The European Union, the Treaty of Lisbon, and "Justice and Home Affairs"

*By Paul Rosenzweig**

With the vote of the Irish in a referendum and the signature of a reluctant Czech President, the European Union has begun the process of implementing the Treaty of Lisbon.[1] That treaty, which entered into force on December 1, 2009, creates new institutions in the European Union, changes voting rules, and changes the allocation of power among European institutions. It will, quite naturally, work a sea change in the operation of the EU, something that Europeans have long anticipated.

What is less well-understood is how significant the adoption of the Lisbon Treaty will be for the United States. Few outside of the diplomatic establishment have a clear understanding of how America will be affected by these changes. In the near term the changes are likely to be relatively modest; in the long run they are likely to be profound, particularly in the area of "Justice and Home Affairs" (JHA), which is the European name for areas of law and policy that Americans think of as law enforcement, homeland security (or, as the Europeans call it "internal security"), and counter-terrorism.

To put the matter simply (and to simplify greatly for introductory purposes), in the past JHA matters have, presumptively, been the responsibility of each independent sovereign nation that is a member of the EU. Thus, the basic rule has been that questions of policing, for example, were each nation's individual responsibility. Under the law as it existed prior to adoption of the Lisbon Treaty, that presumption of individual state action could be overcome—but only with the unanimous agreement of all 27 member nations of the Union. To be sure, under this régime collective action has occurred—supranational organizations like Europol (a Europe-wide police agency), Eurojust (a Europe-wide prosecutorial organization), and Frontex (the European border security coordination agency) have been set up, and common rules for warrants and extradition are being developed—but action in this area was often perceived by Americans as slow and incremental, since consensus was required for any action.

Under the Lisbon Treaty that will change in at least two significant ways: First, the European Council (the body where each member nation has a single vote) will be authorized to act under a more majoritarian rule (it won't be a simple majority system but rather one with weighted voting) and unanimity will no longer be required. Second, the Council will now share decision-making power with the members of the European Parliament (comprised of elected representatives from the 27 EU member states). That body had, previously, very little real authority in JHA matters—its pronouncements were mostly viewed as advisory and hortatory. As a consequence many in America perceived the Parliament as irrelevant and somewhat irresponsible. Under the Lisbon Treaty the Parliament will now have greater relevance.

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A (Very) Brief History of the European Union

The history of the European Union is rich and complex. The changes wrought by the Lisbon Treaty can only be understood against the backdrop of that history.

The EU owes its existence to a series of supra-national treaties. At various times and in various combinations, the separate sovereign countries of Europe have adopted treaties binding themselves to participation in the supranational structures and institutions of the Union.

The EU began with the adoption of the Treaty of Rome (more formally known as the Treaty Establishing the European Community), which was signed by six nations (West Germany, France, Italy, Belgium, Netherlands, and Luxembourg) in 1957. At its inception the European project focused primarily on establishing common economic policies amongst the several nations. Battered by World War II, this first union grew out of a proposal to create a common economic market in coal and steel. It was thought that this sort of community approach to vital factors of production would "make war unthinkable and materially impossible."[2]

Over time, the Community expanded its role in the economic affairs of Europe, creating various institutions and systems for fostering a common economic market. Perhaps most notably, in 1985 some members of the Community adopted the Schengen Agreement,[3] which led to the elimination of border controls between the signatory nations. The Schengen area has since been expanded to include twenty-five separate nations and formally incorporated into EU governing law. As a result, one may now travel from Portugal to Poland without the need to show a passport.

Later still, in 1992, European nations adopted the Maastricht Treaty (formally known as the Treaty of European Union). The treaty was notable for the transition of the European Community to a more formal Union and for beginning the process that led to the adoption of the Euro as a currency. As the Euro zone expands, one now uses the same currency in France as in Finland.

To give effect to these two treaties, the Union has developed four institutions to implement its policies. These institutions, at least in form, will be familiar to the American reader. Thus, the Union has a European Parliament, consisting of elected officials from throughout Europe, and a European Court of Justice, akin to our court system.

The executive function is split between the European Council (which consists of the heads of state of the twenty-seven member nations) and the European Commission (which is, in effect, the Brussels bureaucracy). Naturally, as the elected heads of state, the Council has a certain degree of primacy. It can act for Europe, even when no treaty directs it to do so by the simple expedient of acting with unanimous agreement. Until the adoption of the Lisbon Treaty, the Presidency of the Council rotated every six months among the member states.

By contrast the Commission staff acts only insofar as they have authority to do so. Often that authority comes from a provision of one of the EU's treaties. Equally often, the Commission (which is akin to our own civil service) acts pursuant to a direction from the Council in an area where no treaty-based role for the European Union exists.

Thus, where a treaty has spoken, the Commission can act; where it has not, the Council can act on behalf of Europe, often with the help and assistance of the Commission. Of course, even if the Council has no *de jure* role over an issue of supra-national concern to Europe (since a treaty has already spoken to the question), the collective view of the members of the Council carries highly persuasive weight with the Commission in determining how to execute its authority.

But the greater significance of Maastricht, at least insofar as it applies to areas under consideration in this paper, was the steps it took to expand European-level powers of the Commission (the executive) beyond economic issues. Under Maastricht, the economic powers of the European Community were transferred to the Union and exercised under a "First Pillar" of authority. In these matters, the institutions of the European Union had, in effect, plenary authority to act.

But several member states wanted to extend the economic cooperation of Europe to the areas of foreign policy, military, criminal justice, and judicial cooperation. Others, most prominently the United Kingdom, had misgivings about giving control over these sensitive sovereign areas to the supra-national institutions of the Economic Community. As a compromise, Maastricht created two other "pillars"—one for a Common Foreign and Security Policy and one for Justice and Home Affairs. In these two pillars, unlike the First Pillar, the powers of the Commission, the Parliament, and the Court of Justice to influence these new intergovernmental policy areas were greatly limited. In effect, any supra-national action required a unanimous agreement of all the member states before the European institutions could act.

Thus, as the European Union approached the 21st Century it had a cast to it that would look almost like a federalism discussion to an American observer. Some powers (mostly in the economic arena) were principally exercised by a centralized executive (the European Commission) in Brussels. Other powers, mostly those relating to foreign and defense policy and those relating to law enforcement, were principally exercised at the independent member state level, except to the extent that the states agreed to let Brussels take the lead. To be sure, from the American perspective it is a federalism discussion that is skewed—imagine Washington having no foreign or defense policy role, but a paramount economic authority—but nonetheless the contours would be familiar.

The Treaty of Lisbon

From its small, early beginning in 1957, the European Union has grown into a colossus. It has twenty-seven member states and spans the distance from Ireland to the newest states in the southeast, Bulgaria and Rumania. As it has grown, however, the capacity for consensus building has diminished. Where once it was comparatively easy to find agreement among six or later ten states with a common heritage, now the Union has twenty-seven actors, many with very diverse cultural and political backgrounds. European commentators, assessing the situation, saw increasing caution and lassitude at the pan-European level.

In part to answer this, Europe has now adopted the Treaty of Lisbon.[4] The treaty is a further step on the road to more centralized power in Brussels, particularly in the area of Justice and Home Affairs. Whether the *de jure* changes will be followed by significant *de facto* changes remains to be seen, but there can be little doubt that Lisbon is intended to make collective action at the European level easier, with a concomitant reduction in the authority of individual sovereign nations to act.

A number of changes will push Europe down this path to centralization.[5] Among the most significant in the treaty (for purposes of Justice and Home Affairs issues) are:

- The European Union will now have a President, selected by the European Council (i.e., the twenty-seven heads of state).[6] The President will chair the Council and may become the leading voice of Europe around the world. Many years ago, Henry Kissinger was said to have asked, "Who do I call if I want to speak to Europe?"[7] If he had wanted to make the call, today he would dial Europe's first President: Herman Van Rompuy, formerly the Prime Minister of Belgium;

- Europe will also have a High Representative for Foreign Affairs and Security Policy, selected by the Council, with the approval of the Parliament.[8] It will also have a quasi-diplomatic service, known as the European External Action Service (EEAS), which will operate on behalf of the High Representative. The first appointee to the post of High Representative under the new provisions is Catharine Ashton from the United Kingdom, who will also serve as a public face of Europe.

- And, most significantly, the Treaty eliminated the Three Pillar structure adopted at Maastricht. Going forward, all issues relating to Justice and Home Affairs will be treated like those issues proposed for adoption relating to economic affairs.

This later point will work a sea-change in the legislative process for Justice and Home Affairs issues. As noted earlier, under Third Pillar rules from Maastricht, unanimity was required in the European Council to adopt a measure relating to Justice and Home Affairs for the Union. Now, matters will proceed differently, through two processes known as "Qualified Voting Majority" and "Co-Decision"—processes that are part of the "normal legislative process" in the EU for economic affairs.

Qualified Voting Majority (or QVM), as its name implies, means that unanimity within the European Council will no longer be required for Europe to collectively act on JHA matters. Instead, voting will be done by each country, which casts a ballot that is "weighted" roughly in proportion to its population. The majority requirement (to get a majority of the weighted votes) is further "qualified" by a distribution requirement—the positive votes must have fifty-five percent of the individual countries representing at least sixty-five percent of the total population.[9] Despite the complexity of the voting system, the end result is clear—a working majority of

the member states is now authorized to create supra-national policy on matters of law enforcement and homeland security in situations where previously unanimity was required. Minority states that do not agree will, nonetheless, be bound to follow the European lead.[10]

Co-Decision reflects the increased power of the European Parliament. Where, previously, the Council was merely obliged to "consult" with the Parliament, now initiatives proposed by the Council must be affirmatively adopted by the legislature. Without Parliament's review and approval no new European initiative can proceed. In effect, the Parliament has gained a great deal of new power to control the justice and home affairs operations of the Union.

These changes in decision-making authority will operate across a broad range of EU activities. The new non-unanimity and co-decision procedures will apply to rules about visas, immigration, judicial cooperation in criminal matters, the operation of Eurojust and Europol, and matters of non-operational police cooperation. Questions of asylum policy and illegal immigration will remain areas where qualified majority and co-decision apply. Only issues of passport and identity card issuance, family law, and operational police cooperation will remain ones requiring unanimous Council approval that do not require Parliamentary assent.[11]

In addition to these changes in decision-making powers, the treaty also effects changes in judicial review. Prior to the Treaty of Lisbon, justice and home affairs matters had generally been deemed questions of domestic law, subject to review by the courts of each member state. Now, to the extent these JHA matters become the subject of pan-European legislation, they will also be subject to review by the European Court of Justice—adding another centralizing layer of authority to domestic practices.

Finally, and perhaps most significantly, the Treaty establishes a new standing committee within the European Council on issues relating to internal security, to be known as "COSI."[12] The new committee will attempt to strengthen coordination among the member states on issues of police and customs cooperation, external border protection and judicial cooperation in criminal matters. While COSI will not make legislative proposals directly, it seems likely that its efforts will influence the Council in developing more pan-European approaches to these areas of law enforcement and homeland security.

What Does the Future Hold?

So, what does all of this mean for the European Union?

At first, one suspects the answer is "not much." The procedural changes worked by the Lisbon Treaty are immense. It will take a great deal of time simply to create and staff the new institutions for which the treaty calls. Symbolizing the difficulty in transitioning to a new legal régime, the provisions of the treaty giving the Commission and the Court of Justice authority over police matters and judicial cooperation in criminal matters will not actually take effect for five years, in December 2014.[13]

Even after the new treaty institutions are created and staffed, it remains to be seen how much true authority they will have. Though the intention of the treaty is clearly to centralize more decision-making authority in Brussels, the capacity and expertise to exercise that authority will take time to develop. One sign of that developing expertise will likely be the creation of permanent staff cadres with homeland security and justice expertise at the new European institutions. One might, for example, expect to see the staff of the COSI become a repository of pan-European expertise in these areas, much as the staff of congressional committees is in the United States. And if the new President intends to exert any influence in the area, one might see the establishment of a structure akin to the NSC/HSC structure in the Executive Office of the President here in America. Conversely, the lack of these authoritative repositories of expertise will, in the end, make significant centralization of JHA affairs more difficult.

Then, too, it remains to be seen how much the QVM system changes the dynamics of the European Council. It is often said that in Europe very little gets done unless the "big" countries want it to be done—and that when they agree, things happen. Historically, the larger countries (e.g., Germany, France, Italy, Spain, and the UK) have had powerful terms as Presidents of the Council and achieved significant changes, while smaller countries have been less effective on the European stage. It seems unlikely that the QVM voting system will change that and that the continued influence of the larger European nations will continue.

The "wild card" in the equation, if there is one, is the European Parliament. In the past the Parliament has had a negligible role in justice and home affairs matters. Though "consulted" by the Council, parliamentarians were, in practice, often ignored. This, in turn, fostered within the Parliament a fairly strong mindset in opposition to EU-wide security matters. Often this opposition was couched as an objection to the encroaching of the growing EU security state, and several MPs have gained a small following as "defenders of freedom." It remains to be seen whether the grant of greater authority to the Parliament will moderate its sometimes strident tone, or whether the parliamentarians will now interpose their objections to increased security measures with greater success. Earliest signs are not encouraging – the Parliament's first act was to reject an terrorist financing information sharing agreement with the United States, rejecting a successful program implemented shortly after September 11.

And what does it mean for America's trans-Atlantic relationship with the EU and with its traditional sovereign allies? Only time will tell. Some may see the new EU power structure as a more effective partner. If the QVM process works to energize European action and the Parliamentary co-decision rule does not become an obstacle, the strengthening of Brussels may work in America's favor.

On the other hand, others see the strengthening of the EU as a challenge to the United States' long-standing bilateral relationships with the countries of Europe. Under this view, we are more likely to achieve our political objectives with the assistance of our traditional friends than we are working with the new EU institutions. As Henry Kissinger has said:

> When the United States deals with the nations of Europe individually, it has the possibility of consulting at many

> levels and to have its view heard well before a decision is taken. In dealing with the European Union, by contrast, the United States is excluded from the decision-making process and interacts only after the event . . . . Growing estrangement between America and Europe is thus being institutionally fostered.[14]

The answer, in the end, is likely to lie somewhere in between. It will depend, to a large degree, on how the European centralization project moves forward. One suspects that, for the near (and even medium) term, America's relations with its traditional sovereign peer allies will continue to form the bedrock of our counter-terrorism operations. Unless and until Europe develops a coherent supra-national police force (not to mention a supra-national intelligence community) with whom their American equivalents can interact (if, in fact, we would want to—itself an open question), it is likely that our exchanges of information and operational assistance with member states and their domestic justice and home affairs services will continue to predominate.

In the longer term, however, the Treaty of Lisbon signals a clear European commitment to increased Europeanization of issues traditionally thought of as state and local powers. Moving forward, America would be wise to take that trend into account.

Endnotes

1 The full English language text of the 200+ page treaty can be accessed at http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2007:306:SOM:EN:HTML.

2 The intent was expressed in the so-called Schuman Declaration, named after Robert Schuman, a leader in Luxembourg at the time. The text of the declaration is available at http://www.schuman.info/9May1950.htm.

3 The original Schengen Agreement is available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:239:0001:0473:EN:PDF.

4 Greater efficiency was not the only reason some sought treaty revisions. Indeed, since more regulation has passed in the EU since the last enlargement in 2004 than had before, some suggest that the efficiency rationale is only part of the story and that the Lisbon Treaty is as much motivated by a desire to enforce pan-European discipline on external matters as it is by a desire to increase internal functioning.

5 As a matter of form, the Treaty of Lisbon does not serve as a stand-alone separate treaty. Rather, its provisions are in the nature of amendments to the existing treaties from Rome and Maastricht that form the basis of the Union's structure. These amendments have been consolidated with all the old treaties into a single new, unified treaty, now titled the Treaty on the Functioning of the European Union (TFEU), and citations to provisions implementing changes occasioned by the Treaty of Lisbon are commonly made to the new consolidated TFEU. Thus, Justice and Home Affairs matters are now covered in Art. 67-89 TFEU (freedom, security and justice) and Art. 196 TFEU (civil protection).

6 Art. 15 TFEU.

7 It is likely that the quote, and its attribution to Kissinger, is apocryphal. *See* Kissinger Never Wanted to Call Europe, http://blogs.ft.com/rachmanblog/2009/07/kissinger-never-wanted-to-dial-europe/ (July 2009).

8 Art. 18 & 27, TFEU.

9 To illustrate the comparative complexity of the voting requirements, one might review the EU's "voting calculator," available at http://www.consilium.europa.eu/App/calculette/default.aspx?lang=en&cmsid=1690.

10 There is, in effect, a "qualified veto" provision in the treaty as well that may provide minority states a means of resisting a majority decision. National parliaments are allowed to exercise a qualified negative on EU proposals. If a proposal that has been passed by the Council and the Parliament is subsequently rejected by one-third of the parliaments of the Member States, the Council must reconsider the proposition. How frequently this will occur in practice remains to be seen—though, given the arithmetic, the possibility does exist for a successive looping function where a qualified majority of the Council passes a proposal that a recalcitrant minority of national parliaments rejects.

11 Art. 77-88, TFEU.

12 Art. 71, TFEU.

13 Art. 10 of Protocol 36, TFEU. The United Kingdom has reserved the right to opt out of these provisions completely. For those who wish to understand the many political compromises that were necessary to bring the Lisbon Treaty to fruition, a perusal of the thirty-seven separate protocols (each modifying a treaty element in some way) will reward the curious reader. The protocols may be accessed at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0201:0328:EN:PDF.

14 Henry Kissinger, Does America Need a Foreign Policy? 57 (2001).