

## THE CER GUIDE TO THE REFORM TREATY

*By Hugo Brady and Katinka Barysch*

- ★ An agreement on the new Reform (or Lisbon) Treaty looks likely at the EU summit this week. However, with an election imminent at home, the Polish government could be tempted to dig in its heels over a proposed new voting system.
- ★ The aim of the treaty is to make the enlarged EU work better. It does so by establishing simpler, clearer rules for decision-making; streamlining the EU's foreign policy machinery; and giving EU institutions a greater role in police and justice co-operation.
- ★ Although the new treaty does not give the Union significant new powers, some member countries have been mulling a popular vote on it. France and the Netherlands have decided that parliamentary ratification is adequate. The UK will probably follow, given that it has secured wide-ranging opt-outs.
- ★ If ratified, the new treaty should be in force in 2009, before the next European Commission and Parliament come in. The difficulty of agreeing a treaty among 27 countries will dissuade EU governments from carrying out a similar exercise any time soon.

European leaders will meet in Lisbon on October 18<sup>th</sup>-19<sup>th</sup>, to reach final agreement on the EU's new treaty. The Portuguese, who currently hold the EU's rotating presidency, hope that the document will be called the 'Treaty of Lisbon', in line with the tradition of naming treaties after the cities in which they were agreed. Other European governments will prefer to stick with the 'Reform Treaty', to signal that it is less ambitious than the constitutional treaty, rejected in the French and Dutch referendums of 2005. Like the treaties of Amsterdam (1997) and Nice (2000), the new treaty will amend the EU's founding charters. Since its changes are presented as amendments to existing texts, the new treaty is very hard to read. The constitutional treaty would have consolidated all existing treaties into one document, which would have made the Union's legal basis much more accessible.

However, in the consolidated constitutional treaty, it was hard for people to distinguish old provisions from new ones. Therefore, long-standing EU principles, such as the supremacy of EU law or the free movement of workers, suddenly became controversial. Many people also disliked those bits that made the treaty look like a national constitution: its grandiose preamble, the clauses on an EU flag and anthem (both of which were officially adopted in the 1980s), and the inclusion of a charter of fundamental rights and freedoms. The Reform Treaty abandons most of these constitutional trappings. It does preserve the parts on human rights, which most Europeans support. Most of the other clauses that have been kept are designed to improve the EU's internal functioning; the way it implements foreign policy decisions; and its efforts to fight crime, terrorism and illegal immigration. So the treaty should make the EU more effective in key areas – without fundamentally altering the balance of power between the member-states and its institutions, namely the European Commission, Parliament and Court of Justice (ECJ).

The treaty's key provisions are:

★ **A full-time European Council president**

The European Council, where EU leaders meet every three months, will have a full-time chairperson or 'president'. With 27 member-states, the current system of shifting the presidency from one country to the next every six months has simply become unworkable. Some smaller countries struggle with the huge task of running the EU's complex agenda; and bigger ones sometimes mix up national priorities with the European interest. Moreover, rotation results in too little follow-up on summit decisions. Under the new system, the EU governments will choose a full-time president who will chair their meetings for a term of two and a half years, renewable once. It will not be easy to find the right person for the job. He or she will need to be a consensual figure but also weighty enough to set the agenda and cajole EU governments into implementing their political promises. The council president will not chair the sectoral councils, where the EU ministers for transport, finance, agriculture and so on decide on more specific measures. For these, a modified system of rotation will remain, under which three EU countries work together to chair the various meetings.

★ **A clearer, fairer voting system**

The Council of Ministers currently takes decisions under the complex 'triple majority' voting system of the Nice treaty. The Reform Treaty's 'double majority' voting system is both fairer – it gives countries with larger populations more weight – and more transparent. Under the new system, a measure will pass if it is supported by 55 per cent of the member-states (currently 15 out of 27), provided they represent at least 65 per cent of the EU's population. Formal votes are rare in the EU. The member-states usually prefer to seek a consensus, even in areas where voting is foreseen. But the mere possibility of a vote means that the voting system can determine a country's bargaining strength. At least as important, however, is a government's ability to make friends and build coalitions. Many Europeans were therefore baffled when the Polish government in June threatened to veto the entire treaty in an attempt to retain a bigger voting share. The Kaczynski brothers (Lech, the president, and Jaroslaw, the prime minister) eventually agreed to the double majority system, under the condition that it should only be phased in between 2014 and 2017. They also wanted the EU to confirm the validity of the so-called Ioannina compromise from 1994, which allows a minority of EU countries to temporarily block a majority decision.

★ **A smaller Commission**

The current system under which each EU country sends one commissioner to Brussels has made the European Commission unwieldy. Each commissioner needs his or her own portfolio (there is one in charge of promoting multilingualism now). And the president of the Commission struggles to make his 26 colleagues behave like a coherent cabinet. So after 2014, the number of commissioners will be capped at two-thirds of the number of member-states. A rotation principle will determine which country sends a commissioner for any given term. There is a risk that efficiency will come at the price of legitimacy, however. Although commissioners are not supposed to act in the national interest, Europeans usually feel represented by 'their' envoy to Brussels. Commissioners also help to explain EU business back in their home country. Decisions from a Commission in which few or none of the big EU countries are present might lack political legitimacy. It would have been better if the EU had allowed each country to keep a commissioner, but divided them into senior and junior ones to reduce the number of portfolios.

★ **A stronger foreign policy representative**

Increasingly, the EU's big challenges lie outside its borders rather than within. The fight against poverty in Africa, the prospect of a nuclear-armed Iran, a resurgent Russia and the need for a global agreement on climate change are just some examples. However, the EU's machinery for co-ordinating foreign policy is ineffective. The Council's High Representative (currently Javier Solana) has the political clout that comes from speaking on the EU's behalf – provided the 27 member-states agree on what he should say. But he has few resources. The commissioner for external action (currently Benita Ferrero-Waldner) has a €10 billion annual budget and a big team of specialists. But she has little diplomatic weight since foreign policy is decided by the Council, not the Commission. Co-operation between the two foreign policy figureheads is often difficult, and sometimes entirely absent. The Reform Treaty therefore proposes the only sensible solution: a merger of the two posts. In response to UK pressure, the merged post will not be called the 'EU foreign minister' but the High Representative for Foreign Policy and

Security. Though less catchy, the title is more accurate. The High Representative will chair the meetings of EU foreign ministers, which will allow him or her to steer the Union's foreign policy agenda. Like Benito Ferrero-Waldner now, the High Representative will be in charge of the EU's external relations budget. And he or she will preside over the EU's new 'external action service' which is designed to provide administrative support and advice. Their service will consist of the foreign affairs departments (including the overseas missions) of the Council and the Commission, as well as officials seconded by the member-states. In key foreign policy areas, the new High Representative (like Solana now) will only be able to act if there is unanimous agreement among all member-states. Even so, the UK government has insisted on a declaration that specifies that the new EU position will not affect British foreign policy.

#### ★ Majority voting on internal security

The new treaty scraps national vetoes in about 50 areas. Many of these are minor, and some are needed to allow the EU to implement its declared priorities, such as the swift disbursement of overseas aid. The most radical shift concerns decisions on EU co-operation for fighting terrorism, crime and illegal immigration, or what officials refer to as justice and home affairs (JHA). In most policy areas, such as the single market or transport, the Commission drafts laws, the Council of Ministers and European Parliament decide on them, and the European Court of Justice has the right to review whether the member-states comply with them. Decisions on JHA, on the other hand, require unanimity, and they are beyond ECJ jurisdiction. The need for painstaking consensus has resulted in frequent delays and watered-down compromises in this hugely important policy area. And the lack of ECJ involvement has raised concerns that EU legislation for say, extraditing suspected criminals, could infringe human rights. Therefore, from 2009 most JHA issues will be dealt with like normal EU business. Since many of the issues at stake are sensitive, the EU has added an 'emergency brake' that allows each government to halt discussions on a JHA measure that could threaten its national legal system. If the country in question cannot reach a compromise with its EU partners, it is free to opt out of the measure. Despite the availability of this safeguard, the British government has negotiated an opt-out from all JHA policies (see the box at the end for the details on what this means). Ireland, with which the UK has a common travel area, will also follow this arrangement.

#### ★ Human rights apply to EU laws

The Reform Treaty will make the EU's charter of fundamental rights legally binding, but only on European legislation. The charter mainly consists of rights and freedoms that EU countries have signed up to in various other documents, such as the European Convention on Human Rights. It adds some aspirational 'principles', such as the right to job training and health care, but specifies that these will only have meaning insofar as they are already applied and practised in the individual member-states. For example, the 'right to strike' will not create new worker entitlements beyond existing national labour laws. Nevertheless, some in the UK worried that such principles might serve as a loophole to undermine its liberal job market. The treaty now includes a legally binding protocol (not strictly speaking an opt-out), underlining that the charter does not create new social or labour rights and cannot be used to strike down British laws. The Polish government has also signed up to this protocol but for different reasons: it worries that the charter's individual freedoms could clash with the conservative and religious values upheld by many Poles.

#### ★ A stronger say for national parliaments

Under the principle of 'subsidiarity', the EU is only supposed to legislate if action cannot be taken more effectively at the national or local level. To enforce this principle, the Reform Treaty will, for the first time, give national parliaments the right to challenge a piece of European legislation that they consider unnecessary. The Commission will in future send draft laws directly to national parliaments. If a third of them express concerns, the Commission needs to explain why the legislation is needed, or submit a redrafted version. If half of them are unhappy, a majority of member-states or MEPs can insist that the draft be dropped altogether. However, as in the past, the role that each national parliament plays in EU law-making will depend on how actively it wishes to be involved. For example, the Danish parliament has been extremely active in scrutinising EU laws and holding the government to account during negotiations; other national parliaments much less so.

#### The politics of treaty change

EU treaties have never been easy or straightforward to amend. However, if and when the Reform (or Lisbon) Treaty finally enters into force in 2009, it will mark the end of a particularly arduous episode of

EU treaty change. Negotiations first started in February 2002, when the European convention began to draft the constitutional treaty. Unlike the inter-governmental conferences (IGCs) that usually negotiate on behalf of EU governments, the convention represented a broad church of diplomats, parliamentarians, NGOs and selected European worthies. In June 2004, all EU countries signed the constitutional treaty, and 18 have subsequently ratified it. But the two negative referendums in France and the Netherlands in mid-2005 forced the EU into a year-long ‘pause for reflection’.

Many EU governments conceded that calling the treaty a ‘constitution’ was over-ambitious and misleading. But all countries agreed that an EU with 27 member-states (and more queuing to join) needed better functioning institutions. They also all agreed (and this included the British government initially) that the Union could not help its members to cope with new challenges abroad and at home unless better rules were found for co-operation in foreign policy and internal security. This broad agreement still stands – although the British have secured additional opt-outs (see below).

Although several EU governments have used the re-opening of treaty talks to make new demands, most of these are minor or of little practical consequence. The Netherlands asked for the EU’s accession criteria to be included in the treaty, since many Dutch voters link their immigration worries to EU enlargement. European leaders adopted the so-called Copenhagen criteria – on democracy, market economics and EU law – back in 1993. So they were already binding for the last two enlargement rounds, in 2004 and 2007; and they apply to all current applicants, including Turkey and the Balkan countries. Their addition to the treaty will make no difference in practice.

The Reform Treaty brings little change in economics. But Nicolas Sarkozy, the French president, wanted to use it to show that the EU is not as ‘ultra-liberal’ as many of his compatriots fear. He therefore asked the EU to remove “undistorted competition” from the list of basic EU objectives. Although symbolically important, the move is of little consequence: while the objective was deleted, a new protocol reinforces the EU’s competition policy. Italy, meanwhile, is unhappy about a reduction in the number of MEPs it sends to the European Parliament. Bulgaria wants the EU to refer to its single currency not only as the euro but also as *evro*, the Cyrillic version of the spelling. Poland (as explained above) secured special assurances on the charter of fundamental rights and a five-year delay before the EU moves to double majority voting. In the run-up to the October summit, the Kaczynskis were still insisting that the EU move the Ioannina compromise from a declaration to a protocol (which has the same legal force as the treaty itself). But they seemed willing to be bought off with a stronger Polish representation in the ECJ and European Investment Bank.

It was Britain that made the strongest demands during the negotiations – and obtained everything it wanted. As one German politician put it at a recent CER seminar: Britain “dined out” three times, defending ‘red line’ issues in foreign policy and defence, taxation, social welfare and justice policy against countries who wanted integration to go further. First, British diplomats had pivotal roles in the European convention, with the result that the constitutional treaty transferred few new powers to the EU and contained various safety clauses. Then, the UK successfully argued that the moribund constitution be abandoned despite the fact that a majority of EU countries had already ratified it. Hence the EU once again ended up with a modest, amending treaty. And finally, the UK managed to secure a number of opt-outs and special declarations, as explained above. The UK government had initially supported strengthening the role of the EU High Representative for foreign policy. But it almost killed the idea when its domestic debate became too heated. Similarly, British politicians had argued in favour of more EU co-operation in fighting terrorism, and dealing with illegal immigration. But in the end, the UK decided that a lack of influence in JHA was a price worth paying for guarantees on national sovereignty. Finally, the special protocol on the charter of fundamental rights may have pleased some domestic critics on the right. But it so incensed the British trade unions, who think that British workers have fewer rights than their European colleagues, that they have been agitating against the entire Reform Treaty.

### **A deal in Lisbon, and then?**

The chances that EU leaders will reach a final agreement on the treaty in Lisbon are good, but by no means certain. The Kaczynski government faces a parliamentary election at home just two days after the October summit. In Poland’s charged political environment, derailing an EU summit could count as a plus on a politician’s scorecard. Gordon Brown, meanwhile, might feel under pressure to seek yet more concessions from his European partners. However, Britain’s eurosceptics have already decided that the treaty goes too far, no matter what the summit outcome. More concessions would hardly sway the opposition Conservative party, parts of the media, the trade unions and other assorted lobby groups, as well as a group of MPs from Brown’s own Labour party, who have all been calling for a popular vote.

Given how much the British government has already achieved in terms of limiting the scope of the new treaty and adding opt-outs, Brown is likely to stand firm on parliamentary ratification.

The fact that most other EU countries have decided in favour of parliamentary ratification should work in Brown's favour. Only the Irish are required by law to hold a referendum, which will probably take place next May. In the Netherlands, the state council, an advisory body, concluded after a lengthy analysis that a referendum was not needed. The Dutch cabinet says it will follow this advice as long as the treaty is not changed at the last minute. The referendum-happy Danes have reserved their decision until the final text has been agreed. The Danish opposition insists on having a political, not just a legal, debate on the need for a referendum. But the government points out that the nine clauses it thought involved the transfer of sovereignty have been removed. No other country is currently considering putting the new treaty to a popular vote – although with half a dozen member-states holding a national election between now and 2009, there is always the chance of a policy reversal somewhere in the EU.

The main lesson that many EU leaders will draw from this lengthy, and often frustrating episode in treaty making is: never again. With 27 members, and more likely to join in the future, reaching the kind of complex and fragile compromise that underlies EU treaties has become very difficult. The Union may still adopt treaties on specific issues, such as climate change. But most European leaders agree that the EU has more important things to do than to fiddle with its institutions and decision-making procedures. And since any substantive new treaty would probably be subject to a referendum in a number of EU countries, the risk of failure would be high.

So the member-states will want to avoid another round of treaty change for as long as possible. The EU can use the accession treaties it signs with newcomers to make minor changes to the way it is run. And it could launch new policies through other types of inter-governmental agreement. However, in the absence of treaty change, the need to bring everyone on board diminishes. So it is more likely that smaller groups of EU countries will go ahead with new projects and policies, perhaps outside the EU's established legal and institutional framework. The Schengen area of passport-free travel started like this. So did the seven-country Prüm treaty on police co-operation (both have subsequently been incorporated into the EU treaties). Future areas for such 'variable geometry' could include harmonising tax bases, integrating defence forces and aligning criminal law. If the negotiations for the Reform Treaty are anything to go by, it is already becoming clear who will take part in future initiatives and who will not.



### How the treaty changes police and justice co-operation

All EU countries see the need for more co-operation in justice and home affairs (JHA). While criminals, terrorists and illegal migrants can easily slip across borders (especially in the EU's 'Schengen' area of passport-free travel), differences in national laws and practices prevent policemen and judges from working across borders effectively. However, questions of immigration, justice and individual freedoms are very sensitive. Therefore, EU initiatives in this area have to strike a balance between facilitating co-operation and preserving national sovereignty.

The EU initially did this by setting up a 'three-pillar' system of decision-making under the Maastricht treaty. The first pillar contains the EU's single market and other policy areas where the European Commission has the right to draft laws, the Council of Ministers votes on them, and the European Court of Justice (ECJ) adjudicates compliance. The second pillar is for foreign policy, where decisions need the consent of all EU governments. The third pillar, for JHA, originally covered EU co-operation in four policy areas: policing, criminal justice, immigration and asylum, and border management. In all these, the EU governments decided only by unanimity, and EU institutions had no real powers.

#### Opting out step by step

In 1997, the EU governments incorporated the Schengen agreement into the Amsterdam treaty. With this, they transferred border and immigration policies to the legally-binding first pillar. Since the UK and Ireland had chosen to remain outside Schengen, they negotiated an opt-out from EU initiatives on borders, immigration and asylum. (Denmark also has a version of this opt-out arrangement). But they have remained full participants in police and criminal justice co-

operation, which has stayed in the inter-governmental third pillar. Through the Reform Treaty, these latter policy areas will now also move to the first pillar, which as explained above, will allow for majority voting and give the Commission and the ECJ a role in them.

Since the UK and Ireland have legal systems that are distinct from those in most other European countries, they feared that any moves towards harmonisation may affect them disproportionately. They therefore insisted that the EU should add an 'emergency brake' that allows any government to halt a measure that could affect its legal system. The issue is then referred upwards, to EU leaders. If they cannot find a compromise, the member-state that has expressed the concerns can opt out from the decision. The rest of the EU can go ahead using the so-called 'enhanced co-operation' procedure. In addition, the Reform Treaty also makes it clear that neither EU decisions on policing and criminal justice nor ECJ judgements can interfere with the work of national intelligence services, the police or special forces.

Despite these safeguards, the British government has insisted that the existing JHA opt-out (on immigration and borders) will now be extended to policing and criminal justice co-operation. As a result, the UK and Ireland will be free to choose which JHA initiatives they want to take part in. Even if they do opt in, they can still pull the emergency brake, as can any other member-state. This JHA opt-out is permanent; it can be modified only if the UK and Ireland want to do so in a future treaty. Furthermore, the UK has ensured that JHA measures that the EU agreed before 2009 will not immediately fall under ECJ jurisdiction. The EU has until 2014 to renegotiate or tighten up any existing agreement before it becomes open to ECJ interpretation. And even after 2014, the UK will be able to decide on a case-by-case basis whether to accept ECJ jurisdiction on these agreements.

### **A price worth paying?**

In practice, the arrangement negotiated by Britain and Ireland, is an opt-in rather than an opt-out. It will work like this: the Commission proposes a piece of JHA legislation to the meeting of EU justice and interior ministers. While the other member-states start negotiations on it, the UK and Ireland have 90 days to tell their EU colleagues whether they want to take part. If they do not, they are automatically excluded, and the legislation will not apply to them. However, even if they opt-in, the UK and Ireland will have much less scope for influencing JHA policy. While the two governments will be busy consulting their ministries, agencies and security services on whether to opt in, their EU colleagues will proceed with the negotiations. The diminished influence of the latecomer is the price that the UK and Ireland will pay for extra safeguards on their sovereignty.

Moreover, the pick-and-choose approach that the UK and Ireland want to pursue will limit what they can achieve from JHA co-operation. Both countries have a strong interest in working with their EU partners on measures that enhance national security, such as sharing information between police forces, extraditing suspects and fighting international terrorism. So the UK and Ireland will support harmonisation in criminal justice, but only insofar as it helps them to fight crime and prosecute criminals. However, other EU countries see such harmonisation as part of a package that should also include better protection of the rights of suspects that find themselves on trial outside their home country. Since the UK and Ireland are much less keen on harmonising such protections, they may not be able to take part in initiatives that would allow their police forces and prosecutors to work more easily with their European counterparts.

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