
INSTITUTIONS

The Distribution of Competences under the Reform Treaty: Some Suggestions towards an Improved Policy-Making Process

Filippa Chatzistavrou Research Associate, ELIAMEP

New challenges in the global context

The question of distribution of competences within the European Union has often been overlooked in policy-making discussions as a purely legal matter. In fact, the way competences are exercised within the EU is mainly a political matter and one of the ‘core issues’ to be tackled by the EU over the coming years.

The new Reform Treaty of the EU abolishes the so-called ‘pillar structure’ and proposes to give the EU competence in new areas such as energy, climate change, and fundamental rights. Furthermore, it proposes the extension of existing competences, such as the environment, right to asylum, or social security matters.

Notwithstanding such changes, the new Reform Treaty adopts a similar approach to all previous amending treaties. It proposes the classification of different domains according to the classical categories of competences (exclusive, joint, complementary, and the specific arrangements for the coordination of economic and employment policies, and for the Common Foreign and Security Policy [CFSP]). However, it does not specify the distribution of competences in the EU, thus leaving open the relevant question regarding the separation of powers between the EU and member states. This vague definition of competences is still broadly considered to be the best solution in order to preserve the essence of the European construction (internal market and compensatory policies). According to the majority of EU legal experts, such flexibility on the allocation of competences is deemed necessary for enhancing the EU capability to respond to new challenges.

Indeed, the new Reform Treaty comes into force within a context of specific challenges for EU governance. These challenges result from economic, social, and demographic shifts in the regional and international context.

The following question is posed here: what are the distinctive features of such challenges? Three medium-term challenges for the EU may be identified:

The challenge of inter-policy coherence in a multi-level system of governance

The interdependence among policies at international level is increasingly striking nowadays, suggesting that no policy can be put forward without considering other policies. For example, managing the Common Agricultural Policy (CAP) is just one aspect of the EU's responsibilities, which also include the global fight against hunger, the protection of nature and biodiversity, trade policy, development policy, etc. In general, the EU's ability to anticipate or deal with interconnected risks is fragmented in different policy domains. Enhancing inter-policy coherence, while achieving the optimal balance between centralisation and decentralisation of competences, might prove a difficult task for the EU and its member states.

Political challenges during crisis

We have entered a new era where human activity entails potential risks for human security, which may result in crisis situations. Transnational business, commercial, and financial activities increase the probability of facing similar types of risks (economic risk, ecological risk, public health risk, energy supply risk etc.). The global economic downturn has set a new agenda while raising one fundamental question: which eurozone mechanism would assist individual countries, thus averting the financial crisis, or preventing its consequences? Undoubtedly, there is an urgent need to develop crisis mechanisms at the EU level.

The challenge of preserving the EU's economic, political and legal *acquis*

The prospects for a growing, dynamic and popular Europe are not encouraging. The failure of the member states' recovery plans may erode the stability of the EU system. The preservation of a single market with a single currency is considered to be the most important task and a major objective for the EU. Furthermore, the controversial experience of the Constitutional Treaty and its replacement by the new Reform Treaty may lead to further disbelief in European politics. The opt-out facility sets a dangerous precedent for other member states to exclude themselves from aspects of emerging common policies, thereby causing fragmentation.

How well-equipped is the EU in terms of decision-making capacity under the new Reform Treaty to deal with such challenges?

Current situation

While the Reform Treaty stipulates the formal delimitation of competences, it is widely accepted that their practical exercise comprises the most decisive factor for policy outcome.

One of the key drivers of European integration is the fact that the extension of competences from the national to the supranational level has been defined by power struggles (creeping competences). Despite disagreements, the Reform Treaty maintains the current legal provision that opens the possibility for the expansion of the EU agenda. Nevertheless, the risk of this mechanism being terminated should not be underestimated. Some reasons that may hinder the EU's ability to expand its competences are presented below.

In recent years, an 'increased fear of centralisation' within the EU has been reported. In fact, European law specialists confirm a reduction in the number of hard EU law acts since the mid-90s. Such concerns regarding the shift in the loci of authority and power are expressed through the strong dissent among member states over which level should different policies be conducted at (e.g. redistributive policies, core functions of the welfare state, employment policy, fiscal policy etc.).

The new set-up still entails many overlapping fields of competence between the EU and member states (i.e. policies, such as social or health policy, identified with more than one category of competence). Due to the vagueness of competence allocation pursuant to the Reform Treaty, the precise practical functioning of subsidiarity will become even more a matter of political negotiation. The greater involvement of national parliaments in EU law-making should reinforce this trend. According to the new Treaty, the question of whether a newly proposed EU law ought to be dealt with at European level, or at national or local level, will be answered in close consultation with national parliaments.

The Reform Treaty will significantly extend the scope of the classic 'Community method' from 2009 by introducing majority voting in new areas (e.g. energy policy, international representation of the euro area) as well as in other areas currently under the unanimity requirement (e.g. areas in the field of Justice and Home Affairs). Nevertheless, some might argue that the stronger role of the European Parliament might sometimes make it harder to reach consensus, for instance in the fight against cross-border crime and terrorism. Moreover, the new qualified majority voting system applied from November 2014 is rather complicated, giving primacy to the population criterion. The fact that no government will be able to easily predict its relative weight in the negotiation process will reinforce further consensus building, thus affecting the EU ability to adopt coherent decisions.

Finally, while new dispositions towards enhanced cooperation propose a solid framework for joint action within the EU's legal framework, much doubt exists about its feasibility. This form of cooperation put forward by the new Treaty has been conceived as an instrument for the enhancement of policy-making rather than the promotion of the idea of a multi-speed Europe. However, this reform will not necessarily make enhanced cooperation less complex; given its complexity and current flexible forms of cooperation (opt-outs or pre-defined forms of intergovernmental cooperation), triggering enhanced cooperation will be a difficult task to achieve.

Proposals

The Reform Treaty came into force on 1st December 2009. This makes Spain, Belgium and Hungary the first Trio to take office under the new institutional provisions. While the new key functions of the President of the European Council and the HR for Foreign Affairs and Security Policy should be properly defined, the nature and role of other aspects of a rotating Council Presidency deserve further clarification.

The EU rotating presidency must take direct political responsibility for the work done during its six-month presidency in all areas except external relations. During the transition period (2010-2011), the Trio Presidency will probably exert great influence over the usual activities of the European Council.

Under the authority of an institutionalised and, therefore, long-term Presidency (European Council, Foreign Affairs Council), the rotating presidency chairs most Council configurations, with the exception of foreign affairs, as well as Coreper. More precisely, Prime Ministers of rotating presidencies maintain the Presidency of the various formations of the Council.

In accordance with the new provisions, the President of the European Council has more input in agenda setting. Moreover, it is clearly stipulated that the new General Affairs Council (GAC) should promote greater coordination and consistency in policy between the European Council and the other configurations of the Council.

In this context, the rotating presidency will play a leading role in shaping EU policy. The GAC faces the challenge of moving beyond the routine tasks of organisation and representation that are often driven by purely national concerns and interests. In fact, the overall effectiveness of the EU Presidency will also depend on the role given to the GAC.

Under the auspices of the GAC, the rotating presidency may embrace a strategic role in improving EU decision-making capacity in day-to-day politics and guaranteeing the political coherence of the whole system. By adopting a competence-coordinator role, the rotating presidency may contribute to the control of the allocation of competences between the EU and member states and support the European Commission's legislative work. Thus, the issue of optimal assignment of policy tasks to different levels of government could be addressed according to specific policy priorities, as set out by the Presidency of the EU and the European Council. The creation of a working group (comprising high-level experts) on better distribution of competences and policy efficiency would certainly be helpful. It could enhance discussions among member states on controversial issues (preferences for core public goods or macroeconomic stabilisation etc.) and promote constructive debate on any issue deemed essential to be dealt with at European level.

By promoting joined-up thinking in various EU policies, the GAC may combine issues and set objectives in close cooperation with the European Commission (e.g., establish a connection between free movement and family law matters). The GAC may also develop a genuine collective strategy, fully supported by sectoral ministers representing relevant policy domains.

The further expansion of the co-decision procedure may signal the beginning of the rotating presidency's role as a negotiator between the Council and the European Parliament. Moreover, national parliaments may become an informal negotiating partner for the rotating presidency in order to facilitate the application of the principle of subsidiarity, or even the activation of *passerelle clauses* for the simplified revision procedure that until now has remained a dead letter.

Finally, the GAC may assist the triggering of an enhanced cooperation procedure. Enhanced cooperation might be envisaged in areas where flexible forms of cooperation, other than enhanced cooperation *stricto sensu*, are already operational (for instance in the field of Justice and Home Affairs or in policies directly connected to European Monetary Union, as well as in areas of joint competence (community policies governed by unanimity, such as social policy or taxation, as well as energy policy)).

As part of its overall coordination role, the GAC will be informed of any existing political constraints or potential blockages to the adoption of new legislation. Enhanced cooperation will present an alternative option to all inefficient, low-denominator compromises, which may include soft law instruments to the detriment of legislation or privilege other flexible forms of cooperation outside the institutional framework of the EU. The GAC may examine the feasibility of any cooperation granted as a last resort in the event of emerging dissent among member states. Besides, the decision authorising enhanced cooperation will be adopted by the Council on a proposal from the Commission and after obtaining the consent of the European Parliament (except in the case of cooperation within the CFSP). Enhanced cooperation will create hard law, which is binding on participating member states and potentially binding upon all future participants.