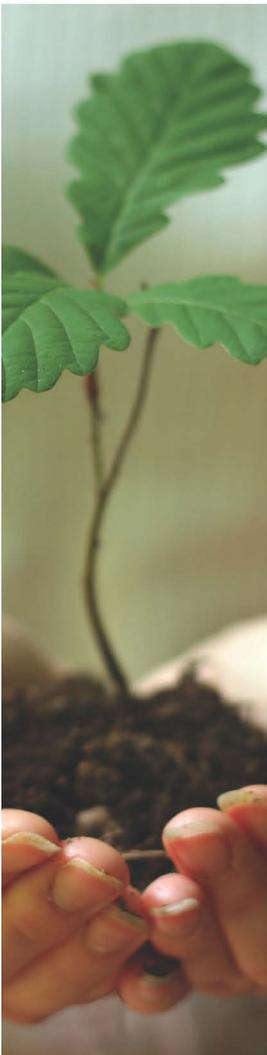


DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT B
STRUCTURAL AND COHESION POLICIES



Agriculture and Rural Development



Culture and Education



Fisheries



Regional Development



Transport and Tourism



**STRUCTURAL AND
COHESION POLICIES
FOLLOWING THE
TREATY OF LISBON**

STUDY



DIRECTORATE-GENERAL FOR INTERNAL POLICIES OF THE
UNION

POLICY DEPARTMENT B: STRUCTURAL AND COHESION POLICIES

Structural and Cohesion Policies following the Treaty of Lisbon

Handbook on

- common agricultural policy**
- common fisheries policy**
- regional policy**
- transport and tourism policies**
- culture and education policies**

STUDY

This document was requested by the Director of the Directorate for Structural and Cohesion Policies of the European Parliament.

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DIRECTORATE-GENERAL FOR INTERNAL POLICIES OF THE
UNION

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Handbook on

- **common agricultural policy**
- **common fisheries policy**
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STUDY

Abstract:

The Treaty of Lisbon clearly has major consequences for structural and cohesion policies. This study assesses the changes made to those policies falling under the responsibility of Directorate B of the European Parliament's Directorate-General for Internal Policies (institutional, procedural and financial changes, and also substantive changes to the legal bases).

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LIST OF ABBREVIATIONS

ACP countries	Countries having signed the Lomé Convention (African, Caribbean and Pacific)
CAP	Common agricultural policy
CE	Compulsory expenditure
CFP	Common fisheries policy
CFSP	Common foreign and security policy
COM	Common organisation of the market
EC	European Community
ECJ	Court of Justice of the European Communities
EU	European Union
GSP	Generalised System of Preferences
IGC	Intergovernmental Conference
MERCOSUR	Brazil, Paraguay, Uruguay and Argentina
MFF	Multiannual Financial Framework
NCE	Non-compulsory expenditure
OMC	Open method of coordination
RFO	Regional fisheries organisations
TACs	Total allowable catches
TEC	Treaty establishing the European Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
WTO	World Trade Organization

1. INTRODUCTION

1.1. The Treaty of Lisbon and the European Parliament

The Treaty of Lisbon was signed on 13 December 2007 by representatives of the 27 Member States of the European Union. It completely reformulates the *Treaty on European Union* (TEU) and the Treaty establishing the European Community (renamed the '*Treaty on the Functioning of the European Union*' - TFEU) ⁽¹⁾. Pursuant to Article 6 of the Treaty of Lisbon ⁽²⁾, the new Treaty has been ratified by the Member States and entered into force on 1 December 2009, the first day of the month following the deposit of the last instrument of ratification.

The changes made by the Treaty of Lisbon mainly stem from the innovations in the previous draft Treaty establishing a *Constitution for Europe* ⁽³⁾. Although the Treaty of Lisbon makes substantial changes to the whole institutional framework (formal recognition of the European Council; extension of the Commission's right of initiative and implementing powers; consolidation of the functions of the High Representative for Common Foreign and Security Policy), the European Parliament is the institution that has been strengthened the most.

As the only EU institution elected by direct universal suffrage, the European Parliament receives new powers and new tools to ensure that the people's voice is heard.

1.1.1. New legislative prerogatives over common policies

The Treaty of Lisbon reinforces the European Parliament's role as legislator. From now on, the codecision procedure, which puts the EP on an equal footing with the Council with just a few exceptions, becomes the '*ordinary legislative procedure*'. It is extended to *new areas*, which increase in number from 44 to 85. The most important are these of agriculture, fisheries, implementation of Structural Funds, common commercial policy, energy security, rules for the multilateral surveillance procedure with a view to enhanced economic coordination, immigration, justice and home affairs, public health, intellectual property, implementation of the European Research Area, sport, tourism and the Staff Regulations of officials of the European Union.

1.1.2. New powers over international agreements

The Treaty of Lisbon also gives the European Parliament new legislative prerogatives in terms of *international agreements*. From now on, the Members of the European Parliament (MEPs) must approve agreements negotiated by the EU at multilateral or bilateral level (on trade issues, transport, fisheries, the environment and climate change, etc.).

¹ Treaty of Lisbon: OJ C 306, 17.12.2007. Consolidated versions of the Treaty on European Union (TEU) and of the Treaty on the Functioning of the European Union (TFEU): OJ C 115, 9.5.2008 (<http://www.consilium.europa.eu/showPage.aspx?id=1296&lang=en>). On the development of the Treaties, see also: http://europa.eu/abc/treaties/index_en.htm.

² OJ C 306, 17.12.2007, p. 135.

³ However, the Treaty of Lisbon is not called a '*Constitution*' and does not contain any constitutional terminology or symbols (European law, Union Minister for Foreign Affairs, hymn, flag, motto, Europe day). Instead of repealing and replacing the EC and EU Treaties, it amends them. Furthermore, the Treaty of Lisbon refrains from codifying the principle of primacy of EU law (which justified the presentation of an opinion from the Council Legal Service, which is attached as an Annex to the Final Act of the Treaty - Declaration No 17). It also does not incorporate the text of the Charter of Fundamental Rights, but simply refers to this through Article 6(1) TEU.

1.1.3. *New budgetary powers*

The European Parliament has also seen its *budgetary powers* increase. Given that the former distinction between '*compulsory expenditure*' and '*non-compulsory expenditure*' has now disappeared, the two branches of the budgetary authority (European Parliament and Council) must jointly decide on the whole Union budget. The Treaty of Lisbon also formalises a *new annual budgetary procedure* and consolidates the *multiannual financial framework* in the TFEU.

1.1.4. *A new institutional framework*

The new Treaty also includes provisions on a wide range of subjects affecting Parliament's work directly or indirectly:

- It replaces the European Community and the European Union with a new *Union* ⁽⁴⁾ *with a legal personality* ⁽⁵⁾ both internally and internationally ⁽⁶⁾.
- It eliminates the *pillar structure*, although it does maintain special procedures in the area of common foreign and security policy (CFSP), including defence policy.
- It consolidates the *Union's values*, which become the reference framework for future accessions to the Union and also for any sanctions imposed on Member States where they persistently and seriously infringe these values.
- It also consolidates *citizenship of the Union* ⁽⁷⁾ and the *rights of citizens* ⁽⁸⁾, including the *right to petition* the European Parliament ⁽⁹⁾ and the *right of citizens' initiative* ⁽¹⁰⁾, which has now become an instrument of direct participation in the public affairs of the Union (see Section 3.10.2. below).
- It reinforces democratic control by expanding the composition of the European Parliament (with 18 additional MEPs) and by recognising the role of the *national parliaments* in the good functioning of the Union ⁽¹¹⁾. In that regard, it recognises that national parliaments have a right to object to legislative proposals made by the Commission if they believe that such issues would be better managed at national level under the principle of subsidiarity ('*early warning mechanism*') (see Section 2.3.3. below).

⁴ Third paragraph of Article 1 TEU.

⁵ Article 47 TEU and Declaration No 24 annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon.

⁶ This personality will exist *internally* as the Union may be held contractually liable (Article 340 TFEU) and will enjoy the most extensive legal capacity in the Member States (Article 335 TFEU). As regards the Union's *international personality*, this will be evident through its capacity to conclude international agreements in its areas of competence, through its right of delegation in third countries and at international organisations (Article 35 TEU; Article 221 TFEU) and through its external action (Articles 21 to 46 TEU) (represented by commercial policy, cooperation with third countries, humanitarian aid and the CFSP).

⁷ Article 20 TFEU.

⁸ Articles 18 to 24 TEU.

⁹ Articles 20(2)(d) and 24 TFEU.

¹⁰ Article 11(4) TEU and Article 24 TFEU.

¹¹ Article 12 TEU and Protocol No 1.

- It encourages the participation of *civil society* in socio-economic, civil, professional and cultural areas ⁽¹²⁾. It confirms the principle of *dialogue* with the social partners ⁽¹³⁾ by extending this to churches and philosophical and non-confessional organisations ⁽¹⁴⁾.
- As regards the *typology of legal acts*, a distinction is clearly made between legislative acts (regulations, directives and decisions), adopted in accordance with an ordinary or special legislative procedure, and non-legislative acts. Moreover, the Treaty of Lisbon contains innovations in relation to *delegated acts and implementing acts* ('*comitology*') (see Section 3.9.2. below).
- Finally, the Treaty of Lisbon grants Parliament a new right to propose *revisions to the Treaties* ⁽¹⁵⁾ and confirms the voluntary *right of withdrawal* of a Member State ⁽¹⁶⁾.

1.2. Implementation of the Treaty of Lisbon: the transitional period

Both before and since the entry into force of the Treaty of Lisbon, the European institutions have begun to take the steps needed to define new legislative procedures and rules for interinstitutional cooperation, where applicable, and to revise the relevant texts in force.

The Commission has presented an '*omnibus*' communication on the consequences of the Treaty's entry into force for ongoing interinstitutional decision-making procedures. This communication lists the pending legislative proposals for which the legal bases are amended ⁽¹⁷⁾. The Commission has also presented a communication on the new *delegated acts* (Article 290 TFEU) ⁽¹⁸⁾. On this basis, the EP's Conference of Committee Chairs and Parliament itself must decide on the framework to be applied to legislative delegations in the future (see Section 3.9.1. below).

An initial *interinstitutional declaration* was also signed in December 2009 on the implementation of Article 291 TFEU. Pending a new regulatory framework on the *exercise of implementing powers* by the Commission, to be adopted in principle before June 2010, the European Parliament, the Council and the Commission have decided to temporarily continue applying the rules on '*comitology*' ⁽¹⁹⁾.

For its part, the European Parliament has adopted several *resolutions* on the entry into force of the new Treaty:

- On *perspectives for developing civil dialogue* (T6-0007/2009 of 13 January 2009). GRABOWSKA report, INI/2008/2067 ⁽²⁰⁾.
- On the *general review of the Rules of Procedure of the European Parliament* (T6-0359/2009 of 6 May 2009). CORBETT report, REG/2007/2124 ⁽²¹⁾.

¹² Article 300(2) TFEU.

¹³ Article 152 TFEU.

¹⁴ Article 17 TFEU.

¹⁵ Article 48 TEU.

¹⁶ Article 50 TEU.

¹⁷ COM(2009)665, 2.12.2009.

¹⁸ COM(2009)673, 9.12.2009.

¹⁹ Declaration of the European Parliament, the Council and the Commission concerning the implementation of Article 291 of the Treaty on the Functioning of the European Union.

²⁰ <http://www.europarl.europa.eu/oeil/file.jsp?id=5608922¬iceType=null&language=en>.

²¹ <http://www.europarl.europa.eu/oeil/file.jsp?id=5491432>.

- On *Parliament's new role and responsibilities* (T6-0373/2009 of 7 May 2009). LEINEN report, INI/2008/2063 ⁽²²⁾.
- On the *impact of the Lisbon Treaty on the development of the institutional balance of the European Union* (T6-0387/2009 of 7 May 2009). DEHAENE report, INI/2008/2073 ⁽²³⁾.
- On the *financial aspects of the Lisbon Treaty* (T6-0374/2009 of 7 May 2009). GUY-QUINT report, INI/2008/2054 ⁽²⁴⁾.
- On the *development of the relations between the European Parliament and national parliaments* (T6-0388/2009 of 7 May 2009). BROK report, INI/2008/2120 ⁽²⁵⁾.
- On the *European citizens' initiative* (T6-0389/2009 of 7 May 2009). KAUFMANN report, INI/2008/2169 ⁽²⁶⁾.
- On the *transitional procedural guidelines on budgetary matters* in view of the entry into force of the Lisbon Treaty (T7-0067/2009 of 12 November 2009). LAMASSOURE report, INI/2009/2168 ⁽²⁷⁾.
- On the *adaptation of the Rules of Procedure of the European Parliament to the Treaty of Lisbon* (T7-0088/2009 of 25 November 2009). MARTIN report, REG/2009/2062 ⁽²⁸⁾.
- On the *improvements needed to the legal framework for access to documents* (T7-0116/2009). Joint resolution adopted following oral questions O-0122/2009 to the Council and O-0123/2009 to the Commission ⁽²⁹⁾.
- On a *revised Framework Agreement between the European Parliament and the Commission* for the next legislative term. Resolution of 9 February 2010, RSP/2010/2519 ⁽³⁰⁾.

In this context, it is also planned that, during the April 2010 part-session, Parliament will adopt a resolution on the *power of legislative delegation*. SZAJER report, INI/2010/2021 ⁽³¹⁾.

²² <http://www.europarl.europa.eu/oeil/file.jsp?id=5608622¬iceType=null&language=en>.

²³ <http://www.europarl.europa.eu/oeil/file.jsp?id=5609042¬iceType=null&language=en>.

²⁴ <http://www.europarl.europa.eu/oeil/file.jsp?id=5608282¬iceType=null&language=en>.

²⁵ <http://www.europarl.europa.eu/oeil/file.jsp?id=5636922¬iceType=null&language=en>.

²⁶ <http://www.europarl.europa.eu/oeil/file.jsp?id=5665862¬iceType=null&language=en>.

²⁷ <http://www.europarl.europa.eu/oeil/file.jsp?id=5817052¬iceType=null&language=en>.

²⁸ <http://www.europarl.europa.eu/oeil/file.jsp?id=5786912¬iceType=null&language=en>.

²⁹ <http://www.europarl.europa.eu/oeil/file.jsp?id=5822882>.

³⁰ <http://www.europarl.europa.eu/oeil/file.jsp?id=5838672>.

³¹ <http://www.europarl.europa.eu/oeil/file.jsp?id=5840472>.

2. THE TREATY OF LISBON AND THE STRUCTURAL AND COHESION POLICIES

2.1. Scope of the study: structural and cohesion policies

The new consolidated Treaties involve significant changes *for all the common policies*. However, this study will only assess the structural and cohesion policies. To this end, we have chosen the definition of '*structural and cohesion policies*' used by the European Parliament at organisational level (now under the responsibility of Directorate B of the EP's Internal Policies DG and specifically managed by the secretariats of the relevant parliamentary committees and Policy Department B), namely:

- common agricultural policy,
- common fisheries policy,
- regional policy,
- transport policy,
- culture, education, youth and sport policies,
- and, finally, tourism policy.

Article 3 TEU redefines the *Union's aims*. It confirms the establishment of an internal market (Article 3(3) TEU) and an economic and monetary union to ensure balanced economic growth and price stability. However, it also confirms that the Union will work for a highly competitive *social market economy*, aiming at full employment, social progress and a high level of protection and improvement of the quality of the environment. This *European model of social market economy* must therefore be based on sustainable development, promotion of scientific and technological advances, economic, social and territorial cohesion, and solidarity among Member States. On this basis, the structural and cohesion policies form key tools for the Union's future, particularly in the current context of economic recovery.

Moreover, it is the case that the Convention responsible for drawing up the draft Constitution for Europe limited its work to *institutional and procedural matters*. Updating the *substantive rules of policies* was not part of its task. However, the Member States were not subject to this limitation during the IGC and therefore exercised their powers in several areas, particularly certain structural and cohesion policies: regional policy (see Section 3.4. below), transport (see Section 3.5. below), sport (see Section 3.6.1. below) and tourism (see Section 3.7. below). These changes to the contents of these common policies have ended up being included in the TFEU.

In this context, the scope of the work of the *parliamentary committees* responsible for structural and cohesion policies (*agriculture and rural development; fisheries; regional development; culture and education; and transport and tourism*) will substantially change, particularly at the legislative, executive and financial levels, and with regard to international agreements ⁽³²⁾.

³² A previous note by Policy Department B assessed the impact of the former Constitutional Treaty on these same areas: '*The Constitutional Treaty and structural and cohesion policies*', IP/B/COMM/NT/2006_02, PE 369.037, 29.5.2006. Published in all languages:
<http://www.europarl.europa.eu/activities/committees/studies/searchPerform.do?page=59&language=EN>.

However, these changes will differ greatly within each policy and will primarily depend on the nature of the *competences conferred upon the Union* by the Member States in each area.

2.2. Division of powers within the Union: contribution of the Treaty of Lisbon

The principle of conferral governs the limits of Union competences⁽³³⁾. Under this principle, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein⁽³⁴⁾. Competences not conferred upon the Union therefore remain with the Member States⁽³⁵⁾.

In this context, Title I of the TFEU establishes a *general typology of the Union's competences* in terms of first-level secondary legislation (legislative acts and acts adopted under treaties or agreements). This typology is based on *three categories*, with each category covering a list of areas or policies in terms of the level of integration. These categories are *exclusive* competences, *shared* competences, and competences *to support, coordinate or supplement* the actions of the Member States⁽³⁶⁾.

2.2.1. The Union's exclusive competences

In areas of exclusive competence, only the Union can legislate and adopt legally binding acts⁽³⁷⁾. In these cases, Member States are able to do so themselves only if so empowered by the Union or for the implementation of Union acts. Exclusive competence also cannot lapse or be reversed, even where the Union refrains from exercising it, unlike shared competences (see Section 2.2.2. below)⁽³⁸⁾.

Article 3 TFEU sets out the following areas of exclusive competence:

- establishment of *customs union*⁽³⁹⁾;
- definition and conduct of the *common commercial policy*⁽⁴⁰⁾;
- definition and implementation of the *competition rules* necessary for the functioning of the internal market⁽⁴¹⁾;

In addition, Policy Department B thanks the secretariats of the relevant parliamentary committees for their contribution to the preparation of the present study.

³³ Article 5(1) TEU and Article 7 TFEU.

³⁴ Article 5(2) TEU.

³⁵ Article 5(2) TEU and Declaration No 18 annexed to the Final Act of the Intergovernmental Conference which adopted the Lisbon Treaty.

³⁶ Furthermore, several protocols and/or declarations have been included in the Treaty of Lisbon to clarify the division and exercise of these competences. See: Protocol No 26 on services of general interest; Declarations Nos 13 and 14 on the CFSP; Declaration No 18 on the delimitation of competences; and, finally, Declaration No 24 on the legal personality of the Union. However, it should be noted that declarations do not in themselves have any binding legal force.

³⁷ Article 2(1) TFEU. In this respect, see ECJ Opinion 1/75 of 11 November 1975, [1975] ECR 1355.

³⁸ See judgment of the ECJ of 14 December 1971 in Case 7/71 *Commission of the European Communities v French Republic*, [1971] ECR 1003.

³⁹ Article 3(1)(a) TFEU. The extent of and rules for exercising this competence are laid down in Articles 28 to 37 TFEU.

⁴⁰ Article 3(1)(e) TFEU. The extent of and rules for exercising this competence are laid down in Article 207 TFEU. It should be noted that the common commercial policy (CCP) is a necessary complement to the customs union mentioned above - Article 3(1)(a) TFEU (see ECJ Opinion 1/75 of 11 November 1975, *op. cit.*).

⁴¹ Article 3(1)(b) TFEU. The extent of and rules for exercising this competence are laid down in Articles 101 to 109 TFEU.

- *monetary policy* since the adoption of the euro ⁽⁴²⁾;
- *conservation of marine biological resources* under the common fisheries policy (CFP) ⁽⁴³⁾;
- lastly, the Union has exclusive competence for the conclusion of an *international agreement* ⁽⁴⁴⁾ when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or insofar as its conclusion may affect common rules or alter their scope ⁽⁴⁵⁾.

2.2.2. The Union's shared competences

When the Treaties confer on the Union a competence that is *shared or concurrent* with the Member States, the Union and the Member States may legislate and adopt legally binding acts in that area ⁽⁴⁶⁾. Shared competences are characterised by the progressive disappearance of national competences as the Union's competence is exercised.

On this basis, Member States may exercise their competence to the extent that the Union has not exercised its competence ⁽⁴⁷⁾, but also where the Union has decided to cease exercising its competence. This scenario can occur when the competent institutions of the Union decide to repeal a legislative act, particularly to better ensure constant respect for the principles of subsidiarity and proportionality ⁽⁴⁸⁾. Consequently, shared competences may be *reversed*, unlike exclusive competences, which are Union competences as a direct result of the TFEU and can therefore be called into question only by their revision (see Section 2.2.1. above). Furthermore, following the Treaty of Lisbon, the European legislator must, in accordance with Protocol No 2 on the application of the *principles of subsidiarity and proportionality*, prove that the criteria laid down in Article 5(3) TEU (namely, the objective cannot be sufficiently achieved by the Member States but can be better achieved at Union level) work to the benefit of the Union. The burden of proof will therefore lie with the Union (and particularly the Commission).

⁴² Article 3(1)(c) TFEU. The extent of and rules for exercising this competence are laid down in Article 105 et seq. TFEU.

⁴³ Article 3(1)(d) TFEU. This exclusive competence is also based on long-standing case-law: judgment of the ECJ of 5 May 1981 in Case 804/79 *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland*, [1981] ECR 1045, at paragraph 17; judgment of the ECJ of 16 January 2003 in Case C-265/01 *Annie Pansard and others*, [2003] ECR I-683. The extent of and rules for exercising this competence are laid down in Article 43(3) TFEU.

⁴⁴ International agreements form an integral part of Community law according to case-law (judgment of the ECJ of 30 April 1974 in Case 181/73 *R. & V. Haegeman v Belgian State*, [1974] ECR 449), which is also valid for acts adopted on their basis by the institutions that they establish (judgments of the ECJ of 5 February 1976 in Case 87/75 *Conceria Daniele Bresciani v Amministrazione Italiana delle Finanze*, [1976] ECR 129, and of 20 September 1990 in Case C-192/89 *S. Z. Sevince v Staatssecretaris van Justitie*, [1990] ECR I-3461).

⁴⁵ Article 3(2) TFEU. The text of this article recognises *explicit external competences* (resulting from an explicit conferral by the Treaty) and *implicit external competences* (resulting implicitly from the existence of an internal competence), a distinction developed through long-standing case-law. The extent of and rules for exercising the competence for international agreements are laid down in Article 207(3), (4) and (5) TFEU and in Article 216 et seq. TFEU. First-pillar international agreements are negotiated and concluded according to the procedure in Article 218(6) TFEU.

⁴⁶ Article 2(2) TFEU. Furthermore, when the Union has taken action in a certain area of shared competence, the scope of this exercise of competence only covers those elements governed by the Union act in question and therefore does not cover the whole area (Protocol No 25).

⁴⁷ Principle already laid down by the Court of Justice (judgment of the ECJ of 16 February 1978 in Case 61/77 *Commission of the European Communities v Ireland*, [1978] ECR 417).

⁴⁸ Declaration No 18 annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon. However, it should once again be noted that the declarations do not in themselves have any binding legal force.

This competitive system covers all those areas not referred to in Articles 3 and 6 TFEU (exclusive and supplementary competences). Article 4(2) TFEU particularly mentions:

- *internal market* ⁽⁴⁹⁾ (apart from the definition of competition rules in themselves, which come under exclusive competence) ⁽⁵⁰⁾;
- definition of minimum standards for *social policy* ⁽⁵¹⁾; otherwise, the Union only has competence to support, coordinate and supplement ⁽⁵²⁾;
- *economic, social and territorial cohesion* ⁽⁵³⁾;
- *agriculture and fisheries* ⁽⁵⁴⁾, apart from the conservation of marine biological resources, which come under exclusive competence (see Section 2.2.1. above);
- *environment* ⁽⁵⁵⁾;
- *consumer protection* ⁽⁵⁶⁾;
- *transport* ⁽⁵⁷⁾;
- *trans-European networks* ⁽⁵⁸⁾;
- *energy* ⁽⁵⁹⁾, an area that previously came under the category of competence to support, coordinate and supplement;
- *area of freedom, security and justice* ⁽⁶⁰⁾;
- definition of *common safety concerns in public health matters* ⁽⁶¹⁾; otherwise, the Union's action in this area essentially supplements the policy of the Member States or encourages cooperation between them ⁽⁶²⁾;
- finally, the TFEU recognises the Union's competence to carry out activities in the areas of *research, technological development and space* ⁽⁶³⁾ and also *humanitarian aid* ⁽⁶⁴⁾, but noting that the exercise of this competence cannot have the effect of preventing the Member States from exercising their competence: this is therefore a case of supplementary actions, rather than shared competences in the strict sense ⁽⁶⁵⁾.

⁴⁹ Article 4(2)(a) TFEU. The extent of and rules for exercising this competence are laid down in Articles 26 and 27 TFEU.

⁵⁰ Article 3(1)(b) TFEU (see Section 2.2.1 above) and Protocol No 27.

⁵¹ Article 4(2)(b) TFEU. The extent of and rules for exercising this competence are laid down in Article 151 et seq. TFEU.

⁵² Article 153 TFEU.

⁵³ Article 4(2)(c) TFEU. The extent of and rules for exercising this competence are laid down in Articles 174 to 178 TFEU and also in Protocol No 28.

⁵⁴ Article 4(2)(d) TFEU. The extent of and rules for exercising this competence are laid down in Article 38 et seq. TFEU. However, a few comments on the CAP and common fisheries policy are included in Section 2.3 below.

⁵⁵ Article 4(2)(e) TFEU. The extent of and rules for exercising this competence are laid down in Article 191 et seq. TFEU.

⁵⁶ Article 4(2)(f) TFEU. The extent of and rules for exercising this competence are laid down in Article 169 TFEU.

⁵⁷ Article 4(2)(g) TFEU. The extent of and rules for exercising this competence are laid down in Article 90 et seq. TFEU.

⁵⁸ Article 4(2)(h) TFEU. The extent of and rules for exercising this competence are laid down in Articles 170 to 172 TFEU.

⁵⁹ Article 4(2)(i) TFEU. The extent of and rules for exercising this competence are laid down in Article 194 TFEU.

⁶⁰ Article 4(2)(j) TFEU. The extent of and rules for exercising this competence are laid down in Article 67 et seq. TFEU. As things currently stand, a distinction must be made in this area: on the one hand, those aspects incorporated within the Community pillar (policy on immigration, visas, asylum or the Schengen *acquis* in general) come under the shared competences; on the other hand, police and judicial cooperation in criminal matters (Article 82 et seq. TFEU) must be included within the supplementary competences.

⁶¹ Article 4(2)(k) TFEU.

⁶² Article 168(1) and (2) TFEU.

⁶³ Article 4(3) TFEU. The extent of and rules for exercising this competence are laid down in Article 179 et seq. TFEU.

⁶⁴ Article 4(4) TFEU. The extent of and rules for exercising this competence are laid down in Article 214 TFEU.

⁶⁵ Articles 180 and 214(1) TFEU.

2.2.3. The Union's competences to support, coordinate and supplement

In some areas, the Union has competence to carry out actions to *support, coordinate or supplement the action of the Member States*, without, however, replacing their competence in these areas ⁽⁶⁶⁾. The Union's legally binding acts in these areas cannot attempt to harmonise the laws and regulations of the Member States, as such harmonisation initiatives come under the previous category of shared competences (see Section 2.2.2. above).

Several aspects of the competences conferred upon the Union by the TFEU fall within this category (*Article 6 TFEU*):

- *protection and improvement of human health* ⁽⁶⁷⁾;
- *industry* ⁽⁶⁸⁾;
- *culture* ⁽⁶⁹⁾;
- *tourism* ⁽⁷⁰⁾;
- *education, vocational training, youth and sport* ⁽⁷¹⁾;
- *civil protection* ⁽⁷²⁾;
- and, finally, *administrative cooperation* ⁽⁷³⁾.

2.2.4. Other Union competences

It should be noted that the TFEU actually sets out a fourth category of Union competences, namely *coordination of economic, social and employment policies of the Member States*, by defining broad guidelines or guidelines in these areas ⁽⁷⁴⁾. In our opinion, these are more coordination competences, to be included within the supplementary competences, rather than a separate category. It should be noted that the coordination of economic, social and employment policies will become a key element in order to emerge from the crisis and establish a new economic governance within the Union (2020 Strategy) ⁽⁷⁵⁾.

- As regards *economic policy* ⁽⁷⁶⁾, the Council can adopt recommendations laying down the broad guidelines of national policies ⁽⁷⁷⁾, particularly where these risk jeopardising the proper functioning of economic and monetary union ⁽⁷⁸⁾. Moreover, the Commission and the Council have the power to monitor economic development in each Member State and in the Union, as well as the conformity of

⁶⁶ Article 2(5) TFEU.

⁶⁷ Article 6(a) TFEU. The extent of and rules for exercising this competence are laid down in Article 168(1) and (2) TFEU.

⁶⁸ Article 6(b) TFEU. The extent of and rules for exercising this competence are laid down in Article 173 TFEU.

⁶⁹ Article 6(c) TFEU. The extent of and rules for exercising this competence are laid down in Article 167 TFEU.

⁷⁰ Article 6(d) TFEU. The extent of and rules for exercising this competence are laid down in Article 195 TFEU.

⁷¹ Article 6(e) TFEU. The extent of and rules for exercising this competence are laid down in Articles 165 and 166 TFEU.

⁷² Article 6(f) TFEU. The extent of and rules for exercising this competence are laid down in Article 196 TFEU.

⁷³ Article 6(g) TFEU. The extent of and rules for exercising this competence are laid down in Article 197 TFEU.

⁷⁴ Articles 2(3) and 5 TFEU.

⁷⁵ COM(2009) 647, 24.11.2009. In the definition of the *2020 Strategy* (which will replace the Lisbon Agenda in 2010), structural and cohesion policies must play a fundamental role in order to develop a new model of more sustainable growth founded more on the knowledge-based economy.

⁷⁶ Article 5 TEU and Article 120 et seq. TFEU.

⁷⁷ Article 121(2) TFEU. The Council must inform Parliament of its recommendation.

⁷⁸ Article 121(4) TFEU (*'Where it is established ... that the economic policies of a Member State ... risk jeopardising the proper functioning of economic and monetary union, the Commission may address a warning*

economic policies with the broad guidelines laid down previously. In this context, the Union institutions may be required to implement the excessive deficit procedure ⁽⁷⁹⁾, but also to grant financial assistance to a Member State in serious difficulty ⁽⁸⁰⁾.

- The same is true with regard to *employment*, as the Union can contribute to a high level of employment by encouraging cooperation between Member States and by supporting and, if necessary, complementing their action ⁽⁸¹⁾.
- As regards *social policy* in a broad sense, the Union has the power to support and complement the activities of the Member States ⁽⁸²⁾. To this end, Parliament and the Council may adopt measures designed to encourage cooperation between Member States and may even adopt, by means of directives, minimum requirements for gradual implementation ⁽⁸³⁾.

Finally, it should be noted that the competences in the area of the CFSP and defence are not included in any of the TFEU categories.

2.3. Legal consequences of the division of powers for structural and cohesion policies

Depending on the level of supranational integration recognised in each area, the typology of competences laid down by the Treaty of Lisbon has very different consequences for the structural and cohesion policies, and also for the work of the relevant parliamentary committees ⁽⁸⁴⁾.

Most of the structural and cohesion policies come under the category of *shared competences*:

- *regional policy* (for the area of economic, social and territorial cohesion, conferred on the *Committee on Regional Development* - REGI);
- *common agricultural policy* - CAP (area under the responsibility of the *Committee on Agriculture and Rural Development* - AGRI);
- *common fisheries policy* - CFP, apart from the conservation of marine biological resources, which comes under exclusive competences (area conferred on the *Committee on Fisheries* - PECH);
- and *transport policy* and also the establishment and development of *trans-European networks* (areas conferred on the *Committee on Transport and Tourism* - TRAN).

to the Member State concerned. The Council, on a recommendation from the Commission, may address the necessary recommendations to the Member State concerned).

⁷⁹ Article 126 TFEU and Protocol No 12.

⁸⁰ Article 122(2) TFEU. It should be noted that the Union's intervention in relation to the Greek crisis (February 2010) was based on the new Articles 121(4) and 122(2) TFEU. The latter provision in particular allowed a special rescue plan for the Greek economy to be established.

⁸¹ Article 147(1) TFEU.

⁸² Article 153(1) TFEU.

⁸³ Article 153(2) TFEU. Article 156 TFEU also includes the open method of coordination (OMC).

⁸⁴ For the powers and responsibilities of standing parliamentary committees, see Annex VII to the Rules of Procedure of the European Parliament, p. 131 (<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+RULES-EP+20091201+0+DOC+PDF+V0//EN&language=EN>).

A second set of policies comes under the *competences to support, coordinate and supplement*:

- *culture, education, youth and sport* (areas conferred on the *Committee on Culture and Education – CULT*) ⁽⁸⁵⁾;
- *tourism* (responsibility of the *Committee on Transport and Tourism - TRAN*).

Lastly, the Union's *exclusive competences* have implications for the structural and cohesion policies in two respects:

- *conservation of marine biological resources* under the common fisheries policy (CFP); in reality, the recognition of this exclusive competence by the TFEU simply formalises the case-law of the ECJ ⁽⁸⁶⁾.
- *international agreements* with one or more third countries or international organisations; these have a direct impact on certain structural and cohesion policies and their parliamentary committees, in particular: *transport* ⁽⁸⁷⁾, *culture and education* ⁽⁸⁸⁾, *agriculture* ⁽⁸⁹⁾ and *fisheries* ⁽⁹⁰⁾.

2.3.1. Shared competences versus exclusive competences: grey areas

The scope of the exclusive competences must be qualified in several respects. Firstly, it should be noted that there are grey areas in certain structural and cohesion policies:

- a) With regard to agriculture, the Treaty of Lisbon completely downgrades the CAP, contrary to the general opinion of doctrine, the Commission's legal services ⁽⁹¹⁾ and case-law ⁽⁹²⁾, which to date has regarded the markets policy (first pillar of the CAP) as an exclusive competence of the Union. No doubt this change in nature has become possible due to the gradual conversion of the price-based CAP into an aid-based CAP since 1992. However, it seems doubtful whether the *fixing of agricultural prices*, at least at the production stage, can be regarded as a shared competence. With regard to public intervention measures adopted by the single *common*

⁸⁵ However, vocational training is the responsibility of the Committee on Employment and Social Affairs (see Annex VII, paragraph VII, of the Rules of Procedure of the European Parliament).

⁸⁶ See judgment of the ECJ of 5 May 1981 in Case 804/79 *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland*, [1981] ECR 1045.

⁸⁷ Article 207(5) TFEU, which refers to Articles 90 to 100 and Article 218 TFEU. Annex VII to the Rules of Procedure of the European Parliament (paragraph XI, p. 135) confers responsibility for '*relations with international transport bodies and organisations*' on the Committee on Transport and Tourism.

⁸⁸ Article 207(4)(a) and (b) TFEU. Annex VII to the Rules of Procedure of the European Parliament (paragraph XV, p. 136) confers responsibility for '*cooperation with third countries in the areas of culture and education and relations with the relevant international organisations and institutions*' on the Committee for Culture and Education.

⁸⁹ The WTO Uruguay Round agreements, particularly the agreement on agriculture, currently govern agricultural trade. These multilateral agreements fall within the common commercial policy and are therefore the responsibility of the Committee on International Trade - INTA (Annex VII to the Rules of Procedure of the European Parliament, paragraph III, p. 132). The Committee on Agriculture and Rural Development - AGRI - does not have any specific responsibilities in this area (Annex VII to the Rules of Procedure of the European Parliament, paragraph XIII, p. 136). However, given the importance of agricultural negotiations within the WTO, the AGRI Committee has always been closely involved in the work of the INTA Committee.

⁹⁰ Fisheries agreements are included in the procedure under Article 218(6)(a)(v) TFEU, with the consent of the European Parliament (see Section 3.8 below). Annex VII to the Rules of Procedure of the European Parliament (paragraph XIV, p. 136) confers responsibility on the Committee on Fisheries (PECH) for '*international fisheries agreements*'.

⁹¹ Communication on subsidiarity (SEC(1992) 1990, 27.10.1992).

⁹² See judgments of the ECJ of 23 January 1975 in Case 31/74 *Filippo Galli*, [1975] ECR 47, and of 14 July 1994 in Case C-438/92 *Rustica Semences SA v Finanzamt Kehl*, [1994] ECR I-3519.

organisation of the market (COM) ⁽⁹³⁾, the Member States have no room for manoeuvre, contrary to the usual situation in the other mechanisms of the first pillar of the CAP (aid, quotas, private storage, marketing rules, etc.), in which the framework is far from uniform and the national authorities have wide discretion in terms of implementation (principle of flexibility in management). The same is true for the guide and production prices for certain *fishery* products ⁽⁹⁴⁾. However, with regard to prices, this exclusive competence exists not by nature but *by practice* ⁽⁹⁵⁾. This distinction, confirmed by the division of powers laid down by the TFEU, is highly significant for the future of the CAP and the CFP: given the fact that exclusive competence based on the European legislator exercising his powers is less intensive than that resulting directly from the Treaty, there is a *potential for reversal* in terms of prices, if the European institutions so wish and do not use their normative competences (this reversal could even occur within a process of *renationalisation of the CAP or CFP*). Given the potential for reversal, there are therefore no significant differences between shared competences and exclusive competences by practice.

- b) Furthermore, the external aspects of the CAP and the CFP are subject to the attraction of the *common commercial policy (CCP)*, which is an exclusive competence. The division of issues between the CAP and the CCP was established by the Court of Justice in its Opinion 1/94 on the World Trade Organization (WTO) ⁽⁹⁶⁾. Participation in a multilateral trade regulation system comes under Article 207 TFEU (CCP), but the internal measures for managing this system must be adopted based on Article 43 TFEU (agriculture and fisheries). In this context, several CAP mechanisms have been developed within the single COM ⁽⁹⁷⁾: import and export licences, customs duties and levies, export refunds, quota management, safeguard measures, etc. The *common organisation of the markets in fishery and aquaculture products* ⁽⁹⁸⁾ does the same for trade with third countries, by developing the customs arrangements, reference prices or safeguard measures.
- c) Finally, the CAP and the CFP benefit from specific arrangements in the area of *competition policy* ⁽⁹⁹⁾. By extension from the provisions of Article 3(1)(b) TFEU, these competition rules applicable to agricultural and fishery products would be exclusive competences.

In conclusion, Union competence in the area of agriculture and fisheries following the Treaty of Lisbon cannot be subject to a monastic approach. The solution must take account of the *diversity of aspects* within the CAP and CFP ⁽¹⁰⁰⁾. Accordingly, the second pillar of the CAP (rural development), structural aid for fisheries, or first-pillar aid under the CAP ⁽¹⁰¹⁾ are certainly a shared competence. However, intervention prices, the external aspect or the

⁹³ Regulation (EC) No 1234/2007 (OJ L 299, 16.11.2007) (Part II. Title I. Intervention measures). See, inter alia, Articles 2(c) (definition of price), 6 (Scope), 8 (Reference prices) and 18 et seq. (Intervention Price).

⁹⁴ Regulation (EC) No 104/2000 (OJ L 17, 21.1.2000) (Title IV - Chapter I). The prices for the 2010 fishing year were fixed by Regulation (EC) No 1212/2009 (OJ L 327, 12.12.2009).

⁹⁵ 'The EU's vigorous deployment of its normative competence reduced the Member States' remaining margin for manoeuvre to nothing, and consequently they could no longer legislate in the sector concerned' (Blumann, C. 'The CAP and the Lisbon Treaty', European Parliament - Policy Department B, Note IP/B/AGRI/IC2008-061, PE 408.952, Section 1.1, p. 3, Brussels (<http://www.europarl.europa.eu/activities/committees/studies/download.do?language=en&file=23410>)).

⁹⁶ ECJ Opinion 1/94 of 15 November 1994, [1994] ECR I-5267.

⁹⁷ Regulation (EC) No 1234/2007, op. cit. (Part III. Trade with third countries).

⁹⁸ Regulation (EC) No 104/2000, op. cit. (Title V).

⁹⁹ Article 42 TFEU. See Section 3.2.2. below.

¹⁰⁰ Blumann, C. op.cit.: 'The CAP and the Lisbon Treaty', Note IP/B/AGRI/IC2008-061, PE 408.952, 1.1, p. 3 (<http://www.europarl.europa.eu/activities/committees/studies/download.do?language=en&file=23410>)).

¹⁰¹ Regulation (EC) No 72/2009 (OJ L 30, 31.1.2009).

competition rules within the CAP, as well as the conservation of fishery resources, prices or international agreements in the area of fisheries, would seem to be an exclusive competence.

2.3.2. Vague dividing lines between objectives or areas

It should also be noted that the dividing lines between areas are not always particularly clear as, to a certain extent, the division of powers laid down by the TFEU is limited:

- a) Aside from the list of competences by subject, the Treaty itself in some cases lays down *horizontal objectives or principles*. These objectives must be incorporated in the definition and implementation of *all the Union's policies and actions*, and particularly in the context of policies under shared competence. This is the case with the promotion of employment⁽¹⁰²⁾, environmental protection with a view to promoting sustainable development⁽¹⁰³⁾, consumer protection⁽¹⁰⁴⁾, welfare requirements of animals, since animals are sentient beings⁽¹⁰⁵⁾, human health protection to a high level⁽¹⁰⁶⁾ and, lastly, economic, social and territorial cohesion⁽¹⁰⁷⁾.

On this basis, these objectives can be developed across several policies, or even beyond the basic policy. For example, in the absence of the pooling of structural funds, the principle of economic, social and territorial cohesion for rural areas is currently predominantly a responsibility of the second pillar of the CAP⁽¹⁰⁸⁾. At the same time, the Natura 2000 programme, which is one of the main tools for protecting biodiversity (and an integral part of environment policy)⁽¹⁰⁹⁾, is financed as a priority by the EAFRD, under the rural development policy⁽¹¹⁰⁾. Lastly, we can also mention the Cohesion Fund, which is linked to regional policy and which finances projects in the fields of environment and transport infrastructure (trans-European networks)⁽¹¹¹⁾.

- b) Secondly, the TFEU provides for the use of a *flexibility clause* similar to the former Article 308 TEC, which, however, requires consent by the European Parliament: if action should prove necessary to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, may adopt the appropriate measures⁽¹¹²⁾.

¹⁰² Article 9 TFEU.

¹⁰³ Article 11 TFEU.

¹⁰⁴ Article 12 TFEU.

¹⁰⁵ Article 13 TFEU. This Article cites, among the areas affected by animal welfare: agriculture, fisheries, transport, internal market, research and technological development, and space.

¹⁰⁶ Article 168(1) TFEU.

¹⁰⁷ Article 175 TFEU and Protocol No 28.

¹⁰⁸ The third paragraph of Article 174 TFEU provides that particular attention shall be paid to rural areas within the cohesion policy. However, the first paragraph of Article 175 and also Article 178 allow the development of rural areas to be assigned to the European Agricultural Guidance and Guarantee Fund, which has now become the EAFRD (European Agricultural Fund for Rural Development), within the CAP.

¹⁰⁹ See the communication '*Options for an EU vision and target for biodiversity beyond 2010*' (COM(2010) 4, 19.1.2010) on the future of Community action in this area (http://ec.europa.eu/environment/nature/biodiversity/policy/index_en.htm).

¹¹⁰ On the financing measures for Natura 2000, see the handbook published in this respect in 2007 (http://circa.europa.eu/Public/irc/env/financing_natura/library?l=/contract_management/handbook_update/financement_2007pdf/_EN_1.0_&a=d).

¹¹¹ Second paragraph of Article 177 TFEU.

¹¹² Article 352 TFEU.

2.3.3. Horizontal effects of the division of powers under the TFEU at procedural level

In essence, in addition to the effects of the division of powers under the TFEU on the substantive scope of structural and cohesion policies, it may be said that other consequences result from this division of powers in terms of the *legislative procedures*.

- a) Firstly, the *principle of subsidiarity* does not apply to those areas under the exclusive competence of the Union (¹¹³). On this basis, in terms of those structural and cohesion policies that do not come within the Union's exclusive competence, the *national parliaments* shall ensure respect for the principle of subsidiarity. They may therefore send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion on whether a draft legislative act complies with the principle of subsidiarity, in accordance with the procedures laid down in the Protocols annexed to the Treaty (¹¹⁴).
- b) Secondly, the *system of enhanced cooperation* only applies within the framework of the Union's non-exclusive competences (¹¹⁵). In this respect, in several areas of the structural and cohesion policies, certain Member States (at the moment at least nine) may choose to give additional undertakings between them in advance of the other members of the Union in terms of cooperation or integration. However, enhanced cooperation cannot be detrimental to either the internal market or economic, social and territorial cohesion, and cannot cause competition distortions. The decision authorising enhanced cooperation shall be adopted by the Council as a last resort, when it has established that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole (¹¹⁶), on a proposal from the Commission and after obtaining the consent of the European Parliament. As an example, enhanced cooperation, on the initiative of at least *nine Member States*, could in the future cover the management of agricultural risks (see Section 3.2.3. below), or be established with a view to a tightened inspection regime for fishing effort in certain marine areas.

¹¹³ First subparagraph of Article 5(3) TEU.

¹¹⁴ Second subparagraph of Article 5(3) TEU and Protocols Nos 1 and 2.

¹¹⁵ Article 20(1) TEU. The rules on enhanced cooperation are developed in Articles 326 to 334 TFEU.

¹¹⁶ Article 20(2) TEU.

3. LEGISLATIVE CHANGES TO STRUCTURAL AND COHESION POLICIES

3.1. Changes to the legal bases and decision-making procedures

The legislative changes made by the Treaty of Lisbon to the structural and cohesion policies are essentially *institutional* (division of powers, see Section 2 above) and *procedural* (introduction of the ordinary legislative procedure for several policies and assent for international agreements). The substantive changes particularly concern certain *legal bases*, which are extended.

The '*Community*' is formally replaced by the '*Union*' in all the articles of the new Treaty. Given that the Union *now has legal personality*, it alone is authorised to conclude an *international agreement* in its areas of competence, subject, however, in most cases, to prior consent by the European Parliament (Section 3.8.).

In addition, the former codecision procedure under Article 251 TEC is replaced by the *ordinary legislative procedure* (Article 294 TFEU) ⁽¹¹⁷⁾ in the common *transport policy* (Section 3.5.1.), *regional policy* (Section 3.4.), development actions of the *trans-European networks* (Section 3.5.2.) and actions in the areas of *education and youth* (Section 3.6.2.). *Cultural policy*, which was previously unanimously decided by the Council under the codecision procedure, now comes under the ordinary legislative procedure (Section 3.6.3.). *New legal bases* are created for *tourism* (Section 3.7.) and *sport* (Section 3.6.1.), which are also subject to the ordinary legislative procedure.

In the areas of *agriculture and fisheries* (Sections 3.2. and 3.3.), the simple consultation of Parliament has disappeared in favour of the ordinary legislative procedure. However, the Council still exceptionally retains its powers in certain areas, without any parliamentary participation. Although long-standing case-law confirms that exceptions must be restrictively interpreted, the fact remains that the division of powers effected by the TFEU in these two areas is causing serious problems (both political and legal), which could result in numerous interinstitutional disputes in the future.

The Treaty of Lisbon also makes changes to the *typology of legal acts*, which now includes new *delegated acts*, and revises the existing rules on *implementing acts* (*comitology* procedure) (Section 3.9.).

Finally, the Treaty makes *horizontal legislative amendments* to all structural and cohesion policies (Section 3.10.). These amendments may lead to significant *changes* in certain areas. They particularly concern Parliament's right of initiative over *revisions of the Treaties* (notably in the context of the *simplified revision* procedures) and the *right of citizens' initiative*.

¹¹⁷ This study does not assess the ordinary legislative procedure, which has already been done in several parliamentary documents. See: '*Codecision and conciliation. A Guide to how the Parliament colegislates under the Treaty of Lisbon*' (DV/795985EN.doc). A Code of Conduct was also adopted in this respect by the working group on the reform of the European Parliament at its meeting of 23 April 2008. For the references, see: http://www.europarl.europa.eu/code/about/background_en.htm.

3.2. Legislative changes made to the common agricultural policy (Articles 38 to 44 TFEU)

The Treaty of Lisbon does not make any substantive changes to the common agricultural policy (CAP). Quite clearly, it simply carries over the existing provisions in the TEC (ex Articles 32 to 38). Accordingly, the rules on the specific nature of the CAP with regard to the common law of the internal market are maintained ⁽¹¹⁸⁾. The same is true for the exception in relation to competition rules (first paragraph of Article 42 TFEU), with the scope of ex Article 36 TEC being taken over unchanged ⁽¹¹⁹⁾. Likewise, the objectives of the CAP are carried over unchanged (Article 39 TFEU – ex Article 33 TEC). Finally, the possible structuring of agricultural markets in the form of common organisations of the market (COM) is maintained (Article 40 TFEU – ex Article 34 TEC).

The changes made by the Treaty of Lisbon to the CAP are therefore institutional (in terms of the division of powers) (see Section 2.3.1. above) and procedural (Articles 42 and 43 TFEU compared to ex Articles 36 and 37 TEC) ⁽¹²⁰⁾.

3.2.1. Ordinary legislative procedure in the agricultural area

The TFEU introduces the ordinary legislative procedure by replacing the existing consultation procedure at two levels:

- *specific rules of competition* applicable to the production of and trade in agricultural products (first paragraph of Article 42 TFEU) ⁽¹²¹⁾;
- and the *establishment of the common organisation of agricultural markets (COM)*, and the *other provisions necessary for the pursuit of the objectives of the CAP* (Article 43(2) TFEU).

The ordinary legislative procedure therefore becomes the common law procedure in agricultural matters. However, there are *two significant exceptions*:

- within the special rules on competition, only the *Council* may authorise the granting of aid for the protection of enterprises handicapped by structural or natural conditions and within the framework of economic development programmes (second paragraph of Article 42 TFEU) ⁽¹²²⁾;

¹¹⁸ Except for replacing the references to '*common market*' with '*internal market*', Article 38(2) TFEU does not amend the former Article 32(2) TEC: '*Save as otherwise provided in Articles 39 to 44, the rules laid down for the establishment and functioning of the internal market shall apply to agricultural products.*' The creation of the internal market in agricultural products therefore forms a derogation from Articles 26 and 114 TFEU as the European legislator will exercise the competences conferred by the Treaty with regard to the CAP.

¹¹⁹ First paragraph of Article 42 TFEU: '*The provisions of the Chapter relating to rules on competition shall apply to production of and trade in agricultural products only to the extent determined by the European Parliament and the Council*' within the framework of the new ordinary legislative procedure (which replaces the consultation procedure, see Section 3.1. above), '*account being taken of the objectives*' specific to the CAP.

¹²⁰ In this chapter we use the analysis made by Claude Blumann in the note requested by the Committee on Agriculture and Rural Development: '*The CAP and the Lisbon Treaty*', European Parliament - Policy Department B, Note IP/B/AGRI/IC2008-061, PE 408.952, paragraph 1.1, p. 3, Brussels (<http://www.europarl.europa.eu/activities/committees/studies/download.do?language=en&file=23410>).

¹²¹ We note in passing that the European Parliament's powers will become *greater* in terms of '*agricultural*' competition than in terms of general competition, since the European Parliament will be merely consulted on legislative acts concerning agreements, dominant positions and State aid in accordance with Articles 103 and 109 TFEU (which take over unchanged the procedural provisions of ex Articles 84 and 87 TEC).

¹²² The TFEU does not specify whether this means Community aid or State aid. The Community aid schemes under Article 42 TFEU are currently developed under the rural development policy (second pillar of the CAP). Competition rules fall within the single COM (Articles 175 to 181 of Regulation (EC) No 1234/2007 (OJ L 299, 16.11.2007)).

- only the *Council* can adopt measures on *fixing prices, levies, aid and quantitative limitations* (Article 43(3) TFEU).

3.2.2. *Scope of exceptions to the ordinary legislative procedure in the agricultural area*

The Court of Justice has always considered that exceptions to a rule or general principle should be *interpreted strictly* ⁽¹²³⁾. This is the case here, as the ordinary legislative procedure becomes the common law procedure in the agricultural area. This interpretation is supported by the general references to the '*objectives of the common agricultural policy*' ⁽¹²⁴⁾, with the Court of Justice having always advocated a broad interpretation of the objectives in Article 39 TFEU (ex Article 33 TEC) ⁽¹²⁵⁾. Furthermore, the exceptions stipulated in Articles 42 and 43 TFEU do not make any reference to a special legislative procedure. It should therefore be concluded that acts adopted on these bases are no longer legislative, but executive. A direct executive competence has therefore been created for the Council, which runs counter to the principle of the hierarchy of norms ⁽¹²⁶⁾.

On this basis, Parliament calls for a *strict interpretation* of the second paragraph of Article 42 and of Article 43(3) TFEU, and therefore underlines that these provisions can be applied only in those *cases explicitly covered by the exceptions*:

- *Article 43(3) TFEU* limits the exception '*to "fixing" prices, levies, aid and quantitative limitations*'. The term '*fixing*' must be understood in its natural or etymological sense: the establishment of amounts or levels (quantification). It must not be a question of the Council alone deciding on price, aid or levy *measures* as a whole. Any other interpretation would make the extension of the ordinary legislative procedure to agriculture appear to be an illusory reform. This would lead, in practice, to a broad interpretation of Article 43(3) TFEU, which would exclude Parliament from the revision of almost all matters coming under the single COM. In fact, the basic *principles* of price, aid, levy or quantitative limitation (quota) measures, as well as the *general rules* for their implementation, will come under the ordinary legislative procedure. On the other hand, the specific fixing of price levels, amounts of levies or aid, or the determination and division of quotas will come under the competence of the Council.
- *Article 42 TFEU* changes the link between its two paragraphs. In the TEC (ex Article 36), the legislative procedure was identical for both paragraphs (simple consultation). The second paragraph was rightly conceived as an illustration of the first paragraph, by developing the specific framework of agricultural rules on competition for aid ⁽¹²⁷⁾. This is no longer the case in the second paragraph of Article 42 TFEU, as the adverb '*in particular*' has been deleted. In other words, the *authorisation* of the granting of aid becomes an exclusive competence of the Council and therefore does not come under the ordinary legislative procedure: this is a specific exception of competence to

¹²³ Inter alia: judgment of the ECJ of 5 May 1998 in Case C-180/96 *United Kingdom of Great Britain and Northern Ireland v Commission of the European Communities*, [1998] ECR I-2265.

¹²⁴ First paragraph of Article 42 TFEU: '*... account being taken of the objectives set out in Article 39*'. Article 43(2) TFEU: '*... and the other provisions necessary for the pursuit of the objectives of the common agricultural policy and the common fisheries policy*'.

¹²⁵ For the sake of the teleological and systematic case-law developed by the ECJ in all areas of EU law.

¹²⁶ See Article 291(2) TFEU (Section 3.9.2.). On this point, C. Blumann writes: '*It appears that with Article 43(3) on the CAP there is an anomaly, since in general, acts adopted in primary application of the treaties are regarded as legislative (first-level derived law), and implementing acts only come afterwards to implement pre-existing legislative acts (second-level derived law)*', Blumann, op. cit., p. 8.

¹²⁷ Article 36 TEC, second paragraph: '*The Council may "in particular" authorise the granting of aid: ...*'

the benefit of the Council, as in the case of Article 43 TFEU. For the European Parliament, the second paragraph of Article 42 TFEU forms a derogation from the *general rules on State aid* in Article 109 TFEU (which stipulates that the EP shall at least be consulted) and, as with any derogation, it must be strictly interpreted and therefore can be applied only in the two cases expressly mentioned: on the one hand, for the protection of enterprises handicapped by structural or natural conditions; on the other hand, within the framework of economic development programmes. According to the European Parliament's interpretation, this exception to the benefit of the Council cannot cover *Community aid* under the second pillar of the CAP in these areas. A broader interpretation would be inconsistent with the whole rural development policy, which comes under the ordinary legislative procedure, and could cause serious distortions.

Parliament has explicitly raised the issue of the scope of the exceptions in Article 43(3) TFEU (¹²⁸). Paragraph 30 of its resolution of 7 May 2009 underlines that the ordinary legislative procedure *'will apply to all legislation in the field of agriculture under Article 43(2) of the TFEU, and that this will notably be the case in respect of the four main horizontal texts in the field of agriculture (the single common market organisation, the direct payments regulation, the rural development regulation and financing of the CAP)'*. The reference to the four basic texts of the CAP effectively rejects the Council's competence for the rules on prices, aid, levies or quantitative limitations on production. In addition, paragraph 31 of the same resolution of 7 May 2009 considers that *'Article 43(3) of the TFEU does not provide for a legal basis or for any autonomous power which would allow the adoption or amendment of any of the Council acts presently in force in the field of the CAP'*. As a result, Parliament asks the Council to refrain *'from adopting any of the measures referred to in Article 43(3) of the TFEU without prior consultation of Parliament'*.

In its comments on Parliament's resolution, the Commission has indicated that the text of the Treaty does not correspond to Parliament's interpretation regarding the link between the two paragraphs of Article 43 of the TFEU (¹²⁹). The approach taken by the Commission's legal services is based on the existence of two independent procedures, to be selected depending on the issues. However, the new Agriculture Commissioner, Mr Dacian Ciolos, in his answers to the questionnaire from the Committee on Agriculture and Rural Development before his hearing, explicitly indicated that Article 43(3) TFEU was an exception and, therefore, that it should be interpreted restrictively. He believes that an assessment should be made on a case-by-case basis so that the general principle of codecision, which must prevail in the agricultural field, does not become devoid of meaning. For its part, the Council has not yet given a formal opinion on these issues.

It may well be imagined that the exceptions in Articles 42 and 43(3) TFEU will be difficult to apply in practice, given the interinstitutional problems that they may cause (between Parliament and the Council with regard to the scope of the ordinary legislative procedure, but also between the Council and the Commission with regard to the implementing powers, which would remain with the latter). However, in strictly legal terms, it would be desirable to determine in advance the dividing line between the ordinary legislative procedure and the exceptions to the benefit of the Council.

¹²⁸ Resolution T6-0373/2009 of 7 May 2009 on Parliament's new role and responsibilities implementing the Treaty of Lisbon (see <http://www.europarl.europa.eu/oeil/file.jsp?id=5608622¬iceType=null&language=en>).

¹²⁹ Reply of the Commission to the European Parliament resolution on Parliament's new role and responsibilities in implementing the Lisbon Treaty: XI. Agricultural Policy.

In our opinion, without a clear delimitation of the legislative competences with regard to the CAP, political and legal disputes could frequently occur, particularly in the context of the *fundamental reform of the CAP* planned for 2011-2012. A case-by-case assessment seems too uncertain. An *interinstitutional agreement on legislative cooperation* is therefore needed to fill the legal vacuum in terms of the structure and decision-making levels of agricultural acts.

Furthermore, the division of powers effected by the TFEU may even lead to a backward step in terms of parliamentary competence, as Parliament will no longer be consulted on the areas covered by the exceptions. The interinstitutional agreement should therefore also decide the issue of Parliament's consultation in those cases when the exceptions in Articles 42 and 43(3) TFEU may be used.

3.2.3. Substantive consequences of the Treaty of Lisbon on the CAP

It should be noted that Parliament's amendments to agricultural legislative proposals often have a direct impact on the Union budget. This partly explains the delay in applying codecision to the CAP. Although some points are yet to be clarified (see Section 3.2.2. above), the TFEU has defined the ordinary legislative procedure as the common law procedure to be applied to the CAP. Furthermore, the TFEU has eliminated the distinction between '*compulsory expenditure*' (first pillar of the CAP) and '*non-compulsory expenditure*' (second pillar of the CAP) (see Section 4.2. below). From now on, the two branches of the budgetary authority (Parliament and the Council) will decide together on all appropriations under the main area of Union expenditure (see Section 4.1. below - Table 1).

In this context, we can already say that the CAP will significantly change under the new multiannual financial framework for the period 2014-2020, which will be heavily dependent on the development of the economic crisis. We can therefore expect a radical reform of the CAP beyond 2013, an exercise that the European institutions did not dare tackle in 2008, at the time when the last reform of this policy was adopted, described as a '*health check*'. Beyond 2013, there is even talk of *reformulating the CAP*, which would affect its objectives, principles and main mechanisms.

It goes without saying that the European Parliament must play a decisive role in defining this new CAP and its financial framework, based on the new legislative and budgetary powers conferred by the TFEU.

However, firstly, Parliament must consolidate its new prerogatives. Beyond the interinstitutional agreements that must interpret the scope of the exceptions in Articles 42 and 43 TFEU, Parliament must examine in detail the *adaptations needed to the basic regulations* (particularly on the single COM and direct payments) ⁽¹³⁰⁾ following the entry into force of the Treaty of Lisbon. In this context, the new rules to be introduced for delegated acts and implementing acts (*comitology*), which are extremely important in the agricultural area, must be closely examined (see Section 3.9. below).

In the longer term, once the new CAP beyond 2013 has been defined and consolidated, the European Parliament may be able to take the initiative of updating the agricultural chapter of the TFEU using the *simplified revision procedure* provided for in Article 48(6) TEU (see Section 3.10.1. below). It should be noted that the text of the agricultural chapter in this Treaty has remained unchanged since the Treaty of Rome. Inspired by productivity-based

¹³⁰ Regulation (EC) No 1234/2007 (OJ L 299, 16.11.2007) and Regulation (EC) No 73/2009 (OJ L 30, 31.1.2009).

principles, which are now obsolete, the objectives of the CAP set in 1957 have never been amended. Key concepts of the current CAP, such as agricultural multifunctionality, rural development, sustainable development, food quality and safety, public health and the fight against obesity, animal welfare, regional development, protection of natural resources and biodiversity, fight against climate change, development of renewable energies of agricultural origin and, lastly, financial discipline have not been integrated. The same is true for the existing mechanisms: payments decoupled from holdings, aid modulation, financial instruments (EAGGF, EAFRD), traceability, cross-compliance, etc.

Lastly, the provisions on *enhanced cooperation* (Article 20(1) TEU - Article 326 et seq. TFEU) (see Section 2.3.3.b above) allow for a medium-term assessment with a view to the future development of the reformed CAP (e.g. on risk management or on the development of interprofessional organisations at European level).

3.3. Legislative changes made to the common fisheries policy (Articles 38 to 44 TFEU)

In the heading of Title III of Part Three of the TFEU, the words '*and fisheries*' have been added to the word '*Agriculture*'. In addition, Article 38(1) TFEU provides that the Union shall define and implement a common agriculture '*and fisheries*' policy. In principle, this change could be regarded as relatively minor, in that, since the beginnings of the Community, fishery products have been likened to agricultural products (¹³¹).

However, this clear reference to a fisheries policy, which is repeated in Article 43(2) TFEU, allows this to become independent of the CAP, even though, for the sake of legislative economy, the TFEU introduces a new paragraph into Article 38(1) TFEU indicating that: '*References to the common agricultural policy or to agriculture, and the use of the term "agricultural", shall be understood as also referring to fisheries, having regard to the specific characteristics of this sector*'. In other words, the TFEU refrains from laying down rules specific to fisheries by applying the specific '*agriculture*' rules to the whole of *Green Europe* and *Blue Europe*.

In this context, the comments already made about the CAP (see Section 3.2.2. above) can be applied to the CFP en masse. However, a few comments must be made about the specific reference to '*fixing and allocation of fishing opportunities*' (TACs and quotas), inserted in the exception in Article 43(3) TFEU, which remain under the Council's competence.

In the past, the European Parliament had a right of consultation with regard to the whole of the CFP, except for the fixing of TACs ('*Total Allowable Catches*') and quotas. As a legal basis under secondary legislation, Article 20 of the Council's basic Regulation on the conservation and sustainable exploitation of fisheries resources under the CFP (¹³²) was used by the Council to avoid parliamentary consultation on the allocation of *fishing opportunities* (¹³³). In fact, the Council has repeatedly used this provision to decide not only

¹³¹ "*Agricultural products*" means the products of the soil, of stockfarming and of fisheries and products of first-stage processing directly related to these products' (Article 38(1) TFEU – ex Article 32(1) TEC). Annex I to the Treaty sets out the list of agricultural and fishery products covered by the specific rules of the CAP and the CFP.

¹³² Regulation (EC) No 2371/2002 (OJ L 358, 31.12.2002).

¹³³ An area which includes catch and/or fishing effort limits, the allocation of fishing opportunities among Member States, as well as the conditions associated with these limits (Article 20(1) of Regulation (EC) No 2371/2002).

the allocation of fishing opportunities, but also to adapt other provisions of the CFP without, however, consulting Parliament.

This abnormal situation has ended with the entry into force of the TFEU. From now on, the ordinary legislative procedure becomes the common law procedure for the whole of the CFP, except for the '*fixing and allocation of fishing opportunities*' (TACs and quotas), in which case the exception in Article 43(3) TFEU will apply, but according to a restrictive interpretation (see Section 3.2.2. above) ⁽¹³⁴⁾. The terms '*fixing*' and '*allocation*' of fishing opportunities must therefore be understood in their pure etymological sense and can only cover the quantities or levels of TACs and quotas.

Furthermore, international agreements on fisheries, which is one of the main aspects of the CFP, will be concluded after *obtaining the consent of Parliament* according to the procedure under Article 218(6)(a) TFEU. We will assess the post-TFEU situation of these agreements in the chapter on international agreements (see Section 3.8. below). It should be noted that the Union already has a wide range of agreements concluded with the coastal states of Africa and the Pacific and with northern countries (Norway, Iceland, Faroe Islands and Greenland). In addition to these agreements are those concluded with several regional fisheries organisations (RFO).

Finally, it should be noted that, unfortunately, as is also the case with the CAP, the TFEU has missed the opportunity to update the general framework of the CFP, with this framework having become obsolete in light of its development since its creation. Key concepts and instruments of the CFP (such as '*fishing effort*', '*measures for the conservation of fisheries resources*' (TACs), '*international fisheries agreements*', the '*European Fisheries Fund*', etc.) are still not mentioned in the fisheries chapter of the Treaty. An extensive revision of the primary legislation in this sector is now desirable. The simplified revision procedures provided for in Article 48(6) and (7) TEU could undoubtedly be used for this purpose, possibly by establishing a *Blue Europe* policy that is independent of the CAP (see Section 3.10.1. below).

3.4. Legislative changes made to regional policy (Articles 3(3) and 3(5) TEU; Articles 174 to 177 TFEU)

3.4.1. Substantive and procedural changes in the TEU and TFEU

The TEU expands the scope of the Union's action in terms of economic and social cohesion by adding '*territorial cohesion*' ⁽¹³⁵⁾. In this way, the new *economic, social and territorial cohesion* becomes one of the fundamental principles of the Union, with a view to the harmonious and sustainable development of the whole Union, complementing the achievement of the internal market (Article 3(3) TEU) ⁽¹³⁶⁾. Furthermore, the TEU extends the principle of subsidiarity to regional and local authorities (Article 5(3) TEU).

As regards the TFEU, *Articles 174 to 177* replace Articles 158 to 162 TEC on Community action in favour of economic, social and territorial cohesion. Moreover, a *Protocol* has been

¹³⁴ Paragraph 32 of EP resolution T6-0373/2009 of 7 May 2009 confirms this restrictive interpretation (<http://www.europarl.europa.eu/oeil/file.jsp?id=5608622¬iceType=null&language=en>).

¹³⁵ On this point, see the note of Policy Department B '*The impact of the Treaty of Lisbon on Regional Policy*', PE 431.586, January 2010.

¹³⁶ On this basis, no enhanced cooperation may undermine cohesion (Article 326 TFEU).

annexed to the new TEU and TFEU (¹³⁷). To achieve this objective, the Union aims at reducing disparities between the levels of development of the various regions and the backwardness of the least favoured regions (second paragraph of Article 174 TFEU). On this basis, the TFEU introduces a *new paragraph into Article 174*, which prioritises those regions where the Union's action must encourage economic, social and territorial cohesion: particular attention shall be paid to rural areas, areas affected by industrial transition, and regions which suffer from severe and permanent natural or demographic handicaps such as the northernmost regions with very low population density (arctic regions) and island, cross-border and mountain regions (third paragraph of Article 174 TFEU).

Aside from Articles 174 to 177 TFEU, the Treaty of Lisbon makes other significant changes:

- It includes economic, social *'and territorial'* cohesion among the shared competences of the Union (Article 4(2)(c) TFEU) (see Sections 2.2.2. and 2.3.1. above).
- Article 14 TFEU highlights the role played by *services of general economic interest* in the promotion of the Union's social and territorial cohesion. In this context, Protocol No 26 recognises the wide discretion of national, regional and local authorities in providing, commissioning and organising services of general economic interest (Article 1).
- It amends the framework of *State aid* in favour of regions at an economic disadvantage, where the standard of living is abnormally low or where there is serious underemployment: the TFEU introduces a sunset clause (of five years) for aid granted to the regions of the Federal Republic of Germany (FRG) affected by the division of Germany (Article 107(2)(c) TFEU). It also includes aid intended for the outermost regions (Article 107(3)(a) TFEU).
- The TFEU also introduces a provision on actions before the Court of Justice for *infringement of the principle of subsidiarity*: actions to review the legality of legislative acts (Article 263 TFEU) may be brought by the Committee of the Regions against those acts for the adoption of which the TFEU provides that it be consulted (¹³⁸).
- Lastly, it recognises the organisation of public authorities at the national, regional and local levels in the *Charter of Fundamental Rights* of the European Union.

In fact, the Treaty does not provide for a regional policy, but only measures designed to reinforce economic, social and territorial cohesion. Although possible grouping of funds is provided for (Article 177 TFEU; Protocol No 28), Community action in favour of cohesion has so far been implemented in the form of several financial instruments:

- *Three Structural Funds* (Article 175 TFEU): a) the *European Regional Development Fund (ERDF)* (Article 176 TFEU); b) the *European Social Fund (ESF)*, developed in Articles 162 to 164 TFEU under the social and employment policy; and c) the *European Agricultural Guidance and Guarantee Fund, Guidance Section (EAGGF-G)*, developed in Article 40(3) TFEU, under the CAP. In 2005 this last fund became the *European Agricultural Fund for Rural Development (EAFRD)* (¹³⁹).
- The *Cohesion Fund* (second paragraph of Article 177 TFEU).

¹³⁷ Protocol No 28 (OJ C 115, 9.5.2008, p. 310).

¹³⁸ Article 8 of Protocol No 2 on the application of the principles of subsidiarity and proportionality.

¹³⁹ Regulation (EC) No 1698/2005 (OJ L 277, 21.10.2005).

- The *European Investment Bank* (EIB) (Articles 308 and 309 TFEU and Protocol No 5 annexed to the Treaties).
- Other financial instruments, not explicitly mentioned in Article 175 TFEU, such as the *Solidarity Fund* (to respond to natural disasters) ⁽¹⁴⁰⁾ or the *European Fisheries Fund* (EFF).

In this respect, those who drafted the Treaty of Lisbon missed the opportunity to update the EAGGF (EAFRD) terminology and to include the Solidarity Fund and the European Fisheries Fund within the primary legislation.

The Treaty has also not amended the procedural arrangements for specific measures in favour of the *outermost regions*, for which a *special legislative procedure* is maintained ⁽¹⁴¹⁾. On the other hand, all other actions in favour of economic, social and territorial cohesion will from now on be decided using the ordinary legislative procedure ⁽¹⁴²⁾. It should be noted that the definition of the tasks, priority objectives and organisation of the Structural Funds was previously decided by the Council by unanimity (ex Article 161 TEC - new Article 177 TFEU).

3.4.2. Future impact of the introduction of territorial cohesion

Neither the concept of territorial cohesion nor its implications for the implementation of common policies have been clearly defined by the Treaty of Lisbon. The European Parliament has urged the Commission to publish a White Paper in order to consolidate territorial cohesion ⁽¹⁴³⁾, but without any reaction to date. All the same, we can already see that the introduction of the territorial dimension into cohesion policy will affect the future of regional policy in the strict sense and, to a certain extent, all the financial instruments with a structural aim.

This could lead to coordination being improved between *all* sectoral policies with territorial effects ⁽¹⁴⁴⁾. In that event, a new (integrated) approach should be taken in decision-making and management of common policies, and intersectoral synergies at all levels (local, regional, national and Community) should be reinforced. Moreover, the assessment of territorial effects could be included within each policy, and integrated assessments of the impacts of all common policies in a specific territory could perhaps even be performed.

¹⁴⁰ Regulation (EC) No 2012/2002 (OJ L 3111, 14.11.2002).

¹⁴¹ The arrangements for the outermost regions (French OD-OCT, the Azores, Madeira and the Canary Islands) are based on Articles 349 and 355 TFEU.

¹⁴² Articles 175 and 177 TFEU in general; Article 178 TFEU for the ERDF; Article 43(2) TFEU for agriculture and fisheries; Article 164 TFEU for the ESF.

¹⁴³ Paragraph 24 of resolution T6-0163/2009 of 24 March 2009 on the *Green Paper on Territorial Cohesion* (<http://www.europarl.europa.eu/oeil/file.jsp?id=5666042>). Moreover, several EP resolutions have looked at the links between territorial cohesion and those common policies with territorial effects: resolution T6-0157/2009 of 26 March 2009 on *Complementarities and coordination of cohesion policy with rural development measures* (<http://www.europarl.europa.eu/oeil/file.jsp?id=5625302>); resolution T6-0164/2009 of 24 March 2009 on the *Urban dimension of cohesion policy in the new programming period* (<http://www.europarl.europa.eu/oeil/file.jsp?id=5637232>); resolution T6-0156/2009 of 24 March 2009 on *Best practices in the field of regional policy and obstacles to the use of the Structural Funds* (<http://www.europarl.europa.eu/oeil/file.jsp?id=5608562>); and resolution T6-0432/2008 of 21 October 2008 on *Governance and partnership at a national, regional and project basis in the field of regional policy* (<http://www.europarl.europa.eu/oeil/file.jsp?id=5608632>).

¹⁴⁴ Paragraph 10 of the resolution of 26 March 2009 on the Green Paper on territorial cohesion, op. cit. (T6-0163/2009). Furthermore, paragraph 8 of resolution T6-0373/2009 of 7 May 2009 considers that the inclusion of territorial cohesion will increase the competence of Parliament to assess the territorial impact of key Union policies. See <http://www.europarl.europa.eu/oeil/file.jsp?id=5608622¬iceType=null&language=en>.

In this context, the debate on the future of regional and cohesion policy will be influenced by the results of the experiment currently being conducted with *macro-regions*, and particularly the *Baltic Sea Strategy*. This is an attempt to implement a new, more open and participative approach. If this model of enhanced cooperation at macro-regional level is developed further, it should necessarily include structural and cohesion policy actions (¹⁴⁵).

A *mid-term review* of regional policy is planned for 2010. Given the weight of regional policy in the Union budget (Table 1, see Section 4.1. below), this debate will very much depend on the negotiations on the *new financial framework for 2014-2020* (if the European institutions do not decide to extend the current financial perspective *until 2016*) (see Section 4.4. below).

3.5. Legislative changes made to common transport policy (Articles 90 to 100 TFEU) and trans-European networks (Articles 170 to 172 TFEU)

With regard to transport policy, *Articles 90 to 100 TFEU* replace Articles 70 to 80 TEC. At the same time, *Articles 170 to 172 TFEU* replace the previous legal bases on trans-European networks (Articles 154 to 156 TEC). The common transport policy and the actions in favour of trans-European networks come under the rules on *shared competences* (Article 4(2)(g) and (h) TFEU) (see Section 2.2.2. above).

3.5.1. Common transport policy

In the area of transport policy, the changes made by the Treaty of Lisbon are minor. The former codecision procedure indicated in Articles 71, 75 and 80 TEC, introduced by the Treaty of Amsterdam, is replaced by the *ordinary legislative procedure* (Articles 91, 95 and 100 TFEU). Moreover, the Treaty of Lisbon introduces a sunset clause for the exceptional measures taken by the FRG to compensate for the economic disadvantages of those regions affected by the division of Germany (Article 98 TFEU): five years after the entry into force of the Treaty (1 December 2014), the Council, acting on a proposal from the Commission, may adopt a decision repealing Article 98 (¹⁴⁶).

Until common rules are laid down in the field of transport (referred to in Article 91 TFEU), the Council will retain the power to adopt measures granting a derogation (Article 92 TFEU). These derogations will be decided unanimously, without the participation of Parliament.

Aside from the changes to the specific legal bases of the common transport policy, it should be noted that the Treaty of Lisbon has amended other areas, which will have indirect effects on the work of the TRAN Committee. Firstly, Article 191(1) TFEU has included the *fight against climate change* in the environmental protection requirements to be integrated in the definition and implementation of the Union's policies as a whole (Article 11 TFEU). On this basis, following the signature of the Kyoto Protocol and with a view to the measures resulting from the Copenhagen Conference in December 2009, transport policy, particularly

¹⁴⁵ The initial concrete results of the Baltic Sea Strategy are expected in 2011 and may result in a revision of the approach followed and in discussions on the possibility and appropriateness of this cooperation model being applied to other regions.

¹⁴⁶ This same provision has been inserted in Article 107(2)(c) TFEU with regard to State aid (rules on competition). See Section 3.4.1. above.

in terms of road and air transport, will be very directly affected by the Community strategy to reduce greenhouse gas emissions.

In addition, in the '*Research and Technological Development*' title of the TFEU, a reference is added to '*space*' and a new Article 189 on a European space policy is introduced. In this field, the Union has competence to carry out activities, in particular to define and implement programmes. However, the exercise of that competence may not result in Member States being prevented from exercising theirs (Article 4(3) TFEU). The multiannual framework programme for research, technological development and space will be adopted in accordance with the ordinary legislative procedure (Article 182(1) TFEU), but the specific programmes to be adopted will be decided in accordance with a special legislative procedure in which Parliament will only have the right to be consulted (Article 182(4) TFEU).

Lastly, the new provisions on the area of freedom, security and justice (Articles 67 to 89 TFEU) may have an impact on transport policy, particularly in the context of judicial cooperation in civil and criminal matters (Articles 81 and 82 TFEU) and the passenger screening that may be carried out. This area has become a shared competence following the disappearance of the third pillar in the Treaties (Article 4(2)(j) TFEU) (see Section 2.2.2. above).

3.5.2. Trans-European networks

The guidelines and measures envisaged in the area of trans-European networks will also be adopted by the European Parliament and the Council in accordance with the *ordinary legislative procedure* (Article 172 TFEU), which replaces the codecision procedure.

Trans-European networks consist of transport, telecommunications and energy infrastructures (Article 170 TFEU) ⁽¹⁴⁷⁾. They contribute to the establishment of the internal market (Article 26 TFEU) and to the strengthening of economic, social and territorial cohesion (Article 174 TFEU) by taking account of the need to link island, landlocked and peripheral regions with the central regions of the Union (Article 170(2) TFEU).

3.6. Legislative changes made to culture, education, youth and sport policies (Articles 165 and 167 TFEU)

The legal basis of the action carried out by the Union in the area of *culture* is laid down in *Article 167 TFEU*, which replaces Article 151 TEC. The objectives of the Union's action in the areas of education, youth and sport are laid down in Article 165 TFEU (ex Article 149 TEC) ⁽¹⁴⁸⁾.

¹⁴⁷ However, for organisational reasons, Parliament has assigned the trans-European networks exclusively to the TRAN Committee. See Annex VII to the Rules of Procedure of the European Parliament, paragraph IX, p. 135 (<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+RULES-EP+20091201+0+DOC+PDF+VO//EN&language=EN>).

¹⁴⁸ Vocational training, which is also included in Title XII of the TFEU (Article 166), will not be assessed in this study given that it does not form part of the structural and cohesion policies and comes under the Committee

3.6.1. Sport

Although no article of the EC Treaty explicitly referred to sport, the European Union has played a decisive role in this area, particularly through the case-law of the Court of Justice. The Bosman case (¹⁴⁹) in particular had a major impact on professional sport, by establishing that transfer fees would constitute an obstacle to the free movement of workers (footballers) and were therefore illegal under the Treaty.

The Treaties of Amsterdam and Nice included declarations on sport. However, there was still no specific legal basis in the primary legislation. The Treaty of Lisbon adds sport to the list of Union competences to carry out actions to support, coordinate or complement (Article 6(e) TFEU) (see Section 2.2.3. above). Moreover, it creates a specific legal basis in *Article 165 TFEU*, together with education and youth.

From now on, the Union will contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function (second subparagraph of Article 165(1) TFEU). Community action in this area will aim to develop the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports. It will also protect the physical and moral integrity of sportsmen and sportswomen, especially the youngest sportsmen and sportswomen (Article 165(2) TFEU) (¹⁵⁰).

The first practical consequence of the introduction of this new legal basis into the Treaty will be the implementation of a *new programme for sport* at European level. This decision, together with others that will follow in this area, will be made using the *ordinary legislative procedure* (Article 165(4) TFEU).

3.6.2. Education and youth

The main changes in the areas of education and youth are procedural. The ordinary legislative procedure replaces the codecision procedure (Article 165(4) TFEU).

Furthermore, the Treaty of Lisbon adds encouragement of participation of young people in *democratic life in Europe* (fifth indent of Article 165(2) TFEU). However, the Union is already active in this area: in particular, the promotion of civic participation is one of the main objectives of the '*Youth in Action*' programme. It may be felt that the introduction of this new objective will strengthen EU action in this area.

In the context of humanitarian aid actions, the Treaty also refers to the creation of a '*European Voluntary Humanitarian Aid Corps*', with the specific objective of encouraging the participation of young Europeans in this area (Article 214(5) TFEU). This European Voluntary Humanitarian Aid Corps will be developed through the ordinary legislative procedure.

on Employment and Social Affairs (see Annex VII, paragraph VII, to the Rules of Procedure of the European Parliament).

¹⁴⁹ See judgment of the ECJ of 15 December 1995 in Case C-415/93 *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others*, and *Union des associations européennes de football (UEFA) v Jean-Marc Bosman*, [1995] ECR 4921.

¹⁵⁰ Paragraph 27 of resolution T6/O373-2009 of 7 May 2009 stresses that the Union can at last take action for the development of sport and its European dimension and can take due account of the specific nature of sport when applying other European policies. See <http://www.europarl.europa.eu/oeil/file.jsp?id=5608622¬iceType=null&language=en>.

In addition, *trade in education services* is explicitly mentioned in Article 207(4)(b) TFEU. The negotiation and conclusion of international agreements in this area will be decided *unanimously* by the Council, where these agreements risk seriously disturbing the national organisation of such services and prejudicing the responsibility of Member States to deliver them. This is therefore a derogation from international agreements in general, for which the rule is always action by qualified majority (first subparagraph of Article 207(4) TFEU and Article 218(8) TFEU). However, the European Parliament must give its consent to all trade agreements, given that the common commercial policy comes under the ordinary legislative procedure (Article 281(6)(a)(v) TFEU) (see Section 3.8. below).

Finally, it should be noted that *Article 14 of the Charter of Fundamental Rights of the European Union* provides that everyone has the right to education and to have access to vocational and continuing training (¹⁵¹). Although this Charter does not establish any new power or task for the Union, it does have the same legal force as the Treaties and is therefore legally binding from the entry into force of the Treaty of Lisbon (¹⁵²).

3.6.3. Culture

The preamble to the TEU recognises the cultural, religious and humanist inheritance as a source of inspiration for the values of the European Union. In addition, the new Article 3 TEU recognises, among the Union's aims, respect for the rich cultural and linguistic diversity, and the safeguarding and enhancement of Europe's cultural heritage.

However, the main change made by the Treaty of Lisbon with regard to cultural policy concerns the introduction of the ordinary legislative procedure (Article 167(5) TFEU). To date the Council has decided unanimously under the former codecision procedure. However, this change will not have any significant impact in the future on an area in which the Member States are accustomed to taking decisions by consensus. In addition, the Council will retain its power to adopt recommendations in this area, on a proposal from the Commission.

Furthermore, *trade in cultural and audiovisual services* is mentioned in Article 207(4)(a) TFEU (common commercial policy). The Council will act unanimously in the negotiation and conclusion of international agreements in this area, where these agreements risk prejudicing the Union's cultural and linguistic diversity. In the same way as with agreements on trade in education services (see Section 3.6.2. above), this forms a derogation from international agreements in general, for which the rule is always action by qualified majority (Articles 207(4) and 218(8) TFEU) (see Section 3.8. below). In this way the Council will ensure respect for the '*cultural exception*', which is always invoked by the Union during WTO negotiations (¹⁵³). However, the European Parliament must consent to agreements covering these areas where the ordinary legislative procedure applies to them (Article 218(6)(a)(v) TFEU) (see Section 3.8. below).

¹⁵¹ See http://www.europarl.europa.eu/charter/pdf/text_en.pdf.

¹⁵² See Article 6(1) TEU and the first Declaration annexed to the Treaty (OJ C 115, 9.5.2008, pp. 19 and 337).

¹⁵³ The '*cultural exception*' is based on the specific nature of cultural and audiovisual industries and the protection of cultural diversity and pluralism of the media. In addition, Protocol No 29 of the TFEU covers the system of public broadcasting in the Member States, a subject that is closely linked to the audiovisual area.

3.7. Legislative changes made to tourism policy (Article 195 TFEU)

The Treaties of Maastricht and Amsterdam included tourism among the EU's aims (Article 3(1)(u) TEC), without indicating the instruments for its implementation.

The Treaty of Lisbon includes tourism among the Union's competences to support, coordinate and supplement (see Section 2.2.3. above). It also introduces a specific legal basis in this area (Article 195 TFEU). From now on, the Union will complement the action of the Member States, in particular by promoting the competitiveness of Union undertakings in this sector, which is increasingly important for the European economy and employment.

The European Parliament and the Council will act by adopting measures for the tourism sector through the *ordinary legislative procedure*. However, any harmonisation of the laws and regulations of the Member States is excluded as such harmonisation initiatives come under the category of shared competences (see Section 2.2.2. above).

Tourism places considerable demand on transport services. For this reason, Parliament has assigned this area to the TRAN Committee ⁽¹⁵⁴⁾.

3.8. Legislative changes made to international agreements with implications for structural and cohesion policies (Articles 207 and 218 TFEU)

Originally, the competences conferred by the Treaty on the Community to conclude international agreements under the *first Community pillar* were exercised through a general procedure (ex Article 300 TEC), with a few adaptations for *specific agreements*.

The competences for the negotiation and conclusion of agreements linked to structural and cohesion policies came under these *specific agreements* and were limited to two cases:

- in the area of customs and common commercial policy for tariff and trade agreements (ex Article 133 TEC);
- in the area of association agreements (ex Article 310 TEC).

The Treaty of Nice then extended the scope of international agreements (initially limited to trade in goods) to services (ex Article 133(4) TEC) ⁽¹⁵⁵⁾.

Under the TEC, the European Parliament was not at all involved in the negotiation phase of international agreements. It purely had a right of information on those association

¹⁵⁴ See Annex VII to the Rules of Procedure of the European Parliament, paragraph XI, p. 135 (<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+RULES-EP+20091201+0+DOC+PDF+VO//EN&language=EN>).

¹⁵⁵ Successive revisions of the Treaties allowed the list of international agreements under the first Community pillar to be extended to other areas: *research and technological development* (ex Article 170 TEC - new Article 186 TFEU); *environment* (ex Article 174(4) TEC - new Article 191(4) TFEU); *exchange rates and the monetary system* (ex Article 111 TEC - new Articles 138 and 219 TFEU); *economic, financial and technical cooperation with third countries* (ex Article 181a TEC - new Articles 212 to 214 TFEU); and *intellectual property* (ex Article 133(5) TEC - new Article 207(4) TFEU). Given that these areas do not concern the structural and cohesion policies, we will not analyse them.

agreements already concluded (ex Article 300(2) TEC). It was consulted only in the case of agreements concerning services and intellectual property rights (ex Article 133(5) TEC).

Following the entry into force of the TFEU, all areas under the CCP will come under the *exclusive competence* of the Union (see Section 2.2.1. above). As a result, there will no longer be any joint trade agreements concluded by both the Union and the Member States. At the same time, the TFEU fundamentally reformulates this framework in *Articles 207 and 218* and increases Parliament's powers.

3.8.1. Procedural changes: the role of the European Parliament in international agreements

The TFEU introduces the ordinary legislative procedure for the *implementation* of the common commercial policy (Article 207(2) TFEU). This new procedure will from now on apply to all independent commercial policy instruments: to the basic rules on measures to protect trade, to the Generalised System of Preferences (GSP), to anti-dumping, to rules of origin, etc.

The TFEU (Articles 207(3) and 218(1)) establishes a special procedure for the *negotiation and conclusion of international agreements*, by granting consultative or consent powers to the European Parliament, depending on the nature of the agreement (Article 218(6) TFEU). The position of Parliament, which was not even consulted on the conclusion of tariff and trade agreements under the TEC, has therefore been significantly improved.

Aside from these new parliamentary prerogatives, this new procedure under Article 218 TFEU essentially takes over all the provisions of the EC Treaty on the signature, conclusion and even suspension of international agreements, including therefore the voting rules within the Council (Article 218(5), (6), (8) and (9) TFEU).

The Council will authorise the opening of negotiations, adopt negotiating directives, authorise the signing of agreements and conclude them (Article 218(2) TFEU). Throughout the procedure, the Council will act by a *qualified majority* (first subparagraph of Article 218(8) TFEU). Exceptionally, the Council will act *unanimously* when the agreement covers a field for which unanimity is required for the adoption of a Union act. This is the case with association agreements and with economic, financial and technical cooperation agreements with the states that are candidates for accession (second subparagraph of Article 218(8) TFEU).

It will also act *unanimously* in the negotiation and conclusion of agreements in the following areas: *trade in services and the commercial aspects of intellectual property*, as well as foreign direct investment, where such agreements include provisions for which unanimity is required for the adoption of internal rules (second subparagraph of Article 207(4) TFEU); *trade in cultural and audiovisual services*, where these agreements risk prejudicing the Union's cultural and linguistic diversity (indent (a), third subparagraph of Article 207(4) TFEU) (see Section 3.6.3. above); and *trade in social, education and health services*, where these agreements risk seriously disturbing the national organisation of such services and prejudicing the responsibility of Member States to deliver them (indent (b), third subparagraph of Article 207(4) TFEU) (see Section 3.6.3 above).

The Commission does not have the power to conclude agreements. However, it may, where applicable, be authorised by the Council under '*specific conditions*' to subsequently approve

modifications to an agreement concluded, where this agreement provides for these modifications to be adopted by a simplified procedure (Article 218(7) TFEU).

In this context, the European Parliament will from now on have real power of approval, in the form of *consent*, for the conclusion of various agreements (Article 218(6)(a) TFEU):

- association agreements (often the prelude to a future accession), already included in the TEC (ex Article 310 TEC);
- agreements establishing a specific institutional framework by organising cooperation procedures, also already included in the TEC (ex Article 300(3) TEC);
- agreements with important budgetary implications for the Union, also taken over from the TEC (ex Article 300(3) TEC);
- agreements on Union accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms, which is a new area introduced by the TFEU;
- agreements covering fields to which the *ordinary legislative procedure* applies (since the TFEU, although no internal act has been adopted using this procedure) ⁽¹⁵⁶⁾;
- finally, agreements covering fields to which a special legislative procedure applies, for which consent by the European Parliament is required, which is a new area introduced by the TFEU.

For other agreements, the European Parliament must simply be consulted (Article 218(6)(b) TFEU) ⁽¹⁵⁷⁾, except for those exclusively relating to the CFSP, from which Parliament remains excluded (first subparagraph of Article 218(6) TFEU).

Aside from the provisions of Article 218(6) TFEU, Parliament also has the *power of consent* for *accession agreements* (Article 49 TEU), acting by a majority of its component members. Furthermore, the TFEU makes no mention of the new specific agreements with a view to developing special relationships with neighbouring countries of the Union, established by Article 8 TEU ⁽¹⁵⁸⁾. In principle, they should be similar to association agreements and therefore receive the European Parliament's consent, unless it is felt that they form a kind of external neighbourhood policy. In this case, they would come under the CFSP, without the EP being involved.

Furthermore, although the European Parliament is still excluded from the negotiation phase of agreements, the TFEU provides that it will be regularly informed on the progress of negotiations in the case of *trade agreements* (Article 207(3) TFEU) and, for *all agreements*, at all stages of the procedure (Article 218(10) TFEU).

¹⁵⁶ Previously, consent was required only if an internal act had been adopted under the codecision procedure and had to be amended under the agreement (ex Article 300(3) TEC).

¹⁵⁷ For example, cooperation agreements in criminal matters.

¹⁵⁸ This neighbourhood policy was announced by the Brussels European Council of 13 and 14 March 2008 with a view to re-launching the Barcelona Process or Euro-Mediterranean Partnership, initiated in 1995. The bodies for this Mediterranean neighbourhood policy have already been set up (Union for the Mediterranean).

3.8.2. International agreements and the structural and cohesion policies

From now on, *most* international agreements relating to the structural and cohesion policies will be concluded following *consent by the European Parliament*, where they cover fields to which the ordinary legislative procedure applies (Article 218(6)(a)(v) TFEU) and/or where they have important budgetary implications for the Union (Article 218(6)(a)(iv) TFEU). This particularly involves *international fisheries agreements, transport agreements and trade agreements*, whether bilateral or multilateral, covering agricultural and fishery products as well as cultural, audiovisual and education services.

In addition, the TFEU explicitly mentions two types of agreement relating to the structural and cohesion policies, in the context of the common commercial policy (Article 207 TFEU):

- Agreements in the field of *transport* (Article 207(5) TFEU), subject to Articles 90 to 100 TFEU for the substance and to Article 218 TFEU for the procedure for the negotiation and conclusion of agreements in this field (see Section 3.5. above).
- Trade agreements on *cultural, audiovisual and education services* (Article 207(4)(a) and (b) TFEU), to which the procedure in Article 218 applies. However, these international agreements will be adopted unanimously by the Council in order to protect the cultural exception and guarantee the smooth running of education services at national level (see Sections 3.6.2. and 3.6.3. above).

Paradoxically, the TFEU does not refer to international *fisheries* agreements, although they are the most common type of agreement. It has already been indicated (see Section 3.3. above) that these specific agreements must come under the procedure in Article 218(6)(a) TFEU (with consent by the European Parliament), as fisheries is one of the areas to which the ordinary legislative procedure applies (Article 43(2) TFEU - Article 218(6)(a)(v) TFEU). In addition, the *fisheries partnership agreements* with third countries (under which access to resources results in financial compensation for the Union) should be subject to the procedure in Article 218(6)(a)(iv) TFEU as they will have important budgetary implications for the Union ⁽¹⁵⁹⁾.

Furthermore, trade in fishery products is generally subject to multilateral rules adopted within the WTO ⁽¹⁶⁰⁾, which come under the common commercial policy – CCP (Article 207 TFEU). However, internal management measures are adopted based on Article 43 TFEU (CFP) and particularly within the *common organisation of the markets in fishery and aquaculture products* ⁽¹⁶¹⁾ (see Section 2.3.1. above).

Agriculture is also not mentioned by the TFEU with regard to international agreements, although it is a very important aspect in most of the *preferential arrangements* concluded by the Union (with countries in the Mediterranean Basin, the ACP countries, Mercosur, etc.). These preferential arrangements (and also unilateral concessions adopted on the basis of the Generalised System of Preferences - GSP) span the common commercial policy (Article 207 TFEU) and the cooperation policy with third countries (Articles 208 to 213 TFEU).

¹⁵⁹ There are several *types of fisheries agreement*: a) *partnership agreements*, under which the European fleet obtains access to resources in return for financial compensation or access to the European market through lower customs tariffs; b) *reciprocal agreements*, which involve trading of fishing opportunities between Community fleets and third country fleets (from northern Europe); c) *multilateral agreements with regional fisheries organisations* (RFO) mainly to prevent illegal fishing; and d) *international agreements*, which encourage fair and efficient use of marine resources and protect the marine environment.

¹⁶⁰ Decision 94/800/EC (OJ L 336, 23.12.1994).

¹⁶¹ Regulation (EC) No 104/2000 (OJ L 17, 21.1.2000) (Title V).

Based on the criterion of the purpose and main aim of an *agreement*, the Union can conclude a *specific cooperation agreement* (under Articles 209(2) or 212(3) TFEU) or a *trade agreement* (in accordance with the procedure in Article 218(6)(a) TFEU). At the same time, the European Parliament and the Council will always act in accordance with the ordinary legislative procedure for those measures necessary for the *implementation of cooperation policy* (Article 209(1) TFEU; Article 212(2) TFEU) and for the framework for *implementing the common commercial policy* (Article 207(2) TFEU).

In any event, as the Treaty is silent in this area, agricultural trade is currently governed by the multilateral agreements of the World Trade Organization (WTO) and specifically by the *Agriculture Agreement* (¹⁶²). It has already been indicated (see Section 2.3.1. above) that the division of issues between the CAP and the CCP was established by the Court of Justice in its Opinion 1/94 on the WTO (¹⁶³). The general framework of the Union's undertakings with regard to a multilateral system of trade regulation is laid down by Article 207(2) TFEU (CCP), but the internal management measures are adopted based on Article 43 TFEU (CAP), particularly within the framework of the *single COM* (¹⁶⁴).

3.9. The new typology of the Union's legal acts: detailed examination of delegated acts and implementing acts (Articles 290 and 291 TFEU)

The Treaty of Lisbon (Article 288 TFEU) retains the legal instruments laid down by the TEC (ex Article 249 TEC). Nevertheless, a distinction is clearly made between *legislative acts* (regulations, directives, decisions), adopted in accordance with an ordinary or special legislative procedure (Article 289 TFEU), and *non-legislative acts* (opinions, recommendations, delegated acts, implementing acts) (Articles 288 and 290 to 292 TFEU). However, the most important innovations are those relating to *delegated acts* (Article 290 TFEU) and *implementing acts* (Article 291 TFEU).

The distinction between legislative and delegated acts and the recognition of the specific executive role of the Commission under the equal control of the two branches of the legislature will enhance the quality of European legislation (¹⁶⁵). However, several aspects of delegated acts and also the new framework for implementing acts are yet to be defined.

3.9.1. Delegated acts

Article 290(1) TFEU provides that a legislative act may delegate to the Commission the power to adopt *non-legislative acts of general application* to supplement or amend certain *non-essential elements* of the legislative act.

It should be recognised that drawing a line within a basic act between what constitutes *essential elements* and what constitutes *non-essential elements* is not easy. However, there

¹⁶² Decision 94/800/EC (OJ L 336, 23.12.1994). Regulation (EC) No 3290/1994 (OJ L 349, 31.12.1994) developed the WTO's Agricultural Agreement internally.

¹⁶³ ECJ Opinion 1/94 of 15 November 1994, [1994] ECR I-5267.

¹⁶⁴ Regulation (EC) No 1234/2007 (OJ L 299, 16.11.2007) (Part III. Trade with third countries).

¹⁶⁵ Paragraph 3 of EP resolution T6-0387/2009 of 7 May 2009. See <http://www.europarl.europa.eu/oeil/file.jsp?id=5609042¬iceType=null&language=en>.

is already fairly precise Court of Justice case-law drawing this dividing line (¹⁶⁶). A *basic legislative act* can therefore contain three types of provision:

- those forming the *essential elements*, which may not be either delegated or implemented: for example, the general guidelines of an act, the general principles underlying the act, or, lastly, the scope of the rules (regulation or support);
- those forming the *non-essential elements* of the act, which may be *delegated* with a view to amending or supplementing them;
- and, finally, those forming the non-essential elements which may be explained or clarified using executive procedures (Article 291 TFEU) (see Section 3.9.2. below).

The use of delegated acts could in theory threaten Parliament's legislative function. However, it should be noted that the rules on delegation offer Parliament several *guarantees*:

- firstly because Parliament must consent to the operation, as the delegation must stem from a basic legislative act, which Parliament will have previously adopted in collaboration with the Council (second subparagraph of Article 290(1) TFEU);
- secondly because said legislative act must define '*the content, scope and duration of the delegation*' (second subparagraph of Article 290(1) TFEU);
- thirdly because other conditions may also be laid down, including the *power of the Council or Parliament to revoke* the delegation (Article 290(2)(a) TFEU) and also their *power to object* to the delegated act, which may halt the entry into force of the act in question (Article 290(2)(b) TFEU); in both these cases, Parliament must act by a majority of its component members (third subparagraph of Article 290(2) TFEU);
- and finally because the conditions laid down in Article 290 TFEU are not exhaustive and the European Parliament may propose other conditions, through its power of amendment under the ordinary legislative procedure (for example, by being more demanding with regard to information on the measures taken by the Commission or in terms of scrutiny).

It goes without saying that the effective exercise of these guarantees will require detailed examination of the provisions of each Commission legislative proposal by each parliamentary committee. Clearly, delegation can never become an ordinary instrument of legislation and the European Parliament must ensure that this procedure remains exceptional. Extensive use of delegated acts would threaten the institutional balance, the principle of transparency and, finally, the very legitimacy of the Union's legislative procedures.

Legal debate on the scope of delegated acts has already begun as a result of one of the legislative proposals included in the Commission's '*omnibus*' *communication* (¹⁶⁷) establishing a catch documentation programme for bluefin tuna (¹⁶⁸).

¹⁶⁶ Case-law based in particular on agricultural comitology: ECJ judgment of 17 December 1970 in Case 25/70 *Einfuhr- und Vorratsstelle für Getreide und Futtermittel v Köster et Berodt & Co.*, [1970] ECR 1161; ECJ judgment of 13 March 1997 in Case C-103/96 *Directeur général des douanes et droits indirects v Eridania Beghin-Say SA*, [1997] ECR I-1453. For a list of the main ECJ judgments on comitology, see on IPOLNET: <http://www.ipolnet.ep.parl.union.eu/ipolnet/webdav/site/myjahiasite/shared/code/List%20of%20relevant%20ECJ%20rulings.pdf>.

¹⁶⁷ COM(2009)665, 2.12.2009.

¹⁶⁸ COM(2009)406, 3.8.2009.

In this context, the Commission presented in December 2009 a communication on the new *delegated acts* pursuant to Article 290 TFEU (¹⁶⁹). In this document, the Commission proposes models providing standard wording to be used in the context of future delegations (particularly on the duration of the delegation and on the right of revocation/objection). However, it should be noted that the TFEU does not impose any limit on the EP's legislative powers in this area. That said, the models proposed are not binding on the co-legislators. On this basis, Parliament would prefer a case-by-case assessment, ensuring that the prerogatives to approve, object to and revoke delegations are always properly respected. Prior to the vote in plenary, the EP's Conference of Committee Chairs must decide in the next few months on the framework to be applied to legislative delegations in the future, as a response to the Commission's communication (¹⁷⁰).

3.9.2. Implementing acts (former 'comitology' procedures)

The Treaty of Lisbon makes a distinction between delegated acts and implementing acts. Previously, both these types of act were regulated by Decision 1999/468/EC of 28 June 1999, as amended (Comitology Decision) (¹⁷¹). From now on, the adoption of delegated acts will be regulated in the basic legislative act in question (see Section 3.9.1. above), whereas, in order to adopt an implementing act, a regulation must firstly be adopted laying down *'the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers'* (Article 291(3) TFEU).

Article 291(2) TFEU lays down the rules for acts conferring implementing powers on the Commission or, in specific cases of the CFSP, on the Council. An implementing act may only be adopted where uniform conditions for implementing legally binding Union acts are needed. Otherwise, it will be the Member States that adopt all measures of national law necessary to implement Union acts (Article 291(1) TFEU).

It should be noted that the TFEU confers new powers on Parliament in this area. Whereas, under the TEC, the adoption of the Comitology Decision came under the sole competence of the Council acting unanimously, with Parliament simply being consulted (third indent of ex Article 202 TEC), the TFEU now reserves a more important role for Parliament by stipulating that the necessary regulation shall be adopted in accordance with the ordinary legislative procedure (Article 291(3) TFEU).

Based on that provision, the Commission must therefore present a *proposal for a regulation* laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers. This new regulatory framework should in principle be adopted before June 2010 in accordance with the ordinary legislative procedure. In the meantime, the European Parliament, the Council and the Commission (¹⁷²) have decided to temporarily continue applying the rules of the Comitology

¹⁶⁹ COM(2009) 673, 9.12.2009. See also the 'Non-Paper' entitled: *'Implementation of Article 290 of the Treaty on the Functioning of the European Union'*, 12 November 2009.

¹⁷⁰ <http://www.europarl.europa.eu/oeil/file.jsp?id=5840472>.

¹⁷¹ OJ L 184, 17.7.1999, p. 23. Version consolidated by Decision 2006/512/EC (OJ C 255, 21.10.2006, p. 4). On comitology, see *'Comitology Handbook - the European Parliament's work in the field of comitology'*, Conference of Committee Chairs, 2009 (<http://www.ipolnet.ep.parl.union.eu/ipolnet/cms/lang/en/pid/2335>).

¹⁷² *Declaration of the European Parliament, the Council and the Commission concerning the implementation of Article 291 of the Treaty on the Functioning of the European Union*. This declaration therefore becomes the interim solution requested by the EP in its resolution of 7 May 2009 (paragraph 73 of resolution T6-0373/2009).

Decision, as the TFEU does not contain any transitional provision allowing the continued exercise of implementing powers to be guaranteed (¹⁷³).

Parliament must now consider how to link together the new (very complex) procedures that will succeed the former comitology procedure. A distinction may have to be made between the scope of the framework (to be inserted in the new regulation to ensure better parliamentary control) and its daily exercise (bearing in mind the workload that this exercise could involve for the parliamentary committees). Furthermore, greater simplification with regard to the former comitology procedures would be welcome.

3.10. Other horizontal legislative changes: revision procedures for the Treaties (Article 48 TEU) and right of citizens' initiative (Article 11(4) TEU and Article 24 TFEU)

The Treaty of Lisbon makes certain *horizontal legislative amendments* that could *potentially lead to significant changes* in the structural and cohesion policy areas. These particularly involve Parliament's right of initiative in the *revision of the Treaties* (notably in the case of the *simplified revision procedure*) and the *right of citizens' initiative*.

3.10.1. Simplified revision procedures for the Treaties

Article 48 TEU lays down three revision procedures for the Treaties: the *ordinary procedure*, through a Convention and an IGC, covering all the Treaties (Article 48(2) to (5) TEU); and two *simplified revision procedures*, the first aimed at amending all or part of the provisions of Part Three of the TFEU (*Union policies and internal actions*) (Article 48(6) TEU), and the second aiming to switch from the rule of acting by unanimity within the Council to the rule of acting by qualified majority, or even to replace special legislative procedures for the adoption of legislative acts with the ordinary legislative procedure (Article 48(7) TFEU).

We will limit ourselves in this study to commenting on the *first simplified procedure*, which offers clear opportunities for revising the structural and cohesion policies *on the initiative of the European Parliament*, without, however, allowing the Union's competences to be increased (third subparagraph of Article 48(6) TEU).

The European Parliament can therefore submit *to the European Council* proposals for *revising all or part of the provisions of the TFEU* with regard to structural and cohesion policies: agriculture and fisheries (Articles 38 to 44 TFEU); transport (Articles 90 to 100 TFEU); education, youth and sport (Article 165 TFEU); culture (Article 167 TFEU); trans-European networks (Articles 170 to 172 TFEU); economic, social and territorial cohesion (Articles 174 to 178 TFEU); and tourism (Article 195 TFEU). On the other hand, this simplified procedure cannot be used to revise the chapter on international agreements (included in Part Five of the TFEU - external action by the Union) (see Section 3.8. above) or to amend the financial provisions (included in Part Six of the TFEU) (see Section 4. below).

¹⁷³ It should be noted that the Treaty of Lisbon has deleted Article 202 TEC, which laid down the implementing powers of the Commission conferred by the Council. Although this Article 202 has been replaced in its substance by Article 16(1) TEU and Articles 290 and 291 TFEU, there is a legal vacuum to be filled in this respect.

The TFEU aims to avoid convening a Convention and IGC for simplified procedures. However, it reserves the right of final adoption of amendments for the Council acting by unanimity, after consulting the European Parliament. It also lays down the obligation for approval by the Member States in accordance with their respective constitutional requirements (second subparagraph of Article 48(6) TEU).

This first simplified procedure appears to be particularly promising for updating and adapting the chapter on *agriculture and fisheries* (Title III of Part Three of the TFEU), which has become obsolete in light of developments in the CAP and the CFP (see Sections 3.2. and 3.3. above). The European Parliament can therefore submit to the European Council a proposal to update this chapter, by introducing the principles that will from now on govern these two policies and their main mechanisms.

It is perhaps too early to envisage this approach at the moment, as this will be highly political. However, bearing in mind that the CAP and the CFP will be extensively revised prior to the entry into force of the new financial perspective, Parliament may submit to the European Council proposals for the revision of the primary legislation beyond 2014. These would consolidate any new secondary legislation frameworks adopted previously.

3.10.2. Right of citizens' initiative

Article 11(4) TEU provides that *not less than one million citizens* who are nationals of a significant number of Member States may take the *initiative of inviting the European Commission*, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties.

The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt the provisions for the procedures and conditions required for a citizens' initiative, including the minimum number of Member States from which such citizens must come (second subparagraph of Article 11(4) TEU; first paragraph of Article 24 TFEU).

In this context, the Commission has just submitted a *Green Paper on a European Citizens' Initiative* (¹⁷⁴), further to the European Parliament resolution adopted on 7 May 2009 (¹⁷⁵). The purpose of this Green Paper is to seek the views of all interested parties on the key issues that will shape the future regulation on the procedure and practical arrangements required for this new institutional instrument. In principle, it is planned to present the legislative proposal in the next few months, so that it can enter into force before December 2010.

The consultation begun by the Green Paper concerns the following issues: *minimum number of Member States* from which citizens must come (the Commission suggests setting the threshold at one quarter of Member States, the same threshold as proposed by the EP in its resolution) (¹⁷⁶); *minimum number of signatures* per Member State (the Commission proposes 0.2% of the population of each Member State involved, which is the same as the threshold recommended in the EP's opinion, namely 1/500 of the population)

¹⁷⁴ COM(2009) 622, 11.11.2009.

¹⁷⁵ T6-0389/2009, European Parliament resolution of 7 May 2009 requesting the Commission to submit a proposal for a regulation on the implementation of the citizens' initiative (<http://www.europarl.europa.eu/oeil/file.jsp?id=5665862¬iceType=null&language=en>).

¹⁷⁶ Paragraph 1 of the Annex to the resolution of 7 May 2009, op. cit.

(¹⁷⁷); *setting the minimum age of participants* (the Commission suggests 16 or 18 years and Parliament refers to the legislation of the Member State on the right to vote) (¹⁷⁸); and the *form and wording of a citizens' initiative* and requirements for the procedure, in particular collecting, verifying and authenticating signatures (the EP has proposed a specific procedure consisting of five stages) (¹⁷⁹).

The right of citizens' initiative will add a new dimension to European democracy and will increase the public debate around common policies, particularly the structural and cohesion policies. More specifically, this right of initiative will allow Union citizens to participate directly in the implementation of existing common policies and actions. In addition, with a view to the *fundamental reforms planned for certain common policies (CAP, regional policy, CFP)*, the right of citizens' initiative will confirm the role of civil society in the development and revision of European law and, implicitly, in *decision-making on the new financial perspective*. In this context, the right of citizens' initiative will help to create a true European public space for debate on the *Community priorities and strategies* to be developed *in relation to the major challenges facing the Union* (e.g. commercial and financial globalisation, definition and defence of the European social model, fight against climate change, decline in population, fight against hunger and food crises, sustainable development, etc.).

The European Parliament, as the only EU institution elected by direct universal suffrage, can only rejoice at the introduction of the citizens' initiative in the Treaties. At the same time, it must closely monitor the achievement of specific initiatives and possibly adapt its legislative work schedule.

¹⁷⁷ Paragraph 2 of the Annex to the resolution of 7 May 2009, op. cit.

¹⁷⁸ Paragraph 3 of the Annex to the resolution of 7 May 2009, op. cit.

¹⁷⁹ Paragraph 4 et seq. of the Annex to the resolution of 7 May 2009, op. cit.

4. BUDGETARY CHANGES

4.1. Significant effects on structural and cohesion policies

The Treaty of Lisbon makes significant financial changes to the current Treaties and secondary legislation, particularly with regard to interinstitutional relations and decision-making procedures. It introduces a new Title II into Part Six of the TFEU, with 6 chapters and 15 articles (¹⁸⁰). In fact, the new Treaty takes over, substantially unchanged, the financial provisions adopted by the Intergovernmental Conference (IGC) in 2004.

Most of the new financial provisions are general in their scope. However, they have specific effects on expenditure under the structural and cohesion policies, which, let us not forget, currently account for the bulk of the Community budget (73.7% in 2010) (Table 1). This impact will be particularly felt by the CAP (42% of the budget) and regional policy (28%), as these are easily the two largest Union policies in terms of expenditure.

Table 1: STRUCTURAL AND COHESION POLICIES - BUDGET 2010

COMMISSION BUDGET 2010		
	Commitments (million EUR)	% Total
Agriculture and Rural Development	58 080.71	41.9%
Regional Policy	38 896.65	280.1%
Transport	2 296.49	1.7%
Education and Culture	1 821.86	10.3%
Fisheries and Maritime Affairs	1 001.19	0.7%
Tourism	4.60	0.0%
Structural and Cohesion Policies	102 101.50	73.7%
Total Commission Budget (¹⁸¹)	138 515.40	100%

Source: *General budget of the European Union for the financial year 2010*. The figures. January 2010 (http://ec.europa.eu/budget/library/publications/budget_in_fig/syntchif_2010_en.pdf).

¹⁸⁰ Articles 310 to 325 TFEU.

¹⁸¹ *Agriculture*: Chapter 05; *Regional policy*: Chapter 13; *Transport*: headings 06 02 and 06 03, and other appropriations under Chapter 06; *Education and culture*: Chapters 09 (Information society and media) and 15 (Education and culture), and heading 09 06 (Audiovisual policy and MEDIA programme); *Fisheries*: Chapter 11; *Tourism*: heading 02 02 08.

The *main elements* of the Treaty of Lisbon with regard to the financial framework are ⁽¹⁸²⁾:

- Simplification of the annual budgetary procedure by *suppressing the distinction between compulsory expenditure (CE) and non-compulsory expenditure (NCE)*, with the *disappearance of the Preliminary Draft Budget (PDB)* and the *elimination of second reading by the EP*.
- Formalisation of a *new annual budgetary procedure* similar to the ordinary legislative procedure, with a *single reading* and *conciliation* between the two branches of the budgetary authority.
- Consolidation of the *multiannual financial framework* in the TFEU.
- Application of the new '*financial constitution*' through:
 - a) adoption of a *new regulation containing the multiannual financial framework*;
 - b) *adaptation of the existing Financial Regulation* to the new principles on how to adopt and implement the budget; and
 - c) possibly, adoption of a *new interinstitutional agreement containing rules on the collaboration* of the institutions during the annual budgetary procedure, which are not included in the two legal instruments above ⁽¹⁸³⁾ (see Section 5(a) below).

4.2. Suppression of the distinction between CE and NCE

The former TEC distinguished, in Articles 272 and 273 thereof ⁽¹⁸⁴⁾, *between two categories of expenditure*:

- a) '*Expenditure necessarily resulting from this Treaty or from acts adopted in accordance therewith*' (CE), particularly expenditure on markets and aid under the *first pillar of the CAP* or international agreements, over which the Council, as the first branch of the budgetary authority, had the last word in determining the annual budget.
- b) '*Expenditure other than that necessarily resulting from this Treaty or from acts adopted in accordance therewith*' (NCE), over which the European Parliament (second branch of the budgetary authority) retained its decision-making competence up to a maximum rate of increase in relation to expenditure of the same type to be incurred during the current year, while respecting the principle of balance between revenue and expenditure.

To *simplify* the procedure for adopting the annual budget, the TFEU *suppresses this distinction* in its new Articles 314 (ex 272) and 315 (ex 273). From now on, the two

¹⁸² For an overview of the application of the existing financial framework during the last legislative term (2004-2009), see '*The Interinstitutional Agreement of 17 May 2006 and 2005/2009 Budgetary Procedures*', EP, Policy Department D - Budgetary Affairs, PE 411.271, 30.7.2009.

¹⁸³ Pending the new financial framework, a very recent EP resolution (T7-0067/2009 of 12 November 2009) determined the *Transitional procedural guidelines on budgetary matters in view of the entry into force of the Lisbon Treaty*. This particularly covers implementation of the budget, adoption of amending budgets, authorisation of transfers and the principles for interinstitutional collaboration (<http://www.europarl.europa.eu/oeil/file.jsp?id=5817052¬iceType=null&language=en>).

¹⁸⁴ Second subparagraph of Article 272(4); first and fourth subparagraphs of Article 272(9); third paragraph of Article 273.

branches of the budgetary authority will decide *jointly on all* budgetary expenditure. The Council therefore acquires decision-making powers over NCE and Parliament over CE ⁽¹⁸⁵⁾.

However, the distinction between CE and NCE still remains in the *Interinstitutional Agreement on budgetary discipline and sound financial management* ⁽¹⁸⁶⁾ and in the *current Financial Regulation* ⁽¹⁸⁷⁾, to be adopted henceforth in accordance with the ordinary legislative procedure by Parliament and the Council, after consulting the Court of Auditors (Article 322 TFEU). Amendments shall therefore be made as a result of work to update the Interinstitutional Agreement and secondary financial legislation. On this basis, the European Parliament resolution of 7 May 2009 on the financial aspects of the Treaty of Lisbon ⁽¹⁸⁸⁾ approves the revision of the Financial Regulation in incorporating the implementation of those provisions directly affected by the Lisbon Treaty (paragraph 50 of the resolution of 7 May 2009). It also highlights the need to reach an interinstitutional agreement allowing optimum transition to the new legal acts and the new decision-making procedures (paragraphs G, 51, 52 and 53).

4.3. The new special procedure for adopting the annual budget

The TFEU inserts a new chapter '*The Union's Annual Budget*' in the '*Financial Provisions*' title ⁽¹⁸⁹⁾, which amends, and simplifies, the existing budgetary procedure.

In the former procedure (Article 272 TEC), the Commission submitted a *Preliminary Draft Budget (PDB)* around May, which contained an estimate of revenue and an estimate of expenditure. The Council, acting by qualified majority, established the *Draft Budget (DB)* no later than 1 September of the year preceding that in which the budget was to be implemented, and forwarded it to the European Parliament no later than 5 October. In general, the Council established its DB in *July* and the EP voted on it in September in committee and in October in plenary, by *simple majority*.

The *new Article 314 TFEU has eliminated the PDB* and introduced a *special legislative procedure* for the adoption of the annual budget by *conciliation* between the EP and the Council (the two branches of the budgetary authority). From now on, the two readings will be replaced by a *single reading*: the Commission will submit its proposed DB not later than *1 September* (Article 314(2) TFEU). The Council will adopt its *position* and forward this to the EP no later than *1 October*, and will inform the EP of the reasons which led it to amend the Commission's proposal (Article 314(3) TFEU). It should be noted that the Council previously did not give any reasons for the reductions that it determined.

¹⁸⁵ It should be noted that, following the Treaty of Lisbon, there is still a differentiation between budget appropriations, namely: a) *differentiated appropriations (DA)*, intended to finance multiannual actions, which consist of *commitment appropriations* and *payment appropriations*; b) *non-differentiated appropriations (NDA)*, which guarantee the commitment and payment of expenditure during each financial year.

¹⁸⁶ Interinstitutional Agreement between the European Parliament, the Council and the Commission on budgetary discipline and sound financial management (OJ C 139, 14.6.2006, p. 1 - <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:139:0003:0003:EN:PDF>). CE/NCE are mentioned in paragraphs 13, 23, 34 and 36, and in Annex II, Parts B and C.5. This agreement was last amended by the Decision of the European Parliament and of the Council 2009/407/EC (OJ L 132, 29.5.2009 - <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:132:0008:0009:EN:PDF>).

¹⁸⁷ Council Regulation (EC, Euratom) No 1605/2002 (OJ L 248, 16.9.2002) (<http://eur-lex.europa.eu/JOHtml.do?uri=OJ:L:2002:248:SOM:EN:HTML>) and Commission Regulation (EC, Euratom) No 2342/2002 (OJ L 357, 31.12.2002).

¹⁸⁸ P6_TA(2009)0374 (<http://www.europarl.europa.eu/oeil/file.jsp?id=5608282¬iceType=null&language=en>).

¹⁸⁹ OJ C 115, 9.5.2008, pp. 183-185.

The EP resolution of 7 May 2009 (paragraph 30) ⁽¹⁹⁰⁾ draws attention to the fact that the new procedure and its single reading will no longer make it possible in *de facto* terms for the institutions to adjust their standpoints at second reading, as they were able to hitherto. Parliament must therefore *fine-tune its political priorities* at an earlier stage and adapt accordingly its operational approach and organisational arrangements so as to enable it to achieve all the objectives set. Although the TFEU refers to general deadlines for the new annual budgetary procedure, it does not establish *precise dates for the parliamentary work*. As a result, a pragmatic timetable similar to the current one must be set, which will allow both Parliament's priorities to be asserted and the conciliation mechanisms established in the TFEU to be implemented in good time (paragraphs 31 and 32 of the aforementioned resolution) ⁽¹⁹¹⁾.

The new procedure allows for *three parliamentary votes*:

- a) The first vote, by *qualified majority*, within *42 days of the Council's position being forwarded* ⁽¹⁹²⁾, concerns *amendments* to the DB (Article 314(4) TFEU). The TFEU does not stipulate anything about the procedure for this vote in plenary, which will determine the *EP's position* on all the appropriations and which will end the reading stage. However, there are no significant reasons why the current procedure cannot be retained, with a report and a resolution by plenary on the DB, which is a legislative act that currently allows the strategic lines to be set, and any pilot projects and preparatory actions to be introduced. As indicated by Parliament in its resolution of 7 May 2009 (paragraph 34), this resolution before the first conciliation meeting will take on increased importance, since it will enable Parliament formally to set out its budgetary priorities, unencumbered by tactical considerations linked to the Council's position. From now on, specialist committees required to give an opinion should be closely involved (as is currently the case) with the work of the Committee on Budgets (COBU) in preparing the draft resolution.
- b) The second vote, by *simple majority*, concerns the outcome of the *Conciliation Committee*, which brings together the representatives of the Council and an equal number of members representing the European Parliament in the case of interinstitutional divergences on *the amended draft budget* (Article 314(5) TFEU). This vote in plenary could occur around *mid-November* in the event of agreement in the Conciliation Committee (Article 314(6) TFEU).
- c) A *third alternative vote* should be added in the specific case of *rejection of the joint text by the Council*. In this case, the EP vote would decide to confirm all or some of the amendments adopted during the single reading (Article 314(7)(d) TFEU). As a result, the EP, acting by *qualified majority* (majority of members plus three-fifths of the votes cast), would have the last word on the annual budget.

Aside from the single reading, some of the other main innovations in the annual budgetary procedure under the TFEU are:

- a) The decisive role conferred on the *European Parliament at the end of the procedure* (Article 314(7) TFEU): 1) the Conciliation Committee's text (*'joint text'*)

¹⁹⁰ <http://www.europarl.europa.eu/oeil/file.jsp?id=5608282¬iceType=null&language=en>.

¹⁹¹ With regard to the timetable for the new budgetary procedure, see '*Working document of the implications of the Treaty of Lisbon for the annual budgetary procedure*', Committee on Budgets, Rapporteurs Sidonia Elzbieta Jedrezejewska and László Surján, DT/804312EN.doc, PE 439.064, 9.2.2010.

¹⁹² Given that the Council must forward its position before 1 October (Article 314(3) TFEU), the plenary vote of the European Parliament may occur around mid-October (See the Working document of 9.2.2010, op. cit.).

will not be regarded as adopted if the European Parliament rejects it (by a majority of its component members); 2) if the Council rejects the joint text but the EP approves it, either this text will enter into force as it is or the European Parliament can impose the amendments that it adopted during its first reading of the draft budget, by qualified majority (majority of its component members plus three-fifths of the votes cast). In this context, if the EP and the Council do not succeed in approving a *'joint text'* within 21 days, the Commission will be required to submit a new draft budget (DB) (Article 314(7)(b) and (c) and Article 314(8) TFEU) ⁽¹⁹³⁾.

- b) The right of initiative acquired by the *Commission*, which allows it to amend its draft budget until such time as the Conciliation Committee is convened (second subparagraph of Article 314(2) TFEU) ⁽¹⁹⁴⁾.
- c) Lastly, the important role of the *Conciliation Committee*, which embodies the interinstitutional dialogue between the two branches of the budgetary authority.

The *Conciliation Committee* is composed of the members representing the Council and an equal number of members representing Parliament (Article 314(5) TFEU). The TFEU does not define the exact number or level of political representation of the Council. These are undoubtedly two very sensitive issues that will be a matter for each institution to decide. In addition, an agreement between the EP and the Council will be necessary to ensure the smooth running of the Conciliation Committee as quickly as possible (paragraph 41 of the resolution of 7 May 2009). Experience gained with previous *legislative* conciliation committees ⁽¹⁹⁵⁾ should in principle facilitate agreement on the procedures and internal organisation of the Conciliation Committee with regard to the new budgetary procedure (e.g. committee chairs; composition of its secretariat or support staff and their role; documentation to be prepared and translated; working or meeting arrangements - trilogues, interinstitutional technical groups; timetable; negotiating, voting and/or general procedural rules; etc.). In principle, the *new financial regulation*, which will replace the 2002 Financial Regulation (see footnote 188), should include the operating rules of the Conciliation Committee (paragraph 50 of the resolution of 7 May 2009). A new interinstitutional agreement laying down the rules for collaboration during the annual budgetary procedure may also be envisaged (see Section 4.1. above and Section 5.1. below).

Certain decisions concern the *European Parliament only*. Parliament has already decided that its delegation to the Conciliation Committee should be headed by the Chair of the Committee on Budgets and that it should incorporate, in addition to the members of that committee, members of specialist parliamentary committees in cases where the negotiations concern a specific issue within their policy area (paragraph 40 of the resolution of 7 May 2009).

¹⁹³ Moreover, if, at the beginning of a financial year, the budget has not yet been definitively adopted, a sum equivalent to not more than one twelfth of the budget appropriations for the preceding financial year may be spent each month in respect of the *chapter in question, without exceeding one twelfth of the appropriations provided for in the same chapter of the draft budget* (Article 315 TFEU).

¹⁹⁴ In this context, the EP resolution of 7 May 2009 (paragraph 45) draws attention to the fact that the rule stipulating that the Commission may no longer amend its draft budget once the Conciliation Committee has been convened will preclude the use of the traditional autumn letter of amendment to take account of the updated forecasts for agricultural policy and their budgetary implications. The EP considers that, in such a case, the more appropriate procedure would be for the Commission to submit a draft *'specific amending budget'* (SAB) once all the agricultural data have been finally determined.

¹⁹⁵ Rule 68 of the EP's Rules of Procedure (<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+RULES-EP+20091201+0+DOC+PDF+VO//EN&language=EN>). See also *'Codecision and conciliation. A Guide to how the Parliament legislates under the Treaty of Lisbon'* (DV/795985EN.doc).

The EP's Rules of Procedure have already been amended to incorporate the new budgetary procedure (¹⁹⁶): it is stipulated that the members of the delegation shall be appointed by the political groups each year prior to Parliament's vote on the Council's position, preferably from amongst the members of the committee responsible for budgetary issues and other committees concerned. The delegation shall be led by the President of Parliament. However, the President may delegate this role to a vice-president with experience in budgetary matters or to the chair of the committee responsible for budgetary issues (COBU). However, the representation on the Conciliation Committee of those committees responsible for structural and cohesion policies with a higher budget share (e.g. AGRI or REGI) has yet to be decided.

As regards other more specific issues relating to the internal organisation (e.g. extent of the mandate given by plenary to the parliamentary representatives to the Conciliation Committee and their room for manoeuvre in negotiations; links between the secretariat of the Conciliation Committee and the secretariat of the Committee on Budgets (COBU); relationships between the Conciliation Committee, COBU, the other specialist committees and the political groups; the role of specialist committees with regard to the second vote asserting the amendments; etc.), account may be taken of experience gained at legislative level (¹⁹⁷).

4.4. Consolidation of the multiannual financial framework and financial discipline in the TFEU

Article 270 TEC is repealed and the provisions on budgetary discipline are inserted in the new Article 310(4) TFEU (ex Article 268 TEC), which also mentions the '*multiannual financial framework*'.

In fact, the Treaty takes over and updates most of the provisions on the current multiannual financial perspective within the *Interinstitutional Agreement on budgetary discipline and sound financial management* (¹⁹⁸). Having said that, the '*multiannual financial framework*' (MFF) and its rules are incorporated for the first time in primary legislation through Article 312 TFEU.

The provisions of the Treaty of Lisbon confirm the *duration* of the existing MFF (five years) (Article 312(1) TFEU), establish a *special legislative procedure* for the adoption of the *regulation*, which will determine the amounts of the annual ceilings on commitment appropriations and which will replace the current Interinstitutional Agreement (Article 312(2) TFEU), and, finally, formalise the contents of the Union's multiannual programming, based on *categories of expenditure* corresponding to the Union's major sectors of activity (Article 312(3) TFEU) (¹⁹⁹).

¹⁹⁶ Article 75d ('*Budgetary conciliation*') (<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+RULES-EP+20091201+0+DOC+PDF+VO//EN&language=EN>).

¹⁹⁷ In addition, Article 75d of the EP's Rules of Procedure provides that Rules 68 and 69 on legislative conciliation shall apply in the budgetary area.

¹⁹⁸ Op. cit. (footnote No 187): OJ C 139, 14.6.2006, p. 1 (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:139:0003:0003:EN:PDF>).

¹⁹⁹ Parliament's resolution T6-0387/2009 of 7 May 2009 (paragraph 50) called for the financial programming to be based on a '*programme*' or '*contract*' for the parliamentary term, to be decided by Parliament, the Council and the Commission at the beginning of the Commission's mandate (possibly in the form of an interinstitutional agreement) (<http://www.europarl.europa.eu/oeil/file.jsp?id=5609042¬iceType=null&language=en>).

In this context, following the entry into force of the Treaty, negotiations should begin on the adoption of the *new regulation* in order to update the rules on budgetary discipline and the financial perspective. This regulation will be adopted jointly by Parliament and the Council through the *special procedure* that has already been mentioned.

It should be noted that the Council will act *by unanimity* on this new regulation, following *approval* by the European Parliament, which will act by a majority of its members. The EP has regretted that the Council's decision will be taken unanimously, rendering the decision-making procedure very difficult and encouraging negotiations on the basis of the '*lowest common denominator*' (paragraph 8 of the resolution of 7 May 2009). It has therefore encouraged the Council to use, as soon as possible, the clause allowing it, through a decision adopted unanimously, to act by qualified majority when adopting the MFF (second subparagraph of Article 313(2) TFEU).

The EP has further regretted that it has only a right of approval and no genuine power of codecision on the new regulation (paragraph 9 of the resolution of 7 May 2009). However, it has emphasised the fact that the Lisbon Treaty stipulates that the institutions must take any measure necessary, throughout the procedure, to ensure that it is ultimately successful (Article 312(5) TFEU). It has therefore called on the Council to demonstrate its willingness to develop a *structured political dialogue* with Parliament in order to take full account of the latter's priorities.

Finally, it can be seen that the EP, in its resolutions of 25 March 2009⁽²⁰⁰⁾ and 7 May 2009⁽²⁰¹⁾ has proposed the prolongation and adjustment of the current financial perspective for the period 2007-2013 *until 2016* so that the next five-year MFF enters into force not later than 2017. In this way, the MFF would coincide with the mandates of the European Parliament and the Commission and would fit better within a comprehensive approach to interinstitutional strategic programming. In that regard, it should also be recognised that the prolongation of the current financial perspective would work very well in a context of economic and financial crisis, as is currently the case. By allowing a gradual return to the Stability Pact, accompanied by a vigorous recovery of the EU-27 economies, prolongation would undoubtedly facilitate the debate on the Union's financial future.

²⁰⁰ Resolution T6-0174/2009 of 25 March 2009 on the Mid-Term Review of the 2007-2013 Financial Framework (paragraphs H, 7(b) and 7(c)) (<http://www.europarl.europa.eu/oeil/file.jsp?id=5608352¬iceType=null&language=en>).

²⁰¹ Resolution T6-0374/2009 (paragraphs 11, 13 and 16), op. cit., and resolution T6-0387/2009 (paragraphs J, 50 and 51), op. cit. (<http://www.europarl.europa.eu/oeil/file.jsp?id=5609042¬iceType=null&language=en>).

5. EPILOGUE: ON THE GRADUAL IMPLEMENTATION OF THE TREATY OF LISBON

The Treaty of Lisbon marks a real turning point in the institutional development of the Union. Although the new consolidated Treaties cannot be likened to a Constitution in the formal sense, they can, however, be defined as a Constitution in the substantive sense, in accordance with the long-standing case-law of the Court of Justice (ECJ).

The Treaty of Lisbon fully recognises the European Parliament as one of the two branches of the legislative and budgetary authority of the Union (Article 14(1) TEU). However, there are still some gaps to be filled with regard to the exercise of the new powers and the new tools to be used. In some cases, the powers and/or procedures are laid down by the Treaties, but not particularly clearly, and they may therefore give rise to contradictory interpretations. In other cases, there is no explicit reference to them in the new primary legislation, but new parliamentary powers may implicitly stem from the colegislator role introduced by the Treaty of Lisbon.

The European Parliament, as the main beneficiary of the new Treaty, must therefore be strong with regard to the other institutions to ensure full recognition of its new prerogatives. In reality, we are right in the middle of a transition phase, which will be decisive for the future.

a) Immediate regulatory challenges

In the next few months, the Members of the European Parliament must decide on several *regulations proposed* by the Commission in order to supplement the legal framework deriving from the Treaty: on the citizens' initiative, on the new comitology rules and, especially, on the new '*financial constitution*' of the Union ⁽²⁰²⁾. Six *legislative 'packages'* are awaited in this financial area:

- a) The *first package*, to be presented in February 2010, will cover: *transitional amendments to the Financial Regulation* in order to adapt it to the Treaty of Lisbon (suppression of CE and NCE; new rules on transfers), to be decided under the codecision procedure; the *proposal for a regulation on the multiannual financial framework*, to be decided by the Council by unanimity, with the EP's approval; and the Commission proposals on the *new interinstitutional agreement* on budgetary discipline and sound financial management, to be negotiated by Parliament, the Council and the Commission.
- b) The *second package*, also planned for February 2010, will cover: the proposal on the *European External Action Service*, under the consultation procedure; the *adaptation of the financial rules* in force, to be decided under the codecision procedure; the *new rules on the European Civil Service*, under the codecision procedure; and a proposal on *amendments to the Budget*.
- c) The *third package*, to be presented at the end of April 2010, will include the *Draft Budget 2011* and the proposal on the *assessment of the functioning of the Interinstitutional Agreement 2007-2013* ⁽²⁰³⁾.

²⁰² Expression used in EP resolution T7-0067/2009 of 12 November 2009, paragraph C.

²⁰³ Based on Declaration No 1 and Article 7 of the Interinstitutional Agreement of 17 May 2006.

- d) The *fourth package*, planned for May 2010, will include the proposal on the *triennial review of the financial rules*.
- e) The *fifth package*, to be presented in July 2010, will cover the *review of the Budget* ⁽²⁰⁴⁾.
- f) Lastly, the *sixth package*, to be presented in 2011, will include the proposal on the *new multiannual financial perspective*.

In this context, account must be taken of the fact that these financial proposals will actually form a single *political 'package'* and that they must be coherently assessed by Parliament ⁽²⁰⁵⁾. It must also be checked whether the new instruments proposed include *rules on the collaboration* of the institutions during the annual budgetary procedure, as called for by the European Parliament ⁽²⁰⁶⁾ or whether they may need a *specific interinstitutional agreement* to be added.

b) Political and interinstitutional challenges

Away from the financial area, several other *interinstitutional agreements* will be required in the current transition phase. During the February 2010 part-session, Parliament adopted a resolution on a *revised Framework Agreement between the European Parliament and the Commission* for the next legislative term ⁽²⁰⁷⁾. This puts the European Parliament on an equal footing with the Council, a principle that includes access to meetings and to the preparatory documentation for a legislative act ⁽²⁰⁸⁾. It clarifies the procedural aspects of Parliament's legislative initiatives, provided for in Article 225 TFEU, and commits the Commission to negotiations on the Interinstitutional Agreement on '*Better Law-Making*'. The resolution also includes several measures to reinforce the Commission's responsibility. Finally, it confirms the role of the European Parliament in international negotiations. The aim of the resolution is to act as a launch pad for a special partnership process between Parliament and the Commission.

Aside from this Framework Agreement on cooperation with the Commission, Parliament has raised the need for a *political agreement* with the European Council on relations between the two institutions ⁽²⁰⁹⁾ and for *new interinstitutional agreements* on: a) guidelines for the *organisation of Intergovernmental Conferences* (IGCs), notably in relation to the participation of the European Parliament and issues concerning transparency ⁽²¹⁰⁾; b) working relations between the EP and the Council concerning the *CFSP, including the sharing of confidential information*; and c) institutional involvement in each *stage of the negotiations of an international agreement* ⁽²¹¹⁾. There should perhaps also be a legislative cooperation agreement clarifying decision-making procedures in the areas of *agriculture and fisheries* (see Sections 3.2. and 3.3. above).

²⁰⁴ Based on Declaration No 3 of the Interinstitutional Agreement of 17 May 2006.

²⁰⁵ Paragraph 15 of resolution T7-0067/2009, op. cit.

²⁰⁶ Resolution T7-0067/2009, paragraph C, op. cit.

²⁰⁷ <http://www.europarl.europa.eu/oeil/file.jsp?id=5838672>.

²⁰⁸ Request already included in EP resolution T6-0387/2009 of 7 May 2009, paragraph 8 (<http://www.europarl.europa.eu/oeil/file.jsp?id=5609042¬iceType=null&language=en>).

²⁰⁹ Paragraph 16 of EP resolution T6-0387/2009 of 7 May 2009, op. cit.

²¹⁰ Paragraph 10 of EP resolution T6-0387/2009 of 7 May 2009, op. cit.

²¹¹ EP resolution T6-0373/2009 of 7 May 2009, paragraph 77 et seq.

c) Parliamentary initiative versus institutional inertia

It should be noted that the deep-rooted inertia within the institutions will disappear as the new Treaty is implemented. This is particularly the case in those political areas in which the consultation procedure has been replaced by the ordinary legislative procedure (CAP and CFP) and in which the legislative powers of Parliament have therefore been extended. In these cases, the Council has a clear tendency to legislate on its own. Parliament is also accustomed to submitting symbolic amendments to Commission proposals, but this practice will no longer make sense in the framework of the new procedures (legislative or budgetary).

Certain parliamentary practices must therefore change and the quality of legislative work must be improved. However, at the same time, imagination and initiative to extend the scope of parliamentary action must be demonstrated. We have a recent example of the power of parliamentary initiative faced with the inertia of the institutions in the field of fisheries. Based on the European Parliament's right to be immediately and fully informed at all stages of the negotiation procedure for an international agreement (Article 218(10) TFEU) (see Section 3.8.1. above), the Council recognised, in February 2010, the right of the chair of the Committee on Fisheries to participate in the work of the Joint Committee on the EU-Moroccan Fisheries Partnership Agreement (Rabat, 2 and 3 February 2010). This marks a real achievement in relation to the previous situation, in which the EP had only the right to be informed of any decision taken by the Council (third subparagraph of ex Article 310(2) TEC).

d) Organisational challenges

Lastly, the European Parliament has already adapted its structures, procedures and working methods to the new powers and requirements for interinstitutional cooperation resulting from the Treaty of Lisbon. The conclusions of the working group created in this respect have already led to a reform of the Rules of Procedure of the European Parliament ⁽²¹²⁾.

However, as the Treaty of Lisbon unfurls its institutional, legislative and financial cloak, Parliament must improve the legislative, support and research capacity of its parliamentary services. Reinforcing Parliament's role as colegislator will require an improvement in legislative quality and, indirectly, in the specialisation and/or expertise of services. Greater integration of the units involved in parliamentary work may also be envisaged. The redistribution of responsibilities among the parliamentary committees could even be considered, in line with the extensive policy reforms planned for beyond 2013 (notably the CAP, regional policy and the CFP, within the framework of the structural and cohesion policies).

²¹² Resolution of 6 May 2009 on the General review of the Rules of Procedure (<http://www.europarl.europa.eu/oeil/file.jsp?id=5491432>); and resolution of 25 November 2009 on the Adaptation of the Rules of Procedure to the Treaty of Lisbon (<http://www.europarl.europa.eu/oeil/file.jsp?id=5786912¬iceType=null&language=en>).

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

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