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Federal Trust Policy Commentary

December 2007 • The Federal Trust, 31 Jewry Street, London EC3N 2EY • www.fedtrust.co.uk • info@fedtrust.co.uk

Personal Submission for House of Lords EU Committee, 12 December 2007

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The Reform Treaty: Its Impact on the EU Institutions

Introductory Comment

Many institutional provisions of the Reform Treaty are framed, perhaps deliberately, in general, permissive or tentative terms. The real impact of these provisions will therefore only emerge in the course of their implementation. This implementation will be influenced by the personalities involved in the workings of the new structures and the general political background against which implementation takes place. As a result, some uncertainty must still attach to many answers offered to the Committee's questions.

Reform Treaty Structure and Legal Personality

If the European Constitutional Treaty had been adopted in its original form, it would have constituted a clearer and more accessible document than the structure arising from the Reform Treaty and its interaction with the existing European Treaties. This is a definite drawback of the abandonment of the "constitutional concept" by the European Council in June 2007. The often confused controversy caused over the past three years by the use of the phrase "European constitution," however, was such that the abandonment of the "constitutional concept" was probably the only politically acceptable option open to the European Council.

The question of the legal personality of the European Union has both a practical and a symbolic aspect. Practically, the recognition of the Union's legal personality puts an end to an existing controversy about whether the Union may not already have this legal personality. The Union's recognition by third parties as having treaty-signing power would strongly suggest that it does already have this personality and that the Reform Treaty simply recognises an existing reality. Symbolically, legal personality for the European Union is seen by some of the Treaty's critics as creating a new (or consolidating an existing) state-like characteristic of the European Union. It should be pointed out that a number of organisations, such as the UN, already enjoy legal personality without being states. More generally, a distinction should be drawn between "state-like" characteristics for the European Union and its potential development towards becoming a state or "superstate." The European Union already enjoys and will continue to enjoy a number of state-like characteristics, such as a common currency, a directly-elected parliament, an independent court and an (admittedly small) central budget. It lacks many others, such as an army, a large central budget, direct powers of taxation and welfare policy. To recognise that the Union already has, and should continue to have certain "state-like characteristics" is not the same as asserting it is, will or should become a "superstate."

European Council and Council of Ministers

When the concept of a semi-permanent President of the European Council was first mooted in the European Constitutional Convention, it was the hope of some advocates of the creation of this post that he or she would be endowed with a range of substantial powers to co-ordinate the work of the sectoral Councils and thereby possibly to modify the existing institutional balance of the European Union. Typically, the new Presidential post was seen by its supporters and opponents as being likely to shift the institutional balance of the Union in a more "intergovernmental" direction. In the event, the powers of the new Presidency seem in the Reform Treaty to be limited to the point of marginality. It must be more than questionable just how substantial an impact the new President will be able to make on the day to day workings of the Union. Even less plausible is the hypothesis that he or she will be able, even if willing, to alter in any significant manner the existing institutional balance of the European Union.

It is true that the Reform Treaty gives to the European Council the right to define the "general political priorities and directions" of the Union. Few would anyway have disagreed before the Reform Treaty that this was the case. The President of the European Council is also enjoined to promote the cohesion and effectiveness of the European Council's work. A quasi-permanent Presidency may well be better able to do this than a rotating Presidency, where priorities and preoccupations tend to shift every six months. But because the European Council stands somewhat aside from the day to day activities of the European Union's working institutions (sectoral Councils, Commission and Parliament) its capacity corporately to shape the work of these institutions is limited. General and occasional exhortations from the European Council become diluted in the complexities of the Union's institutional and negotiating structures, where national ministers are by no means always simply the creatures of their national Presidents or Prime Ministers. The new President's relationship with the proposed "team presidencies" will be another source of uncertainty and diffusion of his or her potential influence on the Union's overall decision-making.

One of the few specific powers given to the new President, that of external representation, is subject to an unhelpful sharing of responsibility with the High Representative. If, as is widely expected, the new President is a former head of a national government, it may be that he or she initially enjoys greater personal prestige than does the High Representative. It does not follow, however, that he or she will exercise over time more real influence than will the High Representative, whose integration into the European Union's decision-making structures will be much greater than that of the President. (The High Representative's chairmanship of the Foreign Affairs Council and ability to call on the resources of the External Action Service are particularly relevant in this regard.)

Qualified Majority Voting

Both because of the increase of the number of areas in which Qualified Majority Voting can be used and because of the re-weighting of votes within the Council, some streamlining of decision-making (with its consequent risk that the United Kingdom or other countries may be outvoted) may be expected within the Council. It should be stressed, however, that even in matters theoretically susceptible of majority voting the Council normally tries to proceed by consensus, particularly to meet the wishes of a large country such as the United Kingdom; and that the United Kingdom is more likely to be the beneficiary of streamlined decision-making over time than its victim. The re-weighted voting system of the Constitutional Treaty, now taken over by the Reform Treaty, is an improvement on that contained in the Nice Treaty, in that it replaces the laborious system of the "triple majority" with a somewhat more comprehensible "double majority." This improvement in comprehensibility, however, is likely to be more apparent to specialists and scholars than to the general public.

European Parliament

The extension of the co-decision procedure will undoubtedly increase the influence of the European Parliament in a number of policy areas where until now its legislative role has been limited. In the new areas now subject to co-decision, democratically elected politicians will come to play a larger role in a decision-making process traditionally dominated by civil servants, both national and international, and national ministers for whom European questions represented often only a small proportion of their responsibilities. This is certainly a development to be welcomed.

Some commentators attach in this connection particular importance to the extension by the Reform Treaty of the European Parliament's powers over the European budget. It should not, however, be assumed that the European Parliament, representing as it does the widest range of political and national positions, will necessarily be an ally of the British government on such questions as the reform of the Common Agricultural Policy and the British budgetary abatement.

Indeed, the general implications for the democratic life of the European Union of the extension of co-decision should not be overstated. The co-decision procedure is already well established in many areas of the Parliament's work and the Parliament is entirely used to regarding itself as a co-legislator with the Council. This sense of its own identity will be reinforced by the Reform Treaty, but it is not the Reform Treaty which has created it. The Reform Treaty is best regarded as a further step along a road which the Union has followed over the past three decades of integrating the European Parliament more fully into the Union's decision-making. A powerful argument in the deliberations of the European Constitutional Convention was that there seemed little rationality in the only partial application of the co-decision procedure. The generalisation of the procedure appeared the appropriate and logical next step in the interests of consistency and simplicity.

Members of the European Parliament are themselves uncomfortably aware of a striking paradox, namely that their increasing powers over the past three decades have not led to generally greater public prestige for or greater public interest in their institution. This is seen by many of them as detracting from the political legitimacy and democratic representativity of their institution, a concern accentuated by the traditionally low turnout for European Elections. It may be doubted whether the extension of the co-decision procedure will of itself reverse this phenomenon. Many factors certainly contribute to the lack of public salience of the debates and decisions of the European Parliament, such as the consensual nature of much of its work, the complex nature of the European Union's decision-making system and the Parliament's role in it and perhaps above all the absence of an identifiable European executive arising directly from the European Parliament. The Reform Treaty offers the possibility of at least a partial solution to the last problem. (Please see following paragraph.)

European Commission

How the new Commission envisaged by the Reform Treaty will function is largely subject to the caveats of this submission's introductory comment. The European Parliament already regards itself as exercising a large measure of supervision over the European Commission, and this self-assessment will no doubt be enhanced by the extension of co-decision. More important potentially for the relationship between Parliament and Commission are the provisions of the Reform Treaty on the election of the European Commission's President in the light of the European Elections. If the President of the European Commission were demonstrably a candidate issuing from and supported by the current majority in the European Parliament, then this would fundamentally change the relationship between Commission and Parliament, making it more like that between national parliaments and national governments. It would also change the nature of European Elections, giving to electors a sense of personal choice and involvement in European decision-making. This in its turn might well enhance the democratically legitimising capacity of the European Parliament. The apparent absence of political consequences following from European Elections is certainly one reason why many electors doubt the European Parliament's capacity to make the European Union more democratic in its structures.

Charter of Fundamental Rights

Serious technical and legal questions surround the application in the United Kingdom of the Charter of Fundamental Rights and the UK Protocol on the Charter. These technical and legal issues should not be confused with the separate question of whether the Charter could represent in any genuinely foreseeable circumstances a significant threat to the United Kingdom's economic well-being. If it does not represent any such threat, then the interesting technical and legal questions about the Charter and the British Protocol logically deserve less political salience than they have enjoyed until now in the discussion of the Reform Treaty.

National Parliaments

The provisions of the Reform Treaty represent a clear compromise between those who wished to create for national parliaments a central and specific role within the European Union's legislative process and those who, for practical or philosophical reasons, did not favour such a role. Practical arguments cited by the latter included the difficulty of establishing any common view between forty different elected national parliaments and the new complication which would have been introduced into an already complex legislative system by anything approaching a veto for these national parliaments on European legislation. Philosophically determining for many was the belief that the main contribution of national parliaments to the Union's legislative procedure should be their control of their national executives and what they do in the Council of Ministers rather than any attempt directly to shape European legislation in competition with the European Parliament. The compromise attained by the Reform Treaty arguably gives to national parliaments no powers that they do not already enjoy. If a large number of national parliaments today protested to the European Commission about the supposed infraction by a new legislative proposal of the principles of subsidiarity or proportionality, it would be surprising indeed if the Commission took no notice. It also has to be asked how often the Commission would anyway put forward proposals which a large number of national parliaments would find unacceptable specifically on grounds of subsidiarity or proportionality.

Many of those eager to involve national parliaments more directly in the Union's decision-making did so in the certainly justified belief that national parliaments represent an important source of legitimacy and national political discourse for the European Union, its institutions and workings. It may well be that the Reform Treaty is an occasion for national parliaments to review more carefully than hitherto the specific role they can play in the future evolution of the European Union. Better methods, consonant with differing national parliamentary systems, for scrutinising the role of national ministers in the Council would be one obvious starting-point. National parliamentary reports, such as those regularly produced by the House of Lords, on matters of current European controversy, would be another, compelling attention by the force of their arguments rather than by formal institutional structures to support these arguments.

Enlargement

Please refer to introductory comment. If there are public and political reservations surrounding any particular proposed new member of the European Union, be it Croatia, the Ukraine or Turkey, the Reform Treaty will help the expression of those reservations, but it will not itself have created them or even substantially facilitated their emergence.

Simplified Revision Procedure

Throughout the European Union, there is a widespread sense among politicians, officials and commentators that in recent years enough, or even too much time has been devoted by the Union to the discussion of institutional matters. It would be surprising indeed if unanimity could be achieved between the twenty-seven member states in the foreseeable future for any use of the simplified revision procedure or the other passerelles of the Treaty on anything other than genuinely marginal and technical changes. It is worth pointing out in conclusion that modification in the practical workings of the Reform Treaty will be entirely possible in the coming years through inter-institutional agreements rather than new Intergovernmental Conferences and treaty amendments. The respective roles of the High Representative and the President of the European Council in the external representation of the Union would be an obvious candidate for an agreement of this kind.