From EU Constitution to the Irish referendums on the Lisbon Treaty

By Jens-Peter Bonde

The EU Constitution, the Lisbon Treaty and the two Irish referendums analysed by a Danish member of the two constitutional conventions, Jens-Peter Bonde.

Foundation for EU Democracy

"The Treaty of Lisbon is the same as the rejected constitution. Only the format has been changed to avoid referendums."

Valéry Giscard d'Estaing,
former French President and President
of the Constitutional Convention in several
European newspapers, 27 October 2007

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Jens-Peter Bonde is the author of 60 books on the EU. He has also published a reader-friendly edition of the Lisbon Treaty and the Constitution containing an index of more than 3000 alphabetically listed words.
This book can be downloaded for free along with a practical guide and a commentary on the web page: www.bonde.com and www.euabc.com

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German ratification stopped by 8 Judges

On 30 June 2009 the German Constitutional Court in Karlsruhe dealt a large blow to the Lisbon Treaty. The Court's verdict may be difficult to ignore because it may be the basis for many other court cases and a fresh start in bringing the EU closer to its peoples.

It is a little ironic that a treaty initiated and pushed so hard by German politicians might fall apart because of their own constitutional judges.

Formally the 8 judges say they *approve* the Lisbon Treaty in principle. But they then describe a treaty completely different to what they say they may approve.

The draft Constitution was first initiated by the former German Foreign Minister, *Joschka Fischer*. Chancellor Angela Merkel then turned it from a Constitution into a treaty with identical content.

The heart of a constitution everywhere is the answer to the simple question, *who decides*? The heart of the draft Constitution was Art. 6, which stated the *primacy* of Union law over national law.

This core principle is now moved to Declaration No. 17 in the Lisbon Treaty. The text is made more difficult to read. But the core is still exactly the same: If there is a conflict between a piece of EU legislation and a national law the EU rule must prevail.

No national law - or national constitution - can annul any rule from the EU. If there is any doubt the Lisbon Treaty gives the *monopoly* of *all* interpretations of EU law to the European Court of Justice in Luxembourg. See Art. 344 TFEU – perhaps the single most important article in the treaty.

It is actually *illegal* for member states to settle any conflict between them concerning EU law in any body other than the highest Court of the EU. National judges are legally *obliged* to send all questions of interpretation to Luxembourg.

The member state judges and authorities are then bound to implement what the judges in Luxembourg have decided.

Legally speaking, the EU will look like all other states when the Lisbon Treaty is implemented.

No, No, 'No' is then the surprising but very blunt comment from the 8 German judges.

We will decide in Karlsruhe on any conflict between German and European law. Fellow citizens, come to us with a court case if you think the European

institutions have taken decisions outside the areas delegated to the EU to decide on.

The German judges want Germany to control the borders between German sovereignty and EU competences. The EU should no longer be allowed to develop its own competences. The EU should not be a *state*, according to the German Court.

The EU shall only be a limited cooperation between 27 sovereign nations, which shares some specific competences – only those that are handed over by the treaties.

The Lisbon Treaty and the draft Constitution is not a constitution at all, according to the German judges. It is just a normal international treaty like all other treaties, the judges insist – in sharp contradiction to several verdicts of the EU Court over the years since 1964.

Outright rejection is the unanimous answer of the eight German constitutional judges to Fischer's dream of a European Constitution and a European federal state.

The judges continue: Many of the new competences handed over to the EU through the Lisbon Treaty will also remain as sovereign German policies to be decided by German voters and the German Parliament.

The German constitution is a *democratic* constitution. *All* power originates from the German people, as *voters*. Germany could only approve a European constitution if it was a true democratic constitution with a true parliament. Then every citizen in the new European *nation state* should have the same say.

And even then, such a democratic constitution could only be decided *democratically*, by the German voters themselves, and not just by an act of parliament.

The German constitution strongly favours international cooperation and European integration, but there are clear limits, according to the Court: There must always be enough "*living democracy*" left for German voters when they vote for the German Bundestag.

There must be areas of German sovereignty, which cannot be reached by the European institutions, the judges state.

Then the judges become really aggressive towards the contents of the Lisbon Treaty. They define many of the new Lisbon Treaty competences as core German sovereignty areas in relation to which German voters must always have the last word on the law.

The Treaty's new common area of Home Affairs and Justice – an area that has been initiated, promoted and pushed by German governments over the years - is stated to be a core area of German sovereignty! German Courts

must be able to decide who should be put in prison for any crimes. The new structured cooperation in relation to defence, leading to a common European army, may not develop into the planned common army. Germany will decide on each German soldier being put into joint actions.

The planned development of the common economic and monetary Union will not be able to establish a common financial policy. This is a core principle of German sovereignty, the Court states.

As for dreams about a social Europe, forget it. Social policies are a matter of national sovereignty.

The new Lisbon Treaty article on religious cooperation can be archived. Again, matters of religion are a German competence.

Anyone reading the radical verdict must wonder why the conclusion approves the Lisbon Treaty *in principle* at the end. Following the fundamental criticism of the Court, the only logical answer would have been a rejection of the proposed German ratification.

But the 8 German judges in Karlsruhe do not possess an army. They are appointed by the German politicians. They are salaried by the German Government and they will get their pensions from the German Government. The judges would not be allowed to block the Lisbon Treaty *for*ever.

The political class in Germany would find a way to dissolve or overrule the Constitutional Court, for example by an amendment to the German constitution. Amendments to the German constitution can be decided by a 2/3 majority of the Bundestag. The two governing parties, CDU and SPD, hold this majority. The judges can be outlawed if necessary. They know and respect their own inherent limitations.

Instead of blocking the Lisbon Treaty they requested that the German parliament would decide new internal German laws allowing German voters and politicians to control German participation in the implementation of the Lisbon Treaty and in the day-to-day adoption of European laws.

The Lisbon Treaty may only be ratified by Germany when these implementing laws have been decided by the German Parliament. German politicians then decided this new law in September 2009.

The politicians all expect that German ratification can now be a simple thing. They don't seem to be nervous at all.

We will see. Why should German citizens be satisfied with a limited result removing the influence of German voters on many new important areas of law-making?

Why would they not decide to go to the Constitutional Court and see if they can gain more democracy?

If they did that they might also gain so much time that British voters might get a chance to be consulted. Prime Minister *Tony Blair* and his successor *Gordon Brown* had cancelled the promised UK referendum.

The Conservative Party in Britain has said they will withdraw Britain's ratification of the Lisbon Treaty if they come into office before the treaty's final ratification by *all* 27 member states.

The Czech president, *Vaclav Klaus*, has said that he is not eager to sign. A new court case has been initiated by 17 senators in the Czech Republic. The Polish president has said he will not sign as long as there are uncertainties.

Why after all should they hurry to adopt a treaty that has been rejected by the voters in France, the Netherlands and Ireland?

Why should they play the game of making Irish voters think they are isolated when they just had the same position as the French and the Dutch – the same as the citizens of most other member states if they too were to be asked to vote on the Lisbon Treaty?

The Irish Commissioner, *Charlie McCreevy,* has said rather bluntly that the Lisbon Treaty would be rejected by 95% of the member states in the EU if it were put to referendum.

It is at least very doubtful if the Lisbon Treaty would pass a German referendum. The German judges and politicians know that. Many admit it privately. They cannot say this publicly because such criticism is still seen as *anti-European* in Germany.

The Germans have strong feelings for Europe. But they have also similar strong feelings for democracy.

German politicians have always worked for more powers for the European Parliament. It is therefore a somewhat surprising that the German Constitutional Court is rather critical of the European Parliament.

The German judges do not see the European Parliament as properly representative of the voters. The competences of the European Parliament are very limited, they state. Law-making in the EU is still mainly for ministers and civil servants, whether national or European, the *executive* arm of government.

The judges insist on true parliamentary democracy, both in Germany and in the EU.

It is indeed interesting that we should be given a lesson in democracy from Germany. But the importance of *democracy* is the core message of the 149-page verdict of the 8 German judges. This contradicts what Irish voters have been told by their own government and its "*Referendum Commission*".

They say that the Lisbon Treaty will bring more democracy.

A neutral leaflet with misleading mistakes

In the last week of August 2009 all Irish households received a colourful 8-page leaflet from the Irish Referendum Commission.

This Commission has the official task of sending neutral information to all voters on the effects on the Irish constitution of Irish ratification of the Lisbon Treaty. This sole statutory task has not been carried out at all.

Instead Commission chairman, Judge Frank Clarke, and his team have produced a pamphlet cleansed of any point that might be remotely helpful to the "No" side in the referendum. All the points made are identical to the Irish Government's partisan view. The "No" side has not been consulted as regards to the content.

The Referendum Commission's leaflet contains only 3 pages on the Lisbon Treaty and 3 pages on the so-called "*Irish assurances*". The latter are *not* part of the treaty at all. These so-called *assurances* are not even mentioned in the constitutional amendment people are actually voting on and which may be obtained by voters in post offices, libraries and police stations.

The Irish Government's so-called assurances are *not* part of any ratifying document. They are not *legally* binding under EU law.

The text was adopted at a European summit in June 2009 as an aid to the Irish Government in re-running the Lisbon referendum first held on 12 June 2008. The first referendum had resulted in a 53% No-side majority – more than Barack Obama's presidential victory in the United States.

No one will ask the Americans to re-run their presidential elections, stated the Irish businessman *Declan Galley,* when he re-entered the 'No' campaign on 12 September 2009.

The media in Ireland have reported the assurances as if they made Lisbon a new and very different treaty. They should know better. It is *not* possible to have a legally binding agreement on the interpretation of EU treaties that is not actually part of the treaty document to be ratified.

It is simply *illegal* under EU law. Again, read Art. 344 TFEU, which gives the *monopoly* of interpreting treaties to the European Court of Justice in Luxembourg. No member state is allowed to raise *any* dispute on the interpretation of EU law in any national or international court outside the EU institutions.

There is only *one* place for disputes to be settled, and *there*, in the EU Court, the Irish assurances are simply not a document to be taken into account.

This would change if the assurances formed part of some future agreement on, say Croatian or Icelandic membership, and if that future enlargement treaty would be ratified with the Irish assurances as an attached Protocol.

But if it were meant to change the interpretation of the Lisbon Treaty it should *either* be attached the Lisbon Treaty, *or* be handled as a new proposal for a change of the Lisbon Treaty.

Such a proposal would then at a later date require the unanimous agreement of *all* 27 member states and a new ratification of that Protocol of *all* 27 national parliaments. A promise of future approval of a Protocol not yet negotiated and whose precise content is not yet known has no legal value.

The governments of today can bind no government of tomorrow.

All governments and EU lawyers know that. They have therefore inserted a sentence in the Summit Conclusions introducing the assurances, which states that "The Protocol will clarify but not change either the content or the application of the Treaty of Lisbon".

This whole operation of the Irish assurances is a pure show, a modern edition of *The Emperor's New Clothes* - the famous fairytale of the Danish poet *Hans Christian Andersen*.

The fairytale works as pure truth in Ireland, with the help of the country's rather biased media. Many people still believe that there is a new, renegotiated Lisbon Treaty on the table. This is also the impression people get by reading the leaflet of the Referendum Commission. Why else provide equal space for the Lisbon Treaty and the non-treaty *assurances* document?

Irish "No" voters are meant to be re-assured that all their concerns from the first referendum have been taken into account in the re-run.

If it was a neutral Referendum Commission, why does it not also try to deal with the concerns of the many voters who voted "Yes" to the Lisbon Treaty?

Many of them feared being thrown out of the EU.

Why has the Referendum Commission not sought to re-assure those voters that Ireland will continue as a full member of the EU after either a "No" or a "Yes" vote?

It is a basic fact that a new treaty can only be amended by 27 signatures. The existing EU can only be dissolved by 27 signatures, as well.

Such simple basic facts have not been communicated to Irish voters. The entire Irish "Yes" campaign is designed to instil fear into voters as to their future membership of the EU.

There is not one single poster in Ireland praising the content of the Lisbon Treaty. All the posters from the "Yes" organisations and parties argue for a simple "Yes" to Europe.

"*We belong*" is the name of a new Yes-side movement. Who in Ireland does not belong to Europe?

"*Ireland for Europe*" is another name for an organisation set up by the former President of the European Parliament, *Pat Cox*.

As if there were any on the "No" side who wanted to move Ireland out of the Atlantic, or the EU or out of "Europe".

There is a lot of EU criticism in Britain, but not in Ireland.

Here, all participants on the "No" side argue for continued EU membership – but just without the Lisbon Treaty. The heart of the Lisbon Treaty is the change in the existing voting system from weighted votes to the introduction of voting based on the exact *number of citizens* in each member state.

Today Ireland has 2.0% of the votes in the Council of Ministers. The Lisbon Treaty would give Ireland 0.89% of the vote on a pure population basis. This figure is based on the population numbers for 2009. The number of votes based on population size is changed every year.

Ireland would halve its influence under this new system. At the same time Germany would double its vote from its present 8.4% to 16.4%. The other big countries would go from their present 8.4% to an average of 12% each on a straight population bases.

Today the 4 biggest countries together have 33.6% of the votes in the Council of Ministers. Lisbon would give them 53.6%. The 23 smallest countries have 66.3% of the weighted votes today but only 46.4% under Lisbon.

Such simple but important *key* facts are hidden in the leaflet from the Referendum Commission and on the Irish Government's website.

The Referendum Commission is also misleading as regards the number of commissioners. It ignores the fundamental difference between the Treaty of Lisbon and the Treaty of Nice as regards the method of deciding the commissioners.

According to the existing Nice Treaty the EU must aim to reduce the numbers of commissioners to fewer than the number of member states. This reduction has to be decided *unanimously*. This means that Ireland and all other member states can only get rid of their "own" commissioner by an act that is supported by the Irish Government and *all* other EU governments.

Under Lisbon the Commission *must* be reduced to 2/3 of the number of member states *unless* a unanimous decision is taken to continue one commissioner for each member state.

There is a *political* agreement on the latter in the Summit Declarations as long as the EU has 27 member states. There is absolutely no *legal* guarantee that this system will last following the accession of Croatia, Iceland etc.

The Swedish Prime Minister *Fredrik Reinfeldt* admitted this as President of the European Council. He said that the question of the size of the Commission might be re-opened following new enlargements.

Under Nice the member states propose and decide their own commissioner. Formally speaking each government makes a *proposal*. The Commission President needs the *proposal* to compose his Commission.

Under Lisbon the member states only make "*suggestions*".

The decision on WHO shall be, for example, the Irish member of the Commission will be taken by the new Commission President and a qualified majority vote of the prime ministers.

In this vote the four biggest countries will have more than half the votes, while the remaining 23 member states will have less than half the vote on who shall be members of the Commission. The same system will be used for the nomination of the Commission President, making him very dependent on the biggest member states that will effectively have appointed him.

It is a radical change of the "government" in Brussels, from a bottom-up appointment to a top-down one. In the Referendum Commission's leaflet it is written that there is *no change* as regards the mode of appointment. It uses the word *nomination* to cover the two very different situations.

The Referendum Commission leaflet implies that Irish voters will only lose their commissioner if they vote No. This scaremongering campaign is on purpose - the Government's purpose. It is a *lie*.

Unfortunately for the Irish Government - and the Referendum Commission - Swedish Prime Minister Fredrik Reinfeldt told the truth to EU correspondent *Jamie Smyth* of The Irish Times in an interview on 6 September 2009.

Reinfeldt said that if the Irish vote "No", the next EU Commission will be composed of one commissioner from each of 26 member states, while the country holding the post of EU foreign minister will not have an extra seat in the Commission.

This formula is called *26+1*. It has been informally agreed between diplomats, according to the interview with Reinfeldt. This compromise means that there will still be one post for each member state. At the same time, the new Commission will de-facto be *smaller* than a Commission with a member from each member state, as the Nice Treaty requires.

In the Nice summit in December 2000 the politicians made a compromise. The big member states gained the *promise* of a smaller Commission. The other countries won on the procedure: it can only happen by *unanimity*.

The Referendum Commission has also published a larger pamphlet in which they have invented the notion of a *member state's exclusive competence*. This

expression does not exist in the treaties. This innovation is clearly invented to calm Irish voters. It is also rather misleading information coming from the "neutral" members of the Referendum Commission.

I offer the Referendum Commission and anyone else a very good bottle of wine if they can give just one example of a law, which could be passed by the Lisbon Treaty, but not in Prime Minister *Brian Cowen's* "*Lisbon II*" treaty. There is no second treaty at all. I could offer another good bottle of wine for an example of a law that could be passed under the first draft EU Constitution – but not under the Lisbon Treaty.

Finally, I offer a third bottle of very good wine for just one example of an Irish, or any other national law, which cannot be touched in some way by the EU under the Lisbon Treaty.

I am not saying that the EU Court will actually touch all areas of national law including the sensitive areas of human rights where national standards differ (such as Irish rules on inheritance, fair trial or the right to life), but they may do so.

I do not think that EU judges will act on abortion in the next few years – but they *can* do. In this case they can act both with and without the Lisbon Treaty and the Irish *assurances* make no real change.

The EU Court *has* already decided on abortion. In 1991 the EU judges decided that abortion was a normal *economic service* to be sold freely everywhere. As a derogation from this principle the EU judges then permitted the Irish nation to keep its abortion laws in Ireland.

The advocate-general of the EU Court wanted to overrule the Irish rules. The EU Court decided not to do it "*on balance*". The Lisbon Treaty and the Irish assurances do not alter this court case (Grogan), which also makes the EU Court competent to judge on future *balances* between different legal principles.

For example, what might be the result if an Irish-owned hospital in Belfast would offer abortion to Irish women while a British-owned hospital in Donegal would not be allowed to sell this service freely? Where would we then be "*on balance*"?

The published information from the Referendum Commission is dotted with straight mistakes, unrealistic promises and misleading arguments. It would be better if it were withdrawn.

A better system would be if an equal number of "Yes" and "No" experts could be asked to write a *joint* explanation. It would not be an easy task, but it is possible. I have done it several times and have, for example, written a joint explanation of a new treaty with the former secretary-general of the Council of Ministers, *Niels Ersbøll*.

Let leading personalities from both sides agree on an objective text and then set out in neutral words the points on which they disagree as regards interpretation and possible effects. The voters will then be much better served as they face their difficult choice on pros and cons.

This would be a serious way of informing voters. It is not fair to choose sides. Eventually it may even be illegal to use taxpayers' money to present just one side of the argument before a referendum. Biased public information might be contested in the courts.

There are already Irish court verdicts requiring equality as regards government funding and balanced presentation of controversial issues on public radio and TV. The two court cases are named the McKenna and the Coughlan cases after former Green MEP *Patricia McKenna* and university lecturer *Anthony Coughlan*, who raised and won the cases.

The Irish referendums

On 12 June 2008 Irish citizens voted "No" to the Lisbon Treaty. Ireland was the only country in the whole EU to vote on this new treaty. Eight national referendums were cancelled to ensure this. Where referendums were held, as in France and the Netherlands, the EU did not accept their results.

All the major Irish political parties and newspapers had urged the voters to vote Yes. The voters, however, were not properly informed about what they were voting upon: 329 pages of unreadable amendments which – if adopted – would be inserted into the existing 2800 pages of EU treaties to turn these treaties into an EU Constitution.

Ireland's Prime Minister *Brian Cowen* and the country's EU Commissioner *Charles McCreevy* publicly admitted that they had not read the text they were urging people to vote for.

The chairman of the statutory Referendum Commission, Mr Justice *Iarfhlaith O'Neill*, had the job of informing the citizens before the referendum about the changes they were being asked to make to the Irish Constitution.

During a press conference Justice O'Neill showed that he had not understood essential parts of the draft Lisbon Constitution. Instead of sending the Treaty they were going to vote on to the citizens or leaving it to an independent committee with different views to describe its contents, the five-person Referendum Commission sent a brochure on the Treaty to all Irish households.

In this brochure the Referendum Commission informed Irish citizens about the advantages of the new treaty, mostly along the line of arguments

used by the Government. The text of the booklet was written by supporters of the Government. It was not approved by a single person from the No-side.

The brochure scarcely mentioned the parts of the treaty the No-side was concerned about. It did not explain how ratifying Lisbon would affect the Irish Constitution, even though this was supposed to be the prime duty of the Referendum Commission under Ireland's Referendum Act. It did not explain the text of the amendment to the Irish Constitution, even though it was supposed to do this under the law.

When I read the Referendum Commission's booklet, I did not find any of my arguments for voting No. The independent Commission took a partisan view and misled the Irish voters.

Still, 53% of the Irish voters ignored the unbalanced propaganda. They were not convinced either by the additional threats of being isolated in Europe.

A convincing majority simply voted No.

The Irish "No" to Lisbon was not a "No" to membership of the EU. Not one participant on the Irish No-side argued for withdrawal from the EU, not even those who had argued against Irish membership in 1972.

There were many different arguments on the No-side. The No-side was a very broad coalition. Two small political parties, Sinn Fein, with four seats in the Irish Dáil, and the Socialist Party (outside the Dáil), recommended a No, together with five independent members of the Dáil. So did independent MEP *Kathy Sinnott*.

The No-side outside parliament included of the People's Movement, with former Green MEP *Patricia McKenna* as its spokesperson. A few Irish trade unions also urged a "No" vote, as did Catholic pro-life group CÓIR.

The National Platform, with veteran EU critic *Anthony Coughlan*, fed the media and the various elements on the No-side with arguments. Coughlan was one of the few Irish people who had read and understood the treaty and its constitutional consequences.

A new think-tank, Libertas, established by the successful Irish businessman *Declan Ganley*, also campaigned for a No. He had read the treaty and gave copies of it to voters, something the government did not do. Libertas had a budget for advertisements that was able to balance to some extent the advertisements of the "Yes" side.

After the referendum the media questioned the Libertas budget. 'No' one criticised or asked for information on the source of the much bigger budgets of the Yes-side campaigners. 160 of the 166 members of the Dáil and all the Irish Government Ministers recommended a Yes!

There were also different "Yes" campaigns by the three main Irish political

parties, Fianna Fail, Fine Gael and Labour, as well as by several civic society groups outside the parties. The Green Party was split between the two camps.

Still, strong pressure for a "Yes" vote did not succeed with the majority of Irish voters. Ninety six percent of the Irish MPs were voted down by 53% of the citizens.

I was in Ireland seven times before the referendum to help inform people about the contents of Lisbon. I had published a consolidated Readable version of the Treaty in English with a 3,000-word alphabetical index and was often questioned by the media as an authority on the Treaty.

When I took part in a range of information meetings across Ireland mainly organised by independent MEP Kathy Sinnott, I felt from early on that the result would be a No.

I was also invited by Irish State Television, RTE, to take part in the final TV debate with Patricia McKenna from the "No" side and Pat Cox, the former President of the European Parliament and the current international president of the European Movement, on the "Yes" side. Cox was accompanied by the Spanish Christian Democrat and EPP spokesperson on constitutional affairs, *Mendez de Vigo*.

I did not urge people to vote "No". I simply told them about the content of the Treaty that they were voting on, this was not because I did not want a "No", but simply because I do not find advice on how to vote appropriate when the advice comes from foreigners.

Foreigners may come and inform people when they are invited. Foreigners should not however campaign in a country on their own. That backfired on the "Yes" side when Commission President *José Manuel Barroso* came to Ireland to campaign. He was met by thousands of demonstrating farmers and did not help the "Yes" side with his appeals to vote Yes. His unacceptable threats of isolation of the Irish did not work either.

Pat Cox and De Vigo interrupted me every time I opened my mouth in that TV debate. That was their agreed strategy. They called me a "liar" when I only stuck to the facts of the treaty. Anyone can check the debate now and compare it with the articles in the Treaty. Next day people in the streets talked about the "aggressive Spanish bull", referring to De Vigo, who is normally a very intelligent and noble speaker.

Bulldozing does not work. People can listen and take notes, even when one's sentences are interrupted. People have a good instinct about who is right and who is wrong on the facts. The No-side won the debate and the referendum, simply because the Yes-side had a bad case.

Voters lose influence with the Lisbon Constitution. They do not win greater

influence in the EU nor any other kind of benefit. I commented on the result of the referendum on Irish radio and TV when we had the final result. I foresaw immediately that the Irish Government would come back with a re-run of the same text.

The EU and the Irish Government would not take 'No' for an answer and would prepare a new envelope with the same content, with not one single amendment being made to the rejected treaty.

It was not difficult to foresee because this is what happened when another little country, my own – Denmark, was pressured into re-running the Maastricht Treaty after the Danish people's first "No Thanks" on 2 June 1992. Irish voters were also asked to re-run the Nice Treaty in 2002 after they had first voted "No" to that in 2001.

On that occasion Ireland obtained a Declaration on continued Irish neutrality. The Irish Parliament, the Dáil, also introduced scrutiny of EU decisions and a National Forum was established to debate the EU.

The Irish then voted "Yes" to the Nice Treaty by 62.9% to 37.1%, in contrast to the 46.1% in favour in the first Nice referendum. The real thing that made the difference was the turnout. In the first referendum only 34.8% of the voters took part. In the referendum re-run the Irish Government and the 'Yes' side succeeded in having a 49.5% turnout.

The referendum on the Lisbon Constitution on 12 June 2008 had a higher turnout, over that of 53.1%. The "No" side was particularly strong among young people, women and workers. The "Yes" side had a majority among older people, the self-employed and men.

In the TV debate I also foresaw that the Irish voters would gain one real concession: a Commissioner for each Member State. This can be done without changing the Treaty, for Lisbon itself makes provision for it.

The Treaty already includes a clause making it possible for the Prime Ministers by unanimous decision to continue with one Commissioner for each Member State after 2014.

A few days after the referendum the 27 Prime Ministers and Presidents met for their June summit in Brussels. They decided unanimously to continue the ratification process in spite of the Irish No. This decision was only possible because the Irish Government allowed it.

In the following months Irish ministers campaigned against the Irish 'No' in the corridors of Brussels. During various foreign visits, for example to the Czech Republic, Irish ministers privately criticised their own citizens for having rejected the Lisbon Treaty.

The plan they had in mind was that Irish citizens should now feel they were

isolated in Europe. They should be driven by fear and threats to reverse their rejection of Lisbon. Then in the end, when everyone else had ratified, Ireland would come back with a Yes. This is what the Irish Government promised its EU partners. We truly live in interesting times when a national Government can ask other governments to ignore its own people and approve a treaty that people have rejected. It was not a voluntary plebiscite. It was a legally binding referendum that should have been respected under the Irish Constitution.

At the December 2008 EU summit the Irish government formally declared that it would come back with an Irish ratification of Lisbon. It obtained the promise of a continuing Commissioner for each Member State.

The government also negotiated a promise of various Declarations that would be made "*legally binding*" in the next EU enlargement Treaty that was foreseen for Croatian membership planned for 2011.

At the same meeting the United Kingdom and several other Member States obtained a guarantee that not a single word or comma would be changed in the Lisbon Treaty!

The British Prime Minister, *Gordon Brown*, insisted on no change because even the smallest amendment would require a new vote in the British parliament. The mood has changed in the UK Labour Party. The Conservatives voted against the ratification of Lisbon. Brown said that he could not guarantee a British ratification if it came before Parliament again.

The Irish Government then promised to prepare a second referendum on exactly the same text without one single amendment.

They needed some time to recover and prepare and promised to have the referendum by October 2009. This would be after the European Parliament elections on 4-7 June 2009 and before the formal appointment of the next European Commission, which is due to be formally installed by the end of 2009.

The summit then decided formally that the 'Lisbon Constitution' would enter into force on 1 January 2010. Again this is an interesting decision since the existing treaties require unanimity and this unanimity formally disappeared with the constitutionally binding Irish referendum.

It is an open question whether it is legally possible in Ireland to run a second referendum on the same text in the same election period. The Irish Constitution leaves the definite decision on ratification to the Irish voters.

"Every proposal for an amendment of this Constitution shall be initiated in Dáil Éireann as a Bill, and shall upon having been passed or deemed to have been passed by both Houses of the Oireachtas, be submitted by Referendum to the decision of the people in accordance with the law for the time being in force relating to the Referendum." (Art. 46.1, Constitution of Ireland).

Article 6 of the same Constitution provides that the Irish people ´in final appeal' may decide any issue of national policy.

This decision of the Irish people was made on 12 June 2008. The Irish Constitution places the competence to ratify with the Irish people in a binding referendum. There is no legal basis for a new referendum to change the constitutionally valid result.

A government cannot just come back to its Parliament with the same rejected treaty. Politically speaking, there must at least have been new elections where political parties have declared that they intend to have a second referendum on the same un-amended treaty.

If voters then return a majority for a re-run, the new referendum on the same text will have been accepted by the voters.

The Government could also come back with a renegotiated treaty with new content and then ask voters to vote a second time within the same election period, because the content now would have been changed. That would not be a second referendum on the same text.

The Irish Government chose the risky path of a re-run on an identical text and faced the risk that some Irish citizen might bring the intended re-run before the Irish Supreme Court.

That happened in September 2009. An Irish cattleman brought it to an Irish Court. The judge accepted the re-run of the Lisbon Constitution.

To try to sell the Lisbon Constitution to Irish voters a second time, the Irish Government and its EU partners prepared Declarations on sensitive issues from the first referendum debate relating to taxes, abortion, neutrality, defence and workers' rights.

Before the European elections in June 2009 the politicians explained that these new guarantees for Irish voters will be legally binding. Not immediately, but they will be added to the treaties when Croatia joins the EU.

The texts were only put on the table after the European Elections. This was the explicit wish of the Irish Government at the EU summit in December 2008.

After the elections everyone who can read can now see that there is not a single change in a single article in the Lisbon Treaty.

What can be made legally binding is solely "clarifications" that change nothing in the Treaty. The Irish Government has orchestrated this exercise in the hope of deceiving its voters in Lisbon Two. Irish Foreign Minister *Micheál Martin* introduced a false argument into the referendum debate about Irishmen being conscripted into a European army under Lisbon. He said he had heard that argument from the No-side, clearly intending to discredit the latter.

In my many meetings in Ireland before the first referendum and in all the

written material I read I did not hear or see the argument about conscription from the "No" side on a single occasion.

I only heard this argument from Minister Martin. His purpose is easy to understand. Because of it he got a chance of representing the No-side victory as bogus. Nothing in this promised future Protocol will alter a single commitment under the Lisbon Treaty. That will be subject to interpretation by the EU Court of Justice from the moment it comes into force.

This new future Protocol will not hinder the activist Court in the slightest from making new decisions on abortion, human cloning, stem cell research, family law and other sensitive ethical questions.

In the 1991 Grogan case the Court already decided that abortion is an economic service, which can be freely sold, including to Irish women, as long as the service is delivered outside Ireland.

The Court's Advocate-General at the time had recommended that the free sale of abortion services should be provided for in all Member States. On balance the Court accepted the Irish Constitution's restrictions on abortion in Ireland, at least for a time.

Tomorrow they could allow foreign companies to settle in Ireland and deliver abortion services. I do not think that this will happen and I have not myself used the argument on abortion. But it is not unthinkable. It is no more than was already proposed by the Advocate-General, whose recommendations for verdicts are often followed by the Court.

If Lisbon is ratified we would all be turned into real citizens of the new EU. We will then have a EU citizenship and EU citizens' rights in addition to national citizenship and national citizens' rights. The EU Court will then be able to lay down the EU citizens' rights of 500 million Europeans.

These rights are set out in the EU Charter of Fundamental Rights. They cover a vast range of issues and offer wide scope for clashes between human rights standards at EU and national level in the years and decades ahead.

No Protocol can offer a real guarantee against the activist judges of the European Court unless it clearly and explicitly states that the Court has no competence in that area.

Irish participation in EU defence will not be hindered by a Protocol, unless Ireland declares that it will abstain from participation in the EU "mutual defence" and "common defence" and the European Defence Agency referred to in Lisbon, as Denmark does.

Denmark, a NATO member, is outside EU Defence policy, even though neutral Ireland has not opted out of it.

On taxation the risk is that an EU Court decision calling the low Irish

corporate tax at 12.5% a hindrance to the EU's Internal Market or a future – indeed already planned – decision to harmonise the different tax bases, which would indirectly put pressure on Ireland to change its own low corporation tax rate by its own decision.

There would be no difference to the Treaty in real terms – a future Protocol will change nothing.

The only real concession is the previously mentioned Commissioner for each Member State. That was a real victory for the Irish voters. But it was not accompanied by a change in the procedure on how to appoint the Commissioners. This is not envisaged, for it would require a change to Lisbon.

Under the existing treaties Member States put forward proposals for their new Commissioner. A country's Prime Minister then discusses the proposal with the newly appointed Commission President and eventually with his colleagues on the European Council. He can insist on standing by his proposal even if the others are unhappy with it, so that this right to propose is effectively a right to decide.

The Lisbon Constitution changes the word "proposal" to "suggestions", which means that the decision on the appointment is no longer a matter of agreement between the Irish Government and the new Commission President.

Ireland can only put possible names on the table. The Commission President decides which Irish man or woman should be in his Commission. The full composition of the Commission is then approved by a decision requiring the support of 20 of 27 Prime Ministers in the European Council and a majority of members in the European Parliament.

The then Irish Commissioner David Byrne said at the time of the adoption of the Nice Treaty that the decided compromise with the "smaller Commission" would mean that Ireland would lose its Commissioner for only five years out of every 135!

This would be in full conformity with the Nice Treaty provision that the number of Commissioners should be fewer than the number of Member States from 2009. Now, eight years later, the Irish Prime Minister deliberately falsely presents the existing Nice Treaty rule as an obligation to reduce the number of Commissioners from 27 to 18 from the time of appointment of the next Commission in 2009.

He says that if the Irish vote for Lisbon in a second vote they can keep their Commissioner, whereas if they vote "No" they will lose it.

The vast majority of members in the Constitutional Convention wanted to continue with a Commissioner from each Member State. As a member of the Convention which drew up the original EU Constitution I collected the

signatures of 60% of the Convention members to support the keeping of a Commission with one member at all times from each Member State.

The representatives of 21 governments signed my proposal as well, including all the Irish representatives, among them Europe Minister *Dick Roche*!

The representatives of the biggest Member States insisted on the smaller Commission and got it their way when the French President pushed this through at the summit meeting, which agreed the Nice Treaty.

Now, there will be one Commissioner from each Member State – until the next treaty revision when France, Germany and the UK will again press for a smaller Commission – one that they can dominate more easily.

The British Government did offer the Irish Government a chance to avoid a British ratification. It said that it was up to the Irish Government whether the ratifications continued or not. The Irish Government then urged the UK to ratify Lisbon in order to help isolate its own people.

Rightly or wrongly, in a democracy the voters are always right, or at least their votes have to be respected. Our political leaders should all read the famous poem by the German poet *Bertolt Brecht* when he commented on the 1953 workers' uprising in the GDR:

"After the uprising of the 17th of June
The Secretary of the Writers Union
Had leaflets distributed in the Stalinallee
Stating that the people
Had thrown away the confidence of the government
And could win it back only
By redoubled efforts. Would it not be easier?
In that case for the government
To dissolve the people
And elect another?"

After 29 years in the European Parliament I stood down on 9 May 2008. I have stopped being a politician but continue as an expert on the EU in my free web lexicon: www.euabc.com

Here you can find explanations of most terms from the EU debate and many thousand links to documents and further reading.

Following the new introductory chapters, you can now read the contents of the first edition of this book. This was circulated in Ireland before their first referendum. The Index does not cover this Introduction and the new chapters.

Jens-Peter Bonde
September 2009

Introduction
How it happened

The sun was shining beautifully in Portugal's capital, Lisbon. It was as bright as a spring day in Denmark, almost like the light at *Skagen*, the northern tip of Jutland. The temperature was distinctly pleasant. Not too warm and not too cold. The calendar showed that it was Thursday 13 December 2007 when I disembarked from the first morning flight from Brussels on Brussels Airlines, with a departure time from Brussels of 06.50.

The flight was half-empty. The prime ministers and their official retinues had gone on private aircraft. Elected prime ministers from 27 European democracies were due to meet at 11.30 a.m. to sign the most far-reaching treaty between them to date. The British Prime Minister, *Gordon Brown,* stayed away and was represented by his young Foreign Secretary, *David Miliband.*

The prime ministers, their foreign ministers and officials arrived in black or silver-grey cars, followed by large motorcycles and cars with flashing police lights. The ministers were escorted into the hallowed halls by a host of assistants from the Ministry of Foreign Affairs Protocol Department. They took the guests past the security checks with metal detectors which journalists, Members of Parliament and other, less important, invited guests and observers had to undergo.

On 19 October 2007 the prime ministers and their enormous retinue had met in the much larger buildings of the EXPO World Fair, a quarter of an hour away from the airport. The Portuguese presidency had found a more select venue for the formal signing ceremony. The treaty was to be signed in the *Jerónimos Monastery,* a little over half an hour's drive from the airport, in the city's Belem district.

Behind the elegant high white walls dating from the fifteenth century is a space redolent of European culture and history.

The last resting place of the famous Portuguese explorer *Vasco da Gama* is in the church next to the monastery. The monastery was built in his honour after he had voyaged to India in 1497. Construction began in 1501. It took hundreds of years to complete.

Away from the monastery people sat at pavement cafés drinking coffee or port, just a week before the shortest and bleakest day of the year. Inside the monastery the European elite gathered for coffee and cakes before the formal

signing. The ceremony was followed by an official dinner at festively dressed tables with exquisite food and wine.

A special stage was set up for the signing ceremony, so that those present could sit in the rows of seats and see the historic moment when the prime ministers, herded together, bravely signed a treaty that many of their electorate wanted nothing to do with.

In the many large alcoves in the walls symbols of the old nation states were displayed. There were billowing national flags from all 27 countries as well as their shared blue-and-yellow flag. The flags were caused to flutter by a machine, which was not visible, while the treaty was being signed *without* the rejected constitutional provision of a joint flag and the other symbols of a nation state that have been assigned to the EU. A choir of young girls in white blouses and red scarves sang the EU anthem, Beethoven's *Ode to Joy.*

The prime ministers took their seats on the stage for the signing ceremony. The French President as usual arrived last, as had been carefully planned, because he is the finest of them all. He is not a mere prime minister, but a Head of State, a President. The German Federal Chancellor, *Angela Merkel,* sat next to the Irish Prime Minister, *Bertie Ahern,* who was the only one of her counterparts Merkel was unable to persuade to call off a referendum.

When the French President too had taken his seat, *José Socrates*, the elected Socialist Prime Minister of Portugal, delivered his prepared speech. José Socrates was followed by the President of the Commission, the former Portuguese Prime Minister *José Manuel Barroso,* and the President of the European Parliament, *Hans-Gert Pöttering* from the German CDU party.

Signing an unreadable version

The prime ministers and foreign ministers were then called up in the alphabetical order of the names of their countries. The country that had been without a government for five months, *Belgium,* therefore came first, with acting Prime Minister *Guy Verhofstadt* and his Minister of Foreign Affairs *Karel de Gucht*. They both signed two very bulky treaty books with contents that *neither* of them could have read – in the final version.

They may possibly have been briefed by a few civil servants who might actually have had an opportunity to study and make a mark on the contents. A small club of particularly initiated people knew both the details and possible consequences. But *none* of the many prime ministers and foreign ministers had read the text they signed in that handsome room on that Thursday in mid-December. This was during the first day of their ordinary December summit, due to be held at a different venue.

The following day they continued the summit in Brussels. By meeting in two different places they were responsible for an additional 200 tonnes of CO2 emissions. This happened the day before a UN summit in Bali decided to work towards implementation of a new Kyoto Protocol to combat human-induced climate change.

The excursion to Lisbon was the price to be paid for being able to call the new treaty the *Treaty of Lisbon*. The country without a government – Belgium – insisted that the summit *had* to take place in Brussels. In fact this is stipulated in a protocol the prime ministers signed along with the Treaty of Lisbon. According to the Treaty the European Parliament is to continue to meet alternately in Brussels and Strasbourg, while 2000 of the employees in the secretariat remain in Luxembourg.

This was *not* changed by the prime ministers when they gathered to renew and expand European cooperation on top of the rejected constitution. An attempt had first been made to use the more ambitious name of *Reform Treaty*. The name had not really caught on, perhaps because the contents were still too reminiscent of the rejected constitution.

How can we be sure that *none* of them had read what they signed?

Very easily. The text is quite simply unreadable! In the French version there are 329 A4 pages of different and unconnected amendments to the 17 existing basic treaties. The amendments can only be read and understood if they are inserted at the appropriate places in the 2800 pages of relevant treaties.

That is the only way in which to see what is amended and how. It is only after a comparison has been made that it is possible to *understand* the amendments and start to think about the consequences of implementing them. It does not take days but *weeks* to grasp the whole context, even for specialists.

More words in a mini-treaty

To prevent the uninitiated, for example critical specialists, from starting to work on and publish complete and readable texts, officials at the Council of Ministers were given orders to make understanding as difficult as was humanly possible. "Orders" is the word one of those involved used when talking to me. He or she did not mention him by name, but implied that the orders pleased the French President, Nicolas Sarkozy.

The negotiators went a very long way in incomprehensibility. The head of the legal service at the Council of Ministers, *Jean-Claude Piris,* chaired a special working group composed of leading lawyers from the Member States. The group was therefore called the *Piris Group.* He has written a technically outstanding book on the rejected EU Constitution, "*The Constitution for*

Europe: A Legal Analysis" and provided the recipe for how the Constitution's contents could be implemented once more.

He was also the one who, in 1992, invented a completely new non-existent form of decision-making without a basis in the treaties: *A Decision in the European Council*. This was presented at the time as *legally binding,* even though not a comma was changed in the Treaty of Maastricht. But this invention caused the Danes to vote for the *Edinburgh Decision,* as a circumlocution for the *Treaty of Maastricht* which the Danish electorate had rejected in a referendum held on 2 June 1992. Now this method was re-used to assure the Poles that they had achieved a special legally binding concession. They had won a *decision.*

The French electorate had repeated the Danish No vote. In a referendum held on 29 May 2005, 55% had voted against the draft EU Constitution. There were twelve candidates in the French presidential election in May 2007. Eleven of them were in favour of a referendum on the new constitution. The twelfth wanted to drop the rejected constitution and adopt a more practical *mini-treaty* in its place, which did not require a referendum at all. The twelfth candidate won.

When the officials met again, more words emerged from the series of meetings. The French President Sarkozy's wish for a "mini-treaty" was met with an instruction to officials to print the text in *smaller* letters. The eager officials at the Council of Ministers secretariat ingeniously removed the space between the lines instead. As a result they were able to fit 7.229 more words onto 55 fewer pages.

Bosch whitewashes the constitution

The negotiators also invented, used and implemented no fewer than four different numbering systems, so that no one outside the circle of initiated people can remember what the various numbers stand for. Each edition has its own numbering system, which was amended from the system published previously.

At a summit in the Brussels suburb of *Laeken* in 2001 the prime ministers had reached a decision that they would *simplify* the treaties. The citizens would be met with openness, proximity and democracy. The federalist Belgian Prime Minister, *Guy Verhofstadt,* had signed the first draft of the Laeken Declaration on his own on a flight back home from discussions in Berlin.

A convention was then appointed with 105 members and others who drew up a draft constitution. They were to abolish the 2800 pages of EU basic treaties in favour of a difficult but readable constitution of 560 pages. This number of pages is quoted in Piris's book.

The Convention had negotiated openly. All the documents were made publicly available on the Internet when they had left the Presidium discussions. The situation now was the opposite. Closed negotiations instead of openness. Remoteness instead of presence. Negotiations between officials instead of democracy. The outcome would be unintelligible to everyone except the initiated.

An unofficial working group of supporters of the Constitution was first appointed under the leadership of the Italian Minister of the Interior, *Giuliano Amato*. He has also been Prime Minister of Italy and had led the Social Democrats in the Convention. Amato, together with the former Belgian Prime Minister *Jean-Luc Dehaene,* was Vice-Chairman of the Convention. The Chairman was the former French President *Valéry Giscard d'Estaing.*

The working party was not official and therefore could not be funded from the EU budget. It was the German white-goods manufacturer, the *Bosch Group,* which paid the travel and accommodation expenses of the group that was to *whitewash* the Constitution so that it became an ordinary treaty.

Sign first, read afterwards

There was a critical opposition group in the Convention, the *Democracy Forum,* which cooperated with an "inter-group" in the European Parliament, *SOS Democracy.* Our request to have an observer in the working group was turned down, so that the preparations could be kept confidential.

One hundred and thirty-nine of us MEPs had voted against the Constitution and 40 had abstained, with 500 voting in favour. All the doors were now closed to us and we could not even set up meetings with representatives of the German and Portuguese presidencies. Our written proposals were filed in the nearest wastepaper bin.

There were also other unofficial preparations for a revival of the Constitution, which merit thorough historical investigation. The German Chancellor *Angela Merkel* was well prepared when she took over the presidency of the European Union on 1 January 2007 and presented the finished result on a plate to the Portuguese presidency which began on 1 July 2007.

First the officials changed all the numbers in the proposed – and rejected – constitution. The articles were renumbered in the October version. It was not signed, but agreed at a special summit in Lisbon in October. Then they adopted the December version, again with new article numbers.

In the version signed by the prime ministers they finally adopted a table indicating how the article numbers, which had now been changed three times, were once again to be changed for the final version. This exercise has not yet

been undertaken at the time of writing. But it is *this next* version that will apply eventually. Yet *it* has not been signed!

The Council of Ministers refused before, during and after the negotiations to provide a table of comparison between the October version and the last two versions. The texts were in all the languages required by the Treaty. But they were made unreadable, even though this is certainly not a Treaty requirement.

Unreadability did not prevent Hungary becoming the first to ratify. On the first working day after the summit, Monday, 17 December 2007, the Hungarian Parliament, with 385 votes for, only five Christian Democrats against and 14 abstentions, ratified a treaty they could not read and before it was available with the final numbering scheme for all the articles.

There are also, and there will probably be even more, amendment sheets, which have not been approved in Hungary and the other countries that rushed to be the first to show their literally *blind* trust in the Union's decisions.

It is only possible to make a comparison with the rejected constitution by drawing up a comparison table for oneself. No official EU service will assist. The Intergovernmental Conference decided that no EU institution would be allowed to publish a *consolidated* edition until the Treaty has been *ratified* in all 27 Member States.

This monstrous decision was mentioned to me when I asked to be sent a promised consolidated version. The Constitutional Affairs Committee of the European Parliament decided unanimously that we would have to produce a consolidated edition for ourselves. But this decision could not be put into practice, because higher powers have evidently prohibited it.

"Sign first – without reading and understanding" was the principle to be rigidly followed, including in Parliament, which did not bother with it. The President of the Parliament, *Hans-Gert Pöttering*, in fact promised us a readable edition at a meeting of the Conference of the Presidents, but could not deliver it.

The European Parliament was therefore also dealing with the Treaty of Lisbon without knowing the whole text and the context. There was a deadline for submission of amendments to the Parliament resolution on the Treaty of Lisbon before the Treaty from 13 December was officially delivered to the Members of Parliament.

Regretting the French referendum

The 27 elected prime ministers had - and have - a shared problem, which the French President Sarkozy spoke about very frankly in a closed meeting with the group leaders in the European Parliament in November 2007. There is a gulf between the electorate and the elite in all our countries, he said. France

was the first to produce a No vote, but it could also have happened anywhere else. He was also sure of another No vote if the Treaty of Lisbon was put to a referendum. There should therefore not be any referendums.

The governments knew better than their electorates what Europe needs. 75% of all Europeans wanted a referendum on the new treaty. Only 20% wanted to leave such a decision to the governments and national parliaments.

As many as ten Member States had accepted the idea of putting the constitutional EU treaty to the electorate in a referendum. The then French President, *Jacques Chirac*, also accepted that idea. He would easily cope with that. Chirac refused to debate the text with opponents of the constitution and asked instead for a few hours to explain himself on television.

This elderly man would have a young audience who could look up to him. He had 80 young people who could ask questions that could be answered by the President – without any debate. The unexpected happened when the 80 young people decided to *read* the quite readable constitution from start to finish. The eighty young people sat in the television studio, each holding their well-worn copies of the constitution, filled with yellow notes and underlined text.

They put many questions to the President, not all of which were agreed. Chirac clearly did *not* know the contents of the constitution he had himself accepted. He said, for example, that there is *nothing* about health in the Constitution, even though there is a whole column with 32 keywords and 42 references to articles about health in my Reader-Friendly Edition of the Constitution.

In the National Assembly in Paris the constitution had received the backing of no fewer than 90% of members. Yet there was a 55% no vote amongst the French electorate. Three days later there was to be a referendum in the Netherlands. No fewer than 62% of Dutch voters rejected a text that had received the backing of the Dutch Government and 80% of members of their national parliament.

Merkel's anniversary invitation

There was then a *pause*. The new German Federal Chancellor, *Angela Merkel,* and her assistants had an idea. They would use the 50th anniversary of the Treaty of Rome on 25 March 2007 to resume the constitutional process.

The clever and likeable chancellor put her name to a letter stamped "confidential" which she addressed to her fellow heads of state and government. She asked orally and in writing whether they were willing to enter into the same obligations again in a new form - and call off the referendums.

Merkel put 12 questions to her prime ministerial counterparts. *"How do you*

assess the proposal made by some Member States to use different terminology without changing the legal substance, for example with regard to the title of the treaty, the denomination of legal acts and the Union's Minister for Foreign Affairs?" she asked in Question 3. (See Merkel's 12 questions to the heads of state and government at www.bonde.com under Documents.)

Unfortunately for her this secret letter was leaked. As a consequence, there was a tighter grip on secrecy during the subsequent negotiations.

Members of the European Parliament

The officials from the Member States then met in genuine secrecy to prepare a new text. The European Parliament had three representatives during the negotiations: *Elmar Brok* from the Christian Democratic-Conservative group, EPP; *Enrique Barón Crespo* from the Socialist group, PSE; and *Andrew Duff* from the Liberal group, ALDE. All middle-aged men, no woman and no one from the new Member States.

These three musketeers now took on the role of Merkel's loyal officials and refused to hand over the internal negotiating documents to their more critical colleagues or the public, not to mention the untrustworthy electorate.

These three men came from the three largest groups in the European Parliament. Each of them are champions of openness and democracy. Barón Crespo fought against Franco's dictatorship in Spain before becoming a Socialist minister and a Member of the European Parliament from the day Spain joined. Elmar Brok came up with the now familiar quotation that there are three countries in the world which pass their laws behind closed doors: North Korea, Cuba and the EU! Duff, as the leader of the British Liberals, has also supported every proposal for increased transparency in EU business.

The three of them were chosen to represent the whole of the Parliament, with an obligation to involve all members in the negotiations. But they were then forced to join in the prime ministers' secretiveness, with the good intention of having the text approved without messing about further with the electorate. The prime ministers were fully aware that they could hardly have the treaty approved if it was read, understood, discussed and put to popular referendum. The three skilled parliamentarians had to abandon all attempts at openness and democracy in order to, as they put it, to have this treaty which enshrines more openness and democracy adopted.

Instead of drawing up a text to which the peoples of the different countries could give their backing and happily and enthusiastically vote for, the assembled Euro-elite decided behind closed doors to call off *all* referendums. However, an exception had to be made for Ireland, where the constitution is

too clear, and the courts perhaps *too* independent to accept an open breach of its constitution.

Danish referendum called off

Things went much better in Denmark, the other little EU country which had normally given its electorate an opportunity to vote on new treaties. In 1986 the Government had even called a referendum on a treaty that was rejected by a majority in the *Folketing*, the Danish Parliament. Now the trick was to avoid the referendum which is required under the Danish Constitution for any hand-over of sovereignty.

On 21 December 2006 the German Federal Chancellor visited the Danish Prime Minister to discuss how it might be possible to have the treaty adopted. Danish electors were expected to vote in just as undisciplined a way as the French and Dutch. What could be done?

The Danish Ministry of Foreign Affairs had prepared a legal opinion on how to resolve the problems in nine areas in which the Ministry of Justice had found difficulties with the restrictive Danish Constitution on the occasion when referendums were allowed to be held.

The memorandum was prepared by the veteran legal expert *Per Lachman.* He was also the one who, in the 1980s, wrote a confidential memorandum to the other Member States in which he warned against planned use of the *"flexibility clause"* for purposes that fell outside the Danish transfer of sovereignty up to that time under Article 20 of the Danish Constitution. Now he showed how the limits could be extended further - without a referendum.

The Ministry of Foreign Affairs therefore had a secret plan, which the Prime Minister could endorse at the same time as publicly denying that the Government was speculating about avoiding a referendum.

If the plan to avoid a referendum on the new Treaty was publicly known *before* a forthcoming election to the Folketing, the Danish Prime Minister would run the risk of failing to be re-elected.

Instead he reassured the electorate by saying that there would not be any statement of position on the treaty until it was finalised. Instead of calling off the referendum *before* the election, the Prime Minister, *Anders Fogh Rasmussen,* held face-to-face meetings with other party leaders, who also refrained from calling off the referendum for their voters ahead of the election.

After the election the major Danish parties could then jointly call off the referendum, as they had previously agreed in private. The opposition party, the Social Democrats, were allowed to drop out first, because they had the most sceptical voters.

A small amendment to the bye-laws

The new party leader, the former British Labour leader *Neil Kinnock's* daughter-in-law *Helle Thorning-Schmidt,* had read the *whole* text, she said. She had come to the conclusion that it was just a matter of a minor "*amendment to the bye-laws*", which did not necessitate a referendum.

Amendment to the bye-laws. These words will perhaps pass into history, just like the then Danish Prime Minister Poul Schlüter's characterisation of the Single European Act from 1986 as a *"stone-dead union"*.

The Danish Prime Minister, Anders Fogh Rasmussen, and his legal advisers had done their creative reading when the Danish lawyers secretly met their German counterparts in Berlin. Most of the problems had now been transferred to a Danish opt-out on internal and legal affairs. This could then be endorsed by a subsequent – unfortunately for them unavoidable – referendum, in which there is perhaps a danger of the electorate taking revenge.

Denmark will, in a quite wide-ranging way, withdraw from most cooperation on internal and legal affairs when this becomes supranational under the Treaty of Lisbon. Denmark today plays a full part in this cooperation, provided it falls within the intergovernmental Third Pillar of the existing treaties. Now this special pillar is being abolished, and Denmark is dropping out of the cooperation.

The party leaders can therefore tell the Danish population that Denmark will be a country completely open to terrorists if the electorate is unwilling to vote to abolish the Danish opt-out from EU legal policy.

With their own self-assigned powers, they will say that this future referendum is only concerned with giving the electorate influence over the provisions which will apply in Denmark in all circumstances because they, the politicians, will otherwise photocopy the EU rules if the electorate vote against giving up the Danish opt-out. The Danes will therefore be asked to vote on *joint influence* in the establishment of rules, not on their content.

One way or another, the politicians have decided that the Union's rules are also to apply to Denmark, however the electorate might vote, with the exception of the EU's rules on refugees, which the major parties in Denmark are agreed on rejecting. This is done with a reformulation of the Danish opt-out, so that Denmark after adoption of the Lisbon Treaty can decide for itself which parts of the internal and legal affairs rules it wants to adopt.

The Danish politicians also avoided awkward questions by having the Ministry of Justice declare that the Ministry was not sure that the various articles would be applied in full. "The Ministry *assumes*" is the new key phrase. Because a new topic is added as an area for cooperation, it is not certain that

it will be used to establish directly binding decisions… even though such plans can be inferred from the working programs of both the Commission and the European Parliament. Denmark can safely wait and see *whether* problems also arise later on, when all the other countries have ratified the treaty and it is therefore not open to amendment. The card has then been played, and there are no adverse consequences for those who find that they were mistaken, or for those who instructed them or carried out their wishes or who connived to get the Lisbon Treaty through in face of the awkward Danish constitution.

The opposition and the Government are agreed on the constitutional drift. There are only a few moaners who take the old Danish Constitution literally. Consequently, no adverse parliamentary consequences can be expected for giving the Folketing and the electorate inadequate information either. The vast majority in the Folketing are in agreement, and discussion of the issue with the electorate was avoided in the Danish parliamentary elections held on 13 November 2007.

Applause for Fogh

On 14 December 2007 all the EU prime ministers met in the Justus Lipsius Building in Brussels. The Danish Prime Minister spoke, proudly explaining how he had avoided what had appeared to be an unavoidable referendum in Denmark. The others applauded spontaneously. The prime ministers had won the battle, apart from the unavoidable clash in Ireland.

Now the 27 elected prime ministers could finally get ready to celebrate Christmas without having to think about meetings with awkward electorates back home. The bad Danish habit of asking the voters would consequently not spread to other countries. The United Kingdom of *Gordon Brown* in particular could presumably avoid putting a referendum to the highly sceptical British electorate, according to all the commentators.

By dint of great efforts, the prime ministers had succeeded in signing the final treaty which had been rejected by the French and Dutch electorates. However, Brown's own Scottish Parliament decided on 19 December 2007 that they wanted a referendum. His Labour party colleagues abstained. Perhaps, at the time of writing, the last word has not yet been spoken in the United Kingdom.

Had the prime ministers listened to the concerns of their electorates? Or had they merely altered the mode of *presentation of the Constitution*, as Angela Merkel had asked them to do in her confidential letter?

Is the Chairman of the Constitutional Convention, the former French President *Valéry Giscard d'Estaing,* correct in continuing to maintain that the content of the Lisbon Treaty is the same as the Constitution?

Is the former Irish Prime Minister *Garret FitzGerald* right in saying that only the packaging has been changed, in order to avoid referendums as much as possible?

Important changes

There are various changes in the Lisbon Treaty compared to the EU Constitution. The new text containing amendments contains 75,079 words, while the Constitution has only 67,850. The Constitution runs to 349 pages and the Treaty of Lisbon to 294.

The word *constitution* and the concept of the *precedence* of EU law have been removed from the treaty. This appears to be a substantial change. But the content can be found by looking at the end of the treaty. The construction referring to a constitution has not been abandoned but is transferred to Declaration 27, which will be re-numbered Declaration 17 in the final version of the Consolidated Treaties.

From the legal point of view the Treaty of Lisbon will continue to be a *constitution* with *precedence* over the constitutions of the Member States. But people can be misled into thinking that this is not the case. We will return to this.

The flag, the anthem and the other symbols of a Union State will no longer have specific articles of their own. This is apparently also a great change, which only a few people have asked for in debates. But *all* the symbols will continue to be used in practice, for they had no legal basis before. They were even used in the signing ceremony, although some prime ministers had proudly told the populations of their countries that these symbols of EU statehood would now disappear. The European Parliament has decided to insert all symbols in the rules of the Parliament and use the symbols more regularly. See the so-called Gonzales-report.

The joint text on EU citizens' rights – and obligations – known as the *Charter of Fundamental Rights* was formally signed by the same three institution presidents, those of the European Parliament, the Commission and the Council of Ministers. This took place at a formal meeting in the European Parliament in Strasbourg on 12 December 2007. The signing was met with vocal opposition from members wearing T-shirts and waving banners demanding a "Referendum".

The Charter *has* been removed from the treaty as a separate chapter, the former Part II of the draft constitution. But all the articles are declared at the same time to be *legally binding* in Article 6 TEU of the Treaty of Lisbon. The entire Charter is printed in the Official Journal, just as the Treaty of Lisbon is.

The presentation has changed, but each article will be binding in exactly

the same way as in the rejected constitution. The Charter has actually been made binding *prior to* adoption. The Council of Ministers, the Commission, the European Parliament and the European Court of Justice already use it in both legislation and judgments, even though the text was formally rejected by the French and Dutch electorates. We will also look at this more closely below.

A bottle of fine wine

I have promised a bottle of fine wine to whoever can give me just one example of a law that could be adopted under the Constitution but not under the Treaty of Lisbon. I still have that bottle. *No one* has yet come up with a real example of a limitation which the Lisbon Treaty puts on the scope of the Constitution.

During a hearing in the Folketing the Ministry of Foreign Affairs specialist *Per Lachman* said that the wording was too cunning for him to be able to find an example. But what cunning is needed to find just one example of a law that can be adopted under the Constitution but not under the Treaty of Lisbon? In spite of everything, the amendments being made by Lisbon are being used as the reason for referendums being no longer necessary. So there should be not one but many examples.

A journalist was willing to pay for Christmas lunch for the entire EU press corps if they could give him good examples, but he did not get any either.

There *are* differences between the two treaties, we shall see. But I have not been able to find any examples of differences in the scope for decisions; nor have leading specialists been able to do so.

Nor was I given any examples when I took part in a panel debate on 17 December 2007 with *Valéry Giscard d'Estaing*, his Vice-Chairman, *Giuliano Amato*, and the Vice-Chairman of the Commission, *Margot Wallström*. It was *Friends of Europe* who arranged a packed meeting in the Solvay library in the park behind the European Parliament building in Brussels. No one at the meeting claimed that there were substantial differences between the Constitution and the Treaty of Lisbon.

The Chairman of the Constitutional Convention, the former French President Valéry Giscard d'Estaing, wrote as follows in an open letter to several European newspapers on 27 October 2007: "*The Treaty of Lisbon is the same as the rejected constitution. Only the format has been changed to avoid referendums.*" This is not a misinterpreted quotation. They are the words he wrote himself.

Merkel's efforts proved successful. The legal obligations contained in the rejected draft constitution were revived in a new presentation. That is how the treaty could be signed in Lisbon on that lovely sunny day in December 2007.

Since I cannot deliver my very good bottle of red wine to any person for an example of difference in legal obligations between the Lisbon Treaty and the rejected Constitution, I have promised a bottle for an example on a Danish – or Irish – law which can never be touched by the Lisbon Treaty.

Even there I have no examples, yet – maybe because the Lisbon Treaty is more of a constitution than a normal treaty covering specialised topics.

Born in sun and sin

The new Lisbon treaty was born, under a blazing sun and in democratic sin, because the electorate were disconnected from having a say in a referendum in Denmark. But first the Treaty has to be ratified by all 27 Member States and got through a referendum in Ireland. It also has to be approved by some constitutional courts, which may delay the ratification process, with possible requirements for amendments to national constitutions.

What the prime ministers hope and plan, however, is that the Treaty of Lisbon will be finally ratified by the end of 2008. It can then come into effect on 1 January 2009 – six months before the elections to the European Parliament in June 2009.

Chapter 1

From Constitution to the Lisbon Treaty

Intergovernmental Conference

A series of meetings between the EU's 27 Member States began on 23 July 2007. This form of decision-making is known as an *Intergovernmental Conference*. Under Article 48 TEU following the Treaty of Nice, *all* the Member States have to be in agreement for it to be possible for an amendment to the Treaty of Nice and the other founding EU treaties to be adopted. An Intergovernmental Conference can meet at several levels: civil servants, foreign ministers and prime ministers. The task now was to revise the rejected constitution.

On Thursday 4 October 2007 the legal experts completed the final version for the concluding sessions of the foreign ministers and prime ministers. It was published at 5 pm on 5 October, when all the journalists had left for the weekend. It was ensured, by clever news management, that there was not one line of discussion of the new treaty in the weekend's media. The text at that time ran to a total of 294 pages, carefully prepared by the Secretariat of the Council of Ministers, first in French and then in all the other official languages of the EU.

Minor corrections were then made to the texts, and new texts were added. The final version can be read here: www.consilium.europa.eu/cms3_foshowPage.asp?id=1296&lang=en&mode=g

All the texts are written as *amendments, deletions* and *additions* to texts, but *cannot* be seen simultaneously. It is possible to read *where* a change is made, but readers have to find for themselves the appropriate place in the 2 800 pages of treaty text to which the amendment applies.

The texts are therefore unintelligible to anyone who does not know the existing treaties more or less inside out. Making the amendments understandable is laborious but straightforward, because most of them are amendments to two main treaties. It is possibly simply to take them one at a time and incorporate the amendment into the existing text. In bold, if it is an addition, in *italics,* if a text is omitted, and without any highlighting if a text stays unchanged. An edition of this kind is known as a *consolidated* edition.

Unreadable text

That is how all legislative drafting should be done with a view to promoting understandability and therefore the possible involvement of citizens. It should be possible, as an ordinary member of the public, to follow what is happening.

The Commission has a Swedish Vice-President with responsibility for information to citizens. She is a Social Democrat, and her name is *Margot Wallström*. She had promised an easy-to-read version when she met the European Parliament's Group Chairmen together with the President of the Commission, *José Barroso*, at the end of September.

Poor Margot. As usual she was very cheerful and confident when I asked, but came up against a brick wall. She does not *have to* communicate anything so that people can read the new EU treaty for themselves and understand it. She has to limit herself to issuing material that emphasises all the benefits.

The negotiations now proceeded in secret. At the European Convention all citizens were nevertheless able to keep track of what was going on when the secretive presidium delivered its reports for open discussion among the Convention's mostly elected members from the national parliaments and the European Parliament.

Now neither the national parliaments, nor the European Parliament were to see texts while they were subject to negotiation. Final negotiations on the Treaty took place at the summit in Lisbon on 18-19 October 2007. Negotiations then continued between lawyers and linguists to make the various versions agree. There was also agreement on varying translations, so the contents of the Treaty may differ from one country to another.

The extent of creative translations and minor corrections is not yet known, as here too access to the documents was denied during the negotiations. As an elected Member of the European Parliament for 29 years, as a member of two constitutional conventions, as an active member of the Parliament's Constitutional Affairs Committee since it was established in the 1980s, I am *not* allowed to check how the Treaty of Lisbon came about in each of the phases, even though I have been elected to carry out this task.

Together with my staff I have to do the best I can, without any assistance from the institutions. We prepare the readable, consolidated edition which the institutions ought to have published for ourselves. We have ourselves laboriously compiled the comparison tables containing article numbers which the institutions have refused to provide.

106 new powers

My legal colleagues have made thorough comparisons of the rejected constitu-

tion and the Treaty of Lisbon. They have found a total of 106 new EU powers in the final version, 34 of which are legislative. They also found 106 new powers in the rejected constitution, 33 of which were legislative.

There are 68 new areas with majority voting in the revised text, and exactly the same number in the rejected constitution. They are not entirely identical, however. There are two new areas with majority voting (energy supply and climate) in the Treaty of Lisbon, and at the same time two fewer areas with majority voting (accession to the European Convention on Human Rights and a new court for intellectual property rights). All the other provisions are identical.

The new combined founding treaties run to some 3 000 pages. The number can only be calculated when more than 300 pages (the number depends on the language, in French there are 329 pages, for example) of amendments have been inserted into 2 800 pages of existing treaty texts. The rejected simplified constitution fills 560 pages by Mr Piris" count. It is the large one, running to perhaps 3 000 pages, which is identical to French President Sarkozy's *"mini-treaty"*!

In our own easy-to-read version of the Treaty of Lisbon all additions appear in **bold** in the existing treaties. Anyone interested can then see and read the amendments. We also did this in my office when we published an easy-to-read version of the Treaty of Nice. It is consequently possible to see and assess all the amendments in relation to the current Treaty of Amsterdam. The consolidated Treaty of Nice and the easy-to-read version of the draft European Constitution can also be downloaded free of charge from my website: Bonde.eu or from the lexicon website euabc.eu

This little book is a *critical* review to launch the debate. It also presents constructive proposals for amendments we would like to be discussed before the constitutional process finally comes to an end. Europe *needs* new basic rules.

We have made a politically neutral, readable version of the new texts. There is 3 000 headwords from the Constitution and some new ones, so that everyone can find their way to topics of particular interest. In the electronic version there is reference *both* to the article numbers in the final version of the Treaty of Lisbon and to the numbers in the draft constitution. This means that it is possible to compare the texts for each entry.

The Council of Ministers still allows itself to issue treaties *without* an index. They do *not* regard it as their task to make themselves understood. They instinctively *prefer* to keep citizens out of the decision-making process. The Union's executive does not even want to deliver the negotiation documents to the European Parliament. Democratic and transparent it is not.

Not proper negotiations

The negotiations on the new treaty - the Treaty of Lisbon - are over. Negotiations took place at several levels simultaneously, but the Portuguese Presidency did not allow actual *negotiations* on new ideas. The Portuguese Foreign Minister, *Luís Amado*, said that he only wanted *technical* discussions on what the prime ministers *had* agreed on 23 June 2007.

The Treaty was prepared pursuant to Article 48 TEU following the Treaty of Nice, according to which all Member States have the right to propose amendments. The EU Member States were agreed on *not* utilising this option unless it was necessary for subsequent adoption. The *entire* contents were agreed between the prime ministers themselves after top-secret discussions at their summit in Brussels on 23 June 2007.

The representatives of the prime ministers and foreign ministers, known as *sherpas*, had prepared the foreign ministers' discussions and had themselves resolved many minor problems. Two legal experts from each country attended special meetings to polish all the articles.

The first two-day meeting was held on 24-25 July 2007. The legal experts concluded their work on Thursday 4 October 2007.

Following adoption by the prime ministers of the EU Member States at the special summit held in Lisbon on 18-19 October 2007, the text went to a special working group of linguists with legal expertise, known as *lawyer-linguists*. They were officially to endeavour to make the texts identical in the various languages.

Political translations

Negotiations of this kind are also used to agree on different possible interpretations and presentations in the different language versions. We are used to political translations into Danish. *Subsidiaritet (subsidiarity)* has become *nærhed* (literally "closeness"). *Union* has become *samarbejde* (cooperation). *Lighed* (equality) has become *ligestilling* (equal status). The new *Præsident* (President) of the EU is only to be *formand* (literally "chairman") in the Danish version. Union citizenship (*Unionsstatsborgerskab,* literally "Union state citizenship"*)* in the Danish version becomes the milder, non-existent term *unionsborgerskab*.

No new *additional* citizenship is included in the new Danish version. There is still only mention of citizenship of the Union as a "supplement" to Danish citizenship.

In the other versions there is now mention of citizenship of the Union *in addition to* national citizenship. In the English version of the Treaty of Lis-

bon the word "complementary" has been changed to "additional". There are equivalent changes in the French and German versions.

This particular change is regarded as a major victory for Spain, the Commission, the European Parliament and the most pro-Union EU Club. In the Danish version it is merely stated that the change does *not* have any significance for the Danish version. Denmark has an exemption from citizenship of the Union. If a correct translation was adopted, the Danish Government would have problems with its promises to hold referendums if changes were made to the opt-outs.

It is also difficult for additional citizenship of the Union in competition with Danish citizenship to stay within the "more closely defined extent" according to which powers are transferred from Denmark to the EU under Article 20 of the Danish Constitution.

Translations of this kind are known as *constructive ambiguity*. Poland gets a particular interpretation of the Charter of Fundamental Rights for home use. The United Kingdom gets a protocol which apparently says that the Charter is not binding on it. There is a great need for this kind of ambiguity if the Member States are to reach agreement.

Following the ceremonial signing by the prime ministers in Lisbon on 13 December 2007, the new treaties were sent for *approval* in the Member States. This is known as *ratification.* Such approval takes place according to the appropriate rules in national constitutions.

Finally the heads of state, in the case of Denmark *Queen Margrethe*, deposit the *instrument of ratification* with the Italian Government. Italy has kept all the EU treaties since the *Treaty of Rome* in 1957. It is by ratification that the EU shows itself to be an association of independent nations.

Each country decides independently to accede to new treaty texts according to its own rules. When the Member States have acceded to the new rules, the Member States are obliged in return to abide by all the rules as interpreted from that time on by the Union's institutions and the

European Court of Justice – even where the interpretations might be in conflict with the national constitutions.

When *all* 27 Member States have approved the treaties, they will enter into force on 1 January 2009 or on the first day of the month following the last signature. There is no binding treaty until *all* 27 Member States have ratified. These are the ground rules after the Treaty of Nice. In *form* it is therefore still an *international* agreement between independent states. In terms of *content* it is much more than that.

99 percent repetitions

The question is whether the new Treaty is at all different from the rejected *Constitution*. Which rules could have been adopted under the rejected Constitution that cannot also be adopted under the new texts?

The European Parliament's Committee on Constitutional Affairs had a Finnish specialist who participated in three intergovernmental conferences on behalf of the Finnish Government. He is *Alexander Stubb (*current Finnish minister of foreign affairs*)*. Stubb was joint co-ordinator of the Committee on Constitutional Affairs for the largest political group in the European Parliament, the Christian Democrats and Conservatives, EPP-ED.

Stubb said he was happy that 99% of the Constitution had been kept in the new texts. I asked him about the remaining percent. Stubb had to admit that there was no major difference at all between the two texts with regard to which laws may be adopted on the basis of the two different draft Treaties (sets of texts).

At the next session of the Committee, I asked the chairman of the Convention on the Constitution, former French President *Valéry Giscard d'Estaing*. He was also unable to find any difference in impact. Nor could I, and that is why, after reading the 273 pages of amendments carefully,

I offered a reward to anyone who could give me some good examples of laws that could be adopted under the rejected Constitution but which could not be adopted under the revised version.

Where is the difference in impact?

If there is no difference, it is difficult to justify cancelling referendums that have already been announced or promised on the original EU Constitution.

At the time of writing, there is an unanswered question: How many countries will have a referendum on the texts? Ireland *has* announced a referendum for summer 2008. Who will be next?

New format, same content

The former chairman of the Convention on the Constitution, former French President *Valéry Giscard d'Estaing*, hailed the result at a session of the European Parliament on 17 July 2007.

He said that the content of the new Treaty was the same as in the rejected Constitution, but the format had changed from a legible Constitution to two sets of incomprehensible Treaty amendments.

Giscard said that he agreed with his Chairman-Elect at the Convention, former Italian Prime Minister and current Internal Affairs Minister *Giuliano Amato.* Amato said, according to euobserver.com on 16 July 2007, that the

Constitution had *deliberately* been made *illegible* for citizens, precisely in order to avoid referendums.

The former Irish Prime Minister *Garret FitzGerald* has said the same thing:

"As for the changes now proposed to be made to the constitutional treaty, most are presentational changes that have no practical effect. They have simply been designed to enable certain heads of government to sell to their people the idea of ratification by parliamentary action rather than by referendum."

Quotations:

Nicolas Sarkozy:
"Europe obviously has to be at the service of the people, everyone can understand that. But Europe cannot be built without the people, because Europe is a voluntary sharing of sovereignty, and sovereignty is the people. The advice of the people must therefore always be sought on any major European integration. Otherwise we cut ourselves off from the people."

French President during the UMP national meeting
9 May 2004 in Aubeville.

Dr Garret FitzGerald:
"As for the changes now proposed to be made to the constitutional treaty, most are presentational changes that have no practical effect. They have simply been designed to enable certain heads of government to sell to their people the idea of ratification by parliamentary action rather than by referendum."

Former Irish Prime Minister,
Irish Times, 30 June 2007.

Giuliano Amato:
"They [EU leaders] decided that the document should be unreadable. If it is unreadable, it is not constitutional, that was the sort of perception. Should you succeed in understanding it at first sight there might be some reason for a referendum, because it would mean that there is something new."

- Speech at the Centre for European Reform
in London on 12 July 2007.
Source: euobserver.com (16 July 2007)

Valéry Giscard d'Estaing:
"In fact, the content is the same. Legally, it is a matter of treaties, and they can be ratified as such by the national parliaments. But the substance is still the Constitutional Treaty."

- Speech to members of the Committee on Constitutional Affairs, European Parliament, 17 July 2007.

A common people with a common additional citizenship

The new Union will also have its own citizens, who have rights and obligations *directly* in relation to the Union. In the treaties to date it has been the citizens of each individual country who are represented through direct elections to the European Parliament held in their country.

Now it is the common citizens of the Union who will acquire a common parliament. In Article 9a TEU, which will be renumbered as Article 14 in the final version of the Treaty of Lisbon, the European Parliament becomes a parliament containing "representatives of the Union's citizens".

At present the Parliament consists of "representatives of the peoples" (see for example Articles 189-190 TEC as amended by the Treaty of the Nice).

The various peoples are joined together into one common people. This new common people, as mentioned earlier, acquires common *additional* citizenship. This is expanded with common legally binding fundamental rights, as in other states. It can also be developed further by the Court of Justice, as has happened historically in the United States.

A common people with a common state ability to act externally, common citizenship with common fundamental rights internally. Will the new *Union* perhaps become a completely new state?

Chapter 2

State functions

Comparison with normal state functions

Let us start with a bird's-eye view and assess the overall effect of all the relevant paragraphs.

All states have constitutions. For example, Germany has a *federal state constitution*. The distribution of legislative, executive and judicial power may differ, but the basic functions are the same for all states. We shall see that the new Lisbon Treaty includes the same functions that states usually have.

Legislative authority. There is a common legislative authority. The *Commission* and the *Council of Ministers* share legislative power with the European Parliament as a somewhat stronger co-worker. There is also greater influence for the European Parliament on a lot of new areas. Binding majority decisions are going to be a lot easier to enact for the Council. The Council will decide by majority decision in relation to 68 new policy areas and matters. In addition the Prime Ministers can independently extend the Union's legislative authority by a unanimous decision among themselves. It is hard to find an example in the legislative area that cannot be affected by the Union authorities post-Lisbon.

During an expert hearing in the Danish Parliament I asked tree times, unsuccessful, the experts to give an example of some legislative area that could not be affected by the laws and regulations opened up by the Lisbon Treaty.

A Dutch expert, *Hanna Sevenster*, referred to national security. However, a substantial part of the Lisbon Treaty is in fact devoted to security and common defence.

After two vain attempts to name areas in which Denmark has sole powers of decision, the leading expert from the Dutch Council of State finally admitted that there were *no* areas beyond reach of the Union, indicating that even the designation "Appointed Supplier to the Royal Court" could not be restricted to Dutch businesses alone under EU law.

Power to legislate on matters affecting the Danish people is therefore in the hands of the EU institutions, leaving the Danish Folketing with only those areas of legislative power which the Union itself does not exercise. Where the Folketing does decide independently, it is still required to comply with EU

common principles and rules and with the decisions of the Court of Justice. The Union exercises legislative power in the same way as any other body politic.

The Executive. There is also a common executive – *The Commission*, which has been given greater powers to put its own decisions into effect, along the lines of a Federation in which decisions are implemented by the constituent states. The Commission has executive power while sharing responsibility for implementation with the Member State authorities. *Each* national authority is required to comply with EU law and is obliged to set aside national rules running counter to EU rules or judgments. It acts on behalf of the Union in all relevant areas.

The Lisbon Treaty gives the Commission greater legislative powers in the form of "delegated acts". In addition to this, the EU's executive arm also has the judicial authority to impose fines for infringements of EU rules.

Judicial authority. There is a common judicial authority, a common Supreme Court with the possibility of establishing new specialised tribunals under it. A new development is that new tribunals can be set up by easier majority decision. Judgments of the *European Court of Justice* will take precedence over all national laws in the light of the principle of EU legal primacy and conformity.

Accordingly, the new Union will have a legislative, executive and judicial authority, just as in a national constitution. But there will be no clear distinction between legislative, executive and judicial powers in the Lisbon EU Treaty. Montesquieu's classical conception of the separation of governmental powers as fundamental for a democracy does not exist in the Lisbon Treaty.

Will we have a common European democracy of the sort with which we are familiar in all the Member States? Let's have a look on some of the other sources of power.

Common President. We will get a common EU *president* who will head the work of the European Council. But he will not be elected as in the United States or France.

The President will be the permanent Chairman of *the European Council*. Here, the Prime Ministers and Presidents of the EU countries will now meet, at least four times a year, as an official EU institution. They will normally decide by consensus but may also be able to make binding majority decisions. The European Council will become a new common government above the other states. The President will represent the Union in talks with, for example, the American or Russian or Chinese Presidents. The post of President of the

European Council may later be amalgamated with the post of President of the Commission, so the new EU might get a fully presidential leadership, as they have in France or USA.

Common Foreign Ministry. We will also get a common Foreign Minister who can accompany the President on trips abroad. He will head a common Foreign and Defence Ministry. He will have a new title in the revised Constitution, where he was called the Foreign Minister. Under the Lisbon Treaty he will be called *"the Union's High Representative for Foreign and Security Policy"*. With such a long-winded title, the Franco-German machine ensured that in practice the media will call him the Union Foreign Minister. He will also chair the Foreign Ministers' Council of Ministers and represent the Union in cooperation with the *Foreign Ministers* of the Member countries.

In fact he is already appointed as the *EU Foreign Minister*, back when everyone thought the constitution was going to be ratified in all Member States. The Union's "Foreign Minister" is *Javier Solana*. He has a history as Foreign Minister of Spain and has been Secretary-General of the military cooperation organisation the Western European Union and later on of NATO.

In future, EU foreign policy may be laid down by majority decision, after a proposal by the EU Foreign Minister. Solana will also have another hat as a Vice-President of the Commission.

With these two hats for the Commission's powerful Vice-Chairman, foreign and internal policy can be integrated with the EU's other work. Binding laws on foreign policy cannot yet, however, be adopted as the basis of foreign policy decisions. The Court of Justice does not have full control over foreign and security policy either. The nation states still have some leeway in this area.

Common Diplomatic Corps. The common Foreign and Defence Ministry can be extended by the use of normal majority decisions on the budget to establish a large common diplomatic corps. Common EU embassies can be established worldwide which could gradually replace national embassies and the 126 already existing common EU representations. The common Intelligence Section can be expanded in ways that could make it look like the CIA. There are no legal limitations on the common Union foreign policy in the Lisbon Treaty. As regards military matters, the limits relate to the requirement for unanimity, if everybody has to be included.

The third public face of the new Union will be the President of the Commission. Accordingly, the Union can be represented vis-à-vis other states in the same way as other states are represented, with a common President, Prime

Minister and Foreign Minister. Seen from the outside, the EU will thus be seen to resemble a state.

Common international agreements. The Union will for the first time become a *legal person and have its own distinct corporate existence as an international actor.* This is a difficult concept, but a very important one. Today, the European Economic Community is a legal person that can negotiate, for example, trade agreements with other countries.

Now, the *division of pillars* between "intergovernmental" and "supranational" or Community cooperation that we have had up to now will disappear. The European Community will disappear. The Union as such will become a legal person. The Union can thus sign treaties with other states and international organisations on everything from trade to foreign and defence policy. Only states sign treaties with one another.

The United States and China will not negotiate with the Member States of the EU on major issues any more. The Union will negotiate for the whole territory of the EU. The President of the Commission, *José Manuel Barroso,* has called the new EU an *empire.* He is right. The Union is already the world's largest trading power and is now on the way to becoming a political *superpower.*

The Lisbon Treaty will introduce specially *structured military cooperation* for selected EU countries, built on the French and British nuclear weapons.

QUOTE:

José Manuel Barroso:
"Europe is an empire. A non-imperial one, it must be said.
But still, an empire."
At a press conference in Strasbourg on 10 July 2007, the President of the European Commission, Barroso, was asked what the EU will be once the new Treaty has been negotiated and adopted.

Source: EUX.TV, 10 July 2007.
You can see the clip on YouTube using the link:
http://www.youtube.com/watch?v=-I8M1T-GgRU

As a general rule under the Treaty of Lisbon international agreements can be concluded by majority decisions where the internal rules can be decided by majority vote. The agreements will be binding on a Member State, even if its representatives voted against the contents of an agreement.

International agreements entered into by the new EU will also take precedence over the Member States' own laws and agreements.

Common external borders. The Union has and will have *common external borders*. They can be controlled by everything from common border troops to common rules, decided by majority vote, on immigration and asylum. The European Union will decide, by majority decision, who may enter and settle in our countries. The Member States individually will lose the power to decide this.

Common armed forces. In addition to the provisions for specially structured military cooperation, the Union will get a common defence policy for all EU countries. A common weapons market will be established, supported by a common military agency which was already set up in June 2004 as the European Defence Agency when it was believed that the constitution was would be successfully adopted. In 2005 the EU got a military planning unit and military battle groups, supplemented by a military operations centre from 2007 onwards. The Treaty envisages that this will lead over time to the gradual development of common armed forces, a "common defence".

A common intelligence service (Sirene) is being set up. A number of military committees are meeting at the Council building in Brussels. The beginnings of a common Defence Ministry, a military planning unit, have already been set up in Avenue de Cortenbergh in Brussels.

The Lisbon Treaty will also give the Union a basis for waging war *without* the approval of the UN. There will be no Treaty requirement for it to wait for UN mandates. Accordingly, the Union will get common external capacities and powers like other states.

The right to enter into agreements with other states and to wage war is perhaps the most important function states have in comparison with businesses and individuals. The newly established Union will have the same powers as other states and will thus come to resemble a state in this way too.

Joint police and prosecution authority. The EU now has a joint police force known as Europol, with its headquarters in the Dutch seat of government, *The Hague,* the Lisbon Treaty establishes more firmly cross-border police cooperation. With the adoption of the necessary general budgetary decisions, Europol could become the equivalent of the American Federal investigative body, the FBI.

The Lisbon Treaty also creates the framework for an EU joint prosecution service and for much closer cooperation between the Member State law enforcement authorities.

Common penal code. As something new, the Union will also get the oppor-

tunity to punish its citizens for breaches of its law. Specifically, there is now an explicit basis for adopting a common EU penal code and the opportunity to lay down sentences for breaches of all Union laws.

This is how it is in all states. The national parliaments adopt laws, with penalties for infringement. Now, Union citizens may be punished for infringing Union laws. There are still no common Union prisons though. The common penal provisions will be implemented in and by the Member States. Under the European Arrest Warrant some Member States may be forced to extradite citizens to other Member States for something that was not a crime in their country.

The Union will thus get real powers over its citizens. The Member States may be fined if they do not implement and act in accordance with the Union's laws. The Union can also implement a forced collection of fines for breaches of Union legislation.

There are no restrictions under the provisions of the Lisbon Treaty regarding justice. In certain sensitive areas, however, agreement between the Member States is required, while the Lisbon Treaty contains a new provision *automatically* authorising *enhanced cooperation* between nine or more Member States if unanimity cannot be achieved.

Common fundamental rights. Under the Lisbon Treaty the Union will as for the first time get a code of common *fundamental rights* on its own just as with other states. The supreme interpreter of fundamental rights will now be the European Court of Justice, just as most Member States have a Supreme Court.

The Union will accede to the European Convention on Human Rights, just as its Member States have already done. If there is conflict between common European human rights standards as laid down in the Convention and the interpretation by the Union Court of Justice, we will have to adapt ourselves to the EU again.

The Lisbon Treaty expressly forbids Member States of the Union from lodging complaints against other countries or the Union itself other than through the European Court of Justice.

We therefore risk having two kinds of human rights in Europe: those that apply to all the European countries that have acceded to the Convention on Human Rights, and to its court in Strasbourg. And those that only apply in the EU and its own Court in Luxembourg.

We also face the risk of the European Court of Justice limiting our freedoms. For example in Sweden, civil servants have a *freedom to communicate information,* which generally makes it illegal for the Swedish authorities to enquire into leaks to the press.

There is no guarantee whether the Union's court will allow citizens and national authorities to have rights of this kind. On the contrary. The German reporter *Hans-Martin Tillack* was arrested for revealing the Eurostat scandal and had his computer, telephone and 16 boxes of documents confiscated.

The EU Court of Justice approved the action, which was prompted by the Commission's fraud unit OLAF. They wanted to find his sources of information. At the Human Rights Court in Strasbourg Tillack won his case in 2007 and was given € 40.000 in compensation. First, OLAF also denied it had asked the Belgian police to have access to Tillack's confiscated files. Later they had to admit – they will not protect the sources of journalists.

Common citizenship of the Union. The Union is not only a group of *states*. The Union also unites *its citizens.* There is a common citizenship as a common superstructure over and above national citizenships. If there is conflict between Union citizenship and national citizenship, it is the Union's rules that apply. Just as citizenship of the German Federal State of Bavaria must be set aside if it is in conflict with the rules of the Federal Republic on common German citizenship.

The new "additional" citizenship of the Union means that we have a duty of obedience to the Union's laws and loyalty to the Union's institutions and authority.

A State must have citizens and one can only be citizen of a state. One consequence of this change is that in the future members of the European Parliament will no longer be representatives of the "peoples of the Member States", but of the "citizens of the Union".

Common symbols of state. A common flag, currency, motto, national anthem and annual national day have been removed from the text of the Lisbon Treaty. But it is also written in the negotiation mandate that this will change nothing. The symbols of the Union will remain in force as hitherto, without any formal legal basis in the Treaties.

Official state symbols for the EU will no longer be provided for as they were in the Constitution. The father of the Constitution, *Giscard d'Estaing*, and the European Parliament are very annoyed at this. The Parliament voted by a large majority to reinforce the use of the common symbols of state for the EU, even if they are not mentioned in the new Treaty.

Is it a constitution? The word *Constitution* has now been removed from the published text, while the state functions and *primacy* of the Union's laws and

judgments are confirmed explicitly in Declaration No. 17. Instead of inserting the latter point clearly, reference is made to various judgments by the European Court of Justice that citizens themselves can look up.

In a European Court verdict on the 23rd of April 1986 (294/83, premise No. 23) in a conflict between The European Parliament and the Group of the Greens (Les Verts), the EU Treaty is for the first time described as a constitution. ("The basic Constitutional Charter, the Treaty"). In Opinion 1/91 of the European Court of Justice, the European treaties are described as *"the constitutional charter of a Community based on the rule of law."*

In the Lisbon treaty the term "Constitution" goes out through the front door. References to the effect that there is already a Constitution are coming in through the back door with the specific acknowledgment of the judgments of the Court of Justice..

So there *is* a *Constitution*, an EU constitution that we will soon have to adhere to if the Lisbon Treaty is ratified. There are *no* functions of Member States that cannot now be found or developed at EU level. Even missing powers such as the possibility of taxing citizens or bringing them into a war can be decided by unanimous decision without asking the peoples of Europe directly. The new Constitution will thus mean that each country will from now on have *two constitutions*, the national one and the Union one. Bavaria will even have three constitutions. If there is conflict between them, the Union one will apply. Not the national one, the European Court of Justice *has* decided.

Distribution policy. There is, however, one important normal state function which is still weak under the Union's new constitution, the Lisbon Treaty. There is not yet a common budget for distributing resources from the rich to poor citizens in the Union. In most countries taxes are levied on citizens by the government, which are then used to finance public services, for example for supporting the unemployed and funding health services, pensions, schools, public housing etc.

The Lisbon Treaty provides the *basis* for developing a distribution function of this kind. Majority voting may be introduced by unanimous agreement on the composition of the budget. The current ceiling on Brussels funds, amounting to 1.27% annually of the aggregate GNP of the EU's 27 Member States GNP, may be exceeded without voters having to be asked.

There is also talk of introducing common EU taxes. This may also be decided unanimously among the countries, without first asking the voters.

The EU's income today is a good 1 percent of the countries" aggregate GNP. In the United States, for example, the federal budget is 20% of GNP.

The EU has some way to go here, compared to other states. There is a common currency, a central bank and a common monetary policy. There is not yet a common fiscal or tax policy, income policy or social service policy.

In the socio-economic field there is still meaningful control by the governments and peoples of the Member States. We can have national elections and still decide the size of pensions at national level.

But the *framework* for our economy is increasingly being settled by majority decision at the Union's Council of Ministers. There is, however, a legal basis for developing common rules for all social affairs, including the state pension. Member States are directly forbidden to give preference to their own citizens in some areas. This is called discrimination. It is also forbidden to pursue an active policy of employment if there is a danger that this will create too big a deficit in the state's accounts. Respect for price stability must always take precedence over concern for employment in the policy of the European Central Bank.

This is already in the EU's existing Treaties. Now the EU will have more opportunities to coordinate economic policy, especially for countries that have adopted the common EU currency, the Euro.

Most legislation *has already been* exported to the EU. Former German President *Roman Herzog* wrote recently that 84% of German laws now come from the EU, which led him to ask whether it was valid to regard Germany as a parliamentary democracy any longer. The next big battle will be over the issue of money arising from the power to impose common taxes.

47 paragraphs are enough

The critics in the Convention on the Constitution prepared constructive alternatives for building European cooperation.

We put forward a complete vision based on the values of openness and transparency in decision-making, closeness to the people and democracy, as well as greater freedom for member countries through the EU adopting minimum commo*n* rules instead of alignment or harmonization of complete rules, so-called *total harmonisation.*

I set out this vision in a brief proposal for a European *Cooperation Agreement.* With only 47 paragraphs, it takes up only one page of a broadsheet newspaper and can be understood by everyone.

It does not need more words than this to describe how a European society should be properly managed. The content of laws should not appear in a constitution, as they do in the EU Constitution and the Treaty of Lisbon. They should be decided on the basis of a short constitution or a European cooperation agreement.

Such a cooperation does not need 3000 pages of Constitutional Treaties, which only experts can understand. A proper basis for the enlarged EU can be made that is much shorter, more democratic and easier to understand by citizens. Even if they want to have a full EU Constitution.

Three crucial proposed amendments

The SOS Democracy Inter-group in the European Parliament has also set out some very specific proposed amendments to the Lisbon Treaty text.

Every country has the right to table a proposal under Article 48 of the EU Treaty. This right cannot be abolished or signed away.

The position of the Danish "June Movement" ("JuniBevægelsen") on the final Treaty text will particularly depend on whether it contains these three important proposed amendments:

1. Democracy as the basis for all laws

Any EU-law must have the approval of a majority of the persons elected by the people either in the national parliaments and/or in the European Parliament. We reject a "double majority" with votes in the Council of Ministers according to population size. The Lisbon Treaty will halve Danish influence in EU law-making and double German influence. Instead, we want one vote for each country in the Council of Ministers. If unanimity cannot be reached, we want all laws to be adopted by decision of 75% of the countries and a general majority in the European Parliament.

2. A permanent Danish Commissioner

We want to keep a Commissioner from each Member State and make him or her responsible to the national parliament for the way they vote in the Commission.

3. Common minimum rules.

We want the requirement to have *total harmonisation* of laws changed to a requirement to have common *minimum rules,* so that countries that wish to have the opportunity to go further can do so in relation to such matters as protecting health and the environment, security and employment, consumer protection, animal welfare and cultural diversity.

First and foremost, we want to ask *voters* about the most comprehensive measure to date in EU cooperation. Together with supporters and opponents of the Constitution in the rest of Europe, we have taken the initiative to collect *signatures* for referendums in the whole EU.

Ideally, we want a new *convention* to be elected in order to prepare one or two different proposals that can then be sent for referendums in all EU countries at the same time. You can support the call for a referendum on the Lisbon Treaty and get involved by spreading the word about the Inter-group website: www.x09.eu

Chapter 3

The Democratic deficit

The French and Dutch "No" votes

On 29 May 2005 55% of French citizens voted "No" to a proposal to give the EU the basis for a *Constitution*. On 1 June 2005 the Dutch followed suit, but with a 62% "No".

Voters in two of the EU's original core countries had clearly said No to the Constitution.

Nonetheless, an EU summit decided to proceed with the ratifications as if nothing had happened. The Prime Minister of Luxembourg, *Jean-Claude Juncker,* offered to push the constitution through there by way of a referendum.

Even then, 43.48% of Luxembourg voters voted No. To avoid a "No" majority, this popular Prime Minister even threatened to hand over his post to an unpopular politician!

The supporters of the Constitution then tried to explain that it was not the EU Constitution, but something completely different from what people had voted on in France and the Netherlands.

Opinion polls showed, however, that a good 40% of the population of France had looked at the Constitution and 10% had read the whole text. The former French President, *Jacques Chirac*, who took part in its adoption, was – significantly – not among them. This is an extra good argument for referendums; it forces the politicians to read the texts they are voting for!

Constitution without democracy

A constitution usually protects citizens from politicians. It sets limits to what those elected may decide on between elections. The EU Constitution and the Lisbon treaty are different in this respect. They protect bureaucrats and politicians from the normal democratic influence of voters.

The EU Constitution contains everything a state needs in its provisions. But it is weak on the most fundamental thing in any democratic constitution: *democracy*.

Where are the voters? Where am I in the Lisbon Treaty? How can *I* have an impact on laws in society? This is precisely where the process started. For a summit in the Brussels suburb, Laeken, on 14 and 15 December 2001 the Belgian Prime Minister, *Guy Verhofstadt*, wrote the draft of the Laeken

Declaration. He wanted to get rid of bureaucracy and mincing words and to connect the voters better to the EU.

This ideal goal was forgotten along the way. I wrote a little guide in which I could show the power shift from voters to Brussels in 113 points. There was and is not a single instance of power going the other way.

As a Member of the European Parliament, I should be happy about the Constitution and now the Lisbon Treaty. The EP will have a much greater say in making EU laws. It will give MEP's many more areas where they can have some influence. In the European Parliament, this is called *democratisation*.

But the cornerstone of democracy does *not* lie with the Members of the European Parliament, but with *voters*. The cornerstone of democracy is that we, as *voters*, can have elections, achieve a new majority and then get a new law. It is we, *the voters*, who have the last word on all the nationally originating laws in our respective countries.

The EU consists of 27 parliamentary democracies with this common cornerstone. Of all the values, this is the one to which we are most committed together. This is how we distinguish ourselves from dictatorships and less democratic countries. We can always get rid of an unpopular law and an unpopular government.

We do not need to sell out as regards the market either or issues of left-right policy. We can also take part in sharing social values with our *right to vote.* We can use the secret and general right to vote to say "Yes" or "No", so that our leaders can understand what we want – or be kicked out.

It is precisely this democratic cornerstone which is passed over in the Lisbon Treaty. It is not removed entirely, but it is made into something that is very far removed. In practice, it is outside the Lisbon Treaty's frame of reference. We can still have elections, but we cannot use our vote to change legislation in the many areas where the Union is given power to decide.

It is a very, very long process to change an EU law under the Lisbon Treaty. The power to do this *does not* lie with the normal majority of voters. It also demands a great effort in a lot of countries to change a law.

Sole right to make proposals

It is only the *non-elected* who have the right to propose legislation in the EU. The Commission in Brussels still has the *sole right* to propose legislation, but in many more areas now. The Lisbon treaty contains the prize of direct democracy, which I helped to propose in the special Convention on the Constitution. There is the right for a million voters to sign a petition for the Commission to put forward a proposal.

The Commission is not obliged to listen. When over a million voters signed the demand for the European Parliament to have one common seat, we could not even get the proposal debated once in the European Parliament itself!

This is the *only* direct nod to voters in the Lisbon Treaty. It is therefore a poor substitute for the democracy that we are losing in the Member States in the many new areas where the national parliaments can be outvoted.

Stated polemically: It is a condition for making a proposal in the EU that one is not elected!

The Commission does not answer to voters. It cannot be kicked out at the next election. With or without one million signatures.

Do you think we will have referendums on the Lisbon Treaty in all Member States if we assemble one million signatures calling for them in Europe?

A smaller Commission

The Lisbon Treaty will remove the right to have a permanent Commissioner from each Member State and will continue to make their appointment a matter for the Prime Ministers and Presidents. They have to meet for a summit every five years and agree on the new Commission President and a smaller Commission.

After 2014 there can only be Commissioners from two-thirds of the Member States. In turn the countries themselves do not decide *who* will participate, when it is their turn to have a citizen in the Commission. They can only make "suggestions" regarding names, instead of their right to propose their national Commissioner now. .

The President and Commissioners will be decided by a *super-qualified majority* of 20 of the 27 Prime Ministers. That is 72% of the Member States. The Prime Ministers' choice will then be placed before the European Parliament, which can vote "Yes" or "No" firstly on the President and then on the whole Commission.

The elected representatives in the European Parliament *cannot* elect another President or another Commission of their own choice. It is the supreme executive authority in the EU countries, *the Prime Ministers*, who will appoint the Commission by majority decision. The Commission will be more powerful than ever and will exercise legislative, executive and judicial authority.

It says in the Lisbon Treaty that the Prime Ministers must show regard to the elections for the European Parliament, and that the European Parliament chooses the Commission. But there will be only one candidate nominated by the Prime Ministers to choose from Therefore neither the National

Parliaments nor the European Parliament really elect what is in effect the *EU government*. We will get a common EU government, but it will not be responsible to the voters.

Indirect influence

National Prime Ministers emerge from national elections. "We, as voters, have an indirect influence on who they are. But in the EU we do not have the direct influence on the appointment of a government that we exercise when we vote in elections to our National Parliaments.

At national level we really do elect our government. We get something visible for our votes. The old Prime Minister again, or a new one. A new majority in the national parliament can amend the laws. The European Parliament *can* reject the Prime Ministers" choice of Commissioners. When the Barroso Commission was appointed, a majority in the European Parliament wanted to reject two proposals for Commissioners. The countries concerned had to give up their candidacies.

The majority of the European Parliament did not like the proposed Italian Commissioner, who was appointed by the Italian Government, supported by a majority of the Italian parliament. The Latvian candidate was a former opponent of EU membership and was therefore not accepted, even though she was the choice of the Latvian Government.

There are two different models for giving voters power over the Commission. One is the *federalist* model, where the European Parliament elects the President, who then puts his or her government together and has it approved or rejected by an overall majority in the Parliament. So it is voters' elections for the European Parliament that decide the Commission's colours.

The European parties can then each put forward a candidate for the post of President. The one who achieves a majority in the Parliament is elected. This is classical parliamentary democracy now at EU level.

This model is preferred – not surprisingly - by the large majority in the European Parliament. But it is *not* in the Lisbon treaty.

The Constitution's critics have put forward another model, where *voters* in individual countries elect their own representative in the Commission. There would therefore be a Commission that represents voters in every country. This model has also been rejected.

The revised EU Constitution effectively establishes a common European government, but it does not allow this government to be directly answerable to either National Parliaments or the European Parliament.

A Europe of Democracies

Do we want to be represented as a European people, or as the different peoples we still are?

Are we ready for a common, supranational democracy in the EU? Could we possibly combine parliamentary democracy in the Member States with parliamentary democracy in the EU?

I like the vision of a *Europe of Democracies*. An EU Commissioner could be appointed by the national parliament or by direct election, where voters vote directly on who will represent their country in the Commission in Brussels, and thus have some influence on what laws should be proposed.

The Commission is at the heart of EU cooperation and is its driving force. Not only do Commissioners have the sole and exclusive right to propose EU legislation, but they also have the right to adopt many laws themselves. The Lisbon Treaty effectively gives the Commission enormous powers to legislate by decree.

Such arrangements are referred to as "delegated acts" in the Lisbon Treaty, while the constitution referred to *delegated European regulations* and *implementing regulations* and *decisions*. The original Articles I-36 and I-37 of the constitution have now become Article 290 and 291 TFEU in the final Lisbon Treaty. Under the Treaty of Nice, which is currently applicable, the implementing provisions relating to the Commission are in Article 249 TEC.

The elected representatives and governments can only alter Commission decrees if they are able to obtain a substantial *qualified majority* in the Council of Ministers or an "*absolute majority*" in the European Parliament.

Unelected officials are therefore in a position to decide on what must be done against the large majority of Member States.

Our democracies can be overruled by officials acting behind closed doors in Brussels, whose decisions take precedence over national law. Under EU law, even the National Constitutions must give way to an implementing regulation adopted by Commission officials, not even requiring the presence of a representative from the country affected.

This is a measure of the distance separating voters from decision-making processes in the Union under the Lisbon Treaty.

Secret legislation

Today, 85% of all EU laws are adopted by civil servants from the Member States and the Commission in some 300 secret work groups under the Council of Ministers in Brussels.

The draft laws are drawn up and implemented by some 3000 other secret working groups attached to the Commission.

The Council of Ministers usually just acts as a rubber stamp, merely endorsing working party recommendations. Decisions entered on the agenda as "A-items" are not debated but automatically adopted after the Council of Ministers meeting has ended and treated as having been approved by them.

Only 15% of EU laws are actually discussed or considered at meetings of the Council of Ministers where the Ministers themselves may be present. The elected representatives from the national parliaments or the European Parliament are not allowed in here either.

This will not change with the Lisbon treaty even if, according to one of its stated objectives, it is supposed to bring citizens closer to the EU. On the contrary, even more laws in even more areas will be moved from open National Parliaments, elected by the peoples of the Member States, to closed meetings in Brussels.

Under the Lisbon Treaty the European Parliament is involved in a larger number of areas than before in the form of *"joint decision making"*. This has now been renamed the *general legislative method* and is currently set out in Article 251 TEC under the Treaty of Nice. This becomes Article 251 TFEU under the Treaty of Lisbon and finally becomes Article 294 TFEU. The wording is identical to the corresponding provision of the proposed constitution.

Under this method, Members of the European Parliament can still reject laws and *propose amendments* to Commission proposals. In recent years, up to 80% of laws have been adopted on a first reading under this joint decision-making procedure, representatives of Parliament, Council and Commission having been able to reach agreement.

Adoption on a first reading can give Parliament greater real influence than is provided for under the formal distribution of powers. On a first reading Parliament decides by *overall* majority of votes cast. However, the Commission and the Council of Ministers will want to know whether proposals have gained the support of the *absolute majority* of members required for Parliament to exert its influence on a second reading.

If there is a likelihood of Parliament's proposal for amendment re-emerging to meet the stricter criteria for adoption required for a second reading, the Commission and the Council might as well compromise on the first reading. If Parliament's proposed amendment seems unlikely to obtain the absolute majority of its membership which is required for a second reading, the Commission and the Council of Ministers can simply ignore it.

While he European Parliament and its rapporteurs have secured a large amount of real influence on legislation in the EU, this still cannot be considered as democracy in the general meaning of the term, under which laws can be amended by the electorate through the holding of a new election!

It is the non-elected Commission which really decides whether an amendment proposed by the directly elected representatives of the citizens will be allowed to go forward to likely acceptance. It is the officials and sometimes the ministers in the Council of Ministers who decide whether an amendment proposed by the directly elected representatives can be adopted. If the Commission rejects a proposed amendment, unanimity is required in the Council of Ministers for it to be adopted, thereby giving the unelected Commission unrivalled power in the Union's legislative process.

It is *not* the European Parliament that adopts laws in the EU in the same way as national parliaments adopt laws in each of the EU's 27 countries. And of course the European Parliament cannot initiate or propose any law - such a right of initiative being the most important function of all real parliaments. In the EU this right of legislative initiative rests solely with the non-elected Commission.

Democratic deficit

Members of the European Parliament have growing *influence* on the creation of laws, but they still do not have the real legislative power. The problem with the Lisbon Treaty is that it moves much more power *away from* voters and the elected representatives in the Member States than it gives *to* us as European voters and to our elected representatives in the European Parliament.

A new *democratic deficit* therefore arises. Voters lose the opportunity to hold elections, achieve a new majority and then amend the laws that bind them at national level

The compensation for that is that we can hold elections to the European Parliament every five years and thereby elect some people who can participate in *influencing* EU laws.

I this is a good system for Europe – why not also use it in the Member States?

Then we should forbid our national MPs to initiate and decide the laws. Instead, they should only send recommendations to the heads of civil service department at the various ministries, who should then meet behind closed doors and decide whether the advice of the elected representatives is good or not.

The heads of ministry departments at national level are not elected, just as Commissioners are not elected in the EU.

Common decision-making is not common enough. It is the Commission and

the Council of Ministers which fundamentally legislate in the Community, and henceforth in the post-Lisbon Union. *They* share the *legislative power*, even though none of them are elected directly to exercise it.

The European Parliament is elected, but actually does not have legislative *power*. The people we vote for at European elections can influence but cannot really decide. What is really decided is not decided by those who are elected.

It is therefore not such a bad thing that the first version of the EU Constitution was rejected by *voters in 2005.*

Why should French and Dutch voters – and now Irish - say "Yes" to reducing their own influence as voters?

Two models for cooperation

There are also two different models for removing this democratic deficit. The federalist model would move the entire legislative power to the European Parliament, so that laws are adopted in a common European parliamentary democracy. Are we ready for that? Is Europe ready for that?

The democratic opposition in the Convention which drew up the original Constitution proposed a combination of parliamentary democracy in the Member States with two different hearings at the EU level.

In one chamber, *the Council of Ministers,* each country should have one vote, regardless of size. A law might be adopted if, for example, 75% of the countries agree. Each country's minister should have a mandate from his or her national parliament. An EU decision would therefore express the will of 75% of the national parliaments and thus, indirectly, of most national electorates.

At the same time, the other chamber, *the European Parliament*, could be given a real right of veto over all EU laws by simply seeking that any EU law should also be adopted by an overall majority in the European Parliament.

Thus a vote in the European Parliament would also have a direct influence. So the laws would be introduced in full view of the public, instead of by the Commission's offices and the 300 secret work groups under the Council of Ministers in Brussels – for good or ill.

The Lisbon Treaty does not adopt either democratic method. It gives much less power to the European Parliament than it takes away from the voters at national level. This is the consequence of the 68 cases where the member countries lose their *right of veto* in the EU.

As compensation, the European Parliament will have greater influence in 19 of the current policy areas that are currently decided by majority voting in the Council of Ministers, without common decision-making with the European Parliament.

Seen in isolation, this is progress in 19 cases, but it is clearly not enough to make up for the total loss of democracy in 49 cases. Greater influence for the European Parliament is not an unqualified good either. That Parliament is well-known for wanting to centralise things unnecessarily.

Since the French and Dutch "No" to the Constitution we have, however, been able to obtain support in the Parliament for the principle of common *minimum rules* instead of *total harmonisation*.

But making this effective is still a long way off, and so all too often we lose the opportunity to raise national standards in relation to, for example, health and the environment, while we are waiting for action at EU level.

Plan D – for dialogue and democracy

When voters rejected the Constitution in France and the Netherlands, the Commission and the EU countries decided on a "Plan D for dialogue and democracy".

Nothing much came of it. The Commission pledged money to those who agreed with the proposed Constitution. Nonetheless, the opinion polls did not give a majority in favour of the Constitution in all countries.

Many voters were still sceptical about the Constitution and wanted, above all, to be consulted as to whether it should come into force.

According to an opinion poll in March 2007 organised by the British think-tank, *Open Europe*, 75% of European voters want to be asked about the Lisbon Treaty, while only 20% want to pass the decision over to politicians. (www.openeurope.org.uk/media%2Dcentre/pressrelease.aspx?pressreleaseid=31)

The popular desire to decide on the text by referendum was however not good enough. Instead of amending the text so that it could be made more acceptable to voters, the EU Prime Ministers decided that it should not go to a referendum at all!

The voters had misused the Prime Ministers' permission to vote by voting No, Non and Nee. So from now on we will never again be asked to decide on such important matters by referendum.

Chapter 4

Balance of power

The Lisbon Treaty's two main treaties

The Union Treaty – "The Treaty on European Union" – will still be abbreviated to *TEU* and will have a number of supplements from the Constitution.

The other basic treaty, the "Treaty Establishing the European Community" is currently abbreviated to *TEC* and will now have its name changed to "The Treaty on the Functioning of the European Union". We abbreviate it TFEU.

These two main Treaties, together with other relevant existing Treaties and the old and new protocols, would make up the constitutional legal basis of the Union, the Union's *constitution,* if the new Lisbon Treaty is ratified.

Primacy of EU law

The Prime Ministers have now removed the Constitution's provision on the *primacy* of EU law set out in Article I-6 of the rejected Constitution. Declaration No 27, which becomes declaration No 17 in the final version of the Treaties, states that "*The Conference recalls that, in accordance with well settled case law of the European Court of Justice, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of the Member States under the conditions laid down by the said case law"*.

It is stated in the negotiation mandate that the Treaties will *not* have a *constitutional nature* (point 3 of the negotiation mandate). Yet what happens here is that the word "constitution" or "constitutional" is just *not* repeated in the Lisbon Treaty itself.

In certain countries politicians may refer to this excerpt from a non-binding Declaration and argue that the substance thereof is no longer the same insofar as it is no longer contained in a formal constitution which clearly takes precedence over the laws and constitutions of the Member States. For example, in making a submission to the Dutch parliament with regard to the constitution, the Dutch Council of State made this very point.

In other countries, they can say: "It is only a change in name, the Constitution is intact. Any national decision is invalid if it conflicts with something adopted by the EU."

Before one gets to Point 4 of the negotiation mandate, there is a piece of wording which is completely incomprehensible for most normal people, about

keeping the existing legal situation of the primacy of EU over national law, as laid down by the European Court of Justice.

This is followed by a special declaration, Now no 17, where explicit reference is made to "the well-settled case-law of the EU Court of Justice" which gives EU law *primacy* over the law of the Member States. The European Court of Justice *has* for a long time established EU law as a consistently constitutional system.

This is expressly acknowledged by this incomprehensible declaration and, at the same time, by the fact that some politicians can refer to the wording by denying it.

The European Council of 21-23 June 2007 in Brussels: Presidency Conclusions, General Observations, point 3, page 16:

"The TEU and the Treaty on the Functioning of the Union will not have a constitutional character. The terminology used throughout the Treaties will reflect this change: the term "Constitution" will not be used, the "Union Minister for Foreign Affairs" will be called High Representative of the Union for Foreign Affairs and Security Policy and the denominations "law" and "framework law" will be abandoned, the existing denominations "regulations", "directives" and "decisions" being retained. Likewise, there will be no article in the amended Treaties mentioning the symbols of the EU such as the flag, the anthem or the motto. Concerning the primacy of EU law, the IGC will adopt a Declaration recalling the existing case law of the EU Court of Justice. Footnote 1: (Whilst the Article on primacy of Union law will not be reproduced in the TEU, the IGC will agree on the following Declaration: "The Conference recalls that, in accordance with well settled case-law of the EU Court of Justice, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case-law." In addition, the opinion of the Legal Service of the Council (doc. 11197/07) will be annexed to the Final Act of the Conference.)"

Note 11197/07 doc. 580/07 from the EU Legal Service states: "It results from the case-law of the Court of Justice that primacy of EC law is a cornerstone principle of Community law. According to the Court, this principle is inherent to the specific nature of the European Community. At the time of the first judgment of this established case-law (Costa/ENEL, 15 July 1964, Case 6/64 (footnote)) there was no mention of primacy in the treaty. This is still the case today. The fact that the principle of primacy will not be included in the Lisbon Treaty shall not in any way change the existence of the principle and the existing case-law of the Court of Justice."

In the footnote, there follows a quote from the Court which established

the primacy of EU law: "It follows … that the law stemming from the treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question."

In other areas of life this kind of amendment would be called fraud. It is not. Its authors are merely being economical with the truth. Similar qualifications can be found in purchasing conditions for goods, if one does a little research and looks up all the relevant legal judgments.

The primacy of EU law is now expressly stated for the first time in an EU Treaty. It is introduced in this non-binding declaration No.17, but the declaration refers to the already existing legally binding judgments which the Member States expressly acknowledge.

To remove the word "Constitution" does not change the nature of the Constitution either. Because as mentioned previously, the Court has laid down that EU law makes up "*the constitutional basis for a community governed by the rule of law",* as expressed in an opinion of the Court in 1991 on EEA cooperation.

Everywhere the proposed Lisbon Treaty is hailed as progress for democracy in the EU. Such a claim does not give voters any more real influence.

The main question for any Constitution is whether *I* can decide. What is my role as a voter?

If I can decide together with other voters, it is a democratic Constitution. If not – I vote "No"…

The principle of subsidiarity

The Netherlands negotiated for and won a gesture towards the principle of proximity (*subsidiarity* in EU jargon). In future, national parliaments may protest at draft EU laws on the grounds of lack of respect for the principles of subsidiarity and proportionality. The Lisbon Treaty provision requires that one-third of the parliaments agree to the criticism within eight weeks of reception of the proposal. This procedure is colloquially called the "yellow card".

Later the European Parliament or 55% of the member state governments can reject a proposal if they think it does not respect the principle of subsidiarity. This is called the orange card and requires a majority among the national parliaments.

The new orange or red cards cover the principle of subsidiarity but *not* the more important principle of proportionality.

On paper, this is progress. But the threshold of 55% should have been 25%,

as the critics proposed at the Convention. They called for the Commission being obliged listen to objections from 25% of the national parliaments. That would have been real progress by comparison with the rule in the rejected constitution that at least 33% of the national parliaments must object.

The orange card with its 55% requirement does not change anything in practice, since the EU cannot adopt a proposed law in any case if 45% of the countries disagree!

In other words, 55% of the countries have to back every law in the Council of Ministers. This "prize" for the Netherlands shows what came out of a negotiation in which all the negotiators – including the Dutch ones – agreed that it was the voters who had voted incorrectly. They were offered a headline only – with no decentralising content.

The concession of the Commission

Since September 2006 the Commission *has* sent proposals for new laws directly to all the national parliaments, so that the latter can say whether the proposals comply with the principles of closeness to citizens, subsidiarity and proportionality. In the rejected Constitution, the national parliaments had six weeks to react. This will now be amended to eight weeks by the Lisbon Treaty. The two extra weeks are a little real progress.

On the other hand it is no longer just one third of the national parliaments which must react to stop a Commission law proposal. One third is still enough to require the Commission to take a closer look at its proposal again.

But we now have to get unanimous opposition from 55% of the countries" governments to *stop* the negotiation of a proposed law. The Commission had previously declared that they would respond to objections if there was opposition from a third of the countries. This concession has most likely been withdrawn following pressure from the majority in the European Parliament who do not like gestures to the national parliaments.

At a meeting of representatives from the national parliaments of the EU countries in Berlin in mid-May 2007 they discussed whether just two or up to five proposals should be controlled for subsidiarity in the Union each year. The national parliaments do not have the courage to take EU legislation seriously, unfortunately.

The Commission did however receive 152 reactions from the national parliaments to its legislative proposals between September 2006 and September 2007. But these did not trigger one single change in the Commission's proposals.

Most of the reactions came from the French Senate (39), the German Federal Council (20), and the British House of Lords (17). These bodies do not have the

primary legislative power in their respective countries. The Swedish Parliament has reacted 17 times, Portugal 12 times and the Danish Parliament 11 times. The two chambers of the Dutch Parliament which has been so eager to introduce the principle of subsidiarity have only used the right three times.

We will not achieve a real principle of closeness to citizens until the day when the national parliaments are required to make statements on all EU legislation, so that they can be held responsible for that on election day. The new rule of legislative proximity in the Lisbon Treaty is made out to be a strengthening of the national parliaments. Unfortunately, the rule covers the greatest transfer of real power and influence to date from the national parliaments – *and their voters* – to the executive power in the EU.

In the resurrected Union Constitution, the national parliaments will have the principle of proximity incorporated in a new Article 8c in the amended EU Treaty which becomes Article 12 TEU in the final Lisbon Treaty.

Votes according to population size

The Lisbon Treaty drastically changes the existing power relations between the Member States. Power is not only shifted away from voters in *all* countries. Power is also shifted away from the small and medium-sized countries to the largest ones.

The key proposal is that countries will get votes according to their *population size.* Thus Germany gets 82 million votes, Denmark 5.4 million, Ireland 4.2 million. This means that Germany, France and two other countries can block any proposed law, even if the 23 other countries are in favour.

The new system, with a *double majority*, gives the larger countries a much stronger bargaining position in making EU laws. In future, the Commission will start by consulting the largest countries when it is preparing proposals for EU laws. It will know that the small ones can always be outvoted if need be.

Today, most proposed laws are adopted by *consensus* on the Council of Ministers. Only a few laws are actually voted on, even if in practice it is possible to vote them through by a *qualified majority*. Government civil servants calculate whether there is a qualified majority for something or whether a blocking minority exists, so a form of mental shadow-voting takes place all the time.

Today, under the Nice Treaty, there are 345 votes in the Council of Ministers. There have to be 255 for a qualified majority. Germany and the other big countries have 29 votes each, Poland and Spain 27 each, Romania 14, Sweden 10 and Denmark and Ireland 7.

The Polish alternative

Germany wanted to use the "double majority" system proposed in the Treaty of Lisbon and the Constitution to double its influence in relation to many other countries.

Under Lisbon Germany will have *15* times the influence of Denmark, and more than twice the influence of Poland with its 38 million citizens. Under the Nice Treaty Poland has 27 votes in comparison with 29 for Germany, France and the other big nations.

Poland will have its influence halved by the Lisbon Treaty, but it was criticised for being difficult in the negotiations on this point, while Germany was praised for her patience.

The proposed Polish alternative to votes according to population size would have introduced a system whereby the weighting of votes for individual Member States would be calculated according to the square-root of a country's population.

This would have meant that that Germany would have 9 votes and Poland 6. Accordingly, Poland started by offering to go from 27 votes to 6, while Germany would only go from 29 to 9.

In fact, this Polish proposal was not originally Polish. It had originally been put forward by Sweden. A similar system is used for deciding on voting strength in the German Bundesrat! There, none of the *Länder* may have fewer than 3 votes, nor more than 6.

Little Saarland, with 1.04 million inhabitants, has 3 members in the Bundesrat, whilst big Rheinland-Westphahlia, with 18.03 million inhabitants, has 6 seats, according to the Bundesrat's website.

The German Länder *would never accept the system of voting according to total population size which Germany above all has now insisted on imposing on the whole EU.*

The difference between Nice and Lisbon Treaty voting rules

During the negotiations in Brussels on the night of 23 June 2007, Poland achieved a concession on the double-majority system. It will not enter into force before 2014, but up to 2017 any country may request a vote in accordance with the rules of the Treaty of Nice.

The background to this is that Spain achieved great influence at the negotiations on the Treaty of Nice in 2000. The President of France, Chirac, insisted on having the same weighting of votes as Germany in the Council of Ministers, even though post-reunification Germany is significantly larger than France.

The four big countries therefore got 29 votes each in the Council of Ministers, while Germany got 99 Members in the European Parliament as compensation for her large size, in comparison with 78 for France. Now Germany will get votes according to its population size in the Council and will almost keep its entire large representation in the European Parliament *at the same time*. With the Lisbon Treaty, Germany will have 96 members in the European Parliament which is the highest possible number of members. There will also be a lower limit of 6 members.

Spain – and thus also Poland, with about the same population – won 27 votes in the Council of Ministers with the Nice Treaty. Very close to the four big Member States. It was on this basis that Poland originally joined the EU. As soon as she had joined she was told: "That is invalid; your influence will be halved henceforth."

So Poland proposed the fairer square-root principle, which would give Poland two- thirds of the German voting weight instead of nearly the same.

The proposal to divide mandates according to the square-root of a population was first developed by the British mathematician *Lionel Penrose.* It had already been proposed by Sweden during the negotiations on the Treaty of Amsterdam.

The system has the big advantage of abolishing horse-trading between countries regarding the weighting of votes, and it is much easier to use than population size. Instead of 82 1/2 million votes, Germany would have got 9 votes, Poland 6, Sweden 3 and Denmark and Ireland 2 each. This is easy for ordinary people to remember.

The system in the EU Lisbon treaty, based on total population size, will enter into force, together with the smaller Commission, in 2014. The population size is revised each year and published in the EU's Official Journal. But calculating it is not that simple.

For example, there are 4 million Romanians who live and work in other EU countries. Where are they to be counted? With their country of origin or country of residence? There are millions of citizens around the EU with dual nationality. Is it only residence that should be counted?

Using the principle of square-root of the population, there are fewer meaningless changes of this kind to population size. The system could be simplified further, as I have shown in the Table below which is based on the most recently published official population statistics and the weighting of votes according to different models.

In the simplified model – based on that used in the German Bundesrat – Germany would get 6 votes, France, Italy and the United Kingdom would get

5 each, Poland and Spain 4, medium-sized countries 3, Denmark and similar countries 2. There would then be a single vote for the smallest countries, such as Luxembourg and Malta.

A simplified system such as this would be easy for ordinary people to remember. Even with further enlargements of the EU, we could stay below a total of 100 votes. Germany would get more votes than France and have 3 times as many as Denmark and Ireland.

In the original EEC which Denmark, Ireland and Britain joined in 1973, Germany had 10 votes and Denmark and Ireland had three each. With the Treaty of Nice, Germany went from 10 to 29 and Denmark and Ireland from 3 to 7. With the Lisbon Treaty, Germany gets 15 times the Danish influence, 20 times the Irish. The biggest countries are now taking **a firmer grip on power in the EU.**

Blocking minority – the Ioannina compromise

Under the Treaty of Lisbon and the EU Constitution, in order to adopt an EU law 55% of the countries have to be in agreement, together representing 65% of the overall EU population. The adoption of a law can thus be impeded by a little more than 45% of the Member States, or countries with more than 35% of the population.

This is called a *blocking minority.* In this way Germany and France, for example – or Turkey in due course – could dominate EU cooperation. There is also, however, a rule that there must be at least four countries for a block. Accordingly, the Franco-German machine would only need to have the agreement of two other countries, for example Luxembourg and Belgium, to be able to tip the balance in their favour.

When the Treaty of Nice was negotiated, Spain was angry that it got a worse bargaining outcome than it had under the previous system. Spain therefore achieved a special dispensation, whereby a decision may only be blocked once by a smaller number of votes than is usually needed for a blocking minority.

This agreement had been originally reached at the Greek town of Ioannina and is therefore called the Ioannina compromise. Its content is not very important, because it has only been used once in practice. On the night of 23 June 2007, Poland achieved a similar victory. It gained a new Ioannina compromise, whereby it is possible for a country to demand postponement of negotiations on a proposed law if its proposal has the support of 75% of the votes needed to make up a blocking minority according to the new rules of the game.

The 75% figure may refer to the number of Member States or the population. This rule shall apply until 31 March 2017. "As from 1 April 2017, the

same mechanism will apply, the relevant percentages being, respectively, at least 55% of the population or at least 55% of the number of Member States necessary to constitute a blocking minority resulting from the application of ...". This text is contained on page 18 of the negotiating mandate and now in Declaration No 7.

The Declaration contains a draft decision of the Council which is just as binding or non-binding as Denmark's Edinburgh Declaration.

Poland can accordingly claim to have obtained greater negotiating power regarding the next two seven-year budgets. The fact is that a simple majority of Member States can call for a vote under the provisions of the Treaty, as indicated in Article 3 of the draft decision in Declaration No.7 , "in compliance with the Rules of Procedure of the Council". The President of the Council shall "facilitate a wider base of agreement in the Council".

Other voting rules also have legal weight, however. While the Ioannina compromise provides for a few months' grace in relation to adopting EU laws, it does not prevent the larger countries from forcing through decisions thanks to the size of their populations.

It is therefore quite possible for Poland to be voted down.

There is disagreement between Member States on the interpretation of this compromise. Can a vote be delayed for a maximum of two years or for only three months until the next EU summit? The Polish negotiators have accepted these three months in exchange for concessions on other points of the Treaty.

The EU summit provided for the compromise in a *non-binding* Declaration by the European Council. Under a new legally binding protocol, the Declaration can only be overturned by the unanimous agreement of the Member States. In the course of tough negotiations, Poland has accordingly ensured that a non-binding provision remains non-binding. On the other hand, unanimity is required to overturn it.

The much easier majority decision-making process dominated by the bigger powers is legally established. Poland lost its battle but can, while admitting defeat, naturally claim to have obtained political concessions.

Luxembourg compromise and the right of veto

The *Luxembourg compromise* was applicable from 1966 to 1986. Any country could, through recourse to the "veto", request a waver of voting rules under the Treaty.

While the right of veto has not been officially abolished, it is no longer used in practice. The "dual majority" system established by the Constitution provides for its formal abolition, unless it is specifically upheld. In the absence

of any such move, the controversial right of veto formally existing under the Luxembourg compromise has thus been formally *ended*.

Its place has been taken by the abstruse Ioannina compromise. This is how laws come into being within the EU. In 1986, the Luxembourg compromise was included in the official report of Danish parliamentary proceedings as a legal and political condition for Danish membership of the EU. The formal disappearance of the compromise is not referred to in the statement issued by the Ministry of Justice regarding the EU constitution or the Lisbon Treaty and does not figure in the debate concerning a fresh referendum.

At the constitutional convention critics also proposed the transition to majority voting, amending the right of veto under the Luxembourg compromise, so that it could henceforth only be used by ministers at EU summit meetings, when it related to an issue which was decided by public debate in the national parliaments.

Such an arrangement would provide a genuine right of veto in particularly sensitive areas and greatly simplify matters, given that in general, all laws could then be adopted by a 75% majority at the Council of Ministers and a simple majority in the European Parliament.

Instead, legislators are now required to recall population statistics for each new year and take a computer into the meetings to see whether proposed legislation has obtained a dual majority with or without the hurdles contained in the Ioannina compromise.

It will be difficult to explain how some EU laws come into being.

Common fundamental rights

In some countries, it can now be claimed that the EU did not adopt common fundamental rights, because these will not be published in the new Treaties. Instead, there is a reference in the Lisbon Treaty to the EU Charter of Fundamental Rights, which makes the provisions of the Charter legally binding.

The contents of the Charter were also published for "technical reasons" in the Official Journal of the European Union.

There is no real difference in publishing the Charter as an independent Part II of the Constitution and leaving it out entirely but making a cross-reference to it in a Treaty Article, as is done in the Lisbon Treaty. The Charter's provisions would be made legally binding in exactly the same way as if they were explicitly set out in the Treaty itself.

It will still be the European Court of Justice in Luxembourg which will decide *how* the now legally binding human rights of EU citizens should be interpreted.

For example, we all have *the right to life* in Art. 2 of the Charter. That sounds good, but does life start at birth or nine months before that? Or at some specific time between those two dates?

We also have *the right to strike*. Thanks for that. Will this new EU right also apply to strikes against foreign companies that want to sell their products inside the EU instead of the national companies hit by strikes? Can a trade union start a legal sympathetic strike? Can civil servants go on strike? Such questions may now be settled by the European Court of Justice, I wrote in the first edition of this book.

Now, the Court has judged on the right to strike in very revolutionary verdicts of 11 and 18 December 2007 (Viking and Laval cases) and the Rüffert case from March 2008. The right to strike is outlawed by the Court when it hinders the free movement of services. It is illegal to require the respect of certain collectively bargained salaries in public tenders. It is illegal to strike against a foreign company paying the minimum salary of 9 – in Ireland even if the average paid normal salary for Irish workers should be the double.

With my Irish colleague in the European Parliament, Kathy Sinnott, I have proposed to add a protocol to the Lisbon Treaty to outlaw these legislative verdicts from the Court. Together with the Danish TUC I proposed a clearer treaty rule in the two treaty drafting conventions. It was not difficult to foresee a conflict even if I did not foresee the far reaching content of the 3 famous verdicts.

Issues such as strikes and a number of other human rights questions have, until now, been outside the competences transferred to the EU. The devil is not in the rights, but in the interpretation of the detail. Our rights would no longer be decided by national parliaments, national courts and voters.

Because of the legally binding nature of the Charter there is therefore a massive and completely opaque transfer of sovereignty to the EU. Nobody can say what the Court of Justice will achieve for the different rights. How can there be a *certain degree* of transferring powers regarding rights?

We will lose the right to decide on our own basic rights. Even the freedoms of the Constitution have to be interpreted in the light of EU law. In none of the areas covered by the Treaties can we achieve a standard of rights other than that laid down by the Union's authorities and the Union's Court – unless we leave the EU altogether.

I would not recommend the latter. The Union also decides on important legal areas in Norway and Iceland through the EEA Agreement. *All* Europeans, whether members of the EU or not, need a better EU with real democracy and greater freedom through common minimum rules.

The best solution for the human rights question would be that the EU satisfies itself with enforcing the common European human rights as the European Court of Human Rights in Strasbourg interprets them. Its judgments are based on the European Convention of Human Rights, which all European States, and not just those that belong to the EU, have signed up to. Then we would have only one set of human rights in Europe. Then adopting a code of human rights cannot be misused to help turn the EU into a state.

On the other hand, we could perhaps appoint a special Ombudsman to protect citizens against possible human rights violations by the EU institutions and have her or him bring cases on behalf of citizens before the Court of Human Rights in Strasbourg and the European Court of Justice in Luxembourg. In that way the citizens would *gain* something instead of possibly having to give something up.

Some other changes in Lisbon

There are a number of minor changes in the Treaty of Lisbon which have real content, although the differences are not of any great substance.

Every national Parliament, for example, gets the right to block the application of the general provisions for the use of the simplified revision procedure in art. 48 TEU.

The national parliaments also get their own right to veto new EU legislation on family law which becomes Article TFEU 81.3). Under the Constitution it was the governments which, each for itself, held the right of veto. In many countries this amounted to much the same thing because the Governments act on a mandate from their national parliaments.

Britain and Ireland will get an *opt-in* for criminal justice and police cooperation. They did not have it under the Constitution.

The new European Public Prosecutor's Office and the rules to allow police personnel to operate across borders can be implemented automatically by a smaller number of countries if all the Member States do not want to participate. Here European integration is made easier in relation to the Constitution.

These minor changes do not alter the overall impression:

Same content – new name

Essentially the Treaty of Lisbon has the same content as the Constitution. The changes are not sufficient justification for the cancellation of referendums and enabling citizens to decide on such fundamental constitutional changes. It was only the desire to do away with referendums which motivated the minor differences between the EU Constitution and the Lisbon Treaty

The changes are largely cosmetic. There is no question of less European integration. On the contrary, a few new areas have been added to the EU process. In particular, it becomes much easier to introduce further integration. Europe's politicians no longer have any need to consult their voters.

The chairman of the Convention on the Constitution, former French President Giscard d'Estaing (according to The Sunday Telegraph, 2 July 2007: http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2007/07/01/weu201.xml) said that the draft Lisbon Treaty is "*hidden and disguised*" and "*very, very near*" his original proposal.

"Although the British, Dutch and French have insisted that we eliminate all reference to the word "Constitution", the new treaty "still contains all the key elements [of the Constitution]."

"All the earlier proposals will be in the new text, but will be hidden and disguised in some way," said the father of the Constitution.

Giscard bemoaned the omission of reference to the EU symbols, but added that the new text was "*good in terms of substance as it will be very, very near to the original.*"

Giscard is not alone in his verdict. Here are a number of other statements on the same point by leading politicians:

Quotations on the Lisbon Treaty: "We kept the substance of the Constitution." - Jo Leinen, MEP (PSE), Chairman of the Committee for Constitutional Affairs during a debate at the European Parliament's Committee for Constitutional Affairs on 26 June 2007. "We have achieved the same, but we have sold out on openness and clarity." - Enrique Barón Crespo, MEP (PSE), on the same occasion "It is unbelievable what they have managed to sweep under the carpet." - Gérard Onesta, MEP (Greens), on the same occasion "It is not formally a constitution, but it is a big step towards a constitution." - Richard Corbett MEP (PSE), on the same occasion "Our political Union finally has a constitution." - Johannes Voggenhuber, President-Elect of the Committee for Constitutional Affairs, MEP (Greens), on the same occasion "The whole constitution is there. Nothing is missing!" - Jean-Louis Bourlanges, MEP (ALDE), in the radio broadcast "Esprit public" on Sunday 24 June 2007 on France Culture"[The new Treaty] is essentially the same proposal as the old Constitution." - Margot Wallström, Commissioner for Communications and Institutional Affairs, in the, Sunday Telegraph, 2 July 2007.

In a special guide, my group's legal expert, Klaus Heeger, has reviewed all the proposed amendments from the Lisbon Treaty from December 2007 and has compared them with the rejected Constitution.

This thorough review leads to the same conclusion: as regards legal obligations the new text is exactly like the rejected Constitution. It has the same impact as the rejected text. It is binding in the same way as its predecessor.

In the interests of fairness and democracy, there should therefore be referendums on it in the same way as there should have been on its predecessor.

Some small changes in the new text

Most of the changes in the Lisbon Treaty text make it possible, above all, to *present* the Constitution differently in the different Member States, but without changing the content.

Poland, for example, will get a unilateral declaration to the effect that they can legislate themselves on ethical questions such as "public morality, family rights and protection of human values and respect for people's physical and moral integrity".

The Polish Prime Minister has presented this declaration as a victory in Poland. It satisfies opponent of the Treaty but does not change anything: No Polish law may breach the fundamental rights of EU citizens, as they have now been published as legally binding in the EU's Official Journal.

Even for subjects that are explicitly outside the EU's competence, the law-making European Court of Justice has laid down that the fundamental rights set out in the EU Charter apply. For example, it has been laid down in a judgment that the Treaty's basic principle of equality between men and women applied to the German armed forces. That judgment was made before the question of defence was even included in EU cooperation. (The Kreil judgment)

Declarations attached to Treaties are *not* legally binding in the way that Protocols and Articles in Treaties are. One-sided declarations by individual countries usually are a sign of defeat in the actual negotiations, for other countries do not join in making them. They indicate that other countries do not want to commit themselves by means of a *common* non-binding declaration, or a legally binding Protocol or Article.

The United Kingdom and Ireland

These two countries currently have an exemption from cooperation on justice and home affairs. This includes an *opt-in scheme* whereby the United Kingdom and Ireland can decide for themselves which rules they want to participate in.

This scheme will continue in a tighter version for the United Kingdom, while Ireland has been given the right to decide its status any time after the Treaty comes into force.

By extension, the United Kingdom has got a provision in a special Protocol

to specify certain aspects with regard to the use of the Charter in the legislative and administrative practice of the United Kingdom and the opportunity for its judicial enforcement in the United Kingdom.

Here we need to emphasise the word "*specify*". This does not change any of the Charter's contents. The Charter applies in the United Kingdom as in all the other countries when the United Kingdom implements EU legislation and the Treaty makes British citizens into Union citizens also

The European Court of Justice in Luxembourg interprets when the Union rules apply and when they do not. The United Kingdom has not obtained, and cannot obtain, a real exemption from the Charter, because fundamental rights are, in principle, the same throughout the EU.

It is Union *citizens* of the new "additional" Union citizenship that have the rights. That includes UK citizens. National discrimination is forbidden. The rights of people and Union citizens are defined as common European human rights taken from the EU Charter of Fundamental Rights, the European Convention on Human Rights, the common constitutional rights from the Member States' own constitutions - as the European Court of Justice may interpret them at any time.

In principle there is nothing new in the Charter of Fundamental Rights that does not already apply today, it is formally said. The reality is very different. By making the Charter formally legally binding the Union Court is invited to develop the rights and duties by concrete verdicts in all thinkable areas. Nothing is left for pure national interpretations. I can't get one single example on a national law which can not be touched by the Lisbon Treaty.

11 and 18 December 2007 the Court accepted the new Charter article on the "right to strike". But they also limited the importance by establishing the other principle of free movement of services as the more important principle when it comes to a conflict between the two rights.

This example will be followed by hundreds of examples. The Lisbon Treaty is very unclear. I posed more than 700 concrete non-polemic questions purely on the interpretation of the different treaty articles and principles. I had very few serious answers from the Danish government because they cannot give the clear answers where the treaty is unclear.

If it were formally acknowledged that the Charter contains some newly created content, it would be a matter of transferring new sovereignty from the Member States. This cannot be admitted before the ratifications have been finalised.

I am sure there are both new rights and duties in the Charter which will be recognised by the Court of Justice at a later date. But the Charter itself

denies that – not least because stating otherwise it would lead to a referendum in Denmark and troubles in other countries. The Court already had to take into account the human rights traditions of the Member States and the rights set out in the European Convention etc., but after Lisbon it can itself decide what these rights mean for Union citizens.

Also, the whole concept of citizenship is changed from a "supplementary" EU citizenship to an "additional" Union citizenship which is a double citizenship where the Union citizenship prevail in the interpretation given by the Union Court – as in the US and German federal states.

The United Kingdom has achieved a protocol exemption without any real content. There is currently some conflict over this in the United Kingdom.

The exemption may appear in the United Kingdom as a genuine exemption – until, for example, a British citizen has to go to the European Court of Justice and invoke the rights in the Charter…

Then the Court is likely to show that the Charter applies in the United Kingdom in the same way as in the rest of the EU.

In a response to the undersigned on 6 October 2006 the President of the Commission, José Barroso, declared that the Charter had already been used 117 times to adopt legislation in the EU (http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2006-3544&language=DA).

The Court regards the Charter as legally binding and now it also gives it the green light in the new version of the Constitution.

Climate Change

There are two new topics which were included in the revised version of the Constitution from the summit in Brussels on 23 June 2007. Concern over climate change is expressly mentioned in the section on the environment. Article 191 in the final edition of the Lisbon Treaty now includes as one of the EU's objectives'… promoting measures at international level to deal with regional or worldwide environmental problems, and in particular "*particularly combating climate change.*"

This little supplement is a Danish initiative. It is a useful political signal. One could claim that the provision itself does not change anything, since climate change will clearly be one of the global environmental problems of the future. The reference to climate change relates to measures "at international level" only. It is not a new horizontal principle to be implemented in all other policies as I would have preferred.

Since the rejection of the Constitution by the French and Dutch, environmental legislation has been implemented by a Court judgment with the

result that European criminal penal provisions may be introduced by qualified majority in all areas of EU law. For better or for worse.

Energy

Poland negotiated a reference in the Lisbon Treaty to energy solidarity, if countries are exposed to supply difficulties. When the Council decides on, for example, matters relating to supply difficulties in the area of energy, it must do so "in a spirit of solidarity between the Member States".

This is also followed by a new provision on promoting links between the different energy networks.

The background to this is an agreement between Germany and Russia on creating a gas supply by means of an underwater pipeline through the Baltic Sea, avoiding Poland. This would enable the Germans to get Russian heat while the Poles freeze during a crisis of supply.

This agreement reminded the Poles of how the Russians and Germans divided Poland between them in 1939. Now Poland gets some nice words about *solidarity in the Lisbon Treaty.* This will hardly change the political facts of the real world in the Baltic Sea, but it makes the energy network of the different Member States a new Union competence where the Union, including Germany, can legislate for energy policy by majority decision.

A Czech victory without content

The Czech Republic has a President who is very sceptical about the Union's centralisation. The liberal economist *Vaclav Klaus* is a fervent supporter of the market economy and governmental decentralisation.

The Czech Government also wants to transfer powers from the EU back to the Member States. They got a non-binding declaration to the effect that the Council may, at the initiative of one or more Member States ask the Commission to table a proposal to repeal a piece of legislation.

Any country can do this already today. So what? The Commission is still not obliged to comply with any such request. The Commission's sole right to put forward Union law proposals remains unfettered. It requires unanimity among Member States to remove powers from Brussels. This has never happened. This Czech negotiating "victory" still does not have any new real content.

Article 48 TEU dealing with future Treaty revisions states that future amendments may serve either to increase or to reduce the competences conferred on the Union. It goes without saying that unanimous amendments to the Treaties can go in either direction. Again, here the Czechs received some nice words, again, with absolutely no content.

In the Constitution the reference in its Preamble to "an ever closer union" had been removed. However, it has been reinstated in the Treaty of Lisbon. In the Treaty of Lisbon there are political signals both to those who would like more union and to those who think there is too much. A good example of what insiders name *constructive ambiguity.*

Social security and EU taxes

The then Prime Minister of the United Kingdom, *Tony Blair,* raised the issue of some "red lines" in the negotiations, boundaries that had to be respected if he was to approve the text.

The five boundaries were all guaranteed in the existing Constitution text. It was not difficult to have them respected in the new one. They are mostly *spin*. One wonders how this is possible in a society with a free press.

Blair's only substantial demand was that it should not be possible to implement common taxes at EU level. But the power to harmonise taxes is already there under Article 93 of the EC Treaty. This is now renumbered as Article 113 TFEU in the final edition of the treaties. It covers so-called *indirect* taxes. The Lisbon Treaty inserts an amendment which states that such taxes must be harmonised if that is necessary to "avoid distortion of competition". This enables the Court of Justice to make rulings in this area and to decide what indirect taxes are.

The new wording looks like an invitation to outlaw the low Irish corporate tax. If I was Irish I would seek their low corporate tax guaranteed in a special protocol.

Harmonisation of taxes requires unanimity in the Council. But this is no guarantee against a court decision. Unanimity is only required when the proposal for harmonisation is based on Art. 113 TFEU of the Lisbon Treaty. If the proposal is based on Article 116 TFEU on the Internal Market it may be decided by qualified majority, just as the new draft legislation on patients' rights will be based on the Internal Market rules and not on the special rules on health.

Common energy duties may also be levied on the basis of the new Article 194 TFEU in the final edition of the Lisbon Treaty, but still requiring unanimity – unless we switch unanimously to settling the matter by majority decision, as the Lisbon treaty would henceforth permit.

Direct personal taxes are not mentioned directly. Tax harmonisation still requires unanimity. The budget may also be repealed indefinitely by unanimity. But Art. 311 TFEU on "own resources" could be used to establish direct Union taxes.

The Constitution proposed majority decisions for parts of social security

for migrant workers in Article III-136 of the Constitution - Article 42 TFEU of the Lisbon Treaty which becomes Article 48 in the final edition. An emergency brake is thus inserted under which a country that encounters severe difficulties as regards social security for migrant workers may have the agreement referred to an EU summit.

In the Lisbon Treaty it is stated that Member States have the right of veto at the summit if a proposal is tabled in accordance with this Article. This was also provided for in the rejected Constitution, but was open to interpretation. It was not clear what would happen after a veto. Now it is stated explicitly that the Council also can decide not to act after the summit meeting so that the proposal would disappear.

The crucial question would be: Is there a qualified majority in the Council to introduce new rules? If yes, they can always find an appropriate legal base.

The emergency brake applies only to one specific article no 48 TFEU. It does not apply if the provision on the Charter of Fundamental Rights is used, which reads: "Everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with Union law and national laws and practices."

This wording from the Charter will now become legally binding under Lisbon. The Court can use it as it likes. They can give it direct effect. It is not unreasonable that foreign workers should be guaranteed the same rights as citizens in the relevant Member State. But it raises special problems for countries with general citizens' social rights.

For example in Denmark, where we have social welfare for citizens paid for from high taxes and a rather special negotiating model relating to agreements on the labour market.

As regards citizens from third countries the rules are to be found in the Lisbon Treaty Art. 69 B 2b TFEU which becomes Article 79 TFEU in the final edition of the Lisbon Treaty.

Enlargement to new Member States

After the summit in Brussels in June 2007, it was said that the Copenhagen criteria for enlarging the EU to new Member States should now be written into the Treaties.

On page 27 of the negotiation mandate it merely adds: "The conditions of eligibility agreed upon by the European Council shall be taken into account." This was a cosmetic nod to the Netherlands, which is sceptical about new enlargements. The EU can only be enlarged in the future by unanimity between the countries.

France can block Turkish membership all by itself. France has announced that it will raise the question of Europe's borders *after* the Lisbon Treaty is adopted.

The French President provisionally had a new Article 7a of the EU Treaty introduced in the Lisbon Treaty relating to agreements with the Union's close neighbours. This article becomes Article 8 TEU in the final edition of the Treaty. On the basis of this, Turkey could get a partnership agreement in due course instead of the full EU membership which is currently being negotiated.

The seats and meeting place of the European Parliament

The seats of the institutions are laid down in a Protocol which may only be amended unanimously at an *intergovernmental conference*. Over a million citizens have signed a petition for the European Parliament to have only one meeting place.

The question was *not* raised at the intergovernmental conference. It can only be discussed if a Member State proposes it. The European Parliament cannot get the issue of its seat discussed itself.

Today, the Parliament meets for weekly sessions 12 times a year in Strasbourg. It has more than 2000 employees in offices in Luxembourg and even more in offices in Brussels. A plenary meeting room has also been built there, and Parliament meets there at least six times a year for mini-sessions.

The European Parliament has proposed a new distribution of seats from the European elections in 2009. The European Council can change the distribution of seats by unanimity among the Member States.

Small states like Ireland and Denmark will each lose a seat bringing the figures down to 12 and 13.

Germany will have much more power

Many small Member States lose seats and will have difficulty in obtaining representation in the European Parliament for smaller parties from their national parliaments.

At the other end of the scale Germany will have 96 of the 751 European Parliament seats as compared with 99 today and as a result it can continue to dominate half of the political groups in the Parliament and at the same time vote on the basis of its full population size in the Council.

As previously mentioned, Saarland with one million citizens has 3 votes in the German Bundesrat and Rheinland-Phalz with 18 million citizens has 6 votes. In the US every state has two senators each in the Senate, irrespective of their population size, With the Lisbon Treaty Germany imposes on others a system it would never accept at home.

When Denmark joined the EU in 1973 Germany had 3⅓ times the votes of Denmark and Ireland and 3½ times the number of Danish seats in the Parliament. Now Germany will have 15 times the voting strength in the Council and 7 times as much in the European Parliament as compared with Denmark. Germany will have 18 times the voting strength of Ireland instead of 4 times today and 8 times as many seats in the European Parliament instead of 3½ times when Ireland entered the EU.

Even a big country like the UK will lose heavily compared to Germany.

In a few years time, if the Lisbon Treaty is ratified, we will have a Commission without representation from all countries, a Council of Ministers where almost half of the Member States can be voted down in making EU laws and a European Parliament where a lot of respected smaller national parties will not be represented at all.

Legitimacy will be missing for many voters. The Lisbon Treaty will establish a system which is not fit for an enlarged EU and would be harmful to the many small and medium-sized states. The Lisbon summit on 13 December 2007 decided a new distribution of seats. In practise it offered Italy an extra seat in the European Parliament, which would then have 751 members defined as 750 plus a president.

Free and fair competition

The French President, *Nicolas Sarkozy,* got a reference to "free and fair competition" taken out of the EU's objectives in Article 3 TEU. He could then present this as a political victory in a France where many people still believe that one can protect oneself against competition in the world.

This amendment to the EU's objectives changes nothing in the 16 different operational provisions of the Treaty that continue to ensure free competition in practice. A new Protocol on the internal market and competition was also added. This specifies that Article 3 TEU, also without a supplement on free competition, ensures "that competition … is not distorted". The new legally binding Protocol adds that the EU can use the *catch-all* Article 308 of the EC Treaty - Article 352 in the final Lisbon Treaty - to adopt laws regarding competition in the internal market.

The EU's internal market can thus be extended to cover, for example, all intellectual property rights and general financial services in the entire public sector.

It is an area where, in future, the European Court of Justice will achieve much by including new topics, such as health, that were previously regarded as lying outside the scope of EU supranational cooperation.

The use of Article 352 TFEU requires unanimity between the governments in the Council of Ministers, but not adoption by the national parliaments. The difficult process of treaty *ratification* for introducing new areas of cooperation through Treaty amendments is thus avoided.

For example, on general public services.

Services of general interest

The EU was originally about establishing a common market. The *Treaty of Rome* only applied to the sale of goods, services, capital and labour on the *common* market.

Radically comprehensive decisions by the Court of Justice have induced the EU to set limits on how voters and elected representatives can manage their own societies. The Court's rulings have then been followed up by new Treaties which have often brought little order to the new competences effectively created by the Court.

For example, the Court has declared waste to be a product that may be sold as a commodity. Similarly health services have been deemed to be covered by the free competition provisions of the internal market.

Patients have the right to buy teeth and glasses in other EU countries of their own free will, with a grant from their home State, because of a Court judgment. Even hospital services can be obtained in other countries, with a grant from the home State. There are some limitations, but they are not clear, because the Court has not yet defined them exactly.

Instead of waiting for more Court rulings in this area, the Commission wants to get common rules adopted. A proposal has long been awaited and will be published – just after the Irish referendum…

In December 2007 the Commission, for the second time, withdrew the proposal for a new directive on freedom of movement for patients across national borders. It is feared that there will be difficulties with the approval of the Treaty of Lisbon if it becomes clear that a liberal market economy can also be introduced for the treatment of hospital patients.

The directive will oblige Member States to treat patients from other EU countries and to extend the same financial cover as that provided in the home country to patients who travel to other countries to receive treatment. Special information bureaux would also be set up so that patients can find out what health services they can obtain in other EU countries with financial cover from home.

Danish regional politicians and hospital staff have also protested against the proposed directive. The proposal is to be presented under the rules for

the internal market. The directive can therefore be adopted on a decision by *qualified majority* in the Council of Ministers. Denmark and other countries with misgivings can be overruled.

Considerable progress has been made with the adoption of the so-called *Services Directive*, which takes effect on 1 January 2010. However, not *all* services are covered. Education is included but health, for example, is excluded.

In the revised Treaty of Lisbon there is now a separate, legally binding "Protocol on services of general interest" and a new provision in Article TFEU 14 which *interprets* Article 16 TEC of the Treaty of Nice (Article III-122 in the Constitution and Article TFEU 14 in both the first and final versions of the Treaty of Lisbon.) During the negotiations on the Treaty of Lisbon it was for a time numbered Article 16. It deals with *services of general economic interest*. Services of no *economic* relevance have hitherto not been covered by the Treaties and hence fall entirely within the powers of the Member States.

This distinction is formally kept. Article 1 of the Protocol lays down the "Essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organising services of general economic interest as closely as possible to the needs of the users." The distinction does not hinder the Court from interfering very detailed in the services of a general economic interest.

Article 2 of the Protocol lays down: "The provisions of the Treaty do not in any way affect the powers of the Member States to provide, order and develop non-economic services of general interest." True, but the Member States have to respect all treaty principles on non-discrimination, state aid etc.

The Protocol may be perceived as a symbolic nudge to the Court to hold back from non-economic services and to show a little more respect for the Member States' management of their public sector services. But the Protocol does not change some of the sweeping judgments that have already brought key areas of the public sector under the control of the Commission and the Court.

It also does not change the very comprehensive Services Directive that has already been adopted.

The Protocol mostly exists in order to appease French voters, who are very scared of EU interference in French public services, something that caused some of them to vote against the proposed EU Constitution in their 2005 referendum.

Summary of new majority decisions after treaty changes

The Lisbon Treaty will introduce majority decisions in 68 new policy areas or matters and gives the prime ministers the possibility of independently

introducing many new areas. This is the biggest leap to date from unanimity to qualified majority voting. The Treaty of Rome allowed for 38 majority decisions. The 1987 Single European Act on the Internal Market introduced 12 new areas for law-making by qualified majority. The 1992 Maastricht Treaty introduced 30. The 1998 Treaty of Amsterdam introduced 24 and the 2002 Treaty of Nice 46.

The most important EU Treaty to date in terms of shifting law-making and decision-taking from the national to the supranational level should *not* have a referendum, says the Danish government and the majority in the Danish Parliament. The British Government takes the same view.

At the same time, this new Treaty will make it much easier to adopt decisions by qualified majority at EU level.

Today, 74% of the weighted votes in the Council of Ministers are required. The Lisbon Treaty's "double majority" reduces the threshold to 55% of the countries, representing 65% of the EU's total population.

Accordingly, it will be much easier to outvote smaller countries and to harmonise laws between countries. The argument for this is that an enlarged EU would make it more difficult to adopt decisions any other way.

The 12 new Member States have not, however, made the negotiations of new laws more difficult since they joined the EU in 2004. On the contrary! The Science-Po University in Paris has calculated that new rules have been adopted 25% more quickly *since* the enlargement from 15 to 27 Member States.

This study showed also that the 15 older Member States block proposed EU laws twice as often as the new Member States.

The last time you will be asked to vote on an EU Treaty?

As something radically new, a general basis for shifting EU law-making provisions from unanimity to qualified majority voting has been inserted in the Lisbon Treaty to avoid the need to ask voters again about ratifying new treaties..

This is the so-called *simplified revision procedure* in Article IV-444 of the Constitution, which is now incorporated in Article 33 (6) TEU of the Lisbon Treaty). This article becomes Article 48 TEU in the final edition of the Lisbon Treaty.

This may be used to introduce the principle of majority decision at the Federal level in all areas where unanimity applies, apart from matters relating to armed forces.

As compensation for this exception, the armed forces can be developed in the special *structured cooperation* in some areas by a sub-group of nine or more Member States, even if the others are opposed. So there will no longer

be any need for changing the new Constitution - the Lisbon Treaty - to permit this through the general amendment procedure.

So this is probably the last time that we the European voters will have the chance to be asked about significant Treaty changes.

The "simplified revision procedure" only requires all the governments to agree, and that none of the national parliaments object to the proposed amendments. This is not as difficult to achieve as it sounds.

The rejected EU Constitution was approved by a unanimous decision of the Prime Ministers of the EU countries in the European Council. It was rejected by *voters* in France, even though 90% of the French elected representatives in the National Assembly - and all the other national parliaments - supported the Constitution.

The "simplified revision procedure" may also be used to introduce the general procedure for making most EU laws, whereby the Commission has the monopoly of proposing new laws and changes to existing laws. These are then decided on by qualified majority vote in the Council. At the same time the European Parliament gains the right to propose amendments or to reject the proposal by an absolute majority of its members. There are about 30 areas left in the Lisbon Treaty where the common legislative procedure has not yet been introduced.

The Lisbon Treaty is thus a Constitution which can amend itself.

There is also another simplified revision procedure in Article 445 of the rejected Constitution, which can now be found in Article 33(3) TEU of the Lisbon Treaty. This article becomes Article 48 in the final edition of the Lisbon Treaty.

This may be used to introduce new policy areas for EU-level law-making by unanimity among the countries. But this provision presupposes that the result is *ratified* by the Member States.

There is, however, a way of avoiding a difficult referendum in countries such as Denmark, UK and Ireland. It is called *reinforced cooperation,* whereby a sub-group of Member States can implement among themselves what might otherwise be stopped by, for example, Danish or Irish voters.

Reinforced cooperation made easier

This "reinforced cooperation" provision eliminates the possibility of a national Parliament or voters preventing, for example, a common EU penal code and police cooperation among those countries that want this.

It only needs nine countries to implement reinforced cooperation, and it can be decided by qualified majority among the EU countries. The rejected Constitution required a third of the countries to agree to it. A third of the

current 27 members is nine. It will still need just nine countries after possibly several future enlargements.

The permission that should be given according to Articles I-44(2) and III-419(1) of the rejected Constitution is now regarded as being given *automatically* if one country blocks the implementation of common rules for all, as earlier mentioned. This decision can be found in the Lisbon Treaty, Arts. 10 TEU and 280 a - h TFEU, which in the final edition of the Lisbon Treaty become Article 20 TEU and Article 326 TFEU. This is a signal to the UK that the other Member States will not stop further integration in justice and home affairs.

A country that says No to an amendment on reinforced cooperation can only have its influence removed and be put in a coffin, so to speak – together with some odd countries out, such as Denmark and its Danish exemptions.

The United Kingdom wanted to be sure that it cannot be forced to change its penal code by the EU. Instead it has "won" a guarantee that there will be a common EU police force, a common EU border guard, common EU penalties for crimes and a common EU criminal code.

The only question still open is whether all the Member States will be in this or not. The United Kingdom and Denmark could be out.

The Union train is going further. With the Treaty amendments, the right of veto on overall EU development by individual Member States will be abolished in practice, because cooperation can be built in different ways, for some or for all. We can count on it being made into something which some eager Member States can use to force everyone else to go along with what they want.

Referendums cannot change the direction of European cooperation anymore. They can only decide a country's own relationship with the fully developed EU of the Lisbon Treaty. If a country becomes too difficult, one can now point to a new treaty provision on voluntary withdrawal from the EU and ask a country to leave. This text has been taken, unchanged, from the rejected EU Constitution.

The Union will thereby be released from having to pay attention to its voters. We can still have elections for the national parliaments and the European Parliament every five years. But we cannot change anything important with our votes. Instead of a close cooperation, the EU is turning itself into a European state that is run by small committees of top politicians and civil servants, whether voters want it or not.

The cradle of European democracy was in ancient Athens 2500 years ago. There are grounds for going back to that cradle again.

Let us at least have a referendum on this Lisbon Treaty to see whether we want to limit our influence as voters.

Then we will see whether that will be the last referendum.

Chapter 5

75% of people wants a referendum

Born of secret diplomacy

In its new incarnation, the EU Constitution is the result of a very successful piece of secret diplomacy carried out by the otherwise very nice new German Federal Chancellor, *Angela Merkel,* and her helpers at the Prime Ministers" Offices and Foreign Ministries.

She started the German Presidency of the EU in good time before 1 January 2007, when she officially put herself in the driving seat. She had bilateral meetings with a number of key European politicians to start up the stranded EU Constitution again.

Merkel planned the German Presidency together with the two next Presidencies, Portugal and Slovenia. They agreed on a common 18-month programme and a common plan. She thus guaranteed German influence on the final result, even if there were delays and she would not be able to get the negotiations going herself.

The National Parliaments and the European Parliament were deliberately kept out of the negotiations on the revised Constitution. The public was not involved either. Every country could have two civil servants taking part, generally one from the Foreign Ministry and one from the Prime Minister's Office.

When the Czech Republic selected a Euro-sceptic from the European Parliament as a negotiator, Chancellor Merkel cancelled joint meetings and instead allowed her own people to negotiate through bilateral meetings with the different delegations.

Only Germany could know the positions of the different countries. Angela Merkel went to the difficult countries, which she visited before she took on the German Presidency.

After many consultations, Merkel wrote a confidential letter to her Prime Minister colleagues in which she asked whether they would like to participate in deciding the content of the Constitution if some other name for it could be found. They said they would indeed.

A total of 16 countries had approved the Constitution when she took office.

They only represented 59% of the EU countries, with 37% of the total population of the EU. The UK had been committed by Tony Blair to a referendum on the Constitution. The new ratification process was set in motion. Portugal did not dare to have the referendum that had been announced, because they feared a "No" vote, said the President of the Committee on European Affairs, former EU Commissioner Vitorino, to a delegation of the European Parliament's Committee on Constitutional Affairs.

The Danish Prime Minister, Anders Fogh Rasmussen, had the same fear, and abandoned the idea of a Danish referendum.

The German Constitutional Court must also take a position

Slovakia and Germany had majorities in their national parliaments for the Constitution, but these states had not officially ratified it, because objections had been raised in their courts. In Germany itself, Merkel risked and still risks the Constitution being rejected by the country's own constitutional court in Karlsruhe.

Roman Herzog, the former President of Germany and of its Constitutional Court, and of the Charter Convention, has pointed out that the EU already decides 84% of German legislation and is a threat to parliamentary democracy.

> *Roman Herzog:*
> "The Federal Ministry of Justice has compared the amount of legislation from the Federal Republic of Germany and the amount from the EU with each other for the years 1998 to 2004. The result: 84% comes from Brussels, and only 16% from Berlin... It raises the question of whether one unreservedly can call the Federal Republic of Germany a parliamentary democracy at all."
>
> *Source: Die Welt, 21 January 2007 and Welt am Sonntag*

In my opinion, based on many debates in Germany, a German referendum would give a bigger "No" than in France and the Netherlands. In Germany, the three biggest parties are in favour of the Constitution, but citizens in the *federal state* are tired of what they perceive as ever more EU centralisation and detailed regulation from Brussels.

The leaders of Germany therefore want to avoid a referendum at all costs. So Mrs. Merkel negotiated with each country to induce the countries which had announced referendums to cancel them. To this end, the EU Constitution would be created indirectly through making changes to the existing Treaties

rather than directly through the total repeal of the existing Treaties and their replacement by an explicitly titled Constitution.

She kept her cards close to her chest.

Voters in Europe want a referendum

A British think-tank, "Open Europe", has allowed a number of opinion poll institutions measure attitudes to a referendum on the Lisbon Treaty in a number of European countries (http://www.openeurope.org.uk/media%2Dcentre/pressrelease.aspx?pressreleaseid=31). Let the citizens of Europe have the last word:

"If a new treaty is drawn up which gives more powers to the EU, do you think that people should be given a say on this in a referendum or citizen consultation or do you think that it should just be up to the national parliament to ratify this treaty?"

	Yes for referendum	No for referendum	Don't know
Ireland	**87%**	**11%**	**1%**
Greece	**83%**	**14%**	**3%**
United Kingdom	**83%**	**15%**	**3%**
Czech Rep.	**82%**	**15%**	**3%**
France	**81%**	**16%**	**3%**
Latvia	**80%**	**11%**	**10%**
Germany	**77%**	**23%**	**1%**
Malta	**77%**	**17%**	**6%**
Cyprus	**76%**	**21%**	**3%**
TOTAL	**75%**	**20%**	**5%**
Estonia	**74%**	**16%**	**11%**
Luxembourg	**74%**	**23%**	**3%**
Poland	**74%**	**16%**	**10%**
Belgium	**73%**	**25%**	**2%**
Denmark	**73%**	**22%**	**4%**
Spain	**73%**	**24%**	**3%**
Finland	**72%**	**25%**	**3%**
Bulgaria	**71%**	**13%**	**16%**
Austria	**71%**	**25%**	**4%**
Italy	**70%**	**23%**	**8%**
Sweden	**68%**	**30%**	**2%**
Lithuania	**67%**	**15%**	**18%**
Hungary	**66%**	**30%**	**4%**
Romania	**66%**	**11%**	**23%**
Portugal	**64%**	**21%**	**15%**
Slovakia	**64%**	**20%**	**16%**
Netherlands	**62%**	**29%**	**9%**
Slovenia	**55%**	**40%**	**4%**

You can sign yourself at: www.x09.eu

Appendix

Proposals for a European Cooperation Agreement

from SOS Democracy to the Intergovernmental Conference on the Future of Europe which started on 23 July 2007

Democracy
A double majority is defined as 75% of the Member States in the Council and a simple majority in the European Parliament.

Justification: Today, decisions by qualified majority require 74% of the weighted votes in the Council. Amendments from the European Parliament are also based on weighted representation for the different Member States. In the US all states are represented equally in the Senate. In the German Bundesrat states have between 3 and 6 votes each, irrespective of population size. One could imagine eventually a protocol giving a Member State the right to block a decision if a national parliament instructs its Prime Minister to raise the topic at the next EU summit.

Composition of the Commission
Each Member State elects its own Commissioner.

Justification: 60% of the members of the Convention signed a written proposal to keep one Commissioner for each Member State. The Commission has a monopoly of legislative initiative and decides most laws and implementing rules itself. We cannot have laws governing our countries decided only by foreigners – and with a legal status above our own constitutions.

Minimum rules instead of total harmonisation
When harmonising laws, the EU must allow Member States greater protection for matters relating to health and the environment, security and the work environment, consumer protection, animal welfare and cultural diversity.

Justification: The EU aims to deliver a high level of protection for health, the environment and consumer protection. When harmonising laws, no country should be bound to lower its level of protection. The right of a country to adopt

the highest levels of protection must always be safeguarded through the establishment of minimum rules instead of identical rules – "total harmonisation".

Seat of the European Parliament

The European Parliament is asked to decide its permanent seat by a simple majority vote.

Justification: The European Parliament is discredited in the eyes of the public for the waste of taxpayers' money for meetings in different locations. The Heads of State have to change the existing protocol on the seats of the different institutions. The locations losing the European Parliament may be compensated by giving them other European institutions of similar economic benefit.

A fairer budget

The budget should be financed by progressive contributions based on GNP. Rebates can be established for countries with below-average GNP.

Justification: Free trade normally benefits the richest countries more than the poor countries. Therefore, we often link financial protocols to free trade agreements. Our own EU budget is not financed progressively and deserves a reform, with contributions defined according to a progressive scale based on GNP.

A transparent budget

No money should be spent from the budget without publishing the purpose and the recipient.

Justification: No one is bound to receive subsidies from the EU. To avoid fraud and misuse of taxpayers' money, we must establish full transparency for all spending.

More votes for Romania and Malta

Romania will have 19 votes in the Council instead of 14 and Malta 4 instead of 3 under the agreement of the Treaty of Nice.

Justification: Romania has 57% of the Polish population but only 52% of their votes. The Netherlands has 43% of the Polish population but 48% of their votes. 19 votes is fairer for Romania. Malta and Luxembourg have 0.08 and 0.09% of the total population. It does not justify the difference between 3 and 4 votes under the system established in Nice

Transparency and openness
All EU documents and meetings should be transparent and public unless derogations are decided by qualified majority.

Justification: This proposal was supported by 200 of the 220 members and deputies at the Convention. The proposal was supported by all members from the national parliaments, all members from the European Parliament bar one, and 23 out of 28 governments. No other proposal had such big support in the Convention. It deserves to be put in place.

An alternative cooperation agree3ment in 47 paragraphs
Drafted by Jens-Peter Bonde as an example for an - easy to read, understand and use - simplified treaty.

We, the peoples of Europe, have drawn up and voted for this European cooperation agreement in order to strengthen our democracies and expand them beyond our borders and to relegate war and poverty to the historical record.

We are desirous of reaching common decisions and finding common solutions for the benefit of the citizens, sustainable development for the entire world and of those who come after us.

We are desirous of coordination and cooperation between living democracies and of creating a common democracy in those areas where we cannot ourselves legislate effectively in our Member States.

What we can decide ourselves, we wish to decide democratically in our countries.

What we cannot resolve ourselves, we wish to decide as openly, locally and democratically as possible in the EU in cooperation with the United Nations.

Our objective is to ensure peace and sustainable development, security, employment and welfare, health, a good environment and cultural diversity.

1. Nature of cooperation
The EU shall respect the UN, the constitutions of the Member States and the allocation of powers in this agreement.

Member States and the common institutions shall assist each other and cooperate loyally.

Common EU laws shall outrank the Member States' own legislation only in the specifically defined and circumscribed areas in which the EU is empowered under this agreement to adopt common legislation.

The EU may negotiate international agreements with countries and organisations where the EU may adopt common legislation. The EU may assist Member States in other areas of international cooperation.

2. Human rights

The EU shall accede to the European Convention on Human Rights and shall respect all decisions by the European Court of Human Rights and the freedoms enshrined in national constitutions.

3. A common market

EU legislation shall ensure a common internal market with freedom of movement for labour, services, goods and capital as well as freedom of establishment, common competition rules and a ban on discrimination.

4. Common civil rights

All nationals of EU Member States shall be entitled to vote in local elections and elections to the European Parliament in their country of residence.

They may move and travel freely throughout the EU and enjoy protection from the diplomatic and consular authorities of any Member State in third countries in accordance with the rules laid down in the relevant legislation.

5. Allocated powers and proximity principle

The EU shall enjoy only those powers allocated under this basic agreement. They shall be applied in compliance with the principles of proximity and proportionality.

The proximity principle means that the EU shall adopt common binding laws only where Member States cannot themselves adopt rules with equal effectiveness.

The proportionality principle means that EU laws and actions cannot go further than necessary to achieve the set objectives.

6. National parliaments

The national parliaments shall consider all proposals for EU laws and shall ensure compliance with the principles of proximity and proportionality.

They shall adopt an annual legislative programme authorising the Commission to draw up proposals.

Where 25% of the national parliaments oppose a proposal for an EU law, it shall lapse. Any parliament can bring an action in the EU Court of Justice for breach of the proximity and proportionality principles.

7. Nature of powers

The EU is entitled to adopt binding laws and decisions in the areas specified in this agreement.

In all other areas the Member States have sole authority to legislate. The EU may assist with coordination and cooperation but may not harmonise the laws and administrative provisions of the Member States. Cooperation may result in non-binding recommendations and communications.

The scope of the EU's powers shall be spelt out in greater detail for each area in an annex to this agreement. These powers can be increased only by unanimity among and approval of the Member States.

8. Powers of the EU

The EU has sole authority to legislate on international trade and competition rules for the common market.

The EU may legislate for the internal market, the environment, agriculture and fisheries, transport, trans-European networks and energy and may adopt minimum provisions for social and labour market policy, economic, social and territorial cohesion, consumer protection and animal welfare.

The EU may implement common programmes for research, technological development, public health, development aid and humanitarian cooperation.

9. Economic policy

Member States shall coordinate their economic policy in order to ensure stable growth and full employment. The EU shall lay down detailed rules for those countries with the Euro as their common currency.

10. Foreign and security policy

Member States may coordinate their foreign and security policy. Military matters shall remain outside the scope of the EU/or: the EU shall lay down detailed rules for those countries that have established enhanced cooperation on joint military forces.

11. Incentives

The EU may subsidise activities in order to protect and improve human health, industry, culture, tourism, education and vocational training, civil protection and administrative cooperation.

12. Institutions of the Union

The EU shall have common institutions that are allocated powers by the Member States. The institutions shall be the European Parliament, the European Council, the Council of Ministers, the Commission, the Court of Justice, the Court of Auditors and the Ombudsman.

13. Separation of powers

The European Parliament and the Council of Ministers shall share legislative authority and shall adopt legislation and the budget. The Commission and the Member States shall exercise executive authority. The Court of Justice shall exercise judicial authority.

14. European Parliament

The number of members and the allocation of seats between the countries in the European Parliament shall be adopted by unanimous decision of the Council of Ministers.

Members shall be elected by direct secret ballot for five years.

The proceedings of the European Parliament shall be public. Parliament shall itself elect its President and its Bureau from among its members.

The European Parliament shall act by ordinary majority of the votes cast and shall adopt its rules of procedure by a 75% majority.

The European Parliament may call for any papers or supporting documentation within the EU's field of activity where appropriate, subject to confidentiality.

The European Parliament's terms of remuneration and employment shall be agreed with the Council of Ministers, which shall act unanimously.

15. Council of Ministers

The Council of Ministers shall comprise one minister from each Member State. The Council of Ministers shall coordinate cooperation between the Member States and shall share legislative authority with the European Parliament.

The Council shall act by a 75% majority of the Member States unless otherwise specified. A country may request that the majority must also represent 50% of the total EU population.

A country may request that an item be not put to the vote where its national parliament has asked that country's prime minister to raise the issue at the next EU summit.

The Council's rules of procedure, configurations and election of one or more permanent chairmen shall be decided unanimously. The presidency shall rotate between the various countries at six month intervals.

The Council's working documents and meetings shall be public when the Council is considering legislation and at all other times when a reasoned dispensation has not been decided.

16. European Council

The Heads of State and/or Government shall meet in the European Council as required. They shall act unanimously. Countries may abstain from voting without this precluding unanimity.

17. Commission

The Commission shall consist of one member from each country who may possibly be elected by direct and secret ballot at the same time as the elections to the European Parliament.

The Commission shall itself elect its President and its Vice-Presidents.

The Commission shall exercise executive authority together with the Member States.

The Commission shall monitor compliance with EU legislation and may bring actions in the Court of Justice for Treaty infringements.

The Commission shall implement the budget and manage programmes and subsidy schemes.

The Commission shall represent the Union externally in those areas where the EU legislates for the Member States or authorises the Commission to act externally.

The Commission shall itself adopt its rules of procedure by a 75% majority and shall perform its duties with complete independence.

The Commission shall act by ordinary majority. An individual commissioner may receive instructions from his national parliament on how to vote in the Commission but must manage his portfolio in the common interest of all Member States and citizens.

18. Operation of the Commission

The Commission's proceedings shall be public when it is adopting proposed legislation and taking political decisions. Reasoned dispensations can be decided by a 75% majority. The Commission may set up working parties. Their membership and working documents shall be accessible to the European Parliament unless Parliament approves a special dispensation.

The Commission's administrative decisions and actions are subject to full scrutiny by the Court of Auditors, the Ombudsman, the European Parliament and the oversight committees of the national parliaments.

19. Vote of no confidence in the Commission

Where the Council or Parliament adopts a vote of no confidence in a commissioner, that commissioner may be dismissed by the Court of Justice.

Where a national parliament adopts a vote of no confidence in its own commissioner, the country concerned shall elect a new one.

Where the Council or Parliament adopts a vote of no confidence in the entire Commission, it shall continue in office as a caretaker administration until a new Commission has been elected.

20. Court of Auditors

The Court of Auditors shall comprise one auditor elected by each national parliament.

It may call for any supporting documentation involving either full or partial use of EU funds.

It shall submit an annual report on the EU's accounts to the European Parliament. The accounts shall be recommended for approval or rejection by ordinary majority of the members of the Court of Auditors.

The Court of Auditors shall perform its duties with complete independence. Members may be dismissed only by the Court of Justice on a recommendation from a majority of the Court of Auditors.

21. Ombudsman

The Ombudsman shall be elected by the newly elected European Parliament from candidates who are or have been ombudsmen in their home countries.

The Ombudsman may call for any document and any kind of information from the European institutions.

The Ombudsman shall consider complaints from citizens about EU actions or lack thereof and may raise issues on his or her own initiative.

The Ombudsman may be dismissed only by the Court of Justice on a recommendation from a 75% majority of the European Parliament.

22. Working parties and committees

The institutions of the European Union may establish management committees, advisory committees and working parties. They shall operate under the responsibility of the institution which established them.

23. Court of Justice

The European Court of Justice shall comprise a supreme court and one or more subsidiary courts and specialist tribunals.

Each body shall comprise one judge from each Member State. He/She shall be appointed by the national parliament following fresh elections to the national parliament.

Only persons of unquestionable independence who have held office as a judge or professor of law shall be eligible for appointment as a judge or advocate-general.

Judges may be dismissed only by the Court of Justice itself.

24. Operation of the Court of Justice

The Court of Justice shall itself adopt its own rules of procedure and may subdivide into chambers.

The Court of Justice shall act by ordinary majority. Any ruling by a subordinate body may be appealed to a higher body.

Citizens of limited means may request free legal aid where the case is supported by the Ombudsman.

The Court of Justice shall decide cases brought by a Member State against another Member State or an institution or by any natural or legal person.

The Court of Justice shall give preliminary rulings on questions concerning the interpretation of EU law submitted by authorities in the Member States or by an EU institution.

The Court of Justice shall interpret EU legislation. New interpretations of the basic treaty must be approved by the Council of Ministers acting unanimously.

25. High Representative

The European Council shall nominate a High Representative for election by the European Parliament to coordinate a common foreign and security policy.

The High Representative shall chair the Council of Foreign Ministers and the EU delegations in third countries and international organisations.

The High Representative shall act in cooperation with the commissioners responsible for external trade and development policy.

26. Central Bank

The European Council shall appoint the President and the Governing Council of the European System of Central Banks and shall adopt the statute of the Central Bank unanimously.

27. Categories of decision-making

The EU may adopt laws and recommendations, regulations, decisions and opinions.

A law shall require a legal basis in this cooperation agreement, shall be generally applicable and binding in all details and shall take precedence over

the law of the Member States. A recommendation shall not be binding. A decision shall be binding on the party to which it is addressed. An opinion shall not be binding. Regulations may be promulgated only on the basis of a law.

Legal acts shall enter into force on the indicated date or 20 days after publication in the EU Official Journal.

28. Right of initiative

All institutions may propose laws. One million citizens can with their signatures call on the Commission to present a proposal for a law.

The Commission must produce a proposal where it is supported by a 75% majority in the proposing institution.

29. Better legislation

Every law must stipulate a date on which it automatically lapses unless re-enacted. Any regulation issued by the Commission can be considered as a proposed law on request from an ordinary majority in the European Parliament or the Council of Ministers.

All legal acts shall state the reasons behind them and shall refer to the proposals, initiatives, recommendations, requests and opinions that have preceded them.

All declarations in connection with legislation shall be on the public record and shall have no legal significance.

30. Finance

The EU budget shall be financed from own resources and shall be adopted in the form of a law with 75% support in the Council of Ministers and an ordinary majority in the European Parliament.

The budget must respect a financial ceiling of 1% of the EU's total gross domestic product. Increases in this ceiling may be adopted by the Member States acting unanimously.

Only expenditure that is authorised in a law and entered as expenditure in a validly adopted budget may be incurred.

In the event of disagreement over a new budget, the maximum expenditure that may be incurred each month is one-twelfth of the expenditure that was approved for the previous year or entered in the draft budget.

31. Monitoring of spending

The budget shall be implemented in keeping with the principles of sound financial management.

The EU's annual accounts shall be adopted in the form of a law on a recommendation from the Court of Auditors.

All expenditure shall be publicly accessible unless reasoned dispensations are adopted by a 75% majority.

Member States and the EU institutions shall combat fraud and shall treat offences involving EU funds in the same way as offences involving a Member State's own funds.

32. Foreign and security policy

The European Union may pursue a common foreign and security policy. No laws may be adopted in this area. The Court of Justice may not deliver judgements in this area.

Decisions shall be taken unanimously and may contain special provisions to be decided with 75% support among the Member States. Where one country abstains, this shall not preclude decisions by unanimity.

33. Defence

EU Member States may make military resources available for peacemaking operations decided by the UN.

The EU shall respect the Member States defence policies, membership of NATO or status as a neutral country.

34. Enhanced cooperation

Enhanced cooperation may be established in all areas with shared powers, for foreign and security policy and for judicial and police cooperation and must respect any EU decision.

A decision on enhanced cooperation shall be taken unanimously while allowing for countries to abstain.

Enhanced cooperation shall involve the EU institutions and shall be subject to joint democratic guidance and scrutiny.

Administrative expenditure shall be financed from the general budget unless stipulated otherwise in the law. Operational expenditure shall be financed by the participating countries unless the law stipulates unanimously that it be financed from the EU budget where minor expenditure is concerned.

35. Principle of equality

The EU shall respect the principle of the equality of citizens and states in all activities.

Citizens are entitled to participate in the democratic life of the EU. Deci-

sions must be taken as openly, democratically and close to citizens as possible. Citizens may freely form parties and associations to express their will.

36. Freedom of negotiation

The EU shall respect the two parties on the labour market and their right to conclude voluntary arrangements and agreements on pay and working conditions at both national and European level.

37. Minimum rules

Laws relating to the environment, working environment, safety, health, consumer protection, personal data, social conditions, animal welfare and cultural diversity shall be adopted as common minimum rules.

Every country is entitled to adopt more comprehensive protection of citizens as long as the rules are applied without discrimination.

38. Religion

The EU shall respect the status of churches, religious communities and non-denominational organisations and their operation in accordance with national legislation.

39. International agreements

The EU shall develop special ties with its neighbouring countries, other countries and international organisations. It may, acting unanimously in the Council and with the approval of the European Parliament, conclude agreements involving reciprocal rights and obligations.

40. Membership of the EU

The EU is open to all European countries that fully respect the European Convention on Human Rights. Applications for membership shall be addressed to the Council of Ministers.

Negotiations on membership shall be conducted by the Commission in accordance with the Council's guidelines. The outcome of negotiations shall be decided by unanimity in the Council and by ordinary majority in the European Parliament.

Where a country blatantly breaches its obligations, it may be excluded from the EU. Exclusion shall require unanimity among the other Member States, approval by 75% of the members of the European Parliament and a judgment from the International Court in The Hague.

A country may, by giving two years' notice, voluntarily secede from the

EU by its own decision. The terms for secession shall be agreed between the seceding country and a 75% majority in the Council.

Any disagreement shall be subject to a binding ruling by the International Court in The Hague. A country that has seceded may reapply for membership in accordance with the usual procedure.

Member States shall themselves indicate which parts of their territories and possessions are covered by the provisions of the basic treaty.

41. Right of property

The arrangements governing property rights in the Member States shall not be affected by this cooperation agreement.

42. Officials

The staff regulations for officials and other employees and rules on professional secrecy shall be adopted in the form of a law.

43. Seats and languages

The seats of the EU institutions and agencies and the language regime shall be decided unanimously in the Council of Ministers.

44. Legal continuity

Previous treaties shall be repealed unless annexed to this cooperation agreement. Laws and judgments shall continue unchanged unless explicitly amended in annexes to this agreement or subsequently under the usual legislative procedure.

Protocols and annexes to this agreement shall rank equally with the provisions of the agreement. Declarations shall have no legal significance.

45. Treaty amendments

The national parliaments and EU institutions may submit to the Council proposed amendments to this cooperation agreement.

Amendments shall be decided by unanimity in the Council and by a 75% majority in the European Parliament. They shall enter into force two months after ratification in all Member States in accordance with national constitutional requirements.

Where no more than 10% of Member States are unable to ratify a unanimously decided proposed amendment, a unanimous solution shall be found in the Council of Ministers.

46. Amendments to annexes

Annexes and protocols to this agreement may be amended by unanimity among the Member States unless a national parliament or one million citizens demand subsequent ratification.

47. Duration

This agreement shall be concluded for an indefinite period and shall enter into force two months after ratification by all Member States.

The letters of ratification shall be forwarded to the President of the Italian Republic who shall preserve them on behalf of the EU.

The agreement shall be drawn up in the official languages of all Member States. The texts shall be equally authentic.

Important annexes:

The various policies and decision-making categories condensed from the Nice Treaty and Part III of the draft Constitution for Europe, much simplified.

Cooperation with the national parliaments on the proximity principle. The yellow card becomes a red card.

The detailed rules governing foreign and security policy, UN forces, the defence agency and the solidarity rule.

The detailed rules governing judicial and police cooperation.

Survey of all existing legislation showing expiry dates unless re-enacted in accordance with the provisions of the cooperation agreement.

Survey of judgments with changed effects in the future.

Practical survey of national competences not covered by any EU competence.

The European Convention on Human Rights, indicating any reservations involving Member States and areas where the EU provides additional protection.

Voting in the Council of Ministers according to the Nice and Lisbon Treaties

	Nice		Lisbon	
	% of votes in the Council	Number of votes	% of EU population	Population in millions
Germany	**8.4**	**29**	**16.41**	**82.00**
France	8.4	29	12.88	64.35
United Kingdom	**8.4**	**29**	**12.33**	**61.63**
Italy	8.4	29	12.02	60.05
Spain	7.8	27	9.17	45.83
Poland	7.8	27	7.63	38.14
Romania	4.1	14	4.30	21.50
Netherlands	3.8	13	3.30	16.49
Greece	3.5	12	2.25	11.26
Belgium	3.5	12	2.15	10.75
Portugal	3.5	12	2.13	10.63
Czech Republic	3.5	12	2.09	10.47
Hungary	3.5	12	2.01	10.03
Sweden	2.9	10	1.85	9.26
Austria	2.9	10	1.67	8.36
Bulgaria	2.9	10	1.52	7.61
Denmark	2.0	7	1.10	5.51
Slovakia	2.0	7	1.08	5.41
Finland	2.0	7	1.07	5.33
Ireland	**2.0**	**7**	**0.89**	**4.47**
Lithuania	2.0	7	0.67	3.35
Latvia	1.2	4	0.45	2.26
Slovenia	1.2	4	0.41	2.03
Estonia	1.2	4	0.27	1.34
Cyprus	1.2	4	0.16	0.79
Luxembourg	1.2	4	0.10	0.49
Malta	**0.9**	**3**	**0.08**	**0.41**
EU-27 Total	100.0	345	100.00	499.75
Blocking Minority	26.38%	91	35%	174.913
Qualified majority	73.91%	255	65%	324.838

From EU Constitution to the Irish referendums on the Lisbon Treaty

Jens-Peter Bonde is the author of 60 books on the EU. He has also published a reader-friendly edition of the Lisbon Treaty and the Constitution containing and index of more than 3000 alphabetically listed words.
This book can be downloaded for free along with a practical guide and a commentary on the web pages: www.bonde.com and www.euabc.com

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