

A CRITICAL LOOK AT THE REPORT OF THE FRANCO- GERMAN WORKING GROUP ON EU INSTITUTIONAL REFORM

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*Sans la liberté de blâmer, il n'y a point
d'éloge flatteur.*

Beaumarchais

Introduction

The report called *Sailing on High Seas: Reforming and enlarging the EU for the 21st century* comes at an important juncture for the European Union (EU) and has generated a lot of attention. It is a useful contribution to a necessary debate. However, reading it as a long-time practitioner, I found it wanting on several issues. I will explain why, in the hope that this will not be seen as gratuitous criticism, but as an attempt at contributing to a serene, well-informed and constructive debate about the future of our Union.[1] In doing so I will base myself on the fact that the EU is a very peculiar kind of animal, neither state nor simple intergovernmental organization, but rather a democratic union of democratic states and peoples. The report shares this assessment and provides a useful and welcome description of what it calls a "hybrid political system."

Before looking at the details, a few general observations on why I have reservations about the report.

First, it starts from the wrong premise by putting upfront institutional and treaty change issues. This is a classical mistake often made in EU circles, based on the belief that for any political problem in the EU there is an institutional answer.[2] There is not, alas. My view is that after the many treaty changes

between 1985 and 2009, we have reached a certain plateau; the existing treaties are by no means perfect, but they do provide a working framework that allows for innovative solutions, as we have seen over the past years in the management of the various existential crises the EU has faced. More importantly, it seems to me that a comprehensive treaty debate at this stage would not only be a distraction but would create divisions we cannot afford. We should not start with the tacit assumption that we need a treaty change in any event. It is better to analyse the problems we want to solve, based on the experience of the last fifteen years of crises, and then to look at workable solutions. The EU's future depends on the responses we will give to policy challenges and the question of how to find the necessary funding far more than on institutional tinkering. Most responses do not require treaty changes[2], and some of the issues can be solved in the accession treaties. If some treaty changes are required, we should start with limited and targeted changes rather than an all-out heavy procedure with a Convention.

Second, it tries to solve three issues at the same time via institutional reform: increasing the capacity to act, strengthening the rule of law and democratic legitimacy, and getting the institutions ready for enlargement. All three are important, but there should be a clearer admission that there is, at times, a need for trade-offs between them. Measures proposed for increasing legitimacy can lead to a reduction in the capacity to act; rebalancing qualified majority voting (QMV) in favour of the smaller Member States is a good illustration of this. The reverse is also true:

Note from the author: *This is a purely personal comment as a former Senior EU official. The positions I express are just mine, not those of TEPSA or any other organization.*

[1] The group seems to plan to continue its work on the questions raised in the report. This would provide an opportunity to further refine the analysis and to review the measures proposed.

[2] This is not the fault of the authors since they were asked specifically to reflect on institutions and treaty change.

[3] Interestingly, the citizens consulted in the framework of the Conference on the Future of Europe mostly put forward suggestions that do not require treaty or institutional changes.

more systematic outvoting of countries can reduce the legitimacy of EU action.

Third, it proposes institutional/bureaucratic 'solutions' for non-existent problems addressed by other means; one instance is the proposal for a new Joint Chamber of the Highest Courts and Tribunals of the EU. That again is a typical 'Brussels syndrome'.

Finally, it envisages 'sweeteners' to help pass reforms deemed necessary, which in fact would endanger rather than smoothen the functioning of the EU; this is particularly true in the case of the passage to QMV.

I will now look at a certain number of proposals on key issues made in the report. The order I follow is the one set out in the 'Main Recommendations'.

Better protect a fundamental principle: the rule of law

Budgetary conditionality: the report suggests making the rule of law conditionality mechanism an instrument to sanction breaches of the rule of law, and, more generally, systematic breaches of the European values enshrined in Article 2 TEU. The exact title of the existing mechanism is 'General regime of conditionality for the protection of the EU budget'. The title shows that this is not a rule of law instrument per se. It is a mechanism that links the protection of financial interests to possible breaches in terms of rule of law. There was a debate about this at the time. The Commission had proposed a rule of law mechanism, but the Council Legal Service successfully argued that in view of the existence of Article 7 TEU in the treaty (primary law), it was not possible to adopt a different rule of law mechanism via secondary legislation. This still holds true today.

That is why the only way to change matters would be to refine the Article 7 procedure itself. The report suggests this, but as an additional recommendation to its first one. The idea of moving to a four-fifths majority also for the second stage of the procedure, at the level of the European Council, makes sense, even though it will be difficult to impose. Including time limits for the stage one procedure at the Council is also reasonable. The idea of having "automatic sanctions five years after a proposal to trigger the procedure" is not. If there is no four-fifths majority in the Council, the procedure must stop. Otherwise, we negate the Council's role and turn the whole procedure on its head. It would mean that the Commission could on its own dictate whatever it likes and then wait for five years to get its way. I do not think any Member State or legal service would defend such an approach.

Create a Joint Chamber of the Highest Courts and Tribunals of the EU: this is a very bureaucratic and heavy solution to a non-existent problem: thanks to the system of preliminary rulings set out in Article 267 TFEU, the EU has developed an intense, regular, and effective dialogue between national jurisdictions and the European Court of Justice (ECJ). That is a much more elegant way of doing things than creating a new Joint Chamber.

Addressing institutional challenges

Making the EU institutions enlargement ready

The report states that "The EU's current institutions lack agility and are penalised by complexity and an abundance of players." This is an over-generalization. The EU system has delivered quite impressive responses to the exceedingly difficult challenges of the last 15 years. The complexity is part of the EU's DNA, because it is a union of states and peoples

requiring checks and balances to protect all the players. The abundance of the latter, likewise, reflects what the Union is, and is not. We are not the United States of Europe, with one President of the EU. Considering the specific measures proposed under this heading, a few comments:

The number of MEP: capping and even lowering the number is a promising idea. This can be done easily by a unanimous decision of the European Council on a proposal by the European Parliament (EP) (see Article 14 TEU).

The rotating Presidency of the Council: this system has delivered in the past and there is no reason that it cannot function with a higher number of Member States. Not one Council Presidency over the last thirty years has 'failed'. Why? Because the system does not allow it to fail. A Presidency does not operate in a vacuum. It is part of a machinery, where the General Secretariat of the Council (GSC) assists it and prepares briefings, where the Council Legal Service intervenes when there is a legal problem, where the Commission sits in the Council and provides input, advice, and compromise solutions, where the other Member States around the table work towards finding compromises. The proposal to transform the trio presidency into a quintet will not solve anything. The truth is that the trio presidency does not play a significant role, and neither would a quintet. It is useful in that it makes three administrations work together in the run-up to their presidency, but that is about it; the so-called trio program is forgotten as soon it is adopted.

The number of Commissioners: 27 or 35 Commissioners are indeed far too many. It is difficult to find meaningful portfolios for all the Commissioners, and almost impossible to

apply the principle of collegiality in a meaningful fashion. But the solution to this problem is simple indeed. It just takes a European Council decision to at last apply Article 17(5) TEU as originally intended (i.e., a number of members corresponding to two thirds of the number of Member States).[4] The time has indeed come to reverse that European Council Decision.

Decision-making in the Council

Generalisation of QMV: the report proposes "transferring all the remaining policy decisions under unanimity to QMV". It seems like a logical proposal, but it is not the hoped-for panacea. First, we should recognize that most legislative files already fall under the Ordinary Legislative Procedure whereby the Council votes by QMV. The remaining areas are in the areas of taxation, Justice and Home Affairs and the Multiannual financial framework (MFF) regulation. They are all extremely sensitive issues, and in the best of cases it would take heavy lifting to convince all Member States to accept QMV. Concerning the MFF regulation, I see no chance of agreement on QMV. Then we have enlargement as well as Common Foreign and Security Policy (CFSP) and Common Security and Defence Policy (CSDP,) which are in a different league. Enlargement decisions are existential questions about who should be in the Union and under which conditions. As the report acknowledges, the final vote will inevitably remain a decision by unanimity and ratification in all Member States; there is zero chance of changing that. At most, there may be a willingness to accept limited QMV for taking intermediary steps. CFSP and CSDP are and will remain intergovernmental policies, where the default option is unanimity. I doubt that there will be agreement to pass to QMV on key issues; in fact, I am not even certain

[4] After the initial "no" in the Irish referendum on the Lisbon treaty, the European Council decided, as it could do according to article 17 (5) TEU, to keep one Commissioner per Member State.

that it would be desirable. Should the EU outvote the Baltic States or Poland on relations with Russia? Or Cyprus and Greece on relations with Turkey? For less important questions, the best route is to try and activate the *passerelles* that exist in the treaties. A final remark in this context: Article 31 TEU foresees the possibility of constructive abstention by a Member State on a CFSP decision, with the proviso that it can then request not to be bound by the decision. It is highly likely that such a rule would also apply in the case of a move towards QMV in the field of CFSP/CSDP, with a serious risk of increased fragmentation. The question I ask is whether it is better to take a little more time to reach a unanimous political decision on imposing sanctions against Russia or to force a quick vote by QMV with one or more Member States not taking part in the sanctions?[5]

Making QMV more acceptable: the authors of the report acknowledge that the general move towards QMV is a tall order. That is why they have imagined ways of addressing the legitimate concerns of the Member States. Unfortunately, the three recommendations they produce would make matters worse, not better.

A sovereignty safety net inspired by Article 31(2): if applied generally, this would amount to a return to the so-called Luxembourg compromise of 1966, which we mercifully ditched in the 1980s. It would in fact be worse, because the compromise at the time was in fact an agreement to disagree. A sovereignty clause would be a new rule agreed by all and would lead to endless debates about what is a legitimate sovereignty concern and what is not and, of course, to gridlock. I hope that the reference to Article 31(2), which is in the CFSP part of

the Treaty, signals that the intention of the authors is to limit this possibility to foreign policy decisions. It would be good to clearly state this upfront to avoid misunderstandings.

Rebalancing between the smaller and bigger Member States (in favour of the smaller ones): this would make decision-making more difficult, especially in light of the high number of small Member States among the candidate states. The present double majority system protects the big and the small and is adequate.

An opt-out for policy areas transferred to QMV: this is dangerous. An opt-out is sometimes a necessary evil, which should be employed as a last resort and with the outmost prudence. Making it easier to obtain an opt-out would be an error. As to the idea of creating three packages forming the basis for a transition to QMV, this is a bit theoretical. In real life, everybody knows what the various policy areas are and the EU has always been good at linking various issues and finding trade-offs. There is no need to conceptualise that.

EU-level democracy

There are a few proposals made in the report which could offer interesting developments of the current system. Harmonisation for electoral laws may not be the most pressing of issues but has been in the debate for a long time, so why not give it a try in the run up to the 2029 election?

The appointment of the Commission President: the *Spitzenkandidaten* model raises many issues, not least that the European Council will never accept that the EP elections automatically decide the

[5] Article 215 TFEU on restrictive measures requires a preliminary political decision by unanimity adopted in accordance with Chapter 2 of Title V of the Treaty on European Union (specific provisions on the Common Foreign and Security Policy).

designation of the President of the Commission. I do agree with the call of the report to find a political agreement between the European Council and the EP on the choice of the President of the Commission. That is precisely what the present treaty system forces them to do and what they do quite naturally, since the candidate proposed by the European Council must find a majority in the EP (see Article 17(7) TEU). You do not need to formalise this in an agreement.

Participatory democracy: the Conference on the Future of Europe has shown that there is an interest among citizens in being more actively involved in EU matters, and that is positive. The EU should indeed build on this experience, with two caveats: preserving the representative nature of our democracy and confronting citizens with expert opinions on feasibility, legality, trade-offs, and financing.

Probity and transparency: these are legitimate concerns. But again, the answer here is a bureaucratic one: creating a new independent Office for Transparency and Probity. We already have the European Anti-Fraud Office, the Court of Auditors, the ECJ, the budgetary controlling organs of the EP, and even a joint Prosecutor (EPPO), albeit not applying to all Member States (there should be a push to have all Member States integrated here). On transparency, the EU regulation goes over what exists in most Member States including Sweden. Any legislative debate in the Council is streamed live, and the documents going to a Council meeting are public. The first has predictably led to the Council meetings having less genuine exchanges than before; it has therefore not really increased transparency. The transparency regulation goes very (too) far in that the definition of what constitutes a document is extremely extensive and covers even simple preparatory documents. I would plead to rectify this situation, which leads to an enormous workload of the services for the benefit of a few lobbying groups.

Powers and competences

The report suggests "clarifying the competences": to do what exactly? And how? If you look at the treaties, there is a pretty clear distinction between categories of competences - exclusive, mixed, complementary, and intergovernmental. As to the idea of a "provision for unforeseen developments", I wonder what that would look like. Unfortunately, no mechanism or treaty provision will make us immune to unforeseen developments. What we need is to build strategic autonomy, adapting our policies, increasing our resilience; with this, we will be better prepared for any events or black swans that may come along our way.

EU resources

Indeed, a major issue. Concerning QMV for spending decisions, it would be good to know what the authors have in mind. Most legal bases that are necessary for spending money are adopted by QMV. The MFF regulation itself, which fixes the key overall figures for seven years and the repartition among policy areas, is adopted by unanimity, after consultation of the EP. I see no way that Member States would accept QMV here.

More generally we should look at finances in a holistic way. As the report rightly points out, this also encompasses a fresh look at our own resources, at EU borrowing, and possible new NGEU-type funds. And of course, taking account of the fact that the EU budget is but a small part of public expenditure in the EU; that is why we must factor in the delicate issue of state aid, which is both necessary and dangerous for the integrity of the Single Market.

And yes, of course it would be nice to have a higher EU budget. But it will be difficult politically. For some Member States this is a

zero-sum game: they feel that the money transferred to Brussels is a loss for the national budget. This is the wrong way of looking at it, of course, but it exists. The 'fallback' the report proposes "to use enhanced cooperation by some Member States to finance policies together" is not really feasible. If that money goes to an EU policy involving all the Member States, it will create a free-rider problem. If it is money only for those who participate in financing, you will create a fragmentation of EU policies, which will make things unmanageable. What you can do is use joint financing for initiatives that only concern some Member States (differentiation), but this cannot apply to ordinary Community policies.

How to manage progress: deepening and widening the EU

Six options for treaty change

The report mentions six options. The first three are in the treaties: the normal (quite heavy) procedure, the simplified revision procedure, and the tool of the accession treaties. The report seems to advocate always to first try out the heavy procedure. I would do exactly the opposite. The two other procedures are there precisely to solve specific issues without having to launch the enormous machinery of a convention followed by a long and arduous Intergovernmental Conference. The existing *passerelles* in the treaty also offer a lighter way of doing needed reforms.

The three new recommendations are not clear to me. I do not know what a "framework enlargement and reform treaty" means. How would that treaty relate to the existing treaties? And involving a convention in the drafting of it is strange; in that case it would make more sense to follow procedure one as set out in the treaties. As for a "supplementary reform treaty between willing Member States", how would that function? One thing is certain: you cannot change the EU treaties except by the mechanisms set out in the treaties. As for a "supplementary reform treaty between willing Member States", how would that function? One thing is certain: you cannot change the EU treaties except by the mechanisms set out in the treaties. And differentiation can work in policy areas but should not apply to treaties.

Differentiation

The report in many instances paraphrases the treaty language of Articles 20 TEU and 326-334 TFEU about enhanced cooperation)[1]. What is problematic, however, is the recommendation to envisage the future of European integration as four distinct tiers, each with a different balance of rights and obligations. That is the wrong approach in my view. It was tried in the past and it always failed. For quite a simple reason: candidate countries, or indeed existing Member States, will not accept the idea of second-class membership. Differentiation as a tool to manage some policies is fine. Differentiation as a structural feature is not. Nor is the idea to offer uncooperative/unwilling Member State opt-outs in the new treaty. How would that work? In our practice, new treaties, except in the case of the failed constitutional treaty, have always been amendments to the

[6] Enhanced cooperation became much more difficult once the principle was introduced into the treaty. Why? Because the proponents of enhanced cooperation wanted to include it in the treaty, but the Member States that were worried of being left out only accepted this against the promise of very restrictive conditions being required to apply enhanced cooperation! The lesson is clear: trying to solve an issue via treaty change can and sometimes does backfire.

existing treaties. Thus, playing with opt-out clauses would open a can of worms.

Managing the enlargement process

Enlargement is a two-way street; we do not control how candidate countries will evolve. The report calls for setting 2030 as the target date “for the EU to be ready by 2030” for enlargement. The risk is that people in the candidate countries will read this as a firm promise that they will be in by 2030. The nine principles proposed in the report are mostly fine and are in line with what the Council and the Commission are planning to do. The EU will have to show imagination and flexibility if the enlargement process is to come to fruition. In this context, a recent [CEPS study on enlargement](#) published a few weeks ago contains a number of interesting suggestions that may help advance the debate.

All the opinions expressed in this publication are the sole view of the author, and do not represent the position of the Trans European Policy Studies Association (TEPSA) or of its Members.

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