

The ECB under the Lisbon Treaty —The Impact on the ECB's Constitutional Status and External Relations*

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Abstract

The entry into force of the Lisbon Treaty on 1 December 2009 which marked a new step in the overall process of European integration. The purpose of the Lisbon Treaty is to enhance institutional efficiency and democratic legitimacy of the enlarged Union, as well as the coherence of its external actions. The Treaty will provide the EU with a new institutional framework and many policy powers necessary to meet future challenges. The European Central Bank (ECB) is classified as one of the Union's institutions. The change of ECB's constitutional status in the EU is one of major innovations of the Lisbon Treaty. Accordingly, the Lisbon Treaty will have a far-reaching impact on the ECB and its

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external relations. From a policy perspective and employing legal methods, this paper reviews the most important innovations and the major changes of the ECB introduced by the Treaty of Lisbon, comparing it at the same time to the defunct EU Constitution.

Key Words: European Union, Treaty on the Functioning of the European Union, European Central Bank, Treaty on European Union, the Lisbon Treaty

I. The ECB's Status under the EC Treaty

A. The Birth of the ECB

The European Central Bank (ECB) is the major pillar of Economic and Monetary Union (EMU), which dates back to the Werner Report of 1970.¹ The Single European Act² of 1986 introduced a new article (Article 102a) in the EEC Treaty concerning the EMU, with special reference to the European Monetary System and the development of the European Currency Unit. The constitutional foundation of the EMU was formally laid down in the Treaty on European Union (TEU), as signed on 7 February 1992 and came into effect on 1 November 1993. On 1 January 1999, the European Union (EU) embarked on the effective start of the EMU with a common monetary policy, an independent supranational central bank and a single European currency, the euro (De Grauwe, 2000: 129-130).

The ECB was established on 1 June 1998 in Frankfurt am Main, and commenced its operation on 1 July 1998. The establishment of the ECB was one of the objectives of the TEU and the Treaty establishing the European Community (TEC), as provided for in the Preamble TEU and Article 2 TEC respectively (Scheller, 2006: 21-22). The major provision of the ECB is contained in Articles 8, 105 to 124 TEC. The Treaty of Amsterdam³ and the Treaty of Nice⁴ instituted the amendments and the renumbering of the TEU and TEC. Therefore, the Treaty provisions referred hereinafter in this paper will refer to the consolidated versions of the TEU, and the TEC incorporating

¹ Presentation by the Werner Group to the Council and the Commission of the final report on the attainment by stages of Economic and Monetary Union in the Community, 13 October 1970, OJ C136, 11.11.1970; Supplement to EC Bulletin, No. 11-70.

² OJ 1987, L169/1.

³ OJ 1997, C340/1.

⁴ OJ 2001, C80/1.

the changes made under the Treaty of Amsterdam (European Union, 2006).

Article 8 TEC states that, a European System of Central Banks (ESCB) and a European Central Bank shall be established in accordance with the procedures laid down in this Treaty; they shall act within the limits of the powers conferred upon them by this Treaty and by the Statute of the ESCB and of the ECB (hereinafter referred to as “Statute of the ESCB”) annexed thereto.

In accordance with Article 107(1) TEC, the ESCB is composed of the ECB and the national central banks of the Member States. Article 105(1) states that the primary objective of the ECB is to maintain price stability. Without prejudice to the objective of price stability, it shall support the general economic policies in the Community with a view to contributing to the achievement of the objectives of the Community as laid down in Article 2 TEC.

In accordance with Article 105(2) TEC, the basic tasks to be carried out through the ESCB are:

- to define and implement the monetary policy of the Community;
- to conduct foreign exchange operations consistent with the provisions of Article 111 of the EC Treaty;
- to hold and manage the official foreign reserves of the Member States; and
- to promote the smooth operation of a payment system.

The establishment and operation of the ECB was an important step in the overall process of European integration. The ECB implies the completion of the internal market, as well as an irrevocable single currency and, finally, a new monetary institution. The development of the ECB necessitates changes. However, it would formally operate in accordance with the mandate given in the provision of the European Community Treaty (the EC Treaty) (Gros & Thygesen, 1992: 319-325).

B. Main Features of the ECB

The major features of the ECB constitutional status under the TEC are: independent status and legal personality. The EC Treaty provides for the independent status for the ECB and the National Central Bank of the EU Member States. The independent status of the ECB under the EC Treaty covers three dimensions: functional independence, financial independence and personal independence (Smits, 1997: 154-158). Functional independence ensures the ECB's independent status to conduct its monetary policy and to pursue the price stability objective.

Article 108 TEC provides that:

When exercising the powers and carrying out the tasks and duties conferred upon them by this Treaty and the Statute of the ESCB, neither the ECB, nor a national central bank, nor any member of their decision-making bodies shall seek or take instructions from Community institutions or bodies, from any government of a Member State or from any other body. The Community institutions and bodies and the governments of the Member States undertake to respect this principle and not to seek to influence the members of the decision-making bodies of the ECB or of the national central banks in the performance of their tasks.

Aside from monetary policy independence, the ECB also has financial independence associated with the fact that it has and manages its own budget, which is distinct from the EC's budget.

Article 12(1) of the ESCB Statute (European Union, 1992) stipulates that:

The Governing Council shall adopt the guidelines and take the decisions necessary to ensure the performance of the tasks entrusted to the ESCB under this Treaty and this Statute. The Governing Council shall formulate the monetary policy of the Community including, as appropriate, decisions relating to intermediate monetary objectives, key interest rates and

the supply of reserves in the ESCB, and shall establish the necessary guidelines for their implementation.

Article 26(2) of the ESCB Statute further provides that “the annual accounts of the ECB shall be drawn up by the Executive Board, in accordance with the principles established by the Governing Council. The accounts shall be approved by the Governing Council and shall thereafter be published.”

Article 28 of the ESCB Statute also states that the establishment capital of the ECB shall be 5,000 million euro. According to Article 32(6) and 33, the ECB takes responsibility for allocation of monetary income of national central bank and of net profits and losses of the ECB respectively.

With regards to personal independence, it is significant that the members of the decision-making bodies of the ECB have a status of their own, in order to ensure their independence. Article 112(2)(b) TEC and Article 11 of the ESCB Statute defines the procedure for appointment of members of the Executive Board of the ECB. According to Article 11 of the Statute, the terms and conditions of employment of the members of the Executive Board, in particular their salaries, pensions and other security benefits shall be the subject of contracts with the ECB. The term of office of the members of the Executive Board shall be eight years. Only the Court of Justice of the European Communities (ECJ), on an application by the Governing Council or the Executive Board of the ECB, may retire a member of the ECB's Executive Board. Article 36 of the Statute states that the Governing Council, on a proposal from the Executive Board, shall lay down the conditions of employment of the staff of the ECB. Article 40 also provides privilege and immunities for the ECB and its staff.

The ECB enjoy a high level of independence under the EU constitutional order. The reason is that Article 108 EC seeks, in essence, to shield the ECB from all sources of external influence in order to enable it effectively to pursue the objectives attributed to its tasks, through the independent exercise of the specific powers

conferred on it for that purpose by the EC Treaty and the ESCB Statute (Seidel, 1996: 50-52).

In addition to its independent status, the ECB was provided with a legal personality under the EC Treaty. Article 107(2) TEC states that the ECB shall have legal personality. Equivalent provisions exist in Article 281 of the EC Treaty, Article 184 of the Treaty establishing the European Atomic Energy Community (Euratom), and Article 6 of the Treaty establishing the European Coal and Steel Community (ECSC). Seeing that Article 282 TEC and Article 185 Euratom refer to legal capacity under domestic law, it is generally agreed that Article 281 TEC and Article 184 Euratom relate to international legal personality. Article 6(2) ECSC contains a more precise reference to international legal personality: in international relations, the Community shall enjoy the legal capacity it requires to perform its functions and attain its objectives. For functional reasons, it is conceivable that a central bank may enjoy legal personality in order to perform its tasks. It is also a logical reflection of the functional and institutional independence of the central bank. Accordingly, Article 107(2) TEC should be taken to cover the extent of the ECB's legal capacity in both the Member States and its external relations (Rudden & Phelan, 1997: 243).

The case law developed by the Court of Justice of the European Communities (ECJ) has confirmed the international legal personality of the Community. The ECJ referred to the EC as a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity, and capacity of representation on the international plane. The capacity of the Community extended over the whole extent of the field the objectives of Part One of the EC Treaty.⁵ Furthermore, the system of internal Community measures may not be separated from that external powers are implied to parallel internal powers in order to: (1) make internal powers workable; (2) achieve the general

⁵ Case 6/64, *Costa v. ENEL* (1964) ECR 585, at 593, 594.

objectives of the Treaty; and/or (3) protect European interests.⁶

European Community law is open to assigning legal personality to public banks established under the Treaty. Article 266 of the EC Treaty provides legal personality to the European Investment Bank (EIB). This legal personality has been confirmed by the ECJ. The ECJ ruled that: The Bank (EIB) has legal personality distinct from that of the Community and that it is administered and managed by organs of its own in accordance with its statute. In order to perform the tasks assigned to it by the Treaty the Bank must be able to act in complete independence on the financial markets, like any other bank.⁷

In addition, the EIB and the EC, together with 40 other countries, are members of the European Bank for Reconstruction and Development (EBRD). The EBRD is European in its basic character and broadly international in its membership, which constitutes a new and unique structure of cooperation in Europe. The purpose of the EBRD is to contribute to economic progress and reconstruction in the Central and Eastern European countries. The conclusion of the Agreement establishing the EBRD by the EC is necessary to achieve the EC's objectives in the field of external economic relations.

Article 45 of the Agreement establishing the EBRD provides for the status of the EBRD (European Union, 1990):

The Bank shall possess full legal personality and, in particular, the full legal capacity:

- (1) to contract;
- (2) to acquire and dispose of immovable and movable property; and
- (3) to institute legal proceedings

International personality means that the ECB can exercise legal rights and assume legal duties over the whole range of matters

⁶ Case 22/70, *Commission v. Council* (1971) ECR 236, para. 19.

⁷ Case 85/86, *Commission v. Board of Governors of the European Investment Bank* [1998] ECR 1281 at 1320, para. 28.

that the EC Treaty and the ESCB Statute assign to it. International personality also signifies the ECB's capacity to possess rights and duties in international law, particularly the right to enter into agreements, the ability to be a party to dispute settlement proceedings, and the capacity to claim or be liable for damages (Jennings & Watts, 1996: 330-331). The ECB then is not a Community institution such as the Council or the Commission of the EC. The ECB is considered not a part of the institutional actor of the EC, but "an autonomous entity in the European Union" or "a Community of its own" (Zilioli & Selmayr, 1999: 285).

It should be noted that the ECB need not possess all international rights, duties and powers, as do other European Communities. The International Court of Justice (ICJ) held that "the subjects of law in any legal system are not necessary identical in their nature or in the extent of their rights, and their nature depends upon the needs of Community" (ICJ, 1949: 178). The ECB only possesses rights and duties in the field of monetary policy and thus only possesses limited international personality. Nevertheless, this limited international personality does not affect the ECB as an international person. This is certainly crucial, as the external and internal aspects of monetary policy are geared towards the objective of price stability, as provided for in Article 4(2) of the EC Treaty.

The ECB also have law-making powers to carry out its tasks. According to Article 110 TEC, Article 12(1) and 34 of the Statute, the ECB may make regulations, decisions, recommendations, opinions, guidelines, instructions, as well as fines or penalty payments on undertakings. A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States. A decision shall be binding in its entirety upon those to whom it is addressed. The ECB may also decide to publish its decisions, recommendations and opinions.

All these features demonstrate that the ECB could be seen as a *sui generis* supranational central bank, which sets the ECB apart from the core EU institutions in the sense of Article 7 TEC

(Eichengreen, 2008: 37-38). In other words, the ECB is clearly distinct from the Community institutions. It is an independent specialized organization under the TEC, and in many instances is similar to the EC and Euratom, which also have legal personality (Zilioli & Selmayr, 2000: 591, 621; 2007: 398).

II. Major Changes under the Lisbon Treaty

A. From Maastricht to Lisbon

The need to reform the EU's institutional framework, particularly in light of the impending accession of the ten new Member States in 2004, was highlighted in a declaration annexed to the Treaty of Nice in 2001. The Laeken Declaration of December 2001 further committed to improving democracy, transparency and efficiency based on a constitution. The EU Constitution was signed in Rome on 29 October 2004, but it was rejected by French and Dutch referenda in 2005. On 13 December 2007 the EU Heads of State or Government signed the Lisbon Treaty⁸ to replace the Treaty establishing a Constitution for Europe (hereinafter referred to as the EU Constitution).⁹ The Treaty then needs to be ratified by all 27 Member States, with the intention to take into force on 1 January 2009, before the European Parliament elections in June 2009.¹⁰

The Lisbon Treaty is divided into several parts:

- Preamble,
- Changes to the Treaty on European Union (TEU) (Article 1),

⁸ The formal title of the Lisbon Treaty is "Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community," CIG 14/7, Brussels, 3 December 2007. The text see OJ 2007, C306/1. Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, OJ 2008, C115/1. See also OJ 2010, C83/1.

⁹ The text of the Treaty Establishing a Constitution for Europe, see OJ 2004, C310/1.

¹⁰ Article 6 the Lisbon Treaty, OJ 2007, C306/1.

- Changes to the Treaty establishing the European Community (Article 2),
- Final provisions (Articles 3-7),
- Protocols, and
- Annex.

The EC Treaty will be renamed as the “Treaty on the Functioning of the European Union (TFEU)” and its articles will be re-numbered.¹¹ According to Article 1 TEU of the Lisbon Treaty, the EU shall be founded on both the TEU and the TFEU. Those two Treaties shall have the same legal value. The EU shall replace and succeed the European Community. Therefore, the Lisbon Treaty makes a new stage in the process of creating an ever closer union among the peoples of Europe. In contrast to the European Constitution, which would have replaced the two main treaties of the European Union plus the Charter of Fundamental Rights with a single, combined treaty, the Lisbon Treaty will simply amend them thus making a legal binding reference to the Charter of Fundamental Rights. In addition, the Charter shall have the same legal value as the TEU and the TFEU. The Charter will thus enjoy constitutional status under the Lisbon Treaty.¹²

The Treaty simplifies the structure of the European Union, which currently consists of a Community “pillar” and two separate foreign policies and home affairs “pillars.” In the Lisbon Treaty, the pillars cease to exist and the Community is succeeded and replaced by the Union, which will have legal personality.¹³ It also drops all reference to the symbols of the EU—the flag, the anthem and the motto—though these will continue to exist.¹⁴

The Treaty of Lisbon is intended to keep most of the institutional innovations that were agreed upon in the EU

¹¹ Article 5, the Lisbon Treaty, OJ 2007, C306/1.

¹² Article 6 TEU Lisbon.

¹³ Article 47 TEU Lisbon and Article 335 TFEU.

¹⁴ Article 1(2)(b), the Lisbon Treaty. Brussels European Council, Presidency Conclusions, Annex 1. 21-22 June 2007.

Constitution, such as a permanent EU president, a foreign minister (renamed “High Representative of the Union for Foreign Affairs and Security Policy”), the same distribution of parliamentary seats, a reduced number of commissioners, a clause on withdrawal from the EU and a full legal personality (currently held only by the European Community) allowing it to sign international agreements. In addition, many of the political changes and substantial amendments to the old treaties in the European Constitution have also been kept.

The main substance of the EU Constitution will be preserved in the Lisbon Treaty. The Lisbon Treaty contains many founding principles and provisions of the EU Constitution, such as:

(1) The abolition of the pillars and attribution of legal personality to the EU. The Brussels Intergovernmental Conference (IGC) of June 2007 mandate stipulates that the Union is to have a single legal personality.¹⁵ The TEC will be called Treaty on the Functioning of the European Union. The term “Community” will be replaced throughout by the term “Union” (BBC, 2010; Dougan, 2008: 617-703; Pernice, 2009: 349-407).

(2) The definition of the EU’s democratic bases, such as democratic equality, representative democracy, participatory democracy and citizens’ initiative;¹⁶

(3) European citizens’ rights will be enshrined by means of a reference to the Charter of Fundamental Rights, which, although its text will not be incorporated into the Lisbon Treaty, will be legally binding in all Member States (except the United Kingdom);¹⁷

(4) The introduction of a voluntary withdrawal clause, enabling Member States to leave the EU;¹⁸

(5) The strengthening of the principle of subsidiary, in

¹⁵ Article 47 TEU Lisbon; and Article I-7 the EU Constitution.

¹⁶ Articles 9-11 TEU Lisbon; and Articles I-45 to 47 the EU Constitution.

¹⁷ Article 6 TEU Lisbon; and Articles II-61 to 114, Part II the EU Constitution

¹⁸ Article 50 TEU Lisbon; and Article I-60 the EU Constitution.

particular as a result of an enhanced role for national parliaments;¹⁹

(6) A clearer division of responsibilities between the European Union and Member States.²⁰

(7) A politician chosen to be president of the European Council for two-and-a-half years, replacing the current system where countries take turns at being president for six months.²¹

(8) A new post combining the jobs of the existing foreign affairs and the external affairs commissioner, to give the EU more clout on the world stage.²²

(9) A smaller European Commission, with fewer commissioners than there are member states, from 1 November 2014.²³

(10) A redistribution of voting weights between the member states, phased in between 2014 and 2017.²⁴

(11) New powers for the European Commission, European Parliament and European Court of Justice, for example in the field of justice and home affairs.²⁵

(12) Removal of national vetoes in a number of areas.²⁶

B. Major Changes in the Lisbon Treaty

The Lisbon Treaty incorporates the following major changes in comparison with the EU Constitution and those current treaties:

(1) The “Treaty Establishing the European Community” (Treaty of Rome) will be renamed the “Treaty on the Functioning

¹⁹ Article 12 TEU Lisbon; Protocol on the role of national parliaments in the European Union; and Article I-11(3) the EU Constitution.

²⁰ Article 5 TEU Lisbon; and Articles I-11 to 14 the EU Constitution.

²¹ Article 15 TEU Lisbon; and Article I-22 the EU Constitution.

²² Article 27 TEU Lisbon; and Article I-28 the EU Constitution.

²³ Article 17(4) TEU Lisbon; and Article I-26 the EU Constitution.

²⁴ Article 17(5) TEU Lisbon and Article 244 TFEU, Protocol on Transitional Provisions, the Lisbon Treaty; and Article I-25 of the EU Constitution.

²⁵ Articles 13-18 TEU Lisbon; Articles 67-89 TFEU, and Articles I-20, 23, 24, 26, 29 the EU Constitution..

²⁶ Articles 2-6 TFEU.

of the European Union.” However, in contrast to the EU Constitution, the two main treaties of the European Union will not be combined to one single constitutional treaty. Those two Treaties shall have the same legal value. The Union shall replace and succeed the European Community.²⁷ The EU Constitution would have created an entirely new legal order for the EU, sweeping away earlier treaties, whereas the Lisbon Treaty merely amends them (Mulvey, 2007).

(2) There will be some changes to the institutions of the Union: the European Council and European Central Bank will both become official institutions; the Council of the European Union will be known in the treaty as “the Council” or the “Council of Ministers;” the Court of Justice of the European Communities shall be known as the “Court of Justice of the European Union,” and the term “European Commission” will also be used in the treaties instead of the Commission of the European Communities.²⁸

(3) It was agreed to drop most of the state-like features such as the name “constitution,” as well as reference to EU symbols (flag, anthem, motto).²⁹ However, all the symbols are already in use, the flag having been adopted in the 1980s, and the Constitution would have just given them a more formal status. So despite being dropped from the text, use of the symbols will continue will continue. This was a basic compromise between the EU’s Member States, which involved a necessity to preserve as much as possible the EU Constitution content and at the same time to abandon those sensitive symbols of the Union to the Treaty (Editorial Comments, 2007: 1230-1231). The Treaty also ditches some of the constitution’s flowery preamble; and the text of the Charter of Fundamental Rights is relegated to a protocol annexed to the Treaty. There will be a reference to the Charter, making it legally

²⁷ Article 1 TEU Lisbon and Article 1 TFEU.

²⁸ Article 13 TEU Lisbon.

²⁹ Article I-8, Treaty Establishing A Constitution For Europe.

binding.³⁰

(4) Protocol 2 provides for a greater role of national parliaments in ensuring that EU measures comply with the principle of subsidiarity. In comparison with the proposed Constitution, the Lisbon Treaty allows national parliaments eight rather than six weeks to study European Commission legislative proposals and decide whether to send a reasoned opinion stating why the national parliament considers it to be incompatible with subsidiarity.³¹

(5) According to the Lisbon Treaty, the EU shall have a single legal personality. This implies the ability to enter into an agreement or be a member of an international organization (Cremona, 2008: 37-39). The EU's three "pillars" structure are replaced and merged together. The union's competencies in two major legislative areas or "pillars"—Foreign and Security Policy (second pillar) and Police and Judicial Co-operation in Criminal Matters (third pillar)—would be increased at the same time.³²

(6) Article 50 TEU contains an exit clause for any Member State to withdraw from the European Union in accordance with its own constitutional requirements. The EU shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the EU. A Member State's membership of the euro area would not survive the exit of its membership of the EU (Athanassiou, 2009: 4).

One of the major objectives of the Lisbon Treaty is to prepare and adjust the EU for enlargement. The EU enlargement is a strategic step towards the European unification, peace, prosperity and stability. However, a Union of 27 or more Member States requires more thoroughgoing reforms in order to guarantee

³⁰ Article 6 TEU Lisbon.

³¹ Article 2, Protocol on the Role of National Parliaments in the European Union, the Lisbon Treaty, OJ 2008, C115/203.

³² Articles 4, 67-89 TFEU; Articles 23-47 TEU Lisbon.

democracy, effectiveness, transparency, solidarity and governability. The Lisbon Treaty as a whole is to provide a more effective and democratic European Union (Piris, 2010: 141-145).

The Treaty of Lisbon introduces a new system of majority voting for national ministers in the Council. The current system of voting is known in the EU as “Qualified Majority Voting” or QMV. Under the new “double majority” voting system (“DMV”), a threshold number of Member States representing a certain percentage of the EU’s population is required to pass legislation. It means a minimum of 55% of the Member States (i.e. 15 out of 27 countries) representing a minimum of 65% of the EU’s population must vote in favour for European legislation to be passed. In the case the Council is not acting on a proposal of the Commission, the necessary majority of all Member States is increased to 72% while the population requirement remains the same.³³ The new system will start to come into force in 2014, with a transition period to 2017. As the new system is more strongly based on population size, the big Member States such as Germany, France and UK’s share of votes in the Council of Ministers will increase (Anonymous, 2007).

The significance of the Lisbon Treaty lies in three factors: more efficiency in the decision-making processes, more democracy through a greater role for the European Parliament and national parliaments, and increased coherence externally. All of these will equip the EU to better promote its interests internally and externally (Moravcsik, 2008: 158-159). Table 1 indicates major developments of the Lisbon Treaty from April 1951.

³³ The current EU’s QMV rules include a majority of Member States (67%), voting weights (74%) and population (62%).

Table 1 Key Developments of the Lisbon Treaty

April 1951	ECSC Treaty signed in Paris, entered into force on 25 July 1952.
February 1957	EEC Treaty and Euratom signed in Rome, entered into force on 1 January 1958.
February 1986	Single European Act signed, entered into force on 1 July 1987.
February 1992	Treaty on European Union signed in Maastricht, entered into force on 1 November 1993.
October 1997	Treaty of Amsterdam signed, entered into force on 1 May 1999.
February 2001	Treaty of Nice signed, entered into force on 1 February 2003.
February 2002	The Convention on the Future of Europe Started work.
June 2003	Draft EU Constitution submitted to EU summit.
October 2004	EU Constitution signed in Rome.
May 2005	French No vote.
June 2005	Dutch No vote.
December 2007	The Lisbon Treaty signed in Lisbon.
December 2009	The Lisbon Treaty entered into force on 1 December 2009.

Source: Compiled by the author.

III. The Impact of the Lisbon Treaty on the ECB

A. New Adjustments and Challenges

The Lisbon Treaty introduces a number of adjustments to the EU treaties. Some provisions governing the monetary policy framework of EMU even lead to fundamental changes for the ECB. Article 3(1)(c) TFEU provides that the EU shall have exclusive competence in monetary policy for Member States whose currency is the euro. Accordingly, only the ECB has the power to legislate and adopt legally acts relating to EMU. The Lisbon Treaty

introduces a list of objectives for the Union. Price stability is already the primary objective of the ECB and the ESCB, and is also included in these EU objectives, one of which is the “sustainable development of Europe based on balanced economic growth and price stability.” An “economic and monetary union whose currency is the euro” is another EU objective.³⁴

In contrast to the current Article 2 TEU and Article 2 TEC, price stability is listed among the overarching objectives of the EU under Article 1(4) of the Lisbon Treaty. Price stability is considered as one of the best contribution of the ECB with regard to the achievement of other economic goals (ECB, 2004: 58, 59). Price stability ensures confidence in the long-term value the euro and stability of the European economy, which in term create favorable conditions for a high level of financial integration and business investment and, ultimately, growth and employment (Gerlach & Hoffmann, 2008; Jappelli & Pagano, 2008; ECB, 2008b). Consequently, price stability is also recognized as a formal EU objective in the Lisbon Treaty.

It should be noted that price stability is incorporated in the paragraph 3 of Article 3 TEU of the Lisbon Treaty relating to the establishment of an internal market, not in Paragraph 4 of the same Article relating to the establishment of an EMU. In other words, price stability is an integral part of overall EU objectives. Although price stability is the primary objective of the ECB, it is not superior to other EU objectives. Article 3(3) TEU provides that

The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.

³⁴ Article 3(4) TEU Lisbon, Article 3 TFEU.

Growth and employment is explicitly identified as the EU objectives. The Lisbon Treaty signals a new constitutional strategy of the EU to balance between social, economic and employment policies in the European integration. The EU's monetary, economic and social policies thus could work together in a mutually reinforcing way to contribute to price stability, growth, employment and social cohesion in the EU (Zeitlin, 2008: 441-445).

The term "Eurosystem" is introduced into the Lisbon Treaty. This refers to the ECB and the national central banks of the Member States that have adopted the euro, differentiating it from the term "ESCB", which refers to the ECB and the national central banks of all EU Member States. Apart from technical redrafting, no changes are made in the areas of the convergence criteria, prudential supervision or exchange rate policy. The new text clarifies the current situation but does not change the allocation of responsibilities as regards economic policy and monetary policy (Begg, 2008a: 21-22).

The increasing number of Member States in the Euro Group will make for a more diverse spectrum of national interests, therefore effective institutions will need in order to avert the risk of paralysis in decision making procedures of the ECB and the Euro Group. The Lisbon Treaty has made improvements in certain areas to accommodate an Euro Group with 16 or more Member States by changing in its voting model in order to promote efficiency in its decision-making process.

Under Article 283 TFEU, the appointment of members of the ECB's Executive Board is by a qualified majority of the European Council, whereas currently it requires the common accord of the governments of the Member States (Frankal, Oleaga, & Coussens, 2007-2008: 123-126).

The Lisbon Treaty, provided in Article 137 TFEU, also introduces several other innovations in the area of monetary governance. These include recognition of the "Euro Group," which retains its current informal status. The original system of

half-yearly rotating presidencies for the Euro Group will be abolished. Instead, the Euro Group President will be elected by a majority of the members of the Euro Group for a period of two-and-a-half-year term, which would slightly extend the “de facto” two year fixed Presidency introduced in 2005 (European Union, 2008).

Moreover, the role of the euro area countries is strengthened. Informal meeting of Economy and Finance Minister of the Member States of the euro area are held monthly. These meetings allow them to work together, notably, on the budgetary policy. A new provision allows them, by a qualified majority, to adopt new measures to bolster the coordination and surveillance of their budgetary discipline and to set out specific economic policy guidelines for the euro area members. The wider use of qualified majority voting is essential to achieve a genuine inter-institutional balance and is the key to effective decision-making in the Euro Group. According to Article 136 TFEU, decisions on non-compliance by euro area countries with the excessive deficit procedure and the broad economic policy guidelines will be taken only by euro area countries, and without taking into account the vote of the Member State concerned (Piris, 2010: 305).

The euro area members will provide a recommendation on whether a country can adopt the euro, such that the final decision on the introduction of the euro in a Member State, while being taken by the whole Council, will take into account the view expressed by the euro area members. This does not in any way change the current procedure of the ECB and the Commission providing convergence reports and the Commission making a proposal.

B. Impacts on the ECB’s Constitutional Status and External Relations

The ECB, which currently has the status of a *sui generis* Community body, is given the legal status of a Union institution.

The ECB saw no need to adjust the monetary constitution that had proved so successful for the operation in the first decade. The ECB considered it essential that price stability remains a stated objective of the EU. In addition, the ECB deemed it indispensable that the special institutional features of the ECB and of the Eurosystem/ESCB were preserved (ECB, 2004: 57). These special features, which include all aspects of independence, the ECB's regulatory powers, and its legal personality, are key to the successful performance of the ECB's tasks. The Lisbon Treaty fully retains all these special features (Krauskopf & Steven, 2009: 1150-1151).

Article 13 TEU of the Lisbon Treaty, based on currently Article 5 TEU and 7(1) TEC, sets out the new institutional framework of the EU. The ECB and the Court of Auditors are added to the list of the EU institutions. Article I-19 of the EU Constitution did not include the ECB in the list of EU institutions. During the first draft of the Lisbon Treaty, the ECB criticized the inclusion of the ECB in the list of EU institutions could jeopardize the ECB's independence. The ECB is then classified as one of the "other Union institutions" on the basis of the ECB's correction proposals.³⁵ The new Article 13(3) TEU provides that the provisions relating to the ECB and detailed provisions on the "other institutions" are set out in TFEU.

The Lisbon Treaty will be divided in two sections, one on the Union and one on its functioning. It seems that the provisions regarding the ECB will be entailed in the second section. The ECB is placed in Section 6, Chapter 1 of Title 1 "Provisions on the Institutions" of the TFEU. Article 1 TEU and Article 1 TFEU of the Lisbon Treaty make it clear that both treaties will have the same legal value. In this context, the ECB's status will become more complicated and controversial under the Lisbon Treaty.

On the one hand, the ECB is recognized as the other Union

³⁵ President of the IGC, "Letter from the European Central Bank, dated 2 August 2007," CIG10/07, Brussels, 3 September 2007, p. 3.

institution in Article 13(3) TEU of the Lisbon Treaty. The wording of “other Union institutions” confirms the special constitutional status of the ECB as an independent institution in the EU institutional framework under the Lisbon Treaty.³⁶ Article 282(3) TFEU of the Lisbon Treaty restates that the ECB “shall have legal personality.” “It shall be independent in the exercise of its powers and in the management of its finances.” “Union institutions, bodies, offices and agencies and the governments of the Member States shall respect that independence.” The word “independence” is not found in the EC Treaty. Therefore, the Lisbon Treaty tends to clarify the ECB’s independence explicitly in the new constitutional order (Zilioli & Selmayr, 2007: 390). These provisions reconfirm the special features and status of the ECB.

On the other hand, the ECB is included in the list of the seven core institutions which are, according to Article 13 TEU of the Lisbon Treaty, the component parts of the EU institutional framework. On this basis, the status of the ECB is only provided as a Union institution, not a Union organization in the new EU constitutional order. Article 13(2) TEU of the Lisbon Treaty states that the ECB and each Union institution shall act within the limit of the powers conferred on it in the new Treaties, and in conforming with the procedures, conditions and objectives set out in them. However, the same provision also require the Union’s institutions shall practice mutual sincere cooperation, and shall aim to promote the Union’s values, advance its objectives, serve its interests, and ensure the consistency, effectiveness and continuity of its policies and actions (Begg, 2008b: 430-431).

In addition, new horizontal clauses ensure that, in the definition and implementation of its policies, the Union will take into account the social dimension of the single market, sustainable development and employment. Employment and social protection become more and more important in the EU politics (European Commission, 2005, 2006). A new provision of Article 9 is inserted

³⁶ Article 13(3) TEU Lisbon; Comments see Kapteyn (2005: 127).

in the TFEU, which states that in defining and implementing its policies and activities, the EU shall take into account of a high level of employment, adequate social protection, and protection of human health, etc.

Article 5 TFEU further provides that the Member States shall coordinate their economic policies within the Union. To this end, the Council shall adopt measures, in particular broad guidelines for these policies. Specific provisions shall apply to those Member States whose currency is the euro. The Union shall also take measures to ensure coordination of the employment policies of the Member States, in particular by defining guidelines for these policies. The Union may take initiatives to ensure coordination of Member States' social policy. According to Article 4 TFEU, the Union shall have shared competence with the Member States in internal market, social policy, economic, social and territorial cohesion policy areas, etc.

Article 13 TEU of the Lisbon Treaty is also influenced by two recent developments in the EU: the success of the ECB in the first ten years and the judicial clarifications of the ECB's status by the ECJ. Due to the successful performance of the ECB in the first decade, the EU and its Member States are very eager to integrate the ECB into the EU institutional framework. Article 13 TEU of the Lisbon Treaty demonstrates that the ECB is classified as one of the core institutions, and at the same time this new institutional framework may avoid the ECB distancing from the EU's control (Maher, 2007: 682-685).

The primary objective of the ECB is to maintain price stability, in other words, to keep inflation low within the euro area. The present target is to keep inflation below, but close to, 2% (ECB, 2001, 2002; European Union, 1995). Although oil prices have tripled from 1999 to March 2008, the 15 Member States of euro area have enjoyed a low level of inflation during the same period (ECB, 2008a: 32-37). However, in the eyes of the EU and Member States, the ECB should be integrated into the overall EU framework, and the ECB should not only be integrated into the

overall EU framework, but also make more contributions to the general economic policies and general objectives of the EU. The institutional change for the ECB's status in the EU contained in Article 13 TEU of the Lisbon Treaty thus may avoid constitutional disputes in the future operation.

The ECJ judgment at the OLAF Dispute³⁷ already clarified the ECB as an integral part of Community framework. The ECJ held that provisions of the EC Treaty must be given a broad interpretation. The fact that a body, office or agency owes its existence to the EC Treaty suggests that it was intended to contribute towards the attainment of the EC's objectives and places it within the framework of the Community.³⁸ In spite of the independent feature of the ECB, the ECJ further concludes that the ECB "falls squarely within the Community framework." In this case, the notion of "body", not "organization," was referred to the ECB by the Advocate General Jacobs.³⁹

In Case 85/86 and Case C-370/89, the ECJ had already pointed out that recognition of the European Investment Bank's operational and institutional autonomy does not mean that it is totally separated from the Communities and exempt from every rule of Community law.⁴⁰ In Case C-11/00, the ECJ upheld and applied this point on the ECB with three reasons. First, it is evident from Article 105(1) TEC that the ECB is to contribute to the achievement of the objectives of the EC, whilst Article 8 TEC states that the ECB is to act within the limits of the powers conferred upon it by the EC Treaty and the ESCB Statute. Second, the ECB is subject to various kinds of Community controls by the Court of Auditors. Finally, it is also possible for the Council to amend certain provisions of the ESCB Statute based on Article

³⁷ Case C-11/00, *Commission of the European Communities v. European Central Bank* (2003) ECR I-7147.

³⁸ *Ibid.*, para. 91.

³⁹ *Ibid.*, Opinion of Advocate General Jacobs, para. 124.

⁴⁰ Case 85/86 *Commission v. EIB* (1988) ECR 1281, and Case C-370/89 *SGEEM and Etory v. EIB* (1992) ECR I-6211.

107(5) TEC.⁴¹ In light of that judgment, the ECJ held that “recognition of ECB’s independence does not have the consequence of separating it entirely from the EC and exempting it from every rule of Community law.”⁴²

In this context, the ECB will face increasing pressure from the other Union institutions as well as Member States to pursue growth, employment and other objectives in line with its primary objective of price stability. The ECB status will shift from the *sui generis* supranational central bank status to the institutional framework status under the EU constitutional order. This will be the most significant change of the ECB’s status under the Lisbon Treaty.

The second major change is that the ECB independence clause does not appear in the Lisbon Treaty. Article 108 TEC incorporates a clause relating to the ECB independence status, which stipulates that:

When exercising the powers and carrying out the tasks and duties conferred upon them by this Treaty and the Statute of the ESCB, neither the ECB, nor a national central bank, nor any member of their decision-making bodies shall seek or take instructions from Community institutions or bodies, from any government of a Member State or from any other body. The Community institutions and bodies and the governments of the Member States undertake to respect this principle and not to seek to influence the members of the decision-making bodies of the ECB or of the national central banks in the performance of their tasks.

Under the EU Constitution, integration of the ECB into the EU institutional framework has already begun. However, the ECB is still identified as a separate “other Union institution.” Moreover, the ECB independence clause, Article 108 TEC, is replicated in Article III-188 of the EU Constitution. On the contrary, Article

⁴¹ Case C-11/00, para. 135.

⁴² *Ibid.*

108 TEC does not appear in the Lisbon Treaty. Article 282(3) TFEU of the Lisbon Treaty only reiterates the principle of independence, which states:

The European Central Bank shall have legal personality. It alone may authorize the issue of the euro. It shall be independent in the exercise of its powers and in the management of its finances. Union institutions, bodies, offices and agencies and the governments of the Member States shall respect that independence.

Independence is an uncertain legal concept in the new clause. It will mean different thing to different parties. This sends a strong signal to the ECB. It could well mean that ECB will be independent for its function but not independent from general EU objectives. In other words, the EU and Member States will be more secure with the ECB brought within the single institutional framework and acting as an integral part of the EU (Smaghi, 2008).

The Lisbon Treaty also has an impact on the ECB's external relations. Under the TEU and TFEU, the EC already has the right to legislate over external trade and customs policy, the internal market, the monetary policy of countries in the eurozone, agriculture and fisheries and many areas of domestic law including the environment and health and safety at work. The Lisbon Treaty redrafts the language used regarding the external representation of the euro area in the context of the international financial architecture. Notably, the Lisbon Treaty introduces for the first time the concept of "unified representation." Articles 17(1), 24 TEU, Articles 220, 221 TFEU of the Lisbon Treaty provides that the EU shall ensure consistency between the different areas of its external action and between these other policies. Article 26 TEU of the Lisbon Treaty even states that the European Council shall identify the strategic interests and objectives of the Union. According to Article 3(1)(c) TFEU of the Lisbon Treaty, the EU enjoys exclusive competence in the monetary policy for the Member States whose currency is the euro (Jung, Mongelli &

Moutot, 2010).

Article 3(5) TEU of the Lisbon Treaty states that the EU external relations, shall uphold and promote its values and interests and contribute to peace, security, the sustainable development, free and fair trade, the protection of human rights, and the development of international law, etc.

The EU as an actor on the global stage will be enhanced by bringing together EU's external policy tools including:

(1) A new High Representative for the Union in Foreign Affairs and Security Policy, also Vice-President of the Commission, will increase the impact, the coherence and the visibility of the EU's external action (House of Commons Foreign Affairs Committee, 2008: 30-49; Howorth, 2010: 455).

(2) A new European External Action Service will provide back up and support to the High Representative (Vanhoonacker & Reslow, 2010).

(3) A single legal personality for the Union will strengthen the Union's negotiating power, making it more effective on the world stage and a more visible partner for third countries and international organizations.

(4) The EU shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a EU legislative act or is necessary to enable the EU to exercise its internal competence, or in so far as its conclusion may affect common rule or alter their scope.⁴³

(5) Progress in European Security and Defense Policy will preserve special decision-making arrangements but also pave the way towards reinforced cooperation amongst a smaller group of Member States.⁴⁴

In this context, the Lisbon Treaty will give the EU a clear voice in its external relations. It will harness the EU's economic, trade, humanitarian development, political and diplomatic

⁴³ Article 3(2) TFEU.

⁴⁴ Articles 42-46 TEU Lisbon.

strengths to promote EU's interests and value worldwide. The EU shall also ensure consistency between the different areas of its external action and between these and its other policies (Cremona, 2006: 3-4; Zielonka, 2008, 474-475). In addition, the European Council may identify the strategic interests and objectives of the Union. The operation of monetary policy by the ECB will be unavoidably involved external activities. How to promote ECB's profile in the international monetary system? How to apply for the IMF's membership by the ECB (Cohen, 2008: 468-469; Horng, 2005: 802-803)? How to resolve the 2008 global financial crisis? What's the role of the ECB in the formation of a new international financial order?⁴⁵ These issues should be considered as strategic interests of the EU. Consequently, ECB external relations will be more effective and influential under the new contextual approach of EU foreign policy provided by the Lisbon Treaty (Wouters, Coppens, & Meester, 2008: 196-197).

The meaning of the Lisbon Treaty for the constitutional status of the ECB is very significant. Although the Lisbon Treaty leaves the ECB's function fundamentally unchanged, it introduces many revolutionary features. The major changes particularly include: (1) listing the ECB in the EU institutional framework, and also providing it the status as another Union institution; (2) the ECB independence clause does not appear in the Lisbon Treaty; and (3) integrating the ECB into the overall EU external relations. The Treaty recognizes some current realities and refines the ECB in several respects, offering both progress on mechanisms for more distinct economic governance of the euro area and the potential for further developments.

Under the Lisbon Treaty, the ECB will tend to greater integration into the EU and also make more contribution to the EU's objectives. How to balance the constitutional changes on the one hand and maintain its independence and objectives on the

⁴⁵ Council of the European Union, "Presidency Conclusions," Brussels European Council, 11 and 12 December 2008, 17271/08, pp. 3-7.

other hand will be a challenge faced by the ECB under the Lisbon Treaty. The Treaty introduces a single legal personality for the Union, which enables the EU to speak and take action as a single entity. The Lisbon Treaty will also help the EU work more effectively and consistently in its external relations. Connecting different strands of EU external policy, such as diplomacy, security, trade, development, humanitarian aid and international negotiations will give the EU a clearer voice in relations with its partner countries and organizations worldwide (Sari, 2008: 84-85).

IV. Conclusions

The innovations of the EU Constitution combined with additional modifications provide the basis for the changes in the Lisbon Treaty. The Lisbon Treaty amends the EU's two core treaties, the EU Treaty and the EC Treaty. The latter is renamed the Treaty on the Functioning of the European Union. In addition, several Protocols and Declarations are attached to the Treaty. The Treaty thus enhances the enlarged Union in term of decision-making efficiency and democratic legitimacy to tackle challenges in the 21st Century.

The Lisbon Treaty introduces several innovative changes for the ECB. Most of the special features of the ECB are preserved by the Lisbon Treaty, in particular the legal personality, the independence and the regulatory powers of the ECB. The Lisbon Treaty strengthens the ECB's independence by explicitly introducing its financial independence in primary law. However, the Lisbon Treaty also entails many significant changes to the ECB. In particular, the ECB is classified as an EU institution; and the ECB independence clause—Article 108 TEC— does not appear in the Lisbon Treaty. These are two major changes for the ECB. The Lisbon Treaty, while re-ensuring the legal personality and independent principle of the ECB, at the same time formally integrates it into the EU institutional framework. The Lisbon

Treaty has settled the ECB as a formal institution of the EU. This is a fundamental change of constitutional status to the ECB. The ECB's status will be shifted from a *sui generis* supranational central bank organization to a Union institution in charge of monetary policy. In addition, the Lisbon Treaty makes the ECB's primary objective of price stability as an objective of the EU as a whole. In the pursuit of price stability, the ECB will face increasing pressure in support the general economic policies in the EU, in particular growth, employment and other social policies. The Lisbon Treaty therefore will have a far-reaching impact on the ECB's status in the EU constitutional order.

Some provisions under the Lisbon Treaty governing the monetary framework of the euro group may also lead to fundamental change for the ECB. The Lisbon Treaty would increase the possibility of more effective economic governance in the euro area. The euro group would be given formal recognition in the Lisbon Treaty. Voting in the Economic and Financial Affairs Council (ECOFIN) has been restricted to ministers representing euro-area countries in a number of cases. Budgetary surveillance and economic coordination will be strengthened in the euro area. In addition, the ECB is integrated into the overall EU external relations under the Lisbon Treaty. The EU's competence in matters of common foreign and security policy shall cover all areas of foreign policy. The EU also enjoys exclusive power in many policy areas, such as trade, monetary policy, competition, agriculture, internal market, etc. The EU's external relations are becoming more important as its economic integration grows deeper and wider. The EU may finally become a decisive building block for a multi-polar economic regime. These new changes will help shape the ECB's contribution to the formation of a new international economic order in the 21st Century. Consequently, the operation of the ECB, under the Lisbon Treaty, may provide positive inputs to the stability and prosperity of world economy.

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里斯本條約對ECB憲法地位與對外關係的影響

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摘 要

里斯本條約於二〇〇九年十二月一日生效，代表歐盟整合已發展至另一新的階段。里斯本條約的目標包括用以強化歐盟行政效率、決策民主以及正當性，同時協調歐盟對外關係活動，以提高歐盟國際地位，並有效因應歐盟在二十一世紀所面臨的挑戰。ECB在里斯本條約被歸類為一個歐盟機構並納入歐盟單一組織架構，此一變革將影響ECB在歐盟的憲法地位以及ECB對外關係，ECB將不能自外於歐盟單一組織架構以及共同目標。在歐盟共同外交政策及政策整合策略下，ECB對外關係的影響力預期將有所擴增，進而提高ECB的國際地位。

關鍵詞： 歐盟、歐盟運作條約、ECB、歐盟條約、里斯本條約