

The Lisbon Treaty: A Qualified Advance for EU Decision-Making and Governance



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The Lisbon Treaty represents a significant shift in EU decision-making, although important changes have already taken place as the institutions have adapted to enlargement. The extension of majority voting promises some further increase in efficiency, and the extension of codecision as the “ordinary legislative procedure” strengthens the formal democratic aspects of the process. The new system of instruments and procedures, including the new distinction between delegated acts and implementing acts within non-legislative acts, may also prove easier for people to understand, despite the existence of multiple exceptions and special cases. However, it remains to be seen how several important aspects of the new system will be implemented in practice; it is not clear that this will in itself increase legitimacy; and the dynamics of change will continue to be felt. Even if there is no major treaty reform in the near future, this is not the end of history when it comes to the EU institutional system.

Introduction

This contribution discusses the impact of the Lisbon Treaty on EU decision-making procedures from two perspectives. First, it discusses whether the resulting system of binding EU acts is likely to be simpler and more efficient in terms of producing decisions.

Second, it asks how far the Treaty promises to strengthen the foundations of the Union by addressing the basic challenges for decision-making in terms of (good) European governance? That is, does it seem likely also to increase the transparency of procedures and the quality of the results, as well as the overall legitimacy of the system?

It therefore starts by summarising the main issues which have been at stake, then reviews the changes introduced by the new Treaty, and finally offers some tentative assessments of the likely impact of Lisbon on the EU’s decision-making processes.

Simplification and problem-solving

Member States have largely agreed on two basic drivers for reform of the Union’s constitutional structure and decision-making procedures. On the one hand, there has been

universal support for *simplification* of the complicated system which has grown up bit by bit over the last decades. On the other hand, and with less consensus as to the solutions, there has been pressure for substantive *problem-solving*. That is, there has been broad political agreement, with considerable public support, that in certain spheres the existing arrangements of the Union are dysfunctional for

the achievement of shared objectives, and are so to an extent that outweighs the sovereignty costs of joint action. Consequently a formal change in powers and procedures has been accepted which strengthens European decision-making at the expense of national discretion. In both respects, it has also been hoped that reforms would boost legiti-

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macy, both on the “input” side, by permitting a clearer understanding among citizens as to how decisions are taken (and perhaps also a feeling of greater influence on decision-making), and on the “output” side, by producing tangible benefits in areas of popular concern.

The process of simplification was to begin with the basic treaty structure. The Treaty of Maastricht, the “Treaty on European Union” (TEU), modified the content of the three Community Treaties, which continued to exist within the TEU.³ In its Titles V and VI, it also established the bases for intergovernmental cooperation between the Member States

in the form of a Common Foreign and Security policy (CFSP – the “second pillar”) and Cooperation in Justice and Home Affairs (the “third pillar” – since 1999, Police and Judicial Cooperation in Criminal Matters).

The EU since Maastricht has thus often been presented in the form of a Greek “temple”, with the Union as the roof, the Communities as the *naos* at the heart, and inter-governmentalism as the surrounding *peristasis*. This model rather accurately reflects the way in which European integration has historically worked. Stability in the complex and contested process has been assured by a combination of a range of commitments based on law, and the acceptance of more flexible arrangements around that indispensable “hard core”. Yet these arrangements have resulted in a degree of complexity which is incomprehensible to most people, as well as working against efficiency and effectiveness even in policy areas in which there is a general consensus. Only the Communities have explicit legal personality. Each pillar gives the institutions different powers and uses different instruments and procedures.

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different name. The TEU remains as such, continues to include CFSP, and gives legal personality to the Union. The Community Treaty becomes the Treaty on the Functioning of the European Union (TFEU) and notably includes the former third pillar. The two treaties are said to have “the same legal value”, and the Union replaces and succeeds the Community (the term “Community” is systematically replaced throughout). Euratom remains a separate Treaty, modified by a Protocol annexed to the Treaty of Lisbon.

The resulting structure can no longer be captured by the old architectural imagery (although it is tempting to say that, given the continued specificities of procedures in both CFSP and, albeit within the TFEU, of police and judicial cooperation in criminal matters, the change has been from a Greek temple, with pillars on the outside, to a Roman villa, with pillars on the inside). It is more complicated than it could have been, which is a disappointment in terms of making the constitutional structure of the Union more comprehensible to people. Nonetheless, as far as the practical consequences for decision-making are concerned,



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The Constitutional Treaty proposed to merge the Treaty of Maastricht and the Treaty of Rome (the Community Treaty, that is: given the sensitivities over nuclear energy, Euratom was never going to be merged, but simply attached to the Union – hopefully out of public sight). The Lisbon Treaty does not go so far. Indeed, the result of the retreat from the Constitutional near-unification is that we will go from a situation in which we have three Treaties to one in which we will have ... the same three Treaties, one with a

this does represent an advance in terms of both simplification and problem-solving because the same instruments and largely the same procedures will be applied in police cooperation and judicial cooperation in criminal matters.

The simplification exercise was equally directed at the Union’s multiple legal instruments and decision-making procedures. The Community started with three binding legal instruments (Regulation, Directive, Decision) and one main procedure: decision by the Council on the basis of a

Commission proposal, generally after consulting the Parliament. In theory, qualified-majority voting (QMV) would come to apply in numerous sectors in contrast to unanimity, thus creating two main alternatives within this "consultation" procedure,⁴ but in practice this was not used until the 1980s. Over the decades, decision-making procedures proliferated. The role of the EP in decision-making was strengthened, however, by successively adding on new procedures in specified areas. By the early 1990s the EP variously had the right of consultation, cooperation and codecision in legislative procedures, as well as its budgetary powers and the right of assent. At the same time, a second level of Community law was consolidated as the system of Community implementing acts was formalised: that is, the delegation of powers in secondary legislation by the

Council (or later, the Parliament and Council) to the Commission for the application or adaptation of certain non-essential elements of the rules. Numerous different procedures were defined governing the way in which the Commission should consult these "comitology" committees.

As already noted, the new "pillars" had their own instruments and procedures. Together with the lack of a clear hierarchical differentiation between binding Community instruments, the result was complex and hard to understand. There were regulations, directives and decisions adopted on the basis of the Treaty (by different forms of inter-institutional interaction); regulations, directives and decisions adopted on the basis of secondary legislation (with different forms of consultation with committees); common strategies, joint actions, common positions and decisions in CFSP; and framework decisions, decisions and common positions in the third pillar. One of the core mandates given to the European Convention by the Laeken European Council was thus to reduce the number of instruments and procedures.

Instruments

The Constitutional Treaty had proposed two legislative acts: "European laws" and "European framework laws", which would respectively replace, with the same legal characteristics, the regulations and directives currently adopted by the Community legislator on the basis of the treaty. Everything else would be squeezed into two non-legislative categories of regulations and decisions

The introduction of the word "law", however, was among those symbolic elements which were dropped in order to demonstrate that the new treaty did not have a constitutional character. The Lisbon Treaty therefore retains regulations, directives and decisions as the legally-binding instruments of the Union for legislative acts and for all kinds of non-legislative acts.⁵ The loss of the terminological distinction between these two kinds of act may well be regretted on the grounds of transparency, although the system proposed in the Constitutional Treaty would have introduced other forms of complexity as well being a

practical nightmare to introduce (Best 2003).

Only one instrument, the decision, is changed. It will henceforth be defined as follows: "A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them."⁶ This covers both decisions as defined in Article 249 of the TEC, which are individual instruments addressed to specified

parties (ranging from all the Member States to an individual company); and "sui generis" decisions adopted in the framework of the Community which have no addressees (for example, in trade policy, for the adoption of action programmes or to change organic rules). Whereas the instruments of the third pillar will genuinely disappear, the changes in CFSP are largely cosmetic. A "common strategy" becomes a "European Council decision on the strategic interests

and objectives of the Union"; a "joint action" a "decision defining a Union action"; and a "common position" a "decision defining a Union position".

Legislative acts

Like the Constitutional Treaty the Lisbon Treaty explicitly establishes a category of "legislative" acts, divided according to the procedure by which they are adopted.

Codecision, by which the Parliament has equal rights with the Council, becomes the "ordinary legislative procedure" and is extended to over 40 new cases. The new areas notably include agriculture and most of the former third pillar. In this latter respect, however, the extension has come at a price. The Commission will share the right of initiative with one-quarter of the Member States.⁷ An "emergency brake" is foreseen in different ways for decisions on criminal procedure, the definition of offences and sanctions, the establishment of a European Public Prosecutor's Office, and operational cooperation between police, customs and other specialised law enforcement services. In these cases the procedure may be suspended for four months and referred to the European Council, possibly resulting in the proposed measure going ahead in the form of enhanced cooperation among at least nine Member States.

A category of "special legislative procedures" covers several other forms of interaction between Council and Parliament. These include the annual budget negotiations, in which the Parliament has gained in power notably by virtue of the abolition of the distinction between "compulsory" and "non-compulsory" expenditure, and the formal introduction of the Conciliation Committee procedure. The Parliament adopts "regulations on its own initiative" concerning exercise of the right of inquiry and conditions governing the performance of MEPs and the Ombudsman's duties. There are five cases of "consent" by the European Parliament (a renaming of the present "assent"), concerning procedures for European elections, combating discrimination, citizens' rights, implementing measures for the system of own resources and the multi-annual financial framework.

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Finally, there are 22 cases in which Parliament is only consulted – of which, in 20 cases, the Council acts unanimously. These apply in a number of cases in justice and home affairs, as well as in the usual sensitive areas for Member States such as taxation or social security.

Non-legislative acts

The Lisbon Treaty introduces two categories of non-legislative acts which will have to start replacing the present system of “comitology” – just as the ongoing reform of that system reaches its full implementation. In order to assess the impact, one needs to look briefly back at the previous stages in this process. There have been four basic issues.

The first, the pursuit of a clearer hierarchy of norms – meaning a terminological distinction between those binding acts adopted on the basis of primary law and those binding acts adopted on the basis of the secondary acts – has already been mentioned.

The second issue has concerned rationalisation and standardisation of the procedures governing the Commission’s consultation of committees. By the mid-1980s, a proliferation of different procedures had grown up. The first “comitology decision” in 1987 provided for a menu of seven different procedures. The second comitology decision of June 1999 reduced this to three procedures⁸ – advisory, management and regulatory – which provided standard options between which the legislator could choose. This was accompanied by standard rules of procedure and improvements in transparency.

The third issue has been the basic question as to whether the Commission *should* be subject to control in the exercise of its delegated powers of execution. The Commission has always stressed the importance of expert advice, but would have liked to remove the control involved in management and regulatory committees. The Commission’s 2001 White Paper on Governance thus proposed “a simple legal mechanism [which] allows Council and European Parliament as the legislature to monitor and control the actions of the Commission against the principles and political guidelines adopted in the legislation” (EC 2001 p.31). In the Convention, some Member States did support this position. The majority, however, insisted on retaining a reference to “control by the Member States”.

The fourth concerns the European Parliament’s rights with regard to supervision of implementing measures when it comes to base acts adopted by codecision, since comitology committees only include representatives of the Member States. This has been the source of inter-institutional debate since the early 1990s. The 1999 decision only partly satisfied the Parliament, by giving it the rights of information and of scrutiny, meaning the right to receive the drafts of proposed measures implementing elements of acts adopted under codecision, and to adopt non-binding resolutions, within one month, indicating that the Commission had exceeded its powers.

The Constitutional Treaty proposed a major reform. Amid the uncertainty following the French and Dutch referendums, however, a 2002 Commission proposal to modify the comitology decision was revived, leading to a major reform in 2006. A new procedure known as “regulatory with scrutiny” was introduced. This applies to measures of general scope for which powers are delegated to the Commission in secondary legislation adopted by codecision, and which modify non-essential elements of

the base act. Its impact may be summarised as giving the Parliament the right of veto where a committee has given a positive opinion, and certain powers to influence the final outcome where a committee has not. Following a set of urgent cases to which the new procedure was applied in 2007, a massive process of “general alignment” was under way by early 2008.

Against this background, the Lisbon Treaty foresees a future division of all acts adopted on the basis of secondary legislation into two categories. *Delegated acts* (to be termed “delegated regulations” etc.) will be “non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act”. They will be adopted by the Commission on the basis of powers delegated to it by the legislator in the legislative act, subject to supervision and possible revocation of the delegation by either the Parliament or the Council. *Implementing acts* (to be termed “implementing regulation” etc.) will be adopted “[w]here uniform conditions for implementing legally binding Union acts are needed” on the basis of implementing powers conferred in such acts on the Commission or, in some cases, the Council. The Council and the Parliament will, by codecision, adopt “the rules and general principles concerning mechanisms for control by Member States of the Commission’s exercise of implementing powers”.

It seems probable that the concept of delegated acts will cover the same areas now being placed under the regulatory procedure with scrutiny plus all those of similar nature arising in the new areas to which the ordinary legislative procedure will be applied. However the modalities for implementation of this concept will have to be defined. What kind of body will carry out the task of reviewing the Commission’s work on behalf of the Council? Implementing acts will presumably be considered to be those now being left under the advisory, management and regulatory procedures, but it remains to be clarified whether the same procedures will be retained, and with what rights for the Parliament. A successor to the current comitology decision will have to be agreed, which will, in contrast to last time, be done by codecision between Council and Parliament.

Majority voting

The new Treaty provides for a significant extension of qualified-majority voting (which also becomes the “default setting” of the Treaty). A new system of majority voting is also foreseen to replace the Nice arrangements, with a threshold for a qualified-majority requiring 55% of Member States and 65% of total population, with a minimum of four countries required for a blocking minority. This new system would in principle make decision-making in the Council more efficient (although one should not exaggerate the importance in day-to-day reality of the details of the voting system; the basic question is simply whether or not a majority vote is possible). However, it will not come into effect at all until 1 November 2014, and even then, until 31 March 2017 a Member State may request that the Nice system is applied in particular cases. In other words, in the medium term there will be no change in this respect.

National parliaments

A new Article 12 in the TFEU lists the ways in which national parliaments “contribute actively to the good functioning of the Union”. These include the role of “seeing to it” that the

principle of subsidiarity is respected in decision-making. This is developed in detail in the Protocol on the Role of National Parliaments in the European Union, and the modified Protocol on the Application of the Principles of Subsidiarity and Proportionality.

National parliaments are to receive directly all "draft legislative acts" (i.e. proposals from the Commission, initiatives from a group of Member States, initiatives from the European Parliament, requests from the Court of Justice, recommendations from the European Central Bank and requests from the European Investment Bank for the adoption of a legislative act) as well as amended drafts, legislative resolutions of the European Parliament and positions of the Council.

Each national parliament will have two votes, which may be shared between chambers in the case of bicameral parliaments. Within eight weeks of receipt of the draft acts (in all the official languages) they may issue reasoned opinions on a draft act's non-compliance with the principle of subsidiarity. If such opinions represent one-third of the votes (one-quarter in the case of police and judicial cooperation in criminal matters), the draft will have to be "reviewed" by its author. In the case of proposals under the ordinary legislative procedure, if such opinions represent a simple majority of the votes, the draft will have to be reviewed. If the Commission maintains its proposal it will have to issue a reasoned opinion stating why the proposal is justified in terms of subsidiarity. Either the Council or the Parliament may then decide to terminate the legislative procedure.

These two general provisions have been dubbed, following the sporting practice, "yellow" and "orange" cards. There is in fact also one, rarely-commented, provision which is equivalent to a "red card" which can be used by any single national parliament, namely decisions determining those aspects of family law with cross-border implications which may be the subject of acts adopted by the ordinary legislative procedure.⁹

It remains to be seen what practical impact these provisions will actually have. Eight weeks is not a long time for a parliament to act. In all events, however, they may help to increase the quantity and quality of national debates over European initiatives involving opposition parties and civil society, a need which is more important and relevant than to allow national governments to be stopped by the parliamentary majorities on which they in most cases rest.

Concluding remarks

What can one say at this stage with respect to the likely consequences of all this for the efficiency, quality and transparency of EU decision-making, and for the overall legitimacy of the EU system?

It obviously remains to be seen what will happen in practice, but the new provisions do not in themselves promise any major change in the efficiency of decision-making. On the one hand, the Treaty comes on top of the procedural adaptations which have already been introduced

to deal with enlargement as well as an important reform to the system of comitology. On the other hand, it is not self-evident that the additional treaty changes will lead to greater efficiency. Despite majority voting (and, as noted above, the treaty changes will not actually come into effect for a long time), codecision does not mean quicker procedures or simpler laws. This is all the more so in the enlarged Union; evidence from recent years indicates that codecision procedures have been taking longer than before, and that the texts adopted are longer (Best and Settembri 2008). It can also be expected that the new arrangements

which will be implemented to replace the current comitology system will not make decision-making any quicker. At the time of writing, the practical implications of the 2006 reform remain unclear (Christiansen and Vaccari 2006). Comitology decisions under the new regulatory procedure with scrutiny only began to be adopted in 2008. We have no experi-

ence of how Parliament will "play" the arrangements, nor of the impact of the new language conditions: the periods for Parliamentary action will henceforth only start to operate once the measure has been transmitted in all official languages, while it is also possible that there may be pressures to implement a new language regime in comitology committees (Alfé et al 2008).

It is also unclear what all this will mean for the quality of decisions. In addition to questions as to how the Parliament will manage to process the great mass of measures involved – and the extension of codecision to agriculture and other areas will entail a further leap in the demands on Parliament – there is also some concern as to the content of Parliament's input. The Parliament has very few "technical" resources of its own to support the positions of its Members. The risk is already present that Parliament's positions may rely on the kind offer of expertise from interested parties. What can be done to prevent this from having even wider consequences? In addition, the kinds of procedural devices which have been adopted in order to facilitate decision-making under the codecision procedure – notably the practice of reaching agreements at first reading on the basis of informal negotiations between the institutions – continue to raise some questions as to their consequences for the transparency and quality of parliamentary practice.

Will the Treaty at least make decision-making more transparent – notably easier for people to understand? The answer is probably "yes" on balance, so long as they only look at the consolidated versions and concentrate on the main issues rather than all the details. Even if the terminological distinction is not as great as hoped, the new system does provide for a formal hierarchy of acts. The differentiation between the categories of non-legislative acts is also a positive step in principle with regard to the clarification of powers. Yet the new system in fact increases the number of basic procedures involved even when it comes to acts adopted on the basis of secondary legislation. In addition, there are numerous non-legislative acts which are adopted directly on the basis of the Treaties. Looking only at the main variables (Council decision-making rule, power of the EP, source of the proposal/role of the

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Commission) there are 19 different procedures of this nature. Together with four variants of the ordinary legislative procedure and seven kinds of special legislative procedure, one can therefore identify as many as 30 different procedures by which binding acts can be adopted on the basis of the TFEU, quite apart from the specific procedures applicable to CFSP/CSDP under the TEU (Best 2008).

In terms of legitimacy and public support, finally, the Treaty is likely to have a limited impact. Hopes that the reform process might itself help achieve political consensus and public consent have been subordinated to efforts to ensure ratification with as little debate as possible. Moreover, while the further strengthening of the powers of the European Parliament may rightly be held to increase the formal democratic quality of the Union, the fact remains that greater formal powers for the EP do not in themselves translate automatically or universally into greater popular acceptance of the EU system. It remains to be seen whether people will be reassured by the kind of role foreseen for national parliaments in controlling subsidiarity, or whether at least some will rather be confirmed in their scepticism by the negative imagery of national parliaments' having to save people from some of the mad or bad things that might otherwise come at them from Brussels.

Although it is indeed unlikely that further developments will take the form of major treaty reform in the near future, this is not the end of the road in the evolution of EU decision-making. Some important steps still have formally to be taken to define how things will work, most notably concerning the future of comitology, and the new structures and procedures in CFSP. In the coming years, at least some of the complications and exceptions introduced as a result of the recent political negotiations may be reviewed.

Beyond this, there is no reason to believe that the dynamics of institutional change will cease to operate: the new provisions do not guarantee complete political consensus or perfect practical performance; the institutional actors in European integration will not stop pursuing their interests; and the evolution of the EU's decision-making procedures will inevitably be influenced by, perhaps even more than they influence, the broader challenges of consolidating a stable system of multi-level European governance.

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NOTES

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- ¹ The author would like to thank Michael Kaeding and Pierpaolo Settembri for helpful comments received.
- ² Presidency conclusions, Brussels, 14 December 2007, 16616/07.
- ³ The Treaty of Paris established the European Coal and Steel Community (1951, entering into force in 1952). The two Treaties of Rome (1957, entering into force in 1958) established the European Economic Community (EEC) and the European Atomic Energy Community (known as "Euratom"). These three were for most purposes merged as the "European Communities", but there were significant differences in powers and procedures. The current system of European law-making is primarily derived from the EEC model.
- ⁴ Simple majority has been the "default setting" of the Treaty but applies to very few cases and not to the adoption of legislative acts.
- ⁵ Recommendations and Opinions are also retained as non-binding instruments.
- ⁶ Ex Art. 249 TEC, renumbered Art. 288 TFEU, fourth indent.
- ⁷ There are also minor exceptions giving the initiative to the European Central Bank and the Court of Justice in specific cases concerning those institutions' statutes.
- ⁸ The 1999 decision also foresaw a so-called safeguard procedure. This, however, provides for an appeal to the Council by an affected Member State, and not a committee procedure.
- ⁹ Article 81(3) TFEU.