

A critical evaluation of the Lisbon Treaty

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IVAYLO IAYDJIEV, APR 18 2011

The European Union has expanded from the original six to 27 members in five decades. Scholars have offered various explanations for this enlargement, from instrumental and security considerations to normative and discursive reasons. Additionally, the logic of widening has also pushed for deepening in various areas in order to enhance efficiency and coherence, starting from economic and trade policy and gradually adding new areas such as social policy, immigration policy, justice and home affairs, and foreign and defence policy. Historically, this has occurred through a process of treaty revisions, including most notably the Treaty of Rome (1957), the Single European Act (1986), and the Treaty of Maastricht (1992). However, the European Union has experienced significant difficulties in adjusting to the latest “Big Bang enlargement”, which almost doubled its membership. This process included the Treaties of Amsterdam (1997) and Nice (2001), the failed Treaty establishing a Constitution for Europe (2004), and, finally, the Treaty of Lisbon (2007). The last two, in particular, aroused debates around Europe, with critics claiming that the treaties were paving the way for an unelected European super-state, while proponents presented them as the way forward for a bigger EU in the 21st century. However, in order to understand the place of the Treaty of Lisbon, recently ratified on 1 December 2009, in the overall process of European integration, one should recognise that it is not part of “a Manichean war between good and evil, but a normal political conflict over the governance and direction of the Union” (Church and Phinnemore 2010:49). From this perspective, this essay will critically examine whether the Lisbon Treaty (LT) represents another step towards an ‘ever closer union’. Thus, the first section establishes a non-teleological framework for approaching the question; the next three sections then examine the main provisions of the LT related to efficiency, external action, and democracy, respectively. Throughout, this essay draws parallels with the Constitutional Treaty (CT) as both documents have similar purpose and content. Finally, it concludes that the Treaty of Lisbon is not a major step in advancing the institutional interests of the EU, but some of the new institutional arrangements and the ambiguities central to its main provisions have the potential to shift the process of European integration from formal treaties towards informal evolution of competences.

General Approach

Before discussing whether the LT is a step towards an ‘ever closer union’ it is important to clarify what this actually entails. Gilbert warns that the currently dominant narrative of triumphant ‘construction’ or ‘advance’ of Europe can be revised by historians to emphasise other elements than the elimination of war in Europe (Gilbert 2008:634, 645, 658). Additionally, it is mostly “impregnated with the belief that supranationalism is a desirable ideological goal” and often depicts European integration as ‘progress’ in that direction (Gilbert 2008:658-659). Therefore, this essay seeks to present a more nuanced and balanced judgement on the LT by ‘unpacking’ its main provisions and assessing their likely impact. Similarly as “little is gained by classifying the Lisbon Treaty *in toto* as either a ‘European constitution or as the epitome of its failure” (Reh 2009:627), this essay will discuss which parts of the CT are preserved or dropped within the overall discussion of the LT.

The shock of the ‘Big Bang’ enlargement is taken as a starting point for the analysis of the LT as the single most important change inside the EU in the beginning of the 21st century (McAllister 2010:214, Wallace 2005:485, Friis 2002:191). Previous attempts to deal with the newly presented challenges, the Amsterdam (1997) and the Nice Treaty (2001), had limited success and left a number of key questions, particularly institutional reform, unresolved (Bradbury 2009:25-27, McAllister 2010:214, Dinan 2009:87). Therefore, the “debate on all the big issues” (Bradbury 2009:28) was opened only with the Laeken Declaration (2001) and addressed at the Convention for the Future of

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Europe (2002-2003), presided by former French President Valéry Giscard d'Estaing, which eventually led to the Draft Treaty Establishing a Constitution (McAllister 2010:220). Moreover, this essay focuses on the "contested political opinions over interests, ideas and visions" of Member states (Bradbury 2009:32) in the process European integration and is critical of both the generally deterministic neo-functionalist account and the economically driven intergovernmentalist theories (Gilbert 2008:650-653).

In summary, this essay recognises that "theory is always for someone and for some purpose" (Cox 1981:128) and takes a critical, non-teleological perspective in its evaluation of the likely impact of the new provisions on the functioning of the EU.

Efficiency

According to the Europa website, one of the key aims of the LT is to create "a more efficient Europe, with simplified working methods and voting rules, streamlined and modern institutions for a EU of 27 members and an improved ability to act" (Europa). The TL introduces a number of institutional innovations aimed at that direction, but their effect remains to be seen in practice.

One of the most visible institutional innovations of the LT is the introduction of a president of the European Council for a period of 2,5 years – a suggestion preserved from the CT (Art. 9b TEU, Art. 21 TCE)[1]. The purpose of this position is to create more permanence in the top EU leadership than the six-months rotating presidencies. The treaty articles are rather limited and suggest mostly an administrative and symbolic role, reflecting the "unheroic task of political leadership" in the EU (Hayward 2008:311). However, the appointment of a relatively unknown and uncharismatic leader from a 'small' Member State such as Von Rompuy, additionally known for his consensus-seeking style, reflects anxieties about the potential for this institution to evolve due to its ambiguities (Dinan 2009:86). For example, it is possible for one person to occupy both the position of President of the European Council and Commission President, which would create a powerful 'dual hat' leader with both intergovernmental and supranational authority (Smith 2010:138-140).

Other institutional reforms preserved from the CT concern the European Parliament (EP) and the Commission. Their size is capped to 750 MEPs and a President and to two thirds of Member States, including its President, from 2014[2], respectively (Art. 9d (6), Art. Art. 9a (2) TEU). Thus, this would ensure more efficiency by reducing the possibility for conflicts and making consensus easier to achieve (Boylan 2008:226), but it might damage the already frail legitimacy of the Commission (Dinan 2009:86). The TL also brings for the first time several of the European institutions within a treaty framework (Art. 9(1) TEU), such as the European Council and the European Central Bank (Koehler 2010:68, Gloggnitzer 2008:78). Additionally, the TL also includes a precise delimitation of the areas of the competence between the EU and Member States (Art. 2 TFEU) and a clear statement on the principle of conferral (Art. 3 TEU). These provisions are again taken from the CT (Dinan 2005:178) and curb the supranational level (Reh 2009:635, Boylan 2008:225). Furthermore, the TL explicitly grants the EU legal personality (Art. 46a TEU), which is important clarification in regard to international law and agreements (Cremona 2008:34-35, Koehler 2010:63). However, these relatively minor adjustments only streamline and bring into a treaty framework already well established practices.

However, the most important institutional innovations in relation to the efficiency of a EU of 27 is the extension of qualified majority voting[3] (QMV) procedures and the collapse of the Maastricht pillar structure (Reh 2009:634, Dinan 2009:85). Both are directly related to the effects of enlargement (Kreidman 2008:6, Friis 2002:189) and are similar to provisions in the CT (McAllister 2010:224). Such reforms should enable the Council to overrule individual Member States[4] and "to make more political decisions" by removing Nice arrangements on weighted thresholds, which effectively blocked much of the Council's work (Tsebelis 2008:276-277, 280-281, 286-288). With these changes, QMV becomes the norm in the Council (Art. 9c (3),(4) TEU), effectively 'destroying' the separate pillar of Justice and Home Affairs (Kurpas 2007:9). Despite that, two caveats are in order – first, mainly due to the insistence of Poland, the introduction of QMV will be delayed until 2014 and possibly until 2017 (Dinan 2009:79); second, the foreign and defence policy remains very much a special case (Juncos and Whitman 2009:29). Thus, the attempt to promote effective decision-making in the European institutions has certain limitations.

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Overall, the short survey of the efficiency reforms in the LT, very similar to those of the CT, illustrates the decision to respond to the latest round of enlargement by incremental institutional adjustments (Bradbury 2009:28) rather than by a broad strategic overhaul of the whole decision-making mechanism of the EU (Wallace 2005:487). These generally small but important innovations seem likely to be successful in preventing a deadlock in a EU of 27 (Dinan 2009:85-86), but they also have some significant shortcomings. In particular, while the CT itself was not short and clear (Boylan 2008:218-219), it superseded all previous treaties; the LT is even lengthier, more difficult to grasp as a whole, and amends and thus adds to previous treaties (Reh 2009:632, McAllister 2010:237), even if this may have been inevitable following the failure of the former (Dinan 2009:80). Furthermore, the elimination of the controversial 'supremacy clause' (Boylan 2008:227), the numerous opt-outs of the UK, Poland, and Ireland (Kurpas 2007:8), the 'secession' clause (Art. 49, see also Barrett 2008:16), and the possibility to decrease the competences of the EU (Art. 48 (2)) all undermine not only the codification, the constitutionalisation, and the continuity (Reh 2009:631-637), but also the institutional balance of the EU (Kurpas 2007:9). More fundamentally, it is worth remembering that even with these adjustments the EU continues to be made up of 27 diverse interests and that more efficient decision-making does not necessarily mean better decisions (Zielonka 2008:73-74). The ambiguities related to the position of the President of the European Council, however, suggest that this position might evolve into an important office and it might provide the necessary leadership of the EU, albeit not for the foreseeable future. There is also significant potential for overlapping of competences and 'turf wars' between this office and the President of the Commission and the High Representative.

External Action

The Europa website also declares that the "Treaty of Lisbon gives Europe a clear voice in relations with its partners worldwide" (Europa). Indeed, 25 out of the 62 amendments in the TEU concern the CFSP and/or the ESDP (Juncos and Whitman 2009:28). However, despite introducing important changes, their significance depends on the way in which ambiguities are resolved by future practice.

Perhaps the single most important innovation in the LT is the introduction of a High Representative of the Union for Foreign Affairs and Security Policy, who is also Vice-President of the Commission, chairs the Foreign Affairs Council and is appointed for a period of five years by the European Council (Art. 9e TEU). This provision is mostly retained from the TCE, albeit with an altered name (Art. 27 TCE). This 'upgrade' of the previous roles of High Representative and the External Relations Commissioner is "clearly key to achieving the ambition of greater synergy across all aspects of external action" (Juncos and Whitman 2009:32). Thus, the new High Representative is expected to personify the Union on the world stage (Blockmans and Wessel 2009:14), providing an answer to Kissinger's famous question "Who do I call if I want to call Europe?" (Kissinger, quoted in Verhagen 2008:15). In particular, the 'dual hat' position joins together in one person both supranational and intergovernmental elements through the Commission and the European Council (Koehler 2010:67). However, the choice of a relative weak personality such as Catherine Ashton who only aims to "keep traffic moving" (Cendrowicz and Robinson 2010) undermines the leadership potential of this position even if she does come from the Commission rather than from a particular Member State (Koehler 2010:67-68). Furthermore, the broad but undefined mandate of the position raises concerns about possible conflict of competences with other EU actors, such as the President of the European Council, Commissioners with portfolios related to external action (Enlargement, Trade and Humanitarian Aid), and other top positions representing the EU (Juncos and Whitman 2009:33, Koehler 2010:68-69, Blockmans and Wessel 2009:22).

Another significant element introduced by the LT is the European External Action Service, which should support the High Representative (Art. 13a TEU). Its staff should comprise both officials from the Commission and the Council Secretariat, and seconded national diplomats (Edwards and Rijks 2008:73) as well as from all issue areas, including those with exclusive EU competence, should be represented (Koehler 2010:70). However, despite being a key element for any international actor and "the most significant innovation in EU diplomatic representation" (Edwards and Rijks 2008:81), the current debate surrounding Ashton's proposals for the EEAS highlights problems related to ambiguities about the nature and scope of competences, to bureaucratic politics, and to the overall organisation of the service (EurActiv 2010, Edwards and Rijks 2008:75-78). Similar problems beset the plans for Union Delegations (Art. 188q TFEU, Juncos and Whitman 2009:36).

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Finally, there are only few other changes. First, the inclusion of a 'solidarity clause' related to terrorist attacks (Art. 188r TFEU) and a clause related to armed aggression (Art. 28a(7) TEU) has been interpreted by some as a "collective defence obligation, albeit perhaps *in statu nascendi*" (Blockmans and Wessel 2009:22). Second, it contains provisions for 'coalitions of the able and willing' (Art. 28c TEU), St. Petersburg's tasks have been enlarged (Art. 28b TEU, Juncos and Whitman 2009: 42-43) and a voluntary Permanent Structured Cooperation between the armies of certain Member States (Art. 28e, see also Biscop 2008:447-448). Nonetheless, despite the introduction of QMV in the other policy areas, the CFSP and the ESDP "remain a distinctive pillar" (Juncos and Whitman 2009:30) and decision-making is separate and generally based on unanimity due to the sensitive nature of the subject (Koehler 2010:71). Furthermore, these areas remain outside the jurisdiction of the European Court of Justice (Art. 11 TEU, Juncos and Whitman 2009:30, Koehler 2010:59) and the EP has only formal influence (Blockmans and Wessel 2009:14).

In summary, the Lisbon Treaty is an "enabling document in the sense that it provides for reforms" (Juncos and Whitman 2009:45), but the details and ambiguities are left to be resolved by practice after ratification. Thus, it has significant potential to evolve further without new treaty amendments. However, it remains "hard to imagine a truly effective European foreign policy without a sense of a European interest" (Zielonka 2008:73).

Democracy

Finally, the Europa website also declares that the TL establishes a "more democratic and transparent Europe" and "a Europe of rights and values, freedom, solidarity and security" (Europa). In this area, however, the LT marks the biggest step 'back' from the CT, particularly in relation to its symbolic character and the way it was drafted (Reh 2009:642).

The TL undoubtedly contains significant improvements for democracy. For example, the trend for the EP, the only elected European body, continues to gain more competences (Dinan 2009:86) thanks to expanded budgetary and co-decision powers (Art. 9c,d TEU, see also Reh 2009:638, McAllister 2010:238). Additionally, the election of the Commission President is now linked to the outcome of EP elections (Art. 9a,d). Alongside these European-level improvements, national parliaments also gain further competences with a strengthened provisions for subsidiarity (Art. 8c TEU) which some call "yellow cards" (Duff 2007:5) or "emergency breaks" (Boylan 2008:228). Furthermore, they are also brought in at an earlier stage of the policy-making process by allowing them to scrutinise legislation proposals (Protocol on the Role of National Parliaments in the European Union, see also McAllister 2010:238, Bradbury 2009:29, Kurpas 2007:8). Furthermore, the LT also introduces an element of direct democracy through the citizens' initiative^[5] (Art. 8b TEU), which can potentially have a significant impact on policy-making (Boylan 2008:224, Reh 2009:641). Finally, the ECJ gains broader jurisdiction (Boylan 2008: 224) and the Charter of Fundamental Rights becomes legally binding by cross-reference (Art. 6 TEU, Bradbury 2009:30).

However, while these democratic improvements are welcomed, they are substantially narrower than the provisions of the CT (Reh 2009:642), even if the "constitutional character [of the TL] cannot be hidden" (Boylan 2008:216). Some reject the idea that there is a democratic deficit in the EU (Moravcsik 2008:621-622), but most agree that its frail legitimacy is based on its outputs, which was at the core of the 'permissive consensus' (McAllister 2010:240, Wallace 2005:495-496). However, with greater public attention since the Maastricht Treaty (De Búrca 2008:35) and with the rejection of the CT and the 'no' in the first Irish referendum (see Quinlan 2009:110-113, 117-118) there was a sense that "political elites had taken integration faster and deeper than popular will really desired" (Bradbury 2009:24). Thus, despite that the LT is often presented as "unpacking and repackaging" of the CT (McAllister 2010:231, Dinan 2009:81) and reframed as "just another Treaty" by most European governments (Seeger 2008:24-25, Boylan 2008:228), the removal of the symbolic language, such as references to constitution, laws, Minister of Foreign Affairs, the elimination of the full text of the Charter of Fundamental Rights, etc. (Boylan 2008:227), represents a significant loss. Furthermore, this was coupled with a secretive negotiations and a closed method of drafting the LT, in stark contrast to the Convention on the Future of Europe (Reh 2009:645). This has significant implications as legitimacy remains limited and the LT fails to turn the "lawyers' law into people's law" (Reh 2009:641).

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Conclusion

This essay examined from a non-teleological perspective the changes introduced by the LT in terms of efficiency, external action, and democracy to the EU as an institution. It demonstrated that some of the new provisions are likely to improve efficiency overall and coherence of external action. Most of these changes are directly retained from the CT, from which the LT differs little substantially, but is a significant step 'back' in terms of promoting symbolically a more visible European demos. The conclusion of this assessment is that the way in which the numerous ambiguities, particularly in relation to the two newly established top positions, are resolved will be key to assessing the impact of the LT in the future. It is unlikely that there will be any further treaty revisions in the foreseeable future, which also suggests that LT might be the point when European integration turned towards more informal and flexible means of proceeding 'forward' (Kurpas 2007:9). However, a critical assessment of the LT suggests that it cannot be simply presented as a step 'forward' towards federalism and an 'ever closer union' because it strengthens not only supranational but also intergovernmental aspects. Therefore, the "provisional" is set to "persist" (Wallace 2005:501).

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[1] This essay refers to the consolidated Treaties of the European Union (TEU) and on the

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Functioning of the European Union (TFEU), formally Treaty on the European Community (Dinan 2009:85), and to the Draft Treaty Establishing a Constitution for Europe (TCE).

[2] Both measures were controversial, particularly in Italy in relation to its adjusted number of MEPs and Ireland in relation to the loss of its Commissioner (Dinan 2009:82, see also Quinlan 2009:111).

[3] The new QMV requires a majority of at least 55% of Member States, representing at least 65% of the population of the EU.

[4] However, the LT still contains transitional arrangements retaining a form of the Ioannina Compromise (1994) (Art. 116a TFEU).

[5] The citizens' initiative allows one million citizens from a number of Member States to propose legislation to the Commission.

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