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978-1-107-01376-6 - Resolving Controversy in the European Union: Legislative Decision-Making Before and After Enlargement

Robert Thomson

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1 Introducing the political system of the European Union

1.1 Diversity and controversy in the European Union

Decision makers in the European Union (EU) constantly disagree with one another, yet they usually find ways of resolving their disagreements by taking decisions. These decisions have significant and sometimes unwelcome consequences for citizens. Member states vehemently disagreed on important institutional reforms set out in the Lisbon Treaty that came into force in December 2009. EU member states are diverse in terms of their population sizes. As a result, they have different views on the appropriate weighting of large and small states in the voting system of the Council of Ministers where countries are represented. This controversial issue was raised in the Constitutional Convention that was charged with designing a new set of rules for governing the EU. Despite the long discussions held in the Constitutional Convention between February 2002 and July 2003, talks among member states' governments collapsed on this issue in December 2003. Representatives of Poland and Spain were among those who wanted to keep the existing rules that gave substantial voting weights to small and medium-sized member states. The French and German governments were among those in favour of reform that would give more voting power to large states. The disagreement was resolved with an amended version of the Franco-German proposal that made some concessions to meet the concerns of smaller countries. This deal was set out in the constitution signed by EU leaders in Rome in October 2004.¹

But this controversy re-emerged after French and Dutch voters rejected the constitution in national referendums in May and June 2005. A period of reflection followed during the next 18 months. Then

¹ Details of the voting procedures are described later in this chapter and in Chapter 7. Duff (2005) and Norman (2003) describe the Constitutional Convention and its outcomes. A comparative analysis of states' positions on the main controversies during the Constitutional Convention is given by König and Hug (2006). See also Finn (2008) and Prins (2010) for studies that examine the subsequent Lisbon Treaty.

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the German government called for a resumption of the institutional reform process. Under the stewardship of the German government, the constitution was repackaged as a treaty that contained most of the same reforms, but dispensed with the symbols of a constitution such as the flag and anthem. The advantage of the treaty form from the perspective of EU leaders was that it did not legally require a referendum in most member states. During this repackaging of the constitution as a treaty, the Polish government argued that the reform of member states' voting rights should be revisited. Tensions rose as the Polish prime minister, Jaroslaw Kaczynski, accused Germany of trying to dominate its smaller neighbours, and recalled that Germany had done so violently in Europe's troubled past. The Czech government was sympathetic to the Polish argument, but most other member states were reluctant to revisit the issue. The controversy was resolved by revising the proposed voting system again. EU leaders postponed the new system of voting until 2014, introduced a new transition period until 2017 and introduced a new power of delay for minorities of states that were outvoted on issues of national interest. After a marathon round of talks in which this and other controversies were resolved, the late Polish president, Lech Kaczynski, said 'the one who wins in these kinds of situations is the one with the strongest nerves'. The treaty was then signed by EU leaders in Lisbon in December 2007, and became known as the Lisbon Treaty.²

EU member states are diverse in terms of economic wealth. This type of diversity often leads to disagreements between net contributors to, and recipients from, the EU budget. Negotiations on the financial perspectives for 2007–13, which set the EU's spending plans for that period, stalled in June 2005. The group of six net contributors – Austria, France, Germany, the Netherlands, Sweden and the UK – argued against an increase in the EU's budget beyond 1 per cent of the EU's gross national income, while other actors pressed for more spending. EU leaders also disagreed on the relative priority that should be given to different policy areas. With low levels of economic growth, 'the question of how a slowly increasing Brussels pie is cut into slices becomes all the more important' (Schild 2008: 535). Both the Commission and European Parliament (EP) called for more spending in new areas including research and development. They argued that

² President Kaczynski's statement was cited in 'EU leaders scrape treaty deal at 11th hour', *EU Observer*, 23 June 2007. The Lisbon Treaty was due to come into force at the start of 2009, but was delayed by the Irish electorate's rejection of it in June 2008, in the only referendum held on the treaty. The Irish government received guarantees regarding sensitive national issues, and the Irish electorate approved the treaty in a second referendum in October 2009.

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these new spending priorities would lead to more growth in the long term than the EU's traditional spending priorities. These controversies were resolved in the Interinstitutional Agreement of May 2006. Overall, Schild describes the agreement as one of incremental change compared to previous financial perspectives. It involved a small increase in the budget, close to the net contributors' preference, and only modest increases in priorities for new policy areas.

EU member states also differ from one another in styles of national regulation. This type of diversity is often the source of controversies regarding proposals to reform markets. For example, at the end of 2005 the European Commission introduced a legislative proposal to liberalize the market for payment services such as credit and debit cards. The responsible commissioner, Commissioner for Internal Market Charlie McCreevy, argued that this would give consumers more choice and savings by allowing businesses other than banks to provide payment services. A fierce debate ensued that was described as 'tribal' by one insider.³ On one side of the debate, a group of member states informally led by the UK supported the Commission's liberal approach. The proposal was broadly in line with their existing national regulations. On the other side, a group of member states informally led by France argued for a tougher regulatory approach in line with their national regulations, one that would restrict entry to the payment services market. This, they argued, would protect consumers and the wider economy from financial risks. Others argued that the regulatory approach would only protect the banks' interests by limiting competition. This controversy, discussed in more detail later in this book (Chapter 9), was resolved by amending the legislative proposal in response to the French concerns. Nonetheless, the legislation has the effect of liberalizing payment services in line with the Commission's proposal.

Despite the ubiquity of controversy and difficulty of finding ways to resolve it, EU leaders have built the furthest-reaching form of international cooperation that presently exists in the world. The once-divided and still diverse countries of Europe are now united by their decisions to adhere to thousands of common rules. EU laws now affect a broad range of policies throughout Europe and beyond. EU laws govern standards for products and services, including everything from food to telecommunications and banking. EU laws guarantee workers' rights, such as maternity leave, safety conditions and freedom from discrimination. EU laws also provide significant subsidies, not only for agriculture as was once the case, but also for environmental protection

³ Interview, Brussels, July 2007.

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and research. Each one of these rules may seem relatively small if considered alone. But the sheer weight of their numbers means that they give substance to the present state of European integration. Jean-Claude Juncker, prime minister of Luxembourg and a prominent figure in the EU, highlighted the importance of apparently small decisions when he said: ‘We decide on something, leave it lying around and wait and see what happens ... If no one kicks up a fuss, because most people don’t understand what has been decided, we continue step by step until there is no turning back’ (*Economist* 2002).

The EU’s ability to resolve controversy is being tested by the enlargements of 2004 and 2007. These enlargements added to the existing diversity of the EU and increased its membership from fifteen to twenty-seven member states. The new members differ markedly from the old in terms of their recent historical experience and levels of economic development. Practitioners and academics expressed concern about the impact of enlargement on the EU’s capacity to act. This may have made decision-making more difficult, even raising the danger of paralysis in response to disagreement (Hosli 1999; König and Bräuninger 2004: 421). Since most new members are relatively poor, they put extra demands on EU spending programmes, and this may have widened the gulf between net contributors and net recipients from the EU budget (Zimmer *et al.* 2005). In addition to warnings from EU specialists, research on collective decision-making in other contexts suggests that increasing the number of decision makers can fundamentally alter the way in which groups take decisions. Social psychologists have long known that small and large groups typically have different ways of taking decisions (e.g., Simmel 1902). Only some groups manage to preserve cooperative ways of taking decisions when their membership is increased. The research presented in this book examines whether the EU is one of these groups.

The way in which decisions are taken in the EU is also the subject of controversy. Many experts on EU politics have criticized its decision-making process for being undemocratic (e.g., Weiler *et al.* 1995; Scharpf 1999; Hix 2008a; Habermas 2009: Chapter 6). EU leaders’ decision to press ahead with the Lisbon Treaty despite the fact that its contents were rejected in three national referendums seems to add credence to this criticism. Although the EU’s democratic deficit is contested, there are some recurring charges: the EU is dominated by a large unelected bureaucracy; the elected EP has too little effective say in the process; and there is a lack of real political competition for the levers of power. As a result, it is argued, citizens are uninterested in EU politics and EU decisions do not reflect their interests. By examining the way in

which the EU has resolved a wide range of controversies in recent years, this book presents evidence that is highly relevant to some of the key issues in this debate, as well as to proposals for improving how the EU works.

**1.2 Analysing contemporary EU decision-making
 as a political system**

In this book I present the results of more than 10 years of research that has focused on how the EU decides amid controversy. This research examines how the contemporary system of legislative decision-making works. The following chapters address a range of descriptive and explanatory questions regarding the inputs, processes and outputs of the political system. Inputs are competing policy demands made by different political actors. Processes are the mechanisms through which these demands are turned into outputs. And outputs are the authoritative decisions produced by decision makers in the system. Easton (1953; 1957) was one of the first political scientists to set out a framework for analysing political systems in terms of inputs, processes and outputs. These concepts are useful heuristics because they point toward important research questions for political scientists to address.

Since inputs are competing policy demands, we can observe inputs when the EU decides on controversial issues. The examples given earlier show that EU decision makers often disagree with one another. One of the first steps in analysing the political system is to describe a range of controversies systematically. A systematic analysis should also describe and explain the policy demands made by different actors. To what extent are there strong patterns in policy demands made by different actors? Do certain member states, for instance, tend to agree more with each other, and if so why? What explains variation in the policy demands made by the main actors in the EU: the European Commission, the EP and the member states? Answers to these questions are important because political systems in which there are cross-cutting cleavages among actors are fundamentally different from systems in which there are reinforcing cleavages.

‘Process’ refers to the transformation of demands into outputs, and since policy demands are competing, it is common for some demands to be satisfied more than others in any single decision. Therefore, this concept directs our attention toward the mechanisms through which some demands are selected and other demands are rejected. These mechanisms are partly defined by the formal rules of decision-making. However, if we consider a political system as a system of action, we

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should not be satisfied with descriptions of the legal rules of decision-making and analyses of their consequences; we should also be concerned with what actually happens (Almond 1956: 393). The formal rules do not necessarily reflect the actual distribution of power in a political system accurately. In the context of the EU, the concept of process prompts us to question the relative importance of the EU's formal decision-making procedures and informal bargaining. And also to ask: Which actors are most powerful in the EU's decision-making process?

Relevant questions regarding the outputs or authoritative decisions of the EU's legislative system concern the contents of EU laws. Explaining variation in outputs requires that we refer to the inputs and processes of the system. Why do some laws reflect some actors' demands – for instance, for more integration, more regulation or higher subsidies – to a greater extent than other laws? The answer to this question depends partly on the distribution of power among the actors. Another important aspect of the contents of EU laws is the amount of discretion they delegate to the actors charged with implementing them. These implementing actors are the European Commission and member states' national authorities. Why do some laws give a great deal of discretion either to the Commission or to member states' national authorities while other laws tightly prescribe implementers' actions? Variation in discretion may depend partly on the differences among actors' policy demands.

Although these concepts are useful for structuring the analysis by identifying relevant questions, my research does not apply Easton's systems theory in its entirety. Like many other political scientists today, I do not subscribe to the functionalist logic of systems theory. For Easton, political systems are comparable to biological systems in their adaptation to their environment. While there are undoubtedly insights to be gained from combining evolutionary biology and political science, these are not my concern here. Rather, the analysis examines the interactions among purposeful political actors operating within institutional constraints to produce decision outcomes. These are the main building blocks of rational choice institutional analysis.

In contrast to my focus on how the contemporary system of decision-making works, a considerable amount of existing research on EU politics focuses on how the system has developed over time. Such analyses can provide insights into how the system works at any given point in time, but these foci are distinct and oftentimes disjointed. Many theories of European integration have little of direct relevance to say regarding the way in which the contemporary system works in terms of resolving specific controversies; indeed, they do not set out to do so. One of the earliest theories of European integration, neofunctionalism

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(Haas 1958; Lindberg 1963; Schmitter 1969), gives an account in which cooperation in one area creates demands for cooperation in other related areas. Integration, therefore, occurs through a process of ‘spill-over’ from one area to another. Neofunctionalism attributes important roles to non-state actors, including the supranational Commission, in realizing demands for integration. This theory is still a reference point for contemporary integration theorists, particularly for those who stress the impact of supranational institutions on the integration process (e.g., Sandholtz and Stone Sweet 1998). However, neofunctionalism has largely been discarded, even by its original proponents (Haas 1975), mainly because it failed to account for the stalling of the European integration process in the 1970s. Regarding the analysis of the current decision-making system, neofunctionalism emphasizes the distinct role and power of the Commission. However, it was not designed to offer concepts for analysing how actors resolve specific controversies.

Various strands of intergovernmentalism are the main alternatives to neofunctionalism in explaining the course of European integration. While intergovernmental theory has some implications for how the current system of decision-making works to resolve specific controversies, it is also of limited relevance. Hoffmann (1966) interpreted European integration as a process driven by member states’ interests in cooperation, rather than by supranational or non-state actors’ interests. Milward’s (1992) historical research on the early stages of European integration confirmed the paramount importance of hard bargaining among national governments that were motivated by the pursuit of self-interest, not the supranational actors and ideals emphasized by neofunctionalists. Moravcsik’s (1998) liberal intergovernmental theory of integration builds on this intergovernmental tradition. Liberal intergovernmentalism links a theory of national preference formation with a theory of interstate bargaining. The intergovernmental perspective has implications for some aspects of contemporary decision-making that will be explored in the following chapters. For instance, it leads us to expect that national interests pervade what are supposedly supranational institutions, that member states’ policy demands are motivated by domestic interests rather than lofty European ideals and that member states dominate the decision-making process. However, like other integration theorists, intergovernmental theorists are generally more concerned with explaining the milestones that mark changes to the system than with explaining how controversies are resolved within the EU system.

Rational choice institutionalism gives more relevant theoretical guidance for the analysis of how specific controversies are resolved. This approach offers a framework for examining how purposeful actors

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operate within institutional constraints to produce decision outcomes. The relevant actors in the EU's legislative system include the European Commission, the EP, the Council of Ministers and actors within those institutions. The relevant actors are assumed to act purposefully, in the sense that they make policy demands that are motivated by their interests, and they try to achieve their policy demands in the contents of legislative outputs. Actors are constrained in their ability to realize their demands by formal and informal 'institutions'. In the broadest sense, institutions are 'humanly devised constraints that structure political, economic and social interaction' (North 1991: 97). They include formal institutions, such as voting procedures, adherence to which can be compelled by third parties such as courts. They also consist of informal institutions, such as informal norms of behaviour, adherence to which depends only on the actors themselves. After summarizing the main actors and decision-making procedures in the next section, I will outline how my study is informed by this approach.

1.3 Legislative decision-making in the EU: actors and decision-making procedures

This book examines legislative decision-making in the period 1996–2009. As described above, the current twenty-seven members are highly diverse, which often means that their interests diverge. The aggregate measures of economic wealth and freedom depicted in Figure 1.1 illustrate this diversity. The 2007 data indicate that the three poorest members are Bulgaria, Romania and Poland, while the three richest are Luxembourg, Ireland and the Netherlands. Luxembourg, with its small population and concentrated financial sector, is clearly an outlier in terms of per capita gross domestic product (GDP). Differences in economic wealth often mean that member states have different interests when decisions are taken regarding EU subsidies. However, some relatively rich member states do quite well from certain subsidy programmes because they fulfil other criteria, such as disparities in regional economic development. The impact of different levels of wealth will be explored further later in this book (Chapters 3 and 6 in particular).

EU member states are also diverse in terms of the way in which they organize their national economies. Despite sharing a common market, national governments have considerable room for manoeuvre to allow or constrain economic freedom. Figure 1.1 depicts an often-cited indicator of economic freedom calculated by the Fraser Institute, an economically liberal think tank. It identifies Ireland, the

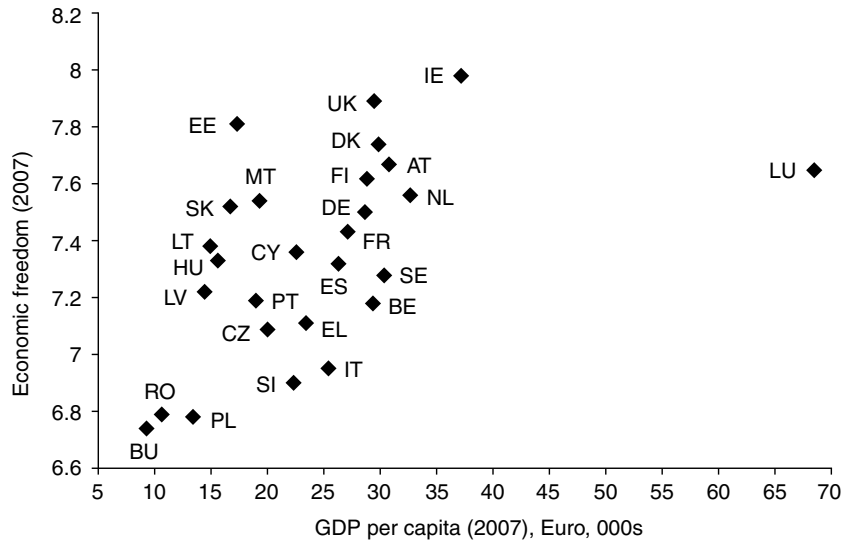


Figure 1.1 EU member states' wealth and domestic economic freedom
Note: GDP per capita at market prices, purchasing power standard per inhabitant in thousands of Euros (Eurostat). Economic freedom index is the 2007 summary index from the Fraser Institute (Gwartney and Lawson *et al.* 2009). AT: Austria; BE: Belgium; BU: Bulgaria; CY: Cyprus; CZ: Czech Republic; DK: Denmark; EE: Estonia; FI: Finland; FR: France; DE: Germany; EL: Greece; HU: Hungary; IE: Ireland; IT: Italy; LV: Latvia; LT: Lithuania; LU: Luxembourg; MT: Malta; NL: Netherlands; PL: Poland; PT: Portugal; RO: Romania; SK: Slovakia; SI: Slovenia; ES: Spain; SE: Sweden; UK: United Kingdom.

UK and Estonia as the members with most economic freedom, and Bulgaria, Poland and Romania as the members with least economic freedom. This aggregate indicator includes a range of indicators of economic freedom, including the size of government expenditures, levels of taxation and strength of regulation. If we consider economic freedom defined more narrowly in terms of the regulation of credit, labour and business, then Austria, Denmark and the UK are the most free, while Greece, Germany and Cyprus are the least free (Sector 5 freedom indicator in Gwartney and Lawson *et al.* 2009). Such differences in national economic structures affect controversies at the EU level. When deciding on European rules for governing the single market, member states' national policy positions are influenced by their existing national arrangements (see Chapter 6).

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Differences among member states' population sizes are reflected in the system of qualified majority voting (QMV; Table 1.1). The numbers of votes held by the member states were changed after the 2004 and 2007 enlargements, as were the thresholds for adopting laws under QMV. In the EU-15, the numbers of votes held by member states ranged from two to ten. For a proposal to be passed by QMV in the EU-15, it had to be supported by member states holding at least sixty-two of the eighty-seven votes. When the EU enlarged to twenty-five and then twenty-seven members, a new system of voting was brought in by the Nice Treaty, in which the numbers of votes ranges from three to twenty-nine. For a proposal to pass under the Nice system of QMV in the EU-27, it must have the support of member states holding at least 255 of the 345 votes. In addition, these member states must be at least fourteen in number and have at least 62 per cent of the EU's total population. This triple-majority system will remain in place until 2014, when the new Lisbon Treaty rules will come into effect. In the first 3 years, 2014–17, any member state will be able to request that a decision be taken according to the present triple-majority system. I will examine the possible effect of the new Lisbon rules in Chapter 7.

Figure 1.2 summarizes the two main procedures according to which legislation is passed in the EU: the consultation and co-decision procedures. The co-decision procedure, which was slightly changed and renamed the ordinary legislative procedure by the Lisbon Treaty, is now the most common procedure.⁴ The most important feature of the co-decision procedure is that it gives equal decision-making power to the Council and the EP. For a bill to pass, it must be approved by both the Council and the EP. The European Commission introduces the proposal, often in response from requests from member states or the EP (Rasmussen 2007). According to the co-decision procedure, if there is still disagreement between the Council and EP after two readings, a conciliation committee is formed. The conciliation committee, which consists of representatives of the Council and EP, then attempts to formulate a draft that will be approved by both the Council and EP. Since the Commission need not approve of the text adopted by the Council and EP after the conciliation committee, some observers view the co-decision procedure as one in which only the Council and EP matter. However, in practice the Commission is involved in the discussions

⁴ According to the ordinary legislative procedure defined in the Lisbon Treaty, the EP can reject the bill in the second reading with a simple majority of members present. Under the co-decision procedure, an absolute majority of all members was required. In practice, this is a minor change.