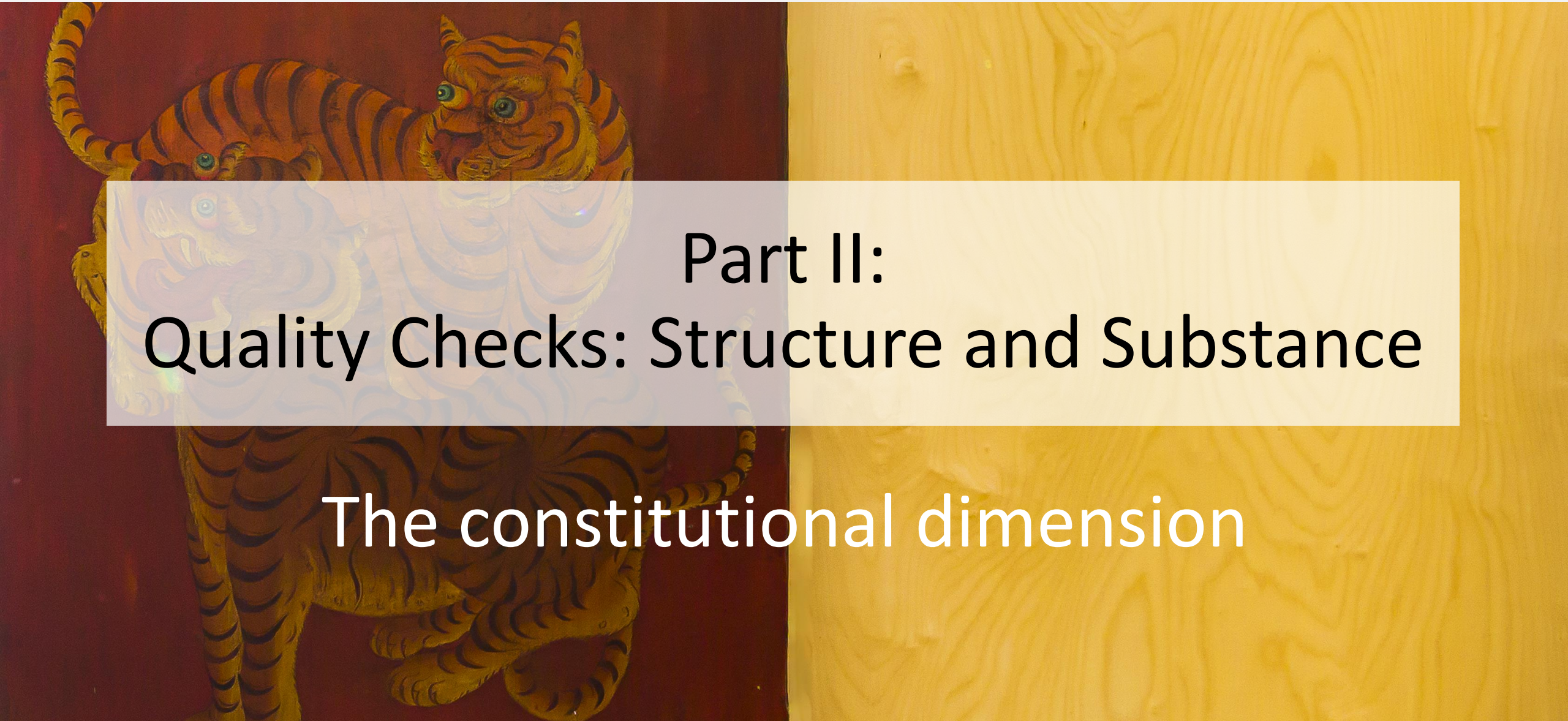
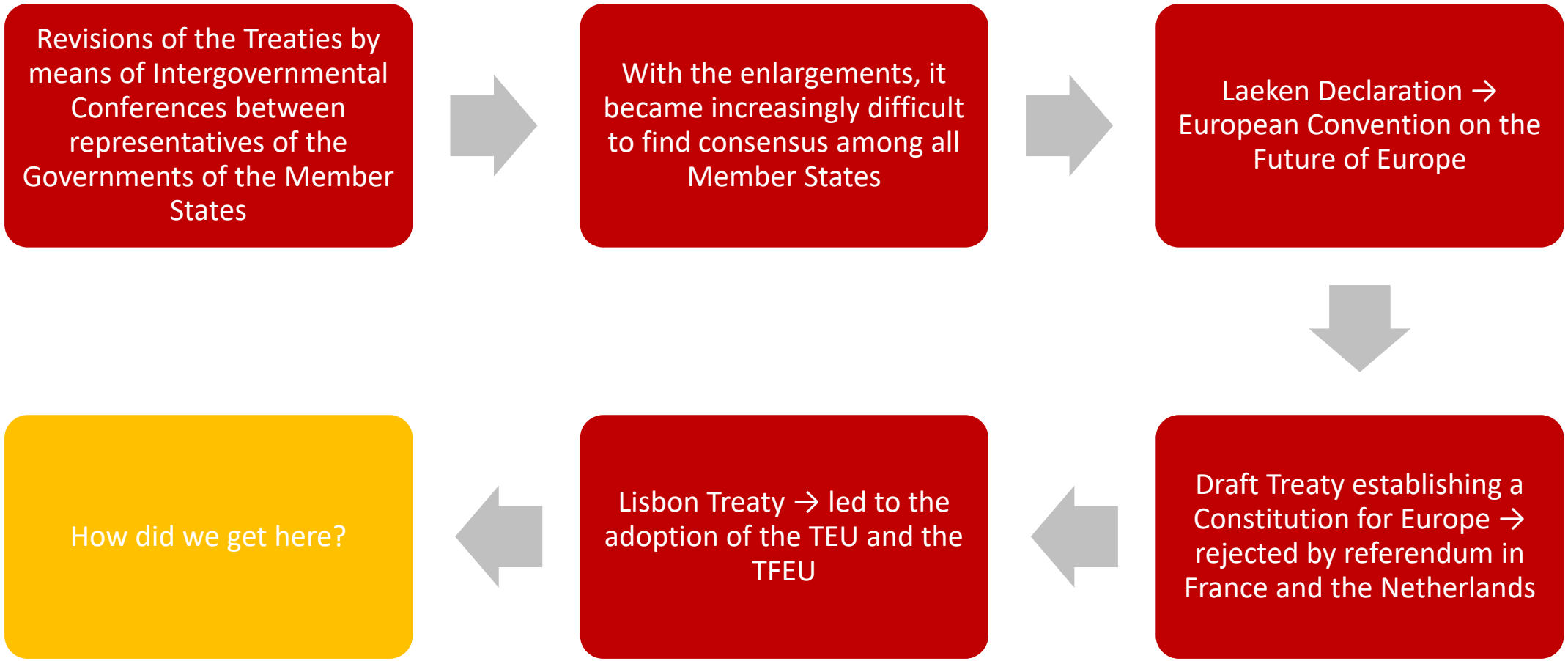


Part II:
Quality Checks: Structure and Substance

The constitutional dimension

The Treaties revision and its rules



Introducing the process of constitutionalisation - a rigid but adaptable body of law

Member States have always been – and still are – the holders of the revision powers; the initiative is shared with the Parliament and the Commission and no amendment of the Treaties is possible without their unanimous agreement

Amendments under the ordinary revision procedure: the powers of revision shall, *in fine*, depend on the common accord of the representatives of the governments of the Member States

The participation in the revision procedure of Member States' respective parliaments, or of their electorate by means of a referendum, has a decisive constitutional dimension, namely from the point of view of the democratic legitimacy of the EU itself

Nevertheless, for the EU phase of the revision procedure, the Treaty requires the mandatory involvement of the Union's institutions

Complex procedure of revision

The process of ‘constitutionalisation’ of the Treaties

The term “constitutionalisation” refers to:

- A circular or spiral process;
- In which a treaty such as the EC or the EU Treaty is interpreted by a court such as the Court of Justice;
- In accordance with a systematic, teleological and dynamic method, similar to that used by the constitutional courts of the member States and different from that characterising the approach usually taken by international courts and arbitrators for the interpretation of an international convention.

The stages of the constitutionalisation process

The first three stages of "constitutionalisation" of the Treaties led essentially to establishing the autonomy of the Community/Union legal order vis-à-vis the legal orders of the Member States:

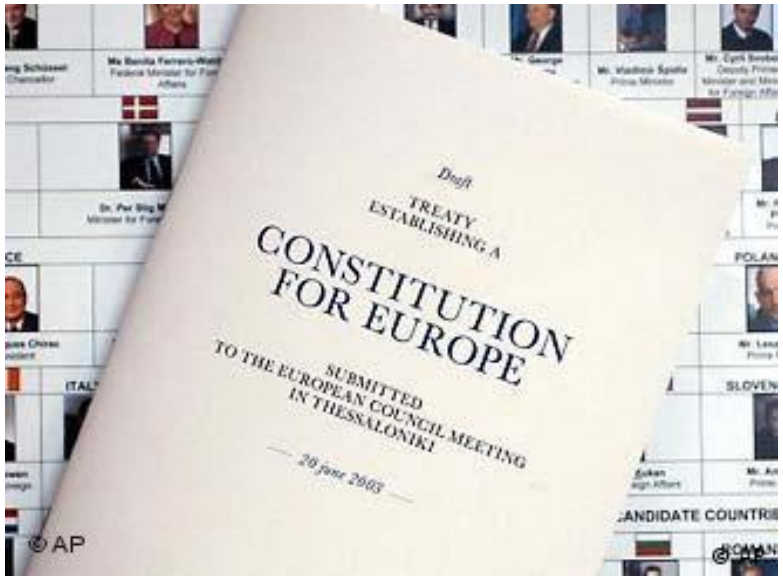
- **Direct effect**:
  - Inaugurated by the judgment in Van Gend and Loos;
  - General principle by virtue only of the content of its provisions, regardless of the will of the Contracting Parties.
- **Primacy**:
  - Cases Costa/ENEL, Simmenthal and Factortame;
  - Obligation to take any measures capable of eliminating any incompatibility of domestic law with EU law.
- **Unwritten catalogue of Fundamental Rights**:
  - Process based essentially on the general principles common to the constitutions of the Member States and on the inspiration provided by the European Convention on Human Rights;
  - Charter of Fundamental Rights of the EU;
  - Article 2 TEU: values on which the Union is founded;
  - Article 20 TFEU: European citizenship that confers new rights on nationals of any Member State;
  - Article 7 TEU.

The stages of the constitutionalisation process

The next step of "constitutionalisation" of the Treaties, which is related to their revision concerns essentially the autonomy of the former vis-à-vis the international legal order:

- The Member States were fully sovereign States when the Communities were set up, and they still are today and have preserved their capacity as entities subject to international law
- The provisions on revision contained in Article 48 TEU are not merely optional and do not allow for the alternative recourse to the general rules of international convention law;
- Article 48 TEU operates, in relation to the general principles of international law, as a "lex specialis";
- The EU Treaty thus establishes a revision procedure encompassing **formal and procedural limits** to Treaty amendments similar to those that can be found in any rigid or semi-rigid national constitution;
- Opinions 1/91 and 1/92: "Article [19 TEU] and, more generally, the very foundations of the [Union]" may NOT be modified in accordance with the procedure laid down in [Article 48 TEU], in the same way as any other provision which has the character of a foundation of the Union can be" (**implicit substantive limits to revising the Treaties**).

Do we still need a text to be called 'EU Constitution'?



- The two Treaties currently in force, as interpreted by the Court of Justice, operate as the real "EU Constitution";
- The new Treaties, like their predecessors, have from the outset received dual democratic legitimation:
  - (i) at Union level, through approval by the Union's institutions;
  - (ii) at Member State level, through parliamentary ratification or by referendum, in accordance with their respective constitutional arrangements;
- **Article 4(2) TEU**: '*The Union shall respect the* ***equality of member States*** *before the Treaties as well as their* ***national identities****, inherent in their* ***fundamental structures, political and constitutional****, inclusive of regional or local self-government'*.

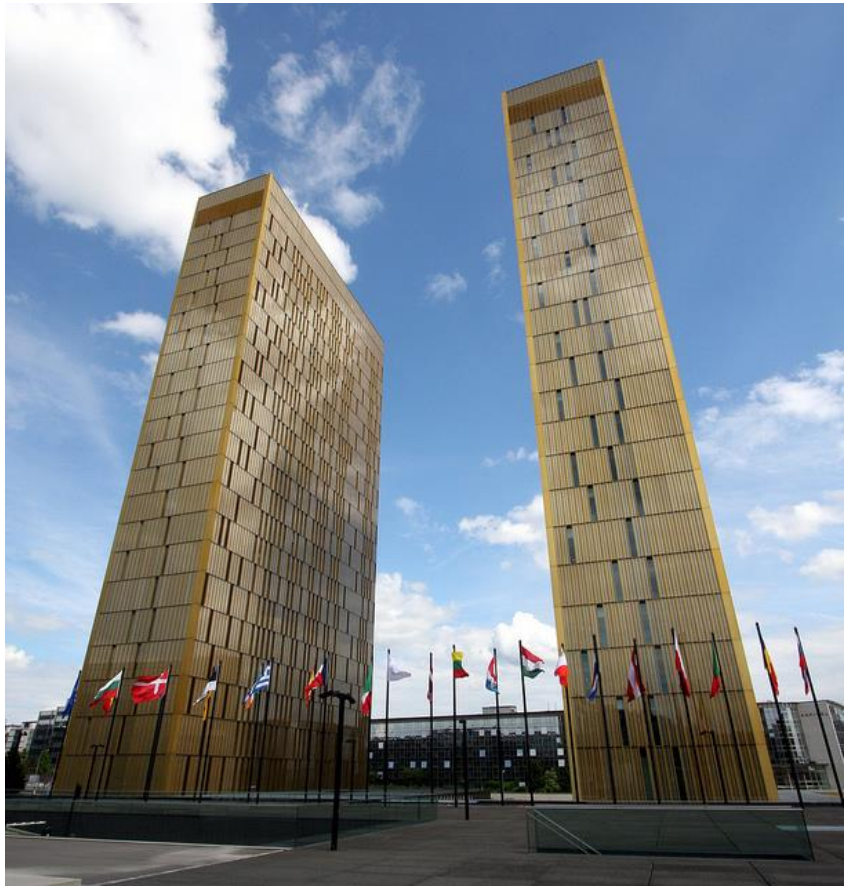
The question of the constitutional identity of the Member States

- *'However, **measures which restrict the freedom to provide services may be justified on public policy grounds** only if they are **necessary** for the protection of the interests which they are intended to guarantee and only in so far as those objectives **cannot be attained by less restrictive measures**.*
- *It is not indispensable in that respect for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected. Although, in paragraph 60 of Schindler, the Court referred to moral, religious or cultural considerations which lead all Member States to make the organisation of lotteries and other games with money subject to restrictions, it was not its intention, by mentioning that common conception, to formulate a general criterion for assessing the proportionality of any national measure which restricts the exercise of an economic activity.*
- *On the contrary, as is apparent from well-established case-law subsequent to Schindler, the need for, and proportionality of, the provisions adopted are not excluded merely because one Member State has chosen a system of protection different from that adopted by another State.'*

Judgment of 14 October 2004, *Omega*, C-36/02, paras 36, 37 and 38.

Is the Court of Justice a Constitutional Court?

- There can be no democratic constitution without a mechanism for judicial review of the constitutionality of the laws and other acts adopted by public authorities;
- The ECJ assumed that role, as the Treaties establishing the European Communities did not establish a specialized constitutional court;
- The Court has also set in train a process of gradual 'constitutionalisation' of the Treaties that has further strengthened its own role as a true constitutional court.



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