The Lisbon Treaty: The Irish 'No'.

Europe's New Realism: The Treaty of Lisbon*

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[...] How should we assess the innovations of the Treaty of Lisbon? Are they suited for restoring Europe's capacity to act? [...]

Institutional reforms – The principle of democracy: the European Parliament *and* the national parliaments – Bypassing unpleasant national debates by taking the European route – Reinforcement of protection of the subsidiarity principle: most valuable reform – Doubts on the effectiveness – Crucial weakness: creeping transfers of competences still possible

Institutional reforms

The institutional reforms of the Treaty of Lisbon aim to achieve three goals, all of them familiar from the Constitutional Treaty: increasing efficiency, increasing the democratic legitimacy of the expanded Union and increasing the coherence of the Union's external dealings. Of the goals of the Constitutional Treaty, only the fourth could no longer be preserved: the goal of normative simplification and transparency.[1] This has a direct effect on the structure of the treaty itself: instead of the systematic codification and consolidation of European primary law, a thoroughly impressive accomplishment that the Constitutional Treaty attempted, the Treaty of Lisbon leaves the current treaty structure intact, in principle. Rather, the innovations are incorporated in the existing treaties. In so doing, the Treaty on

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[1] *See* Peter-Christian Müller-Graff, 'Die Zukunft des europäischen Verfassungstopos und Primärrechts nach der deutschen Ratspräsidentschaft', speech at Forum Constitutionis Europae, 27 June 2007, FCE 6/07, <http://whi-berlin.de/fce/2007.dhtml>, (p. 20).

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European Union shall retain its current name, while the Treaty establishing the European Community will be renamed the 'Treaty on the Functioning of the European Union'.

To be sure, this name change – at first glance unassuming – conceals a fundamental restructuring of the foundations of the treaty structure. The current pillar structure of Europe is to be dissolved; European Union and European Community are to be melded into one unitary supranational organisation, with a unitary legal personality, in principle unitary modes of action and the unitary name 'European Union'. The current distinction between supranational Community law on the one hand, and Union law as a partial legal order characterised by international law on the other, thereby becomes obsolete. The unitary priority of Union law, on the other hand, was the only thing not to be expressly put in writing (even though this would have been logical), as fear of national sensitivities stood in the way of this for the time being; as it happened, however, priority was affirmed in a statement attached to the treaty text.

Overall, the changes in the organisational structure of the Union can certainly be welcomed. It is a reasonable expectation that the new organisational structure will do more justice to the realities of an expanded union of (by now) 27 member states and that Europe will find its way back to its old capacity to act: the role of the European Council as an independent institution of the Union is now to be consistently implemented in all of the treaties; the European Council is to receive its own mention for the first time.

A more substantial change is the departure from the semi-annually changing presidency: the current practice has made for some lively summit tourism, but has also often wasted vital energy. According to the new rules, a full-time president will be chosen to serve a maximum of two two-and-a-half-year terms, internally co-ordinating and continually providing impetus to the work of the European Council and externally acting as a representative and communicator. It was not only considerations of efficiency that spurred the creation of the office of a President of the European Council; it was also the realisation that European politics is increasingly perceived as the product of a faceless technocracy, far-removed from the citizen. I think that 'personalising' the European institutions is a good way to counteract this alienation. In order to convey what European politics are about, it takes a face that can arouse emotions and use them for integration. This concept of personalising a collective body will also be followed by the installation of a 'High Representative of the Union for Foreign Affairs and Security Policy', who will preside over the Foreign Affairs Council and at the same time will also be one of the Vice-Presidents of the Commission. The need for a 'face', to be sure, cannot be mistaken for the need for inflated institutions. Due to the accession rounds of recent years, the institutions of the Commission and the Parliament have be-

come bloated with members; these are certainly not suitable to provide Europe with a citizen-friendly countenance. The fact that both of these are to be slimmed-down, then, is to be welcomed. The Commission will be reduced by a third in 2014 and from then on it will only have members from two thirds of the member states. A rotation system will guarantee a fair balance among the member states. For the European Parliament, as well, the constant growth required by the accession rounds will be trimmed back a bit and the number of members of parliament will be reduced to 750 not including the president.

Strengthening of the democratic element

At the same time, the nominal reduction of the Parliament is inversely proportional to its degree of importance, which will only increase under the Treaty of Lisbon. The European Parliament can be justly described as the winner of the reform project (*Hans-Gert Pöttering*). It will be the equal partner of the Council in acting as a legislature and is to receive – aside from in the area of tax policy – an equal right of co-decision in all cases in which the Council decides by majority. The co-decision procedure will consequently become the rule. Additionally, the Parliament is to receive a comprehensive right of budgeting. Finally, it is to elect the Commission President and can block the appointment of the Commission as a whole.

The principle of democracy, furthermore, will for the first time be honoured with its own title in the treaty text. In it, the Union acknowledges the equality of its citizens as well as the principle of representative democracy, which will be filled with European life by the activity of the European parliament, the European parties as well as – to be noticed – the lobbying interest groups. These mechanisms of representative democracy will be supplemented by an element of direct democracy: it is to become possible for a citizen initiative of at least one million Union citizens from a considerable number of member states to force the Commission to develop proposals on matters of Union law.

Despite this augmentation of democratic elements, one leg is not yet enough for the democratic legitimacy of the European Union to stand on. In addition to the genuinely European legitimisation via the European Parliament, the second leg, the regard to the national parliaments, remains rather necessary. It can therefore be especially welcomed that the Treaty of Lisbon also substantially strengthens this second path of legitimisation. On the one hand, this takes place through the more democratic weighting of member state votes in the Council. The new principle of double majority once and for all goes beyond the scope of the rules of international law granting one vote to all states, regardless of size, and additionally requires a majority of 65% of the total population. The population-rich

member states like Germany will thereby have more weight in the Council, because their proportion of the total population of the Union will be taken into consideration. Voting will thus be more democratic, because the true value of each individual Union citizen's political share, as handed on by the national parliaments and governments to the European Union, will be at least roughly approximated. At the same time, the national parliaments, as well, will be elevated to the rank of European stakeholders, which will – and I quote – 'contribute actively to the good functioning of the Union'. This desired contribution is to be secured with a separate 'Protocol on the role of national parliaments in the European Union', which guarantees the national parliaments extensive and, more importantly, timely information about plans for European legislation. Additionally, cooperation among the national parliaments will be increased: this could come in the form of inter-parliamentary conferences and should serve to bundle common national interests towards the Union level. In my view, this is a long overdue shift in emphasis, which it is to be hoped will end the European shadow existence of the national parliaments.

Catalysing national problems

In Germany, at least, the impression often existed in the past that European legislation took place without the substantial involvement of the Bundestag. The federal government could exert its influence on a European level via the Council, largely undisturbed by parliamentary control. Many a domestically difficult project could be realised by taking the European route in order to bypass unpleasant national debates. The government would then respond to the public outcry upon the implementation into national law by pointing to European obligations and the cold comfort of an absolutely minimal implementation. Some of the tears shed in Berlin about Brussels supposedly usurping competences were thus little more than crocodile tears, since the decisions getting the blame had already been taken with German participation.[2] The buck was unfairly passed to Brussels in these matters on numerous occasions, when in reality it should have been passed to Berlin.

The European reform process and, perhaps as well, the case on the European Arrest Warrant at the German Federal Constitutional Court have led to a new way of thinking. The Bundestag was jolted awake and now recalls its European responsibility. Not long ago it set up its own liaison office in Brussels. It made a deal with the federal government at the end of 2006 that it should be involved in the process of European opinion formation, and early on in the process at that. It is

[2] *See* Ralph Alexander Lorz, 'Kompetenzverteilung im europäischen Mehrebenensystem', *EuR* – Supplement 1-2006, p. 43 (44).

therefore to be hoped that by now, more justice will be done to the co-operation rights of the Bundestag, which are already enshrined in Article 23 of the German Basic Law; and at any rate, the Federal Constitutional Court already deemed the use of these rights to be a constitutional obligation in its *Maastricht-Urteil*.

Competence system and subsidiarity principle

Ladies and gentlemen, the participation of the national parliaments, and more specifically of the German Bundestag, leads directly to a further aspect of the Lisbon reform project: the reorganisation of the competence system as well as the reinforcement of the idea of subsidiarity.

Competences: The most far-reaching change, in my view, results from the previously mentioned new architecture of the European Union as one of a unitary legal personality with a supranational character. Through the dissolution of the traditional pillar architecture, the Union gains a co-ordinated competence for the Common Foreign and Security Policy as well as for the whole of the Area of Freedom, Security and Justice.[3] Entire areas of policy, previously only accessible to intergovernmental co-operation on the part of the member states, now find themselves integrated – albeit under countless special conditions – into the supranational decision-making structure. In terms of constitutional politics, this kind of change in the decision-making structures carries a much greater weight, in my view, than the attribution of a few new individual competences to the European Union does, something the Treaty of Lisbon also aims to do. Even more important is the express inclusion of the principle of conferral in Article 5(1) TEU (new).

Subsidiarity: I consider the reinforcement of the subsidiarity principle to be the most valuable reform in the Treaty of Lisbon. The treaty attempts to equip the hitherto rather toothless criterion of subsidiarity with a tough control mechanism. To this end, one thing being created is a so-called early warning system, which together with further procedural changes should establish an effective political *ex ante* control. The other thing that the treaty introduces is a new type of appeal to the European Court of Justice, the subsidiarity action, to enable a downstream procedural *ex post* review.

But what it is about in particular? The core concern of the so-called early warning system is to involve the national parliaments in the subsidiarity control and to grant them the possibility of issuing a subsidiarity warning at an early stage. In future the national parliaments should be informed of the Commission's legisla-

[3] *See supra* n. 1 (p. 7).

tive proposals at the same time as the Union legislature, so that they can still make their influence count in the political run-up to the decision. After that, there remains eight weeks' time to review the subsidiarity aspects of the intended measure. Within this period, the national parliaments can issue a subsidiarity warning in the form of a reasoned opinion. The European legislative institutions then have to take this statement into account in the further legislative process, but they are not bound by it. A formal review of the proposal in question is only called for if one third, or with regard to questions of the area of freedom, security and justice one quarter of the national parliaments, have issued the subsidiarity warning. This early warning system is flanked by an expanded obligation on the part of the European legislative institutions to subject their proposals to comprehensive hearings and thereafter to provide extensive reasoning for their draft legislation. These formal obligations will both promote self-review, by introducing a pause to think, and make the external review easier.

The protection of subsidiarity shall be rounded off with the introduction of the subsidiarity action ('action on grounds of infringement of the principle of subsidiarity'). This special form of the action for annulment expands the possibility of adjudicating an infringement of subsidiarity. Where until now, the general action for annulment was only available as such to the Community institutions and the member states, the circle of parties entitled to the action is now expanded to the chambers of the national parliaments as well as the Committee of the Regions insofar as it was to be consulted on the specific matter. So in Germany, the Bundestag and Bundesrat would each be independently entitled to lodge an action for annulment. This newly created entitlement of the national parliaments is again based on the idea – as is the early warning system just described – that the national parliaments are the natural guardians of the subsidiarity principle.

But how should these reforms be assessed? Are they suited to actually resolve the weaknesses of the current legal system? The implementation of the early warning system hardly seems feasible to me. From 1998 to 2004, a total of 18.167 regulations and 750 directives were enacted in the EU. Even if the lion's share of these legal documents amounts to nothing more than agricultural regulations, this very number gives one an idea of the flood of paper surging through the halls of Brussels every day. In light of that, I believe ensuring an individual and qualified subsidiarity review to be virtually out of the question. On top of that there is the tight deadline of eight weeks that has been set (the Constitutional Treaty, incidentally, provided for an even shorter deadline of six weeks). This period, which furthermore can take no heed of national parliamentary recesses and the like, makes it practically impossible to review the proposed regulations for their possible consequences at the lowest level. Because by the time that an enquiry to that effect

makes its way to the local authorities through the official channels, that deadline will have long passed.

But even if, in an exceptional case, the subsidiarity warning were to be filed on time, there is still only an obligation for the European institutions to take the warning into account; if they so desire, they can subsequently maintain their legal point of view and carry on with an unchanged proposal. To force reconsideration, satisfying a quorum of one third or one quarter (as the case may be) of the national parliaments would be required, which would additionally require some considerable international co-ordination that would be quite difficult to manage within the purported eight weeks.

On the other hand, the new type of judicial claim, the subsidiarity action, is progress to the extent that it can be activated by both chambers of the national parliaments. In the federal member states, this strengthens the role of the federal units like the *Bundesländer*, and in all member states, this strengthens the role of the parliamentary opposition, since after all the parliamentary groups having a majority in Parliament have always been able to exercise their influence by way of the governments that they regularly appoint. However, not all too many hopes should be staked on this reform. For one thing, judicial review after the fact is only ever the second-best way to resolve a grievance. For another, it remains to be seen whether the European Court of Justice will extend the standard of its review to the numerous questions of competence placed before it – which have often been of crucial importance lately – or whether it will limit itself to a pure check on subsidiarity criteria, which would remove exactly the thorniest arrogations of authority from the realm of application of the subsidiarity action.[4] And finally, it cannot be expected that the European Court of Justice would substantially change its hitherto very restrained jurisdiction simply on account of a new type of judicial claim.

So ultimately, the reformed subsidiarity control might not be at all as 'ingeniously devised' as has sometimes been written.[5] The procedural reinforcement of the substantially unchanged subsidiarity criteria might in fact require the investment of a great deal of effort for a largely disproportionately small return.

[4] *See* for details Peter Altmaier, 'Die Subsidiaritätsklage der nationalen Parlamente nach dem Subsidiaritätsprotokoll zum EU-Verfassungsvertrag', in Hans-Jörg Derra (ed.), *Freiheit, Sicherheit und Recht : Festschrift für Jürgen Meyer zum 70. Geburtstag* (Baden-Baden, Nomos 2006), p. 301 (318 f.); but *see also* Volkmar Götz, 'Kompetenzverteilung und Kompetenzkontrolle in der Europäischen Union', in Jürgen Schwarze (ed.), *Der Verfassungsentwurf des Europäischen Konvents* (Baden-Baden, Nomos 2004), p. 43 (60 f.).

[5] This may have been Christian Callies' view of the system of subsidiarity control in the EU Constitutional Treaty in 2004 as quoted by Hans Hofmann, 'Europäische Subsidiaritätskontrolle in Bundestag und Bundesrat – Das 8. Berliner Forum der Deutschen Gesellschaft für Gesetzgebung (DGG)', *ZG* (2005), p. 66 (70).

Even so, we might be able to count on a certain warning and preventative effect of the new mechanisms of control if the Community institutions, with the possibilities of control looming over them, already take the member states' misgivings into consideration in the run-up to their own decision-making.[6]

The crucial weakness in the protection of subsidiarity, however, is still there after the Treaty of Lisbon: the inner dynamics of the subsidiarity principle as it follows the processual aspect of the Union, trailing behind the continuing development of the 'ever closer' Union; from the point of view of the member states this does not guarantee any certain limit to the creeping transfer of competences. Admittedly the dynamics of the union need not be anything bad in and of itself, and the open-ended formulation of its competences should also be appropriate, in theory. Yet one might have wished for a Reform Treaty that would give a clearer picture of the finality of Europe, of both its inner and its outer boundaries.

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[6] *See* Hans Hofmann, *supra* n. 5, p. 66 (73).

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