WHY TREATY CHANGE IS NECESSARY, WHAT IN THE TREATY SHOULD BE CHANGED, HOW IT SHOULD BE DONE - AND WHEN

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The European Union faces many challenges and suffers some indignities. It has no credible, discernible government. Its authority abroad, even in its own immediate neighbourhood, is weak. EU enlargement has ground to a halt. At home, the Union is unloved by many of its own citizens. National political parties and parliaments have effectively ceased to support the further unification of Europe. Rising centrifugal forces compete with the centripetal force of 'Brussels' to undermine the old nation states of Europe. The risk of disintegration of the Union is real.

The achievements of the European Union should not be underrated: they are many and remarkable. But the EU remains in essence a constitutional experiment which like all true experiments can still fail.

The latest transfiguration of the EU's constitution is the **Treaty of Lisbon**, whose difficult conception and protracted birth pangs were all shared by the European Parliament. Yet the decade the Union took to move from Nice to Lisbon via the Convention and the Constitutional Treaty, followed by the crisis-ridden first years of Lisbon in operation, must not be allowed to distort our memory about why treaty change has always been an inevitable feature of European integration – and still is today. Whatever are the strengths and weaknesses of Lisbon, not even its strongest advocates can claim that it achieved for the Union a sense of constitutional settlement, or that the way the Union now is run is sufficiently stable, effective and democratic. The acute financial and economic crisis since 2008 has exposed the limitations of the present constitutional arrangements, most particularly with regard to the governance of the eurozone but in other matters too.

So, difficult as it may be, we have soon to take the next steps in the constitutional development of the Union if the risk of falling apart is to be minimised, if government is to become better and if new momentum is to be given to the dynamic of ever closer union. Many people speak vaguely about the need for EU 'reform'; few link their desire for policy improvement to the necessity of making important structural changes to the EU's system of governance. President Juncker is in the process of trying to revive Herman Van Rompuy's 2012 report on 'genuine EMU' which painted the triptych of banking, fiscal and political union. But the Commission President needs the wholehearted consent of a large majority in the European Parliament if he is to succeed.

The role of the European Parliament

The European Parliament has an important duty to honour its own democratic mandate and to protect its Treaty-based prerogatives – and to get on with things. The last elections were already one year ago, and the clock ticks. Parliament enjoys six specific rights under the Treaty of constitutional significance. They are:-

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1. To re-apportion the seats in the Parliament between member states before the next election on a fair and transparent basis, ideally by establishing an arithmetical formula (Article 14(2) TEU);
2. To propose a uniform electoral procedure, ideally by creating a pan-European constituency from which a certain number of MEPs will be elected from transnational party lists (Article 223(1) TFEU);
3. To be prepared to give a negative opinion to a request from the European Council to amend the treaties (Article 48(3) TEU 1st para.) – as we did during the last mandate with the Czech Protocol on the Charter;
4. To be prepared to give a negative opinion to a request by the European Council to revise Part III TFEU according to the simplified revision procedure (Article 48(6) TEU);
5. To be prepared to insist on the calling of a Convention against the wishes of the European Council (Article 48(3) TEU 2nd para.);
6. And, above all, to make proposals of its own to amend the Treaties (Article 48(2) TEU).

Although a general revision of the EU Treaties will not be considered a viable option until after 2017, Parliament would do well to prepare itself for the new Convention. Questions to be answered include the size of the Parliamentary delegation to the Convention, the Convention's working methods, the type of its mandate, and the Convention's relationship with the subsequent IGC.

The choice of the new President of the Parliament to take office in January 2017 will be an important factor in determining Parliament's stance and profile in these constitutive negotiations. President Schulz's unsubstantiated claim to the European Council in February 2015 that his Parliament is opposed to treaty change must not be repeated. It is Parliament's principal mission to strengthen the democratic governance of the European Union, and this can be ultimately achieved only through treaty change.

The status quo is intolerable. The European Commission has powers to enforce compliance with EU law that it does not have the courage to use. The European Council will never have the wit or find the political will to use one of the *passerelle* clauses inserted by Lisbon with the express purpose of making government more democratic and efficient. Moreover, the Council continues to by-pass the Parliament especially in the field of justice and home affairs, but more generally in the conduct of the ordinary legislative and budgetary procedures: the spirit of Lisbon has still to pervade the Council.

The quest for government

The main problem of the European Union is the weakness of its executive authority, which is dispersed, diffuse and abstruse. Nobody really knows who's in charge, which in itself poses a democratic problem. Especially in the field of financial and economic affairs, we have the European Commission, the European Council, Ecofin and the Eurogroup, to say nothing of the European Central Bank with its adventurous monetary policy and its new powers over banking supervision. The crisis has made things even more technocratic and rules-based than they were before, given the plethora of organs making up the regulatory framework for the financial sector plus the various bail-out funds, notably the European Stability Mechanism, as well as the several investment instruments, notably the EIB. It is hardly surprising that the emergence of the Troika – basically functionaries from the Commission, the ECB and the IMF – has caused such resentment in those countries honoured by its visits. And yet, all these crisis management measures and new institutions have still not provided the EU with an assured way to govern its political economy. The EU's frantic efforts, sometimes outside the confines of the Lisbon treaty, to coordinate the national economic policies of its member states have led to over-centralisation. These methods could only be excused as temporary

expedients if they had actually been effective in inducing financial stability and economic recovery across the eurozone: alas, they have not.

So the priority task of the next treaty revision must be to concentrate executive authority in the **European Commission**. The Commission needs to be endowed with the powers to craft a common economic policy that combines macro-economic, fiscal and monetary instruments and is backed up by a decent budget. The Commission, of course, needs internal reform: it will have to acquire an enhanced capacity for economic analysis based in its own treasury facility; and the college should be reduced in size both to save money and to prevent the Commission from acting like a Coreper *bis*. The present budgetary system of the Union, as everyone knows (but few admit), is not fit for purpose. A decent dose of fiscal federalism needs to be injected into the system of 'own resources'. This requires a change of procedure away from unanimity towards QMV for the taking of the key decisions on own resources and the Multi-Annual Financial Framework. The European Parliament must also gain the power to vote on the revenue side of the budget.

To complete the picture, the **European Central Bank** should be endowed with all the powers of a federal reserve bank, becoming the proper lender of last resort. The restrictions on the progressive mutualisation of sovereign debt should be lifted. Without these substantial reforms, all of which require treaty change, the cohesion of the eurozone and the future of the single currency itself will remain in peril. Banking union will be incomplete and fiscal union an impossible goal as long as the EU remains under the constraining arrangements of the Treaty of Lisbon (most of which are unchanged since Maastricht a quarter of a century ago).

In the course of these adjustments to economic governance it will be necessary and timely to reconsider some of the arrangements made in a hurry at the height of the crisis, including the mandates of the various European supervision and surveillance bodies. Although the Fiscal Compact Treaty envisages its own incorporation into the framework of EU law by the end of 2017, it is no longer intelligent or feasible to endorse *en bloc* the prescriptions found in that treaty (few of which have ever been implemented). On the other hand, the novel decision-making procedures introduced in the Six Pack and Two Pack – notably that a Commission decision will stand unless reversed in the Council by QMV – certainly need to be codified in terms of primary law, along with the granting of a larger role for the European Parliament in the semester process.

A further concentration of executive powers in the hands of the Commission should be considered. This would involve, among other things, a radical reorganisation of most of the EU agencies (including the European Defence Agency) and the transfer of residual executive powers of the Council, for example to fix farm prices.

In the opposite direction, by way of checks and balances, the quasi-judicial powers of the Commission, notably in competition cases, should be hived off to a new arms' length body. Transparency and accountability will be enhanced by greater institutional simplicity, as well as the payment of more lively attention by both chambers of the legislature to the scrutiny of the more political Commission.

Rectify anomalies

Having established the principle that the European Commission should form the basis of Union government, we can revise again the role of the **European Council**. The current division of labours between the Commission and European Council is unsatisfactory for both parties and confusing for everyone else, at home and overseas. The European Council should retain its important constitutional role and its ultimate duties in the event of a security crisis, such as Ukraine. But the

Lisbon prohibition that the European Council cannot act in legislative matters is a conceit, and should be scrapped. Instead, the European Council should be put in charge of the Council of Ministers in order to bring direction and coherence to the second chamber of the legislature. And the European Parliament needs full recourse to the Court of Justice against potential infringement by the European Council.

Accordingly, the rotating six-monthly presidency of the **Council of Ministers**, which has long passed its usefulness and efficacy, should be scrapped. In its place, in the interest of specialism and continuity, each formation of the Council should elect its own 'permanent' chair. Such reform should allow the Council to become more parliamentary and less diplomatic, more open and accountable to national parliaments. An adjustment of the voting weights in the Council should be considered (as a corollary to the re-apportionment of seats in the European Parliament).

These changes to the inter-institutional balance within the Union lead logically to other reforms. The **European External Action Service**, for example, should be re-integrated within the services of the Commission with the goal of conducting a more rational, coherent and forceful international policy.

The **European Court of Justice** should be encouraged to continue its evolution to the status of federal supreme court. Access by the individual to the Court should be eased. As the Court itself has already suggested in the context of EU accession to the ECHR, its own relationship with the European Court of Human Rights needs to be clarified in order to facilitate the confident development of a corpus of jurisprudence based on the Charter of Fundamental Rights.

Democratic legitimation

The new round of treaty revision must address squarely the reservations expressed by the constitutional courts as well as by public opinion that the EU is not yet sufficiently democratic. Top of the list comes electoral reform of the **European Parliament**. Academic discussion is well advanced about how to make the apportionment of seats among member states at once more fair and automatic. It is also critical for the reputation of the Parliament and for the consolidation of supranational parliamentary democracy that, by the time of the next elections in 2019, a system is in place which allows for a certain number of MEPs to be elected for a pan-European constituency from trans-national party lists. Such a reform is the logical next step to the *Spitzenkandidat* experiment of 2014. It will transform both the quality and popularity of the European Parliamentary elections and oblige the federal level political parties to become true campaigning organisations competing for ideas, votes and seats. A revision of the inadequate Statute for European political parties will therefore be required in time for 2019. Anything that falls short of such a radical reform will leave the Parliament ill-equipped to shoulder its new responsibilities – not the least of which must include the right to vote on the revenue as well as the expenditure side of the EU budget.

National parliaments have some clearly defined duties in the governance of the EU plus one poorly defined and difficult to manage function, namely the subsidiarity 'early warning mechanism'. Eurosceptical critics of the present system propose to tamper with the card-waving in order to aggrandise the role of national parliaments in the law making of the Union. But that approach would lead ineluctably to a reduction of the powers of the European Parliament and an unseemly intrusion on the legislative powers of the Council as the parliamentary chamber representing member states. Moreover, such a constitutional 'one size fits all' proposal is predicated on the assumption that all national parliaments are the same - which they are not. A better reform would be to scrap the whole subsidiarity procedure, leaving national parliaments free to express themselves on whatever they choose at any stage of the legislative process. If national parliaments wish to upgrade COSAC into

something of a more regular assembly, meeting in Strasbourg and without the ambivalent participation of MEPs, let them do so.

Modernising common policies

Given that the treaty revision exercise outlined here is large and comprehensive (and intended to be the last for a long time), the opportunity should be taken to modernise some of the common policy provisions, many of which – for instance, the CAP and transport – are outdated. This is the chance properly to apply the subsidiarity principle, recognising in terms of primary law where action at the EU level means real added value. In the area of the single market, the digital agenda could well be an added task. Case-law of the ECJ suggests a clarification and codification of the freedom to provide services. The restraint on tax harmonisation should be lifted. Combating global warming would be a useful addition to the objectives of environmental policy. And in two areas, immigration and energy supply, competence has to be shifted upwards to the EU level if current ambitions are to be rightly fulfilled.

In general terms, the rather clumsy attempt in Lisbon to categorise the conferral of competences by the states on the Union deserves revision. A more fluent approach would be to regard everything that is not strictly speaking an exclusive competence of the EU to be a competence shared between the Union and its states (and in many cases regional governments), but at the same time to ease the restriction placed on lower tiers of government against their taking autonomous but coordinate action in areas already 'filled' by the EU. Such would be a more rational and operational articulation of the share-out of powers within Europe's unique federal union.

While we are about it, a restructuring and simplification of Lisbon's two treaties would be an admirable and popular advance. The **Charter of Fundamental Rights** should be fully integrated in treaty form, and its horizontal clauses relaxed to let it breathe. And the useful substance of the ancient **Euratom** treaty should also be incorporated in the new constitutional treaty.

Brexit

British prime minister David Cameron is in the course of gradually defining his catalogue of demands for the 'renegotiation' of the UK's terms of membership. This catalogue is reported to include a proposal that the UK dissociates from the Union's historic mission of 'ever closer union', that the principle of freedom of movement of EU citizens throughout the Union is compromised, that the powers of the European Court of Human Rights (and by implication the European Court of Justice with regard to the Charter) are restricted, and that national parliaments are given the power to block EU laws. Other matters will be raised of revision to existing secondary law, including the Working Time Directive. The outcome of such a renegotiated package is to be put to the British people in a referendum before the end of 2017.

It would be churlish to deny that the UK is helping to build momentum towards a comprehensive revision of the treaties. On the other hand, because Mr Cameron's timetable is improbable and his demands are implausible, some may suspect his motives. One recalls that the UK is already a semi-detached member state of the Union, having joined neither the euro (Protocol 15) nor Schengen (Protocol 19), while enjoying a permanent derogation from the EU's common policies on justice and interior affairs (Protocol 21), and having claimed special dispensation from the Charter (Protocol 30). The UK also has its notorious budgetary rebate.

At any rate, it is clear that the new British Conservative government is not satisfied with its present wide range of opt-outs and derogations from mainstream integration and it now wishes the UK to

become an even more detached member state than it is already. Naturally, no existing member state can be forced to accept the federalisation of the Union (which we advocate here) against its will. But the question should be asked whether any single state of minority group of states, despite their enjoyment under the Treaty of the legal veto, would have the moral authority or political will to prevent the majority of states from taking the federal steps thought necessary and desirable by that majority. This implies a modification to the rules for the revision of the new constitutional treaty that would bring the EU in line with the normal practice of federal and international organisations. For example, it would be wise to enable future treaty amendments to enter into force before their ratification by all member states.

It also implies that a new form of subsidiary or affiliate membership needs to be created in order to accommodate an existing member state which chooses not to accept the federal prospectus but wishes to retain the status of membership in some lesser form. The British attempt at 'renegotiation' renders such an innovation in the Union's constitution inevitable.

A special dispensation for the British people not to be bound by the mission of 'ever closer union among the peoples of Europe' would categorise the UK officially as a second-class member state and would surely jeopardise the retention by the British people of the privileges of EU citizenship, namely to be treated by the Union equally with others and not to be discriminated against on the grounds of their nationality.

Already, in June 2014, the European Council noted that the UK had 'raised some concerns related to the future development of the EU'. It continued: *'These concerns will need to be addressed. In this context, the European Council noted that the concept of ever closer union allows for different paths of integration for different countries, allowing those that want to deepen integration to move ahead, while respecting the wish of those who do not want to deepen any further*'.

Multi-speed integration is all very well if everyone is headed in more or less the same direction; however, taking 'different paths' which lead to different destinations is another thing entirely. Confronting Britain's provocation, its partners face an invidious choice between keeping Britain half-in the Union (while all the time trying to get out) and putting Britain half-out of the Union (from where it may be expected eventually to want to get back in).

In the shorter term, the British initiative will involve the European Parliament through the ordinary legislative procedure in any revision of secondary law concerning , for example, the in-work rights of mobile workers or the welfare rights of those moving in search of work. However, Parliament should not be complicit in agreeing to accept yet another bad British Protocol, doubtless in part oxymoronic and tautological, that might be cooked up putatively with the intention of being glued on to the existing treaty at the time of its next revision.

In addition, Parliament should ready itself to go the European Court of Justice under Article 267 TFEU for a ruling on whether any intergovernmental agreement that may be struck by the member states outside the framework of EU law to appease the United Kingdom is in breach of their EU obligations.

Process and timing

Substantive arguments aside, any revision of the Lisbon treaty that is serious rather than spurious will be fashioned not in a secretive IGC but in an open **Convention**. Parliament is honour bound to insist on the calling of a Convention, as it is entitled to do, even were the European Council to prefer otherwise. Experience shows that it is only in the crucible of a Convention that all elements of

reform can be properly considered in an inter-connected way. Most of those reforms are outlined in this paper: other ideas will surface during the rich dynamic of a successful Convention composed of MEPs, national MPs, government leaders and the European Commission. One may anticipate a large constitutional package deal designed, among other things, to meet with public approval in numerous referenda.

Notwithstanding British exceptionalism, the next Convention needs careful reflection and preparation before it starts. The timetable suggests itself. Once the French and German elections are out of the way in 2017, along with the (first) UK referendum, the Convention should open. Because the attention span of prime ministers on European constitutional matters is limited, the schedule should be tight. A Convention that closed in September 2018, for example, could lead to a treaty signature in December and to ratification in parallel with the elections to the European Parliament in May 2019.

Such a constitutional exercise is ambitious, feasible and necessary. It will result in a system of European governance which is more permissive and less prohibitive than we have at the moment, more capable and more democratic. It is surely the right way to govern a more united Europe.

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