



OccasionalPaper 54

The Treaty of Lisbon – a Threat to Federalism?

George Herbert

Liberales Institut

JEDER MENSCH BRAUCHT
FREIHEIT, UM SEINE
ANLAGEN UND FÄHIGKEITEN
ENTFALTEN UND
VERWIRKLICHEN ZU KÖNNEN.
ER
MÜSST SICH
WIDERSCHAFTLICH UND
WISSENSCHAFTLICH STAGNIERT
DIE WIRTSCHAFT
GÜNSTIGES LEBEN BRAUCHT
FREIHEIT GENAU, WIE DER
KÖRPER DIE LUFT ZUM ATMEN.

Imprint:

Editor
Liberal Institute
Friedrich-Naumann-Stiftung für die Freiheit
Karl-Marx-Straße 2
D-14482 Potsdam

Phone +49 3 31.70 19-2 10
Fax +49 3 31.70 19-2 16
libinst@fnst-freiheit.org
www.freiheit.org

Image:
"Europol-members-map.png" from Wikimedia Commons
is provided under Creative Commons Attribution 2.5.

COMDOK GmbH
Office Berlin

2008

The Treaty of Lisbon – a Threat to Federalism?

George Herbert

Paper prepared for the International Colloquium "Competitive Federalism – International Perspectives" organized by the Liberal Institute, Friedrich Naumann Foundation, Potsdam, Germany, 3rd July 2008.

Contents

1. Introduction	5
2. How can centralisation occur?	7
2.1 Treaty Reforms	8
2.2 Flexibility Clause	9
2.3 The ECJ	10
3. Who holds what powers?	12
3.1 Where subsidiarity suggests power should be federalised...	14
3.2 ...And where it suggests they should be decentralised	16
3.3 Why hasn't the subsidiarity principle had more of an impact?	18
3.4 Progress...	19
3.5 ...But not in all areas!	20
3.6 How to make subsidiarity more than just a word	22
4. Conclusion	24
5. Bibliography	27

1. Introduction

Is the Treaty of Lisbon a threat to European federalism? Perhaps, following the recent developments in Ireland the Czech Republic and Poland, some might consider this question little more than academic. However, if the evidence provided by the crises following the Irish rejection of the Nice Treaty or the Dutch and French rejections of the European Constitution are anything to go by, it is pretty likely that in the not too distant future the Lisbon Treaty – as it stands, or rebranded and slightly amended – is likely to become the basis on which the EU operates for the next stage of its development. Thus the Lisbon Treaty hasn't stopped being important.

What, then, might be meant by a claim that the Lisbon Treaty represents a threat to federalism? 'Federalism' is a term frequently used imprecisely in the context of development in the EU. This can lead to considerable confusion. In the UK references to EU 'federalism' tend to imply centralisation and the aim of a 'United States of Europe' with a strong central government and increasingly impotent national governments. This is a distortion of the traditional usage of 'federal' to refer to an organisation in which "final authority is divided between sub-units and a centre"¹. However, in some ways it is not as much of a distortion as it might appear: the creation of a European federal *state* would involve not only a change in the theoretical location of sovereignty but a degree of centralisation unprecedented in the EU's history.

This suggests the first, rather simple, answer one might give to the question of whether the Lisbon Treaty threatens European federalism: namely that it cannot because there is none. I can't imagine that I would need to provide much evidence to convince anyone here that the EU is neither currently a federal state nor about to become one as a result of the current reform process. Whether one looks to the existence of multiple currencies within the EU, to the absence of any real system of pan-European wealth redistribution, to the almost complete lack of centralised enforcement powers, or to the ability of some members of the EU to go to war while the others do not, it should be clear that the EU is rightly understood as an organisation of states and not as a state in its own right.

However, academics coming from a comparative federalism perspective often claim that the EU can be fruitfully analysed as if it were a federal state. The reason that the comparative federalism paradigm can sometimes prove useful in the context

1 Stanford Encyclopaedia of Philosophy.

of the EU is that the division of powers between central European institutions and strong member state institutions has much in common with the division of authority within federal states between the federal government and sub-unit authorities that have important powers and privileges.

Does this mean that the EU should be understood as a federal organisation? As I see it there are two reasons why one might be interested in this question. Firstly, like comparative federalism scholars, one might want to find out whether modelling the EU as a federation will be fruitful from the point of view of describing developments that have occurred in the EU's history, and predicting future developments. Alternatively, one might have in mind federalism as a normative ideal that the EU could be measured against. When we ask whether the Lisbon Treaty is a threat to federalism it is this second normative conception that is relevant.

What, then, does this ideal amount to? A federal system isn't necessarily superior to all others. However, when – as in the case of the EU – political entities decide to form a Union a federal system with divided authority gains normative appeal. We consider the pre-existing entities that formed the Union to have normative and legal rights to community self-determination, and thus to have the right to set the conditions under which they are prepared to enter into a union. If they do not retain some kind of authority once that union is achieved, there is no guarantee that those conditions will be honoured.

Thus in the European context we should be worried about a threat to a federal-style EU because the member states agreed to form a Union on the understanding that it would be limited. They took it on good faith that authority would remain at the national level except where they had explicitly handed authority to the central institutions. A federal division of responsibility, in which the consent of member states is required for further centralisation, is the guarantor that this understanding will be honoured.

Additionally, federal structures have a unique advantage in their ability to resolve conflict between the benefits of unity and the legitimate demands of diversity. By far the most powerful case for European Union lies in the practical advantages of unity in helping to ensure security and prosperity for Europeans. The need for a federal EU lies in the diversity across Europe of what is needed from and demanded of government, and the need to bring together a continent in which people continue to identify primarily with their nations. Such diversity needs to be catered for through the decentralisation of power in many areas of policy.

Thus there seem to be two main criteria against which one can judge how close the EU comes to the federal ideal, and which one can use to judge whether the Lisbon Treaty is a threat to federalism. Firstly, does centralisation require the explicit and informed consent of the member states? Secondly, is power centralised only where the benefits of Europe acting as one are sufficient to overwhelm the *prima facie* case that the diverse preferences and identities of Europeans make it appropriate that policy making is left to lower levels of government.

While these two criteria are distinct, and I shall analyse them separately, they are bound together by a common idea. This idea is that in a multi-nation co-operative Union like the EU, diversity must be constitutionally protected, both because diversity is valuable for its own sake and because the long-term stability of the Union requires that the culture and identity of each nation is respected.

The case I would like to present today is that while the pre-Lisbon status quo seems to aspire towards meeting the federal criteria I've outlined, it falls short of satisfactory in respect to both. My assessment of the Lisbon Treaty itself against these criteria suggests that it would be wrong to see it as actively threatening to European federalism. Overall, the treaty represents a small, but not inconsiderable, step in the right direction.

The real failing of the treaty, then, is not so much anything it does, but what it will fail to do. The disappointment is that the pace of European cooperation in some of the areas where it is most needed is likely to remain slow. The threat is that the treaty will grease the EU's wheels, and placate the EU's critics, just enough that radical reform of the EU will be delayed indefinitely, missing an opportunity to create European unity on a foundation that safeguards diversity against undemocratic 'creeping centralisation' in areas better left to member states or regions.

2. How can centralisation occur?

How does the EU fall short of federal standards regarding the means by which power can be centralised? There are three main ways in which power can be centralised within the EU: through treaty reforms, through the use of the so-called Flexibility Clause, and through the interpretation of the treaties by the European Court of Justice (ECJ). While the process of treaty amendment easily meets the

minimum federal requirement that there are substantial checks to centralisation from below, such checks are not sufficient when it comes to centralisation through the Flexibility Clause and through the jurisprudence of the ECJ.

2.1 Treaty Reforms

Major shifts in the distribution of powers within the EU have tended to occur through the signing of new treaties. Treaty changes require unanimity amongst member state executives, approval from the European Parliament, and ratification by member state legislatures. Thus centralisation through treaty reform is very strongly checked from below, easily meeting federal standards.

The Lisbon Treaty doesn't substantially amend the process of treaty reform. However, it does clarify the process by outlining the procedure for future amendments to the EU's governing treaties. It creates a simple system through which the European Commission, European Parliament or the government of any member state can put forward a request for a treaty amendment, which will then be considered by a 'Convention' of the 'great and the good' before potentially being put forward for ratification².

An even more rigorous standard might require not just the consent of the institutions losing power through centralisation but also the consent of the constituencies represented by those institutions, to ensure that they are not acting against the will of the people they are supposed to represent. It seems desirable that member states should create checks against elite domination by requiring that major changes in national sovereignty must receive popular consent. However, given the diversity of attitudes towards referenda across Europe - ranging from traditional suspicion in modern Germany to their strong constitutional enshrinement in Ireland - it seems sensible that the requirements for ratification be determined by the states themselves, rather than being mandated centrally.

It might also be wondered whether European treaty reforms can claim democratic legitimacy and consent given the opaque nature of most EU treaties. Anyone attempting to read the old draft constitution is struck first by its length, then by the impenetrability of its legalistic jargon, and finally by the labyrinthine complexity of the cross-referencing required to gain any sense of it. The Treaty of Lisbon is even less comprehensible since it is in reality an amending document to two

2 Article 48 of the consolidated Treaty on European Union.

separate treaties, the Treaty on European Union and the Treaty Establishing the European Union³. Given this it is scarcely surprising that most people don't even make an attempt to understand it. This ignorance undermines the extent to which representatives at the national level can be held to account by the electorate, and therefore, arguably, the legitimacy of the whole ratification process.

2.2 Flexibility Clause

It is too often forgotten that high profile treaty reforms are the only way in which power can be centralised in the EU. Competences can also be transferred from member states to the central European Union institutions through the so-called 'flexibility clause'⁴. This allows the Council to extend the competence of EU institutions if it is felt that their treaty derived powers are insufficient to achieve its core objectives.

Admittedly, this power is quite strongly checked. The Council can only act when advised to do so by the European Commission, the European Parliament must consent, and there must be unanimous agreement within the Council. In practice this clause seems unlikely to be used very often since it requires such a broad basis of support within diverse institutions. However, it nevertheless seems an undesirable measure.

However, the Flexibility Clause, in its current form, is still deeply undesirable since it epitomises the EU's failure to achieve transparency. Many European publics have been denied referenda on the Lisbon Treaty partly on the grounds that it involves only a limited transfer of sovereignty away from the member states. However, the flexibility clause theoretically allows almost unlimited centralisation without the need for further popular or legislative consent at the national level. This represents a real failure to live up to the federal ideal, since while national executives must agree to such changes, the consent of national legislatures is not required, despite the fact that the Flexibility Clause could be used to deprive them of authority.

The danger is that the clause leaves national sovereignty at the mercy of the transient whim of member state governments, since while unanimity is needed

3 The Treaty Establishing the European Union is renamed the Treaty on the Functioning of the European Union.

4 Originally enshrined through Article 308 of the Treaty Establishing the European Community and maintained under the Lisbon reforms as Article 352 of the Treaty on the Functioning of the European Union.

to transfer power to the centre, the election of a new government which opposed centralisation would not be sufficient to ensure its return. Thus, I would argue that the Flexibility Clause is just the kind of feature that has tended to breed distrust of European integration amongst ordinary Europeans, since it fosters the impression that an elite committed to integration is prepared to use underhand methods to avoid accountability to their more sceptical publics in order to achieve that end.

It may be desirable that some procedure of this kind exists to allow the EU to adapt quickly to new challenges, especially given how slow and difficult it is to amend the EU treaties. However, some flexibility could still be ensured if national parliaments could veto the competence transfer⁵.

2.3 The ECJ

Another means by which power can be centralised is through the judgements of the European Court of Justice (ECJ). The court has been instrumental in expanding the scope of EU authority, through extremely broad interpretations of EU competences. This is in line with the cynicism of academics in the field of comparative federalism who often predict judicial help for regulatory centralisation on the grounds that federal courts have an “institutional self-interest in seeing the scope of federal law extended” since this enlarges the range of policies over which they are the ultimate arbiters⁶. Notable examples of this centralising jurisprudence include its 1996 ruling against the UK’s appeal against the working time directive⁷ and its 2005 verdict that Germany couldn’t introduce legislation providing for temporary employment contracts for employees over the age of 52 since it would involve age discrimination⁸.

5 This would be effectively identical to the procedure which enables the Council of Ministers to move an issue from unanimous decision making to Qualified Majority Voting (QMV) (i.e. the change requires unanimous support in the Council and majority consent in the European Parliament, and there is a period of time in which any national parliament can raise an objection and veto the change). Article 48(7): consolidated Treaty on European Union. A procedure was adopted similar to that which enables the Council of Ministers to move an issue from unanimous decision making to Qualified Majority Voting (QMV), if the change enjoys unanimous support in the Council and majority consent in the European Parliament, but subject to an effective veto by any one national parliament.

6 Keleman (2004).

7 Court of Justice of the European Union, 1996, Case C-84/94.

8 Court of Justice of the European Union, 2005, Case C-144/04.

The ease with which the ECJ has been effectively able to transfer powers from member states to the central EU institutions represents a sad failure to live up to the federalist ideals I've outlined. The problem is that the ECJ is organised in a fashion that creates incentives for its judges which reduce the probability that they will neutrally interpret the treaties in the fashion that they are supposed to.

Appointments to the ECJ are made behind closed doors by "common accord of the governments of the member states"⁹. Part of the motivation for the absence of US-style public confirmation hearings is a genuine fear that the judiciary may become politicised, and it has been argued that there would be a real danger of judges being forced to 'prejudge' cases under cross-examination during such a selection process¹⁰. However, the main effect of avoiding public appointment procedures is not to depoliticise but merely to reduce public scrutiny, ensuring a one-sided politicisation in which national executives can manipulate the appointment process.

The Treaty of Lisbon establishes a committee composed of former members of the ECJ & General Court, national Supreme Courts and other lawyers to "give an opinion on candidates' suitability"¹¹. This is a welcome innovation, as far as it goes, towards ensuring that the ECJ is made up of judges "whose independence is beyond doubt". However, the advice given by this committee would not be binding on member states, and the existence of the committee – whose deliberations and advice would be in private – would do little to ensure the kind of transparency over appointments that I believe is necessary both to prevent abuse and to foster public confidence in the European judiciary.

Additionally, appointments to the ECJ are for terms of 6 years, which can be renewed subject to the approval of the executives of the member states. However, this allows governments to exert pressure on the ECJ through their control of the reappointment procedure. The EU would do well to move towards longer, non-renewable terms – as has been suggested by the ECJ itself¹².

The problems in terms of potential abuse posed by unaccountable appointment procedures and renewable terms are exacerbated by the fact that the voting results of judgements cannot be published and dissenting opinions within the court cannot be aired. This creates a situation in which the court cannot be publicly cal-

9 Article 253, Consolidated Version of the Treaty on European Union.

10 Kapteyn (2001).

11 Article 255, Consolidated version of the Treaty on the Functioning of the European Union.

12 Report of the Court of Justice on certain aspects of the application of the treaty on European Union, Paragraph 17 (Luxembourg, May 1995).

led to account from within, shielding majority judgements from implicit or explicit critique from minorities within the court. Such internal critiques would be a particularly useful check because it would provide for an apolitical legal critique which should ensure that judges know that if they let political considerations influence their judgements they may sacrifice their legal reputations.

Thus the ease with which power can be transferred within the EU is undesirable from a federalist point of view. While high standards are required for treaty revisions, powers can still be centralised without full consent from national institutions through the 'flexibility clause' mechanism and through the judgements of the ECJ, which is unaccountable and, arguably, institutionally biased in a centralising direction. The Treaty of Lisbon does not make things worse in this area, but nor does it make it substantially better.

3. Who holds what powers?

I'll now move onto the second federalist standard I suggested: whether a balance is struck within the EU between the benefits of unified action in some areas and the need to cater for diversity of preferences, needs and circumstances across member states. Given this diversity, and especially given the superior democratic credentials of national-level institutions¹³, I believe that authority should reside with member states (or their sub-units) unless it can be shown that there are substantial to unified European action.

In principle, one would expect competences to be divided along these lines within the EU. This is because since 1992 the concept of 'subsidiarity' has been enshrined in EU law¹⁴. Subsidiarity is phrased in several different non-identical ways within the body of EU treaties, but in all its forms the intention seems quite clearly to ensure that the Union should only act where there are clear advantages to centralised over member state or regional action. However, to date the subsidiarity principle has proved a paper tiger, which despite having become firmly enshrined

13 Both in terms of institutional structure and in terms of the existence of the feeling of community necessary to create the 'demos' on which democracy relies.

14 Currently through Article 5 Treaty Establishing the European Community and through the Protocol on the Application of the Principles of Subsidiarity and Proportionality.

within the institutional jargon of the EU seems to have had little in the way of an impact on policy.

It is true that the enforcement of the subsidiarity principle will never be simple or uncontroversial. It is inevitably a very subjective concept, especially given the vague wording of all the references to subsidiarity in the treaties, and the non-identical nature of each of those references. There is, for instance, a glaring difference between the principle as articulated in the preamble to the Treaty on European Union, in which subsidiarity is taken to imply that decisions should be taken "as closely as possible to the citizen", and that articulated by Article 5 of that Treaty. But even within Article 5 paragraph 3 there seems a not so subtle difference between the requirement that in order to be allowed to act the EU must show that "the proposed action cannot be sufficiently achieved by Member States" and the weaker statement that the EU can act if a desired result can be "better achieved at the Union level". The latter seems to imply that any efficiency gains are enough to ensure that Union action doesn't violate subsidiarity, whereas the former implies that there is a violation of subsidiarity even if there are efficiency gains from Union action so long as the Member State could sufficiently achieve the desired result.

This concept of 'sufficiency' and the Preamble's resolution that decisions should be taken "as closely as possible" to the citizen are vague and subjective. However, something along these lines does seem necessary given that those who are motivated by subsidiarity are surely concerned with more than merely the raw economic efficiency criterion that is implied by a willingness to centralise wherever the specific aim of legislation could be better achieved through Union action. It seems to me that a belief in the value of the subsidiarity principle, and a belief in a federal division of powers in general, must also be grounded on a concern for democratic accountability, for community empowerment and for the value of catering for diversity. A quick glance at the current division of responsibilities within the EU is enough to reveal that such a strong conception of subsidiarity is not being implemented. Indeed, it might be questioned whether there is much evidence that subsidiarity, on any reasonable interpretation of the concept, is having an impact on the EU's practices, since in many areas where coordination would yield substantial benefits the EU does little, whereas it is often almost hyperactive in areas where member states are perfectly capable of acting efficiently on their own.

3.1 Where subsidiarity suggests power should be federalised...

There are a large number of areas within which central EU policy coordination would be desirable but national vetoes within the Council or a total lack of Union competence means that action is inefficiently left at the national level. For instance, the unanimity requirement for immigration policy coordination has hampered cooperation despite the need to resolve the policy 'spillovers' created by the absence of internal borders within the EU. The Lisbon Treaty would move immigration under QMV, making a more sensible unified policy more likely¹⁵. Similarly, the new shared competences created by the Lisbon Treaty in the area of Space Policy¹⁶ and energy security¹⁷, represent a sensible move that should allow Europe to benefit from the significant scale effects pervasive in these policy areas.

In contrast little progress is likely to be made to redress the absence of a strong European response to environmental 'public bads'. Despite the fact that the EU has a shared competence in the area of environmental policy it has not managed to harmonise policy in important areas such as fuel taxation where economic theory suggests centralisation may be required for an effective response to concerns such as anthropogenic climate change. This is unlikely to change post-Lisbon since unanimity will continue to be required for EU action in environmental policy that is "primarily of a fiscal nature"¹⁸, leaving EU action hostage to national vetoes in the Council of Ministers.

The extent of EU cooperation is even more glaringly inadequate in the areas of foreign, security and defence policy. Here a high degree of cooperation would be beneficial due to the existence of large returns to scale and, potentially, considerable externalities between the EU states¹⁹. However, there has been comparatively little in the way of institutionalised cooperation despite the official existence of a 'Common Foreign and Security Policy' (CFSP) since 1992.

Some progress in the direction of creating a truly operational European CFSP does seem likely to result from the Lisbon Reforms. Symbolic importance can be attached to a new Solidarity Clause²⁰, which creates an obligation for mutual assistance

15 Though the UK and Ireland would have opt-outs.

16 Article 189: TFEU.

17 Article 194: TFEU.

18 Article 192: Consolidated Version of the Treaty on the Functioning of the European Union.

19 Since, it could be argued, increases in military spending in France increase the security of Luxembourg: see Berglof et al. (2003).

20 Article 222, TFEU.

amongst the European states in response to terrorist attack, and a collective defence clause²¹, which mandates the same in response to an attack on an EU member by another state²². However, the most important reforms are practical innovations such as the merger of the EU's two foreign policy representatives²³ and the creation of an 'external action service'²⁴. This should allow the European nations to provide a more unified voice in areas of common interest, thus increasing their collective influence on the world stage.

Additionally, the removal of the 'pillar system' and the introduction of legal personality for the EU as a whole²⁵ should facilitate cooperation by allowing the EU to become a signatory of international treaties dealing with security and defence, as well as creating the potential for the EU to move towards having joint representation on some international organisations where that would be in the interest of all member states²⁶.

The treaty also introduces the concept of 'Permanent Structured Cooperation'²⁷, which is effectively an application of the existing 'enhanced cooperation' mechanism to defence and security policy. This could potentially be a useful tool for allowing some states to push ahead with cooperation in an area where the unanimity requirement makes integration difficult. However, one might question how much difference it will actually make given that its sibling – the much vaunted enhanced cooperation mechanism, which has existed since 2001 – has never been used²⁸. Additionally, the treaty provisions are sufficiently vague to make it unclear precisely what 'permanent structured cooperation' will offer that bilateral deals outside of the EU structure could not²⁹.

21 Article 42(7) TFEU.

22 Angelet & Vrailas (2008).

23 Article 18, TEU (consolidated version).

24 Article 27(3), TEU (consolidated version).

25 Article 47, TEU (consolidated version).

26 Berglof et al. (2003).

27 Articles 42 & 46, Protocol 10; TEU.

28 Tekin & Wessels (2008). However, there is no minimum number of states that can participate in Permanent Structured Cooperation, making it more flexible than Enhanced Cooperation for which there must be at least 9 participants.

29 See Tekin & Wessels (2008), which suggests that informal methods of cooperation outside the EU framework, are likely to remain popular alternatives to 'enhanced cooperation' and 'permanent structured coordination'. Also, Biscop (2008), for an account that is generally supportive of the policy but which notes that the kind of 'pooling' that it aims to achieve has already occurred to a limited degree between, for instance, Belgium and the Netherlands.

The European Defence Agency, which was created in 2004, has had some real successes in moving towards a more unified policy towards defence within the EU. Particularly valuable was its work in ending the exemption of defence products from the free internal market requirement of the EU³⁰, which has paved the way for a spate of defence industry mergers within the EU. However, the EU is still far from operating a common procurement policy, and the Treaty of Lisbon doesn't seem to move the EU any further in the right direction. Some further moves towards coordinating procurement are probably possible within the current structure, but it seems likely that for the foreseeable future defence procurement policy in the EU will remain fractured and inefficient, leading to needless duplication of R&D, a failure to take advantage of economies of scale and learning, loss of market power and missed opportunities for useful coordination in order to render defence forces of the states of the EU more mutually compatible³¹.

3.2 ...And where it suggests they should be decentralised

While the EU's impotence in these areas where coordination would be beneficial leaves the EU unable to fulfil its potential, the excessive competences and powers possessed by it in other areas represents an even more worrying phenomenon for three reasons.

Firstly, centralisation reduces the scope for policy experimentation within Europe. Policy experimentation can potentially play a role for institutions analogous to that envisioned for individuals by John Stuart Mill's advocacy of the freedom necessary for 'experiments of living'³². It should increase the pace of institutional evolution by exposing poorly conceived policies to analysis in the light of innovative alternatives tried elsewhere and thus lead to better policy in the long run.

Secondly, unnecessary concentration of decision-making in the central EU institutions may make the EU less durable. This is because the lack of strong feelings of identification with the EU means that European institutions are likely to suffer from extremely strong credibility problems if it introduces policies that are unpopular in some states or with some sections of society. Given diverse policy preferences between EU states it seems likely that centralised decision making will leave more people dissatisfied than policy making at a national level. However, even in areas

30 Article 296, Treaty of Amsterdam.

31 Hartley (2003).

32 Mill (1998).

where there is little difference between the preferences of the European nations on aggregate heterogeneity of preference within each state combined with the absence of strong feelings of identification towards Europe means that the more the EU does the more likely it is that it will become deeply unpopular.

Finally, this lack of strong identification with Europe and the EU reveals the absence of a European *demos*³³. The existence of a political community or '*demos*' is necessary for decisions to enjoy democratic legitimacy. Thus the lack of feelings of widespread identification with Europe creates not just practical constraints on what Europeans will be prepared to have decided at the EU level, but also constraints on what should be done by the EU given that it claims to genuinely believe in the importance of democracy.

Thus, the shared competence in the area of social policy – despite the many restrictions and caveats that limit the practical ability of the EU to set policy in this area – seems to contravene federalist principles in that it is an area in which there appears to be a large degree of heterogeneity of preferences across Europe and where there seem few significant benefits attached to EU as opposed to member state action. Indeed, a public choice theory perspective might suggest that the existence of multiple jurisdictions within Europe all with the ability to set different social policies should ensure competition to attract mobile factors of production that would check the ability of rent-seekers to harmfully influence government policy towards excessive interventionism³⁴.

A similar logic suggests that the broad shared competence over agricultural policy goes too far. While a good case can be made for the EU having some authority in order to achieve a balance between the need to ensure a free internal market and the legitimate desire of some member states to preserve rural communities, this does not necessitate a Common Agricultural Policy. A common set of regulations governing maximum levels of protection for farmers could prevent governments from finding themselves trapped in a Prisoner's Dilemma scenario of spiralling subsidies, and member states could then be allowed to set subsidies below this level to suit national preferences while facing the full cost of that policy. The Lisbon Treaty, sadly, but predictably, does not challenge the status quo in this area.

As I've already noted the EU's powers in the area of the environment often isn't sufficient to ensure that the Union can act to combat cross-border environmental

33 Jolly (2007).

34 Berglof et al. (2003).

problems. However, the shared environmental competence goes too far in other ways in that it gives the EU the power to act in a whole range of areas where member states would be quite capable of acting effectively. Thus, the EU can legislate in any area of environmental policy with the aim of “preserving, protecting and improving the quality of the environment” or “protecting human health”³⁵ even where there is no international dimension, allowing for harmonisation of regulations on anything from “town and country planning”³⁶ to the management of landfill sites. Again, the Lisbon Treaty leaves this status quo intact.

Similarly, the shared competence over transport policy includes not only EU powers that a federalism based on the principle of subsidiarity would grant it – such as the creation of “common rules applicable to international transport”, but also powers with a seemingly purely national dimension in which there are few obvious benefits to having a single European policy, such as that “to improve transport safety”. The story is the same in the case of the shared competence in the field of public health, which includes both sensible union powers, such as that to enact legislation to combat cross-border epidemics, and one’s that would seem to contravene the principle of subsidiarity, such as the ability to regulate to ensure the quality of donated blood and organs and of medical products³⁷.

3.3 Why hasn’t the subsidiarity principle had more of an impact?

Thus the distribution of competences and powers between the Union and the member states is often at odds with the federalist rationale that lower levels of government should hold power unless centralisation offers substantial benefits. This is in some ways understandable. While there actually seems to be considerable support – on aggregate at least – for a European role in policies such as foreign and defence policy, control over policy in these areas also tend to be a highly emotive issue for some, since sovereign control over them is often felt to be integral to national identity.

Similarly, these are areas within which any residual distrust between the European peoples will make itself felt most acutely. Thus nationalists and others who are inclined to care about national sovereignty in general are likely to fight particularly

35 Article 191: TFEU.

36 Article 192: TFEU. The Council would currently only be able to enact legislation in this area unanimously, but the Council could unanimously agree to adopt QMV-decision making.

37 Article 168: TFEU.

hard to avoid centralisation in these areas. In addition, politicians who will hardly notice the loss of national control over workplace health and safety regulations or the rules on planning applications – since the technical nature of such issues tends to minimise the level of their involvement, anyway – will feel acutely the loss of 'glamorous' issues such as foreign policy from which they gain much of their status and where their input into policy making tends to be more active.

Thus the bargaining process that ultimately decided where power resides on any given issue will be far from certain to produce a result that is compatible with the federalist ideal I've outlined. Indeed, there seems to be an unfortunate paradox at the heart of European integration in that in many of the areas in which federal cooperation is unnecessary or undesirable it has already occurred or could quite easily occur in the near future, while in those areas where there is most to gain from central direction of policy there is the least prospect for it.

This paradox will not be easy to resolve, but it seems likely that in order to achieve a deeper EU in the areas where greater centralisation would be really useful the EU needs to become looser and more decentralised in other areas. By concentrating on such core tasks the EU is less likely to be weakened by the distrust generated towards its interference in matters that are of primarily national concern. It needs to regain the trust of Europeans by stepping back from any lingering ambitions towards 'ever closer union' as ever closer integration. It needs to ensure that centralisation is achieved in a democratically accountable fashion, and it needs to ensure that it is feasible to renationalise powers, so that the stakes surrounding integration can be lowered with member states no longer feeling that they are being trapped into arrangements from which they couldn't extricate themselves at will.

3.4 Progress...

Thus, an important and promising features of the Treaty of Lisbon from the point of creating a durable EU is the creation of a formalised and legally relatively simple procedure for leaving the EU, since this means that the states need not feel that they are walking into what may be a trap from which they cannot free themselves. However, more than just a legal right and procedure is required, for the long term stability of the EU. It needs to be ensured that leaving the EU is also feasible in the sense of not involving outrageous costs; for instance, through guarantees that those who remain part of the EU will continue to cooperate with and behave with restraint and fraternal feeling towards any who decide to leave. Additionally, cooperation in the important areas of defence and foreign policy must be pursu-

ed – at least in the short to medium term – on a basis which retains the ability of members to act and achieve security independently.

Thus the current direction of defence and foreign policy cooperation, while it is progressing unfortunately slowly, is desirable in that it has been focused on increasing the ability of the member states to coordinate their actions while not undermining the ability of member states to act independently to pursue their own defence and foreign policy aims. While some may be disappointed that the current reforms, by maintaining the CFSP as an area requiring unanimity for EU action, will mean that the EU will often find itself unable to operate under a common policy, this seems unavoidable given the diversity of attitudes to foreign policy among the states of the EU and the importance commonly attached to having an independent foreign policy capability.

Indeed, moves towards QMV in CFSP might well reduce the long term prospects of foreign policy cooperation by creating resentment towards the EU from groups who disapproved of the policies pursued and did not feel bound to respect the community will as they might if decisions were made at a national level. Despite the prima facie desirability of EU control over defence and foreign policy from the point of view of efficiency and given the many shared interests of the European states, these factors must be balanced against the need to ensure democratic consent in a continent where patriotic and nationalistic sentiment continue to ensure demand for state sovereignty in this area.

3.5 ...But not in all areas!

What is, regrettably, not addressed by the Treaty of Lisbon is the need to make the Subsidiarity Principle a practical as well as theoretical constraint on EU institutions. It is my belief that ensuring that power is held within the EU at the lowest institutional level that is practicable is both desirable in itself, since it caters for the diversity and independent spirit of the peoples of Europe, and also desirable from the point of view of ensuring that cooperation can be extended and deepened where it is really needed and desirable. Achieving this may be difficult but it is also not impossible.

The right to legislate is divided into areas: exclusively the responsibility of member states, 'exclusive competences' in which only the central EU institutions can legislate, 'shared competences' in which member states can legislate but only if EU institutions have chosen not to legislate, and policy areas in which the EU can

act to "support, coordinate or supplement" the activities of member state governments³⁸. It is desirable and fortunate from the point of view of subsidiarity that in all areas, where competence is not explicitly assigned, it is assumed to reside solely with the member states³⁹. Exclusive competences of the EU fall outside the scope of the subsidiarity principle⁴⁰, but this is largely unproblematic since the areas of 'exclusive' EU competence are narrow and, with the exception of the exclusive EU competence in the area of marine biological resources policy, relate to the key functions of the EU such as that of ensuring a free internal market.

The real problem from the point of view of subsidiarity, then, is the large number of vaguely defined shared competences within which member states lose the right to action should the Union see fit to act in that area. Admittedly, in this area the ideal of 'subsidiarity' supposedly applies. All EU draft legislation which falls within the scope of a 'shared competence' must be explicitly shown to conform with the principle of subsidiarity using qualitative and, where possible, quantitative evidence to back up the claim⁴¹. Under the Lisbon Treaty national legislatures have 8 weeks - extended from the current 6 weeks - in which to examine the proposed legislation before it is sent to the Council, and if they think an act violates subsidiarity they can demand a review⁴². However, while one third of all national parliamentary votes are sufficient to force a review of the legislation⁴³, there is no actual veto power, since the commission can proceed with the legislation if its own review finds that there are no subsidiarity issues. Given the lack of strong networks of national parliaments it seems unlikely that there will be the kind of cooperation that would be needed to ensure that this system provided a real 'subsidiarity check' on EU legislation.

Similarly, cases can be brought before the ECJ challenging European regulations or directives that contradict the subsidiarity principle in areas of shared competence⁴⁴, and if the court finds that a violation of subsidiarity has occurred, it will

38 Article 2, TFEU.

39 Article 4: Consolidated Version – TEU.

40 Article 5(3) of the consolidated Treaty on European Union (TEU).

41 Article 5: Protocol on the Application of the Principles of Subsidiarity and Proportionality (PAPSP).

42 Article 6: PAPSP.

43 Article 7: PAPSP. More accurately „one third of all the votes allocated to the national Parliaments“, where each Parliament is allocated 2 votes, with one vote allocated to each chamber for countries operating under a bicameral system.

44 Article 8: PAPSP.

"declare the act concerned to be void"⁴⁵. However, as already noted, the ECJ is a somewhat flawed institution from the point of view of accountability and immunity from political influence, which means that it cannot be assumed that it will apply impartially the subsidiarity principle in its rulings.

This is backed up by the almost total lack of engagement by the Court with subsidiarity as a substantive principle in high profile challenges to EU regulations based on violation of subsidiarity, such as the 1996 UK government appeal against the Working Time Directive and the 1997 German appeal against what it claimed was a failure by EU institutions to offer an adequate account of why regulations requiring a significant degree of harmonisation of credit-guarantee schemes was justified by subsidiarity⁴⁶. Vassilios Skouris – president of the European Court of Justice since 2003 – has himself acknowledged that the Subsidiarity Principle has not left much of a trace on the rulings of the Court⁴⁷, and I can find no evidence of the ECJ striking down a directive or regulation on grounds of a failure to comply with subsidiarity. Thus something seems to be wrong with the current means by which subsidiarity is enforced.

3.6 How to make subsidiarity more than just a word

In order to ensure that the subsidiarity principle is actually respected within the EU there needs to be both strong checks on central institutions from below and an ultimate arbitrator that is likely to be sympathetic to the importance of decentralised decision making where there are not really strong reasons for keeping power centralised. Checks from below already exist in the EU to a reasonable extent through the way in which the Council of Ministers combines being a Union legislature with being an organisation of national executives and through the limited checks provided by the ability of national Parliaments to demand that Union legislation is reviewed if they feel it violates subsidiarity.

Reform at the EU level could improve such checks by breaking the monopoly on initiative that the Commission currently enjoys over legislation, perhaps using the method suggested for matters falling under the Area of Freedom, Security and Ju-

45 Article 264: TFEU. Though, it may choose declare only the part of the act that is actually *ultra vires* to be void.

46 De Búrca (1998).

47 in a speech made at the 2006 'Europe begins at home' conference on subsidiarity (<http://www.ue2006.at/en/News/information/subsidiarity/skouris.html>).

stice where 1/4 of member states acting together can initiate legislation⁴⁸, so as to make the repatriation of competences easier to achieve. Additionally, more could be done to ensure that national parliaments provide a forceful check on EU legislation. However, there is also substantial scope for improvements through greater cooperation between national legislatures, and through mechanisms to ensure greater accountability of national executives as members of the Council of ministers through better funded scrutiny committees or through Danish-style efforts to ensure parliamentary control of ministerial negotiating positions.

The situation is less happy as regards the position of the ECJ as the ultimate arbitrator when the Union has exceeded its competence by violating subsidiarity. To date, as I've already noted, it has demonstrated very little concern for subsidiarity. Part of the problem could be mitigated by reducing the scope for judicially driven centralisation by moving away from granting the EU rather broad 'shared competences' towards a more explicit statement of what it is permissible for the EU to do⁴⁹.

Additionally, there seem to be considerable attractions attached to Weiler's suggestion of a constitutional council made up of representatives of the highest courts of the member states which would have the sole function of ruling on whether a newly enacted Union law violates subsidiarity⁵⁰. It would convene at the request of any national legislature, national executive or union institution, after a law was adopted but before it came into force, in a fashion similar to the French *Conseil Constitutionnel*. The great advantage of such an institution would be that with its sole function being questions of competence and subsidiarity it could hardly fail to address the issue in a thorough and explicit fashion, and that - since it would be made up of members of national constitutional courts - its members would have a vested interest in ensuring subsidiarity was upheld. The burden of proof should be placed squarely with the central institutions by requiring that they demonstrate why the legislation doesn't violate subsidiarity if the legislation is to come into force.

48 Article 76, TEU.

49 Though see Swenden (2004) on the disadvantages of comprehensive competence catalogues.

50 Weiler (1997).

4. Conclusion

If, then, the Treaty of Lisbon does not represent a threat to federalism, what would its adoption represent for the future of the European Union. Certainly it would involve a real improvement in some areas: decision-making procedures should be made more accountable through the move to greater use of the codecision procedure; bureaucracy should be decreased through the streamlining of the Commission, longer terms for the EU presidency and through the merger of the current two major foreign policy posts into a single High Representative for Foreign Affairs; and the creation of an explicit procedure for leaving the EU should over time help increase confidence that a superstate isn't being thrust onto reluctant European peoples by the back door against their will. QMV would be extended to a number of new areas and while the debate over whether this would represent sensible streamlining or dangerous transfers of sovereignty to unrepresentative and undemocratic institutions, is a question on which there is likely to be little in the way of agreement, it would be hard to argue that this move is either unprecedented for the EU or on such a scale that it would represent a fundamental change in the nature of the EU. Thus the Lisbon Reformers would seem to represent a pretty modest set of changes to the European framework; the EU post-Lisbon would be a bit more efficient, to a limited extent more democratically accountable, and a bit, but not really that much, more integrated and centralised.

I've generally chosen to avoid the issue of what the Irish 'No' Vote represents for the EU, but perhaps this is the moment to touch on it. There is a body of opinion which feels that the Irish 'No' was simply the result of misunderstanding of the treaty and under-education about the benefits of the EU. There is almost certainly a measure of truth in this assessment, since the Irish No Campaign frequently made false claims about the treaty which whipped up unjustified fears that the passage of the Lisbon Treaty would necessitate large changes in Irish public policy.

However, anyone who thinks that the EU simply needs to 'get the message across' and everyone will fall into line is, I would argue, somewhat naive. Concern about what the EU has become and where it is heading is both common to a large number of EU states and represents a substantial faction of the population in some member states. Even more worrying for the prospects of the development of the EU in the longer term is the fact that the reasons given for opposition to the EU are often contradictory. In the UK concerns tend to be that the EU has moved beyond its 'free market' remit and that it threatens to impose what are seen as inefficient regulations, welfare or employment policies; elsewhere the concern often seems to

be that it is undermining just those kind of policies, which are seen as necessary to ensure social cohesion and combat the effects of globalisation. Almost everywhere there seems to be some concern that the EU may undermine local customs, or lead to the imposition of unpopular policies.

The Treaty of Lisbon was never going to resolve such concerns simply because the treaty is not very radical and so would see the EU continuing pretty much on the same course as before. Thus while it might be possible to reverse the Irish vote through a re-run in a year's time, in a repeat of 'keep on asking until you get the right answer' policy pursued to get the Treaty of Nice ratified, it seems likely that the barriers to the development of the EU will remain.

In my opinion the EU could not survive as a federal state: fundamentally there isn't the will at the present time, nor is there likely to be the will in the foreseeable future, to overcome either the conservatism of the European peoples which leads them to be deeply suspicious of any radical moves away from national sovereignty. However, I also believe that only if it begins to adopt federalist principles more comprehensively in both its constitutional structure and in the way it sees its purpose can the EU fulfil its full potential as a union.

The Lisbon Treaty fails to make any considerable strides towards an EU based on such federal principles, what might be called a confederation of sovereign states. Such a system seems necessary to reconcile the absence of a real European demos, and the heterogeneity of European states, with the need for institutionalised cooperation to solve the common problems confronting European states, which they often have real trouble resolving alone.

A confederal European Union in which the principle of subsidiarity would be of primary importance might in some ways do less than the current EU - with less power to harmonise regulations in areas such as planning policy or labour policy - but in others it would do more - whether in coordinating the European response to climate change or helping the European member states advance their common foreign policy interests more effectively. However, public suspicion of the EU means moves towards integration in sensitive areas such as defence seem likely to prove difficult, while institutional self-interest suggest it would be difficult to wrest back national control of competences currently held by the EU, even where there seems little need for them to be wielded centrally.

In my opinion it is judicial reform that could do the most to ensure that the EU develops in a fashion that is friendly to the federal ideal of constitutionally protected

diversity. The ECJ is currently structured in a fashion that makes it easily perverted into a tool for centralising powers by the back door at a time when increasing public scepticism about the EU limits the prospects for treaty based centralisation. Simple reforms such as making appointments to the ECJ non-renewable, opening up appointments and the voting records of judges to public scrutiny, and allowing minority concurring and dissenting judgements to be published would reduce the scope for the court to be used in this fashion. However, there seems little prospect for such reforms. Needless to say the prospects for a supplementary European court composed of judges from national constitutional courts, tasked with ensuring legislation complies with subsidiarity, is a distant dream.

Thus while the future direction of the EU seems more uncertain following the Irish 'No' vote, a good bet would seem to be that with or without Lisbon the EU will continue to evolve in a similar fashion to the way it has over the last decade or so, with powers slowly gravitating towards the centre pushed forward by broad readings of the powers granted to the EU by the treaties and supported by favourable ECJ judgements. This is dually frustrating in that it means that integration is likely to progress slowly in areas where the EU should be doing a lot more, and that in other areas the autonomy of member states will continue to be lost in violation of the spirit of subsidiarity.

With or without Lisbon the EU will remain out of the range of easy classification by political scientists, neither a state nor just an intergovernmental organisation; with member states continuing to exercise considerable but imperfect control over the direction of policy; with powers distributed more as a result of political bargaining than of any general plan or theory; less efficient than it could be but not as inefficient as it is often made out to be; and certainly functional enough that European governments are unlikely to abandon it or radically reform it in the foreseeable future.

5. Bibliography:

- Angelet, B. and Vrailas, I (2008) 'European Defence in the wake of the Lisbon Treaty'. Royal Institute for International Relations, Egmont Papers, Number 21.
- Anthony A (2004) 'A Constitutional Court for Europe'. In . Bell J., and A. Dashwood (eds.) The Cambridge Yearbook of European Legal Studies, Volume 6.
- Berglof, E., Eichengreen, B., Roland, G., Tabellini, G., & Wyplosz, C (2003) – 'Built to last: A political architecture for Europe'. Monitoring European Integration, Volume 12.
- Biscop, S. (2008) 'Permanent Structured Cooperation and the Future of the ESDP'. Royal Institute for International Relations, Egmont Papers, Number 20.
- De Búrca, G. (1998) 'The Principle Of Subsidiarity and the Court of Justice as an Institutional Actor'. Journal of Common Market Studies, Vol. 36, No.2, pp. 217-35.
- Gerken, L. & Herzog, R. (2007) 'We must cure Brussels of its centralising fever' Europe's World, Summer 2007.
- Hartley, K. (2003) 'The Future of European Defence Policy: An economic Perspective'. Defence and Peace Economics, Vol. 14, issue 2, pages 107-115.
- Jolly, M. (2007) The European Union and the People (Oxford: Oxford University Press).
- Kapteyn, P. (2001) 'Reflections on the Future of the Judicial System of the European Union after Nice' Yearbook of European Union Law, Vol. 173.
- Keleman, R. (2004) The Rules of Federalism: Regulatory federalism and the EU (Harvard University Press).
- Kennedy, T. (2006) 'The European Court of Justice'. In Peterson, J. and Shackleton, M. (eds.) The Institutions of the European Union, 2nd edn. (Oxford: Oxford University Press).
- Mayer, F. (2004) 'Competences – Reloaded? The Vertical Division of Powers in the EU after the New European Constitution'. Walter Hallstein-Institut, Paper 19/04.
- Mill, J. S. (1998) – 'On Liberty'. In On Liberty and Other Essays (Oxford: Oxford University Press).
- Richardson, J. (ed.) (2005) European Union: Power and Policy-Making (London: Routledge)
- Swenden, W. (2004) 'Is the European Union in Need of a Competence Catalogue? Insights from comparative federalism' Journal of Common Market Studies, Vol. 42, No. 2, pages 371-92.
- Tekin, F, and Wessels, W. (2008) 'Flexibility within the Lisbon Treaty: Trademark or Empty Promise?' EIPASCOPE, 2008/1. (European Institute of Public Administration)
- Weiler, J.H.H (1997) 'The Reformation of European Constitutionalism' Journal of Common Market Studies, Vol. 35, No. 1, pages 97-131.

'ECJ limits fixed-term employment for older workers' & 'Government acts on EU working time directive'
- European industrial relations observatory on-line (EIROline): www.eurofound.europa.eu/eiro/

'Royal Navy warships may form part of EU fleet': www.telegraph.co.uk

'Federalism': <http://plato.stanford.edu>

The Irish Referendum Commission website: <http://www.lisbontreaty2008.ie>

'Human Trafficking: EU extends further control over common immigration policy to which the UK will become subject': www.europeanfoundation.org

'Skouris: The subsidiarity principle in the jurisdiction of the European Court': www.ue2006.at

Eurobarometer data: http://ec.europa.eu/public_opinion

'Report of the Court of Justice on certain aspects of the application of the treaty on European Union' (Luxembourg, May 1995): <http://www.ena.lu/>

Charter of Fundamental Rights: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:0001:0016:EN:PDF>

Treaty on European Union as amended by the Treaty of Lisbon: <http://www.consilium.europa.eu/uedocs/cmsUpload/st06655-re01.en08.pdf>

Treaty on the Functioning of the European Union: <http://www.consilium.europa.eu/uedocs/cmsUpload/st06655-re01.en08.pdf>

Case C-144/04 (2005) - Werner Mangold vs. Rüdiger Helm: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62004J0144:EN:HTML>

Case C-84/94 (1996) - UK vs. Council of the EU: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61994J0084:EN:HTML>

If you wish to support our work:
Commerzbank Berlin
BIC 100 400 00
Donations account: 266 9661 04
Donation receipts will be issued.

George Herbert studied Politics, Philosophy, and Economics at St Peter's College, Oxford University. He served for two terms as Treasurer of the Oxford Hayek Society. In 2007 he worked for the Institute of Economic Affairs (IEA) as a Research Fellow, examining issues surrounding European Union integration.