

Does the EU need a new Treaty?

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The EU's next step

This essay argues that the answer to the title's question is a resounding 'yes'. We make the case based on two strands of evidence. The first is based on data - the slow down in EU decision making since the May 2004 enlargement. The second is based on 'revealed preference' reasoning concerning the men and women who are most in touch with the realities of EU decision-making - the leaders of EU member states.

The facts: flow of EU law making

A recent publication by a team of French scholars documents the sharp drop in the flow of EU legislation pre- and post-enlargement.¹ As Figure 1 shows, the May 2004 enlargement was accompanied by a sudden slump in the number of EU laws adopted (see Box 1 for examples of such laws). What is plain from the figure is that the EU15 made a maximum effort to pass a host of laws before the newcomers got their votes in May 2004. This burst of activity was followed by a marked lull that continued up to the end of 2004. The figures also show how law-making is usually grouped around the semi-annual summit meetings of EU leaders in June and December.

¹ R. Dehousse, F. Deloche-Gaudex and Dumamel, 2007, 'Elagissement: Comment l'Europe s'adapte', Science Po, Paris

The 2004 enlargement occurred in tandem with two other events that could be expected to dampen the flow of new laws - the election of a new European Parliament (EP) in June 2004 and the installment of a new European Commission in 2005. The reduction in the flow of legislation adopted by the European Council in 2005, however, was much larger than the drop witnessed in the year following the previous European Parliamentary elections, namely 2000, as the left panel of Figure 2 shows. The panel also shows the large reduction in laws adopted in the year after enlargement, 2005.

While the flow of legislation was reduced, the laws that were passed went through more quickly, as the right panel of Figure 2 shows. This is perfectly in line with the notion that enlargement made EU decision-making more difficult. Knowing that decision-making would be difficult, the initiators of new EU laws (mainly the European Commission) chose to introduce only the less controversial measures, which passed through the elaborate process more smoothly precisely because they were relatively uncontroversial. It is worth noting, however, that even these pieces of legislation took about a year each to work their way through the EU's decision-making machinery. (The preparation phase, i.e. the pre-introduction phase, can easily take another year or more.)

Figure 1 Adoption of EU laws, January 03 – December 05

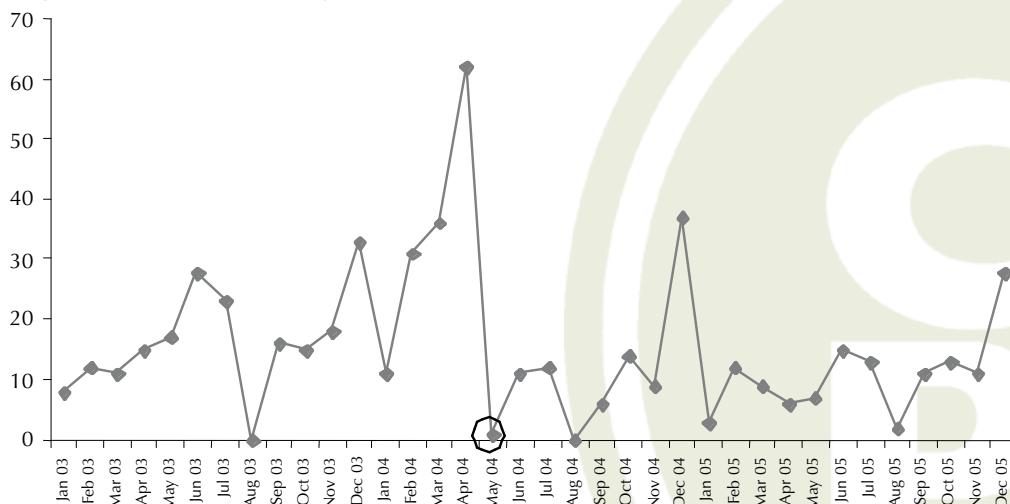
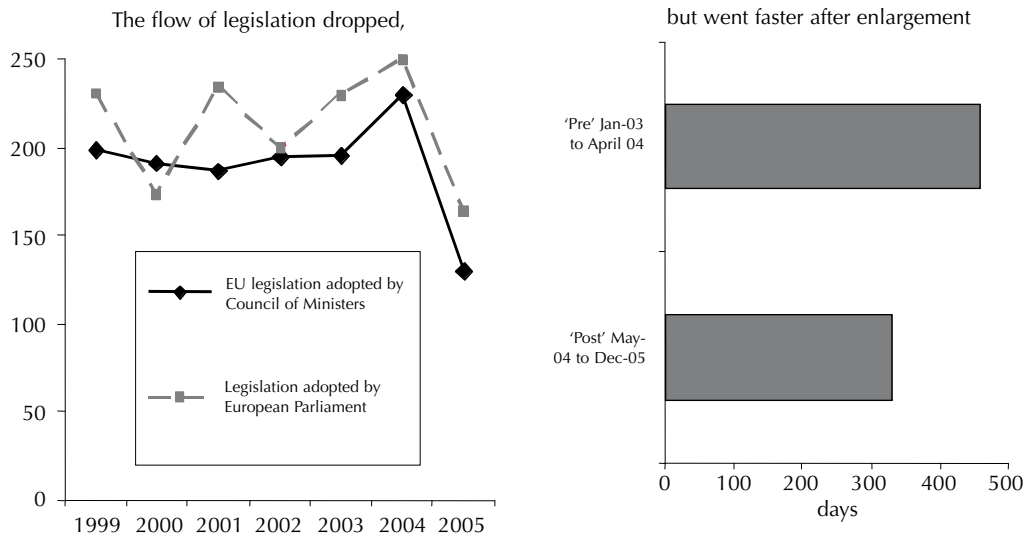


Figure 2 Flow of EU legislation (1999–2005) and average speed (pre- and post-enlargement)



Note: Data from Denhouse, Deloche-Gaudez and Duhamel (2006).

Very recent figures in Hagemann and De Clerck-Sachsse (2007) show that the flow of legislation in 2006 recovered to something close to its pre-enlargement level.² However this aggregate 2006 figure hides the fact that a significantly larger share of the legislation concerns areas where decision-making in the Council of Ministers is by majority voting rather than unanimity. Since the types of laws that are subject to majority voting – Single Market measures and the like – tend to be less controversial, this shift heightens the impression mentioned above that decision-making in the enlarged EU has had particular problems addressing controversial issues.

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Hagemann and De Clerck-Sachsse (2007) augment their quantitative evidence with information from interviews with EU practitioners on the inside of the decision-making process. The authors report that: ‘All member states have had to become accustomed to a new logic of negotiations as the working procedures have become more formalised and encompass a larger and more heterogeneous set of interests. Reaching a consensus has become more cumbersome since the enlargement ...’. As a result, ‘the Presidency is seen to have a much more important role now in preparing and coor-

inating the negotiations, given the increased number of parties.’

Revealed preference evidence

Counting the number of laws passed is a poor way to evaluate the impact of enlargement on the EU’s decision-making capacity. The basic problem is that there is no natural metric-stick for law-making. One of the laws in the Box 1 data was the ‘Services Directive’ that heightened cross-border competition in the services sector and thus affected billions of euros of business and tens of millions of workers. Another one was ‘Directive 2005/84/EC of the European Parliament and of the Council of 14 December 2005 amending for the 22nd time Council Directive 76/769/EEC on the approximation of the laws, regulations and administrative provisions of the Member States relating to restrictions on the marketing and use of certain dangerous substances and preparations (phthalates in toys and childcare articles)’. Each counts as one law in the figures but they are obviously quite different.

The un-quantifiability of decision-making output, does not mean that it cannot be gauged. There are a few hundred, maybe a few thousand, people intimately involved in EU decision-making and we can be quite sure that they know whether enlargement has hampered the process. The trouble, however, is that this is ‘private knowledge’, i.e. not something that outsiders can objectively evaluate. In such instances, merely asking the insiders their opinion does not usually produce correct results, since the insiders typically have an interest in strategically manipulating their unverifiable statements.

Economists frequently get around such private information situations by relying on what is known as ‘revealed preference’ reasoning. If you ask a five year-old whether he prefers an ice cream or a toy, you face a private information situation; it is typically impossible to get a straight answer since he wants both. However if you give the child enough money to buy only one, his choice in this difficult situation reveals his preference.

² S. Hagemann & Julia De Clerck-Sachsse, “Old rules, new game: Decision making in the council of ministers after the 2004 enlargement,” CEPS Special Report, March 2007.

This proves an excellent way of obtaining private information in a reliable manner; we shall apply it to the question of Europe's need for a new Treaty.

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Almost all of the hundreds of men and women who really know whether enlargement requires a reform of EU decision-making procedures report to Europe's political leaders – the Council of Europe. We can therefore presume that the EU leaders know the true state of affairs. As usual, one cannot trust 'cheap talk' from these leaders since they typically have an interest in strategically manipulating unverifiable statements. But their choices in difficult situations reveal their preferences. In this part of the essay, we demonstrate that EU leaders have repeatedly revealed that they unanimously believe that enlargement requires a reform of EU decision-making procedures.

The story starts in the mid-1990s.

Enlargement requires institutional reform: Take 1

In June 1993, EU12 leaders said that the Central and Eastern European nations would eventually become EU members. Everyone knew that EU institutions had to adapt; procedures designed for six were groaning under the weight of 12 (soon to be 15). It was plain to all that adding 12 or more members would bring down the roof. In December 1993, EU leaders added institutional reform to the list of items to be considered in the 1996 Inter-Governmental Conference (IGC, the EU body that prepares new treaties). Thus in the mid-1990s, EU leaders had unanimously agreed that (i) Council of Ministers' voting rules and the composition of the Commission were problems that had to be solved if the enlarged EU was to continue to operate with 'efficiency, coherence and legitimacy,' (ii) the problems stemmed from the fact that enlargement would swell the numbers of members, and (iii) it would be wiser to agree the reforms before the Eastern enlargement talks started so the new members would know what they were joining.

The IGC96 negotiations on institutional reforms proved difficult. The treaty that was produced, the Amsterdam Treaty, failed to resolve institutional reform issues. From the revealed preference perspective, however, the difficulty is useful. Hard-fought negotiations like the IGC96 act as a sort of 'natural selection' on agenda items. Very soon all participants realise which issues are urgent and obvious and which issues are 'filler' – things that address the concern du jour, or help buy the political support of wavering governments. Hard bargaining and thinking between 1993 and 1997 whittled down

the list of 'must do' institutional reforms to just two: Council of Ministers voting rules (vote allocation and areas subject to majority voting), and Commission composition. These came to be known as the 'Amsterdam Leftovers.' Using revealed preference reasoning, we can tell that EU leaders truthfully believed that enlargement meant that institutional reform was imperative.

Enlargement requires institutional reform: Take 2

In reaction to the Amsterdam Treaty's failure to address enlargement-linked reform, EU leaders committed themselves to a new IGC in the year 2000. The prime goal of IGC2000 was to agree reforms that would maintain the Union's democratic legitimacy and its ability to act in the face of enlargement. The EU leaders explicitly focused the IGC on the Amsterdam Leftovers, i.e. weighting of votes in the Council (and extension of the use of majority voting in the Council to areas currently subject to unanimity), and the size and composition of the Commission.³

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IGC2000 stretched over most of the year while national experts laid out the basic options for institutional reform. Two main options for Council voting emerged. The first retained the weighted voting scheme (called Qualified Majority Voting, or QMV) that had been in operation since the Treaty of Rome, but to rearrange the allocation of Council votes in a way that would allow the Union to act even after enlargement. This option would hurt small members since the weighted voting rules gave small members more votes than population proportionality would suggest.⁴ Because Eastern enlargement would bring in many small members, any viable re-weighting would have to reduce the power of small countries. The second option was a shift to the 'dual majority' system, i.e. one where a majority would have to consist of nations that represented at least X% of the EU population and at least Y% of the Member States – a system akin to the bicameral democratic procedures in many EU nations where X and Y are usually 50%.

3 At the June 1999 Feira summit, EU15 leaders added a fourth agenda item, closer cooperation (i.e., Enhanced Cooperation).

4 For a pre-Nice summit analysis of the power and efficiency implications of the various IGC 2000 voting proposals, see Baldwin, Berglof, Giavazzi and Widgren (2000). For an early and less sophisticated analysis of the impact of necessary reforms on the voting weight of small nations, see Baldwin (1994).

EU leaders meet in December 2000 to wrap up the year-long talks and sign a new treaty. France had the EU Presidency so the Summit was held in France (Nice) under the chairmanship of French President Jacques Chirac. Using the prerogative of his chairmanship, Chirac tabled a proposal that goes a long way to explaining the Nice Treaty's failure to adequately reform EU decision-making rules. Rather than adopting one of the carefully thought-out and well-prepared 'vote re-weighting,' or 'dual majority' options discussed in the IGC, he invented a brand new, highly complex proposal - a proposal that was basically a shotgun marriage of re-weighting and dual majority. Since the meeting had to reach political agreement on EU institutional reform as a pre-condition for EU enlargement there was no time to study the implications of Chirac's scheme.

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After a bargaining session that dragged on until the early hours of the morning, the European Council announced political agreement on a new Treaty. In the end, the small nations sacrificed power to allow the enlargement to proceed. In exchange, the Nice summit Conclusions had to declare the Nice Treaty a success and state that the enlargement could proceed. The Nice European Council Conclusions states: 'This new treaty strengthens the legitimacy, effectiveness and public acceptability of the institutions and enables the Union's firm commitment to the enlargement process to be reaffirmed.' Soon after, Chirac promised the European Parliament that the Nice reforms would be enough to allow the EU to function effectively and legitimately even after enlarging the club from 15 to 27. As it turns out, these assertions were hollow.

**Enlargement requires institutional reform:
Take 3**

It took a while for analysts and governments to recognise that the Nice Treaty voting rules failed to address the key enlargement-linked institutional problems.⁵ Even when the recognition became widespread, EU leaders could not explicitly admit their failure because the small members were selling the Nice Treaty to their national audiences as a painful but necessary reform - the price of Eastern enlargement.

Since the Nice reforms were not in fact sufficient and decision-making reforms were still needed, EU leaders adopted a new tactic. They set up a 'convention' to consider a long list of questions. This change in tac-

tics threw up a smokescreen that made it difficult for observers to accuse EU leaders of having bungled the Nice Treaty reforms. In retrospect, however, this is exactly what the EU leaders admitted in 2001 with their famous Laeken Declaration. This declaration asked for the decision-making Nice reforms to be reformed - even before the Nice reforms had been tried. (The Nice Treaty institutional changes took effect only after enlargement and so had not been tested when the Laeken Declaration was written in 2001.)

The Laeken Declaration contains a long list of questions that the Convention was supposed to consider. Hidden among the 56 questions is the implicit admission that the Nice reforms were not sufficient to keep the EU running smoothly and legitimately after enlargement. One is: 'how can we improve the efficiency of decision-making and the workings of the institutions in a Union of some thirty Member States?' That, of course, was supposed to be the job of Nice Treaty; EU leaders had unanimously asserted that the Nice Treaty reforms were sufficient. Yet, EU leaders asked the Convention to consider reforming the institutional reforms that had been agreed just the year before.

Making such a volte face is not easy for politicians. They faced a very difficult choice of either pretending the Nice reforms would work or trying to fix them before enlargement. From the revealed preference perspective, this difficulty is useful. It shows that the men and women in Europe who were the most capable of judging the matter actually believed that the Nice Treaty was a failure. Unfortunately, these Nice reforms are the rules that are now in force. They will remain in force until a new treaty is ratified. But that is getting ahead of the historical narrative. The EU had one more failure to go.

...EU leaders adopted a new tactic. They set up a 'convention' to consider a long list of questions. This change in tactics confused the issues. It made it difficult for observers to accuse EU leaders of having bungled the Nice Treaty reforms...

The Convention was chaired by Former French President Giscard d'Estaing. One point where the chairman's prerogative was crucial was in the list of the working groups that were set up. On the issue that would be central to the entire grand bargain, the issue that had been central in IGC96 and IGC2000 - the reform of Council of Ministers voting rules - Giscard choose not to set up a working group. Instead, he consulted a narrow group of advisors and pulled a Chirac-like move. He produced a proposal at the last moment and included it in the near-final draft (as Chairman, he controlled the text). His solution was a dual-majority scheme requiring 'yes' votes from 50% of member states that represented at least 60% of the population.

Giscard's draft formed the basis for a new IGC in

⁵ For an early analysis, see Baldwin, Berglof, Giavazzi and Widgren, 'Nice Try: should the Treaty of Nice be Ratified?' *Monitoring European Integration* 11, 2001, CEPR, London.

2003. Differences that had been papered over in the Convention re-emerged. In particular, Council of Ministers voting and Commission composition reforms became highly contentious – just as they had been in the IGCs in 1996 and 2000.

As history would have it, the final draft produced by the Italian Presidency was rejected by the European Council in December 2003. Although many members had problems with many parts of the draft, the final hold-up was the voting rules which greatly reduced the voting power of Spain and Poland (compared to the Nice Treaty rules) and greatly increased the voting power of Germany.⁶

...The final compromise in the Constitutional Treaty retained the Nice Treaty rules up to November 2009 ... and it modified Giscard's double majority scheme modestly This was the Constitutional Treaty's fix-up of the Nice Treaty's foul-up...

Enlargement and the European Parliament's election proceeded without agreement on the new Treaty. The next European Council to consider the Treaty consisted of 25 members. Importantly, the Spanish Prime Minister José María Aznar, who had so forcefully opposed the new voting rules in December 2003, lost his national election and the new Prime Minister, Jose Luis Zapatero, proved more flexible on the voting issue.

The final compromise in the Constitutional Treaty retained the Nice Treaty rules up to November 2009 (to assuage Poland and Spain who were to lose so much power under the Constitution) and it modified Giscard's double majority scheme modestly. This was the Constitutional Treaty's fix-up of the Nice Treaty's foul-up. It was accepted grudgingly but unanimously by EU25 leaders in June 2004.

As everyone knows, the people did not agree with their governments. French and Dutch voters rejected the Constitutional Treaty and it is likely that referendums in the UK and a couple of other members would also have delivered a 'no' had they been held. Since passage requires its approval by all member states, the Constitutional Treaty is dead.

Using the revealed preference perspective, the Constitutional Treaty's reforms reveal what EU leaders thought about the Nice Treaty rules. They could have simply refused Giscard's double-majority scheme in the IGC2003, stuck with the Nice reforms, and taken the rest of the Constitution. (In fact that was first option laid out by the Italian Presidency.) In 2003, EU leaders rejected the Nice Treaty voting rules for a new set of rules. This reveals that they must have believed that the Nice rules were flawed.

The same choice was faced under the 2004 Irish

⁶ For a formal analysis of the power implications of the various rules see "Winners and Losers under Various Dual Majority Rules for the EU Council of Ministers", Richard Baldwin and Mika Widgrén, CEPR DP 4450, 2003

Presidency and the outcome was the same. Note that there is wide-spread belief among analysts and governments that the decision-making reforms in the Constitutional Treaty would have been sufficient to meet the requirement – laid out by EU leaders in the IGC96, IGC200, IGC2003 and IGC2004 – that the enlarged EU continue to operate with 'efficiency, coherence and legitimacy.'

...Hard bargaining has pared down the agenda to the bare essentials – reform of the Council voting rules and reform of the Commission's composition. None of the other institutional changes in the Constitution are essential to allow the EU to function effectively and legitimately...

Enlargement requires institutional reform: Take 4?

There is no reason to believe, nor has there ever been, that the EU could enlarge from 12 to 27 members without streamlining its decision-making procedures. So far the EU has failed three times to reform itself – the Amsterdam Treaty, the Nice Treaty and the Constitutional Treaty. What the EU is left with now is the Nice Treaty reforms which are so bad that EU leaders asked for them to be reformed even before they were tried.

Plainly, something will have to be done. Europe needs a new teaty.

Having read this brief historical narrative, readers will not be surprised to hear that EU leaders are talking about a new treaty that would focus on: (i) the Council of Ministers' voting rules, and (ii) the composition of the Commission.

Most of the various proposals floating in Spring 2007 also include a number of changes that, strictly speaking, do not need a teaty. For example, the EU's key political body – the meeting of EU heads of state and government, the so-called European Council – ran things for more than a decade before it was even mentioned in a Treaty. After all, EU leaders do not need a teaty's permission to meet and discuss their affaires. Likewise, EU leaders could appoint a multi-year 'leader', or President of the European Council without a teaty. They could also appoint a 'Mr or Mrs EU Foreign Policy' without a teaty. The key point here is that every concrete proposal from these two new figureheads would have to be processed via existing EU legislative procedures – just as is true now of all proposals from the European Council.

Concluding remarks

EU leaders have debated enlargement-linked institutional reform since the early 1990s. Hard bargaining has pared down the agenda to the bare essentials – reform of the Council voting rules and reform of the Commission's composition. None of the other institutional changes in the Constitution is essential to allow

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the EU to function effectively and legitimately – if they had been, then they would have been discussed the IGC96 or IGC2000. In particular, every treaty has a number of ‘filler’ items – things that address the concern du jour, or help buy the political support of wavering governments.

The Constitution’s removal of the three pillars, the Passerelle, and inclusion of the Social Charter were included in the Constitution to balance the trade-off between federalists and intergovernmentalists – not to address the urgent and obvious problems posed by enlargement. While some of these measures may be part of the next grand bargain, there may also be other ways of accomplishing the same balance.

To answer the question in the title, Europe needs a new treaty. The new treaty may contain a variety of ‘filler’ items but it must reform the current EU decision-making system. It must fix up the Nice Treaty’s foul up.

Box 1 Examples of EU laws.

The vast majority of EU legislation is quite technocratic. The last three directives adopted in 2005 were: "Council Directive 2005/92/EC of 12 December 2005 amending Directive 77/388/EEC with regard to the length of time during which the minimum standard rate of VAT is to be applied.", "Council Directive 2005/94/EC of 20 December 2005 on Community measures for the control of avian influenza and repealing Directive 92/40/EEC", and "Council Directive 2005/93/EC of 21 December 2005 amending Directive 69/169/EEC as regards the temporary quantitative restriction on beer imports into Finland". Keeping an economic area with almost 500 million people running efficiently requires a flow of legislation even without any deepening of the level of integration.

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