Treaty made the process of arriving at an alternative instrument – through force of circumstances 'just' an amendment treaty – rather sluggish. The presence of Eurosceptic parties in the European Parliament and the Member States increased significantly.¹³ New procedures, competences and developments under the new creation were controlled and discussed intensively and much criticism has been voiced concerning the final result: some say that Lisbon is only a weaker form of the Constitution and therefore still distorts the balance between the Union and the Member States; others state that Lisbon is only a standard amendment treaty, which will not achieve any new development as it lacks true innovation. The question arises what Lisbon actually entails. Is it really nothing but a weak amendment, or does it in fact take a significant step forward towards an effective, democratic and modernised European Union? In this respect, what is the Union's ideal? In order to place the changes with

8 This is Euroscepticism in its most traditional form as it was introduced by the British around the 1980s. M. Spiering, 'British Euroscepticism', in Harmsen & Spiering (eds.), supra note 7, pp. 127-149.

9 This 'cultural constraints argument' is often used in matters concerning European family law. For an interesting perspective from both sides see M.A. Antokolskaia, 'Family Law and National Culture. Arguing against the Cultural Constraints Argument', in K. Boele-Woelki (ed.), *Debates in Family Law around the Globe at the Dawn of the 21st Century*, 2009, pp. 37-51, P. Legrand, 'A Diabolical Idea', in A.S. Hartkamp et al. (eds.), *Towards a European Civil Code*, 2004 and P. Legrand, 'Against a European Civil Code', 1997 *The Modern Law Review*, pp. 44-63.

10 Legrand 1997 and 2004, supra note 9.

11 For instance enhanced cooperation, soft law instruments, spontaneous harmonisation, unanimity voting – albeit not completely voluntary, but at least all Member States have the right to veto.

12 For instance, in all QMV decisions the minority have to respect the decision adopted. This may infringe national identities and lead to an undesirable decrease in diversity.

13 G. Benedetto, 'Explaining the Failure of Euroscepticism in the European Parliament', in Taggart & Szczerbiak (eds.), supra note 7, pp. 127-150. Gifford, supra note 7, pp. 5-6. P. de Wilde, "'Welcome Sceptics!' A Pro-European Argument in Favour of Eurosceptics in the European Parliament', 2009 *Hamburg Review of Social Sciences (HRSS)* 4, pp. 59-73, at p. 59.

regard to competences and procedures within the context of this contribution, it is essential to reveal the Union's perspective with regard to the future of the EU in relation to diversity.

Diversity among Member States is and has been an important matter for the future of the Union. The protection of diversity is one of the main obstacles experienced by the 'ever closing Union'. As this contribution focuses on cultural, legal and political diversity with regard to cultural diversity, national identity and Euroscepticism, the most logical definition of 'diversity' would be: 'EU Member States having different features or characteristics, which are expressed in politics, legislation, common behaviour and national traditions'. Hence, diversity is linked to the differences between cultural and national identities and should not be mistaken with multiculturalism, which is the phenomenon of the societal coincidence of the multiple different cultures and identities and should therefore be seen as a broader concept.¹⁴ Cultural diversity and national identity have significant meaning with regard to the delegation of power to 'Brussels' and are therefore important in the light of the principle of subsidiarity and the principle of conferral (formerly the principle of attribution).

On the one side, diversity is something positive. Different states provide for different solutions and in many areas this results in an exchange of best practices, which can be very useful for innovating national approaches and solutions in every field.¹⁵ In addition, diversity forms an inspiration not only for surrounding states in national matters, but also for the EU.¹⁶ In this respect, the Union's enlargement not only leads to an economic improvement for the acceding states; it also gives a boost to European society and a new 'exchange of cultures', which may lead to new – legislative – initiatives and new problems that have to be solved. As regards decision-making, in many fields diversity does *not* frustrate consensus, especially since in most cases there is a common interest in the decision to be taken.¹⁷

On the other side, decision-making is exactly where the more complex sides of diversity occur. Inevitably, diversity leads to disputes between Member States or between the European citizens. These problems can occur in all fields imaginable, but are most present in fields that are closely linked to traditional national values, such as criminal law and family law. These values find their roots in national culture or religion and are often considered to be politically sensitive.¹⁸ It is these sensitive values that restrict the scope of EU action. Member States regularly prefer their traditional values to European cooperation and therefore diversity may restrict the Union's development. The more Member States are involved, the more the Union will be subject to these kinds of restrictions. However, to what extent is this restriction a bad thing? It can be said that diversity and national sovereignty coincide and that this is reflected in the Union's decision-

14 See also B. Parekh, *Rethinking Multiculturalism. Cultural Diversity and Political Theory*, 2000, pp. 1-11.

15 As far as this is concerned, one of the improvements of the Lisbon Strategy is that the Open Method of Coordination (OMC) has been defined as a soft law instrument. According to the Evaluation of the Lisbon Strategy, the OMC is a successful intergovernmental cooperation instrument. Commission Staff Working Document, Lisbon Strategy Evaluation Document (SEC(2010) 114 final), Brussels, 2 February 2010.

16 See the Preamble to the Lisbon Treaty: 'Drawing inspiration from (...)'

17 Art. 1 TEU.

18 For instance the Swedish veto with regard to the Rome III Regulation on conflict of law in cross-border divorces. Sweden stated that this Regulation infringed the liberal Swedish rules on divorce and considered it to be a decrease in national values. See K. Boele-Woelki, 'To be, or not to be: enhanced cooperation in international divorce law within the European Union', 2008 *Victoria University of Wellington Law Review* (VUWLR), pp. 779-792, at p. 785. M. Jännterä-Jareborg, 'Jurisdiction and Applicable Law in Cross-Border Divorce Cases in Europe', in J. Basedow et al. (eds.), *Japanese and European Private International Law in Comparative Perspective*, 2008, pp. 317-343. A. Fiorini, 'Rome III – Choice of Law in Divorce: Is the Europeanization of Family Law Going Too Far?', 2008 *International Journal of Law, Policy and the Family*, pp. 179-180. The same can be said for same-sex marriages and abortion, but also with regard to aspects of criminal law, education, and health care.

making procedures, ideas, and objectives.¹⁹ In this regard, it is interesting to analyse the EU's *true* ideas – also placed in the 'Constitutional Treaty perspective': does the Union truly respect cultural diversity and national identity? Or does it only state so in order to 'mislead' the Member States in the process so as to gain more competences? Coming back to diversity, it is thus the question of to what extent the restricting effect of diversity may frustrate the Union's future idea(s). This is where the different perspectives on what the Union *is* and what the Union *should be* are encountered.

As regards the Union's desires, some new signals seem to have appeared. Besides the well-known objectives²⁰ and statements²¹ that were introduced in the former Treaties, the Preamble to the Treaty of Lisbon contains some interesting statements concerning the EU's objectives and desires.²² Increasing transparency, improving democratic procedures, and stimulating efficiency and effectiveness²³ are the primary goals of the Lisbon Strategy and Lisbon Treaty.²⁴ In addition, involving the people in the process of further European integration is seen as an important issue too.²⁵ This is reflected in the 'promises' in Articles 3 and 4 TEU as well as by the new citizens' initiative. In short, the different peoples of Europe are taken into account in European decision-making. Diversity and national identity have thus been included in the basis of Union activity. However, the question is to what extent this coincides with the aim to increase effectiveness and efficiency. The two aims seem to be divergent.

3. New competences

3.1. *Exclusive, shared and supporting competences*

In order to create more transparency, the EU's competences have been divided into three categories: exclusive, shared and supporting.²⁶ The division, which was approved at the IGC in 2004,²⁷ serves as a clear overview of the balance between the Union's competences and those of the Member States. By the division of competences it is clearly visible that the Union has significantly changed since its original establishment: the economic approach has turned into a wider approach also connected to non-economic fields such as the environment and social policy. Furthermore, if one looks at the competences listed, one can see a rather clear division between

19 For instance, although since the establishment of the EU the Union's focus and competences have been broadened significantly, the politically sensitive areas (family law, environmental law, criminal law) have been rather unwavering as compared to other areas. Only in the Lisbon Treaty has a new step been taken toward an intensification of European integration in these areas. This may be an incentive for a 'new Union'.

20 I.e.: economic welfare, the functioning of the internal market and European integration by the four freedoms.

21 I.e.: the 'new stage in the process of European integration', 'an ever closer union', 'in view of further steps to be taken in the process of European integration'. All these statements have been introduced by the former Treaties.

22 The word 'objective' refers to the objectives explicitly expressed in the Treaties (see Art. 3 TEU). The word 'goal' or 'aim' refers to the goals of the Lisbon Strategy, meaning the whole process of the innovation and modernisation of the Union. The words 'desire' and 'ideal' refer to the broader ideas that exist on the institutional future of the Union. The different meanings should not be confused.

23 Some Union documents seem to mix up the terms 'efficiency' and 'effectiveness'; however, these are two different things: efficiency concerns the way decisions are taken, especially with regard to reasonable time and effort; effectiveness concerns the effect of decisions and to what extent they achieve the EU's objectives.

24 Transparency: Arts 1, 10(3) and 11(2) TEU. Efficiency and democracy: Preamble TEU. Lisbon European Council, Presidency Conclusions of 24 and 25 March 2000 (Lisbon Strategy). For an overview of the – too ambitious? – goals, see R. Boyer, 'The Lisbon Strategy: Merits, Difficulties and Possible Reforms', in M. João Rodrigues (ed.), *Europe, Globalization and the Lisbon Agenda*, 2009, pp. 149-164.

25 Preamble Lisbon Treaty. Art. 3(3) and Art. 4(2) TEU. Art. 165(1) TFEU. Art. 167(1) and (4). Art. 207(4(a)). S.C. Sieberson, *Dividing Lines between the European Union and its Member States*, 2008, p. 52.

26 Title I: Arts. 2 to 6 TFEU. Art. 3 TFEU contains a list of the exclusive competences of the Union. Art. 4 presents the shared competences and Arts. 5 and 6 contain provisions on the coordinating and supporting competences.

27 The IGC 2004 agreed on the categorisation of competences in Art. 13-I European Constitution (OJ C 310, 16.12.2004, pp. 15-16) that was first touched upon by the Laeken Declaration (2001). By supporting competences is meant the action to support, coordinate and supplement actions by Member States.

sensitive and less sensitive matters. Those areas which are connected to national values and traditions fall under the shared and supporting competences.²⁸

With regard to the supporting, coordinating and supplementing competences the Union has minimal involvement: Member State initiative is required. The supporting actions often consist of financial support. Under the new Treaty some interesting supporting competences have been added, including some politically sensitive matters such as health care and education.²⁹ As regards the influence of the limited interference of the Union, it is a means to attach the ‘Union seal’ to projects that in principle were initiated by Member States but were coordinated or financially supported by the Union. In that way, the Union expresses its goodwill and this may have the effect of more confidence among the Member States and their citizens. This confidence may contribute to the progressive approach towards more EU power. After all, the more confidence the EU enjoys, the greater possibility it has to develop its influence in other areas. Hence, the supporting competences are a clever tool to bring about confidence and a good image.

No new exclusive competences have been introduced by the new Treaties, and also the new shared competences have remained limited. However, it is remarkable that – especially with regard to the aim of improving transparency – several ‘old’ competences have been reformulated ambiguously and now allow for various interpretations – i.e. progressive or conservative. As will be discussed further below, an example of such an ambiguous reformulation can be found in Article 81 Treaty on the Functioning of the European Union (TFEU) on the regulation of family law with cross-border implications. If the EU would progressively interpret such vague provisions the consequence would be that the ambiguous wording would provide a basis for expanded Union powers which have gone unnoticed. That would mean that without the interference and approval of Member States, a competence is expanded by its more progressive interpretation. Normally it would not be likely that a competence would change in that way, but with regard to various recent Union initiatives, approaches and progressive actions,³⁰ it is not unlikely that several reformulated competences are supposed to be interpreted more progressively. This may for instance be the case with regard to Article 81(3) TFEU concerning legislation in cross-border family matters. Also, relating to this matter of ‘unnoticed expansion’, there are several questions concerning the status of the Charter of Fundamental Rights in relation to the competences it creates and to the balance of powers of the European Court of Justice (ECJ) and the other institutions.³¹ Whilst it is stated that the Charter does not lead to an expansion of competences, the fact that the UK, Poland and Ireland have adopted a special protocol restricting the consequences of the Charter illustrates that there are doubts concerning this particular statement.³² In addition, the flexibility clause or residual powers clause – the former Article 308 TEC – has become more lenient. The new Article 352 TFEU allows the EU – with the consent of the European Parliament – to take actions which are ‘necessary within the framework of the policies

28 This does not mean, however, that once a decision is taken on the basis of this kind of competence, diversity or national identity cannot be distorted. The competences protect sovereignty, but not cultural diversity and national identity.

29 See Art. 6 TFEU: tourism, sport, education, intellectual property law, and health care.

30 A few examples of Union enhanced action in private law regulation: 1) the desire of the EU to develop a Social Europe; 2) the Commission’s – ambitious – idea to design a ‘28th’ European matrimonial property regime, 3) the EU’s support for the (Draft) Common Frame of Reference; and 4) the recent adoption (in July 2010) of the Commission proposed regulation for enhanced cooperation in cross-border divorces.

31 Formally, according to Art. 6(1) TEU, no new competences are created, but as discussed in Sections 3.1.1. and 3.2.1. *infra*, this is questionable.

32 Protocol (No. 30) on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom. Conditions for ratification: Ireland, see <Presidency Conclusions of the European Council 11 and 12 December 2008, 13 February 2009>.

defined in the Treaties, to attain one of the objectives set out in the Treaties'.³³ Although it has been emphasised that the provision cannot be used to increase the EU's competences,³⁴ it is difficult to see how it could not be used in that manner. Even though the proposals are subject to 'subsidiarity control' by National Parliaments, it is the legal basis for actions for which no specific basis is adopted in the Treaties. Thus new competences are created, subject to the requirement of being 'necessary'. And, in addition, deciding what is 'necessary' is rather arbitrary.³⁵

It can be concluded that in several ways the Lisbon Treaties provide for a rather unnoticed expansion of competences. Thus, notwithstanding contrary statements in the Laeken Declaration,³⁶ the statement that competences not expressed in the Treaties remain under the sovereignty and responsibility of the Member States³⁷ seems not to be entirely true. Furthermore, besides the *substantive content* of the competences, the *impact* of certain competences may also have changed. The frequency with which certain exclusive competences were carried out under the former Treaties may change under the new Treaties: the QMV procedure is now applied instead of the unanimity procedure, so some competences may be exercised or effectuated more easily and may therefore have more implications in the Member States. In that sense, by the increased freedom of interpretation – due to a lack of clear wording – in combination with the ordinary QMV procedure the Union can 'make use' of the rather progressive Member States in favour of strengthening European integration. As indicated, this has to be seen in isolation from the substantive content of the competence, but is however important with respect to the possible increase in the influence of the EU, albeit under the control of a democratic system of decision-making.³⁸

3.1.1. Human rights: implications of the new status of the Charter

By the entry into force of the Lisbon Treaty, the European Charter of Fundamental Rights has gained the same legal status as the Treaties.³⁹ Although in the Treaties it has been stated that this new legal status will have no effect as regards new competences or powers,⁴⁰ this statement seems to be very doubtful.

Firstly, since the EU now has a legally binding human rights instrument for actions at EU level, it is bound to act in compliance with this instrument.⁴¹ In general this will have no influence, since for years the Union was already complying with the rights adopted in the ECHR. However, as the Charter is a very complete and specific instrument it may cause some problems, especially because the balance between Union competences and national cultural values seems to be blurred. The Treaties state that the Charter will not bring about new competences. Thus, if

33 Dutch Parliamentary Documents (*Kamerstukken*): Explanatory Memorandum (*Memorie van Toelichting*), *Kamerstukken II* 2007-08, 31 384, no. 3, pp. 23-24.

34 Compare Art. 352(2) TFEU: 'subsidiarity control mechanism'. Explanatory Memorandum, *supra* note 33, p. 23.

35 For an interesting discussion of Art. 352 TFEU see T. Konstantinides, *Division of Powers in European Union Law*, 2009, pp. 244-246.

36 With regard to a 'competence creep': while it is essential that the Union is able to explore new policy areas, it is important to question '(...) how to ensure that a redefined division of competence does not lead to a creeping expansion of the competence of the Union or to encroachment upon the exclusive areas of competence of the Member States?'. See Laeken Declaration on the future of Europe (2001) and Konstantinides, *supra* note 35, pp. 245-246.

37 Arts. 4 and 5 TEU.

38 See Section 4, *infra*.

39 B. Bercusson, 'The Lisbon Treaty and Social Europe', 2009 *ERA Forum: scripta iuris europaei* 10, no. 1, pp. 90-92.

40 Art. 6 TEU.

41 The former status of the Charter was unclear, also concerning the ECJ's case law. G. de Búrca, 'Beyond the Charter: How Enlargement Has Enlarged the Human Rights Policy of the EU', 2004 *Fordham Journal of International Law*, pp. 679-714. K. Lenaerts & P. Foubert, 'Social Rights in the Case-Law of the European Court of Justice', in P. van der Auweraert et al. (eds.), *Social, Economic and Cultural Rights*, 2002, pp. 162-163. R. Lawson, 'A Feast for Lawyers', in P. van der Auweraert et al. (eds.), *ibid.*, pp. 188-189.

a Member State does not act in conformity with any specific provision in the Charter, in fact the Union – while being bound by the Charter – has no competence to enforce the particular right. Nonetheless, – and this is most ambiguous – the jurisdiction of the European Court of Justice has been expanded to cover the Charter. In fact, at the EU level the ECJ is thus the only institution that can enforce the rights adopted in the Charter. In my perspective, this is somewhat strange, as it disrupts the balance between the legislative, executive and judicial institutions of the Union, and it leads to uncertainty as to the status of the provisions for the Member States and their national courts.

Secondly, as regards this national status of the Charter, it is stated that the instrument is primarily aimed at limiting the exercise of the Union's powers. However, the Charter itself does not only concentrate on rights in fields whose regulation falls within the Union's competences; it also contains rights related to, for instance, substantive family law.⁴² In that sense, the statement that the Charter binds Member States 'only insofar as they enforce or execute EU law' is an ambiguous one, the more so since the Charter has itself also become EU law itself. If it appears that the Charter is merely an extra instrument to enforce the proper implementation of EU law, it should be concluded that various rather specific provisions are adopted without any meaning. For example, the right to marry is adopted in the Charter. This right constitutes, above all, a substantive norm within family law, whilst the EU is assumed not to have any competences in substantive family law, but only in rules of private international law. Hence, the function and impact of this particular right in practice is doubtful. In that case, the Charter would not be fulfilling its task to provide for better protection for citizens and neither does it improve efficiency, effectiveness and transparency.

3.1.2. Area of Freedom, Security and Justice

Under the Area of Freedom, Security and Justice (AFSJ) several competences have been changed or added.⁴³ For instance, the Union's powers with regard to the politically sensitive and culturally-oriented fields of criminal law and police cooperation have been expanded.⁴⁴ Furthermore, new legal bases have been adopted, thereby expanding the Union's competences with regard to policies on border checks, asylum and immigration.⁴⁵

Among the instruments that the Union can issue in the field of judicial cooperation in criminal matters, as well as in police cooperation, are instruments that allow for active and effective Union action.⁴⁶ As far as this is concerned, especially in a field such as criminal law, cultural matters and national principles play an important role. If Union institutions – partially – take over the powers related to these sensitive fields, national values and cultural diversity may be damaged. This could be the case with regard to the approximation of definitions of criminal offences.⁴⁷ If there is such a conflict, the importance of national identity and cultural diversity has to be weighed against the effective enforcement of criminal law and police cooperation.

These fields, however, are not the only fields within the AFSJ that have been extended in favour of Union power. Also judicial cooperation in civil matters has been adapted to the Lisbon Strategy. Article 81 TFEU adds several new legal bases and also the 'approximation of laws' is now explicitly aimed at. However, besides this clear expansion there is also an obscurity within

42 For instance, the right to marry as adopted in Art. 9 of the Charter.

43 See Title V TEU. Sieberson, *supra* note 25, p. 64.

44 Explanatory Memorandum, *supra* note 33, p. 51 and pp. 59-62.

45 *Ibid.*, pp. 55-56.

46 This progressiveness is in line with the Tampere Conclusions. Tampere European Council, Presidency Conclusions of 15 and 16 October 1999.

47 Art. 67(3) TFEU.

the provision. The regulation of cross-border family law matters has until now been considered as a particularly sensitive matter, which is so closely connected to the cultural, traditional and sometimes religious principles of Member States that *substantive law* harmonisation or unification has been considered undesirable and at least infeasible.⁴⁸ As indicated above, the EU is assumed not to have any competences in regulating substantive family law. Nevertheless, the third paragraph of Article 81 TFEU is formulated ambiguously, especially when read in conjunction with Article 81(1) TFEU which promotes the approximation of laws. In this sensitive field it seems illogical that more competences – for instance, substantive law regulation – have been delegated to the Union, but the formulation of the third paragraph does not exclude this from occurring. It is evident that among the Member States there is no consensus as to the acceptance of Union interference in this field; the protection of national values plays its part.⁴⁹ On the one side, that does mean that the Union should respect the different approaches and in relation thereto the principle of subsidiarity. On the other side, however, it can also stimulate progress in this field. The latter is not as illogical as it may seem: if one looks at the rapid developments that the Union has gone through in the field of criminal and police cooperation, it is not incomprehensible that family law will go through such a development too. In addition to the other AFSJ fields, family law has an ‘extra strong’ legislative procedure which safeguards national principles even more.⁵⁰ Hence, because – in the eyes of the Member States – a ‘safer’ procedure applies, more risky proposals may be initiated.

3.2. Jurisdiction of the Court

With the abolition of the pillar structure and the establishment of a single legal framework within which the Union works, the jurisdiction of the ECJ has been extended. The jurisdiction now covers also the AFSJ – including criminal matters and police cooperation – and the Charter of Fundamental Rights. Besides the increase in the scope of the Court’s jurisdiction, also access to the Court has been improved.⁵¹

3.2.1. Charter of Fundamental Rights

As indicated before, the Charter does not extend the competences of the Union’s legislative institutions.⁵² The Lisbon Treaty states that in its activities the Union will respect the rights entrenched in the Charter.⁵³ Hence, it will serve as more protection for common rights and principles and will restrict the scope of Union powers, instead of creating new powers. On the other hand – and, in my opinion, somewhat contrary to this previous statement – the *enforcement* of the Charter falls within the scope of the ECJ’s jurisdiction. This is rather ambiguous: the Union’s competences are said not to be broadened by the adoption of the Charter, but the Court is allowed to decide on cases which involve the enforcement of the Charter.⁵⁴ In that respect it would be problematic if the ECJ would deliver a ground-breaking ruling on such a matter, as this would infringe the principle of *Trias Politica*, which could in fact in some way be applied to the

48 Therefore, this field of law has only been subject to instruments containing private international law, such as jurisdiction, enforcement and recognition.

49 That is related to cultural differences within the Union. Some Member States base their family law on conservative, religious principles (i.e. Ireland, Poland, Malta). And some Member States have a liberal and modern family law (the Nordic countries, the Netherlands).

50 Art. 81(3) TFEU. Extra subsidiarity control mechanism by National Parliaments and unanimity in the Council. However, a *passerelle* was also adopted.

51 See for example Art. 263(4) TFEU and Art. 263(3) TFEU.

52 Art. 6 TEU.

53 Art. 6(1) TEU.

54 See also Bercusson, *supra* note 39, pp. 92-93.

Union's system.⁵⁵ Taking the right to marry as an illustration once more, the Court could cause some commotion if it decides to take a substantive approach toward this right, since the Union's legislative institutions do not have such a competence. Once again the Lisbon Treaty has not provided for the transparency and clarity for which it was designed at first instance.

3.2.2. Area of Freedom, Security and Justice

The ECJ's jurisdiction has been strengthened and expanded to the complete policy area of the AFSJ.⁵⁶ The UK, Denmark and Ireland have adopted protocols containing exceptions to the applicability of the AFSJ provisions in these jurisdictions.⁵⁷ Consequently, no decision of the ECJ in AFSJ cases shall be binding upon or applicable to the UK, Ireland and Denmark.⁵⁸

For decisions stemming from before the entry into force of the Lisbon Treaty, their applicability depends upon the degree of participation of the UK and Ireland in these decisions or the specific area in question: for the UK and Ireland it is relevant whether the matters are compliant with the Protocol on Article 7A EC Treaty. In that respect, the Court's jurisdiction in AFSJ matters applies to the UK and Ireland in so far as it was already applicable under the Treaty of Amsterdam.⁵⁹

The Court's decisions concerning the AFSJ will be interesting, for these fields are particularly sensitive. With regard to the eventual increase in powers, the principle of primacy as developed by the case law of the ECJ⁶⁰ is essential. Whilst in the European Constitution a provision had been adopted that codified this principle, it was not feasible to include this codification in the Lisbon Treaty. Therefore, a Declaration has been adopted.⁶¹ The IGC 2007 has indicated that not codifying it actually has no real effect, for the principle has to be respected anyway. On the other hand, since the principle was not codified in the new Treaty, this is apparently a sensitive issue for the Member States. The increase in powers related to the principle of primacy results in tensions between the Union and the Member States. For instance, the fact that the principle is adopted in 'only' a Declaration can be perceived as a signal to the ECJ to be careful in the new AFSJ cases.

3.3. Legal personality

Formerly, the European Community had legal personality.⁶² The Treaty on the European Union, however, contained vague provisions on the legal acts of its institutions.⁶³ For the sake of clarity and in relation to the EU's position in international matters it was decided in 2002 that 'in the

55 The institutional balance has been increasing since the 'constitutionalisation' of the European Union. Especially under the current Treaty, which provides for various control mechanisms, as is discussed in this contribution, the separation of powers has become clearer and more visible. For that reason, the Union's institutional balance develops into a system which is similar to Montesquieu's *Trias Politica*. O. Holman, 'Asymmetrical regulation and multidimensional governance in the European Union', 2004 *Review of International Political Economy* 11, no. 4, pp. 714-735.

56 According to Art. 276 TFEU operational cooperation is excluded from the ECJ's jurisdiction. This is in conformity with the fact that also the CFSP is not included in the scope of the ECJ's jurisdiction. This was so under the former Treaties and is retained under the Lisbon Treaty.

57 Protocol (No. 21) on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice. And Protocol (No. 22) on the position of Denmark. Hereinafter: Protocol No. 22.

58 Art. 2 of Protocol No. 21. However, as regards AFSJ initiatives and measures, these three Member States are free to opt in whenever they want to. However, as soon as they opt into a particular project, they will have to comply with ECJ rulings concerning that particular matter.

59 Explanatory Memorandum, supra note 33, p. 39.

60 In Case 6/64, *Costa E.N.E.L.*, [1964] ECR 585, and further developed in e.g. Case C-213/89, *Factortame I*, [1990] ECR I-2433; Case 106/77, *Simmmenthal II*, [1978] ECR 629; and Cases C-6/90 and C-9/90, *Francovich*, [1991] ECR I-5357.

61 Declaration No. 17 of the <Declarations annexed to the final act of the Intergovernmental Conference which adopted the Treaty of Lisbon, 13 December 2007>.

62 Ph. de Schoutheete & S. Andoura, 'The Legal Personality of the European Union', 2007 *Studia Diplomatica* 60, no. 1, pp. 233-244.

63 Such as Art. 24 TEU (old).

future the Union should have its own explicit legal personality'.⁶⁴ In 2003 this decision was taken up in the European Constitution⁶⁵ and later in the Lisbon Treaty. Article 47 TEU now states that the Union has legal personality. Since the European Community has merged into the Union and is succeeded by it, this means that there is now a single and explicit legal personality. Because of the fact that under the former situation the legal personality of the Union was actually implied, the current provision will probably not bring any significant changes with regard to competences and external relations. However, combined with eventual accession to the ECHR the Union's legal personality may become a point of discussion in relation to new competences and the enforcement of the human rights provisions, also with an eye to the obscurities relating to the Charter.

3.4. Competences and diversity: an overview

One can say that under the new treaties not all competences have been regulated as transparently and unambiguously as one would expect in respect of the Lisbon goals. Indeed, the distinction of competences helps to clarify the balance between the Union and the Member States and restricts the powers of the EU in certain areas. This results in more protection for Member States' sovereignty to protect their national values. In addition, the categorisation indeed provides for more transparency for European citizens. Nevertheless, some provisions concerning the regulation of competences are rather vague and allow for multiple interpretations. Especially in the case of exclusive competences this is dangerous for diversity, but also in relation to shared competences these provisions may be harmful. They allow the Union to explore the Member States' views on the degree of Union interference. The more the Member States seem to allow – by not referring to the principle of subsidiarity – the more power the Union will gain in these vaguely regulated areas. The most evident illustration is the aforementioned Article 81(3) TFEU concerning the regulation of family law. In its Explanatory Memorandum to the Bill of Approval concerning the Lisbon Treaty the Dutch Government stated that – in accordance with the literal interpretation of the provision – under the Lisbon Treaty also substantive civil law – including family law – can be subject to approximation and harmonisation.⁶⁶ This is an extremely liberal – and revolutionary! – approach that is definitely not shared by all Member States. However, in case of a majority agreeing with this view, the Union may benefit from the liberal interpretation it has given to the provision and from the new ordinary procedure: because of the fact that – in general – Member States no longer have a veto, they can be forced by a qualified majority to accept such decisions. Evidently, this may severely damage diversity among the Member States, especially when it concerns areas of law and policy that are closely connected to national values and traditions.

As regards the ECJ, it is remarkable that the Charter of Fundamental Rights is now included within the Court's jurisdiction. At first glance, the adoption of the Charter as an instrument that has the same legal value as the Treaties would not be of any great significance for changes concerning cultural diversity and national identity, especially since Article 6 TEU states that the Charter will not extend the Union's competences. However, nothing could be further from the truth: the Charter contains highly specific provisions that may have significant

64 European Convention, Decision on Legal personality 2002 (CONV 305/02), 1 October 2002.

65 European Convention, Draft Treaty establishing a Constitution for Europe (CONV 850/03), 18 July 2003.

66 In fact, according to the literal wording of the provision, except for the applicability of another procedure, Art. 81(3) TFEU does not contain a deviation from the words in Art. 81(1) TFEU. In that sense, family law can indeed be subject to substantive law approximation. Explanatory Memorandum, *supra* note 33, p. 57.

effects on national legislation. As observed above, the right to marry has been adopted as a fundamental right. This leads to questions as to how this right should be interpreted, especially with regard to the non-discrimination clauses in both the Charter and the Treaties. Do homosexuals also have the right to marry? As soon as the Court will interfere in these kinds of matters, a great discussion on ‘European principles’ and notions will develop. In that case, there will be strong contrasts between the Member States, whose cultural and national identity will play an important part in the discussion. As regards this current ambiguous situation, several questions arise with regard to the role of the Court in fundamental rights cases. First, concerning the legal basis on which the Court operates and how this legal basis should be interpreted in the light of the principle of subsidiarity; second, why the Court *does* have the competence to rule on such matters, and why the legislative Union institutions *do not* have the competence to regulate these matters; and third, concerning the extent to which the Court is allowed to deliver rulings on substantive law involving fundamental rights.

These questions relate to the balance between national sovereignty and Union power as well as the internal separation of powers. Throughout the Union, fundamental rights are determined rather similarly. The ECHR, of course, has a significant impact on the recognition and regulation of human rights in Europe. However, that does not mean that the Member States allow the European Union to interfere in these issues as they often remain delicate. Since the Charter contains rather specific rights – political, social and economic – it is an even more sensitive instrument. And although the Lisbon Treaty emphasises that no new competences arise from the new status of the Charter, there seems to be some doubt as to the reality. For that reason, the UK, Poland and Ireland have adopted a Protocol on the application of the Charter of Fundamental Rights to ensure that the Charter will not have any influence on their national legislation related to rights adopted under the Charter.

The broader access to the Court is an important step in increasing trust in the European legal framework, with regard to European integration not only by citizens, but also by national courts. As the Dutch Explanatory Memorandum states,⁶⁷ due to this improved access to the court, the national legal orders and the European legal order will intertwine more extensively. This is clearly to the benefit of European integration: both in a social and in a judicial perspective the different systems are likely to converge. However, this means that diversity will decrease. In fact, the developments at the Court of Justice show a proactive approach by the Union to extending its interference. Not only will diversity be affected by the fact that the ECJ’s jurisdiction has been extended to the AFSJ and to the Charter, also the fact that individuals from the Member States have more possibilities to bring a case before the European Court shows that the Union is willing to exercise more power in more areas, thereby affecting cultural diversity among the Member States’ national courts – and laws – and diminishing national identity by delivering ‘universally applicable’ judgments in – increasingly – Europeanised areas. To put it succinctly, the effectiveness of the Union again seems to have primacy over the promise that cultural diversity will be respected.

In short, in relation to the competences under the Lisbon Treaties it is clear that despite the Union’s objectives to clarify the structure and balances and to increase transparency, some significant problems have occurred under the new Treaties. In some perspectives the competences and balances are indeed clearer, but in several important areas multiple obscurities exist

67 Explanatory Memorandum, *supra* note 33, p. 40.

in relation to the Union's powers and the possible decrease in diversity and damage to cultural diversity and national identity.

4. New procedures

4.1. European Parliament: codecision

For the effectiveness of a Union of 27 Member States it was necessary to adapt the decision-making and legislative procedures. Moreover, the 'democratic deficit' had to be abolished.⁶⁸ Therefore, the codecision procedure has been introduced as the new ordinary procedure.⁶⁹ This means that the Council decides by qualified majority and in addition *needs* the consent of the European Parliament, which has therefore gained a more powerful position in the Union and strengthens the democratic control of the Union.⁷⁰ Although the codecision procedure does not apply to all areas,⁷¹ in a majority of the areas the European Parliament has become a co-legislator.⁷² Hence, the Parliament's powers of decision are greatly enhanced.⁷³

4.2. Council of Ministers: QMV

The former ordinary procedure within the Council was the unanimity procedure in which every Member State had the right to a veto. However, with the enlargement of the EU to 27 Member States, this unanimity procedure would result in disproportional power for every Member State, which means a rather poor democratic system⁷⁴ and an ineffective decision-making structure. Although, under the former Treaties, this movement from unanimity voting to qualified majority voting (QMV) had already started, Article 16(3) TEU now introduces QMV as the new ordinary procedure.⁷⁵

According to Article 16(4) TEU, from November 2014 'qualified majority' will be defined as 'at least 55% of the members of the Council, comprising at least 15 of them and representing Member States comprising at least 65% of the population of the Union'.⁷⁶ This system, called 'the system of double majority', replaces the former system and provides for more efficiency, effectiveness and democracy in the Union.⁷⁷ Until March 2017, however, a transitional period will apply within which Member States may still request the application of the former calculation system provided for in Article 205 TEC. In addition, as a result of a strong request by Spain and

68 This term relates to the – lack of – democratic legitimacy and democratic control of Union actions and the complex procedures there were applied under the former Treaties. Sieberson, *supra* note 25, pp. 106-107. S.C. Sieberson, 'The Proposed European Constitution – Will it Eliminate the EU's Democratic Deficit?', 2004 *Colum. J. Eur. L.*, p. 173.

69 Art. 289 TFEU in conjunction with Art. 294 TFEU (the former Art. 251 TEC). Under the former Treaties – especially the Treaty of Nice – the development toward more QMV voting was introduced, and under the Lisbon Treaty it has been 'completed' in the sense that it is now the ordinary legislative procedure.

70 In fact the European Parliament has the right to veto. Art. 294 TFEU.

71 See Section 4 *infra*.

72 The codecision procedure has now been extended to, for instance, agriculture, fisheries, transport and structural funds. P. Ponzano, "'Executive" and "Delegated" Acts', in S. Griller & J. Ziller (eds.), *The Lisbon Treaty. EU Constitutionalism without a Constitutional Treaty?*, 2008, p. 139.

73 Also, the multi-annual financial framework will be subject to the approval of the European Parliament. Art. 9a(1) and 9c(1) TEU and Arts. 268-279b TFEU.

74 In the sense that the right to a veto does not contribute to democratic decision-making as it is a disproportional power that every Member State had.

75 Art. 9c(4) and (5) TEU, Art. 16 (4) and (5) TEU, Art. 205 TFEU and Art. 238 TFEU. The decisions that have to be decided by QMV have increased significantly and now amount to 44. Not only in the existing areas such as the AFSJ, but also in new areas concerning new legal bases such as intellectual property law, general economic interest, civil protection and energy.

76 Art. 16 TEU.

77 Explanatory Memorandum, *supra* note 33, p. 31.

Poland⁷⁸ a procedure based upon the *Ioannina compromise* has been adopted as a back-up mechanism. This compromise allows a group of states not being able to block the proposal to request a continued discussion for a reasonable time.

In some fields special legislative procedures apply. Nevertheless, sometimes the Treaty provides for the possibility to extend the applicability of the ordinary procedure. These are the ‘bridging clauses’ or *passerelles* which under certain conditions allow for the application of the ordinary procedure instead of a special legislative procedure. The application of the most regular *passerelle* requires the European Council to decide unanimously and with the approval of the European Parliament. In addition, National Parliaments can oppose this within six months. However, there are also special *passerelles* by which the Council is required to act unanimously and to consult the European Parliament.⁷⁹

4.3. National Parliaments

Besides the enhanced power of the European Parliament in favour of democracy in the Union, also the National Parliaments will be involved in European decisions. As a result, also on the national level there is more control of the Union’s institutions. National Parliaments can directly participate in a number of European decision-making procedures. Proposals by, for example, the Commission have to be sent to the National Parliaments, which can express their eventual opposition within six months. Without any opposition, the European Council may adopt the decision.⁸⁰

The role of the National Parliaments reflects the importance of the principle of subsidiarity. Parliaments are now in several areas the watchmen over the appropriateness of the level on which a decision is taken. This is the so-called ‘subsidiarity control mechanism’.⁸¹ Their intervention makes the Union institutions aware of their powers and limits. On the one hand, this enhances the democratic process, but on the other, it may also frustrate European decision-making to some extent, especially where the National Parliaments have the power to express their opposition against a proposal. If one-third of the National Parliaments contest the adoption of the proposal, it is suspended, and in that case the Commission is required to review its legislative proposal and to decide whether to maintain, withdraw or amend it. However, it is clear that, depending on the procedure which is applicable, the views of the National Parliaments are not always binding. For instance, if the Commission decides to maintain a legislative proposal when more than half of the National Parliaments contest this proposal – that is subject to the codecision procedure under the principle of subsidiarity⁸² –, the Commission has to explain its motives to the Council and the European Parliament, who then decide upon the proposal.⁸³

4.4. Unanimity procedure and other ‘special procedures’

Whilst the ordinary legislative procedure is explained rather comprehensively in the Treaty, the special procedures are not. Because of the fact that clear provisions on the particular special procedures are lacking, it is necessary to consult the specific legal basis requiring a special

78 Ibid., p. 32.

79 For instance Art. 81(3) TFEU. QMV does not in principle apply to measures concerning cross-border family law matters. However, a *passerelle* has been adopted. It is these AFSJ measures that play an important role in the lives of European citizens. For that reason, increased effectiveness by means of QMV was considered desirable.

80 Art. 48(7) TEU.

81 Arts 69 and 70 TEU.

82 Protocol (No. 2) on the application of the principles of subsidiarity and proportionality.

83 See Protocol (No. 1) on the role of National Parliaments attached to the Lisbon Treaty and Protocol No. 2 on the application of the principles of subsidiarity and proportionality.

legislative procedure.⁸⁴ It seems to be a case by case approach that differs depending on the particular area involved.

4.4.1. Unanimity procedure

As Article 289(2) TFEU determines, special procedures may apply to special cases when explicitly required by the Treaty provisions. As the provision states, this concerns the adoption of acts or decisions by the European Parliament with the participation of the Council, or vice versa.

One of the special procedures is the unanimity procedure,⁸⁵ which in general applies to the rather sensitive areas within European decision-making: social security,⁸⁶ languages,⁸⁷ tax,⁸⁸ institutional tasks and seats,⁸⁹ some main aspects of common foreign, security and defence policies,⁹⁰ criminal procedure⁹¹ and operational police cooperation.⁹² As regards the unanimity procedure, the role of the European Parliament differs. Firstly, in some areas requiring the Council to act by unanimity, the European Parliament is excluded from the decision-making process, meaning that the Council acts on its own – whether or not on a proposal by the Commission.⁹³ Secondly, in some of these areas, such as anti-discrimination measures,⁹⁴ the European Parliament has the right to consent, which means that the ordinary decision-making procedure of codecision applies; however, with unanimity within the Council. Thirdly, some areas in principle require unanimous action by the Council, but provide for specific *passerelles* which under certain conditions allow for the application of the ordinary legislative procedure⁹⁵ – thus, codecision with QMV in the Council. Fourthly, sometimes the consultation procedure applies. Lastly, there is also the rare possibility that the European Parliament acts on its own, be it either with or without the previous consent or consultation of the Council or the Commission.⁹⁶

4.4.2. Consultation procedure

In principle, the consultation procedure requires that the European Parliament is consulted before the Council decides. This is for instance the case in decisions concerning cross-border family law matters⁹⁷ and social security.⁹⁸ However, in many cases besides the European Parliament, another institution is consulted; for instance, under Article 127(6) TFEU both the European Parliament and the European Central Bank have to be consulted before a decision on specific supervision tasks is taken. With regard to social policies as well as to certain environmental matters, even two extra committees have to be consulted besides the Parliament: the Economic and Social Commit-

84 For instance Art. 218(6)(a)(iii) and 218(8) TFEU on the accession of the Union to the ECHR. Upon accession, the EU would become subject to an *external* human rights review by the ECtHR. Lawson, *supra* note 41, p. 203. Because this is such an important decision, it was chosen to apply unanimity voting to this procedure.

85 Art. 292 TFEU.

86 Art. 21(3) TFEU, Art. 153(2) TFEU.

87 Art. 342 TFEU.

88 Art. 113 TFEU.

89 E.g. Art. 223 TFEU.

90 E.g. Art. 20(2) in conjunction with Art. 77(3) TFEU.

91 E.g. Art. 82(2)(d)) TFEU, Art. 83 TFEU and Art. 86 TFEU.

92 Art. 87(3) TFEU and Art. 89 TFEU.

93 This is the case under, for instance, Art. 108 TFEU concerning state aid and Arts. 301 and 305 TFEU concerning the composition of the Economic and Social Committee and the Committee of Regions.

94 Art. 19 TFEU.

95 For instance Art. 81(3) TFEU, Art. 153(2) and Art. 192(2) TFEU.

96 Art. 223(2) TFEU concerning the duties of the Member States. Also see Art. 226 TFEU, Art. 228 TFEU, and Art. 319 TFEU.

97 Art. 81(3) TFEU.

98 Art. 21(3) TFEU.

tee and the Committee of Regions.⁹⁹ It is important to note that consultation is required, but it is not binding. However, hence, also in cases where the consultation procedure applies, the Council in fact acts alone.

4.4.3. *Going too fast? Emergency brake!*

The fact that decisions are much more easily adopted by QMV instead of by unanimity leads to the situation that also decisions concerning sensitive matters are more easily approved with the result that the opposing minority have to accept certain significant changes to their national systems or infringements to their national values – i.e. national identity. In general, decision-making always requires a compromise. However, especially in these sensitive areas it is necessary to provide for some protection for national norms and values. Therefore, for the three sensitive areas – social security and criminal law cooperation and approximation – that have now become subject to the QMV procedure, a special protection mechanism has been introduced: the emergency brake procedure. By this procedure a Member State can request the Council to refer the proposal to the European Council, thereby suspending the ordinary legislative procedure. The European Council will review the proposal and refer it back to the Council either with approval or rejecting it. In its review, the European Council will take account of the proposal's possible infringement of fundamental national values or whether it affects important aspects of the national system.

4.4.4. *Enhanced cooperation procedure*

The enhanced cooperation procedure, allowing Member States to proceed with a certain proposal if a qualified majority is not reached during the legislative procedure, has been clarified under the new Treaties. Although the main principles concerning this procedure were retained,¹⁰⁰ some changes have been made. First, the number of the required Member States has been raised to nine.¹⁰¹ Second, Member States are allowed to cooperate in more fields.¹⁰² For instance, within the Common Foreign and Security Policy (CFSP), defence matters may now also be subject to enhanced cooperation. Third – and most relevant to this contribution – the TFEU introduces the simplified enhanced cooperation procedure under the AFSJ. Four provisions allow enhanced cooperation if the *emergency brake procedure* does not lead to a solution.¹⁰³ Thus, if the Council cannot agree upon a proposal, and afterwards the proposal was unsuccessfully reviewed by the European Council, a minimum of nine Member States can 'go ahead' by notifying this to the European Parliament, the Commission and the Council. As the provisions state: 'in such a case, the authorisation to proceed with enhanced cooperation referred to in Article 20(2) TEU and Article 329(1) TFEU shall be deemed to be granted and the provisions on enhanced cooperation shall apply'. It is remarkable that in these politically sensitive matters relating to criminal law and police cooperation, enhanced cooperation is so easily applicable. Of course, it is the Member States that cooperate together on their own initiative and make progress in European integration in certain areas. However, on the other hand, the enhanced cooperation procedure can distort the balance between the liberal, progressive Member States and the more conservative Member

99 Art. 153(2) TFEU and Art. 192 TFEU.

100 For instance, the Member States have to respect the single framework of the Union and the procedure may not extend the competences as laid down by the Treaties. Also, the procedure should be considered as a last resort. It must further the Treaty objectives and cannot apply in areas of exclusive Union competence.

101 Art. 20(2) TEU.

102 Art. 20 TEU. Arts. 326 to 334 TFEU.

103 Arts. 82, 83, 86 and 86 TFEU.

States. Furthermore, it may affect diversity, and above all, result in – or increase – legal and political fragmentation. As regards this fragmentation, it is noteworthy that in March 2010 the European Commission published its proposal for enhanced cooperation regarding cross-border divorce.¹⁰⁴ Almost nine months after the Commission rejected a cross-border divorce proposal for enhanced cooperation between ten Member States, it presented its own proposal.¹⁰⁵ Sweden had earlier blocked the Rome III Regulation as it was afraid of losing its liberal divorce law – a typical illustration of the damage that the Union can bring about when it comes to diversity and national identity!¹⁰⁶ The Commission's proposal for enhanced cooperation may lead to the first actually implemented enhanced cooperation, as until now this procedure has never been applied. It is most interesting to see that this procedure – being a sensitive issue for the 'Europe of two speeds' constraints¹⁰⁷ – will now probably be applied to one of the Union's most sensitive and delicate areas: family law.

4.4.5. Citizens' initiative

Cultural diversity and national identity relate to the way that citizens behave. Their moral, religious, and traditional behaviour in a national society results in society having its own identity, with the result that there is a great diversity among Europe's Member States. For that reason, the citizens' initiative as introduced by the Lisbon Treaty may become a decisive means for the course of European activity. Dependent on the popularity of the citizens' initiative, this new concept may have an influence on the focus of the European Union. Although the minimum number of citizens participating in the initiative is only one million – in a Union of approximately 492 million citizens – the other requirement is important in respect of diversity and the importance of the initiative at the European level: they have to be nationals of a *significant number* of Member States. In that way, the 'European interests' of the initiative are guaranteed, instead of only national interests. It remains to be seen how popular the citizens' initiative will become and to what extent the Commission, in its policy-making and legislative activity, will 'involve the peoples'¹⁰⁸ and be guided by the citizens of Europe.¹⁰⁹ In March 2010 the Commission published its proposal for the 'clarifying regulation' concerning the citizens' initiative.¹¹⁰ What can at least be said is that the initiative may become important for the trust of European citizens and for the micro-level integration of the European Union: citizens coming together to determine what is really important in the EU.

4.4.6. Withdrawal from the Union

Besides the consequences for the effectiveness and progression of the Union, respect for cultural diversity and national identity is important, not in the last place since under the Lisbon Treaty Member States are able to withdraw from the Union. Not respecting diversity, i.e. being negligent of the national consequences of a European decision, would interfere too heavily in the national order and be contrary to the principle of subsidiarity and the principle of conferral. Union infringements of these principles – meaning infringements upon Member States' cultural

104 <European Commission press release, European Commission goes ahead with 10 countries to bring legal certainty to children and parents in cross-border marriages, 24 March 2010>.

105 Both initiatives are directly the result of the failure of Rome III, the regulation concerning choice of law in relation to cross-border divorces.

106 Boele-Woelki, supra note 18, pp. 779-792, at p. 785. Jänterä-Jareborg, supra note 18, pp. 317-343. Fiorini, supra note 18, pp. 179-180.

107 Sieberson, supra note 25, pp. 128-129.

108 Preamble Lisbon Treaty. Art. 3(3) and Art. 4(2) TEU. Art. 165(1) TFEU. Art. 167(1) and (4). Art. 207(4(a)). Sieberson, supra note 25, p. 52.

109 See the press release by the <European Commission, European Citizens' Initiative: giving citizens new possibilities to influence EU policy, 31 March 2010>.

110 <Proposal for a Regulation of the European Parliament and of the Council on the citizens' initiative (COM(2010) 119 final), 31 March 2010>.

diversity and national identity – could lead to opposition, especially if these infringements occur with increasing frequency.

In addition, although it is not expected that Member States would readily withdraw from the Union, the procedure can also be used as a political pressure tool. Especially with regard to the change of the ordinary legislative procedure to qualified majority voting, Member States may use this threat instead of their former veto. On the other hand, it can also be said to be the other way around; if it appears that one Member State consistently opposes the further development of the Union, the other Member States may recommend or pressure this state to withdraw from the Union. That serves two goals: first, the further progression of the Union, and second, the preservation of the conservative Member States' cultural and national identity. However, it remains to be seen how easily a Member State would withdraw for reasons of cultural and national identity, since in most cases the economic benefits are the leading actors in European Union membership.

4.4.7. Hidden pillar?

What is remarkable at first glance when one looks at the Treaties is that all procedures, competences and working areas are adopted in the TFEU, except for the CFSP, which is adopted in the TEU. The main reason for this is that the CFSP is of such a specific nature that it had to 'avoid' being applicable to the general procedures under the TFEU. Not only the decision-making procedures differ, also the institutional structure, governance and competences strongly deviate from all other areas. Except for the general competence of the Union to define and implement a CFSP – including a common security and defence policy –¹¹¹ and some explicit exclusions or specific procedures,¹¹² the CFSP has been evaded in the TFEU. All relevant provisions and specific procedures are adopted in the TEU. In this sense, one could reason that the CFSP was not included in the merger of the European Union and the European Community. In fact, one could argue that the CFSP is still some sort of pillar, for it totally deviates from all other areas and procedures, just as before under the Second Pillar.

4.5. Procedures, roles and diversity: an overview

Following from the aforesaid, it can be concluded that the changes in procedures and roles contain many aspects relating to more or less diversity and the protection of national identity. But what should be considered the 'final approach' if we compare and analyse the different aspects?

One of the goals of Lisbon was to increase the democratic procedures by which decisions are adopted. 'Increasing democracy' should be interpreted as making the procedures more effective by abolishing unanimity voting. Getting rid of the right to veto decisions is considered to provide for 'more democracy'. However, although at first sight this might appear to be logical, in fact this is questionable. Under the unanimity procedure every Member State had to approve the decision before it was adopted. Although this may indeed not be the most effective method of decision-making, it in fact leads to decisions that are adopted with the support of every state. A decision can therefore not be more democratically supported. On the other hand, and this was considered an aspect of the 'democratic deficit' of the Union, one Member State could spoil the

111 Art. 2 TFEU.

112 Art. 218(3) TFEU excludes purely CFSP agreements from the scope of the particular procedure. Art. 275 TFEU explicitly excludes the CFSP from the ECJ's jurisdiction. Arts. 329 and 331(2) TFEU prescribe a special procedure for enhanced CFSP cooperation. And finally, Art. 352(4) TFEU – the residual powers clause – excludes any CFSP-related activity from its scope and in addition refers to Art. 40(2) TEU concerning CFSP rules.

situation for the other Member States: even if only one Member State would not agree with a certain decision, the proposal has to be rejected.¹¹³ Hence, in a Union of 27 Member States among which a high degree of diversity exists, the unanimity procedure was considered as ineffective and democratically weak: QMV was introduced as the ordinary legislative procedure. This procedure may indeed be more effective; however, it is not necessarily 'more democratic' as the Union documents like to state.¹¹⁴ A qualified majority decides for all Member States, meaning that, in contrast to the unanimity procedure, other Member States can be 'damaged' or be impaired in their national sovereignty and national values. Is this 'more democratic'? No, but it is more effective. As regards this effectiveness, it is interesting to analyse the goal of the Union. Apparently – and this is thus illustrated by e.g. the QMV procedure – its effectiveness is more important than respect for and the protection of national values and cultural diversity.

As regards the simplified way of adopting decisions, it was recognised that more control was needed in order to restrict this negative influence of QMV on Member States. For that reason, the roles of both the European Parliament and the National Parliaments are improved.¹¹⁵ The codecision procedure is important for the protection of diversity and the principle of subsidiarity. Furthermore, in some cases also the National Parliaments serve as a 'subsidiarity control mechanism'. However, although National Parliaments can now indeed be directly involved in European decision-making in order to safeguard national principles and, related to that, cultural diversity, they cannot block a decision. Their role is thus restricted in favour of effectiveness and at the expense of the protection of – and respect for – cultural diversity and national identity.

Besides the most important changes as regards the codecision procedure and the qualified majority procedure, the special procedures that are provided for also have an effect on diversity and national identity. In some sensitive fields, unanimity is retained. In principle, this enables the Member States to protect their national values and to protect diversity. In those special areas the Union indeed seems to respect diversity among the Member States. However, with regard to several unanimity decisions under the AFSJ, the Treaty provides for a simplified enhanced cooperation procedure in case the legislative procedure – after applying the emergency brake procedure – does not lead to an effective decision. This innovation contains three interesting aspects with regard to diversity and national identity.

1. The AFSJ, which exists in the Union's most sensitive areas – criminal law, police cooperation and civil law including family law –, retains the unanimity procedure, though several *passerelles* have been taken up. The fact that the National Parliaments play an important role in this area and the fact that unanimity is required show the sensitiveness of this field. In this respect, the Union seems to take into account the differences between Member States and the principle of subsidiarity.

2. The emergency brake procedure, which provides for extra protection for national values and fundamental principles. Although the review by the European Council does not *per se* have to lead to a revision of the proposal, it is clear that by introducing this new revision the Union has made an effort to comply with the promises made in the Preamble to and in Articles 3 and 4 TEU.

113 Sieberson, *supra* note 25, pp. 106-107. Explanatory Memorandum, *supra* note 33, pp. 83-94.

114 For instance, <European Commission, Communication from the Commission to the Council (COM(2007) 412 final), 10 July 2007>. Also the <Presidency Conclusions of the European Council 11 and 12 December 2008, 13 February 2009>, and the Laeken Declaration on the future of Europe (2001).

115 Explanatory Memorandum, *supra* note 33, pp. 51-53.

3. The enhanced cooperation procedure. Overall, the clarification and expansion of the enhanced cooperation procedure as well as the creation of a simplified procedure may lead to an enhancement of this procedure's position. With regard to diversity and national identity several remarks should be made. Primarily, enhanced cooperation allows Member States to proceed where other Member States prefer to stop. The big advantage is thus that the Union can develop further, albeit only with a group of Member States. Another advantage is that this does not infringe upon the cultural diversity and national identity of other Member States. On the other hand, the problem is that this results in a so-called 'Europe of two speeds', meaning that a division is made between the fast forward, progressive Member States and the slow, conservative Member States. This would damage the image of the European Union, which is trying to be a unity. Furthermore, it would not contribute to the European identity and, above all, it will cause political fragmentation. The fact that enhanced cooperation will in many cases lead to a decrease in diversity does not make sense with regard to the purposes of the *Union*. It is the *Member States* that decide to cooperate in matters that are not – yet – feasible on the 'complete' Union level, risking a decrease in diversity. In these cases the decrease in diversity is completely voluntary and should therefore not be seen as a negative development resulting from Union action. The EU institutions only have to authorise the cooperation, except in cases where the simplified procedure applies.¹¹⁶

Besides these special procedures, also the citizens' initiative is relevant, as well as the withdrawal procedure and the CFSP 'pillar'. As was already discussed briefly, both procedures are not expected to have much effect on the degree of diversity or respect for national identity, but they are interesting in this perspective. In short, the citizens' initiative would be a tool for shaping the course of European activity. An eventual decrease in diversity would to some extent be legitimised by the fact that European citizens – required to respect several conditions – take the initiative and request Union action. The withdrawal procedure is relevant as a political pressure tool and may be used if the Union frequently infringes national principles or decreases diversity too strongly. Concerning the exceptional 'pillar' on the CFSP it can be stated that in this field special procedures apply – other than those under the TFEU! – and that the protection of national values and diversity is rather high.

Resuming, it seems that in general there is a fairly good balance between new procedures that protect diversity less and those protecting it to a greater extent, depending on the sensitivity of the particular field. Although the ordinary procedure appears to allow for an easier method of decision-making, the special procedures and fields often still require unanimity and give a greater role to the National Parliaments. However, whilst the roles of the European Parliament and the National Parliaments have improved, it remains to be seen to what extent these roles will affect effective European decision-making. This effectiveness of the Union is, combined with democracy and transparency, the most important objective with regard to the change of procedures. It seems that effectiveness has primacy over the protection of and respect for diversity and national identity. Where these matters have been taken into account, for instance with regard to the roles of the European Parliament and the National Parliaments, there appears to be tension between the effectiveness and the loss of diversity. However, it is not yet clear to what extent these new roles will have an influence and to what extent the Eurosceptic parties may – either directly or indirectly – influence European Union action.¹¹⁷

116 Arts. 82, 83, 86 and 87 TFEU.

117 J.-V. Louis, 'The Lisbon Treaty: The Irish "No". National Parliaments and the Principle of Subsidiarity – Legal Options and Practical Limits', 2008 *European Constitutional Law Review*, no. 4, pp. 429-452.

5. Final remarks – Promises under the Lisbon Treaty: giving in to Euroscepticism?

With an eye on Lisbon's innovations, it seems that 'effectiveness and efficiency' should be interpreted as the way by which to adopt decisions most easily and rapidly, rather than with the strong support of the Member States. The recent proactive and sophisticated attitude of the EU presents the idea that effectiveness in relation to the expansion of Union powers is more important than respect for Member States' cultural diversity and national identity. Therefore, the question has arisen how these 'promises' in Article 3(3) TEU and Article 4(2) TEU should be interpreted: are they indeed meant to be respected in every activity of the Union? Or are they adopted as a means to convince the Member States of the goodwill and durability of the Union, while actually not being lived up to? In that sense: are they a booby-trap misleading the Member States for the benefit of the Union?

5.1. Euroscepticism and the Lisbon Treaty: the main findings

These questions are related to one of the most important aspects of 'diversity-related' Euroscepticism. Three different, though interrelated, subjects have been discussed in order to balance the innovations with the main arguments of Euroscepticism. Starting from the 'fresh' Treaty text, the Union's recent initiatives and activities, and some basic documents, this contribution has provided for an evaluation of the Lisbon Treaties' innovations in the light of cultural diversity and national identity. It has appeared that, in general, these innovations seem to be in favour of the effectiveness of the Union, thereby ignoring the consequences that decisions and procedures can have for cultural diversity and national identity. Some novelties, such as the role of National Parliaments, slightly compensate for this by providing extra protection for national values in certain areas, such as family law. Overall, however, the promises to respect cultural diversity and national identity seem to be little more than window-dressing. A short summary of the main findings:

1. Concerning the future of the European Union with regard to its *finalité*, it was considered that it seems that the Union wants to increase its powers. Since the Union is 'Member State-made' it should be investigated to what extent this is really desirable and feasible. In this respect, the aspects of cultural diversity and national identity are essential in relation to the delegation of competences and the design of decision-making procedures. Although this assumption is based on Union documents, it is difficult to draw indisputable conclusions therefrom. The overall conclusion of the Union's most recent attitude is that respect for cultural diversity and national identity is not guaranteed. For reasons of progressiveness and effectiveness, the Union seems sometimes to overestimate the Member States' willingness to give up their sovereignty. However, even if it would appear to be true that the Union has the ideal to become a more centralised political entity, this does not mean that it cannot have respect for cultural diversity and national identity. As is evidenced by, for instance, the USA and India, diversity is not *per se* damaged by centralised governance. Hence, in fact the creation of a European state-like entity is not insurmountable with regard to respecting diversity and national identity. However, it all depends on the design of the governance¹¹⁸ of the European state-like entity to what extent it would increase Euroscepticism.¹¹⁹

2. Regarding the competences, it can be stated that a majority of the competences have remained the same. Only a few new competences have been introduced, albeit only shared and

118 I.e. how the Union would realise the centralised political entity: similar to how it is organised today, or e.g. increasing its state-like features.
119 S. Hix, 'Euroscepticism as Anti-Centralization', 2007 *European Union Politics*, no. 1, pp. 131-150.

supporting competences. The categorisation of competences clarifies the balance between the EU and its Member States. Nonetheless, some areas are ambiguously formulated. These ambiguous provisions give the EU the opportunity to explore how far the Member States are willing to go before they invoke the principle of subsidiarity. Nevertheless, in combination with the – special – procedures applied to these particularly vague provisions, it seems that there is enough control of the Union to conclude that it does respect the diversity and national identity of the Member States. In general, the adaptations made to the competences do not seem to infringe the promises made in Articles 3 and 4 TEU.

3. With regard to the new procedures under the Lisbon Treaty, several contradicting remarks can be made. The ‘democratic deficit’ of the ordinary legislative procedure under the former Treaties has been abolished in the sense that, in general, the Member States no longer have a veto. On the other hand, for reasons discussed earlier, it does not mean that the QMV procedure is in all perspectives ‘more democratic’ than the unanimity procedure. In an increasing number of cases decisions are adopted much more easily than under the former treaties. This may imply that the minority are – or may be – overruled in their national values, resulting in a decrease in diversity that is not supported by every Member State, as it was under the former Treaties’ unanimity procedure. As regards the roles of the European Parliament and the National Parliaments, one can say that two new control mechanisms have been introduced: one internal and one external. This is to the benefit of diversity and national identity. Furthermore, it seems that the special procedures, applicable in more politically sensitive fields, are also a sign of respect for diversity and national identity. However, overall, a certain tension is perceivable between this respect, on the one hand, and effectiveness on the other. It appears, as evidenced by the choices made concerning procedures and roles, that effectiveness is preferred over respect for diversity. In conjunction with the Union’s assumed ideal, this is perfectly logical. In the end, the Union can only achieve its *finalité* when the Union’s powers are effectively exercised. Taking the effects on diversity and national identities too much into account would frustrate European decision-making.¹²⁰ Hence, if that means that due to certain decisions diversity decreases – as is assumed in this survey – then so be it.

5.2. Conclusion

Resuming, although the Treaty has the intention to attach considerable value to the sovereignty of Member States and their cultural and national identity – thereby respecting diversity to some extent – the overall signal that the Union seems to emit is one of gradually expanding the Union’s powers. In that sense, the promises made do not seem to be much more than window-dressing. In an effectively functioning Union, cultural diversity and national identity seem to be considered as obstacles standing in the way of smooth cooperation and effective decision-making. The promises to respect diversity and national identities cannot be lived up to as this would be contrary to the Union’s actual idea(l): an increase in powers. Concerning this desire, it is interesting to discover the EU’s exact prospects.

Many novelties that were introduced by the Lisbon Treaty seem to have – gradually – led to more Union power and interference.¹²¹ Whilst every Member State has ratified the Treaty, the

120 Which in itself could lead to Euroscepticism from another angle: slow, complex and ineffective procedures are another aspect of Euroscepticism as referred to in the introduction.

121 I.e. Increasing the amount of policies and legislation at the EU level; increasingly interfering in national matters; creating ‘supporting competences’ in areas in which exclusive or shared competence is not yet feasible, so that the Union can still interfere in these sensitive matters.

ambiguous provisions and empty spaces concerning competences can be interpreted and filled in in different ways depending on the approach taken: either progressive or conservative as regards more Union powers. The question is how the Union institutions will be filling these spaces in the coming years and how Member States will perceive this. The more they allow, the more the establishment of a more centralised political entity becomes imaginable.

With regard to effectiveness in relation to an increase in Union powers: although many new rules concerning procedures and competences are in favour of effectiveness, it remains to be seen whether the EU will indeed be more effective, or whether its stimulation of effectiveness will have a counter-effect: the more effective the EU will become, the more opposition it will receive, especially when its decisions frequently distort national values and cultural diversity. There thus appears to be a conflict between effectiveness and progress. While these two terms should normally be interconnected, an increase in effectiveness can now lead to opposition which brings progress to a halt. As far as this is concerned, it may be interesting to see whether the Lisbon Treaty, while containing promises such as those subject to this survey and other 'safeguards', may actually lead to more Euroscepticism. It can be concluded that although the Treaty has finally entered into force, the discussions and negotiations concerning its provisions and ideals are expected to continue for a while... In that respect, there will always be the everlasting *political* diversity concerning the considerations on progress *versus* cultural diversity and national identity and, on the other side, progress *and* cultural diversity and national identity: the core considerations of Euroscepticism.