

DECISION N° 2007-560 DC – December 20th 2007

Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community

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Treaty amending the Treaty on European Union and the Treaty establishing the European Community.

On December 13th 2007 the Constitutional Council received a referral from the President of the Republic, pursuant to Article 54 of the Constitution, as to whether authorisation to ratify the Treaty on the European Union and the Treaty establishing the European Community, signed in Lisbon on the same day, requires prior revision of the Constitution;

THE CONSTITUTIONAL COUNCIL

Having regard to the Constitution of October 4th 1958 and in particular to the first paragraph of Article 88-1 thereof;

Having regard to Ordinance n° 58-1067 of November 7th 1958 as amended (Institutional Act on the Constitutional Council);

Having regard to the Treaty establishing the European Community;

Having regard to the Treaty on European Union;

Having regard to the other undertakings entered into by France with respect to the European Communities and the European Union;

Having regard to the decision of the Constitutional Council n° 2004-505 DC of November 19th 2004 pertaining to the "Treaty establishing a Constitution for Europe" ;

Having heard the Rapporteur

1. The Constitutional Council has been asked to rule as to whether the Treaty amending the Treaty on European Union and the Treaty establishing the European Community signed on December 13th 2007 in Lisbon by the plenipotentiaries of the twenty seven Member States of the European Union contains a clause running counter to the Constitution;

2. Article 1 of this international undertaking amends the Treaty on European Union; under 2) of Article 1 the Union replaces and succeeds the European Community; 8) of Article 1 confers on the Charter of Fundamental Rights of the European Union of December 7th 2000, as adapted on December 12th 2007, the same legal standing as the Treaties; Article 2 amends the Treaty establishing the European Community the title of which becomes "Treaty on the Functioning of the European Union" ; Article 3 provides that this Treaty is concluded for an unlimited period; Article 4 pertains to two Protocols annexed thereto; Article 5 pertains to the renumbering of articles, sections, chapters and parts of the Treaty on European Union and the Treaty establishing the European Community; Article 6 provides that the Treaty shall be ratified by the States in accordance with their constitutional requirements and shall enter into force on January 1st 2009, providing that all instruments of ratification have been deposited or, failing that, on the first day of the month following the deposit of the instrument of ratification by the last signatory State to take this step; Article 7, which names the new Treaty, "Treaty of Lisbon" lists the languages in which the text of said Treaty shall be authentic. Lastly, this Treaty annexes eleven Protocols to the Treaty on European Union, the Treaty on the Functioning of the European Union or the Treaty establishing the European Atomic Energy Community;

WITH RESPECT TO APPLICABLE NORMS OF REFERENCE:

3. In the Preamble to the Constitution of 1958 the French people solemnly proclaimed "its attachment to the Rights of Man and the principles of National Sovereignty as defined by the Declaration of 1789, confirmed and complemented by the Preamble to the Constitution of 1946";

4. Article 3 of the Declaration of the Rights of Man and the Citizen proclaims that " the principle of any Sovereignty lies primarily in the Nation". Article 3 of the Constitution of 1958 provides in the first paragraph that "National Sovereignty shall vest in the people, who shall exercise it through their representatives and by means of referendum";

5. The 1946 Preamble to the Constitution proclaims in paragraph 14 that the French Republic shall "respect the rules of public international law" and in paragraph 15 that "subject to reciprocity, France shall consent to the limitations of sovereignty necessary for the organisation and preservation of peace";

6. In Article 53, the Constitution of 1958 formally establishes, as does Article 27 of the Constitution of 1946, the existence of "Treaties or Agreements pertaining to international organisation"; such Treaties or Agreements may only be ratified or approved by the President pursuant to a statute;

7. The conditions in which the French Republic participates in the European Communities and the European Union are specified by the provisions of Title XV of the Constitution currently in force, with the exception of those of paragraph 2 of Article 88-1 pertaining to the Treaty establishing a Constitution for Europe which has not been ratified. Under paragraph 1 of Article 88-1 of the Constitution "The Republic shall participate in the European Communities and in the European Union constituted by States which have freely chosen, by virtue of the treaties that established them, to exercise some of their powers in common". The constituent power thus recognised the existence of a Community legal order integrated into domestic law and distinct from international law;

8. While confirming the place of the Constitution at the summit of the domestic legal order, these constitutional provisions enable France to participate in the creation and development of a permanent European organisation vested with a separate legal personality and decision-taking powers by reason of the transfer of powers agreed to by the Member States;

9. When however undertakings entered into for this purpose contain a clause running counter to the Constitution, call into question constitutionally guaranteed rights and freedoms or adversely affect the fundamental conditions of the exercising of national sovereignty, authorisation to ratify such measures requires prior revision of the Constitution;

10. It is with regard to the foregoing principles that it is incumbent upon the Constitutional Council to examine the Treaty of Lisbon together with the Protocols and Annexes thereof. Those provisions of the Treaty which merely reiterate undertakings already entered into by France are however excluded from any such examination as to their conformity with the Constitution;

WITH RESPECT TO THE FUNDAMENTAL RIGHTS OF THE UNION:

11. Firstly, 1 of Article 6 of the Treaty on European Union resulting from 8) of Article 1 of the Treaty of Lisbon provides that "The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of December 7th 2000, as adapted in Strasbourg on December 12th 2007, which shall have the same legal value as the Treaties. The provisions of the Charter shall not in any way extend the competences of the Union as defined in the Treaties. The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions of Title VII of the Charter governing the interpretation and application thereof and with due regard for the explanations referred to in the Charter, which set out the sources of said provisions";

12. Firstly, except for the change in numbering, the provisions of the Charter, recognised as having the same legal standing as the Treaties, are identical to those examined by the Constitutional Council in its decision of November 19th 2004 referred to hereinabove. On the same grounds as those set forth in said decision, the Charter does not require any revision of the Constitution, either as regards the contents of the Articles thereof or the effects of said Charter on the exercising of National Sovereignty;

13. Secondly, under Indent 2 of Article 6 of the Treaty on European Union, "The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms ..." However indent 8 of Article 218 on the Functioning of the European Union, deriving from 173) of Article 2 of the Treaty of Lisbon, provides that the decision pertaining to the adhesion of the Union to said Convention shall come into effect after approval by Member States in accordance with their respective constitutional requirements. The latter provision thus requires, where France is concerned, the statutory authorisation provided for by Article 53 of the Constitution;

WITH RESPECT TO THE POWERS AND FUNCTIONING OF THE UNION:

14. Article 88-2 of the Constitution, as worded following the revisions of the Constitution implemented on June 25th 1992, January 25th 1999 and March 25th 2003, provides : " Subject to reciprocity and in accordance with the terms of the Treaty on European Union signed on February 7th 1992, France agrees to the transfer of powers necessary for the establishment of the European Economic and Monetary Union . Subject to the same reservation and in accordance with the terms of the Treaty establishing the European Community, as amended by the Treaty signed on October 2nd 1997, the transfer of powers necessary for the determination of rules concerning freedom of movement of persons and related areas may be agreed upon. Statutes shall determine the rules relating to the European arrest warrant pursuant to instruments adopted under the Treaty on European Union.";

15. The clauses of the Treaty which transfer to the European Union powers concerning the fundamental conditions of the exercising of national sovereignty in areas or in a manner other than those provided for by the Treaties referred to in Article 88-2 require a revision of the Constitution;

16. The "principle of subsidiarity" as set forth by paragraph 3 of Article 5 of the Treaty on European Union, as worded pursuant to 6) of Article 1 of the Treaty of Lisbon implies that, in areas not falling within the exclusive jurisdiction of the Union, the latter shall act only "if, and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member

States, either at central level or at regional and local level, but can rather, by reason of the scale of the effects of the proposed action, be better achieved at Union level". However the implementation of this principle may not suffice to preclude any transfers of powers authorised by the Treaties from assuming a dimension or being implemented in a manner such as to adversely affect the fundamental conditions of the exercising of national sovereignty;

17. In accordance with Article 289 of the Treaty on the Functioning of the European Union deriving from 236) of Article 2 of the Treaty of Lisbon, legislative acts shall be adopted, unless otherwise provided for, on a recommendation by the Commission and the Council of Ministers, ruling by a qualified majority as provided for by articles 16 of the Treaty on European Union and 238 of the Treaty on the Functioning of the European Union as worded in accordance with the Treaty of Lisbon, and by the European Parliament, according to the "ordinary legislative procedure" provided for in Article 294 of the Treaty on the Functioning of the European Union as derived from the Treaty of Lisbon. Unless otherwise provided for, all matters coming under the jurisdiction of the Union, in particular those pertaining to "the area of freedom security and justice" as set forth in Title V of part three of the Treaty on the Functioning of the European Union" will henceforth be subject to this procedure;

With respect to the transfer of powers in new areas:

18. The provisions of the Treaty of Lisbon which transfer to the European Union under the 'ordinary legislative procedure' powers inherent in the exercising of national sovereignty require a revision of the Constitution. This applies to Article 75 of the Treaty on the Functioning of the European Union as regards the fight against terrorism and related activities, to Article 77 as regards border controls, to d) of paragraph 2 of Article 79 as regards the fight against trafficking in human beings, to Article 81, as regards judicial cooperation on civil matters and to Articles 82 and 83 thereof as regards judicial cooperation in criminal matters, and as regards the powers mentioned in said Articles which do not come under the provisions of Articles 62 and 65 of the Treaty establishing the European Community nor Article 31 and 34 of the Treaty on European Union.

19. Article 86 of the Treaty on the Functioning of the European Union as deriving from the Treaty of Lisbon, which firstly provides that the Council may unanimously establish the office of European Public Prosecutor duly empowered to prosecute offenders committing acts detrimental to the financial interests of the Union and to institute criminal proceedings in connection with such offences before French courts and secondly sets out the means whereby, failing unanimous agreement by the Member States, such an office may nevertheless be brought into being, also requires a revision of the Constitution.

With respect to the new manners of exercising powers already transferred, applicable as from the coming into force of the Treaty.

20. Any provision of the Treaty which, in a matter inherent to the exercising of national sovereignty already coming under the jurisdiction of the Union or the Community, modifies rules applicable to decision taking, either by substituting a qualified majority for a unanimous decision of the Council, thus depriving France of any power to oppose a decision, or by conferring decision-taking power on the European Parliament, which is not an emanation of national sovereignty, or by depriving France of any power of acting on its own initiative requires a revision of the Constitution.

21. 2 of Article 31 of the Treaty on European Union, as deriving from the Treaty of Lisbon, which reiterates Article III-300 of the Treaty establishing a Constitution for Europe, and Articles 76, 82, 83, 85, 87 to 89, 133 and 329 of the Treaty on the Functioning of the European Union, which reiterate respectively Articles III-264, III-270, III-271, III-273n III-275 to III-277n III-191 and III-419 of the Treaty establishing a Constitution for Europe require a revision of the Constitution for the same reasons as those set forth in the decision of November 19th 2004 referred to hereinabove.

22. Indent v) of a) of 6 of Article 218 of the Treaty on the Functioning of the European Union which extends the field of agreements which the Council may only approve after obtaining the consent of the European Parliament also requires a revision of the Constitution:

With respect to the adoption of qualified majority voting under a subsequent European decision:

23. Any provision of the Treaty which, in a matter inherent to the exercising of national sovereignty, makes it possible, even when the measure involved is dependent upon a unanimous decision of the European Council or Council of Ministers, to substitute in the Council of Ministers a majority decision for the rule that a decision be taken unanimously requires a revision of the Constitution. Such changes will, when the time comes, require no national ratification or approval such as to allow for a review of the constitutional nature thereof on the basis of Article 54 or 61, paragraph 2, of the Constitution.

24. 3 of Article 31 of the Treaty on European Union, as amended by the Treaty of Lisbon, which reiterates 3 of Article III-300 of the Treaty establishing a Constitution for Europe, together with d) of 2 of Article 82 and indent 3 of 1 of Article 83 of the Treaty on the Functioning of the European Union which respectively reiterate the d) of 2 of Article III-270 and indent 3 of 1 of Article III-

271 of the Treaty establishing a Constitution for Europe, require a revision of the Constitution for the same reasons as those set forth in the decision of November 19th 2004 referred to hereinabove;

25. The provisions of 3 of Article 81 of the Treaty on the Functioning of the European Union, as derived from the Treaty of Lisbon, which enable the Council, by a unanimous decision and barring opposition by a National Parliament, to submit certain aspects of family law which have cross-border ramifications to ordinary legislative procedure also require a revision of the Constitution;

With respect to the simplified revision procedures provided for by 6 and 7 of Article 48 of the Treaty on European Union as derived from 56) of Article 1 of the Treaty of Lisbon:

26. Firstly, 6 of Article 48 of the Treaty on European Union, which introduces a simplified revision procedure for internal policies and actions of the Union, reiterates the provisions of Article IV-445 of the Treaty establishing a Constitution for Europe. As stated in the decision of November 19th 2004 referred to above, the reference to the constitutional rules of the Members States refers, in the case of France, to the Parliamentary authorisation provided for in Article 53 of the Constitution;

27. Secondly, 7 of Article 48 of the Treaty on European Union which introduces a simplified revision procedure for treaties, reiterates the provisions of Article IV-444 of the Treaty establishing a Constitution for Europe. This provision requires a revision of the Constitution for the same reasons as those set forth in the decision of November 14th 2004 referred to above;

WITH RESPECT TO THE NEW POWERS VESTED IN NATIONAL PARLIAMENTS IN THE FRAMEWORK OF THE UNION:

28. The Treaty submitted to the Constitutional Council increases the participation of national Parliaments in the activities of the European Union. 12) of Article 1 of said Treaty sets out in Article 12 of the Treaty on European Union the list of prerogatives recognised as vested in such Parliaments for this purpose. It is necessary to decide whether such prerogatives may be exercised within the framework of the current provisions of the Constitution;

29. 7 of Article 48 of the Treaty on European Union, as worded pursuant to 56) of Article 1 of the Treaty of Lisbon, recognises that the French Parliament is entitled to oppose the implementation of a procedure of simplified revision of the Treaties, and reiterates the provisions of Article IV-444 of the Treaty establishing a Constitution for Europe. It requires a revision of the Constitution for the same reasons as those set forth in the decision of November 19th 2004 referred to

above. The same applies to Articles 6, 7 paragraphs 1 and 2, and 8 of the Protocol on the application of the principles of subsidiarity and proportionality to which the Treaty of Lisbon refers and which reiterate the provisions of Article 6 to 8 of the Protocol n°2 of the Treaty establishing a Constitution for Europe, while extending the timeframe within which the French Parliament may, if need be under procedures proper to each of its Houses, formulate a reasoned opinion;

30. Furthermore, 3 of Article 81 of the Treaty on the Functioning of the European Union, as worded pursuant to 66) of Article 2 of the Treaty of Lisbon, recognises the right of a national Parliament to make its opposition known within six months to a decision subjecting certain aspects of family law with cross-border implications not to a special legislative procedure requiring the unanimous agreement of the Council after consultation with Parliament but to the ordinary legislative procedure;

31. 3 of Article 7 of the abovementioned Protocol on the application of the principles of subsidiarity and proportionality confers on national Parliaments, within the framework of ordinary legislative procedure, new means, in comparison with the Treaty establishing a Constitution for Europe, of ensuring compliance with the principle of subsidiarity. Under this provision, when the Commission decides to maintain a proposal which has been criticised by a majority of votes allocated to national Parliaments or, if need be, to each House thereof, each national Parliament having two votes and each House of a bicameral Parliamentary system having one vote, on the grounds of non-compliance with the principle of subsidiarity, the reasoned opinion of the Commission and those of the national Parliaments shall be submitted to the Council and the European Parliament. If, by a majority of 55% the members of the Council or a majority of votes cast in the European Parliament, the Union legislator is of the opinion that the proposal of the Commission is not compatible with the principle of subsidiarity, such proposal shall not be given further consideration;

32. The recognised right of the French Parliament to oppose the subjecting to ordinary legislative procedure of certain aspects of family law requires a revision of the Constitution in order to allow for the excising of this prerogative. The same holds good for the new means conferred upon Parliament, if need be according to procedures specific to each of its two Houses, to ensure compliance with the principle of subsidiarity in the framework of ordinary legislative procedure.

WITH RESPECT TO THE OTHER PROVISIONS OF THE TREATY:

33. No other provision of the Treaty referred for review by the Constitutional Council under Article 54 of the Constitution requires any revision;

WITH RESPECT TO THE TREATY AS A WHOLE:

34. On the grounds set forth hereinabove, authorisation to ratify the Treaty amending the Treaty on European Union and the Treaty establishing the European Community requires a revision of the Constitution.

HELD

Article 1 : Authorisation to ratify the Treaty amending the Treaty on European Union and the Treaty establishing the European Community requires a prior revision of the Constitution.

Article 2.- The President of the French Republic shall be notified of this decision, which shall be published in the *Journal Officiel* of the French Republic

Deliberated by the Constitutional Council sitting on December 20th 2007 and composed of Mr Jean-Louis DEBRE, President, Messrs Guy CANIVET, Jacques CHIRAC, Renaud DENOIX de SAINT MARC and Olivier DUTHEILLET de LAMOTHE, Mrs Jacqueline de GUILLENCHMIDT, Messrs Pierre JOXE and Jean-Louis PEZANT, Mrs Dominique SCHNAPPER and Mr Pierre STEINMETZ