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The Potential of the Lisbon Treaty: How one Treaty May Conceal Another?

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Understanding the present and controlling the future require a proper assessment of past events, however unpalatable they may be. The upsets recently experienced by the Union in the latest revision of the Treaties, the Constitutional and then the Lisbon Treaty, come into that category. It would therefore be a serious mistake to move on without learning the lessons from them. This long and painful process of ratifying the Lisbon Treaty illustrates, once again, the need for more flexible mechanisms to adapt the EU's institutional framework and substantive policy options to the rapidly changing reality of an enlarged EU. Indeed, the difficulty of obtaining unanimous agreement at an Intergovernmental Conference and subsequent ratification within the member states in accordance with their constitutional procedures is only exacerbated in an EU of 27, with its increased degree of national diversity. In view of these limitations of the traditional treaty amendment procedure, the Lisbon Treaty contains certain alternative revision strategies intended to facilitate this process, but also to facilitate the potential for differentiated integration. The purpose of this contribution is to assess the potential of those various flexibility instruments.

Learning the lessons from recent experience: future Treaty revision prospects

How has the Union managed, within the space of three years, to move from a draft 'Constitution,' seen by many as the penultimate step on a federal path and drawn up with the utmost transparency in a prestigious forum, the Convention, to an unreadable Treaty, definitely representing a step backwards in form and, in a way, also in substance, produced by an exercise in diplomatic secrecy living up to the worst pre-enlightenment traditions? How has such a U-turn been carried out with the active collusion of the European Parliament, not long ago so critical of the slightest liberty taken with transparency and democracy? The answer is simple: just by virtue of the principle of reality, whereby dreams cannot be sustained indefinitely and any venture ignoring the facts, which are well known to be stubborn, is doomed to failure.

Under that principle of reality, there is little or no likelihood of any similar exercise over the next few years. While the Treaty does lay down a revision procedure involving the convening of a Convention, which suggests that any such aspiration has not been killed off altogether, it goes on straight away to stipulate that, with the European Parliament's agreement, that formality may be dispensed with where the issues at stake do not require it. It is a fair assumption that, for a decade or more, member states will make sure they do not lose control of the basic treaty-revision procedure, as they did recently; the price to pay for that would be too high.

There is another lesson to be learned from this sorry tale: in allowing multiple potential vetoes, the present treaty-revision procedure courts disaster. As the course of full-scale revision is fraught with risk, the new Treaty's authors took care to offer their successors a range of means of adapting the basic texts to the new opportunities and fresh challenges to be faced by the Union over the years ahead. The general thinking behind those future-development clauses is to provide the Union, from the outset, with the political and legal tools with which to make inconspicuous yet tangible progress as needs and openings arise. This can be seen as a way of reverting to the founding fathers' pragmatic, workmanlike approach.

General treaty-revision clauses

The revised Treaty thus brings a radical innovation, in stipulating that the provisions of the Treaty on the Functioning of the European Union (TFEU) – i.e. policy formulation in particular – may be amended merely by a unanimous decision of the European Council, subsequently ratified by member states in accordance with their respective constitutional procedures (Art. 48(6) Treaty on European Union [TEU]). While this arguably does not involve any great change, as the need for consensus and national ratification still remains, the effect of the innovation is to be seen elsewhere. It lies in the option of dispensing with an Intergovernmental Conference, which will make the use of this procedure more routine, taking the heat out of substantive debate and in all likelihood improving the chances of a favourable outcome. It should be pointed out, however, that, in making use of this provision, the European Council cannot "increase the competences conferred on the Union in the Treaties".

Also in the interests of calmer, more focused discussion of any new needs, it will in future be possible to move from unanimity to a qualified majority and hence from a special legislative procedure to the ordinary legislative procedure (i.e. a qualified majority and codecision) merely by a decision of the European Council, together with a procedure for tacit consent by national parliaments (Article 48(7) TEU). This general bridging *clause passerelle* is, however, subject to restrictions: its application is limited to the provisions of the TFEU and Title V of the TEU; aside from the need for the European Council to adopt such a decision unanimously and obtain the consent of the European Parliament, the national parliaments *de facto* obtain the right to 'veto' that decision within a six-month period; moreover,

for decisions with military implications or in the area of defence, no such adjustment from unanimity to qualified majority voting (QMV) can be accepted. It should also be noted that Article 353 TFEU explicitly excludes the application of this general bridging clause in respect of the voting and decision-making procedures laid down in the following articles: Article 311(1) and (4) TFEU relating to decisions on 'own resources'; Article 312(2) TFEU on the adoption of multiannual financial frameworks; Article 352 TFEU incorporating the 'flexibility clause' and Article 354 TFEU on the suspension of membership rights.

Enhanced cooperation and other bridging clauses in particular areas

Another factor making for flexibility in the revised Treaty stems from improvement of the provisions on enhanced cooperation. In a Union with a wider membership and greater diversity, use of enhanced cooperation would seem, in theory at any rate, the prime way of enabling the Union, for the time being at least, to live with differing levels of ambition, while maintaining overall political consistency and preserving the unity of the institutional framework. Since its introduction under the Amsterdam Treaty, enhanced cooperation has not met with the anticipated success, firstly because it was available in another form where the need was greatest (currency, Schengen, etc.) and secondly because the requirements for its implementation were too stringent. The new Treaty tries to put this right in a number of ways.

First of all, by generally relaxing the requirements for use of enhanced cooperation. The main instrument available for enhanced cooperation between some member states is Article 20 of the Lisbon Treaty, allowing them to "establish enhanced cooperation between themselves within the framework of the Union's non-exclusive competences". This new Article 20 thus provides opportunities to cooperate on policy issues, even if the support and participation of all EU member states is not (yet) forthcoming. Under enhanced cooperation, the member states can make use of the EU institutions and exercise those competences by applying the relevant provisions of the treaties. The three main innovations meant to facilitate the triggering of enhanced cooperation are as follows: firstly, the last-resort condition has been clarified and downgraded, i.e. a deadlock in the decision-making process can now be established by the Council in the initial decision authorising enhanced cooperation; secondly, the initial authorising decision is to be enacted by a qualified majority, without any further qualifications (except in Common Foreign and Security Policy); thirdly, the authorising decision may lay down conditions for participation, to test the capacity, or the goodwill, of the initial participating members states. This is aimed at preventing the participation of unwilling member states, only interested in keeping some influence over the development of enhanced cooperation, or even impeding it.

However, the use of Article 20 is subject to certain conditions: the scope for enhanced cooperation is limited to non-exclusive competence; at least nine countries should participate; the decision authorising enhanced cooperation is to be adopted by the Council; it should

respect the *acquis communautaire* and not undermine the internal market or the social and economic cohesion of the Union; and the instruments, procedures and rules laid down in EU primary law also apply to the operation of differentiated cooperation.

Secondly, by stipulating that the countries participating in enhanced cooperation may decide of their own accord to move from unanimity to a qualified majority, in order to facilitate adoption of implementing measures. Under Article 333 TFEU, the Lisbon Treaty provides that the Council can adjust either the voting requirements from unanimity to QMV or the decision-making procedure from a special to an ordinary legislative procedure, although such an amendment to the Treaty provision to which enhanced cooperation relates still requires unanimity within the Council. The application of the bridging clause might be easier in that it will only be necessary to reach such unanimous agreement among those member states that participate in enhanced cooperation, in order to approve the amendment to the decision-making procedure.

It is clear from the analysis so far that a serious effort has been made, in the Lisbon Treaty, to render the enhanced cooperation mechanism more attractive and effective, at the initial stage (triggering arrangements), at the functioning stage (bridging clause) and in relation to non-participants. However a number of uncertainties, ambiguities and potential problems remain. Some of those uncertainties are legal in nature. How will enhanced cooperation affect the Union's judicature, e.g. in assessing the applicability of decisions enacted in enhanced cooperation to situations in one way or another involving non-participating members states or their nationals? What will be the impact of enhanced cooperation on the Union's external action and on further enlargements? What may turn out to be the legal nature of enhanced cooperation and its *acquis*?

Lastly, in some areas where the value of such cooperation is already acknowledged, such as security and defence or justice and home affairs, by laying down various pre-established arrangements (structured cooperation and opting out or in) in anticipation or furtherance of enhanced cooperation.

Judicial cooperation in criminal matters, including minimum harmonisation of national criminal law, is another potential area for enhanced cooperation. In the Lisbon Treaty, an 'emergency brake' on the legislative procedure has been devised but, in the event of continuing deadlock, authorisation to pursue enhanced cooperation "shall be deemed to be granted" to willing member states. It is therefore the whole former third pillar (Title VI of the TEU) which will be covered by that special procedure aimed at easing the creation of enhanced cooperation.

Another innovation under the Lisbon Treaty concerns extension of the scope of enhanced cooperation to Common Foreign and Security Policy (CFSP), without confining it to mere implementation of common action or positions on behalf of the Union. Being formally part of

CFSP, defence policy has also become a potential area for enhanced cooperation. Enhanced cooperation is allowed in that field under the heading of "permanent structured cooperation". This is to be set up in order to increase and further integrate the forces of the participating member states and to engage in the most demanding Petersberg missions. Permanent structured cooperation resembles enhanced cooperation in that it will be set up by a Council decision identifying the participating member states. It will be confined to willing member states that fulfil the criteria and have made the predefined military capability commitments set out in a protocol in that regard. Non-participants will be precluded from voting in the Council (whereas no express provision is made regarding their right to take part in deliberations). And they can at a later stage submit to the Council their intention to participate. Such cooperation consists in practice of entrusting the implementation of a Petersberg mission to a group of states "which are willing and have the necessary capability for such a task," presumably on behalf of the Union. Such missions are supposed be carried out "within the framework of the Union". The Council is to be kept informed and may amend the mandate for the mission. However, management of the mission remains in the hands of the group of States, "in association with the High Representative".

Even though the rather disappointing experience to date gives reason for some caution, the combined value of these highly technical-looking provisions should not be underestimated. The Union can now, with the new treaty, be said to have a more flexible and more appealing framework providing real opportunities for those member states wanting to fulfil their legitimate ambitions without undermining the whole edifice.

Conclusion

To conclude, assuming there to be no substantial revision of the Lisbon Treaty within the foreseeable future, it is highly probable that a need will be felt to make use of the wide range of instruments available under the new Treaty in order to adapt the Union's policies to the opportunities or needs of the day. The most go-ahead member states are also likely to try out the various options opened up by the new arrangements for enhanced cooperation, an inclination naturally made all the stronger as considerable reluctance is shown by the slowest-moving member states, particularly in justice and home affairs, under the 'brake / accelerator' system. Other potential areas of application can be identified, including Community policies governed by unanimity, like taxation, social policy and some aspects of energy policy, as well as European citizenship.

This trend, were it to materialise, could in time lead to the formation of the oft-mentioned 'pioneering group,' long called for in some quarters. Time will tell, although the main obstacle standing in the way of that development continues to be the diversity and wide range of aspirations, making it more realistic to refer to 'pioneering groups,' in the plural, particularly regarding the euro and defence, rather than any real structured, homogeneous political

avant-garde. Such clearer, more radical differences in aspirations cannot be ruled out in the longer run, however, depending in particular on proper use being made of the practical opportunities opened up here by the new treaty.

In addition, use of various means of reflecting such differences would then have to be accompanied by greater practice of democracy within the Union, something at present largely artificial in the absence of any real shared policy. Some reforms introduced by the new Treaty should help bring that about.