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Guidelines for a Constitutional Reform of the European Union

by

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Abstract

On several occasions over the last few years, the prospect of a reform of the treaties, which seemed to have been put on the back burner after the laborious gestation of the Lisbon Treaty, has regained topicality and has also been called for by several EU governments, including that of Germany, ever since the economic crisis has begun to threaten the very survival of the Euro. The aim of this paper is to lay down guidelines for a future reform that could ensure the stable efficiency and democratic legitimacy both of the Union as a whole and of the core Eurozone countries, as well as that of any additional EU Member-State aggregation, which may be larger or smaller than the Eurozone but does not include all the members of the Union itself.

Key-words:

European Union, constitutional reform, crisis in the Eurozone



1. Premise

On several occasions over the last few years, the prospect of a reform of the treaties, which seemed to have been put on the back burner after the laborious gestation of the Lisbon Treaty, has regained topicality and has also been called for by several EU governments, including that of Germany, ever since the economic crisis has begun to threaten the very survival of the Euro, resulting in a dramatic decline in growth and employment, unknown since the 1930s.

The aim of this paper is to lay down guidelines for a future reform that could ensure the stable efficiency and democratic legitimacy both of the Union as a whole and of the core Eurozone countries, as well as that of any additional EU Member-State aggregation, which may be larger or smaller than the Eurozone but does not include all the members of the Union itself.

The reforms proposed here can be carried out following different procedures, depending on issues and functions. Some of them do not even require the treaties in force to be amended and can be achieved on the basis of existing rules, in particular through enhanced cooperation or disciplines related to implied powers (Art. 352 TFEU) or the Euro (Art. 136 TFEU): A significant set of reforms to make the EU (or, rather, a group of Member States willing to advance) both more effective and democratic – in terms of the EU's economic policies, by introducing a European fiscal power at least inside the Eurozone and launching a large-scale investment plan for growth and employment; in extending the qualified majority vote; in security and defense; in terms of codecision etc. – could thus be achieved without changing the existing treaties. Others require regulatory changes that can be achieved using the procedures provided for in Art. 48 of the Treaty on European Union (TEU). Finally, another way to reform consists in one or more new treaties involving only some EU Member States, as was the case with the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG) and the European Stability Mechanism (ESM).

Each of these proposals has a different implementation timeframe. While activating possible reforms within the treaties only formally requires the political will of a large number of Member States to implement them, amending the treaties involves ratification



by all members, hence an implementation period of several years can be expected, as experience has proven. Even the adoption of one or more new treaties only by some EU Members would take rather long, as this is likely to be undertaken only once there is evidence that amendment to the treaties on the basis of Art. 48 TEU are not agreed upon by all Member States.

One additional point must also be emphasized *in limine*. The EU's constitutional reforms envisaged here are based on the assumption that certain, still widespread ideological concepts regarding sovereignty as the exclusive prerogative of nation-states will be recognised to be simply wrong, in principle, as well as to be already disproved by the political reality both at national and European level. EU Member States already are no longer sovereign in a series of functions and important competences. Therefore, these lines of reform aim at completing a trend already underway at Union level, imposed in turn by the inescapable reality of the globalisation of the planet, while at the same time protecting to the fullest extent possible – on the basis of the principle of subsidiarity included in the treaties – national and local identities as well as the autonomy of nation-states (as required by Art. 4 TEU).

2. A Two-Tier Regulatory System of the Union

The still unattained objective of the reform of the EU treaties should be twofold: ensuring that the EU possesses a stable constitution while, at the same time, enabling minor future regulatory adjustments under procedures which are sufficiently smooth.

To this end, a two-tier EU legal and institutional system should be created, as foreseen in the 2003 Convention and in part also included in the current combination of the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU).

The top tier should be constitutional and include: a) the principles on which the EU is founded, the basic profiles of its institutions, and rules for future institutional reforms; and b) the EU Charter of Rights. The lower tier, which regulates the functioning of the Union, should include the current TFEU and the reforms the EU requires at this and later stages.



Regarding future amendments, on both tiers the new treaty should: a) charge the European Council (EC), the Commission and the European Parliament (EP) with making proposals; and b) give the EC and the EP codecision power in future treaty amendments.

Any future amendment to the first-tier Treaty (ECT: European Constitution Treaty) would require more complex procedures and higher qualified majorities than future amendments of the second-tier Treaty (TFEU).

Amendments to the ECT would presumably enter into force after being ratified by a super-qualified majority of Member States, calculated using the double parameter of number of States and overall population (e.g. two-thirds or three-fourths of one and the other). However, amendments to the TFEU (provided they are not in conflict with what is laid down in the ECT) could enter into force without the need for national ratification, by reaching a qualified majority within the EC that accounts for a similar majority of the EU population (e.g. an absolute majority or two-thirds of both the EC and the population).

From the perspective of a federal union, the new treaty should not allow for the withdrawal of one or more Member States (Art. 50 TEU); but the opportunity to shift from being a full Member State to becoming an Associate State could be considered.

Institutional configurations that allow for participation, and that are well-differentiated in terms of the coordination and integration level with respect to the new European Union, should also be provided for EU Member States that are not parties to a new treaty, for Eastern European countries, and for Mediterranean countries. There could be distinct institutional arrangements for the different Associate States.

Finally, forms of coordination including special procedures for decision-making and decision implementation should be laid down for cross-border regions sharing geographical and economic characteristics (alpine regions, sea-coasts etc.).

3. Principles

The institutional reforms outlined here are consistent with the fundamental principles enshrined in the EU Charter of Fundamental Rights and in the TEU: dignity, freedom, equality, solidarity, citizenship, and justice, to which the right to peace should be added. The reforms are based on the three fundamental pillars of the Union's legal system, all now laid down in the treaties:



- *subsidiarity* (as a principle of competence allocation to jointly achieve the objectives of minimum governance, finding the appropriate level of governance for the problem to be solved, and governance that is as close as possible to the citizen);

- *efficiency* (only possible if there are rules ensuring real decision-making opportunities, hence by generally adopting the majority principle, which centuries of experience have proven to be the only way for a body to take decisions within its powers when its members take divergent positions); and

- *democracy and rule of law* based on popular sovereignty (which, at the European level, is only possible by granting the European Parliament, elected by universal suffrage, full legislative codecision, budgetary powers, as well as control over the government of the Union). Also, the channels of direct democracy established by Art. 11 TEU must remain open.

4. EU Institutions

The European Parliament

In addition to the functions provided for in the existing treaties, the European Parliament should be granted:

a) *Codecision power in all EU legislative decisions*, including proposals for the reform of the European Constitution and the TFEU;

b) *The power to introduce taxes at the European level, in codecision with the European Council;*

c) *The power to approve a share of the debt (borrowing capacity) within predetermined limits established by the treaties to be allocated for investments in European common goods on the basis of the principle of subsidiarity;*

d) *Budgetary power relating to the amount and allocation of the EU's own resources, in codecision with the Council* and (for the multi-annual planning of resources transferred from national budgets) with the cooperation of national parliaments;

e) *The power of legislative initiative* in cases in which the Commission has not responded to the invitation to prepare a draft law;

f) *The ability to define common foreign and security policy guidelines* and allocate the corresponding financial resources; and



g) *The ability to appoint the President of the Commission and issue a vote of confidence in the Commission in codecision with the European Council.*

Decision-making requiring an absolute majority of EP members for legislative codecision and for appointments should be limited to a few matters of particular constitutional importance.

The parliamentary procedures as well as the forms and limitations of the powers of the EP Committees should be established through regulation by the EP itself, approved by a qualified majority.

A deadline should be set for adopting a uniform electoral procedure (Art. 223 TFEU), which should also be approved by a qualified majority in codecision between the EP and the Council.

The new treaty would be able to review the distribution of EP seats to the Member States, reducing (but not necessarily completely eliminating) the over-representation of the smallest States with respect to the largest ones (in fact, a strict proportionality of representative bodies is often missing at the national level, too).

For decisions regarding the Eurozone and in the enhanced cooperation framework adopted for a group of countries, which may be larger or smaller than the Eurozone, the European Parliament must be involved at the legislative level (which is already possible: cf. Art. 333 TEU). In this case, the debate could take place in plenary composition, both in the Committees and in the House, but the *voting power should be limited to those MEPs from countries participating in the initiative* that has only been adopted by them and not by the entire Union¹.

The European Council

The European Council must retain its role as the highest body with political driving force, a sort of collegiate presidency of the Union. It must also continue to exercise the direct function of government, especially in foreign and security policy, in synergy with the Commission and without creating another bureaucratic apparatus within the Union.

The majority principle must apply to all the decisions of the European Council – proposals for and decisions on new laws, actions, appointments, future reforms of the treaties –, with the double calculation of the number of states and their population sizes: a simple, qualified, or super-qualified majority, depending on the matter at hand.



The President of the Commission may be appointed by a qualified majority as President of the EC, already possible under the current TEU. This option would have the dual benefit of ensuring both the unity and personalisation of leadership that are typical of present-day democracies while maintaining a regime in which the Head of the Executive is chosen via second-order elections by the two “Chambers” of the Member States and the citizens, in line with the outcome of the EP election, again as already established by the treaties¹¹.

The Council of Ministers

The majority principle must apply to all the decisions of the Council of Ministers, with a simple or qualified majority, depending on the matter at hand.

Regarding the legislative procedure to adopt for the Council of Ministers, the options are the following: to make its sessions public, to make the meeting minutes public (within a specified period of time), or to maintain the current system. The second of the three proposed solutions may be preferable to ensure both greater transparency and freedom of discussion, also protecting against the risks of forcing through any issues for internal political use.

Furthermore, a future reform could be envisaged which emphasises the configuration of the Council of Ministers as the second Chamber of the Union by adding one representative from each Member State’s national parliament, elected by the latter and belonging to the opposition or, in any case, to a different political grouping with respect to the Minister from that country.

The Commission

The Commission should become the true government of the EU acting, as already mentioned, in synergy with the European Council, which would retain its role as the main political driving force of the Union: a synergy that would be greatly enhanced if the two presidencies were conferred upon one and the same person.

The Commission’s control and its role as “guardian of the Treaties” could be partly entrusted to special agencies, accountable to the Commission itself. The latter, despite frequent claims, has always exercised *an inherently political function* as well, in that it has the exclusive right of legislative initiative, which is a political function par excellence.



This *legislative initiative* function could be maintained by the Commission, while granting both the European Parliament and the two Councils the power to put forward draft legislation when an invitation of the Commission to that effect has remained unanswered.

The principle enshrined in the treaties, according to which *the President of the Commission* must obtain the affirmative vote of both the European Council and the European Parliament, must be maintained. The need for such double consent is based on the dual legitimacy of the Union, i.e. a political system of peoples *and* nation-states.

However, the current procedure for the appointment of the President gives priority to the European Council's role over that of the European Parliament, although it is true that the Lisbon Treaty requires EP election results to be taken into account. Looking ahead, a better balance between the two bodies seems however necessary. The Council could choose from a list of names provided by the EP, or *the European Parliament could choose the President of the Commission from a list of names indicated by the Council*, certainly deciding by a majority and also taking into account the election outcome. This second option would be preferable, especially if the previously suggested criterion of making the President of the European Commission also the President of the European Council was adopted.

The Commission should obtain a vote of confidence in the European Parliament. While the individual Commissioners are chosen by the appointed President, putting forth a motion of censure with, if carried, the obligation to resign should be possible both as regards the President (in which case the entire Commission has to resign) and each individual Commissioner, who would then be replaced if he earlier obtained confirmation by the European Parliament.

The number of Commissioners could be reduced, with a reasonable rotating mechanism between larger and smaller Member States, without prejudice to the principle that each Commissioner would act as a Union Minister and not as a member of his/her nation-state.

The Commissioners for a) the economy, taxation and the European treasury; b) foreign policy; and for c) defence as well as the internal and external security of the Union would have to be appointed upon mutual agreement between the European Council and the President of the Commission.



The Court of Justice

The Court of Justice would maintain its current functions in this two-tier structure. Its functions as the Constitutional Court of the Union would be exercised only at the higher tier and could (or indeed should) include the power to declare ineffective national laws if the Court regards them as conflicting with the Constitutional Treaty of the Union (TEU or ECT or Fundamental Law) and/or the Treaty on the Functioning of the European Union (TFEU).

National Parliaments

National Parliaments – either all of them or only those of the Member States participating in an Enhanced Cooperation – are called upon to cooperate with the European Parliament in the multi-annual planning of EU budgetary resources as regards the transfer of funds and tax revenues from national budgets to the Union budget.

5. The Budget, EU Taxation and the European Central Bank

In line with the above stated, codecision between the European Parliament and the Council by a qualified or super-qualified majority should be the cornerstone of the reform insofar as Union resources are concerned (Art. 311.3 TFEU).

The multi-annual financial framework (Art. 312.2 TFEU) should also be prepared in codecision of the Council with the EP, involving national parliaments in the form of a convention-assembly, or via a special mandate given by each parliament to its own government, which would then take decisions in the Council in accordance with said mandate.

The transfer of shares of taxes (e.g. VAT) or certain budget shares (e.g. regarding defence spending) from the national to the European level should take place using the same procedure: codecision between the Council and the EP, plus the involvement of national parliaments in one of the two above-mentioned forms.

In both cases, decisions would be taken at the European level and would be binding upon all Member States if a codecisional agreement between the Council and the EP – by qualified or super-qualified majority – is achieved.



The EU's annual budget (Art. 314 TFEU) may continue to follow the current procedure.

The Union must be able to establish its own taxation (e.g. carbon tax, Financial Transaction Tax) using the codecision procedure between the EP and the Council by a qualified or super-qualified majority. Similarly, the Union must be able to have its own Treasury.

The European Central Bank must fulfill its role as a last-resort lender, which is also essential for stability.

The same codecision procedure between the Council and the EP must be respected in order to coordinate Member States' internal tax regimes at European level.

It is essential that some budget sections and items be subject to a restricted configuration (e.g. with regard to European taxes, defence spending by means of funds transferred from national budgets, the ESM and so on), with the decision-making and voting powers of the European Council and the European Parliament limited to the governments and (as mentioned above) the parliamentarians of the countries participating in the initiatives concerned. This applies not only to the Euro Group but also to other aggregations (e.g. in the area of a Financial Transaction Tax).

Both the TSCG and the ESM must be integrated into the Community method with appropriate roles for the EP, the Commission, and the Court of Justice.

The obligation of a balanced Union budget should be imposed, freed from cycle shifts, to ensure a level of primary surplus that enables interest expenditures related to investments at the European level to be included while maintaining a balanced budget.

The possibility of establishing *a maximum ceiling for the EU budget* should be considered, for example 5% of the combined European GDP, including defence expenditures, after the transfer of the current and corresponding national allocations for this item.

6. Enhanced Cooperation and Dual Institutional Configuration

A key issue is whether or not it would be appropriate to maintain enhanced and structured cooperation procedures (EC, SC) in the institutional framework of a new treaty. On the one hand, it may be argued, with undoubted consistency, that adopting codecision and the majority principle across the board implies that decisions regularly taken within the



EU are always binding, even upon dissenting States. On the other hand, it may be assumed that proceeding with further reforms with an advance guard of Member States – so far constantly followed by the EU (e.g. regarding social policy, Schengen, or the Euro) – does not deserve to be removed.

This second assumption seems preferable, but only under three conditions: a) that the restricted configuration be applied in a way that does not jeopardise the Single Market by structurally altering the rules of competition and international trade; b) that obligations and benefits resulting from decisions made by only a few governments in the Council (for example regarding their own resources or European taxation) are borne by or benefit only those Member States that have subscribed to them; and c) that in these cases the right to vote in the European Parliament be reserved to the MEPs from the Member States participating in the new initiative, similar to what is provided for in Art. 330 TFEU on Enhanced Cooperation.

A specific institutional dimension is already up and running in form of the Eurozone, and has been explicitly recognised in the current treaties and in the two Treaties on the TSCG and the EMS, which are now in force. Similar rules should also apply to common defence.

Since it is highly unlikely (if not impossible) that the United Kingdom will agree to bring the EU to the level of a federation by increasing its supranational dimension, generalising the principle of majority rule and accepting the greater involvement of the EP, a two-tier configuration of rules needs to be provided for in order to maintain a single institutional framework. This means that there will be rules that are valid for all 28 Member States – maybe even accepting a reduction in their supra-nationality, as the British would prefer – and rules valid only for those countries which have accepted the reforms, first of all the Eurozone countries, but also others which will agree with them.

This is in part already possible by adopting the Lisbon rules on enhanced cooperation, including Art. 333 TFEU, allowing for the passage to the ordinary legislative procedure, hence assigning a potentially greater role also to the EP. However, the new treaty will have to go further and impose general legislative codecision, the majority principle, the fiscal capacity of the EP, common defence, and the other above-mentioned changes.

These rules (the majority principle and the double legitimacy of the EP as well as the Council of Ministers and the European Council, formed only by representatives of



participating countries) should also apply to the group adopting enhanced cooperation, i.e. at the federal core of the Union: the two Councils in restricted formation and the European Parliament with the right to vote reserved to MEPs from participating countries.

7. Common Defence

The principle of structured cooperation, already included in the treaties (Art. 42.6 TEU), should become the basis for future common defence, if not all the Member States show their willingness to establish it from the outset for everyone. The States that agree to it would have to transfer a greater part (if not all) of their current budgetary resources for national defence to the EU, possibly reducing the amount in proportion to the economies of scale made possible by the far greater efficiency of common management.

The use of these resources should be regulated according to codecision procedure between the EP and the Council, both taking decisions in restricted configuration (only ministers and parliamentarians of the structured cooperation may vote), according to that which has been stated regarding enhanced cooperation.

A Commissioner appointed jointly by the European Council and the EP would perform the functions of EU Minister of Defence.

8. Planetary Cosmopolitan Guidelines

So far the European Union has been leading the way in giving precedence to cosmopolitan and multilateral approaches to issues that (consistent with the principle of subsidiarity) do not have appropriate solutions outside a global framework.

This concerns peacekeeping, including peace enforcement and peacekeeping instruments; international trade; arms control, especially regarding nuclear weapons; climate control and policies to combat planetary global warming; investments in alternative sources of energy; the protection of biodiversity; reactions to and the prevention of genocide; and a world monetary system with its related institutions.

These objectives may be achieved through institutions and international agencies: from the UN to the WTO, from the International Criminal Court to the International Tribunal for the Law of the Sea, and from the IMF to the World Bank and other international agencies.



The new EU treaty should thus include: a) a general clause similar to Art. 11 of the Italian Constitution, containing a willingness to transfer parts of EU sovereignty to global institutions, starting with the UN, in accordance with the principle of subsidiarity; b) the obligation to start negotiations (by a date to be agreed upon) for attaining a unified EU representation within the UN Security Council and the IMF Board; or, alternatively and/or as an interim agreement, at least France's commitment to bring the positions adopted by qualified majority inside the European Council into the UN Security Council; c) a UN reform aimed at modifying the Assembly system, promoting the implementation, even under a restricted configuration, of Art. 43 of the UN Charter as well as at reforming the Security Council by introducing representatives at the continental level and removing the veto power; and d) the definition of transitional measures and timeframes towards the achievement of these objectives.

9. To Amend the Treaties or Draft a New Treaty?

There are two conceivable ways to carry out EU reforms along the lines of the aforementioned suggestions with respect to the rules not contained in the current legislation that therefore cannot be adopted without changing the legislation, taking recourse to enhanced cooperation.

A new treaty may be adopted following the procedure requested by art. 48 TUE for amending the existing treaties, or instead (once ascertained that unanimity on the proposed reforms is unattainable) choosing to forego such a procedure in order to establish a new treaty entering in force only among Member States who sign up to it.

The first way is clearly indicated in Art. 48 TEU: the European Parliament, the Commission or one or more of the EU governments may submit a proposal; the European Council shall act by a majority in favour of examining the proposed amendments and convene a Convention to draft the proposal; an Intergovernmental Conference (IGC) shall approve, amend or reject the proposal; and then all EU Member States shall ratify it according to their respective constitutional rules. While relatively easy in the first two stages, the rules of Art. 48 become very strict in later stages: the Convention must decide in accordance with the principle of consent, which implies unanimity; the IGC shall act by unanimity; and ratification must take place in all the Member States.



Within the Convention, the principle of consent may be interpreted as the consent of all four of its components, which does not mean that unanimity is required within each of them and hence in the final decision. Within the IGC and during the ratification process, however, unanimity is an insurmountable constraint, despite the fact that the saving clause in Article 48.5 establishes that the matter shall be referred to the European Council in the event of ratification by at least four-fifths of EU Member States.

Since the scope of Art. 48, with the double unanimity of governments and national parliaments, implies with almost absolute certainty that at least the United Kingdom, and perhaps a few other Member States, will not agree to such institutional reforms, at this point there might be three possible ways to achieve a genuine reform treaty of the EU:

a) Adopting the treaty with an opting-out clause for dissenting countries; this procedure, which is already being followed for the Euro in Maastricht, might be more easily adopted by Great Britain if the new treaty ensured the same country the return of some competences which do not hinder the Single Market, or at least some new opting-out clauses;

b) Launching the treaty within a treaty on the basis of the Vienna Convention on International Treaties, by means of the “rebus sic stantibus” clause; or

c) Launching a new treaty agreed upon by the consenting Member States, in which the previous treaties are deemed inadequate (due to the bottlenecks of Art. 48) to meet the objectives set out by the very same treaties in force related to the improvement of the EU and are replaced by a new treaty. This can be achieved by envisaging the withdrawal of States in favour of the new treaty, or the withdrawal of dissenting States (for example, following the negative outcome of a British referendum on staying in the EU), in both cases through the negotiation of the relations after the approval of the new treaty in order to maintain the Single Market.

After national ratification, the new treaty would be submitted to a European referendum and enter into force if approved by a qualified majority of both States and the European people.

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^I This solution seems far more preferable than the other possibilities. In fact, it should be noted that: a) assigning the function of legislative codecision in these cases to national parliaments or to another assembly composed of representatives elected in the first or second grade at the national level (except for cases that will be discussed below) distorts the necessary European level of popular, i.e. representative legitimacy that is the proprium of the European Parliament elected by universal suffrage, thus seriously delegitimising its democratic representativeness; b) the extension of the voting power to the entire EP would be unjustified in decisions regarding resources or actions concerning only the Eurozone or a larger or smaller group of Member States (e.g. for the Financial Transactions Tax); and that c) the participation of the entire EP in the debate would, however, still take into account the needs of the EU as a whole.

^{II} This solution – which is consistent with a constitutional structure typical of a federation of states in the form of a parliamentary republic based on the dual legitimacy of people (EP) and States (European Council of Ministers) – certainly seems preferable to that of electing the President of the Commission by direct universal suffrage, which poses several problems, starting with the language barrier not yet removed, nor likely to be removed in the near future.

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