



DIALOGUES

CONFERENCE ON THE FUTURE OF EUROPE

OVERCOMING THE SINGLE COUNTRY VETO IN EU REFORM?

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ABSTRACT: This contribution to the *Dialogue* discusses the contribution by Federico Fabbrini, in which he proposes an innovative way forward for the reform of the European Union (F. FABBRINI, *Reforming the EU Outside the EU? The Conference on the Future of Europe and Its Options*, in *European Papers*, Vol. 5, 2020, No 2, www.europeanpapers.eu, forthcoming). Given the extreme difficulty of reaching a unanimous agreement among all the Member States on a formal revision of the European Treaties, he proposes the use of international agreements among “willing” States to take forward an ambitious reform. This would take the form of a “Political Compact” among those States, whereas the other States would not participate in it and would not be bound by its content. This contribution discusses the legal feasibility of this “Political Compact” option.

KEYWORDS: revision of the European treaties – *inter se* agreements between EU States – differentiated integration – enhanced cooperation – unanimity rule – primacy of EU law.

In his contribution to this *Dialogue*, Federico Fabbrini discusses the upcoming Conference on the Future of Europe and focuses, in particular, on a shadow looming over that Conference: to the extent that the Conference will discuss and propose ambitious changes to the current operation of the European Union, it will face the need for revision of the current EU Treaties, and such revision seems all but impossible in the current circumstances.¹ The reason for this is that Treaty changes still require the unanimous agreement of all the 27 Member States and, in most cases, also a separate ratification procedure in every single State. Given the current divisions among the Member States on all kinds of questions, including on the overall direction of the integration process, Treaty revision seems unfeasible, thereby drastically reducing the potential ambi-

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¹ F. FABBRINI, *Reforming the EU Outside the EU? The Conference on the Future of Europe and its Options*, in *European Papers*, Vol. 5, 2020, No 2, www.europeanpapers.eu, p. 963 *et seq.*



tion of the Conference. As Fabbrini rightly puts it: “any major reform plan that may emerge from the Conference on the Future of Europe risks foundering on the rocks of the unanimity requirement”. Fabbrini does not stop at that sad conclusion but proposes a way forward, namely the adoption of a “Political Compact” among the “willing” Member States that would move forward the European integration project despite the lack of an overall agreement among all the Member States. In this way, the single country veto hurdle could be overcome.

It is, no doubt, possible for a group of Member States to conclude an agreement of international law among themselves, which is formally situated outside the EU legal order, but very much connected to the European Union in substantial terms. The model for this “variable geometry” approach used to be the Schengen Convention and is nowadays the European Stability Mechanism (ESM). In a sense, one could say that this form of flexibility exists since the early days of the European integration process. Such agreements typically occur in areas in which the European Union has no law-making competence at all, but also in areas in which the EU possesses shared law-making competence but where a set of Member States prefer to use their “share” in order to conclude an agreement among themselves rather than acting in the framework of the European Union. These “*inter se* agreements”² may indeed allow a group of Member States to move European integration forward in the face of the opposition of other Member States. In this respect, the Schengen experience is still referred to, in current discussions, as a positive model; it offers an example of both the potential of such agreements to overcome a blockage within the Union’s decision-making system (because, at the time, the UK refused to agree to the abolition of internal borders), and the possibility for their later re-integration within the EU legal system.

In the post-Lisbon years, the EU Member States have reiterated the practice of concluding international treaties among themselves, even when the subject matter of their agreement is close to European Union policies. This happened, in particular, in the domain of Economic and Monetary Union. In the *Pringle* case, the Court of Justice gave its blessing to the creation of the European Stability Mechanism as a separate international organisation of which only the euro area States are members.³ The Court did not mind that the ESM relies, in its operation, on the contribution of various EU institutions and is strongly embedded in the EU’s economic governance regime. Currently, negotiations are under way to entrust additional tasks to the ESM. A provisional agreement was reached on a revised text of the ESM Treaty at the Eurogroup meeting of 14 June 2019,⁴

² This is an expression from international law. It refers to the case where some, but not all, parties to a first international treaty (in this case, the EU Treaties) conclude a second international treaty among themselves that complements the first one.

³ Court of Justice, judgment of 27 November 2012, case C-370/12, *Pringle*.

⁴ Draft revised text of the treaty establishing the European Stability Mechanism as agreed by the Eurogroup on 14 June 2019.

but this text still needs to be signed by the governments of the euro States, and then ratified by their parliaments, before it will enter into force. Among the new tasks given to the ESM, we find the creation of a backstop facility to support the operations of the Single Resolution Board (SRB), if the SRB would run out of funds to undertake banking resolution operations. This new task ties in the ESM even more closely with the operation of the European Union.

In light of this recent practice, we can indeed see the attraction of such a recourse to *inter se* agreements for advancing the European integration project. The main advantage is that the participants to the cooperation project can freely choose their partners to the agreement: a self-proclaimed core group can indeed decide to act together without having to wait for the agreement of all EU Member States. Furthermore, States can conclude separate international agreements on matters that fall outside the current scope of EU competences and can therefore extend the integration project beyond the existing EU policies without the need for a prior revision of the EU Treaties.

The constraints that limit recourse to separate international agreements cannot be found in the Treaty text; they rather result from the inherent primacy of EU law over the national law of the Member States. Indeed, it has always been clear that a group of EU States cannot resort to the conclusion of a separate *inter se* treaty in order to escape from their obligations under EU law. Such “satellite” agreements may not contain norms conflicting with EU law proper; they cannot derogate from either primary or secondary EU law. As Fabbrini notes, the Court of Justice has consistently held that the primacy of EU law extends not only to measures of national law but also to agreements between two or more Member States, which must be disapplied by national courts if they are inconsistent with EU law. Similarly, in direct actions for infringement, the Court has not distinguished between infringements caused by a State acting on its own and infringements caused by a bi- or multilateral agreement concluded between several Member States.⁵ This is entirely logical. It would otherwise be easy for the Member States to escape from their EU law obligations by concluding a separate treaty with each other. The recent *Achmea* judgment, in which the Court held that a bilateral investment treaty (BIT) between the Netherlands and Slovakia was contrary to EU law,⁶ was a clear reminder that the EU Member States are not at all free to engage in *à la carte* cooperation with each other. They must refrain from agreeing anything that could undermine the integrity of the EU legal order.

In view of this, can the conclusion of an *inter se* agreement between a group of “willing” Member States be an appropriate vehicle for major reforms of the Union, as Fabbrini suggests in his contribution? He reminds us that Jean-Claude Piris, the former director

⁵ See, for judgments of the Court of Justice in this sense: judgment of 31 January 2006, case C-503/03, *Commission v. Spain* [GC], particularly the paras 33-35, and judgment of 21 January 2010, case C-546/07, *Commission v. Germany*, paras 42-44.

⁶ Court of Justice, judgment of 6 March 2018, case C-284/16, *Achmea* [GC].

general of the Council's legal service, developed a concrete legal model for this, in a study published in 2012.⁷ Piris envisaged a Eurozone-based avant-garde that would break away from the rest and create its own organisation with new institutions, namely a Council, an "administrative authority" (parallel to the Commission) and a "parliamentary organ" (parallel to the EP), running together a number of policies. This model had a distinctly pre-Brexit flavour, as the author had openly designed it to overcome the blockage by the UK government of further deepening of European integration. Despite the concrete explanations on the legal mechanisms that were envisaged, this model seems hardly feasible in practice, not least because it would create an "EU-*bis*" alongside the "old EU", with each of the two organisations having its own complete institutional framework.⁸ Maybe the "vanguard group" could decide to withdraw from the European Union, using the withdrawal clause of Art. 50 TEU, leaving the other States within a "rump EU". Yet, it is really difficult to see how this could work. The existing EU institutions would remain in existence and would presumably keep their buildings and their civil servants, and the EU-*bis* would have to find new accommodation and new personnel.

In fact, though, Fabbrini does not advocate such an adventurous institutional duplication as Piris had envisaged in his book. Rather, in his view, "the Political Compact would be an international agreement struck outside the EU legal order, which does not replace it but rather is functionally and institutionally connected to it", and he adds that this could only work if the Compact "would not introduce any measure explicitly inconsistent with EU law". But is this not precisely the problem? How could the Conference propose an ambitious reform of the European Union which would at the same time respect all the existing rules of primary and secondary EU law? For one thing, that condition would exclude any changes to the composition and powers of the EU institutions, and to the decision-making rules for the adoption of EU legislation, the EU budget and EU agreements with third countries. This means that the Political Compact would have to speculate on the willingness of the EU institutions (specifically, the Commission and the European Parliament) to abandon the EU legislative and executive arena in a number of policy domains. That is, the Commission would have to refrain from making legislative proposals in those domains, and/or the European Parliament would have to refuse to discuss them, so as to leave room for the operation of the Political Compact in those domains. This seems rather unlikely, except if a quasi-Commission and a quasi-European Parliament were created under the Political Compact, but this would raise the issue of institutional duplication noted in relation to the Piris plan. The resulting institu-

⁷ J.-C. PIRIS, *The Future of Europe: Towards a Two-Speed EU?*, Cambridge: Cambridge University Press, 2012, p. 121 *et seq.*

⁸ See the criticism by P. CRAIG, *Two-Speed, Multi-Speed and Europe's Future: A Review of Jean-Claude Piris on the Future of Europe*, in *European Law Review*, 2012, p. 800.

tional landscape would be chaotic and the European citizens would likely fail to understand what the European integration project means and how it functions.

Having said this, I do not wish to deny that a number of European policy reforms could be envisaged and adopted in a variable geometry mode. They might take the form of either intra-EU enhanced cooperation or extra-EU international agreements, the choice among these two instruments depending mainly, though not exclusively, on the competence resources offered by the European Treaties. The European Parliament, in its recent resolution on this subject,⁹ expresses considerable reluctance to move towards more differentiated integration, and is particularly hostile towards the conclusion of separate international treaties in which parliamentary participation seems, almost by definition, to be limited or inexistent. However, faced with the impossibility of formal treaty reforms, and given the limits of EU competence under the current Treaties, the conclusion of a separate international agreement among a group of “willing and able” Member States may, in certain cases, be an appropriate solution of last resort.

The argument I would like to make here, in counterpoint to Fabbrini’s high hopes for a Political Compact, is that such a solution cannot lead to an overall reform of the way the European Union operates, but only to the adoption of piecemeal projects in particular policy domains. Such projects could very well happen in other areas than that of EMU law and economic governance. Indeed, the Commission scenario of “[t]hose who want more do more”¹⁰ lists a number of other areas in which new projects of differentiated integration could be experimented, such as defence, justice and security, taxation and social policy. For areas such as taxation, migration and criminal justice, where the TFEU provides clear and rather broad legal bases, enhanced cooperation would seem the most appropriate tool. It would allow for the circumvention of the unanimity requirement where it is still in place (especially for taxation), and more generally would allow like-minded States to take forward their cooperation, using the instruments of EU law and side lining the acrimonious resistance of other States. In the field of social law, the scope for enhanced cooperation is more problematic, as some of the most frequently invoked reform measures, such as the creation of a European minimum wage system, or of a European minimum income benefit, possibly fall outside the scope of EU competences. In that case, the tool of enhanced cooperation would not be available, and the conclusion of a separate international agreement by “socially minded” States would be the only available option.

In conclusion, whereas future “policy-specific compacts” seem perfectly possible from an EU law perspective, they can only *add* to existing EU law and policy, but not

⁹ European Parliament resolution P8_TA-PROV(2019)0044 of 17 January 2019 on differentiated integration.

¹⁰ Commission, *White Paper on the Future of Europe – Reflections and Scenarios for the EU27 by 2025*, COM(2017) 2025 final.

modify them. The adoption of an ambitious reform instrument such as Fabbrini's "Political Compact", inspired on the historical model of the Philadelphia Convention, would necessarily imply a reform of the way in which the EU currently operates. Such a reform can, unfortunately, only take place by following the excessively rigid rules on the revision of the European Treaties. An institutional transformation of the Union requires, now more than ever, a willingness to reform EU treaty-making,¹¹ including a painful reconsideration of the "taboo" rule that European treaty revision requires the unanimous agreement of all the Member States.

¹¹ See e.g. D. HODSON, I. MAHER, *The Transformation of EU Treaty Making. The Rise of Parliaments, Referendums and Courts since 1950*, Cambridge: Cambridge University Press, 2018, chapter 9, p. 246 *et seq.*, entitled "Eight Ideas for Reforming EU Treaty Making". Note that these authors do not think that the unanimity requirement should be replaced.