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Summary

How can the quality of EU treaty negotiations be improved? In a recent paper we broached this subject (Risse and Kleine 2007) when assessing the legitimacy of treaty revisions at the example of traditional Intergovernmental Conferences (IGCs) and the Convention method. We argued that the legitimacy of decision-making may vary considerably with the institutional set up in which processes of choice take place. In our comparison we found that the Convention method substantially improved the prospect for deliberation in decision-making, and thus led to both a more legitimate and qualitatively better outcome.

In this paper we revisit this question, but broaden the scope of our analysis to the preparation, negotiation, and ratification stage of the five treaty revisions the EU has undergone within the last 20 years. Section 1 introduces criteria for assessing the “quality” of treaty-revisions. In the light of these criteria, section 2 analyses the three stages of treaty revisions. The last, third section discusses factors that determine the quality of treaty revisions, and, on that basis, makes more specific recommendations for improving the quality of treaty negotiations.

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I. Introduction

How can the quality of EU treaty negotiations be improved? In a recent paper we broached this subject (Risse and Kleine 2007) when assessing the legitimacy of treaty revisions at the example of traditional Intergovernmental Conferences (IGCs) and the Convention method. We argued that the legitimacy of decision-making may vary considerably with the institutional set up in which processes of choice take place. In our comparison we found that the Convention method substantially improved the prospect for deliberation in decision-making, and thus led to both a more legitimate and qualitatively better outcome.

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II. What is “quality”?

Within the framework of rational-choice bargaining theories quality is tantamount to the efficiency of decision-making. Efficiency, in turn, relates to the attainment of outcomes to which there is no alternative that would make an individual better off without making any other individual worse off (Pareto-optimum). Sources diminishing this efficiency are usually regarded to lie in unnecessarily high transaction costs and incomplete information. In short, an outcome of high quality is, on the basis of the represented interests, simply the best outcome available. And since incentives to renege on such an outcome are considerably lower, it may directly improve compliance with, and, thus, the effectiveness of an agreement. Less efficient outcome are in turn those where transaction costs and incomplete information lead decision-makers to question the efficiency of the process, and to identify gains “left on the negotiation table”.

Proponents of deliberative democracy (Cohen and Sabel 1997; Elster 1998a; Habermas 1992), in contrast, suggest that decision-making processes that systematically allow for arguing, reason-giving and mutual learning rather than hard-nosed bargaining will have a substantially improved chance of leading to outcomes of a usually higher quality. The main reason is that arguing and reason-giving provide mechanisms to probe and challenge the normative validity of actors’ interests as well as to check the empirical facts on which policy choices are based. Thus, the deliberative quality of a decision-making process may increase when decision-makers are in the first place given the chance to evaluate and consensually agree on its legitimacy. Consequently, “quality” does not equal “efficiency”; it rather emphasizes the aspect of effectiveness through legitimacy in that the “governed” regard compliance with it as appropriate behavior. Factors lowering this deliberative quality are generally seen to lie in secretive,
intransparent decision-making processes where legitimate interests are viewed as being systematically disregarded. Outcomes that are of lower quality in this sense are those that decision-makers themselves describe as unsatisfying, and whose legitimacy is substantially contested.

Unfortunately, both bodies of literature have yet to come up with a definitive answer to our research question. In other words, we know very little about the contextual factors that affect both the efficiency and quality of decision-making processes. Several variables have been suggested that we will discuss in the remainder of this paper. These are *inter alia* the intensity and heterogeneity of preferences (e.g. Fearon 1998), the transparency of a debate (e.g. Checkel 2003; cf. Ulbert and Risse 2005; Elster 1998b), and the scope of the agenda (e.g. Tolleison and Willett 1979).

To summarize this section: We consider a treaty revision being of a high quality when, at each stage of the treaty revision process, decision-makers a) attain an agreement, b) identify no gains left on the table, and c) widely agree on its legitimacy, in the sense that it reflects the interests of the governed. *Ceteris paribus*, outcomes of low quality are those “gains left on the table” are identified, and whose legitimacy is substantially contested. In the following we use these yardsticks to evaluate the quality of the five major treaty-revisions the EU has undergone within the last 20 years.

**III. What determines the quality of treaty revisions? – A first cut**

Article 48 of the Treaty establishing the European Union (TEU) provides the legal basis for the revision of the treaties upon which the European Union is founded. Treaty revisions are an act of international law, and prepared by an Intergovernmental Conference (IGC) that “shall be convened by the President of the Council for the purpose of determining by common accord the amendments to be made to those Treaties. (...) The amendments shall enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements.” Within the last twenty years the EU has undergone five such major treaty revisions. Yet, these revisions vary substantially with respect to their structure and conduct. A structured comparison will thus allow us identify, as a first cut, whether factors like the intensity and heterogeneity of preferences, the transparency of a debate, and the scope of the agenda affected their quality.  

**III.1 The Single European Act**

In the month after the signing of the Stuttgart solemn declaration on European Union in June 1983, the Commission headed by Jacques Delors drafted a White Paper laying out nearly 300 measures to remove trade barriers by 1992 and to make the EU more competitive economically. This initiative led to the creation of the Dooge Committee, a group of experts (one representative for each Member State) that was instructed to put forward specific proposals for the improvement of the way in which both cooperation in the Community and European political cooperation in foreign affairs operated. All issues were addressed openly in a report that recommended the transformation of the European Communities into a European Union, the construction of a single economic area, and the promotion of a European external identity. It was unable to agree, however, on decisive institutional issues such as qualified majority
voting and veto rights. To achieve these results, in spite of grave misgivings on the part of the British, Danish and Greek delegates, it recommended the convening of an IGC to negotiate a draft European Union Treaty. In sum, the Dooge report, though containing some ideas for reforms, did not find complete agreement among its members (Moravcsik 1991: 39-41).

Both the White Paper and the Dooge Report were approved at the Milan Council of June 1985, which accordingly resolved to set up a new IGC over the coming months – the first IGC in almost three decades. The IGC met five times at Foreign Minister level between 9 September and 28 November 1985. Following very lengthy and difficult discussions, the Luxembourg European Council in December 1985 succeeded, almost in extremis, in securing the approval of the national delegations on a final declaration. Even though Germany, France, and Italy stated that they would have been prepared to go further on the powers of the Parliament, the treaty was widely hailed a full success (Moravcsik 1991: 44). In sum, the SEA found agreement among all governments. Even though some countries would have liked to delegate more power to the Parliament, and, thus, slightly questioned the treaty’s legitimacy, it can be regarded as quite efficient as no gains were identified left on the table.

However, the Danish Parliament rejected the draft Act in January 1986, and subsequently called a national referendum. In February, 56.2 % of the Danish population voted in favor of the Treaty. During 1986 and 1987, the ratification by the national parliaments took place. The SEA, which amended the European Communities’ founding Treaties, came into force on 1 July 1987. Thus, even though the SEA was widely hailed a success and regarded as legitimate, it nonetheless faced problems in the ratification stage. The referendum in Denmark, however, broke the deadlock, and added legitimacy to this treaty.

To conclude, the intensity and heterogeneity of preferences in both the preparation and negotiation stage was rather low as it dealt with what can be regarded low politics. The scope of the reform agenda was limited to the completion of the single market, and only to some extent, to institutions and foreign policy. Negotiations were conducted mainly behind closed doors. The final outcome was regarded as efficient, and its legitimacy only slightly questioned.

III.2 The Treaty of Maastricht

Immediately after the end of the Cold War and Germany’s reunification, two new separate IGCs were convened in order to negotiate Economic and Monetary Union and Political Union. Preparations for the former, however, predate these important events. A Committee consisting of central bankers, and headed by the Commission President Delors, came up with a report that proposed a stage plan towards EMU. The “Delors report” was well received and approved by the European Council in June 1989. Yet, the critical points of the timing of these stages, and the design of a central bank, were left open, and differences of opinion and hesitations came to light over how to continue the process (Moravcsik 1998: 432-440). Margaret Thatcher, the British Prime Minister, challenged the need for a new treaty. In contrast to the IGC on EMU, the IGC on Political Union, convened at the request of Germany, was not prepared by a special committee, but based its work upon a series of separate reform proposals.

The IGC on Economic and Monetary Union began on the 13th of December of 1990 at the Rome European Council, and the IGC on Political Union was launched on the following day. The foreign ministers of the Twelve or their personal representatives were to conduct the conference on Political Union, while the ministers of economics and finance assumed responsibility for the IGC on Economic and Monetary Union. The negotiations proved very difficult, however, particularly with regard to the European defense identity, social policy, the economic and social cohesion of the Community and, on the institutional side, codecision rights...
for the European Parliament and the use of qualified majority voting in the Council. Moreover, the treaty structure, and the distinction between the Community system and new intergovernmental policies were hotly debated issues. In December 1991, the Heads of State or Government settled the remaining issues and finalized the political and monetary texts. It took another few weeks, however, for the experts to mould the political agreement reached into the legal provisions of a new treaty. The Treaty on European Union was signed in Maastricht in February 1992 by the Foreign and Finance Ministers of the Twelve. While the negotiation outcomes were probably efficient, as there are no signs for any gains left on the table, its legitimacy was nonetheless contested. At the urging of federalist countries, Article N in the Final Provisions lay down that in 1996 a new IGC was to be convened in order to review the problem-solving capacity of the treaty structure.

After signing the TUE, however, the ratification of the TUE was also fraught with difficulties in various states. The treaty was ratified after highly contentious referenda in France and Denmark, a smoother one in Ireland, and the imposition of important legal conditions by the German constitutional court. The treaty entered into force on 1 November 1993.

To conclude, the intensity and heterogeneity of preferences in the negotiation stage was already higher as the IGC now focused on many “high” politics issues such as monetary integration and foreign policy. The scope of the agenda was limited, however, since those issues where dealt with in different negotiation context and by different government representatives. Negotiations were again conducted mainly behind closed doors. The final outcome was regarded as efficient; its legitimacy, however, was questioned through the inclusion of a revision clause, and hotly debated in the ensuing ratification stage.

### III.3 The Amsterdam Treaty

The now 15 Member States set out to focus on the effectiveness of the EU’s institutional architecture. The ‘review clause’ in Article N provided for the calling of a new conference in 1996. In retrospect, the secrecy of the IGC negotiations “behind closed doors” was regarded as partly responsible for the ratification debacle as they were “too far away from the citizens” as to be understandable for them (McDonagh 1998: 35). In June 1994 the European Council in Corfu therefore established a “Reflection Group” that “in a spirit of democracy and openness” should examine and elaborate ideas for the revision of the Treaties (European Council 1994a). It was composed by representatives of the Member States, the president of the Commission and two MEPs, and chaired by the Spanish representative Carlos Westendorp. It did not aim at producing a single text, but listed some options that were in no way surprising. When it reported to the Madrid summit six months later, its vague conclusions were far from instructive and merely reflected the different views of the Member States. In short, the Westendorp Group was a response to growing critique on the secrecy of IGCs. Despite the openness of the debate within this group, it did not, however, agree on any substantial recommendation for the IGC. The whole endeavor was therefore even described as a complete time loss (Interview with a member of the Reflection Group, 02 May 2005).

The 1996 IGC was inaugurated during the European Council of Turin in March 1996 and lasted until June 1997. The negotiations were conducted primarily within the group of ministers’ representatives, decisions being taken by the Council of Ministers for Foreign Affairs, and the broad guidelines established during the European Councils of the Heads of State or Government. The IGC paid particular attention to a number of issues, but most importantly it focused on reforming the institutions and the functioning of the Union in order to improve its democratic legitimacy and problem-solving capacity in preparation for Eastern enlargement. Those reforms were, however, rather limited. The Treaty of Amsterdam, signed in October...
1997, once again entailed a provision for its own revision: The Protocol on the institutions stated that “at least one year before the membership of the European Union exceeds twenty” an IGC “shall be convened in order to carry out a comprehensive review of the provisions of the treaties on the composition and the functioning of the institutions”. The protocol did not, however, detail how those reforms could look like, nor did governments identify any specific gains left on the table. Hence, we can conclude that the treaty did not suffer from insufficient information or high transaction costs (Moravcsik and Nicolaïdis 1999: 69-73). Nonetheless, the legitimacy of the outcome, in particular with regard to its problem-solving capacity, was highly contested.

After formal signing and approval of the Treaty by the European Parliament, each member state ratified the treaty. Only one country, Ireland, held a referendum in which Irish citizens approved the treaty with a great majority.

To conclude, the intensity and heterogeneity of preferences in the negotiation stage was quite high as the scope of the IGC agenda was mainly limited to decisive institutional questions. While negotiations were again conducted behind closed doors, the IGC was this time prepared by a Reflection Group that met “in a spirit of democracy and openness”. This committee did not manage to produce a consensual outcome, though, and received only little attention. The final outcome can be regarded as efficient, but its legitimacy was nonetheless questioned through the anew introduction of a revision clause.

III.4 The Nice Treaty

Accordingly, the looming big-bang enlargement put pressure on the Cologne European Council in June 1999, which agreed on the need for a new IGC in order to address the Amsterdam “leftovers”: weighting of votes in the Council, extension of QMV, and the size of the Commission. This time the preparatory work was less formal. At the request of the Commission, a group of high-level independent experts, Jean-Luc Dehaene, Richard von Weizsäcker, and David Simon, prepared a report on the institutional implications of enlargement. Their report remained vague though on critical points, and was consequently largely ignored.

At the Helsinki European Council in December a quite narrow agenda was accorded, and it was decided to convene the IGC in February 2000. As to organization, the Foreign Ministers would have the overall political responsibility. Preparatory work for their meeting was to be the responsibility of a Group composed of a representative of each government. The most critical Amsterdam issues were not decided until the very last minute. After quite difficult negotiations during the “night of the long knives” the IGC came up with a quite complicated voting scheme that required a triple majority of member states, weighted votes, and population. The negotiations among the Heads of State and Government were largely regarded as hostile and even inefficient, and their upshot, the Treaty of Nice, was commonly considered as a great disappointment. Pressures from pro-integrationist countries led to the annexation of the Declaration No. 23 on the Future of the Union to this treaty. This Declaration encouraged a deeper and wider discussion on the future of the European Union, whose results should be taken up by a new IGC that would make the necessary changes to the treaties. This whole process was meant to address concerns of democratic legitimacy and transparency of the Union and its institutions in order to “bring them closer to its citizens” (Laursen 2006a). In sum, the government representatives agreed on a new treaty that was widely regarded as a complete failure. It is doubtful, though, that this is due to incomplete information or high transaction costs only since information was not scarce. The emphasis on the necessity to bring Europe closer to its citizens, and to improve the problem-solving capacity before enlargement, however, shows that the legitimacy of the treaty was hotly contested among decision-makers.
The ratification process following the signature of the Nice Treaty was plagued by difficulties. In all the EU member states the Treaty of Nice was ratified by parliamentary procedure, except in Ireland. To the surprise of Europe's political classes, the voters in Ireland rejected the Nice Treaty in May 2001. The Irish government, having obtained the Seville Declaration on Ireland's policy of military neutrality from the European Council, decided to have another referendum on the Treaty of Nice in October 2002. The result was a 60% "Yes" vote on near double the turn-out of the previous referendum.

To conclude, the intensity and heterogeneity of preferences in the negotiation stage was very high, and the scope of the IGC agenda was mainly limited to decisive institutional questions. Negotiations were again conducted behind closed doors. This time, the final outcome was regarded as highly inefficient, and its legitimacy more than ever contested by both decision-makers and the public in the ratification stage.

III.5 The Constitutional Process

Following the Nice Treaty's call for "a deeper and wider debate about the future of the European Union", the Laeken European Council adopted a “Declaration on the Future of the European Union” committing the Union to greater democracy, transparency and efficiency, and to preparing the 2004 IGC. The European Convention comprised representatives from national parliaments, Commission, the European Parliament, and the governments, and met for most parts publicly. It was held from February 2002 to June 2003. Evidence has piled up that suggests that the Convention method put a premium on reason-giving and arguing as opposed to interest based bargaining (Kleine and Risse 2007). First, the rules of the game, as laid out by Convention President Giscard d'Estaing at the very beginning, stipulated that Conventioneers were supposed to speak on their own behalf rather than on behalf of their nation-state, party, or whatever group. While such a rule does not preclude interest-based bargaining, it does require that speakers have to appeal to commonly accepted principles and norms in order to make their points. In that sense, it privileges arguing and reason-giving over bargaining. Second and perhaps most importantly, the Convention’s decision rule was consensus (not unanimity, since it was never specified what precisely was meant by ‘consensus’).4 Given the plurality of interests and preferences represented at the Convention (see above), speakers could never be certain about the preferences of their audiences. They could not know for sure whether a particular proposal would meet the interests of a large majority of Conventioneers.

To the great surprise of a vast majority of experts and Conventioneers, this large and heterogeneous body managed to consensually agree on single proposal for a full-fledged Constitutional Treaty that changed the institutional provisions of Nice even before this recently signed Treaty had entered into force. In short, this original negotiation setting came up with a comprehensive outcome that was not only regarded as highly efficient, but whose outcome went even beyond what was regarded as possible. Its legitimacy with regard to its problem-solving capacity and the represented interests was little contested.

There was only little work left to be done for the following IGC. Despite high initial hopes, agreement was not reached due to differences over the size and composition of the Commission and the definition and scope of qualified majority voting (QMV). After heated negotiations, and a change of government in Spain, an agreement was finally reached on 18 June 2004, and the Constitutional Treaty signed in Rome in October 2004 by the now 25 Member

4 See also the discussion in Kleine (2007).
States of the European Union. In contrast to almost all previous IGCs, the Constitutional Treaty did not comprise provisions for its own revision, and was widely celebrated for having broken the deadlock on institutional questions. In sum, the Convention method (Convention + IGC) proved highly successful in negotiating a treaty that was widely regarded as efficient (as it did not leave any gains on the table), improving the problem-solving capability of the Union (as the institutional provisions were regarded as more effective) and as representing a wide array of legitimate interests.

Nonetheless, ratification has turned out very difficult. To date, 18 member states have already ratified the Treaty, either by parliamentary procedures or by referendum. But French and Dutch citizens have expressed their rejection and the remaining member states have their ratification process on hold.

To conclude, the intensity and heterogeneity of preferences in the Convention was even higher in previous IGCs as the Convention now included a wide variety of new negotiating actors. This time, negotiations were for most parts conducted in public and the scope of the Convention was broadened. In fact, every issue with the remotest link to the Laeken Declaration could become subject to the discussions. The transparency of the debate in combination with the decision-rule, however, increased the deliberative quality of the debate and helped attaining an outcome that decision-makers themselves regarded as highly legitimate and efficient. As it came up with a comprehensive text, the following IGC was deprived of its responsibilities, and its agenda was limited to relatively small changes of the Constitutional Treaty. Despite its public negotiations and its widely perceived legitimacy, however, the Constitutional Treaty was rejected by the citizens in France and The Netherlands.

IV. When will treaty-revisions be of “high quality”?

Interestingly, the intervals between the conclusion of the previous treaty and the preparation of a new one never lasted longer than 5 years, and almost all treaties already contained provisions for their own revision. This period could thus be conceived of as a de facto semi-permanent reform process in which the recent Constitutional Treaty only marks another effort to end this process once and for all. Yet, this would be an exaggeration of the EU’s teleological character as these treaty revisions always also reacted to changes in the EU’s membership and its environment. Therefore, in order to understand the factors that determined their respective efficiency and legitimacy, we have to take a closer look at each in turn.

Intensity and Heterogeneity of Preferences: The intensity and heterogeneity of preferences increased with every new treaty revision. While this may have prolonged the negotiations, it does not seem to have seriously affected the overall efficiency of the outcome, nor the ability to attain an outcome in the first place. Both the Nice IGC and the Convention dealt with institutional issues where governmental preferences can be regarded as relatively intense and heterogeneous. Nonetheless, the Convention attained an outcome that was regarded as having a considerably higher quality than that of the Nice IGC. Thus, intense and heterogeneous preferences do not necessarily preclude the attainment of efficient and legitimate outcomes.

Transparency: The results regarding the transparency are mixed as well. Even though IGCs generally meet behind closed doors, its results with regard to the quality of the agreement differ. In fact, negotiations behind closed doors do not guarantee that the final result remains unquestioned in both the negotiation and ratification stage. On the contrary: The example of the Convention has shown that under certain circumstances the transparency systematically improves the deliberative quality of the debate. It does not, however, guarantee the citizens accord with the outcome, as we have seen at the example of the Convention.
Scope of the Agenda: While government representatives regularly tried to keep IGC agendas narrow, their results vary again with regard to the quality of the outcome. In cases where preferences are intense, however, it appears advisable to broaden the scope of the agenda as this might provide opportunities to break deadlocks by constructing package-deals. After all, the Convention’s final outcome indeed features some of these packages.

V. Conclusion and Specific Recommendations

There is no single prescription for improving the quality of treaty revisions. The above discussion demonstrated that none of the previously singled out factors improves the quality of an outcome if we conceive of quality purely in terms of efficiency. What is more, while we have argued that under some circumstances the transparency nonetheless improves the deliberative quality of an outcome in the negotiation stage it does not guarantee the citizen’s approval in the ratification stage. Neither, however, does the secrecy of a debate guarantee smooth ratification. But if the citizens cannot be convinced by the quality of an outcome, what can be done? We suggest that the current crisis demonstrates a more fundamental problem of EU policy-making that even the Constitutional Convention – for all its merits – failed to address: The increasing gap between an elite consensus on European integration, on the one hand, and growing Euro-skepticism among the citizens, on the other. The Euroskepticism as expressed in the two negative referenda on the Constitutional Treaty suggests a growing uncertainty and even uneasiness of European citizens about the European project. This uneasiness cannot be overcome through renewed public relations efforts. But also the current elite silence on Europe makes things even worse. On the contrary, a fundamental politicization of the European project is required. European policies must become similar subject to contestation and controversy in the transnational public sphere as domestic policies are in the national publics.
VI. Literature


