

EU Reform Treaty: Unacceptable on account of its method and its content!

Tuesday 18 September 2007, by [KHALFA Pierre](#) (Date first published: 19 August 2007).

Contents

- [A Method that precludes \(...\)](#)
- [A Content that Follows the \(...\)](#)
- [Fight this treaty, demand \(...\)](#)

Several hundred pages with 297 modifications to the existing treaties, twelve Protocols and several dozen Declarations that have the same legal standing as the treaties, this is what the “Reform Treaty” of the European Union looks like. This article will not formulate an exhaustive commentary of the whole treaty and will leave several subject areas out on purpose; it will, however, point out some of its provisions and give a general assessment of the treaty as a whole.

A Method that precludes any Democratic Discussion

The joint declaration of the Union governments, adopted in Berlin on the occasion of the fiftieth anniversary celebration of the signature of the Treaties of Rome, set as its aim to “place the European Union on a renewed common basis before the European parliamentary elections in 2009.” Everything was to be done to avoid that the European elections become a chance for political debate about the future of the Union. The European Summit on 21 - 22 June confirmed that agenda. The European Summit repeated the worst moments of the construction of the European architecture, with its negotiations behind closed doors that, yet again, were unintelligible to the citizens of the Union.

One month later, the Portuguese Presidency hands in a draft that has to be adopted by the Council 18 - 19 October, 2007. In barely two months, everything is supposed to be sealed. The speed with which this affair has been bungled says a lot about the conception of Europe and the democratic spirit of the European leaders. The French/Dutch double No vote against the Treaty Establishing a Constitution for Europe (TECE) was, among other things, a rejection of the way Europe had been built: secret negotiations at the state-level, lack of transparency about what was at stake, and refusal of any public debate.

One would have thought that, after the incident with the Treaty Establishing a Constitution for Europe (TECE), the governments would not act this way any more. However, the opposite took place and we see a clear will to exclude the European citizens from any discussion about the future of the Union. The French/Dutch double No has shocked the European leadership to such an extent that they do not want to take the slightest risk any more: everything has to happen very fast to pre-empt a possible citizen reaction. And obviously we can count on the fingers of one hand the governments that will dare to hold a referendum on whether such a treaty should be ratified. France will not be one of them, as the new President of the Republic has already decided.

This process is unacceptable and goes against the demands of many popular movements in Europe including, for example, the European Attac groups. Attac recommends that “a new and democratic Assembly, directly elected by the citizens of all European member states, shall be mandated to elaborate, with the effective participation of national parliaments, a proposal for a new Treaty” and that “any new Treaty must be legitimated by referenda in all member states.”

A Content that Follows the Same Trend as Before

The “Reform Treaty” amends the two existing treaties, the Treaty on European Union (TEU) and the Treaty establishing the European Community, entitled “Treaty on the Functioning of the European Union” (TFEU). Remember that the Treaty on European Union is the Maastricht Treaty, amended by the Amsterdam Treaty and the Treaty of Nice, and that the Treaty establishing the European Community is the Treaty of Rome, amended by the subsequent treaties since 1957.

The preamble of the TEU has been amended by an addition that the Union is to draw inspiration from the religious inheritance of Europe. If such a reference persists, it would be a victory for the obscurantist movements and a very important ideological set-back. We demand that the President of the Republic of France veto such a clause, which contradicts the principle of secularism.

Competition

The press made a big deal of Nicolas Sarkozy’s “success” in getting the reference to “free and undistorted competition” taken out as an EU goal. This is certainly a symbolic victory for those fighting for the No against the TECE, and symbolic victories have their significance because they legitimize a struggle. But will this have any concrete consequences whatsoever?

The principle of free competition remains embedded in numerous articles of the treaties. Let us take, for example, Article 105 of the TFEU, which remains as it is, and which underlines the “principle of an open market economy with free competition.” It is also at the heart of most European legislative agreements that are still in effect, especially those to liberalise public services.

Finally, to avoid any ambiguity, Protocol 6 of the Reform Treaty restates clearly the applicable principle: “the internal market as set out in Article [I-3] of the Treaty on European Union includes a system ensuring that competition is not distorted.” Article [I-3] is about the objectives of the Union. Undistorted competition is thus reintroduced in the Union objectives, from where it had seemed to have disappeared. To drive the point home further and to underline that this is not a theoretical objective, Protocol 6 provides that “the Union shall, if necessary, take action under the provisions of the Treaties.”

It is clear that the right to competition remains as powerful as ever. It remains the organizing principle of the Union, a prescriptive part of the standards, a real “constitutional” right that mostly degrades the other European texts to mere declarations of intent without any practical operational impact.

The amendment to Article 93 of the TFEU, which deals with fiscal harmonisation, and among others with the harmonisation of laws concerning turnover taxes, provides that this harmonisation is necessary in order to “avoid distortion of competition.” However, this harmonisation process has to be adopted unanimously by the States. It remains to be seen in which direction harmonisation will occur, given that some countries do not tax corporations at all - such a harmonisation is thus not going to happen any time soon.

Trade Policy / Circulation of Capital

The EU trade policy has as an objective to “encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade” (new Article 10A TEU). Generalised free trade remains the horizon for European politics that cannot be exceeded.

This objective is reinforced and expanded in Article 188B of the TFEU, which indicates that the EU “shall contribute to (...) the progressive abolition of restrictions on international trade and on foreign direct investment, and the lowering of customs and other barriers.” This article amends the current text to allow for even greater liberalisation: foreign direct investment and the “other” barriers are not mentioned in the original article. The latter expression refers to “non-tariff trade barriers” like environmental standards or consumer protections regulations, which are a target for the liberalisation policies of, among others, the WTO.

Unanimity among the States is, however, required for the conclusion of trade agreements “in the field of trade in cultural and audiovisual services, where these risk prejudicing the Union’s cultural and linguistic diversity” and “in the field of social, educational and health services, where these agreements risk seriously disturbing the national organisation of such services...” One question remains however open: who will decide whether the aforementioned risks exist?

The Reform Treaty does, of course, not limit the free circulation of capital, not only among member states but also between these and third countries (Art. 56 TFEU), and unanimity is required for any measure to restrict the free movement of capital (Art. 57-3 TFEU).

Role of the ECB/ Economic Policy

Price stability is now one of the EU objectives (amended Art. 3 TEU). It should be mentioned that in the current TEU, price stability is not listed as one of the EU objectives. It was only an objective of the European Central Bank (ECB) as per Article 105 of the Treaty establishing the European Community. Even if its addition as an objective of the EU will not change anything in practice, it is highly symbolic, even more so since nothing is said about the inflation of financial assets, one of the causes for malfunctionings of the world economy. This Article 105 is retained in the TFEU and, furthermore, a new Article 245 regarding the ECB underlines this objective again to drive home the point, if needed.

The independence of the ECB is, of course, retained (Art.108 TFEU), and it will have as its sole objective to maintain price stability, unlike the other central banks.

Declaration 17 underlines again “its commitment (of the IGC) to the Lisbon strategy” and recommends the strengthening of competitiveness. It invites a “restructuring of public revenue and expenditure while respecting budgetary discipline in accordance with the Constitution and the Stability and Growth Pact.” It sets the objective “to gradually achieve a budgetary surplus in good times.” In short, the normal neo-liberal orthodoxy made worse by the objective to achieve a budgetary surplus.

Security and Defence Policy

A common defence for the Union is only foreseen in the NATO framework. The link to NATO is strengthened. The current wording (Art. 17-4 TEU) states that cooperation between member states, in the framework of NATO, would only take place “provided such cooperation does not run counter to or impede that provided for in this Title.” The new wording links a future European defence policy

more closely to NATO: "Commitments and cooperation in this area shall be consistent with commitments under the

North Atlantic Treaty Organisation, which, for those States which are members of it, remains the foundation of their collective defence and the forum for its implementation" (future Article 27-7 TEU).

Protocol 4 drives the point home further, "recalling that the common security and defence policy of the Union respects the obligations under the North Atlantic Treaty" and that "a more assertive Union role in security and defence matters will contribute to the vitality of a renewed Atlantic Alliance."

Militarism is officially encouraged: "Member States shall undertake progressively to improve their military capabilities" (future Art. 27-3 TEU). This must be the only area where the treaty encourages countries to increase their public spending!

Military interventions abroad are encouraged in the name of fighting terrorism: "All these tasks may contribute to the fight against terrorism, including by supporting third countries in combating terrorism in their territories" (future Art. 28 TEU). Such a clause in fact authorizes any military adventure whatsoever.

Charter of Fundamental Rights

The Charter of Fundamental Rights has not been included in the Reform Treaty. Declaration 11 states that it "will be solemnly proclaimed by the European Parliament, the Council and the Commission the day of the signing" of the two amended treaties. The same Declaration will take up its text. Article 6 of the TEU on fundamental rights has been rewritten to refer to the Charter's existence and give it "the same legal value as the treaties." The Charter will thus be "legally binding" (Declaration 31). The only problem is to what extent.

In reality, the social rights included in the Charter are very weak. The right to a work-place and to gainful employment does not exist, the only right that is mentioned is the "right to engage in work." The right to social security is replaced by a simple "entitlement to social security benefits and social services." This text is thus a step backwards in comparison to the Universal Declaration of Human Rights and the French Constitution. The latter states that "everybody has the right to employment" and that "(the state) guarantees everybody the protection of their health and material security." To get these rights fulfilled certainly requires a daily struggle, but at least they exist.

Other areas are even more problematic. The right to abortion and to contraception are not recognized under the Charter. Given this framework, some advocates might use the "right to life" to challenge the rights to abortion and contraception before the Court of Justice.

The implementation of the rights in this Charter is essentially a matter of the "national practices and legislation." This Charter hence fundamentally does not create a set of European social rights that might be able to provide a counterbalance to the right to free competition, which will remain dominant on the Europe-wide level. Just as icing on the cake, these rights can be limited if "necessary."

In addition, to protect against any slip or blunder, its scope is explicitly limited. The text states that it "shall not extend in any way the competences of the Union ... (and) shall not affect the Union's competences as defined in the Treaties," a phrase that recurs - you can never be too careful - in the new wording of Article 6 of the TEU and in Declaration 31. Furthermore, "they (the Charter provisions) shall be judicially cognisable only in the interpretation of (action taken by the institutions

of the Union and the national governments) and in the ruling on their legality,” which greatly reduces their legal impact.

On the other hand, the Charter indicates that it “will be interpreted by the courts of the Union and the Member States with due regard to the explanations prepared under the authority of the Praesidium of the Convention which drafted the Charter and updated under the responsibility of the Praesidium of the European Convention.” These “explanations,” taken up again in Declaration 12, mostly restrict the scope of the Charter rights.

Finally, the 4th paragraph of Article 6 of the TEU on fundamental rights, which states that “the Union shall provide itself with the means necessary to attain its objectives and carry through its policies” is taken out, which confirms that this Charter is not likely to have any impact on European public policies.

Despite all these precautions, this text is still too much for some governments. The United Kingdom has thus gotten an exemption (Protocol 7), and Poland and Ireland are considering doing the same.

Public Services

Article 16 of the Treaty establishing the European Community recognizes the services of general economic interest (SGEI) as a “shared value of the Union” and indicates that the Union and the member states “shall take care that such services operate on the basis of principles and conditions which enable them to fulfil their missions.”

This article is amended. It becomes Article 14 of the TFEU. The new wording explicitly transfers to the Union and its member states the requirement to ensure the economic and financial conditions to allow the SGEI to complete their missions. In addition, a new sentence is added that states that “the European parliament and the Council (...) establish these principles and set these conditions.”

These amendments are positive. They do not, however, cover what is essential. In fact, the implementation of this article is explicitly subject to Articles 86 and 87 of the treaty. These articles have been retained in the TFEU. Article 86 has considerable scope. It is deadly for public services. These are subject to the rules of free competition. They can only depart from these rules if this does not impede the development of trade “in a way as would be contrary to the interests of the Community.” It’s the Commission that judges on possible exemptions. The Commission has thus all the power to open public services to free competition. This article provides the legal basis for the liberalisation of public services. In fact, Article 87 makes any assistance from the state for purposes of the common good almost impossible.

The reference to Articles 86 and 87 takes, in fact, any operational scope to develop public services away from the new Article 14.

Protocol 9 is about services of general interest (SGI). It’s the first time that a text with legal impact equivalent to the treaties deals with SGIs. It is about the interpretative clauses that will be annexed to the TFEU. The first article explains Article 14 about the SGEIs. It recommends “a high standard of quality, security and accessibility, equal treatment and the promotion of universal access and protection of users.” Unfortunately, this general wording, which is already found in other European texts, is unlikely to pose any obstacles to the opening to free competition, which remains the rule for the SGIs.

Apparently more novel, Article 2 also deals with the SGIs: “the provisions of the Treaties shall in no way affect the competences of member states with respect to the provision, the initiation and the

organisation of non-economic services of general interest.” This article thus seems to protect the SGIs from the rules of free competition. The problem, however, is in the definition of “non-economic services,” which is not given in the text.

A ruling from the Court of Justice (C-180-184/98) has decided that “an economic activity is any activity consisting in offering goods and services on a given market.” With this kind of definition, basically anything can be considered “an economic activity” and thus subject to the right to free competition and to the rules of the internal market. And indeed, in a report on services of general interest for the European Council in Laeken at the end of the year 2001, the Commission states that it is “impossible to draft a priori a definitive list of all services of general interest that need to be considered non-economic.” It continues that “the range of services that can be offered on any market is dependent on technological, economic and societal changes.” The distinction between services of general interest and services of economic interest loses its meaning.

In this framework, Article 2 is in danger of remaining without practical implications.

Health/Social Security

The amended Article 18 of the TFEU deals with the right to freedom of movement of all citizens of the Union within the Union. A new paragraph 3 is created. It states that, in this respect, “the Council, acting in accordance with a special legislative procedure, may adopt measures concerning social security or social protection.” The scope of this article is certainly limited and unanimity among the national governments will be required. However, the highest vigilance is indicated since we know the propensity of the Commission to use the slightest legal loophole to call public policies into question.

The amended Article 42 of the TFEU is about migrant workers’ rights to social security. The unanimity procedure is replaced by a more complex procedure that allows any state to temporarily suspend a draft for four months.

Declaration 14 states that “in the event that a draft European law (...) would affect fundamental aspects of the social security system of a Member State, (...) the interests of that Member State will be duly taken into account.” The need for such a declaration says a lot about what might be contemplated!

Article 176 E of the Reform Treaty, which amends article 152 of the Treaty establishing the European Community, reasserts that it is the responsibility of the member states to set their health policies, including in the area of resources. Given the very high disparity in social protection systems since the 2004 enlargement, it would, however, have been useful and necessary for the treaty to set down more precise objectives for public health, a minimum standard for health expenditures in proportion to the GDP of each country, and a long-term prospect for convergence towards the higher end of the range of social protection systems.

Transport

The second paragraph of Article 71 TFEU is to be amended. Its current wording provides a requirement for unanimity among the states to adopt measures within the framework of the common transport policy whose implementation could affect the standard of living, employment, or the operation of transport facilities. The new wording states simply that, in the design of the common transport policy, these factors “shall be taken into account.” A safety factor for public transport services is gone.

Energy

A dedicated title is to be included in the TFEU (Art. 1176 A). It is situated “in the context of the establishment and functioning of the internal market,” meaning of the liberalisation of the energy market. It states that it wants to “ensure security of energy supply in the Union, (...) promote energy efficiency and energy saving and the development of new and renewable forms of energy,” but it also wants to “promote the interconnection of energy networks,” even though disastrous consequences can, and already have, occurred with the multiplication of problems that are created by the liberalisation of the sector. The right to energy is not even mentioned, even though the liberalisation of the sector directly attacks the public provision of energy.

Distribution of Competences between the Union and the Member States

The distribution of competences between the Union and the member states has been laid out in more detail. “Competences not conferred upon the Union in the Treaties remain with the Member States. (...) The Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States” (new Art. 4 and 5 TEU). These principles are further explained in Articles 2 to 6 of the TFEU.

Three kinds of domains are created: those that are the exclusive competence of the Union, those that are a shared competence between the Union and the member states, and those where the “Union has a competence to carry out actions to support, coordinate or supplement the actions of the Member States.” This distribution of competences, which appears clear, is not really all that clear.

In fact, in the case of areas of shared competence, the Reform Treaty indicates that “the member states exercise their competence to the extent that the Union has not exercised its competence.” It is thus not a matter of shared competence with member states but of a pre-eminence of Union activities over those of member states. The list of domains that fall under the “exclusive competence” and the “shared competence” includes an impressive number of aspects of the everyday lives of Union residents, even without considering the areas for which “the Union has a competence to take action to support, coordinate or complement the activities of member states.”

The states retain a veto right on the external activities of the Union and on the common foreign and security policy. Some social and fiscal policies are outside the purview of the Union, but they are, in practice, predetermined by the economic policies which do come under the Union. Hence about 80% of the laws adopted by national parliaments are nothing but adaptations of European law. This makes the building of strong links among movements at the European level absolutely necessary.

Institutional Changes

1) Right to Citizen Initiative

“Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties” (new Article. 8 B TEU).

Besides the fact that the citizens had not expected that the Treaty would include a clause to put it into place, this right to petition remains severely restricted. The petition has to be about the implementation of the Treaties. It is out of the question to petition for an amendment of the Treaties. In addition, it is obviously the Commission that decides whether and when to submit a proposal. In short, a step forward for citizen participation that is so tiny that it looks like a step on the spot.

Nevertheless, the provision can be used as a tool to build strong links among movements at the European level, just like a petition at the national level.

2) Legal Acts of the Union /Role of the Commission

These are the regulations, directives, decisions. They are defined in Article 249 of the TFEU. The definition of a “decision” has been amended. In its current definition, a decision is binding on the one or several actors to whom it is addressed. The new definition gives it a more general scope. One can only wonder about the exact meaning of this amendment.

The role of the Commission is described in a new Article 9 D of the TEU: “Union legislative acts may be adopted only on the basis of a Commission proposal, except where the Treaties provide otherwise.” Which cases are these exceptions? This language refers to two types of legislative acts (new Article 249A TFEU). “The ordinary legislative procedure shall consist in the joint adoption by the European Parliament and the Council of a regulation, directive or decision on a proposal from the Commission. A special legislative procedure shall consist in the adoption of a regulation, directive or decision by the European Parliament with the participation of the Council, or by the latter with the participation of the European Parliament.” At first reading there is a certain obscurity around this notion of a “special legislative procedure,” which shows up quite a number of times in the Reform Treaty. In this case, the role of the Commission is not mentioned. In other respects, the role of the Commission is increased, since a legal act can delegate to the Commission the power to amend “certain non-essential elements” of the given act (new Article 249 B TFEU).

3) The Role of the National Parliaments and of the European Parliament

The national parliaments are mentioned several times (new Article 8 C TEU, Protocol 1 and 2...), with the obvious intention to strengthen their role.

Article 7 of Protocol 2 indicates the procedure for national parliaments to influence the European legislative process. Each national parliament has 2 votes. Two sets of figures apply. In the case of an ordinary legislative procedure, if a majority of the votes of national parliaments are against the draft legislative act, it has to be reviewed. In the other cases, a third of the votes is sufficient (a quarter in the area of security and justice). The no vote has to be based on non-compliance with the principle of subsidiarity.

This article certainly strengthens the role of national parliaments. However, its scope is very limited, because the national parliaments do not decide based on the substance of the draft legislation but based on its legal compliance with the principle of subsidiarity.

The role of the European Parliament is enhanced by a significant increase in the areas of co-decision with the Council.

Finally, a national parliament will be able to block a decision by the Council to change the way the Council can adopt a given legislative act from a unanimity rule prescribed in the Treaties to a qualified majority decision or from a special legislative procedure to an ordinary legislative procedure (new Article 33-3 TEU).

4) Right of Individual Recourse before the Court of Justice

It is restricted. In fact, the 4th paragraph of Article 230 TFEU is amended. The current wording gives individual recourse for decisions of direct and individual concern to the natural or legal person instituting proceedings, even if the decisions were in “the form of a regulation or a decision addressed to another person.” This latter option has been taken out.

5) Other Amendments

The Union has legal personality, which allows it to sign international agreements in the name of the member states. A qualified majority in the Council changes to 50% of the states and 55% of the population on November 1, 2014, with complex transitory measures that can last until 2017. The number of Commission members will be reduced, also with a transition procedure lasting until October 31, 2014. A position of European Council President is created, with a mandate of 2.5 years once renewable, as well as a High Representative of the Union (the term Minister was rejected) for Foreign Affairs.

Fight this treaty, demand a referendum

The Reform Treaty transfers the substance of the TECE to the current treaties. As Valéry Giscard d'Estaing said bluntly, "the European governments have agreed on some cosmetic changes to the Constitution to make it easier to swallow." The term "constitution" is certainly not used any more and the text will thus have less symbolic impact. It will just be yet another treaty.

The provision that allows the United Kingdom to be exempt from applying the Charter of Fundamental Rights opens an interesting question. It can be interpreted in two ways. Either it means that, at the European level, social rights, even reduced to the smallest common denominator, are not as binding as the rules of the internal market. The social provisions would thus be optional, while free competition is compulsory. That would be making social dumping official. The other possible interpretation is that each country can now choose what it likes from among the European decisions. A Europe à la carte would be established, with its disadvantages – an increase in competition between states – and its advantages – the ability to refuse to comply with decisions. For example, the French government, which claims it wants to defend public services, could refuse to apply the Postal Services Directive!

In addition, the fundamental reasons for rejecting the TECE also apply to this treaty. Coloured from one end to the other by neo-liberalism, from the principles it promotes to the policies it advocates, this treaty is an extension of those of Maastricht and Amsterdam. The European Union will remain a privileged space for the promotion of neo-liberal policies. The few positive points do not fundamentally challenge the current functioning of the Union, which is marked by a profound democratic deficit with a confusion of powers whereby the Executive of the Union, the Commission, has legislative and judiciary powers and the Council, a legislative organ, is the assembly of national executives.

Beyond these basic reasons there is also the method that was used, which confirms the desire of the governments and the Commission to exclude the people and the citizens from the process of building the Union. The speed of the process will likely limit any chance to influence its content, given the complexity of the text. A first point can, however, cause an extensive citizen mobilisation: to take any reference to the religious inheritance of Europe out of the treaty.

Beyond that, we have to demand the holding of a referendum. The TECE was rejected by a referendum. The "Reform Treaty," which takes up the substance of the former, should directly be subjected to a citizen vote through a referendum.

P.S.

* Translation : Silke Reichrath et Jack Montanuy, Coorditrad.