

## European Policy Brief

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# The Treaty of Lisbon and Citizenship

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## Introduction

The Treaty of Lisbon<sup>1</sup> introduces rather few substantive and almost no substantial changes to the existing EU and EC Treaty provisions, so far as these concern the legal status of the citizen of the Union, perhaps reflecting the fact that no Working Group of the Convention directly addressed the issue of citizenship.<sup>2</sup> So far as there are only limited changes, it is clear that the Treaty of Lisbon is the natural heir to the Constitutional Treaty. Yet much of the tenor of the Laeken Declaration of 2000 strongly invoked the 'spirit' of citizenship. It referred on several occasions to the performance of the European Union as a polity *vis-à-vis* its citizens and to its putative 'closeness' to the citizen. This was reflected in a number of diverse ways in the text of the Constitutional Treaty, although many commentators expressed themselves disappointed by the outcomes of the Convention and the subsequent IGC. It is therefore important to analyse the Treaty of Lisbon in terms of the broader issue of 'citizenisation', understood here as the project of citizen empowerment in its most general sense, rather than by reference to the formal texts on citizenship of the Union alone.

Three dimensions will be briefly explored:

1. There is one notable absentee from the roll call of invocations of the citizen to be found in the Constitutional Treaty ('CT'). This is the reference to the 'will of citizens' in Article I-1 CT.
2. Some rather limited changes have been introduced to Articles 17-22 of the EC Treaty; they have been slightly reworked, in part amplified, and substantially restructured – the latter as a consequence of the new divide between the Treaty on European Union ('TEU') and the Treaty on the Functioning of the European Union ('TFEU').
3. There are important developments in relation to the status of the European Parliament as a representative body, and in relation to democracy more generally.

This discussion has to be set against the backdrop of the Cinderella status of Union citizenship. A Eurobarometer survey published in February 2008 (Flash Eurobarometer 213) highlighted (continuing) widespread ignorance about the details of citizens' rights under EU law, especially in the new Member States, even though a substantial 78% of those questioned across the Member States did claim some familiarity with the term. In practice, they were often unable to identify correctly which rights attach specifically to Union citizenship or did not know that they automatically were Union citizenship

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### EDITOR'S NOTE

This is one in a series of regular *European Policy Briefs* produced by the Federal Trust. The aim of the series is to describe and analyse major controversies in the current British debate about the European Union.

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by virtue of their national citizenship. However, an earlier Eurobarometer survey published in May 2006 on topic of the Future of Europe,<sup>3</sup> which contained some questions on citizenship, revealed an interesting trend. When respondents were asked what would be the best ways to strengthen European citizenship, rather large numbers of them spontaneously replied that they did not wish to be a European citizen. The figure stood at 8% across the EU as a whole, but was an impressive 25% in the United Kingdom. This suggests a modest approach remains necessary when discussing such matters in the UK.

## The 'will' of citizens

Article I-1 CT, which 'established' the refounded European Union under the Constitutional Treaty, purported in that context to reflect 'the will of the citizens and the States of Europe to build a common future'. One of the most controversial aspects of the transition from the Constitutional Treaty to the Treaty of Lisbon has been the so-called abandonment of the constitutional idea, formalised in the detailed mandate for reform rather than refoundation, agreed at the June 2007 European Council.<sup>4</sup> Unsurprisingly, the Madisonian ideal of constitutive self-government expressed in Article I-1 CT has been excised from the more modest provisions of the Treaty of Lisbon as part of that 'abandonment'. The Treaty of Lisbon, not least in the manner in which it was negotiated and the manner in which it seems likely to be ratified by the Member States, with just the one referendum held in Ireland, authoritatively reasserts the Member States as the sole masters of the Treaties. Further references to citizenship throughout the treaties (and indeed to citizens as participants in the Union's model of democracy) should be read in that light.

## Union citizenship

The limited changes to the legal and constitutional nature and scope of Union citizenship, means that it is possible to address the same criticisms

towards post-Lisbon citizenship as applied to post-Maastricht and post-Amsterdam citizenship. For the most part, the changes stem from the structural changes to the Treaty framework. These concentrated on remodelling the Treaty on European Union (TEU), to ensure that it would fulfil many of the same functions and comprise most of the same core elements as Part One of the Constitutional Treaty.

Hitherto there have been no references at all to 'citizenship' in the pre-Lisbon TEU, although there are a number of references to 'citizens' in general, although the concept of 'citizen' used is not defined. Instead, citizenship of the Union was defined and developed solely in the EC Treaty. In contrast, Part One of the Constitutional Treaty did refer to citizenship (Article I-10 CT). The experience of the Constitutional Treaty suggested that citizenship should be introduced into the post-Lisbon TEU, with further amplification reserved for the TFEU.

In fact, in the July 2007 version of the Treaty,<sup>5</sup> there was no reference at all to citizenship of the Union, and merely a reference to the *equality* of citizens. This reference may have been inspired by Article 20 of the Charter of Fundamental Rights,<sup>6</sup> which refers to the liberal principle of equality before the law.

In its final version, Article 9 TEU provides:

'In all its activities, the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies. Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to national citizenship and shall not replace it.'

It is understood that the final two sentences, drawn from the text of Article 20(1) TFEU, were included in the Treaty of Lisbon at the behest of the European Parliament representatives in the IGC.<sup>7</sup> The parliamentarians had adopted citizenship of the Union as a political priority because of its symbolic importance.<sup>8</sup> It is obviously clumsy to have such textual repetition between

the TEU and the TFEU, but it was perhaps unavoidable.

The most significant difference between the EC Treaty citizenship provisions and those of the post-Lisbon TFEU (Articles 20-24 TFEU) concerns the wording of the relationship between national citizenship and citizenship of the EU. In the TFEU this is articulated as *additionality*; previously, citizenship of the Union was expressed as being *complementary* to national citizenship in Article 17 EC. In both texts, it is made clear that EU citizenship does not *replace* national citizenship. Expressing Union citizenship as *additional* to national citizenship was insisted upon by the Member States, in order to reinforce the point that EU citizenship can only *add* rights, and cannot *detract* from national citizenship. Legally speaking, additionality, reinforcing the duality between national and EU citizenship seems to be a more accurate delineation of the two statuses, and avoids any unfortunate implications that there is somehow a duty on the part of one status to bend to the will of the other, in order to achieve the sought after 'complementarity'. Conceptually speaking, it makes the point that the development of different layers of citizenship entitlements is not a zero sum game, in which rights given at one level must necessarily detract from those given at another level. Overall, the rewording seems unlikely to make a substantial difference to the trajectory of EU citizenship. Thus far, the cases in which the Court of Justice has placed weight upon the status of EU citizenship, from *Martínez Sala* onwards,<sup>9</sup> have in no way detracted from the status of national citizenship, except in terms of undermining its exclusivity by, for example, extending the territorial boundaries of the welfare state.

Other changes involve amplification of the text. A legal basis for adopting the measures necessary to give effect to citizens' initiatives as provided for under Article 11 TEU has been added to Article 24 TFEU (which also addresses the right to petition the European Parliament, to apply to the Ombudsman and to write to any of the institutions and agencies of the Union in any of the official

languages of the Union and to receive a reply in that language). A new paragraph has been added to Article 23 TFEU giving a legal basis, using a special legislative procedure involving only consultation of the European Parliament, for the Council to establish the coordination and cooperation measures necessary to facilitate diplomatic and consular protection, as per that provision. In addition, in fleshing out the former Article 20 TEU (currently Article 35 TEU), the drafters of the Treaty have sought to impose additional duties on the diplomatic and consular representations of the Union and the Member States in third countries give effect to protection for Union citizens on the basis of this status, rather than nationality:

'[The diplomatic and consular missions of the Member States and the Union delegations in third countries] shall contribute to the implementation of the right of citizens of the Union to protection in the territory of third countries...'

Finally, pursuant to amendments made to the Freedom, Security and Justice provisions of the TFEU which have seen the introduction of a specific legal basis in relation to the adoption of measures on passports, identity cards and residence permits (Article 77(3) TFEU), the exclusion of such matters from what will be Article 21 TFEU (formerly Article 18 EC) is no longer necessary. Moreover, the reference to social security and social protection has been switched around. No longer are such matters to be covered by measures adopted under Article 21 TFEU. They can be addressed in measures adopted under this provision, provided the Treaty has not otherwise provided the necessary powers, but only where the Council acts unanimously after consulting the European Parliament (Article 21(3) TFEU), under a special legislative procedure.

It would have been interesting if the treaty reform process had involved the incorporation into the text of the treaties interpretations given by the Court of Justice of key phrases. For example, the formula contained in the TEU on the protection of fundamental rights (Article 6(3) TEU; Article 6(1) pre-

Lisbon TEU), which refers to fundamental rights as general principles of Union law, is drawn directly from the Court's case law in the field of fundamental rights. Closa regrets that the drafters of the Treaties have not applied this technique in the citizenship sphere. Notably they have not picked up on the Court of Justice's favourite phrase regarding the nature of citizenship of the Union.<sup>10</sup> Since the case of *Grzelczyk* in 2001,<sup>11</sup> the Court has repeatedly asserted that citizenship of the Union is 'destined to be the fundamental status of nationals of the Member States'. The addition of this sonorous phrase would indeed have added to the gravitas and weight of Union citizenship.

## The democratic life of the Union

Where the Constitutional Treaty grandiosely referred to 'the democratic life of the Union', the TFEU post-Lisbon contains merely a title on 'democratic principles', although the basic provisions are the same. This title fleshes out somewhat the notion of the citizen as a political actor within the EU, without fully embracing a concept of democratic citizenship. Speaking to the provisions of the Constitutional Treaty on democratic engagement, but with clear resonance for the Lisbon Treaty provisions also, Closa warns that:

'The conception of citizenship that emanates from these provisions privileges a vision of citizens as bearers of rights that provide them protection from public authorities, grant them some reduced scope of participation in the policy process but, by and large, it does not establish a solid connection between the citizens and the exercise of their political rights and the "democratic life of the Union".<sup>12</sup>

The provisions on democracy, which could be criticised for lacking a central focus, address consecutively concepts of representative, direct and participatory democracy, without giving the impression of how these might be linked in a coherent way. The provision with the greatest capacity to capture

headlines is the one on citizens' initiatives, where an important link to citizenship of the Union is made. Article 24 TFEU contains a legislative power, permitting the European Parliament and Council, acting by co-decision, to adopt the provisions necessary to implement the new 'citizens' initiatives' which allow citizen power, especially via the internet, to be channelled into seeking specific legislative initiatives to be put forward by the Commission. Citizens' initiatives were originally included in the Constitutional Treaty (allegedly at the behest of Giscard d'Estaing himself), and they were retained in the new TEU provisions on 'democratic principles' (Article 11(4) TEU). Under the TFEU, the European Parliament and the Council must together define what constitutes a 'significant number of Member States', for the purposes of determining the minimum standard of cross-EU representativity for any citizens' initiative which is to be taken up in legislative format. These initiatives may develop into interesting cases of *transnational* popular democratic pressure, without as such detracting from the powers of national parliaments.

Referring to the Constitutional Treaty provisions on this matter, Piris makes clear his view that this is an important initiative in favour of the role of the Union's citizens within its functioning. Doubtless it is not his intention to be negative when he states that 'this provision is very innovative and symbolic'.<sup>13</sup> That his view is positive can be discerned from the fact that he does not think that one million signatures is a very high threshold to be reached, and that while 'the Commission will not be legally obliged to follow up on any such initiative, the political weight of it will, in practice, force the Commission to engage in serious work following the result of an initiative.'

It is also interesting to note that the provisions on the European Parliament in the TEU now refer to 'citizens', where previously the analogous provisions in the EC Treaty referred to the 'people'. Article 14(2) TEU will provide that: 'The European Parliament shall be composed of representatives of the Union's citizens...'; Article 10(2) TEU states that

'citizens are directly represented at the Union level in the European Parliament'; and Article 10(3) TEU states that 'Every citizen shall have the right to participate in the democratic life of the Union.' The text of Article I-19(2) CT providing for the European Parliament to be elected 'by direct universal suffrage of European citizens in free and secret ballot' is not in the post-Lisbon TEU, but the reference to universal suffrage in connection with the European Parliament does appear in Article 39 of the Charter of Fundamental Rights. The Charter is, of course, recognised under Article 6(1) TEU post-Lisbon as a legal source of equal standing to the Treaties.

In any event, the status of the principle of universal suffrage under EU law (whether by virtue of the Charter, or by virtue of Article 3 of Protocol No. 1 of the ECHR) had already been clarified even before the Treaty of Lisbon, as a result of the judgments of the Court of Justice in the *Gibraltar* and *Aruba* cases.<sup>14</sup> It is implicit in the Court's important judgments in these politically sensitive cases about the scope of voting rights in European Parliament elections that European citizens have a right, as a matter of democratic principle, to vote for 'their' parliament. This emerges especially clearly from the *Aruba* case. The provisions of both the current Article 19 EC and the prospective Article 22 TFEU only provide explicitly for an *equal treatment* right, whereby nationals of the Member States resident in *other* Member States have the right to vote in European Parliament under the *same conditions* as nationals. There has, hitherto, never been a text in the EU Treaties which states, in terms, that 'the citizens of the Union shall elect the members of the European Parliament.' However, an important conclusion can be drawn, in particular from the *Aruba* case, that citizens of Union cannot be deprived of their right to vote in European Parliament elections, if the national legislation which excludes them from the franchise fails a basic rationality test.<sup>15</sup> This amounts to recognising the right to vote in European Parliament elections as a normal incident of EU citizenship, even if this is not explicitly stated in the Treaties. In fact, the Advocate General explicitly made this point in his joint

Opinion on the two cases and he argued that the right to vote in European Parliament elections is *the most important* EU citizenship right.<sup>16</sup>

The shift from the language of 'people' to 'citizens' in relation to the European Parliament raises important questions about the allocation of seats. The principle of 'degressive proportionality' was enshrined in Article 14(2) TEU, and its application already caused some difficulty with respect to the allocation of seats to Italy during the 2007 IGC. Hitherto the calculation base for Member State populations, both for EP purposes and for purposes of QMV in the Council of Ministers has been that of the number of residents rather than the number of nationals. This avoids difficult questions such as whether divergences in national laws make access to national citizenship so hard that this artificially deflates the number of national citizens, and whether non-resident national citizens should be counted.<sup>17</sup> There are also more advanced statistical methods available for estimating the number of residents present on the territory between the dates of comprehensive national censuses than there are for calculating the number of national citizens. Even so, Italy was successful in raising a specific issue about numbers of citizens abroad as part of the array of arguments it used to lay claim to the same number of MEPs in the 2009-2014 Parliament as the UK, where the principle of degressive proportionality seemed to demand that it should have one less.

## Conclusions

Citizen empowerment (however weakly expressed) is not the only *leitmotiv* of the Treaty of Lisbon. The proliferation of references to delivering policies for the benefit of citizens which appear throughout the TEU and the TFEU post-Lisbon reinforces a paternalistic notion of the Union as a *protective* polity. Furthermore, the formal reference to the Charter of Fundamental Rights also contributes to filling out the concept of membership, at least from a rights-based perspective, in the EU. However, overall the changes in the Treaty of Lisbon as charted here are modest. This

is despite (or perhaps because of) the fact that since the introduction of citizenship of the Union by the Treaty of Maastricht there have been some quite radical interpretations of the scope and effects of citizenship of the Union by the Court of Justice. These started with challenges to the territorial scope of the national welfare state, extended through judgments asserting the fundamental nature of the right of free movement for citizens and the consequent right to reside throughout the territory of the Member States, and have culminated in the *Gibraltar* and especially the *Aruba* cases with some tentative steps towards curbing the electoral sovereignty of the Member States, at least in relation to the exercise of European Parliament voting rights. It seems plausible to suggest that the next phase of citizenship developments in the EU are more likely to be led by the Court of Justice than they are by the Member States and/or the political institutions. Whether such developments are legitimate, especially when viewed in the light of the Constitutional Treaty debacle, is a speculation which lies outwith the scope of this brief survey.

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## Notes

<sup>1</sup> References throughout to the TEU and the TFEU are to the consolidated numbering as it will be after the entry into force of the Treaty of Lisbon, this survey having been written on the assumption that ratification and entry into force will occur in due course. For the consolidated text, see OJ 2008 C115/1. References to the EC Treaty are to the text currently in force. Where references to the pre-Lisbon TEU are made, this is clarified in the text.

<sup>2</sup> See C. Ladenburger, 'Fundamental Rights and Citizenship of the Union', in G. Amato, H. Bribosia and B. de Witte (eds.), *Genesis and destiny of the European Constitution*, Brussels: Bruylant, 2007, 311-365 at 318-319.

<sup>3</sup> Special Eurobarometer 251.

<sup>4</sup> Presidency Conclusions, Council Document 11177/1/07, Rev 1, Concl 2, 20 July 2007.

<sup>5</sup> See proposed amendments to Article 8 TEU in CIG 07/1, 23 July 2007 at point 12;

<sup>6</sup> This refers to the December 2007 version of the Charter which is referred to in the Treaty of Lisbon and as solemnly proclaimed by the Presidents of the European Parliament, the Council and the Commission: OJ 2007 C310/41.

<sup>7</sup> See the interviews at <http://www.taurillon.org/IGC-on-the-Reform-Treaty-Interview-with-MEPs>.

<sup>8</sup> See the emphasis placed on citizenship by Andrew Duff, one of the 2007 European Parliament IGC representatives, in his book on the Constitutional Treaty: *The Struggle for Europe's Constitution*, London: Federal Trust, 2005.

<sup>9</sup> Case C-85/96 *Martínez Sala v. Freistaat Bayern* [1998] ECR-I 2691.

<sup>10</sup> C. Closa, 'Constitutional Prospects of European Citizenship and new forms of democracy', in Amato *et al*, above n.\h 2, 1037-1063 at 1052.

<sup>11</sup> Case C-184/99 *Grzelczyk v. CPAS* [2001] ECR I-6193.

<sup>12</sup> Closa, above n.\h 10 at 1052.

<sup>13</sup> J.-C. Piris, *The Constitution for Europe*, Cambridge: Cambridge University Press, 2006 at 119.

<sup>14</sup> Case C-145/04 *Spain v. United Kingdom (Gibraltar)* [2006] ECR I-7917; Case C-300/04 *Eman and Sevinger v. College van burgemeester en wethouders van Den Haag (Aruba)* [2006] ECR I-8055.

<sup>15</sup> At issue was a national rule which excluded Arubans from voting in EP elections so long as they were resident in Aruba, but allowed them to vote under general Netherlands expatriate voting rules when they moved to a third country.

<sup>16</sup> Opinion of AG Tizzano of 6 April 2006, para. 67: 'it can be directly inferred from Community principles and legislation as a whole, thus overriding any indications to the contrary within national legislation, that there is an obligation to grant the voting rights [in European elections] to citizens of the Member States and, consequently, to citizens of the Union.'

<sup>17</sup> See the discussion by Andrew Duff in a Working Document for the European Parliament Committee on Constitutional Affairs on the Election of the European Parliament (III), PE400.478v01-00, 18 January 2008 at 2-3.