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Constitutional Change in the European Union

Towards a Federal Europe

Andrew Duff

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Andrew Duff
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About the Author

Andrew Duff was a British Member of the European Parliament from 1999 to 2014. He was a spokesman for the Liberal group on constitutional affairs, a member of the Convention on the Charter of Fundamental Rights and a member of the Convention on the Future of Europe. He then represented the Parliament at the intergovernmental conference on the Lisbon Treaty. He was a member of the EU Turkey joint parliamentary committee.

Duff is former President of the Spinelli Group, President of the Union of European Federalists, Director of the Federal Trust, London, and Vice-President of the UK Liberal Democrats. He is an Academic Fellow of the European Policy Centre, Brussels. His latest book is *Britain and the Puzzle of European Union*, 2022.

CHAPTER 1

What Unity Is For

Abstract The introduction recalls the origins of the European Union and the tensions that existed from the beginning between confederal and federal approaches to integration. The Russian invasion of Ukraine reminds us why European unity matters. The chapter summarises the work of the Convention on the Future of Europe which led, after setbacks, to the Treaty of Lisbon.

Keywords Federalism • Confederalism • Integration • Convention • Lisbon treaty

The Russian invasion of Ukraine is the starkest possible reminder of why European unity matters. The crisis shakes the European Union out of any complacency that its historic mission of "creating an ever closer union among the peoples of Europe" is already accomplished.[1] The EU has for too long been weak on the world stage and uncertainly governed at home. In the short term, President Putin may have galvanised solidarity among the Europeans but unity in the longer term cannot be taken for granted. Nationalist forces within Europe still oppose further integration. The future of the Union—its size, shape, competence and type of governance—is hotly contested. How the EU copes with the challenges it

[1] Article 1 Treaty on European Union (TEU).

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faces will be central to the future of the whole continent of Europe, and will dominate it.

It must be obvious, except to rabid nationalists of the British variety, that if the EU had not been in existence for over seventy years, something quite like it would be rapidly invented. Some believe that Europe can be organised as a straightforward confederation and run by diplomatic ways and means between consenting national governments. Others hope a united Europe can be a federation, with a supranational government created up above the level of the old nation-states, but coordinate with them.[2] That was the inspiration of Jean Monnet who in 1950 marshalled Robert Schuman and others into taking a binding step that, they hoped, would lead "to the realisation of the first concrete foundation of a European federation indispensable to the preservation of peace".[3]

There was to be no linear progression, of course, from the European Coal and Steel Community to a complete federal union. Federalists were countered by the strong reaction of national governments which, while conceding the need for increased coordination between the states, nonetheless wished to preserve as much of their own sovereign powers as possible. At times, the confederal idea prevailed over the federal. Even where lip service has been paid to the goal of integration, confederal methods have usually been preferred by the governments of the member states represented in the Council. Conservatives have believed that a European confederation is a safer bet than the federal alternative. Eurosceptics want the EU to remain an alliance or league of states that come together for limited but specific purposes. According to the confederal thesis, national sovereignty is loaned to the joint endeavour only on the basis of international, not supranational, law. Citizenship remains with the states. National governments and their parliaments retain the right of veto on confederal activities, as well as the right to leave as they choose. Confederate solidarity against foreign threats remains negotiable. As eurosceptics are condemned to discover, however, and just as James Madison warned, confederations are difficult to run.

Federations are also difficult to run, but in a different way. Europe conceived as a federal union is a durable covenant based on pooled

[2] For a good analysis of the current state of scholarly debate, see John Erik Fossum, *EU Constitutional Models in 3D: differentiation, dominance and democracy*, EU3D Research Papers No 15, July 2021.

[3] Schuman Declaration, 9 May 1950.

sovereignty, with a broad range of conferred competences and capable democratic institutions. A federation implies a solid collective defence against external threats. A federal state acquires a power of general competence subject only to the constraints of a constitution. Citizenship is federal. A member state should leave the federation only on terms agreed. In making arrangements for its own domestic constitution, a member state should have regard for the parameters of the federal constitution to which it adheres. Federal arrangements are in a constant quandary about how centralised they should be, putting the federal government in constant flux. An important federal principle is subsidiarity whereby decisions are taken and implemented in a decentralised manner subject only to the overall common purpose.

It took a series of economic, political and security crises, as well as new horizons raised by enlarging the membership of the European Union, for the objective of continual convergence to become accepted as the norm. But what we find is that while the EU succeeds in its internal market, trade and competition policies, it fails in macroeconomic policy and in foreign policy, security and defence. While the Union has no general competence, it enjoys some crucial exclusive competences and many other competences that are shared irrevocably between it and its member states. But the EU's central government is weak and lacks full democratic legitimacy. Its constitutional treaties, the basic law, are deficient. A full seventy years since its foundation, the EU is still a hybrid organisation, a historical muddle, prone to controversy and liable to instability. And it may be in danger of losing sight of what European unity is for.

Writing in 2014, Henry Kissinger, then as now a hopeful admirer of the European Union, called it "a hybrid, constitutionally something between a state and a confederation, operating through ministerial meetings and a common bureaucracy—more like the Holy Roman Empire than the Europe of the nineteenth century" [Kissinger p. 92]. Another critic well-disposed to the EU describes the EU as a system of "semi-federalism" [Pagden p. 49]. Some find virtue in this half-state-like nature of the Union: others, including me, regret that our emerging polity is poised uneasily between one thing and another.

Political scientists debate theoretically about the complex character of the European Union in a vast literature which is, alas, incomprehensible to the general reader and, in our view, more or less unhelpful to the practitioners of European integration. In this revisionist book, we are less concerned, therefore, to intervene in scholarly dialogue between

neo-intergovernmentalists and post-functionalists. Clearly, the days are over when Europe's integration progressed by dint of functional spillover from one technical dossier to the next. Neither is integration today the result merely of the political will of the member states, even if expressed through supranational institutions. Based on empirical evidence, we suggest that integration is shaped by many forces at different levels of European society and some powerful external influences. The future of the EU seems best understood and explained as an emerging federal union in which the contest between federalists and their nationalist opponents is the predominant factor and essential driving force.

A revival of federal studies, therefore, would be of the greatest practical benefit to Europe's lawmakers, policy thinkers and public servants [Burgess; Montani; Fabbrini; Pagden]. Understanding the federal paradigm comes naturally to lawyers and business folk who have learned how to operate successfully within the large single market, as well as to workers, students, tourists and pensioners who enjoy the fruits of freedom of movement. Politicians who still stand out against the European project are looking increasingly marginalised and reactionary. EU citizens seem gradually to be awakening to the potential of their new polity. They see the EU's relevance to tackling climate change. They assume that the Union contributes to collective defence against Russian irredentism as well as Islamist terrorism. In the coronavirus pandemic, people looked instinctively to the Union to act regardless of questions of legal competence. Treating the Union as a practical federal concept, and having faith in it politically, should be how Europe lives. It is axiomatic that the more democratic the Union gets to be, the closer it will come to fulfilling its potential.

The Convention and After

Twenty years ago, a Convention on the Future of Europe was summoned under the chairmanship of former French President Valéry Giscard d'Estaing to try to sort out the constitutional muddle. I was a member of the Convention, in the federalist camp. Against us were nationalists of different hues, led by the British contingent, some more overt than others. Many who came to the Convention, especially those representing national parliaments, needed a crash course in the current state of the Union—to learn, that is, how far integration had advanced in recent years when they had not been paying much attention. The imminence of the big enlargement of the Union, due to take place in 2004, with the attendant risks new

member states might pose to the *acquis communautaire* served to concentrate minds wonderfully. Giscard, ever subtle, knew he needed both the federalist and nationalist camps on board if the Convention was to succeed [Duff 2005; Norman].

After a lot of work, the Convention colluded in drafting a new constitutional treaty which was eventually accepted in most particulars by the European Council. It was, of course, a classic European compromise, laced with ambiguity: the federalists could welcome its permissive character and the potential it gave for the EU to continue to develop towards an ever closer union; the nationalists took comfort in those clauses of a prohibitive type that provided brakes that could (and would) be applied to the federal project [Piris 2006]. Nevertheless, had it entered into force, the Constitutional Treaty of 2004 would have rationalised the conferral of competences, made law making more democratic and clarified to a large extent where power lay. The treaty did not establish a federal union, but it pushed integration in the federal direction to such an extent that the UK greatly disliked it. Then in 2005, a referendum in France killed the project—ironically on the grounds that, at least as far as the French left was concerned, it seemed too British.

Two years later, after a considerable hiatus in which some of the more 'constitutional' elements of the Giscard treaty were ditched, a new compromise treaty was signed. The Treaty of Lisbon suffered the indignity of a first referendum defeat in Ireland and was then challenged in various constitutional courts before it could eventually enter into force on 1 November 2009. Although its genesis was troubled, the Lisbon treaty has undoubted merit [Duff 2009]. But the British were still not satisfied and, in 2016, they decided to leave the Union altogether, taking advantage of one of Lisbon's new clauses which allows a member state to secede in a more or less orderly fashion [Stephens; Duff 2022].[4]

Brexit aside, however, the EU has still not exploited the Treaty of Lisbon to the full. In particular, Lisbon installed a number of bridging clauses or *passerelles*, which permit the EU to move its decision-making further in the federal direction.[5] These remain unused. And where sensible options are permitted under Lisbon—for example, to turn the European Commission into a streamlined executive—the status quo has been

[4] Article 50 TEU.

[5] Notably Article 48(7) TEU, the general passerelle.

preferred.[6] Other innovations, such as the procedure for electing the Commission president, intended to make the governance of the Union more democratic, have been bungled.[7] A new mechanism to enforce the rule of law across the bloc has been mishandled.[8] And provisions—'enhanced cooperation'—allowing a federally minded group of member states to move forward further and faster than others have seldom even been attempted.[9]

Two major crises that then befell the Union—the financial crash in 2008–2009 and the migration surge in 2015–2016—were managed pragmatically but did not lead to radical change. The EU is good at patching things up but tends to promise more than it delivers. Efforts to develop a common foreign and security policy have been frustrated. Some of the newer member states are challenging the values on which the Union is founded. Enlargement of the bloc to include new members has ground to a halt. Certain national parliaments, alleging breaches of the treaty-based principle of subsidiarity, are tempted to claw back powers from the European Parliament.[10] The Commission vies with the Council for control of the executive, so that nobody, at home or abroad, really knows who is in charge. Press reports from Brussels are peppered with the language of crisis.

So the muddle persists and governance of the EU remains in flux. New and unexpected challenges come thick and fast while old problems lie unresolved. The question arises, therefore, about whether the European Union can continue to be governed so ineptly or whether a new push for constitutional reform is now needed. In 2021, the three political institutions of the EU just about managed to agree to set up a Conference on the Future of Europe involving certain citizens, chosen at random, in an elaborate exercise of consultation and deliberation. The Conference, which we discuss more in Chap. 9, concluded its business on 9 May 2022. The European Parliament and France's President Macron now argue for a new bout of treaty revision.

This book looks at the reforms needed of each institution if the Union is to fulfil its federal promise. We will make some recommendations for the

[6] Article 17(5) TEU.
[7] Article 17(7) TEU.
[8] Article 7 TEU.
[9] Article 20 TEU.
[10] Article 5 TEU.

constitutional amendment of the Union in the light of the deliberations of the Conference. As the COVID-19 pandemic begins to recede, the prospect of major economic reform advances. Russia's attack on Ukraine, meanwhile, has galvanised the EU into an unprecedented level of integration in the security field. While it is entirely possible that such unity may only be short-lived, the long-term structural problems of the Union will continue. It is these, and remedies for them, that we discuss in the following chapters. To draw the story together, we recommend that another Convention is called to work towards a revised EU treaty in time for 2029, the 50th anniversary of the first direct election by universal suffrage of the European Parliament.

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CHAPTER 2

The Twin Executive

Abstract One of the main flaws in the structure of governance of the EU is the lack of a single effective executive. The two presidents of the Commission and European Council, who risk duplication and confusion, should be merged. The system of rotating the presidency of the Council of ministers should be phased out. The role of the General Affairs Council should be enhanced. The Commission should be reduced in size and restructured to include a law officer and treasury secretary.

Keywords Commission • Council • European Council • presidency • Lisbon treaty • Spitzenkandidat • EU reform • Democratic deficit

The European Commission is the direct descendant of the High Authority that ran the Coal and Steel Community under Jean Monnet. The Commission has to share its powers in three directions: executive power with the Council of ministers and the European Council of heads of state or government; legislative power with the European Parliament; and judicial power with the European Court of Justice. There is no classic separation of powers in the European Union. This makes leadership and democratic accountability difficult to locate, and there is plenty of potential for disruption between the institutions.

The central task of the European Council is to "provide the Union with the necessary impetus for its development" by defining the "general

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political directions and priorities thereof".[1] By contrast, the European Commission "shall promote the general interest of the Union and take appropriate initiatives to that end".[2] Executive power is spread in a fairly complicated, bifurcated way between the Commission and the Council. The Council clings to its executive powers like a limpet, even over decisions, like the imposition of sanctions and the fixing of farm prices and fish quotas, which are pre-eminently of a supranational type and which logically reside with the Commission. While the Commission is responsible for setting the annual and multi-annual work programmes of the Union and for the formal initiation of draft laws, it is much beholden to guidelines set by the European Council. In an anomaly, the European Council (and not the Commission) is tasked routinely with setting the legislative agenda in justice and home affairs.[3]

The European Council is empowered to take legally binding decisions of an executive type—and increasingly does so on big issues, like setting targets for carbon emissions. Although it is expressly forbidden from exercising "legislative functions", the European Council is often tempted to interfere in the law-making process.[4] Indeed, in several circumstances, the treaty prescribes positive recourse to the European Council when a stalemate has been reached at the level of the Council of ministers—the official second chamber of the Union legislature.[5] The heads of government may act as arbiters in disputes when one or more member state objects to the use of qualified majority voting (QMV), for example, in social security or family law matters. The European Council also has a distinct role to play in the budgetary affairs of the Union, in macroeconomic policy, in making senior appointments to the EU institutions, in dealing with breaches of the rule of law, and in all constitutional matters, including enlargement, secession and treaty revision.

Nobody can complain that the heads of the national governments of the member states pay close attention to EU affairs or that they have become an institutionalised part of the EU governing system. But the European Council is often tempted to accrue powers to itself in an ad hoc and unaccountable manner. Enjoined by the treaty to meet only four times

[1] Article 15(1) TEU.
[2] Article 17(1) TEU.
[3] Article 68 Treaty on the Functioning of the EU (TFEU).
[4] Article 15(1) TEU.
[5] Articles 31(2) TEU and 48, 82(3), 83(3) TFEU.

a year, the European Council now meets in formal and informal sessions more than three times as often, sometimes for two days running.[6] Crisis management is always a convenient pretext for a meeting, but unless heads of government are well prepared in advance, scrupulous in respecting the EU's interinstitutional balance and rigorous in following through their decisions, the super-arrogation of the European Council can do more harm than good.

In theory, the Commission has executive responsibility for enforcing EU law, earning it the sobriquet of "guardian of the treaties". It can arraign a non-compliant member state in front of the Court of Justice.[7] If the Court upholds the Commission's complaint that a state has failed to fulfil its obligations under the treaties, the offender can be penalised.[8] Recent research indicates that since Jose Manuel Barroso became President in 2004, the number of enforcement actions taken by the Commission fell steeply.[9] The Commission showed forbearance for the new members which had to settle into the EU regime, but it also curried favour with older member states which had complained at what they saw as the increasing bossiness of the previous Commission under President Romano Prodi.

Keleman and Pavone suggest there has been a trade-off within the Commission between its technocratic legal service which seeks to apply the rules and the college's political arm which is more focussed on extracting policy concessions from the European Council. Their thesis is certainly upheld by the evidence of former Competition Commissioner Mario Monti who wrote a scathing report for Barroso in 2010 about the problems confronted in implementing the internal market provisions.[10] The trend towards a more 'political Commission' was accentuated after 2014 by President Juncker and his powerful secretary-general Martin Selmayr—a trend encouraged by MEPs. In truth, however, if a Commission president becomes too complicit in every decision of the European Council, he or

[6] Article 15(3) TEU. Some of the extra meetings in the pandemic were by video conference. The EU chiefs also meet regularly with international partners, such as the US, Canada, Japan and Eastern Europe countries.

[7] Article 258 TFEU.

[8] Article 260 TFEU.

[9] Daniel Keleman and Tommaso Pavone, *Where Have the Guardians Gone? Law Enforcement and the Politics of Supranational Forbearance in the European Union*, December 2021. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3994918.

[10] Mario Monti, *A New Strategy for the Single Market: at the service of Europe's economy and society*, May 2010.

she will surrender the autonomy the Commission needs to act effectively in its executive capacity to uphold EU law, especially in applying single market legislation uniformly across the Union.

The Two Leader Problem

One of the major innovations of Lisbon, crafted in the Convention of 2002–2003, was the creation of the permanent presidency of the European Council. This was a special favourite of Valéry Giscard d'Estaing who had been primarily responsible for the invention of the summit-level European Council in the first place, back in 1974. Giscard distrusted the system of rotating the presidency of the European Council every six months, especially in the light of the imminent enlargement of the Union to include untried states and untrusted leaders from central Europe. The British government of Tony Blair, disliking the federalist ambitions of small states like Belgium and ever anxious to downplay the importance of the Commission, supported him.

However, as was the case with other reforms proposed by the Convention, the reconfiguration of the European Council presidency was not carried through to its logical conclusion. The General Affairs Council, which is supposed to prepare the meetings of the European Council and follow up on its decisions, is still chaired by each member state in turn for a period of six months.[11] Partly because of the disjointed, rotating and, in terms of quality, variable presidencies, the General Affairs Council has never fulfilled the roles expected of it in servicing the European Council or in coordinating the different sectoral formations of the Council of ministers to fulfil coherently the agreed multi-annual work programme. It would make more sense for the General Affairs Council to be chaired by either the president of the European Council or the president of the Commission (or their deputies).

The president of the European Council is charged with representing the Union externally in foreign and security policy "at his level and in that capacity".[12] He does that in collaboration with the High Representative responsible for the conduct of common foreign and security policy who chairs the Council of ministers of foreign affairs, heads the European External Action Service (EEAS) and is also a vice-president of the

[11] Article 16(6) TEU.
[12] Article 15(5) TEU.

Commission.[13] The role of the Commission president in foreign affairs is less assured, and it has proven difficult to ensure consistency of action and strategic coherence across the whole range of the Commission's international responsibilities. Running the foreign show day by day has been left up to the double-hatted High Representatives, none of whom so far has exactly excelled in that office (it is a difficult job). Foreign governments may be forgiven if they are confused about who speaks for the European Union, when and where. One recalls the excruciating scene in Ankara in 2021 when President Recep Tayyip Erdogan, in his kitschy new palace, enthroned Charles Michel, President of the European Council, next to him and relegated Commission President von der Leyen to sit on a lowly sofa.[14]

The Lisbon experiment in bicephalous governance has not worked out well. If the two presidents say exactly the same thing, there is duplication. If they differ, there is division. The EU was lucky in that Herman Van Rompuy, the first 'permanent' president of the European Council from 2009 to 2014, was by training an applied economist and could concentrate his efforts naturally and skilfully on managing the financial crisis. Van Rompuy's successor, Donald Tusk (2014–2019), had less feeling for the interinstitutional niceties of European integration. His distinctive opinions about the foreign policy stance of the Union sometimes rubbed up against the external policies of the Juncker Commission. And there was tension between the two over dealing with Brexit. Charles Michel, who succeeded Tusk, seems to have less authority than either of his predecessors. Even close admirers of the European Council are hard pushed nowadays to identify with its attempts to define the "strategic interests and objectives of the Union".[15]

The Commission president is an ex-officio member of the European Council and shares with the president of the European Council the job of preparing its meetings. Neither president has a vote in the European Council.[16] The job of the president of the European Council—officially fairly limited—is to chair the body and "drive forward its work", to "ensure the preparation and continuity of the work of the European Council in

[13] Article 18 TEU.

[14] *One is enough: the case for a single presidency of the European Union*, Friends of Europe #CriticalThinking, 9 May 2021.

[15] Article 22 TEU.

[16] Articles 15(2) TEU and 235(1) TFEU.

cooperation with the President of the Commission … on the basis of the work of the General Affairs Council". He shall "endeavour to facilitate cohesion and consensus" and make reports to the European Parliament.[17] The Commission president—who is, in effect, responsible jointly to the European Council and Parliament—chairs the college and runs the administration of the Union's executive. She must manage as best she can her relations with the European Council and Parliament.

At the Convention, a number of us proposed that the two presidencies should be combined into one (and that the single president, or a vice-president acting as deputy, should also chair the General Affairs Council). This proposal was not carried in the Convention for the fairly obvious reason that both the Commission and Council feared a takeover by the other. Some saw the system evolving along the lines of the Gaullist Fifth Republic of France, with an executive head of state served by a prime minister who is eminently sackable when things go wrong. But the idea that the Commission should become the mere secretariat of the European Council was, and is, anathema to federalists. The future government of a federal union can only be built around the stable authority of the supranational Commission and not the intergovernmental European Council on day trips to Brussels with its shifting membership and national preoccupations. The Lisbon treaty attempted to accommodate gradual steps in the federal direction while respecting the current prerogatives of the heads of government. It was indeed a classic European compromise which had to be stress-tested empirically, in real time. His discomfiture in trying to manage the Lisbon system led Juncker gradually to the view that it would be best to unite the two presidencies.[18]

Electing the Commission President

One of the first big tests of the Lisbon compromise came with the search for a new Commission president in 2014. Initially, because of the care taken by Van Rompuy and Barroso, the formula had worked, but a key moment came when both men had to be replaced. The political groups in the European Parliament chose to exploit their Lisbon powers to elect the Commission president on receipt of a candidate nominated by the

[17] Article 15(6) TEU.

[18] State of the Union speech, European Parliament, 13 September 2017.

European Council.[19] In an effort to pre-empt the European Council's choice of candidate, the EU political parties each promoted champions in their election campaigns, one of whom, it was presumed, would have to be acceptable for the heads of government to adopt as their own nomination for the top job. The *Spitzenkandidat* of the largest group of MEPs, the European People's Party (EPP), was the ex-prime minister of Luxembourg Jean-Claude Juncker, a popular federalist of social Christian tendencies. He was duly nominated by the European Council and elected consensually by the European Parliament—which then elected Martin Schulz, the socialist *Spitzenkandidat*, as its own president.

Five years on, however, in 2019 the European Parliament had failed to consolidate its little coup by introducing the anticipated measure of electoral reform—namely the election of a portion of MEPs for a pan-EU constituency from transnational party lists. Without the installation of a truly federal element in the European elections, the Parliament's overpromotion of its *Spitzenkandidaten* looked rather thin. Contrary to the provisions of the Lisbon treaty, no common accord was reached between the Parliament and Council on how to manage the process of the post-election consultations.[20] Tusk had no candidate up his sleeve.

The EPP's *Spitzenkandidat* was Manfred Weber MEP, who perversely had led the opposition to the introduction of transnational lists. But Weber proved unacceptable to the European Council and could not even attract a majority among MEPs. The eventual appointment of the two presidents, Charles Michel for the European Council and Ursula von der Leyen at the Commission, was a messy compromise following an ugly and very public row between the institutions and among the member states. Von der Leyen was only narrowly elected by MEPs.[21] Her relationship with neither the Parliament nor the European Council has been easy. During her term, two member states have tilted dramatically towards illiberal democracy, and another has left the Union altogether. Von der Leyen has been unlucky with her timing. She made an uncertain start to the coronavirus health crisis. The internal cohesion of her college of Commissioners has been under visible stress. And Russia has started a war on the frontiers of the Union.

[19] Article 17(7) TEU.
[20] Declaration 11 of the Lisbon Intergovernmental Conference.
[21] On 16 July 2019, by 383 votes. An absolute majority of 374 was needed.

Quarrelling over the Conference on the Future of Europe has added to the friction. As things stand, there is no way that the electoral reform of the Parliament can be put in place in time for the next elections in 2024. The most we can hope for is that the current Parliament will produce a coherent proposal for transnational lists and that this will prove to be more or less acceptable to the Council in readiness for 2029. We return to this matter in Chap. 4. In the meantime, no serious preparations are underway to smooth the operation of the Lisbon system for the nomination of the next Commission president in 2024. Unless something is done, another constitutional crisis beckons.

A Streamlined Executive

The pragmatic solution to the problem of succession would be simply to allow the new Commission president to chair the European Council and the General Affairs Council. The European Council will continue to play a central function in the governance of the Union, committing as it does all national leaders to the European project. But it needs to become more fully integrated into the institutional architecture, and systematically better led. Jacques Delors, Commission President 1985–1994, provided clear leadership to the European Council in his day—which included the big beasts of Kohl, Mitterrand and Thatcher—and the next Commission president should seek to emulate him. The switch of chairmanship could be implemented in the first instance in 2024 without treaty revision, although it would be necessary to codify the practice in treaty form, once proven, at a later stage. The European Council elects its president by QMV for a term of two and a half years, renewable once.[22] He or she may not hold a national office (which the Commission president, indeed, does not).[23]

A second useful decision in 2024 would be to apply at last the Lisbon Treaty's provision to reduce the size of the Commission to eighteen members from twenty-seven—that is, two-thirds the number of states.[24] A smaller college would be more efficient in asserting supranational authority on behalf of the Union as a whole. The representation of member

[22] Article 15(5) TEU.

[23] Article 15(6) TEU.

[24] Articles 17(5) TEU and 244 TFEU. In theory, the European Council needs to agree to a formula for the strict equal rotation of Commissioners between nationalities, reflecting size and geography. In practice, the matter could be left to the good sense of the Commission President-elect.

states in Brussels is best left to the national ambassadors in COREPER and other manifestations of the Council, such as the Political and Security Committee, and the myriad of Council working groups. The incoming president of the Commission should be empowered to choose a college of talent from candidates nominated by the member states. Those Commissioners-elect will then be subject to auditions by the Parliament followed by a vote of approval for the college as a whole. The practice of hearings for Commissioners-elect has been developed successfully over the years by Parliament and should soon be codified in the revised treaty. Several designated Commission hopefuls have been rejected by MEPs, and others have had their portfolios adjusted after performing poorly at the audition.

A third important innovation in 2024 would be to reinforce the Commission's role as an enforcer of EU law by reconstituting the Commission's quasi-judicial competition directorate-general as an EU Competition Authority at arm's length from the political college. This would protect the supranational authority of the Commission in an area most sensitive to the interests of member states, reduce the risk of overt political interference and bring confidence to stakeholders in the integrity of the internal market process.

Likewise, the college of Commissioners needs its own senior Law Officer whose job it will be to enforce EU law—not least to tighten control of member state spending from the EU budget. National state governments have an Attorney General to head the administration of justice, give objective legal advice and lead the prosecution in important cases (*Garde des Sceaux*). A Commission restructured in this way would be in a better position to protect its legal services from political interference at the hands of the president's chef de cabinet or the secretary-general.

Another innovation aimed at the better integration of external and internal sectors would be the appointment of a member of the Commission in charge of defence policy. This portfolio would include oversight of the European Defence Agency, now solely subject to the authority of the Council.[25] The holder would also be a key figure in the evolution of the European Security Council whose establishment we discuss in Chap. 8.

A united presidency would ensure consistency and continuity across the shared executive of the Union as well as bring more direction and coordination to the affairs of the Council when acting in its legislative capacity.

[25] Article 45 TEU.

The dual-hatted president would be responsible before the European Parliament for the performance of both executive arms, including that of the European External Action Service which already straddles the Commission and Council. A stronger Commission presidency would also be able to take a firmer grip on the forty or so EU decentralised agencies that have spun out of the Commission services in recent years with a variety of regulatory, supervisory, executive or scientific functions.

As power is concentrated in a single president, MEPs would be bound to respond accordingly. In a federal democracy, a more centralised government will inevitably bring forth a stronger federal parliament. The reform would rectify the present situation in which the Commission president is complicit in the decisions of the European Council—even when they may conflict with the positions of her college—but she cannot be held directly accountable for them by the Parliament. It would also prick the conceit that members of the European Council are only responsible to their own national parliaments on an individual basis but not accountable to the European Parliament for their collective performance. The ingrained habit of passing the buck—that is, blaming Brussels when things go wrong and claiming the credit when they don't—should be gradually surpassed by submitting the heads of government to closer EU scrutiny.

The emergence of an effective, unified executive of the Union would clarify for the EU citizen who is responsible for what at the federal level. EU governance would also become less incomprehensible to its international rivals and partners (and their protocol officers). The appointment of a smaller Commission under a stronger president able to command a stable majority in both Council and Parliament would be simplified. A college of Commissioners that included a Treasury Secretary (whom we discuss further in Chap. 6) and somebody responsible for security and defence as well as an autonomous Law Officer would look and feel more like a government. That would be better for democracy.

Reforming the Council

While the Union's critics continue to lay much blame on its supposed 'democratic deficit', the particular cause of trouble is the uneven performance and opacity of the Council as a legislator. The transfer of much of its residual executive power to the Commission would allow the Council of ministers to concentrate on its role as law maker, emerging more obviously as the second chamber of the bicameral legislature. Were the

European Council able, through the offices of its new-style dual-hatted presidency, to take a grip on the ten sectoral configurations of the Council of ministers, law making would be not only quicker than it is now but also more consistent with the overall strategic guidelines of the Union established from time to time by the European Council.

The Council would do well to pay special attention to improving the quality and consistency of its chairmanship. The continuity of the Council's work is hampered in any case by the rapid turnover of personnel as ministers rise and fall from the national office. The present system of six-monthly, rotating presidencies of the different Council formations throws up at random variable, uncoordinated and sometimes incompetent chairs. Too often, as with Slovenia in the second half of 2021, the national agenda of the term presidency is at odds with the agreed work programme of the institutions.

If we scrap the rotating presidency, what should replace it?[26] The Council of foreign affairs ministers is already chaired by the High Representative/Vice-President of the Commission—whom we should rename, as the Convention did (now the British have fled) the EU's Foreign Minister. We have suggested above that the General Affairs Council should be directly linked to the European Council and therefore chaired by the president of the Commission (or his or her representative). Following that logic, the Council of economic and financial affairs (ECOFIN) should be chaired by the EU Treasury Secretary, who would also be a vice-president of the Commission. Other formations of the legislative Council should be free to select their own chair, hopefully on merit, for a period of two and a half years, just as committees of the European Parliament elect their chairs. Clearly, it would be desirable to achieve some informal balance of party affiliation and nationality in the choice of Council chairs—again as the Parliament manages to do.

Defenders of the system of the rotating presidency ignore the fact that the administrations of smaller member states are evidently hard pushed to service the Council presidency once every fourteen years. If there were a technocratic value in obliging each national government to take the helm of the Council, one would expect the conduct of the term presidencies to be systematically higher than they are. Some also claim to be able to manufacture a domestic political advantage when the EU circus comes to town

[26] Article 16(9) TEU.

with razzmatazz: for myself, I doubt the lasting value of folk dancing displays.

A Commission more able and willing to take the political lead and determined to protect its own legislative prerogatives—to initiate and promote draft laws, and then implement them—would help proceedings in the Council. The operation of co-decision between the Council and the European Parliament, which is at the heart of the ordinary legislative procedure, would be much facilitated by the engagement of a more professional Council presidency and a more political Commission.[27] The law-making process would be better paced and more transparent. The current trend of enacting laws at their first reading after 'black box' trilogues among the three institutions does a disservice to good law making. In theory, the result of each informal trilogue should be reported back to the relevant Parliamentary committee, COREPER and the Commission before further steps are taken in the tripartite forum. In practice, such reportage can be less than rigorous. The formal conciliation procedure of the ordinary legislative procedure which has to be convened, if necessary, at the second reading is more open and democratic.

In future, all working documents, agendas and minutes of all legislative meetings should be published. The default switch of the television cameras in the Council chamber should be set to 'on' not 'off'—as they are in any state legislative chamber. Stakeholders in the legislation should be better informed at every stage of the law-making process. Greater transparency will help national parliaments follow the legislative footprints in Brussels and scrutinise draft EU law, as they should, on the grounds of efficacy, subsidiarity and proportionality.[28]

To boost transparency further, many MEPs are proposing that the Council composes itself into a single legislative format when it enacts law, in a formal plenary session, leaving the sectoral formations to conduct trilogues and prepare amendments. Indeed, the idea of a Law Council got some traction in the discussions at the Convention—before being dismissed by the heads of government as being too obviously parliamentary.

Any adjustments of this type to the balance of power and the management of business between the institutions will need to be reflected in

[27] Article 294 TFEU.

[28] Article 12 TEU and Protocol No 1 on the role of National Parliaments in the European Union.

revised Interinstitutional Agreements (IIAs).[29] The treaty already presumes that the Commission, Parliament and Council will find common ground on their respective working methods and be able to manage potential disputes between them. IIAs reflect in as practical terms as possible the interaction between the three institutions' own internal rules of procedure. To protect the interinstitutional equilibrium implicit in the treaty structure, however, it is important that these cooperation agreements, especially where they have a binding nature, are conceived and maintained as genuinely tripartite. Side deals between Parliament and the Commission which let the Council off the hook—for example, in the matter of international agreements—have proved to be more trouble than they are worth. After the Commission and Parliament had developed the concept of a transparency register for some years, the Council only reluctantly agreed to join an official IIA on the mandatory register of lobbyists as late as 2021.

[29] Article 295 TFEU.

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CHAPTER 3

Vote Versus Veto

Abstract At the heart of the case for a federal Europe is the need to extend qualified majority voting (QMV) in the Council and co-decision with the European Parliament. Legislative procedures need simplification and clarification. All special laws of the Council should be replaced by introducing a formal class of organic law. Constraints on the use of the *passerelle* clauses should be eased, along with the relaxation of the provisions on enhanced cooperation to encourage the emergence of a vanguard. The procedures for future treaty revision should be liberalised, bringing them into line with other federal and international organisations.

Keywords EU decision-taking • Qualified majority voting (QMV) • Unanimity • Comitology • *passerelle* • Enhanced cooperation • Differentiated integration • EU law-making • Delegated acts • Organic laws • International agreements • Treaty revision • Referendum

We argue that an EU government led by a united presidency will serve to calm interinstitutional rivalries between the Council and Commission, which share residual executive functions, and to improve accountability between the Council and Parliament, which share legislative functions. It would also encourage the Council to work more by qualified majority vote.

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Put as simply as possible, the Council takes decisions in one of four ways: (1) by strict unanimity between all twenty-seven national governments, often needing endorsement by national constitutional procedures; (2) by consensus, a form of relaxed unanimity, sometimes helped by the constructive abstention of the minority; (3) by a simple majority vote of its members; or (4) by qualified majority vote. There are two types of qualified majority voting (QMV): the first requires a threshold of 55 per cent of the member states comprising 65 per cent of the population; the second—'super QMV'—needs 72 per cent of the states comprising 65 per cent of the population.[1]

A blocking minority of at least four states can suspend QMV and push the matter up to the European Council, composed of heads of state or government, for further discussion. Nothing is said in the treaty about what should happen at that stage in the European Council, paralysis being the default. I propose that where it has to act as an arbiter of a stalemate dispute at the level of the Council of ministers, the European Council, within a four-month period, should be obliged to determine the issue by super QMV.

Each of the five revisions of the founding Treaty of Rome—Single European Act (signed in 1986), Maastricht (1992), Amsterdam (1997), Nice (2001), and Lisbon (2007)—extended the number of decisions that can be taken by QMV and reduced the scope of the national veto. This gradual process reflects the basic federal logic of the Union. But widening the scope of QMV has always been strongly resisted by eurosceptic governments which, although committed by treaty to the endeavour of an ever closer union, remain wedded to intergovernmental methods and suspicious of the extension of supranational authority. Conservative governments have assumed that keeping the national veto preserves a semblance of national sovereignty, although they rather overlook the fact that if they keep the veto, other states will do so too. Nonetheless, on the battleground between federalists and nationalists, QMV is totemic. QMV proved so unpalatable to the British that they left the Union altogether.

[1] Article 238(3) TFEU.

Reaching Consensus

The Lisbon Treaty allows the Council to act by QMV in the field of common foreign and security policy once the European Council has decided what the Union's strategic interests and objectives are to be.[2] It also provides for the constructive abstention of a state which, while not being obliged to apply a decision, accepts that the decision commits the Union. Unfortunately, such consensual arrangements are rarely deployed.[3] Instead, the case for unanimity in foreign policy is made by Charles Michel:

> In foreign policy unanimity is required [sic]. This issue of unanimity is, as everyone knows, regularly discussed. And my opinion on it is nuanced. It is true that requiring unanimity slows down and sometimes even prevents decision-making. But this requirement pushes us to work unremittingly to unite the Member States. And this European unity is also our strength. Unanimity promotes a lasting commitment by the 27 countries to the strategies which have been developed together. So I wonder: would abandoning unanimity really be such a good idea?[4]

Michel believes that extending QMV in foreign policy will reduce the pressure on a member state to respect a decision it dislikes. He speaks as if taking a vote precludes debate. He prioritises unity over action. This is a pity.

Worse, however, is the Council's reluctance to use QMV in legislative matters even when the treaty requires it to do so. The treaty lays down intricate decision-making procedures whose intention is to establish a delicate interinstitutional balance characteristic of federal structures. There are three outstanding examples of co-decision: the ordinary legislative procedure;[5] the rules for making the budget;[6] and the process for negotiating an international agreement.[7] Failure to observe these rules scrupulously unsettles the equilibrium of EU governance and sows distrust between the Brussels institutions and among the member states.

[2] Article 31(2) TEU.

[3] Article 31(1) TEU. A recent exception to the rule is the abstention of Austria, Ireland and Malta in the decision to send weaponry to Ukraine.

[4] Speech to Bruegel, 28 September 2020.

[5] Article 294 TFEU (15 paragraphs).

[6] Article 314 TFEU (10 paragraphs).

[7] Article 218 TFEU (11 paragraphs).

All these procedures rely on the full use of QMV. Abandoning QMV and retreating to unanimity only serves to protect and exaggerate special interests. In the world of diplomatic trade-offs, unanimity allows one dossier to be taken hostage by another. Even the shadow of an eventual Council veto can be enough to bury a file before the informal trilogue between the three institutions gets going. Under unanimity, EU law making is laborious—resulting too often in tardy, minimalistic, compromise legislation that has a slight impact in the real world. Perpetual quest for unanimity breeds frustration and dissent. The highest common factor achieved by unanimity is always less than the lowest common denominator readily available via QMV.

QMV speeds up decision taking in the Council. The practice of regular voting imbues a democratic climate and helps the institutions articulate the general interest of the Union as a whole. Constructive abstention in any Council vote is permitted and should be deployed regularly on items of business, as can be the case, of little account to one or two member states.[8] In some cases, however, it can be rather useful for a government to be outvoted in the Council, providing a defensive shield against a hostile national press or parliament back home. QMV tames bullying by bigger member states and prevents smaller states from holding the rest to ransom. The balance between more and less populous states is always a sensitive issue, of course, and we will return later to that question when we also discuss the reweighting of seats in the European Parliament.

Comitology

We discussed earlier how many of the Council's residuary executive functions, such as the setting of farm prices under the Common Agricultural Policy, should be transferred to the Commission.[9] An elegant way of doing this would be to allow the Council to block or amend a proposal of the Commission by a qualified majority vote. In cases where the dissenting threshold is not reached in the Council, the Commission's original proposal will stand. 'Reverse QMV' shifts the balance of advantage from the Council to the Commission. Its practice is becoming steadily more common, as we see in certain economic policy decisions and in procedures

[8] Article 238(4) TFEU.
[9] Article 43(3) TFEU.

known as 'comitology' through which the legislature delegates executive functions to the Commission.

In an attempt to rationalise the heap of expert and advisory groups of national civil servants which make up comitology, the Convention and then the Lisbon treaty installed two types of delegated power on the Commission. The first type comprises 'delegated acts' that empower the Commission to amend certain non-essential elements of an original directive or regulation subject to there being no objection from the Council (acting by QMV) or Parliament (acting by an absolute majority of its deputies) within a specified deadline.[10] Delegated acts are akin to tertiary legislation of general application. The second method of delegation consists of acts that confer on the Commission powers to implement a regulation uniformly within the member states under national supervisory control.[11] Examination of the delivery by the Commission of its 'implementing acts' is farmed out to a variety of comitology committees composed of representatives of the member states. Parliament has no co-decision over implementing acts. Naturally, Parliament prefers the use of delegated acts, and the Council of implementing acts.

Although an acquired taste, drawing the distinction between delegated and implementing acts goes to the heart of the matter of defining the Union's executive. How to choose is elaborated in an Interinstitutional Agreement on better law making of 2016.[12] But all is not so simple. The choice between the two turns on whether the executive act amends or supplements the primary law or whether it does not—a matter that can often only be tested once the executive action is underway [Craig and de Burca 2020, pp. 151–159]. However, the precise purpose, scope and duration of a delegated act have to be explicitly defined in the original law enacted according to the ordinary legislative procedure. Likewise, in an implementing act, the original regulation must lay down in advance the rules concerning the control mechanism to be used by the member states. How controversial the implementation of EU law can be is vividly demonstrated by the row on the taxonomy regulation on gas and nuclear energy where the route of the delegated act was chosen.[13] As soon as some

[10] Article 290 TFEU.
[11] Article 291 TFEU.
[12] Official Journal L 123, 12 May 2016.
[13] See https://ec.europa.eu/commission/presscorner/detail/en/IP_22_2

members of the Council woke up to the far-reaching nature of the Commission's green taxonomy proposal, a fierce reaction set in.

The *Passerelles*

At the last general revision of the treaties, the time was not ripe for a wholesale move from unanimity to QMV. That is why the Lisbon Treaty introduced a transitional device to permit future advances in the federal direction to be made as and when political will coalesces behind such change. The *passerelle* or bridging clauses allow the European Council to decide, by unanimity, and subject to a veto by any single national parliament, to shift a decision-making procedure from unanimity to QMV or to replace a special law of the Council (where the European Parliament is only consulted or given the right of passive consent) by an ordinary law co-decided by Council and Parliament. To date, none of these *passerelles* has been crossed.

Furthermore, in the retrograde step back from the Constitutional Treaty of 2004 to the Lisbon Treaty of 2007, an extra clause was added that expressly proscribes the use of the *passerelle* to modify four key articles:[14]

- the decision on the system of revenue ('own resources');[15]
- the decision on the multi-annual financial framework (MFF) of the Union;[16]
- the decision to use the 'flexibility clause' (which allows special measures to be introduced to achieve treaty objectives where the treaty does not provide the necessary powers to do so);[17]
- the decisions necessary to suspend the voting rights of a member state found in breach of the rule of law.[18]

On these issues, therefore, the Council continues to be encumbered by unanimity, with the Parliament playing a subsidiary role. If the Union is to escape from its confederal entanglement, all these prohibitions on the

[14] Article 353 TFEU.
[15] Article 311 TFEU.
[16] Article 312(2) TFEU.
[17] Article 352 TFEU.
[18] Article 354 TFEU.

scope of the *passerelle* should now be dropped. Operation of the important general *passerelle* clause should itself be shifted from unanimity to super QMV.[19] And the unilateral veto of any one national parliament on the use of the *passerelle* should be replaced by the threshold of one-third of all national parliaments (that is, nine) in conformity with the EU's normal subsidiarity procedures (by which national parliaments can question the passage of a draft EU law on the grounds of a breach of the subsidiarity principle).[20]

Organic Laws

As the Union modifies its decision-making procedures in a federal direction, it would be well advised to institute a new class of organic law applicable for certain specified and sensitive cases. Organic laws would be subject to the passing of higher qualified majority thresholds in both Council and Parliament.[21]

In the first case, organic laws would replace all the current special laws of the Council that oblige ministers to act unanimously while they avoid co-decision with the Parliament. The persistence of special laws of the Council is particularly deleterious in the making of a common policy in the field of indirect taxation and over the approximation of national laws and regulations affecting the functioning of the internal market.[22] Organic laws should also replace those special laws of the Council where differences between national practice are abnormally large, for example, concerning harmonisation of family law with cross-border implications;[23] some aspects of social security and worker protection;[24] and the choice and structure of energy supply.[25]

Furthermore, organic laws should be introduced for issues of particular delicacy that tread directly on to the formerly sovereign territory of the

[19] Article 48(7) TEU.

[20] Protocol No 2 on the application of the principles of subsidiarity and proportionality.

[21] Under Article 354 TFEU Parliament is already required to act by an absolute majority and by two-thirds of the votes cast in implementing Article 7 TEU. And according to Article 314(7)(d), Parliament acts by an absolute majority and by three-fifths of the votes cast to enact its version of the annual budget against the wishes of the Council.

[22] Articles 113 and 115 TFEU.

[23] Article 81(3) TFEU)

[24] Article 153(2) TFEU.

[25] Article 192(2) TFEU.

states and/or have serious budgetary, security or constitutional implications. These would include the following:

Article 7(2) TEU on a serious and persistent breach of the rule of law by a member state
Article 14(2) TEU on seat apportionment in the European Parliament
Article 19 TFEU on measures to combat discrimination
Article 22 TFEU creating new citizenship rights
Article 77(3) TFEU on the policing of national border controls
Article 89 TFEU on cross-border police operations
Article 126(14) TFEU on the terms of the stability and growth pact
Article 223 TFEU on the electoral law of the European Parliament
Article 311 TFEU on the own resources decision
Article 312 TFEU on the multi-annual financial framework
Article 329(2) TFEU on enhanced cooperation in foreign and security policy
Article 341 TFEU on the location of the seats of the institutions
Article 342 TFEU on the rules governing the languages of the institutions
Article 352(1) TFEU governing the use of the 'flexibility clause'.

The introduction of quasi-constitutional organic laws to the hierarchy of norms will enhance the simplicity and transparency of law making while ensuring important political guarantees for certain states' rights whose radical alteration would affect the balance of power within the Union.

Enhanced Cooperation

Over the years, as the number of states steadily increased, it became fashionable to countenance a more differentiated approach to integration [Piris 2012]. Constructive provisions were installed in the treaties to allow for 'enhanced cooperation' between member states wishing to go forward further and faster in areas of non-exclusive competence, maximising the use of QMV, while leaving the rest to catch up later.[26] However, the integrationist group (of at least nine states) can advance only "as a last resort" when consensus in the wider Council is unachievable, and where the essentials of the internal market are not to be distorted.[27] In the area of

[26] Article 333 TFEU.
[27] Articles 20 TEU and 326-334 TFEU.

judicial cooperation in criminal law, and in police cooperation, enhanced cooperation is propelled forward automatically if blockage persists in the Council as a whole.[28] The establishment of the office of the European Public Prosecutor was accelerated in this way (by twenty-two states).[29]

In practice, however, there has been strong resistance to using these enhanced cooperation rules elsewhere, and to date they have only been deployed to advance the matter of a patents' court, to cater for divorce law and to smooth property rights for international couples. The Union seems to have lost the political will to develop internal differentiation much beyond the Schengen area and eurozone. Whenever the Commission proposes the wider use of enhanced cooperation, as in the harmonisation of taxation policy, there is a procedural row. The Council has clung to unanimity and one-size-fits-all proposals even when it has been unreasonable to do so. Coalitions of willing states have been slow to form. Therefore, to encourage enhanced cooperation among the more progressive member states, the "last resort" condition should now be dropped. And the Commission should be less finickity in its assessment of when the formation of a core group affects adversely the operation of the internal market.

In the field of common foreign and security policy, too, there has been a reluctance to mandate (by unanimity) a small group of states to act on behalf of the Union as a whole.[30] This has led to the formation of ad hoc groups outside the Union framework, lacking the kudos and cost-efficiency involved in utilising EU methods and reducing the incentive for more cautious member states to participate. The so-called Normandy format, where France and Germany freelanced without an EU mandate in talks with Russia and Ukraine, allowed President Putin ample scope to sow the seeds of division among the EU partners. In the area of security and defence policy, a tentative beginning has been made to deepen military integration in the form of permanent, structured cooperation in defence (PESCO), but the original intention to make the defence core group an exclusive club of those states able and willing to fight has been diluted in practice.[31] We return to PESCO in Chap. 8.

[28] Articles 82(3), 83(3) and 87(3) TFEU.
[29] Article 86(1) TFEU.
[30] Article 44 TEU.
[31] Article 46 TEU.

International Treaties

Another source of tension between the vote and the veto concerns the decision-making procedures to conclude and ratify the EU's international treaties. In principle, those procedures accord with those laid down for the internal order of the Union. So a simple trade agreement—EU exclusive competence—can be agreed by QMV and ratified by the European Parliament without recourse to national parliaments.[32] But an international agreement that includes provisions, for example, on labour or environmental standards—EU shared competence—may be ordained by the Council to be a 'mixed agreement' and therefore subject to more onerous decision-making involving unanimity and national ratification. Similarly, broad association agreements and those containing an element of cooperation in common foreign and security policy are also subject to the heavier procedure.[33] Some member states police the mixity boundaries with rigour—and none more so than France which has a strongly protectionist stance when it comes to cultural and language issues. For such matters, unanimity is required in Council.[34]

This leads to trouble. After six years of negotiation, the (fairly simple) Comprehensive Economic and Trade Agreement (CETA) with Canada was concluded in 2014 and entered into force on a provisional basis in 2017 pending its full ratification by the twenty-seven member states. In federal Belgium, the constitutional processes included the assent of the regional parliament of Wallonia based in Namur which was, for reasons of its own, hostile to the agreement. In 2019 the Court of Justice delivered a favourable opinion on CETA's investor-state dispute resolution—but not all EU states have yet ratified the treaty. In the light of experience, the Commission and European Parliament, helped along by the Court of Justice, have tried to limit the scope of mixed agreements so as to avoid such paralysis. As comprehensive, portmanteau, mixed agreements are taking years and years to negotiate and ratify, they are going out of fashion. If adopted, our proposal to use the *passerelle* to switch decision-making to QMV should in any case ease the problem for the future.

[32] Article 218(6) TFEU.
[33] Article 218(8) TFEU.
[34] Article 207(4)(a) TFEU.

Unloosing the Treaty Straitjacket

The Union has not only tied itself up in knots with respect to secondary legislation but to primary law also. Unlike other federal states, notably the US, or international organisations, such as the United Nations, the World Health Organization or the International Labour Organisation, the EU's constitutional treaties cannot be changed one jot or tittle without rigid unanimity between governments, followed by ratification in every member state—which may involve the cost and trauma of a national referendum.[35] Lisbon introduced a slightly simplified revision procedure for those parts of the treaties which deal with the internal policies of the Union (but do not confer new competences on the Union), but the European Council still has to act only by unanimity and national ratification by all still applies.[36]

These improbable conditions placed on treaty revision, even of a minor kind, turn any decision to embark on reform into a drama. By continuing to insist on unanimity to change the treaties, the EU has tied itself into a straitjacket. It has fallen victim to historical fallacy. Thus, trapped in confederate mode, the bloc looks increasingly antiquated.

The good news is that, under the Lisbon Treaty, future treaty amendment now involves the calling of a Convention (at the insistence of the Parliament) before the usual intergovernmental conference (IGC) takes place.[37] The Convention introduces an important new dynamic to the constitutive process. Whereas the IGC needs unanimity among the national governments, the Convention works by achieving consensus among all its component parts—member states, the Commission, MEPs and MPs. In the Convention, governments cannot just say no: good ideas surface by force of argument; bad ideas sink. The innovation of the Convention suggests that the treaty revision process is not quite as immutable as the nationalists would like.

The Conference on the Future of Europe is agreed on the need to amend the treaties. It is a pity therefore that it has not also been able to suggest a modification of the procedure on how to change the treaties in the future. I suggest that future treaty amendments with respect to the internal policies of the Union should be adopted, after referral for an

[35] Article 48(4) TEU.
[36] Article 48(6) TEU.
[37] Article 48(3) TEU.

opinion to the European Court of Justice, by a vote of three-quarters of the states and two-thirds of members of the European Parliament. For the nostalgic, this would effectively resurrect the flexibility displayed in the first and most federal of the EU treaties, the Treaty of Paris, which established the European Coal and Steel Community in 1952.[38]

As far as the revision of the more 'constitutional' articles of the treaties is concerned, the states will prefer to continue acting by common accord. But the drafting process can be made more open, fluent and democratic by enhancing the role of the Convention. A citizens' assembly, learning from the experiment of the Conference on the Future of Europe, could usefully accompany the Convention process. I would also recommend that formal proposals sent from the Convention to the IGC should be allowed to stand unless they are reversed at the IGC with the heads of government acting by QMV.[39]

Moreover, and in any case, all future treaty amendments should enter into force as soon as they are agreed by the European Parliament and ratified by, say, four-fifths of the member states. This important reform would bring the Union more into line with all other federal states or international organisations.[40] It would relieve the Union of the threat of a unilateral veto by one or two nationalistic national parliaments or disjointed, stray referendums. The pitfall of national referendums might also be disadvised by the inclusion in the treaty of rules laying down the conditions for an occasional pan-EU referendum, to be deployed from time to time to sanction major constitutional change [Vibert].

In a federal union, voting is normal and vetoing rare. The recommendations made here give effect to the wishes of those in the Conference on the Future of Europe who want a more fair, modern and democratic Union. Those who would resist them may have to live with the consequences of a paralysed Union when the next political crisis confounds its institutions and divides its member states.

[38] Article 95 ECSC.

[39] This would normally require 72 per cent of the states (i.e. 20) representing at least 65 per cent of the population.

[40] One recalls that amendments to the US Constitution need (only) a two-thirds majority in each House of Congress plus ratification by three-quarters of the States.

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CHAPTER 4

Parliamentary Europe

Abstract Development of EU democracy is hampered by the lack of proper political parties at the federal level. To rectify this, electoral reform of the European Parliament must introduce transnational lists for a portion of MEPs. Treaty rules for the election of the next Commission president should be respected by the Parliament. A formula should be agreed upon for seat apportionment in the Parliament, and the federal principle of degressive proportionality should be extended to the voting system in the Council. A limited right of initiative should be granted to MEPs, alongside internal reforms. Both the European Parliament and national parliaments should reinforce the scrutiny of their respective executives.

Keywords Electoral reform • Transnational lists • Political parties • Voting systems • Degressive proportionality • European Parliament • Council • National parliaments • Right of initiative • Subsidiarity • Accountability • Transparency • Scrutiny procedure

I have been making the case for the European government up above the level of the nation-state. Proposed reforms focus on a concentration of executive authority on a restructured Commission and the better management and democratisation of the Council. The emergence of a more discernible and accountable federal government also calls into being a more powerful and distinct federal parliament. It is unconscionable, for

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example, that the European Parliament should be given powers to tax EU citizens without first acquiring full democratic legitimacy. It has been a principle long held in Europe that taxation without representation is coercion.

The assumption by the Parliament of greater responsibilities implies a review of the quality of its own representative capability as well as improvements to its working methods. This will not be easy: we know that self-criticism does not come easily to parliaments, and sitting deputies tend to favour the status quo over constitutional reform of any kind that threatens their re-election. Not that MEPs have always been reticent in seeking more powers for themselves, usually to the irritation of the Commission, Council and national parliaments. More than forty years since it was first directly elected by universal suffrage, the European Parliament has accrued many official functions comparable to those of an established parliament of a nation-state. Through every round of treaty change, the evolution of the Parliament has kept pace with the increasingly state-like character of the Union. Indeed, there has been something of a regular trade-off between more powers for the Parliament and more powers for the European Council.

Since the entry into force of the Lisbon Treaty in 2009, Parliament has worked hard to exploit its new powers. It has played a constructive part in responding to the financial crash, in legislating to combat climate change and regulate the digital era, and, latterly, in assisting economic recovery from the pandemic. On constitutional matters, however, its touch has been less assured. Parliament's informal political authority has not developed commensurately alongside its formal powers. It is widely held, and not just among its detractors, to have something of a legitimacy problem. One may hope that their experience in the Conference on the Future of Europe will shake Members of the European Parliament out of any complacency about their own institution and ready themselves to be proactive in the next round of the Union's constitutional development.

The Problem of Party

Nobody really likes political parties, but we know they are an indispensable prop to healthy representative democracy. Political parties are the conduit between citizen and authority, defining political choice for the electorate and establishing career paths for the elected. They sharpen partisan contests and conduct arbitrage within and between parliamentary chambers. In a federal system, political parties play additionally important

roles both of assisting transversal cooperation among like-minded political forces in the member states and of facilitating vertical coordination between the different tiers of multilevel governance.

In top EU circles, too, party affiliation has begun to matter in the permanent three-way negotiation between Parliament, Commission and Council in the matter of law making and jobs. Informal party caucusing takes place within the college of Commissioners and before meetings of the European Council. Party caucuses played a big role in the Giscard Convention, and they will do so again in the next.

So the EU needs proper political parties if it is to progress on its federal path. The prototype European parties created at the time of the first direct elections in 1979 have not evolved much beyond being tentative confederations of national parties whose main job is to minimise or disguise differences between their national members during a European election. They are forbidden by national and, absurdly, EU laws from campaigning directly in those elections.[1] Very few citizens have taken up the offer of direct individual membership of a European party. Candidates for the European Parliament are selected, financed and deselected by national parties—most of which, being congenitally preoccupied by national issues, are usually ignorant about and often jealous of the ever-growing European dimension of politics. As we shall discuss below, the bloc's national parliaments attempt to network with each other for the purpose of subsidiarity checks. But it is virtually impossible for such disparate parliaments and their homegrown political parties to take a collective view of the general European interest.

In theory, "political parties at European level contribute to forming European political awareness and to expressing the will of the citizens of the Union".[2] The European confederations of national parties are even funded quite handsomely from the EU budget. But in real life, these EU parties are marginal to the business of EU politics, having no formal power and little influence. We have noted in Chap. 2 how the parties' attempt to impose their own *Spitzenkandidaten* on the European Council has failed. The party groups which run the European Parliament do not hold themselves to be accountable to their respective EU parties. For MEPs, belonging to a parliamentary group is not contingent on membership of an EU

[1] Article 224 TFEU.
[2] Article 10(4) TEU.

party, whose enthusiastic policy papers often bear little resemblance to the stance of the associated groups in Parliament.

Proper federal parties will not emerge courtesy of some natural law but only when they compete against each other for votes and seats at a European Parliamentary election. There is no such competition today. Having no supranational element, the five-yearly elections to the European Parliament remain twenty-seven separate and disconnected national contests. Voters can be blithely ignorant of the personalities and transnational issues at stake. It is hardly a surprise that turnout is low. People do not vote for parliaments, however respectable those parliaments may be, but they vote for or against political parties and their leaders who attract or repel them. The absence of party makes it even difficult for the hardcore Brussels media to distinguish and report on the pan-EU dimension of a European election campaign.

Electoral Reform

Parliamentary Europe is in urgent need of a democratic jolt in the shape of electoral reform. The aim, long discussed, is to inject a genuinely federal dimension into the elections.[3] The key feature of the reform is to enable a number of MEPs elected from transnational party lists to sit for a pan-EU constituency. Initially, at least, the portion of federal MEPs can be modest, but it must be large enough to render the elections truly European by scale to build a significant cadre of parliamentary leaders who are motivated more by party than by nationality.

Every voter in the European elections will be given a second ballot for the federal list in addition to the one they already cast for their national or regional list. Unlike their first vote, their second for the transnational list will have truly equal value across the Union. Some voters will be nonplussed by the gift of the second ballot but many more will come to enjoy such a concrete expression of EU citizenship—especially those disenchanted by their own lacklustre national parties. The arrival on the scene of European federal parties will expand options and horizons for the electorate. Transnational lists will also be an effective vehicle for protest

[3] Full disclosure: the author was the Parliament's rapporteur on electoral reform from 2009 to 2014. See Maria Diaz Crego, *Transnational electoral lists: Ways to Europeanise elections to the European Parliament*, EPRS Study, PE 679.084, February 2021.

votes—for example, to enable Greeks to vote for or against German candidates.

The central purpose of the proposed reform is to promote the representation of a political party over that of the member state. However, it is natural that smaller states may fear that only candidates from big countries will make it into Parliament from transnational lists. To ensure diversity, therefore, the lists must be drawn from a substantial number of member states—say, at least two-thirds. Candidates should be ranked on lists preordered by the EU political parties so that, for example, no more than two persons of the same nationality appear in any cohort of ten federal candidates. Successful EU parties will in any case need no encouragement to compose lists that fully reflect the diversity of Europe's citizenry in terms of age, gender, ethnicity and religion, as well as nationality.

Such electoral reform will fulfil the Treaty of Rome's original injunction that Parliament should be elected by a uniform electoral procedure.[4] It will also embody the Treaty of Lisbon's formulation that Parliament "shall be composed of representatives of the Union's citizens" (and not, as in previous treaties, of "the peoples of the States brought together in the Community").[5]

To give effect to these changes, however, requires a proposal from the Parliament, unanimous agreement in the Council, the consent of an absolute majority in the Parliament, followed by the endorsement of national parliaments and implementation in each member state (sometimes needing primary legislation).[6] It is also desirable to adjust the treaty itself to insist that European elections are conducted "in a free, *fair* and secret ballot".[7] Electoral reform is a complex package, including the setting up of an autonomous EU Electoral Authority to oversee the registration of candidates, the conduct of political parties, the federal ballot and the count. The Electoral Authority should be tasked with protecting the integrity of Europe's democratic process against foreign interference.

[4] Article 138 TEC.
[5] Article 14(2) TEU and Article 137 EC.
[6] Article 223(1) TFEU.
[7] Article 14(3) TEU.

Breakthrough

Although transnational lists have been canvassed by federalist MEPs since 1998, their introduction has been blocked by a coalition of nationalist and conservative opponents. The naysayers argue that no other federal state has adopted transnational lists. They complain that MEPs elected on a federal basis would be unknown to the electorate (as if MEPs elected within their states are very well known). They worry about installing two classes of MEP (which rather neglects the current twenty-seven varieties). In Germany, nobody grumbles about having two types of parliamentarian elected by either local or party ballot: as in the Bundestag, once elected every MEP will enjoy exactly the same rights regardless of constituency.

Brexit removed the UK as an insuperable obstacle to electoral reform as well as provided a surplus number of ex-British seats that can be used for transnational lists. In 2018, French President Emmanuel Macron persuaded the ultra-cautious German Chancellor, Angela Merkel, of the case for transnational lists.[8] A Franco-German non-paper in 2019 foresaw transnational lists as a priority question for the Conference on the Future of Europe, which duly signalled support. By early 2022, the larger groups in the European Parliament, including the EPP, reached a political agreement.[9] On 3 May, the Parliament voted by 323 to 262 to send a formal proposal for a regulation to the Council for a transnational list of 28 MEPs.[10] Much work is now needed if the reform is to be completed in time for the 2029 elections, marking the fiftieth anniversary of direct elections.

Before the introduction of the new voting system, however, Parliament needs to drop its attempt to impose its own *Spitzenkandidat* for the Commission presidency against the wishes of the European Council. Top MEPs in the elections of 2024 should rather seek advancement within the hierarchy of the House. Parliament should respect the EU's implicit inter-institutional balance and stick to the treaty rules—which give the job of nominating the Commission president to the European Council and the right of his or her election only thereafter to MEPs.[11] It will be tactical, as

[8] Meseberg Declaration, 19 June 2018.

[9] Midterm Agreement on Political Priorities of the EPP, S&D and Renew Europe groups.

[10] Proposal for a Council regulation on the election of the members of the European Parliament by direct universal suffrage, (Rapporteur, Domènec Ruiz Devesa MEP), A9-0083/2022.

[11] Article 17(7) TEU.

well as tactful, for MEPs to take more seriously their treaty-given right to reject the nominee of the European Council, voting by an absolute majority. In that case, the European Council has one month, acting by QMV, to come up with a better candidate. In the grander scheme of things, it is more conventional for a parliament to block a government appointment than the other way around.[12]

There will always be those who hanker after a US-style direct election of an EU president. That might come one day. But there can be no EU-wide election (or for that matter a pan-EU referendum) without serious federal political parties. And there will only be serious federal political parties once they have been obliged to fight each other on transnational lists for the European Parliament. Before jumping to a presidential regime, parliamentary Europe needs to build solid party foundations. The Union's solution to the problem of democratic representation need not ape other federal unions; instead, it can be distinctively and proudly European—something that could be a global pioneer in shaping the paradigm of post-national federal democracy.

Representing the Citizen

The treaty declares quite simply, first, that the Union "shall observe the principle of equality of its citizens";[13] second, that "citizens are directly represented at Union level in the European Parliament";[14] third, that "every citizen shall have the right to participate in the democratic life of the Union",[15] and fourth, that Parliament "shall be composed of representatives of the Union's citizens".[16] EU citizenship has a very specific definition under the treaty and excludes those who are not nationals of an EU state. One of the principal civic rights of an EU citizen, indeed, is to vote and stand as a candidate in elections to the European Parliament.[17] So far so good.

However, we also find that the concept of degressive proportionality is introduced in the rules concerning the composition of the European

[12] If MEPs insist on maintaining their *Spitzenkandidat* coup, the treaty must be amended to reflect that.

[13] Article 9 TEU.

[14] Article 10(2) TEU.

[15] Article 10(3) TEU.

[16] Article 14(2) TEU.

[17] Article 20(2)(b) TFEU.

Parliament which say that "representation of citizens must be degressively proportional".[18] This oxymoronic formula, which is common to federations, requires some explanation. In the German Bundesrat, for example, each Land is given a graduated weighting of between three and six votes despite the vast disparity in population numbers.[19] In the context of the European Union, the notion of degressivity is introduced in order to manage the large disequilibrium in terms of population size between Malta, the smallest, and Germany, the largest member state. At the Convention and thereafter in the Treaty of Lisbon, it was agreed that the more populous states would accept to be slightly under-represented in the Parliament so that the less populous states could be better represented.[20] Thus an MEP from a smaller state represents fewer people than an MEP from a larger state. That being so, the vote of every citizen does not really have an equal value.

We should note the treaty's stipulation on the minimum and maximum representation. The six MEPs for the smallest state (then Luxembourg) were agreed in order to allow a fair spread between Luxembourg's three political parties. The ceiling of ninety-six MEPs for Germany was accepted by the German government of Angela Merkel in her valiant efforts to bring the EU's constitutional wrangling to a conclusion. Neither six nor ninety-six has the power of magic, and both thresholds could be reopened at the time of a future treaty revision. As could the question of the overall size of the House (751). But not now.

As we have seen, the treaty, purposedly, gives the right of initiative on electoral reform to the Parliament. This right is extended to the business of reapportioning parliamentary seats among the member states—a task which will in any case have to be undertaken afresh when transnational lists are introduced for a quota of federal MEPs.[21] In the past, the apportionment of seats between states has been an ad hoc, and frequently unseemly, scramble. To stabilise the Parliament and to ensure a fair distribution of MEPs between states of different sizes according to the treaty-based principle of degressive proportionality, an arithmetical formula for

[18] Article 14(2) TEU.

[19] The smallest Land, Bremen, has 0.68 million people; the largest, North-Rhine Westphalia, has 17.9 million.

[20] The latest official definition of degressive proportionality is found in Council Decision (EU)2018/937, Official Journal L 165I, 2 July 2018.

[21] Article 14(2) TEU.

the regular and systematic reapportionment of seats needs urgently to be agreed upon.

The calculation of seat apportionment between the states respecting degressive proportionality is based on the UN-acknowledged gold standard of the total resident population, as collated by Eurostat, whether those counted are EU citizens or not. In recent years there has been large-scale migration of citizens across the EU taking advantage of the freedom of movement, mainly from east to west. The EU has been firm in sticking to the UN formula.[22]

The rationalisation of the system for composing the Parliament should reassure the German Federal Constitutional Court which, amongst others, criticises the present haphazard carve-out of seats. In its judgment on the Lisbon Treaty, the German Federal Constitutional Court, which sits in Karlsruhe, noted that because the votes of all EU citizens are not strictly equal in value, the European Parliament lacks the full legitimacy of being democratically elected.[23] Parliament is merely "a representative body of the peoples in a supranational community, characterised as such by a limited willingness to unite". It is important, then, that the next phase of constitutional reform includes a methodical adjustment to the matter of seats.

The optimal formula would be to give every state five seats and allocate the remaining seats proportionately to the size of the population, using the divisor method with upward rounding.[24] This system, known as CamCom, would meet all the requirements of the treaty and allow for the smooth redistribution of seats every five years to take account of demographic shifts, any changing number of member states and any changing quota of transnational MEPs. The European Council hopes that the formula Parliament will propose (and it must agree) will reapportion seats in an "objective, fair, durable and transparent way".[25] Unfortunately, Parliament has yet to act on this matter.

[22] The question of where people should be counted has been raised by MEPs from Fidesz who claimed that Hungarians living in their post-First World War diaspora of Romania, Slovakia and Croatia should be added to Hungary's total electorate.

[23] BVerfG 2 BvE 2/08, 30 June 2009.

[24] Geoffrey R. Grimmett, 'European apportionment via the Cambridge Compromise' in *Around the Cambridge Compromise: Apportionment in Theory and Practice*, Guest ed. Jean-François Laslier, Special Issue, Mathematical Social Sciences, Vol. 63, issue 2, March 2012.

[25] European Council Decision 2013/312/EU. Official Journal L 181, 29 June 2013.

In Annex I, we illustrate how the reformed Parliament would be recomposed on its 2019 basis under the CamCom system and given a transnational list of forty-six MEPs (which would fill all the currently available empty seats). A 'power compromise' variant of the CamCom formula would also be available to mitigate the impact of seat loss at any one election.[26]

Representing the States

Adjusting the balance of seats among member states in the Parliament, the first chamber of the legislature, calls for a review of the balance of power between the states in the Council, the second chamber. Sensitivity about relative size is even more acutely felt in the Council than in the Parliament. The question of voting weight was fought over especially heavily at the IGC which concluded in the Treaty of Nice. The Lisbon Treaty altered the system entirely, laying down that QMV in the ordinary legislative procedure would be formed by 55 per cent of states representing 65 per cent of the population.[27] But this is qualified by the extra condition that a blocking minority has to be formed in at least four states.

As population size is one of the two factors that make up the voting system in the Council, just as it is for the Parliament, it may seem odd that the principle of degressive representation does not feature at all in these provisions. The fact that, under Lisbon, voting weight in the Council is now directly proportional to the size of the population gives the more populous states a significant advantage in meeting QMV thresholds. There is therefore a strong case for introducing the same federalist principle of degressive proportionality into the voting systems of both legislative chambers. As Lionel Penrose argued, changing the voting power of states to accord to the square root of their population reduces the differentials between large and small states.[28] Such a reform was suggested by Poland (highly sensitive about its place in the European pecking order) during the constitutional negotiations twenty years ago: it is time to revive it.[29]

[26] Geoffrey Grimmett, Kai-Friederike Oelbermann and Friedrich Pukelsheim, *A power-weighted variant of the EU27 Cambridge Compromise*, in Laslier, op cit.

[27] Articles 16(4) TEU and 238(3)(a) TFEU.

[28] Lionel Penrose, *The elementary statistics of majority voting*, Journal of the Royal Statistical Society, vol. 109, no. 1, 1946.

[29] Wojciech Slomczynski and Karol Zyczkowski, 'Jagiellonian compromise: and alternative voting system for the Council of the European Union' in Marek Cichocki and Karol Zyczkowski (eds), *Institutional Design and Voting Power in the European Union*, 2010.

In Annex II, we illustrate the square root system for the Council. Ordinary QMV could be reached when at least half of the states achieve more than half of the total of the square root of the population. Super QMV, deployed as we have suggested for organic laws, could require, say, two-thirds of the states to achieve two-thirds of the square root total.[30]

The democratic legitimacy of the Union is founded on a compromise between the classic electoral principle of one person one vote and the general principle of equality among the member states.[31] Tension between states of different sizes is a natural characteristic of federal systems and must be managed constitutionally. The installation of transnational lists will ensure a vote of equal status for each EU citizen who chooses to use their second ballot to elect an MEP in the pan-EU constituency. The addition of the principle of degressive representation to the Council voting system will ensure equity between the two chambers of the legislature. Taken altogether, these reforms will enhance the representative capability of both Parliament and Council and buttress the federal architecture of the Union.

Right of Initiative

Another area where the treaty accords the right of legislative initiative to the European Parliament rather than the Commission concerns the establishment of a system of parliamentary inquiry.[32] Here again, however, MEPs have failed to punch their weight. According to the current system, Parliament's committees of inquiry lack the power to subpoena witnesses, have only limited access to documents and have no way of imposing sanctions and penalties on transgressors. Decent parliaments are tough inquisitors.

Many MEPs appear to want to change the treaties to give Parliament an unlimited right of legislative initiative. It will be difficult to justify such a proposal, however, unless Parliament shows itself capable of exploiting to the full the limited rights of initiative it already enjoys. Moreover, that far-reaching demand would have to be judged against the effectiveness of the

[30] Article 238(3)(b) TFEU.
[31] Article 4(2) TEU.
[32] Article 226 TFEU.

current treaty rule whereby Parliament—voting by absolute majority and on the basis of a detailed justification—can ask the Commission to initiate a new law.[33] This practice works. The Commission responds to Parliament's properly reasoned initiatives, and there is no instance of a blank refusal by the Commission to entertain a proposal coming from MEPs.

If they wish to go further, MEPs should be especially careful because the granting of an automatic right of legislative initiative to the Parliament could immediately be trumped by the Council demanding exactly the same privilege.[34] In areas of cooperation in police and judicial affairs, where under the Lisbon Treaty the Council is already granted the exceptional privilege of sharing legislative initiative with the Commission, there has been tension and confusion.[35] If this practice were to be inflated generally, the Commission would be much enfeebled and the precious 'Community method' invented by Monnet would be shattered.

Nevertheless, if a compromise exists it would involve adjusting the treaty to provide that, in the case where, after a period, the Commission were to fail to justify a refusal to accept a specific legislative proposal of the Parliament, Parliament's proposal should stand as its first reading of a draft law under the ordinary legislative procedure.[36] MEPs will know, however, that a draft law unsupported by the Commission is highly unlikely to make headway in the Council.

There could also be a case for allowing individual MEPs to fly legislative kites outwith the constraints of their committee or group, perhaps being allotted a slot in the timetable by ballot. But no national parliament in Europe follows the US Congress in granting an unfettered right to any individual MP to table a draft law. Where the right of legislative initiative exists, it is strictly circumscribed. In most member states it is the government of the day which proposes laws and steers the legislative agenda: again, what the EU misses more than a hyperactive Parliament is a decent capable government.

[33] Article 255 TFEU.
[34] Article 241 TFEU.
[35] Article 76 TFEU.
[36] Article 294(3) TFEU.

Checks and Balances

At present, oral and written parliamentary questions can be directed only at the Commission.[37] MEPs need to acquire the right to question the Council when it acts in its executive rather than its legislative capacity. The occasional appearance of the president-in-office at plenary sessions of the Parliament is an insufficient check, especially if the serving minister is elusive or ill-informed. The President of the European Council agrees to answer questions from MEPs about his own agenda, but he refuses to take formal questions about the internal affairs of the body he chairs or to elaborate on formal communiqués. Michel's appearance in Parliament's plenary after each meeting of the European Council is an inadequate method of scrutiny and does neither institution a service. The problem of lack of accountability of the European Council for the taking of its legally binding executive decisions will be resolved simply, as we propose, if its chair is taken by the next president of the Commission. Tougher scrutiny of the EU's heads of state and government may even sharpen their performance and improve the Union's overall output legitimacy.

In addition, however, Parliament should be given the additional right to take the European Council to the Court of Justice on grounds of *ultra vires* if the chiefs stray outside their powers when they act either legislatively or politically. The present rule only permits possible action by the Parliament against the European Council when it takes legally binding executive decisions.[38] Lifting the restriction on legal actions against the European Council would place it on a par with the Council, Commission and European Central Bank.

Parliament's Ombudsman, Emily O'Reilly, is proving to be an effective critic of the institutions in matters of transparency and access to documents. She is a tough defender of the rights of the citizen against maladministration by the Commission.[39] The Ombudsman's powers should be increased to permit her leave to refer to the Court of Justice as *amicus curiae* in cases concerning a breach of the Charter of Fundamental Rights.

The Commission fares better than the Council in terms of parliamentary accountability. Even in the difficult circumstances of the coronavirus pandemic, Commissioners have had to justify themselves regularly before

[37] Article 230 TFEU.
[38] 1st paragraph, Article 263 TFEU.
[39] Article 24 TFEU.

parliamentary committees, which in many cases evince a high degree of specialist knowledge about the relevant dossiers. In any exercise of treaty revision, MEPs will wish to re-open the question of holding individual members of the Commission to account in case of a misdemeanour. At present, Parliament has the power only to censure the Commission as a body leading to the resignation of the whole college.[40] A modest reform, short of sacking individuals, would be to enable the Parliament (as well as the Council) to vote to reduce the salary or pension of any errant Commissioner.[41] Going further, the Parliament should have the right conferred on it, equal to the Council, to arraign a failing member of the Commission before the Court of Justice with an eye to early retirement.[42]

Cuisine Interne

The European Parliament is at its most assured amid the thicket of EU law making [Corbett et al.]. The combination of committee and group discipline helps MEPs level up to their co-legislators in the Council when enacting the Commission's complex and often large legislative packages, such as the current 'Fit for 55' on climate action and green transition. The need for intelligibility at a trilogue with Commission and Council, amendment by amendment, does wonders for Parliament's coherence. Faced with a lively external threat, Parliament also showed an impressive degree of cohesion over Brexit in the period 2016–2020 [Barnier].

It is when the Parliament steps away from the conventional left-right dynamic and confronts issues across the federalist-nationalist fault line that it works less well. In the realm of constitutional affairs, where the Commission is largely unhelpful, a disunited Parliament faces an obdurate Council. Relatively isolated as they are, without the prop of political parties or public opinion, MEPs must get better at the business of coalition building on constitutional reform.

Parliament is the least impressive when it meets in plenary, where sessions badly need an injection of vitality (and leadership) if the House is to achieve a more sustained, meaningful dialogue with President von der Leyen and her colleagues. One expects that the introduction of transnational lists will produce MEPs of professional calibre and high media

[40] Article 17(8) TEU.
[41] Article 245 TFEU.
[42] Article 247 TFEU.

profile. Modest changes to internal parliamentary rules would encourage the promotion by merit of talented MEPs to the important posts of committee chair, group coordinator and rapporteur. Groups should rely less than they do now on placement by virtue of the size of national delegation according to the D'Hondt proportionality formula. Here again, more emphasis on party and less on nationality would ginger up the institution and enhance input legitimacy.

Greater transparency over the internal operation of the House will alter the picture of bland mediocre consensus which all too often characterises the public image of Parliament. As the Commission, reduced in size and more political, begins to think and act like the government of the Union, so will the normal dynamics of government and opposition percolate through to the Parliament. Once stable majorities and minorities begin to shape Parliament's policy and law-making processes, citizens will be in a better position than they are now to identify with the government at the European level.

Taken together, these reforms would revitalise the European Parliament and equip it to undertake the multifarious tasks befitting a strong parliament for a federal union. The Conference on the Future of Europe has not forgotten to remind the Parliament that one of its most important constitutional powers is the right to initiate a revision of the treaties.[43] And the next step after the Conference is to ensure that the revision of the EU treaties is preceded by a constitutional Convention. Happily, as we have seen, Parliament has the absolute right to insist on the calling of a Convention.[44] Immersion in a Convention will do wonders for the profile and cohesion of the Parliament—as well as provide a rite of passage for EU political parties.

Meanwhile, MEPs should be busy refining their proposals for deeper political integration, guided by threefold objectives of efficacy, accountability and transparency. Parliament's priority for treaty change should be the elimination of the whole category of special laws of the Council and the extension of co-decision with the Council to all legislation. Its overall constitutional priority must be the installation of an electoral procedure involving transnational lists and federal parties in time for the 2029 elections.

[43] Article 48(2) TEU.
[44] Article 48(3) TEU.

National Parliaments

National parliaments have something of a walk-on role in the drama of EU politics. But they should not be dismissed as unimportant. If EU democracy is to reflect the diversity and pluralism of European society, it needs to have a continual dialogue with elected representatives at many levels.

From the treaties we learn that members of the European Council and Council are democratically accountable to their national parliaments.[45] National parliaments "contribute actively to the good functioning of the Union" by seeing to it that the principle of subsidiarity is respected by the EU institutions.[46] If, within an eight-week deadline, one-third of the parliaments flag a possible infringement of subsidiarity in any draft law—a 'yellow card'—the Commission may review the proposal.[47] If over half the national parliaments object to an infringement—an 'orange card'—the Commission must justify itself, amend or withdraw the proposal. In that circumstance, 55 per cent of the states in the Council or a simple majority in the Parliament may scrap the proposal. National parliaments may also bring an action against any law before the Court of Justice on the grounds that it infringes subsidiarity.[48]

The insertion of this mechanism into the Lisbon Treaty, typical of a confederation, implies that the job of national parliaments is to defend national sovereignty against European incursion. British eurosceptics at the Convention and consistently thereafter tried to introduce a 'red card' whereby national parliaments could simply block any draft EU legislation they disliked. Quite rightly, they have been thwarted. No national parliament that has a proper grip on the behaviour of its own government ministers when they go to Council meetings in Brussels is in need of an EU red card.

In practice, despite endless fuss about the methodology, the elaborate early warning mechanism has proved virtually redundant (as some of us intimated at the time of the Convention). The yellow card has only been used three times. The first, in 2012, led to the withdrawal of a draft law on the right of labour to take collective action. In 2013, the threshold was reached in objection to a proposal for a European public prosecutor's

[45] Article 10(3) TEU.

[46] Article 12 TEU.

[47] Protocol No 2 on the application of the principles of subsidiarity and proportionality. The lower yellow card threshold of one quarter applies in security and justice policy.

[48] Article 263 TFEU.

office, but the reasoned opinions were contradictory, some arguing the measures went too far, others not far enough. In the end, the law was passed under the enhanced cooperation procedure. The third, in 2016, concerned the posted workers directive, which was latterly altered by the Commission and legislature. All in all, the evidence is that the EU institutions are at pains to respect the subsidiarity principle. It also suggests that member state governments are not particularly motivated to deploy their national parliamentary majorities (in so far as majority governments exist) as a weapon to disrupt the EU's ordinary legislative procedure.

Scrutiny Procedures

National parliaments have numerous rights to be informed directly by the Commission about EU developments.[49] They will be part of any Convention to change the treaties.[50] They have the right of veto to the use of the *passerelle* clauses.[51] They have a share in the evaluation of policies concerning freedom, justice and security, including, specifically, the scrutiny of the operation of Eurojust and Europol.[52] National parliaments and the European Parliament together determine methods of interparliamentary cooperation, the principle manifestation of which is COSAC, the conference of national committees on EU affairs. This body meets twice a year to exchange the (mainly divergent) views of national MPs with MEPs and the Commission.

There is a wide range of interparliamentary fora involving national MPs with MEPs. Joint committee meetings on economic and monetary affairs and on security and defence issues can prove valuable to Brussels policy makers, although doubtless many MPs return home dissatisfied at their reception. COSAC will continue to discuss ways to improve these processes and is toying with the idea of a 'green card' whereby national parliaments might propose new legislative initiatives to the Commission. In addition, some national parliaments send in their opinions on many matters outside the narrow constraints of subsidiarity, although the practice is patchy: the Italian Senate seems to send to Brussels every opinion it

[49] Articles 48(2) and 49 TEU; Protocol No 1 on the role of national parliaments in the European Union.

[50] Article 48(3) TEU.

[51] Article 48(7) TEU.

[52] Articles 70, 85(1) and 88(2) TFEU.

reaches; the German Bundestag sends none.[53] Anxious to foster political dialogue, the Commission undertakes to respond to these opinions politely.

National parliaments could usefully play a larger role in scrutinising how EU law is transposed into national law and regulation at state level, but their scrutiny committees have to work hard to keep track of delegated and implementing acts. At the end of the day, however, national parliaments should concentrate on what they do best, which is to hold to account their own ministers for their performance in the Council (and of their head of government at the European Council). Here national parliaments can and do benefit from an exchange of information about best practices, much of it coming from Scandinavia.

Direct engagement with the EU institutions is of special relevance to those parliaments of eurozone countries that wish to open up debate during an annual 'European semester' about the convergence and structural reform programmes initiated by the Commission.[54] European Parliamentary committees provide a useful platform for the hearings of relevant national MPs, especially rapporteurs, and can assist national parliaments in achieving a degree of scrutiny of their own national finance ministers that might otherwise elude them. Involvement of national parliaments strengthens the sense of national ownership of economic policy measures, something which, for example, was woefully absent during the financial crisis between the Greek parliament and the EU's troika.

As the EU continues to develop its common approach to fiscal policy, it is important that the debates about parliamentary accountability are deepened. But the more far-fetched proposal—advanced by Thomas Piketty and others—for a confederate eurozone assembly made up of national MPs should be fiercely resisted.[55] The European Parliament is the parliament of the Union just as the euro is the currency of the Union. In time all member states are intended to join the eurozone. Adding to the institutional complexity of EU governance by creating yet another parliamentary organ would be bound merely to dilute democratic accountability and jeopardise coherent government. Only if a special budget is created

[53] Olivier Rozenberg, *The Role of National Parliaments in the EU after Lisbon: Potentialities and Challenges*, DG for Internal Policies Study, European Parliament, 2017.

[54] The fiscal compact treaty of 2012 has also spawned an interparliamentary committee.

[55] *Genuine Economic and Monetary Union will be federal or it will not be*, in European Papers, vol. 3, no 1, 2018.

for the eurozone could there be a case for non-eurozone MEPs to register abstentions in voting, but there is no case for a formal partition of the House between euro and non-euro MEPs. (Some of the most valid critiques of EMU have come from non-eurozone quarters.)

Relying on a combination of national parliaments to enhance the democratic legitimacy of the Union is a fool's game. The twenty-seven parliaments, usually with two chambers, work at a separate pace to their own timetables and in their own languages; their resources, powers and protocols are different, as is their level of ambition and political stance with respect to European affairs. Although they each have a constitutional role, experience shows that the scope for formal coordination between national parliaments is limited. Informal collaboration, however, especially on a party-political basis has much greater potential—at least once federal parties begin to emerge at the European level, courtesy of transnational lists.

It is hardly normal for state parliaments to want to interfere directly in the matter of federal government. The careful rationalisation of competences and the delimitation of powers laced with subsidiarity is what allows federations to happen. The Lisbon Treaty points in the right direction and strikes the right balance. The subsidiarity early warning mechanism should be kept as it is for national parliaments by way of a constitutional backstop. But national parliaments should trust the European Parliament to do its own job.

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CHAPTER 5

The Judiciary

Abstract The European Court of Justice plays a critical role in the integration process. National constitutional courts have to come to terms with the primacy and direct effect of EU law. Current restrictions on the judicial authority of the Court should be lifted. The Charter of Fundamental Rights has potential yet to be reached. Only full respect for the rule of law will allow the European Court of Justice to evolve into a federal supreme court, with wider access for the citizen on appeal.

Keywords EU law • Primacy • Direct effect • Rule of law • Judicial control • Charter of Fundamental Rights • Federal supreme court

A supreme court plays a critical and indispensable role in any federal polity. The Court of Justice of the European Union, which sits in Luxembourg, is not quite the supreme court but seems set on the way to being so.[1] As the Commission's classical role as "guardian of the treaties" becomes blurred with its overtly political role, it falls more to the Court to be proactively associated with the job of protecting the integrity and application of Union law. As suggested in Chap. 2, the appointment of a Commissioner

[1] The Court of Justice of the European Union (CJEU) consists of two courts, the European Court of Justice and a lower General Court (formerly the Court of First Instance).

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as Law Officer would provide the Court with a professional interlocutor in the executive arm of EU government.

The formal mission of the Court, established by treaty right at the start of the history of the European Communities, is to "ensure that in the interpretation and application of the Treaties the law is observed".[2] It works by ruling on actions brought by member states, institutions or individuals, companies and legal bodies. It delivers preliminary rulings to national courts which interpret EU law and validate (or not) the activities of the EU institutions. The Court launches infringement proceedings against a member state, sanctions an EU institution for failure to act or for acting erroneously and annuls EU law that breaches the treaties. Where the Court has established well-settled case law, its jurisprudence should be codified in treaty revision.

As in any federal system, Union law has primacy over national law, including state constitutional provisions. But because the EU is not a classic federation where competences between the state and federal levels are demarcated vertically and laid down in a constitution, the European Court of Justice (ECJ) can strike down an EU law but not, at least directly, a national law. The Court's role in clarifying who should do what, and why, if the EU treaties are to be fulfilled is a matter of subtle and patient explanation and iterative persuasion. Inevitably, some flexibility is allowed by national courts in providing "remedies sufficient to ensure effective legal protection in the fields covered by Union law".[3] It is a decentralised judicial system in which national courts are expected to contribute positively towards attaining full respect for EU law. Member state governments face penalties if their national courts fail to do their duty by the EU Court.

Interpreting the Law

The treaties leave the Court of Justice with ample room to interpret the law of the Union. The ECJ fills in the gaps where primary law sets the framework but is not prescriptive in detail. The generalised prohibition of discrimination on the grounds of nationality, for example, leaves wide scope for judicial action in specific cases.[4] Likewise, the laying down of the broad aim of establishing a single market "without internal frontiers in

[2] Article 19(1) TEU.
[3] Idem.
[4] Article 18 TFEU.

which the free movement of goods, persons, services and capital is ensured" has required years of jurisprudence from the ECJ as well as secondary legislation from the European Parliament and Council to achieve and maintain.[5] Periodically, iconic cases, like *Cassis de Dijon* in 1978, have laid the foundations on which much subsequent law has been built. Moreover, the ECJ has had to flesh out important elements of secondary law where the legislature has made do with ambiguous compromises which fail to achieve legal certainty. A good example of such collusive ambiguity would be the Services Directive of 2006.

The importance of such jurisprudence has led to attacks on the integrity of the Court from nationalist forces in the Union: the controversy over the role of the ECJ was and is prominent in the continuing Brexit saga. But the truth is that the Court is driven by the need to apply EU law as uniformly as possible in pursuit of treaty goals. Its jurisprudence has by no means always favoured maximum centralised integration. It has developed the concept of judicial review as a check on the untrammelled executive powers of the Commission, for example in competition policy. Although the ECJ has helped the European Parliament to protect its prerogatives, it has also sought to sustain the implicit balance of powers between the institutions, as predicated by the treaties. The implications of interinstitutional balance are that each institution pays due regard to the powers of the other institutions; that institutions may not assign their powers to others; that each institution must retain its independence; and that the institutions uphold the spirit of sincere cooperation with each other and the member states.[6] Protecting the interinstitutional equilibrium within a constitutional system that does not feature the formal separation of powers is a subtle business to which constant attention is paid.

The legal order of the Union has been developed over decades through a process of intelligent dialogue between the ECJ and its national component parts and between the Court and the other EU institutions. The Union's judicial system has mainly developed on the basis of the Court's preliminary rulings.[7] In theory, at least, all rulings by the ECJ are binding on national courts. The process has not been without friction, but until recently no *ultra vires* dispute between national courts and Luxembourg has been allowed to escalate into open warfare. A principal player in this

[5] Article 26(2) TFEU.
[6] Article 4(3) TEU.
[7] Article 267 TFEU.

judicial game has been the Bundesverfassungsgericht (BVerfG). The influence of the BVerfG on other national constitutional courts in the Union flows not only from Germany's size and importance but also from the fact that it itself is accustomed to working within a federal paradigm. A series of legal challenges to and from Karlsruhe as the bloc developed its economic and monetary union has opened but not closed the question of ultimate constitutional supremacy. In its 2009 judgment on the Treaty of Lisbon, the German Court found that the EU is still a close association of sovereign states (*Staatenverbund*) and not itself a federal state. It warned that any further European integration may be unconstitutional (in German terms) "if the level of democratic legitimation is not commensurate with the extent and importance of supranational power".[8]

Primacy and Direct Effect

The question of the validity of the Union's supranational competence has been raised regularly by the Bundesverfassungsgericht. In its judgment on the Maastricht treaty, the German Court treated Economic and Monetary Union (EMU) as a mainly technical issue, concluding that the ECB was able to act so long as it did not stray from its treaty parameters.[9] In *Pringle* (2012), the ECJ judged that the famous no-bail-out clause does not forbid the establishment of joint financial mechanisms such as the ESM.[10] The BVerfG, rather proud, did not request its first preliminary ruling from the ECJ until 2014—a rather mischievous case concerning the stated intention of the European Central Bank to indulge in outright monetary transactions. (By contrast, the UK courts, steeped in common law tradition, were frequent supplicants in Luxembourg.) The German court argued that the ECB outreached its mandate in proposing to purchase government bonds in the secondary market and that the ECJ had failed to verify correctly the proportionality of the Bank's actions.[11] Responding in *Gauweiler* (2016) and *Weiss* (2020), the Court of Justice found that the European Central Bank could work around the general treaty prohibition of direct monetary financing. But the fact that Karlsruhe has dared to challenge the orthodoxy of the EU's legal order has

[8] See footnote 102.
[9] BVerfG 2134/92 and 2159/92, 12 October 1993.
[10] Article 125 TFEU.
[11] Article 123 TFEU.

encouraged other national courts to do so too. We read from the ping-pong between the Karlsruhe and Luxembourg courts that further steps towards political union must be genuinely constitutional on the side of the European Union and will in any case and in due time require amendment of the German Basic Law.

The Convention on the Future of Europe sought to include a clause in the Constitutional Treaty which made explicit the primacy of Union law. After the debacle of the French and Dutch referendums in 2005, however, an attempt was made, strongly supported by Germany and the UK, to deconstitutionalise the text. The primacy clause was dropped and replaced by a mere declaration added to the Treaty of Lisbon which reaffirmed the principle of primacy first spelt out in the *Costa v ENEL* judgment of the Court in 1964.[12] It remains the position that Union law, being an independent source of law, cannot be overridden by domestic law without being deprived of its character as Union law. At the time of the next treaty revision it would be sensible, and apparently necessary, to resurrect that bold and simple provision of the failed Constitutional Treaty.[13]

Charter of Fundamental Rights

An important milestone in developing the constitutional order of the Union on a federal basis was the drafting in a Convention of the EU's own Charter of Fundamental Rights in 1999–2000. I was a member of the Convention and Parliament's co-rapporteur on the dossier. Initially proclaimed by the Nice IGC as a code of conduct, the Charter was rendered mandatory under the terms of the Lisbon Treaty, and now features increasingly in the case law of the European Court as a bulwark of EU citizenship, particularly with regard to anti-discrimination issues.[14]

The Court of Justice, however, has not done itself any favours in resisting the express intention of the Treaty of Lisbon that the EU should sign up in its own right to the European Convention on Human Rights.[15] The problem is the Court's insistence that it alone should be responsible for interpreting EU law. It has resisted until now the idea that the European Court of Human Rights in Strasbourg should act as the external

[12] Declaration 17.
[13] Article I-6 CT.
[14] Article 6(1) TEU.
[15] Article 6(2) TEU.

supervisor of the Union's developing corpus of fundamental rights law.[16] While the ECJ is understandably minded to protect its own prerogatives, the fact remains that its objection to ECHR accession is impeding the development of a superior rights regime unique to the Union but respectful of wider European norms.

The Charter of Fundamental Rights will only obtain its full value for the EU citizen once the legal stand-off between the two European courts is ended. The Council of Europe has never fulfilled the political aspirations of its founders, such as Paul-Henri Spaak, but its record over decades in promoting human rights has been impressive. The European Court of Human Rights is not a body to be resented: indeed, a European Union more confident of its own jurisprudence in human rights, based on the Charter, could lead the rest of Europe in a fruitful direction. Such a development would have special relevance as the Union struggles to formulate effective policies of its own on asylum and immigration that do not conflict with international refugee law.

The next round of treaty revision should also take the opportunity to modernise the Charter. The clause on environmental protection should certainly be upgraded to take into account the commitments made by the EU when it signed, along with all its member states, the 2015 Paris Agreement on combating climate change.[17] More controversially, others have suggested that the right to have an abortion should now be included in the Charter, although that may require a parallel adjustment of EU competence to meet the constraint of the Charter's important horizontal clauses that delimit the field of its application. In any case, and to reflect the widening use made of the Charter by the Court of Justice, the Charter should be revised to assert its applicability by the EU institutions "*whenever they act within the scope of Union law*".[18]

The European Court of Justice has championed the cause of European Union citizenship, which has gradually emerged from a thicket of social and labour legislation to do with the creation of the internal market. The Charter of Fundamental Rights adds weight to the cause of enhancing the civil liberties of the EU citizen. We have already suggested that Parliament's Ombudsman should be granted a privileged access to the Court. As EU

[16] Opinion 2/13.

[17] Article 37 CFR.

[18] Article 51(1) CFR now reads more narrowly that the Charter applies to the institutions: "… only when they are implementing Union law".

citizenship further matures, something more should be done to reinforce the *locus standi* of natural or legal persons as they approach the Court. At present such access relies on the plaintiff proving that he or she is individually, directly and adversely concerned by an action or law of the EU.[19] The Court has set a high standard of proof, not least because it fears being overwhelmed by a surge of litigation.

Reform of the structure of the Court to cope with more business, including the establishment of regional courts and an appellate procedure, should be considered. Cases brought to federal supreme courts are usually on appeal from lower courts. If the Union is to become a just and reliable democratic polity, its citizens need a relatively straightforward and affordable entrée to federal justice. Federal citizenship has now moved beyond the member state, not just complementary to national citizenship, as the Treaty of Maastricht had it, but supplementary to it in its own right.[20]

Scope

The Court of Justice will not achieve the status of a federal supreme court until all restrictions on the scope of its judicial oversight have been removed by a treaty amendment. At present, judicial control of the European Stability Mechanism and of the fiscal compact treaty is limited because of their quasi-intergovernmental character outside the scope of Union law. The treaty imposes regrettable limits to the scope of the Court's authority concerning the operations of police and security services.[21] Equally disconcerting is the Court's exclusion from the main aspects of the common foreign and security policy.[22]

When it comes to sanctions, however, the situation is more nuanced. The ECJ has not been backward in reviewing the legality of sanctions levelled by the Council against individuals on grounds of fundamental rights. In general, sanctions can be imposed by the EU against a third country or non-state actor only on the basis of a preliminary unanimous decision of the Council under the rules for common foreign and security policy.[23] But

[19] Article 263 TFEU.
[20] Article 9 TEU.
[21] Article 276 TFEU.
[22] Article 275 TFEU.
[23] Article 31(1) on the basis of Article 29 TEU.

the actual imposition of the restrictive measures deemed necessary is decided by the Council, acting by QMV on a Commission proposal, with the Parliament duly informed.[24] MEPs, therefore, prefer the use of an anti-terrorism measure where sanctions can be imposed by a regulation enacted by the ordinary legislative procedure without the preliminary Council decision by unanimity.[25] The imposition of sanctions against Russia for its attack on Ukraine has to negotiate this legal terrain while ensuring that the sanctions devised make good tactical sense and will be implemented rigorously by the member states.

Faced with limitations of scope concerning 'mixed' international agreements (part supranational, part intergovernmental), the Court has acted pragmatically, moved by the need to ensure that the Union acts effectively at home and abroad on the basis of both Union and international law. As the EU assumes a more confident identity in international organisations, such as the United Nations, one can expect the Court of Justice to be more ready to act like a federal supreme court. This will include adjudicating cases brought by one member state against another—something in which the ECJ to date has seemed reluctant to indulge.[26] The latent border dispute between Slovenia and Croatia, for example, would seem well suited for judicious settlement by the ECJ.

We have already suggested above two other enhancements to the constitutional status of the Luxembourg Court. First, it should hear cases brought by the Parliament against the European Council on the grounds of misuse of powers. A good example of such a case might be the European Council's decision in 2016 to do a deal on migration with Turkey outwith the treaty rules that cover the negotiation of international treaties.[27] The second adjustment would be that the Court stands ready to deliver opinions on draft treaty amendments at the request of the Union legislature or a member state. In Chap. 7, moreover, we propose that the Court adapts itself to accommodate the new concept of affiliate membership of the Union.

[24] Article 215 TFEU.
[25] Article 75 TFEU.
[26] Article 273 TFEU.
[27] Article 218 TFEU.

Rule of Law

The constitutional identity of the European Union is predicated on the assumption that its institutions and its member states will always act within the law. In recent years, alas, this assumption is no longer safe. Corruption has spread in several member states, especially Bulgaria, and other governments in central Europe have fuelled antisemitism and homophobia, attacked press freedom, and compromised the independence of the judiciary. Hungary is the prime culprit. Its Prime Minister Viktor Orban proudly boasts of the spread of anti-Brussels "illiberal democracy" across central Europe.[28] Poland equals Hungary in tampering with its judges, and both are complicit in protecting each other, under the unanimity rule, from the penalties that could be imposed on an errant state in cases of a serious and persistent breach of the values of the Union.[29]

In October 2021, Poland's Constitutional Tribunal overturned its previous judgments which had been in favour of the Treaty of Lisbon. The Tribunal now declares that the mission of the EU ("ever closer union"), its values as and the powers of the ECJ are unconstitutional in terms of Polish law.[30] As the European Court has already condemned the packing of the Tribunal by Poland's ruling party, its opinion in this case is of negligible legal value and created a political storm both within Poland and between Warsaw and Brussels. But it is an indication of how fragile the EU's rule of law has become. If Poland's judiciary can no longer challenge the actions of the Polish government, the edifice of EU constitutional law will crumble. The reliable application of EU law is especially sensitive in the area of security and justice policy where, for example, the European Arrest Warrant is rendered unworkable if the integrity of Poland's courts is in doubt.

Fearing the worst, in 2020 the EU legislature passed a regulation that imposes a general regime of conditionality for the protection of the Union budget—a control mechanism that takes on extra relevance in the light of the large increase in the volume of EU spending post the COVID-19

[28] Orban gave his first substantial rendition of this theme in a speech at Baile Tusnad on 26 July 2014. He has doubled down since. https://budapestbeacon.com/full-text-of-viktor-orbans-speech-at-baile-tusnad-tusnadfurdo-of-26-july-2014/

[29] Articles 7 and 2 TEU respectively.

[30] That is, Articles 1, 2 and 19 TEU. See the helpful commentary by Marta Lasek-Markey in https://europeanlawblog.eu/2021/10/21/polands-constitutional-tribunal-on-the-status-of-eu-law-the-polish-government-got-all-the-answers-it-needed-from-a-court-it-controls/

pandemic. Hungary and Poland protested to the Court of Justice and sought to annul the regulation. In its much-awaited judgment of February 2022, the Court found that compliance with the values on which the EU is founded "cannot be reduced to an obligation which a candidate State must meet in order to accede to the European Union and which it may discard after accession".[31] It judged that the regulation in question was properly aimed at protecting the financial interests of the Union being grounded on a concept of the rule of law (*Etat de droit*) which all member states share, and must share, within their own constitutional traditions. Such, the Court pronounced, is a matter of the Union's identity.[32]

The Commission will now be bound to trigger the conditionality mechanism and cut EU funding to Hungary and Poland until they return to full respect for the rule of law. Neither the Commission nor Council should be able to turn a blind eye to the existence of rampant corruption in any member state or the traducement by a member state of the values of the Union, including democratic principles, when it amends its domestic constitutional arrangements. In general, the Union is bound to strengthen its monitoring of the state of human rights protection within all member states. Helpfully, the Commission's annual rule of law reports will from now on include specific recommendations to member states about how to improve their standing and avoid regression from the standards to which they are in theory committed. The EU's Fundamental Rights Agency, established in Vienna in 2007, should be enabled to follow up on such recommendations, working with civic as well as national authorities.

Going further, the European Court of Justice should have no compunction in regarding as justiciable all the foundation articles of the Treaty which set out the values and principles of the Union. An EU federal supreme court would be prominent in adjudicating breaches of the Charter and in enforcing democratic principles in the context of elections, both at the European and national levels (on which rests the legitimacy of the Council).[33] It has not escaped our notice that the Organization for Security and Co-operation in Europe (OSCE) found the recent elections

[31] *Hungary v Parliament and Council* [C-156/21] and *Poland v Parliament and Council* [C-157/21].

[32] See the persuasive comment *Who we are* by Maximilian Steinbeis in Verfassungsblog, 20 February 2022.

[33] Article 10 TEU. See Thomas Verellen, *Hungary's Lesson for Europe: Democracy is Part of Europe's Constitutional Identity,* Verfassungsblog, 8 April 2022.

and referendum in Hungary to fall well below international standards, being "marred by the absence of a level playing field" between government and opposition.[34] In the previous chapter we have already suggested a treaty amendment to insist that elections to the European Parliament are not only free but also fair.[35]

[34] Statement by the International Election Observation Mission, Office for Democratic Institutions and Human Rights, OSCE, 3 April 2022. https://www.osce.org/files/f/documents/4/6/515111.pdf

[35] Article 14(3) TEU.

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CHAPTER 6

Fiscal Union

Abstract Economic and monetary union is incomplete, not least because there is no common fiscal policy and the European Central Bank is not the lender of last resort. The EU's supervisory machinery introduced after the financial crash is due for an overhaul. A watershed was reached when eurobonds were launched to recover from the shock of the COVID-19 pandemic. But these eurobonds should be scaled up, made permanent and fully federal. The EU budget should be subdivided into federal and national parts, with the former part funded by direct EU taxation.

Keywords Economic and monetary union (EMU) • Maastricht treaty • financial crash • COVID-19 crash • EU budget • Revenue • Taxation • Fiscal policy • European Central Bank • Eurobonds • European Stability Mechanism • Eurozone

An obvious outstanding feature of a federal union is that its citizens become taxpayers to a federal exchequer in return for public goods. The European Union stands today on the cusp of that change. It has never been more important, therefore, to bolster citizen confidence in the EU's system of governance and to enlarge the capacity of that system to act effectively.

There is much speculation about the European fiscal policy of the new German coalition government of Chancellor Scholz and Finance Minister

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Lindner. One hopes that it will not fall victim to what Jürgen Habermas criticises as the smug self-deception of German pro-Europeans.[1] Germany has a central responsibility to secure the future of the eurozone. The current Bundestag may well have to approve changes to Germany's Basic Law that will allow the EU to move forward to fiscal union. Another critical player, as we have seen, is the Federal Constitutional Court at Karlsruhe, not altogether a stranger to zealotry, which has remained vigilant against any unorthodox fiscal behaviour that might breach the EU treaties or the German constitution.

One Money, One Polity

Few people outside Germany, however, still cling to the notion that the construct of Economic and Monetary Union (EMU) designed in the conditions of the 1990s is durable. In fact, both President Delors and Chancellor Helmut Kohl were adamant at the outset that the process of EMU would not ultimately be complete without fiscal and political union. Inventing a single currency before the Union created a treasury seemed mighty odd. Centralising monetary policy while leaving fiscal policy in the hands of the member states was never going to be a long-term solution. Obliging the Commission to coordinate national economic policies while denying it the powers to run a common economic policy for the whole of the eurozone was a fool's errand. That these flaws were known from the beginning accentuated the fear of moral hazard and lessened the appetite for risk sharing.

The Maastricht Treaty was grounded on the belief that pressure from the financial markets would impose self-discipline on all stakeholders to respect the EMU rules. This proved not to be the case as investors chased cheap money across the eurozone [Stiglitz]. Britain's refusal to join the euro club, which effectively gave the City of London a free ride, weakened the EU's ability to regulate banks on a supranational basis. The next generation of political leaders was less committed politically than Kohl and Delors to the completion of the EMU architecture. Economic convergence was not sustained. Without fiscal instruments to correct disequilibrium, regional imbalances inside the eurozone rose. No attempt was made to form a core group of the eurozone states under the enhanced

[1] Jürgen Habermas, *Are We Still Good Europeans?*, Social Europe, 13 July 2018.

cooperation provisions of the treaties which would have reinforced political leadership.

The Maastricht provisions have been widely disrespected. The convergence criteria for joining up to the single currency were treated in a cavalier fashion from the start, particularly by Greece.[2] Denmark and Sweden met the criteria but refused to join the eurozone. The excessive deficit procedures have proved unworkable in practice.[3] The fiscal rules first adopted in 1998 in the form of the Stability and Growth Pact have never been scrupulously applied and are now unsustainable.[4] German-led efforts to impose even tighter rules through an additional fiscal compact treaty of 2012 have failed to be implemented.[5] For both procedural and substantive reasons, the fiscal compact has not been incorporated into Union law, as was intended. The valiant attempts by the Commission to restrain the tax and spend plans of the member states during an annual 'European semester' lack punch and are in danger of becoming little more than an academic exercise.

The Financial Crash

After the financial crash in 2008, the EU moved swiftly if belatedly to reform its hitherto weak system of supervision and surveillance of the financial sector [Tooze]. The European Central Bank chaired a new European Systemic Risk Board (ESRB) for monitoring macro-prudential risks. Three autonomous supervisory authorities were created and began work in 2011: the European Banking Authority (EBA), the European Securities and Markets Authority (ESMA), and the European Insurance and Occupational Pensions Authority (EIOPA). A single rule book was invented for the whole financial sector whose aim was to impose stronger prudential requirements on banks, improve protection for investors and manage failing banks. A European Fiscal Board was set up to advise the Commission. As the financial crisis morphed into a eurozone debt crisis, a single supervisory mechanism was introduced to allow the ECB to supervise Europe's largest banks alongside a single resolution mechanism to manage failing banks. In 2015, the Commission proposed a deposit insurers' scheme as a further pillar of 'banking union'.

[2] Article 140 TFEU.
[3] Article 126 TFEU.
[4] Protocol No 12 on the excessive deficit procedure.
[5] Treaty on Stability, Coordination and Governance in the Economic and Monetary Union.

All these arrangements made by way of crisis management now need to be reviewed. The powers granted to the supervisory authorities should be used with an alacrity and a confidence that so far seem lacking. Further powers must be granted to the regulators as seems necessary if the EU is to finally break the doom loop between bad banking and bad government. In addition, the scope of the ECB's formal remit to supervise the whole financial industry should be extended to include insurance.[6] Although the Bank emerged from the crash with de facto wider powers to trade government bonds in the secondary markets, it faced legal challenges from Germany, as we have seen, about conformity with treaty constraints concerning market intervention. A treaty adjustment is called for to regularise the legal situation.[7]

The European Stability Mechanism (ESM) was established in 2012 to bypass the famous no bail-out rule.[8] But the ESM clause inserted into the treaty has served to complicate and not to simplify or clarify how financial risk is to be shared between member states.[9] The ESM, founded by an intergovernmental agreement, is still not an EU official institution. Its use is far from unconditional, and with its lending capacity capped at €500 billion, it is too small to cope with another major financial crash. Although a reform is in train to let the ESM act as the backstop to the single resolution mechanism for failing banks, decisions within the ESM are still to be taken confederally—which means that Germany has an effective veto in its deployment.

The ESM is not the only weak element in the governance of the euro system. The Eurogroup of the nineteen eurozone finance ministers remains 'informal' and lacks coherence.[10] Meeting too often in the surreal 'inclusive format'—that is, with all twenty-seven states—it manages to duplicate ECOFIN as well as evade proper parliamentary scrutiny. Once again, it falls to the Commission to assume political leadership on the supranational plane.

[6] Article 127(6) TFEU.

[7] Article 123 TFEU.

[8] Article 125 TFEU.

[9] "The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality." Article 136(3) TFEU.

[10] Protocol No 14 on the Eurogroup.

Looking back at the crash (and preparing for the next shock), it is not the Maastricht rules but pragmatism, improvisation and a good deal of luck that have saved the euro—being "ready to do whatever it takes to preserve the euro", as Mario Draghi famously said in July 2012. The ECB's unorthodox monetary policy has weathered the legal and financial storms. Grexit has not happened. The weaker states have returned to the market. But the relief that the stability of the eurozone has been recovered should not blind us to the basic defects in the construction of EMU.[11] While national central banks have lost control of their currencies, the ECB does not yet enjoy the status of the Union's lender of last resort. The first elements of a banking union have been erected, but progress on the deposit insurance scheme is stalled. A plan for the better integration of capital markets, reducing tax, legal and regulatory barriers to trade, has been launched by the Commission but also remains stuck in the Council. The case for the structural reform of EMU must be made prominently in the anticipated new round of treaty amendment.

The COVID-19 Crash

The coronavirus pandemic was an unforeseen exogenous shock. As the plague spread quickly across Europe, there has been no denying that, unlike the financial crisis, we are indeed all in this together. There is no moral hazard. At first it was clear that the EU institutions had no contingency plans to deal with the emergency. Their formal treaty competences were slim and the exercise of their powers unrehearsed.[12] The Commission botched its early steps on vaccine procurement, to general consternation, but quickly assumed executive responsibility for the coordination of member state response to the pandemic, including the collective purchase of vaccine. Although the plague knows no boundaries its impact is asymmetric and the need for a firm EU hand on the tiller is obvious. The Union should emerge out of the COVID-19 crisis with a clearer sense of European solidarity and civic duty. Intense interest is now paid by the press and public to what is happening in other EU states in terms of vaccination, hospitalisation, statistics, social restrictions, travel bans and health security measures [Van Middelaar 2021].

[11] See *The Five Presidents' Report: Completing Europe's Economic and Monetary Union*, 2015.

[12] Article 168 TFEU.

For Europe, this is a very political pandemic—with severe economic consequences, especially for labour and supply-side shortages. Its social impact will be long felt, and it will take time to rebuild public trust in institutions. The EU's short-term response is in complete contrast to the rapidly enforced austerity measures taken a decade ago after the financial crash and eurozone scare. Keynesianism is back—a veritable sea change which the mechanics of EMU governance struggle to ingest. Germany under Merkel changed its tune about lending to the poorer south, and even the frugalist Dutch have softened their tone. The EU quickly suspended its normal fiscal rules for the duration of the crisis—at least until 2023.

In July 2020, at an arduous meeting of the European Council, an ambitious economic recovery programme was agreed involving the Union itself (helpfully shorn of the UK) in unprecedented levels of borrowing and lending. To finance 'Next Generation EU', the Commission, on behalf of the member states, will borrow up to €800 billion on the capital markets—about €150 billion per year between 2021 and 2026. As the holders of the eurobonds are to be paid out of the EU budget, the cap on the Union's revenue ('own resources') is raised to accommodate the extra spending from 1.4 per cent of GNI to 2.0 per cent. The first eurobonds were launched successfully in 2021, being many times over-subscribed. The Commission is charged with overseeing how the money is spent by the states according to established criteria, mainly through a Recovery and Resilience Facility (RRF). A total of €407.5 billion is to be made available in grants and €386 billion for loans. The Council must approve by QMV the implementation of the Commission's spending proposals.

The RRF places a premium on structural reforms aimed at boosting sustained productivity. Although European added value is not an explicit criterion, the importance of greening the economy, advancing digitalisation and modernising transport infrastructure are challenges which clearly demand the investment of public money on the supranational dimension. The loan element of the programme is less attractive to EU states already labouring under huge public debt—and at a time when interest rates were in any case at rock bottom. The grant element, by contrast, provides a real fiscal boost, especially to Italy and Spain. The innovation represents a significant rebalancing of EU fiscal and monetary policies, relieving the ECB of its hitherto almost lone responsibility for macroeconomic stabilisation. Both the loan and grant elements will become steadily more attractive as

and when, during 2022, the ECB ends its programme of quantitative easing and raises interest rates to counter high inflation.

Although the economic recovery scheme involves significant short-term fiscal transfers between member states, it does not promise a centralised fiscal policy for the longer term. The so-called frugal member states, led by the Netherlands, have until now insisted that Next Generation EU must be a one-off, never to be repeated, emergency risk-sharing measure. No permanent European safe asset has therefore been created. One hopes for more agile thinking from the new governments in Germany and Holland. When the current bond issue concludes in 2026, it will also be time to renegotiate the EU's new medium-term budgetary settlement. If the eurobonds have been a success—and how can they not be?—it will be crazy not to continue with a similar scheme. Why would the Union opt to reduce its fiscal instruments and downgrade its assets? A political decision by the EU to renationalise bonds would be certain to discombobulate investors. It is more likely, in truth, that the Union, bolstered by its new fiscal capacity, will seize its next chance to extend and enlarge its eurobond operation to establish permanent, effective measures for contracyclical macroeconomic policy.

The outbreak of war on the borders of the Union—the latest exogenous shock—adds a new element to the argument for the creation by the EU of public goods, this time in defence expenditure. It becomes more important than ever that the RRF experiment works for all concerned and that the Commission is trusted by the Council to take the lead in fashioning the Union's countercyclical fiscal stance, simplifying the mechanisms of economic governance and reinforcing both the vertical and horizontal coordination between the federal and national levels.

Eurobonds and Budget Reform

Thus armed, the EU will have to learn how to conduct its fiscal affairs in a federal manner. The fiscal union will not come about by magic but by an orderly and determined package of constitutional reform on the basis of which capital market integration and banking union can be fully accomplished. There are three elements to the necessary reforms.

First, federal eurobonds must be issued not on the joint guarantee of individual member states but on the joint and several liability of the Union as a whole. To ensure this change in gear, bondholders should no longer be paid by that part of the EU budget financed by contributions from the

states but by revenue accruing directly to the Union from federal taxation and customs duties. The Commission has recently unveiled its proposals for the next generation of its own resources amounting to €17 billion per annum. It proposes that 25 per cent of revenue from the carbon emission trading scheme should accrue directly to the EU budget, along with 75 per cent of proceeds from the carbon border adjustment mechanism and 15 per cent of the share of residual profits of multinational corporations under a scheme launched by the OECD and G20.

These advanced reforms imply compartmentalising the EU budget into two tiers: the top slice financed by the EU taxpayer and levies, as proposed by the Commission and voted by the European Parliament. The bottom slice would continue to be financed by the fees paid by national finance ministries according to the GNI peg and voted, as now, by national parliaments.[13] Such a rebalancing of the federal and confederal elements of the EU budget will accelerate pending decisions on introducing new forms of own resources. When the debt and deficit rules come to be rewritten after the COVID-19 crash, the Union should submit itself to the same budgetary disciplines as it imposes on its member states.

A restructuring of the European budget in the way suggested will allow the EU to reduce its unhealthy obsession with *juste retour*—the unseemly scramble between net gainers and net losers in which Margaret Thatcher, pre-eminently, indulged. The departure of the British opens up the possibility of ending all rebates and abatements that clutter and obscure the financing system. The opportunity to cleanse the system of Thatcherite legacy should not be missed at the next revision of the MFF in 2026. The duration of the next MFF should be aligned with the term of office of the Parliament and Commission, to last five years rather than seven. This would enhance the transparency and democratic foundation of the budgetary process.

The European Parliament, rightly, wants to tighten financial control on the many EU agencies which have proliferated in an ad hoc way over recent years as the Commission's regulatory and executive powers have grown. MEPs insist that there should be one specific legal basis for the establishment of the agencies in the hope of rationalising their management and improving their effectiveness.[14] Other criticisms have been levelled at the Court of Auditors, whose remit needs to be more understood,

[13] Article 311 TFEU.

[14] Most of the agencies have been created under the flexibility clause, Article 352 TFEU.

and its advice respected. Parliament wants a say in the appointment of the auditors equal to that of the Council—and it should use that power to see that the size of the Court is reduced commensurately to that of the smaller college of Commissioners.[15]

More assured financial regulation at the EU level is a concomitant to fiscal union. Together these reforms will usher in a period of more rational debate about how to bring supranational added value to the delivery of European public goods. The size of the EU budget should be determined rationally by the legislature to match federal spending priorities and debt commitments. One notes that the Union starts from a very low budgetary base. Even with the post-pandemic recovery programme, the MFF for 2021–2027 amounts to some €2 trillion, or barely 2 per cent of the Union's GNI. This is not a European superstate. As we propose in Chap. 3, an organic law should be used for the purpose of growing the budget.

Our second necessary element is that the ESM must be transformed into a European Monetary Fund and fully incorporated into the law of the Union. Its mandate should be expanded to include crisis prevention as well as crisis management. The EMF, like the IMF, will take decisions by QMV not unanimity, building political and market confidence. The Treasury Secretary, whose incarnation we witnessed in Chap. 2, will chair the EMF board. Permission to float federal eurobonds must be put beyond legal peradventure by a treaty amendment that provides the treasury with a regular source of federal revenue without compromising the fiscal liabilities of national governments.

Building the Eurozone

And third, the Eurogroup should be formally reconstituted under the enhanced cooperation provisions of the treaty.[16] In the interest of fidelity to the general interest, the Eurogroup should be chaired by the Treasury Secretary, who would vote only on executive and not legislative matters. Ideally, the new Eurogroup would comprise all nineteen eurozone states, but so long as few as nine countries are willing to act as pioneers, the critical step towards fiscal union can be taken, with others joining later, including Denmark and Sweden. Once inside enhanced cooperation, the vanguard should decide to leave unanimity behind and operate only by

[15] Articles 285 and 286 TFEU.
[16] Article 20 TEU.

QMV.[17] The likelihood of such differentiated integration based on the eurozone is much facilitated by the retreat of the UK from the field of play. A better run eurozone will make membership of the single currency more attractive and accessible to non-euro states.

The role of the economic affairs and budgetary committees of the European Parliament is already powerful, but any reform of the governance of EMU must pay greater heed to the need for parliamentary accountability. Acquiring the right of co-decision under the organic law procedure for decisions on revenue, as we propose, will be the single most important boost to the powers of the European Parliament. We can go further to democratise the emerging fiscal union. Under the Lisbon Treaty, Parliament is only informed but not consulted by the European Council and Council about their recommendations to member states on the conduct of economic policy.[18] If these macroeconomic policy guidelines, aimed at increased economic convergence, were turned into a legislative act co-decided by Council and Parliament, they would have more force and a higher profile. In the case where the excessive deficit procedure had to be applied, the national parliament of the member state concerned should be granted an automatic hearing under the auspices of the European Parliament.[19]

The new-style Eurogroup and EMF can become the valid fiscal policy interlocutor of the ECB as it conducts monetary policy, working together to consolidate the currency and advance economic convergence. The bloc needs to attain high standards of fiscal prudence that command democratic respect and enable the eurozone to withstand future shocks. The more coherent leadership will reinforce the international role of the euro. Participation of the Treasury Secretary in the IMF and other global monetary institutions will clarify usefully for its international partners the EU's direction of travel. The treaties will have to be adjusted to codify these changes, simplify the rules and eliminate the legal uncertainty that prevails at present.

The bloc will not have a 'Hamiltonian moment' when a new federal state, like the US, assumes the sovereign national debt of its members. Rather, Europe's fiscal union will permit the gradual and incremental growth of federal debt in a framework that is coordinated with that of the member states. National treasuries, not least the Bundesministerium der

[17] Article 333 TFEU.
[18] Article 121(2) TFEU.
[19] Article 126 TFEU.

Finanzen in Berlin, will save money out of European fiscal union. Banking union will be assured. The EU citizen taxpayer will benefit from a more state-like, capable federation with decent spending power at all appropriate levels of government.

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CHAPTER 7

The Neighbours

Abstract The EU's conventional enlargement policy has run its course. Yet the Union must prepare itself to take fuller responsibility for the wider neighbourhood. A new category of affiliate membership would suit both the Union's western and eastern neighbours, allowing for an upgrade of all the current association agreements and privileged participation in the work of the EU institutions.

Keywords Enlargement • Copenhagen criteria • Brexit • Ukraine • Western Balkans • EFTA • European Economic Area (EEA) • Association agreement • Differentiation • Affiliate membership

Few things have caused more problems for the European Union as its enlargement. The treaty bids the bloc to welcome to membership any European state that respects the values of the Union "and is committed to promoting them".[1] In practice, however, admitting new members is fraught with complications, not the least of which are the recalibration of power and finance that must then take place among the existing member states as well as the coming to terms with new next-door neighbours at the expanded border.

[1] Article 49 TEU.

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In 1993, at Copenhagen, the European Council spelled out what made an eligible candidate for membership—and it has been trying to apply the criteria ever since. New member states must be able to demonstrate stable institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities. They will need a functioning market economy and the ability to cope with competitive pressure and market forces within the EU. They must have the ability to take on all the obligations of membership, including the capacity to effectively implement the rules, standards and policies that make up the body of Union law (the *acquis*). And they must adhere to the aims of political, economic and monetary union.

Enlargement is not only a domestic question for the Union but also an instrument of its foreign and security policy. It requires an integrated and not a fragmented approach that fully recognises the deeply political challenge of adding new members into an existing pact of a federal type. The conduct of enlargement policy has long since ceased to be the preserve of diplomats. EU citizens and national parliaments have rightly demanded a say in the decision about where the territory of their new European polity starts and stops.

The End of Enlargement?

For the first twenty years of its existence, the then European Community was plagued by the question of whether to admit the British and, if so, on what terms. After the eventual accession of the UK, Ireland and Denmark in 1973—Norway was lost on voyage—the Union took another thirty years to grow to fifteen member states. Then the 'big bang' enlargement in 2004 saw membership jump to twenty-five. This was followed by the entry of Bulgaria and Romania in 2007 and Croatia in 2013. All the newcomers have found it more difficult than expected to adapt as member states under the EU regime and some, notably Hungary and Poland, have since openly disavowed the values of the Union to which they so recently signed up. Public support for enlargement cooled. In the UK, exaggerated fear of Turkish accession (stoked by Boris Johnson) is thought to be one of the chief reasons for the Leave vote in the 2016 referendum. Chastened by difficulties in assimilating the new members, sobered by the stress of large-scale irregular immigration from Africa and the Middle East and badly bruised by Brexit, few serious EU politicians were left to champion the further expansion of the bloc. Instead of preparing for further

enlargement, the Union was busy building a Fortress Europe—in many cases, such as on the Polish border with Belarus, quite literally out of ditches, razor wire and watchtowers.

Before the Ukraine crisis, at least, EU enlargement had effectively ground to a halt. Now Ukraine, Georgia and Moldova seek a fast-track entry to membership. One appreciates that emotional responses to Ukraine lead many, including President von der Leyen, to make generous tweets and gestures about the immediate renewal of the Union's enlargement to the east. Nonetheless, while nobody can know the future, it is important to recall that the EU has strict procedures concerning the accession of new members and that they are there for a purpose.

An official decision to admit new members is subject to a lengthy procedure involving, first, a favourable opinion from the Commission, the assent by an absolute majority of the European Parliament and the unanimous agreement of the European Council. A candidate then has to be able to open and close negotiations on thirty-one chapters, the fundamentals of which concern economic readiness, the functioning of democratic institutions and the reform of public administration.[2] The final accession treaty has to be agreed by every government and ratified by the parliaments of the twenty-seven member states (in some cases involving referendums)—to say nothing of the democratic consent of the candidate country itself.

Debates about enlargement usually focus on the eligibility and state of readiness of the candidate countries to assume the honour of Union membership. Too little attention is paid to the capacity of the Union to absorb new members. It is in truth the systemic feebleness of the EU's own governance which weighs against the further enlargement of the bloc. Brussels is still processing the impact of Brexit which, at least superficially, has left the Union weaker, smaller and poorer. As things stand, the EU institutions are unfit for the purpose of internalising the national problems of the Balkans or of Ukraine, Georgia and Moldova. The Russo-Ukrainian war does not alter these fundamentals.

The Commission has prepared its Opinions on the accession of Ukraine, Georgia and Moldova. It has positioned these East European applications in the context of the stalled enlargement process in the Western Balkans. The Commission will rehearse the formal accession procedure. It may be able to be unusually inventive, speed up the process and modify its

[2] EU Commission Communication, *Enhancing the accession process*, COM(2020) 57, 5 February 2020.

approach. One proposal, from Michael Emerson and colleagues, is to admit the candidate states in phases, involving gradually increased participation in EU institutions.[3] In the final pre-accession phase, after meeting various tests, the new member states would be admitted to the Council but deprived of their right of unilateral veto. It is hoped, optimistically, that letting in new members as probationers empowered only to act by QMV would set an example which old member states might wish to emulate.

Nevertheless, on the basis of the current treaty and Copenhagen criteria, on which the Commission's Opinion will ultimately rest, the chance of early Ukrainian accession is negligible. The Union is honour bound, therefore, to address the question of how, in such circumstances, it can shoulder its responsibilities to the troubled wider Europe. The treaty commits the EU to develop a "special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation".[4] But how should this commitment be translated into practical moves to advance the social, economic and political aspirations of its neighbours—to develop, in other words, what Commission President Romano Prodi called a comprehensive "proximity policy"? The need to repair the devastation of Ukraine after the Russian invasion brings a new urgency to that old question.

The Eastern Neighbours

The Union would do well, in the first instance, to learn from previous mistakes in the way it has handled its eastern neighbourhood. Wishful thinking is no basis for strategy. Western assumptions about the ease of the transition of ex-Soviet countries into stable liberal democracies have been confounded by events. The Union's interventions on its eastern borders have not stabilised the region or added to its own security—indeed, rather the contrary. Russia's invasion of Ukraine shatters any residual post-Cold War illusion that the EU's eastward expansion will be uncontested. At the time of writing (May 2022), it is impossible to predict how the conflict

[3] Michael Emerson, Milena Lazarevic, Steven Blockmans and Strahinja Subotic, *A Template for Staged Accession to the EU*, October 2021. https://www.ceps.eu/ceps-publications/a-template-for-staged-accession-to-the-eu/

[4] Article 8 TEU.

will end. War reshuffles the pack. But there is one very important lesson for Brussels to learn: that the Union needs now to drop its pretence that it will admit its eastern and southern neighbours to full membership once they pretend to be ready.

Facing up to reality also requires the EU to achieve a genuine unity of purpose with respect to its neighbourhood policy. This has not always been the case. While the European Parliament has been fairly consistent in wanting enlargement for its own sake, several member states have supported eastern enlargement only as a buffer against Russia and Turkey. Other states, traditionally led by Britain, have promoted enlargement in the fond expectation that the newcomers would blunt the drive to a deeper European integration of a federal type. Mixed messages have not been helpful.

Ursula von der Leyen continues to defend the line introduced by the European Council at Thessaloniki in June 2003, namely that its then Stabilisation and Association Process "will remain the framework for the European course of the Western Balkan countries all the way to their future accession". Few believe her—certainly not the leaders of Serbia or Albania who are already, wisely, wondering how to better secure their own regional interests in spite rather than because of the European Union. Serbia's President Aleksandar Vucic and Albanian Prime Minister Edi Rama know very well that if the Commission is ambiguous about enlargement, the Council presents an insuperable obstacle. It should not be missed that a Western Balkans summit at Brdo in October 2021 could only agree to confirm support for the enlargement *process*—but not for actual enlargement.[5]

The facts on the ground rather speak for themselves.[6] Although democratic strides have been made, especially by younger generations, most potential candidates for EU membership in Eastern Europe and the Western Balkans still suffer from endemic corruption, organised crime, religious strife, antisemitism, ethnic tension and a compromised judiciary. Many are quarrelling with their immediate neighbours. Stable multi-party democracy is rare. Few enjoy the conditions for steady economic development. All are at a distance from meeting the increasingly tough eligibility

[5] https://www.consilium.europa.eu/en/press/press-releases/2021/10/06/brdo-declaration-6-october-2021/

[6] See the Commission's 2021 Communication on EU Enlargement Policy, COM(2021) 644, October 2021.

criteria for Union membership—criteria which, as France especially has insisted, will be applied rigorously henceforward. The days are long gone when the theoretical Copenhagen criteria could be amiably ignored in practice.

The truth is that there is a dearth of eligible candidates for EU accession. None of the six countries of the Western Balkans—Serbia, Montenegro, North Macedonia, Albania, Bosnia Herzegovina and Kosovo—have attained the fully rounded character of a modern independent state, let alone a state capable of taking on the obligations of EU membership. Kosovan independence, denied by Serbia and Russia, is not even recognised by five current EU member states.[7] The EU dispenses large sums of aid to the rulers of those countries in the hope of boosting their European credentials. But two dictatorships, China and Russia, vie with the EU for influence in the region. And they all compete with Turkey, officially an EU candidate itself since 1999, but long since removed beyond the pale by adopting an authoritarian government and flouting fundamental rights.

In 2014, the EU signed elaborate and ambitious Association Agreements with Ukraine, Georgia and Moldova.[8] These Agreements created a deep and comprehensive free trade area (DCFTA) and were predicated optimistically on there being steady convergence with the EU *acquis* and the transformation of the three states into stable, secure market democracies based on the rule of law. The three Association Agreements looked good enough in Brussels but provoked a staunch backlash in several member states.[9] The European Council felt obliged to confirm that the Agreement "does not confer on Ukraine the status of a candidate country for accession to the Union, nor does it constitute a commitment to confer such a status to Ukraine in the future".[10]

Signing up to the EU's Association Agreements also sparked major political convulsions within the three countries, being too much for pro-Russian nationalists and too little for pro-European opinion. Although the economic development of Ukraine was latterly encouraging—not least

[7] Spain (because of Catalonia), Cyprus (because of Turkish North Cyprus), Greece (because of Cyprus), and Romania and Slovakia (for reasons best known to themselves).

[8] For the Ukraine Association Agreement, Official Journal L 161, 29 May 2014.

[9] None more so than the Netherlands whose Liberal-led government, absurdly, held a referendum on the Ukraine Association Agreement in 2016 and lost it—forcing an embarrassing delay in its ratification.

[10] European Council Conclusions, 16 December 2016.

profiting from the benefit of visa liberalisation—it is still a very poor country by western standards.[11] And its progress towards liberal democracy has been spasmodic. Because Ukraine failed to meet requisite EU norms of governance, its gradual integration into the internal market, as presaged by the DCFTA, has not happened. Vladimir Putin consistently threatened to retaliate if progress towards Europe was resumed. He was surely to be taken at his word.

The Western Neighbours

Over the years, the EU has crafted association and free trade agreements with its western neighbours as a substitute for failed membership bids.[12] Iceland, Norway and Switzerland, with little Liechtenstein, compose the European Free Trade Area (EFTA). Iceland, Norway and Liechtenstein trade with the EU under the protection of the European Economic Area agreement of 1992 (EEA). Although they are not in the customs union, the EEA trio have privileged access to the single market and have joined the Schengen area. A separate EFTA court works in a sisterly fashion with the European Court of Justice to resolve disputes according to EU law. There is no instance of major divergence between the EEA and EU, although the Commission complains of the late adoption of EU law by the EEA states. In terms of democratic accountability, however, the EEA leaves a lot to be desired.

Switzerland, having failed to accept the EEA, has been left with a free trade agreement dating back to 1972. Modernisation of the Swiss arrangement has been hampered by a weak Federal Council in Bern having to have everything endorsed by referendums. Given the fact that the Alpine Swiss are surrounded by the Schengen area, a certain pragmatism was inevitable—for example with veterinary, health and food safety checks and customs' controls—but discord persists on the questions of free movement of people, maintaining a level playing field and state aid. In the institutional arena, the role of the European Court of Justice, the standing of the Swiss parliament and the size of the annual budgetary contribution to EU coffers (CHF 1.3 billion) have caused difficulties. A total of 120 separate bilateral arrangements, sector by sector, spark litigation, and the protracted negotiation of a framework agreement between Bern and Brussels

[11] Ukraine's GDP per capita is under half that of Bulgaria's, the EU's poorest country.
[12] Article 217 TFEU.

has not been humorous. No further progress is expected until after Switzerland's next federal elections in 2023.

Although no longer candidates for EU accession, each EFTA country has to work hard to manage its own eurosceptic public opinion. They have been watching Brexit closely. The Commission was anxious not to concede to the UK something which it would then be bound to offer also to EFTA. Conversely, the EFTA countries were wondering if the UK would gain something they could then lay a claim to themselves. There is growing dissatisfaction in EFTA that as European Union integration advances via the Treaty of Lisbon into civic, police and justice matters, including asylum and immigration, the democratic deficit grows. The extension of the EU's regulatory clout into digital market, energy supply and climate change policies presents new challenges. Now thirty years old, the EEA was and is essentially just a trading arrangement run by technocrats. The Swiss arrangements—weirdly touted from time to time by Boris Johnson as a model for Britain—are clearly unsatisfactory.

The western refuseniks—Iceland, Norway, Switzerland and the UK—have all decided for reasons of their own that they do not want EU membership. The question will soon arise, however (if it has not already), about how a new model of a more dynamic and democratic partnership might suit all parties better. This I will call affiliate membership of the European Union.

Affiliate Membership

At present, there is nothing in the EU treaties between full EU membership and no membership. The plethora of association agreements of different types and intensities attempts to fill the gap. It is in the EU's interest that it maintains and where possible strengthens its own contribution to the prosperity and security of its neighbours. The current association agreements are not an adequate vehicle for these purposes and are overdue for an overhaul. A new form of affiliate membership would be a more realistic objective than the false hope of full accession—as well as being a more assured conduit for EU trade and leverage and assistance to those affiliated partners that want it. Affiliation would require all parties to aim for stability based on political honesty and legal certainty, putting a stop to the pretences that pepper the rhetoric about the enlargement of the Union.

The general purpose of affiliation is to allow European states with social market economies, trading within the EU's regulatory orbit, to become

stable and reliable partners of the Union without having to espouse the goal of political, economic and monetary union. Affiliate status should be regarded as a durable settlement and not necessarily as a springboard for full membership. Naturally, affiliation as a long-term partner of the Union should require respect for the Charter of Fundamental Rights and for the values on which the Union is founded—democracy, the rule of law and fundamental rights.[13] But affiliated countries would not be required to sign up to the political objectives of the Union.[14] The Copenhagen criteria should be retained by the EU as its benchmark for accession but not affiliation.

The installation of a new formal category of affiliate membership will require treaty change.[15] The new clause—a possible draft of which can be found in Annex III—will establish an appropriate legal base for a privileged partnership with close neighbours that can develop confidently to mutual benefit. A new accession process will have to be devised for affiliate member candidates, but this will be less onerous and, importantly, much quicker than the current procedures for full membership. Finding the precise right balance between full membership and non-membership will be attuned to the differing circumstances of the affiliate states and will be a matter for specific negotiation.

For the EU's western neighbours, affiliate membership would imply a significant upgrading of current agreements. This would be especially valuable for the UK which concluded a minimalistic Trade and Cooperation Agreement (TCA) with the EU on Christmas Eve 2020. Concluded under international and not Union law, this Agreement is unusual, to say the least, because it pitches not at convergence but at divergence from the *acquis*. Unlike the Union's conventional association agreements, the British pointedly refused to pay respect to EU values.[16] In truth, the TCA is more about dissociation than association. Unsurprisingly, it is already under stress, not least with respect to the position of Northern Ireland which remains in the European single market for goods. While the TCA is fiercely defended by the current nationalist government in London, it has led to a steep fall in UK trade with Europe, labour shortages, customs difficulties and many practical problems for EU and UK citizens alike. It

[13] Article 2 TEU.
[14] Article 3 TEU.
[15] Surely, Article 49(a) TEU.
[16] Compare Article 8 TEU with Article 1 of the TCA, Official Journal L 149, 30 April 2021.

continues to reduce British political influence on the European mainland and across the world (especially in Washington).[17] The UK rejected EU proposals to include a chapter in the Agreement on foreign, security and defence policy.

The Trade and Cooperation Agreement will be up for review from 2024 onwards, when the next UK general election is in any event scheduled to take place. The opposition parties of Labour, Liberal Democrats, and Greens as well as the Scottish and Welsh nationalists are already promising to seek some (unspecified) form of fresh convergence with Brussels. A Political Declaration on the framework for future EU-UK relations was signed by Boris Johnson in 2019 but was later discarded by him.[18] The Political Declaration would be a good place for another British government to start on the renewal of relations with the EU. Reconciliation will not be straightforward, because the UK is so deeply distrusted by its erstwhile partners and domestic opinion in Britain remains bitterly divided on the Europe question. A new deal for post-Brexit Britain, therefore, will have to be inventive, take its time and be bipartisan. It will be crafted in the full knowledge that it could provide the pretext for the transformation of the EU's other neighbourhood partnerships. If affiliate membership beckons for Britain, it will be sure to have wider relevance.

For the EU's eastern neighbours, affiliate membership will facilitate convergence on EU norms without obliging them to leap improbable legal and political hurdles or to surrender national state sovereignty to a degree that would be unacceptable, for example, to President Vucic (who, now re-elected until 2027, tags along behind Orban). In the Balkans, affiliate membership should be deployed to intensify democratic reform and encourage intra-regional collaboration. Affiliation will mean closer political cooperation with Brussels, the expansion of trade, investment and cultural ties and the systematic joint management of EU-funded programmes. The affiliate package, building on current partnership agreements, could be made available for the Balkans promptly. For Ukraine, Georgia and Moldova, the timing of affiliation depends on the outcome of the war. But the EU must be prepared for whatever happens next in Russia, unlike in 1991. The addition of affiliate membership to the EU's

[17] The UK's Office for Budget Responsibility estimates an overall 4 per cent fall in the UK's national wealth as a result of Brexit.

[18] Official Journal C 384 I, 12 November 2019.

arsenal will enlarge the options available to both Brussels and Kyiv—options which, at least at present, seem in rather short supply.

Affiliate membership would also offer, should it be needed, a parking place for any current EU member state, like Hungary or Poland, that sought to dissociate itself from an EU that has chosen to take the path towards a federal union. A negotiated relegation to affiliate status would avoid the costly humiliation of a UK-style secession while maintaining close links with Brussels.

Affiliating with the EU Institutions

In institutional terms, for those countries enjoying a current association agreement, promotion to affiliate membership (to be worth the trouble) must mark a significant upgrading of their relationship with the Union. The present clutch of joint committees, mixed parliamentary bodies and partnership councils will need to be reinforced to govern the new condition of affiliation and cope with the demands of a necessarily more dynamic relationship. For the EEA countries, which already enjoy privileged access to the single market, affiliate membership must confer the new right to participate in the Council vote—without the power of veto—on relevant market regulation. This would plug the glaring democratic deficit which exists for the EEA at present.

Furthermore, all affiliate members should be involved in the preparation and implementation phases of EU laws that will apply to them. Affiliate states joined to the EU customs union must be informed and consulted and given a say in all EU trade policy negotiations. Affiliate ministers and officials should be included as observers in regular Council business. Engagement would take place at every appropriate level, including within the comitology system aimed at improving the smooth and correct application of those EU regulations adopted by the affiliate states. Likewise, parliamentarians from the affiliate states, especially rapporteurs, should be welcome to attend the legislative committees of the European Parliament.

The EU institutions will have to adapt to accommodate the new status of affiliate membership. They are already proven able to manage a degree of internal differentiated integration among member states, notably through the treaty provisions on enhanced cooperation. They may now have to cater for external differentiated integration among a dozen varieties of affiliate member states. For the Commission, especially, although

well used to the complexity of running association agreements, the installation of affiliate membership will bring new challenges. While differentiation beyond EU orthodoxy demonstrates welcome flexibility, there are certainly limits to pragmatism. Excessive differentiation would risk boosting centripetal dynamics that could unravel the *acquis communautaire* and create normative confusion.[19]

The EU will be properly concerned to retain a clear distinction between the respective rights and duties of full and affiliate member states. As the Brexit process demonstrated, the Union is highly sensitive to the dangers of cherry-picking by third countries. While the option of full membership will remain open conditionally to all, as the treaty prescribes, the boundaries between full and partial membership must be clearly demarcated and regularly policed. Practical experience of partial membership may very well lead certain affiliate members in due course to apply for accession as full members. Unlike the current association agreements, the affiliation agreements should be designed to serve as effective preparation for full membership for those countries who want it—just as they should suit as a permanent parking place for those who don't.

In all events, the Commission remains the essential central pillar of EU governance for the whole European neighbourhood. A senior Commissioner should be appointed with specific responsibility for relations with the nexus of affiliate members, including oversight of their participation in EU spending programmes and related budgetary contributions. Access to all relevant EU agencies should be guaranteed for affiliate states. The pandemic illustrates the importance of the Commission's capability to cajole and coordinate member states in matters of public health: the coronavirus does not stop at the Union's frontiers. Such executive action is needed across a wider geography, and the role of EU agencies in working on a reciprocal basis with affiliate members will become critical. Re-joining the EU's executive and research agencies should be particularly welcome to the UK, including the European Defence Agency.[20]

Because the treaties of affiliation would fall under the jurisdiction of the European Court of Justice, the courts and lawyers of the affiliated states

[19] Nicoletta Pirozzi and Matteo Bonomi, *Policy Recommendations for a Differentiated Union: Ensuring Effectiveness, Sustainability and Democracy*, EU Idea Policy Brief No 4, December 2021.

[20] Steven Blockmans, *Why the Ukraine crisis should push the UK and EU into a tighter embrace on security policy*, CEPS Policy Brief, February 2022.

should be accorded privileged access in Luxembourg. Affiliates would be empowered to approach the EU Court for preliminary rulings over the interpretation or implementation of the affiliation treaty.[21] They might institute third-party proceedings to contest a judgment of the ECJ rendered without their being heard where the judgment is prejudicial to their affiliation treaty rights. In addition, a citizen or legal entity in an affiliate state should be entitled to seek redress in the European Courts if directly, individually and adversely affected by an EU act.[22]

Other attributes of EU citizenship, such as protected residency rights, should be shared through reciprocity with the affiliate members. Certain individual rights should also be extended—for example, the opportunity to take part in popular consultations such as the Conference on the Future of Europe and to engage in a European Citizens' Initiative.[23] EU political parties and civil society organisations would naturally extend their activities to include the affiliate states. The right to vote and stand in an election to the European Parliament could be extended to affiliate citizens resident within the EU. The right to petition the Parliament and apply to the EU Ombudsman could also be widened to affiliate citizens. The formal consultative organs of the EU, the Economic and Social Committee and Committee of Regions, could be fully opened up to participants from the affiliate states to amplify the influence of the affiliates on the Brussels policy makers and help vertical coordination with affiliate social partners and regional and local government.[24]

Affiliates should also be granted the option of becoming a stakeholder in the European Investment Bank (EIB).[25] The activities of the EIB are of special interest to underdeveloped regions. The national central bank of an affiliate state could be formally allied to the European System of Central Banks which, under the direction of the ECB, is dedicated to maintaining the overall stability of Europe's financial system.[26] Likewise, affiliates would engage with the EU Court of Auditors when accounting for their dealings with the EU budget.

[21] Article 267 TFEU.
[22] Article 263 TFEU.
[23] Article 11(4) TEU.
[24] Article 300 TFEU.
[25] Article 309 TFEU.
[26] Article 127(5) TFEU.

Whereas conventional association agreements are mostly intergovernmental in character, run by government officials and Brussels technocrats, affiliate membership should be designed to engage wider civil society and economic interests in the life of the Union. Affiliation should aim to replicate the pluralistic relationship of full membership, involving professional stakeholders, social partners and non-governmental actors—including opposition parties—in official dialogue with the EU. European integration is not the exclusive preserve of ruling elites. Deeper engagement with the Union by large sections of society should stimulate the swifter development of secular liberal democracy in those affiliate member states that aspire to it, notably in the Balkans.

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CHAPTER 8

Security

Abstract Affiliate membership should be underpinned by a new intergovernmental European Security Council, combining the best of the EU and NATO. Such a body would sharpen the strategic posture of the Union as well as keep the US involved in Europe—and the Russians out. Recent events necessitate the rapid development of the Union's security and defence dimensions, especially if it is to play a central role in the peace process.

Keywords Security and defence policy • European Security Council • NATO • US • Russia • Ukraine • OSCE

It goes without saying that the replacement of the EU's fictive enlargement policy by the introduction of affiliate membership must be designed to augment European security. That Russia could invade Ukraine in the twenty-first century shocks all member states of the EU, including those famously 'neutral' sheltering under the patronage of NATO, into reconsidering their present security arrangements. Nobody can continue to rely just on the over-complicated and partially dysfunctional security and defence provisions of the Treaty of Lisbon. More radical innovation is required, necessarily involving all EU member and affiliate states.

We have noted before how the drafters of the Lisbon Treaty suffered from a form of constitutional schizophrenia—wishing the end without

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willing the means, proposing lofty federal ambition while condoning mundane confederal methods. Nowhere is this more obvious than in the treaty's approach to security and defence. We read that member states "shall support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity and shall comply with the Union's actions in this area". They will "refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations".[1] A common security and defence policy will be progressively developed, "which might lead to a common defence".[2] Elaborate institutions and painstaking decision-making procedures are prescribed to progress such goals, including a special solidarity clause to be triggered if a state suffers a terrorist attack or a natural disaster.[3] A core group of states with military capability is even permitted and encouraged to create a permanent military structure within the EU framework (PESCO).[4] Other member states must come to the aid of a state under armed attack.[5]

At the same time, and on the other hand, the reactionary mindset kicks in. We read: "In particular, national security remains the sole responsibility of each Member State".[6] Although it is only NATO that guarantees collective mutual defence, the EU will respect NATO but not join it.[7] And whereas PESCO was meant to be exclusive, the European Council under Donald Tusk and Charles Michel have actually rendered it inclusive—so that almost all member states are now involved in PESCO in some vague non-combatant way or another.

The division between NATO and the EU has contributed greatly to the weakness of western security over many years. Not least among the flaws was that Britain refused to allow the EU to develop a serious common policy in foreign, security and defence while France, long influenced by General de Gaulle, harboured antipathy towards the Atlantic Alliance. Acting separately, and largely uncoordinated, the enlargement policies of both organisations have failed. Prudently, in an attempt to shore up the West, the Clinton administration created a Partnership for Peace (PfP)

[1] Article 24(3) TEU.
[2] Article 24(1) TEU.
[3] Article 222 TFEU.
[4] Article 42(6) TEU.
[5] Article 42(7) TEU.
[6] Article 4(2) TEU.
[7] Article 42(2) TEU.

programme in 1994 under NATO auspices which came to include the entire European neighbourhood.[8] Imprudently, PfP was later allowed to fizzle out and a Euro-Atlantic Partnership Council became dysfunctional. Russia was kicked out of PfP after its annexation of Crimea in 2014. NATO's (absurdly named) Open Door policy led in 2008 to a glib and half-hearted promise of NATO membership to Ukraine, Georgia and Moldova and, later, to the haphazard admission of Albania, Montenegro and North Macedonia to full membership—none of which has added materially to Europe's security.

What can be done? In 2009, President Nicolas Sarkozy wisely reversed De Gaulle's decision to exclude France from NATO's military structure. President Macron talks of the need to bolster the EU's "strategic autonomy", clearly frustrated by the inability of the Lisbon provisions on defence to take flight. In 2018, Macron improvised the European Intervention Initiative (E2I), launched outside the Union framework and PESCO, to develop a shared strategic culture among its signatories. He insists that E2I is compatible with both the EU and NATO. Encouragingly, eleven EU member states have so far joined E2I, including non-NATO members Finland and Sweden, plus non-EU member Norway.[9] Once Brexit was done, the British realised they can no longer veto the development of EU defence policy. The UK has now signed up to E2I, albeit nervously.

Provocation

If ever there was a time to strengthen western security, Vladimir Putin has hastened it. Behind Putin's invasion of Ukraine lies the suspicion, boldly articulated by President Joe Biden, that Russia and China are conniving to shape a new world order with the express intention of stemming the advance of liberal democracy. This postulates a battle of ideology reminiscent of the twentieth century. It deserves a cogent response from the West which will be understood elsewhere in the world, not least in Africa, India and Latin America. The immediate response to Putin's war is a military

[8] Even Austria, Ireland, Malta and Switzerland joined PfP, alongside all Western Balkan countries (except Kosovo) plus Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrghyz Republic, Moldova, Tajikistan, Turkmenistan, Ukraine and Uzbekistan.

[9] Denmark has joined E2I despite having an opt-out from the EU's common security and defence policy. Protocol No 22 on the Position of Denmark, Part II. A referendum on the suppression of this opt-out was held on 1 June 2022.

refortification of NATO's eastern border. But the ideological war can only be fought by the West on the basis of a sharper geopolitical strategy, a closer alignment of interests and values, and tighter coordination between political and military institutions. The European Union has a leading role to play at the heart of the battalion of the democracies in strategic rivalry against the autocrats.

At first, the Ukrainian crisis exposed real divisions both within the EU and between the EU and its transatlantic NATO allies about the future of European security. These problems of western cohesion were already stripped bare by the disastrously chaotic retreat from Afghanistan in August 2021. The EU and NATO had been left gaping since 2008 when Russia began to redraw the 1945 frontiers of Eastern Europe by invading South Ossetia, Abkhazia and the Donbas and by effectively annexing Transnistria and Crimea. The West lacked the wherewithal either to defend the integrity of Ukraine, Georgia and Moldova or to articulate a sensible buffer zone policy. The latter was inevitably a sensitive issue because no non-Russian wanted to deny these countries the sovereign right to decide their own future. But no coherent alternative strategy was ever articulated in Brussels. Dissonance between the EU and NATO contributed greatly to this failure.

We conclude, therefore, that a new institution, which we call a European Security Council, is now required to manage the conjunction of NATO and the EU, adding value to both. The intergovernmental body would unite the western democracies untrammelled by old institutional constraints. As things stand, NATO lacks strategic capacity and the EU lacks military capacity. Neither organisation can cope with the current security situation if left to its own devices. A European Security Council would underpin the Atlantic Alliance, helping NATO to think strategically while enabling the EU to act militarily. The new body would be tasked specifically to overcome the historic division between the two Brussels-based organisations.

A European Security Council

Europe's Security Council would be a standing conference ready for emergency situations but committed to building over the long term a strategic consensus about the future of western security. It would keep under continual assessment Europe's defence capabilities and review pooled intelligence. It would provide the platform to keep the US permanently engaged

in the matter of European security and discourage the White House from talking directly to the Kremlin over the heads or behind the backs of the Europeans. It should help Germany, Europe's most reluctant military member, to upgrade its contribution to collective defence. For France, the European Security Council would stimulate the EU's own efforts in the defence domain—but as a complement to, and not a substitute for US engagement. Active participation in the European Security Council alongside the US and Canada would be a dignified and effective way for the British to find their way back to Europe.

The setting up of the European Security Council, probably chaired by a senior foreign or defence minister from an EU state, need not be cumbersome.[10] Analogy with the Permanent Security Council of the UN is misplaced. Actions to follow through the consensual decisions of the European Security Council would be taken through the offices of NATO or the EU with their own competences and under their own procedures, or by states acting individually or on a sub-regional basis. PESCO and E2I will be building blocks. Membership of the European Security Council would involve all EU and NATO member states. Although Sweden and Finland look set to join NATO in their own right, participation in the European Security Council should be an acceptable route for the EU's remaining 'neutrals'—Austria, Cyprus, Ireland and Malta—to contribute more to collective western security.

The European Security Council should also welcome the participation of the wider neighbourhood, including Ukraine, Georgia, Moldova and the Western Balkan countries. Engagement with the European Security Council would be integral to EU affiliate membership and could be made conditional on membership of a rebooted and enhanced programme of Partnership for Peace. By choosing to participate in the European Security Council, Serbia and Turkey would have the useful chance to reaffirm a western strategic orientation. Who knows, Turks and Cypriots might even begin to talk to each other. Working regularly together in the Security Council format, EU and NATO members should engender greater public confidence in Europe's ability to defend their interests worldwide.

[10] Article 37 TEU.

Concept and Compass

In March 2022 the European Council published a lengthy Strategic Compass document which incorporates the bloc's first-ever joint threat assessment.[11] It identifies measures to reverse what High Representative Josep Borrell regrets as Europe's "strategic shrinkage". It emphasises the importance of solidarity against Russia and the need to enhance the resilience of all the EU's security and defence arrangements, including hybrid threats and intelligence shortfalls. Making many commitments to future investment and activities, the Compass highlights three concrete proposals: to create a force of (only) 5000 EU troops for rapid deployment, to strengthen its Military Planning and Conduct Capability (in effect, an EU Headquarters) and to convene every two years a Security and Partnership Forum with its neighbours, chaired by Borrell. The Forum would embrace both the EU's "bilateral partners" (including the US, Canada and Norway) and its "tailored partnerships" with East European, Western Balkan and friendly African countries.[12] Borrell's rather insipid Forum would be better superseded by the more formal, regular and purposeful European Security Council.

The Strategic Compass urges the greater acceptance of constructive abstention in the Council by its less committed ministers. It promises actually to implement the treaty provision on the delegation of specific security and defence tasks to a core group of member states.[13] EU-NATO cooperation will function on the basis of "inclusiveness, reciprocity and decision-making autonomy". There will be regular joint meetings of the EU Political and Security Committee and the North Atlantic Council. Attention is drawn to the EU's specific role in offering mutual assistance to its members under attack alongside the collective defence guarantee of NATO.[14] If followed through, the Compass should help define a clearer purpose for PESCO and reduce duplication and waste in Europe's defence and R&D efforts. At least in the short term, Putin's provocations are working to reinforce unity among his western opponents. Joe Biden's participation in the meeting of the European Council in Brussels on 24 March 2022 was an

[11] https://eeas.europa.eu/sites/default/files/strategic_compass_en3_web.pdf.

[12] "We remain open to a broad and ambitious security and defence engagement with the United Kingdom".

[13] Article 44 TEU.

[14] Article 42(7) TEU.

encouraging sign.[15] Time is pressing. Any new arrangements, including a European Security Council, need to be up and running before another possible Trumpian presidency takes over at the White House in January 2025.

Peace Process

The invasion of Ukraine on 24 February 2022 takes Europe back to the Cold War. The failure of the West after the fall of the USSR to fully complete the re-ordering of Europe's strategic affairs had encouraged Moscow to return to its old imperious habits. Although the Baltic and central European states were successfully incorporated into the Euro-Atlantic community, Ukraine, Georgia, Moldova and the Western Balkan states, along with Turkey (of its own volition), were left out of the grand bargain. The offer to Eastern Europe from the EU and NATO in Brussels was unconvincing and ambiguous.[16] And with Russia, in any case, left feeling slighted, Europe was to be encumbered by important unfinished business.

The present conflict may last a long time. When eventually peace of some sort returns to Ukraine, diplomacy will reconvene. If Ukraine emerges in some way victorious, one may imagine it will be a country transformed, paradoxically, at once more nationalistic and also in a great state of eagerness for European integration. The oligarchs and the corruption which frustrated President Zelensky's previous efforts for reform will probably have been swept aside. An immediate offer of affiliate membership of the Union, coupled with membership of the European Security Council, would consolidate Volodymyr Zelensky's position inside his country. Ukrainian security will need to be upheld by such western guarantees. How to achieve this on a stable basis while helping Kyiv to apply the rule of law, develop its free market and deepen democratic politics will be the top priority on the agenda of the EU and the European Security Council.

If the war is prolonged, however, the West will inevitably be drawn further into the conflict. Already, shipping lethal aid to Ukraine on a bilateral

[15] One may note on this occasion that the White House, protocol perfect, agreed to two joint communiqués with the EU: a substantive statement with Von der Leyen on sanctions, energy and humanitarian issues https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_22_2007 followed by a declaration with Michel on security https://www.consilium.europa.eu/en/press/press-releases/2022/03/24/joint-readout-by-the-european--council-and-the-united-states/?utm_source=dsms-auto&utm_medium=email&utm_campaign=Joint+readout+by+the+European+Council+and+the+United+States.

[16] In particular, the unimplementable 1994 Budapest Memorandum signed by Russia, Ukraine, the US and the UK in which Ukraine gave up its ex-Soviet nuclear weapons in exchange for security guarantees.

(non-NATO) basis, coupled with the increasing moral outrage at Russian atrocities, renders the EU complicit in whatever will be the political and military outcome. European unity will be put under severe pressure if the peace process involves the partition of Ukraine into Russian and western sectors. Putin knows this—not least because Viktor Orban, now re-elected until 2026, is disloyal to the Union. Germany, meanwhile, is still obstinately dependent on Russian oil and gas. The European Security Council will be at the centre of these arguments as the West adjusts its own military posture and faces a fundamental realignment of its relations with Russia and its allies.

Eventually, no doubt, there will be a conference under the auspices of the Organisation for Security and Cooperation in Europe to deal with all the unfinished business of the Cold War, including human rights, arms control, cyber security, energy supply and nuclear safety. This will involve exploring with post-Putin Russians the principles that should underpin collective security in the twenty-first century. The OSCE was a product of the Cold War. Its time has come again. The European Union, chastened if not fortified by recent events, and faithful to its own origins as peace maker, should play the leading role in its revival.

On 29 June 2022 a NATO summit in Brussels pronounced a new decennial Strategic Concept for the Alliance. Returning the compliment of the EU's Strategic Compass, NATO finds the EU to be "a unique and essential partner" with which strategic partnership must be reinforced. Notwithstanding the presence of Brexiteer Johnson, the summit also insisted that for the development of the strategic partnership "non-EU Allies' fullest involvement in EU defence efforts is essential".

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CHAPTER 9

A Constitutional Moment

Abstract The EU is approaching another constitutional moment when important strides can be taken towards fulfilling its original federal promise. The Conference on the Future of Europe should be followed up by a small reflection group tasked with preparing options for a new convention. We examine the concepts of strategic autonomy and sovereignty in the contemporary context. The agenda of treaty change is summarised, with the aim of installing, by 2029, a capable and discernible federal government of the EU.

Keywords Conference on the Future of Europe • Reflection group • Convention • Treaty change • Federal union • Sovereignty • Constitution

The percipient Henry Kissinger criticised European leaders for turning in on their own soft-power preoccupations and neglecting the need to build a new world order. "Europe", he wrote, "thus finds itself suspended between a past it seeks to overcome and a future it has not yet defined" [Kissinger p. 95]. Few Europeans reacted to his call—and certainly not the recent leaders of Britain or Germany.

One who did was Emmanuel Macron. Soon after his election in France in 2017, Macron gave a hefty lecture at the Sorbonne in which he painted

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a picture of a European federal union properly equipped to enjoy full sovereign autonomy. He argued, among other things, for the introduction of transnational lists for the European Parliament and the reduction in size of the Commission.[1] He proposed the holding of democratic conventions to debate the future of Europe. Later he promoted the idea of a "Conference for Europe in order to propose all the changes our political project needs, with an open mind, even to amending the treaties".[2] The Conference on the Future of Europe was the eventual result—an ambitious attempt in the digital age to involve EU citizens directly in deliberating on a pan-European basis the shape of things to come.

The Conference on the Future of Europe

Starting work in May 2021, the Conference adopted curiously cumbersome rules of procedure which left it up to a plenary composed of more than 400 people to sluice the recommendations of citizens' panels and working groups. An executive board made up of representatives of the three EU institutions drafted a final report.[3] The European Parliament, led by Guy Verhofstadt, has been keen to maximise the opportunity posed by the Conference. The Council, divided as ever about constitutional next steps, works to minimise the outcome. The Commission, which in normal circumstances could be expected to act as the EU's think-tank, has been spectacularly vacuous in its approach to the Conference. Von der Leyen astonished MEPs when she told them she intends to follow up on its proposals before she knows what they are.[4]

While much of the discussion (hampered as was everything by the pandemic) was rather abstract, some clear preferences emerged from the citizens' panels.[5] There was strong demand for more EU education in schools, better EU information policy and more cultural exchanges. The citizens suggested holding occasional EU-wide referendums and regular online polling to test EU policy. They would institutionalise a European

[1] *Initiative for Europe*, Sorbonne speech, 26 September 2017.

[2] *For European Renewal*, 4 March 2019.

[3] Conference on the Future of Europe, *Report on the Final Outcome*, May 2022.

[4] State of the Union speech, 15 September 2021.

[5] Regrettably, the Conference's Multilingual Digital Platform is incomprehensible: https://futureu.europa.eu/?locale=en. For a useful critique, see High-Level Advisory Group Report, *Conference on the Future of Europe: What worked, what now, what next?*, Conference on the Future of Europe Observatory, 22 February 2022.

agora or citizens' assembly. In a quest for more self-reliance, the citizens inclined towards protectionism. They want a tougher and more uniform EU asylum and immigration system, tempered by decency, and linked to the needs of a more fully integrated European labour market. They would reinforce the powers and resources of Frontex, the EU border force, and support joint EU military action for defensive and humanitarian purposes. Higher EU spending, more social policy and tougher regulation are popular. The citizens want harmonised EU corporation tax—but are silent on the matter of EU direct taxation. Unsurprisingly, a majority wants the Union to have more powers in public health policy, upgrading the "protection and improvement of human health" to become a fully shared competence of the Union.[6]

On constitutional matters, the citizens' element of the Conference wants the stronger and wider enforcement of the rule of law across the Union. Like Macron, the citizens favour transnational lists for the European Parliament and the development of federal political parties. They support extending the use of QMV in the Council so long as the interests of smaller states are protected. The national veto should be kept only for decisions on the enlargement of the membership of the Union and changes to fundamental rights. In general, the citizens' panels are in favour of 'more Europe', not less, including a much larger EU budget. They urge the Union to be innovative. They support reopening the constitutional process, thereby confounding the prejudice of 'treaty fatigue', which still seems to prevail in the Council and beset several national parliaments.

A Reflection Group

With the Conference concluded, the next step is to draft concrete proposals for action, including those requiring the kind of treaty amendments we have outlined in this book, and packaging them together to make a logical whole. A small reflection group of wise heads might be tasked with that job. The expert group should take evidence from each of the institutions (independently of each other) about the strengths and weaknesses of EU governance. We would be especially interested in the considered opinions

[6] In other words, promoted from Article 6 to Article 4 TFEU.

of the Commission and Court of Justice. Expert evidence from other sources should also be welcomed.[7]

There are many useful precedents over the years of official reports authored at arm's length from the institutions that have nudged the constitutional evolution of the Union in the right direction. The Spaak Report in 1956 laid the foundations for the common market. The Vedel Report in 1972 showed how increasing the powers of the European Parliament would need it to be directly elected. The Tindemans Report in 1976 illustrated how the aggrandisement of the role of the heads of government in the European Council should be balanced by the directly elected Parliament and the wider use of QMV in the Council. The report of the Three Wise Men in 1979 urged greater use of the flexibility clause to combat 'euro-sclerosis'.[8] The Dooge Report in 1985 opened the door to the IGC which led to the creation of the single market. The Penelope Report in 2002 presented a federalist counterblast to the prevailing intergovernmentalism in the Convention [Duff 2015].

Altiero Spinelli, as a member of the Commission, had been one of the driving forces behind the Commission's very ambitious contribution to the Tindemans Report.[9] Spinelli gave a further major impetus to the political integration of Europe in 1984 when, by then an MEP, he persuaded the Parliament to vote for a draft federalist treaty.[10] The governments were at pains to be seen to react positively to the initiative even though they harboured many reservations about the detail of the proposals. Parliament's influence reached another high point during the Giscard Convention.

In February 2017, MEPs voted through a report written by Verhofstadt that already advocated the beginning of a new round of treaty revision.[11] The Parliament argues that lessons should be learned from the secession of the UK. Although it is open to some form of differentiation, Parliament is opposed to opt-outs from central EU common policies and wishes to eliminate rebates from the budget. The mission of an ever closer union has

[7] Early into the debate, for example, is Jean-Guy Giraud, *Réforme de la gouvernance de l'Union*, February 2022. The Brussels think-tanks should also be tapped for their expertise.

[8] Article 235 TEC, now Article 352 TFEU.

[9] European Commission, *Report on European Union*, Bulletin of the European Communities, Supplement 5/75.

[10] Official Journal C 77, 19 March 1984.

[11] Verhofstadt Report, *Possible evolutions of and adjustments to the current institutional set-up of the EU*, Official Journal C 252, 18 July 2018.

to be reaffirmed "in order to mitigate any tendency towards disintegration and to clarify once more the moral, political and historical purpose, as well as the constitutional nature of the EU".

A Convention

Welcoming the outcome of the Conference on the Future of Europe, Emmanuel Macron called for a wider European confederal political community (including the UK and Ukraine) to be built around a federal core.[12] He is supported by a large majority of the European Parliament in taking forward these ideas.[13] In making at long last its formal proposal for transnational lists, the Parliament has already changed the context. Constitutional reform again becomes thinkable. The next step is for either Macron or the European Parliament—preferably both—to trigger the ordinary revision procedure.[14] An obvious move would be for MEPs to propose to facilitate the use of the unused *passerelle* clause by changing the method of its deployment from unanimity to QMV.[15] The European Council will then have to decide by simple majority to summon a new Convention to be followed by another Intergovernmental Conference.[16] Those who live in perpetual fear of opening Pandora's Box must be persuaded to regard the constitutional treaties of the Union as a lively contract between the Union's states and citizens which need continual reassessment if they are to remain fair and fit for purpose. Constitutional change is good news. It should not be traumatic; it can be regular and methodical. Improvements can always be made.

Certainly, the treaties read as literature can be bettered—especially in those early articles which try to explain what the Union is and is not. The next treaty revision should not pass up the opportunity to polish its

[12] Speech to the closing session of the Conference on the Future of Europe, Strasbourg, 9 May 2022.

[13] One issue where a majority of MEPs and the French government will disagree concerns the future of the Parliament's second seat in Strasbourg. Parliament has proposed a revision to Article 341 TFEU to allow it to decide on its own location as opposed to it being exclusively a decision of the heads of government.

[14] Article 48(2) TEU.

[15] Article 48(7) TEU.

[16] Article 48(3) TEU.

language throughout.[17] The Treaty on European Union and the Treaty on the Functioning of the European Union, each with their own preamble, have equal legal value and make numerous mutual cross-references. For the sake of simplicity and clarity, the two should be brought together again in one treaty as they were in the Constitutional Treaty of 2004. The result would be a single document, much shorter, more rational—and readable [Spinelli Group & Bertelsmann]. Also welcome would be the resurrection of the clauses on the Union's anthem and flag which were unceremoniously ditched by the Treaty of Lisbon.[18]

One last sub-edit will be the excision from the text of all reference to the United Kingdom of Great Britain and Northern Ireland as a member state, along with its dependent overseas territories, plus those several protocols and declarations bearing opt-outs and cop-outs with which the British encumbered their partners in 2007.[19] But the UK's secession also opens the door to making more substantive improvements to the treaty language on common foreign, security and defence policies which Lisbon decorated with qualifications and conditionality, mainly to cater for British reservations. Other countries which once hid behind Britain's obfuscations will have their chance to come clean.

The overall objective of the Convention must be to render the new treaty less prohibitive and more permissive than its predecessors, enabling the Union to act capably when and where it needs to do so. The installation of the category of affiliate membership makes indispensable the reinforcement of the Union's executive. Without a strong centre, the Union will be unable to take on additional responsibilities on behalf of the wider Europe and the Atlantic Alliance. Many of the other suggestions made in this book support that thesis, if only to prevent from spreading the kind of disintegration epitomised by Brexit and the unwinding of the *acquis* as espoused by Orban and his fellow travellers.

[17] One yearns for the simplicity of late eighteenth-century English. Compare the gobbledygook of Lisbon's Article 4(2) TEU with Article IV(4) of the US Constitution: "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion".

[18] I am somehow less keen on Giscard's equivocating motto of "Unity in Diversity". Something more laconic would be better: perhaps "Whatever it Takes".

[19] Notably Protocol Nos 15, 20, 21, 30 and Declarations 55, 56, 63, 64, 65. The departure of the UK allows Ireland to reconsider its own stance with regard to Schengen. Poland, on reflection, may wish to drop its British-inspired reservations on the Charter.

A convincing justification of the need for a more centralised government implies, too, a willingness to adopt a more teleological approach to the politics of integration than we have seen for decades. The Union cannot continue to fall back on the lazy nostrum that because it is somehow *sui generis* its constitutional evolution can be left up to natural selection. Nor can we just hope that good things will happen to the European project by accident. We have enough recent experience of bad shocks to fear for the resilience of the Union. European unification is not condemned to succeed. In these uncertain times, the EU needs powerful leadership if it is not to drift into irrelevance, threatened by Russia, marginalised by China and the US, and incapacitated in the face of climate change, pandemics and large-scale immigration. The Conference on the Future of Europe seems already to have reopened the debate, long since dormant, about what is meant by the mission of "ever closer union among the peoples of Europe". It falls to another Convention to follow this up.

Over twenty years since the last Convention, the European Union must prepare to take some difficult constitutional decisions. With the advantage of hindsight, we know more than we did in 2002 about the *problematique* of European integration—and much more than was known earlier in the heady days at Maastricht after the fall of the Berlin Wall. The Union should be alert to the necessity of reaffirming every now and again the general principles of democratic government, subsidiarity and the separation of powers through a robustly independent judiciary. Advances in EU citizenship, many given effect by settled case law of the Court of Justice, should continually be codified in treaty form. Beyond that, the locus of executive power must be firmly established in a unified presidency of Commission and Council, and the machinery of law-making overhauled.

No matter how the rules for treaty revision are modified for the future, the upcoming Convention and IGC will have to conform to the rubric of the existing Treaty of Lisbon. This suggests that the parcel of reforms to be tabled needs to be wide and ambitious enough to garner the support of all those who share a stake in the Union's future. Tinkering at the edges will not hack it. A package deal will only be possible if it is large. We have suggested some linkages in this book, and we propose the target date of 2029 for the completion of the exercise. In the meantime, the search

should be on for a new Commission president in 2024 who will refuse to take the job unless he or she is allowed to reduce the size of the college—and chair meetings of the European Council too.[20]

More Europe

We have pointed in this book to some lessons learned from Europe's recent experiences which will shape the agenda of the Convention. New competences, fresh powers and instruments will from time to time be required if the Union is to exercise good governance at the supranational level. Wishful thinking is no basis for a foreign and security policy. EU enlargement is a powerful tool of geopolitics and must serve the security interests of the Union and its (understandably nervous) citizens. Economic and monetary union will not work well through bad times without a common fiscal policy, the issuance of eurobonds and a decent federal budget. A banking union is now an essential addition to the armoury if the eurozone is to be stabilised.

Realisation is dawning even in the camp of the frugalists that confederations are more difficult to run than federations. Smaller member states discover that they have more clout in the Council under QMV rules than under unanimity when any one state (especially a big one) can threaten to wield a veto. Rebalancing voting weights in the Council will help to keep the peace. No true democrat can rest easy in the current situation where legal powers are transferred in very many sectors to the Union level but political agency is guarded jealously by the nation-states. A significant majority of Members of the European Parliament now know their own legitimacy will remain impaired unless they can be bolstered at election time by the coming of age of proper European political parties, matured by dint of competition on transnational electoral lists.

Europe's energy crisis propels the case for treaty change in energy policy. We see in real time the problems caused by simply leaving energy supply in the hands of member states: over 40 per cent of the EU's gas now comes from Russia. An adjustment of powers in energy would also allow for the full incorporation of Euratom under the new single constitutional treaty. Euratom's present powers concerning nuclear safety should be

[20] The search can usefully be confined to a former head of government, untainted by corruption or senility, with the nationality of one of the fourteen member states enjoying both euro and NATO memberships.

added to the list of the Union's exclusive competences.[21] In an encouraging breakthrough, the European Council is now prepared to adopt a similar collective approach to the purchase of oil and gas as it assumed *in extremis* to the supply of coronavirus vaccine. At its March 2022 meeting, the leaders agreed to "work together on voluntary common purchase of gas … making optimal use of the collective political and market weight of the EU and its Member States to dampen prices in negotiations".[22] Significantly, the common purchases platform will be open for the participation of the Western Balkan states, Ukraine, Georgia and Moldova: differentiation within the Union combined with flexibility without.

We know that the Union has to define and manage its own borders effectively if it is to be a trustworthy neighbour. The many millions of refugees and displaced persons from Ukraine deserve to be well received as they cross over the borders of the EU. They go mainly into Hungary and Poland which, ironically, are the two member states with nationalist governments most hostile to refugees and asylum seekers. Here it falls to the Commission to police high standards and initiate and implement workable common policy. In one of the many swift and positive reactions to the Ukraine crisis, EU legislation enacted at the time of the Balkan War is being deployed for the first time. Refugees from Ukraine are being permitted to scatter as they will across the EU without visas, avoiding intra-EU borders.[23] The Dublin refugee convention, first drafted in 1990, is beyond repair.[24] The Lisbon Treaty is deficient in this respect in that it consigns to member states the sole right to determine the volume of third-country immigrant workers.[25] There are good social and economic reasons for having better-coordinated labour market policies—an advance which would also help the Union develop a policy of managed immigration that catered for the demographic challenge of Europe's ageing society.

As the pandemic recedes, and with migration pressures still high, the Schengen agreement needs rescuing by a revitalised set of common policies in the field of justice and home affairs. If necessary—which it appears to be—a core group of federally minded states must be prepared to take things forward in this sector under the provisions of enhanced

[21] Article 3 TFEU.
[22] European Council Conclusions, 24-25 March 2022.
[23] Temporary Protection Directive 2001/55/EC, Official Journal L 212, 7 August 2001.
[24] Latterly Regulation 604/2013, Official Journal L 180, 29 June 2013.
[25] Article 79(5) TFEU.

cooperation. Differentiation will also be needed if the investigatory and prosecutorial powers of Europol and Eurojust are to be raised to face squarely the growing challenge of international organised crime and war crimes. More generally, enhanced cooperation should be deployed as necessary on a regular basis to build the vanguard of federalist member states.

The federalisation of the Union will allow it to make up much lost ground on the international scene. It is striking, for example, that India and South Africa, both supposed democracies, choose to side with China in helping out Putin at the UN. The European Union needs to recover quickly from the shock of Ukraine if it is to burnish its appeal to the world-wide community and help counter the widespread aversion of non-aligned countries to the West. Without that, it will be unable to augment its contribution to the cause of international justice, the fight against climate change and the raising of living standards, especially in Africa. After years of introspection, a confident unified executive in Brussels backed by a more popular Parliament will be in a position to advance the Union's profile on the world stage. In contradistinction to Russia, one looks forward to EU initiatives in the OSCE and at the global fora of G7, G20, the United Nations and the IMF. The Union will have earned the authority to take the lead in peace initiatives, not least through the European Security Council. Once Europe has found how to speak with one voice, it should have something important to say.

Federal Union

Slowly but surely the logic of the federalist case, originally so powerfully articulated by Jean Monnet, Robert Schuman and Altiero Spinelli, is gaining new respect (except, oddly, in academia). After a long period when eurosceptic or conservative governments held the whip hand in the Council, Europe's federalists are finding their voice [Spinelli Group; Verhofstadt; Fabbrini]. As the 2022 French presidential elections show, the far-right can enjoy spasms of electoral success. But with the exceptions of Hungary and Poland, the electorate across most of the EU maintains a fairly solid liberal-democratic consensus. Britain's nationalist government is out of the constitutional picture. Albeit inadvertently, the financial crash, the climate crisis, the coronavirus pandemic and lately the Ukrainian war have greatly accentuated the need for the Union to be able to take effective common action against shared threats. Nationalists are confounded by the logic of integration. Democracy remains the best weapon against

autocracy. To the European eye, Donald Trump seems a very foreign gentleman. President Putin amply fills the role of external integrator, like Stalin and Brezhnev before him.

Fortunately, the new German government promises to put greater emphasis on EU reform and less on mere cohesion. The coalition agreement of December 2021 between the Social Democrats, Liberals and Greens even talks of the further development of a "federal European state" (*föderalen europäischen Bundesstaat*).[26] It recognises that Germany has a special duty towards the EU. The Scholz government emphasises the importance of the rule of law; it supports the calling of a Convention to change the treaties; it wants a larger role for the Charter and the introduction of transnational lists. Immediately after the invasion of Ukraine, Berlin announced a dramatic increase of €100 billion in defence expenditure and a reversal of thirty years of Russian appeasement. The EU also broke new ground in advancing €1.5 billion from its European Peace Facility to the Ukrainian armed forces, including lethal equipment.[27] This is soft power no longer. And we still find at the heart of Europe's political project the Franco-German axis, just as it was in Schuman's day. That Mario Draghi joins Emmanuel Macron and Olaf Scholz in the European Council looks like a historic opportunity not to be missed. Draghi told the European Parliament that he wants "pragmatic federalism" to lead through treaty change to "perfect federalism".[28]

We have tried to show why, in such challenging times, the Union should be confidently advancing the prospectus of an alternative level of efficient post-national government—not suppressing national politics but enhancing the capability of national governments to act pertinently and effectively. According to public opinion surveys, the wary citizen seems to understand this shift of paradigm rather instinctively, especially when it comes to the big global issues of the day which leave small national parties and politicians, rooted in their own country, looking fairly hapless. Europe's political class needs to seize this bigger constitutional moment if the Union is to catch up with democratic reality. People say they trust the EU more than they trust their national governments, and many more have

[26] See Ronja Kempin & Nicolai von Ondorza, *From Status Quo Power to Reform Engine*, SWP Comment, February 2022.
https://www.swp-berlin.org/publications/products/comments/2022C11_Germany_in_EU.pdf

[27] Articles 28 and 30 TEU.

[28] Speech to European Parliament, 3 May 2022.

a positive rather than a negative view of the EU. In the recent Eurobarometer poll, taken just before Russia's invasion of Ukraine, 62 per cent are optimistic about the future of the Union, against 35 per cent negative.[29]

Positive views notwithstanding, however, none of the changes proposed and others mentioned in this book will come about unless the leaders of Europe take decisive action over the next few years. Certain modest improvements to the EU institutions could already anticipate treaty change. Most reforms require the formal revision of the EU's two treaties and the Charter of Fundamental Rights. The group of reflection, which we recommend, should be charged with driving out obsolescence from the old treaties and producing a clear and cogent roadmap towards a more federal Union for the benefit of future legislators who may choose to take that route. The overall aim is to produce a more settled constitutional framework for the Union within which normal left-right politics can be played out and the debate about deeper integration continues without endangering the collapse of the whole edifice. Fear of reform must be overcome if the Union is to thrive long into the twenty-first century.

The emerging European federation must be ever mindful of the need to respect the principle of subsidiarity at home. The impact of deeper European integration can have domestic constitutional consequences inside several member states resulting in a greater regional devolution of powers: these shifts may need to be reflected in the EU treaties. The Union must do no harm to the internal democracy of the states, and it should be ready to accommodate new forms of national, regional and municipal government, as well as adapt to innovatory approaches to popular consultation, deliberation and representation. The active participation in EU politics of affiliate members, with their own democratic life and constitutional systems, should contribute to the vitality of Union governance and add usefully to the pluralism of the Brussels system.

Another pitfall to avoid is to fall victim to the mania of sovereignty. The EU is already a distinct polity and established legal entity.[30] As it becomes a more centralised European power, it will be bound to take on some appurtenances of sovereignty at the federal level. In his 2017 Sorbonne speech, Emmanuel Macron made a great deal of sovereignty.

[29] Standard Eurobarometer 96, Winter 2021–22. France and Greece, interestingly, are the least positive.

[30] Article 47 TEU.

> Only Europe can, in a word, guarantee genuine sovereignty or our ability to exist in today's world to defend our values and interests. European sovereignty requires constructing, and we must do it. Why? Because what constructs and forges our profound identity, this balance of values, this relation with freedom, human rights and justice cannot be found anywhere on the planet. This attachment to a market economy, but also social justice. We cannot blindly entrust what Europe represents, on the other side of the Atlantic or on the edges of Asia. It is our responsibility to defend it and build it within the context of globalization.[31]

In less rhetorical mode, Macron then goes on to explain that he wants the EU to be more autonomous, strategic, productive, self-sufficient and secure. His political manifesto for Europe stands up on its own feet and is even more justified after Russia's attack on Ukraine. Setting out a list of sensible objectives for Union policy does not need, in my view, to be clouded with the mysticism of sovereignty. An obsession with sovereignty misled the nation-states of Europe to their many disasters of the twentieth century. British anti-Europeans making a fetish of national sovereignty led to the cataclysm of Brexit. The *souverainisme* of Marine Le Pen would return France to ultra-nationalism and cause the swift dissolution of the European Union.

In fashioning the constitutional identity of the new European federation, therefore, we need to strike the right balance between autonomy and assertiveness. Sovereignty—whether it be of the state or popular sort—is at best a nebulous concept wide open to different interpretations. Within this globalised world, where Europe's crowded states are so deeply dependent on each other, the salience of the question of who is sovereign over whom recedes [MacCormick]. Federalists need not cloak themselves in the sovereignty language of nationalists to justify their project. Whatever the future of Europe, it will be up to our successors to decide it. Our mundane task is to establish here and now a suitable, robust, functional and democratic constitutional framework. Macron, older and wiser, might temper his language about sovereignty: no doubt he recognises that re-election is not apotheosis.

[31] http://international.blogs.ouest-france.fr/archive/2017/09/29/macron-sorbonne-verbatim-europe-18583.html

Constitutional Patriotism

As Habermas argues, the best way for Europe to combat nationalism is to install good federal government along liberal principles. Crafting a constitution within which pragmatic government can be carried out on a settled basis will in itself attract a new loyalty, even patriotism, of the EU citizen.

The constitution of a successful federal polity will be regularly adaptable as successive generations consider how best to govern themselves on a pan-European basis. That is why the revision and liberalisation of the constitutive procedures themselves are such an important part of the package of proposals outlined in this book. Already, contrary to the usual commentary, member states are no longer the exclusive 'masters of the treaties'. As Giscard d'Estaing quickly realised, treaty revision is no longer politically possible without the consent of the European Parliament. The installation of the Convention as a constituent body involving European and national parliamentarians was one of the Lisbon Treaty's most critical innovations. It is high time to use it again.

The upcoming constitutional moment may not settle for all time the *finalité politique* of the Union, but it should serve to confirm the federalist nature of this unique experiment in peaceful European unification. The hope of an ever closer union will be handed on safely to the next generation. If Europe's leaders can define its future in this way, as Kissinger urges, it will have reached an important watershed in European history.

Building a new form of democratic multinational government up above the level of Europe's rickety old nation-states has not been easy. Nor can it be quick. We have seen in this book what a blizzard of treaty articles, ornate voting rules, opaque procedures and protocols are involved. Anybody who took part in Brexit knows how difficult it has been to unwind and dismantle the ties that bind a member state to the existing Union. Completing the federal union will need skill and determination on behalf of technocrats and politicians, plus a great deal of leadership from the EU's present inchoate institutions and disparate national governments. Luck will also help, including having at the Convention the right people in the same place (not Zoom) at the right time.

A collective sense of pride in the history of the European Union would not go amiss. It has borne unique witness not only to a Germany

peacefully united but also to a Germany that has joined into a federal pact with its historic enemy, France. Since 1945, liberal, secular democracy has spread peaceably across the continent. Europe is no longer a congested jumble of warring principalities and nation-states or of flailing empires. That is why Putin's behaviour, which takes us back to fascist times, is so shocking. In interrupting the post-Cold War international order, Russia has challenged the legitimacy of the cause of European unity. Against such disruption, the Union must shine a light brightly on dissenters, democrats and anti-nationalist voices in Russia. Across the rest of the world too, where illiberal and undemocratic states are the norm, people look for hope of reform to the values of Europe.

It was no small thing for the Union to build first a single market where goods, services, money and workers could move easily between states. Then an area of freedom, security and justice was established to protect its own citizens as they took advantage of free movement. The conferral of EU citizenship carried certain important rights, not least the democratic franchise to a joint parliamentary assembly and the fundamental right to speak freely. Common institutions were created, including a court and an executive. But if it is now to take greater care of the wider European neighbourhood, the Union must become yet more state-like. And that means intensifying its quest for a democratic federal government.

This book has argued that the EU is now ready for its next constitutional moment when it can move forward confidently to a fuller and more rewarding federal union. Spurred first by the COVID-19 pandemic and then the Ukraine crisis, the EU should recognise it has reached a watershed in its history. Constitutional reform will have to command the support not just of its institutions and member states but also of its own people, EU citizens, who will properly insist on democracy and fair play. One reason this may be the moment to reinforce the federal character of the Union is that Europe's electorate is more literate and better networked—and more culturally European—than ever before.[32] For younger generations, as well as for Europe's many recent immigrants, the logic of modern Europe prevails over the pull of the old nation-state. Newcomers should be more alert than old hands in recognising a watershed moment when they see it.

[32] Student audiences are often astonished to learn that Twitter and Facebook had yet to be invented at the time of the Giscard Convention two decades ago.

Federal Europe is a project which only makes sense, and will only be concluded successfully, if we remember what European unity is for, how fortunate Europeans are in the greater scheme of things, and what value we can bring to others around the world if our experiment in post-national democracy works.

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Annex I: Parliamentary Seat Apportionment[a]

Constituency	*Population (000s)*	*MEPs 2019*	*MEPs CamCom*
Germany	83,155	96	96
France	67,440	79	92
Italy	59,258	76	81
Spain	47,394	59	66
Poland	37,840	52	54
Romania	19,186	33	30
Netherlands	17,475	29	28
Belgium	11,566	21	20
Czechia	10,702	21	19
Greece	10,683	21	19
Sweden	10,379	21	19
Portugal	10,298	21	19
Hungary	9731	21	18
Austria	8933	19	17
Bulgaria	6917	17	14
Denmark	5840	14	13
Finland	5534	14	13
Slovakia	5460	14	13
Ireland	5007	13	12
Croatia	4036	12	11
Lithuania	2796	11	9
Slovenia	2109	8	8
Latvia	1893	8	8

(*continued*)

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(continued)

Constituency	*Population (000s)*	*MEPs 2019*	*MEPs CamCom*
Estonia	1330	7	7
Cyprus	896	6	7
Luxembourg	635	6	6
Malta	516	6	6
Pan-EU	–	–	46
Total	*447,009*	*705*	*751*

[a]Article 14(2) TEU establishes the total size of the Parliament at 751 with no state being allocated fewer than 6 seats or more than 96. Population data Eurostat 2021. For the CamCom method, see footnote 24 on p. 45

Annex II: Council Voting Weights[a]

Member state	*Population (000s)*	*Current voting weight %*	*Square root of population*	*Square root voting weight %*
Germany	83,155	18.6	9119	10.00
France	67,440	15.1	8212	9.00
Italy	59,258	13.3	7698	8.44
Spain	47,394	10.6	6884	7.55
Poland	37,840	8.5	6151	6.74
Romania	19,186	4.3	4380	4.80
Netherlands	17,475	3.9	4180	4.58
Belgium	11,566	2.6	3401	3.73
Czechia	10,702	2.4	3271	3.59
Greece	10,683	2.4	3268	3.58
Sweden	10,379	2.3	3222	3.53
Portugal	10,298	2.3	3209	3.52
Hungary	9731	2.2	3119	3.42
Austria	8933	2.0	2989	3.28
Bulgaria	6917	1.5	2630	2.88
Denmark	5840	1.3	2417	2.65
Finland	5534	1.2	2352	2.58
Slovakia	5460	1.2	2337	2.56
Ireland	5007	1.1	2238	2.45
Croatia	4036	0.9	2009	2.20
Lithuania	2796	0.6	1672	1.83
Slovenia	2109	0.5	1452	1.59

(*continued*)

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(continued)

Member state	*Population (000s)*	*Current voting weight %*	*Square root of population*	*Square root voting weight %*
Latvia	1893	0.4	1376	1.51
Estonia	1330	0.3	1153	1.26
Cyprus	896	0.2	947	1.04
Luxembourg	635	0.1	797	0.87
Malta	516	0.1	718	0.79
Total	*447,009*	*100.00*	*91,203*	*100.00*

[a]Population data Eurostat 2021

Annex III

Article 49a (New) Treaty on European Union

Affiliate Membership

1. Any European country which upholds democratic principles, the rule of law and human rights may become an affiliate member state of the Union. The conditions of admission to affiliate membership shall be the subject of an agreement between the Union and the applicant state.
2. Affiliate member states shall undertake to ensure the balance of rights and obligations laid down in the Union agreement. They shall commit in particular to respecting the values of the Union,[1] the principle of sincere cooperation,[2] the Charter of Fundamental Rights,[3] the development of a special relationship with the Union,[4] and the Union's actions on the international scene.[5]
3. The applicant state shall address its application to the Commission which shall give its opinion on the application to the European Parliament and European Council. A decision to open negotiations

[1] Article 2 TEU.
[2] Article 4(3) TEU.
[3] Article 6 TEU.
[4] Article 8 TEU.
[5] Article 21 TEU.

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on an agreement with the applicant will be taken by the European Council acting by a simple majority, after obtaining the consent of the European Parliament.

4. A decision to conclude the agreement shall be taken on a proposal of the Commission by the European Parliament acting by an absolute majority of its members, and by the European Council acting by a majority of four-fifths of its members.

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