

TWO FOR THE PRICE OF ONE?

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With the deal reached at the European Council in Lisbon, a long cycle of attempts to improve the working of the EU, including three intergovernmental conferences (IGCs) in 15 years, is finally ending. The road has been painful, but most of the substance of the failed Constitution has been preserved and the final agreement will serve the EU well.

Decision-making improves through the permanent, elected presidency for the European Council, its institutionalisation and its new voting mechanism based on majorities of countries and population. A better equilibrium between big and small countries is one immediate result. Even if not called such, there is *de facto* a Foreign Affairs Minister who will head a common diplomatic service and oversee the first building blocks of a common defence policy. Justice and home affairs fully enter the fold of common Union policies, with the UK opt-outs mainly constituting a political symbol. In reality, cooperation in judicial affairs will be needed even by countries that have opt outs as fighting criminality increasingly requires a European approach.

The mechanisms of democratic control over the Union's institutions are improved as well. National Parliaments and the European Court of Justice will be the gatekeepers of subsidiarity. Moreover, the Treaty on European Union (TUE) establishes that competences not clearly attributed to the Union, belong to the States. A declaration attached to the Treaties *a latere* even foresees the possibility to give back jurisdictions to member states with a simple decision of the Council.

A potentially important improvement in the text agreed by the IGC, and one that is often overlooked, is the fact that there will be two treaties: a Treaty on the EU, which contains most of the institutional provisions, and a second treaty 'on the functioning of the Union'. The first is close in character to a 'fundamental law', or constitution at the national level, whereas the second is closer to implementing legislation. It is thus fitting that certain provisions (e.g. passage by qualified majority voting in new areas) of the second treaty can be modified by a simplified procedure. And herein lies the germ for an important innovation: a true two-level treaty structure with a fundamental law on which everyone must agree, and provisions on specific policies on which dissent is normal and can thus be modified more easily.

The new text, however, is even more opaque than its predecessor, but this might be necessary under the present circumstances. The heads of state and government of the 20

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countries that have already ratified the Constitutional Treaty now have to argue at home that the new text is essentially the same as the old one and thus there is no need for a grand debate or a referendum to approve the new Treaty. In the other member countries (France and the UK, for example), the heads of state must use the opposite argument: they will insist that this new text is so different from the old one that there is no need for a referendum. It will be interesting to see whether the different national debates that will now start can be kept totally separate.

The new treaties adapt the institutional set-up of the Union to its expanding remit. During its first half century, Europe tried to create a new economic order by setting general rules and leaving implementation to the member states. And lately this approach has been extended to the area of Justice and Home Affairs: here again the EU sets common rules and the platform to ease the cooperation of national judges and police forces. But this approach cannot be copied in the area of foreign policy, which requires concrete actions to face specific problems. It is thus natural that in this new context the European Council turns out to be the main actor, especially in the areas of foreign and defence policy. The 'Community approach' does not offer the best solution in all policy fields.

But the European Council is not the only institution to gain in power. The role of the European Parliament also expands in the traditional fields of action of the EU where the 'Community approach' will be retained.

Relative to these two institutions, the European Commission loses power: it keeps his role of guardian of the treaties but forfeits in part the power to initiate legislation by sharing it with the new President of the European Council. Also the life of the President of the Commission will be harder, squeezed between his Vice President who will be also foreign affairs minister and coordinator of the external policy and the new President of the European Council. Discussions about who will be the true 'President' of Europe and who can speak for Europe abroad will be unavoidable.

All of this is simply to reaffirm the 'bicycle' theory of the EU once more. Europe takes a step forward only by creating a new disequilibrium, which will not be addressed until experience has shown that the new set-up needs to be improved again. It is thus clear that this latest text is not the last word on the structure of the EU. Eliminating all references to a constitution, however, has one clear advantage: nobody can be surprised when new Treaty revisions will be proposed even before all of the provisions of this present one have been fully implemented.