

After Lisbon: EU Legislation on the Path to Efficiency?

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Abstract:

For multi-level government structures, the crucial question is how authority can be most efficiently allocated between jurisdictions that differ in scope. This is especially true when rules provided by a larger jurisdiction claim primacy over rules provided by the smaller entities. The Theory of Fiscal Federalism explains the choice of the size of jurisdiction as a trade-off between, on the one hand, internalizing externalities as well as allowing for economies of scale, versus heterogeneity costs on the other. Further arguments on what should determine the optimal jurisdiction size can be derived from the literature on Institutional Competition. Here it is claimed that the assignment of power to rather small and competing jurisdictions will help to tame Leviathan, i.e. opportunistic politicians. Moreover, it allows for differences in policy making which will be conducive to legal innovation.

After a brief discussion of the different strands of literature, this paper turns its attention to the Treaty of Lisbon, which, as the new legal institutional framework of the EU, ushers in changes in the assignment of powers. Most interestingly, the Treaty attempts to address the issue that large jurisdictions (i.e. supranational organizations) lack information as to local preferences and will therefore provide goods inefficiently. With the Treaty of Lisbon, the EU tries to address and remedy this issue by asking nation state parliaments as well as European citizens to contribute to the Union's legislative actions.

Based on the assumption that considering local preferences play a key role for the well-being of the almost 500 million people living in the European Union, the paper examines the Treaty of Lisbon focusing on its ability to create the information needed to provide its citizens with an efficient allocation of responsibilities within the European Union. Therefore, several new features of the Treaty are discussed and evaluated from a political economy perspective. Special emphasis is put on the nation states parliaments' new functions to participate, ex-ante, in the legislative process of the European Union (Article 12 TEU). My fundamental contention is that since control of the European institutions can be characterized as a European public good, the individual parliamentarian will have no private incentive to support the use of the new instrument. However, looking at the 58 times the instrument was used between January 2009 and July 2011, I find that the "*reasoned opinion*" never reached the critical threshold needed for it to be acknowledged by the European institutions. I conclude that the *reasoned opinion* is not a qualified instrument to control for compliance with the subsidiarity principle, and will not help to allocate competencies within the EU more efficiently. Notably, more than one third of the EU member states did not at all make use of the reasoned opinion. Therefore, the paper develops a model to explain the differences in the use of the reasoned opinion by looking at variables such as size of the domestic parliament, per capita income, local patriotism and length of EU membership.

Key words: political economy, Treaty of Lisbon, reasoned opinion

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1. Introduction

For supranational organization like the European Union, the question how and which competences and authorities should be allocated at the international layer is of great importance. Some normative criteria how to determine which jurisdiction is best suited to fulfil a given task and which issues should be taken into consideration when doing so, can be derived from the literature on Fiscal Federalism and Institutional Competition as well as from Political Economy. Generally, within a multi-layered government structure the appropriate authority can vary between a continuum of a local provision of a good to a worldwide one.

Research on the activities the European Union is most heavily involved in,¹ about the procedures used within the decision making and the incentives predominant in the European institutions² have shown that much needs to be done to make the European Union's legislative actions more efficient, democratic and accountable.

Moreover, not only scholars from different theoretical backgrounds have addressed the weaknesses of the European Union, but also the politician themselves, who in the Declaration of Laeken emphasize the need to improve democracy and efficiency in the European Union.³

Therefore this paper's aim is to analyse whether the Treaty of Lisbon, as the new institutional legal framework of the European Union can live up to the challenges present. The paper starts by reflecting the key normative issues arisen in the literature about the allocation of powers. It borrows and presents ideas from Fiscal Federalism, Institutional Competition and Political Economy concerning chances and risks linked with the allocation of powers to a specific level.

This section is followed by a brief overview of changes and new features of the treaty, which are seen to be of importance to the topic of this paper. In Section five the key innovative features of the Treaty are discussed in more detail. A special emphasis is put to the "reasoned opinion" which is a new legal instrument, assigned to the parliaments of the

¹Alesina, Alberto; Angeloni, Ignazio and Schuknecht, Ludger. What does the European Union do? Public Choice.2005.pp275-319. p277.

² Bernholz, Peter; Schneider, Friedrich; Vaubel, Roland; Vibert, Frank: An Alternative constitutional treaty for the European Union, in: Public Choice 118.2004.

³ See the declaration of Laeken Emphasising and demanding for a transparent, efficient and democratic European Union, see.URL: http://europa.eu/scadplus/glossary/laeken_declaration_de.htm

member states in order to allow them to participate in the legislative actions of the European Union ex-ante. It is conjectured that the effectiveness of the instrument is very limited as the therewith linked good, (i.e. a more efficient policy making of the European Institutions) is characterized by the criteria of a European public good. Looking at the data I find, that so far the reasoned opinion, - thought to take care about deviating opinions from the European Institutions - never made it reach the critical threshold, to be noticed by the European Institutions. Notably, one in eight attempts to make use of the reasoned opinions by member states was invalid. Moreover, more than one third of the countries of the European Union never made it to use the new instrument at all. Therefore section six develops a model to explain the huge differences in the use of the reasoned opinion by the member states. Variables such as size of the domestic parliament, per capita income, local patriotism and length of EU membership will therefore be used. Section seven concludes.

2. Theory Overview

a)Fiscal Federalism

The theory of Fiscal Federalism states, that the choice of allocating authority within a multilevel governance structure is characterized by a trade-off between internalizing positive or negative spill overs (as well as benefiting from economies of scale) and the thereby occurring heterogeneity costs.⁴ The first stresses that if the local production of a certain good has positive or negative effects outside of the local authority borders, it can be efficiency enhancing, if a larger jurisdiction is chosen for the provision of that good. The latter stresses, that if the scope of the provision with a uniform public good is increased, this impedes to care about different preferences for a certain good. (i.e. consuming the good in a different quality and or quantity), and thereby incurring heterogeneity costs.

In principle, also a larger jurisdiction could provide different public goods that suit the different preferences of its constituents and leads to minimized heterogeneity costs;

⁴Oates, Wallace. Fiscal Federalism. New York.1972.

however, as the supranational organization will face information problems, it will have to provide a uniform good (Oates 1998).⁵

In 2005, Alesina, Angeloni and Schuknecht, developed criteria for the goods that international or supranational organisations like the European Union should provide for its citizens. They argue that the supranational level should be tasked with responsibilities where the provision of the goods is characterized by large spill overs or economies of scale and where the preferences are homogenous.⁶

Of course, there are a lot of cases, where it is rather difficult to come up with a clear advice. Nevertheless, for areas like international trade and the common market where externalities are predominate, the attribution to the European level seems obvious. While as for areas where a high degree of heterogeneity is present, like in the areas of education or research as well as in cultural issues and agriculture, the attribution to a rather decentralized authority is superior.⁷ Interestingly to note is that this normative proposition of the attribution of authority, is also much in line with the appreciation of the European citizens.⁸ However, looking at the policy areas, the European Union is de facto involved in they find that for a lot of areas the opposite attribution applies.⁹

Apparently, for the attribution of powers within the European Union, normative criteria as the internalization of externalities, the realization of economies of scale and the costs of heterogeneity are of little relevance. One explanation therefore could be seen in interests of the political agents who are active in the European Institutions. If for them, the expansion of their sphere of influence and power is recognized as being beneficial,¹⁰ these agents might favour an integration strategy that is in line with their aims rather than with the normative criteria of an optimal attribution of powers. As a result the European Institutions will favour an integration strategy with the goal of a very large scale integration in contrast to a flexible

⁵Oates,Wallace. An Essay on Fiscal Federalism. Journal of Economic Literature, Vol. 37 No.3. 1999. Pp. 1120-1149.

⁶Alesina, Alberto; Angeloni, Ignazio and Schuknecht, Ludger. What does the European Union do? Public Choice.2005.pp275-319. p277.

⁷ Ibid. p. 284.

⁸ The finding is based on the results of Eurobarometer in spring 2001, a publication by the European Commission. ibid. p.284.

⁹ Ibid. pp 294-311.

¹⁰ As it is suggested by political economy scholars. See Downs, Anthony: *Ökonomische Theorie der Demokratie*. Tübingen.1968.p.30. or Niskanen, William A. *Autocratic, democratic and optimal government: fiscal choice and economic outcomes*.Cheltenham.2003.p71.

one, as this is leading to an attribution of powers to the supranational layer, and therewith most contributes to their individual utility functions.¹¹

b) Institutional Economics/ Political Economy

Political Economy scholars have been aware of not only benevolent politicians for several decades.¹² It is argued, that the rational politician (as well as the rational bureaucrat¹³) is self-interested and therefore focuses on the maximization of his own welfare, in contrast to maximizing society's welfare.¹⁴ Assuming different preferences between the (politician) agent and his (constituent) principal,¹⁵ we know from institutional economics, that in this kind of relationship opportunistic behaviour is likely to occur. Decisive for the opportunistic actions is the allocation of asymmetric information between principal and agent. Put more generally, the principal faces transaction costs and uncertainty when assessing the agent's performance. This leaves leeway to the (political) agent that enables him to pursue his own interests to the detriment of his principal (voter).

If the relationship between politicians and their voters is described by a principal-agent relationship, at least a normative perspective - which promotes the wellbeing of the constituent principal - calls for adequate instruments of control. This is especially true when power is delegated to an international or supranational organisation¹⁶. The argument here is that the prolonging of the delegation chain further weakens the principal's ability to control the agent's undertaken actions.¹⁷

¹¹ Theurl, Theresia, Meyer, Erich Institutionelle Grundlagen der Europäischen Union. Integrationspolitische Strategien und aktuelle Entwicklungsperspektiven, in: Ohr, Renate (Edit) Kompendium europäische Wirtschaftspolitik. 2001.p1870f.

¹² Brennan, G ;Buchanan, J. Besteuerung und Staatsgewalt. Analytische Grundlagen einer Finanzverfassung. Überstezt von Folkers,Cay(Hrsg.).Hamburg.1988.p.17.

¹³ The relevant value for the bureaucrat is the magnitude of its administered budget. Niskanen, William. Autocratic, democratic and optimal government. Fiscal choice and economic autcomes.2003.p.71.

¹⁴ However, that does not mean that he will not at all care about his constituent's preferences, but it makes opportunistic behaviour more likely

¹⁵ See for formal overview of the different utility functions of politicians, bureaucrats and constituents, Erlei, M, Leschke, M; Sauerland, D. Neue Institutioneökonomik.2007. p. 358-361.

¹⁶ From a welfare economic perspective, there are of course good reasons to delegate authority to an international level. For instance, if a good is characterized by the criteria of a European or international public good. This paper however focuses on a different issue, i.e. political opportunism and therefore abstracts from a welfare perspective, see therefore Caesar, Rolf: Leitlinien für eine europäische Finanzverfassung, in Schäfer, Wolf: Zukunftsprobleme der europäischen Wirtschaftsverfassung. Berlin. 2004

¹⁷ Vaubel, R. Principal-Agenten Probleme in Internationalen Organisationen. HWWA Discussion Paper 219.2003.p.1.

In more general terms, the constituent faces the dilemma of delegation on the international level in a compounded way. The dilemma of delegation implies that on the one hand the benefits of international policy making are only available if authority is delegated to a third party, on the other hand, especially on the international sphere, the danger of a misuse of power becomes increasingly likely. This raises the question which instruments could be seen as adequate to balance interests on the international level and therewith contribute to an efficient and preference suited provision of legal frameworks.

c) Institutional Competition

For Institutional Competition scholars the question of assigning powers on a supranational layer is seen sceptical because it hinders competition by diminishing available choice options. One way to support choice options is by allocating responsibilities on a rather decentralized level. The smaller entities will then react in different ways to new challenges and therewith provide differing answers, which will allow for selection. Another option could be the provision of European soft law, which could inspire the local authorities, provide information, but does not constraint the potential sample space for solutions.

Coming back to the European Union, from a pure domestic perspective, states could be seen as the only provider of legal rules however this situation significantly changes, by taking on an European or International perspective. Internationally a lot of states exist and each of them is able to provide all kind of legal rules in the same, as well as in a different quality and quantity. Following this argument, states can be described as “territorial enterprises” that basically provide the good “rules of the game”.¹⁸

As these rules can be regarded as an input factor for production, a different designing of the rules will change the value of certain investments as well as the cost of production and finally the prices of goods and services.¹⁹ In this respect, the design of the rule- framework is recognized in having a significant influence on the potential wealth creation in a jurisdiction. As a result, states will compete to attract these wealth creating production factors, as they

¹⁸Vanberg, V. Can competition between governments increase democracy in Bergh, A; Höijer, R (Eds.) Institutional Competition Edward Elger.Cheltenham, UKu.a.2008. p.114

¹⁹ Ebenda p.117 is arguing that governments basically compete in two ways. Indirectly as the legal framework affects the cost of production and directly in the way that a states legal framework will more or less attract mobile resources.

are responsible for the satisfaction of their citizens and moreover, importantly contributing to the state's tax revenues. In doing so, they directly and indirectly contribute to the politician's utility function.

Put differently, the mechanism of IC works in the way, that if politicians design rules which do not match the preferences of a mobile resource, the mobile resource will exit this jurisdiction. If the exiting resource is scarce, the jurisdiction will face an economic decline and its citizens will react to this situation by their voice option.²⁰

Hence, from the perspective of Institutional Competition a rather decentralized assignment of powers is what should be aimed for. Besides different choice options also a high degree of mobility of the production factors is needed, to allow for IC. One way to understand different degrees of mobility, is by comparing relative (transaction)-cost of changing allegiance between different jurisdictions. An increase in the degree of the mobility of people or capital will promote the competition between states. In contrast prohibitive high costs of changing allegiance will detain competition. The European Union already provides his citizens with the four fundamental freedoms, thus enabling their citizens to exit one jurisdiction and choose another.

So the desirability of Institutional Competition is best explained by thinking of its absence. Within microeconomic theory, the absence of competition is defined as a monopoly, and it is agreed that this kind of marked structure is only beneficial for the monopolist supplier and to the detriment of the consumer. Instead, a market with perfect competition is seen as maximizing welfare. In analogy to a commodity market, it can plausibly be argued that competition also leads to superior result within the market of legal institutions.²¹

To support this position, basically three arguments are to be made. First and for most, Institutional Competition puts the governments production function more in line with the preferences of its constituents and avoids dissipation of resources. This is, because in a situation without Institutional Competition, the constituent can not abstain from consuming the legal rules provided; neither from the taxes he has to pay. The constituent is totally

²⁰Kiwit, D; Voigt, S. Grenzen des institutionellen Wettbewerbs in Max – Planck Institut zur Erforschung von Wirtschaftssystemen, Jena. Diskussionsbeitrag 05-97.p.14

²¹ Højjer, R. The Concept of institutional competition in Bergh, A; Højjer, R (Eds.) Institutional Competition Edward Elger. Cheltenham, UK. 2008. P.20f arguing that competition between states is best described by a monopolistic competition as there are costs of changing allegiance.

depending on *one* institution and therefore it is likely that higher tax obligations will be imposed on him.²²

Accordingly, the situation changes with the introduction of Institutional Competition. The constituent is now provided with a tool to sanction the government by an exit and/or voice mechanism.²³

Furthermore Institutional Competition not only provides for a sanction mechanism, but as a yardstick competition it also endogenously creates and provides the information needed to judge the different performances of states. This is, because the performances of a number of other jurisdictions facing the same or similar problems become available.²⁴ In addition it has to be pointed out, that the exit option and its success, in contrast to voting, solely depend on an individual and private decision making.²⁵ The threat of exit and voice can thus diminish the government's discretionary scope and lead to an efficient production of public goods.

As the preferences of individuals might differ in the question of how many public goods should be provided and in which quantity, a second feature of Institutional Competition is, that it allows for different supply levels of public goods/ tax packages. The constituents can then choose by a "voting by feet"-mechanism according to their preferences the package which fits them best.²⁶

A third feature of Institutional Competition is its property to allow for learning gains. Taking a Hayekian approach to competition, Institutional Competition can be described by the attempt to find a not yet known solution to a given problem. Competition can therefore be interpreted as a trial and error process as well as a discovery procedure to an appropriate answer.²⁷ Taking this avenue, Institutional Competition is the simultaneous and independent attempt of jurisdictions to define an optimal legal framework which is unknown beforehand.

²² Ebenda p.19

²³ Thereto seminal, Hirschmann, A.O. *Abwanderung und Widerspruch. Reaktionen auf Leistungsabfall bei Unternehmen, Organisationen und Staat.* Tübingen.1974.

²⁴ Vaubel, Roland. A history of thought on institutional competition, in Bergh, A; Höijer, R (Eds.) *Institutional Competition* Edward Elger. Cheltenham,UK. 2008. pp.29-66. Distinguishing between yardstick competition a resource based competition. The first enables for comparison thereby promoting learning and innovation, the latter concerning competition for mobile capital.p.31.

²⁵ Ibid. Hirschman 1974, see also Wohlgemuth, M. *Economic and Political Competition in Neoclassical and Evolutionary Perspective*, in *Constitutional Political Economy* 6.1995b.pp 7-96. p.86 and Pitlik, Hans. *Politische Ökonomie des Föderalismus. Föderative Kompetenzverteilung im Lichte der konstituellen Ökonomik*, in Caesar, Rolf u.a. (Hrsg.)*Hohenheimer Volkswirtschaftliche Schriften* Band 26. Frankfurt am Main u.a.1997. p.242.

²⁶ Tiebout, C. *An economic theory of fiscal decentralization.* National Bureau of Economic Research (Eds.). *Public Finances: Needs, Sources and Utilization.*Princeton.1961.

²⁷ Hayek von, F.A. *Der Wettbewerb als Entdeckungsverfahren.* Kiel. 1968.

Gaining or loosing of tax- substrate can than be interpreted as a feedback-mechanism, showing the solutions adequacy.²⁸ These learning effects can be realized by learning from jurisdictions of the same size from smaller as well as from larger jurisdiction. One way or the other, the small or bigger entities, which are free to choose in which way they react on given problem, work as a laboratory for the other jurisdictions.²⁹

In doing so, Institutional Competition institutionalizes a learning framework with the three main features of providing incentives to be innovative, arranging an interactive feed-back mechanism and in being flexible to future adaptations.

3. Describing the European Union

Within an international context, it is not clear if the (domestic)constituents' principals really need to be worried about the dilemma of delegation. The argument of some international legal scholars is that, as actually no delegation of substantial importance is done to an international level there is no reason to be worried.³⁰ However, this is not true for the European Union. The Unions importance, competency and influence have significantly and continuously increased since its foundation in 1957. Evidence therefore can be seen in the circumstance that it is nowadays commonly accepted that EU legislation is of a higher rank than the nation-state legislation.³¹

Nevertheless, for a discussion of what kind of accountability or control mechanisms are appropriate for the European Union, one should have a clear picture in mind of what characterizes the European Union.

The EU could in analogy to its historical roots be an association of compound states. Than the decision making would solely be done by the nation states executive branches, whereas a European parliament would be negligible. This situation changes however significantly if the European Union had emerged to a federation or confederation, with the consequence of

²⁸ Wohlgemuth, Michael. Institutioneller Wettbewerb als Entdeckungsverfahren. Zur Rolle von Abwanderung und Widerspruch im europäischen Binnenmarkt, in König T, Rieger, E; Schmitt, H (Hrsg.). Europa der Bürger? Voraussetzungen, Alternativen, Konsequenzen. Frankfurt, New York. 1998. p.64.

²⁹ Oates(1999) *ibid.* Pp 1132,1133.

³⁰ Guzman, A; Landside, J. California Law Review Vol.96/2008.1693-1723. The Myth of International Delegation. However also noting that this is not true for the United Nation Security Council and the European Union.p.1695

³¹ Streinz, Ohler, Herrmann(2010) p.107.

a greater emphasis to the need and relevance of a powerful European parliament.³² However, in the European context the role of the European Parliament as counterweight to supranational interests is in result to its one interest in a supra-nationalization (i.e. allocation of authority on the supranational layer) not very promising.

Thus, the European Union has recently taking control over more and more policy areas, including such important branches as Security and Justice one could now plausibly argue that it is incrementally developing its characteristics towards a confederation.³³ Since the limiting of political opportunism is always an important issue, with the allocation of sensitive policy areas like Security and Justice to the European level, the situation is now even more heavily demanding for an adequate control of the political agents active in the European institutions.

The Treaty of Lisbon written in the light of the declaration of Laeken³⁴ and the failed attempt of a European Constitution³⁵ should thereby be assessed on the normative base of being successful in making the European citizens better of i.e. providing an efficient provision with European public goods. Therefore, a (constitutional) framework should fulfil two major properties. On the one hand, such a framework of basic rules has to enable and legitimize an authority to act for the common benefits. On the other hand it has to create and protect the citizens by defining privacy as opposed to the public sphere. Furthermore it should provide instruments to limit the political agents misusing their received authority.³⁶

Therefore, the institutionalization of Institutional Competition within the European Union becomes crucial, as it is an important instrument to limit the politician's opportunism. The competition of institutions can be reached, when policy competences are allocated on a rather decentralized level or if the European Union only produces non-binding rules. These rules can then be implemented on a nation-state level but don't have to be implemented (output informality). Then the national and the international rule could compete with each

³² Blankart, Charles. The European Union: confederation, federation or association of compound states. A Hayekian approach to the theory of constitution, in constitutional Political Economy Vol.18 No.2.06/2007.p.105.

³³ Neyer, Jürgen: Europa als Res Publica – wider der Dominanz der Exekutiven in der Europäischen Union. in Demokratieprobleme in der Europäischen Union? Wirtschaftsdienst 2008/8.

³⁴ Emphasising and demanding for a transparent, efficient and democratic European Union, see.URL: http://europa.eu/scadplus/glossary/laeken_declaration_de.htm

³⁵ Being rejected twice by referenda the "European constitution" obviously did not catch up to promise of Laeken.

³⁶ Vanberg, V. Can IC increase democracy in Bergh, A; Höijer, R (Eds.) Institutional Competition Edward Elger.Cheltenham, UKu.a.2008. p.116

other.³⁷ The relevance for this kind of limitation in the European Union is especially important, as other forms of limiting the European Institutions such as inter-organizational control, as well as democratic control are likely to fail. The first resulting from the similar interests of the European Institutions, namely the European Parliament, the European Commission and the ECJ to increase their outreach³⁸, the latter as a result of a not existing European demos.

4. The new institutional features of the Treaty of Lisbon with regard to their ability to enhance efficient policy making.

a) The Member States' Parliaments

The Treaty of Lisbon is consisting of two main parts, the Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) and is supplemented by several protocols. The protocols nevertheless are on equal terms with the rest of the Treaty (Art.51 TEU) and of great interest with regard to the preconditions for Institutional Competition. This holds in particular for protocol (1) "on the role of the national parliaments in the European Union" and protocol (2) "on the application of the principles of subsidiarity and proportionality" (below abbreviated Protocol1 and Protocol2).

Generally, the Treaty of Lisbon puts new emphasis to the role of the Nation State Parliaments. Therefore the Treaty defines in Art.10 TEU that the functioning of the Union shall be founded upon a representative democracy. Furthermore the ToL clarifies in Art.12 TEU that the "National Parliaments contribute actively to the good functioning of the Union". How this active role should take place is than explained in the following letters a) to f). Of particular interests are the new information rights (letter a) and the task to oversee the compliance with the principle of subsidiarity (letter b). The information rights are completed by the obligations of the European institutions to deliver relevant information in time, like

³⁷ On the one hand this could work as a laboratory for rules. On the other hand the fact that they are chosen or not creates a base for the assessment of European Institutions performance in policy-making.

³⁸ Vaubel, Roland: Europa Chauvinismus: der Hochmut der Institutionen. München. 2001.

for example the agenda of the Council (Art.5 protocol1) or the commission's obligation to forward the annual legislative program and other instruments of policy planning (Art.1 protocol1).

More important however, is the nation states' completely new task to control for compliance with the subsidiarity principle.³⁹ With the possibility to question whether a policy is inline with the principle, the member states' parliaments become equipped with a concrete tool to ex-ante question the responsibility of the supranational level for the first time.⁴⁰ Therefore, protocol2 asks the parliaments to deliver their "*reasoned opinion*" within of eight weeks.

For the delivering of a valid "*reasoned opinion*" the parliaments have to match several requirements. Firstly, the issue which is in question, not to comply with the principle of subsidiarity has to be subject of the category of shared competencies. Secondly, within this field of categories on European institution wants to become active, although the member states could fulfil the task on their own, or the Union is not able to achieve a better outcome.⁴¹ Thirdly, the objection of the member state's parliament must contain a justification of argument.

The possibility to object to a legislative act in the form of a reasoned opinion is than available to each chamber of a member state's parliament. In case of Germany, this means that also the Bundesrat, who counts as a second chamber in sense of the Treaty, is allowed to deliver a "reasoned opinion".⁴²

How the European Institutions will react to the petition, however, depends on how many member states' parliaments doubt a European responsibility. Each member state parliament is equipped with two votes (one for each chamber, if there is a bicameral system), if the reasoned opinions reach at least one third (a quarter if the legislative act is induced by the member states) of all the votes allocated to the parliaments, the draft has to be reviewed (Art.7 Protocol 2). The European Institution responsible for the legislative draft must than

³⁹ If the reasoned opinion also includes the assessment of the proportionality principle is arguable. In favour, Streinz; Ohler; Herrmann (2010) p.74, of different opinion Groh, Thomas (2009) p.87.

⁴⁰ Groh, Thomas: Die Rolle der nationalen Parlamente, in Fastenrath, Ulrich (Hrsg.); Nowak, Carsten(Hrsg.). Der Lissabonner Reformvertrag. Änderungsimpulse in einzelnen Rechtsund Politikbereichen. Berlin.2009. p.85

⁴¹ Ibid. p.87

⁴² Streinz, Rudolf; Ohler, Christoph; Herrmann, Christoph: Der Vertrag von Lissabon zur Reform der EU. Einführung mit Synopse. 3. Auflage. München. 2010. p.76

react to the reasoned opinion. However, it is free to maintain, amend or withdraw the draft (Art. 7 protocol 2).⁴³

Besides the “reasoned opinion”, the member states’ parliaments have a second possibility to question the responsibility of the European Union. The parliaments can now in addition to the member states, take a case to the European Court of Justice if they consider a legislative act to stand in contrast to the principle of subsidiarity. This is expanding the amount of eligible complainants and also equipping the member states parliaments with an ex-post instrument to question a European responsibility. Content of the subsidiarity claim is also the assessment, whether the issue in question is generally of a shared competency’s nature.⁴⁴

At least for Germany, the national Parliament is equipped with a further instrument to influence and control the decision making on the supranational level. The German Bundesverfassungsgericht was especially concerned about the possibilities of treaty amendments in the type of Art.48 para.6, 7. This article enables the European Council to change the voting procedure in the Council from unanimity to a qualified majority rule. As this could mean that Germany or any other member state would ex-post disclaim its veto right, the German parliament has first to pass a law which enables the German representative in the European Council to vote for a change of the decision making procedure. This requirement is in particular required with regard to the legitimizations of bills by Art.352 TFEU aiming to leash the German representative to the vote of its parliament.⁴⁵

b) Extension of shared competencies

Apart from its exclusive competencies defined in TFEU Art.2, and 3 para.1, (in this area, the member states are not allowed to make any legislative acts) the second important category of competences is the category of shared competencies. Here both, the European Union as well as the member states are allowed to legislate. Nevertheless, it is important to note from an Institutional Competition point of view, that if the EU becomes active, than the member

⁴³ A special procedure is applied if a simple majority of votes is reached see therefore Art.7 para.3 subpara. 2 p.1 Protocol2)

⁴⁴ Streinz, Ohler, Herrmann (2010) p.75.

⁴⁵ Ibid p.78.

states lose their competences (Peremptions-principle), and as a result making a centralized, homogenous policy for the Union more likely. Furthermore, it has to be noted that in contrast to the closed list of the exclusive rights the list of the shared competencies is not closed, and therewith open to extensions. With the treaty of Lisbon however, the list is extended by new policies like sports (Art.165 TFEU), a European space policy (Art.189 TFEU) and a European energy policy (Art.194 TFEU). The gain of the new field energy policy, however also fosters the European influence in the field of environmental policy.⁴⁶ Further new policy areas are in addition tourism (Art.195 TFEU), civil protection (Art.196 TFEU) an administrative cooperation (Art.197 TFEU).

c) Future treaty amendments and legislative procedure

In Art. 48 TEU, the Treaty of Lisbon offers an ordinary revision procedure (TEU Art.48 para1-5), as well as a simplified revision procedure (TEU Art. 48 para. 6, 7) to amend the Treaty. The ordinary amendment procedure bears on cases of constitutional and/or great political importance. In the case of an ordinary amendment procedure, the national parliaments are involved and the change is subject to a member state approval.

However, this changes fundamentally, if the simplified revision procedure is used. Here, the now in the standing of an official European institution acting European Council (Art.13 TEU), is of greatest importance. By adopting a decision it can in the case of Art.48 para.6 TEU change or amend the provisions of the whole part three of the TFEU. The scope of the policies mentioned in part three of the TFEU is enormous. The power of this tool is watered by Art.48 para.6 subpara.1, mentioning that the potential effects of a change due to Art.48.para 6 shall not increase the competences conferred to the Union.

More important, is the second simplified revision procedure (Art.48 para.7 TEU). This article empowers the European Council to adopt a decision allowing the Council to change from unanimity to qualified majority rule.

As a result, the decision making in the Council might become quicker and easier as the cost of deciding decreases with a reduced requiring approval. On the other hand, this means,

⁴⁶ Bungenberg, Mark: Europäische Wirtschaftsverfassung zwischen Freiheit und Regulierung am Beispiel des Umweltschutzes, in: Fastenrath, Ulrich (Hrsg.); Nowak, Carsten(Hrsg.). Der Lissabonner Reformvertrag. Änderungsimpulse in einzelnen Rechts- und Politikbereichen. Berlin.2009.p.214.

that the likelihood of legislative acts, aiming to harmonize the European legislature increases. A likely effect therewith is that the supply of different competing rules within the European Union dwindles down.

In general, the legislative procedure in the EU will become more harmonization friendly. One reason therefore is the change from unanimity to a qualified majority rule in the Council. Another reason is the lack of a definition of the principle of subsidiarity that acts as a balance to the supranational interests.

d) Method of soft and open Coordination

In addition to the exclusive competences (Art.3 TFEU) and the concurrent competences (Art.4 TFEU) the European Union can also become active through coordinating (Art.5 TFEU) and supporting (Art. 6 TFEU) measures.

Besides that, some articles refer to the possibility to make use of a “soft method of coordination”.⁴⁷ As the initiatives taken by the EU in this field are not legally binding they can be seen as European soft law. The evaluation of the European soft law is ambivalent. On the one hand its production can be seen as less costly as negotiation, ratification, modification and exit cost decrease.⁴⁸ Furthermore if the initiatives simply offer a further (rule) option, they could be seen as increasing the marked for rules, as an additional product enters it.

The appropriateness of European soft law making of course also depends on the procedure and information present, nevertheless as it is non-binding the nation states themselves can decide whether they want to implement it on the their domestic level. In doing so, the local jurisdictions create some information about their preferences ex-post, which can be used to adopt the legislation.

V) Discussion

The new legal features of the Treaty of Lisbon provoke mixed feelings. Generally, the emphasising of a more active role of the member states’ parliaments and the European

⁴⁷ See Art.156, 168, 173 and 181TFEU.

⁴⁸ Voigt, Stefan. The Economics of Informal International Law – An Empirical Assessment.2011.P.6.

Citizens must be acceded. This is, because it introduces a new player in the legislative process of the European Union. This circumstance is of great importance, as therewith a new perspective towards the question of which policies should be centralized enters the debate. It opens up the cartel of interests on a further centralization of the European Union and is conducive to provide the legislator with information about local preferences. In addition the Treaty of Lisbon lists concrete instruments and rights to promote this task, namely the information rights of the Parliaments, the reasoned opinion and the right of the member states' parliaments to take an action to the ECJ because they assume the EU Institutions not to comply with the principal of subsidiarity.

However, for the effectiveness of both the subsidiarity claim as well as for the delivering of a reasoned opinion, a lot of crucial issues remain unsolved. For the latter, its effectiveness heavily depends on the ability of the member states' parliaments to coordinate each other and to offer free resources to monitor and to assess Brussels legislative actions. The time therefore is scarce, as everything has to be done within eight weeks. This seems to be a rather tough job. Moreover if successful in challenging on of the European Institutions' propositions, these institutions (regardless of the case of a simple majority of all votes) are absolutely free in their preferred action, as they can maintain, amend or withdraw the draft (Art. 7 protocol 2).

Looking at the effectiveness of the tool from a political economy point of view, the crucial point is how the individual member of the nation states' parliaments values the costs and benefits of using the new instruments. Costs arise, because the control of the European Institutions and their legislative actions is a highly time consuming activity. First of all, it requires a specific and well-founded understanding of the European institutions. The therefore needed knowledge might be already available by some members of parliament but certainly not by all of them. If the knowledge is not yet on hand, the individual politician would have to make a specific and costly investment to maintain this knowledge. More important however, is that the on-going evaluation of the potential legislation acts from Brussels' Institutions will bind a significant amount of time and resources. To sum up the control of the EU institutions is a costly undertaking for the individual politician of the member states' parliaments.

However, the politicians might be willing to take these costs, if the therewith linked benefits are sufficiently large. We can here distinguish between at least two categories of benefits

that contribute to the politician's utility function. Firstly, we can assume the politician to be interested in his re-election. If this is the case, he will invest in the control of a supranational or international authority, when his constituents value this control. Moreover, they have to notice the specific contribution of the individual politicians to a successful control. Secondly we could think of the parliament as a group of people facing the problem of collective action⁴⁹ (Olson 1968). The individual politician might be willing to overcome this dilemma, if the group can offer him some social incentives. This is most likely the case, if the group is small enough that members know each other and can assess each other's action. In a nutshell, for the individual parliamentarian private as well as social incentives are determining the level of efforts he is willing to take, to control the European Institutions compliance with the Subsidiarity Principle.

Assumed that this is the case, I conjecture that the individual politician's incentive to control the European Union is rather low. That's because the costs of control are considerably high and the potential benefits for the individual politician are rather small. The costs mainly arise from a two level collective action problem.

On the first level, i.e. the member state, the parliamentarians have to come up with a collectively adopted reasoned opinion in their chamber of parliament. Therefore, they will have to invest in this adoption, whereas the situation within the nation state parliament can be described as follows. If the reasoned opinion is successfully adopted and the European Institutions are controlled, this success is available to all members, it is non-excludable. As it doesn't matter who makes the effort needed to accomplish a successful control, each parliamentarian has an incentive to free-ride on the efforts undertaken by his colleagues. A likely outcome is that the efforts undertaken to control the European Institutions are too little.

On the second level, we can think of all member states' parliaments as a further group. This group then again has to overcome the problem of collective action. If the European Institutions are controlled and let's say the allocation of powers becomes more efficient, the efficiency gains are then available to all member states. None can be excluded. So again the member states' parliaments have an incentive to free-ride on the efforts of their foreign colleagues.

⁴⁹ Olson, Mancur. Die Logik des kollektiven Handelns. Mohr Siebeck. Tübingen. 1968, 2004.

The result is that nobody has an incentive to make any efforts and it is likely that no or too little control will occur.

To sum up, the individual parliamentarian cannot privatize the benefits of a successful control of the European Institutions. Nonetheless, he will bear a cost, if contributing to its production. I therefore conjecture that also the politicians, if generally interested in the control of the Union, will rather prefer to free-ride on the efforts of other parliamentarians. So, the incentives to use the instrument of the reasoned opinion are rather weak. Moreover, the possibility to overcome the problem of collective action by offering a social incentive in one of the two groups is weak. This is because both groups are if anything, anonymous and large.

Furthermore, I conjecture that within the constituency, the knowledge and interest about the European Union - and therewith their valuation of parliamentarians investing in this area - in comparison to other (domestic) policy areas is small. So, it can be expected that the rational politician will not invest in the control of the European Union, but rather go for more promising investments.

Taking stock: As we can see from table one (appendix 1), within January 2009 to the end of June 2011 the reasoned opinion was used by 24 parliaments (first or second chambers) in 58 cases. More than half of the countries didn't use the instrument more than once, more than a third not at all. Around one in eight of the reasoned opinions were not valid.

To be noticed by the European Institution responsible for a legislative bill, the threshold of one third of all votes (18 out of 54) is required. This was never achieved. The maximum score of votes (concerning a bill to harmonize the assessment basis of the corporative tax) was 9 (appendix2) – less than a quarter.

The right to bring an action (because of non compliance with the principle of subsidiarity) to the ECJ also supports a decentralized allocation of authority. Still, the power of this tool depends on the judgement of the ECJ, who in the past took over the role of the engine of European Integration and when ever possible supported the interests of the supranational Institutions with regard to the “effet utile”.⁵⁰ However, until now this tool was not at all used by the parliaments.⁵¹

⁵⁰ Folz, Hans-Peter: Die Kompetenzverteilung zwischen der europäischen Union und ihren Mitgliedstaaten, in: Fastenrath, Ulrich (Hrsg.); Nowak, Carsten (Hrsg.).Der Lissabonner Reformvertrag.

Moreover, with the Treaty of Lisbon the European Council becomes a powerful institution. This is mainly due to Art.48 TEU. Here especially a fear arises that the interplay of competence to change from unanimity to a qualified majority rule (Art.48 para.7) linked with the additional competences in the category of the competing competences will incur a further increasing number of European legislative acts. A further unpredictable source of harmonization might additionally reside in Art.352 TFEU which allows for legislative acts out of the defined competencies of the Treaty, if this is necessary to promote the goals of the Treaty. Furthermore the Treaty lacks a clear interpretation of the subsidiarity principle of Art.5 para1, 3. According to the wording, the EU can become active if the regional or state level is not able to fulfil this task sufficiently. This however leaves open a lot of scope for normative interpretation and leeway for rather more than less European legislative actions.

So, for the question if the Treaty of Lisbon can be seen as a suitable competition order for the normative aim of Institutional Competition, the answer turns out to be rather questionable. In future the interests of the agents' active on the supranational level might be counterweighted by the new rights of the nation states' parliaments. This however depends on the effectiveness of their new tools to control for the compliance with the principle of subsidiarity. For their ex-ante instrument of the reasoned opinion the effectiveness will heavily depend on the nation states' parliaments' ability to coordinate themselves.

For their ex-post instrument to bring an action to the ECJ because of the Unions non compliance with the principle of subsidiarity, the interests of the ECJ judges matter a lot. If they are willing to promote the outreach of the Union, the instrument is blunt. If they in contrast are willing to respond the wish of the nation states' parliaments of heterogeneity within a strong Union, it might become an effective one in promoting Institutional Competition.

Änderungsimpulse in einzelnen Rechts- und Politikbereichen. Berlin.2009. p.73.

⁵¹ Source: European Commission

VI) Why do some states use the reasoned opinion and others don't?

VII) Conclusion and outlook

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Appendix 1

Reasoned opinions 1.1.2009 -1.7.2011 (source: European Commission)

	Total number of reasoned opinions	Not in time	not adopted in parliament	Percentage valid reasoned opinions in %
GB Unterhaus	4	2		50
GB Oberhaus	2		1	50
BG Nationalversammlung	1			
S Riksdag	5			
NL Eerste Kammer	2	1		50
NL Tweede Kammer	4	1		75
PL Sejm	6			
PL Senat	8		1	87,5
M Abgeordnetenhaus	1			
IRL Senat	1			
RO Abgeordnetenhaus	1			
SK Nationalrat	1			
A Nationalrat	1			
A Bundesrat	2			
CZ Senat	1			
CZ Kammer	1			
D BT	1			
D BR	1			

DK Folketinget	3			
LT Seimas	2			
LUX Abgeordnetenhaus	5			
F Senat	3			
I Senat	2	1		50
Sum Reasoned opinions	58	5	2	87
Sum parliaments	24			
sum countries	17 (27)			

Countries: 27

Overall votes(two per country): 54

Number of issues in question: 18

Threshold for being noticed by the responsible European Institution: $1/3 * 54 = 18$ ($1/4 * 54 = 14$ if legislative bill origins from one of the member states)

Highest votes per issue: 9, 5 (including not valid 8), 4 (5), 4, 4, 4(6), 5, 2(3), 3, 2, 1, 1, 1, 1, 1, 1, 1, 1

Appendix 2

Support for each Reasoned Opinion (not in chronological order)

Obs.	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	
	9	5	4	4	4	4	5	2	3	2	1	1	1	1	1	1	1	1	

scoring	Frequency of occurrence
9	1
5	2
4	4
3	1
2	2
1	8